

ARTICLES

STATE ENFORCEMENT OF FEDERAL LAW

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Federal law is enforced through a combination of public and private efforts. Commentary on the choice between public and private enforcement has generated a remarkably stable set of arguments about the strengths and weaknesses of each type. But the conventional wisdom tells only part of the story, as it ignores variations within the category of public enforcement. Many federal statutes authorize civil enforcement by both a federal agency and the states. State enforcement is different from federal enforcement in several important respects, representing a unique model of public enforcement. The authority to enforce federal law is also a unique form of state power. As I show, enforcement authority can serve as a potent means of state influence by enabling states to adjust the intensity of enforcement and to press their own interpretations of federal law. To date, enforcement has been neglected in the federalism literature, which tends to equate state power with state regulation. But enforcement authority may exist outside of regulatory authority, allowing states to operate even in areas where state law is preempted or state regulators have chosen not to act. And enforcement empowers a distinct breed of state representatives—elected, generalist attorneys general. Just as state attorneys general differ from federal agencies as agents of enforcement, they differ from state agencies as agents of federal-state interaction. Moreover, attorneys general in most states are independent from the state legislature and governor, and may represent different constituencies. Enforcement authority therefore opens up new outlets for state-centered policy, empowering actors whose interests and incentives distinguish them from the state institutions that dominate other channels of federal-state dialogue.

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INTRODUCTION

The law in books is different from the law in action.¹ Enforcement determines the distance between the two. Studies show that only a fraction of people with litigable grievances sue.² Federal agencies go after an even smaller proportion of offenders.³ If that changed overnight, and every arguable violation resulted in some form of enforcement action, the law as we know it would mean something very different. The words that appear in statutes and in judicial decisions would be the same, but their practical effect would be transformed by the shift in enforcement practices.

¹ See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910), reprinted in AMERICAN LEGAL REALISM 39, 39–40 (William W. Fischer III, Morton J. Horwitz, & Thomas A. Reed eds., 1993).

² See David Luban, *A Flawed Case Against Punitive Damages*, 87 GEO. L.J. 359, 377 (1998) (“[A]part from automobile-related injuries, Americans are extremely reluctant to sue. A large ICJ study found that claims were made in 44% of motor vehicle injuries, 7% of work-related injuries, and 3% of other injuries—all in all, in about one accidental injury in ten.”); see also Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 136 (2002) (discussing results of survey of more than five thousand households and reporting that “even for . . . substantial grievances, litigation is by no means a knee-jerk or common reaction in America, as overall only about 5% of the survey’s grievances ultimately resulted in a court filing”).

³ For example, in the 1990s the audit rate for individual tax returns was 1.7 percent and the probability of arrest for drunk driving was about 0.003. A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. ECON. LIT. 45, 71 n.77 (2000) (citing James Andreoni et al., *Tax Compliance*, 36 J. ECON. LIT. 818, 820 (1998), and Donald S. Kenkel, *Do Drunk Drivers Pay Their Way? A Note on Optimal Penalties for Drunk Driving*, 12 J. HEALTH ECON. 137, 145 (1993)).

If enforcement controls the effective meaning of the law, it matters a great deal who controls enforcement. Virtually all federal civil statutes vest enforcement authority in a federal agency; some also create private rights of action that permit private parties to sue to enforce federal law. Decades of commentary on the choice between public and private enforcement has generated a remarkably stable set of arguments about the strengths and weaknesses of each type.⁴ But the conventional wisdom tells only part of the story, as it ignores variations within the category of public enforcement.

In fact, there are two types of public enforcement. Many federal statutes authorize civil enforcement by both a federal agency and the states, typically through states' attorneys general.⁵ State enforcement provisions appear most frequently in federal laws designed to protect

⁴ See *infra* Part I.A.

⁵ See *infra* Part I.B (discussing state enforcement of federal law). This Article focuses on direct state enforcement of federal civil law. States may participate in various ways in the enforcement of federal criminal law as well, for example by arresting individuals for federal offenses. But states lack power to enforce federal criminal law directly, such as by prosecuting federal offenders themselves in state or federal court. States play a similar role with respect to federal immigration law. Under Section 287(g) of the Immigration and Naturalization Act, states or localities can sign a Memorandum of Understanding with the federal government to deputize officials to enforce federal immigration law "in relation to the investigation, apprehension, or detention of [noncitizens] in the United States." 8 U.S.C. § 1357(g) (2006). Deputized state officials obtain federal training from the federal Immigration and Customs Enforcement agency (ICE) and work under ICE's supervision. See Jennifer M. Chacon, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1582–86 (2010) (discussing Section 287(g) arrangements). States also contribute to the criminal enforcement of immigration law by investigating and arresting offenders, though again they lack the authority to prosecute offenders directly. See 8 U.S.C. § 1252c (2006) (authorizing state and local law enforcement officials to arrest and detain certain illegal aliens "for such period of time as may be required for the [ICE] to take the individual into Federal custody for purposes of deporting or removing the alien from the United States"); *United States v. Santanaga-Garcia*, 264 F.3d 1188, 1193–94 (10th Cir. 2001) (recognizing implicit authority for state police to detain suspects for federal immigration violations); *Gonzales v. City of Peoria*, 722 F.2d 468, 474–75 (9th Cir. 1983) (holding that state and local police may arrest suspects for violations of criminal, but not civil, provisions of federal immigration law). The current controversy regarding Arizona's immigration laws concerns efforts by the state to increase its role in implementing federal immigration rules in ways that are not authorized by federal statute. See *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009) (rejecting preemption challenge to Arizona law that authorizes attorney general to sue employers who hire illegal aliens in violation of federal law), *cert. granted sub nom. Chamber of Commerce of U.S. v. Candelaria*, 130 S. Ct. 3498 (2010); *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (enjoining portions of Arizona law authorizing police officers to check individuals' federal immigration status and to arrest individuals where there is probable cause to believe that they committed offenses that make them removable from United States). As such, they are distinct from the questions explored here, which involve state enforcement of federal law pursuant to explicit congressional authorization.

consumers, such as the recent Dodd-Frank financial overhaul bill.⁶ Proponents of state enforcement emphasize its potential to buttress federal efforts by putting more “cops on the beat.”⁷ But state enforcement does not just intensify public enforcement of federal law, it changes it. State and federal enforcement serve different principals and empower different agents. The first distinction should be obvious: The public interest promoted by state enforcement is the interest of the state and its citizens, while federal enforcement purports to serve the broader national interest. More subtle, but no less significant, are the differences between the agents who control the exercise of enforcement authority at each level. Elected, generalist state attorneys general⁸ share little in common with the appointed, specialist agency officials who are the typical agents of federal enforcement. The result is a brand of public enforcement that differs markedly from the more familiar federal model.

Despite its prevalence, we lack an account of state enforcement of federal law—what it is and how it affects citizens, states, and the federal system.⁹ This Article seeks to fill those gaps, exposing state

⁶ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1042, 124 Stat. 1376, 2012–14 (2010) (to be codified at 12 U.S.C. § 5552).

⁷ See 153 CONG. REC. S15,990 (daily ed. Dec. 19, 2007) (statement of Sen. Mark Pryor) (arguing that Consumer Product Safety Improvements Act (CPSIA) “ensures that [state attorneys general] can act as real cops on the beat, looking out for consumers and restoring confidence in the marketplace”).

⁸ Forty-three states provide for popular election of the attorney general. In the remaining states, the attorney general is appointed: in Maine, by the legislature; in Tennessee, by the state Supreme Court; and in five states (Alaska, Hawaii, New Hampshire, New Jersey, Wyoming), by the governor. Only two states—Alaska and Wyoming—permit the governor to remove the attorney general at will. 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).

⁹ Some scholars have analyzed state enforcement of federal law in a specific legal context, most notably antitrust. For critiques of state antitrust enforcement, see, for example, Michael S. Greve, *Cartel Federalism? Antitrust Enforcement by State Attorneys General*, 72 U. CHI. L. REV. 99 (2005), and Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, in *COMPETITION LAWS IN CONFLICT: ANTI-TRUST JURISDICTION IN THE GLOBAL ECONOMY* 252, 252–66 (Richard A. Epstein & Michael S. Greve eds., 2004). For defenses, see Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 DUKE L.J. 673 (2003), Carole R. Doris, *Another View on State Antitrust Enforcement—A Reply to Judge Posner*, 69 ANTITRUST L.J. 345 (2001), Harry First, *Delivering Remedies: The Role of States in Antitrust Enforcement*, 69 GEO. WASH. L. REV. 1004 (2001), and Ronald L. Hubbard & James Yoon, *How the Antitrust Modernization Commission Should View State Antitrust Enforcement*, 17 LOY. CONSUMER L. REV. 497 (2005). As I explain below, antitrust is an extreme and unusual case for state enforcement. See *infra* notes 271–72 and accompanying text (distinguishing antitrust as unique among areas of state enforcement). It would be a mistake, therefore, to generalize from the antitrust context to the many other areas in which states enforce federal law. Scholars have begun to focus their attention on other specific instances of state enforcement outside the antitrust context. See, e.g., Amanda M. Rose, *The Multienforcer*

enforcement as both a unique model of public enforcement and a unique form of state power. Enforcement has been neglected in the federalism literature to date, which equates state power with state law.¹⁰ As I show, however, enforcement authority can serve as a potent means of state influence by enabling states to adjust the intensity of enforcement and to press their own interpretations of federal law.

Although enforcement authority usually follows from regulatory authority, state enforcement of federal law disrupts that pattern, by empowering state enforcers even in areas where state law is preempted or where state regulators have chosen not to act. Enforcement also employs a distinct set of state representatives. Just as state attorneys general differ from federal agencies as agents of enforcement, they differ from other state actors as agents of federal-state interaction. Unlike the specialist state agencies that administer cooperative federalism schemes, attorneys general have broad jurisdictions as well as political incentives to challenge federal orthodoxy. And attorneys general in most states are independent from the state legislature and governor, representing different constituencies. Enforcement authority therefore opens up new outlets for state-centered policy, empowering actors whose interests and incentives distinguish them from the state institutions that dominate other channels of federal-state dialogue.

This analysis has important implications for current debates. First, attention to state enforcement reveals the limitations of the standard discourse on models of enforcement. State enforcement blurs the lines between public and private enforcement, drawing features from both categories. The hybrid nature of state enforcement makes it a valuable tool in areas where policy makers are concerned about the possibility of overenforcement yet are reluctant to rely exclusively on a federal agency. Like private enforcement, state enforcement offers a hedge against the possibility that federal agencies will abdicate on enforcement due to capture, bureaucratic pathologies, political influence, or

Approach to Securities Fraud Deterrence: A Critical Analysis, 158 U. PA. L. REV. 2173 (2010) (critiquing state enforcement of state and federal securities law); Amy Widman, *Advancing Federalism Concerns in Administrative Law Through a Revitalization of State Enforcement Powers—A Case Study of the Consumer Product Safety and Improvement Act of 2008*, 29 YALE L. & POL'Y REV. 165 (2011) (praising state enforcement of CPSIA).

¹⁰ See *infra* notes 76–77 and accompanying text (noting authors' emphasis on state regulatory authority in federalism context). Amy Widman's study of state enforcement of the CPSIA is an important exception. See Widman, *supra* note 9, at 177–78 (identifying state enforcement of federal law as valuable form of “uncooperative federalism” in areas where law is underenforced by federal agencies (quoting Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1259 (2009))).

resource limitations. But unlike private enforcement, state enforcement has built-in safeguards that reduce the risk of overenforcement. State enforcers are limited in number and must ration their own scarce resources. Existing institutional arrangements further discourage state-federal conflict and overenforcement by states by promoting consultation and cooperation between state enforcers and their federal counterparts. Thus, state enforcement can serve as a compromise between broad private rights of action and a federal monopoly on enforcement.

State enforcement of federal law also holds new lessons for federalism. Federalism scholars tend to see preemptive federal law as the end of the battle over states' rights.¹¹ That view is mistaken. While preemption prevents states from making and enforcing their own laws, it need not extinguish all state authority. On the contrary, states can continue to exert influence through enforcement of federal law. Such state enforcement is capable of generating many of the democratic and epistemic benefits commonly associated with state regulatory authority. Decentralization is not an unqualified good, as state-level variation in enforcement (as in regulation) can produce inefficient and undesirable policy outcomes. But state enforcement and state regulation generate different costs and benefits for the federal system; as a result, state enforcement power is appropriate even in some areas where state law is properly preempted. State enforcement of federal law, moreover, is not a one-size-fits-all proposition. Congress can calibrate state enforcement through procedural mechanisms that reduce the risks of disuniformity and overenforcement, while still promoting the values of federalism.

This Article unfolds in three parts. Part I surveys the literature on public and private enforcement of federal law and then introduces state enforcement as a third option. Part II explores the distinctive features of state enforcement authority that differentiate it both from federal enforcement and from other types of state authority. Part III takes up the question whether this unique form of state power is valuable from a federalism perspective, isolating the conditions that

¹¹ Some scholars have argued that the anti-commandeering doctrine—which prohibits the federal government from compelling states to participate in the implementation of federal law—should be abandoned if the alternative is preemption. See Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1635 (2006) (“[C]ommandeering should be held constitutional as far as the Tenth Amendment is concerned when preemption constitutes a feasible alternative in the short run and such preemption would reduce state regulatory control relative to the commandeering at issue, the federal mandate is fully funded or relatively inexpensive to carry out, and the federal government takes effective measures to maintain lines of accountability . . .”).

render state enforcement of federal law more or less desirable. A brief conclusion follows.

I

THREE CATEGORIES OF ENFORCEMENT

A. *Public and Private Enforcement*

The academic literature on enforcement authority recognizes two categories of enforcement: public enforcement—defined as “the use of public agents . . . to detect and to sanction violators of legal rules”¹²—and private enforcement by nongovernmental individuals and groups. Most of the commentary analyzes enforcement from an economic perspective.¹³ Viewed through that lens, the central goal of any system of law enforcement is to promote the right level of deterrence as efficiently as possible.¹⁴ A large part of that task is identifying the most suitable enforcer or combination of enforcers, which in turn demands an inquiry into the interests, incentives, and capabilities of both public and private actors.

The conventional account of public enforcement emphasizes its capacity to translate broad legal commands into sensible operating rules that promote the optimal level of deterrence. First, public enforcement can be “monopolistic” in the sense that decision making is centralized in a single body.¹⁵ Some degree of centralization is necessary to ensure that enforcement, in all of its forms, conforms to a stable set of principles. Second, public enforcers have no inherent incentive to maximize enforcement by taking action on every colorable offense.¹⁶ The salaries of government lawyers and other officials are not usually tied to the number of enforcement actions they under-

¹² Polinsky & Shavell, *supra* note 3, at 45.

¹³ For a sampling, see, for example, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 631–46 (6th ed. 2003), STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 389–539 (2004), Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1 (1974), William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975), A. Mitchell Polinsky, *Private Versus Public Enforcement of Fines*, 9 J. LEGAL STUD. 105 (1980), Polinsky & Shavell, *supra* note 3, and Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive To Use the Legal System*, 26 J. LEGAL STUD. 575 (1997) [hereinafter Shavell, *Fundamental Divergence*].

¹⁴ See Shavell, *Fundamental Divergence*, *supra* note 13, at 581 (“[T]he social objective is simply minimization of the sum of social costs: the harm from injury to victims, plus the costs of precautions, plus the costs associated with use of the legal system—these comprising victims’, injurers’, and the state’s legal costs.”).

¹⁵ See Landes & Posner, *supra* note 13, at 39 (“The existence of a public monopoly of enforcement in a particular area of the law is a necessary . . . condition of discretionary non-enforcement.”).

¹⁶ See *id.* at 15 (emphasizing that “public enforcer[s] are] not constrained to act as . . . private profit maximizer[s]”).

take. And while public enforcers may be rewarded in various ways for successful enforcement, “good” enforcement is not the same thing as maximum enforcement. Given expansive liability rules and limited resources, uncompromising enforcement will rarely be the path to success for a public official.¹⁷ Third, public enforcers are charged with representing the public interest, which in the case of federal enforcement agencies means the interests of the nation as a whole. That broad perspective allows public enforcers to take into account the full range of costs and benefits from enforcement, including the expense of litigation for all involved and the risk of discouraging valuable conduct.

Although public enforcement is capable of promoting optimal deterrence, various factors can skew it away from the public interest. Limited resources may prevent public enforcers from uncovering and pursuing violations.¹⁸ Politicians may drive down public enforcement efforts by slashing budgets or replacing agency personnel.¹⁹ Public enforcers may take bribes²⁰ or may be captured by the targets of the law.²¹ Government attorneys’ individual interests may lead them to shy away from difficult or controversial cases and focus instead on low-stakes enforcement with relatively little public payoff.²² Alterna-

¹⁷ The same is often true even when liability rules are carefully specified. Imagine a police chief who institutes a zero-tolerance policy toward all traffic infractions, so that every violation results in a ticket. Such a move is unlikely to be a career builder.

¹⁸ See Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1214 (1982) (“Public enforcement is . . . frequently inadequate because of budget constraints . . .”).

¹⁹ See, e.g., Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 67 (1975) (“[W]hen the budget is determined by the political process, there is no reason to believe that the rate of enforcement would be economically optimal.”); see also Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 COLUM. L. REV. 1301, 1341 (2008) (arguing that SEC “is subject to political whims (particularly with respect to its budget)”; *infra* notes 83–84 and accompanying text (discussing political control of federal agencies)).

²⁰ See Polinsky & Shavell, *supra* note 3, at 73 (“[E]nforcement agents may be corrupted: they may accept bribes, or demand payments, in exchange for not reporting violations.”); see also Posner, *supra* note 13, at 633 (explaining that public enforcement may encourage corruption because enforcer gains less than offender pays, which incentivizes private transfer payments).

²¹ See, e.g., A.C. Pritchard, *The SEC at 70: Time for Retirement?*, 80 NOTRE DAME L. REV. 1073, 1089–92 (2005) (discussing problem of capture at SEC). For an overview of the capture literature, see Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1284–92 (2006).

²² See Jonathan R. Macey & Geoffrey P. Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 GEO. WASH. L. REV. 1105, 1115–18 (1995) (discussing risk that government attorneys will act contrary to agency interests for purposes of “career-building”); Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1404 (1998) (“[O]n average, the gov-

tively, public enforcers may take an unduly aggressive approach to enforcement in certain contexts, engaging in predatory prosecutorial tactics²³ or overreacting to well-publicized scandals.²⁴

Private enforcement offers policy makers a different set of trade-offs. By disrupting the public monopoly on enforcement, private enforcement may undermine any centralized enforcement strategy.²⁵ Private parties seek to advance their own private interests, ignoring costs and benefits to others. The result is often either more or less enforcement than is socially desirable.²⁶ Especially when the benefits of enforcement are high—for example, where multiple or punitive damages are available—private enforcement is prone to over-deter.²⁷ On the other hand, when litigation will have a valuable deterrent effect but offer little reward to plaintiffs, private enforcement may lead to under-deterrence.

Despite these drawbacks, private enforcement has some valuable features. One is compensatory: Allowing injured parties to sue offenders directly provides a means for victims to recover from violators.²⁸ Where deterrence is the primary goal, private enforcement can offer a critical supplement to public efforts, particularly in areas where overenforcement is less of a concern.²⁹ Private parties' profit motives create built-in incentives to enforce—incentives that public enforcers

ernment seeks and obtains less monetary relief for plaintiffs than does the private bar and fails to address cutting edge issues, choosing instead to concentrate its efforts on small, routine [civil rights] cases.”); *cf.* Posner, *supra* note 13, at 637–38 (explaining that agencies will prefer to pursue cases that are “relatively unimportant to the defendant” and therefore cheaper and easier to win).

²³ See Aron Harel & Alex Stein, *Auctioning for Loyalty: Selection and Monitoring of Class Counsel*, 22 *YALE L. & POL'Y REV.* 69, 106–07 (2004) (identifying predatory prosecution as potential risk of public enforcement).

²⁴ See Pritchard, *supra* note 21, at 1076 (identifying “cyclical pattern of neglect and hysterical overreaction that typifies . . . regulation” in Congress and at SEC).

²⁵ See William E. Kovacic, *Private Monitoring and Antitrust Enforcement: Paying Informants To Reveal Cartels*, 69 *GEO. WASH. L. REV.* 766, 781 (2001) (“Robust private participation, especially independent rights of action that eliminate a public prosecutorial monopoly, reduce or eliminate the ability of government enforcement officials to use prosecutorial discretion as a nonlegislative tool for altering the law.”).

²⁶ See generally Shavell, *Fundamental Divergence*, *supra* note 13 (arguing that level of litigation can be sub- or *supra*-optimal because private parties do not account for cost of legal fees to others nor external deterrence benefit from suits).

²⁷ See Landes & Posner, *supra* note 13, at 15 (describing this so-called “overenforcement theorem”).

²⁸ See Shavell, *Fundamental Divergence*, *supra* note 13, at 594 (acknowledging compensation as one goal of private enforcement, but arguing that social insurance system is more efficient mode of distribution).

²⁹ See Landes & Posner, *supra* note 13, at 31–32 (explaining that in areas such as “tort, contract, property, and commercial law,” private enforcement is less likely to overdeter because of high probability of apprehension for violators, and because penalties tend to equal harm caused by violations plus cost of enforcement).

may lack.³⁰ Private parties also may have ready access to information—for example, knowledge of who harmed them—that would be more costly for public enforcers to uncover.³¹ And the decentralized nature of private enforcement operates as a failsafe mechanism by reducing the risk that entire classes of violations will go unremedied. Precisely because private enforcers tend to be a diverse and disorganized group, they cannot be captured by industry or controlled by politicians.

Thus, neither public nor private enforcement is perfect in every circumstance: Each can result in under- or overenforcement depending on a variety of contextual factors. Moreover, neither category of enforcement can be assessed in a vacuum. Policy makers can shape enforcement through legal rules that exploit—and perhaps adjust—the distinct incentives and abilities of public and private enforcers. For example, private enforcement may be encouraged or discouraged by raising or lowering the available recovery for plaintiffs,³² and political control over public enforcement may be enhanced or diminished by vesting authority in independent or executive agencies.³³ Commentators have long debated how to design such legal interventions in order to achieve the most efficient results. Behind the debates, however, lies broad consensus about the basic tendencies of public and private enforcement.

B. State Enforcement

The conventional account outlined above pits centralized public enforcement against the individualistic efforts of private plaintiffs. But matters are more complicated than that. The image of “public” enforcement reflected in the literature is not just public—it is federal. Public enforcement assumes a different shape at the state level, mixing in features typically associated with private enforcement and others that do not fit neatly into either of the familiar models. State enforcement is worthy of independent study regardless of whether the law at issue is state or federal. But the unique attributes of state

³⁰ See Becker & Stigler, *supra* note 13, at 13 (explaining that “widespread reliance on victim enforcement” of public statutes works because private enforcers are motivated by promise of financial rewards).

³¹ See SHAVELL, *supra* note 13, at 578–79 (“Suppose that victims or potential victims of harm from dangerous acts, or perhaps other parties, can identify the violators with little or no effort. Then a private role in law enforcement is apparently desirable, for it is advantageous for society to harness this information that private parties have rather than to spend resources on public enforcement to uncover violations.”).

³² *Id.* at 590–91.

³³ See generally Pritchard, *supra* note 21 (comparing political accountability of independent agency with that of executive agency in context of SEC).

enforcement—and their ramifications for federalism—are particularly striking when state and federal actors share authority to enforce the same *federal laws*.

