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## Forward: State Enforcement in an Interstate World

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## Foreword: State Enforcement in an Interstate World

*Margaret H. Lemos\**

As befits a topic as rich and multifaceted as this one, this symposium brought together commentators from a range of backgrounds, each addressing the question of state enforcement from a different angle. Indeed, the very term “state enforcement” admits of multiple meanings. For some, it calls to mind affirmative litigation by state executive officials—enforcement activities that might overlap (or sometimes conflict) with those of officials from other states, or different officials from within the same state; or with efforts by federal officials or private lawyers and litigants. For other commentators, the term “state enforcement” conjures up images of state courts, which may provide venues for litigating actions that span state lines and often overlap (or sometimes conflict) with parallel actions in other courts. No matter how we tilt and turn it, however, the topic of state enforcement shines light on some of the most important challenges for our legal system today. What does it mean to say that a state—whether acting through its executive or judicial branch—has an interest in a set of legal claims? What are the costs and benefits of enforcement overlap, whether by multiple enforcers or by multiple courts? Which actors—state, federal, or private—are in the best position to represent the interests of state citizens in litigation?

My own work has focused primarily on state enforcement in the first sense: I began by seeking to understand state litigation—by which I mean litigation spearheaded by state officials (typically attorneys general, or AGs)—as an alternative to other, private, modes of representative litigation, particularly private class

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actions.<sup>1</sup> One common argument in favor of the public alternative is that government is accountable whereas private litigants and lawyers are not.<sup>2</sup> There is indeed something appealing about the idea of accountability in representative litigation. After all, a state AG can claim to represent citizens in two ways—both in the adjudicative sense of an attorney representing clients and in the political sense of an elected official representing citizens—and accountability seems key to the legitimacy of both modes of representation. Litigation can have substantial consequences for how the law actually operates on the ground, affecting not only the litigants themselves but also individuals and entities who have nothing to do with the case. Litigation can cause a great deal of money to change hands; it can cause regulated entities to change their behavior in significant ways; it can cause governments to change their policies. So, it may seem only right and good that litigation be responsive to the public will in some way—that it be “accountable,” as the critics of private litigation like to say.

But debates about state litigation have taken an interesting turn in more recent years, with critics now arguing that state AGs are *too political*.<sup>3</sup> These critiques are not entirely new, but they have gained steam over the last decade or so as AGs have become more prominent and visible on the national scene. To be sure, if you look at the headlines, it is not hard to paint state litigation as a partisan affair, with blue-state AGs challenging national policies or business practices that are defended by their red-state counterparts—and vice versa.<sup>4</sup> It is also clear that AG elections have become more expensive, more high-profile, and more hard-fought in recent years. Not all AG elections are expensive today, but some are *very*

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1. See generally Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698 (2011) (exploring the role states play, alongside private litigants, in enforcing various elements of federal law); Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486 (2012) [hereinafter Lemos, *Aggregate Litigation*] (examining the relationship between private damages class actions and representative suits led by state attorneys general).

2. See David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 637–38 (2013) (describing a common line of critique of private enforcement that “proceeds from a . . . basic pair of observations: public enforcers are politically accountable actors. Private enforcers are not”).

3. See Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 85 (2018) (describing critiques and citing examples).

4. For an extended discussion of partisanship in state public law litigation, see generally *id.*

expensive, with much of the money flowing in from outside the relevant state.<sup>5</sup> The partisan AG organizations—RAGA and DAGA—are playing ever-larger roles, and raising more and more money.<sup>6</sup> And both groups are deploying their money more aggressively after announcing in 2017 that they would end their longstanding “handshake agreement that they wouldn’t target seats held by incumbents from the other party.”<sup>7</sup> In one 2017 race alone, RAGA and DAGA collectively spent about ten million dollars.<sup>8</sup>

We also have good reason to believe that the trends toward polarization that have afflicted other parts of government have not bypassed AGs. Based on ideology scores gleaned from the campaign contributions AGs receive as candidates, it appears that AGs nowadays exhibit a high degree of so-called “partisan sorting”: that is, there is no overlap between the most conservative Democrats and the most liberal Republicans.<sup>9</sup> The same data suggest that AGs are fairly polarized in the sense of “ideological divergence,” which has to do with the ideological distance between AGs from different parties.<sup>10</sup> One study found that the AGs in office in 2009–10 were more ideologically extreme than the mean state legislator from their respective parties in thirty-five states.<sup>11</sup> There is not much reason to think that ideological divergence has decreased over the last decade.

It is a separate question, of course, whether trends in political polarization are being reflected in state litigation. It is easy to see why they might be. Some observers predict, for example, that the changes in AG elections will sharpen partisan divides and reduce

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5. See Lemos & Young, *supra* note 3, at 86–88 & Figs. 1–2 (documenting rise in mean and median total campaign contributions reported by AG candidates from 1990 to 2012).

6. Dan Levine & Lawrence Hurley, *Trump Bump: Court Fights Draw Big Money into Attorney General Races*, REUTERS (July 31, 2017, 5:05 AM), <https://www.reuters.com/article/us-usa-politics-attorneys-general/trump-bump-court-fights-draw-big-money-into-attorney-general-races-idUSKBN1AG17K> (describing spending in AG races and role of RAGA and DAGA).

