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PREFACE

I don't smoke, but tobacco served as the inspiration for this book. My interest in state attorneys general (AGs) began with research into the multi-billion-dollar Master Settlement Agreement in 1998 between the tobacco industry and most of the nation's AGs. What I found fascinating about the settlement was the way in which it served as a form of national regulation of one of America's largest industries while simultaneously bypassing the typical channels of national policymaking in Washington, DC. This prompted me to ask what AGs had been up to since the tobacco settlement. The answer, I soon discovered, was a lot. While the Master Settlement Agreement was unusual for its sheer size—it remains the largest civil settlement in American history—AGs have become increasingly aggressive in using coordinated litigation strategies to exert influence in national policy. As this book details, AGs have used the legal process as a form of national policymaking in several major areas of American public policy—activity that has exhibited greater partisan divisions among the AGs themselves and prompted many other private litigants and groups to collaborate with AGs to accomplish policy goals.

I hope to convince readers of three main propositions in the pages that follow. The first is that AGs are more than simply, as the joke goes, aspiring governors. Instead, AGs have been and continue to be an important and underappreciated force in contemporary American political development. Their litigation campaigns—and they are indeed best described as campaigns, consisting of individual skirmishes as part of a long-term battle for political influence—have gone beyond simply enforcing the law and have instead crucially shaped the contours of national policy. Second, the rise of contemporary AG activism helps illustrate an aspect of American federalism that receives far too little attention in both contemporary scholarship and in political rhetoric. While advocacy of federalism and states' rights is so often associated with a parallel commitment to a weaker national government, the activity in this book illustrates how the activism of state-level actors can lead to expanded governmental power at all levels, including the central state. My third main argument is that the emergence of AG activism as a form of national policymaking intersects with several fundamental questions about democracy in America. On the one hand, AG litigation promises to be an avenue for policy development at a time of significant

political deadlock in our national policymaking institutions, thereby providing an outlet for public demands for policy change. On the other hand, the AGs' peculiar form of policymaking raises some significant difficulties, not the least of which is that policy goals achieved through litigation often fail to adequately balance competing interests and are developed in highly technical forums obstructed from public view. It is my hope that this book serves to generate more interest in AGs' role in American politics and focus more attention on the positives and negatives of this distinctive form of national policymaking—especially as Congress and the courts continue to encourage AG activism.

Many individuals and institutions helped bring this book to fruition. At Boston College, I could have hardly imagined a more supportive mentor than Shep Melnick. I learned countless things from Shep, but perhaps the most valuable lesson was that many of the most interesting and consequential developments in American law and politics happen outside of the US Supreme Court and its constitutional jurisdiction. His encouragement to explore the complex relationships of law and politics outside of the most familiar contexts led me to write this book and will remain with me throughout my career. Michael Greve first introduced me to the politics of state attorneys general and was immensely helpful at various stages of this project. Even as he juggled a remarkable number of projects of his own, he provided me with so many incisive comments on draft chapters, and so quickly, that it puzzles me to this day how he did it. Special thanks as well to Ken Kersch and Marc Landy, both of whom provided several excellent comments on early draft chapters and encouraged me to think more about the origins of the modern institution of the AG. Ken and Marc were also superb mentors whose contributions to my scholarly career extend well beyond this book alone. Several others at BC also provided invaluable assistance during the early stages of this project, including Kay Schlozman, Christopher Kelly, Peter Skerry, Dan Geary, Hillary Thompson, Alison Smith, Carol Fialkosky, and Shirley Gee.

My gratitude also goes out to many at Marquette University who have helped in various ways to make this book a reality. I have been lucky to have outstanding colleagues in the political science department at Marquette, all of whom provided a great deal of personal and intellectual support throughout the development of this project. I would especially like to thank Julia Azari and Amber Wichowsky for their willingness to read several draft chapters and provide insightful comments. I also received helpful comments throughout this research from many other colleagues, including McGee

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Many others also enriched this project throughout its development. I presented research on AGs at various academic conferences, and I received helpful comments from Kevin McMahon, Dale Krane, Dave Robertson, Paul Brace, Karl Trautman, Tom Burke, Richard Flanagan, Paul Parker, Eric Kasper, Kenneth Manning, and Seval Yildirim. I am also grateful for enlightening conversations about my research with numerous additional scholars, including Chuck Epp, Catherine Albiston, Martha Derthick, John Dinan, Paul Herron, Carol Weissert, Michael Solimine, Cynthia Bowling, Robert Agranoff, Jeb Barnes, Aaron Ley, and Phillip Wallach. Dan Schweitzer at the National Association of Attorneys General generously provided key information concerning AG amicus curiae brief filings, and my conversations with several other practitioners in the world of state attorneys general were helpful throughout my research.

