

STATE-LOCAL LITIGATION CONFLICTS

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INTRODUCTION

Municipal litigation is on the rise. Commentators have championed affirmative litigation by local governments as a means of vindicating citizens' rights and interests.¹ Meanwhile, the Chamber of Commerce has identified municipal litigation as a pressing threat to business and proposed a laundry list of mechanisms state legislatures could use to rein in, hobble, or outright prohibit local suits.² Such opposition isn't surprising. The Chamber has targeted litigation by state attorneys general (AGs), too,³ and from a defense-side perspective local litigation must look like state litigation on steroids: tens of thousands of potential plaintiffs, often using private lawyers to raise claims that may not be available to private parties.

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1. See *infra* Section I.A.

2. U.S. CHAMBER INST. FOR LEGAL REFORM, MITIGATING MUNICIPALITY LITIGATION: SCOPE AND SOLUTIONS 14–18, 20 (2019).

3. See generally, e.g., U.S. CHAMBER INST. FOR LEGAL REFORM, ENFORCEMENT GONE AMOK: THE MANY FACES OF OVER-ENFORCEMENT IN THE UNITED STATES 10–14, 33–34 (2016); U.S. CHAMBER INST. FOR LEGAL REFORM, UNFAIR PRACTICES OR UNFAIR ENFORCEMENT? EXAMINING THE USE OF UNFAIR AND DECEPTIVE ACTS AND PRACTICES (UDAP) LAWS BY STATE ATTORNEYS GENERAL 1–5 (2016); U.S. CHAMBER INST. FOR LEGAL REFORM, ENFORCEMENT SLUSH FUNDS: FUNDING FEDERAL AND STATE AGENCIES WITH ENFORCEMENT PROCEEDS 23–24, 33–35 (2015).

If your enemy's enemy is your friend, one would expect state and local litigators to be natural allies, pursuing complementary claims against those responsible for harm to state and local governments and citizens. Yet local suits sometimes have been met with opposition from state AGs themselves. The sprawling opioid litigation has brought such conflicts into the public eye.⁴ In Ohio, for example, the AG sought mandamus to prevent counties and cities from pursuing claims on behalf of residents that, he argued, "belong[ed] to" the state.⁵ AGs from multiple other states filed an amicus brief in support of the Ohio AG.⁶ Skirmishes have erupted in other states as well, as AGs and local litigators clash over which level of government should exercise control.⁷

Of course, conflicts between state and local governments are not uncommon these days. Others have analyzed state legislatures' increasingly aggressive use of preemption to curb local regulatory authority.⁸ The battles over preemption track familiar political patterns: red states vs. blue cities.⁹ Conflicts between state and local litigators are more complicated, defying easy categorization. Litigation conflicts are relatively rare and balanced by cases in which state AGs actively support, join, or replicate local efforts.¹⁰ Where conflicts emerge, they don't always (or even usually) involve Republican AGs facing off against Democrats at the local level. That's not to say politics play no role in the kinds of arguments AGs make against local litigation. Anecdotally, at least, Republican AGs appear to be more likely to challenge local litigation on grounds that would dampen the overall level of enforcement. But in other instances, conflicts involve co-partisans or bipartisan groups on one or

4. For a recent overview of the opioid litigation and the relationship between state and local efforts, see Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1 (2021).

5. Petition for Writ of Mandamus of State of Ohio, *In re State of Ohio*, No. 17-md-02084 (6th Cir. filed Aug. 30, 2019).

6. Brief of Amici Curiae States of Michigan et al., *In re National Prescription Opiate Litigation*, No. 19-3827 (6th Cir. filed Sept. 6, 2019).

7. See *infra* Part II.

8. See generally, e.g., Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995 (2018).

9. See, e.g., *id.* at 1997–98 (“[T]he preponderance of new preemption actions and proposals have been advanced by Republican-dominated state governments, embrace conservative economic and social causes, and respond to—and are designed to block—relatively progressive local regulations.”); Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 PUBLIUS 403, 406, 412 (2017).

10. See Sarah L. Swan, *Preempting Plaintiff Cities*, 45 FORDHAM URB. L.J. 1241, 1244 (2018) (contrasting regulatory and litigation preemption and observing that “states have adopted a relatively restrained approach to city litigation, and much city litigation continues unimpeded by state intervention”).

both sides and focus primarily on which level of government can better represent its citizens in court.¹¹

This Essay uses the opioid litigation and other disputes between AGs and local attorneys in an effort to better understand the relationship between state and local litigation. Scholarship on these two forms of public litigation has tended to travel separate paths, with scholars addressing one or the other but rarely the two together. I take a more inclusive view here, seeking both to highlight the functional similarities between local and state litigation and to draw out the differences. I begin in Part I by situating local litigation in relation to affirmative litigation by state AGs and underscoring the significant points of overlap in the arguments offered in support of and against each type. Part II then identifies recurring themes in cases in which state and local litigation have come into conflict. Although I offer some assessments of the arguments AGs have made in opposition to local litigation, I do not purport to offer a comprehensive analysis—much less resolution—of the disputes. Instead, my goal is largely to flag questions worthy of study and elaboration beyond what I can offer in this Essay. For the most part, I suggest, conflicts between AGs and local attorneys turn not on characteristics intrinsic to local or state government, but on advantages and disadvantages that flow from state law—and which state law could (and in some cases should) change.

Before proceeding, a word on terminology: Terms like “local litigation” and “municipal litigation” obscure a great deal of variation in the types of government entities that may pursue affirmative litigation and in the processes they may use to authorize, investigate, and litigate their cases. Proponents of local litigation authority tend to focus on cities as their prototypical plaintiffs, while critics paint with a broader brush. I elaborate on these points below, where heterogeneity in local litigation is relevant to the arguments under consideration, but generally use the catch-all “local” to refer to any governmental unit inferior to the state.

I. PARALLELS BETWEEN STATE AND LOCAL LITIGATION

Local litigation has emerged as a powerful force in recent years.¹² A handful of cities joined the prominent state-led litigation targeting harms

11. See *infra* Part II.

12. This trail has been well blazed by others. Terrific resources on local litigation include Kathleen S. Morris, *San Francisco and the Rising Culture of Engagement in Local Public Law Offices*, in *WHY LOCAL MATTERS: FEDERALISM, LOCALISM, AND PUBLIC INTEREST ADVOCACY* 51 (2008) [hereinafter Morris, *Rising Culture*]; Kathleen S. Morris, *Cities Seeking Justice: Local Government Litigation in the Public Interest*, in *HOW CITIES WILL SAVE THE WORLD* 189 (Ray Brescia & John Travis Marshall, eds., 2016) [hereinafter Morris, *Cities Seeking Justice*]; Kathleen S. Morris, *Expanding Local Enforcement of State and Federal Consumer Protection Laws*, 40 *FORDHAM URB. L.J.* 1903 (2016) [hereinafter

from tobacco and asbestos in the 1980s and 1990s.¹³ In the decades that followed, local claims have become increasingly common.¹⁴ In some instances, as in the tobacco and asbestos cases, localities have worked with state AGs as litigation partners.¹⁵ In many others, local governments have gone it alone, targeting a wide range of issues, including defective products, mortgage lending practices, toxic waste dumping, climate change, and firearm safety.¹⁶

The rise in local litigation has been fueled in part by increased capacity at the local level. Some big cities have created dedicated departments that focus on affirmative litigation; others have partnered with law school clinics to support affirmative litigation efforts.¹⁷ And many other local government units—not just cities, but also counties, townships, villages, school boards, water districts, etc.—have discovered fruitful partnerships with private lawyers who are willing to represent the local government on a contingent basis, taking fees as a percentage of any financial recovery.¹⁸

For those who have watched the development of state litigation, this evolution will seem familiar. Like local litigation, state litigation has gained prominence over the last several decades—with Big Tobacco marking a pivotal chapter in the creation story—and state AGs' offices have seen commensurate growth in both size and stature as they have shifted from a focus on defense to a more ambitious role in affirmative litigation.¹⁹ As is true of many local suits, the shift in state litigation was stimulated by shortfalls in other forms of government action, including regulation and enforcement by federal agencies.²⁰ And, like their local counterparts, state litigators have vastly expanded their capacity by

Morris, *Expanding Local Enforcement*]; Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227 (2018); Swan, *supra* note 10.

13. Swan, *supra* note 12, at 1230.

14. *Id.* at 1230–31.

15. *Id.*

16. See, e.g., JILL HABIG, CHRISTINE KWON, JOANNA PEARL, MARISSA ROY & PALAK SHETH, LOCAL ACTION, NATIONAL IMPACT: A PRACTICAL GUIDE TO AFFIRMATIVE LITIGATION FOR LOCAL GOVERNMENTS 6–13 (2019) [hereinafter GUIDEBOOK] (collecting examples); Morris, *Cities Seeking Justice*, *supra* note 12, at 192–201 (same).

17. Morris, *Rising Culture*, *supra* note 12, at 54–55.

18. See, e.g., Joe Palazzolo, *More Cities Suit Up for Legal Actions*, WALL ST. J. (May 3, 2016, 4:11 PM), <https://www.wsj.com/articles/more-cities-suit-up-for-legal-actions-1462218870> [<https://perma.cc/WX4V-H7UP>].

