

The Reach of Local Power

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ABSTRACT. California’s Unfair Competition Law (UCL) empowers district attorneys and certain city attorneys, along with the state attorney general, to bring actions to protect consumers statewide from predatory business practices. Recent litigation, however, has challenged the power of local prosecutors to seek and receive statewide relief for violations occurring outside county lines. This Essay argues that to undercut local prosecutors’ power in this way, and thereby necessitate multiple prosecutions of the same consumer harms, would be both wasteful and dangerous—it would protect companies guilty of wrongdoing, not consumers. As statutory text, legislative history, case law, and public policy considerations establish, the UCL empowers specific local prosecutors to enforce the statute statewide. Further, examining the dispute over UCL enforcement within the broader context of modern federalism, this Essay argues it is inappropriate to co-opt federal constitutional norms that govern federal-versus-state conflicts when state and local governments disagree.

INTRODUCTION

The enforcement of American consumer protection law is at a low ebb. The private bar and federal government are respectively unable¹ and unwilling,² to

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1. See *infra* text accompanying note 10.
 2. See, e.g., Bruce Schneier, *We Need Stronger Cybersecurity Laws for the Internet of Things*, CNN (Nov. 10, 2018, 10:46 AM), <https://www.cnn.com/2018/11/09/opinions/cybersecurity-laws-internet-of-things-schneier/index.html> [<https://perma.cc/B5SX-RXSC>] (“[T]he US federal government is abdicating responsibility [over cybersecurity of Internet of Things devices (devices capable of connecting to the Internet and transmitting data)].”); Glenn Thrush, *Mulvaney, Watchdog Bureau’s Leader, Advises Bankers on Ways to Curtail Agency*, N.Y. TIMES (Apr. 24, 2018), <https://www.nytimes.com/2018/04/24/us/mulvaney-consumer-financial-protection-bureau.html> [<https://perma.cc/X7GA-W43R>] (“Mr. Mulvaney . . . a longtime critic of the [Consumer Financial Protection Bureau] . . . was tapped by President Trump . . . to temporarily run the bureau, in part because of his promise to sharply curtail it.”).

pursue cases against even the most blatant violations of the law. This development has put the onus on state and local governments to fill the void.³

California's Unfair Competition Law (UCL)⁴ and its sister statute, the False Advertising Law (FAL),⁵ provide a pathway by which state and local governments can assume this role and protect consumers from predatory business practices.⁶ The UCL contains a unique provision that effectively incorporates all other local, state, and federal consumer protections and empowers certain city attorneys, along with the state attorney general and district attorneys, to enforce the statute. These public prosecutors can seek injunctive relief, restitution, and civil penalties.⁷ Under the UCL and the FAL, district attorneys, city attorneys, and county counsels have brought hundreds of actions in the name of the People of the State of California, resulting in significant statewide relief for Californians.⁸ Although private litigants have standing to bring UCL actions, the proliferation of mandatory arbitration clauses and class action bans in consumer

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3. Cf. Thomas W. Kelly, *Federalism: While the Stewards Slept* . . . *New York v. United States*, 29 URB. LAW. 529, 531 (1997) (discussing the impact of *New York v. United States*, 505 U.S. 144 (1992), on local governments) (“We are now suffering from and paying the price for a legacy of generations of dependence upon federal government largess that has led to a financial, regulatory and political crisis that has now forced these national problems into the chambers of city councils, village boards, town councils, county boards, school boards, and other such governing bodies throughout the United States.”).
 4. CAL. BUS. & PROF. CODE §§ 17200-210 (West 2018).
 5. *Id.* §§ 17500-600.
 6. The authors are a student and alumna of the San Francisco Affirmative Litigation Project (SFALP) at Yale Law School, a clinical partnership that pairs law students with attorneys at the San Francisco City Attorney’s Office to conceive, develop, and litigate plaintiff-side civil rights and consumer protection lawsuits. SFALP brings a significant number of these lawsuits under the UCL to secure meaningful relief for California consumers statewide against pernicious business practices. The authors’ litigation experience in SFALP informs the views expressed in this Essay, which grew out of the authors’ work on amicus briefs supporting local prosecutors filed in the *Abbott Laboratories v. Superior Court*, 424 P.3d 268 (Cal. 2018) litigation. See *infra* Part I.
 7. See CAL. BUS. & PROF. CODE §§ 17203-17204 (West 2018) (authorizing public prosecutors to seek injunctive relief and restitution); *id.* § 17206 (authorizing public prosecutors to seek civil penalties).
 8. See, e.g., *People ex rel. Herrera v. Nat’l Arbitration Form Inc.*, No. CGC-08-473569 (Super. Ct. S.F. City & Cty. 2008) (UCL action by the San Francisco City Attorney’s Office against a national dispute resolution service arbitrating credit card disputes biased in favor of banks); *People v. Wells Fargo & Co.*, No. CV 15-4181-GW(FFMx), 2015 WL 4886391, at *1 (C.D. Cal. Aug. 13, 2015) (UCL suit by the City of Los Angeles against the largest bank in California for engaging in illegal, unfair, and fraudulent “gaming” business practices and for misusing customer information); *People v. Purdue Pharm. L.P.*, No. SACV 14-1080-JLS (DFMx), 2014 WL 6065907, at *1 (C.D. Cal. Nov. 12, 2014) (suit brought under the FAL, public nuisance statutes, and UCL by the Santa Clara County Counsel and Orange County District Attorney

agreements⁹ has effectively blocked many private plaintiff consumer suits. Moreover, California's Proposition 64, passed in 2004, expressly limited the scope of private UCL actions by imposing heightened standing requirements for private plaintiffs.¹⁰ As a result, UCL and FAL cases brought by local public prosecutors play an increasingly significant role in obtaining meaningful relief for millions of consumers statewide.

