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MDL NATIONALISM, FEDERALISM, AND THE OPIOID EPIDEMIC

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I. Introduction

Multidistrict litigation (MDL) is a nationalist animal in a federalist system. It is a pragmatic, creative and modern response to the needs of litigation in today's national economy. As such, MDL has become something of a force against the litigation federalism that is at the core of traditional civil procedure. This should come as no surprise. In many ways, that's the point.

Although not the intent of the original drafters of the MDL statute, 28 U.S.C. § 1407,[2] today, MDLs are formed to centralize into a single federal court for resolution nationwide suits that often are not amenable to class action. Of course, class actions are often not possible due to a key feature of federalism itself: differences across state law. And almost all "mega" MDLs[3] of this nature hold out as their goal "global peace"—a settlement of *all* pending suits, including suits filed in *state courts* and so outside of the MDL. In this push for settlement, the gravitational force of large MDLs often pulls state actors and state cases into the federal courts' domain regardless of the formalities of state-by-state jurisdiction and with little attention to state-law variations.

This essay aims to focus new attention on MDL nationalism and federalism. Is MDL's emergence as a nationalist workaround to a fed-

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2. 28 U.S.C. § 1407 (2018); Multidistrict Litigation Act of 1968, Pub. L. No. 90-296, 82 Stat. 109 (1968) (codified at 28 U.S.C. § 1407 (2018)); *see also* Andrew D. Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. Pa. L. Rev. 831, 840 (2017) ("The [drafters] did not intend MDL . . . to be a stand-in should the mass-tort class action ultimately prove to be unviable.").

3. The types of cases centralized in MDLs run the gamut from securities, employment, and antitrust to products liability, sales practices, and common disasters. My focus is on "mega" MDLs—ones with 1,000 or more cases—because they are the ones exerting pressure on the system, but the ways in which they do so can likewise impact smaller proceedings.

eralist litigation system a symptom of broader cracks in the way traditional procedure applies (or fails to adequately apply) to modern problems? And is this particular type of workaround—which has developed organically through generous judicial bending of the MDL statute and the Federal Rules—the way we want the system to evolve? Would a more formal change—such as a new statute, perhaps one that thinks about aspects of federalism we might wish to preserve—be preferable?

Only a few years ago, MDL was the best kept not-so-secret in civil procedure, known well to insiders but little known to mainstream litigation and procedure scholars. Even as MDL cases grew to comprise some forty percent (!) of the federal docket[4]—a truly shocking statistic considering that many lawyers hardly know what MDL is—scholarship remained limited,[5] and MDLs largely remained absent from law school casebooks and teaching.[6] The last few years changed that, with a wave of important scholarship[7] (also coinciding with the fiftieth anniversaries of the class action rule, Federal Rule of Civil Procedure (FRCP) 23, and the MDL statute) and high-profile litigation utilizing the MDL's tools and creative options.[8]

No litigation has had a higher profile or brought more federalism issues into high salience than *In re Opiates*,[9] the MDL centralizing some 2,800 cases that comprise the bulk of the litigation arising out of the national opioid crisis, together with the constellation of more than

4. Judith Resnik, *"Vital" State Interests: From Representative Actions for Fair Labor Standards to Pooled Trusts, Class Actions, and MDLs in the Federal Courts*, 165 U. PA. L. REV. 1765, 1767 (2017).

5. The work of Elizabeth Burch is a major exception. *See, e.g.*, Elizabeth Chamblee Burch, *Disaggregating*, 90 WASH. U. L. REV. 667 (2013); Elizabeth Chamblee Burch, *Group Consensus, Individual Consent*, 79 GEO. WASH. L. REV. 506 (2011).

6. For the limited casebook attention to MDLs, see, e.g., OWEN M. FISS & JUDITH RESNIK, ADJUDICATION AND ITS ALTERNATIVES 593–94, 96–98 (2003); JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 380–82 (11th ed. 2013); GEOFFREY C. HAZARD, JR. ET AL., PLEADING AND PROCEDURE: CASES AND MATERIALS 320–21 (11th ed. 2015); LINDA J. SILBERMAN ET AL., CIVIL PROCEDURE: THEORY AND PRACTICE 311, 979, 1111–12 (4th ed. 2013); STEPHEN N. SUBRIN ET AL., CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT 1074 (5th ed. 2016).

7. More recent scholarship includes, for example, Andrew D. Bradt, *Something Less and Something More: MDL's Roots as a Class Action Alternative*, 165 U. PA. L. REV. 1711, 1712 (2017); Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CAL. L. REV. 1259 (2017); Alexandra D. Lahav, *A Primer on Bellwether Trials*, 37 REV. LITIG. 185 (2018); Adam S. Zimmerman, *The Bellwether Settlement*, 85 FORDHAM L. REV. 2275 (2017).

8. *See, e.g.*, Transfer Order, *In re* Juul Labs, Inc., Mktg., Sales Practices, & Prods. Liab. Litig., No. 3:19-md-02913-WHO (J.P.M.L. Oct. 2, 2019); Transfer Order, *In re* Gen. Motors, LLC Ignition Switch Litig., MDL No. 2543 (J.P.M.L. June 9, 2014).

9. Transfer Order, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804-DAP (J.P.M.L. Dec. 12, 2017).

500 state-court and municipality opioid lawsuits running in parallel across the country.[10]

The opioid litigation offers the starkest example yet of the challenges and opportunities that our federalist and overlapping system poses for litigation on a national scale—and also for subsequent settlement and preclusion. State Attorneys General (AGs), state courts, state laws, state governments, state localities all come into play. So too do our other court systems and national actors, including the Department of Justice, tribal courts, and the bankruptcy courts.

Forty-nine state AGs have filed a case against at least one party involved in the MDL.[11] All of them are in state court.[12] More than 2,000 localities, on the other hand, have filed in federal court—and so are now in the MDL—empowered by attorneys willing to bring their cases on a contingency-fee basis and emboldened to proceed on their own by memories of the massive 1990s tobacco litigation, after which some states gave localities short shrift.[13] In *Opiates*, localities are mostly using private attorneys to represent them in federal court, while their own public state legal actors—their AGs—proceed in their separate state court systems.

For the most part, only the localities who actually filed in federal court want to be there. As such, the MDL has been punctuated by various disputes brought by other actors over efforts to remand cases to state court or keep them there in the face of removal motions. For example, the Cherokee Nation had initially sued in tribal court, but that suit was dismissed for lack of jurisdiction. The Nation then sued in state court, and the case was removed to federal court.[14] Today, more than eighty state and federally recognized Indian tribes are in

10. Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Petitioner State of Ohio at 10, *In re* State of Ohio, No. 19-3827 (6th Cir. Sept. 6, 2019) [hereinafter Brief of Chamber of Commerce].

11. David Eggert, *Michigan Sues Opioid Distributors Under Drug Dealer Law*, U.S. NEWS & WORLD REP. (Dec. 17, 2019, 9:07 PM), https://www.usnews.com/news/politics/articles/2019-12-17/michigan-sues-opioid-distributors-likens-to-drug-dealers ("Michigan [is] the 49th state to have filed some kind of legal action against the opioid industry. Only Nebraska has not.").

12. Brief of Chamber of Commerce at 10–11, *In re* State of Ohio, No. 19-3827 (6th Cir. Sept. 6, 2019).

13. *See, e.g.*, CAMPAIGN FOR TOBACCO-FREE KIDS ET AL., BROKEN PROMISES TO OUR CHILDREN: A STATE-BY-STATE LOOK AT THE 1998 TOBACCO SETTLEMENT 20 YEARS LATER 1 (2018) ("Over the past 20 years, from FY2000 to FY2019, the states have spent just 2.6 percent of their total tobacco-generated revenue on tobacco prevention and cessation programs.").