19. See Margaret H. Lemos & Kevin M. Quinn, *Litigating State Interests: Attorneys General as Amici*, 90 N.Y.U. L. REV. 1229, 1236 (2015); Morris, *Rising Culture*, *supra* note 12, at 54–56.

20. See Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 712, 719 (2011) (discussing states' responses to downturns in enforcement by federal government); GUIDEBOOK, *supra* note 16, at 5 (citing “state or federal inaction” as reasons for affirmative local litigation).

partnering with private lawyers eager to share in the advantages of government litigation.²¹

Given the similar trajectories state and local litigation have followed, it is perhaps no surprise that the emerging normative case for (and against) the latter bears a marked resemblance to arguments that have been made about the former. Yet local litigation is distinct from state litigation in important ways, both formally and functionally. Indeed, when they challenge local litigation, a common theme from state AGs is that local suits are *different* from suits by the AG.²² A key distinction concerns the sovereign status of state and local governments. States are independent sovereigns—a status that provides both doctrinal and normative heft to their claims of litigation authority.²³ Cities and other local government units, by contrast, are not independent sovereigns but appendages of the state.²⁴ Like private corporations, “municipal corporations” are creatures of state law, and they exist at the sufferance of the state.²⁵ Unlike private corporations, however, municipalities also are sites of democratic governance—and it is that feature that animates both defenses and critiques of local litigation.²⁶

A. The Case for State (and Local) Litigation

One of the most important arguments in favor of state litigation sounds in democratic accountability. Litigation often affects individuals and entities who are not parties to the case, including by causing the defendant to change its behavior in ways that extend beyond the

21. See Margaret H. Lemos, *Privatizing Public Litigation*, 104 GEO. L.J. 515, 532–33 (2016) (discussing use of private counsel by state and local governments).

22. See *infra* Part II.

23. States’ sovereign status allows them to sue as *parens patriae*, for example, based on their “quasi-sovereign interest in the health and well-being—both physical and economic—of [their] residents in general.” *Alfred A. Snap & Sons, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982); see also Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859, 1863–71 (2000).

24. See David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218, 2233 (2006) (“State control over cities is, as a matter of federal constitutional law, extremely broad.”). As a consequence, as Kathleen Engel has detailed, “[t]he federal courts have unequivocally held that political subdivisions cannot bring claims as *parens patriae* because their power is derivative, not sovereign.” Kathleen C. Engel, *Do Cities Have Standing? Redressing the Externalities of Predatory Lending*, 38 CONN. L. REV. 355, 365 (2006).

25. See, e.g., Kathleen Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. L. REV. 1, 1–26 (2012) (describing and critiquing conventional view that cities are “mere instrumentalities of their state governments”).

26. See Morris, *Rising Culture*, *supra* note 12, at 52–53 (“[San Francisco] serves two different but equally important roles: it is a public management corporation, and it is a unit of representative democracy.”).

plaintiff(s). Successful litigation, or merely the threat of litigation, also can have a deterrent effect on actors similar to the defendant, causing them to modify their own behavior for fear of sanction.²⁷ Litigation can reshape industry practices and reform institutions; and it can shape the law by generating judicial decisions that expand or constrict the scope of rights and duties.²⁸ Hence the pejorative term “regulation by litigation”²⁹—a phrase that highlights the reality that the effects of litigation are often *regulatory* in nature—and the more complimentary “private attorney general,” used to describe private parties and lawyers whose suits serve social goals of deterrence and harm reduction.³⁰ Once one recognizes the unavoidably public character of litigation, vesting litigation authority in an actual attorney general—independently elected in most states, duty-bound to serve the public interest in all³¹—seems like an obvious plus. Notions of democratic accountability and responsiveness therefore are central to analyses of affirmative litigation by state AGs.³²

Proponents of local litigation likewise have highlighted democratic accountability as a benefit of affirmative litigation by local government units.³³ The force of the claim probably depends on context, and one might sensibly be skeptical about the potential for meaningful accountability in the face of low-salience (or uncontested) local elections and minimal public information about litigation. Similar points could be made about state litigation, as I have argued in other work.³⁴ Yet the variation is even more pronounced at the local level. There are vast differences between, say, a city attorney’s office with a dedicated unit for affirmative litigation and a county prosecutor with a small staff and budget and a docket of mostly criminal cases, for whom affirmative civil litigation is far from the core of the job. How those differences play out in terms of accountability is an interesting and complicated question.³⁵ Local cases also may be

27. Margaret H. Lemos, *Democratic Enforcement? Accountability and Independence for the Litigation State*, 102 CORNELL L. REV. 929, 946 (2017).

28. See Lemos, *supra* note 20, at 737–41 (describing policymaking via state litigation enforcing statutory rights and duties).

29. ANDREW P. MORRISS, BRUCE YANDLE & ANDREW DORCHAK, REGULATION BY LITIGATION I (2009).

30. E.g., William B. Rubenstein, *On What a “Private Attorney General” Is—and Why it Matters*, 57 VAND. L. REV. 2129, 2140–55 (2004).

31. Lemos, *supra* note 27, at 945.

32. See, e.g., *id.* at 943–56 (discussing common assumption that government litigators are and should be democratically accountable and developing a theory of accountability for public enforcement).

33. See, e.g., Kaitlin Ainsworth Caruso, *Associational Standing for Cities*, 47 CONN. L. REV. 59, 89–90 (2014); Morris, *supra* note 25, at 39–40.

34. See Lemos, *supra* note 27, at 979–89.

35. Compare Darien Shanske, Response, *Colloquium: The Case for Local Constitutional Enforcement*, HARV. C.R.-C.L. L. REV. (July 11, 2012), <http://harvardcrcl.org/cr-cl-presents-a-colloquium-the-case-for-local-constitutional->

spearheaded by different categories of elected officials, most notably mayors, who may be sufficiently high-profile as to draw attention to the issue.³⁶ And there's much to be unpacked about how local governments make decisions about litigation—and how those processes link up to claims about democratic authorization and accountability. In some local cases, for example, the city council has held a public vote to authorize the litigation.³⁷ Scholars have used the town-hall metaphor in debates about private class actions, but local litigation creates the potential—and sometimes the reality—of a literal town hall discussion of the case.

A second theme in arguments in favor of state litigation is that state AGs are likely to be good representatives for the state's citizens for a variety of reasons linked to AGs' expertise and incentives. Unlike private parties, state AGs and other officials can bring a perspective rooted in actual governance, offering a wider lens than that typically available to private parties but attuned to local conditions in a way that may not be true of the federal government.³⁸ Advocates of local litigation have made similar arguments. Kaitlin Caruso, for example, notes that local governments “interact with their residents each day” and thus have “an

enforcement/ [https://perma.cc/5TKG-KBHK] (suggesting that arguments in favor of local authority to raise constitutional claims for citizens “appear stronger . . . insofar as the localities in question are cities, especially older, larger cities. Special districts, Lakewood plan cities, even school districts – all of these entities do not seem to be equally attractive defenders of constitutional values.”), with David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 776 (2017) (discussing evidence that voters in smaller, less-population-dense areas may attend more closely to local elections than voters in big cities, though the type of office also matters).

36. The mayor of Reno, Nevada, for example, was the public figurehead of the city's opioids suit, which was prosecuted by private attorneys. *See, e.g., City of Reno Files Lawsuit Against Distributors, Manufacturers of Opioids*, NEWS 4 (Sept. 18, 2018), <https://mynews4.com/news/local/city-of-reno-files-lawsuit-against-distributors-manufacturers-of-opioids> [https://perma.cc/ZPZ9-XFUA] (quoting mayor for the announcement of the case); Riley Snyder, *Reno Mayor Blasts Laxalt for Pitting Nevadans Against Nevadans' Amid Opioid Lawsuit Disagreement*, NEV. INDEP. (Nov. 13, 2017, 12:08 PM), <https://thenevadaindependent.com/article/reno-mayor-blasts-laxalt-for-pitting-nevadans-against-nevadans-amid-opioid-lawsuit-disagreement> [https://perma.cc/6T3Q-RGMU] (describing the clash between the Reno mayor and Nevada AG over the city's suit).

37. Reno's opioid suit, described in the previous note, is an example. Michael Scott Davidson, *Reno Follows Clark County in Using Las Vegas Law Firm for Opioid Litigation*, L.V. REV.-J. (Jan. 10, 2018, 6:24 PM), <https://www.reviewjournal.com/news/politics-and-government/clark-county/reno-follows-clark-county-in-using-las-vegas-law-firm-for-opioid-lawsuit/> [https://perma.cc/C7VC-KB62] (describing vote by the Reno City Council); *see also* William Crum, *Oklahoma City Council Moves Ahead with Opioid Litigation*, OKLAHOMAN (Aug. 1, 2018, 5:00 AM), <https://www.oklahoman.com/article/5603264/oklahoma-city-council-moves-ahead-with-opioid-litigation> [https://perma.cc/R98X-86E7] (describing vote by city council “after discussions and negotiations that lasted much of the summer”).