Recently, however, district and city attorneys have clashed with private corporations, the California Attorney General, and the California District Attorney Association (CDAA) over the power of local prosecutors to bring UCL actions for statewide violations of consumer protection laws. This issue arose last year before the California Court of Appeal in *Abbott Laboratories v. Superior Court*,¹¹ which held that although the UCL confers standing on district attorneys to sue in the name of the People of California, it does not grant district attorneys the power to seek and receive statewide relief for violations occurring outside the jurisdiction of their counties.¹² The California Supreme Court will review *Abbott Laboratories* next year.¹³

Opponents of statewide enforcement authority seek to cabin local prosecutors' ability to pursue restitution and civil penalties by limiting them to acts, violations, and remedies for conduct within their own city or county lines. These jurisdictional restrictions would considerably limit the reach of the UCL's statutory protections for California consumers, leaving them even more vulnerable to harmful business practices. Moreover, diminishing the UCL's reach would undermine the integrity of the state legislative process, through which the elected

against opioid manufacturers for a long-running scheme to deceive doctors and patients about the use of opioids for long-term treatment of chronic pain).

9. Cf. *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011).
10. See Proposition 64 (Cal. 2004) (amending CAL. BUS. & PROF. CODE § 17203); *Allergan, Inc. v. Athena Cosmetics, Inc.*, 640 F.3d 1377, 1381 (Fed. Cir. 2011) ("The intent of the proposition was to 'prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact under the standing requirements of the United States Constitution.'" (quoting Proposition 64 § 1(e))); see also *California v. IntelliGender, LLC*, 771 F.3d 1169, 1174 (9th Cir. 2014) ("Indeed, '[t]he voters restricted private enforcement of the UCL in 2004, by approving Proposition 64 . . . Accordingly, to bring a UCL action, a private plaintiff must be able to show economic injury caused by unfair competition.'" (quoting *Yanting Zhang v. Superior Court*, 304 P.2d 163, 168 (Cal. 2013))); *Palmer v. Stassinis*, 419 F. Supp. 2d 1151, 1154 (N.D. Cal. 2005) ("Proposition 64 . . . limits the standing of plaintiffs to sue under the UCL.").
11. 233 Cal. Rptr. 3d 730 (Ct. App. 2018).
12. See *id.* at 733-34.
13. See *Abbott Labs. v. Superior Court*, 424 P.3d 268, 268 (Cal. 2018) (petition for review granted on Aug. 22, 2018).

representatives of the people of California have chosen to designate certain local prosecutors to enforce consumer protection laws statewide.

In three Parts, this Essay argues that undercutting local prosecutors' power under this critical consumer protection statute, and thereby requiring multiple prosecutions of the same consumer harm, would both waste state resources and endanger Californians; it would help companies that are guilty of wrongdoing, not consumers.

First, through the prism of the pending *Abbott Laboratories* litigation, this Essay discusses how the California Attorney General and other parties are attempting to impose geographic limitations on the remedies local prosecutors may seek in UCL actions. Second, this Essay argues that the UCL clearly empowers specific local prosecutors to enforce the statute statewide, as evidenced by the statute's plain text, related statutory initiatives, relevant case law, and public policy considerations. Finally, this Essay situates the dispute over UCL enforcement within a broader discussion of federalism, suggesting that these arguments implicate the extent to which conflicts between states and local entities will mirror those between the federal government and states. In so doing, it illustrates that corporate actors and the California Attorney General have inappropriately made sovereignty-tinged arguments, though sovereignty is only relevant in power struggles between the federal government and states.

I. LITIGATING THE REACH OF REMEDIES: ABBOTT LABORATORIES V. SUPERIOR COURT

In 2016, the Orange County District Attorney sued pharmaceutical companies under the UCL, alleging that they had intentionally delayed the sale of a generic version of a prescription drug, causing consumers, their insurers, public healthcare providers, and others in California to overpay for the drug.¹⁴ The District Attorney sought commensurate statewide injunctive relief, restitution, and civil penalties for the companies' allegedly anticompetitive, unfair, and unlawful business conduct.¹⁵

The pharmaceutical companies moved to strike "all claims for restitution and civil penalties based on conduct outside the territorial jurisdiction of Orange County" from the District Attorney's complaint.¹⁶ To support their argument that the District Attorney's enforcement authority did not extend outside Orange County, the companies relied principally on one decision: a 1979 California

14. See *Abbott Labs.*, 233 Cal. Rptr. 3d at 734.

15. *Id.*

16. *Id.*

Court of Appeal case, *People v. Hy-Lond Enterprises, Inc.*¹⁷ In that case, the companies contended, the court limited a local prosecutor's UCL enforcement authority to conduct occurring within the geographic boundaries of the city or county for which the prosecutor was elected.¹⁸

The District Attorney in *Abbott Laboratories* countered that *Hy-Lond* did not bar the statewide remedies he sought against the pharmaceutical companies.¹⁹ Unlike *Abbott Laboratories*, *Hy-Lond* involved a settlement and stipulated injunction that purported, first, to designate the Napa County District Attorney as the *only* government agency to enforce the injunction against all of *Hy-Lond*'s convalescent facilities across the state and, second, to grant immunity from state enforcement against future UCL offenses.²⁰ *Hy-Lond* thus arose out of a unique set of facts inapposite to *Abbott Laboratories*, which does not even concern a settlement, much less one with such unusual terms. The District Attorney additionally argued that the California Constitution and the plain language of the UCL granted district attorneys both statewide enforcement authority and the ability to seek statewide relief.²¹

The trial court agreed with the District Attorney, finding *Hy-Lond* inapplicable to the case and denying the companies' motion to strike.²² The California Court of Appeal, however, vacated the trial court's denial. The appellate court held that notwithstanding district attorneys' statutory authority to sue on behalf of all California residents, the UCL "cannot constitutionally or reasonably be interpreted to grant the District Attorney power to seek and recover restitution and civil penalty relief for violations occurring outside the jurisdiction of the county in which he was elected."²³ The Court of Appeal reasoned that to conclude oth-

17. *People v. Hy-Lond Enters., Inc.*, 155 Cal. Rptr. 880 (Ct. App. 1979).