14. Transfer Order at 5, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804 (J.P.M.L. Dec. 6, 2018) (transferring *Cherokee Nation v. Purdue Pharma L.P.*); Transfer Order at 3, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804 (J.P.M.L. June 6, 2018) (transferring *Cherokee Nation v. McKesson Corp.*); *see* Stacy L. Leeds, *Beyond an Emergency Declaration: Tribal Governments and the Opioid Crisis*, 67 U. KAN. L. REV. 1013, 1019–27 (2019).

the MDL as plaintiffs,[15] along with more than 400 other tribes involved as amici.[16]

State Attorneys General have also tried to fight back. They have made unprecedented use of repeated mandamus petitions to stop the MDL in the name of "state sovereignty."[17] In July 2019, the Arizona AG also took the unusual step of (unsuccessfully) petitioning the Supreme Court to take original jurisdiction of its fraudulent-transfer case against the Sackler family, which controls the major manufacturer Purdue Pharma—a move widely believed to have stemmed from the AGs' continuing desire to keep more issues out of the MDL.[18]

All of these overlapping parties have cooperated and competed intensely, whether through settlement negotiations, races to their own respective courthouses, fights over discovery or attorneys' fees, and even disputes over the power to sue and allot damages in the first place. This dynamic context has been complicated by the unusually frank ambitions of the MDL's presiding judge, Judge Dan Polster of the federal court in Cleveland. Judge Polster has been clear from the start that his goal is a *complete* settlement of all current and potentially all future claims between plaintiffs and defendants in the litigation—those both in state and in federal court, whether under his formal jurisdiction or not,[19] and even including the 30,000 potential localities out there that have not yet sued at all.

As I have detailed elsewhere, MDL judges are notably creative, often inventing new forms of "unorthodox civil procedure"[20] to address the complexity and volume of the cases before them. *Opiates* is no exception. Judge Polster's belief that "the other branches of gov-

15. For an empirical breakdown of the different types of plaintiffs in the MDL, see Roger Michalski, *MDL Immunity: Lessons from the National Prescription Opiate Litigation*, 69 AM. U. L. REV. 175, 190 (2019) (counting eighty-one tribal plaintiffs as of February 2019).

16. Brief *Amici Curiae* of 448 Federally Recognized Tribes in Opposition to Defendants' Motions to Dismiss Tribal Claims at 1, *In re* Nat'l Prescription Opiate Litig., 1:17-md-02804-DAP (N.D. Ohio Oct. 5, 2018); *see also* Order, *In re* Nat'l Prescription Opiate Litig., 1:17-md-02804-DAP (N.D. Ohio June 4, 2018) (creating a separate litigation track for all federally recognized tribes).

17. *See, e.g.*, Petition for Writ of Mandamus of State of Ohio at 19, *In re* State of Ohio, No. 19-3827 (6th Cir. Aug. 30, 2019).

18. *See, e.g.*, Adam Liptak, *Arizona Files Novel Lawsuit in Supreme Court Over Opioid Crisis*, N.Y. TIMES (July 31, 2019), https://www.nytimes.com/2019/07/31/us/politics/arizona-supreme-court-opioid-sackler.html; Anita Snow & Geoff Mulvihill, *Arizona asks for US Supreme Court involvement in opioid case*, ASSOCIATED PRESS (July 31, 2019), https://apnews.com/article/7ce825bc554d40248ab6be0c4fad887c.

19. *See, e.g.*, Memorandum Opinion Certifying Negotiation Class at 3, *In re* Nat'l Prescription Opiate Litig., 1:17-md-02804-DAP (N.D. Ohio Sept. 11, 2019) (certifying the negotiation class because it paves the way to global settlement).

20. Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1689 (2017).

ernment, federal and state, have punted" the public health crisis to the "federal court[s]"[21] and his intent to resolve it, has led to unprecedented action. This has held true for both Judge Polster, who has encouraged the invention of creative new procedural forms to help tackle the problem of how to bind (and preclude) parties who are not before his court and may not have even sued yet, as well as for the state AGs, who have made unprecedented attempts to resist the MDL's gravitational pull.[22]

The state AGs have cried "federalism" time and time again. They argue that they, not their localities, speak for their states and that their suits should effectively preempt their local governments' abilities to sue. They have argued that one of Judge Polster's most important procedural innovations, the novel concept of a "negotiation class" which, like a class action, would bind current and future suing localities to negotiate and settle together, undermines the AGs' state sovereignty and is unconstitutional. At the same time, the AGs are in tense contests with their own state legislatures, with stinging memories of diverted tobacco recoveries, as they devise ways to tie up any opioid remedies for direct use on opioid prevention and cessation programs.

Is this "dialectical litigation"[23] a good thing? Is it sustainable? In a new Article, Elizabeth Burch and I detail some of the benefits that sharper attention to federalism has indeed brought the opioid MDL, including more information production, more momentum, and more diverse judicial input.[24] *Opiates* has both exposed MDL's nationalist tendency to steamroll over federalism but at the same time—particularly in more recent months—has shown how strong federalist forces can dislodge and disperse the MDL's force. *Opiates* has seen unusual disruptions of the usual MDL nationalism because of its high salience and the participation of many MDL outsiders unwilling to play by the usual insiders' rules. It shows us the options of what exists and what might be when it comes to the national-state litigation balance.

There are also some real puzzles here. One of the most prominent relates to the challenge of preclusion—how to get to "global peace,"

21. Transcript of Proceedings at 4, *In re* Nat'l Prescription Opiate Litig., 1:17-md-02804-DAP (N.D. Ohio Jan. 12, 2018).

22. *See, e.g.*, Petition for Writ of Mandamus of State of Ohio at 19, *In re* State of Ohio, No. 19-3827 (6th Cir. Aug. 30, 2019).

23. *Cf.* Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1046–52 (1977) (describing a paradigm of dialectical federalism in which federal and state courts engage in productive, overlapping conversations, each with unique roles to play).

24. *See generally* Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 95 N.Y.U. L. REV. (forthcoming 2021).

which defendants often require to reach settlement, when there are so many cases in different jurisdictions and future potential cases still not filed. The most interesting development in this vein has been the emergence of *bankruptcy* as an odd solution to the federalism problem. Federal bankruptcy court has a unique set of powers not given to other federal courts especially relevant in this context: the bankruptcy court can halt all state litigation (and indeed all litigation) against a defendant and bring all current and future claimants to the table regardless of where cases are filed. It is distinctively anti-federalist in that sense. And it is uncomfortably more powerful in this regard—even though it is just an Article I federal court—than either an Article III federal court or any state court.

For that reason, the bankruptcy court's efforts to settle claims against Purdue, which filed for bankruptcy in 2019, have been much simpler than Judge Polster's efforts to achieve voluntary cooperation—and preclusion—with fifty states and the federal MDL parties, which include some two dozen more defendants. But resorting to bankruptcy is not practical for most defendants and hardly seems the intended design for resolution of thousands of national claims brought in state and federal courts alike.

This Essay aims to map out this complicated landscape of MDL nationalism and federalism, illustrating the various vectors—state/local, AG/other branches, and state/federal—at play. There is much more to say about what Burch and I call the "MDL Revolution"—*all* the ways in which the modern MDL chafes at the traditional norms and processes of civil procedure.[25] As we detail, MDLs are marked by unusual procedural creativity; they afford surprisingly little weight to the due process rights of plaintiffs, who cannot opt out of an MDL and who are not guaranteed counsel who adequately represent them; they engage in far too little motion practice; they often operate under intense secrecy; and they are shielded from routine appellate review.[26] At the same time, MDLs have beneficially opened the courthouse doors to many who have been shut out, an unorthodox workaround to the obstacles of modern litigation and the Court's stingy class action jurisprudence.[27] Burch and I explore these complexities and challenges in detail in other work.[28]

Here, I aim to highlight just the federalism piece of that larger project. Part I situates MDL in the broader story of the development of

25. *See generally id*.
26. *Id.* (manuscript at 48–64).
27. *Id.* (manuscript at 48).
28. *See generally id*.