38. *See* Lemos, *supra* note 20, at 721.

excellent vantage point for recognizing patterns of harm affecting their communities.”³⁹

Not only can state and local governments notice harms that federal enforcers might miss and private enforcers might fail to pursue, but those patterns of harm also often translate into injuries to the government itself. Many local-government claims rest on allegations of harm to the government—that is, so-called proprietary claims in which the municipality seeks to recover losses that it incurred as a result of the defendant’s actions.⁴⁰ Again, the same is true of state litigation.⁴¹ For defenders of government litigation, this is a feature, not a bug: the idea is that there is an *identity of interest* between local governments and their citizens because the harms suffered by residents often cause harm to the local government as well.⁴²

Importantly, proponents argue, government *attorneys* (again, state or local) are well situated to pursue such claims. Like their counterparts at the state level, local attorneys are sworn to pursue the public interest rather than the interest of any particular individual or group.⁴³ And, because state and local government attorneys are paid salaries rather than hourly or contingent rates, they have incentives to prioritize cases with the most public benefit rather than the highest payout and to seek remedies that get to the heart of the problem rather than focusing on financial recoveries.⁴⁴ If litigation is successful, moreover, attorney’s fees need not be carved out

39. Caruso, *supra* note 33, at 61; see Morris, *Rising Culture*, *supra* note 12, at 59–60.

40. See, e.g., Caruso, *supra* note 33, at 62 (“Without standing to litigate on residents’ behalf, many cities strain to identify harm to their own interests in order to bring a suit . . .”). The many local suits against e-cigarette giant JUUL offer a recent example. Although in one sense the litigation is focused on harm to local citizens—underage vapers—the relevant injury for standing purposes is to the plaintiff government units themselves, and the complaints explain in detail how treating, and attempting to combat, teen vaping affects public resources. See, e.g., Complaint at 4, 54–69, *Illinois ex rel. Nerheim v. JUUL Labs, Inc.*, No. 19L 00000571 (Ill. Cir. Ct. filed Aug. 13, 2019).

41. See Seth Davis, *The New Public Standing*, 71 STAN. L. REV. 1229, 1233 (2019) (“State standing to sue the federal government for financial injuries is ‘the new public standing.’”).

42. Caruso, *supra* note 33, at 61 (noting that “a city’s welfare is intimately intertwined with that of its residents”); see also Swan, *supra* note 12, at 1251 (elaborating on the local government-citizen relationship).

43. See Caruso, *supra* note 33, at 90 (noting that city officials “are often accountable to a smaller, narrower ‘public interest’ than attorneys general”); NAT’L DIST. ATT’YS ASS’N, NATIONAL PROSECUTION STANDARDS § 1–1.2 (3d ed. 2009), <https://ndaa.org/wp-content/uploads/NDAA-NPS-3rd-Ed.-w-Revised-Commentary.pdf> [<https://perma.cc/JLL2-XWHT>].

44. See Lemos, *supra* note 21, at 525–27 (contrasting incentives of public and private litigators and linking salaries and other institutional features of public litigation to pursuit of public interest).

of public recoveries; the money can go directly to supporting the relevant government and its citizens.

B. Critiques of State (and Local) Litigation

If the arguments in favor of local litigation are similar to those made by proponents of state litigation, so, too, are the critiques. A frequent complaint about state litigation is that it is regulation in disguise.⁴⁵ “Regulation by litigation” may be problematic for process reasons—that is, if litigation affords fewer opportunities for meaningful democratic input and engagement, and for checks by other political actors, than do regulatory processes—or because it empowers state AGs to reach issues over which state governments lack regulatory authority.⁴⁶ Similar arguments have been lodged by critics of local litigation. The Chamber of Commerce, for example, has identified local litigation as a “usurpation of state power” because “[m]unicipalities . . . may pursue litigation as a shortcut to solve public problems that otherwise would be addressed legislatively.”⁴⁷ “Regulatory action,” the argument continues, “is typically the province of state legislators who are also elected to represent constituents in a statewide body.”⁴⁸

As the quotes from the Chamber of Commerce suggest, critiques about regulation by litigation often bleed into arguments about the potential for public litigation to extend beyond the jurisdiction of the plaintiff government. Just as state litigation may, as a practical matter, resolve issues of nationwide concern, so, too, local litigation may impact the state as a whole.⁴⁹ Thus, critics of state litigation argue that AGs should step aside and leave matters to the federal government, while critics of local suits point to the state as the appropriate unit of government.⁵⁰

Related to this second strand of critique is a set of concerns about appropriate uses of public litigation authority and how decentralized litigation authority coheres (or not) with theories of federalism. Professors Ernie Young and Lynn Baker coined the term “horizontal

45. See, e.g., Lemos, *supra* note 27, at 948–49 (discussing critique of state litigation as regulatory).

46. Lester Brickman, *Regulation by Litigation: The New Wave of Government-Sponsored Litigation*, 1 MANHATTAN INST.: CONF. SERIES 27, 29–31 (1999), <https://media4.manhattan-institute.org/pdf/mics1.pdf> [<https://perma.cc/BW27-R9R2>].

47. U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 2, at 16.

48. *Id.*; cf. Swan, *supra* note 12, at 1251–52 (discussing instances in which courts have held that local litigation authority is impliedly limited by state laws preempting local regulatory authority).

49. See Petition for Writ of Mandamus, *supra* note 5, at 8–9 (detailing potential for statewide impact of local claims in opioid litigation).

50. See Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998, 1998–2000 (2001); U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 2, at 15–16.

aggrandizement” to refer to the process by which a state, or group of states, uses federal law to impose its policy preferences on the rest of the country.⁵¹ Litigation can have similar effects—for example, where a state or group of states persuades the Supreme Court to adopt a new constitutional principle that limits state power. As Professor Young and I have argued in other work, such advocacy sits uneasily with federalism-based justifications for state litigation authority.⁵² And the same has been said, in somewhat different terms, of local litigation.⁵³

Critics of both state and local litigation also have highlighted the role private attorneys often play in such litigation. Like so much else about public litigation, the objection traces back to Big Tobacco, in which the states were represented by some of the same attorneys who had litigated unsuccessful private suits.⁵⁴ Coordinated action by state AGs proved successful where private efforts had failed,⁵⁵ the attorneys earned a great deal of money,⁵⁶ and observers learned two important facts about public litigation. First, government plaintiffs often enjoy significant advantages over private parties.⁵⁷ For example, when AGs sue in a representative capacity as *parens patriae*, they can “avoid difficult questions of predominance that [might] doom[] [a] class action[] [in which] individualized evidence of injury or causation” would be required, and state statutes often permit government plaintiffs to prevail upon a showing of a violation without a need for proof of causation and damages.⁵⁸ Second, partnerships with private attorneys can create a win-win situation in which resource-strapped government offices obtain high-caliber legal representation without having to risk any public funds, while private

51. Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 109–10 (2001) (defining and contrasting “vertical” and “horizontal aggrandizements”).

52. Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 96–105 (2018).

53. See, e.g., Barron, *supra* note 24, at 2222 (arguing that cities “have no sufficient interest in pressing” claims that “would not expand local policymaking discretion but instead bind every locality to follow a single course”).

54. See Howard M. Erichson, *Private Lawyers, Public Lawsuits: Plaintiffs’ Attorneys in Municipal Gun Litigation*, in *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS* 129, 136 (Timothy D. Lytton ed., 2005) (discussing the relationship between state suits and lawyers who had spearheaded the large *Castano* private class action).

55. Lemos & Young, *supra* note 52, at 69–70.

56. See, e.g., Michael Debow, *The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage*, 31 SETON HALL L. REV. 563, 568 (2001).

57. Lemos & Young, *supra* note 52, at 69–72 (discussing states’ litigation advantages in general and in tobacco litigation specifically).

58. *Id.* at 119–21 (summarizing litigation advantages for state AGs); see also GUIDEBOOK, *supra* note 16, at 14 (“[A]s a public office, you can take advantage of tools that are not available to private plaintiffs.”).

attorneys can earn hefty fees by taking advantage of the state's capacity to bring claims unavailable to private plaintiffs.⁵⁹ Defense-side critics cried foul, and even some otherwise-sympathetic defenders of state litigation raised objections to unfettered reliance on private counsel.⁶⁰ Similar arguments are now being made, unsurprisingly, about local litigation.⁶¹

II. DIFFERENCE AND CONFLICT IN STATE AND LOCAL LITIGATION

Although I can only sketch the outlines in this Essay, I've sought to illustrate the substantial overlap between arguments for and against both state and local litigation. Given these similarities, conflicts between state and local litigators in the opioid litigation and elsewhere present something of a puzzle. If state and local litigation are two means to the same end—promoting the interests of the state's citizens—why do they come into conflict? And if state AGs appreciate the arguments in favor of state litigation—as presumably they do—why do they not see the same value in the local equivalent?

An obvious rejoinder, informed by the preemption wars noted in the Introduction, is, "It's politics, stupid." Put somewhat more delicately, perhaps states and localities are pursuing different visions of the public interest because they serve different constituencies. That may well be true in some cases, but state-local conflicts over litigation do not reliably fit the red state/blue city frame that explains so much of the recent conflict over regulatory authority. Nor do state-local litigation conflicts consistently take the form of a local government that wishes to target a particular defendant pitted against a state that wishes to leave that defendant alone. In that sense, litigation conflicts also diverge from the deregulatory vs. pro-regulatory pattern we see in the preemption context.⁶² Instead, conflicts tend to arise when state and city both want to use litigation to target the same perceived problem, often with effectively the same goals. What they're arguing about is who can do it better.