18. *Abbott Labs.*, 233 Cal. Rptr. 3d at 734 (citing *Hy-Lond*, 155 Cal. Rptr. 880, 890 (holding that a local prosecutor can neither bind a state agency to a settlement nor waive liability for future UCL violations)). The companies also invoked *California v. M&P Investments*, 213 F. Supp. 2d 1208 (E.D. Cal. 2002), for the proposition that local prosecutors' authority was limited to their city or county. *Abbott Labs.*, 233 Cal. Rptr. 3d at 744 n.10. However, that case involved enforcement of a public nuisance abatement statute that, unlike the UCL, contains an explicit geographic limitation. See CAL. CIV. PROC. CODE § 731 (West 2018). Accordingly, it has not played a major role in the case. See *Abbott Labs.*, 233 Cal. Rptr. 3d at 744 n.10 (noting that the court was not relying on *M&P Investments*).

19. See *id.* at 734-35.

20. See *id.*

21. *Id.* at 735.

22. *Id.*

23. *Id.* at 733-34; see also *id.* at 738-51.

erwise would “permit the District Attorney to usurp the Attorney General’s authority and impermissibly bind his sister district attorneys.”²⁴ Examining provisions of the California Constitution and the California Government Code, the court found that because the Constitution appoints the Attorney General as “the chief law officer of the State” with “direct supervision over every district attorney . . . in all matters pertaining to the duties of their respective offices,” district attorneys’ representation of the state is “territorially limited to the confines of their county.”²⁵

The Court of Appeal read the California Constitution and *Hy-Lond* “to bar a district attorney’s unilateral effort to seek restitution and civil penalties for UCL violations occurring outside his or her own county jurisdiction.”²⁶ “Even absent *Hy-Lond*,” the court found that “the text of the UCL provides no basis to conclude the Legislature intended to grant local prosecutors extraterritorial jurisdiction to recover statewide monetary relief.”²⁷ In order to support the District Attorney’s position, the court concluded that the UCL must specifically vest district attorneys with the authority to recover restitution or civil penalties for conduct outside of their jurisdictional boundaries.²⁸

In dissent, Justice Dato underscored that nothing in the text of sections 17203, 17204, or 17206 of the UCL limits district attorneys to enforcing the statute on behalf of residents in their particular counties.²⁹ He explained, “Consistent with the UCL’s broad remedial purposes and the perceived need for vigorous enforcement, there is nothing unconstitutional about the Legislature’s decision to permit and encourage multiple public prosecutors with overlapping lines of authority on the theory that more enforcement in this context is better than less.”³⁰ Moreover, he stressed that there is no “practical risk” that a local district attorney would bind the Attorney General or other district attorneys because the Attorney General — as the chief law enforcement officer of the state — always retains the authority to intervene in a case at any point.³¹

24. *Id.* at 734.

25. *Id.* at 739-41 (internal quotation marks omitted) (first quoting CAL. CONST. art. V, § 13; then citing *id.* art. XI, § 1(b) and CAL. GOV’T CODE § 24000; and then quoting *Pitts v. County of Kern*, 949 P.2d 920 (Cal. 1998)).

26. *Id.* at 746; *see also id.* at 742-51 (analyzing relevant provisions of the UCL and case law examining the same).

27. *Id.* at 748.

28. *See id.* at 749.

29. *Id.* at 754 (Dato, J., dissenting).

30. *Id.* at 755.

31. *Id.*

If left to stand, the Court of Appeal's majority decision will reduce the number of consumer protection actions brought on behalf of California residents statewide by restricting the ability of local prosecutors to effectively pursue UCL cases. Not only would this harm California consumers, but as the next Part illustrates, it would also undermine the will of the California Legislature because the UCL does, in fact, empower certain local prosecutors to enforce the law and pursue remedies statewide.

II. LOCAL PROSECUTORS' AUTHORITY UNDER CALIFORNIA'S UNFAIR COMPETITION LAW

The plain language, overall statutory structure, and legislative history of the UCL authorize specific local prosecutors to bring claims on behalf of all California residents and seek statewide remedies. Application of traditional canons of statutory interpretation indicates that the statute empowers both the Attorney General and authorized local prosecutors to enforce its terms without geographic limitations. The larger structure of the UCL and especially its statutory history bolster this reading of the UCL. Moreover, the California Supreme Court has recognized that the absence of a geographic limitation in statutory text indicates legislative intent not to impose such limitations, and that both local public officials and the Attorney General may assert the interests of the People of California statewide.

A. *Traditional Interpretive Methods*

Traditional methods of statutory interpretation indicate that local prosecutors have authority under the UCL to seek remedies for statewide violations. The structure of the UCL is simple. Section 17200 defines "unfair competition" as any "business act or practice" that is "unlawful, unfair or fraudulent."³² The California Supreme Court has interpreted the Legislature's use of the word "unlawful" to incorporate "violations of other laws" and to "treat[] these violations, when committed pursuant to business activity, as unlawful practices."³³ Public prosecutors are authorized to enforce the statute primarily by two provisions, sections 17204 and 17206.³⁴ Section 17204 gives public prosecutors, as well as

32. CAL. BUS. & PROF. CODE § 17200 (West 2018).

33. *Farmers Ins. Exch. v. Superior Court*, 826 P.2d 730, 734 (Cal. 1992) (quotations omitted); see also *Saunders v. Superior Court*, 33 Cal. Rptr. 2d 438, 441 (Cal. 1994) ("The 'unlawful' practices prohibited by section 17200 are any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made.").