"unorthodox civil procedure" in response to civil procedure's still-federalist structures. Part II sketches the MDL-federalism story, as we understood it before the opioid cases, with examples from other litigation. Part III highlights the different ways in which federalism has emerged in the context of *Opiates* specifically. The Essay concludes with some reflections about what this emerging landscape means and where we go from here.

II. Where We Are: Nationalism, Federalism, and Unorthodox Lawmaking

Let us consider where we are: modern MDL is largely a response to national litigation in a federalist legal system. It addresses the challenge of litigating parallel cases that arise across the fifty states in a national economy, where class actions are hard to come by, especially when fifty different states' laws are at issue.

To be sure, MDL didn't start out this way. The MDL statute was enacted in 1968 to address the limited problem of a rash of antitrust litigation against electrical equipment manufacturers that inundated federal courts across the country.[29] The statute expressly contemplates that the MDL court would have only *pre-trial* jurisdiction, to address concerns about duplicative discovery or conflicting pre-trial motions in similar horizontal claims across the country.[30] But as the MDL has evolved, its essence has changed. The reality is that once centralized, more than ninety-seven percent of MDLs terminate or settle in the MDL court, never to return whence they came.[31] Burch and I have termed this the "MDL paradox"—because what justifies MDL from a formal perspective is that although the MDL court lacks jurisdiction over all the cases before it, the final disposition occurs in the home-district federal court which does indeed have jurisdiction.[32] In practice, this could not be further from the truth, and it gives the MDL, once created, incredible leverage against any lawsuits outside of it in parallel systems.

29. *See* Bradt, *supra* note 2, at 854–63; Gluck, *supra* note 20, at 1671–72.

30. 28 U.S.C. § 1407(a) (2018).

31. *See* Admin. Off. U.S. Courts, *Judicial Panel on Multidistrict Litigation – Judicial Business 2019*, https://www.uscourts.gov/judicial-panel-multidistrict-litigation-judicial-business-2019 (noting that, since its inception, the Judicial Panel on Multidistrict Litigation has centralized 722,146 civil actions for pre-trial proceedings and remanded a total of 16,918, or 2.3%, of those).

32. *See generally* Gluck & Burch, *supra* note 24.

A. Unorthodox Civil Procedure

In previous work, I have labeled MDLs "unorthodox civil procedure."[33] This term borrows from theories outside of the procedure literature that describe the increasing number of ways in which traditional legal structures have informally evolved to address pragmatic concerns of modern lawmaking. In the field of legislation, as I have chronicled,[34] there is an analogous rise of "unorthodox lawmaking"—political scientists' term for Congress's increased use of legislative pathways and vehicles that do not track the textbook, "how-a-bill-becomes-a-law" paradigm.[35]

I have already made many connections between those developments and the rise of MDLs. Newly developed mechanisms to bypass traditional, sometimes cumbersome, legislative procedures—such as committee consideration and the filibuster—find parallels in the ways in which MDLs find more efficient paths to discovery and claim narrowing, and bypass trial altogether. With respect to federalism in particular, just as changes to the national legislative landscape have called into question traditional lawmaking models, so too does this era of sweeping national litigation pose challenges to earlier paradigms. Indeed, such was the case in the late 1930s when, not coincidentally, we welcomed the FRCP, the New Deal, and the Administrative Procedure Act at essentially the same time.[36] That was a moment for introspection about our legal system, its needs, and how it changes. This may be another.

B. Our Federalist Procedure System

One way to think about the recent rise of the MDL is to view its development through the lens of the more general tensions between nationalism and federalism in civil procedure. Procedure's current doctrines of jurisdiction, choice of law, and class action all effectuate a relatively federalist view of the world that in some ways is incompatible with the modern concept of a nationally integrated economy. MDLs highlight and respond to that pressure by working around those doctrines.

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33. Gluck, *supra* note 20, at 1677.

34. *See* Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1789–90 (2015).

35. BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 256–59 (5th ed. 2017).

36. Gluck, *supra* note 20, at 1678.

1. The Doctrines

Look first at the current doctrines. The law of personal jurisdiction clings to antiquated concepts of territoriality and emphasizes state sovereignty. It still does not accommodate a concept of minimum contacts for jurisdictional purposes based on the premise that goods may be aimed at the United States as a whole (the idea of a national economy) rather than at a particular state.[37] Justice Kennedy's assessment in *J. McIntyre Machinery, Ltd. v. Nicastro* offers a recent and memorable iteration of this conclusion: "[P]ersonal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis."[38] *Bristol-Myers Squibb Co. v. Superior Court of California* reaffirmed the Supreme Court's rejection of a conception of specific jurisdiction grounded in the fact of a national economy.[39] The Court addressed these principles again recently in two consolidated products liability cases against Ford Motor Company argued in October Term 2020.[40] The question in the cases is whether a plaintiff may assert jurisdiction over a defendant who does business in her state but where the injury in question did not stem from specific contacts with that state.[41] At oral argument, Justice Kagan noted "federalism has become an at least equivalent concern in the due process cases as fairness," even as Justice Alito pointed out that "the world in 2020 is completely different" from the world in 1945, when the Court decided its foundational specific jurisdiction case, *International Shoe*.[42]

With respect to choice of law, the *Erie* doctrine still reigns and is, of course, state-centered. *Erie* requires federal courts to apply the substantive law of the state.[43] This requirement, in turn, makes many nationwide damages suits unamenable to class certification because federal courts tend to view differences across state law as fatal to Rule 23's commonality requirement.[44] National litigation, then, must look elsewhere.

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37. For a rarely used exception, see FED. R. CIV. P. 4(k)(2) (allowing for personal jurisdiction over a defendant not subject to jurisdiction in any state).

38. 564 U.S. 873, 884 (2011).

39. 137 S. Ct. 1773, 1780–82 (2017) (barring the state of California from adjudicating claims by non-Californians for drugs that were bought, ingested, and caused harm outside California).

40. Bandemer v. Ford Motor Co., 931 N.W.2d 744, 747 (Minn. 2019), *cert. granted*, 140 S. Ct. 916 (2020); Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 443 P.3d 407, 411 (Mont. 2019), *cert. granted*, 140 S. Ct. 917 (2020).

41. *Bandemer*, 931 N.W.2d at 747–49, 755; *Mont. Eighth Jud. Dist. Ct.*, 443 P.3d at 411.

42. *See* Transcript of Oral Argument at 49, 54, *Mont. Eighth Jud. Dist. Ct.*, No. 19-368 (argued Oct. 7, 2020); *cf.* Int'l Shoe Co. v. Washington, 326 U.S. 310, 315 (1945).

43. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

44. *See* Genevieve G. York-Erwin, Note, *The Choice-of-Law Problem(s) in the Class Action Context*, 84 N.Y.U. L. REV. 1793, 1794, 1798–99 (2009).

The civil procedure literature does not contain nearly as much discussion of this nationalism–federalism tension as one might suppose. The existing work tends to be limited to the classic minimum-contacts teaching cases, such as *Asahi Metal Industry Co. v. Superior Court of California*[45] and *McIntyre*.[46] For decades, the Court has infamously failed to produce a majority opinion on that question and has never concluded that merely putting one's product in the stream of American national commerce would suffice; instead—unless the *Ford* cases change that—connection to a specific state is likely still necessary.[47] Enter MDLs.

