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A New Dynamic in American Federalism: The Rise of
Multi-state Lawsuits

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Abstract

My study examines why some lawsuits against the federal government involve multiple states while others involve single states. I compare two multi-state lawsuits against two single-state lawsuits. For each case, I examine public opinion, the state attorneys general (SAGs) who represent the states in the lawsuits, and the SAGs' political ambition. The results indicate that on the one hand, in multi-state court cases, a majority of the national public opposes the federal law. On the other hand, in single-state lawsuits, a majority of the national public supports the federal law. In multi-state lawsuits, states join the litigation only if the members of the SAGs' political party oppose the federal law. SAGs join multi-state lawsuits to obtain political capital because of their ambition to run for reelection or for another political office. My thesis suggests that courts are being used for a partisan political game and states are suing because of public opinion, not because the federal government is violating the law.

Introduction

On March 23, 2010, President Barack Obama signed the Patient Protection and Affordability Act (PPAA) into law. According to the Congressional Budget Office, this act is projected to cost \$943 billion and will expand health insurance coverage to an additional 32 million Americans, making it the most substantial healthcare overhaul since Medicare and Medicaid were created in 1965 (Health Care Reform Bill, 2010). Within hours of the bill's signing, thirteen states filed a lawsuit against the federal government claiming that portions of the law are unconstitutional (Dharapak, 2010). Other states soon jumped on the bandwagon. Now, a total of twenty-six states are challenging the healthcare law in the 11th Circuit Court of Appeals (Harris, 2011).

The health care lawsuit is an example of a new phenomenon called multi-state litigation. Rather than a single state suing, multiple states join together to file suit against the federal government. This recent development contrasts with the historic norm of single-state litigation. Multi-state proceedings raise an important question that political scientists have yet to address: Why do multiple states join together in some instances to sue the federal government while in other cases only an individual state decides to sue? This question merits further investigation, since multi-state court cases have significant implications for how our government functions.

Multi-state lawsuits are important for several reasons. First, they are changing how federalism works in the United States. When a single state initiates legal action against the federal government, federalism is vertical, from one state up to the federal government. But when multiple states sue, federalism becomes more of a horizontal phenomenon; states coordinate with each other and then they sue the federal government (Erbsen, 2009). Thus, multi-state lawsuits are changing how federalism functions in the United States by altering the

relationship between state and federal government. Therefore, multi-state lawsuits are changing the dynamics of American federalism.

Second, multi-state proceedings have far-reaching consequences for public policy. For instance, in 2007, a multi-state lawsuit entitled *Massachusetts v. Environmental Protection Agency* (Mass v. EPA) changed the legal interpretation of the Clean Air Act. The ruling altered the legal definition of “air pollutant” to include greenhouse gases. Consequently, the EPA’s authority expanded to the regulation of carbon dioxide and other greenhouse gases through the Clean Air Act even though Congress did not pass a new law giving it the specific authority to do so (Wasden, 2007). Similarly, the current multi-state lawsuit against the new healthcare law entitled *The State of Florida v. United States Department of Health and Human Services* (Florida v. HHS) could dramatically affect current law. Although the PPAA was passed by Congress and signed by the president, a Florida District Court Judge declared the whole healthcare law unconstitutional on January 31, 2011 (Arsenault, 2011). The federal government appealed the decision. However, the Supreme Court could end up upholding the District Court’s decision, and repeal portions of the PPAA or completely strike it down. This would obstruct the government’s power to regulate insurance markets.

Third, *Mass v. EPA* changed the legal requirements for states to prove that they have standing to sue. To have standing, a party must show that it has been harmed. As a result of the court case, states now have a special legal standing status called “special solitude.” This rule makes it easier for states to meet the jurisdictional requirement of standing in their lawsuit; consequently, the rate of both single-state and multi-state litigation is likely to rise in the future (Stevenson, 2007).

While various researchers have addressed the question of why multiple states have sued private entities, this study is the first to explain why some lawsuits against the federal government are single-state while others are multi-state (Lynch, 2001; Provost, 2001; Provost, 2006; Meyer, 2007). Since multi-state litigation against the federal government is a recent development, few scholars have studied the trend. Several studies have explored the legal, policy, and political consequences of multi-state lawsuits against the federal government, however these studies have not compared single-state cases to multi-state cases, nor have they examined the reasons why some lawsuits are multi-state while others are single-state (Stevenson, 2007; Wasden, 2007; Leonard, 2010; Jost, 2010).

My study demonstrates that multi-state lawsuits arise for political reasons. I argue that multi-state court cases occur when a majority of the public nationwide opposes a federal law, and single-state litigation arises when a nationwide majority of the public supports a federal law. I show that state attorneys general (SAGs) join a multi-state lawsuit when a majority of nationwide voters who belong to their particular political party disapprove of a federal law. For example, Republican SAGs will join in a multi-state litigation if a majority of Republicans across the nation oppose a federal law, while Democrat SAGs will join the litigation if a majority of Democrats across the nation oppose a federal law. The SAGs react to public and political party opinion to obtain political capital because of their political ambition to run for future office.

To test my hypothesis, I research two multi-state lawsuits and two single-state lawsuits. To illustrate the political nature of these proceedings, I examine polling data on the laws and the issues addressed in the court cases to determine whether the public supported the lawsuit. In addition, I investigate SAGs' political parties and their political ambition to run in subsequent elections. In the first section, I examine several theories that may help explain why some

lawsuits are multi-state while others are single-state, and I also explain my hypothesis in detail. Next, I introduce and analyze four court cases. From the case studies, I determine whether the data are consistent with my hypothesis. Lastly, I conclude by exploring the further implications of this study.

