

LESSONS IN FEDERALISM FROM THE 1960s CLASS ACTION
 RULE AND THE 2005 CLASS ACTION FAIRNESS ACT:
 “THE POLITICAL SAFEGUARDS” OF AGGREGATE
 TRANSLOCAL ACTIONS

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I. INSIGHTS FROM CAFA AND FROM FEDERALISM

What does the Class Action Fairness Act of 2005 (CAFA)¹ teach us about federalism? A first lesson is that, when confronted with state-based decision making of which they disapprove, national lawmakers federalize rights, as they have repeatedly done throughout United States history. In 2005, Congress turned to the federal courts because CAFA's proponents believed that state courts were too welcoming of collective adjudication. CAFA is part of a cohort of enactments and doctrinal developments of this era that preempt state decision making and push litigants toward noncollective and nonadjudicative remedies such as privately sponsored arbitration programs.

CAFA's reliance on federal courts to deal with aggregate litigation parallels decisions made in the 1960s to revise the Federal Rules of Civil Procedure to facilitate the aggregation of parties and claims.² The mechanism—federalization—is the same, but the goals are not. In the 1960s, Rule 23 was redrafted to expand class action opportunities for claimants in the federal courts. By easing access, rulemakers wanted to maximize the enforcement of federal rights, which they perceived to be *under*-protected in state courts, especially when state actors were charged with discrimination. In 2005, the purpose was, once again, to offer an alternative to state courts, perceived by then to have *over*-protected rights for various kinds of plaintiffs. Thus, a second lesson to be drawn from the enactment of CAFA is how quickly substantive “national” goals can change—aimed now at deploying federal courts to very different ends.

Turning the question around to ask what federalism teaches us about CAFA yields other insights. A review of the history of the interactions between state and federal governance results in a third lesson, that efforts to centralize authority in the federal government and to exclude the states are not likely to endure. In this federation, national rule pronouncement regularly relies on local implementation. Fifty years after *Brown v. Board of Education*,³ local judgments about school-

¹ Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

² See Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1484-89 (2008); Edward Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1851 (2008).

³ 347 U.S. 483 (1954).

ing, housing, and spending continue to shape opportunities for integrated schools. Further, local officials are regularly pressed by constituencies—troubled by the warming climate, the safety of the products that they use, the acceptance of same-sex marriage, or the inequalities around them—to pursue welfare and safety in ways different from those pursued at the national level. Concurrent, overlapping, and sometimes conflicting legal regimes are part and parcel of a federalist system.

Fourth, local decision making does not occur in isolation. Rather, state policies and laws are regularly shaped through the interaction of state officials crossing their own borders as well as those of the nation. As localities try to make judgments about legal rights and remedies, they look to their colleagues domestically and sometimes internationally—borrowing proposals on global warming or product safety and adapting them to local conditions. The interactions across localities have increased as government officials work, translocally as well as transnationally, through national organizations of local officials such as the U.S. Conference of Mayors, the National Governors Association, and the National League of Cities. While CAFA may try to centralize decision making at the national level in an effort to assert the United States' sovereign interests, pressures from local and transnational levels function as “political safeguards”⁴ that limit concentrations of power through countervailing mechanisms that produce other policy judgments.

From the density and richness of such translocal initiatives comes a fifth lesson: CAFA's efforts to diminish the role of aggregate-rights-claiming will not succeed. Joint endeavors by local officials and their national organizations are themselves a form of aggregation, prompted by the need for collective responses to problems that affect large numbers of persons. Like the invention of the class action rules in the 1960s, the development of translocal organizations is likewise innovative.

These national networks of local actors function as “political safeguards” that check exclusive national authority, but they are not themselves intrinsically “safe.” Rather, their power raises questions that are familiar in the class action and political science literatures—about the adequacy of representation by spokespersons for the group, the com-

⁴ See generally Herbert Weschler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954), discussed *infra* text accompanying note 151.

monality of interests among members, and the opportunities of members to participate so as to inform and to monitor their representatives.⁵ Further, some of these national networks raise new questions for social movement theory, which has been focused on networks of nongovernmental organizations (NGOs) rather than on these voluntary national, private entities gaining authority by virtue of their members holding local and state offices. Thus, I propose capturing their presence through the term “transnational organizations of government actors,” or TOGAs, as I begin below to interrogate their contributions both to federalism and to aggregation.