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CHAPTER ONE

STATE LITIGATION AND THE STRUCTURE OF CONTEMPORARY AMERICAN POLICY

On January 1, 1999, when I got this office, I suddenly became an enormous fan of the new federalism. I suddenly said, "States' rights are a beautiful thing." States' rights are the future, and we want to do everything we can to promote them.

Eliot Spitzer, former attorney general of New York

Before a personal scandal precipitated his dramatic fall, Eliot Spitzer was one of corporate America's most feared regulators. Yet his influence on national regulation stemmed not from a political position in Washington, DC, but from his role as his state's chief prosecutor. As New York's state attorney general from 1999 to 2006, Spitzer conducted litigation campaigns against Wall Street firms, gun manufacturers, energy producers, and other prominent national industries. Joined by several of his fellow attorneys general from across the country, Spitzer also led lawsuits aiming to force the George W. Bush administration to address environmental hazards such as acid rain and climate change. These actions were necessary, he claimed, because of the federal government's failure to protect consumers and the environment. By battling national corporations and federal regulators under the banner of a new states' rights, Spitzer aimed to use litigation to pursue national policy goals Congress and federal agencies had declined to adopt.

Eliot Spitzer's rise to national prominence was part of a growing trend in American politics. Beginning in the last decades of the twentieth century, state litigation has taken on an expanded role in national policymaking. State attorneys general (AGs), the actors responsible for nearly all state litigation, have increasingly collaborated across state lines on investigations and lawsuits against major corporations and the federal government alike. Just before Spitzer took office, for example, forty-six of the nation's AGs completed a \$206 billion settlement with leading tobacco firms in what

remains the largest civil settlement in American history. This settlement, which followed the failure of comprehensive tobacco regulation in Congress, established a host of new tobacco advertising regulations, industry lobbying restrictions, and new de facto taxes on cigarettes.¹ More recently, the 2008 foreclosure crisis prompted a coordinated AG investigation of several of America's largest banks, which concluded with a \$26 billion settlement in 2012 imposing new regulations on the American lending industry not otherwise required under federal law.² Meanwhile, AGs have made aggressive use of lawsuits against the federal government to challenge several federal policies. For example, the constitutional challenges to President Barack Obama's signature domestic achievement, the Affordable Care Act, began with coordinated groups of AGs filing suit just minutes after the bill became law.

The emergence of this activity may initially appear as simply the latest example of states playing a central role in American political development. Many ideas born at the state level have found their way into national policy, from labor laws in the Progressive Era to welfare reform in the 1990s. Moreover, tensions between state and federal power have long been central to the American experience. "The question of the relation of the states to the federal government," as Woodrow Wilson remarked in his classic *Constitutional Government in the United States*, "is the cardinal question of our constitutional system."³

Yet the activity examined in this book, I suggest, is different. Although states have long served as laboratories for democracy as well as sources of political conflict, the rise of state litigation as a force in contemporary national policymaking represents a new and significant development in American federalism. Rather than merely influencing national policy through the diffusion of political innovations, AGs have increasingly used the legal process to dictate the terms of national policy. This complicates the standard conception of intergovernmental conflict, which typically focuses on state efforts to protect their interests against a federal government encroaching upon their prerogatives. Instead, this new form of politics raises precisely the opposite problem—state policy preferences effectively trumping those of the federal government.

Further complicating the familiar narrative of "the states versus the federal government" is that "the states" in this story are not a monolithic group. Armed with nearly complete control over determining their states' position in litigation, AGs have defined the state interests they are tasked with representing in increasingly divergent terms. Reflecting broader trends of

political polarization and conflicts over policy, AGs have used their position to ally with like-minded advocacy groups and partisan interests to pursue ideological policy goals. This in turn has led to greater conflict between AGs and other state institutions as well as among the AGs themselves. These conflicts have become increasingly important in American politics because coordinated state litigation is different from the policymaking tools available to other state actors—and, as I argue, has become a particularly powerful method of national policymaking.

The Origins of Contemporary State Litigation

What explains how and why state litigation has become such an important part of policymaking in the United States? What are the consequences for American politics? Is this new assertion of states' rights really a "beautiful thing," as Spitzer suggests? In the following chapters, I examine the causes and consequences of state litigation's emergence as a new dimension of American federalism. Anchoring my analysis is the notion that "new policies create a new politics."⁴ This idea has drawn attention from scholars of American political development who have explored how policy regimes, once established, generate feedback effects setting new political forces in motion.⁵ Theda Skocpol's work on early social policy development in the United States, for example, illustrated how the expansion of Civil War pensions in the late nineteenth century created negative feedback effects, making adoption of a European-style welfare state more difficult.⁶ Jacob Hacker demonstrated how American welfare politics has been profoundly shaped by regulatory and tax policies encouraging the development of private social benefits.⁷ These examples are a reminder that, as Paul Pierson put it, "social life unfolds over time."⁸ Understanding developments in contemporary politics requires attention to how prior policies set these new politics in motion.

