

Analysis & Perspective

GOVERNMENTS AS CLASS MEMBERS

Governments cannot be properly represented by private litigants in class actions, attorneys Robert K. Spotswood and Kenneth D. Sansom argue in this analysis and perspective. The U.S. Constitution, most state constitutions, and many federal and state statutes define who can represent a governmental body.

Article II authority strictly limits when Congress can authorize someone other than the U.S. attorney general to handle litigation, the authors argue, using independent counsel and qui tam laws to demonstrate possible exceptions.

State attorneys general derive their authority from a variety of constitutional, statutory, and common law provisions, and any exceptions to that authority will require a detailed analysis of each jurisdiction's laws.

Spotswood and Sansom conclude that these problems make final class action judgments or settlements involving governments suspect and recommend that governments be excluded from plaintiff classes.

Who May Speak for the King? Challenging Common Assumptions About Representing the Government in Class Litigation

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Class actions brought by private plaintiffs usually include federal, state, and local governmental entities as members of the putative class. After all, governments are often the largest consumers of the allegedly defective goods and services at the center of the class action litigation boom. Although challenges to the representation of governmental entities by private class representatives are usually overlooked, private representation of governmental entities through the class action device actually presents significant legitimacy concerns. Federal and state constitutions, federal and state

statutes, and state common law limit who may litigate on behalf of governmental entities and how those who represent the government in litigation may be compensated. Typically, the law reserves such representation to attorneys general, who may retain outside counsel only in limited circumstances and under specified conditions.

This article examines the problems presented by the inclusion of governmental entities in classes represented by private litigants. Part I demonstrates that the representation of instruments of the federal government by private litigants cannot be squared with constitutional separation of powers principles and Congress's statutory commitment of the civil litigation authority of the U.S. government to the U.S. attorney general. It notes the numerous safeguards for federal executive power that federal courts have found essential when Congress has delegated the attorney general's authority to others, and observes that federal and state class-action rules do not provide those essential safeguards.

Part II identifies similar problems inherent in the representation of state and local governmental entities by private litigants. Complex combinations of state constitutions, statutes, and common law generally preserve the authority of state attorneys general to litigate the in-

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terests of their governments, but the specific contours of each state's assignment of civil litigation authority to its attorney general, which can only be ascertained by specific examination of the laws of each state, vary too widely to permit inclusion of state entities in any nationwide class.

Part III notes some collateral problems inherent in private representation of the government, including inadvertent violation of principles governing the retention of government contractors and of norms governing the payment of private counsel by the government. Finally, Part IV points out significant practical consequences of including governmental entities in classes arising from these many legal issues and argues that doing so is simply not worth the cost.

I. Who May Speak for the Federal Government?

A. The Attorney General Must Be Permitted to Direct Litigation Implicating the Interests of the United States.

The legal authority to pursue a lawsuit on behalf of the United States rests exclusively in the attorney general, unless Congress expressly provides otherwise. See 28 U.S.C. § 516 ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General." (emphasis added)); *id.* § 519 ("Except as otherwise provided by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party. . .").

On occasion, Congress has "otherwise authorized" the conduct of litigation on behalf of the federal government. In the Ethics in Government Act of 1978, 28 U.S.C. §§ 49, 591-599, Congress authorized the appointment of independent counsel with powers ordinarily reserved to the attorney general for certain investigations regarding which the attorney general might not be disinterested. Similarly, in the False Claims Act, 31 U.S.C. §§ 3729-3733, Congress authorized private persons with knowledge of frauds against the federal government to pursue so-called *qui tam* actions in which they, instead of the attorney general, file suit on behalf of the federal government. See also 28 U.S.C. § 516 (authorizing the United States attorney general to make special attorney appointments subject to an oath requirement and a fixed annual salary).

Those statutes, however, have been subjected to constitutional challenge. The Constitution provides that it is the duty of the president (and thus the federal executive branch) to "take care that the laws be faithfully executed." U.S. Const. Art. II, § 3. Pursuant to this duty, the "Attorney General acts as the agent of [the] United States in all civil and criminal suits brought by or on behalf of the United States," and "all such suits, so far

as the interests of the United States are concerned, are subject to the direction, and within the control of the Attorney General.'" *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1088 (C.D. Cal. 1989) (quoting *Buckley v. Valeo*, 424 U.S. 1, 139 (1976) (quoting *Confiscation Cases*, 74 U.S. (7 Wallace) 454, 458-59 (1869)). "In general," the attorney general's control "includes the authority to investigate and litigate offenses against the United States." *Stillwell*, 714 F. Supp. at 1088 (citing *Buckley*, 424 U.S. at 138-39).