Literature Review

What factors explain why some lawsuits are multi-state and others are single-state? Since multi-state proceedings against the federal government are a relatively new phenomenon that few scholars have studied, I review literature that examines why multiple states decide to file a suit against a private entity, such as the tobacco industry. This information is relevant to my research question because in both lawsuits against private entities and against the federal government, multiple or single states can initiate legal action.

There are four competing schools of thought that address why states may join multi-state lawsuits: the constitutionalist, regulatory gap, logistical, and rational choice points of view. In the following section, I investigate these perspectives and find rational choice to be most useful in explaining why some proceedings against the federal government are multi-state while others are single-state.

Constitutionalist

Every lawsuit must be grounded in a legal issue to be actionable. Thus, disagreements over legal matters could explain why SAGs join multi-state proceedings against the federal government. For instance, states may initiate litigation against the government, if the states disagree with the federal government's interpretation of the Constitution. A constitutionalist proponent would argue that multiple-state litigations only occurs when Congress passes a law

that extends the federal government's power at the expense of the traditional authority held by states (Leonard, 2010). Hence, according to constitutionalists, multi-state court cases arise out of a disagreement over federalism. Thus, multi-state lawsuits are initiated to prevent the federal government from encroaching on the states' governmental powers (Jost, 2010).

Although the constitutionalist perspective may be a factor, it is unsuccessful in explaining why certain states decide to join a legal proceeding while others do not. If a multi-state litigation is initiated because the federal government has encroached upon all the states sovereignty, then all the states should logically join suit. All states should have an equal interest in protecting their governmental authority. However, it has never been the case that all states join together to sue the federal government. Furthermore, the constitutionalist viewpoint does not address the many instances in which there are disagreements over the role of the federal government that result in single-states lawsuits.

Regulatory Gap

Other scholars suggest SAGs are more likely to join multi-state proceedings against private entities because of the "regulatory gap." Regulatory gap proponents argue that states file a suit because the federal government either refuses to regulate or is legally prohibited from regulating a particular area (Meyer, 2007). For example, during the Reagan administration, the federal government refused to enforce antitrust regulations against IBM. Consequently, several states filled the regulatory void by suing IBM to enforce anti-trust laws. Likewise, when the Food and Drug Administration failed to stringently regulate cigarettes, multiple states joined together against the tobacco industries (Lynch, 2001). Thus, proponents of regulatory gap theory argue states take legal action to fill voids in regulation.

However, this position fails to provide a persuasive answer to the multi-state lawsuit puzzle. Lack of regulation may be a factor, but like the constitutionalists, proponents of the regulatory gap position cannot explain why some court cases are multi-state while others are single-state. Furthermore, as discussed in relation to the constitutionalist theory, any convincing theory should address why some states choose to be a party to a legal action while others do not. If there is a lack of federal regulation, then usually there would be a regulation gap in all states. Moreover, the government does not rigorously regulate all industries. For instance, the government has been criticized for not sufficiently regulating offshore drilling (Billitteri, 2010). The regulation gap position does not address why states decide not to file suit to fill perceived voids in governmental oversight.

Logistical

An alternative perspective explains that states enter into multi-state lawsuits for logistical reasons. According to the logistical point of view, multiple states join together to combine resources to more effectively challenge either a private entity or the federal government. When a single state files suit, it will have fewer resources available to devote to its case than opponents due to budgetary constraints. For example, some corporations have bigger legal defense budgets than some states. States are often involved in several court cases at one time; they cannot afford to put all of their resources in pursuit of a single case. If states work together, they can share the costs and increase the resources available for a particular case (Lynch, 2001). States band together against the federal government to pool their resources, and thus increase their chance of success by having a bigger, more informed and more prepared legal team.

While it may be true that when states work together they will have increased resources, it does not mean that logistical reasons are the source of the multi-state court cases. A state must

first choose whether it is going to be a party to a lawsuit against the federal government before it considers whether to pursue single-state or multi-state litigation. It may well be that resources are the result of multi-state suits rather than their cause. Furthermore, SAGs had substantial budget increases throughout the 1980s and the SAG's office with the smallest budget has thirty-one attorneys and sixteen non-attorneys (Clayton, 1994; Meyer, 2007). Consequently, states typically have enough resources to initiate an action against the federal government without combining resources. In fact, most lawsuits against the federal government are single-state cases.

Furthermore, states receive additional resources from interest groups in the form of amicus curiae or "friend of the court" briefs. These legal briefs provide free legal assistance in over 70 percent of Supreme Court cases (Collins, 2007). The logistical argument fails to explain the phenomenon of multi-state litigation because in both multi-state and single-state suits, states would benefit by having additional resources at their disposal. Moreover, the logistical argument is not able to explain why some states choose to take legal action while others do not.

Rational Choice

The most persuasive point of view suggests multi-state litigations arise for political purposes. The rational choice perspective explains that SAGs take legal action against private entities so they can reap the political benefits. Recent studies discovered a correlation between multi-state litigation against private entities and states' differing political ideologies. For instance, two studies showed that the more liberal the state, the more likely it was to bring a claim for consumer protection (Provost, 2001; Provost, 2006). According to rational choice, SAGs are more likely to bring a corporation to court if the state's populace supports the action. Thus, if the rational choice perspective is correct, then the political circumstances of a proceeding may explain why states join multi-state lawsuits against both private entities and the

federal government. The SAGs who sue the federal government pursue this course to gain political capital as opposed to constitutional, logistical, or regulatory reasons.