Building on these insights, my analysis illustrates how earlier decisions by federal policymakers contributed to the rise of state litigation as a challenge to national policy. Most fundamentally, state litigation's status as an increasingly powerful aspect of national policymaking is a product of the peculiar structure of new social policy regimes constructed by state and federal lawmakers in the 1960s and 1970s. These policy regimes adopted broad, national objectives—such as cleaner air, wider access to health care, and greater protections for consumers in the marketplace—while reflecting both the horizontal and vertical fragmentation of power in the American state. The policies manifested America's horizontal fragmentation,

which separates power across governing institutions, by carving out a major role for the judiciary in the policy process. In particular, new social policies adopted a framework of adversarial legalism by making litigation a crucial component of the enforcement and implementation of new regulatory requirements.⁹ The new social policy also reflected America's vertical fragmentation, which separates powers between federal and state governments, by making states a major component in the operation of national policy. Federal environmental, health care, and consumer protection statutes adopted new forms of cooperative federalism in which federal and state actors shared responsibilities for the implementation of national policy goals. The federal government encouraged actors on the state level, including AGs, to administer and enforce these broad new areas of social policy.

The incorporation of a distinctive brand of cooperative federalism and adversarial legalism in federal policy provided fertile ground for entrepreneurial AGs to take advantage of their position as state litigators. Yet federal support for the rise of modern state litigation did not end there. Beginning in the 1970s, federal policymaking institutions specifically empowered AGs in a variety of ways. Congress provided federal grants for AGs, bolstering their ability to initiate large-scale litigation campaigns. Federal courts, along with Congress, have steadily expanded AGs' jurisdiction by granting these state actors greater ability to bring lawsuits across a range of policy areas. Meanwhile, federal agencies expanded resources available to state litigators by sharing resources and information with the states in efforts to streamline enforcement efforts. In some cases, examined later in this book, federal agencies even supported AG lawsuits against the federal government as a way to expand the regulatory state. Already armed with a great deal of institutional autonomy as the chief legal representatives of their states, AGs have benefited from this federal support to bring an increasing number of coordinated lawsuits—which, ironically, have served as a significant challenge to federal policy itself. Over time, these coordinated efforts to reshape national policy have made state litigation a major venue for broader battles over politics and regulation in America.

From Veto Points to Opportunity Points

The outgrowth of state litigation from the structure of contemporary American policy challenges the notion that the American system of separation of powers stymies, rather than encourages, national public policy development. The common view is that the vertical division of powers between

the national and state governments, especially when combined with the horizontal division of powers among branches of governments, fragments policy to such a degree that it presents major obstacles to the establishment of new national policies.¹⁰ Except during those rare critical moments when a political party can achieve unified control of federal policymaking institutions, the numerous veto points available to opponents of policy development result in little more than gridlock and inaction.¹¹

This book, however, illustrates a different aspect of the operation of the structure of contemporary American government. Although horizontal and vertical fragmentation can indeed produce veto points leading to more difficult national policymaking, institutional fragmentation simultaneously opens up new opportunity points for national policymaking. It can spur “unorthodox lawmaking,” Barbara Sinclair’s term for new procedures and processes that aim to accomplish policy goals through unconventional and often innovative lawmaking strategies.¹² Fragmentation can also enable a wider range of policy-seeking actors, such as the AGs, to gain entry into the national policymaking system. By taking advantage of the horizontal and vertical fragmentation inherent in contemporary American policy, these actors have ironically derived the ability to forge centralized, national policies.

Although the rise of this new style of politics has served as a way to overcome the many veto points embedded in the American policymaking system, it raises new normative concerns about the proper role of this form of policymaking in a democracy. Several scholars have noted the increasing judicialization of American politics, in which the complex and technical arena of law and courts has become a crucial battleground for political competition.¹³ State litigation is a prime example of this type of political contestation, becoming increasingly important in creating national regulatory policy yet occurring in venues largely shielded from the normal democratic process. Unlike policymaking in legislatures or administrative agencies in which the public has the opportunity to follow the process via C-Span or notice-and-comment rule-making hearings, the AGs’ national policymaking is conducted largely behind closed doors. Out-of-court settlements involving billions of dollars and establishing new regulations require only the approval of a single judge, if at all, to go into effect. Lawsuits against administrative agencies proceed in highly technical legal forums, serving to muddy the waters of electoral accountability by complicating the ability of lawmakers to achieve a proper balance of government regulation and economic efficiency.