Thus, while Congress can delegate the Article II authority of the attorney general to some extent, the Constitution requires that the attorney general retain at least "sufficient means of controlling and supervising" litigation to "ensure that the President is able to perform his constitutionally assigned duties.'" See *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 755, 751 (9th Cir. 1993) (quoting *Morrison v. Olson*, 487 U.S. 654, 696 (1988)). *Morrison*, the governing Supreme Court case, upheld the independent counsel provisions of the Ethics in Government Act using that standard. In so doing, it examined the varied ways in which the independent counsel provisions preserved or removed the attorney general's power, including the attorney general's role in initiating, controlling and terminating an independent counsel investigation. The Supreme Court upheld the statute because the provisions, when "taken as a whole," preserved a sufficient oversight role for the attorney general. See *Morrison*, 487 U.S. at 685, 693.¹

Lower courts have subsequently applied *Morrison's* limits to determine whether the *qui tam* provisions of the False Claims Act are constitutional. The *qui tam* provisions entitle private citizens, termed "relators," to sue on behalf of the United States to vindicate frauds against its government, see *Kelly*, 9 F.3d at 745, but only under carefully controlled procedural conditions that define the attorney general's role in initiating, controlling, and terminating any such litigation.² The conditions, which ensure that the Justice Department is entitled to maintain its role to whatever degree it believes prudent, are essential to the constitutionality of the *qui*

¹ The appropriateness of this constitutional test of has been widely debated. That debate is beyond the scope of this article.

² The statute provides two basic safeguards for executive power: the right to control the litigation or the alternative right, should the government choose not to control the litigation, to monitor the relator's pursuit of the case. See *id.* at 746. The attorney general may exercise the right to take control of the litigation at the beginning of the suit or later on. When commencing suit, a *qui tam* relator is required to submit the complaint, which is filed with the court under seal, to the Department of Justice for review and investigation. See *id.* At the end of the review and investigation period, the attorney general simply chooses—without review by a court—whether to take control of the litigation or relinquish control of the action to the relator. See *id.* Although the relator remains in the case in either event, (s)he exercises no control unless authority is relinquished by the government. See *id.* Even if the attorney general at first declines its absolute right to control the case, it may still intervene later upon a showing of good cause to a court. See *id.* If the attorney general chooses to control the litigation, it may seek to limit the relator's role in the case (upon court approval), dismiss the case (upon notice to the relator and a hearing), or settle the case (also upon court approval). See *id.* If, on the other hand, the government chooses not to assume control of the litigation, it is still entitled to copies of all pleadings and transcripts, and to stay the relator's discovery to facilitate its own investigation. See *id.*

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tam provisions. See *Kelly*, 9 F.3d at 751-56 (comparing the safeguards of the *qui tam* provisions with those under the independent counsel provisions upheld in *Morrison* to determine whether the former are also constitutional); see also *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 753-57 (5th Cir. 2001) (en banc) (accepting the analogy drawn in *Kelly*, recounting the statutory safeguard to find the statute constitutional, but declining to find *Morrison* strictly controlling); *United States ex. rel. Taxpayers Against Fraud v. General Electric Co.*, 41 F.3d 1032, 1040-2 (6th Cir. 1994); *United States ex. rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1155 (2d Cir. 1993) (“[T]he FCA *qui tam* provisions do not usurp the executive branch’s litigating function because the statute gives the executive branch substantial control over the litigation.”); Cf., *United States ex. rel. Stone v. Rockwell Int’l Corp.*, 92 F.App. 708, 726-28 (10th Cir. 2004) (upholding the *qui tam* provision in a cause in which the government intervened but declining to rule on the statute’s constitutionality in other circumstances.).

In summary, as the cases addressing the independent counsel and *qui tam* statutes demonstrate, delegations of the litigation authority of the U.S. attorney general must survive two tests: First, they must not conflict with Congress’s general allocation of litigation authority to the attorney general in Title 28 of the United States Code. Second, they must permit the attorney general to exercise sufficient control of the litigation to preserve the constitutional role of the executive branch. The inclusion of the federal government, or federal governmental entities, among class members in a class action brought by private litigants and counsel is likely to fail both of these tests.