The political nature of SAGs becomes increasingly apparent as we investigate how SAGs attain their positions. In forty-three states, SAGs are directly elected by the voters; in five states, SAGs are appointed by the governor; and in two states, SAGs are appointed either by the state legislature or by the state supreme court (Clayton, 1994). Thus, almost all of the SAGs in the nation are both politicians and lawyers, but unlike a typical lawyer, they are not strictly limited to representing the legal interests of their clients. The combined role of SAGs may mean that they sue for both legal and political motivations. SAGs' political interests may be contrary to their states' interests. SAGs are beholden to political forces. Just like governors and senators, most SAGs have to win statewide elections. Like other politicians, SAGs are concerned about being challenged in party primaries. To obtain the public's backing, SAGs have an incentive to listen to the wishes of the majority of voters. Multi-state lawsuits provide an opportunity for SAGs to get publicity and to demonstrate support for their constituents' interests.

This study demonstrates that rational choice can also account for why multiple states initiate legal proceedings against the federal government. The rational choice point of view is more convincing than the constitutionalist, regulatory gap, and logistical positions because it addresses the flaws that are apparent in the competing positions. Unlike the other positions, rational choice explains why some cases are multi-state and others are single-state. Multi-state lawsuits occur when a majority of the national public opposes a federal law and single-state lawsuits occur when a majority of the national public supports a federal law. Since SAGs depend on voters for reelection, it is in their political interests to litigate if the public supports taking legal action.

In addition, rational choice explains why some states decide to join the court case while others do not. Politics indicates that the differing ideologies of the states and the different political parties that the SAGs belong to influence their decision whether to join or not to join the multi-state litigation. For instance, rational choice indicates that Democrat SAGs in states with liberal-leaning citizens would be more likely to take legal action regarding a liberal issue, like regulating greenhouse gases. Similarly, conservative states with Republican SAGs would be more likely to file an action regarding a law that most Republicans oppose, like healthcare reform. SAGs join a multi-state lawsuit only if a majority of the national public opposes a federal law and if a majority of the national members of their political parties also oppose that law. Thus, rather than relying on logistical, regulatory, or constitutional reasons, SAGs make a rational choice to sue for political purposes. The SAGs decide to file a suit so that they can gain both the publicity and the public support that are necessary to get reelected or to run for another elected office.

Hypothesis

Individuals' political desires to be involved in politics cause multi-state lawsuits. When multiple states bring a claim against the federal government, the SAGs involved seek to benefit politically. This is ascertained by examining public and political party opinion and the SAGs' political ambitions.

This study argues that SAGs join multi-state lawsuits when a majority of the nation opposes the challenged federal law. Thus, in multi-state proceedings, a majority of the national public are supportive of taking legal action. SAGs sue to gain political support from their constituencies. Since SAGs face the threat of primary challenges, they have incentives to join multi-state court cases when a majority of the partisan opinion within their national political

party opposes a federal law. On the other hand, when a single state pursues legal action against the federal government, a majority of the national public supports the law being challenged.

Obviously, it is not usually in the SAGs' interests to challenge laws that enjoy popular support.

This theory suggests that SAGs who file joint litigation belong to one political party and that multi-state court cases do not have bipartisan support. If only one political party joins the lawsuit, the proceedings are likely a form of partisan politics. Furthermore, it is likely that SAGs who join multi-state proceedings have political ambitions of running for reelection or another political office.

Data and Methods

To determine whether my hypothesis is accurate, I examined four court cases in which a state or states filed suit against the federal government. They are all recent cases that occurred within the last eleven years, each of which involved disagreements over a federal law between the federal government and state governments. In all four cases, the legal questions addressed included disagreements over federalism and state rights. Two of the court cases are examples of multi-state litigation and the two are instances of single-state litigation. The two multi-state lawsuits are *Mass v. EPA* and *Florida v. HHS*. In *Mass v. EPA*, thirteen states filed a suit against the federal government to force the EPA to regulate greenhouse gases under the Clean Air Act (Wadsen, 2007). In *Florida v. HHS*, twenty-six states allege that the new healthcare law exceeds Congress's powers and that portions of the law are unconstitutional (*Florida v. HHS*, 2010).

The two single-state court cases are *Reno v. Condon* and *Connecticut v. Duncan*. In *Reno v. Condon*, South Carolina took the federal government to court arguing that the Drivers Privacy Protection Act violated the Tenth Amendment (*Reno v. Condon*, 2000). In *Connecticut v.*

Duncan, Connecticut brought a claim alleging that sections of the No Child Left Behind Act violated the Tenth Amendment (Connecticut v. Duncan, 2010). I examine these two single-states cases because, like the multi-state cases, they are recent instances of a state taking legal action against the federal government over policy disagreements that involved federalism; the laws challenged in the single-state suits affected the governmental authority of all the states (unlike, for example, Gonzalez v. Oregon, where the law being challenged affected only one state (Sclar, 2006)); and unlike other lawsuits that dispute complex legal questions, there was polling data available to determine if the public supported these laws.

I examine the political circumstances surrounding each of the four court cases in order to evaluate my theory that the national political atmosphere explains why two of the cases were multi-state lawsuits and two were single-state. I explore the political circumstances of each case by examining polling data for each of the laws or issues involved in order to determine whether a majority of the national public supported or opposed the proceedings. I look at polling data because it reflects public opinion, which is the opinion that SAGs depend on to win elections. There is a correlation between public opinion and multi-state litigation if the public was opposed to the federal laws in the multi-state lawsuits but supportive of the federal laws in the single-state lawsuits.

In addition, I analyze the effect of party-politics on the lawsuits, by looking at both the SAGs' political party affiliations and the political parties' opinions on the challenged laws. I also research the SAGs involved in each case to see whether their political ambition played a role in their decision to go to court. I do this by determining if they subsequently ran for reelection or for a different political office.