II. ASSESSING THE IMPORT OF CAFA

CAFA’s innovations have to be put in the context of the many debates about whether and how to revise the 1966 class action rule. In 1999, four years before the amendments that put the current version of Rule 23 into place,⁶ the *University of Pennsylvania Law Review* also held a symposium raising many of the issues on the table now, but with a focal point differently described.⁷ The topic then was “Mass Torts,” and panelists assessed the handling of such claims through multidistrict litigation, class actions, and bankruptcy. Participants included academics, practitioners, several federal judges, and a few state court judges. At that time, the idea of federalizing state-based causes of action seemed remote, but one federal judge spoke forcefully about the need to bring state courts, which he perceived to be unduly permissive, under control.

The paper I presented focused on what I called the “F” word,” referring to the question of lawyers’ fees, a topic that had not been named on the program or in the many proposals for reform that were then pending. But fees were and are central to producing the marketplace of mass tort lawsuits.⁸

⁵ See, e.g., Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21 (1996); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991).

⁶ See Amendments to the Federal Rules of Civil Procedure, 215 F.R.D. 158, 162-69 (2003).

⁷ See Symposium, *Mass Torts*, 148 U. PA. L. REV. 1851 (2000).

⁸ See Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2146, 2149 (2000) [hereinafter Resnik, *Money Matters*].

That hesitancy to confront directly the dominant role of money in aggregate litigation reflected the general etiquette of the civil justice system, which does not often face the haunting problem of the costs entailed in making good on the promise of access to justice. Class actions provide a kind of subsidy for certain litigants who, if not part of a group, would lack the resources (in terms of economic ability and knowledge) to pursue claims. Aggregating claims is a complex dynamic that can have effects that vary depending on the nature of the claim, its remedy, and the diversity of claimants within the group aggregated. For example, through bringing in some claimants otherwise left out, aggregation can affect the value of the claims as a set, thereby producing redistribution among plaintiffs in that some high-end claims may lose value while some low-end claims can gain value. Further, aggregation endows certain players (mostly lawyers) with the power to be spokespersons for groups, thereby raising questions about how to monitor their loyalty and the quality of their work. When lawyers receive fees based on awards to large numbers of individuals, aggregation often gives such lawyers economic stakes that exceed those of any individual class member.

Over the decades of class action practice, judges took on tasks of appointing lead counsel and awarding fees. Given that power to choose and to pay lawyers, I argued, “in mass torts, judges *are* the market”; through decisions about which lawyers to select and how to compensate them, judges alter “demand and supply by shaping aggregates and settlements, by valuing certain forms of lawyering, and by directing capital not only to lawyers but to a host of subsidiary service providers.”⁹ The creation of rules for aggregation thus generates new litigation markets in which various participants become stakeholders, and if enough of them are vested in the status quo, regulatory interventions are hard to achieve. But, as shown in 2005 by CAFA, interventions are not impossible once various forces are politically aligned.

By then, the code word of “mass torts” no longer quite fit, in part because some of the perceived problems involved consumer, environmental, and property claims. CAFA embraces another term, again beginning with “F,” here standing for “fairness.” As this Symposium’s title makes plain, naming the problem as “fairness” does not necessarily make for a frank discussion of its parameters. CAFA can be read to have several different targets: bad acting by lawyers and litigants in need of judicial control, bad acting by state court judges in need of

⁹ *Id.* at 2129.

federal control, and bad acting by trial judges in need of appellate control.

The technique chosen by Congress in the name of “fairness” relies on a third “F” word: “federalism.” Congress divested state courts of jurisdiction over cases formerly called “state cases” (in the sense that the causes of action arose under state law) because Congress saw federal judges as better able to police the perceived misbehaviors that caused “unfairness.” Some members of Congress hoped that, through federalization, they would accomplish a form of fee regulation in that CAFA’s proponents assumed that many federal judges would not certify classes in some cases in which state courts had certified or likely would have certified.¹⁰ The market for litigation and fee awards will under such assumptions be constrained because, through federal oversight, many claims will lose value. (Whether that view of federal judges is correct is of course a question, raised at the Symposium by the Honorable Lee Rosenthal, who had served as the chair of the judicial subcommittee that had dealt with Rule 23 revisions and who now chairs the Standing Committee on Civil Rules of the Judicial Conference of the United States.¹¹)

A. *A Range of Appraisals*

As the rich papers and discussion for this Symposium make plain, exploration of CAFA’s import for federalism (and sometimes for fairness and fees) is well underway. Thus far, one can find four basic evaluations of CAFA’s relationship to federalism.