7. Alan Greenblatt, *State AGs Used to Play Nice in Elections. Not Anymore.*, GOVERNING MAG. (Nov. 15, 2017, 5:00 PM), <https://www.governing.com/topics/politics/gov-state-attorneys-general-elections-2017-2018-raga-daga.html>.

8. *Id.*

9. Lemos & Young, *supra* note 3, at 89–90 & Fig. 3.

10. *Id.*

11. Adam Bonica, *Mapping the Ideological Marketplace*, 58 AM. J. POL. SCI. 367, 376 (2014).

bipartisan cooperation.<sup>12</sup> Similarly, the trend toward unified government in the states is likely to produce more polarization, and less bipartisanship, in state litigation. Until relatively recently, it was not uncommon to find Democratic AGs in otherwise “red” states.<sup>13</sup> And, because most states had divided government, most AGs had to contend with an opposite-party legislature or governor. It stands to reason that AGs who hail from a different party than other state leaders will tend to take a more moderate approach to litigation than those who work in states with more one-sided politics. But those “purple” seats are becoming less common, as more states turn to unified government and more AG races follow suit. Of the thirty-one states with unified government in 2017, twenty-eight had same-party AGs.<sup>14</sup>

Efforts to study polarization in the work of state AGs provide some support for these intuitions, but with important qualifications. Most scholars who have studied the question have examined the extent to which AGs are taking positions that are shared only by their co-partisans, resulting in Democratic and Republican AGs pitted against each other on opposite sides of the same case, or arrayed in coalitions that are extremely lopsided. The results are mixed but do suggest that polarization is on the rise in AG litigation and advocacy.<sup>15</sup> Context matters, however: the extent to which state litigation reflects polarization among AGs depends

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12. See Greenblatt, *supra* note 7.

13. See Alan Greenblatt, *Avengers General*, GOVERNING MAG. (May 2003) (“There were only 12 Republican attorneys general in 1999, when RAGA was founded . . .”). By comparison, there were twenty-seven Republican AGs in 2018. *Attorney General (state executive office)*, BALLOTPEdia, [https://ballotpedia.org/Attorney\\_General\\_\(state\\_executive\\_office\)](https://ballotpedia.org/Attorney_General_(state_executive_office)) (last visited May 29, 2020) (showing party control of state AG seats).

14. See Lemos & Young, *supra* note 3, at 91.

15. See, e.g., PAUL NOLETTE, FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA 30–32 (2015) (reporting “wide partisan splits” between AGs in multistate litigation in the lower federal courts); Margaret H. Lemos & Kevin M. Quinn, *Litigating State Interests: Attorneys General as Amici*, 90 N.Y.U. L. REV. 1229 (2015) (studying partisan patterns among AGs who joined or opposed each other in amicus briefs filed in the U.S. Supreme Court between 1980 and 2013, and finding that the group of AGs joining or opposing a brief was significantly more or less Republican than would be expected from a random draw of AGs then in office, but only in recent years and mostly in cases in which groups of AGs weighed in on both sides); Paul Nolette, *State Litigation During the Obama Administration: Diverging Agendas in an Era of Polarized Politics*, 44 PUBLIUS 451, 455–56 (2014) (studying cases decided by the U.S. Supreme Court between 1993 and 2013 in which multiple AGs filed briefs, and finding a “large spike” in interstate conflicts during the last four years of the sample, when states either squared off against each other or collaborated on briefs with a strong partisan slant in 35% of the relevant cases).

on the kind of cases at issue. For example, state litigation against business interests tends to be more bipartisan than state litigation against the federal government.<sup>16</sup>

AGs' own partisanship also may interact with other considerations in ways that are difficult—if not impossible—to tease out from the data alone. Take the example above: state litigation against corporations tends to be bipartisan. That pattern might suggest that suits against corporations are not “political.” Or it might reflect the fact that, when a major company is already settling with a large group of states, and when the main consequence of nonparticipation is exclusion from the settlement proceeds, other state AGs may see little advantage to sitting it out.<sup>17</sup>

Most relevant for present purposes, some evidence suggests that AGs' own partisan affiliations may be less significant—at least in some cases—than the ideological commitments of the state's citizens or, perhaps, of other state officials.<sup>18</sup> It follows (as I suggested earlier) that we might expect to see different behavior from a Democratic AG in an otherwise heavily Republican state than from a Democratic AG in a resoundingly “blue” state. And, as more states become more solidly “red” or “blue,” we might expect AGs to act in an increasingly partisan manner—as some of the data suggest.

For the sake of argument, then, let us assume that AGs indeed are behaving “politically” in the sense that Democrats are doing meaningfully different things than Republicans—pursuing different cases, making different legal arguments. The question remains whether that is a bad thing.<sup>19</sup> It is not immediately clear

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16. NOLETTE, *supra* note 15, at 28.

17. *Id.*

18. See Colin Provost, *An Integrated Model of U.S. State Attorney General Behavior in Multi-State Litigation*, 10 ST. POL. & POL'Y Q. 1, 15–17 (2010) (finding that AGs' party affiliations did not significantly predict decisions to join a consumer-protection litigation when factors such as the number of consumer groups in the state and the ideology of state citizens were controlled for); Lemos & Quinn, *supra* note 15, at 1263–66 (exploring interplay between AGs' own partisan commitments and those of state citizens and other state officials).