In addition to my rational choice hypothesis, this study analyzes three additional theories: the regulatory gap, constitutionalist, and logistical arguments. If the regulatory gap point of view is correct, a bipartisan group of states including both Democrat and Republican SAGs should sue the federal government when there is a lack of governmental regulation. If the constitutionalist theory is correct, a bipartisan group of SAGs should file suit in instances when the federal government passes a law that diminishes the states' governmental powers. If the logistical hypothesis is correct, a bipartisan group of SAGs should take the federal government to court when interest groups do not provide needed additional resources. If any of the competing theories are correct, the SAGs suing would have to be a bipartisan group of SAGs, with both Democrat and Republican SAGs. If the SAGs that join the multi-state lawsuit only belong to one political party, it would indicate that the lawsuit was politically motivated, and thus indicate that these theories are incorrect.

Reno v. Condon

In *Reno v. Condon*, South Carolina challenged the constitutionality of the Drivers Privacy Protection Act (DPPA). Prior to the enactment of this law, several states sold private information to private entities. This information was obtained when people registered their automobiles with the Department of Motor Vehicles. States then used the revenue for their states' budgets. The DPPA subsequently outlawed this practice (*Reno v. Condon*, 2000). A polling survey by the University of Connecticut Center for Research and Analysis determined that the public supported the DPPA. Ninety percent of the public thought that states should not be able to sell their private information. Seventy-two percent of registered voters were not familiar with the law, while only 28 percent knew something about the law. However, when informed about the law, 76 percent approved of the law, while only 18 percent disapproved

(Freedom of Information: In the Digital Age, 2001). The Republican SAG litigating the case subsequently ran for both senate and for governor but lost both of the elections (Gelinas, 2004; Davenport, 2001).

Connecticut v. Duncan

In *Connecticut v. Duncan*, Connecticut claimed that the federal law, entitled No Child Left Behind Act (NCLB) was unconstitutional because it forced states to spend money to comply with its provisions (*Connecticut v. Duncan*, 2010). Like the DPPA, a majority of the national public was unfamiliar with the law. Forty-five percent of the public knew about NCLB, while 55 percent were unfamiliar with it. However, when informed about the law, 45 percent had a favorable view of the law, and 39 percent had an unfavorable view of it (Hess, 2007). Therefore, although the public was mostly unfamiliar with the law, a majority supported it. The Democrat SAG from this case was first reelected as SAG and then elected as a Senator of Connecticut in 2010 (Henry, 2010).

Massachusetts v. Environmental Protection Agency

In *Mass v. EPA*, twelve states sued the EPA arguing that the EPA was required to regulate greenhouse gases under the Clean Air Act. The states that sued were California, Connecticut, Illinois, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont and Washington (Stevenson, 2007). Eleven of the SAGs were Democrats. Washington was the only state represented by a Republican (Book of the States, 2005).

States wanted the EPA to regulate greenhouse gases because of global warming. The public supported additional governmental action to address this issue. For instance, a 2006 poll by the Los Angeles Times and Bloomberg revealed that 73 percent of the public believed global

warming to be a serious threat. A 2006 poll by ABC and Stanford University found that to prevent global warming, 68 percent favored additional regulation by the federal government while 31 percent were opposed to additional regulation (Environment 2, 2010).

There was a partisan divide on global warming and environmental regulation. For example, 68 percent of Democrats thought that there was not enough governmental regulation of the environment, while only 36 percent of Republicans concurred (Environment, 2010). Similarly, a 2006 Pew poll found that 52 percent of moderate Democrats and 73 percent of liberal Democrats believed global warming was a serious problem while only 35 percent of moderate Republicans and 18 percent of conservative Republicans agreed (Global Warming: A Divide on Causes and Solutions, 2007). Thus, a majority believed global warming was a threat and favored additional regulation. But Democrats believed global warming was a greater danger compared to Republicans, and Democrats were also more likely to support additional governmental regulation of the environment.

Of the twelve SAGs involved in *Mass v. EPA*, ten either ran for reelection or another elected office. The SAGs from Connecticut, Illinois, Rhode Island, Vermont, and Washington were reelected, while the SAG from California was elected to serve as state treasurer (Book of The States, 2010). The SAG from New York was elected governor, however the former SAGs from Maine and Massachusetts ran for governor, but were unsuccessful in their primaries (Quint, 2007; Cover, 2010; Johnson, 2010). The SAG from New Mexico ran for Congress, but did not get elected (Horrigan, 2010). The SAG from Connecticut was reelected and then subsequently elected Senator of Connecticut in 2010 (Henry, 2010).

Florida v. Health and Human Services

In *Florida v. HHS*, twenty-six states are taking legal action against the federal government, claiming that the individual mandate and other portions of the Patient Protection and Affordability Act (PPAA) are unconstitutional. Before the 2010 midterm elections, there were twenty states in the lawsuit. These states are Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Louisiana, Michigan, Mississippi, Nebraska, Nevada, North Dakota, Pennsylvania, South Carolina, South Dakota, Texas, Utah, and Washington (Aizenman, 2010). However, as a consequence of the 2010 midterm elections, six other states joined the lawsuits. These states are Iowa, Kansas, Maine, Ohio, Wisconsin and Wyoming (Haberkorn, 2011). In the 2010 election, Republicans won the SAG offices in Kansas, Maine, and Ohio, and the governorships in Iowa, Wisconsin and Wyoming (Attorneys General 2010 Election Results; the 2010 Results Map). The previous Democrat governors and SAGs from these states declined to join the lawsuit, but the newly elected Republican SAGs and governors joined the lawsuit shortly after inauguration.