I will return to these normative concerns throughout this book. First, I turn to the broader relationship between state litigation and the two aspects of American separation of powers, adversarial legalism and cooperative federalism, that have given rise to this new form of policymaking. In doing so, I note how this book contributes to our understanding of the politics of litigation as well as the operation of federalism in contemporary American politics.

State Litigation in a Sea of Adversarial Legalism

Observers of American politics have long recognized the peculiarly legalistic nature of American politics and society. The American republic, it is said, is “one of laws and not of men,” and the law has structured relations since the founding of the republic. Alexis de Tocqueville famously noted the influence of law in the United States in 1835, stating, “There is almost no political question in the United States that is not resolved sooner or later into a judicial question.”¹⁴ Others point to American society’s status as “profoundly rooted in law” as a key element of American exceptionalism.¹⁵

However, although law has a long and distinctive history in American politics, something has changed in the past few decades. Since the middle of the twentieth century, courts and litigation have become much more important in resolving complex questions of public policy.¹⁶ The “juridification” of American policy, as Gordon Silverstein has argued, has entailed the increasing substitution of ordinary politics with judicial decisions and legal formality.¹⁷ Part of this juridification has been constitutional, with a variety of groups pursuing rights-based claims that built on the classic model of public interest litigation developed by the NAACP’s success in *Brown v. Board of Education*.¹⁸ Much of it, however, has been spurred by statutory changes, as Congress has built a litigation state by opening the courthouse doors for litigants to enforce key elements of federal policy.¹⁹

The construction of this litigation state has been built on Americans’ reliance on what Robert Kagan calls “adversarial legalism.”²⁰ This distinctive form of policymaking calls on adversarial features of law and courts to resolve complex questions of public policy. For example, the tort law system has grown to become a central method of compensation for victims of large-scale public health issues, and the American process of regulatory decision making allows many avenues for groups to challenge agency decisions in court. This system contrasts with the dominant methods of policy implementation in other industrialized democracies, which grant centralized, expert bureaucracies more autonomy to resolve issues of implementation.

Adversarial legalism—the distinctive American reliance on lawsuits in public policy—was a product of Americans’ seemingly contradictory demands. On the one hand, Americans demanded “total justice,” Lawrence Friedman’s term for the society-wide call for the law to protect citizens from harms previously accepted as a normal part of modern life.²¹ The public expected government to address a bevy of new quality-of-life issues including the environment, consumer protection, and health care.²² At the same time, however, Americans retained a long-standing skepticism of concentrated political power. The more centralized political structures of Western Europe also faced calls for total justice, but the similar American demands were filtered through layers of institutional fragmentation built up because of this continuing distrust of concentrated power. How, then, were we to achieve the ambitious goal of providing Americans increased protections against the vicissitudes of modern life while avoiding too much centralization of the American state?

One answer was reliance on litigation to achieve social goals rather than placing the task wholly within centralized federal bureaucracies. Federal civil rights statutes, beginning with the Civil Rights Act of 1964, adopted private enforcement regimes empowering private litigators to enforce provisions of federal law.²³ This adversarial model of policy enforcement quickly became commonplace in federal statutes, including environmental statutes containing citizen suit provisions allowing individuals to sue polluters directly for violations of federal law.²⁴ Paralleling this development was a revolution in state-level tort and consumer law encouraging private parties to sue corporations for a variety of alleged harms. Large scale class-action litigation sought to use the courts to not only achieve compensation for victims but as an avenue to solve wider social problems.²⁵

The exercise of adversarial legalism by private litigators generated considerable controversy, with concerns about an alleged “litigation explosion” in America prompting politicians such as George H. W. Bush to declare that Americans were “suing each other too much and caring for each other too little.”²⁶ After expanding the private litigation state for decades, legislators and courts alike have more recently sought ways to make private litigation more difficult.²⁷ Yet even as legislatures and courts have trimmed America’s reliance on private litigation, they have continued to strengthen the enforcement power of public prosecutors, particularly AGs. Congress has provided funding to AGs enabling them to expand their capability to handle complex legal investigations. State legislatures placed greater responsibilities on these actors to enforce broadly worded state consumer

protection statutes against corporations. Federal legislation, such as the Dodd-Frank Wall Street Reform and Consumer Protection Act enacted in 2010, expanded AGs' ability to enforce federal law.²⁸ Meanwhile, courts have changed legal rules, making it easier for states to sue corporations and federal agencies.²⁹