States have no inherent power to enforce federal statutory law.³⁴ As is true of private parties,³⁵ states' authority to sue under any given statute is a dependent on congressional intent.³⁶ Many federal civil statutes explicitly provide for state enforcement. Those statutes single out the state attorney general as the primary agent of state enforcement and empower him or her to bring a civil action to obtain specified remedies. Notably, most state-enforcement provisions specify that state attorneys general must sue in federal court,³⁷ thereby departing from the default presumption that state courts retain concurrent jurisdiction over federal causes of action.³⁸ Most provisions also require state enforcers to notify the relevant federal agency in advance of filing a complaint, permit the federal agency to intervene in the case, and restrict states from suing on violations that are the subject of a pending federal enforcement action.³⁹

Express provisions for state enforcement appear largely—though not exclusively⁴⁰—in the field of consumer protection. For example, state attorneys general may sue to bring about compliance with federal standards regarding flammable fabrics,⁴¹ hazardous substances,⁴²

³⁴ I express no view on states' authority to sue to vindicate constitutional interests in federal court absent statutory authorization. *Cf.* *Pennsylvania v. Porter*, 659 F.2d 306, 317 (3d Cir. 1981) (citing cases permitting states to bring *parens patriae* actions in federal court to enforce Fourteenth Amendment).

³⁵ *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (emphasizing that Congress must make choice whether to create private right of action).

³⁶ *See, e.g., Hawaii v. Standard Oil Co.*, 405 U.S. 251, 263–64 (1972) (insisting on “clear expression of a congressional purpose” before state may sue as *parens patriae* to “recover damages for injury to its general economy” under Section 4 of Clayton Act); *Connecticut v. Health Net, Inc.*, 383 F.3d 1258, 1262 (11th Cir. 2004) (emphasizing that states may sue as *parens patriae* to enforce federal law only if there is evidence that Congress “intended that the states be able to bring actions in that capacity”); *Connecticut v. Physicians Health Servs. of Conn., Inc.*, 287 F.3d 110, 120 (2d Cir. 2002) (“When determining whether a state has *parens patriae* standing under a federal statute, we ask if Congress intended to allow for such standing.”).

³⁷ *See infra* notes 40–55 (providing examples of such statutes).

³⁸ *See, e.g., Tafflin v. Levitt*, 493 U.S. 455, 458–60 (1990) (noting that state courts are “presumptively competent[] to adjudicate claims arising under the laws of the United States” and “have concurrent jurisdiction where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case” (internal quotation marks omitted)).

³⁹ *See infra* notes 41–54 (providing examples of such statutes).

⁴⁰ *See, e.g., 18 U.S.C. § 248(c)(3)* (2006) (authorizing states to sue in federal court to enforce federal rules regarding access to abortion clinics).

⁴¹ 15 U.S.C. § 1194(a) (2006). The statute authorizes states to sue for injunctive relief, subject to the procedural requirements of 15 U.S.C. § 2073. Section 2073 provides that the attorney general or other authorized officer of a state may bring an action in federal court

packaging of household substances,⁴³ and consumer products.⁴⁴ Other federal consumer protection statutes allow states to sue as *parens patriae*⁴⁵ to obtain either damages or injunctive relief on behalf of their residents for violations of rules governing credit repair organizations,⁴⁶ credit reporting agencies,⁴⁷ pay-per-call services,⁴⁸ telemarketers,⁴⁹ professional boxing matches,⁵⁰ sports agents,⁵¹ children's online privacy protection,⁵² e-mail spam,⁵³ and the delivery and

to obtain appropriate injunctive relief and must provide written notice to the Consumer Protect Safety Commission at least 30 days before the initiation of such an action. 15 U.S.C. § 2073(b)(2)(A) (Supp. II 2009). State enforcement is precluded if, at the time the suit is brought, the same alleged violation is the subject of a pending civil or criminal action by the United States. 15 U.S.C. § 2073(b)(5). The same limitations apply to private actions. *Id.* § 2073(a).

⁴² 15 U.S.C. § 1264(d) (2006) (incorporating procedural requirements of 15 U.S.C. § 2073).

⁴³ 15 U.S.C. § 1477 (Supp. II 2009) (same).

⁴⁴ 15 U.S.C. § 2073(b)(1) (same).

⁴⁵ For an overview of *parens patriae* actions, see 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), and Jack Ratliff, *Parens Patriae: An Overview*, 74 TUL. L. REV. 1847 (2000).

⁴⁶ 15 U.S.C. § 1679h(c)(1)–(4) (2006) (authorizing states to sue in any court for damages or injunctive relief; states must give prior notice to Federal Trade Commission (FTC) and cannot sue defendant for violation that is already subject of civil action by FTC).

⁴⁷ 15 U.S.C. § 1681s(c)(1)–(4) (2006) (authorizing states to sue in any court for injunctive relief or actual or statutory damages; states must give prior notice to FTC “or the appropriate Federal regulator” and cannot sue defendant for violation that is already subject of civil action by federal agency; FTC “or appropriate Federal regulator” may intervene in any state action and will have right to be heard, to remove action to federal court, and to file petition for appeal).

⁴⁸ 15 U.S.C. § 5712 (2006) (authorizing states to sue in federal court for damages or injunctive relief; states must give prior notice to FTC and cannot sue defendant for violation that is already subject of civil action by FTC).

⁴⁹ 15 U.S.C. § 6103 (2006) (same); 47 U.S.C. § 227(f)(1)–(7) (2006) (authorizing states to sue in federal court to enjoin any “pattern or practice” of unlawful telephone calls or other transmissions to residents of state, and/or to obtain actual or statutory damages for each violation, which may be trebled by court order; states must give prior notice to Federal Communications Commission (FCC) and cannot sue defendant for violation that is already subject of civil action by FCC).

⁵⁰ 15 U.S.C. § 6309(c) (2006) (authorizing states to sue in federal court for injunctive relief, fines, or “such other relief as the court may deem appropriate”).

⁵¹ 15 U.S.C. § 7804 (2006) (authorizing states to sue in federal court for damages or injunctive relief; states must give prior notice to FTC and cannot sue defendant for violation that is already subject of civil action by FTC).

⁵² 15 U.S.C. § 6504(a)–(d) (2006) (authorizing states to sue in federal court for damages or injunctive relief; states must give prior notice to FTC and cannot sue defendant for violation that is already subject of civil action by FTC; FTC may intervene in any state action and will have right to be heard and to file petition for appeal).

⁵³ 15 U.S.C. § 7706(f) (2006) (authorizing states to sue in federal court for injunctive relief or actual, statutory, or treble damages; states must give prior notice to FTC “or the appropriate Federal regulator” and cannot sue defendant for a violation that is already

transportation of household goods.⁵⁴ States have similar authority to enforce federal antitrust laws.⁵⁵

Other statutes do not contain stand-alone provisions governing state enforcement, but nevertheless authorize states to sue under citizen-suit provisions that permit actions by interested “person[s]” and define that term to include states. Such provisions are common in federal environmental statutes.⁵⁶ In addition, some courts have allowed states to sue as *parens patriae* under federal statutes that create broad private rights of action but are silent as to states’ ability to sue.⁵⁷ Examples include the Americans with Disabilities Act,⁵⁸ the

subject of civil action by federal agency; FTC “or appropriate Federal regulator” may intervene in any state action and will have right to be heard and to file petition for appeal).

⁵⁴ 49 U.S.C. § 14711 (2006) (authorizing states to sue for injunctive relief in federal court; states must give prior notice to Surface Transportation Board or Secretary of Transportation, either of which may intervene in action and be heard on all matters and file petitions for appeal). Section 14711(b)(4) specifies that the Secretary of Transportation and/or the Surface Transportation Board “shall be considered to have consented to any civil action of a State under this section if the Secretary or the Board has taken no action with respect to the notice within 60 calendar days after the date on which the Secretary or the Board received notice” The implication is that the federal enforcers have the authority to preclude a state enforcement proceeding, although nothing in the statute says so explicitly.

⁵⁵ 15 U.S.C. § 15c (2006) (authorizing states to sue in federal court to secure treble damages for variety of violations on behalf of their citizens). States also have authority to enforce the federal Commodities Exchange Act, 7 U.S.C. § 13a-2 (2006), as well as federal statutes governing debt relief agencies, 11 U.S.C. § 526(c)(3) (2006), online drug sales, 21 U.S.C. § 882(c) (2008), the provision of health-related services, 42 U.S.C. § 1320d-5(d) (2009), energy-efficient products, 42 U.S.C. § 6304 (2009), and odometer tampering, 49 U.S.C. § 32709(d) (2009). States enforce the federal Securities Exchange Act in a shareholder capacity, usually on behalf of large state pension plans. *See infra* note 149 and accompanying text. The attorneys general of Oregon and Washington are authorized to sue in any court for an injunction or other order to prevent the unlawful use of certain scenic lands. 16 U.S.C. § 544m(b)(1)(B) (2006).

⁵⁶ *See, e.g.*, Endangered Species Act, 16 U.S.C. §§ 1532(13), 1540(g) (2006); Clean Water Act, 33 U.S.C. § 1365 (2006); Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. §§ 1402(e), 1415(g) (2006); Deepwater Port Act, 33 U.S.C. §§ 1502(15), 1515 (2006); Act to Prevent Pollution from Ships, 33 U.S.C. §§ 1901(a)(8), 1910 (2006); Safe Drinking Water Act, 42 U.S.C. §§ 300f(12), 300j-8 (2006); Noise Control Act, 42 U.S.C. §§ 4902(2), 4911 (2006); Energy Policy and Conservation Act, 42 U.S.C. §§ 6202(2), 6305 (2006); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6903(15), 6972 (2006); Clean Air Act, 42 U.S.C. §§ 7602(e), 7604 (2006); Powerplant and Industrial Fuel Use Act, 42 U.S.C. §§ 8302(a)(2), 8435 (2006); Ocean Thermal Energy Conversion Act, 42 U.S.C. §§ 9102(14), 9124 (2006); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601(21), 9659 (2006); Emergency Planning and Community Right To Know Act, 42 U.S.C. §§ 11046, 11049(7) (2006); Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1301(h), 1349(a) (2006).

⁵⁷ By contrast, courts have rebuffed state efforts to sue under statutes that contain only a narrow private right of action. For example, courts have refused to permit state suits under the Employee Retirement Income Security Act (ERISA) on the ground that ERISA carefully lists the types of plaintiffs who can bring suit—participants, beneficiaries, or fiduciaries of ERISA-regulated plans—but does not mention states. *See Connecticut v. Health*

Fair Housing Act,⁵⁹ and Title VII of the Civil Rights Act of 1964.⁶⁰ When a state sues as *parens patriae*, it acts as the representative of its citizens. Therefore, courts have reasoned, Congress's authorization of private suits by the citizens themselves implicitly extends to states suing on their citizens' behalf.⁶¹

Net, Inc., 383 F.3d 1258, 1261–62 (11th Cir. 2004) (denying state standing under ERISA); Connecticut v. Physicians Health Servs. of Conn., Inc., 287 F.3d 110, 120–21 (2d Cir. 2002) (same). Courts have taken a similar approach to statutes that create a cause of action for persons “injured in [their] business or property.” *E.g.*, Hawaii v. Standard Oil Co., 405 U.S. 251, 262–64 (1972) (insisting on “clear expression of a congressional purpose” before state may sue as *parens patriae* to recover damages to its general economy under Section 4 of Clayton Act); Illinois v. Life of Mid-America Ins. Co., 805 F.2d 763, 766 (7th Cir. 1986) (holding that state lacks standing to enforce Racketeer Influenced and Corrupt Organizations (RICO) Act because, “even if the complaint did sufficiently allege an injury to the state in its quasi-sovereign capacity, it is not clear . . . that Congress, in enacting the RICO statute, intended to permit such a *parens patriae* proceeding”); California v. Frito-Lay, Inc., 474 F.2d 774, 777–78 (9th Cir. 1973) (holding that state may not sue on behalf of its citizens under Section 4 of Clayton Act because “if the state is to be empowered to act in the fashion here sought . . . that authority must come not through judicial improvisation but by legislation and rule making”).

⁵⁸ See, e.g., New York *ex rel.* Vacco v. Mid Hudson Med. Grp., P.C., 877 F. Supp. 143, 146–48 (S.D.N.Y. 1995) (interpreting 42 U.S.C. § 12117(a) (2006)).

⁵⁹ See, e.g., Support Ministries for Persons with AIDS, Inc. v. Village of Waterford, 799 F. Supp. 272, 275–79 (N.D.N.Y. 1992) (interpreting 42 U.S.C. § 3613 (2006)).

⁶⁰ See, e.g., EEOC v. Fed. Express Corp., 268 F. Supp. 2d 192, 196–99 (E.D.N.Y. 2003) (interpreting 42 U.S.C. § 2000e-5 (2006)).

⁶¹ See, e.g., *id.* at 197 (citing *Physicians Health Servs. of Conn.*, 287 F.3d at 121) (“[S]tanding provisions in many . . . statutes implicitly authorize[] *parens patriae* standing by using language that permits any ‘person’ who is ‘aggrieved’ or ‘injured’ to bring suit.”); see also *Massachusetts v. Bull HN Info. Sys., Inc.*, 16 F. Supp. 2d 90, 103 (D. Mass. 1998) (reasoning that state attorney general has statutory standing to sue under Age Discrimination in Employment Act as “‘legal representative’ of the people of the [state] for purposes of this action” (quoting 29 U.S.C. § 630(a) (2006))); *Minnesota v. Standard Oil Co.*, 568 F. Supp. 556, 563–66 (D. Minn. 1983) (permitting state to sue as *parens patriae* under Section 210 of Economic Stabilization Act of 1970, which permitted suit by any “person,” because “when a state acts in its quasi-sovereign capacity in a *parens patriae* action, . . . [a] harm to the individual citizens becomes an injury to the state, and the state in turn becomes the plaintiff”). Other courts have ignored the question of congressional intent, focusing instead on the prudential requirements for *parens patriae* standing—that is, that the state assert a “quasi-sovereign interest” and allege an injury to a “sufficiently substantial segment of its population.” *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982); see also *New York ex rel. Abrams v. 11 Cornwell Co.*, 695 F.2d 34, 38–40 (2d Cir. 1982) (permitting state to sue to enforce federal conspiracy statute); *Support Ministries*, 799 F. Supp. at 275–79 (permitting state to sue under Fair Housing Act); *New York v. Peter & John’s Pump House, Inc.*, 914 F. Supp. 809, 811–14 (N.D.N.Y. 1985) (holding that state may sue as *parens patriae* to enforce Title II of Civil Rights Act of 1964). That approach fails to distinguish between the question of *parens patriae* standing and the question of statutory standing. See *Health Net, Inc.*, 383 F.3d at 1262 (distinguishing between two types of standing); see also *Hawaii v. Standard Oil*, 405 U.S. at 259 (“The question in this case is not whether Hawaii may maintain its lawsuit on behalf of its citizens, but rather whether the injury for which it seeks to recover is compensable under § 4 of the Clayton Act.”); *New York ex rel. Abrams v. Seneci*, 817 F.2d 1015, 1017 (2d Cir. 1987) (reasoning that, if state had asserted “injury to a quasi-sovereign interest of the state itself[,] . . . common law

State authority to enforce federal law is a relatively recent phenomenon, though it is also rooted in older practices.⁶² Many state attorney general offices grew dramatically during the 1980s, partially as a response to Reagan-era devolution and a decline in enforcement by federal agencies.⁶³ As state attorneys general assumed new prominence, provisions for state enforcement began to proliferate in Congress. New provisions have been enacted by virtually every Congress in the last two decades. There is no clear link between Democratic or Republican control of Congress, or divided versus unified government, and a preference for state enforcement.

Indeed, state enforcement has been relatively uncontroversial in Congress.⁶⁴ The most common argument in its favor—usually raised in the context of statutes that permit both state and private enforcement—is a need to enhance enforcement for reasons of compensation, deterrence, or both. As the next Part will show, one of the differences

parens patriae standing would undoubtedly exist. We would then be called on to decide whether the RICO statute authorized recovery for that harm” (internal citations omitted)).

⁶² See Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 303–09 (1988) (discussing early state enforcement of federal criminal law).

⁶³ See Cornell W. Clayton, *Law, Politics, and the New Federalism: State Attorneys General as National Policymakers*, 56 REV. POL. 525, 538 (1994) (“During the 1980s the rate of growth in the budget of the attorney general’s office or state department of law outpaced increases in general government spending in every single state, in some states many times over.”); Andrew I. Gavil, *Reconstructing the Jurisdictional Foundation of Antitrust Federalism*, 61 GEO. WASH. L. REV. 657, 661–62 (1993) (suggesting that increased level of state enforcement activity in antitrust and consumer protection areas was in part response to perceived inadequacy of federal enforcement).

⁶⁴ During the George H.W. Bush administration, executive officials expressed concern with the constitutionality of direct state enforcement provisions. See S. 471, *The 900 Services Consumer Protection Act of 1991*, and S. 1166, *the Telephone Consumer Assistance Act: Hearing before the Subcomm. on Commc’ns of the S. Comm. on Commerce, Sci., and Transp.*, 102d Cong. 16 (1991) (statement of Barry Cutler, Director, Bureau of Consumer Protection, Federal Trade Commission) (“[D]irect state enforcement provisions may be unconstitutional because they involve the exercise of significant authority pursuant to the laws of the United States by persons not selected in accordance with the Appointments Clause.”); see also Statement on Signing the Consumer Product Safety Improvement Act of 1990, 2 PUB. PAPERS 1613 (Nov. 16, 1990) (raising concern that state attorneys general may lack Article III standing when enforcing Federal Hazardous Substances Act and Flammable Fabrics Act). Subsequent administrations appear to have abandoned the complaint. For an analysis of the constitutional issues raised when states perform functions within the province of the federal executive branch, see generally Evan Caminker, *The Unitary Executive and State Administration of Federal Law*, 45 U. KAN. L. REV. 1075 (1997) (analyzing state administration of federal law under unitary executive theory). For an argument that the enforcement of federal criminal law by state prosecutors may violate the Appointments and Take Care Clauses of Article II of the Constitution, see Michael G. Collins & Jonathan Remy Nash, *Prosecuting Federal Crimes in State Courts* 55–63 (Oct. 24, 2010) (unpublished manuscript) (on file with author), available at <http://ssrn.com/abstract=1696076>.

between state and federal public enforcement is that state attorneys general often sue to recover damages on behalf of citizens. Like private litigation, then, state enforcement may be driven by a desire to compensate victims, and legislators and lobbyists sometimes invoke that goal as a reason for empowering both states and private parties.⁶⁵ More frequently, state enforcement is justified as a means of ensuring compliance with federal law through a “multilayered approach to enforcement”⁶⁶ that “bring[s] more allies to [the] fight.”⁶⁷ When objections do arise, they tend to be voiced by legisla-

⁶⁵ See, e.g., Susan Beth Farmer, *More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General*, 68 *FORDHAM L. REV.* 361, 377 (1999) (“The legislative history of the [Hart-Scott-Rodino] Act demonstrates that Congress sought to achieve three goals: (1) compensation of victims of antitrust violations; (2) disgorgement of profits by the offenders; and (3) deterrence of future anticompetitive actions.”); see also *Comprehensive Children’s Product Safety Commission Reform Legislation: Hearing on H.R. 4040 Before the Subcomm. on Commerce, Trade, and Consumer Prot. of the H. Comm. on Energy and Commerce*, 110th Cong. 94 (2007) (testimony of Rachel Weintraub, Director, Product Safety and Senior Counsel, Consumer Federation of America) (arguing that state authority to enforce federal consumer products safety law “will be a critical tool that will help buttress the [Consumer Product Safety Commission’s] limited enforcement capabilities, help consumers to obtain redress for harms they have suffered, and deter wrongful conduct”).

⁶⁶ 149 *CONG. REC.* 25,522 (2003) (statement of Sen. John McCain) (regarding CAN-SPAM Act of 2003).

⁶⁷ 153 *CONG. REC.* H16,882 (daily ed. Dec. 19, 2007) (statement of Rep. Rosa DeLauro) (regarding state enforcement under CPSIA); see also *Consumer Product Safety Commission Reauthorization: Hearing Before the Subcomm. on Commerce, Consumer Prot., and Competitiveness of the H. Comm. on Energy and Commerce*, 101st Cong. 65 (1989) (statement of Dr. Mark Widome, Professor of Pediatrics, Pennsylvania State University, College of Medicine) (arguing that state enforcement of Flammable Fabrics Act “would build a needed redundancy and failsafe provision into the [Consumer Products Safety] Commission and help assure that some of these products get off the market”); *Consumer Product Safety Commission Reauthorization (Part 2): Hearing on H.R. 3343 and H.R. 3443 Before the Subcomm. on Commerce, Consumer Prot., and Competitiveness of the H. Comm. on Energy and Commerce*, 100th Cong. 236 (1987) (statement of U.S. Public Research Interest Group) (regarding CPSIA, arguing that state enforcement “would multiply by fifty the number of officials available to help ensure the safety of products that are distributed throughout the country”); 153 *CONG. REC.* S15,990 (daily ed. Dec. 19, 2007) (statement of Sen. Mark Pryor) (arguing that CPSIA “ensures that [state attorneys general] can act as real cops on the beat, looking out for consumers and restoring confidence in the marketplace”); 149 *CONG. REC.* 25,526 (2003) (statement of Sen. Ron Wyden) (“What is going to be important is for those who are charged with enforcement—the Federal Trade Commission, the criminal authorities, . . . the State attorneys general, the Internet service providers—to bring a handful of actions very quickly to establish . . . a real deterrent . . .”); *id.* at 25,548 (statement of Sen. Maria Cantwell) (“By allowing enforcement by State attorneys general and by Internet service providers, we have increased the odds of successful enforcement against the worst spammers.”); 137 *CONG. REC.* 30,822 (1991) (statement of Sen. Ernest Hollings) (regarding common carrier regulation, describing state enforcement as response to uncertainty about “[t]he will of the FCC to enforce the bill rigorously”).

tors and industry groups who oppose the substantive project of the statute.⁶⁸

A second recurring theme in the legislative histories of statutes that provide for state enforcement is that states need authority to enforce federal law because enforcement actions under state law will be ineffective. As one attorney general, speaking on behalf of the National Association of Attorneys General (NAAG), explained to Congress in hearings on a bill targeting pay-per-call services:

Federal court access to the States would substantially reduce the jurisdictional difficulties and maximize the effectiveness of each case brought by any one office. It would carry with it nationwide service of process and also increase the ability of an attorney general in one State to secure a defendant's assets which are located in another State.⁶⁹

Thus, part of the appeal of state enforcement of federal law (from the perspective of its supporters, at least) is that it facilitates states' efforts to reach out-of-state defendants.⁷⁰

⁶⁸ See, e.g., 154 CONG. REC. S7872 (daily ed. July 31, 2008) (statement of Sen. Tom Coburn) (arguing that state and private enforcement of CPSIA "provides false incentives for overzealous attorneys general and would run precisely counter to the CPSC's policy of carefully balancing cost and benefit in making safety regulations"); 140 CONG. REC. 10,173 (1994) (statement of Sen. Orrin Hatch) ("Because [the Freedom of Access to Clinic Entrances Act] delegates an astonishing amount of what is in essence prosecutorial authority to State attorneys general and to private parties . . . and because it offers them the bonanza of substantial monetary penalties, it is a virtual certainty that innocent persons . . . will be targeted and pursued."); see also *infra* notes 248–50 and accompanying text (discussing opposition to state enforcement of federal law due to lack of uniformity).