B. Class Action Procedure Does Not Preserve the Attorney General’s Role Set by the Constitution and Congress.

The attorney general’s litigation authority extends to all litigation in which the United States “is interested, and not just to litigation in which the United States is a party” 28 U.S.C. § 516. Thus, whether or not the federal government is considered a party when part of a class, the attorney general must have authority over the pursuit of class claims on its behalf.

This comports with the reality of class actions, in which plaintiffs’ counsel seek to litigate on behalf of the class from day one, even though there is neither a class, nor appointed class counsel, until the court so certifies. Cf. *Ballan v. Upjohn Co.*, 159 F.R.D. 473, 486 (W.D. Mich. 1994) (“[I]t would be naive not to understand that many of these class actions are lawyer-driven.”). Indeed, the possibility of certifying classes for settlement depends on this reality. See *Amchem Prods. Inc. v. Windsor*, 117 S.Ct. 2231, 2248 (1997) (upholding settlement-only classes). Thus, even in a precertification, or “putative,” class action, plaintiffs’ counsel can be expected to posture on behalf of the class and, perhaps, ultimately to settle the class’s claims subject to certification and court approval of the settlement.

To the extent that parts of the federal government are included in such precertification “classes,” negotiation and posturing by plaintiffs’ counsel would appear to be inconsistent with the attorney general’s exclusive authority to engage in such negotiation and posturing on behalf of the federal government. For instance, even a casual reference to “taxpayers’ money” by plaintiffs’ counsel would seem to trespass on the attorney gener-

al’s authority. See 28 U.S.C. § 518 (“When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so.” (emphasis added)). These statutory transgressions are only exacerbated once a class is certified and class counsel is actually appointed to represent the class. At that point, class counsel has fully assumed the role assigned by the Constitution and Congress exclusively to the attorney general.

Opt-out and intervention rights do not ameliorate these problems. One might argue that the federal government will never join a class action against its will because of the availability of opt-out and intervention rights. See Fed. R. Civ. P. 23(c)(2)(B) (providing for mandatory notice in federal class actions for damages certified under Rule 23(b)(3), including notice of the right to opt out); R. 23(c)(3) (providing that opt outs will be excluded from any class action judgment); R. 23(e)(1)(B) (requiring notice to the class of any settlement); R. 23(e)(3) (affording federal courts discretion to refuse to approve a settlement in a Rule 23(b)(3) case without giving class members an opportunity to opt out of the settlement); R. 24 (providing for intervention as of right and permissive intervention).³

On a practical level, this argument has superficial appeal. Ultimately, however, it fails. First, it does not answer the fundamental problem that the litigation authority of the attorney general is, in some fashion, being abrogated when instruments of the federal government are included in classes. Instead, it rests on the idea that any “error,” in terms of violating 28 U.S.C. § 516 and related provisions, is “harmless” because the government can always get out of or seek to control the litigation.⁴ Section 516 vests litigation control in the at-

³ Class actions that primarily seek damages must afford notice and an opt-out right as a matter of procedural due process. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). This requirement does not extend to other sorts of class actions, such as those seeking injunctive relief, which renders the argument from opt-out rights inapplicable in those actions. It should be noted, however, that as of Dec. 1, 2003, Federal Rule 23 provides for discretionary notice in non-(b)(3) cases. Fed. R. Civ. P. 23(c)(2)(A) (“For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.”). Nevertheless, there is still no opt-out right in non-(b)(3) cases.

As required to satisfy due process, state class action devices provide for notice and opt-out rights. See, e.g., Cal.R.Ct. 1856 (providing for notice and opt-out rights); 735 ILCS 5/2-803, 5/2-804(b) (Illinois) (providing for discretionary notice but mandating the right to opt out); CPLR 903-904 (New York) (providing for discretionary availability of opt-out rights, discretionary notice in injunctive- or declaratory-relief actions and mandatory notice in other class actions). Similarly, state-court procedures provide for intervention. See, e.g., 735 ILCS 5/2-804(a) (providing specifically for class member intervention to be liberally granted); Tex.R.Civ.P. 60 (providing a general intervention right).

⁴ In many circumstances, the federal government might argue that it is entitled to intervene as of right, either because 28 U.S.C. § 516 and related provisions constitute “a statute of the United States confer[ing] an unconditional right to intervene” or because the United States has “an interest relating to the property or transaction which is the subject of the action” and the United States “is so situated that the disposition of the action may as a practical matter impair or impede” the United

torney general “[e]xcept as otherwise authorized by law,” 28 U.S.C. § 516, not “except when inadvertently removed by some other law in a curable way.” Second, the “harmless error” idea is wrong; any “error” endured is not “harmless.” Leveraging, posturing, negotiating, or settling governmental claims harms the institutional order of the federal government irreparably, regardless of whether that government ultimately reasserts itself in the litigation. The question of who may speak for the government, independent of what they may or may not achieve for the government, is not a trivial one.