As the avenues for state prosecution have expanded, AGs have increasingly filled the role played by interest group litigators and private class action attorneys, both of whom have found it more difficult to access the courts. AGs have relied on adversarial legalism to achieve compensation for victims of alleged fraud, challenge agency rule making, and alter corporate behavior in ways increasingly resembling the private elements of America's litigation state. However, despite the often politically charged nature of their litigation, AGs have avoided becoming enmeshed in the broader political controversy over litigation in American society. By engaging in an "acceptable" and less controversial form of adversarial legalism, AGs have become a more attractive avenue for interest groups, plaintiffs' lawyers, and political parties seeking their own financial and policy interests.

One of the broader themes of this book is that modern state litigation illustrates a different way in which law is used to exert power in the American state. Too often in contemporary scholarship on law and courts, the examination of the role of law in America focuses on the formal actions of judges, and particularly those on the US Supreme Court. This characteristic hovers over much of the debate over whether seeking social and political change through the law is merely a "hollow hope."³⁰ Yet other scholars, especially those in the law and society tradition, have noted that the reach of the law goes well beyond formal judicial decision making. Much of what is important in legal development occurs not because of formal court decisions but because of contentious bargaining in the shadow of the law.³¹ As Charles Epp has explained in the context of efforts to reform police practices and reduce sexual harassment in the workplace, the threat of legal liability is a powerful lever to produce compliance with new norms even in the absence of formal judicial action.³²

This dynamic has been central to much of the litigation by AGs. My narrative examines how AGs have attempted to use the law to force political change, but courts and judges often play only a supporting role. The bulk of the AGs' litigation is resolved via out-of-court agreements before formally entering the court system, with little, if any, judicial oversight. Nevertheless, because the threat of active litigation remains ever present in the background, defendants are willing to sign settlements containing regulatory

standards not otherwise required by existing law. Piece by piece, these settlements represent a patchwork national regulatory regime created outside of the typical national policymaking process. This form of policymaking has proven especially resilient because it leverages the power of the law while simultaneously insulating new policy creation from further oversight by judicial, legislative, or administrative institutions.

State Litigation and the Reshaping of American Federalism

AGs are not just litigators, taking advantage of the sea of adversarial legalism that has emerged in the latter half of the twentieth century. They are also state actors who have benefited from important changes in American federalism during the same period. As Daniel Elazar noted, the post–New Deal period represented a transition from a dual federalism in which state and federal governments operated in separate policy spheres to a cooperative federalism in which both worked together to achieve common goals.³³ According to one oft-cited metaphor, American federalism has increasingly resembled a marble cake, in which functions of local, state, and federal governments mingle together, as opposed to a layer cake, in which governmental functions are strictly separate from one another.³⁴

As federal policies grew rapidly after the era of the New Deal, federal policymakers increasingly looked to the states to help implement these new programs. This was especially true in the 1960s and 1970s, when federal policy enlisted states as partners in administering programs aiming to solve large-scale social problems including racism, pollution, and poverty. Clean air and water statutes adopted during the environmental decade of the 1970s, for example, articulated national goals but placed much of the responsibility for implementation on state governments. Medicaid, the health care system for lower-income Americans, likewise adopted a cooperative federalism model by splitting funding between the federal and state governments while giving administrative responsibilities for the program to the states.

The increased role of the states in policy implementation had profound impacts on the shape of federalism in the United States, with many suggesting that the rise of cooperative federalism posed challenges to the vitality of state authority. When in 1969 constitutional scholar Philip Kurland bluntly declared that “federalism is dead,” he had in mind the ways in which the federal government was increasingly dictating the shape of national policy

and squeezing out the traditional role of the states.³⁵ John Kincaid argued that cooperative federalism was morphing into coercive federalism as Congress increasingly preempted state authority and attached various strings to states' receipt of federal money.³⁶ By the 1990s, the Supreme Court—the institution that Kurland accused of playing a central role in killing federalism—became increasingly concerned with cooperative federalism's role in allowing the federal government to commandeer state officials into carrying out federal objectives at the expense of traditional state autonomy.³⁷

Yet the suggestion that cooperative federalism would lead to the demise of federalism overlooked the way in which marble cake federalism has also served to empower states by providing them additional avenues through which to affect federal programs. Taking note of the ways in which federal programs since the 1960s entailed a “great expansion in the use and activity of subnational governments,” Samuel H. Beer noted that states “in consequence find themselves in a stronger position to make demands on the central government.”³⁸ By inviting states into the national policymaking process, federal policy opened the door for entrepreneurial state actors to have a hand in shaping the contours of that process. Although the federal government maintained leverage over the states by means of threatening preemption and attaching strings to federal grants, states maintained leverage over the federal government because federal policy depended on them to carry out federal objectives.