⁶⁹ *Telemarketing Fraud and Consumer Abuse: Hearing Before the Subcomm. on Transp. and Hazardous Materials of the H. Comm. on Energy and Commerce*, 102d Cong. 51 (1991) (statement of Bonnie J. Campbell, Att'y Gen. of Iowa and Vice-Chair, Consumer Protection Committee, NAAG); see also *id.* at 53 (resolution of NAAG) ("[U]nder current law, the sole means of effectively stopping a multistate fraud is for each attorney general to file separate, and identical actions; and . . . the ability of the attorneys general to proceed against telemarketing fraud in a Federal court would eliminate the need for wasteful duplication of State resources . . ."); 149 CONG. REC. 25,546 (2003) (statement of Sen. Patrick Leahy) ("Some 30 States now have antispam laws, but the globe-hopping nature of e-mail makes these laws difficult to enforce."); *id.* at 25,526 (statement of Sen. Ron Wyden) ("I believe a State-by-State approach cannot work in this area."); 139 CONG. REC. 3907 (1993) (statement of Rep. Allan Swift) ("State and local enforcement agencies . . . have initiated actions against fraudulent telemarketers only to be frustrated by state law jurisdictional limits. [Fraudulent telemarketers] locate their operations outside the states in which their victims are located or move frequently to avoid detection and prosecution under state law.");

⁷⁰ See, e.g., *Mail Fraud: Hearing Before the Subcomm. on Postal Operations and Servs. of the H. Comm. on Post Office and Civil Serv.*, 103rd Cong. 163 (1993) (statement of NAAG) (bemoaning "artificial constraints of jurisdictional boundaries"); 139 CONG. REC. 3910 (1993) (statement of Rep. Carlos Moorhead) (regarding Consumer Protection Telemarketing Act, "Thousands of Californians have been victimized by . . . operations . . . beyond the reach of our State authorities. I am therefore pleased that a major theme of

Although states' authority to enforce federal law sometimes operates as a supplement to enforcement of their own laws, that is not always the case. In some cases, attorneys general are empowered to enforce federal rules that have no state analogue, either because state law has been preempted⁷¹ or because the state has chosen not to legislate.⁷² It is important, therefore, to separate the question of state *enforcement* from that of state *regulatory authority*. Typically, the two go hand in hand: A government creates laws and then enforces them. But state enforcement of federal law breaks that link by authorizing state actors to enforce the law of a different sovereign. As a result, state attorneys general may have enforcement authority in areas where state legislatures have not acted or are powerless to act.

Similarly, state enforcement of federal law must be distinguished from the *implementation* of federal objectives by states. Consider the Clean Air Act, which instructs states to create and enforce "[s]tate implementation plans" governing emissions from stationary sources within the state, provided that total emissions satisfy federal standards.⁷³ Federal standards set the floor; states may opt for more stringent standards if they wish, and they retain substantial discretion in

this bill is a broad-based partnership of the Federal Trade Commission with State attorneys general to attack telemarketing scams wherever they may be based.").

⁷¹ For examples of statutes that permit state enforcement of federal law while preempting state law, see 7 U.S.C. § 16(e) (2006) (preempting some state law governing commodities), 11 U.S.C. § 526(d) (2006) (preempting inconsistent state law regarding debt relief agencies), 15 U.S.C. § 1681t (2006) (preempting inconsistent state law regarding credit transactions), 15 U.S.C. § 5722(a) (2006) (preempting inconsistent state law governing pay-per-call services), 15 U.S.C. § 6502(d) (2006) (preempting inconsistent state law regarding children's online privacy protection), 15 U.S.C. § 7707(b) (2006) (preempting most state law regulating spam), and 49 U.S.C. § 32711 (2006) (preempting inconsistent state law regarding odometer tampering).

⁷² See, e.g., 149 CONG. REC. 25,546 (2003) (statement of Sen. Patrick Leahy) (regarding CAN-SPAM Act, noting that only thirty states have antispam laws of their own); 149 CONG. REC. 13,748 (2003) (statement of Rep. Cliff Stearns) (describing provision for state enforcement of Sports Agents Responsibility and Trust Act (SPARTA) and noting its benefits for those states without any similar laws); 149 CONG. REC. 10,294 (2003) (statement of Rep. Thomas Osborne) (discussing SPARTA and noting that it would provide uniform standard, as many states did not have laws regulating sports agents); 140 CONG. REC. 17,842 (1994) (statement of Rep. John LaFalce) (noting that telemarketing fraud regulation would authorize state attorneys general in those states without similar regulations to bring actions in federal courts).

⁷³ 42 U.S.C. § 7410 (2006). State implementation plans must be approved by the EPA. *Id.* § 7410(a)(3), (k).

determining how to achieve their goals.⁷⁴ Other federal environmental statutes follow a similar approach.⁷⁵

The model employed by the Clean Air Act, in which states regulate at the direction of the federal government, is well known in the literature on cooperative federalism.⁷⁶ Students of federalism have emphasized the various ways that states can exercise regulatory authority in areas of concurrent state-federal authority. For these scholars, preserving state regulatory authority is the primary goal of federalism.⁷⁷ Although cooperative schemes like the Clean Air Act

⁷⁴ See John Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1198 (1995) (“The authority to allocate emissions to industry gives states an opportunity to pay a significant political role in controlling air pollution and making related decisions about land use and economic development—an opportunity that the vast majority of states have taken.”).

⁷⁵ See David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1571 (1995) (“[E]ssentially all the modern major environmental laws provide uniform, minimum national standards with the states ‘deputized,’ to a greater or lesser degree, to do the permitting and enforcing for the federal government.”).

⁷⁶ See Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2038 n.54 (2007) (“[T]he [Clean Air Act] embodies a cooperative regulatory framework under which states bear responsibility in the first instance for devising plans to ensure that air pollutant emissions within their borders meet federal air quality standards.”). For overviews of and citations to the cooperative federalism literature, see generally Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1262–63 & nn.14–16 (2009), and Roderick M. Hills, *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 815 & nn.1–2 (1998).

⁷⁷ See Metzger, *supra* note 76, at 2026 n.4 (“[F]ederalism refer[s] primarily to protecting the ability of the states to exercise meaningful regulatory power in their own right.”); Neil S. Siegel, *International Delegations and the Values of Federalism*, LAW & CONTEMP. PROBS., Winter 2008, at 93, 94 n.7 (defining “federalism” as “a constitutional regime that aims to vindicate certain values . . . by affording significant protection to the regulatory autonomy of subnational states”); *cf.* Bulman-Pozen & Gerken, *supra* note 76, at 1259 (discussing instances of “uncooperative federalism,” where “states use regulatory power conferred by the federal government to tweak, challenge, and even dissent from federal law”). The emphasis on regulation is also evident in the vast and ever-growing literature on preemption. For a small sampling, see generally William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1555–56 (2007) (arguing that federal floor preemption risks less regulatory failure than unitary federal choice preemption, which precludes state and local protections and eliminates institutional diversity), Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1937–39 (2008) (offering realist view of federal agency preemption that favors agency regulation over Congressional action), Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 4 (2007) (arguing for presumption against federal preemption of state regulation), Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 742 (2004) (arguing against *Chevron* deference when agencies preempt state law), and Catherine M. Sharkey, *Federalism Accountability: “Agency-Forcing” Measures*, 58 DUKE L.J. 2125, 2129 (2009) (proposing reforms to increase state participation in agency preemption decision making).

limit the autonomy of states in various ways, they leave important room for interstate variation. Accordingly, while states implementing the Clean Air Act and similar statutes certainly engage in enforcement, the rules that they are enforcing may vary from state to state. As the consumer protection and other statutes described above illustrate, however, enforcement authority can exist independent of regulatory authority. That is, even where Congress has denied states any regulatory autonomy, it may offer them a role in enforcing federal law.

II

STATE INFLUENCE THROUGH ENFORCEMENT

State enforcement of federal law complicates conventional accounts of public and private enforcement by exposing gaps in prevailing theories of enforcement. State enforcement is different from federal enforcement in several significant respects. State enforcement is largely decentralized, and states act on behalf of a set of interests that diverge in important ways from those represented by federal enforcers. State enforcement also empowers a different set of agents—elected, generalist attorneys general. Differences between the institutions in charge of enforcement at the state and federal levels translate, in turn, into differences in enforcement outputs. Enforcement therefore creates new channels for state-federal dialogue and, perhaps, discord. This Part explores state enforcement as a form of state influence, first sketching the distinctive features of state enforcement and then illustrating how enforcement can serve as an instrument for state policy making.

A. *State and Federal Enforcement Compared*

1. *Decentralized Enforcement*

Public enforcement at the federal level is marked by centralization and political control. Most federal civil statutes vest public enforcement authority in a single federal agency.⁷⁸ And all federal agencies operate under the supervision of Congress, the President, or both.⁷⁹ The President appoints agency heads and, with the exception

⁷⁸ Federal criminal enforcement may be somewhat less centralized because of the discretion vested in the ninety-three U.S. Attorneys' Offices. See Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 781 (1999) (explaining how "federal prosecutorial authority is . . . famously fragmented"). But cf. Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 525 (2011) (discussing efforts to give Main Justice more centralized authority over federal criminal enforcement).

⁷⁹ See Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 448–49 (2008) (discussing various means

of so-called independent agencies, can remove them from office at will.⁸⁰ Congress can steer agency policy making through use of oversight hearings⁸¹ and informal interactions with agency decision makers.⁸² By adjusting agencies' budgets,⁸³ moreover, the political branches can calibrate the level of agency activity, including enforcement efforts.⁸⁴

Public enforcement at the state level lacks an equivalent mechanism of centralized national control, thereby creating the potential for more than fifty⁸⁵ different approaches to the exercise of enforcement

of political control of agencies); B. Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801, 822 (1991) (finding that "[t]he leadership of an agency is the most frequent mechanism for changing agency behavior").

⁸⁰ See, e.g., Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2326 (2006) ("[A] strong President can stymie two agencies almost as easily as he can stymie one.").

⁸¹ See Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 785 (1999) ("While the nature, quality, and intensity of legislative oversight vary from committee to committee, it is often used to signal congressional preferences on agency policy issues and to extract policy commitments from agency officials.").

⁸² See Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 509 (1989) ("Agency action can be publicly castigated on the House or Senate floor, and members of Congress or their staffs can importune agency decision makers.").

⁸³ See Haoran Lu, *Presidential Influence on Independent Commissions: A Case of FTC Staffing Levels*, 28 PRESIDENTIAL STUD. Q. 51, 61 (1998) (showing that "presidents do use budget, specifically staff level, to influence independent agencies"); Terry M. Moe, *Regulatory Performance and Presidential Administration*, 26 AM. J. POL. SCI. 197, 201 (1982) (discussing presidential influence over budgets through executive Office of Management and Budget); Schuck, *supra* note 81, at 785 ("The appropriations process sharply constrains the authority and discretion of agencies.").

⁸⁴ See MICHAEL E. MILAKOVICH & GEORGE J. GORDON, PUBLIC ADMINISTRATION IN AMERICA 373 (10th ed. 2009) ("Ronald Reagan, from the very start of his presidency, used a comprehensive assault on the national government budget as the key to his attempt to reshape the national bureaucracy. Reagan demonstrated convincingly that the most direct way (if not always the easiest politically) to control an agency is to cut—or increase—its budget . . ."); Hugh Davis Graham, *The Politics of Clientele Capture: Civil Rights Policy and the Reagan Administration*, in REDEFINING EQUALITY 103, 106 (Neal Devins & Davison M. Douglas eds., 1998) (noting that Reagan administration "slowed regulatory activity by cutting the agency budgets"). Studies show that public enforcement by federal agencies changes with shifts in presidential and congressional politics. See, e.g., Moe, *supra* note 83, at 197–98 (finding variation in enforcement efforts of National Labor Relations Board, Federal Trade Commission, and Securities and Exchange Commission based on presidential administration in office); Selmi, *supra* note 22, at 1440–41 ("Since the passage of the Civil Rights Acts in the 1960s, each shift in political party has brought significant change in civil rights enforcement."); Wood & Waterman, *supra* note 79, at 823 (finding significant executive influence on behavior of seven agencies, especially those situated within executive departments).

⁸⁵ The number of non-federal enforcers typically exceeds fifty, as it may include the District of Columbia as well as the Commonwealths of Puerto Rico and the Northern Mariana Islands, and the territories of American Samoa, Guam, and the Virgin Islands. See

discretion.⁸⁶ As noted above, most federal statutes that provide for state enforcement both require state attorneys general to notify the relevant federal agency prior to filing suit and permit the federal agency to intervene in the case.⁸⁷ Such provisions enable federal enforcers to keep tabs on the states and to present their own views regarding enforcement to reviewing courts. But federal enforcers cannot prevent the states from acting in ways that conflict with the federal enforcement strategy.⁸⁸

Similarly, while state enforcers can and do coordinate with their federal counterparts and with each other, cooperation is voluntary and tends to break down in the face of sustained disagreement. For example, state-federal cooperation over antitrust enforcement policy has waxed and waned in the last three decades as state and federal approaches have come into and out of alignment.⁸⁹ Indeed, state enforcement tends to ramp up precisely when—and because—federal enforcers have determined to cut back on enforcement.⁹⁰

About NAAG, Nat'l Ass'n Att'ys Gen., http://www.naag.org/about_naag.php (last visited Apr. 20, 2011). For the sake of simplicity, this Article will focus on enforcement by the fifty states.

⁸⁶ See *infra* notes 248–50 and accompanying text (discussing complaints by legislators and lobbyists that state enforcement will produce disuniformity in federal law).

⁸⁷ See, e.g., 15 U.S.C. § 2073(b) (2006 & Supp. III 2010) (prescribing procedures for state enforcement of federal rules governing consumer products, including notice requirement and federal agency's right of intervention); 15 U.S.C. § 1264(d) (2006) (same, for state enforcement of federal rules governing hazardous substances); 15 U.S.C. § 1194(a) (2006) (providing for state enforcement of federal rules governing flammable fabrics and incorporating procedural requirements of § 2073).

⁸⁸ See Rose, *supra* note 9, at 2205 (explaining that when voluntary cooperation breaks down, “the enforcer concerned about underdeterrence will always stand in a position to thwart the efforts of the enforcer who is concerned about overdeterrence, leading to a potentially ill-advised ratcheting up of enforcement intensity”); Widman, *supra* note 9, at 179 (explaining that state-enforcement provisions “allow[] states to enforce [federal] regulations when the agency does not”).

⁸⁹ See STEPHEN D. HOUCK, NAT'L ASS'N OF ATT'YS GEN., TRANSITION REPORT: THE STATE OF STATE ANTITRUST ENFORCEMENT 2–4 (Oct. 7, 2009), <http://www.naag.org/transition-report-the-state-of-state-antitrust-enforcement.php> (discussing state-federal cooperation—and lack thereof—under Reagan, Bush I, Clinton, and Bush II administrations).

⁹⁰ See, e.g., Calkins, *supra* note 9, at 734 (“State perception of a lack of federal will is the most common stimulus to expansive state activity.”); Ralph H. Folsom, *State Antitrust Remedies: Lessons from the Laboratories*, 35 ANTITRUST BULL. 941, 954 (1990) (“The state attorneys general committed themselves to ‘filling the gap’ created by Reagan administration antitrust policies by increasing their state antitrust prosecutions.”); Dru Stevenson, *Special Solitude for State Standing: Massachusetts v. EPA*, 112 PENN. ST. L. REV. 1, 39–40 (2007) (“[O]ne manifestation of a presidential policy of deregulation is agency inaction on the enforcement and rulemaking fronts. Ironically, the unintended consequence of this policy is an increase in litigation activity by the state AG’s in the very same area, which can prove just as daunting to the regulated industry as routine oversight by a federal agency.”); Brooke A. Masters, *States Flex Prosecutorial Muscle*, WASH. POST, Jan. 12, 2005, at A1

Interstate coordination likewise has worked best at bringing like-minded states together.⁹¹ States frequently work together in multistate actions that target a single defendant or group of defendants.⁹² Those actions rarely involve all fifty states, however, and there is no centralized lever akin to presidential control to pull wayward states into line with the rest. The most that can be said is that multiple enforcers are capable of synchronization when they agree on a common goal. When interests diverge, so too does enforcement.⁹³

2. *Local Interests, Local Knowledge*

Divergent approaches to the exercise of enforcement discretion are not just possible, they are likely. One of the core tenets of federalism is that decentralized decision making will yield different results from policy making at the national level. While the point usually pertains to regulatory authority, it applies with equal force to decisions about enforcement. Rarely does the distribution of interests in one state mirror those in other states or in the nation as a whole. Interests

(“[S]tate regulators and attorneys general are bringing legal action and launching investigations in . . . areas where they say federal regulators have fallen down on the job. ‘Our action is the result of federal inaction,’ said Connecticut Attorney General Richard Blumenthal, who has brought actions against drug companies, polluters, and the Environmental Protection Agency.”); PETER J. BRANN, COLUMBIA LAW SCH. STATE ATT’Y GEN. PROJECT, STATE ATTORNEYS GENERAL CONSUMER PROTECTION UNDER A NEW ADMINISTRATION: NEW OPPORTUNITIES AND NEW CHALLENGES 8 (2008), http://www.law.columbia.edu/null?&exclusive=filemgr.download&file_id=55833&rtcontentdispositi (“As the [George W.] Bush Administration cut back on consumer protection efforts, the States have rushed in to fill the void.”).

⁹¹ Although the NAAG has adopted more than 100 policy positions in an effort to “promote uniformity in specific areas of law[.] . . . NAAG stresses that ‘[t]he autonomy of each Attorney General is carefully protected’” Joseph F. Zimmerman, *Interstate Cooperation: The Roles of the State Attorneys General*, 28 PUBLIS 71, 75 (1998) (quoting NAT’L ASS’N OF ATTORNEYS GEN., POLICY POSITIONS 7 (1993)).

⁹² See generally Jason Lynch, Note, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998 (2001) (discussing multistate actions).

⁹³ See Rose, *supra* note 9, at 2205 (“[V]oluntary coordination can break down if disagreements arise over the best enforcement approach. This is a realistic probability, even amongst well-incentivized enforcers, given the significant empirical uncertainty that will exist regarding the relative level of under- and overdeterrence costs.”); cf. HOUCK, *supra* note 89, at 17 (“The main concern expressed by state [assistant attorneys general working in the antitrust area] relates to the perceived decline in the effectiveness of multistate working groups. There is a general perception that the multistate working groups are not run as effectively or efficiently as they should be, and have been historically.”); Judith Resnik et al., *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709, 753 (2008) (discussing disputes within NAAG and formation of subgroup called Republican Attorneys General Association, which has taken positions different from those of NAAG on several issues).

with little voice on the national stage can be heard loud and clear by state governments. And different interests wield power in different states.

State enforcement in any given state is likely to respond to interests and concerns that would be overlooked by other states and the federal government. In the antitrust context, for example, state enforcers report that they “typically focus on enforcement cases that have significant specific local or regional impact upon their states, their consumers, and their public institutions”⁹⁴ As discussed in more detail below, elected state attorneys general have strong incentives to serve their local constituencies. State enforcers also are likely to have a better understanding of local conditions than their federal counterparts, simply by virtue of living and working in the state rather than in Washington, D.C.⁹⁵ States may have an investigatory or enforcement apparatus in place—a local police force, for example—that would be costly for the federal government to replicate. And state enforcers’ relative closeness to local citizens gives them access to information that federal enforcers may not have or lack the capacity to address. Thus, as the supporters of state enforcement of federal consumer protection law argued, “the attorneys general in all of the States know, perhaps more urgently and more rapidly [than the federal Consumer Product Safety Commission], when a product is deficient.”⁹⁶

3. *Political and Professional Incentives*

State enforcement also is likely to diverge from public enforcement at the federal level because of differences in the agents of enforcement. The prototypical federal civil enforcer is a specialist agency headed by political appointees. Similar agencies exist at the

⁹⁴ Roundtable Conference with Enforcement Officials, 73 ANTITRUST L.J. 269, 296 (2005) (statement of Patricia Connors, Chair of NAAG’s Multistate Antitrust Task Force); see also ANTITRUST MODERNIZATION COMM’N, SUPPLEMENTAL PUBLIC COMMENT SUBMITTED BY THE ATTORNEYS GENERAL OF HAWAII, MAINE, AND OREGON ON STATE MERGER ENFORCEMENT 6 (2006), http://govinfo.library.unt.edu/amc/public_studies_fr28902/enforcement_pdf/060723_suppl_state_merger_com.pdf (explaining that state merger enforcement tends to focus on local industries, including “health care, retail gasoline, solid waste, supermarkets, movie theaters, banking, retail pharmacy, funeral homes, department stores, and asphalt”); Michael DeBow, *State Antitrust Enforcement: Empirical Evidence and a Modest Reform Proposal*, in COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY 267, 274 (Richard A. Epstein & Michael S. Greve eds., 2004) (discussing “quaint, Norman Rockwell-like quality” of state antitrust enforcement).

⁹⁵ See Calkins, *supra* note 9, at 680 (“State attorneys general have a clear comparative advantage in understanding local markets.”).

⁹⁶ 154 CONG. REC. S7877 (daily ed. July 31, 2008) (statement of Sen. Kay Hutchinson) (regarding CPSIA).

state level. Yet when federal law authorizes enforcement by states, it bypasses state agencies in favor of state attorneys general. Unlike their federal equivalent, most state attorneys general are independently elected.⁹⁷ Many have aspirations to higher office,⁹⁸ usually the governor's seat or Congress.⁹⁹ And, unlike agency officials, state attorneys general are policy generalists.

A familiar theme in commentary on state enforcement is that state attorneys general are heavily motivated by political considerations.¹⁰⁰ Critics describe attorneys general as “ambitious politicians more interested in making headlines than consistent, viable policy,”¹⁰¹ implying that politics are the primary driver behind state enforcement decisions. That view ignores that attorneys general are a diverse group with diverse motivations, that government lawyers will often derive some personal or political satisfaction from public policy improvements, and that the political implications of enforcement efforts will not always be clear in advance.¹⁰² As such, the critique is almost certainly overstated. One can believe that attorneys general seek to advance their own, selfish interests without subscribing to the notion that state enforcement decisions can reliably be explained in purely political terms.

Nevertheless, even states' defenders concede that “state attorneys general are responsive to political factors in ways that the federal agencies are not.”¹⁰³ Although each state's experience will be different, all elected attorneys general have incentives to take actions that will respond to the interests of their constituents.¹⁰⁴ And the

⁹⁷ See *supra* note 8 (noting few states where this is not the case).

⁹⁸ See Clayton, *supra* note 63, at 538 (“[T]he accumulation of highly visible functions made the office [of attorney general] increasingly attractive to a younger, better educated, and more ambitious caliber of attorney. The new breed of attorneys general have included [those] who used the office to project themselves into national politics.”).

⁹⁹ Marshall, *supra* note 8, at 2453 (“[T]he Office of the Attorney General has long been seen by many of its occupants as a stepping stone to the Governor's office”); accord Colin L. Provost, *State Attorneys General, Entrepreneurship, and Consumer Protection in the New Federalism*, 33 *PUBLIUS* 37, 40 (2003) (“[O]f the 166 attorneys general who served at least two years between 1980 and 1999, more than 70 ran for a governorship or a U.S. Senate seat. Another 20 ran for or were appointed to a lower court seat, a federal agency post, or another position in state government.”).

¹⁰⁰ See, e.g., Posner, *supra* note 9, at 257–60 (arguing that state attorneys general are focused primarily on promoting their political careers and proposing that attorneys general be appointed rather than elected).

¹⁰¹ Masters, *supra* note 90.