Of the twenty-six states in the lawsuit, nineteen have Republican SAGs while seven have Democrat SAGs. The seven states with Democrat SAGs are Arizona, Georgia, Iowa, Louisiana, Mississippi, Nevada and Wyoming (Current Attorneys General, 2011). However, the Democrat SAGs from six of the seven states refused to join the lawsuit. Rather, the Republican governors decided to join the states to the lawsuit (Attorney General Baker Responds, 2010; *Florida v. HHS*, 2011; Governor Barbour Joins Legal Challenge, 2010; McCarthy, 2011; Richmond, 2011; Wiser, 2011). Thus, *Florida v. HHS* was commenced by nineteen Republican SAGs, one Democrat SAG from Louisiana, and six Republican governors.

Two days after the PPAA enacted into law, Quinnipiac University took a poll to determine the level of its public support. Overall, 40 percent of the public approved and 49 percent disapproved the law. Looking at political affiliation, 71 percent of Democrats supported the PPAA, while only 19 percent disapproved. Conversely, 86 percent of Republicans opposed the law and only 9 percent supported it. This poll also asked the public about their support for the lawsuit that SAGs were planning to file against the federal government. Overall, 40 percent agreed with a potential lawsuit, and 51 percent disapproved. Moreover, 68 percent of Republicans supported the proceeding while only 22 percent were opposed. In contrast, 77 percent of Democrats opposed the court case while only 15 percent supported it (National (US) Poll March 25, 2010). A majority of the national public opposed the law, but Republicans were even more opposed to it, while a majority of Democrats supported it.

For the most part, the SAGs continued to pursue political careers. Of the sixteen SAGs that initially joined the case in 2010, six successfully ran for reelection in 2010. Five of the SAGs were not yet up for reelection (Attorneys General 2010 Election Results). The SAG from Alabama ran for reelection but lost, and the SAGs from Florida, Michigan and South Carolina ran for governor but lost in their primaries (Washington, 2010; Aizenman, 2010; O'Brien, 2010; Curtis, 2010). The SAG from Pennsylvania ran successfully for governor in 2010 (Infield, 2010). In other words, all of the SAGs that were up for reelection ran for a political office in the 2010 midterm election.

Data Analysis

Alternative Hypotheses

The constitutionalist hypothesis is inconsistent with the case studies of the four lawsuits. According to the constitutionalist school of thought, states bring a claim to prevent the federal government from expanding its power relative to the states. This was certainly the legal justification for the lawsuit in *Florida v. HHS*; however, in *Mass v. EPA*, twelve states filed a suit against the EPA to force the agency to regulate greenhouse gasses. Thus, unlike in *Florida v. HHS*, in *Mass v. EPA* the states actually sued to expand the role of the federal government.

Likewise, the regulatory gap hypothesis fails to completely explain why states join to sue the federal government. On the one hand, the regulatory gap theory can explain why multiple states sued in a situation like *Mass v. EPA*, since the EPA reversed its prior position and decided that it did not possess the authority to regulate greenhouse gases under the Clean Air Act. This resulted in a regulation gap with respect to greenhouse gases (Wadsen, 2007). On the other hand, the regulatory gap theory does not explain the *Florida v. HHS* lawsuit, where the challenged federal law would ameliorate a regulatory shortcoming. This is because the healthcare law attempts to fill the regulatory gap in the insurance industry by providing the government the legal authority to ban the practice of denying coverage to people with preexisting conditions and by regulating insurance premium increases (Clemmitt, 2010).

Similarly, the logistical hypothesis fails to completely explain the multi-state lawsuit phenomenon. In both of the multi-state lawsuits examined, the states probably would have had enough money to file a suit without working together because interest groups provided the states additional financial support. In *Mass v. EPA*, several interest groups joined the lawsuit against the EPA including Greenpeace, Sierra Club, and the Environmental Defense Fund (*Mass v. EPA*,

2007). Likewise, In *Florida v. HHS*, an interest group called the National Federation of Independent Business joined the court case (*Florida v. HHS*, 2010). Moreover, several other interest groups provided friend of the court briefs on behalf of the states, which gives the states additional legal resources (*Various Groups Seek to File Briefs*, 2010). Furthermore, the logistical hypothesis fails because single states bring lawsuits, by themselves, all the time. States do not necessarily need the financial support of another state in order to sue.

Moreover, all three schools of thought fail to explain why the SAGs in *Mass v. EPA* were mostly Democrats, whereas the SAGs in *Florida v. HHS* were mostly Republicans. The partisan composition of the SAGs indicates that these multi-state court cases were not based solely on constitutional, regulatory, or logistical issues, but that these lawsuits were politically motivated. Additionally, these hypotheses cannot explain why only a single state sued in both *Reno v. Condon* and *Connecticut v. Duncan* because the laws challenged in these cases encroached on all of the states' governmental powers and yet only one state chose to sue the federal government.