34. Section 17203 mainly authorizes courts to issue orders for injunctive relief and restitution but also references public prosecutors insofar as it clarifies that they are not subject to the standing

private persons, the authority to initiate actions for injunctions and restitution.³⁵ Section 17206(a) provides for public prosecutors to seek civil penalties.³⁶

At the outset, the plain text of each provision indicates that local prosecutors can seek injunctions, restitution, and civil penalties for statewide violations of the UCL. Section 17204 states that “[a]ctions for relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or a district attorney . . . or by a city attorney of a city having a population in excess of 750,000.”³⁷ Section 17206 is even clearer: “Any person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty” in an action brought “by the Attorney General, by any district attorney, . . . [or] by any city attorney of a city having a population in excess of 750,000.”³⁸ The provisions establish a broad scope of prosecutorial authority without geographic limitations and without making any distinctions between the Attorney General and local prosecutors. The import of the statutory language is thus: any person in California who violates the statute is liable in an action brought by any district attorney or city attorney of a city over a certain size. The

requirements for private lawsuits. See BUS. & PROF. § 17203. Section 17207 allows public prosecutors to enforce UCL injunctions regardless of where the injunction was initially issued. See *id.* § 17207.

35. Section 17204:

Actions for relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or a district attorney or by a county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or by a city attorney of a city having a population in excess of 750,000, or by a city attorney in a city and county or, with the consent of the district attorney, by a city prosecutor in a city having a full-time city prosecutor in the name of the people of the State of California upon their own complaint or upon the complaint of a board, officer, person, corporation, or association, or by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition.

Id. § 17204.

36. Section 17206(a):

Any person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars (\$2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General, by any district attorney, by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, by any city attorney of a city having a population in excess of 750,000, by any city attorney of any city and county, or, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor, in any court of competent jurisdiction.

Id. § 17206(a).

37. *Id.* § 17204.

38. *Id.* § 17206(a) (emphasis added).

text of the UCL points to a legislative intent to empower the authorized local prosecutors to enforce the statute statewide.

That other statutes do explicitly limit local prosecutors' enforcement authority underscores the California Legislature's choice *not* to impose such limits under the UCL. For example, section 731 of the California Code of Civil Procedure states that

[a] civil action may be brought in the name of the people of the State of California to abate a public nuisance . . . by the district attorney or county counsel of any county in which the nuisance exists, or by the city attorney of any town or city in which the nuisance exists.³⁹

Similarly, state antitrust laws contain explicit jurisdictional tethers that limit local prosecutors' authority. The Cartwright Act permits district attorneys to bring a *parens patriae* action as the People only when "activities giving rise to the prosecution or [their] effects . . . occur *primarily within that county*."⁴⁰ In an action brought under the Cartwright Act, therefore, although "purportedly brought in the name of the People . . . a district attorney is authorized to prosecute civil actions only on behalf of the county or public agencies located within the county."⁴¹ The UCL, by contrast, contains no qualifying language cabining district attorneys' authority to prosecute in the name of the People.⁴² The absence of a jurisdictional limitation in the UCL operates as a presumption of legislative intent not to impose that limitation.⁴³

The larger structure of the UCL and its statutory history also support this interpretation. Even opponents of statewide enforcement authority concede that local prosecutors can secure statewide injunctive relief.⁴⁴ But the statute itself

39. CAL. CIV. PROC. CODE § 731 (West 2018) (emphasis added).

40. BUS. & PROF. § 16760(g) (emphasis added).

41. *People v. Steelcase*, 792 F. Supp. 84, 85 (C.D. Cal. 1992), *abrogated on other grounds by California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831 (9th Cir. 2004); *see also* *Pac. Gas & Elec. Co. v. County of Stanislaus*, 947 P.2d 291, 296-97 (Cal. 1997).

42. *See Steelcase*, 792 F. Supp. at 85.

43. *Cf. People v. Sinohui*, 47 P.3d 629, 634 (Cal. 2002) (reasoning that the absence of a jurisdictional limitation in the CAL. EVID. CODE § 972(e)(2) (West 2018) exception to spousal testimony privilege creates a presumption that the legislature did not intend to impose such a limitation); *County of San Diego v. State*, 931 P.2d 312, 328 (Cal. 1997) (reasoning that the lack of jurisdiction limitation in CAL. WELF. & INST. CODE § 17000 (West 2018), which requires counties to provide medical care to medically indigent adults, supports a presumption that the legislature did not intend such a limitation).

44. *See, e.g.,* Reply of Petitioner at 26, *Abbott Labs. v. Superior Court*, 233 Cal. Rptr. 3d 730 (Ct. App. 2018) (No. D072577); Brief of the Cal. Att'y Gen. as Amicus Curiae at 5 n.2, *Abbott Labs.*, 233 Cal. Rptr. 3d 730 (No. D072577), 2017 WL 6939447. Both Abbott Laboratories and the

makes no substantive distinction among injunctive relief, restitution, and civil penalties; it merely restricts the ability of private persons to seek the last of these remedies.