¹⁰² To be sure, some cases will have a clear political valence. But every case has two sides, and state politics can be unpredictable. I am grateful to Jim Tierney for emphasizing this point to me.

¹⁰³ First, *supra* note 9, at 1036.

¹⁰⁴ See Provost, *supra* note 99, at 38 (“Because they are elected in most states . . . and because the office often serves as a springboard into higher political positions, state attor-

available empirical evidence—while limited—suggests that elected attorneys general “tend to be more aggressive while appointed ones adhere more to the ‘ministerial functionary’ role of attorney general.”¹⁰⁵

Contrast federal agency heads and attorneys, many of whom follow a career path that leads them to the private sector after a brief stint in government.¹⁰⁶ As others have argued, “[a]gency attorneys who plan to go into private practice have strong incentives to ‘sell out’ their agencies in order to curry favor with private-sector attorneys.”¹⁰⁷ Such attorneys tend to avoid difficult or complicated cases, focusing instead on developing trial experience and a winning record.¹⁰⁸

Other attorneys do seek out agency jobs because of a sincere commitment to the agency’s substantive mission.¹⁰⁹ But even those who hope to stay in government service may have reasons to avoid

neys general have strong incentives to build up their record of political accomplishments by helping consumers and pursuing high levels of enforcement.”); Eric N. Waltenburg & Bill Swinford, *The Supreme Court as a Policy Arena: The Strategies and Tactics of State Attorneys General*, 27 POL’Y STUD. J. 242, 248 (1999) (describing state attorneys general as “politically savvy individuals who recognize the policy ‘hay’ that can be made by litigation actions”).

¹⁰⁵ Provost, *supra* note 99, at 53. The incentives for aggressive, entrepreneurial enforcement likely are amplified for attorneys general with ambitions to higher office. Scholars have found links between ambition to higher office and risk taking and innovation by politicians. See Rebekah Herrick & Michael K. Moore, *Political Ambition’s Effect on Legislative Behavior: Schlesinger’s Typology Revisited and Revised*, 55 J. POL. 765, 771 tbl.1 (1993) (finding that House members with aspirations to Senate introduced more legislation, made more speeches, and had larger staffs than those who aspired to leadership positions within House); Provost, *supra* note 99, at 43 (arguing that attorneys general “with progressive ambition are more likely to prosecute businesses to gain the attention of consumers and voters”); David W. Rohde, *Risk-Bearing and Progressive Ambition: The Case of Members of the United States House of Representatives*, 23 AM. J. POL. SCI. 1, 16 tbl.1 (1979) (demonstrating relationship between risk taking by House members and senatorial ambitions); see also Hills, *supra* note 77, at 24 (“It is not smart politics to play it safe against an incumbent who, almost by definition, will have greater name recognition and nonideological goodwill . . .”).

¹⁰⁶ See Selmi, *supra* note 22, at 1442 (noting one of several reasons attorneys choose to work for government organizations is to obtain litigation experience marketable to private employers).

¹⁰⁷ Macey & Miller, *supra* note 22, at 1117.

¹⁰⁸ See POSNER, *supra* note 13, at 644 (“[L]awyers employed by an administrative agency may prefer to bring small cases because that will enable them to get trial experience during their brief tenure whereas a large case might not come to trial until after they had left . . .”).

¹⁰⁹ See Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. U. L. REV. 7, 29 (2000) (“[A]dministrators self-select into an employment pool consisting of individuals who share some kind of ideological commitment to a given agency’s mission Over time, . . . those who remain with an agency are those who tend to believe in its mission and who reap personal satisfaction from a sense that public service truly serves the public.”).

controversy and risk taking.¹¹⁰ The highest-ranking agency policy makers—those in a leadership position akin to that of a state attorney general—are unlikely to have landed in their jobs because of a long-standing passion for the agency’s project. Instead, “those rewarded by political appointment tend to be those whose prior political loyalty demonstrates some kind of philosophical commitment to a party’s or candidate’s platform; political principles seem especially likely to inform their understanding of their own roles and missions.”¹¹¹ Those principles may weigh in favor of strong enforcement, but that result is hardly inevitable. Political appointees often carry marching orders to do less, not more.¹¹²

State attorneys general also differ from federal agencies in terms of the breadth of their jurisdiction. Research shows that elected generalists are more likely than appointed policy specialists to take risks or initiate major reforms. Professor Roderick Hills explains that

[b]ureaucrats’ authority rests on their expertise, specialized training, and experience dealing with particular interests defined by authorizing statutes. Therefore, bureaucrats rarely try to form new interest groups but instead broker between those groups with which they are familiar. Bureaucrats also tend to resist or at least be indifferent to broad policy considerations or claims of abstract justice that do not fall squarely within their regulatory specialty Politicians’ authority, by contrast, springs out of their capacity to organize and inspire voters.¹¹³

Hills describes state and local politicians as “natural policy entrepreneurs who can significantly influence what sorts of conditions are publicly recognized as problems.”¹¹⁴ Although his focus was regulation rather than enforcement, the argument holds for state attorneys general.¹¹⁵ As the name suggests, attorneys general enjoy a broad

¹¹⁰ See Selmi, *supra* note 22, at 1444 (“For individuals who are interested in a government career, they need to take into account which cases are most likely to advance their careers. . . . [T]his often means avoiding controversy and adopting a policy of choosing safe cases to which the government would not likely object or about which the government is unlikely to come under political scrutiny or pressure.”).

¹¹¹ Croley, *supra* note 109, at 30.

¹¹² See *supra* notes 63, 84, and 90 and accompanying text (discussing decline in federal agency enforcement under Reagan and second Bush administrations).

¹¹³ Hills, *supra* note 77, at 15.

¹¹⁴ *Id.* at 21.

¹¹⁵ See Provost, *supra* note 99 (studying entrepreneurial behavior by state attorneys general); cf. *Allocation of Antitrust Enforcement Between the States and the Federal Government: Hearing Before the Antitrust Modernization Comm’n*, at 14 (Oct. 26, 2005) (Statement of Harry First, Professor of Law, New York University School of Law), available at govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement-First.pdf [hereinafter First, Statement] (comparing state enforcers to “maverick firms” that “pursue divergent

(“general”) jurisdiction to promote the public interest.¹¹⁶ Such expansive authority carries with it important opportunities for agenda setting, allowing attorneys general to pursue far-reaching policy initiatives through their enforcement efforts.

Whatever the reason—be it politics, the professional setting in which attorneys general work, the personalities of those who are attracted to the office, or a combination of those and other factors—there is ample evidence of aggressive, entrepreneurial state enforcement. Take, for example, former New York Attorney General Eliot Spitzer’s groundbreaking campaign against Wall Street. Spitzer dusted off a “long-dormant” state statute¹¹⁷ that “had been used in the past to pursue boiler-room operations and Ponzi schemes.”¹¹⁸ With it, he launched a wide-ranging investigation into the relationship between investment banks and stock analysts. Spitzer began by subpoenaing e-mail from Merrill Lynch. When he discovered “smoking-gun” evidence that the bank’s analysts were using stock recommendations to attract investment-banking business rather than to educate investors,¹¹⁹ he publicized his findings at a press conference and accused Merrill’s research analysts of “an outrageous betrayal of . . . trust and a shocking abuse of the system.”¹²⁰ Soon after, “Harvey Pitt, the chairman of the Securities and Exchange Commission and a stout believer in industry self-regulation, announced that he had changed his mind and ordered an investigation of his own.”¹²¹ For its part, Merrill agreed to pay a \$100 million fine, to apologize, and to change the way it paid its analysts.¹²² Spitzer then led a multistate effort, joined by the SEC, to subpoena email from twelve other banks.¹²³ State and federal enforcers worked together to negotiate a compre-

business strategies as a way of differentiating their offerings from those of more dominant firms with larger market shares”).

¹¹⁶ William B. Rubenstein, *On What a “Private Attorney General” Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2133 (2004) (“What puts the ‘general’ in ‘attorney general’ is not strength but scope: ‘general’ defines the ambit of the ‘power of attorney’ given to the lawyer in question, distinguishing . . . lawyers with general powers of attorney from those with particular or specific appointments.”).

¹¹⁷ Provost, *supra* note 99, at 40 (discussing New York’s 1921 Martin Act).

¹¹⁸ James Traub, *The Attorney General Goes to War*, N.Y. TIMES MAG., June 16, 2002, at 38, 41.

¹¹⁹ Adi Ignatius, *Wall Street’s Top Cop*, TIME, Dec. 30, 2002, at 64, 71 (internal quotation marks omitted).

¹²⁰ Traub, *supra* note 118, at 38 (internal quotation marks omitted).

¹²¹ *Id.*

¹²² *Id.* at 38–40.

¹²³ Ignatius, *supra* note 119, at 71 (explaining that “[t]he SEC jumped in” after Spitzer’s \$100 million settlement with Merrill, and participated with states in going after 12 other investment banks).

hensive settlement, under which the banks ultimately agreed to pay about \$1.4 billion in fines and other penalties.¹²⁴

Spitzer was similarly aggressive in other areas within the SEC's jurisdiction. In a recent study, Eric Zitzewitz, an economist at Dartmouth College, examined twenty large settlements between the SEC and firms accused of market timing and late trading violations.¹²⁵ New York was involved in some, but not all, of those settlements. The research suggests that "New York's involvement had a significant effect on the outcome of settlement negotiations"—raising the ratio of restitution-to-harm tenfold, from 0.07 to 0.77.¹²⁶ After controlling for other case characteristics, Zitzewitz concluded that New York was not simply choosing cases that were destined for large settlements, but rather that Spitzer and others in his office were more aggressive in their negotiations than the SEC.¹²⁷ Zitzewitz offers several possible explanations for the divergence in approach. One is that state and federal enforcers disagreed on the appropriate metric for calculating harm to shareholders.¹²⁸ Another possibility is that Spitzer's "political career concerns led him to be [] aggressive" while "the SEC staff's career concerns [led] them to take pro-industry positions."¹²⁹ Zitzewitz's take on Spitzer is hardly unique. Spitzer's work as attorney general was repeatedly criticized as being motivated by political ambition,¹³⁰ and his eventual (and successful) run for Governor surprised virtually no one.

Nor was Spitzer unique as an attorney general. Other examples of entrepreneurial enforcement include state-led campaigns against the

¹²⁴ *Id.*

¹²⁵ Eric W. Zitzewitz, *Prosecutorial Discretion in Mutual Fund Settlement Negotiations, 2003–7*, 9 BERKELEY ELEC. J. ECON. ANALYSIS & POL'Y, no. 1, art. 24, 2009 at 1, available at <http://www.bepress.com/bejeap/vol9/iss1/art24/> (last visited Apr. 20, 2011).

¹²⁶ *Id.* at 33.

¹²⁷ *Id.* at 3.

¹²⁸ *Id.* at 34.

¹²⁹ *Id.* at 35; see also Rachel E. Barkow, *The Prosecutor as Regulatory Agency*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 27 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (attributing SEC inaction to capture).

¹³⁰ See, e.g., William J. Holstein & Edward M. Kopko, *Spitzer's Climate of Fear*, WALL ST. J., Nov. 23, 2004, at B2 ("Rather than engaging in careful formulation of policy, Mr. Spitzer seems to be building his political career by collecting trophies."); Ignatius, *supra* note 119, at 70 ("The rap on Spitzer is that he's ambitious, that he has his eye on a bigger prize. To his (off-the-record) critics on Wall Street, his pursuit of investment banks smacks of opportunism and grandstanding, of a public official out of control."); John J. McConnell, *Spitzer's Big Lie*, WALL ST. J., May 15, 2002, at A18 (suggesting that Spitzer aggressively pursued flimsy case against Merrill in order to "further his own career").

tobacco industry,¹³¹ makers of lead-based paint,¹³² prescription drug marketing programs,¹³³ student lending practices,¹³⁴ handgun manufacturers,¹³⁵ and, most recently, the mortgage-servicing industry.¹³⁶ In the context of federal law enforcement, state attorneys general have gained notoriety in the antitrust context for pursuing practices—such as resale price maintenance and vertical restraints—that have been deemphasized by the federal enforcement agencies.¹³⁷ Indeed, NAAG’s guidelines on vertical restraints “openly counter” Department of Justice guidelines in the same field.¹³⁸

¹³¹ For a detailed analysis of the states’ legal theory in the tobacco litigation, see Hanoch Dagan & James J. White, *Governments, Citizens, and Injurious Industries*, 75 N.Y.U. L. REV. 354, 382–405 (2000).

¹³² See, e.g., Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 925–29 (2008) (discussing Rhode Island litigation against lead paint manufacturers).

¹³³ See Stephen Paul Mahinka & Kathleen M. Sanzo, *Multistate Antitrust and Consumer Protection Investigations: Practical Concerns*, 63 ANTITRUST L.J. 213, 221–23 (1994) (discussing states’ controversial campaign against common marketing and compensation systems for prescription drugs).

¹³⁴ See Robert A. Schapiro, *Not Old or Borrowed: The Truly New Blue Federalism*, 3 HARV. L. & POL’Y REV. 33, 42–43 (2009) (describing attorneys general campaign against lending industry, which “served to prod federal efforts” in same field); see also *Examining Unethical Practices in the Student Loan Industry: Hearing Before the H. Comm. on Educ. and Labor*, 110th Cong. 14 (2007) (statement of Andrew M. Cuomo, Att’y Gen., New York) (“Part of the reason the practices we have uncovered have been able to flourish nationwide over the past several years is because the U.S. Department of Education has been asleep at the switch.”).

¹³⁵ See William H. Pryor, Jr., *A Comparison of Abuses and Reforms of Class Actions and Multigovernment Lawsuits*, 74 TUL. L. REV. 1885, 1902–03, 1908–09, 1915–16 (1999) (critiquing state-led litigation against gun manufacturers).

¹³⁶ See Press Release, Columbia Law Sch., Expert Says Foreclosure Problems Should Serve as Wake-Up Call for Banks To Cooperate with States (Oct. 13, 2010), available at http://www.law.columbia.edu/media_inquiries/news_events/2010/October2010/foreclosures-tierney (describing state-led investigation into practices of mortgage-servicing industry).

¹³⁷ Folsom, *supra* note 90, at 953–54; see also Mahinka & Sanzo, *supra* note 133, at 216–17 (noting that while enforcement against resale price maintenance was “virtually nonexistent at the federal level[,] . . . state attorneys general have devoted considerable resources to this issue and have initiated a number of high-profile enforcement initiatives”).

¹³⁸ Folsom, *supra* note 90, at 954 (internal quotation marks omitted). State and federal enforcers took different positions in a recent Supreme Court case concerning one form of vertical restraint, resale price maintenance. Compare Brief for State of New York et al. as Amici Curiae Supporting Respondent at 1, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (No. 06-480) (“The States have a particular interest in preserving the *per se* prohibition against the price-fixing practice challenged here—minimum resale price maintenance (‘minimum RPM’). The States vigorously prosecute cases involving minimum RPM agreements.”), with Brief for United States as Amicus Curiae Supporting Petitioner at 3, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (No. 06-480) (“The *per se* rule against vertical minimum resale price maintenance (RPM) established in *Dr. Miles* is irreconcilable with this Court’s modern antitrust jurisprudence and

To be sure, the patterns sketched here will not hold across the board. First, federal enforcement is not always specialized, and state enforcement will not always be controlled by generalist attorneys general. Particularly in large states, offices of the attorneys general may be divided into bureaus that handle certain issues, and the attorney general may have little day-to-day involvement in most enforcement actions.¹³⁹ Nevertheless, the attorney general will play a central role in setting the agenda for the office as a whole—identifying priorities, crafting strategies, and so on. To some extent, the same is true at the federal level, though the effect is quite different. Many federal civil enforcement actions are handled by the Department of Justice (DOJ) rather than by a specialized agency.¹⁴⁰ Although DOJ lawyers do specialize to some extent, they are more generalist in their orientation than the agencies they represent, and they answer to the (generalist) U.S. Attorney General. The influence of DOJ generalists, however, is unlikely to inspire federal agencies to adopt a broader or more entrepreneurial enforcement agenda. The DOJ may decline to pursue an enforcement action proposed by an agency, but it does not initiate civil enforcement on its own. As Neal Devins and Michael Herz have explained, “[s]hould DOJ learn of possible violations warranting investigation, it forwards the information to the agency; an actual civil action will not go forward without a referral from the agency to DOJ.”¹⁴¹ Thus, to the extent that DOJ participation influences federal enforcement, it tends to operate as a brake rather than an accelerant.

Second, federal enforcement will not always be weak and state enforcement always strong. Federal agencies sometimes will be inspired to act aggressively, particularly when federal policy makers scramble to respond to highly salient events.¹⁴² Similarly, the quest for electoral support sometimes will push state attorneys general away

cannot withstand analysis. That per se rule should be abandoned, and Dr. Miles should be overruled.”).

¹³⁹ See, e.g., *Our Office*, ATT’Y GEN. OF NEW YORK, http://www.ag.ny.gov/our_office.html (last visited Apr. 20, 2011) (listing specialized bureaus).

¹⁴⁰ Some independent agencies have independent litigation authority, but most agencies must be represented by the DOJ if they go to court. See 28 U.S.C. § 516 (2006) (“Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.”). For exceptions, see Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CAL. L. REV. 255, 264 (1994).

¹⁴¹ Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 562–63 (2003).

¹⁴² See Pritchard, *supra* note 21, at 1076 (discussing “cyclical pattern of neglect and hysterical overreaction that typifies securities regulation emanating from both the SEC and Congress”).

from aggressive enforcement. State enforcers are subject to capture by local business or other interests and may shy away from enforcement when the targets are local.¹⁴³ Yet it bears repeating that the set of interest-group pressures will be different at the state and federal levels and from state to state.¹⁴⁴ State enforcers' elected status gives them incentives to tailor enforcement to their constituents' interests—whatever they are. Just as political trends at the federal level may provoke more or less federal agency enforcement, attorneys general's commitments may lead them to champion some causes and ignore others. The results will vary from state to state.

Finally, while federal politicians can sell deregulation and nonenforcement to voters on an “anti big-government” platform, it is difficult to imagine the same strategy working for most attorneys general. One need not subscribe to the cynical view that attorneys general choose cases based solely on political considerations in order to conclude that their elected status gives them incentives to *act*, and to act in public ways. It should come as no surprise, then, that attorneys general from both parties take pains to advertise their accomplishments to voters. The issues they advertise may differ—for example,

¹⁴³ For example, many of the states that initially refused to join the litigation against the tobacco industry were major tobacco producers. See MARTHA A. DERTHICK, UP IN SMOKE 163 (2002) (discussing refusal of Alabama, Delaware, Kentucky, North Carolina, Tennessee, and Virginia to join tobacco litigation, in part due to political constraints faced by attorneys general in these states); cf. Barkow, *supra* note 129, at 17 (“[E]lected prosecutors will tend to under-regulate because they have competing concerns that favor industry.”); Elizabeth A. Harris & Michael Barbaro, *Hedge Fund Links Major Donors to G.O.P. Nominee*, N.Y. TIMES, Oct. 14, 2010, at A24 (reporting that 25% of contributions to Daniel M. Donovan, Jr., Republican candidate for attorney general in New York, could be traced to hedge fund “whose chief executive has emerged as a staunch and influential defender of Wall Street,” and noting that Donovan “has repeatedly promoted his cautious, nonconfrontational approach to Wall Street”); Nicholas Thompson, *The Sword of Spitzer*, LEGAL AFFAIRS 50 (June 2004) (“‘You rarely run for attorney general successfully by prosecuting the biggest corporations in your state, represented by the best law firms, with the best PR firms spinning it’” (quoting Scott Harshbarger, former Attorney General of Massachusetts)). The targets of state enforcement may be significantly more alert to enforcement efforts than the diffuse group of beneficiaries. And after the Supreme Court’s decision in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), there are few constraints on corporate defendants’ ability to retaliate politically against aggressive attorneys general. The implications of *Citizens United* for law enforcement are, as yet, unexplored.

¹⁴⁴ See Hills, *supra* note 77, at 23 (“[State politicians] are captured by a different set of interests than those dominant in Washington, D.C., because state constituencies contain a different mix of interests than the nation as a whole.”). Moreover, the dynamics of regulatory capture may vary between specialized agencies and generalist attorneys general. See Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J. L. ECON. & ORG. 93, 93–94 (1992) (arguing that single-purpose agencies are more susceptible to regulatory capture than general-purpose offices like that of attorney general).

Republican attorneys general running for re-election or higher office in 2010 emphasized issues like combating child pornography, while Democrats were more likely to highlight the environment—but the theme is action rather than inaction.¹⁴⁵

4. *Financial Incentives*

A final difference between state and federal enforcement concerns the role of money. No enforcer can ignore money. Litigation is expensive, and even the most public-spirited enforcer needs funds. Nevertheless, a conventional—if imperfect—way to distinguish public from private enforcement is by reference to financial incentives.¹⁴⁶ Private enforcement is often profit-driven; public enforcement is not. Private parties and their attorneys stand to benefit directly from successful enforcement efforts; public enforcers do not. While public enforcers may seek hefty penalties in order to punish or deter viola-

¹⁴⁵ See, e.g., DUSTIN MCDANIEL, ATT'Y GEN., <http://www.dustinmcdaniel.com/story> (last visited Apr. 20, 2011) (describing Arkansas Democrat Dustin McDaniel as “the state’s . . . top consumer advocate” and identifying his priorities as “[c]urbing methamphetamine production, eliminating payday lenders, and assisting consumers through his health care bureau”); *Jerry Brown Accomplishments as Attorney General*, JERRY BROWN, <http://jerrybrown.org/jerry-brown-accomplishments-attorney-general> (last visited Apr. 20, 2011) (listing California Democrat Jerry Brown’s accomplishments as “cracking down on crime and fighting for fairness,” “fighting for public safety and against corporate abuse,” “fighting to keep California fair and pristine,” and “reducing the attorney general’s operating budget”); *About Dick*, RICHARD BLUMENTHAL, UNITED STATES SENATOR FOR CONNECTICUT, <http://blumenthal.senate.gov/about/> (last visited Apr. 22, 2011) (describing Connecticut Democrat and former attorney general Richard Blumenthal as “[a] key player in the national fight against Big Tobacco” and emphasizing that “[h]is aggressive law enforcement for consumer protection, environmental stewardship, labor rights, and personal privacy . . . resulted in the recovery of hundreds of millions of dollars for Connecticut taxpayers . . . each year”); *Accomplishments*, BEAU BIDEN, DELAWARE’S ATT’Y GEN., <http://www.beaubiden.com/about/accomplishments> (last visited Apr. 20, 2011) (highlighting Delaware Democrat Beau Biden’s “record of standing up for kids and families,” combating senior abuse and crime, and acting as “watchdog for consumers”); *About Mike Cox*, MIKECOX2010.COM, <http://mikecox2010.com/meet-mike> (last visited Apr. 20, 2011) (emphasizing that Michigan Republican Mike Cox “has already made a name for himself as a strong leader who is willing to make bold moves, cut spending and produce record-setting results”); *About Jon Bruning*, BRUNING FOR U.S. SENATE, <http://jonbruning.com/about-jon/> (last visited Apr. 20, 2011) (reporting of Nebraska Republican Jon Bruning that “[h]is efforts have increased Nebraska consumer recoveries from just under \$500,000 total to nearly \$1 million annually”); *Tom Corbett’s Story*, TOM CORBETT FOR GOVERNOR, <http://www.tomcorbettforgovernor.com/meet-the-team/tom-corbett/> (last visited Apr. 20, 2011) (highlighting Pennsylvania Republican Tom Corbett’s “efforts to protect our children from internet predators, our seniors from fraud and abuse, our communities from gangs and the violence associated with illegal drugs . . . [and] to protect taxpayers’ hard earned money by going after predatory lenders, pharmaceutical companies and big oil companies that took advantage of consumers”).