In the opioids litigation, for example, public clashes have erupted between state AGs and local litigators in multiple states featuring a mix of

59. Lemos, *supra* note 21, at 536; Lemos & Young, *supra* note 52, at 120–21.

60. See Lemos, *supra* note 21, at 542–56 (collecting critiques).

61. See generally U.S. CHAMBER INST. FOR LEGAL REFORM, BIG BUCKS AND LOCAL LAWYERS: THE INCREASING USE OF CONTINGENCY FEE LAWYERS BY LOCAL GOVERNMENTS (2016).

62. See Riverstone-Newell, *supra* note 9, at 404–07, 419 (describing "[t]he rise in state preemption legislation as a means to undo progressive local policies" as "a departure from preemption's traditional use" in avoiding conflicts between different approaches to regulation); Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1182 (2018) ("[M]uch of recent state law preemption is simply deregulatory. The state law does not replace a local scheme of regulation with a contrary state one, but rather simply bars the locality from regulating at all.").

Democrats and Republicans on both sides,⁶³ and bipartisan groups of AG weighed in on the massive opioid MDL to register their opposition to the proposed negotiation class and other aspects of the proceedings.⁶⁴ The arguments aren't about whether to use litigation to seek redress for the harms caused by the opioid epidemic—at least in their public statements, both sides take a tough-on-opioids stance⁶⁵—but on who should lead the charge. Unpacking these arguments, alongside similar claims made in other state-local litigation conflicts, reveals five recurring themes, explored below.

63. See, e.g., *infra* notes 75–82 and accompanying text (describing conflict in Arkansas between Republican AG and Democratic local attorneys); *Lawyers Lash Becerra Over Move to Restrict New Opioid Suits*, RECORDER (Aug. 30, 2020), <https://plus.lexis.com/search?pdsearchterms=LNSDUID-ALM-RECRDR-20200830LAWYERSLASHBECERRAOVERMOVETORESTRICTNEWOPIOIDSUIT&pdbyasscitatordocs=False&pdsourcingroupingtype=&pdisurlapi=true&pdmfid=1530671&crd=e3b79664-6a2e-41ed-985d-14a851c30513> (describing conflict over Democratic California AG's support for legislation that would allow him to block new opioid lawsuits by cities and counties); *Prescription Opioid Cases*, Order on Petition for Coordination, Sup. Ct. Cal. (Sept. 6, 2019) (granting Democratic AG's motion to coordinate state suit with local suits and declining to rule on his request to assume control over certain claims in the local suits brought on behalf of the People of the State); Riley Snyder, *Laxalt to Schieve: Reno Lawsuit Against Opioid Manufacturers Could Undermine Ongoing State Litigation*, NEV. INDEP. (Nov. 9, 2017, 10:44 AM), <https://thenevadaindependent.com/article/laxalt-to-schieve-reno-lawsuit-against-opioid-manufacturers-could-undermine-ongoing-state-litigation> [<https://perma.cc/JKD7-DWWT>] (Republican AG urging Independent Mayor of Reno to abandon plans to initiate opioid litigation on behalf of the city); OFF. OF TENN. ATT'Y GEN., STATEMENT ON OPIOID LITIGATION (2018) (announcing Republican Tennessee AG Herbert Slatery's efforts to intervene in lawsuits led by three Republican district attorneys); OFF. OF TENN. ATT'Y GEN., LETTER ON OPIOID CASES FILED BY DISTRICT ATTORNEYS GENERAL (Mar. 15, 2018) (expressing concerns about local suits); OFFS. OF TENN. DIST. ATT'YS GEN., LETTER FROM 14 DISTRICT ATTORNEYS GENERAL TO HERBERT H. SLATERY (Mar. 20, 2018) (defense of local suits by group of local attorneys).

64. See Brief of Amici States of Arizona et al., *In re Nat'l Prescription Opiate Litig.*, Nos. 19-4097, 19-4099 (6th Cir. Feb. 14, 2020), ECF No. 50; see also Amicus Letter by Attorneys General Regarding Settlement Negotiation Class, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio July 23, 2019) (objections backed by bipartisan group of thirty-eight AGs); Letter to Court from Attorneys General, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio June 24, 2019) (objections backed by twenty-six AGs); Brief of Amici Curiae States of Michigan et al., *supra* note 6; see also George Jepsen & Perry Zinn Rowthorn, *Leave Opioid Lawsuits to State Attorneys General*, WSJ: OPINION (Mar. 3, 2019, 4:44 PM), <https://www.wsj.com/articles/leave-opioid-lawsuits-to-state-attorneys-general-11551649471> [<https://perma.cc/XJT8-LJZG>] (bipartisan op-ed by former AGs).

65. See Snyder, *supra* note 63; STATEMENT ON OPIOID LITIGATION, *supra* note 63; LETTER ON OPIOID CASES FILED BY DISTRICT ATTORNEYS GENERAL, *supra* note 63; LETTER FROM 14 DISTRICT ATTORNEYS GENERAL TO HERBERT H. SLATERY, *supra* note 63.

A. Democratic Authorization and Its Limits

Recall that notions of democratic accountability feature prominently in defenses of both state and local litigation authority.⁶⁶ Such arguments work best when there is substantial overlap between the governed—those affected by the government action—and those who have the capacity to participate in the democratic process, whether via a vote on the action itself or, more commonly, on the representatives who are situated to decide on the action. Absent a compelling theory of virtual representation, it's hard to get misty-eyed about the democratic process if Group A is selecting a representative who will make choices governing Group B. Yet that's precisely what happens in government litigation, critics argue, citing the problem of spillovers noted above.⁶⁷

To be sure, the fact that litigation may affect third parties is by no means unique to government: private litigation can and often does have similar effects.⁶⁸ Often, therefore, the most a “spillovers” argument can do is undermine government litigants’ claim of democratic superiority; it does not provide an affirmative reason to disfavor government litigation. But when the effects of local litigation extend well beyond the boundaries of the relevant jurisdiction, state AGs can use arguments about spillovers to support a more pointed claim: the local government cannot represent the interests of all those affected, *but the state AG can*.

It's important to distinguish between two different strains of this argument. In some cases, the claim of democratic superiority is pitched in a formal and legal register. Ohio AG Dave Yost's challenge to the local opioids litigation is an example: “[O]nly Ohio, not its counties, has the *power and the right* to represent the people of the state.”⁶⁹ Well, maybe. But the distribution of power depends on state law, and state law sometimes explicitly authorizes local attorneys to sue on behalf of the state and its people for specified harms.⁷⁰ Consumer-protection laws, for example, including states’ Unfair and Deceptive Acts and Practices (UDAP) statutes, may authorize a district attorney, state’s attorney (both typically elected at the county level⁷¹), or city or county attorney to seek

66. See *supra* Section I.A.

67. See *supra* Section I.B.

68. Margaret H. Lemos, *Three Models of Adjudicative Representation*, 165 U. PA. L. REV. 1743, 1745–46, 1750–52 (2017).

69. Petition for Writ of Mandamus, *supra* note 5, at 15 (emphasis added).

70. Cf. Brief of Amici States of Arizona et al., *supra* note 64, at 3 (arguing that the proposed negotiation class in the opioid MDL improperly glossed over differences in state law by lumping together localities that do have authority to make statewide claims with those that do not).

71. See generally Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528 (2012) (discussing prevalence of county-elected state and district attorneys).

injunctive relief and civil penalties “in the name of” the state or its citizens.⁷² Public nuisance laws also sometimes authorize suit by localities, as well as by the AG.⁷³ Indeed, localities in Ohio have statutory authority to sue over public nuisances in the name of the state.⁷⁴

The Arkansas opioid conflict offers another illustration. A coalition of Arkansas counties and cities filed suit in state court against pharmaceutical companies, retailers, pharmacists, and medical providers.⁷⁵ One of the plaintiffs was Scott Ellington, the Prosecuting Attorney for the Second Judicial District of Arkansas, who was suing as a relator on behalf of the state.⁷⁶ Two weeks later, Arkansas AG Leslie Rutledge filed her own suit on behalf of the state against three major opioid manufacturers in a different state court.⁷⁷ Rutledge then petitioned the state supreme court for an emergency writ of mandamus ordering Ellington to abandon the claims he brought on the state’s behalf.⁷⁸ She argued that

72. See, e.g., ALA. CODE § 8-19-11(a) (2021) (“Attorney General or the district attorney acting in the name of the state”); CAL. BUS. & PROF. CODE §§ 17204, 17206 (West 2021) (authorizing suits by AG and variety of local lawyers “in the name of the people of the State of California”); COLO. REV. STAT. ANN. § 6-1-112(1) (2021) (“The attorney general or a district attorney may bring a civil action on behalf of the state”); 815 ILL. COMP. STAT. 505/7 (LexisNexis 2021) (“Attorney General or a State’s Attorney . . . may bring an action in the name of the People of the State”); NEV. REV. STAT. § 598.0985 (2019–20) (authorizing district attorneys to seek to enjoin deceptive trade practices “in the name of the State of Nevada”); N.D. CENT. CODE § 51-10-06 (2021) (“The attorney general and the several state’s attorneys shall institute suits in behalf of this state”); 15 OKLA. STAT. ANN. tit. 15, § 756.1.A. (2021) (“The Attorney General or a district attorney may bring an action”); OR. REV. STAT. § 646.632 (2019) (“[A] prosecuting attorney . . . may bring suit in the name of the State of Oregon”); 37 PA. STAT. AND CONS. STAT. § 201-8 (West 2021) (“[T]he Attorney General, or the appropriate District Attorney, acting in the name of the Commonwealth . . . may petition for recovery of civil penalties and any other equitable relief”); see also MONT. CODE ANN. § 30-14-121 (2021) (authorizing county attorneys, “on the request of the department [of justice] or another county attorney, [to] initiate all procedures and prosecute actions in the same manner as provided for the department”); S.C. CODE ANN. § 39-5-130 (2017) (authorizing suit by “any solicitor or county or city attorney with prior approval of the Attorney General”); S.D. CODIFIED LAWS § 37-24-24 (2021) (“The state’s attorney with prior approval of the attorney general may institute and prosecute actions hereunder in the same manner as provided for the attorney general”).