Moreover, the conflict between 28 U.S.C. § 516, and related statutes, and federal and state class-action devices, is not the entire story. As in the case of the federal independent-counsel and *qui tam* statutes, participation of the federal government in class actions must also survive constitutional separation-of-powers scrutiny. In both of those contexts, courts have analyzed the federal statute purporting to delegate attorney general authority from end-to-end, questioning all of its features, to determine whether the attorney general retains “substantial control over the litigation.” *Kreindler*, 985 F.2d at 1155. It is instructive to compare opt-out and intervention rights to the features of those statutes. First, opt-out rights confer nothing more than an ability to terminate the federal government’s participation in class action litigation. The ability of the attorney general to terminate the litigation was *among* the material considerations in determining the constitutionality of the independent-counsel and *qui tam* statutes. See *Kelly*, 9 F.3d at 755 (comparing the attorney general’s qualified ability to remove an independent counsel with the government’s ability to dismiss or settle *qui tam* cases). But it was only one feature among many relevant to the finding of constitutionality. An opt-out right is not enough to ensure the required government role throughout class litigation.

States’ “ability to protect that interest.” Fed. R. Civ. P. 24(a). Research revealed no cases considering whether 28 U.S.C. § 516 and the like were “statute[s] of the United States” as contemplated by Rule 24. See, e.g., 28 U.S.C. § 2403 (statute expressly providing for intervention by the federal and state attorneys general when statutes of their respective governments face constitutional challenge). The second ground is subject to the discretion inherent in a federal judge’s determination whether the rights of the United States would, in fact, be impaired or impeded and is further subject to the condition that the United States not be “adequately represented by existing parties,” precisely the circumstance envisioned in a class action. Fed. R. Civ. P. 24(a)(2). Thus, whether postured as “of right” under Federal Rule 24(a) or “permissive” under Federal Rule 24(b)—a plainly discretionary rule—any effort by the attorney general to intervene in a federal class action is, as a practical matter, subject to judicial discretion to a degree not present in the independent counsel or *qui tam* statutes.

State class actions present similar problems of judicial discretion. See 735 ILCS 5/2-804(a) (Illinois) (providing for intervention to be liberally granted except when “the court finds that such intervention will disrupt the conduct of the action or otherwise prejudice the rights of the parties or the class”); *Guaranty Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990) (including among the facts for consideration whether intervention will “complicate the case by an excessive multiplication of the issues” and whether “the intervention is almost essential to effectively protect the intervenor’s interest”).

Nor can intervention solve the remaining problems. It is important to the constitutional survival of both the independent counsel and *qui tam* statutes that each permits the federal Executive significant, special controls over *initiation* of the litigation. See *Stillwell*, 714 F. Supp. at 1089 (noting that the “Attorney General’s decision not to seek appointment [of an independent counsel] is unreviewable” and that the jurisdiction of any independent counsel who is appointed “is determined with reference to the facts submitted by the Attorney General”); *id.* at 1090-91 (noting the special requirements of *in camera* filings of *qui tam* complaints and the government’s special 60-day window for determining whether to take control of the action). The standard process for intervention in a federal class action certified does not provide such control. See Fed. R. Civ. P. 23(c)(2)(C) (*following notice*, “any member who does not request exclusion may, if the member desires, enter an appearance through counsel”). First, notice comes far too late to provide meaningful federal government control over initiation of the litigation. If permitted to represent the federal government, named plaintiffs can proceed all the way through class certification benefiting from both its imprimatur and the potential value of its claims in negotiations.

Second, even if notice of the opportunity to intervene comes earlier, intervention opportunities are still of questionable adequacy because they vest any discretion regarding federal government participation in the presiding court rather than the attorney general. See Fed. R. Civ. P. 23(d)(3) (“[T]he court may make appropriate orders . . . imposing conditions on the . . . intervenors.”). In fact, the right to intervene as a plaintiff in a class action is basically no more than the right to challenge the adequacy of the class representatives. See 7B Charles A. Wright, Arthur R. Miller, & Mary K. Kane, *Federal Practice & Procedure*, § 1799 (2d ed. 1986) (describing how Rules 23 and 24 interact in class actions and observing that even intervention as of right under Rule 24(a)(2) is not permitted if the class representatives are adequate). This “right” is too far a cry from the express statutory guarantees of the independent counsel and *qui tam* statutes. Unlike intervention procedures, those guarantees specify absolute minima to attorney general participation and leave the attorney general free of the burden of raising and advocating every aspect of his role before a discretionary decisionmaker of another government branch. See *Stone*, 92 F.App. at 727 n. 6 (noting that the False Claims Act might be unconstitutional, as applied, in suits in which a court denies the attorney general’s request for intervention or removal of the relator); *Kelly*, 9 F.3d at 755-57 (recognizing that *qui tam* suits involve some (but not excessive) “judicial encroachment” because the attorney general must get court approval for certain actions).