A first is that CAFA marks a significant change in the contemporary landscape¹² and, further, that this intervention is both important and positive. Supporters argue that federalization of state court class actions was a necessary response to national markets.¹³ To think of cases involving nationwide corporate actors as “state” cases is a misnomer, goes this argument, and thus CAFA appropriately redefines

¹⁰ See Purcell, *supra* note 2, at 1868-69.

¹¹ Lee H. Rosenthal, U.S. Dist. Judge, S. Dist of Tex., Remarks at the University of Pennsylvania Law Review Symposium: Fairness to Whom? Perspectives on the Class Action Fairness Act of 2005 (Dec. 1, 2007); see also Lee H. Rosenthal, *Back in the Court’s Court*, 74 UMKC L. REV. 687, 706-07 (2006).

¹² See, e.g., Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2131 (2008).

¹³ See, e.g., Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1415-20 (2006).

them as “national” lawsuits and properly places them under the control of federal judges.

Under this approach, one could also read CAFA as congressional approval and confirmation of what federal judges were, in some measure, already doing.¹⁴ Celebrants of CAFA sometimes further argue that federal judges ought to give CAFA a robust reading (statutory maximalism, rather than minimalism¹⁵), interpreting it as a form of protective jurisdiction that can license federal judicial lawmaking.¹⁶ More energetic yet is the claim that CAFA ought to be understood as creating a carve-out under *Erie*¹⁷—authorizing and welcoming federal common lawmaking in areas in which Congress could prescribe substantive rules of law but has not yet done so.¹⁸

A second approach to CAFA bemoans its enactment. While sharing with those who approve of CAFA a view of its significance, these critics take the opposite attitude towards its content. The argument posits that CAFA is both a big and a bad development because (a) CAFA is an unfair incursion on state authority, and (b) the incursion was done in service of corporate America to limit liability for defendants, thereby reducing protections and remedies for tort and consumer plaintiffs.¹⁹ Stephen Burbank has a distinctive but related critique: that the enactment was done without sufficient transparency and, instead, in a “fog of ambiguity and hypocrisy.”²⁰ Kevin Clermont and Theodore Eisenberg proffer another layer of criticism: that CAFA was poorly drafted, failing to specify burdens of proof or standards for

¹⁴ See Richard L. Marcus, *They Can't Do That, Can They? Tort Reform via Rule 23*, 80 CORNELL L. REV. 858, 866-71 (1995). To the extent that “they” (federal judges) were doing “that” (tort reform), Congress could be read to have given its approval in CAFA.

¹⁵ Cf. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

¹⁶ See, e.g., *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). The majority read the Labor Management Relations Act of 1947 as authorizing federal judges to supply common law rules of decision. The decision is also known for its dissent, exploring whether—if the Act had not provided substantive federal lawmaking authority—Congress could have given jurisdiction over the claims to the federal courts. See *id.* at 469-484 (Frankfurter, J., dissenting). See generally Carole E. Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. REV. 542 (1983); Paul J. Mishkin, *The Federal “Question” in the District Courts*, 53 COLUM. L. REV. 157, 195 (1953).

¹⁷ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

¹⁸ See, e.g., Geoffrey C. Hazard, Jr., *Erie Doctrine Repealed by Congress?*, 156 U. PA. L. REV. 1629 (2008); Suzanna Sherry, *Overruling Erie: Nationwide Class Actions and National Common Law*, 156 U. PA. L. REV. 2135 (2008).

¹⁹ Edward Purcell details this position along with others taken during the debates about CAFA’s enactment. See generally Purcell, *supra* note 2, at 1889-1904.