The famous civil procedure chestnuts do not concern the fact pattern that most often gives rise to the MDL. Instead, they concern where jurisdiction might lie for an international defendant who aims products at the U.S. economy, whereas many of the biggest MDLs involve American defendants.[48] Thus, the issue is not whether there is a forum in which the defendant can be sued. Rather, the issue in MDLs tends to be that the defendant can be sued in *too* many places. Although the drafters of the MDL statute may not have envisioned how pervasive the MDL has become or how it is now used, the statute from the start was indeed always intended to address this kind of problem, namely, cases in which "massive filings . . . are reasonably certain to occur" in different jurisdictions.[49]

One area in which procedure doctrine has arguably modernized in recent years—and done so at least in part as a reaction to the expansion of the national economy—is general jurisdiction. As most Court watchers know, general jurisdiction was essentially a static doctrine for more than 50 years, until the Court in 2011, in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, embarked on what now appears to be a multi-case process of reviving, clarifying and modernizing the doctrine in response to current economic conditions.[50] The general jurisdiction cases are modern because they actually acknowledge and strive to find a workable way to deal with the fact that many companies now do business in every state. Before *Goodyear*, general jurisdiction was tied to the concept of territorial jurisdiction—a concept

45. 480 U.S. 102, 105 (1987).

46. 564 U.S. 873, 877 (2011).

47. Gluck, *supra* note 20, at 1682.

48. *Id.*

49. *See* H.R. REP. NO. 90-1130, at 3 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1899.

50. 564 U.S. 915, 919–20 (2011); Gluck, *supra* note 20, at 1685; Meir Feder, Goodyear, *"Home," and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. REV. 671, 672 (2012) (describing *Goodyear*'s "far-reaching effects on both the doctrine and theory of general jurisdiction . . . cast[ing] doubt on a large body of lower court case law.").

even more antiquated than the state-tied stream-of-commerce doctrine discussed in the specific jurisdiction context.[51] There may be something in this evolving story linked to the rise of MDL.

2. *The Docket*

The way in which the MDL docket has evolved also supports the theory that the nationalization of the economy has been a driving cause of the MDL's rise. Early MDLs focused on isolated incidents, such as airline crashes and "common disaster."[52] Prior to 1990, only six products liability actions had been consolidated into MDLs.[53] As of December 2019, however, it was those very cases that had taken over the docket.[54] Moreover, each product-liability MDL tends to have many more individual cases consolidated within it than other types of MDLs, meaning that products liability actions dominate the MDL docket. Antitrust was second, at 24.7% of the docket.[55]

This shift is consistent with the understanding that modern MDLs are motivated by the way companies now do business on a national scale—and so the harm they inflict affects potential plaintiffs across the country. In the words of one judge: "We are in an era of mass litigation and mass marketing. Think about things like FDA warnings. It's all en masse and when you have that, it's about nationalizing litigation."[56]

But think about how a mindset of "nationalizing litigation"—the concept of a "nationwide case"—might permeate these cases and change the judicial approach to them. It goes to more than just flexing MDL muscle to effectively assert pseudo-jurisdiction over large numbers of cases not formally before the MDL court. It also goes to how the MDL judge thinks about the states and the differences among their laws. One of the more famous MDL judges, Jack Weinstein, notably opined that there was a tort "law of national consensus"[57] because he had discovered in an earlier MDL that he needed a "unitary

51. Feder, *supra* note 50, at 672.

52. Emery G. Lee III et al., *Multidistrict Centralization: An Empirical Examination*, 12 J. EMPIRICAL LEGAL STUD. 211, 222 (2015).

53. Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After* Ortiz, 58 U. KAN. L. REV. 775, 793 (2010).

54. U.S. JUD. PANEL ON MULTIDISTRICT LITIG., CALENDAR YEAR STATISTICS: JANUARY THROUGH DECEMBER 2019 (2020), https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics-2019_1.pdf (indicating that, of 190 pending MDLs, products-liability MDLs were the most common, comprising 34.2% of the docket).

55. *Id.*

56. Gluck, *supra* note 20, at 1684 (internal citations omitted).

57. *In re* "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 690, 701 (E.D.N.Y. 1984).

law to govern a multistate mass tort dispute[.]"[58] Of course, there is no such things national tort law. That's one enduring aspect of *Erie*.

C. State Courts and AGs

Every lawyer knows that federal courts are not the only game in town. Many cases that wind up in MDL could wind up in state court too. State AGs, although not the only state-court actors, are the most salient, and have their own unique ways of working together and bringing cases that differ from those in the MDL. AGs do not typically bring class actions or operate in federal court. Rather, they work together in "multistate actions," engaging in pre-complaint investigations—AGs have much broader pre-filing discovery powers than ordinary litigants—and then typically bring their own cases, or enter settlements, at home. State AGs are political actors and have different interests from some private litigants—both in being visible in their own home-state courts and also in resolving ongoing harms quickly.

The MDL, in contrast, is a federal animal aimed at reducing duplicative pre-trial efforts, coordinating discovery and motion practice. While MDLs often ask state AGs to cooperate and coordinate with their efforts, it can be difficult when the AGs' practice norms are so dissimilar. As in the opioid litigation, AGs do not always want to submit to the settlement oversight of a federal court that has no jurisdiction over their state cases.

III. MDLs and Federalism Before Opioids

The federalism tension in the opioid litigation is not a new development in MDL generally, although it is true that *Opiates* has pressed the edges of heretofore-accepted MDL exceptionalism to the extreme. Long before *Opiates*, MDLs have involved AGs and the private bar, even in circumstances in which the AGs may not have filed any federal or removable action and are not "in" the MDL (as is now largely the case in *Opiates*).

Even as many MDL state-court coordination efforts have been successful, state judges have also reported feeling "bullied" by the MDL.[59] Complicated issues have arisen with respect to questions like attorneys' fees. Consider the controversial concept of a "Common

58. Howard M. Erichson, *Judge Jack Weinstein and the Allure of Antiproceduralism*, 64 DePaul L. Rev. 393, 405 (2015).

59. Gluck, *supra* note 20, at 1705 (reporting interviews of state court judges about MDL collaboration).

Benefit Fund"[60]— lawyers in the parallel state action have often been asked to contribute to the lead attorneys' fees in the MDL. Some MDLs have required such contributions as preconditions for global peace, a practice that often rankles state judges and the lawyers, including AGs, in the state cases.[61]

Previous MDLs also have raised federalism concerns related to their propensity to obfuscate and smooth over differences across state laws. The drive to settle from the beginning in many cases mutes motion practice around specifics of state law, even as state-law differences are sometimes determinative for defendants. One federal judge has claimed that MDLs dangerously "mush" fifty state laws together.[62]

Joint coordination orders between courts overseeing parallel state and federal cases are common fare, and often include agreements ranging from joint discovery to joint settlements. For example, in the Volkswagen MDL, although California joined the MDL, forty-four states proceeded in parallel in their state courts on state claims.[63] States coordinated and formed their own leadership to negotiate. All received payment.[64] The BP Oil Spill MDL eventually comprised more than 100,000 private party plaintiffs, plus the five Gulf coast and some localities. Alabama's AG served as coordinating counsel for the state interests.[65] The cases eventually settled through the MDL; as part of the deal, the state AGs did not oppose the common benefit fees.[66]

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60. *See* Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 129 (2010) ("Because many hands contribute to the success of MDLs, doling out shares in common fund fee awards is unavoidably messy."). *See generally* Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371, 375 (2014) ("The [Common Benefit Fund] is created by taxing persons other than a particular client for legal services beneficial to such persons thus spreading the cost of the litigation to all beneficiaries of these services.").