73. See, e.g., IDAHO CODE § 52-205 (2021) (authorizing local government entities to bring public nuisance claims); WIS. STAT. § 823.02 (2019–20) (same).

74. OHIO REV. CODE ANN. § 3767.03 (LexisNexis 2021–22); see also *id.* § 4729.35 (authorizing the attorney general, the prosecuting attorney of any county, or the state board of pharmacy to sue to enjoin violations of certain rules of the board of pharmacy).

75. See Second Amended Complaint, *Arkansas ex rel. Ellington v. Purdue Pharma L.P.*, No. CV-2018-268, 2018 WL 1868852 (Ark. Cir. Ct. Apr. 2, 2018).

76. *Id.*

77. Complaint at 1, *Arkansas ex rel. Rutledge v. Purdue Pharma. L.P.*, 60CV-18-2018 (Ark. Cir. Ct. Mar. 29, 2018).

78. Emergency Petition for Writ of Mandamus at 1, *Arkansas ex rel. Rutledge v. Ellington*, No. CV-18-296 (Ark. Apr. 2, 2018).

“permitting a single prosecutor—who is accountable to only *some* Arkansans—to direct the entire State’s actions would set a dangerous precedent that is inconsistent with principles of representative government.”⁷⁹ But Rutledge faced a significant obstacle in Arkansas law, which provides that “[a]ll actions in favor of and in which the state is interested shall be brought in the name of the state and shall be prosecuted by the prosecuting attorney.”⁸⁰ Rutledge insisted that, when read in the context of other Arkansas statutes, including those empowering the AG, the provision is best understood to apply only to criminal cases.⁸¹ Nevertheless, the supreme court unanimously rejected her petition.⁸²

Democratic objections may still be available where state law empowers local government suits on behalf of the state—or where state law is unclear on the question, as is arguably the case in Arkansas—but the argument must move to a more functional and normative register: the claim must be that the AG can *better* represent the interests at stake given her superior claim to democratic accountability. The force of that claim will depend, of course, on context—including the nature of the claims and interests at issue and the processes that inform litigation decisions at the local and state level. And the argument is more about the wisdom of state law than the legality of the local suit. It’s worth noting, on that score, that state law can authorize local governments to bring claims based on harm to citizens that are more limited in scope than a suit on behalf of the entire state. For example, Virginia authorizes city, county, and town attorneys to sue under its UDAP statute on the same terms as the state AG but in the name of the city, county, or town—not the commonwealth.⁸³ Such an approach finds analogs in federal statutes authorizing enforcement by state AGs, which permit states to sue for harms to their own citizens.⁸⁴ The practical problem of spillovers may remain—a suit by New York might affect life in New Jersey—but no state is empowered to sue on behalf of the U.S. government or to represent citizens nationwide. Many federal statutes that provide for state enforcement also require state AGs to give prior notice to the relevant federal agency, permit that agency to intervene

79. *Id.* at 3.

80. ARK. CODE ANN. § 16-106-101 (2021).

81. Emergency Petition for Writ of Mandamus, *supra* note 78, at 10.

82. Formal Order, *Arkansas ex rel. Rutledge v. Ellington*, No. CV-18-296 (Ark. Apr. 2, 2018). The court’s one-page order offered no explanation of its reasoning.

83. VA. CODE ANN. §59.1-203 (2021); *see also* FLA. STAT. § 501.203(2) (LexisNexis 2021) (defining “enforcing authority” as state attorney (a county-elected officer) if violation “occurs in or affects the judicial circuit under the office’s jurisdiction” and as state Department of Legal Affairs if violation “occurs in or affects more than one judicial circuit”); MISS. CODE ANN. § 75-24-21 (2021) (providing that “[t]he district attorney and county attorney shall, *within their respective jurisdictions*, have the same duty and responsibility under this chapter as that of the attorney general statewide in the enforcement thereof”) (emphasis added).

84. *See generally* Lemos, *supra* note 20.

in the case, and prohibit states from suing on violations that are the subject of a pending federal enforcement action.⁸⁵ State law could adopt a similar model for local litigation, including in cases in which the local government is authorized to sue on behalf of the state. Vermont’s law authorizes the state’s attorney to sue in the name of the state but only “if authorized to proceed by the Attorney General.”⁸⁶ Although such laws share features in common with the federal model, there’s a meaningful difference—in theory, at least—between giving the AG a veto over local suits (as Vermont’s law does) and allowing the state to *join* a local suit, as does the federal model. The latter approach puts a thumb on the scale in favor of enforcement, letting the federal government set the floor and empowering states to do more. The Vermont approach, by contrast, gives the AG the last word on how much public enforcement will take place, period.

B. Likelihood of Success on the Merits

The Arkansas conflict described above illustrates a second set of arguments that crop up in state-local conflicts over litigation, the thrust of which is that the state AG should get priority because she is more likely to succeed on the merits. It’s worth emphasizing at the outset that these issues, too, turn on state law rather than on characteristics intrinsic to state and local government. For better or worse, state law does sometimes give the AG access to certain kinds of claims while withholding the same advantages from both private litigants and local governments. Arkansas law is perhaps a model of what not to do in this regard, as it appears to give the local prosecuting attorney authority to bring all claims on behalf of the state while separately authorizing the AG—and only the AG—to seek certain remedies, including civil penalties under the state’s Deceptive Trade Practices Act and the Medicaid Fraud False Claims Act.⁸⁷ Thus, AG Rutledge argued that if the prosecuting attorney’s suit were permitted to proceed,

the State and its citizens face the distinct possibility of being foreclosed from bringing those claims and being substantially prejudiced in its recovery. . . . [T]he potential preclusive effect of legal determinations made in the [prosecuting attorney’s litigation] could result in the loss of *millions* of dollars in

85. *Id.* at 708–10, nn.41–54.

86. VT. STAT. ANN. tit. 9, § 2458 (2021); *see also* TEX. BUS. & COM. CODE ANN. § 17.48 (West 2021) (authorizing actions by district or county attorneys with prior notice to (statewide) consumer protection division).

87. *See* Emergency Petition, *supra* note 78, at 14.

damages that would otherwise have been awarded to the people of Arkansas.⁸⁸

Note that Rutledge was not objecting to the counties and cities suing on their own behalf; her challenge was to a local attorney suing in the name of the state—an arrangement that raises distinctive concerns about foreclosing other state actors (including the AG) from going after the same defendant again in another suit with, as Rutledge put it, “better claims.”⁸⁹ It’s hard to see the wisdom of a state system that authorizes local governments to stand in the state’s shoes for litigation purposes while denying them tools that are available to the state.

Yet even when state and local authorities have parallel authority to pursue certain claims, their capacities may be meaningfully different. Among other advantages, state AGs typically have significant pre-filing investigative authority. While most civil litigants rely on the formal machinery of discovery to give them the tools they need to dig into the defendant’s conduct, state AGs can issue subpoenas to require the attendance of witnesses or the production of documents or other evidence, conduct hearings, examine records, and more—all prior to commencing an action.⁹⁰ This power is a double-edged sword. On the one hand, it means that AGs can present the court with a detailed and thorough complaint more likely to survive a motion to dismiss. On the other hand, courts may come to expect more from AGs and be less inclined to grant them the benefit of the doubt when they are unable to connect all the dots during the early stages of the case. Investigations take time, too. In a race to the courthouse door, local governments are likely to get there faster precisely because they often do not—cannot—engage in the same kind of pre-filing investigation as the AG. But local claims may be weaker as a result. In a zero-sum world in which only one claim can be brought on behalf of the state or its people, it’s not hard to see why AGs would believe (with some justification) that they should get priority.

The scope of civil investigative authority is largely a function of state law. The San Francisco City Attorney, for example, has authority under San Francisco’s city Charter and Administrative Code to investigate claims, including by issuing subpoenas to compel testimony and the production of records.⁹¹ And some consumer protection statutes grant investigative authority to local attorneys as well as the state AG.⁹² Others

88. *Id.*

89. *Id.* at 12.

90. See STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES 248 (Emily Myers & Nat’l Assoc. of Att’ys Gen. eds., 4th ed. 2018) (describing investigative authority).

91. S.F. CHARTER § 6.102; S.F. ADMIN. CODE § 2A.230.

92. *E.g.*, COLO. REV. STAT. § 6-1-107 (2021).

do not, however, even when they otherwise authorize local suits.⁹³ The discussion here can only scratch the surface, but it underscores the point that simply granting localities the authority to sue on behalf of the state is only a first step—and can provoke predictable and often justifiable conflicts between state and local litigators when the former are, as a practical matter, in a stronger position than the latter to represent the same client.