In summary, involvement of the United States government as a class member in federal or state court both violates the allocation of power established by Congress in 28 U.S.C. § 516 and impinges on the responsibilities of the Executive Branch, acting through the attorney general, in a manner that cannot be squared with the Article II of the Constitution.

C. Laws Establishing the Attorney General’s Role Are Superior to Those Establishing Class Action Procedures.

Neither a Federal Rule of Civil Procedure, such as Rule 23, nor, certainly, a state rule of procedure authorizing class actions, such as Texas Rule of Civil Proce-

dures 42, or a state statute with the same purpose, such as 735 ILCS 5/2-801 *et seq.*, can be permitted by courts to trample on the allocation of litigation authority established by 28 U.S.C. § 516 and related provisions. In the case of Rule 23, permitting the class action device to do so would raise serious concerns that the Rules Enabling Act itself might be violated. That Act provides that federal rules of procedure “shall not abridge, enlarge or modify any substantive right.” 28 U.S.C. § 2072(b). Thus, civil procedure rules should not be read to invade areas of substantive concern. *Cf.* Fed. R. Civ. P. 82 (“These rules shall not be construed to extend or limit the jurisdiction of the United States district courts. . .”). In *Henderson v. United States*, 517 U.S. 654 (1996), the Supreme Court dealt directly with a federal statute-rule conflict under the Rules Enabling Act and resolved it in favor of the rule only because it found that the statute at issue did not involve “substantive matters,” including “who may sue, on what claims, [and] for what relief.” *Id.* at 671 (emphasis added). 28 U.S.C. § 516 plainly determines “who may sue,” and, thus, is substantive.⁵

And, in the case of state rules and statutes providing for class actions, federal law speaking to the allocation of power to federal governmental entities clearly trumps state law when it attempts to speak to that allocation, which, after all, goes to the very structure of the federal government. *See* U.S. Const. Art. VI (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.”).

II. Who May Speak for State Governments?

The laws of the several states also contain commitments of litigation authority to their executive branches and, in particular, to their attorneys general. *See* Na-

⁵ Another approach to determining the authoritative priority of Rule 23 and the statutes governing the attorney general’s litigation authority is to simply examine their order in time. There is a maxim of construction holding that Congress is presumed to be aware of pre-existing law when it passes a statute, and the later-passed provision controls in the event of a conflict. *See, e.g., Ft. Worth & Denver Ry. Co. v. Goldschmidt*, 518 F. Supp. 121, 127 (N.D. Tex. 1981), *rev’d on other grounds by Ft. Worth & Denver Ry. Co. v. Lewis*, 693 F.2d 432 (5th Cir. 1982). The Rules Enabling Act states that “All laws in conflict with such rules [i.e., the Federal Rules of Civil Procedure] shall be of no further force or effect after such rules have taken effect.” 28 U.S.C. § 2072(b). Thus, where a rule is operating within the scope of the REA (i.e., not “abridg[ing], enlarg[ing] or modif[ing] any substantive right,” *id.*), it trumps federal statutes passed earlier. Later-passed federal statutes, however, supersede conflicting rules. *See, e.g., Harris v. Garner*, 216 F.3d 970, 982 (11th Cir. 2000) (*en banc*) (“If there were a conflict between Federal rules of Civil Procedure 15 and the PLRA [Prison Litigation Reform Act], the rule would have to yield to the later-enacted statute to the extent of the conflict.”). The relevant provisions governing the attorney general’s power were passed shortly after the present Rule 23. The modern Rule 23 became effective in July 1966. Congress enacted the key statutes in September 1966. Thus, those statutory provisions control. This resolution of the issue, however, seems excessively formal and trivializing in contrast to an approach inquiring whether the allocation of litigation authority to the attorney general, which goes to the fundamental structure of government, is substantive and thus cannot be abrogated by Rule 23.