19. In another work, Ernie Young and I have argued that partisan *motivations* should largely be irrelevant to a normative assessment of AG action:

The objection to partisan motivations for state litigation seems to be that they render that litigation opportunistic. But it is hard to say why this sort of opportunism is necessarily a bad thing. In Federalist 51, Madison says that we're counting on the selfish interests of particular officials to create incentives to protect

why it should be, especially if accountability is our goal. We tend to critique government officials for behaving politically when we want them to be impartial and independent—as with judges—but not when we want them to be accountable. Few of us are shocked and dismayed when we observe Democrats in Congress behaving differently from Republicans, for example. If partisan behavior is (usually) unproblematic for other kinds of political representatives, why should AGs be different?

Answering that question requires unpacking both the notion of accountability as applied to the work of AGs and other government lawyers, and the nature of the representation they provide. We might begin by asking *to whom* and *for what* AGs are (or should be) accountable. When critics of private class actions invoke accountability as a comparative advantage of state-led litigation, they seem to mean that AGs are accountable to the public in their states, including the state citizens whose interests they represent in court. Class-action attorneys, by contrast, are largely unaccountable to their clients in aggregate litigation. The problem stems from two common features of class actions: first, class counsel often have financial incentives to maximize the fee-to-work ratio rather than the class recovery; and second, individual class members typically are unable and unwilling to monitor class counsel effectively. The lack of monitoring—coupled with the arguable conflict of interest—permits opportunistic behavior by the attorneys, resulting in settlements that are inadequate or ineffective from the perspective of the class members but yield handsome fees for class counsel.<sup>20</sup>

When the lawyers in question are government attorneys, these concerns seem to recede. AGs and other government attorneys are

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the institutional interests of the various parts of the government. Opportunism, in other words, is the foundation of both separation of powers and federalism. Lemos & Young, *supra* note 3, at 104; *see also id.* at 95–105 (explaining why partisan litigating patterns do not prove that AGs are using litigation to do anything other than advance their states' long-term institutional interests).

20. For seminal works on the agency problems in class actions, see generally, for example, John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288 (2010); John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625 (1987); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991).

duty-bound to serve the public interest. Unlike their counterparts in the private bar, their salaries do not depend in a direct way on the outcome of any given case.<sup>21</sup> Popular elections of AGs in most states supply additional incentives for such attorneys to do right by the people they serve.<sup>22</sup> These and other differences between public and private attorneys may make AGs appear as ideal representatives—better, at least, than class-action counsel out to make a buck. Or so the argument goes.

We can see this sort of intuition reflected in some judicial opinions—for example, those that hold that a class action is not a “superior” method for adjudicating claims if the government is also proceeding against the same defendant, on the view that “[p]roceedings by the state . . . are presumably taken with the best interests of state residents in mind.”<sup>23</sup> Similar intuitions may animate decisions that set a higher bar to private intervention in cases being led by the government, again on the view—as one treatise puts it—that “a governmental entity is presumed to represent its citizens adequately.”<sup>24</sup> Or, to take a final example, we might sense something similar in the relatively rare cases in which courts are called upon to assess the adequacy and fairness of government settlements. Here, too, courts emphasize that “the primary concern of the Attorneys General is the protection of and compensation for the States’ resident consumers, rather than insuring a fee for themselves . . . .”<sup>25</sup>

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21. For an overview of the conventional distinctions between public and private enforcement, see Lemos, *State Enforcement of Federal Law*, *supra* note 1, at 704–07.

22. Forty-three states provide for popular election of the attorney general. In the remaining states, the attorney general is appointed by the legislature (Maine), by the state supreme court (Tennessee), or by the governor (Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming). William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 *YALE L.J.* 2446, 2448 n.3 (2006).

23. *Thornton v. State Farm Mut. Auto Ins. Co.*, No. 1:06-CV-00018, 2006 WL 3359482, at \*3 (N.D. Ohio Nov. 17, 2006); see Lemos, *Aggregate Litigation*, *supra* note 1, at 505–07 & nn.80–85 (discussing cases).

24. 6 EDWARD J. BRUNET, *MOORE’S FEDERAL PRACTICE* § 24.03[4][a][v][A] (3d ed. 2007).

25. *In re Minolta Camera Prods. Antitrust Litig.*, 668 F. Supp. 456, 460 (D. Md. 1987); see also *New York v. Reebok Int’l Ltd.*, 96 F.3d 44, 48 (2d Cir. 1996) (noting that attorneys general in representative actions are motivated by concern for enforcement of the law); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 380 (D.D.C. 2002) (“Opinion of experienced and informed [counsel] should be afforded substantial consideration, and particularly here, the Court may place greater weight on such opinion in addressing a settlement negotiated by government attorneys committed to protecting the public interest.”)