²⁰ Burbank, *supra* note 2, at 1445-48.

allegations of amount in controversy, and therefore has resulted in the waste of litigants' and courts' resources as they grapple with the statute's applications.²¹

A third reading of CAFA seeks to lower the decibel level by arguing that it was neither as important nor as innovative as proponents and opponents claim. Modest aims and doctrinal continuity may be a helpful way to summarize the shape of that claim, exemplified here in the Article by Richard Marcus, which argues that CAFA nests inside various other doctrinal shifts.²² A related approach is offered by Linda Silberman, who could be read as calling for statutory minimalism.²³ Silberman argues that one ought not to make CAFA more than it is. She urges judges not to take the license for management as a license for lawmaking. Rather, in her view, CAFA has provided neither a general grant to make law nor a grant to make federal choice of law rules, tasks that she puts directly to Congress.²⁴

A fourth approach—CAFA as a “federalism sleeper,” if you will—is offered by Professor William Rubenstein, who focuses on CAFA’s requirements that notice of proposed settlements must be given to state attorneys general as well as to federal officials.²⁵ These statutory mandates offer new opportunities for public officials to play significant roles in affecting the value of cases and the terms of settlements. That potential impact undercuts a reading of CAFA as unilaterally enhancing federal authority at the expense of state actors and argues instead that the statute will result in shifting power to state actors.

B. *Commonalities (to Borrow a Term)*

Here I offer a fifth approach that, as my title suggests, aims to extract insights into federalism and aggregation by linking CAFA with other developments, both historical and contemporary. I begin below by looking back over the last several decades to show the structural

²¹ See Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553 (2008).

²² See Richard L. Marcus, *Assessing CAFA’s Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765 (2008).

²³ See Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001 (2008). Again, I borrow Cass Sunstein’s description of what he sees as a form of constitutional interpretation. See SUNSTEIN, *supra* note 15.

²⁴ See Silberman, *supra* note 23, at 2031.

²⁵ See William B. Rubenstein, *The Public Role in Private Governance: Some Reflections on CAFA’s Early Experience* 3 (Nov. 19, 2007) (unpublished manuscript, on file with author) (discussing 28 U.S.C. § 1715 (Supp. v 2005)).

commonalities between the 1966 Class Action Rule²⁶ and CAFA. One part of my claim is that, in some respects, CAFA mimics the 1966 revisions that it displaces. Both enactments turned to the federal courts to implement federal norms by overseeing state actors. While substantive visions of which federal norms ought to be implemented differ significantly, the structural gesture—the turn to the federal courts as instruments of policy implementation—is shared.

Both the 1960s Class Action Rule and CAFA are of their time, embedded in and consistent with a much larger legal landscape. The drafters of both had aspirations for federal courts to affect perceived “rule of law” problems in states. Both enactments were aimed at putting federal judges in the driver’s seat. And both the 1960s and the 2005 reforms represent attitudes embraced and shared by different actors at the national level: Congress, the federal judiciary, and rule drafters.

The distinctions between Rule 23 (circa 1966) and CAFA (circa 2005) reflect changes in the aspirations about what federal judges should be doing. Rule 23 raised the federal flag in favor of a robust role for adjudication in regulation. CAFA lowers that flag. Rule 23 invited the possibility of federal judicial oversight of state officials if they violated federal rights. Of central concern then was the enforcement of antidiscrimination norms in the face of de facto and de jure segregation. CAFA also invites federal judicial oversight of state judges, seen at this juncture to be overenforcing consumers’ and tort victims’ rights at the expense of national economic vitality. In these respects, CAFA mirrors the 1966 class action regime that it disrupts, in that it both exemplifies and embodies normative claims about the role of federal courts, federalism, and large-scale litigation.

Moreover, both examples of procedural innovation are part of a set of interconnected legal developments emanating at legislative and judicial levels. The views that shaped the 1960s Class Action Rule also yielded substantive new federal legislation on civil rights and statutes such as the Civil Rights Attorney’s Fees Awards Act of 1976.²⁷ The attitudes that underlie CAFA find expression in a cohort of related provisions, such as the expansion of the doctrines of preemption that, like CAFA, seek to assert national sovereign authority. One vivid example

²⁶ See FED R. CIV. P. 23 (1966).

²⁷ Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (2000)).

is the doctrinal reinterpretation of the breadth of the Federal Arbitration Act which, like CAFA, divests state courts of jurisdiction.²⁸

C. *The Resiliency of Collective Action*

My second claim is that CAFA is misguided in presuming that the centralizing authority of the “national” courts will prove to be a long-lasting method for definitive resolutions of aggregate allegations of wrongdoing. CAFA proposes to delineate a set of problems as distinctively “national,” as if that category were solid, rather than vulnerable to both local and international activities.