Meanwhile, Congress, federal agencies, and the courts provided AGs specifically with additional resources bolstering their capacity to enforce new national policy regimes. This included grants to AGs allowing them to expand their operations as well as the ability to directly enforce federal law. The incorporation of AGs into the national policy process allowed federal policymakers to achieve enforcement goals without the necessity of creating large new federal bureaucracies. At the same time, however, it bolstered an entrepreneurial set of actors who have taken advantage of the invitation to influence national policy to both complement and complicate the goals of federal policy. Another of this book's main themes is that the rise of coordinated AG activity, which has emerged as both adversarial legalism and cooperative federalism became crucial aspects of national policy implementation, requires a reevaluation of common conceptions of the federal–state relationship.

For one, the AGs' activities run contrary to the familiar view that a vigorous commitment to states' rights serves as a limit on national power. This view of federalism has a long lineage in American politics. In his famous

argument in *Federalist* No. 51, James Madison argued that federalism worked with separation of powers to provide a “double security” for the liberties of the people. The commitment to maintaining separate spheres of authority in state and federal governments, themselves both fragmented further into different branches, would help ensure that “the different governments will control each other, at the same time that each will be controlled by itself.”³⁹ Alexander Hamilton similarly portrayed federalism in terms of limiting governmental power, suggesting in *Federalist* No. 28 that the “general government will at all times stand ready to check the usurpations of state governments, and these will have the same dispositions toward the general government.”⁴⁰

These founding-era conceptions of the federal–state relationship have infused much subsequent scholarly analysis as well as popular rhetoric concerning federalism. Several scholars have argued that by fragmenting power and creating additional veto points, federalism both in America and in other federal states contributes to weaker central state development.⁴¹ Some scholars, particularly those from the public choice tradition, celebrate decentralization for its ability to constrain government growth.⁴² Meanwhile, American political movements advocating a vigorous commitment to states’ rights have been most frequently associated with political conservatives. President Ronald Reagan argued for a shift of governmental functions to the states because “the Federal Government is overloaded . . . having assumed more responsibilities than it can properly manage.”⁴³ In the 1990s, conservatives in Congress and on the Supreme Court proposed devolution and dual federalism as ways to limit the reach of the national government.⁴⁴ The rise of the conservative Tea Party movement during the first term of Barack Obama’s presidency also reflected a conservative commitment to federalism as a way to cabin the power of the federal government.⁴⁵

However, the notion that federalism serves as a constraint on governmental power by allowing each level of government to “check the usurpations” of the other belies much of how contemporary AGs have used their position in the federal system. Rather than resisting the growth of a national regulatory state that threatens to expand federal power at the expense of the states, AGs have more frequently used coordinated litigation to promote the expansion of national regulation. By working together across state lines, AGs have developed new national policies conflicting with and even replacing regulatory policy choices adopted by the federal government. AGs have often made this goal explicit, as when Eliot Spitzer claimed his litigation against Wall Street was a way to accomplish what federal regulatory

agencies could not or would not do: place new regulatory oversight over the financial industry's practices. The case studies in this book likewise illustrate how AGs used litigation to expand the national regulatory state across two of the most contentious and economically far-reaching areas of national policy: health care and the environment.

Although the AGs' version of states' rights bears little resemblance to the common portrayal of federalism as playing primarily the role of constraining government power, it appears to mesh better with scholarly conceptions of federalism that emphasize the ways in which post–New Deal federalism empowers government at all levels. In a profound reinterpretation of the New Deal's effects on the federal–state relationship, Stephen Gardbaum observed that the New Deal period, so often assumed to be solely a story of increasing federal power, was actually a period in which the regulatory power of the states was “unshackled” concurrently with increases in national power.⁴⁶ Rather than representing a zero-sum game in which the federal government gained power at the expense of the states, after the New Deal “*both* federal and state governments were constitutionally enabled to regulate a large number of areas of social and economic life that previously they had both been prohibited from regulating.”⁴⁷ Far from killing off federalism, the New Deal revolution fortified state power even as the reach of the central government expanded.

