AN ANALYSIS OF FEDERALISM AND STATE LEGISLATIVE STRATEGY IN THE CONTEXT OF THE AMERICAN OPIOID EPIDEMIC

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Abstract - The opioid epidemic caused markedly harmful addiction related outcomes throughout the United States. As a result of over prescription, an abundance of class action litigation against corporate manufacturers, distributors, and retailers of opioids ensued to hold corporate actors accountable for knowing promotion of addictive substances. States served as plaintiffs in many of these class action suits to recover costs related to citizen harm and mortalities.

As a result of the corresponding state class action litigation, a federal settlement fund was created to assist individual states in funding and implementing policy initiatives to rectify the opioid epidemic within state jurisdictions. Consequently, states enacted legislation to govern and direct disbursement of these federal settlement funds. This paper utilizes data from the National Academy for State Health Policy to present a qualitative coding scheme to categorize state legislative content according to which entity within a given state has binding authority pertaining to spending of state allocated opioid federal settlement funds. This qualitative coding scheme is primed for use in future analysis to determine whether certain categorizations of legislative content, based on which state entity has control of settlement funds, facilitates effective policy outcomes that practically enable meaningful public health improvements.

Keywords - Federalism, Opioid Epidemic, Federal Settlement, Public Health

I. INTRODUCTION

Background

The opioid epidemic is a serious concern in the American healthcare landscape that provides a distressing illustration of the dangers that accompany addiction. "Over the past 25 years, pharmaceutical companies deceptively promoted opioid use [to patients] in ways that were neither safe nor effective, contributing to unprecedented increases in prescribing, opioid use disorder, and deaths by overdose" [1]. For an example, in Indiana, "[t]he rates of opioid prescribing in Indiana reached a peak in 2012 when, on average, there were 112 opioid prescriptions for every 100 residents in the state" [2]. Opioids are extraordinarily addictive, "the pleasure derived from opioids' activation of the brain's natural reward system promotes continued… use…[and] long-lasting changes in the brain" [4].

As a result of such over prescription of opioids, an abundance of class action litigation against opioid corporate manufacturers, distributors, and retailers followed to hold corporate actors accountable for knowing promotion of addictive substances in a manner that did not align with reasonable, safe, or effective prescription treatment. States served as plaintiffs in many of these class action suits to recover costs related to citizen harm and mortalities. "Many states are currently implementing administrative structures and processes to disburse current and future payments from settlements with opioid manufacturers, distributors, and retailers" for their contribution to the opioid epidemic [5]. More than 3,000 state and local governments participated in these class action suits and the resulting settlements [5].

The largest federal opioid settlement, which is subject to analysis herein, pertains to an estimated $26 billion federal settlement (hereafter "opioid federal settlement fund") [5]. As of 2021, 46 states agreed to the terms to participate in this federal settlement to resolve class action litigation with several major corporate actors, including Johnson & Johnson, AmerisourceBergen, Cardinal Health, and McKesson [5]. As of 2024, all state agreed to participate in the settlement fund in some manner.

Participating states have enacted corresponding state level legislation to govern strategies for disbursement of the apportioned federal settlement funds at the state level. Most of the opioid federal settlement funds were distributed to states as late as 2024 [6].

Comparison to Tobacco Settlement

In general, large federal settlements, such as the opioid settlement fund, are created with the intention to counteract the harmful health outcomes that were perpetuated by corporate actors. Such intentions echo the purpose of the historically large Tobacco Master Settlement Fund created in the late 1990s [7].

Similar to opioid settlement fund proceeds, the purpose of the tobacco settlement was to "allocate lifesaving

tobacco prevention efforts in each [participating] state" [7]. In the case of the tobacco litigation, while some participating states took funds and established tobacco prevention and education programs in accordance with the intended purpose of the fund, few states effectively funded tobacco prevention programs at Centers for Disease Control and Prevention recommended standards and only two states funded these programs at the CDC-recommended levels as of 2023 [7].

The issue is correspondingly presented of how to learn from history: how can the federal opioid settlement funds be utilized in a way that meaningfully combats the repercussions of the opioid epidemic? This issue is even more important in the context of federal settlement funds in general: when corporations do facilitate mass harm to public health, and a federal settlement fund is established to aid state level recovery initiatives, how can these funds be used in a targeted and effective manner?

Research Question

This study takes a step to develop an answer to the question of how to utilize federal settlement funds from corporations established to combat public health concerns. To answer this question in the opioid context, this paper provides a proposal for a qualitative coding scheme to categorize legislative content related to the federal opioid settlement funds that specifically provides an analysis of which entity within a state has ultimate authority and discretion over how funds are utilized within a particular state. Because funds were disbursed to states recently (and are still in the process of distribution), this qualitative coding scheme is intended for future analysis addressing effectiveness of use of opioid funds as more targeted empirical results from spending initiatives develop in upcoming years.