The case against statewide restitution is particularly weak. Before 2004, the UCL allowed private persons to bring “representative” UCL actions on behalf of the public even if they had not suffered any injury from the UCL violation.⁴⁵ While a ballot measure eliminated representative actions in 2004,⁴⁶ the California Supreme Court had previously determined that private plaintiffs could obtain a statewide order for restitution as part of a UCL action, even if there was no class action. In *Kraus v. Trinity Management Services, Inc.*, the California Supreme Court not only confirmed this authority, but even discussed the procedure by which “[o]n remand the trial court should order defendants to identify, locate, and repay [restitution].”⁴⁷ Given that the UCL once empowered a private person – without class certification or even an injury – to obtain statewide restitution, it is absurd to suggest that an elected local prosecutor cannot still obtain the same relief.

Moreover, the ballot measure, Proposition 64, in no way limited the authority of public prosecutors. The findings section of the Proposition clearly stated that “[i]t is the intent of California voters in enacting this act that the Attorney General, district attorneys, county counsels, and city attorneys maintain their public protection authority and capability under the unfair competition laws.”⁴⁸ Indeed, in the official ballot guide, Proposition 64 was actually sold as empowering public prosecutors: “Public Prosecutors have a long, distinguished history of protecting consumers and honest businesses. Proposition 64 will give those officials the resources they need to increase enforcement of consumer protection laws”⁴⁹ Thus, whatever authority local prosecutors possessed before Proposition 64, they kept.

Attorney General contend that statewide injunctive relief can only be granted for violations occurring within a local prosecutor’s city or county.

45. *Arias v. Superior Court*, 209 P.3d 923, 927–28 (Cal. 2009). In 2004, the public enacted Proposition 64, which imposed an injury in fact and class certification requirement.
46. Proposition 64 (Cal. 2004).
47. 999 P.2d 718, 732 (Cal. 2000); see also *id.* at 732 n.18; *Arias*, 209 P.3d at 927 (“[A]ny person could assert representative claims under the unfair competition law to obtain restitution . . .”).
48. Proposition 64 § 1(g) (Cal. 2004).
49. *Arguments and Rebuttals: Proposition 64*, OFFICIAL VOTER INFO. GUIDE: PROPOSITIONS (Nov. 2004), <http://vigarchive.sos.ca.gov/2004/general/propositions/prop64-arguments.htm> [<https://perma.cc/5QR6-4V3N>].

Furthermore, the California Supreme Court's restitution precedents suggest a larger interpretive principle for the UCL: when there are no geographic limitations in the statute, it is because the Legislature never intended to impose geographic limitations. It would make little sense to handle restitution and civil penalties differently, since the UCL itself treats them in near identical fashion.⁵⁰ By contrast, the Legislature did impose explicit geographic limits elsewhere in the statute. Under section 17207, for example, actions to enforce injunctions can only be brought in the "county in which the violation occurs or where the injunction was issued."⁵¹ If the Legislature included geographic limitations in only one part of the statute, then we can reasonably infer that they did not intend to place such restrictions elsewhere.⁵²

The Court of Appeal in *Abbott Laboratories* invoked a line of cases beginning with *Safer v. Superior Court* to argue that statutes granting civil litigation authority to district attorneys must be narrowly construed.⁵³ However, the court misunderstood this precedent. In *Safer*, a district attorney argued it had the power, by virtue of its office, to intervene in a lawsuit between two private parties.⁵⁴ The California Supreme Court rejected this argument, noting that the Legislature had enacted various statutes bestowing "narrowly framed" and "specifically authorized" civil litigation authority on district attorneys.⁵⁵ From the existence of these statutes, the court inferred that district attorneys lack a general ability to participate in civil litigation.⁵⁶

Safer, therefore, merely stands for the proposition that a district attorney must be empowered by a particular statute to participate in civil litigation. It

50. Indeed, the only difference between sections 17204 and 17206 is that the latter provision is slightly more emphatic, empowering "any" qualifying local prosecutor to seek civil penalties. CAL. BUS. & PROF. CODE §§ 17204, 17206 (West 2018).

51. *Id.* § 17207.

52. See *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 940 (2017) (defining "the interpretive canon, *expressio unius est exclusio alterius*," as postulating that "expressing one item of an associated group or series excludes another left unmentioned" (internal quotation and alteration marks and citations omitted)); see also *id.* ("If a sign at the entrance to a zoo says 'come see the elephant, lion, hippo, and giraffe,' and a temporary sign is added saying 'the giraffe is sick,' you would reasonably assume that the others are in good health.").

53. *Abbott Labs. v. Superior Court*, 233 Cal. Rptr. 3d 730, 741-42, 749 (Ct. App. 2018) (citing *People v. Superior Court*, 182 P.3d 600, 611 (Cal. 2008); *People v. McKale*, 602 P.2d 731, 734-35 (Cal. 1979); *Safer v. Superior Court*, 540 P.2d 14, 17-18 (Cal. 1975); *People v. Superior Court*, 168 Cal. Rptr. 3d 286, 290, 292 (Ct. App. 2014); *Dennis H. v. Willis H.*, 105 Cal. Rptr. 2d 705, 711 (Ct. App. 2001)).

54. *Safer*, 540 P.2d at 17.