Several scholars have celebrated the potential for the contemporary federal–state relationship to empower government rather than to check it. Robert A. Schapiro, for example, emphasizes the benefits of a “polyphonic” conception of contemporary federalism that “consists of independent state and federal voices that interact together” to bring their powers to bear on common problems.⁴⁸ Having multiple, overlapping layers of authority is valuable, Schapiro argues, because of the way it promotes the values of plurality, dialogue, and redundancy.⁴⁹ The value of plurality argues that policymaking benefits from multiple approaches to similar policy problems, harkening back to Justice Louis Brandeis's argument that 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.”⁵⁰ Contemporary federalism also promotes dialogue between federal and state regulators, which can result in better and more comprehensive regulatory schemes through the exchange of ideas. Finally, the redundancy of overlapping regulation can prevent the existence of regulatory gaps because regulation at one level of government can address regulatory failures at another. Schapiro's work par-

allels similar arguments by scholars who have used an array of monikers to describe contemporary American federalism, including dynamic federalism,⁵¹ empowerment federalism,⁵² intersystemic governance,⁵³ iterative federalism,⁵⁴ and adaptive federalism.⁵⁵ Uniting all of them is a defense of a system of modern governance that provides an expansive role for the states to engage in regulatory policymaking alongside federal regulators.

The emergence of coordinated AG activism appears to fit well into this polyphonic conception of federalism as empowerment rather than federalism as constraint. However, unlike other state actors such as governors and legislators, AGs use a policymaking tool—adversarial legalism—that complicates the alleged benefits of this polyphonic system. Although one of the major purported benefits of state activism is the potential for policy experimentation and regulatory dialogue, the AGs' brand of federalism often results in precisely the opposite. Rather than promoting regulatory experimentation, AG litigation has served as a way to set single regulatory standards across the entire nation. Rather than complementing the federal regulatory regime through intergovernmental dialogue, AGs have used adversarial methods to close off debate rather than promote it by trumping existing national policy and replacing it with their own view of ideal policy. In doing so, the AGs' attempts to solve perceived regulatory problems within national policy regimes have created new complications.

Overview of the Book

The structure of modern American policy, which combined cooperative federalism and adversarial legalism, served to create a new politics in the form of nationally focused state litigation campaigns. This in turn has sparked a different operation of the vertical and horizontal separation of powers than commonly assumed. Rather than standing in the way of national, coordinated policy development, the fragmentation of the American system actually encouraged such development. At the same time, however, the rise of the AGs' coordinated activism has raised new problems by setting into motion a variety of unintended policy consequences. This book examines this activity by relying upon an original dataset of multistate litigation and a series of in-depth case studies.

Chapter 2 provides the background for the case studies that follow by examining the broader trends and goals of coordinated state litigation. I suggest that state litigation falls into three basic categories: (1) *policy-creating litigation* that seeks settlements with national corporations establishing new

regulatory responsibilities not otherwise required by law, (2) *policy-forcing litigation* that challenges regulatory inaction by federal agencies, and (3) *policy-blocking litigation* that attempts to thwart regulatory actions by federal policymakers. Relying on an original data set of multistate litigation from 1980 to 2013, this chapter demonstrates that state litigation has increased dramatically over time. It also examines why this has occurred, including how various state and federal policies and actions of the AGs themselves have bolstered the ability of state litigators to serve as powerful actors in national policymaking.

Chapters 3 through 5 examine the role of AGs in the fast-growing area of multistate pharmaceutical litigation. Chapter 3 examines how AGs used policy-creating litigation to fundamentally alter the multi-billion-dollar prescription drug industry. AGs, often working together with federal prosecutors, private attorneys, and public interest groups, aimed to redefine health care fraud to include practices in which pharmaceutical firms had long been engaged and that Congress had countenanced as a way to ensure that health care providers would remain in Medicare and Medicaid. The success of this litigation prompted an overhaul of the national drug pricing regime and expanded government oversight of the pharmaceutical industry.

Chapter 4 involves another policy-creating litigation campaign that has changed the way in which pharmaceutical firms market prescription drugs. Particularly through the use of out-of-court settlements against drug companies, states achieved new national regulations on the pharmaceutical industry. This has included new restrictions on off-label marketing, disclosures of clinical testing results, and new requirements for direct-to-consumer advertising, all of which are effectively applicable nationally but are not required under federal law. As with pharmaceutical pricing, these lawsuits have successfully disrupted the existing balance of policy objectives maintained by federal policymakers in an area affecting a significant portion of the overall American economy.

Chapter 5 ties together several of the broader themes of the states' pharmaceutical litigation. By making cooperative federalism and adversarial legalism a key part of the underlying statutory structure of government health care programs, Congress carved out entrepreneurial space for state litigators to challenge federal health care policies. The growth of AG capacity, bolstered by federal funding and partnerships with the private bar, helped enable these actors to bring complex pharmaceutical litigation. The effect of these drug pricing and marketing lawsuits has been to destabilize previous compromises in Congress with wide implications for the entire health care

industry. In the meantime, the settlements have served to supplement the AGs' own power by affording them greater oversight over drug companies. The success of these lawsuits suggest that the basic dynamic present in these litigation campaigns, in which state policy choices essentially trump federal regulatory compromises, will continue.