¹⁴⁶ See Rubenstein, *supra* note 116, at 2139–40 (describing differing financial incentives of public and private attorneys based on differences in payment structure).

tors,¹⁴⁷ they rarely have an immediate or personal financial stake in the case.

State enforcers have incentives to pursue monetary recoveries that destabilize these familiar distinctions between public and private enforcement, further distinguishing state enforcement from the federal model. First, states may sue to vindicate what are essentially private interests. For example, states enforce federal antitrust law against firms whose anticompetitive conduct harmed the state government in its capacity as a purchaser.¹⁴⁸ Similarly, states may enforce federal securities law on behalf of large public pension plans.¹⁴⁹ In such instances, the state's interest is largely the same as that of a private purchaser or investor, as is the state's desire for compensation.¹⁵⁰

Second, federal law often authorizes states to sue as *parens patriae* on behalf of private parties.¹⁵¹ In those cases, the state

¹⁴⁷ See generally Max Minzner, *Why Agencies Punish* (2010) (unpublished manuscript) (on file with author) (arguing that retribution goal best describes agency penalty policies).

¹⁴⁸ HOUCK, *supra* note 89, at 5 (“The states play a prominent role in antitrust enforcement by virtue of their representation of state agencies, which are major direct purchasers of many commodities and frequent targets of bid-rigging and other price-fixing conspiracies.”).

¹⁴⁹ See 15 U.S.C. § 77p (2006) (restricting private class actions but preserving right of “a State or political subdivision thereof or a State pension plan [to] bring[] an action involving a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are named plaintiffs”). Ohio's recent suit against Bank of America is an example of such an action. See Press Release, Ohio Att'y Gen. Richard Cordray, Consolidated Amended Complaint Filed in Shareholder Lawsuit Against Bank of America (Sept. 28, 2009), available at <http://ohioattorneygeneral.gov/SecuritiesLitigation/Briefing> (discussing suit). Ohio Attorney General Richard Cordray, during his unsuccessful re-election campaign in 2010, vowed to “hold Wall Street accountable for their actions in harming Ohio investors, retirees, workers and families through violations of securities laws.” John Michael Spinelli, *Ohio AG Cordray Readies AIG Case as House GOP Asks Him To Challenge Federal Health Care Proposal*, COLUMBUS GOV'T EXAMINER, Feb. 20, 2010, <http://www.examiner.com/government-in-columbus/ohio-ag-cordray-readies-aig-case-as-house-gop-asks-him-to-challenge-federal-health-care-proposal>. Cordray's 2009 Annual Report boasts recoveries of more than \$2 billion “for investors.” 2009 OHIO ATT'Y GEN. ANN. REP. 6, available at <http://www.ohioattorneygeneral.gov/AnnualReport2009>.

¹⁵⁰ See Rubenstein, *supra* note 116, at 2141 (explaining that compensation is conventionally conceived as private goal, and that “when the government pursues compensatory damages, it is typically seeking to be made whole for losses it has suffered in its more proprietary, not law-enforcement, functions”).

¹⁵¹ The FTC has similar authority under § 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b) (2006), to seek equitable monetary remedies for violations of any laws within its jurisdiction. In practice, the FTC has used that authority almost exclusively in consumer protection cases. See 2010 Fed. Trade Comm'n Ann. Rep. 48, available at <http://www.ftc.gov/os/2010/04/ChairmansReport2010.pdf> (“From March 2009 through March 2010, the FTC's Redress Administration Office mailed redress checks to 2,598,799 consumers for a total of more than \$63.6 million.”); see also Stephen Calkins, *An Enforcement Official's Reflections on Antitrust Class Actions*, 39 ARIZ. L. REV. 413, 431 (1997) (discussing FTC's sparing use of § 13(b) in competition cases). In recent years—and perhaps as

attorney general plays a role akin to that of private counsel.¹⁵² Although state enforcers lack private attorneys' strong incentive to maximize their own fees, they may benefit in various ways from large damage (and fee) recoveries. Much as private attorneys use hefty damage recoveries to build their reputations and lure new clients, state enforcers trumpet their successes to the public in order to garner electoral support. And while success can mean many things, recovering money for the citizens themselves is a particularly impressive feat for an elected official.¹⁵³

a result of competition with state attorneys general—the FTC has expanded its use of § 13(b) to obtain restitution in antitrust cases, perhaps as a result of competition with state attorneys general. *See infra* note 196 and accompanying text.

¹⁵² Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1, 4 (2000) (noting that “some . . . government lawsuits seek money damages for defendants' injurious conduct toward citizens,” thereby “mix[ing] the roles of public and private lawyers”).

¹⁵³ Attorneys general regularly publicize any damage awards that are returned to citizens. *See, e.g.*, Press Release, Ark. Att'y Gen. Dustin McDaniel, McDaniel Gives \$25,000 to Arkansas Foodbank Network (Apr. 15, 2010), available at http://ag.arkansas.gov/newsroom/index.php?do:newsDetail=1&news_id=304 (“Attorney General Dustin McDaniel presented a \$25,000 check to the Arkansas Foodbank Network today . . . The funding is from part of a 2006 settlement with Berkeley Premium Nutraceuticals, Inc., an Ohio-based company that is now out of business.”); Press Release, Cal. Att'y Gen. Edmund D. Brown, Jr., Attorney General Brown Announces Landmark \$8.68 Billion Settlement with Countrywide (Oct. 6, 2008), available at <http://ag.ca.gov/newsalerts/release.php?id=1618&> (“Attorney General Edmund G. Brown Jr. today announced a landmark, multi-state settlement with Countrywide Home Loans . . . that is expected to provide up to . . . \$3.5 billion to California borrowers.”); Press Release, Conn. Att'y Gen. Richard Blumenthal, Attorney General Announces Mailing of \$60,000 in Lakeview Restitution Checks (June 28, 2010), available at <http://www.ct.gov/ag/cwp/view.asp?A=2341&Q=462338> (“Attorney General Richard Blumenthal today announced that his office has mailed \$60,000 in restitution checks to consumers who paid a Bridgeport company for headstones that were never delivered.”); Press Release, Fla. Att'y Gen. Bill McCollum, Attorney General Reaches \$4.5 Million Settlement with Office Depot for Florida Refunds, available at <http://www.myfloridalegal.com/newsrel.nsf/newsreleases/370FC8DA33D527C9852577380060920D> (“Attorney General Bill McCollum today announced that his office has negotiated a settlement with Office Depot, Inc. . . . Under the settlement, Office Depot will pay approximately \$4.5 million in refunds to eligible Florida customers”); Press Release, Office of N.Y. State Att'y Gen., AG Cuomo Announces Over \$100,000 in Restitution Going to Consumers Victimized by 3 Car Dealerships, available at http://www.ag.ny.gov/media_center/2010/apr/apr26a_10.html (“Attorney General Andrew M. Cuomo today announced that his office is distributing more than \$100,000 in restitution to customers of two auto dealerships in the Hudson Valley and Long Island that misrepresented used cars for sale.”); *Accomplishments*, BEAU BIDEN, DELAWARE'S ATT'Y GEN., <http://www.beaubiden.com/about/accomplishments/> (last visited Apr. 20, 2011) (“[Delaware Attorney General Beau Biden] has expanded the Victims Compensation Assistance Program's (VCAP) operations to help victims of violent crime recover, reaching more Delawareans than ever before and awarding more than \$2.3 million to victims so far this year”); *Attorney General Jon Bruning*, OFFICE OF THE NEB. ATT'Y GEN., <http://www.ago.state.ne.us/your/jonbruning/biography.htm> (last visited Apr. 20, 2011) (“An average of more than \$900,000 a year has been returned to victims of scams since Bruning took

Although compensating citizens features prominently among the justifications for *parens patriae* authority under federal law,¹⁵⁴ injured citizens do not always enjoy a direct financial benefit from state enforcement actions.¹⁵⁵ *Cy pres* distributions, in which the proceeds of enforcement are turned over to charities that serve as rough proxies for the individuals injured by the defendant's conduct, are common.¹⁵⁶ The attorney general may have substantial discretion over the ultimate destination of such funds,¹⁵⁷ which can raise concerns about a possible political quid pro quo when the money goes to political supporters or potential supporters.¹⁵⁸

In other cases, monetary recoveries end up in the state's own coffers.¹⁵⁹ Of course, to say that "the state" keeps the money is different from saying that the attorney general turns a profit.¹⁶⁰ Nevertheless, financial recoveries deliver important advantages to state enforcers.

office."); *Attorney General Recovers \$11.1 Million in Motorcycle Insurance Overcharges for Consumers*, MARTHA COAKLEY, http://www.marthacoakley.com/news/press_releases/details/2010-01-attorney-general-martha-coakley-recovers-111-million- ("Attorney General Martha Coakley's Office entered into settlements with [companies offering insurance for motorcycles] . . . , which return \$11.1 million to consumers"); *Biography*, OFFICE OF THE MINN. ATT'Y GEN., <http://www.ag.state.mn.us/Office/AGBio.asp> (last visited Apr. 20, 2011) ("Attorney General Swanson's lawsuits against insurance companies that sold unsuitable policies to senior citizens resulted in almost \$1 billion in refund offers to consumers.").

¹⁵⁴ See *supra* note 65 and accompanying text (discussing victim compensation as goal of state enforcement); see also First, *supra* note 9, at 1039–40 (emphasizing states' comparative advantage at delivering remedies to consumers).

¹⁵⁵ See Calkins, *supra* note 151, at 436 ("[D]espite the recovery by some state attorneys general of substantial monetary damage awards [in antitrust cases], individual consumers have received little in the way of monetary awards."). For cases in which consumers have received direct payments as a result of state enforcement, see Hubbard & Yoon, *supra* note 9, at 507 n.47.

¹⁵⁶ See generally Farmer, *supra* note 65 (describing *cy pres* distributions).

¹⁵⁷ JEFFREY S. NIELSON & JEFFREY P. YUSHCHAK, U.S. CHAMBER INST. FOR LEGAL REFORM, REPORT ON POLICIES AND PRACTICES OF STATE ATTORNEYS GENERAL IN INITIATING AND CONDUCTING INVESTIGATIONS AND LITIGATION 3 (2007), available at http://www.instituteforlegalreform.com/get_ilr_doc.php?id=1066.

¹⁵⁸ See Posner, *supra* note 9, at 258 ("I worry that state attorneys general will try to channel the moneys recovered in their suits to charitable uses that will advance their political agenda."); Ann Davis, *To Some, Santa Has a New Name: Spitzer; New York Attorney General Turns Settlement Funds into Gifts; Will it Grease an Election Sleigh?*, WALL ST. J., Dec. 24, 2003, at C1 (noting that "the groups receiving the windfall [from Spitzer's civil settlements] also represent voter constituencies that could be key to Mr. Spitzer's widely expected Democratic run for governor in 2006").

¹⁵⁹ For example, \$75 million in fines and penalties that New York collected in the Wall Street settlements, described in the previous Section, went into the state's general treasury. Davis, *supra* note 158; see also NIELSON & YUSHCHAK, *supra* note 157, at 15 (explaining that five of thirteen attorneys general surveyed reported that "settlement proceeds are generally deposited in the state's general fund").

¹⁶⁰ Cf. Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 926 (2005) ("Democratic representatives . . . have no obvious personal

Especially in small states, large damage awards can make an important difference to the state budget. Consider the master tobacco settlement, in which tobacco companies agreed to pay states more than \$200 billion over twenty-five years.¹⁶¹ Though the money was intended for health- and smoking-related initiatives, several states announced that they would use it to balance their general budgets.¹⁶² If nothing else, such budgetary windfalls give attorneys general powerful bragging rights.¹⁶³

State enforcers may reap an even more direct reward from enforcement, because the arm of the state that retains money earned in litigation is often the attorney general's office itself.¹⁶⁴ Many federal statutes that authorize state enforcement also explicitly provide for the payment of fees and costs to successful attorneys general.¹⁶⁵ Attorneys general also may retain funds paid as damages or civil penalties. Depending on state law, the ultimate destination of those funds

incentive to engorge governmental coffers since, absent the most blatant forms of corruption, they derive no immediate benefit from money flowing through the treasury.”).

¹⁶¹ See Dagan & White, *supra* note 131, at 371–73 (describing settlement). Not surprisingly, researchers have found that the decision to enter the litigation against the tobacco companies was influenced by the expected value of the recovery. Rorie L. Spill, Michael J. Licari & Leonard Ray, *Taking on Tobacco: Policy Entrepreneurship and the Tobacco Litigation*, 54 POL. RES. Q. 605, 616 (2001).

¹⁶² Dagan & White, *supra* note 131, at 371–72.

¹⁶³ See Provost, *supra* note 99, at 45 (“[S]ettlements [that] produce monetary benefits for the state and for consumers and voters . . . are significant accomplishments that attorneys general can advertise when they run for reelection or for higher office.”). Attorneys general—particularly those who are facing upcoming elections—take pains to publicize damage recoveries. For example, the campaign website for Terry Goddard, who unsuccessfully ran for governor of Arizona while serving as Attorney General, stated that he “put together an exemplary record of financial responsibility . . . [, producing] more than \$267 million for the state and its consumers in settlements, restitution, penalties and other recoveries” in FY 2010 alone. *Accomplishments*, TERRY GODDARD, <http://terrygoddard.com/record> (last visited Apr. 20, 2011). During her successful re-election campaign, the official state website of Illinois Attorney General Lisa Madigan stated that in 2008 she had “[c]ollected \$1,000,945,708.06 on behalf of the People of the State of Illinois.” *About Us*, ILL. ATT’Y GEN., <http://www.ag.state.il.us/about/index.html> (last visited Apr. 20, 2011).

¹⁶⁴ Attorneys general may also retain funds, collectively, through NAAG. See, e.g., Daniel Fisher, *The House Tobacco Built*, FORBES MAG., Sept. 1, 2008, at 98, 98–99 (discussing \$140 million fund administered by NAAG as result of tobacco litigation, and \$2.8 million “milk fund,” named for settlement of school-milk case, used by NAAG to pay economists and other experts).

¹⁶⁵ See, e.g., 15 U.S.C. § 15c(a)(2) (2006) (recovery of attorneys fees and costs for state antitrust enforcement); 15 U.S.C. § 1681s(c) (2006) (same for state enforcement of consumer credit reporting laws); 15 U.S.C. § 7706(f)(4) (2006) (same for state enforcement against internet spammers); 49 U.S.C. §§ 32709(d)(1)(B), 32710(b) (2006) (same for state enforcement regarding odometer tampering). Courts sometimes have interpreted statutes that are silent as to states as permitting fee awards as well. See, e.g., *New York v. 11 Cornwell Co.*, 718 F.2d 22, 24–25 (2d Cir. 1983) (holding that state may recover fees under 42 U.S.C. § 1988 when it sues as *parens patriae* under federal civil rights statute).

may be the attorney general's office or a revolving fund devoted to a certain category of enforcement.¹⁶⁶ The consequence of this “‘eat what you kill’ approach”¹⁶⁷ is that state enforcement may be largely self-financing.¹⁶⁸

Finally, the lawyers in charge of state enforcement may in fact be private attorneys. State attorneys general frequently reach out to private counsel to assist with the state's business, including enforcement of federal law. Fee arrangements vary, but private counsel sometimes work for states on a contingency-fee basis.¹⁶⁹ Plainly, such attorneys

¹⁶⁶ See First, Statement, *supra* note 115, at 11 (“Some states use ‘revolving fund’ appropriations which require agencies to self-fund their efforts through recovery of litigation fees in much the same way as private law firms do; others fund through general legislative appropriations.”). For example, several states have created antitrust revolving funds that are controlled by the attorney general and consist of a percentage of antitrust recoveries and—in some states—fee awards. See, e.g., ARIZ. REV. STAT. ANN. § 41-191.01 (2004) (depositing greater of ten percent of antitrust recoveries or actual amount expended into revolving fund); CAL. BUS. & PROF. CODE § 16750 (West 2008) (depositing greater of ten percent of antitrust recoveries plus attorneys’ fees or actual amount expended into revolving fund); KAN. STAT. ANN. § 75-715 (Supp. 2009) (depositing twenty percent of antitrust recoveries into revolving fund); OHIO REV. CODE ANN. § 109.82 (West 2002) (depositing ten percent of antitrust recoveries plus fees and costs into revolving fund); WASH. REV. CODE ANN. § 43.10.215 (West 2009) (antitrust fees and funds transferred to revolving fund pursuant to court order or judgment in antitrust actions). Even in states that do not have an antitrust revolving fund, attorneys general may retain funds for antitrust enforcement pursuant to a court order. See, e.g., N.Y. STATE FIN. LAW § 121(1) (McKinney Supp. 2010) (“[E]very state officer . . . receiving money for or on behalf of the state from fees, penalties, forfeitures, costs, fines, refunds, reimbursements, sales of property or otherwise, shall . . . pay into the state treasury all such moneys . . .”). For an example outside the antitrust context, see CAL. BUS. & PROF. CODE § 17206(c)–(d) (West 2008) (providing that funds recovered by attorney general through consumer-protection litigation must be used to further enforce consumer protection law). See also BRANN, *supra* note 90, at 5 (“In some states, the consumer protection division [of the attorney general’s office] is funded, often to a significant extent, by recoveries obtained by the division . . .”).

¹⁶⁷ BRANN, *supra* note 90, at 5.

¹⁶⁸ See Folsom, *supra* note 90, at 958 (“Public antitrust enforcement at the state and local levels is often perceived as ‘paying for itself.’ In many instances this is quite literally true.”).

¹⁶⁹ Such arrangements gained notoriety in the context of the states’ litigation against the tobacco industry, in which thirty-six states employed private attorneys to assist in the litigation “because of the fear that the state legislature would not appropriate funds needed for suits against the major tobacco companies.” Zimmerman, *supra* note 91, at 84. For a thoughtful assessment of the use of contingency fee arrangements, see generally Leah Godesky, Note, *State Attorneys General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?*, 42 COLUM. J.L. & SOC. PROBS. 587 (2009). Courts have accepted the use of contingent-fee arrangements in public litigation, provided that government attorneys exercise meaningful control. See *Cnty. of Santa Clara v. Superior Court*, 235 P.3d 21, 36 (Cal. 2010) (“[R]etention of private counsel on a contingent-fee basis is permissible in [public-nuisance] cases if neutral, conflict-free government attorneys retain the power to control and supervise the litigation.”); *State v. Lead Indus. Ass’n*, 951 A.2d 428, 475 (R.I. 2008) (holding that contingency fee agreement between attorney general and private counsel is permissible in civil case, provided that attorney general retains “absolute and total control over all critical decision-making” (emphasis omitted)).

have a strong incentive to maximize damage recoveries.¹⁷⁰ While the attorneys general themselves do not collect contingency fees, they may gain additional political support from powerful local attorneys.¹⁷¹

State enforcers' ability to recover funds for their constituents, political supporters, state treasuries, and their own offices affects their incentives to enforce. State enforcers may not pursue financial penalties with the single-minded focus that theorists associate with private parties, but they are not immune to the pull of money. The prospect of financial recoveries may lead state attorneys general to choose different cases than their federal counterparts do.¹⁷² Even when state and federal enforcers go after the same defendant, states may be looking for something different—money.¹⁷³ And states' ability to fund enforcement with enforcement means that state enforcement can proceed even when the public resources devoted to enforcement are limited.

¹⁷⁰ See Erichson, *supra* note 152, at 36 (“In contrast to the government lawyer’s incentives, the contingent fee lawyer’s incentives are more entrepreneurial than political. Generally, the contingent fee lawyer’s primary incentive is to maximize the monetary recovery, which corresponds with the primary interest of most private plaintiffs.”).

¹⁷¹ See generally Peter W. Huber, *Guns, Tobacco, Big Macs—and the Courts*, COMMENTARY, June 1999, at 32, 36 (“A state attorney general eyeing his next campaign for Senator or Governor can give his own political fortunes a boost by bringing home a billion or two from an out-of-state industry, and sharing 30 percent with prominent citizens back home.”); JOHN FUND, U.S. CHAMBER INST. FOR LEGAL REFORM, CASH IN, CONTRACTS OUT: THE RELATIONSHIP BETWEEN STATE ATTORNEYS GENERAL AND THE PLAINTIFFS’ BAR 6–11 (2004), available at http://www.instituteforlegalreform.com/get_ilr_doc.php?id=820 (citing numerous examples of attorneys general awarding contingency-fee contracts to campaign contributors).

¹⁷² See Erichson, *supra* note 152, at 21 (“Some commentators have criticized the state attorneys general for behaving too much like private plaintiffs’ lawyers. The Wall Street Journal complained of the ‘sue-the-socks-off-em compulsions’ of the state attorneys general, arguing that ‘the attorneys general increasingly have become little more than deputized posses running raids against the private sector.’” (quoting Editorial, *Who’s Next*, WALL ST. J., Apr. 4, 2000, at A26)); Folsom, *supra* note 90, at 958–59 (“[T]he self-supporting nature of state antitrust law enforcement . . . provides a ready argument for defense counsel that state antitrust enforcement actions are brought to fill the coffers of public prosecutors.”); FUND, *supra* note 171, at 15 (“The pattern set by the state AGs and their plaintiff-lawyer allies is clear: First, find an industry with deep pockets, then make a squeeze play.”); Provost, *supra* note 99, at 44 (“[M]any allies of business have accused some attorneys general of filing frivolous lawsuits and using huge cash settlements to fill state coffers.”).

¹⁷³ See Mahinka & Sanzo, *supra* note 133, at 233 (“[T]he states have focused in settlement agreements on the recovery of civil penalties and administrative costs . . . [t]o a much greater degree than the federal antitrust and consumer protection agencies.”); see also First, *supra* note 9, at 1039 (“If there is one consistent threat to state antitrust enforcement in the past sixty years, it is the effort to collect money damages for violations of the antitrust laws.”); cf. BRANN, *supra* note 90, at 5 (explaining that states in which consumer protection enforcement is funded by recoveries tend to place “emphasis . . . on settling cases, as opposed to engaging in lengthy, expensive, and uncertain, litigation” and that “settlements are then structured to make sure that they include a financial component”).

B. *The Power of Enforcement*

We have seen that state enforcement differs in important respects from enforcement by federal agencies. To some extent, the divergence between state and federal enforcement maps onto the divergence between state and federal law: We can expect states to act differently because they represent different sets of interests. Yet the analogy between enforcement and regulation only goes so far. State enforcement is distinguished not only by the familiar divisions between state and federal interests, but also by features that are peculiar to enforcement: the characteristics of elected attorneys general compared to specialist federal agencies and the influence of financial incentives.

Enforcement authority is also different from regulatory authority as a channel for state influence. Enforcement has gone largely unnoticed by students of federalism, who tend to “identif[y] preserving state regulatory autonomy as central to the project of federalism.”¹⁷⁴ When viewed from that perspective, the omission is understandable. After all, states are enforcing *federal* law. But the differences between state and federal enforcement described above do not depend on variations in the underlying law being enforced. On the contrary, enforcement opens up avenues for state influence even when state actors are enforcing a federal rule. States can influence policy by adjusting the level of enforcement and by pressing novel interpretations of federal law. And states’ choices regarding enforcement can have important practical consequences both within each state and nationwide, as courts, federal enforcers, and regulated entities respond to states’ efforts. Enforcement therefore warrants attention as a distinct source of state power—a power that can exist even where states do not have, or have not exercised, regulatory authority.