55. *Id.*

56. *Id.* The opinion also expressed policy concerns about allowing public prosecutors to intervene in private lawsuits that are irrelevant for the UCL issue. *Id.* at 22.

does not inform how an authorizing statute is to be interpreted. The *Safer* court itself impliedly recognized that while these authorizing statutes are “narrowly framed” and “specifically authorized” in the sense that they are aimed at a particular statutory scheme or area of law, they can bestow “plenary power” and “unbridled discretion.”⁵⁷ That is why later cases applying *Safer* have used traditional, neutral methods of statutory interpretation instead of applying a presumption of narrowness when interpreting potential authorizing statutes.⁵⁸ For example, in *Worth v. Superior Court*, the California Court of Appeal, noting that a provision of the California Welfare and Institutions Code there at issue “facially contemplates authority to participate in [child support and spousal support] modification proceedings,” held that the statute authorized district attorneys to oppose a requested modification of a support order.⁵⁹ Interpreting the UCL to grant local prosecutors the power to seek restitution and civil penalties would be entirely in keeping with the California Legislature’s practice of granting civil litigation authority to district attorneys in a piecemeal fashion. In fact, the California Supreme Court has already recognized that sections 17204 and 17206 meet the *Safer* standard because they provide a “specifically authorized” power.⁶⁰ Accordingly, the dispute in *Abbott Laboratories* only concerns the scope of the Legislature’s authorization, a topic on which *Safer* and its progeny have nothing to say.

B. *The California Attorney General’s Constitutional Role*

Abbott Laboratories and the Attorney General argued, and the Court of Appeal agreed, that allowing local prosecutors to enforce the UCL for statewide violations would infringe on the Attorney General’s constitutional role.⁶¹ Yet there is no authority to support the proposition that the Attorney General derives *exclusive* prosecutorial authority from the California Constitution.

57. *Id.* at 17 (noting that local prosecutors lack “plenary power” and “unbridled discretion” in some of the authorizing statutes).

58. See, e.g., *Superior Court*, 168 Cal. Rptr. 3d at 290-92; *Dennis H.*, 105 Cal. Rptr. 2d at 710-12; *Worth v. Superior Court*, 255 Cal. Rptr. 304, 304-07 (Ct. App. 1989); *In re Marriage of Brown*, 234 Cal. Rptr. 535, 537-38 (Ct. App. 1987).

59. *Worth*, 255 Cal. Rptr. at 306.

60. *People v. McKale*, 602 P.2d 731, 734-35 (Cal. 1979) (“While [in *Safer*] we held a district attorney may prosecute civil actions only when the Legislature has specifically authorized, specific power exists in the instant case. The district attorney is expressly authorized to maintain a civil action for either injunctive relief or civil penalties for acts of unfair competition.”).

61. *Abbott Labs. v. Superior Court*, 233 Cal. Rptr. 3d 730, 733 (Ct. App. 2018); Reply of Petitioner at 18, *Abbott Labs.*, 233 Cal. Rptr. 3d 730 (Ct. App. 2018) (No. D072577); Brief of the Cal. Att’y Gen. as Amicus Curiae at 10, *Abbott Labs.*, 233 Cal. Rptr. 3d 730 (No. D072577), 2017 WL 6939447.

Article V, section 13 of the California Constitution describes the Attorney General as the “chief law officer of the State” with the duty “to see that the laws of the State are uniformly and adequately enforced.”⁶² The Attorney General also “shall have direct supervision over every district attorney . . . in all matters pertaining to the duties of their respective offices, and may require any of said officers to make reports”⁶³ The Constitution further bestows on the Attorney General the ability to step in the district attorney’s shoes anytime he or she thinks that “any law of the State is not being adequately enforced.”⁶⁴ At the same time the California Constitution authorizes the Attorney General to take these enforcement actions, it does not deprive local prosecutors from exercising some of the same enforcement authority.

California courts have recognized that the chief law officer provision endows the Attorney General with expansive, if not plenary, civil litigation authority. *D’Amico v. Board of Medical Examiners* stated that as the Chief Law Officer, the Attorney General “possesses not only extensive statutory powers but also broad powers derived from the common law relative to the protection of the public interest.”⁶⁵ As a result,

in the absence of any legislative restriction, [the Attorney General] has the power to file any civil action or proceeding directly involving the rights and interests of the state, or which he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights and interest.⁶⁶

While the Attorney General’s status as “chief law officer” provides her with independent power, her actual authority over district attorneys is circumscribed by the specific authorizations listed in section 13. As the Ninth Circuit noted in a section 1983 case: “Though the Attorney General ‘shall have direct supervision over every district attorney and sheriff,’ the Attorney General’s control over the district attorney is quite restrained: she is limited to requiring a district attorney to ‘make reports.’”⁶⁷ The Ninth Circuit explained that if the Attorney General was dissatisfied with a district attorney’s course of action, there is only one meaningful remedy: “If the Attorney General believes a district attorney is not adequately prosecuting crime, the Attorney General is not given the power to

62. CAL. CONST. art. V, § 13.

63. *Id.*

64. *Id.*

65. 520 P.2d 10, 20 (Cal. 1974) (citing *Pierce v. Superior Court*, 37 P.2d 453, 460 (Cal. 1934)).

66. *Id.* (quoting *Pierce*, 37 P.2d at 460) (alteration in original).

67. *Goldstein v. City of Long Beach*, 715 F.3d 750, 756 (9th Cir. 2013) (quoting CAL. CONST. art. V, § 13).

force a district attorney to act or adopt a particular policy, but instead may step in and ‘prosecute any violations of law’ himself or herself.”⁶⁸ Since the chief law officer provision does not provide any additional grounds for controlling or limiting district attorneys, it follows that it does not limit the prosecution authority of district attorneys.⁶⁹

One analogous case is the California Supreme Court’s decision in *Perry v. Brown*.⁷⁰ In *Perry*, a coalition of private and public plaintiffs challenged the constitutionality of Proposition 8, which inserted a same-sex marriage ban into the California Constitution.⁷¹ The Attorney General refused to defend the ballot measure.⁷² In response, the “official proponents” of the measure intervened to defend Proposition 8.⁷³ The plaintiffs opposed the official proponents’ intervention, arguing in part that, as the “chief law officer,” only the Attorney General could assert the state’s interest in defending the law.