A different set of issues arises when AGs challenge local litigation involving claims not on behalf of the state but on behalf of the local government itself, or local citizens. AGs may enjoy various advantages in these cases as well—including access to *parens patriae* standing and the ability to avoid removal to federal court on the basis of diversity jurisdiction⁹⁴—but the source of the conflict is significantly less clear. Ohio AG Dave Yost’s challenge to local county participation in the opioids MDL is an example.⁹⁵ In his brief seeking mandamus from the Sixth Circuit to stop the bellwether trial involving claims by two Ohio counties (the same claims he insisted “belong to” the state of Ohio⁹⁶), Yost argued that “any judgment or settlement between two Ohio counties and the defendants will draw down a limited pool of money to satisfy these claims, and will do so in a way that risks defenses that are unique as against the counties.”⁹⁷ He continued,

Cities (and other political subdivisions) have frequently lost claims like those in the bellwether trial because they have been unable to satisfy proximate cause. Unlike its subdivisions, Ohio has standing to sue without regard to proximate cause. As *parens patriae*, Ohio has standing to assert claims based on harms to the health and welfare of its citizens. Ohio’s ability to bring such claims—and its political subdivisions [sic] *inability* to do so—means that Ohio is better able to seek justice for its citizens.

93. Compare N.D. CENT. CODE § 51-10-05.1 (2021) (granting investigative authority to the AG), with *id.* § 51-10-06 (2021) (providing that “[t]he attorney general and the several state’s attorneys shall institute suits in behalf of this state, to prevent and restrain violations of the provisions of this chapter”).

94. See *supra* notes 23–28 (discussing *parens patriae* authority); *California v. Purdue Pharma, L.P.*, No. SACV 14-1080-JLS, 2014 WL 6065907, at *1 (C.D. Cal. 2014) (remanding opioid suit to state court because “[a] state is not a citizen of itself and thus cannot be a party to a diversity action”).

95. Although some of the counties’ claims, such as the public nuisance claims noted above, were asserted on behalf of the state, most were not and instead focused on harms to the counties themselves and to local citizens. Corrected Second Amended Complaint and Jury Demand, *In re Nat’l Prescription Opiate Litig., Cnty. of Summit v. Purdue Pharma L.P.*, 17-md-0204 (N.D. Ohio May 29, 2018) (listing parties and their claims).

96. Petition for Writ of Mandamus, *supra* note 5, at 1.

97. *Id.* at 21 (internal quotation marks and citations omitted).

Second, the State can maintain claims otherwise barred by statutes of limitations. Statutes of limitations in Ohio generally do not apply as a bar to the rights of the state. But, because the rule is an attribute of sovereignty only, it does not extend to townships, counties, school districts or boards of education, and other subdivisions of the state.⁹⁸

Yost's brief doesn't explain why the risk that local governments might *lose* their cases would prejudice the state or its citizens—a failed claim would not, after all, “draw down a limited pool of money,” and a loss by a local government acting on its own behalf wouldn't bar the state from pursuing its own claims against the same defendant. Reading between the lines, the worry seems to be that the counties will be in a weaker position to negotiate settlement if their claims are subject to promising defenses, and in the unique context of an MDL, testing (potentially weak) county claims in a bellwether trial could undermine the negotiating position of the broader group of government plaintiffs. Even if state AGs manage to avoid any formal entanglement with the MDL, their own settlement position will be weakened if the defendants have already paid out substantial sums to state subdivisions (even if those sums are diminished by defenses the state could have avoided). The state as a whole would be better off, then, the argument seems to go, if the whole matter were left in the AG's hands.

This kind of conflict—in which a state AG seeks to quash truly local litigation as opposed to litigation by a local actor who seeks to represent the state itself—appears to be relatively uncommon.⁹⁹ It may be that the opioid MDL is distinctive, if not unique, with Judge Polster's repeated and vocal emphasis on obtaining global settlement bringing to the fore concerns about local resolutions getting in the way of the state's own efforts.¹⁰⁰ I return to the question of global settlement below, but for present purposes it's worth emphasizing once again that arguments like Yost's are contingent on the details of state law. There may be some force to the claim that *if* state law puts local suits at a disadvantage, *and* the AG is actively pursuing the same (or broader) relief, *then* the AG is in a better position in that particular case to represent the locality and its citizens. Such an argument does not, however, provide a basis for disfavoring local litigation in circumstances in which the AG is not inclined to proceed, or

98. *Id.* at 22–23 (internal quotation marks and citations omitted).

99. For another example, see *State v. City of Dover*, 891 A.2d 524 (N.H. 2006) (describing conflict between New Hampshire AG and cities of Dover and Portsmouth).

100. See, e.g., Transcript of Proceedings Had Before the Honorable Dan Aaron Polster at 62, 72–73, *In re Nat'l Prescription Opiate Litig., County of Summit v. Purdue Pharma L.P.*, 17-md-0204 (N.D. Ohio May 29, 2018).

for changing state law to make local litigation even more difficult or to give the AG priority over local claims more broadly.

C. Resource Differentials and Reliance on Private Counsel

In addition to the advantages that may be bestowed (or withheld) by state statutes authorizing state and local litigators to pursue particular enforcement efforts, the success of any given suit may depend, as a practical matter, on the resources available to support it. Here, too, state AGs may hold an advantage over their counterparts in local government—though it’s critical to attend to the variety hidden within the larger categories of “local” or “municipal” litigation. Big cities with affirmative litigation departments, like San Francisco, are in a wildly different position from, say, a local prosecuting attorney with a shoestring budget. Even if the same doctrinal and investigative tools are available to the state and local litigators under state law, differences in staffing, funding, and expertise may give some government units significant advantages over others.

Resource limitations also may give local governments strong incentives to partner with private counsel, who can fund litigation out of their own war chests and supply needed people-power and know-how. On balance, state AGs may be less likely than cash-strapped municipalities to find it necessary to outsource the government’s legal work. When AGs do rely on private counsel, moreover, such arrangements are subject to regulation in many states, with statutes requiring that government officials retain primary decision-making authority and capping the total amount of fees that can be paid to outside counsel.¹⁰¹ For the most part, those laws apply *only* to the AG and other state officials; as written, they don’t extend to local government suits, including those brought on behalf of the state.¹⁰²

Reliance on private counsel can have various consequences, including for how claims are structured and prioritized, which I’ve detailed in other work.¹⁰³ But one feature stands out in particular in state-local litigation conflicts: private attorneys will take a cut of the proceeds for

101. See Lemos, *supra* note 21, at 543–44, nn.158–59 (describing regulation); see also Nick Bowman, *Policy Analysis: Outside Counsel in SLC Member States*, S. LEGIS. CONF. (Nov. 2016), <https://www.slatlanta.org/research/index.php?pub=515> [<https://perma.cc/C7AT-HJHF>].

102. E.g., ARK. CODE ANN. § 25-16-714(d) (2021) (applying caps and other regulations to fee arrangement with AG); ARIZ. REV. STAT. ANN. § 41-4803 (2021) (same, for “the state”); IOWA CODE § 13.7 (2021) (same); IOWA CODE § 23B.3 (2021) (same); MISS. CODE ANN. § 7-5-8 (2021) (same, for “the state, an arm or agency of the state, or a statewide elected officer acting in his official capacity”). California courts have held that municipal counsel must maintain control of any litigation in which the municipality is represented by private counsel. Morris, *Expanding Local Enforcement*, *supra* note 12, at 1918 n.77.

103. See generally Lemos, *supra* note 21.

their fees.¹⁰⁴ In the opioid cases and elsewhere, state AGs have argued that local efforts should yield to state suits in part because states can avoid shaving off a sizeable slice of any recovery for attorney's fees. As Tennessee AG Herbert Slatery put it when seeking to intervene in local opioids litigation, "Our consistent position has been that all recoveries go to the state and affected areas, not to outside attorneys."¹⁰⁵

Sometimes, however, AGs challenge localities' reliance on private counsel in terms that could be borrowed from the Chamber of Commerce and in cases where the state is not seeking any recoveries at all. An example is *Ex parte Attorney General Troy King v. CVS Caremark*.¹⁰⁶ Alabama deceptive trade practices law authorizes both the AG and the local district attorney to file suit on behalf of the state.¹⁰⁷ Five DAs did just that, suing CVS and other pharmacies for allegedly substituting generic for name-brand medications without approval of the doctors who wrote the prescriptions.¹⁰⁸ Alabama AG Troy King promptly moved to dismiss the suits.¹⁰⁹ (That move was permissible, the Alabama Supreme Court eventually held, because although Alabama law authorizes both the AG and the DA to initiate actions, other provisions granting the AG authority to supervise, advise, and instruct litigation on behalf of the state give the AG a trump card.¹¹⁰) While the cases were pending, King wrote an op-ed charging that DAs had been promised a "huge payoff" by the private attorneys they hired for work on the cases.¹¹¹ He warned that "[n]o business is safe in a state where lawyers can shop an extortion scheme to 42 local district attorneys, some of whom will surely take the bait."¹¹² "Make no mistake," King wrote, "it is a settlement they seek. . . . They know that it will be so expensive to defend these suits that the defendants are likely to give in to the shakedown. This is extortion by litigation pure and simple and it is wrong."¹¹³

AG King explained that the same private attorneys had come to him first, but he declined to hire them because they "lacked evidence to bring a lawsuit."¹¹⁴ We cannot know, of course, whether the claims against the pharmacies had any merit or not. The key point for present purposes is that

104. *Id.* at 533.