My work has sought to complicate this picture by showing that AG-led litigation does not—indeed, cannot—avoid the agency problems that bedevil private class actions.<sup>26</sup> The core difficulty is that the public interest that the government is obligated to serve is *different* from the private interests at stake in representative litigation. The broader public includes defendants and potential defendants who would prefer to minimize, rather than maximize, payouts. It includes citizens who think that other cases are more important and government resources should be devoted elsewhere. Thus, one does not have to cast aspersions on the professionalism, dedication, or skill of government attorneys in order to see the potential for a conflict between the two sets of interests the government is supposed to serve in representative litigation: the public interest on the one hand, and the more private interest in compensation on the other.<sup>27</sup>

Viewed in this light, anxieties about partisanship or polarization in AG litigation begin to take more definite shape. AGs represent their entire states, not just those citizens who voted for them and share their ideological commitments. Starkly partisan patterns in AG litigation might suggest that AGs are paying insufficient attention to the interests of citizens from the opposite party. As Ernie Young and I have argued elsewhere, “[t]his representation problem is, of course, endemic to all unitary decisionmakers elected on a winner-take-all basis.”<sup>28</sup> Yet “the problem feels different when the relevant elected official is a lawyer, and the people of the state are not just his constituents but his *clients*.”<sup>29</sup> Even if we believe that periodic elections provide an effective mechanism for holding AGs accountable to voters, opposite-party citizen-clients may find themselves largely left out

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(citation omitted)); *In re Toys R Us Antitrust Litig.*, 191 F.R.D. 347, 351 (E.D.N.Y. 2000) (“[T]he participation of the State Attorneys General furnishes extra assurance that consumers’ interests are protected.”).

26. See Lemos, *Aggregate Litigation*, *supra* note 1.

27. See Elysa Dishman, *Class Action Squared: Multistate Actions and Agency Dilemmas*, SSRN (Oct. 3, 2018), [https://ssrn.com/abstract\\_id=3252149](https://ssrn.com/abstract_id=3252149) (elaborating on the agency dilemmas that can arise when AGs band together to bring multistate representative actions, thereby layering one form of claim-aggregation on another).

28. Lemos & Young, *supra* note 3, at 115.

29. *Id.*

of the conversation, at least in states where the AG seat is reliably blue or red.<sup>30</sup>

An additional reason to worry about partisanship in AG litigation, even if we tolerate partisan behavior from other government officials, is that AGs embody (or should embody) a different model of representation than, say, legislative representatives. Put somewhat differently, we might question the premise that “accountability” is the goal when state officials are acting as lawyers rather than lawmakers.

To see the intuition here, imagine a state that elects its judges. The Supreme Court held in *Chisom v. Roemer* that elected state judges are “representatives” within the meaning of § 2 of the Voting Rights Act.<sup>31</sup> The decision triggered a dissent by Justice Scalia, who rejected the notion that judges “represent” the people in the sense of acting on their behalf.<sup>32</sup> Even the majority expressed discomfort with the notion that judges (elected or not) would be responsive to public opinion.<sup>33</sup> That notion is indeed hard to square with the independence we tend to expect of judges. Due process demands that judges and other officials who perform adjudicative tasks be neutral and impartial – favoritism toward one or the other party is disqualifying, and outside influences are strictly curtailed.<sup>34</sup> Judges are not supposed to be responsive to popular preferences; on the contrary, we expect them to “apply the law without fear or favor”<sup>35</sup> and, when necessary, to “stand up to what is generally supreme in a democracy: the popular will.”<sup>36</sup>

Are AGs more like judges, or more like the Democrats and Republicans in Congress we considered earlier? I have argued that

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30. *See id.* (“Representation of all the states’ citizens often depends on the partisan alignments in the state, which will determine whether the AG must compete for the median voter or play to her party base.”).

31. *Chisom v. Roemer*, 501 U.S. 380, 396–97 (1991).

32. *Id.* at 410–11 (Scalia, J., dissenting) (“[T]he judge represents the Law – which often requires him to rule against the People.”).

33. *See id.* at 400–01 (majority opinion) (“[I]deally public opinion should be irrelevant to the judge’s role because the judge is often called upon to disregard, or even to defy, popular sentiment.”).

34. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242–43 (1980) (emphasizing the “powerful and independent constitutional interest in fair adjudicative procedure” and the “strict requirements” of neutrality for adjudicators).

35. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1662 (2015).

36. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989).

they are a bit like both, which makes the question of accountability substantially more difficult than it first might appear.<sup>37</sup> On the one hand, litigation and enforcement entail the sorts of policy judgments that characterize legislation and regulation. No AGs have the resources to pursue every possible violation of the law; they must set priorities and goals and pick their cases carefully. That would be true even if the law were perfectly determinate—if there were one correct answer to every legal question—which is plainly not the reality. Like other advocates, AGs must select from among a spectrum of colorable legal arguments those that best advance the interests of their clients. But unlike other advocates, AGs' clients—the state and its citizens<sup>38</sup>—may not be in a position to specify their interests on every issue, or offer direction on “the objectives of representation.”<sup>39</sup> Necessarily, therefore, the job of the AG involves a significant element of discretion, going well beyond technocratic judgments about what the law is to policy-inflected choices about what the law should be and how it should operate on the ground. It seems not only inevitable but appropriate that such choices be “political” in some sense—that they be informed by the views of other state officials and citizens.