tional Association of Attorneys General, *State Attorneys General: Powers and Responsibilities* 77-84 (Lynne M. Ross ed. 1990) (“Powers”). For example, 15 ILCS 205/4 assigns statutory duties to the Illinois attorney general including: “[t]o appear for and represent the people of the state in all cases [before the Illinois Supreme Court] in which the state . . . [is] interested; [t]o institute and prosecute all actions and proceedings in favor of or for the use of the state. . . ; [t]o enforce the proper allocation of funds appropriated to the public institutions of the state . . . [and] prosecute breaches of trust in the administration of such funds.” Other states have similar statutes. *See, e.g.,* Ala. Code § 6-5-1(a), (b) (providing that a private attorney can protect the interests of the state only with written authorization from the governor); Cal. Gov’t Code § 12511 (attorney general has charge of all legal matters in which the State is interested); S.C. Code Ann. § 1-7-80 (stating that “the Attorney General shall conduct all litigation which may be necessary for any department of the state government or any of the boards connected therewith, and all these boards and departments are forbidden to employ any counsel for any purpose except through the Attorney General and upon his advice”).^{6 7}

State statutes are not the only sources of law determining the litigation role of state attorneys general. Unlike the attorney general of the United States, state attorneys general are common law creatures whose powers are, in general, not wholly specified by statute and state constitution. *See Powers, supra*, 1-10 (tracing the roots of state attorneys general from English and colonial attorneys general). State attorneys general therefore “derive their powers from constitutional, statutory and common law. There is no clear division between the three sources of authority, for each supplements the others. Many statutes, for example, are merely declaratory of the common law.” National Association of Attorneys General, *Common Law Powers of State Attorneys General* 21 (1976). States vary in the degree to which their legislatures may abrogate, enhance, or merely express the common law powers of their attorneys general by statute or constitution, and the source of their powers varies accordingly. *See Powers* at 31-35, 38 n.59. A complete assessment of the litigation power and responsibilities of any given attorney general therefore requires reference not only to the constitution and statutes of the state in question, but also to its common law. *See also id.* at 76.

These commitments, analogous to the commitment at the federal level of litigation authority to the United

⁶ Interestingly, about one-fifth of the states also have *qui tam* statutes authorizing delegation of their public litigation authority to private relators under prescribed circumstances. *See* Andrew L. Hurst, *Civil False Claims Act of 2003, The Federal Lawyer*, Jan. 2004, at 27, 31 (noting the recent trend of state enactment of false claims acts). Some are limited to certain substantive areas, such as Medicaid fraud. *See id.* (describing the Texas Medicaid Fraud Prevention Act).

⁷ Similar problems are presented when a local governmental entity is joined as a class member. *See, e.g., Daniel E. Heck, Can a County Board of Supervisors Circumvent Government Code Section 25203 When Employing Outside Counsel? Reconstructing and Reinterpreting What is Left of a Statute Bent with Age*, 27 W. St. U. L. Rev. 273 (1999-2000) (recounting problems raised in Orange County, Calif., when the board of supervisors arguably circumvented statutory requirements to retain outside counsel).

States attorney general, are, likewise, substantive expressions of each state's deliberately selected separation of powers scheme and worthy of equal respect. Reconfiguring those schemes through a state class action device not only creates many of the problems raised by including the federal government in a state-court class, but presents entirely new concerns of individualized choice of law regarding the 51 distinct separation-of-powers doctrines to be examined and the full faith and credit due to the laws of one state in the courts of another.

Reconfiguring state separation of powers schemes through the federal class action device, on the other hand, raises not only problems of individualized choice of law but also the question of compliance with *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). It is black-letter *Erie* doctrine that where a civil procedure rule, such as Rule 23, is "on point" and allowed to operate only within its proper scope under the Rules Enabling Act, it trumps conflicting state law. See *Gasperini v. Center for Humanities Inc.*, 518 U.S. 415, 427 n.7 (1996). But the problem here is that finding Federal Rule 23 to control who may represent states and their agencies in litigation permits Rule 23 to infiltrate the very structure of state government. Nothing could be more substantive than a state's determination of who speaks for it and its subsidiary governments in courts of law.

Thus, attempts to represent state governments as members of classes in federal and state courts presents problems similar to, but far more complex, than representation of the federal government.