I move to a second policy area in chapters 6 through 8, which examine how state litigation serves as a tool to shape national environmental policy. Chapter 6 addresses how AGs took advantage of the structure of the Clean Air Act—which placed a twin emphasis on cooperative federalism and adversarial legalism—in successive waves of policy-forcing litigation to address the emerging issue of acid rain. A first wave of state litigation targeted the Reagan administration's deregulatory approach to air pollution control. Although this litigation achieved only modest success in court, it signaled the emergence of a new tool to challenge national policy. A second and much more successful wave of lawsuits challenged the George W. Bush administration's approach to acid rain. This litigation built on the states' experience with the tobacco settlement to force a series of multi-billion-dollar settlements requiring industry leaders to adhere to an interpretation of the Clean Air Act that had been rejected by the Bush administration. A concurrent strategy was to sue the Environmental Protection Agency in an attempt to force the agency to expand regulation of energy producers. These efforts resulted in several state victories effectively reversing the regulatory approach adopted by the federal government.

Chapter 7 explains how states used both policy-creating and policy-forcing litigation strategies to challenge the Bush administration's approach to climate change. Because Congress and the administration appeared unwilling to take action to reduce greenhouse gases contributing to climate change, AGs took to the courts to try and achieve a regulatory approach rejected by federal policymakers. One strategy involved suing polluters directly under innovative common-law theories in an attempt to reach regulatory settlements. This policy-creating litigation campaign eventually sputtered, but a second policy-forcing approach was much more successful. AGs argued that the Bush administration was legally obligated under the Clean Air Act to regulate carbon dioxide and other greenhouse gases, a strategy that achieved success in the US Supreme Court's decision of *Massachusetts v. EPA* (2007). This decision, widely considered the most important environmental ruling in the Court's history, was the result of a lengthy litigation strategy orchestrated by AGs together with a cadre of interest groups and political interests.

Chapter 8 suggests that several of the themes of the pharmaceutical litigation have also appeared in the environmental litigation. As in the pharmaceutical context, the AGs' environmental litigation developed as a result of the statutory structure of the federal air pollution control regime and greater litigation capacity for AGs. Although their strategies were not always successful, AGs' actions in this area have had far-reaching consequences. This litigation has destabilized the federal air pollution control regime by seeking policy goals incompatible with the statutory structure on which the lawsuits are based. Although advocates of stricter climate change regulation achieved in the courts what they were unable to achieve in the executive or legislative branches, it has come at the cost of regulatory certainty. These litigation campaigns also highlight the growing polarization among AGs and increased collaboration between AGs and interest groups, suggesting that state litigation is becoming an additional battleground for national political conflict outside of traditional policymaking institutions.

The last of my case study chapters turns to the changing nature of AG litigation during the Obama administration. I focus in chapter 9 on AGs' use of policy-blocking litigation, especially constitutional challenges to the Patient Protection and Affordable Care Act and litigation seeking to block new climate change regulations. Although these conservative state litigation campaigns have tended to seek constraints on the national regulatory state, they illustrate how state litigators are increasingly part of a larger web of national political conflict in which AGs act as a stand-in for the interests of individuals and political parties as opposed to traditional "state interests." Particularly important is the intensifying polarization among the AGs on party lines, a dynamic that has also appeared in the AGs' use of *amicus curiae* (friend of the court) briefs. AGs have also increasingly collaborated with a variety of outside interests, including private attorneys and public interest groups. In short, AG activism has become a more nationalized battleground for political conflict in which states serve as a method of legitimizing and mobilizing broader litigation campaigns.

The concluding chapter 10 returns to the theme that state litigation reveals American federalism operating in a manner different from commonly assumed. Beyond simply protecting state prerogatives from an overzealous federal government, coordinated state litigation also serves as a way to challenge and destabilize the federal policy regime while often expanding the regulatory reach of government. This nationally focused state litigation has been institutionalized as a powerful way for political actors—along with the interest groups and political parties with whom they are increasingly

linked—to get a second chance at policy change after failing to succeed in Congress or in federal agencies. Ironically, however, federal policymakers have contributed to the institutionalization of this national policymaking rival by bolstering the capacity of state litigators and by maintaining the model of cooperative federalism and adversarial legalism in federal regulatory programs. This development, I argue, is problematic for several reasons. Even as state litigation has often complicated federal regulation, however, various incentives for all of the affected parties are likely to maintain state litigation as a significant part of the national policy landscape.



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