On the other hand, certain aspects of litigation and law enforcement seem more akin to judging than to lawmaking, making the strongest versions of popular control appear inapt. Enforcement decisions are not just made at wholesale; in actual day-to-day practice, lawyering in the name of the state is a retail endeavor. Having determined to devote public resources to combatting elder fraud, for example, enforcers must then decide to

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37. See generally Margaret H. Lemos, *Democratic Enforcement? Accountability and Independence for the Litigation State*, 102 CORNELL L. REV. 929 (2017) [hereinafter Lemos, *Democratic Enforcement*] (arguing for a theory of public accountability for civil law enforcement that make sense of enforcement's similarities to both legislation and adjudication).

38. The clients in public enforcement actions typically are government officials and institutions who are themselves bound to serve the public interest. And, in some cases, the only “client” is the public itself. See Bruce A. Green, *Must Government Lawyers “Seek Justice” in Civil Litigation?*, 9 WIDENER J. PUB. L. 235, 269 (2000) (“Whether one views the client as the government, a government agency[,] or a government official, the client is distinctive in at least this respect: the client owes fiduciary duties to the public . . . .”); NAT'L ASS'N OF ATT'YS GEN., *STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES* 83 (Emily Myers ed., 3d ed. 2013) (explaining that, in various areas, AGs “have been given independent enforcement duties to advance and to protect ‘the public interest’ through litigation”).

39. MODEL RULES OF PROF'L CONDUCT r. 1.2 (AM. BAR ASS'N 1983).

pursue this offender or that one, to seek these remedies or those. Such decisions implicate the interests of identifiable individuals and firms, simultaneously reducing the relevance and value of public input<sup>40</sup> and triggering concerns that popular sentiment may reflect favoritism or vindictiveness.<sup>41</sup> The individualized and retroactive nature of enforcement distinguishes it from prospective, generally applicable lawmaking and complicates the answer to the accountability question. There is something decidedly uncomfortable in the notion that the state's choice of enforcement targets—and of penalties in each case—should be subject to public, or political, whim. As I have argued elsewhere, “[m]uch as we would decry a judicial decision based on the public's desire to punish a particular defendant, we should disapprove of enforcement decisions that echo the angry mob.”<sup>42</sup>

All of this may help explain why the word “political” serves as an effective rhetorical tool when applied to the work of AGs and other government attorneys, despite the undeniably discretionary nature of their jobs.<sup>43</sup> Yet I doubt that many close observers of public enforcement would insist that AGs should be independent, in the mold of federal judges (who of course do not stand for popular, partisan election), blinding themselves entirely to public sentiment in the manner of Lady Justice. The challenge is to strike the right balance between accountability—or responsiveness to the public will—and the principled exercise of independent legal judgment. Reasonable minds will differ on the details.<sup>44</sup> On any

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40. See Lemos, *Democratic Enforcement*, *supra* note 37, at 961–64 (explaining why public opinion will often be unhelpful for guiding individual enforcement decisions).

41. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2363 (2001) (arguing that the different due process rules for lawmaking and adjudication turn on “a distinction between relatively open-ended policymaking . . . and relatively circumscribed resolution of discrete claims involving identifiable firms or individuals”).

42. Lemos, *Democratic Enforcement*, *supra* note 37, at 964

43. The criticism is not reserved for state AGs, of course, but also is levied against their counterparts in the federal government. See, e.g., Michael W. Dolan, *Political Influence on the Department of Justice: Are the Pressures Only External?*, 9 J.L. & POL. 309, 312 (1993) (“Rare is the federal prosecutor who has not been described by his or her enemies as politically ambitious . . .”); Lincoln Caplan, *Hyper Hacks: What's Really Wrong With the Bush Justice Department*, SLATE (Mar. 14, 2007), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2007/03/hyper\\_hacks.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2007/03/hyper_hacks.html) (criticizing the second Bush Administration for its “disdain for the nonpolitical tradition of federal law enforcement”).

44. For my own attempt at reconciliation, see Lemos, *Democratic Enforcement*, *supra* note 37, at 943–68.

account that recognizes *some* role for accountability, however, it is critical to move the discussion beyond the plane of platitude and ask whether adequate mechanisms are in place to secure meaningful, and meaningfully democratic, accountability. That project has both an affirmative element – fostering accountability to the state’s citizens – and a negative element – guarding against the risk that AGs will be unduly influenced by narrow interests or improper considerations. For example, we might seek to facilitate transparency about what AGs are doing and why, so that voters can make informed decisions. We might also consider how AG elections might be regulated, either by managing the money coming in on the front end or developing rules for recusal at the back end, as many states have done for elected judges. And we might take a page from administrative law, where scholars and policymakers have thought a great deal about capture and how to minimize it, using tools like sunshine regulations and restrictions on lobbying. Such tools promote democratic accountability – and protect against influence that is “political” in the pejorative sense – by ensuring that input is truly public.<sup>45</sup>

But what if the statute in question was enacted by Congress rather than the state legislature, with the support of the state’s representatives in Congress? That question is the topic of Anthony Johnstone’s illuminating article, *A State Is a “They,” Not an “It.”*<sup>46</sup>

Johnstone focuses on the series of high-profile challenges to the federal Affordable Care Act (ACA). In each of those cases, state AGs squared off against each other along largely partisan lines. But other state actors offered different “verdict[s] on the Act.”<sup>47</sup> For example, in some states the congressional delegation supported the Act only to see the AG challenge it as an unconstitutional abuse of Congress’s power to tax or regulate interstate commerce. In others, state legislators voted to expand Medicaid coverage pursuant to the Act, while the AG argued that the Medicaid expansion exceeded Congress’s power under the Spending Clause. And some state legislatures opted into the federal regulatory plan by establishing

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45. See *id.* at 979–1000 (expanding on these themes).