61. FED. JUD. CTR. ET AL., COORDINATING MULTIJURISDICTION LITIGATION: A POCKET GUIDE FOR JUDGES 7 (2013), https://www.fjc.gov/sites/default/files/2014/Coordinating-Multijurisdiction-Litigation-FJC-2013.pdf (describing how "the common benefit approach can create conflict").

62. Gluck, *supra* note 20, at 1689, 1691.

63. *See* Adam S. Zimmerman, *The Global Convergence of Global Settlements*, 65 U. KAN. L. REV. 1053, 1079 (2017).

64. Press Release, Volkswagen reaches settlement agreements with U.S. federal regulators, private plaintiffs and 44 U.S. states on TDI diesel engine vehicles, VOLKSWAGEN (June 28, 2016), https://media.vw.com/en-us/releases/715.

65. *See* Pretrial Order No. 26 at 1, *In re* Oil Spill by the Oil Rig "Deepwater Horizon", No. 2:10-md-02179-CJB-SS (E.D. La. Jan. 27, 2011) (establishing Coordinating Counsel for the government parties).

66. *See* Order & Reasons [Aggregate Common Benefit Fee and Costs Award] at 11–15, 42, *In re* Oil Spill by the Oil Rig "Deepwater Horizon", No. 2:10-md-02179-CJB-SS (E.D. La. Oct. 25,

But tensions arise, not only on the subject of legal fees, but also with respect to control. As one state court judge interviewed for a previous study said: "If I get the case first I hit the ground running to get out in front of the MDL. We want to cooperate and coordinate but we don't want to cooperate and coordinate ourselves out of the system."[67] Some of the federal judges likewise have emphasized the need to issue their own joint coordination orders early to "be sure the MDL case gets out front . . . This is one place the plaintiff's and defendant's interest in the MDL are aligned, both wanted me to get state judges under control, and to ignore objections of state plaintiffs' counsel."[68]

A recent ruling from the *Standard and Poor's* MDL captures the flavor. The judge remanded all seventeen state cases back to the state courts on grounds that "the State Cases arise solely under state law and Congress has not authorized federal courts to hear such cases."[69] The judge acknowledged the enticing benefits of an MDL, noting the "natural tempt[ation] to find federal jurisdiction every time a multi-billion dollar case with national implications arrives at the doorstep of a federal court," and the fact that "the federal courts undoubtedly have advantages over their state counterparts when it comes to managing a set of substantial cases filed in jurisdictions throughout the country."[70] But ultimately he concluded:

> [E]fficiency is not the only interest served by this country's federalist system of state and federal courts . . . [T]his Court is not free to disregard or evade [t]he limits upon federal jurisdiction, whether imposed by the Constitution or by Congress . . . [W]ith few exceptions, the doors to federal court do not swing open merely because a [party] has a national presence or is alleged to have committed wrongdoing that is national in scope . . . or merely because litigation in federal court might be more efficient.[71]

The *Standard and Poor's* ruling was widely viewed to be an exceptional instance in which an MDL judge stepped on the brakes in the name of federalism.

2016) (establishing a "a common benefit fee and cost award of $600,000,000.00" and describing how a deal was reached between BP and others for the court to approve the motion for a common benefit fund); Order [Regarding Payment of the Gulf States' Attorneys' Fees and Costs] at 4–7, *In re* Oil Spill by the Oil Rig "Deepwater Horizon", No. 2:10-md-02179-CJB-SS (E.D. La. Oct. 5, 2015) (barring several states' Attorneys General from later contesting the common benefit fees after accepting money from the litigation's Settlement Agreement and Consent Decree).

67. Gluck, *supra* note 20, at 1705 (quoting an unnamed state judge).

68. *Id.*

69. *In re* Stand. & Poor's Rating Agency Litig., 23 F. Supp. 3d 378, 385 (S.D.N.Y. 2014).

70. *Id.* at 413 (citations and quotation marks omitted).

71. *Id.* at 413–14 (citations and quotation marks omitted).

IV. Federalism and the Opioid Litigation

The opioid litigation has made the tensions between MDL and federalism more salient than ever before. One reason for this is that the Opioid MDL has opened the door to an unprecedented array of actions by *local* governments in a context in which AGs have their own pending cases and are under enormous political pressure. The localities' strategy has already been replicated in subsequent MDLs, including *JUUL*, and so will not be unique to *Opiates.* And MDL as a vehicle for local action threatens the dominance of AGs and their traditional mode of operation—the AG "multistate" litigation. *Opiates* makes the multistate model—where AGs work together but file fifty separate actions in fifty separate estate courts—look somewhat quaint and threatens to render it obsolete. Remember, too, that the localities are in federal court and represented by private attorneys; a situation when, juxtaposed against competing AG-brought cases in state courts, creates high-stakes tensions for federalism.

Opiates has also been marked, as Burch and I note, by an unusual number of players who are not MDL-insiders. For the past decade, MDL has been characterized by a "what happens in MDL stays in MDL" club culture, where repeat players know the norms and work to safeguard them. And while AGs have been part of MDLs before, *Opiates* also brings together an enormous constellation of varied plaintiffs and more than two dozen industry defendants, a cocktail that has introduced more outsider voices willing to challenging the MDL's dominance. These challengers have in fact worked to destabilize the MDL's gravitational pull to an unprecedented extent. Whereas in 2019, it appeared that Cleveland would be the center of all of the action, the AGs and other outsiders have dispersed power to the states and, especially now, also to the bankruptcy court in New York.

The following discussion primarily focuses on the state AGs because of the classic federalism questions about the concerns raised by conflicting sovereigns, and also because a substantial share of the obstacles posed to global settlement through the MDL arise out of tensions with the state AGs. But it is important to remember, as Theodore Rave and Zachary Clopton emphasize in this volume, the more than 500 other, non-AG cases filed in the various state courts by localities and individuals who prefer not to be in federal court also raise interesting federalism questions.[72]

72. Zachary D. Clopton & D. Theodore Rave, *Opioid Cases and State MDLs*, 70 DePaul L. Rev. (forthcoming 2021).

Judge Polster tried to coordinate with the AGs from the beginning, but coordination has not held firm throughout. There have been disputes related to information disclosure, races to state court houses and a battle over the novel "negotiation class." There have also been *intra*-state federalism disputes. These developments are detailed in the forthcoming piece with Burch, *MDL Revolution*.[73] This Part offers only broad brushstrokes.

A. Races to the Courthouse and Dialectical Litigation

Despite Judge Polster's efforts to centralize in his court all movement toward resolution of the cases, he was ultimately unable to persuade several state AGs and the parallel state-court judges from moving ahead with their own cases in their home state courts. Oklahoma was first. In June 2017, state AG Mike Hunter filed his complaint in state court.[74] Despite repeated efforts by the MDL court and litigating parties in the MDL to delay the state trial pending global settlement negotiations, AG Hunter and the state judge trying the case refused to wait.[75]

All but seven states' AGs are elected, as are most state judges.[76] Oklahoma revealed an elected AG eager to show himself responsive to his citizenry *at home*, and an elected state-court judge presiding over a televised and intensely reported two-week trial. These are political drivers that the MDL, despite its massive leverage even early on, could not stop.

The threat of a state-court trial in turn creates settlement momentum in the MDL. Trial threatens factual disclosures or pattern-setting, potentially leverage-changing, jury verdicts and awards. The Oklahoma AG settled with manufacturers Purdue and Teva on the eve of trial, and then won a $465 million trial verdict against Johnson & Johnson, after a trial that revealed the company's misleading mar-

73. Gluck & Burch, *supra* note 24.

74. *See* Randy Ellis, *First Major Opioid Trial Begins In Oklahoma*, GOVERNING (May 28, 2019), https://www.governing.com/topics/health-human-services/tns-oklahoma-opioid-trial-.