105. STATEMENT ON OPIOID LITIGATION, *supra* note 63.

106. 59 So. 3d 21 (Ala. 2010).

107. *Id.* at 27.

108. *Id.* at 22–24.

109. *Id.* at 23.

110. *Id.* at 24.

111. John O'Brien, *King Responds to District Attorneys with Op-Ed Piece*, LEGAL NEWSLINE (Oct. 15, 2009), <https://legalnewsline.com/stories/510521657-king-> [<https://perma.cc/A8AD-4LKP>].

112. *Id.*

113. *Id.*

114. *Id.*

King's objection is markedly different from the argument other AGs have raised about local reliance on private counsel in cases involving parallel state enforcement: that action by the state will be more effective because it can avoid the payment of hefty attorney's fees.¹¹⁵ King was not proposing to go after the defendants himself; he thought they should be left alone. And his broader point was that local litigators should not be permitted to hire private attorneys to represent the state (or perhaps at all)¹¹⁶—an idea the Chamber of Commerce also has championed so as to “discourage most municipal plaintiffs.”¹¹⁷ The objection seems to have less to do with the distinctive features of local litigation than with the threat of *litigation*, full stop. That's a natural position for the Chamber to take, but, without more, it provides little reason to prefer state litigation over the local alternative—indeed, the Chamber has challenged state litigation on similar terms.¹¹⁸

D. Destination and Distribution of Financial Recoveries

Concerns about attorney fees relate to a broader source of conflict between states and local governments: where the money goes. Most states' laws provide that funds recovered in state litigation will go to the general treasury to be allocated via legislative appropriations in the same manner as any other revenue.¹¹⁹ In some instances, AGs can take advantage of so-called “revolving funds” that permit their offices to retain a percentage of recoveries for use in future enforcement efforts.¹²⁰ State law may prescribe different rules for certain categories of funds, and state-led settlements likewise may make specific provision for the destination and use of money recovered in litigation.¹²¹ But the money doesn't always end up being used to redress the relevant injuries or prevent similar harms from occurring in the future.¹²² Big Tobacco again looms large in the rearview: states notoriously used funds from the \$200 billion Master Settlement for a

115. See, e.g., *supra* note 105 and accompanying text.

116. O'Brien, *supra* note 111.

117. U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 2, at 31.

118. See U.S. CHAMBER INST. FOR LEGAL REFORM, *PRIVATIZING PUBLIC ENFORCEMENT: THE LEGAL, ETHICAL AND DUE-PROCESS IMPLICATIONS OF CONTINGENCY-FEE ARRANGEMENTS IN THE PUBLIC SECTOR* 1–2 (2013).

119. Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 864 n.47 (2014).

120. *Id.* at 866–67.

121. *Id.*

122. See Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 528–29 (2012) (discussing concerns with settlement distributions in state-led suits).

variety of purposes entirely unrelated to tobacco, including balancing their general budgets.¹²³

From the perspective of a local government that has suffered (and seen its citizens suffer) significant harms at the defendant's hands, the prospect that state recoveries may be diverted from their intended uses—or simply that they may be depleted addressing injuries elsewhere in the state—can provide a compelling argument in favor of local control.¹²⁴ Judge Polster captured the concern in characteristically blunt terms in the opioids MDL:

The problem is that in a number of States any money that . . . a State Attorney General obtains . . . goes into the general fund. And the men and women who control what happens in the general fund are the elected state representatives and senators. That's what they do. And that's what happened in the tobacco litigation. Over \$200 billion, far more than 90 percent of that was used for public purposes totally unrelated to tobacco smoking, lung cancer, whatever. And I believe that's why we have all these counties and cities that filed separate lawsuits, to make sure that doesn't happen again.¹²⁵

State AGs, meanwhile, are likely to see a converse set of problems with—as a group of thirty-eight AGs put it—“[d]oling out small buckets of funds without regard to how the funds should be spent [in a] ‘coordinated’ response, which would balance statewide efforts[,] such as public education campaigns, with local efforts.”¹²⁶ The AGs argued that the allocation system proposed by the MDL plaintiffs, which would distribute settlement funds based on the number of opioid victims within each jurisdiction “regardless of whether caring for the victims falls to State, county or municipal officials,” threatened to “override State decision-making about how best to apply resources to the [opioid] epidemic and may well interfere with existing State programs and priorities.”¹²⁷ Ohio AG Yost, for his part, described Judge Polster's comments as a frank acknowledgement that the local opioid suits “are intended to avoid Ohio Rev. Code § 109.21, which states that all recoveries by the Attorney General will be placed into the general fund.”¹²⁸

123. *Id.* at 528 n.182.

124. *See, e.g.*, LETTER FROM 14 DISTRICT ATTORNEYS GENERAL TO HERBERT H. SLATTERY, *supra* note 63 (expressing concerns about destination of any settlement funds as reason for pursuing independent local litigation).

125. Petition for Writ of Mandamus, *supra* note 5, at 10.

126. Letter to Court from Attorneys General, *supra* note 64, at 3.

127. *Id.* at 3–4.

128. Petition for Writ of Mandamus, *supra* note 5, at 20.

Earlier we saw AG Yost arguing that the counties had relatively *weak* claims—the worry seeming to be that counties and other local government units might either lose their claims or win on terms much worse than what the state could get.¹²⁹ Here we see Yost and other AGs expressing a different set of concerns. One is that, if they *win* their claims or manage to negotiate a settlement, local governments might capture a disproportionate share of limited funds.¹³⁰ State AGs also might worry about how the money is going to be spent and wish to maintain control of that sort of decision-making at the state level.

It's worth noting, however, that while AGs will likely favor state-level decision-making on the allocation of funds, they have little reason to prefer laws like Ohio's directing all recoveries to the general fund. Indeed, shortly after lodging his objection to Judge Polster's approach in the opioid litigation, Yost proposed a constitutional amendment that would have created a Recovery Foundation responsible for allocating opioid-related proceeds to different resources around the state, including local governments, as well as investing some of the money in order to preserve funds for future uses.¹³¹ After legislative leaders declined to hold a vote on the proposed amendment in time to place it on the 2020 ballot,¹³² Yost joined with Ohio Governor Mike DeWine to announce that they had reached agreement with local governments representing approximately 85% of the state's population to adopt a "OneOhio" plan "to jointly approach settlement negotiations and litigation with the drug manufacturers and distributors of opioids."¹³³ Under the plan, 11% of any opioid settlement funds¹³⁴ would be reserved for attorney's fees and the

129. See *supra* notes 95–98.

130. Letter to Court from Attorneys General, *supra* note 64, at 3–4.

131. Andy Chow, *Yost Pitches Constitutional Amendment to Protect Opioid Settlement Money*, STATEHOUSE NEWS BUREAU (Dec. 6, 2019, 4:16 PM), <https://www.stateneews.org/post/yost-pitches-constitutional-amendment-protect-opioid-settlement-money> [<https://perma.cc/Q7DN-ZLRU>].

132. The timeline was extremely tight: Yost introduced the proposal on December 2, 2019, and in order to put a constitutional amendment on the 2020 ballot, lawmakers would have had to pass a resolution by December 18 (90 days before the March primaries). *Id.*

133. Press Release, Governor Mike DeWine of Ohio, Attorney General Announce OneOhio Agreement (Mar. 11, 2020), <https://governor.ohio.gov/wps/portal/gov/governor/media/news-and-media/governor-attorney-general-announce-oneohio-agreement> [<https://perma.cc/9H4C-TH9L>].

134. The plan defines "settlement" as "the negotiated resolution of legal or equitable claims against a Pharmaceutical Supply Chain Participant when that resolution has been jointly entered into by the State, the [MDL plaintiffs' executive committee] and the Local Governments." Memorandum from Governor Mike DeWine & Attorney General Dave Yost to the Local Governments & Plaintiffs' Executive Committee, at 1 (Feb. 19, 2020), https://f.hubspotusercontent10.net/hubfs/2153364/2020.02.19%20One%20Ohio%20Memorandum%20of%20Understanding%20V2%20%20Final.pdf?utm_campaign=Newsletter

remainder divided among the state and local governments; 30% would be set aside for community recovery and go directly to local governments; 55% would go to a statewide foundation, largely as envisioned in Yost's proposed amendment; and 15% would go to the office of the AG.¹³⁵ The plan also provides for joint state-local settlement negotiations and states that any proposed settlement "shall be subject to approval by Local Governments and the State."¹³⁶

Similarly, some state laws provide for a more targeted and granular distribution of litigation proceeds than the default approach of sending all state recoveries to the general treasury, while all local recoveries go to the governmental unit responsible for prosecuting the case. California's unfair and deceptive acts and practices statute, for example, authorizes both state and local attorneys to seek both injunctive and financial relief "in the name of the people of the State of California."¹³⁷ It goes on to prescribe rules for distributions of any penalties collected, allocating half of any penalties collected by the AG to the general fund and half to "the treasurer of the county in which the judgment was entered."¹³⁸ For actions brought by county-level attorneys (district attorneys or county counsel), the entirety of the penalty goes to the relevant county.¹³⁹ And in city cases, half of the funds go to the city and half to the county.¹⁴⁰ In all instances, the "funds shall be for the exclusive use by the Attorney General, the district attorney, the county counsel, and the city attorney for the enforcement of consumer protection laws."¹⁴¹ Like the Ohio example above, the California statute makes clear that the battle lines over the destination and use of litigation proceeds are set by state law; the default arrangements are just that—defaults—and can be changed in ways that may reshape some state-local litigation conflicts and avoid others.