1. *Policy Making Through Enforcement*

To see how enforcement can operate as an instrument for state-level policy making, consider the Consumer Product Safety Improvement Act (CPSIA).¹⁷⁵ Enacted in 2008, the Act aims to strengthen federal consumer product safety standards, in part by adding a provision for state enforcement.¹⁷⁶ Among other things, the CPSIA banned the manufacture and sale of children’s toys containing

¹⁷⁴ Metzger, *supra* note 76, at 2026 n.4.

¹⁷⁵ Pub. L. No. 110-314, 122 Stat. 3016 (2008) (codified at 15 U.S.C. § 2057c (Supp. III 2010)).

¹⁷⁶ For a comprehensive discussion of the CSPIA and the various agency failures that prompted its enactment, see Widman, *supra* note 9, at 179–91. Widman celebrates state enforcement of the CSPIA as a way for states to give effect to federal law in instances where the relevant federal agency underenforces. *Id.* at 213–14.

“concentrations of more than 0.1 percent” of certain chemicals—known as phthalates—which are used to soften plastic.¹⁷⁷ Although there are questions at the margins about what constitutes a children’s toy,¹⁷⁸ there is a core set of products to which the ban clearly and unequivocally applies. Even in those circumstances where the federal rule operates unambiguously, enforcement authority allows states to influence policy by adjusting the intensity of enforcement and hence the degree to which manufacturers are deterred from using phthalates. States with a strong commitment to consumer protection can devote resources to identifying and pursuing violations, while those that wish to court business from toy manufacturers can abstain from enforcement. Indeed, there is some evidence to suggest that the decision by an elected attorney general to take action in the consumer-protection field is influenced by citizen ideology: Attorneys general from “liberal” states do more, while those from “conservative” states do less.¹⁷⁹

The range of enforcement discretion increases when there is room for debate about the meaning of federal law. For example, states have expressed disagreement with federal regulators’ interpretations of the scope of the phthalates ban. The statute provides that, as of February 10, 2009, “it shall be unlawful for any person to manufacture for sale [or] offer for sale” products containing phthalates.¹⁸⁰ The federal Consumer Product Safety Commission (CPSC) issued an advisory opinion letter stating that it would not enforce the ban against products manufactured before the effective date, even if they were sold after it.¹⁸¹ Several nonprofit advocacy groups successfully challenged the CPSC’s interpretation as contrary to the Act.¹⁸² Connecticut Attorney General Richard Blumenthal filed an amicus brief in sup-

¹⁷⁷ 15 U.S.C. § 2057c(a) (Supp. III 2010) (“Beginning on the date that is 180 days after August 14, 2008, it shall be unlawful for any person to manufacture for sale, offer for sale, distribute in commerce, or import into the United States any children’s toy or child care article that contains concentrations of more than 0.1 percent of di-(2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP), or benzyl butyl phthalate (BBP).”).

¹⁷⁸ See Andrew Martin, *Crackdown on Toy Safety Rules Proves No Fun for Toy Makers*, N.Y. TIMES, Sept. 29, 2010, at A1 (discussing uncertainties about scope of CPSIA).

¹⁷⁹ Provost, *supra* note 99, at 51.

¹⁸⁰ 15 U.S.C. § 2057c(a).

¹⁸¹ Advisory Opinion Letter from Cheryl A. Falvey, Gen. Counsel, Consumer Product Safety Comm’n, to Georgia C. Ravitz (Nov. 17, 2008), available at <http://www.crowell.com/PDF/CPSC-Phthalates-Opinion-Letter-and-Memorandum.pdf>; see also *Natural Res. Def. Council, Inc. v. Consumer Prod. Safety Comm’n*, 597 F. Supp. 2d 370, 375 (S.D.N.Y. 2009) (describing CPSC’s interpretation). For a more detailed discussion of the battle over the phthalates ban, see Widman, *supra* note 9, at 186–88.

¹⁸² See *Natural Res. Def. Council*, 597 F. Supp. 2d at 390 (rejecting CPSC’s interpretation as “contrary to the language and structure of the CPSIA[] and . . . inconsistent with the CPSA’s purpose and the CPSIA’s legislative history”).

port of the plaintiffs and argued that the federal agency had misinterpreted the statute and offering a contrary assessment of Congress's intent. Blumenthal later issued a press release trumpeting the plaintiffs' win and vowing to "take whatever steps are necessary to ensure that this phthalate ban is enforced."¹⁸³

The potential for divergence between state and federal approaches to enforcement is even greater in areas where federal law is written in broad terms—particularly where no federal agency has authority to narrow and clarify the law through binding regulations. Antitrust is an example. As noted in the previous Section, states have adopted guidelines on vertical restraints that depart from the standards followed by federal enforcement agencies. States also have taken a distinctive approach to antitrust merger enforcement. Although state and federal merger enforcement differ in several respects,¹⁸⁴ perhaps the most prominent disagreement centers on the relevance of a proposed merger's impact on local jobs. The NAAG Horizontal Merger Guidelines recognize that, in addition to competitive consequences, mergers "may also have other consequences that are relevant to the social and political goals of section 7 [of the Clayton Act]. For example, mergers may affect the opportunities for small and regional business to survive and compete."¹⁸⁵ Those consequences, the Guidelines continue, "may affect the Attorneys General's ultimate exercise of prosecutorial discretion"¹⁸⁶ The federal guidelines make no mention of such considerations.¹⁸⁷ Critics argue that states' concern about the loss of local businesses and jobs is

¹⁸³ Press Release, Conn. Att'y Gen. Office, Attorney General Praises Decision Blocking Manufacturers From Allowing Sale of Toxic Toys (Feb. 6, 2009), available at <http://www.ct.gov/ag/cwp/view.asp?A=3673&Q=433514>; see also Widman, *supra* note 9, at 194–97 (discussing additional clash between Blumenthal and CPSC). California Attorney General Edmund G. Brown, Jr. has likewise expressed disagreement with the CPSC's interpretation of the statute's text and its reading of congressional intent. Letter from Edmund G. Brown, Jr., Cal. Att'y Gen., to Cheryl A. Falvey, Gen. Counsel, U.S. Consumer Prod. Safety Comm'n (Mar. 25, 2009), available at http://ag.ca.gov/prop65/pdfs/CA_phthalate_letter.pdf.

¹⁸⁴ See Nat'l Ass'n of Att'ys Gen., Horizontal Merger Guidelines, at 5–13 (1993) [hereinafter NAAG, Horizontal Merger Guidelines], available at http://www.naag.org/assets/files/pdf/at-hmerger_guidelines.pdf (discussing various points of divergence between state and federal approaches to antitrust merger enforcement); see also David A. Zimmerman, Comment, Why State Attorneys General Should Have a Limited Role in Enforcing the Federal Antitrust Law of Mergers, 48 EMORY L.J. 337, 349–59 (1999) (same).

¹⁸⁵ NAAG, Horizontal Merger Guidelines, *supra* note 184, at § 2.

¹⁸⁶ *Id.*

¹⁸⁷ See U.S. Dep't of Justice and the Fed. Trade Comm'n, Horizontal Merger Guidelines (Aug. 19, 2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.html>.

inconsistent with the statutory text and congressional intent,¹⁸⁸ while states' defenders insist that "preserving the competitive process requires preserving separate competitors, and jobs are part of preserving that separate decision maker."¹⁸⁹ Such a fundamental disagreement about the basic goals of federal law is made possible by the nature of the relevant statute, which defines prohibited mergers in vague terms and relies on courts rather than an agency to flesh out the details.¹⁹⁰

As some of these examples suggest, enforcement authority creates opportunities for states to influence policy not only within their own borders, but also on a national scale. State enforcement may change the federal "law in the books" by generating judicial decisions that clarify the scope of the law. In the 1980s, for example, nineteen states banded together to sue a group of domestic and foreign insurers and reinsurers. The states alleged collusive activity in violation of federal antitrust law. They had urged the Department of Justice to pursue similar claims, but federal enforcers took the view that "collusion is highly unlikely in unconcentrated industries like the property and casualty insurance industry."¹⁹¹ Nevertheless, the states' lawsuit was successful and resulted in a Supreme Court decision defining the extent of the insurance exemption¹⁹² establishing "an expansive scope for U.S. antitrust enforcement against foreign conduct by foreign parties."¹⁹³ The decision has been described as one of the "ten milestones in 20th century antitrust law,"¹⁹⁴ and federal enforcers rely on its precedent in many international cartel cases today.¹⁹⁵

¹⁸⁸ See Zimmerman, *supra* note 184, at 347 n.49 ("The protection of small business has been discussed as a goal of antitrust law since the Sherman Act, but scholars generally agree that such a goal is inconsistent with the legislative history of the antitrust laws and with sound public policy."); see also DeBow, *supra* note 94, at 276 (discussing "state merger case shot through with parochialism" in which "district judge noted that 'nothing in the Clayton Act or other federal antitrust laws addressed [the state's] concern about [a local] plant closing'").

¹⁸⁹ Hubbard & Yoon, *supra* note 9, at 513.

¹⁹⁰ 15 U.S.C. § 18 (2006) (defining prohibited mergers as acquisitions whose "effect . . . may be substantially to lessen competition, or to tend to create a monopoly").

¹⁹¹ Michael F. Brockmeyer, *State Antitrust Enforcement*, 57 ANTITRUST L.J. 169, 170 (1988) (internal quotation marks omitted).

¹⁹² *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

¹⁹³ ROBERT SKITOL, DRINKER BIDDLE, TEN MILESTONES IN 20TH CENTURY ANTITRUST LAW AND THEIR IMPORTANCE TO THE DECADE AHEAD (1999), <http://www.drinkerbiddle.com/publications/Detail.aspx?pub=317&servicesearch=0>.

¹⁹⁴ *Id.*

¹⁹⁵ Kevin J. O'Connor, *Is the Illinois Brick Wall Crumbling?*, 15 ANTITRUST 34, 38 n.32 (2000). For other examples of pathbreaking antitrust decisions spurred by state action, see Hubbard & Yoon, *supra* note 9, at 516–20, and Jay L. Himes, Chief, Antitrust Bureau, Office of the Att'y Gen. of the State of N.Y., Federal "Un-emption" of State Antitrust Enforcement, Remarks at the Antitrust, Competition and Trade Committee of LEX

State enforcement also may have wide-ranging effects when state practices prompt a shift in enforcement by federal agencies. For example, one commentator has suggested that the FTC's decision to reconsider its use of restitution as a remedy for antitrust violations was spurred by states' pursuit of monetary remedies.¹⁹⁶ Similarly, states' enforcement efforts may have nationwide consequences because of their impact on the regulated community, even if the law on the books remains the same. One state's aggressive enforcement can prompt potential defendants to change their practices across the board.¹⁹⁷ The impact is amplified when multiple states work together.¹⁹⁸

2. *Enforcement as a Distinct Form of State Authority*

I have argued that enforcement authority enables states to shape policy at both the state and national level. That is not to say, however, that enforcement is a substitute for regulatory authority. States unquestionably enjoy more power when they are able to write the rules as well as enforce them. Nevertheless, it would be a mistake to view enforcement as nothing more than a watered-down version of legislation or implementation of a federal scheme that leaves room for state regulation. Enforcement authority may be available in areas

MUNDI 13–14 (May 14, 2004), available at <http://www.abanet.org/antitrust/at-committees/at-state/pdf/publications/other-pubs/unemption.pdf>.

¹⁹⁶ First, Statement, *supra* note 115, at 14–15; cf. John C. Coffee, Jr., *The Spitzer Legacy and the Cuomo Future*, 329 N.Y. L.J. 5, 6 (Mar. 20, 2008) (arguing that competition with Eliot Spitzer caused “the total amount of SEC-obtained restitution plus penalties . . . [to] rise[] hyperbolically”).

¹⁹⁷ See Steven J. Cole, *State Enforcement Efforts Directed Against Unfair or Deceptive Practices*, 56 ANTITRUST L.J. 125, 133 (1987) (“Much of the remedies in state consumer protection actions really have been national in scope. One reason is simply the question of market necessity. So, a locally-imposed remedy by New York State in the case of Nutrasweet labeling on soda cans was applied nationally by 7-Up, Coca-Cola, and the others.”); Posner, *supra* note 9, at 259 (“The danger is that interstate businesses will be forced to conform their business practices to the most restrictive state interpretation of federal antitrust law.”); Rose, *supra* note 9, at 2205 (“[M]arket participants will predictably respond to the signals of the strictest enforcer with authority over them and conform their behavior accordingly.”).

¹⁹⁸ See Thomas A. Schmeling, *Stag Hunting with the State AG: Anti-Tobacco Litigation and the Emergence of Cooperation Among State Attorneys General*, 25 LAW & POL'Y 429, 430 (2003) (“Acting together, the [state attorneys general] have won legal settlements or concessions from tobacco companies, auto manufacturers, toy makers, paint producers, and others, agreements that would have been quite unlikely if sought by individual [state attorneys general] acting alone.”); Waltenburg & Swinford, *supra* note 104, at 248 (“[The states] have come to recognize that they actually can affect and shape national policy through coordinated law enforcement efforts . . .”).

where regulatory authority is not.¹⁹⁹ Enforcement also empowers different actors, creating new opportunities for state influence.

As explained in the previous Section, federal statutes that authorize state enforcement typically name the state attorney general as the relevant state actor. By contrast, federal statutes that provide for state implementation tend to rely on a specialist state agency to partner with the relevant federal agency. Indeed, such statutes often contain “single agency” requirements that “essentially force state governments to delegate responsibility for administering a federally funded program to a single state agency that specializes in the program.”²⁰⁰ Scholars have shown that state bureaucracies share much in common with their federal counterparts; their mutual specialization may outweigh federal-state differences. This idea is captured by the picket-fence metaphor, where appointed state and federal agency specialists are represented by the vertical fence posts and elected state and federal generalists by the horizontal rails.²⁰¹ As the image suggests, state agencies may be defined more by their subject-matter specialization—a feature they share with a federal agency—than by their affiliation with state government.²⁰²

State attorneys general represent a different breed of state actor. While attorneys general and their staff may have connections with certain federal agencies, those connections seldom resemble the interdependent web that marks many federal-state agency relationships. As generalists, attorneys general must develop positions on a range of policy issues and negotiate among competing initiatives. As elected officials, attorneys general have ample incentive to make a name for themselves by challenging federal orthodoxy.

State attorneys general also may differ politically from other state actors, such as legislators and governors. It is not uncommon for a state’s attorney general to hail from a different political party than both the governor and the majority of the state’s legislators. That political diversity increases the range of viewpoints that may be represented by “the state” in its interactions with the federal government.

¹⁹⁹ See *supra* notes 71–72 and accompanying text (providing examples of federal statutes that permit state enforcement of federal law yet preempt state law).

²⁰⁰ Hills, *supra* note 76, at 860 n.167.

²⁰¹ *Id.* at 883 n.241 (discussing “picket-fence” federalism and citing TERRY SANFORD, STORM OVER THE STATES 80 (1967)); see also Sharkey, *supra* note 77, at 2158 n.128 (“[A] precondition for . . . cooperative federalism is likely the existence of intricately linked state and federal agencies, with built-in incentives and opportunities for communication as well as constructive collaboration.”).

²⁰² It does not follow that state and federal agencies will always agree, of course. For examples of “uncooperative federalism,” including state-federal agency clashes, see Bulman-Pozen & Gerken, *supra* note 76, at 1271–84.

Indeed, the same may be true even in the absence of political party differences. As one commentator has explained,

even when from the same party, the [attorney general and governor] can [be], and often are, divided by personal rivalries or ideological differences. And even when the two officers agree on a particular issue, they may compete with each other to be the most aggressive in addressing the issue to curry favor with a particular constituency.²⁰³

By empowering state attorneys general, federal law facilitates such competition among state actors. The most obvious example is where federal law authorizes the state attorney general to enforce rules that the state legislature could have enacted on its own—but did not. This possibility is not merely hypothetical: Several federal statutes that permit state enforcement were enacted precisely because state law was lacking.²⁰⁴

Even where other state actors already play a role in enforcing a rule, the state attorney general may choose a different approach. Consider the multi-state litigation against coal-burning power plants in the Midwest. In 1999, New York's attorney general, Democrat Eliot Spitzer, adopted a "novel legal strategy aimed at reducing smog and acid rain in the Northeast" and announced his intention to sue plants in several other states under an "untested provision" of the federal Clean Air Act.²⁰⁵ New York's Department of Environmental Conservation—which "operate[d] at the pleasure of Gov[ernor] George E. Pataki, a Republican"—took a different approach to the same problem.²⁰⁶ Rather than going after plant owners directly, the state agency had petitioned the federal Environmental Protection Agency to act.²⁰⁷ The EPA's efforts had been hampered by a series of legal challenges by midwestern states and utilities.²⁰⁸ Six weeks after Spitzer's announcement, however, the EPA used Spitzer's new legal theory to launch an "unprecedented" enforcement initiative against

²⁰³ Marshall, *supra* note 8, at 2453.

²⁰⁴ See *supra* note 72 and accompanying text (listing examples).

²⁰⁵ Editorial, *A Victory for Cleaner Air*, N.Y. TIMES, Nov. 20, 2000, at A26. For a description of the relevant provisions of federal law, see Rachel Zafrann, *New York's Novel Strategy for Combating Air Pollution*, 11 FORDHAM ENVTL. L.J. 59, 66–70 (1999).

²⁰⁶ Andrew C. Revkin, *In New Tactic, State Aims To Sue Utilities Over Coal Pollution*, N.Y. TIMES, Sept. 15, 1999, at A1.

²⁰⁷ *Id.*

²⁰⁸ See Bob Downing, *Fatal Beauty*, AKRON BEACON J. (Nov. 17, 2009, 7:02 PM), <http://www.ohio.com/lifestyle/downing/70327262.html> (describing EPA's regulatory efforts and industry responses); Revkin, *supra* note 206, at B5 (noting that round of "legal maneuvers by the states that are home to the old coal plants has delayed new [EPA] action to stanch the pollution").

more than 100 plants.²⁰⁹ New York and several other northeastern states intervened in the EPA's suit, which eventually yielded "the biggest settlement—in dollar terms, as well as promised reduction in pollutants—in the . . . history of the 1970 Clean Air Act."²¹⁰

Thus, enforcement authority may open up unique outlets for federal-state dialogue and state-driven policy. The federalism literature, with its heavy emphasis on state regulation, has ignored this feature of state enforcement. Yet state enforcement offers an opportunity for influence—and a distinctive form of influence—quite apart from regulatory authority.

III

ENFORCEMENT AUTHORITY AND THE VALUES OF FEDERALISM

The question remains whether state influence of this sort promotes the values commonly associated with decentralized decision making in a federal system. This Part explores the virtues and vices of enforcement authority from a federalism perspective. Although the conventional arguments for federalism focus on the advantages of regulatory competition, I show that competition over enforcement authority yields similar benefits. It does not follow, of course, that state enforcement of federal law will always be desirable. Decentralized regulatory authority creates risks as well as rewards, as regulations tailored to state interests may interfere with the broader national interest. So too for enforcement. State enforcement of federal law poses a threat to uniformity and may result in overenforcement. Those are valid concerns, but they do not apply with equal force to all exercises of state enforcement power and in most cases can be accommodated through careful structuring of state-enforcement provisions.

A. *Enforcement Authority and the Benefits of Decentralized Decision Making*

Properly understood, federalism is a means to an end.²¹¹ A federal system is desirable not for its own sake, but because decentralized decision making is thought to have various desirable consequences.²¹²

²⁰⁹ Press Release, U.S. Dep't of Justice, U.S. Expands Clean Air Act Lawsuits Against Electric Utilities (Mar. 1, 2000), available at <http://www.justice.gov/opa/pr/2000/March/090enrd.htm>.

²¹⁰ Editorial, *supra* note 205; see also *\$4.6B Pollution Payout Signals Major Shift*, CBS NEWS, Oct. 9, 2007, <http://www.cbsnews.com/stories/2007/10/09/business/main3346547.shtml> (discussing later settlement by defendant in related case).

²¹¹ Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 223 (2000).

²¹² Scholars have debated whether a federal system in fact produces the benefits associated with decentralization. See, e.g., Edward L. Rubin & Malcolm Feeley, *Federalism*:

First, federalism “increases opportunity for citizen involvement in democratic processes” by locating decision making authority in multiple, smaller units of government.²¹³ Second, federalism operates as “a check on abuses of government power” by distributing power among various sovereigns.²¹⁴ Finally, interstate competition over regulatory authority produces better policies, particularly when citizens can “vote with their feet” by moving from state to state.²¹⁵ Competition creates incentives for state-level decision makers to tailor policies to fit local circumstances and preferences. Because “preferences for government policies are unevenly distributed among the various localities, more people can be satisfied by decentralized decision making than by a single national authority.”²¹⁶ Regulatory competition also permits states to experiment with innovative policies,²¹⁷ serving—as Justice Brandeis famously put it—as “laborator[ies]” for the rest of the country.²¹⁸

1. Promoting Democracy

The first justification for decentralized power—promoting participatory democracy—translates easily from regulation to enforcement. Enforcement has significant practical effects on the lives of

Some Notes on a National Neurosis, 41 UCLA L. REV. 903 (1994) (questioning value of federalism). I assume for purposes of this discussion that federalism is (or at least can be) a good thing and ask whether decentralized enforcement produces the same sorts of consequences as decentralized regulatory authority. In the next Section, I identify the circumstances under which those consequences are desirable from the perspective of the federal system.

²¹³ *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); see also Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 7 (1988) (“The greater accessibility and smaller scale of local government allows individuals to participate actively in governmental decision making.”).

²¹⁴ *Gregory*, 501 U.S. at 458.

²¹⁵ Cf. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956) (“[T]he consumer-voter moves to that community whose local government best satisfies his set of preferences. The greater the number of communities and the greater the variance among them, the closer [he] will come to fully realizing his preference position.”). As others have recognized, there is good reason to question the premise of citizen mobility that underlies the metaphor of voting with one’s feet. See Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 387–88 (1997) (“People can and do move, but inertia is a large factor in why each of us lives where we do. Even when moves occur, they tend to be for reasons largely unrelated to government policy decisions: We move because our work takes us elsewhere, or because of marriage or some other personal need, or perhaps because of climate and health.”). As noted, *supra* note 212, my aim here is not to make the case for traditional defenses of federalism, but to investigate whether they make sense when applied to state enforcement rather than state regulation.

²¹⁶ Michael W. McConnell, *Federalism: Evaluating the Framers’ Design*, 54 U. CHI. L. REV. 1484, 1493 (1987).

²¹⁷ *Id.* at 1498–1500.

²¹⁸ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

citizens. As such, it is an important site for democratic input.²¹⁹ By authorizing enforcement by state attorneys general as well as a federal agency, Congress enhances citizens' ability to influence public enforcement of federal law. State enforcers may be more accessible and responsive than federal agencies, both because states are smaller units of government and because state attorneys general tend to be elected rather than appointed. To the extent that federal agencies are accountable to the people, it is by virtue of their relationship with elected officials such as the President.²²⁰ State enforcement removes the middleman.²²¹

State enforcement of federal law also opens up additional channels for democratic input within the state. As noted above, federal statutes can and sometimes do empower state attorneys general to enforce rules that state legislatures could have created under state law but did not. In these areas, federal policy makers have recognized the value of state-level treatment of an issue, but state regulators have not acted. At first blush, such statutes may seem pernicious from a federalism perspective, as they override the state's preference for inaction. However, attention to enforcement as a distinct form of state authority underscores the importance of breaking open the black box that represents "the state" to reveal the diverse group of state actors within.²²² Independently elected attorneys general may represent dif-

²¹⁹ See William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1339 (1993) ("If someone is to decide which laws will be aggressively enforced, which laws will be enforced occasionally, and which laws will never be enforced, it makes sense that the person who has to answer to the voters will make those determinations."). Scholars have made similar arguments about local prosecutors. See, e.g., Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 961 (1997) ("[S]ome formal mechanism is thought necessary to ensure that the 'people' have a voice in how [prosecutors] deploy[] resources in their name."); see also Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 57 (1998) ("[T]he current system of choosing state and local prosecutors through the electoral process was established for the purpose of holding prosecutors accountable to the people they serve.").