46. See generally Anthony Johnstone, *A State Is a “They,” Not an “It”: Intrastate Conflicts in Multistate Challenges to the Affordable Care Act*, 2019 BYU L. REV. 1471.

47. *Id.* at 1476.

state-run healthcare exchanges, even as their AGs sought to render the Act a dead letter.

As Johnstone emphasizes, these different political actors all speak for the state and its citizens, though the messages they send may be quite divergent. His goal is to push federalism scholars to attend to the pluralism of representatives within the state. But Johnstone's analysis also points to some of the difficult normative questions about the place of AGs in state government, and the considerations that drive their choices. Some of the same critics who have criticized AGs for behaving politically have argued that AGs in recent years have strayed too far from their traditional role "as representatives of their states"—a role that centered on vindicating the long-term, institutional interests of states *qua* states.<sup>48</sup> Rather than focusing on threats to state autonomy, AGs today may be pushing for more federal regulation or supporting claims "of individuals as opposed to the states themselves."<sup>49</sup> The ACA litigation is an example of this phenomenon. As Johnstone describes, the initial constitutional challenge to the ACA was initiated by Republican AGs. The challenge took the form of a "vertical" conflict between the states and the federal government, a clash over "who decides," with the states arguing for autonomy to make policy choices for themselves rather than submitting to a federal plan.<sup>50</sup> Yet many other states—led by Democratic AGs—also showed up to defend the ACA, arguing in the name of their states in *favor* of federal regulation. At first blush, the Democratic defenders appear to be engaging in precisely the behavior critics have highlighted: rather than defending the states' "right to go [their] own way,"<sup>51</sup> they deployed the state's legal resources in an effort to lock in a policy position they happened to favor. From that perspective, the Democrats seem to be pursuing a "horizontal conflict" in which one group of states attempts to use the federal government as a tool for imposing their policy preferences on other states.<sup>52</sup>

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48. NOLETTE, *supra* note 15, at 200.

49. *Id.* at 30–31, 200–01.

50. Lemos & Young, *supra* note 3, at 97.

51. *Id.* at 95.

52. *Id.* at 96–97.

On closer inspection, however, the distinction between vertical and horizontal conflicts breaks down. While the Republican-led challenge to the ACA looks like an effort to lift the shackles of federal regulation, leaving individual states free to adopt similar plans or even single-payer systems, defenders of the Act argued that the interstate healthcare market is so interconnected that no state could feasibly impose such requirements on its own. If that is correct, it follows that an ACA-type regime expanding healthcare coverage for all could only be done at the national level. In that sense, the conflict was unavoidably a horizontal one: blue states favoring such a regime had to use the federal government to achieve their goal by requiring dissenting states to conform. And by arguing the national government lacked power to enact the ACA, the red states effectively sought to force the blue states to stick with the prior, less universal system.

The key point is that—in the ACA case and many others like it—there is an essential connection between the states’ institutional interest in autonomy and their immediate policy goals. Interdependence among the states means that states often will be able to vindicate short-term policy interests only via national cooperation. In other words, the best (sometimes the only) way for states to promote their own autonomy may be to push *for*, not against, federal intervention. As Ernie Young and I have argued, “[f]or this reason, states have an institutional interest in ensuring that the national government is strong enough—and has broad enough powers—to help them out with regulatory problems they can’t effectively address on their own.”<sup>53</sup>

Professor Johnstone’s article complicates this analysis by highlighting the question of who—among various state actors—should decide what the state’s short-term policy goals *are*. It is no answer to say that AGs decide questions of law while legislative representatives in Congress and the statehouse decide questions of policy, because in cases like the ACA challenge, one’s view of the law may well turn on one’s view of good policy. If a state’s congressional delegation voted in favor of the ACA—perhaps on the view that the interconnected healthcare market demanded a nationwide solution—should that foreclose the state AG from

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53. *Id.* at 100 (emphasis omitted).

mounting a legal challenge that hinges on a rejection of that view? If a state's congressional delegation voted against the ACA—perhaps on the view that the individual mandate and other requirements of the Act reflected a misguided approach to the challenge of securing affordable and effective healthcare for state citizens—should that foreclose the state AG's defense of the Act? Or are states and their citizens best served by having multiple different representatives who can speak for the state on intertwined questions of law and policy?