II. Relevant Literature and Theory

The broad issue addressed in this paper is how class action litigation can facilitate policy change. Both political science and law and society related literature suggest that the amount awarded because of a class action settlement can determine the effectiveness of corresponding organizational outcomes [8]. In the context of federal settlement funds in general, the research question is targeted to how federal settlement funds resulting from class action litigation, related to corporate malfeasance that instigates mass health epidemics, can be utilized to facilitate policy change. Thus, this analysis calls for literature addressing two distinct concepts. The first relates to how class actions can serve as catalysts for policy change. The second concerns how legislative content, at the state level, impacts policy outcomes within a particular state. Both of these concepts are relevant to the issue of utilization of settlement funds at the state level.

Class Action as a Catalyst for Policy Change

The broader theory of litigation as an agent for change is relatively established within the political science discipline. Epp (2009) provides a wide-reaching and particularly applicable explanation of how activists and administrative professionals use legal liability and lawsuit generated publicity to facilitate policy and social change with focus on changes to administrative or governmental entities [9]. The essence of an applicable theory of legalized accountability is "an aspiration to make legal rights real" in an administrative setting [9]. Legalized accountability "embodies a developmental dynamic: to more effectively bring hidden organizational practices into compliance with public norms" [9].

Turning to more specific empirical examples related to concept of legalized accountability, Edelman (2011) provides a more judicially oriented perspective on change within corporate organizations to examine judicial opinions pertaining to civil rights [10]. Edelman's general hypothesis is that substantial judicial deference is given to existing internal corporate policies, and this deference potentially encourages rulings in favor of corporate defendants [10]. Edelman used data thematically coded from written judicial opinions in federal civil rights cases over a 35-year period to determine that judicial deference to existing company policy is most likely to occur when plaintiffs lack clout and when legal theories require judges to rule on unobservable organizational attributes [10]. Similarly, Hirsch (2008) provides an even more targeted analysis of how class actions can cause reform [8]. Through empirical examination, Hirsch's research generally suggests (i) that the larger the class action, the more likely the organizational change and (ii) that the settlement phase of litigation is most determinative in encouraging organizational transitions [8].

Other relevant literature focuses on distinct contexts that demonstrate the power of litigation. Brutger (2023) provides analysis and a model pertaining to use of litigation to change policy [11]. Specifically, Brutger (2023) writes in the context of international law and how private firms can use funds to steer litigious processes within the World Trade Organization to liberalize trade practices [11]. Brutger views firms' contributions to litigation as a form of "bureaucratic subsidy" that can bolster government authority (11). The explicit labeling of contributions to litigation as a form of "subsidy" to enhance government power is particularly impactful terminology describing how litigation can impact change within an organization. Such strong terminology reinforces the broader idea that litigious processes can prompt policy and social change. Turning to class actions specifically, Mummolo (2018)

provides an analysis of litigation impacting policy in the context of police misconduct and law enforcement reform further demonstrating the impact of litigation in policy outcomes [12].

How Legislative Content Impacts Policy Outcomes

A branch of policy content studies explores "factors that influence the provisions (or content) of legislation… [this] vein of research explores the outcome of action rather than the initiation of action" [13]. "If adopting units do not embrace a uniform policy… policy adoption is [only] a partial indicator of a state's level of innovativeness" and legislative content becomes influential to policy outcomes [14]. Analogously, this paper addresses how legislative content and provisions affect disbursement of opioid settlement funds.

Turning to a more foundational example of policy diffusion within political science literature, Glick and Hays (1991) expand policy diffusion research to examine how change of legislative language over time affects policy reinvention processes [14]. Glick & Hays (1991) examined living will laws in states to argue that "more than chronology of adoption affects" are to be considered in analysis of policy innovation [14]. The "causes of reinvention likely include accumulating social experience, changes in policy positions, priorities of interest groups, patterns of emulation among the states… as well as differences in endogenous state political characteristics" [14]. Glick & Hays (1991) emphasize how legislative language is a factor in the policy innovation processes, "legislators, interest groups, and judges struggle over the precise words and phrases of law to construct their images of correct public policy because they expect the language to have an effect on how policy is implemented" [14].

From the perspective of how to utilize categorization of legislative language in future research, Lamothe (2005) utilizes a selection model to "examine… determinants of content of workplace drug legislation [13]." Lamothe found that states with higher percentages of union workers adopt legislative content that "promotes the rights of business over those of labor" [13]. This research speaks to the premise that various factors impact legislative content, which in turn impacts policy outcomes in state jurisdictions.