75. Andrew Joseph, *Why Houston and other cities want nothing to do with the massive national opioid lawsuit*, STAT (Mar. 27, 2018), https://www.statnews.com/2018/03/27/houston-national-opioid-lawsuit ("[S]ome officials think they might be able to get ahead of the national litigation [by suing in state court]—no matter how fast [Judge] Polster intends to reach a deal—so they can either get a separate settlement or go to trial before a global settlement is reached.").

76. *State Attorneys General*, KAISER FAM. FOUND., https://www.kff.org/other/state-indicator/state-attorney-generals/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D (last visited Mar. 28, 2021); *Judicial selection in the states*, BALLOTPEDIA, https://ballotpedia.org/Judicial_selection_in_the_states (last visited Mar. 28, 2021).

keting practices.[77] The Oklahoma AG's solitary action also gave the public access to a great deal evidence on both sides: 33 days of televised trial testimony, 874 exhibits, and 42 witnesses.[78]

That in turn created a frenzy toward settlement in the MDL before the next round of cases (those were to be bellwether trials created by the MDL itself, followed by a state-court trial in New York—which was delayed due to the COVID-19 pandemic). And *that* in turn spurred the MDL judge to encourage the parties to innovate new forms of procedure to try to advance settlement negotiations. The result was a *new form of class action*—the "negotiation class"—which sought to bind future and yet-to-file parties for purposes of negotiating settlement.[79]

AGs both led negotiations and opposed them. Ohio's AG, Dave Yost, publicly complained at one point that the four state AGs leading negotiations "don't speak for Ohio,"[80] a reminder that horizontal federalism (state-state) tensions were also in the mix.

Pretrial action in the Massachusetts state trial also contributed to changes in bargaining leverage, public pressure, and momentum in the MDL. In particular, public disclosures of evidence about Purdue and the Sackers' efforts to capitalize on the addictive properties of opioids[81]—despite the fact that Judge Polster had tried to impose a confidentiality order on his side in the MDL—created both conflict and opportunity.[82] Massachusetts's novel lawsuit against members of the Sackler family led other states to amend their complaints thereaf-

77. *See* Nate Raymond & Jonathan Stempel, *Oklahoma judge reduces Johnson & Johnson opioid payout to $465 million*, REUTERS (Nov. 15, 2019, 2:12 PM), https://www.reuters.com/article/us-usa-opioids-litigation-oklahoma/oklahoma-judge-reduces-johnson-johnson-opioid-payout-to-465-million-idUSKBN1XP27F.

78. Judgment After Non-Jury Trial ¶ 2, Oklahoma *ex rel.* Hunter v. Purdue Pharma L.P., No. CJ-2017-816 (Ok. Dist. Ct. Aug. 26, 2019).

79. *See, e.g.*, Jeff Overley, *Opioid MDL 'Negotiation Class' Wins Approval*, LAW360 (Sept. 11, 2019, 5:39 PM). The idea of the negotiation class is to extend the class-action framework from Rule 23 to negotiations. It would allow the class to bargain as a collective on the front end, prevent later infighting and splintering among plaintiffs, and give defendants a sense of the scope of peace they will obtain on the back end (without having to wait and see how many members opt out).

80. Jeff Overley, *State AGs Reach $48B Proposed Deal to End Opioid Cases*, LAW360 (Oct. 21, 2019, 5:52 PM).

81. *See* The Commonwealth's Pre-Hearing Memorandum for the Hearing Set for January 25, 2019, Commonwealth v. Purdue Pharma L.P., No. 1884-cv-01808 (BLS2) (Mass. Sup. Ct. Jan. 15, 2019); Vince Sullivan, *Purdue Files Ch. 11 Suit Seeking Stay Of Opioid Litigation*, LAW360 (Sept. 19, 2019, 6:17 PM); Chris Villani, *Purdue Says Mass. Opioid Suit Sets Dangerous Precedent*, LAW360 (Aug. 2, 2019, 7:04 PM).

82. In June 2018, the Massachusetts AG filed her own case in Massachusetts state court. Later that year, she filed a heavily redacted amended complaint with further allegations and details about the Sackler family. Media outlets pushed for disclosure of the information, and the state

ter or file new suits against members of the family entirely.[83] The Sacklers were also then brought into the MDL as named, individual defendants by myriad plaintiffs, including localities.[84] The Massachusetts state judge noted at the time that the state "court is not bound by the parties' designation of information or documents as confidential [in the federal protective order]."[85]

At a broader level, these dialectical moves brought benefits to the MDL not seen when MDL's nationalism full works as a steamroller. The localities' aggressive litigation efforts spurred those of the AGs, and then urged the federal Department of Justice to act. Each AG move then reinjected energy into the MDL. In addition, the very existence of cases outside of the MDL court not only generated public information in a world typically marked by transparency but also moved the needle on substantive state-law development. As Burch and I detail, the drive to settle that is typical in MDLs has stymied a great deal of substantive state tort-law development.[86] For example, even after tobacco, guns, and now opioids, the law on the tort of public nuisance that underlies a lot of these actions is surprisingly underdeveloped because the cases are settled, not tried, and often lack even basic motion practice. And while the existence of state cases cannot substitute for the lack of appellate review of most MDL actions, the parallel proceedings do provide some salutary legal redundancy by giving aspects of the case to different judges and so defuse the monopoly of the federal judge.

AG ultimately supported the request, even though much of that same information, in the MDL's case, had been ruled confidential.

83. *See* Roni Caryn Rabin, *New York Sues Sackler Family Members and Drug Distributors*, N.Y. TIMES (Mar. 28, 2019), https://www.nytimes.com/2019/03/28/health/new-york-lawsuit-opioids-sacklers-distributors.html; Press Release, AG Jennings files suit against Sackler family for role in opioid crisis, DEL. NEWS (Sept. 9, 2019), https://news.delaware.gov/2019/09/09/ag-jennings-files-suit-against-sackler-family-for-role-in-opioid-crisis; Press Release, Attorney General Tong Expands Lawsuit Against Purdue, Sacklers, Alleges Fraudulent Transfer of Funds to Evade Accountability to Connecticut Victims of Opioid Epidemic, OFF. ATT'Y GEN. CONN. (Apr. 22, 2019), https://portal.ct.gov/AG/Press-Releases/2019-Press-Releases/AG-TONG-EXPANDS-LAWSUIT-AGAINST-PURDUE-SACKLERS-ALLEGES-FRAUDULENT-TRANSFER-OF-FUNDS.

84. *See Content Details: 17-2804 - In Re: National Prescription Opiate Litigation*, G??I???, https://www.govinfo.gov/app/details/USCOURTS-ohnd-1_17-md-02804/USCOURTS-ohnd-1_17-md-02804-0/summary (last visited Mar. 28, 2021); *see, e.g.*, Short Form Supplementing Complaint and Amending Defendants and Jury Demand, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804-DAP (N.D. Ohio Mar. 15, 2019) (motioning the court to permit Hancock County, Mississippi to add members of the Sackler family to its complaint in the MDL).

85. Memorandum of Decision and Order on Emergency Motion to Terminate Impoundment at 10, Commonwealth v. Purdue Pharma Inc., No. 1884-01808-BLS2 (Mass. Sup. Ct. Jan. 30, 2019).