The contribution by Professors David Hyman and William Kovacic, *State Enforcement in a Polycentric World*, focuses on a similar kind of pluralism: regulatory and enforcement overlap among different agencies.<sup>54</sup> Although their examples are drawn from the federal government, the point translates easily to the state level: in many areas, “regulatory and enforcement authority is . . . divided and shared within and across agencies.”<sup>55</sup> That point is essential to any meaningful understanding of state enforcement—or public enforcement more broadly. Although it is tempting to contrast the anarchic world of private enforcement to an idealized model of public enforcement that is both centralized and coordinated,<sup>56</sup> the reality is much messier. We are seeing a version of this play out in the opioid litigation, which has brought state AGs into conflict with lawyers for cities and counties over the right to represent residents of municipal subdivisions and to raise claims that—some AGs argue—“belong to” the states.<sup>57</sup> Similar overlap—and potential for conflict—exists between states and the federal government, as both governments may seek to represent the same citizens and enforce the same laws. State citizens are federal citizens too, and state AGs play an important role in enforcing various

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54. David Hyman & William Kovacic, *State Enforcement in a Polycentric World*, 2019 *BYU L. REV.* 1447.

55. *Id.* at 1449.

56. See Lemos, *State Enforcement of Federal Law*, *supra* note 1, at 704 (discussing the conventional view of public enforcement as centralized).

57. Petition for Writ of Mandamus of State of Ohio at 1, In re: National Prescription Opiate Litigation State of Ohio, No. 19-3827 (2019), <https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/Petition-for-Writ-of-Mandamus.aspx>; Brief of Amici Curiae States of Mich. et al in Support of the State of Ohio's Petition for Writ of Mandamus, In re: National Prescription Opiate Litigation State of Ohio, No. 19-3827 (Sept. 6, 2019), <https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/2019-09-06-Michigan-Amicus-in-Support-of-Ohio-Peti.aspx>.



provisions of federal law, as well as state laws that “mirror” federal requirements.<sup>58</sup> As Hyman and Kovacic document, within the federal government—and likewise within each state—different agencies and officials may share authority for regulating the same class of conduct, and for litigating related claims. Last but not least, the various forms of public enforcement—local, state, and federal—may overlap with private rights of action that empower non-governmental individuals and groups to sue alongside their public representatives.

The million-dollar question, of course, is whether such polycentrism is a feature or a bug. Hyman and Kovacic note the potential for “friction, conflict, and inconsistency” that comes from regulatory and enforcement overlap.<sup>59</sup> Additional problems may include irreconcilable demands on regulated parties, inefficiency, and duplication of effort. But as other scholars have argued, redundancy may also have some advantages. Zachary Clopton, for example, has made a persuasive case that overlapping public and private enforcement authority “may respond to errors, resource constraints, information problems, or agency costs at the level of case selection,” while overlapping *litigation*—multiple lawsuits by different actors targeting the same behavior—may help counteract poor case outcomes such as “undervalued settlements or judgments resulting from agent (under-) performance.”<sup>60</sup> Consistent with this analysis, Hyman and Kovacic reject proposals to reduce state-federal overlap by “vesting sole responsibility in federal agencies” with “automatic preemption of state efforts and participation.”<sup>61</sup> Instead, they argue that “the benefits of decentralized authority—notably, useful policy experimentation and prototyping, the supplementation of federal resources with state funding, and a critical safeguard against simultaneous fifty-state catastrophic failure—warrants continuation of a significant state role in multiple policy domains.”<sup>62</sup>

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58. See generally Lemos, *State Enforcement of Federal Law*, *supra* note 1.

59. Hyman & Kovacic, *supra* note 54, at 1449.

60. Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285, 290 (2016).

61. Hyman & Kovacic, *supra* note 54, at 1465.

62. *Id.*

Yet policy experimentation is unlikely to accomplish much good without systems in place to ensure that the results of the experiments – what works, what doesn't, and why – are communicated to other "labs." Hyman and Kovacic therefore propose expanding the use of opt-in networks to connect enforcers and regulators with overlapping jurisdictions, encouraging periodic consultations, the establishment of working groups and inter-agency guidelines and protocols, and the organization of events such as hearings and conferences on topics of mutual concern.<sup>63</sup> Enhanced networking, they argue, not only enhances policy coordination, but "can convert a collection of flatter learning curves into a single steeper learning curve that enables all participating institutions to make progress more quickly."<sup>64</sup>

Professor Linda Mullenix's contribution to this symposium likewise explores themes of jurisdictional overlap and potential conflict. Picking up on the second meaning of state "enforcement," however, her article, *The (Surprisingly) Prevalent Role of States in an Era of Federalized Class Actions*, focuses on judicial rather than executive actors.<sup>65</sup> Mullenix begins by detailing the push to reduce such overlap by federalizing class actions and other forms of complex litigation. The arguments in favor of federalization echoed now-familiar refrains about the downsides of enforcement overlap – including inefficiency, duplication of effort, and inconsistent judgments. In addition, defendants complained that state courts were too lax in granting class certification, creating "judicial hellholes" that served as magnets for forum-shopping plaintiffs.<sup>66</sup> The defense bar won an important triumph in the Class Action Fairness Act of 2005 (CAFA), which expanded federal diversity jurisdiction and removal for class actions.

Although the federalization part of the story is fairly well known, Mullenix's article adds important nuance by demonstrating how courts (both state and – more surprisingly – federal) have slowed the push toward centralization, maintaining pockets of state autonomy and independence. The U.S. Supreme Court has

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63. See *id.* at 1446.