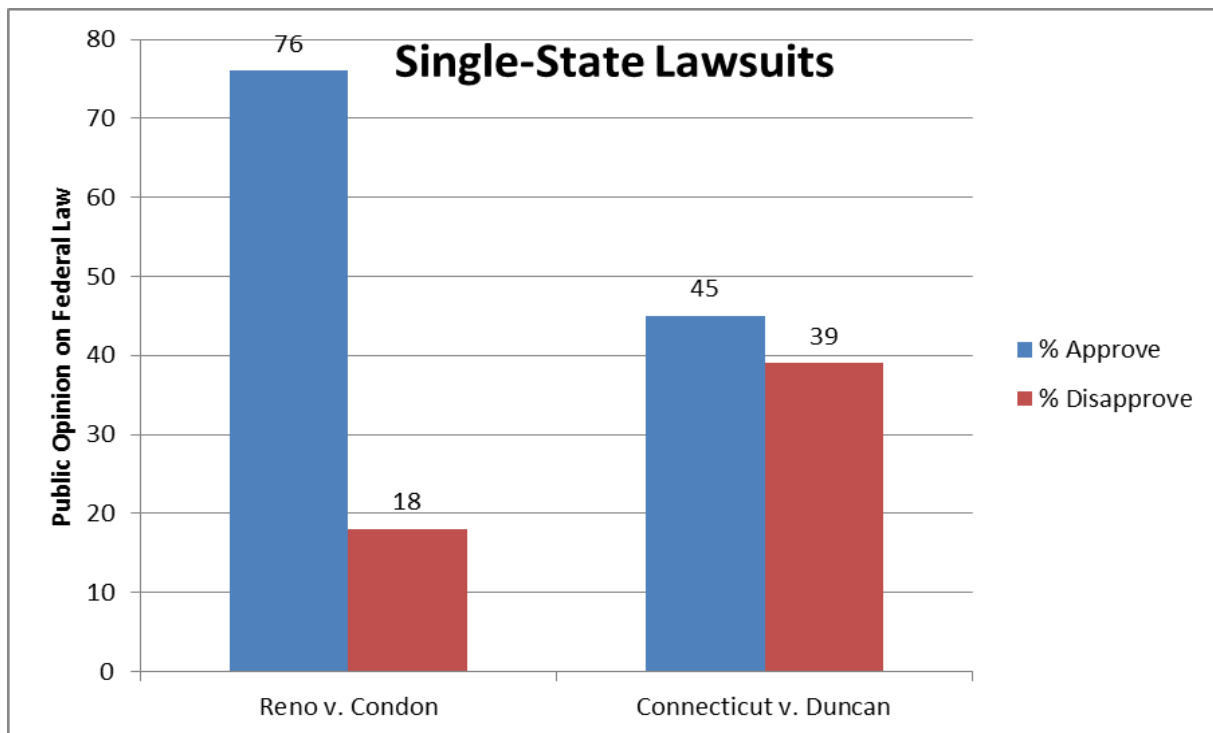


Figure 1. Public opinion on laws at issue in single-state lawsuits

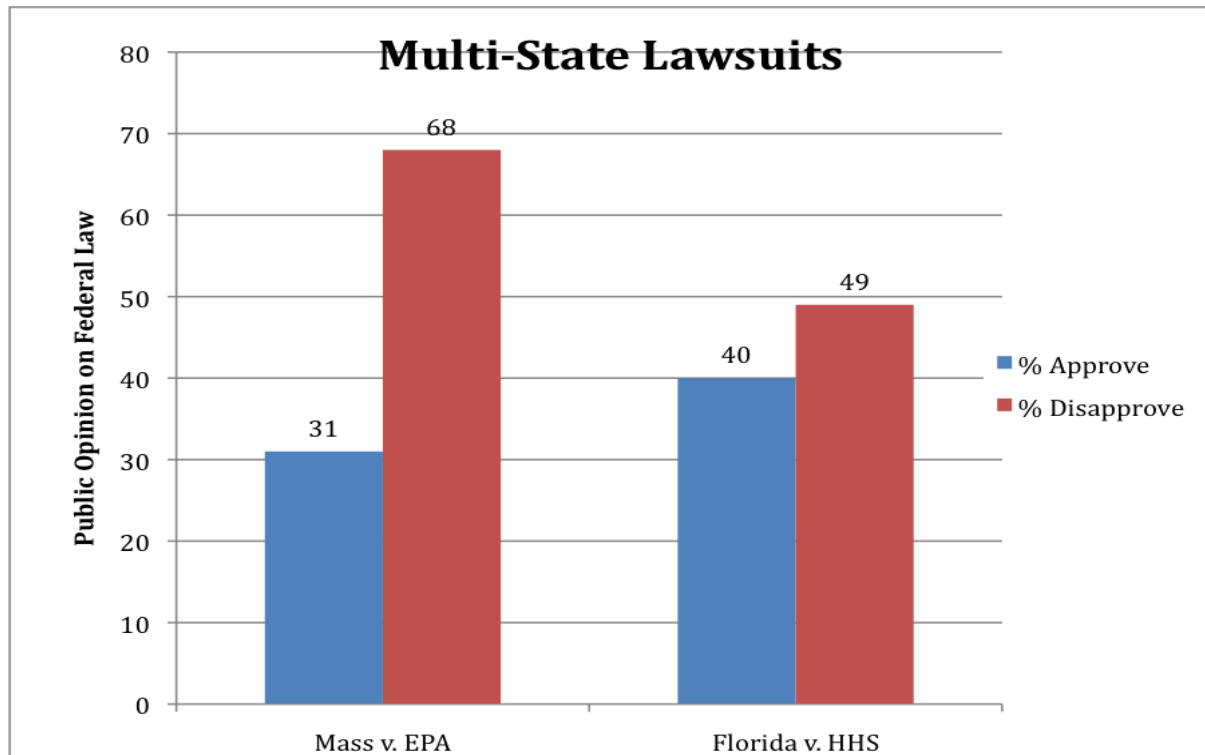


Figure 2. Public opinion on laws at issue in multi-state lawsuits

Rational Choice Hypothesis

Figures 1 and 2 show that multi-state proceedings occur when a majority of the national public supports the lawsuit and single-state proceedings occur when a majority of public opposes the lawsuit. In both *Reno v. Condon* and *Connecticut v. Duncan*, the public was mostly unaware of the challenged laws. However, as figure 1 demonstrates, when informed of the laws, a majority of nationwide voters indicated that they supported the acts passed by the federal government. SAGs would not gain electoral support nor positive publicity by joining these lawsuits about laws that most voters were unfamiliar with, but would support if informed.