Turning to policy innovation and reinvention, policy innovation can be defined as "a policy that is new to the state adopting it" [15]. Moreover, closely related is the concept of "reinvention" of innovation by adopting units during periods of diffusion [14]. "[R]einvention is the modification by a user of a core innovation during the diffusion process" [14]. The "general [theoretical] proposition is that states reinvent [policy] innovations for many reasons, including new social experiences, information and political events as well as political systems differences… [r]esultant state laws differ from each other in important ways even though they [are] grouped under a single broad policy classification" [14].

State legislative policies stemming from the federal opioid settlement can fall under the theoretical frameworks of both innovation and intervention. Although many policies arising from state legislative content may be novel in the opioid context, many strategies have been employed in the context of the tobacco settlement fund or in other policy environments. Thus, analysis of this legislative content draws on theory from both policy innovation and reinvention traditions.

III. HYPOTHESIS

The broad hypothesis herein is that some relationship exists between legislative content pertaining to disbursement of state opioid settlement funds (independent variable) and the "effectiveness" of state policy initiatives to combat the opioid epidemic (dependent variable). This paper takes the first step in the analysis to develop a thematic qualitative coding scheme to categorize legislative content.

Definition of the Dependent Variable in Future Research

The issue will eventually come to light of how to define the dependent variable to evaluate "effectiveness" of state policy initiatives that combat the opioid epidemic. This paper suggests two possible methods for future evaluation. The first is to evaluate amount of settlement funds actually utilized to target opioid addiction within a state. Akin to what the Center for Disease Control ("CDC") implemented with the Tobacco Settlement Fund of the 1990s, the CDC may provide threshold recommendations for levels of spending for opioid causes and determinations of whether states meet those standardized recommendations.

A second potential method of evaluation could directly address opioid outcomes. Specific categories of legislative content could be compared to actual addiction related outcomes or mortality rates over time to determine whether specific legislative strategies practically resulted in a decline of opioid use and mortality rates.

IV. DATA

Table 1 is derived from data provided by the National Academy for State Health Policy, a nonpartisan forum of policymakers throughout state governments

committed to implementing effective health policy initiatives [5]. For each participating state, Table 1 provides detail on state approaches for distribution of opioid settlement funding through providing the following relevant categories (i) amount allocated through the national settlement, (ii) actual text of the state spending plan and agreement, (iii) a summary of disbursement of statewide funding strategy, and (iv) role of any state opioid advisory committee. Table 1 focuses on the "summaries of disbursement of statewide funding" or (iii). This particular category provides a summary of which entities within a state have (i) ultimate discretion over fund spending and/or (ii) a fiduciary duty to the settlement fund. The data provided herein in relevant as of May 2024.

Thus, this analysis seeks to specify which entity within a state has actual decision-making power over spending decisions. An entity with mere reporting responsibilities or advisory privileges is not recognized in the coding scheme. This differentiation helps to set the stage for a more accurate and practical determination of how discretion over federal settlement funds impacts "effective" use of funds.

V. METHODOLOGY AND QUALITATIVE CODING SCHEME

Although many strategies exist for development of coding mechanisms, qualitative content analysis can include any technique for making inferences by systematically identifying unique features of the messages. In this paper, I explore variation in the content of state legislation enacted to address how states allocate control of opioid funds disbursed from the opioid federal settlement fund for 46 participating states using thematic content analysis (as of May 2024).

Table of Categorizations for Authority in State Legislation

Type of Entity that has Control of Opioid Settlement Fund as Specified in Enacted State Legislative Content	Definition of Categorization	Number of States	States Included in Categorization (as of May 2024)
City or Local Agency or Authority	Text of legislation requires disbursement to local or city level entities for discretionary spending; focus on local discretion	3	Arkansas, California, Louisiana
Health Related Agency or Authority	Funds controlled by state entity related to general health services; includes departments of health and human services	16	Alaska, Hawaii, Illinois, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Oregon, Rhode Island, Vermont, Washington, Wisconsin, Wyoming
Mental Health or Social Service Related Agency or Authority	Funds controlled by state entity related specifically to mental health and/or social services	4	Delaware, Indiana, New York, South Dakota
General Oversight	Any general discretionary provision; no specialized entity; includes control by general advisory boards, governor, or general legislature	17	Alabama, California, District of Columbia, Georgia, Idaho, Iowa, Michigan, Mississippi, Missouri, New Mexico, North Carolina, Oklahoma, Pennsylvania, Tennessee, Utah, Virginia
Enforcement Related Agency or Authority	Controlled by state entity related to criminal enforcement; includes Attorney General	6	Arizona, Maine, Maryland, Michigan, Ohio, West Virginia
Other Specific Opioid Related Agency, Advisory Board, or Council	Controlled by state entity specifically created for opioid abatement purposes	16	Colorado, Connecticut, Idaho, Illinois, Kansas, Kentucky, Maine, Montana, New Mexico, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Virginia, West Virginia
Financially Related Agency or Authority	Controlled by state entity related to budget or financial monitoring	2	Alaska, Florida