²²⁰ See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2332 (2001) ("[P]residential leadership establishes an electoral link between the public and the bureaucracy, increasing the latter's responsiveness to the former."); Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 68 (2008) ("While bureaucratic policy preferences are not directly responsive to voter interests, the president—who is responsive to voter interests, at least in expectation—has a number of tools at her disposal to shift the bureaucracy's ideal point.").

²²¹ Cf. Marshall, *supra* note 8, at 2475–76 (arguing that independent, directly elected federal attorney general would better serve goals of accountability and transparency).

²²² See Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law To Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201, 1201 (1999) ("In discussions about American federalism, it is common to speak of a 'state government' as if it were a black box, an individual speaking with a single voice. . . . [A] 'state' actually

ferent constituencies than other elected state officials because of political differences, and they may “hear” different citizen voices because of the distinctive ways their offices are set up to gather and respond to citizen complaints. As a result, state attorneys general may pursue initiatives that the legislature and the governor either overlook or affirmatively reject.

This is a virtue of the existing system, not a vice.²²³ To begin with, the failure of the state legislature to adopt a particular rule is not reliable evidence of legislative intent. There are many reasons why legislation may not be enacted even if a majority of legislators and their constituents favor it.²²⁴ Indeed, the legislature may not even have considered the rule in question. But enforcement by the attorney general may be appropriate even if it were clear that a majority of state legislators would vote against the relevant federal rule. State law recognizes various representatives in the judicial, legislative, and executive branches of state government—including the attorney general. Absent some indication from state law, there is no *a priori* reason to favor state legislatures as the “real” representatives of the states’ citizens.

In any event, the attorney general’s authority to enforce federal law is best understood as a default rule that the state legislature could change, either by foreclosing any state enforcement of federal law or by designating a different state actor as the authorized enforcer. Some federal statutes are explicit in this respect, stating that attorneys general can sue on behalf of the state unless the state enacts contrary legislation.²²⁵ Those statutes reverse the preexisting default, under

incorporates a bundle of different subdivisions, branches, and agencies”); Resnik et al., *supra* note 93, at 728 (“States are themselves aggregates of entities and of persons holding different (and sometimes conflicting) views of what constitutes that state’s ‘interest.’”).

²²³ See Bulman-Pozen & Gerken, *supra* note 76, at 1273 n.45 (“[A]scribing various state officials’ actions to the state itself highlights that many different actors can speak on behalf of the state. This diversity generates more channels for state dissent against federal policy and may be particularly important in the context of what we call the ‘administrative safeguards of federalism,’ where the state ‘administrators’ of federal policy include not just bureaucrats, but legislators and executives as well.”).

²²⁴ Cf. Lemos, *supra* note 79, at 460 (discussing possible barriers to congressional action).

²²⁵ Federal antitrust law is an example. See 15 U.S.C. § 15h (2006) (stating that provision for state *parens patriae* enforcement authority “shall apply in any State, unless such State provides by law for its nonapplicability in such State”). Other statutes specify the attorney general as the default state enforcer but make clear that states could empower different state actors. See, e.g., 15 U.S.C. § 5712(g)(2) (2006) (permitting other state actors authorized by State and FTC to enforce federal regulations governing pay-per-call services); 15 U.S.C. § 7706(f)(1) (2006) (authorizing enforcement of federal anti-spam legislation by “the attorney general, official, or agency of the state”); 47 U.S.C. § 227(f)(1) (2006)

which the legislature's failure to act also forecloses enforcement by the attorney general. Such a reversal seems entirely proper when the citizens' federal representatives and their attorney general have both deemed the issue important enough to warrant action. Given that state enforcement provisions appear primarily in federal statutes designed to protect consumers, the targets of state enforcement are likely to be business interests that are capable of making themselves heard in the state legislature should the need arise. By shifting the burden of inertia onto such groups, federal law can help promote democratic debate at the state level, ensuring that a statewide policy in favor of nonenforcement is made by the citizens' representatives (either the attorney general or the legislature) rather than by default.²²⁶

2. *Preventing Tyranny and Abuse*

Things become more complicated when we move to the second of the traditional defenses of federalism: preventing tyranny. As the Supreme Court has explained, “[j]ust as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”²²⁷ Whether the same argument can be applied to enforcement depends, in large part, on how one defines “tyranny and abuse.” Enforcement authority creates a state-level check against underenforcement by federal agencies.²²⁸ Thus, if the federal government ignores certain violations for illegitimate reasons—targeting Republicans but not Democrats, for example, or African Americans but not Caucasians—the states can level the playing field through their own enforcement efforts. States can provide a similar corrective for underenforcement by other states. And the potential for such gap-filling by individual states should reduce the likelihood of nonenforcement at the outset.²²⁹

(authorizing enforcement of federal common carrier legislation by attorney general “or an official or agency designated by a State”).

²²⁶ Cf. *Hills*, *supra* note 222, at 1248–49 (defending presumption against federal preemption on ground that it encourages Congress to confront issues and “in effect delegat[es the] solution to interest groups seeking national action, who must make the case before Congress for express intervention in state political structure”).

²²⁷ *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

²²⁸ See *Widman*, *supra* note 9, at 176–77 (explaining that enforcement authority enables states to step in when federal agencies fail to enforce).

²²⁹ Similarly, the availability of both state and federal enforcement enables federal enforcers to provide a corrective against underenforcement by states. Just as federal law

Note, however, that the ratchet only moves in one direction: toward more enforcement.²³⁰ States can increase enforcement, thereby reducing the risk of discriminatory nonenforcement and underdeterrence. But state enforcement does not create an effective check against abusive overenforcement by the federal government or other states. Each state can forgo enforcement itself, but it cannot prevent other enforcers from acting.

This problem is not unique to enforcement authority. For example, states lack the power to repeal the federal ban on marijuana possession, even if their own laws permit such possession for medical purposes.²³¹ Nevertheless, the presence of more permissive state laws can exert a powerful influence on public opinion—and, by extension, on federal decision makers.²³²

The same can be said of enforcement. States can object to federal enforcement practices through private communications with federal agencies or in public statements, press releases, and amicus briefs. Of course, states can voice such objections regardless of whether they are empowered to enforce the relevant law. Yet the fact that a state attorney general has authority to enforce federal law in a given circumstance, but has chosen not to do so, lends a certain gravitas to state-based objections. The existence of enforcement authority both validates states' connection to the statute and permits state enforcers to gain the expertise necessary for their enforcement decisions to be taken seriously.

may sometimes set a floor for state regulatory action, *see supra* note 74 and accompanying text, federal enforcement efforts establish a baseline level of enforcement that states are free to exceed. One could imagine a scenario, however, in which states had exclusive enforcement authority, serving as replacements for rather than supplements to federal agencies. Indeed, although every statute that currently authorizes state enforcement also empowers a federal agency enforcer, it may be the case that *as a practical matter* states are the only real enforcers in certain areas. Where states' enforcement powers are legally or functionally exclusive, the one-way ratchet problem discussed in the text below largely disappears—but it is replaced by heightened concerns about the possibility of underenforcement by states.

²³⁰ *See* Posner, *supra* note 9, at 259 (discussing “one-way character” of state antitrust enforcement).

²³¹ *See* *Gonzales v. Raich*, 545 U.S. 1, 9 (2005) (upholding federal prohibition on marijuana possession even as applied to persons who had obtained marijuana legally under California law for therapeutic use).

²³² *See* Press Release, Dep't of Justice, Attorney General Announces Formal Medical Marijuana Guidelines (Oct. 19, 2009), *available at* <http://www.justice.gov/opa/pr/2009/October/09-ag-1119.html> (discussing federal enforcement guidelines that “make clear that the focus of federal resources should not be on individuals whose actions are in compliance with existing state laws”); *see also* Merritt, *supra* note 213, at 5–6 (arguing that state governments can check federal authority through lobbying, litigation, and “by serving as a wellspring of political force,” even though they “can neither veto federal legislation nor declare it unconstitutional”).

3. *Improving Policy*

The next set of arguments for federalism focuses on the policy benefits of decentralized decision making. The conditions in Montana—social, political, economic, agricultural, and so forth—are different from the conditions in Florida, and state actors are better positioned than national legislators or bureaucrats to appreciate the fine points. State law, moreover, “can be adapted to local conditions and local tastes, while a national government must take a uniform—and hence less desirable—approach.”²³³ Citizens can choose among the resulting policy packages by moving from state to state, opting for the one that best fits their preferences.²³⁴ And states, which compete with each other for “productive assets” and “desirable people,” have incentives to create attractive policies.²³⁵ The upshot is that federalism offers a way to satisfy more citizen preferences than does centralized national rule.

State enforcement captures some of these benefits of decentralized regulatory authority. Citizens of different states may have different tastes for enforcement, and state enforcement can reflect those variations. Similarly, a local perspective may inform state enforcers’ interpretations of federal law, generating different approaches in different states and at the federal level. And state enforcers’ familiarity with local conditions enables them to identify violations that their federal counterparts might miss. As with regulation, therefore, state enforcement authority can help match enforcement policy to the preferences of local citizens.

Although a “citizen choice” justification for state enforcement has significant appeal, it is important not to overstate the case. One limitation is the one-way-ratchet problem identified above. While enforcement allows for some variation from state to state, states will find it difficult to satisfy the preferences of citizens who would prefer little or no enforcement, because they cannot prevent other states or the federal government from stepping in. Jurisdictional limitations may preclude states from using state law to reach out-of-state defendants, but those limitations evaporate when states are empowered to enforce federal law. This factor—often emphasized by states as an argument in favor of state enforcement provisions in federal statutes²³⁶—reduces the value of enforcement authority as a vehicle for citizen choice. A second difficulty with the “citizen choice” rationale is

²³³ McConnell, *supra* note 216, at 1493.

²³⁴ For the classic statement of this claim, see Tiebout, *supra* note 215, at 418.

²³⁵ Rubin & Feeley, *supra* note 212, at 920.

²³⁶ See *supra* notes 69–70 and accompanying text.

that the effects of state enforcement frequently spill over state lines. The decisions of one or a few states can effectively shape policy nationwide by generating judicial decisions that limit the range of enforcement choices going forward, inspiring a change in federal law or enforcement practices, or influencing private behavior.²³⁷

Again, these critiques are not limited to enforcement but apply with equal force to regulation. One state's demanding labeling requirements may affect products nationwide, and another state's lax environmental standards may increase pollution in neighboring states. Bigger and more powerful states may have an advantage over smaller states in these respects,²³⁸ which raises concerns about "horizontal aggrandizement."²³⁹ The key point for present purposes is that state enforcement authority—like state regulatory authority—has the potential to improve citizen choice, not that it always will.

Finally, state enforcement can function as a "laboratory," allowing states to "try novel social and economic experiments without risk to the rest of the country."²⁴⁰ Concededly, states' experiments with enforcement will not always be confined within state boundaries. State enforcement that affects out-of-staters by changing judicial interpretations of federal law nationwide, or by inducing regulated entities to alter their behavior, does not occur "without risk to the rest of the country." But not all interstate effects are incompatible with the concept of states as laboratories. On the contrary, the theory assumes that successful state experiments will often be adopted at the national level.²⁴¹ To the extent that experience with state enforcement persuades federal agencies to change their own enforcement practices—as may have been the case with FTC's approach to monetary remedies

²³⁷ See *supra* notes 191–98 and accompanying text.

²³⁸ See BRANN, *supra* note 90, at 9 ("As a practical matter, a relatively small number of States, which were usually larger states with greater resources, end up running most of the [multistate] Executive Committees.").

²³⁹ Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951, 955–56 (2001) ("[T]he federal political process threatens state autonomy insofar as that process is the means by which a majority of states may impose their own policy preferences on a minority of states with different preferences.").

²⁴⁰ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

²⁴¹ See DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 77 (1995) ("[A] policy that may begin its development at the national level . . . [may] assume a different complexion and shape in every state in which it is administered. Ultimately, the experiences of the range of states will reflect back on, and redefine, the policy itself." (discussing DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* (2d ed. 1972))).

in competition cases, for example²⁴²—state enforcement fits neatly with this famous justification for federalism.

An additional epistemic benefit of state enforcement of federal law is that it provides opportunities for experimentation with respect to the institutions of enforcement themselves. Concurrent enforcement authority means that there are more than fifty governmental agencies capable of enforcing a given federal rule at any time. Those state and federal agencies differ along various axes, including their size, resources, degree of specialization, transparency, political affiliation, and so on.²⁴³ Thus, divergent enforcement practices by various states and a federal agency generate useful information not only about possible policy approaches, but also about possible ways to structure public enforcement.²⁴⁴

From the perspective of federalism, therefore, state enforcement shares many important features in common with state regulation. Both types of state authority provide opportunities for democratic input, check abuses by the federal government, improve the range of citizen choice, and create valuable information about different approaches to the use of government power. Although state regulation has received the lion's share of attention to date, state enforcement authority deserves consideration as an additional site for decentralized decision making.

B. *Assessing Interstate Variation in Enforcement*

I have argued that state enforcement authority can advance the project of federalism, generating many of the same benefits of decentralized decision making that state regulation provides. Yet decentralized decision making is not always a force for the good. Few scholars argue that “state regulation *per se* adds value to national policy.”²⁴⁵ Instead, most recognize that state regulation will be advantageous in some instances and not in others.²⁴⁶ Where decentralized regulatory

²⁴² See *supra* note 196 and accompanying text.

²⁴³ See BRANN, *supra* note 90, at 3–7 (discussing differences in state attorney general consumer protection divisions, with consequences for states' emphasis on mediation or settlement versus litigation, their pursuit of “impact litigation,” and their preference for seeking damages or injunctive relief).

²⁴⁴ See First, Statement, *supra* note 115, at 11 (“Comparing how different agencies handle similar problems is a way of overcoming informational asymmetries. [Legislators] can better judge whether agencies are bringing enough of the right kinds of cases or are operating efficiently.”).

²⁴⁵ Metzger, *supra* note 76, at 2099–2100.

²⁴⁶ See generally Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010) (offering functional explanation for Constitution's division of power between federal government and states by showing that federal regulation is preferred when states face collective action problems).

authority is likely to result in parochialism or set off a destructive race to the bottom, for example, a national solution is appropriate even if it means sacrificing state creativity.²⁴⁷

Like state regulation, state enforcement may promote state interests at the expense of the broader public interest. Indeed, state enforcement may be problematic precisely because it is different from federal enforcement. Legislators and industry groups opposed to state enforcement frequently cite the specter of “50 different interpretations of federal law,”²⁴⁸ creating a “confusing patchwork”²⁴⁹ of requirements that “complicate the compliance obligations of legitimate businesses who operate in a regional or multi-State environment.”²⁵⁰ In areas where uniformity is particularly important, the costs of interstate variation may well outweigh the benefits.

²⁴⁷ See Hills, *supra* note 77, at 5 (“Congress frequently regulates activities because state regulation, or lack of regulation, of those activities imposes external costs on neighboring states. The whole point of the federal scheme is to suppress states’ creativity, which might consist only of creatively achieving benefits for their own citizens at the expense of nonresidents.”).

²⁴⁸ S. 1462, *The Automated Telephone Consumer Protection Act of 1991*; S. 1410, *The Telephone Advertising Consumer Protection Act*; and S. 857, *Equal Billing for Long Distance Charges: Hearing Before the Subcomm. on Commc’ns of the S. Comm. on Commerce, Sci., and Transp.*, 102d Cong. 40 (1991) (statement of Richard A. Barton, Senior Vice President, Government Affairs, Direct Marketing Association).

²⁴⁹ 154 CONG. REC. S7871 (daily ed. July 31, 2008) (statement of Sen. Jon Kyl) (regarding Consumer Products Safety Improvement Act: “Giving 50 attorneys general discretion over consumer product safety laws would lead to 50 different interpretations of the law, and, thus, a confusing patchwork of safety standards that would make it more difficult for the CPSC to enforce uniform, national policies.”).

²⁵⁰ *Telemarketing Fraud and Consumer Abuse: Hearing Before the Subcomm. on Transp. and Hazardous Materials of the H. Comm. on Energy and Commerce*, 102d Cong. 79 (1991) (statement of Michael J. Altier, Vice President, National Retail Federation); see also *Consumer Product Safety Commission Reauthorization (Part 2): Hearing on H.R. 3343 and H.R. 3443 Before the Subcomm. on Commerce, Consumer Prot., and Competitiveness of the H. Comm. on Energy and Commerce*, 100th Cong. 121 (1987) (statement of James Lacy, General Counsel, Consumer Product Safety Commission) (“I think the problem is the fact that it is not quite so simple when you have 50 different attorneys general looking at one law and you have a national Consumer Product Safety Commission which is purportedly setting a uniform consumer product safety environment.”); *id.* at 340 (statement of National Electrical Manufacturers Association) (“Manufacturers’ attempts to anticipate and comply with CPSC requirements will be frustrated if the Commission’s decisions about the safety of individual products can be second-guessed by state officials and reexamined and modified by the courts.”); *Extend Commodity Exchange Act: Hearing on H.R. 10285 Before the Subcomm. on Conservation and Credit of the H. Comm. on Agric.*, 95th Cong. 287 (1978) (statement of Laurence Rosenberg, Chairman, Chicago Mercantile Exchange) (arguing that federal agency must have exclusive jurisdiction “so that the industry can be held responsible for one uniform set of requirements. The same reasons which make us unalterably opposed to a division of federal responsibility over futures apply even more strongly to a sharing of authority between federal and state agencies. Such a division of authority would raise the specter of 50 different and possibly conflicting interpretations of the many provision of the CFTC Act.” (emphases omitted)).

State enforcement also may be undesirable in areas where the optimal level of enforcement lies somewhere below maximum enforcement. Overenforcement is possible in any enforcement regime, but the risk is particularly pressing in areas where the relevant liability rule is written in broad terms, capturing conduct that law makers “did not in fact want to forbid.”²⁵¹ A federal agency with a monopoly on enforcement could engage in “discretionary non-enforcement” by ignoring certain technical violations in favor of others it deems more important.²⁵² But that strategy will not work when enforcement authority is scattered among fifty different enforcers, with no mechanism for centralized control. And decentralized enforcement will tend toward more rather than less enforcement because of the one-way ratchet effect discussed above. While states can make up for under-enforcement by other states or the federal government by increasing their own efforts, no state can prevent another from enforcing in any given instance.

States may be particularly prone to overenforcement, moreover, due to the self-financing nature of some state enforcement schemes and the states’ ability to export the costs of enforcement to other states. State enforcers may be too quick to go after out-of-state defendants, since many of the ultimate costs of enforcement (for example, lost jobs or higher prices) will be borne by nonresidents.²⁵³ Political ambitions may also encourage attorneys general to adopt a more entrepreneurial and aggressive brand of enforcement than typically is observed at the federal enforcement agencies.

It is impossible to determine in the abstract when interstate variation in enforcement will “add[] value to national policy”²⁵⁴—or, in other words, when the benefits of state-level decision making will outweigh the potential costs of disuniformity and overenforcement. Striking the correct balance requires answering a series of context-specific empirical questions regarding the actual practices of state, federal, and private enforcers and the effects of enforcement on regulated entities. Perhaps more importantly, reasonable minds will often disagree on what the “right” answer is. For example, one who believes, as a policy matter, that dangers to children’s health should be

²⁵¹ Landes & Posner, *supra* note 13, at 38.

²⁵² *Id.*

²⁵³ See Posner, *supra* note 9, at 257–58 (voicing this concern regarding state antitrust enforcement). *But see* Greve, *supra* note 9, at 103–04 (showing that state antitrust enforcers frequently pursue in-state defendants); Himes, *supra* note 195, at 10 (emphasizing former New York Attorney General Eliot Spitzer’s “willingness to take on home-grown business interests”).

²⁵⁴ Metzger, *supra* note 76, at 2099–2100).

avoided at all costs will not be concerned by the possibility that states might take an aggressive approach to enforcing the CPSIA's ban on phthalates, whereas one who is committed to fostering small business will see a greater risk of excessive state enforcement. Similarly, one's assessment of whether state-to-state variation in enforcement reflects valuable localism or parochial interference with national policy will depend heavily on one's view of the merits of the national policy at issue. Those who broadly support the policy will not be troubled by the possibility that some states will enforce it more stringently than the federal agency, whereas those who deem it critical to cabin the national policy carefully will see creative state enforcement in a different light.

It should come as no surprise, then, that existing debates about state enforcement—both in Congress and in academic commentary—tend to conflate critiques (or defenses) of the substance of the relevant federal law with critiques (or defenses) of state enforcement.²⁵⁵ That approach is understandable, but it is not inevitable. A trans-substantive analysis of state enforcement of federal law reveals several recurring considerations that bear on the risks of disuniformity and overenforcement. As the remainder of this Part will show, the significance of those risks hinges on three common factors: the status of state law, the role of federal courts and agencies, and the nature of the federal rule to be enforced. While the desirability of state enforcement in any area will depend on both objective empirical fact and subjective policy judgment, attention to the factors highlighted here will sharpen the inquiry—and will make clear that concerns about disuniformity and overenforcement can be accommodated in many cases while leaving meaningful room for state participation in the enforcement of federal law.

1. *Disuniformity*

State enforcement of federal law is easiest to defend against charges of disuniformity in areas where states also can enact and enforce their own laws. Many federal statutes that provide for state enforcement do not purport to preempt state law on the subject.²⁵⁶

²⁵⁵ See *supra* text accompanying note 68.

²⁵⁶ See, e.g., 15 U.S.C. § 1203(b) (2006) (permitting states to adopt standards governing flammable fabrics that are more stringent than federal rules); 15 U.S.C. § 6313 (2006) (same, for rules governing boxing matches); 15 U.S.C. § 7806 (2006) (disclaiming intent to preempt state law regulating sports agents); 18 U.S.C. § 248(d)(3) (2006) (same, for state law regulating access to abortion clinics); 49 U.S.C. § 14711(f) (2006) (same, for state criminal law regarding transportation of household goods); see also *California v. ARC America Corp.*, 490 U.S. 93, 101–02 (1989) (explaining that “the Court has recognized that the fed-

Congress's decision to permit state law making (and enforcement of state law) reflects a judgment that the benefits of decentralized decision making outweigh the possible costs to uniformity. That judgment may of course be mistaken—that is, there may be state laws that ought to be preempted but currently are not—but it would be odd to identify state enforcement of federal law as the primary target of reform in those areas. Where disuniformity is a problem, the effects of fifty different approaches to enforcing federal law will pale in comparison to the effects of fifty different approaches to enforcing fifty different laws.²⁵⁷

Although the costs of state enforcement of federal law are minimal in areas where states can make and enforce their own laws, the benefits are still present. By authorizing states to enforce federal law, Congress can harness state enforcers' local perspectives in the development and application of federal law. Similarly, state enforcement of federal law provides rare opportunities for insight into possible enforcement strategies, as citizens and policy makers can compare the efforts of more than fifty government institutions that have authority to enforce the same rule. Competition in public enforcement also reduces the likelihood that powerful offenders will be able to escape

eral antitrust laws do not pre-empt state law” and refusing to preempt state laws permitting suit by indirect purchasers, though such actions are foreclosed under federal law).