However, as figure 2 illustrates, in both multi-state litigations, a majority of voters supported SAGs' causes. In *Mass v. EPA*, a majority of national voters thought that the government needed to supplement regulations on greenhouse gasses in order to mitigate the effects of global warming. In *Florida v. HHS*, the majority of voters were opposed to the new

healthcare law. Thus, in both instances, SAGs could benefit politically by joining the multi-state lawsuits.

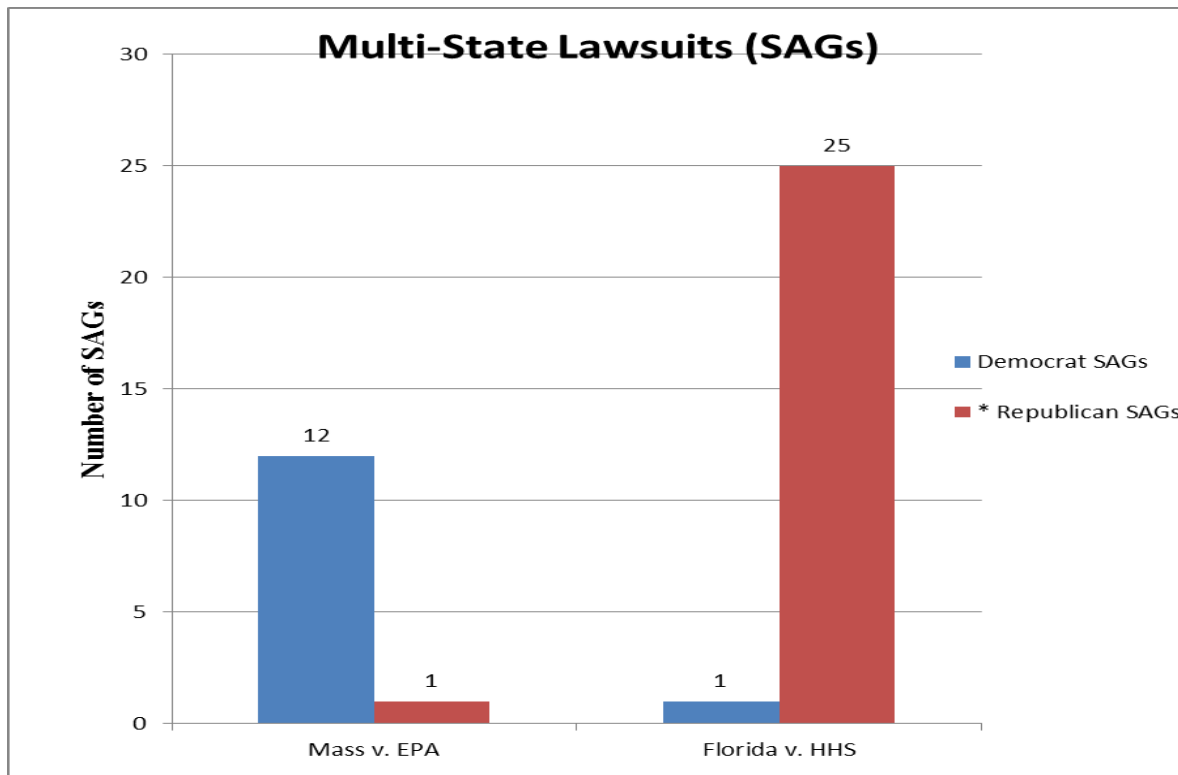


Figure 3. SAGs representing their states in multi-state lawsuits.*

*Florida v. HHS Republican SAG count includes six Republican governors.

The four case studies show that SAGs join multi-state litigation if they belong to a political party that opposes the federal law. States with Republican SAGs are more likely to join a case if a majority of Republicans oppose the federal law. Figure 3 shows that in Florida v. HHS, nineteen Republican SAGs, six Republican governors, and one Democrat SAG took legal action against the federal government. Republicans joined the lawsuit since a majority of Republican voters both opposed the new healthcare act and supported the litigation initiated by the SAGs. Approximately nine out of ten Republicans oppose the federal law being challenged by the states, while about eight out of ten Democrats are in favor of it. Seven states suing in Florida v. HHS have Democrat SAGs. However, six of the seven refused to join the suit since

most Democrats support the law, and as a result, the six Republican governors of those states joined the court case themselves.

The political and partisan nature of multi-state lawsuits has been further illustrated by the 2010 election. After the 2010 election, Iowa, Kansas, Maine, Ohio, Wisconsin, and Wyoming joined the Florida v. HHS lawsuit. Before the 2010 election, either the SAGs or the governors of these six states were Democrats, and healthcare reform was popular among Democrats. However, in the 2010 election, Republicans won these electoral positions. Consequently, the Republican SAGs and governors from these states joined the lawsuit. Republican voters oppose the healthcare law and support the lawsuit. Indeed, many of the newly elected Republican SAGs and governors ran on platforms that promised to join the multi-state lawsuit to challenge what they call “Obamacare” if they were elected by voters (Haberhorn, 2011).