[Table 1]

Creating a coding mechanism that can apply to the entire population of participating states will encourage empirical solutions with that have the highest degree of external validity of variation in legislative content providing more useful policy analysis contributions. Specifically, this paper explores legislative content pertaining to what entity within a state government controls decisions concerning spending of the funds to provide initial structural coding [16]. This method is particularly appropriate in this context because "[t]hematic analysis provides a… flexible approach that can be modified for the needs of many studies, providing a rich and detailed, yet complex account of data [over time]" [16]

"As the qualitative research tradition continues to gain popularity, there is a need for greater disclosure and more sophisticated tools to facilitate researchers in conducting trustworthy qualitative research" [16]. In this paper, to determine the appropriate themes that emerge from legislative content, the analysis provides focus on the purpose of the entity ultimately specified in the legislation to control spending decisions. Purposes of these state entities can vary from law enforcement, mental health, or local support at a city of state level. Moreover, controlling entities can vary regarding "type of entity" from individuals to traditional state agencies.

The research design for this paper attempts to replicate previous studies creating thematic qualitative coding mechanisms. "Thematic analysis has been rarely appreciated in the same way as grounded theory, ethnography, or phenomenology… [and] [t]rustworthiness is one way researchers can persuade… [that] findings are worthy of attention"[16]. Trustworthiness can be based on credibility and transferability of thematic qualitative codes: "credibility is the fit between respondents' views and the researcher's representations [while]… [t]ransferability refers to the generalizability of inquiry" [16]. Here, coding mechanisms are particularly trustworthy because the purposes of controlling entities are easily verifiable and transferrable between jurisdictions.

Themes were created with a focus on facilitating future comparative analyses to address the broader research inquiry of how federal settlement funds resulting from class action litigation (and related to corporate malfeasance that instigates mass health epidemics) can be utilized to facilitate policy change within states that participate in the resulting federal settlement funds. Consequently, supplemental legislative context provided for in the aforementioned dataset, such as additional details on state plans of how to govern disbursement of funds, informed the creation of these coding categories. Notably, these codes could be revised and contextualized with additional research pertaining to the legislative history and evolution of the legislation related to control of opioid settlement fund spending.

Table 1 provides that most states convey authority over spending of opioid funds to more general entities, such as (i) a non-specific entity, such as the legislature, governor, or general council or (ii) an agency or entity created for general health purposes. In future analysis, empirics can provide data explaining whether these strategies, based on legislative content, render settlement fund spending more "effective" verses more targeted allocation approaches (such as allocation of control over spending to local authorities or opioid abatement related entities).

To note, for the purposes of this coding scheme, all states in the United States have enacted some sort of legislation governing disbursement of funds from opioid settlements; however, not all states opted to participate in the federal opioid settlement fund as of May 2024 in the same manner. This analysis categorized all state legislative language, regardless of how the state participated in the fund, to provide ground for future analysis.

Furthermore, when creating these categorizations, some states fell into multiple categories and were thus counted multiple times within Table 1. For example, in Illinois, "[t]he [s]tate's Allocation Agreement gives final authority over spending… to the Governor's Opioid Prevention and Recovery Steering Committee… [and] [t]he Governor and Attorney General have announced that the State share will be distributed by the Department of Human Services" (NASPH, 2024). Thus, in this example, ultimate authority over spending is given to (i) a committee targeted to combat opioid addiction but also (ii) the Department of Human Services for the outstanding amount of discretionary allocation. Thus, Illinois falls into two separate categories and is coded twice for these purposes.

VI. CONCLUSION

Legislative content plays an essential role in facilitating policy outcomes. As a result of the opioid federal settlement fund, states have enacted legislation specifically addressing which state entity has ultimate discretion over how these funds are spent to combat the opioid crisis. Naturally, the question is posed of what legislative content strategy will encourage the most effective policy to practically counteract the harmful impact of the opioid epidemic. Based on established thematic coding strategy and policy innovation and reinvention literature, this paper provides a proposal for thematic codes to categorize legislative content addressing what state entity has discretion over disbursement of opioid settlement funds. The purpose

of the coding scheme is to facilitate future quantitative analysis that can explore a relationship between legislative content and effective opioid abatement policy to better inform future policy-making processes. This research topic and agenda is particularly suitable for future quantitative exploration and sparks ideas for many exciting approaches to analyze effective implementation of health policy at the state level.

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