E. Coordination, Settlement, and Global Peace

When state AGs pursue affirmative litigation, they often—and increasingly—work together. Multistate actions and settlements are

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135. Press Release, Governor Mike DeWine of Ohio, *supra* note 133.

136. Memorandum from Governor Mike DeWine & Attorney General Dave Yost to the Local Governments & Plaintiffs' Executive Committee, *supra* note 134, at 8.

137. CAL. BUS. & PROF. CODE § 17204 (West 2009); CAL. BUS. & PROF. CODE § 17206 (West 2021).

138. *Id.* § 17206(c)(1).

139. *Id.* § 17206(c)(2).

140. *Id.* § 17206(c)(3)(A).

141. *Id.* § 17206(c)(4).

growing in both size and frequency, helped along by longstanding relationships among AG offices as well as time-tested strategies for achieving agreement among numerous states.¹⁴² Multistate actions allow states to pool their own resources while forcing the defendant to respond to multiple actions across the country—a strategy one former AG called “rolling thunder,” which can significantly enhance AGs’ leverage.¹⁴³ Even before any complaints are filed, interstate coordination in investigation can be key when AGs are addressing conduct and harms that extend across state lines. Indeed, given states’ capacity for pre-filing investigation, multistate settlements may not technically be *settlements* of a pending legal action, but agreements negotiated prior to the commencement of any suit. That was the case, for example, when AGs from forty-eight states plus the District of Columbia entered into an “Assurance of Voluntary Compliance or Discontinuance” with Time Consumer Marketing, Inc., in August 2000.¹⁴⁴ The Assurance was the culmination of a multi-state investigation into Time’s sweepstakes mailing practices.¹⁴⁵ In it, Time agreed to comply with numerous requirements for its future sweepstakes mailings and to pay almost \$5 million to consumers (as directed by the states), as well as another \$3.2 million to the states for their attorney’s fees and other costs.¹⁴⁶ In late June 2000, a little more than a month before the agreement was finalized, the State’s Attorney of Cook County, Illinois (a county-elected position), filed suit against Time, seeking restitution for consumers and a \$50,000 civil penalty under Illinois’s Consumer Fraud Act for the same sweepstakes-related conduct.¹⁴⁷ While that action was pending, the AG and Time finalized the Assurance, which released Time from all claims that were or could have been asserted under the consumer fraud statute by the state and all of its subsidiaries.¹⁴⁸ Time then moved to dismiss the State’s Attorney’s suit on the ground that the claims had been released.¹⁴⁹ It pointed out that the consumer fraud act authorizes the AG (and only the AG) to accept an Assurance of Voluntary Compliance¹⁵⁰ and argued that “no party would agree to give the Illinois Attorney General an

142. See generally PAUL NOLETTE, FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA (2015); Elysa M. Dishman, *Class Action Squared: Multistate Actions and Agency Dilemmas*, 96 NOTRE DAME L. REV. 291 (2020).

143. Lemos, *supra* note 122, at 523 (quoting Iowa Attorney General Tom Miller).

144. *People ex rel. Devine v. Time Consumer Mktg., Inc.*, 782 N.E.2d 761, 763 (Ill. App. Ct. 2002).

145. *Id.* at 762.

146. *Id.* at 763–64.

147. *Id.* at 763. The Illinois Act authorizes suit by the AG or any State’s Attorney. 815 ILL. COMP. STAT. 505/7 (2021).

148. *People ex rel. Devine*, 782 N.E.2d at 763.

149. *Id.*

150. See 815 ILL. COMP. STAT. 505/6.1 (2021).

assurance of voluntary compliance with the Consumer Fraud Act without receiving a release from liability for past violations thereof.”¹⁵¹ The court agreed, rejecting the State’s Attorney’s contention that the AG lacks power to settle a claim filed by a State’s Attorney.¹⁵²

The *Time* suit illustrates the interplay between local litigation and *multistate* litigation, including pre-litigation investigation and settlement by numerous AGs working in concert. One of the most common objections AGs raise to local litigation is that it can disrupt the sometimes-delicate negotiations between multiple AGs and the defendant(s).¹⁵³ There are fifty states, and state AGs have established formal and informal institutions to facilitate cooperation and coordination among them.¹⁵⁴ There are, by contrast, tens of thousands of local governments, often overlapping (e.g., counties and cities), with vast variations in size, resources, authority, and governance structures.¹⁵⁵ The number of local governments is part of what makes the prospect of local litigation so threatening to the Chamber of Commerce and the interests it represents. As the Chamber put it in its amicus brief in the opioids MDL,

Litigating and negotiating with 50 state attorneys general is much easier than doing so with thousands of municipalities. The feeding frenzy of municipal lawsuits makes global settlements nearly impossible. And the resulting lack of finality and predictability risks bankrupting smaller businesses and severely stunting the stability and growth of larger ones.¹⁵⁶

It’s easy to see why defendants would recoil at the notion of facing suit by thousands of local governments. And the threat posed by local litigation might provide useful leverage for settlement—a good thing from the perspective of both state and local litigators. The question, however, is who (if anyone) is capable of controlling the lever. Because of their limited number and their own capacity for coordination, state AGs can work effectively as a group in settlement negotiations. And, significantly, they can often offer defendants a form of global peace. That gives states a powerful bargaining chip in settlement negotiations, creating the potential for states (and their citizens) to capture the additional value defendants place on such peace. Absent creative new coordinating mechanisms like the negotiation class Judge Polster certified in the opioid MDL, localities

151. *People ex rel. Devine*, 782 N.E.2d at 766–67.

152. *Id.* at 767–68.

153. *See, e.g., id.* at 763.

154. *Id.*

155. Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner State of Ohio at 3–4, *In re State of Ohio*, No. 19-3827 (6th Cir. Sept. 6, 2019).

156. *Id.* at 4–5.

simply cannot make the same offer.¹⁵⁷ In the opioids litigation, for example, even if the 2,000-plus local entities already in the MDL could reach an agreement on settlement, they couldn't speak for the tens of thousands of *other* localities that have not yet sued but might.¹⁵⁸

For state AGs, several points follow. To begin with, states' ability (and localities' inability) to coordinate among themselves and offer global peace gives states an arguable advantage in settlement negotiations: AGs may be able to get more money for the state than localities can—and get it more quickly—because they can negotiate effectively and efficiently and perhaps even extract a peace premium. A great deal turns, however, on state AGs' power to release or otherwise preclude local suits upon the completion of the state's own action, as in the *Time* case—a question controlled by state law.¹⁵⁹ To the extent that local governments can sue notwithstanding a state settlement, the value of states' peace offering is diminished accordingly. And if AGs must corral a large and unruly group of local governments in order to reach any sort of deal with the defendant, settlement may be delayed or blocked entirely.¹⁶⁰ Hence state AGs' concern about local litigation disrupting a fragile multistate negotiation or shrinking the states' own recoveries.¹⁶¹

CONCLUSION

Examining conflicts between state AGs and local litigators reveals a somewhat surprising culprit: state law. The disputes exposed in the sprawling opioids litigation and elsewhere are not easily explained by the political patterns that dominate clashes between state and local governments in the regulatory context, with red-state legislatures moving to quash progressive innovations at the local level (patterns that sometimes

157. See Gluck & Burch, *supra* note 4, at 21 (“The unprecedented number of localities in *Opiates* is precisely what sets up the conflict with the AGs and makes global peace, centralization, and preclusion more difficult.”).

158. *Id.* at 29 (discussing negotiation class as the solution to the problem of localities that have not yet filed suit).

159. See Swan, *supra* note 10, at 1248 (“The authority of state attorneys general to bind their municipalities ultimately depends on state law, and states' laws differ.”).

160. See, e.g., Brief of Amici States of Arizona et al., *supra* note 64, at 20 (“Given how much easier it is for the Attorneys General to work in coordination with one another than for thousands of political subdivisions to do the same, the Attorneys General may actually be able to negotiate the sort of comprehensive settlement for which the District Court years.”).

161. Jepsen & Rowthorn, *supra* note 64 (“A critical mass of 36 state attorneys general have responded to the opioid crisis with investigations and litigation targeting manufacturers and distributors. But hundreds of private lawyers have also filed a barrage of opioid-related lawsuits on behalf of local governments, making it much harder for the state-led effort to convince the industry to agree to a comprehensive settlement.”).

also pit blue states against bluer cities).¹⁶² Disputes over litigation authority instead have tended to focus on competing claims of effectiveness and hinge on state laws that empower local litigation on terms different from those governing litigation by the state AG. Indeed, virtually all the factors discussed above—factors that differentiate state and local litigation, sometimes fueling conflict between the two—are created, and could be changed, by state law.

162. Jessica Bulman-Pozen, *State-Local Preemption: Parties, Interest Groups, and Overlapping Government*, in HOME RULE BE DAMNED: EXPLORING POLICY CONFLICTS BETWEEN THE STATEHOUSE AND CITY HALL 26, 27–28 (2018).