The California Supreme Court rejected this notion, holding that article V, section 13 and other statutory provisions “have never been interpreted to mean that the Attorney General is the *only* person or entity that may assert the state’s interest in the validity of a state law in a proceeding in which the law’s validity is at issue.”⁷⁴ The court noted that different parts of the executive branch have been known to take opposing views on the validity of the law in the same litigation.

Thus, the official proponents could lawfully intervene to defend Proposition 8. The fact that the proponents were not public officials presented no obstacle. As the court explained: “[E]ven outside the initiative context it is neither unprecedented nor particularly unusual under California law for persons other than public officials to be permitted to participate as formal parties in a court action to assert the public’s or the state’s interest in upholding or enforcing a duly enacted law.”⁷⁵

68. *Id.* at 757 (quoting CAL. CONST. art. V, § 13).

69. Presumably, other local prosecutors, like city attorneys, are limited even less by article V, section 13, as they are not even mentioned in the provision.

70. 265 P.3d 1002 (Cal. 2011).

71. *Id.* at 1005, 1007-08 (challenging Proposition 8 under the Federal Constitution).

72. *Id.* at 1008.

73. *Id.* at 1009. The proponents of a ballot initiative are those who submit draft text of the initiative to the Attorney General, publish notice of initiatives and referenda, or file petitions with the elections official or legislative body. CAL. ELEC. CODE § 342 (West 2018).

74. *Perry*, 265 P.3d at 1025; *see also id.* (“The constitutional and statutory provisions to which plaintiffs point establish that in a judicial proceeding in which the validity of a state law is challenged, the state’s interest in the validity of the law is ordinarily asserted by the state Attorney General.”).

75. *Id.* at 1030 (citing the “the so-called ‘public interest’ exception in mandate actions” and “the well-established private attorney general doctrine”).

While defending the validity of a constitutional provision is different than enforcing a statute, *Perry* establishes that the Attorney General's constitutional position does not make her the only person who can assert the state's interest in important statewide litigation. Further, the specific, approving references to private officials representing the state suggests that there is no obstacle to local public officials enforcing a statute statewide.

III. STATUTORY INTERPRETATION IN STATE/LOCAL CONFLICTS AND THE FEDERAL/STATE PLAYBOOK

Because corporations, the Attorney General, and the CDAA are reluctant to argue that a grant of authority to local prosecutors to pursue statewide cases is unconstitutional, they instead try to inflect their arguments with alleged state constitutional norms that favor their position on the proper roles of state versus local governments. In *Abbott Laboratories*, the California Attorney General and Abbott Laboratories argued that because statewide suits are typically the province of the state Attorney General, the Legislature must provide the authority to litigate statewide suits to local prosecutors in clear terms.⁷⁶ The Court of Appeal explicitly relied on state constitutional norms to interpret the UCL.⁷⁷ These arguments implicate a broader issue for the future of modern federalism: the extent to which conflicts between states and local entities will mirror those between the federal government and states.

Our modern political polarization has ushered in increasingly high-profile conflicts between state and local governments. For example, North Carolina generated enormous controversy when the state legislature invalidated the city of Charlotte's transgender antidiscrimination ordinance,⁷⁸ and Texas is currently attempting to prevent local law enforcement from carrying out "sanctuary city" policies.⁷⁹ Across the country, these state-versus-local battles tend to involve state governments explicitly overriding local ordinances.⁸⁰

76. *Abbott Labs. v. Superior Court*, 233 Cal. Rptr. 3d 730, 744 (2018).

77. *Id.* at 746-47.

78. Tal Kopan & Eugene Scott, *North Carolina Governor Signs Controversial Transgender Bill*, CNN (June 23, 2016), <https://www.cnn.com/2016/03/23/politics/north-carolina-gender-bathrooms-bill/index.html> [<https://perma.cc/AK2D-9X4G>].

79. Manny Fernandez, *Texas Banned 'Sanctuary Cities.' Some Police Departments Didn't Get the Memo*, N.Y. TIMES (Mar. 15, 2018), <https://www.nytimes.com/2018/03/15/us/texas-sanctuary-sb4-immigration.html> [<https://perma.cc/9NCY-ZEWY>].

80. See Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469 (2018). Note that in some states, these types of preemption laws are challenged on the basis of constitutional provisions which give local control over "municipal affairs." See, e.g., CAL. CONST. art. XI, § 5(a) (allowing certain local ordinances to supersede state law). As

These conflicts differ from those in the federal-versus-state context, which of late have tended to focus on statutory interpretation. Because the federal government enjoys such broad power to override state laws, existing discussion of federalism largely contemplates whether a federal statute or set of statutes preempt or permit state regulation.⁸¹ This poses a distinct inquiry from high profile state-local conflicts, which involve unambiguous state statutes that supersede local control. The interpretive task in those cases is minimal. But as state and local relations grow ever more contentious, the battlefield seems likely to expand to cases that place greater importance on interpreting statutes.⁸²

State statutory interpretation cases, such as *Abbott Laboratories*, test the extent to which constitutional norms about the proper, traditional role of each level of government will influence the outcome. Such considerations are critical at the federal/state level. For example, in *Gregory v. Ashcroft*, the U.S. Supreme Court interpreted a federal statute narrowly to avoid preempting a state law that went to “the heart of representative government.”⁸³ That the “Constitution establishes a system of dual sovereignty between the States and the Federal Government” crucially informed the Court’s interpretation.⁸⁴ And in *Arizona v. Inter Tribal Council*, the Court disregarded its traditional presumption against preemption because the statute in question regulated federal election law.⁸⁵

But should a similar mode of analysis govern statutory interpretation in state and local conflicts, particularly in cases that involve local entities other than municipalities (such as special-purpose districts and school committees)?⁸⁶ As

a result, some municipalities may have stronger constitutional arguments against states than states do against the federal government.