64. *Id.* at 1467.

65. Linda S. Mullenix, *The (Surprisingly) Prevalent Role of States in an Era of Federalized Class Actions*, 2019 BYU L. REV. 1551.

66. *Id.* at 1554.

held, for example, that state courts may maintain class litigation even after a federal court has ruled against certification in that same litigation. In the converse set of circumstances—where state law would prohibit class treatment of particular claims—several lower federal courts have refused to treat federal Rule 23 as a trump, instead following state law. The Supreme Court also interpreted CAFA not to apply to actions brought by state AGs as *parens patriae* on behalf of state citizens—actions that bear a striking practical resemblance to private class actions but are procedurally distinct.<sup>67</sup> And CAFA itself carves out a role for state AGs (in approving class settlements) and for state courts (in managing certain complex cases). As Mullenix explains, some federal courts have liberally construed the latter set of carve-outs, “conserv[ing] a role for state courts to maintain jurisdiction over class litigation originally filed there.”<sup>68</sup>

With these and other doctrinal moves, courts have preserved a place for states in the landscape of complex litigation—a landscape that, Mullenix shows, is considerably more complicated than the prevailing post-CAFA narrative of federalization would suggest. As with the other types of enforcement overlap detailed in this volume, Mullenix suggests that overlapping state and federal court jurisdiction can generate valuable information and improve outcomes and fairness.<sup>69</sup> Although such federalism-related values may not be at the forefront of judges’ minds, perhaps “the Court, in recognizing the autonomy of state courts to resolve complex litigation, may implicitly have been countering the ‘affront to federalism’ that is embodied in CAFA.”<sup>70</sup>

In *Class Actions, Jurisdiction, and Principle in Doctrinal Design*, David Marcus and Will Ostrander take up a different set of questions for class actions in an interstate system, concerning *which* state is empowered to adjudicate complex multistate litigation.<sup>71</sup>

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67. For a description of state *parens patriae* actions and comparison to private class actions, see Lemos, *Aggregate Litigation*, *supra* note 1, at 493–501.

68. Mullenix, *supra* note 65, at 1590.

69. *Id.* at 1620 (citing J. Maria Glover, *Mass Litigation Governance in the Post-Class Action Era: The Problems and Promise of Non-Removable State Actions in Multi-District Litigation*, 5 J. TORT L. 3 (2012)).

70. *Id.* at 1622.

71. David Marcus & Will Ostrander, *Class Actions, Jurisdiction, and Principle in Doctrinal Design*, 2019 BYU L. REV. 1511, 1515.

Specifically, Marcus and Ostrander focus on two jurisdictional puzzles. The first concerns personal jurisdiction and the requirement that the plaintiff's claim must arise out of or relate to the defendant's contacts with the forum. When the case is a class action, must each class member's claim satisfy the jurisdictional requirement, or is it enough if the named plaintiff's claim bears the requisite relationship to the defendant and the forum? The second question concerns subject-matter jurisdiction, and whether a named plaintiff has standing under Article III to sue on behalf of members of a class when her injury differs from theirs in particular ways.

These questions are puzzling for numerous reasons, but Marcus and Ostrander have a bigger point to make. Thus, although they offer solutions to both puzzles, their goal is to illuminate a tension between class action theory and "principled doctrinal design."<sup>72</sup> As they explain, proponents long have advocated a "regulatory" understanding of class actions—a view that sees class actions as "vehicles for law enforcement" and measures success in terms of deterrence.<sup>73</sup> Skeptics, meanwhile, describe class actions as mechanisms for "conflict resolution."<sup>74</sup> For these theorists, "the class action does little more than join individual claims for the purposes of adjudicative efficiency. Class-wide litigation must respect preexisting features of these discrete claims, even if attention to them precludes class certification or otherwise creates considerable expense."<sup>75</sup>

Class action proponents, naturally, would prefer for class actions to be robust and effective devices for achieving regulatory ends while skeptics would prefer to cabin class litigation. Yet, Marcus and Ostrander show that while the logic of the regulatory framework produces a class-facilitating answer to the personal jurisdiction question, the same logic leads to a restrictive, class-limiting answer to the standing question. The logic of the conflict-resolution approach likewise generates split outcomes (albeit in the opposite direction): a restrictive rule for personal jurisdiction and a class-facilitating approach to subject-matter jurisdiction.

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72. *Id.* at 1545.

73. *Id.* at 1511-12.

74. *Id.* at 1512.

75. *Id.*

As such, Marcus and Ostrander's contribution stands as an important bookend to a volume devoted to theorizing about state enforcement. It is a reminder that efforts to theorize complicated phenomena may ultimately lead us away from full understanding if we become so wedded to the theory that we lose sight of the relevant phenomenon itself – if, in other words, the theory becomes the source of reasoning rather than the product of it. “Principled lawmaking,” Marcus and Ostrander write, “can proceed one procedural problem at a time, without concern for consistency with a vague set of theoretical priors. A pragmatic, consequences-oriented approach to doctrinal administration, after all, is in the DNA of modern American civil procedure.”<sup>76</sup> The articles in this symposium exemplify that approach, exploring various aspects of state enforcement in operation and from the ground up.

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76. *Id.* at 1545–46.