86. Gluck & Burch, *supra* note 24 (manuscript at 44).

B. Intrastate State Disputes: States Versus Their Own Localities

It is also important to note how *Opiates* has given rise to some challenging *intra*state federalism issues. The first set of tensions derives directly from the MDL: state AGs have challenged the local governments' rights to sue at all, arguing state preemption of local action. They filed a mandamus action in 2019, contending that "only a State Attorney General has parens-patriae standing to prosecute claims vindicating generalized harm to a State's inhabitants. Political subdivisions do not have parens-patriae standing," and the MDL bellwether "trial would fragment the State's claims, pose a high risk of inconsistent verdicts, result in duplicative or overlapping damages, and misallocate funds in the State."[87] They also strenuously opposed the negotiation class: twenty-six AGs filed a letter with the district court,[88] followed by another letter from thirty-nine, including D.C. and Guam, responding to plaintiffs' notice of certification of the negotiation class. The AGs argued that "the amended proposal inverts the relationship between each State and its own political subdivision."[89]

Former AGs also wrote a bipartisan op-ed in the *Wall Street Journal*, arguing that AGs have unique investigatory powers that better situate them vis-à-vis tortfeasors than localities,[90] and criticizing the "cottage industry of law professors [that] has sprung up conjuring novel procedural vehicles never approved by courts to wrestle cities and counties into settlements."[91]

The Sixth Circuit stuck down the negotiation class in September 2020, primarily on the ground that the concept operates entirely outside of the Federal Rules.[92]

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87. Petition for Writ of Mandamus of State of Ohio at 2, *In re* State of Ohio, No. 19-3827 (6th Cir. Aug. 30, 2019).

88. Letter Re: Plaintiffs' Notice of Motion and Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804-DAP (N.D. Ohio June 24, 2019).

89. Letter from 39 State Attorneys General Re: Plaintiffs' Renewed and Amended Notice of Motion for Certification of Rule 23(b)(3) Cities / Counties Negotiation Class, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-2804-DAP (N.D. Ohio July 23, 2019).

90. George Jepsen & Perry Zinn Rowthorn, Opinion, *Leave Opioid Lawsuits to State Attorneys General*, WALL ST. J. (Mar. 3, 2019, 4:44 PM), https://www.wsj.com/articles/leave-opioid-lawsuits-to-state-attorneys-general-11551649471.

91. *Id.* ("Cities and counties . . . need to show that specific people or entities committed a specific act or omission that caused the localities—not their residents—specific damages. Even if they meet that challenge, they arguably have to show that the legal chain of causation wasn't broken by prescribing doctors who could judge the risks themselves or drug dealers whose criminal activity may not be opioid companies' legal responsibility.").

92. *In re* Nat'l Prescription Opiate Litig., 976 F.3d 664, 672–74 (6th Cir. 2020) ("What Plaintiffs fail to appreciate is that a new form of class action, wholly untethered from Rule 23, may not be employed by a court.").

Related to the AGs' objections to the negotiation class have been intrastate disputes over which governmental actor has the right to allocate settlement funds. In December 2019, Ohio AG Yost attempted to place a state constitutional amendment on the ballot to establish a foundation to distribute any opioid-related settlement funds.[93] When that effort was unsuccessful,[94] Yost changed tactics and sought cooperation with other state actors. He worked with the governor to unveil a "One Ohio" plan, which provides a formula of allocation of any settlements to the state foundation, the localities, the AG's office, and private attorneys fees.[95] Texas soon followed with a similar agreement.[96]

Some defendants have used the very existence of state lawsuits to try to block the MDL altogether. In West Virginia, Defendants McKesson, Cardinal, and AmerisourceBergen have argued their previous settlements with the state *preclude* federal suits on behalf of the localities.[97]

C. The Federal Government

The Department of Justice (DOJ) also has been a presence. In April 2018, DOJ expressed its desire to join settlement negotiations in order to ensure that any ensuing settlement is "structured to serve the public interest" and to recover some of the expenses the federal government incurred in responding to the epidemic.[98] The parties tussled with DOJ to release years of information from its Automated Records and Consolidated Orders System (ARCOS). Upon Drug Enforce-

93. Memorandum from Jonathan Blanton, Deputy Att'y Gen. for Major Litig., Ohio Att'y Gen. Office, to Dave Yost, Ohio Att'y Gen. (Dec. 2, 2019), https://assets.documentcloud.org/documents/6569123/Proposed-Constitutional-Amendment-On-Opioid.pdf.

94. Karen Kasler, *House Leaders: Opioid Settlement Amendment Won't Make Ballot*, STATEHOUSE NEWS BUREAU (Dec. 10, 2019), https://www.statenews.org/post/house-leaders-opioid-settlement-amendment-won-t-make-ballot.

95. Laura A. Bischoff, *Ohio unites to push for settlement in opioid lawsuits,* DAYTON DAILY NEWS (Mar. 11, 2020), https://www.daytondailynews.com/news/local/ohio-unites-push-for-settlement-opioid-lawsuits/pyny06Y5Pg3sUMx7cBci6H.

96. *Texas Opioid Abatement Fund Council and Settlement Allocation Term Sheet*, TEX. ATT'Y GEN. (May 13, 2020), https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/Texas%20Term%20Sheet%20(incl%20Ex%20A-C)(Fully%20Executed).pdf; *see also* Amanda Bronstad, *Texas AG Reaches Deal With 254 Counties Ahead of Global Opioid Settlement*, LAW.COM (May 28, 2020. 6:05 PM), https://www.law.com/texaslawyer/2020/05/28/texas-ag-reaches-deal-with-254-counties-ahead-of-global-opioid-settlement/?slreturn=20210226115757 (providing detail on the deal).

97. *See, e.g.*, Memorandum of Law in Support of McKesson Corporation's Motion to Dismiss or for Summary Judgment on *Res Judicata* and Release Grounds, City of Huntington v. AmerisourceBergen Drug Co., No. 3:17-cv-01362 (S.D. W. Va. Mar. 13, 2020).

98. *See* United States' Memorandum in Support of Its Motion to Participate in Settlement Discussions and as Friend of the Court at 1–2, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804-DAP (N.D. Ohio Apr. 2, 2018).

ment Administration delay, Judge Polster ordered that DOJ produce the data for six states[99] and later for every state.[100]

In 2020, DOJ settled with Purdue in the New York bankruptcy court, but, interestingly, voluntarily committed a large portion of settlement proceeds—some $1.775 billion—to be applied to the claims of the states and localities—an interesting recognition of their importance of the state and local cases.[101]

D. Bankruptcy Court as Another Unorthodox Workaround

Bankruptcy has emerged as another unorthodox workaround to challenges posed by nationwide cases in a federalist system.

Purdue filed for Chapter 11 bankruptcy in the Southern District of New York in September 2019.[102] An automatic stay of litigation typically attaches to a bankruptcy filing pursuant to the Bankruptcy Code.[103] However, the Code also provides a federalism exception for suits by governments enforcing their "police and regulatory powers."[104] Purdue argued that the exceptions did not apply but, rather than litigate the issue, filed for a preliminary injunction.[105] The filing

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99. Order Regarding ARCOS Data at 12, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804-DAP, (N.D. Ohio Apr. 11, 2018).

100. Second Order Regarding ARCOS Data at 1–2, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804-DAP (N.D. Ohio May 8, 2018). Judge Polster had rejected public records requests filed by the *Washington Post* and two West Virginia-based media to gain access to the data, but the Sixth Circuit ultimately overruled him.

101. Press Release, Justice Department Announces Global Resolution of Criminal and Civil Investigations with Opioid Manufacturer Purdue Pharma and Civil Settlement with Members of the Sackler Family, OFF. PUB. AFF., U.S. DEP'T JUST. (Oct. 21, 2020), https://www.justice.gov/opa/pr/justice-department-announces-global-resolution-criminal-and-civil-investigations-opioid; *see* Jan Hoffman & Katie Benner, *Purdue Pharma Pleads Guilty to Criminal Charges for Opioid Sales*, N.Y. TIMES (Oct. 21, 2020), https://www.nytimes.com/2020/10/21/health/purdue-opioids-criminal-charges.html (last updated Mar. 16, 2021).