81. See, e.g., Abbe R. Gluck, *Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists’ Gamble*, 81 *FORDHAM L. REV.* 1749 (2013) (examining the debate over whether the Affordable Care Act enhances or diminishes federalism structures).
82. To be sure, cases interpreting state statutes, particularly those involving preemption, are not uncommon. See Lauren E. Phillips, *Impeding Innovation: State Preemption of Progressive Local Regulations*, 117 *COLUM. L. REV.* 2225 (2017).
83. *Gregory v. Ashcroft*, 501 U.S. 452 (1991); see also *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (“Congress legislated here in field which the States have traditionally occupied. So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”).
84. *Gregory*, 501 U.S. at 457; see also *id.* at 461 (explaining that the Court’s presumption against preemption “is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.”).
85. 570 U.S. 1, 13-15 (2013).
86. The constitutional protections that some states include for certainly municipalities (usually termed “home rule”) add a wrinkle for interpreting state law, especially those statutes which grant power to municipalities. The traditional touchstone for interpreting these statutes is Dillon’s rule, a canon which provides that statutes granting power to general, non-home rule

Heather Gerken observed in her seminal piece *Federalism All the Way Down*,⁸⁷ these non-municipality local governments are places “where sovereignty is not to be had.”⁸⁸ Ideas about their proper or traditional roles in government are less developed. Further, they are not separate sovereigns, but instead, they are servants of “a larger policymaking regime.”⁸⁹ They gain their power from the fact that the superior government must, out of practical necessity, rely on them to carry out their policy schemes. An account of federalism that included these local governments—one that went “all the way down”—would help courts and scholars understand the virtues and methods of federalism without sovereignty.⁹⁰ Among other characteristics, this account of federalism would turn not on an entity’s ability to opt out or exit from certain state-level policies, but would emphasize the servant’s voice in larger statewide conflicts over policy. These are messy battles in which political minorities have a voice—but not a controlling voice—in every decision⁹¹ This voice might be expressed in many ways, including in state-wide suits to enforce state law.⁹²

Yet while Gerken adopted the premise that “sovereignty is not be had” for non-municipal governments, there is a risk that as these governments become fully recognized as part of federalism writ large, the temptation will arise to inject norms of sovereignty into how they are understood. Ambitious local servants may be recast as deviant sovereigns, seeking to escape the bounds of their proper sphere. In this next chapter of *Federalism All the Way Down*, courts may find themselves under increasing pressure to apply traditional federal constitutional norms of sovereignty when interpreting state statutes that affect nonmunicipality local governments. That appears to be exactly what happened at the Court of Appeal in *Abbott Laboratories*. When interpreting the UCL, the court imported concepts of sovereignty that normally arise only in the federal-versus-state cases. *Abbott Laboratories* may reflect a coming debate on whether *Federalism All the Way Down* will look the same from top to bottom.

municipalities should be interpreted narrowly against the municipality. However, the force of Dillon’s rule is unclear because of the advent of home rule. See Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1126 n.64 (2007) (explaining that it is difficult to measure the present-day influence of Dillon’s rule because of the proliferation of home rule).

87. Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010).

88. *Id.* at 20.

89. *Id.* at 8.

90. *Id.*

91. See *id.* at 45.

92. Admittedly, a local prosecutor under the UCL has an unusually strong voice for a local government office, but that voice is still not controlling: the Legislature maintains ultimate authority to control the local prosecutor’s voice.

Ultimately, it is inappropriate to inflect statutory interpretation in these state-versus-local cases with federal constitutional norms of separate sovereign spheres and the proper roles of different levels of government. Most non-municipal local governments do in fact clearly lack the claim to sovereignty that tends to underlie federal and state decisions such as *Gregory*. Newer local governments, such as special-purpose districts, probably do not even have a “traditional role,” given their brief history. Instead, these local governments are simply part and parcel of the larger state governmental apparatus.⁹³ They are creatures of the state governments that created them.⁹⁴ It would be perverse for a court to educate the legislature on the “proper sphere” of a government that the legislature made. Traditionally federal- and state-driven notions of the role each level of government should not constrict states as they attempt to allocate their sovereign power. Doing so could easily disrupt innovative or useful allocations of authority between states and their local governments. Courts should instead simply attempt to give effect to the legislature’s chosen scheme.

In the case of the UCL, the California Legislature chose to appoint both the Attorney General and certain local prosecutors to bring statewide enforcement actions. The Legislature commands the sovereign power of the state, and it chose to invest that power in several government actors. This scheme results in exceptionally vigorous enforcement of consumer law in California. For an enforcement action not to be brought, every eligible local prosecutor in the state must pass on a given case. The courts should empower, not impede, the Legislature’s policy judgment. They should not disrupt innovative and effective allocations of sovereign power based on judicially constructed notions as to which governmental actor should have what authority.

CONCLUSION

The plain language of the UCL declares the California Legislature’s intent to designate both the Attorney General and local prosecutors to act as its lawyer and protect its consumers. This intent reflects the spirit of statute: providing more protection – not less – to consumers. By pushing to bend local prosecutors to its will, the Attorney General’s stance may result in under-enforcement of

93. See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907) (“Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property.”). Likewise, the *Perry* court premised its decision on the concept that a state government’s power has one source and can be distributed flexibly.

94. See CAL. GOV. CODE § 26500 (West 2018) (creating the office of the district attorney); *id.* § 41801 (creating the office of city attorney).

consumer protection laws. At a time of national conversation regarding how federalism can be harnessed all the way down, *Abbott Laboratories* may preview conflicts to come. Its resolution will have serious consequences for the public, and perhaps beyond California's bounds.

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