²⁵⁷ That is not to say that state enforcement of federal law poses no risk to uniformity above and beyond that created by a failure to preempt state law. The Microsoft antitrust litigation, which sparked a wave of commentary critical of state antitrust enforcement, illustrates the potential problem. In 1998, the United States and a group of states filed suit against Microsoft alleging antitrust violations. See *Welcome*, COORDINATED STATE ENFORCEMENT OF MICROSOFT ANTITRUST JUDGMENTS, <http://www.microsoft-antitrust.gov/> (last visited Apr. 20, 2011) (describing background of case and providing helpful links). Efforts to mediate the dispute broke down in the face of disagreements between some of the states and the Department of Justice over the appropriate remedy. First, *supra* note 9, at 1033–34. It is unclear whether the states should be faulted for the breakdown in *Microsoft*, or whether the problem (if it is one) has repeated itself elsewhere. *Id.* Nevertheless, the experience suggests how states' involvement in litigation can complicate federal enforcement efforts—a risk that does not occur when states can enforce only state law.

The important point for present purposes is that federal policy makers have tools to combat such interference while preserving state enforcement. Most federal statutes that authorize enforcement by state attorneys general contain provisions that effectively grant federal officials a right of first refusal on enforcement actions. States must give federal enforcers prior notice of any proposed enforcement action and are precluded from proceeding against a defendant for violations that are the subject of a pending federal action. Those provisions do not appear in the federal antitrust statutes. If indeed state interference with federal antitrust enforcement is a recurring phenomenon, it may be appropriate to cabin state enforcement through equivalent notice and pending-federal-action provisions. See also Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 941 (2001) (arguing that Justice Department should have “right of first refusal” to bring antitrust suits, thereby preempting state and private actions).

penalties for federal violations by exerting influence on a single responsible agency,²⁵⁸ and can spur both state and federal enforcers to act more forcefully and efficiently.²⁵⁹ And state enforcement of federal law may be significantly more efficient than the alternative—enforcement of state law—because multiple states can sue together in one federal court rather than filing duplicative actions in separate state courts.

The harder question is whether state enforcement of federal law can be justified on federalism grounds in areas where state law is—or ought to be—preempted.²⁶⁰ One might reasonably conclude that state-level variations in the enforcement of federal law will always be undesirable in such circumstances, since a decision to preempt state law suggests the need for a uniform national policy.²⁶¹ That view has some force, but it ignores important differences between regulation and enforcement. Here the relative weakness of enforcement authority becomes a strength. When states take a divergent approach to enforcement of federal law, they are simply expressing a view on how to interpret and apply a rule that was adopted by Congress or a federal agency. The range of possible outcomes may be quite broad, but it is narrower than if states were free to adopt and enforce different rules. State-to-state variation, then, is necessarily cabined.

Congress can further reduce the risk of disuniformity by giving federal courts exclusive jurisdiction over state enforcement actions. Channeling state enforcement through the federal courts helps ensure that the law develops in a coherent fashion. To see the importance of federal-court control, consider what we know about so-called “mirror” statutes—state statutes that replicate federal law but are enforced by states and private parties in state courts. For example, many states have enacted “little FTC Acts” that mirror the language of the federal act prohibiting “unfair or deceptive acts or practices”²⁶² and specify that “due consideration . . . shall be given” to the FTC’s

²⁵⁸ Cf. Richman, *supra* note 78, at 780–82 (arguing that fragmented prosecutorial authority reduces risk of capture).

²⁵⁹ Cf. Katyal, *supra* note 80, at 2324–27 (discussing benefits of competition among federal agencies with overlapping jurisdictions).

²⁶⁰ See *supra* note 71 and accompanying text (listing statutes that authorize state enforcement while preempting state law); see also Widman, *supra* note 9, at 207 (“A state enforcement power is sometimes created in exchange for absolute preemption of state laws, as in the Data Accountability and Trust Act of 2009 and the Fair Credit and Reporting Act of 2003.” (citing Data Accountability and Trust Act, H.R. 2221, 111th Cong. (2009), and Fair Credit and Reporting Act, 15 U.S.C. §§ 1681–1681x (2006), *amended by* FACTA Act of 2003, Pub. L. No. 108-159 (2003))).

²⁶¹ See Alan Schwartz, *Statutory Interpretation, Capture, and Tort Law: The Regulatory Compliance Defense*, 2 AM. L. & ECON. REV. 1, 20–22 (2000) (detailing inefficiencies that can result from preemptable state law).

²⁶² 15 U.S.C. § 45 (2006).

and federal courts' interpretations of federal law.²⁶³ Despite the similarity in the relevant statutory commands, the state statutes have drifted away from the federal model. The prohibition on “unfair” practices provides a ready illustration. In 1980, the FTC adopted an interpretation of the federal statute that keyed unfairness to a cost-benefit analysis focused on “unjustified consumer injury”²⁶⁴—an interpretation that was later endorsed by the federal courts²⁶⁵ and Congress.²⁶⁶ Meanwhile, states and private parties acting under state law persuaded state courts to adopt divergent interpretations of unfairness, and to reach an increasingly wide range of conduct “adjudged unfair under current commercial mores.”²⁶⁷ As a result of that judicial gloss, many state “mirror” statutes today bear little resemblance to their federal reflection.²⁶⁸

A final factor that bears on the potential for disuniformity is the breadth of the relevant federal rule. While many federal statutes are written in sweeping terms, that is not always the case—as the phthalates ban discussed in the previous Part demonstrates.²⁶⁹ And much state enforcement of federal law entails enforcement of agency regulations, which on the whole tend to be more specific than the statutes that inspire them. The few scholars who have taken notice of state enforcement have focused primarily on antitrust law.²⁷⁰ But antitrust is an extreme and unusual example, not only because of the breadth of the relevant statutory language, but also because it is an area where no federal agency has the authority to adopt binding regulations clari-

²⁶³ See Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 169–73 (internal quotation marks omitted).

²⁶⁴ J. Howard Beales, III, *The Federal Trade Commission's Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, 22 J. PUB. POL'Y & MKTG. 192, 194 (2003).

²⁶⁵ E.g., *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1363–64 (11th Cir. 1988).

²⁶⁶ 15 U.S.C. § 45(n) (2006) (codifying FTC's policy statement by denying Commission authority to declare act unlawful on unfairness grounds “unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition”).

²⁶⁷ Glenn Kaplan & Chris Barry Smith, *Patching the Holes in the Consumer Product Safety Net: Using State Unfair Practices Laws To Make Handguns and Other Consumer Goods Safer*, 17 YALE J. ON REG. 253, 285 (2000).

²⁶⁸ See Michael M. Greenfield, *Unfairness Under Section 5 of the FTC Act and Its Impact on State Law*, 46 WAYNE L. REV. 1869, 1929 (2000) (explaining that although “courts in most states pay lip service to the statutory direction that they ‘be guided by’ interpretations of [federal law], . . . in fact they adhere to pre-1980 articulations” of unfairness).

²⁶⁹ See *supra* note 177 and accompanying text. The phthalates ban preempts state law on the subject. See *Consumer Product Safety Improvement Act Frequently Asked Questions*, CONSUMER PROD. SAFETY COMM'N, <http://www.cpsc.gov/about/cpsia/faq/231faq.html#q1> (last visited Apr. 20, 2011).

²⁷⁰ See, e.g., *supra* note 9.

fying the statutory text.²⁷¹ That scenario is not unique, but it is fairly rare.²⁷² To return to the FTC example above, the FTC Act's prohibition of "unfair" practices is quite broad. The FTC's interpretation of the prohibition, embodied in the 1980 Policy Statement and later codified in the statute,²⁷³ is far more limited. Should state attorneys general be given authority to enforce the FTC Act in federal court (as NAAG has suggested²⁷⁴), they would be constrained by the FTC's interpretations and by the body of case law that has developed in response to FTC enforcement efforts. Both limitations differentiate state enforcement of federal law from state enforcement of state law and help explain why the former may be tolerable even when the latter is preempted.

In sum, state enforcement authority need not entail a significant amount of interpretive discretion. Concerns about disuniformity recede when states are called upon to enforce a relatively precise federal statute or regulation.²⁷⁵ Such enforcement authority represents a way to secure the values of local knowledge and citizen input even in areas where it is important to have a uniform substantive rule. States that wish to increase the level of enforcement over the federal baseline can devote their own resources to the effort and can experiment with different approaches, but the law's core prescription remains the same.

2. *Overenforcement*

Much of the foregoing discussion applies with equal force to the question of overenforcement. As with disuniformity, concerns about overenforcement do not justify jettisoning state enforcement of fed-

²⁷¹ It bears emphasis that antitrust is also an area where state law is not preempted. *See supra* note 256. Moreover, even if state antitrust law were preempted and states were prohibited from enforcing federal antitrust law, federal law would still permit private antitrust suits and divide federal enforcement authority between the FTC and the antitrust division of the DOJ. Thus, while the risk of disuniformity may be particularly stark in the antitrust context, given the breadth of the relevant federal rule, it is far from clear that states' authority to enforce federal law is the root of the problem. Other contributing factors, including the splintering of federal enforcement authority, the availability of private rights of action, and the continued validity of divergent state laws, are at least as important—and probably more so.

²⁷² *See Lemos, supra* note 79, at 429–30 & n.122 (discussing statutes that vest primary interpretive authority in federal courts rather than agencies).

²⁷³ *See supra* note 266 (citing statute codifying FTC's policy statement).

²⁷⁴ Cole, *supra* note 197, at 134.

²⁷⁵ This analysis helps make sense of an otherwise puzzling provision of the recent Dodd-Frank financial overhaul bill, which prohibits states from enforcing any "provision of this title" against a national bank or federal savings association but permits states to enforce, against the same institutions, "a regulation prescribed by the [newly created Consumer Financial Protection] Bureau under a provision of this title." Pub. L. No. 111-203, § 1042(a)(2), 124 Stat. 1376, 2012–13 (2010) (to be codified at 12 U.S.C. § 5552).

eral law in areas where state law is not preempted. If socially valuable activity will be deterred by overly aggressive enforcement, state enforcement of federal law seems significantly less threatening than states' ability to create and enforce legal standards that are stricter than the federal model. Again, the more challenging case for state enforcement is where state attorneys general disrupt what would otherwise be a federal monopoly on public enforcement. And again, the risk of overenforcement in that context expands and contracts with the breadth of the federal rule being enforced. When state enforcement is confined to federal court—and particularly when it is linked to agency regulations—the possibility that state enforcers will target behavior that federal policy makers have condoned is significantly reduced.

Interstate variations in the intensity of enforcement may still be problematic if the federal agency has made a considered decision about how to secure the optimal level of deterrence and state enforcement will push over that line. But that is a big “if.” The same features that make states more prone to overenforcement than federal agencies also suggest that state enforcement will be less likely to result in underenforcement than a federal monopoly on enforcement. Consider the consumer-protection field, the most common site for state enforcement provisions. Attorneys general will have varying incentives regarding enforcement, depending on local conditions and their own commitments. But protecting constituents from harm—whether defined as unsafe products or internet spam or unfair lending practices or elder fraud—is likely to rank high on any ambitious attorney general's list of priorities. And many statutes that authorize state enforcement of federal consumer-protection law permit states to recover damages for their citizens, which may strengthen their incentive to act. In short, consumer protection statutes are likely candidates for aggressive state enforcement. Whether that is a problem depends on a variety of context-specific considerations, including the optimal level of enforcement and the level of enforcement already provided by federal agencies.²⁷⁶ Most consumer protection statutes with provisions for state enforcement fall within the jurisdiction of either the CPSC or the FTC. As Amy Widman has shown, the history of the CPSC has been one of “massive regulatory failure.”²⁷⁷ And the FTC,

²⁷⁶ See Shavell, *Fundamental Divergence*, *supra* note 13, at 586–87 (discussing difficulties in determining optimal level of enforcement); see also Rose, *supra* note 9, at 2178–92 (analyzing over- and underdeterrence in securities context).

²⁷⁷ Widman, *supra* note 9, at 184; see also *Consumer Product Safety Commission Frequently Asked Questions*, CONSUMER PROD. SAFETY COMM'N, <http://www.cpsc.gov/about/faq.html#rep> (last visited Apr. 20, 2011) (“We receive about 10,000 reports of product-related injuries and deaths a year from consumers and others. Due to our small staff size, we can investigate only a few of them.”).

“although one of the smallest administrative agencies, . . . is charged with policing an enormous amount of activity.”²⁷⁸ Empirical research is necessary to answer the question conclusively, but the existing record does not suggest an imminent risk of overenforcement of all or even most federal consumer protection law.²⁷⁹

On the other hand, state enforcement may be less prone to overenforcement than the other alternative: private enforcement. States are more likely than private parties to coordinate effectively with federal enforcers. Coordination is made possible not only by the limited number of state enforcers but also by existing relationships that lay the groundwork for negotiations between state and federal enforcers. Coordination is further encouraged by statutory provisions that both require states to notify their federal counterparts about enforcement actions and permit intervention by the relevant federal agency.²⁸⁰ Effective state-federal cooperation is by no means inevitable, as the previous Part explained.²⁸¹ Nevertheless, the web of ties between attorneys general and their “federal partners”²⁸² creates a kind of friction against state-federal conflict and overenforcement by states.²⁸³

More crucially, state attorneys general face resource constraints that limit the scope of possible enforcement actions. Fifty state attorneys general comprise a relatively small group. Even if each state takes an aggressive approach to enforcement, the volume of litigation will almost certainly be smaller than private plaintiffs would generate. And while both state and private enforcement can create negative externalities, state enforcers represent a wider range of interests and can internalize more of the costs of enforcement. I argued in the previous Part that state enforcers may benefit in various ways from financial recoveries.²⁸⁴ Yet they lack the immediate monetary stake in litigation that private parties and their attorneys enjoy. State enforcement may therefore operate as a compromise between federal and private enforcement—a way to intensify enforcement above the level

²⁷⁸ *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 544 n.6 (2008).

²⁷⁹ *Cf.* First, Statement, *supra* note 115, at 2 (“Although the data themselves cannot show whether there is state under- or over-enforcement [of federal antitrust law], the relatively small number of state cases, coupled with a lack of enforcement resources, leads me to believe that under-enforcement is the more likely conclusion, particularly given the size of the U.S. economy to be policed by antitrust enforcement agencies.”).

²⁸⁰ *See supra* note 87 and accompanying text.

²⁸¹ *See supra* notes 89–90 and accompanying text.

²⁸² *See Federal Partners*, NAT’L ASS’N OF ATT’YS GEN., http://www.naag.org/federal_partners.php (last visited Apr. 20, 2011) (listing federal agencies).

²⁸³ Federal policy makers could further reduce the risk of overenforcement by states by foreclosing multistate actions. *See supra* note 198 (citing examples of coordinated state enforcement actions).

²⁸⁴ *See supra* Part II.A.4.

provided by the federal agency without opening the floodgates entirely.

To see the potential value of state enforcement as a compromise mechanism, consider the federal CAN-SPAM Act, which prohibits various forms of email spam.²⁸⁵ Spam is annoying, but it is surprisingly difficult to pin down exactly how—or to what extent—it harms those who receive it.²⁸⁶ The CAN-SPAM Act accordingly provides for statutory damages rather than requiring proof of actual injury in each case.²⁸⁷ But the availability of statutory damages creates a risk that private parties will sue even if they have not suffered any real harm. With statutory damages linked to each illegal email,²⁸⁸ the price tag can add up quickly. The Act responds to this risk by creating a limited private right of action, available only to the providers of internet access service. Enterprising plaintiffs have found ways to evade that limitation, however, by creating domain names and providing email service to friends and family and then letting the spam pile up.²⁸⁹ State enforcement may offer a better solution. If citizens are truly bothered by email spam, attorneys general will surely hear about it. States can then use their own authority under the CAN-SPAM Act to seek damages or injunctive relief.²⁹⁰ Indeed, state enforcement may be particularly valuable in areas like this, where federal law targets conduct that creates uncertain or intangible harms. It is of course possible that state attorneys general would exploit their enforcement authority in order to obtain windfall recoveries for state treasuries or their own offices. But given limited resources—and in the absence of a significant outcry from the states' citizens—there is reason to doubt that such a strategy would be politically productive.

²⁸⁵ Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, Pub. L. No. 108-187, 117 Stat. 2699 (codified as amended at 15 U.S.C. § 7701–13 (2006) and 18 U.S.C. § 1037 (2006)).

²⁸⁶ See Eric Goldman, *Where's the Beef? Dissecting Spam's Purported Harms*, 22 J. MARSHALL J. COMPUTER & INFO. L. 13, 13–14 (2003) (arguing that most purported harms caused by e-mail spam are illusory, with actual harms adequately addressed by existing law or market mechanisms).

²⁸⁷ 15 U.S.C. § 7706(g)(3) (2006) (providing for statutory damages of up to \$25 or \$100 per violation, depending on type of violation, with cap of \$1,000,000).

²⁸⁸ See *id.* § 7706(g)(3)(A) (specifying that “each separately addressed unlawful message that is transmitted or attempted to be transmitted over the facilities of the provider of Internet access service, or that is transmitted or attempted to be transmitted to an electronic mail address obtained from the provider of Internet access service” is “a separate violation”).

²⁸⁹ See Amy E. Bivins, *Marketing: Professional CAN-SPAM Plaintiff Again Falls Short of Standing as “Adversely Affected” ISP*, 15 ELEC. COM. & L. REP. (BNA) 375 (Mar. 10, 2010), available at 2010 WL 779922 (discussing dismissal of serial CAN-SPAM plaintiff's suit for lack of standing).

²⁹⁰ See 15 U.S.C. § 7706(f) (authorizing states to sue for injunctive relief or recovery of actual or statutory damages of up to \$250 per violation, with maximum of \$2,000,000).

Finally, it bears emphasis that Congress can adopt measures that further reduce the risk of overenforcement by states. The recent Dodd-Frank act, for example, effectively precludes states from pooling their resources in multistate actions by requiring that any state enforcement action take place “in any district court of the United States *in that State* or in a State court *that is located in that state* and that has jurisdiction over the defendant.”²⁹¹ Federal antitrust law effectively precludes states from employing private attorneys on a contingency fee basis by excluding from the definition of “State attorney general” any person “employed or retained on a contingency fee based on a percentage of the monetary relief awarded”²⁹² Those measures—like the provisions for notice to and intervention by the relevant federal agency, the prohibitions on state actions when a federal action is pending, and the requirements that state enforcement cases proceed in federal court—represent ways to cabin state enforcement without squandering its benefits.

Other commentators have proposed more stringent controls on state enforcement, such as requiring state enforcers to obtain pre-approval from the relevant federal agency before undertaking an enforcement action or enabling federal enforcers to effectively “veto” state enforcement efforts.²⁹³ But many of the federalism-related benefits of state enforcement outlined here would be lost if state enforcement were limited to the class of cases that federal enforcers would pursue. When viewed from the perspective of federalism, it becomes clear that state enforcement of federal law offers systemic advantages that go beyond coopting state resources into service of a federal enforcement strategy. Much of the value of state enforcement lies in the fact that state enforcers are likely to make different choices than their federal counterparts—not because state attorneys general are angels, but because their incentives and capabilities differentiate them from the prototypical federal agency enforcers.²⁹⁴ States, moreover,

²⁹¹ Pub. L. No. 111-203, § 1042(a)(1), 124 Stat. 1376, 2012–13 (2010) (to be codified at 12 U.S.C. § 5552) (emphasis added).

²⁹² 15 U.S.C. § 15g(1) (2006).

²⁹³ See DeBow, *supra* note 94, at 281 (arguing that Department of Justice “should clearly be given the authority to move the court to dismiss [state antitrust suits] when the department thinks that the interstate aspects of the litigation outweigh the in-state interests asserted by the plaintiff state”); Rose, *supra* note 9, at 2225–26 (suggesting that federal securities enforcer should be given authority “to invalidate state orders that it believes conflict with the public interest” (citing John C. Coffee & Hillary A. Sale, *Redesigning the SEC: Does the Treasury Have a Better Idea?*, 95 VA. L. REV. 707, 779–81 (2009))).

²⁹⁴ See Widman, *supra* note 9, at 212 (“[O]ne need not see state attorneys general as apolitical in order to champion concurrent state enforcement; one need only assume that different political incentives apply to the federal and state governments and concurrent enforcement thus ensures enforcement even when the regulated industry may strongly lobby against it.”).

are not strangers to the federal rules they enforce. Scholars have argued for decades that states have significant leverage in the federal legislative process: these are the famous political safeguards of federalism.²⁹⁵ Enforcement authority confirms states' shared ownership of federal rules, offering a hedge against the possibility that the federal government will occupy the field legislatively or administratively and then abdicate on enforcement. The Supreme Court recognized a similar principle in *Massachusetts v. EPA*, where it emphasized preemption of state law as a reason to permit states to challenge a federal agency's failure to regulate.²⁹⁶ Yet courts have steadfastly refused to give states and private parties the power to compel federal enforcement.²⁹⁷ Direct enforcement authority operates as a form of self-help for states, guaranteeing them a limited role in policy areas that are otherwise dominated by the federal government.²⁹⁸

Concededly, the costs of interstate variations will in some cases outweigh the benefits that can be derived from state participation in enforcement. But concerns about disuniformity and overenforcement should not be overstated or taken on blind faith. As this Section has shown, such concerns have relatively little purchase in most of the areas where state enforcement exists today. At the very least, policy makers and commentators should recognize that state enforcement can accomplish more than enhancing enforcement according to a federal plan, and should consider the values of federalism before restricting state choice in the name of centralization and control.

CONCLUSION

This Article has sought to expose and explain the growing trend of state enforcement of federal law. State enforcement cannot be understood as a mere supplement to public enforcement by federal

²⁹⁵ See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543 (1954) (emphasizing states' ability to protect their interests through federal political process and thereby "influence the action of the national authority"); see also Kramer, *supra* note 211 (updating and revising Wechsler's thesis).

²⁹⁶ 549 U.S. 497, 519 (2007) ("When a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India, and in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted.")

²⁹⁷ See Stevenson, *supra* note 90, at 16–17 (discussing reluctance even to force federal agency rulemaking).

²⁹⁸ See Widman, *supra* note 9, at 205 ("[A] state enforcement power allows for oversight of those areas where an agency chooses not to prosecute a violation . . ."). As Widman explains, state enforcement authority may be significantly more attractive as a "fix" for federal agency inaction than the alternative of expanded judicial review. See *id.* at 196–97, 201–02.

agencies. Enforcement by state attorneys general is different from federal enforcement in several important respects. It is unique, mixing familiar features of public and private enforcement with others that are distinctive to states.

Enforcement authority also is different from other forms of state authority. Like state regulation, enforcement offers a way for states to influence policy within their boundaries and nationwide. But enforcement authority is both narrower and broader than regulatory authority. It is narrower because states are limited to enforcing a federal law; it is broader because enforcement authority can exist in areas where regulatory authority does not—or should not. Enforcement, moreover, empowers state actors whose incentives and abilities distinguish them from other participants in the state-federal dialogue.

Understanding what state enforcement *is* is the first step to assessing its proper place in the federal system. I have argued that state enforcement can promote the goals of federalism by opening up new opportunities for decentralized decision making outside of the regulatory realm. Decentralization has both virtues and vices, and state enforcement will be undesirable in circumstances where uniformity is critical in both law and enforcement. That limitation leaves ample room for state enforcement of federal law, however, even in areas where state law is preempted.