III. Other Problems.

Even if a private litigant could represent a governmental entity consistent with the various laws governing the allocation of litigation authority, there would still be other problems inherent in government participation in class actions. The question of litigation authority is not the only one that must be considered. When plaintiffs in a class action involving the government seek a fee as a percentage of any common fund that the litigation might generate, they seek fee dollars to be paid out of monies belonging to the government. But there are special requirements governing the conditions under which the government may retain and pay outside counsel.

The U.S. attorney general may commission special assistants or attorneys subject to an oath requirement and a salary cap. See 28 U.S.C. § 515. Cf. 28 U.S.C. § 543-544 (similar provisions for United States attorneys). Federal officials also may retain private debt collection attorneys to collect debts owed to the federal government, see 31 U.S.C. § 3718; 28 C.F.R. §§ 11.1-11.3, private lawyers to prosecute various forms of civil bank fraud, see 28 U.S.C. § 4241 *et seq.*, and outside counsel for federal employees in certain contexts, see 28 C.F.R. §§ 50.15-50.16. But federal hiring of outside counsel is subject to numerous special conditions. See William V. Luneburg, *Contracting by the Federal Government for Legal Services: A Legal and Empirical Analysis*, 63 *Notre Dame L. Rev.* 399 (1988) (exhaustively detailing the Byzantine requirements for federal retention of outside attorneys, including, among other things, determining the lawyer's status as contractor or employee, competitive bidding, and special rules for economically disadvantaged bidders). The appointment of class counsel in a class action, and the payment of

fees from a common fund as a result of a final judgment or settlement, see *Boeing Co. v. Van Gemert*, 444 U.S. 472, 477 (1980), does not normally reflect consideration of any of these issues.

The payment of class counsel's fee from state government funds raises similar issues. Moreover, it raises some additional issues of significance. Some states have held that their attorneys general may not hire outside counsel for a contingency fee at all, while others have found the practice acceptable.⁸ Where duly constituted authority, the state attorney general, may not pay a contingency fee, it must be true *a fortiori* that no such fee may be paid to self-appointed class counsel. And, even when state law does not prohibit an attorney general's paying such a fee, the sensitivity of the issue demonstrates the careful and individualized attention that must be paid state-by-state before granting plaintiffs' counsel a portion of state funds.

IV. A Practical Conclusion.

The drive to compromise serious class claims provides private litigants with ample incentive to minimize the importance of the considerations presented in this article, particularly given the twin options available to governmental entities to either opt out of or intervene in the class cases. In addition to the constitutional statutory and common law defects already discussed, however, there are also at least two practical reasons not to follow the herd on this issue.

First, notice of a class action must be received and acted upon by the proper government agency—the federal Justice Department or a state attorney general—before an opt-in or opt-out decision can be considered legitimate. Thus, when providing class notice to the government, it is generally not enough to provide notice to the governmental "customer." For instance, in a class action arising from the purchase of a certain type of vehicle, the agency executing the contract for a government's fleet purchase would almost never be the appropriate decisionmaker regarding participation in the

⁸ Compare, e.g., *State v. Am. Tobacco Co.*, 772 So.2d 417, 418-21 (Ala. 2000) (ruling a contingency fee agreement between the Alabama attorney general and private counsel in tobacco litigation void *ab initio* for failure to obtain review from government contract review committee); *Meredith v. Ieyoub*, 700 So. 2d 478 (La. 1997) (never allowed) and *McGraw v. American Tobacco Co.*, No. Civ. A. 94-C-1707, 1995 WL 569618 (W. Va. Cir. Ct. Jun. 6, 1995) (particular fee held unconstitutional) with *Pursue Energy Corp. v. Miss. State Tax Comm'n*, 816 So. 2d 385, 390-92 (Miss. 2002) (upholding appointment of special assistant attorneys general to engage in tax collection efforts on a contingency-fee basis), *State ex rel. Nixon v. American Tobacco Co., Inc.*, 34 S.W.3d 122, 134-36 (Mo. 2000) (contingency fee permitted), *State v. Hagerty*, 580 N.W. 2d 139 (N.D. 1998) (same), and Cheryl Winokur, *Tobacco Fee Pact Intact: Contingency Fee Ruled Legal and, What's More, Sensible*, 147 N.L.J. 1073 (1997) (discussing decision of New Jersey trial judge permitting a contingency fee); see also *Texas v. Real Parties in Interest*, 259 F.3d 387, 389-90 (5th Cir. 2001) (recounting the well-publicized battle over contingency fee compensation of lawyers retained by the Texas attorney general for tobacco litigation); *Town of Mamou v. Fontenot*, 756 So. 2d 719, 722-26 (La. Ct. App. 2000) (upholding the right of a Louisiana municipality—unlike the state—to hire counsel for a contingency fee, but only if the contingency fee could be considered "reasonable" and, thus, not an impermissible donation of municipal funds). There are many more cases showing wide variation on the point depending on the circumstances and controlling law.