Except for Virginia and Oklahoma, all of the states that did not sue federal government have Democrat SAGs (Current State Attorneys General, 2010). However, rather than joining the multi-state lawsuit, the Republican SAGs from Virginia and Oklahoma filed their own lawsuits against the healthcare law (Gov. Announces, 2011; Helderman, 2011). Thus, all of the Republican SAGs across the nation are suing the federal government since Republicans support the lawsuit. Likewise, all of the states with Democrat SAGs except for one declined to join the suit since members of their political party support the federal law.

Similar to states with Republican SAGs, states with Democrat SAGs are more likely to join a case if Democrats are in favor of it. Figure 3 shows that in Mass v. EPA, eleven of the twelve SAGs who filed a suit were Democrats. Democrats are more concerned than Republicans about global warming and are more supportive of additional regulation by the government to address global warming. However, most Republicans oppose additional regulation, which is why

most of the SAGs in *Mass v. EPA* were Democrats. In both multi-state lawsuits, the SAGs mostly belonged to one political party, the political party that was most opposed to the laws being challenged.

Politics also helps explain why one Republican SAG joined the case in *Mass v. EPA* and one Democrat SAG joined the case in *Florida v. HHS*, even though members of their political parties were opposed to the court cases. In *Mass v. EPA*, the lone Republican was from Oregon, a liberal state that has voted for the Democratic presidential candidate since 1988 and that President Barack Obama won by 16 percent (Oregon Blue Book, 2010). Similarly, the single Democrat SAG that is suing in *Florida v. HHS* is from Louisiana, a conservative state that has voted for the Republican presidential candidate since 2000 and that Presidential Candidate John McCain won by 19 percent (Louisiana Voting History, 2010). Hence, it was in the political interests of both the Republican SAG in a liberal state and the Democrat SAG in a conservative state to join the proceedings so that they could gain popular support within their states.

As politicians, SAGs react to public' and their political party opinions and join multi-state lawsuits to gain political support because of their ambition to win future elections. Multi-state lawsuits provide SAGs with opportunities to garner publicity and voter support necessary for future electoral success. Political ambition is evident in both multi-state court cases. In *Mass v. EPA*, ten of the twelve SAGs ran for reelection or another office. In *Florida v. HHS*, all of the SAGs that were up for reelection ran either for reelection or another office. Thus, by joining the lawsuits, SAGs helped further their personal political ambitions.

Why are multi-state lawsuits so rare?

Multi-state litigation against the federal government occurs when a majority of the national public opposes a federal law. However, there have been few multi-state lawsuits against

the federal government despite many unpopular laws. This raises an important question: why are multi-state lawsuits so rare?

Multi-state lawsuits are uncommon because they are new phenomenon that arose due to changes in SAGs' behavior. SAGs previously sued only as single plaintiffs. However, in 1988, SAGs started cooperating in suits against private entities. This cooperation started because SAGs from almost every state had separate lawsuits against the same cooperation. For instance, rather than having fifty different lawsuits against the tobacco industry, SAGs decided it would be easier and more cost effective to have one consolidated lawsuit. Multi-state lawsuits became more frequent in the 1990s because of the success of several multi-state lawsuits and new guidelines passed by the National Association of Attorneys General that facilitated cooperation among SAGs (Lynch, 2001). SAGs obtained positive publicity and public support from these lawsuits and they realized that multi-state lawsuits were opportunities to further their political careers.

The changing behavior of SAGs and the trend of multi-state litigation eventually led to *Mass v. EPA* in 2004, which was the first multi-state lawsuit against the federal government. Perhaps, this lawsuit was the first multi-state lawsuit against the federal government because prior to this lawsuit, states would often fail to meet the legal requirement of standing to file lawsuits. However, this lawsuit resulted in a new legal precedent to determine if a state has legal standing called "special solitude." This rule makes it easier for states to gain standing to sue. Thus, multi-state lawsuits may start to occur more frequently because of the changes in SAGs' behavior and the new special solitude rule.

Conclusion

Multi-state lawsuits arise when SAGs react to public' and their political party opinion. In single-state litigation, a nationwide majority of the public supports the challenged federal law. Therefore, multiple states do not take legal action. Conversely, in multi-state litigation, a nationwide majority of the public opposes the challenged federal law. SAGs may join multi-state court cases if a nationwide majority of their political party members oppose the federal law. Thus, the SAGs suing in multi-state court cases mostly belong to one political party, the party which opposes the federal law. By taking advantage of popular sentiment and suing when the public opposes a federal law, SAGs gain additional support from the public and members of their political party and can further their political careers.

This political nature of multi-state lawsuits raises two important implications. First, this study suggests that SAGs are quite susceptible to political influences. The combined role that SAGs perform as legal representatives and as politicians may cause them to bow to political pressure by filing a suit to further their personal interests. This personal interest may be contrary to the interests of the state. Second, this study suggests that SAGs may use the powers of their office to play a partisan political game in our nation's courts. Democrat SAGs used the courts to achieve their party's political objective of governmental regulation of greenhouse gasses, while Republican SAGs are using the courts to push their party's anti-Obama healthcare agenda. This is bipartisan abuse of the judicial process.

SAGs' conflict of interest could perhaps be eased if they were more independent of politics. For example, if SAGs were appointed for life, they would be less dependent on popular support because they would not be concerned about reelection. SAGs would be free to make the decision to file suit independently of popular and political party opinion. Or perhaps the powers

of SAGs could be limited so that they can file federal suits only with the support of a supermajority of their state's legislators. This would make sure that more lawsuits have bipartisan support and are not based on partisan politics. Either of these modifications would ensure that SAGs do their job, by fighting for their states' best interests, rather than their own best interests.

The law should not be an extension of party politics. SAGs should use the courts when the federal government breaks the law; they should not use the courts as a political arena to make a name for themselves or to pursue partisan political objectives.

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