102. *See* Jan Hoffman & Mary Williams Walsh, *Purdue Pharma, Maker of OxyContin, Files for Bankruptcy*, N.Y. Ti??? (Sept. 15, 2019), https://www.nytimes.com/2019/09/15/health/purdue-pharma-bankruptcy-opioids-settlement.html.

103. 11 U.S.C. § 362 (2018); *see generally* Frank R. Kennedy, *The Automatic Stay in Bankruptcy*, 11 U. MICH. J. L. REFORM 177 (1978) (discussing § 362(a) in detail).

104. 11 U.S.C. § 362(b)(4); *see also* Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 960 (2012) (arguing that "bankruptcy serves as a better model for judging when to use, and how to order, nonclass aggregation of mass tort litigation.").

105. *See* Complaint for Injunctive Relief, *In re* Purdue Pharma L.P., No. 19-23649-rdd (Bankr. S.D.N.Y. Sept. 18, 2019) ("Debtors in no way concede that the Governmental Actions fall within the limited 'police power' exception to the automatic stay . . . But, because the stakes to the Debtors are so high, the Debtors cannot risk a case-by-case or claim-by-claim litigation of the scope of the automatic stay . . . Instead, the Debtors ask that this Court stay the tidal wave of litigation that will drown the Debtors and most certainly frustrate their successful reorganization.").

argued: "Protection from uncontrolled litigation is the singular feature of bankruptcy that makes it an effective tool for the successful resolution of mass tort matters."[106]

The bankruptcy court did not rule on the applicability of the government exception to the automatic stay under the law but granted a temporary stay to allow settlement negotiations to proceed.

There is precedent for this unusual use of bankruptcy in mega-MDLs. In the *Takata* MDL, which grew out of the thousands of lawsuits against the airbag manufacturing company,[107] even non-debtors—that is, industry defendants not in bankruptcy themselves—used the bankruptcy process to settle parts of the MDL case. So-called "channeling injunctions" have been justified by bankruptcy courts under their general equitable authority under the Bankruptcy Code, which empowers them to issue "any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Code.[108] Channeling injunctions also were used by doctors and distributors in connection with Dow Corning's bankruptcy over breast implants.[109]

This role for bankruptcy highlights some interesting issues. First, the bankruptcy court's power to stop all litigation to resolve all current *and* future pending claims against the debtor, both ends the race-to-the-courthouse *and* deals with the issue of future preclusion even in the absence of a class action. The parties in the opioid MDL are concerned not only about parallel state lawsuits, but also about the more than 30,000 other localities that have not yet sued. Bankruptcy court provides one answer. What is more, bankruptcy court seems to be the *only* court with jurisdiction to stop both state and federal cases alike—an odd result given that the bankruptcy court is not even an Article III federal court. In other words, while bankruptcy court may be a helpful workaround in the limited instances in which a company is indeed prepared to go bankrupt, it seems far from any considered or broadly applicable solution to the federalism challenges that the U.S. Consti-

106. Debtor's Informational Brief at 6, *In re* Purdue Pharma L.P., No. 19-23649-rdd (Bankr. S.D.N.Y. Sept. 16, 2019).

107. *See generally Airbag maker Takata files for bankruptcy in Japan and US, seeking $1.6B aid from Key Safety Systems*, REUTERS (June 26, 2017, 2:51 AM), https://www.cnbc.com/2017/06/25/takata-files-for-us-chapter-11-bankruptcy-in-delaware-expected-to-file-in-japan-soon.html.

108. 11 U.S.C. § 105(a) (2018); *see generally* Eric D. Green et al., *Future Claimant Trusts and "Channeling Injunctions" to Resolve Mass Tort Environmental Liability in Bankruptcy: The Met-Coil Model*, 22 EMORY BANKR. DEV. J. 157 (2005).

109. *See* Gary Svirsky et al., *A Field Guide to Channeling Injunctions And Litigation Trusts*, 260 N.Y. L.J. SPECIAL REP. (July 16, 2018). The protected non-debtor's alleged liability derives from the debtor's alleged liability: the non-debtor contributes to the settlement fund, and the non-debtor has a sufficient "unity of interest" with the debtor. *Id.*

tution and the Federal Rules and supporting statutes pose for resolving nationwide cases in our federalist system.

V. Conclusion

Unorthodox procedures tend to emerge, and then grow, when the confines of the current system no longer work well. Justice Kennedy noted in *McIntyre* that, there is no such thing yet as nationwide jurisdiction.[110] But MDLs often effectively assert something similar to it. MDL courts that may have no jurisdiction over far-flung federal lawsuits still resolve claims brought by those plaintiffs dragged into the MDL from federal courts across the country with no option to opt out. MDL courts compel state attorneys litigating parallel cases to contribute attorneys' fees toward MDL lawyers in an effort toward global peace across jurisdictions. MDLs exert power over state actors and state cases to coordinate, guard information, settle, and preclude. They often do not see a need to consider the nuances of differences across state law, much less welcome motion practice to develop it. Their rulings, whether on issues of jurisdiction, federalism or anything else, are rarely reviewed.

Justice Kennedy also suggested the possibility that Congress could enact a nationwide-jurisdiction statute to address harms directed to the U.S. economy as a whole, or perhaps even nationwide-tort claims as in *Opiates*.[111] The *Amchem* litigation, which involved the creation of a "settlement class" in order to resolve millions of dollars of claims brought by asbestos victims across the country in the 1990s raised similar concerns, with Congress trying but failing to enact a special federal statute to resolve those cases.[112] Congress did pass such a statute after September 11th, and some experts likewise have called for a special opioid-litigation statute and one for claims anticipated to arise out of COVID-19.

MDL's organic evolution into a nationalist animal makes evident the needs of modern litigation and perhaps the need for serious consideration of such new federal statutes. On the other hand, the lack of a formal federal rule on MDL nationalism still leaves *some* space for litigation federalism when the parties insist on asserting it. That has turned out to be the case in *Opiates*, to the surprise of many, given how dominant the MDL seemed at the outset. And the federalist voices have indeed brought benefits that disperse some of the con-

110. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 884–86 (2011).

111. *Id.* at 885 (suggesting that "Congress could authorize the exercise of jurisdiction in appropriate courts.").

112. *See, e.g.*, Fairness in Asbestos Injury Resolution Act of 2005, S. 852, 109th Cong. (2005).

cerns about MDL monopoly in general—including concerns about transparency, reviewability, substantive-law development and access to court for diverse litigants.

There also may be other ways—with smaller steps—to delve into this area than enacting a law of nationwide jurisdiction. As Burch and I note, we could inject more federalism considerations into MDL procedure, for example, by requiring more guardrails about and reviewability of jurisdictional formality, or more attention to state law differences, including more motion practice or episodic remands.[113] Or we could rethink some of the stinginess of Rule 23 when it comes to certifying class actions that involve differences across state law; that would introduce some of the protections of class actions into the MDL environment. Judges and many MDL insiders resist exploring such tweaks because they relish the flexibility that MDL's relative lack of ruleishness gives courts faced with sprawling cases and nationwide harms. But outsiders are beginning to clamor for them.

The big questions here are how much nationalization of litigation we want; how much is constitutionally permissible; and how much can no longer realistically be avoided. Burch and I delve into these and other areas for broader MDL reform in *MDL Revolution*. *Opiates* suggests the time is ripe for a deeper look.

113. *See generally* Gluck & Burch, *supra* note 24.