litigation. At times, due to political and budgetary realities, an opt-out card returned by a government agency might not even reflect the same decision that the relevant attorney general would have made. Not all governmental entities agree with the attorney general or prefer a broad construction of that office's litigation authority. See, e.g., Walter C. Jones, "High Court Gives Democrats Win in Redistricting Battle," *Augusta Chronicle*, June 27, 2003, at B5 (summarizing a lawsuit brought by Georgia's Republican governor against the state's Democratic attorney general to determine whether the governor had the power to order the attorney general to dismiss a lawsuit seeking to uphold Democrat-drawn legislative districts). Thus, at a minimum, governmental participation in class actions would require extra care to insure that notice of the action was sent to the organ of government with the legitimate authority to supervise litigation.

The second practical consideration is more serious. In a class action, notice to the class typically ensures the notice and opportunity to be heard required for due process. See *supra* n.3 & text accompanying note. Thus, a class member who received notice actually or constructively sufficient to meet Due Process Clause requirements cannot evade the *res judicata* effects of a final judgment or settlement pertaining to the class of which it was a member. See *Shutts*, 472 U.S. at 811-14. Any claims or issues that the class member should have raised may not be presented collaterally in subsequent proceedings. See, e.g., *Stone v. Dep't of Aviation*, 296 F. Supp.2d 1243, 1248 (D. Colo. 2003) ("Res judicata . . . bars not only issues decided in the first proceeding but also issues that should have been, but were not, raised in the first proceeding." (Colorado law)).

What, one might ask, is the *res judicata* effect of a judgment or settlement on a governmental entity that did not opt out of a class action? May the relevant attorney general engage in conduct similar to one-way intervention: Waiting to see the outcome of the suit, accepting that outcome if favorable but attacking it collaterally, on the grounds presented in this article, if unfavorable? Cf. *Amati v. City of Woodstock*, 176 F.3d 952, 957 (7th Cir. 1999) (noting that the rule against "one-way intervention" generally bars class members from "waiting on the sidelines to see how the lawsuit turns out and, if a judgment for the class is entered, in-

tervening to take advantage of the judgment.")⁹ Would it matter if the attorney general received notice directly, or would the second court be convinced by constitutional and other considerations, regardless of notice? Would it matter if the attorney general did not receive the notice but was nevertheless aware of the case? In the end, could either class counsel or the defendant rely on a judgment or settlement inasmuch as it pertained to governmental entities?

These questions make the binding effect on governments of any class judgment or settlement doubtful, at best. Recent litigation experience illustrates the point. In *On the House Syndication Inc. v. Federal Express Corp.*, Case No. 99CV 1336B JFS (S.D. Cal.), the defendant, Federal Express Corp., moved for exclusion of all federal, state, and local governmental entities from a certified class.¹⁰ In reaction to FedEx's motion and briefing by both parties, the court asked the United States Attorney for the Southern District of California whether it considered the federal government's membership in the certified class problematic. In response, the director of the Justice Department's Commercial Litigation Branch opined that no part of the federal government could participate as a class member in private litigation because doing so would transgress 28 U.S.C. §§ 516 and 519. As a result, the representative plaintiff in the case had to send notice to all suspected governmental entities informing them that they were, in effect, opted out.

This experience illustrates that allowing governmental entities to participate in class actions raises real questions about the finality of any judgment in their favor or against them. Given those questions, and the availability of other, more legitimate mechanisms for governments to pursue litigation, this practice, as common as it may be, should be abandoned.

⁹ Federal Rule 23, in its new form effective December 1, 2003, appears to embrace at least some conduct with effects similar to those of one-way intervention by giving federal judges discretion to provide a second opt-out opportunity after the settlement terms are known. See Fed. R. Civ. P. 23(e)(3). But this new provision would only apply to class members who had at least elected to participate until the point of settlement.

¹⁰ On appeal, the Ninth Circuit reversed the judgment of the district court, ruling that summary judgment should have been granted to FedEx and declining to reach any class certification issues. *On the House Syndication Inc. v. Federal Express Corp.*, Nos. 02-56158, 02-56234, 2003 WL 22071278, 79 F. App. 247 (9th Cir. Sept. 3, 2003), cert. denied, 124 S.Ct. 1679 (2004).