Below, I provide a few examples of how networks of translocal actors, sometimes borrowing from abroad through transnational networks, have crafted policies and laws with national effects.²⁹ The resulting redundancy is at the core of a federalist view of properly diffused power-holding. The resiliency of redundancy makes the empirical argument that hard questions do not lead to stable or everlasting answers. Such layered, competing, and complementary regulatory regimes—within federalism in the United States and through transnational interactions—are both unavoidable and desirable.

Moreover, those counterpressures are now expressed in part through new forms of aggregation—twentieth-century organizations of translocal actors that provide further evidence of the impulse toward collective action. To substantiate these claims, I turn to examine the 1960s and 2005 class action reforms to understand their respective approaches to access to courts, rights-claiming, and federalism.

III. CELEBRATING FEDERAL RIGHTS-CLAIMING: THE 1960S CLASS ACTION RULE IN ITS TIME

The 1960s rulemaking was part of a larger story aimed at using the federal courts for regulatory enforcement of federal rights. The relevant players included the Supreme Court, Congress, and the rule drafters, all of whom were interested in facilitating access to federal courts for litigants to enforce newly articulated national rights. As Benjamin Kaplan, the Harvard Law professor who served as reporter for the 1960s rule revisions, put it in 1989, the class action “rule was not neutral: it did not escape attention at the time that it would open the way to the

²⁸ Pub. L. No. 68-401, 43 Stat. 883 (codified at 9 U.S.C. §§ 1-14 (2000)); see *infra* notes 93-97 and accompanying text.

²⁹ See *infra* Part V.

assertion of many, many claims that otherwise would not be pressed; so the rule would stick in the throats of establishment defendants.”³⁰

One can learn about the goals of the drafters from the minutes of the 1960s rulemaking committee, the notes to the rules, and the articles written by Benjamin Kaplan.³¹ As the drafters explained, they had created different “kinds” of class actions, with one particularly focused on plaintiffs in need of declaratory or injunctive relief (“23(b)(2) classes”) and another identified by being subjected to common treatment by a defendant (“23(b)(1) classes”).

Of particular concern was the enforcement of school desegregation orders after schoolchildren had graduated from their segregated environments.³² Class action status authorized courts to oversee implementation during the decades required to bring about change. The 1966 reforms made possible lawsuits that empowered federal judges to decide whether state officials in schools, as well as in jails, prisons, mental hospitals, and social-welfare agencies, were violating federal rights and, if so, to craft long-term remedies to redress those injuries.

The drafters also wanted to use class actions to bundle relatively low-value claims to attract lawyers and prompt them to bring cases enforcing federal statutory rights in areas such as securities and antitrust law.³³ The federal courts had developed an equitable theory of awarding attorneys’ fees based on a lawyer and his or her client conferring a “common benefit.”³⁴ As a result, cases involving small claims but large enough classes would be sufficiently lucrative for lawyers to take the risk of filing cases.

Where is federalism in this story? These various plaintiff groups welcomed by the class action rule were then relatively new to the fed-

³⁰ Benjamin Kaplan, Commentary, *Comment on Carrington*, 137 U. PA. L. REV. 2125, 2126-27 (1989). Thanks to Stephen Subrin for pointing me to this commentary.

³¹ I detail the archival sources in *From “Cases” to “Litigation,”* 54 LAW & CONTEMP. PROBS. 5, 6-15 (1991) [hereinafter Resnik, *From “Cases” to “Litigation”*]. Professor Kaplan explained his project in *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356 (1967) [hereinafter Kaplan, *Continuing Work*].

³² See FED. R. CIV. P. 23 advisory committee’s note, reprinted in 39 F.R.D. 69, 102 (1966) (explaining that civil rights actions are “illustrative” of the purpose of Rule 23(b)(2) and listing several school desegregation cases as examples).

³³ See *id.* (noting that Rule 23(b)(2) is “not limited to civil rights cases” and describing several potential commercial applications).

³⁴ See Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 298-309 (1996).

eral courts. As Theodore Eisenberg and Stephen Yeazell have detailed, schoolchildren, prisoners, and social-welfare recipients had not been rights-holders under federal law; they also had neither lawyers nor other resources to pursue their claims.³⁵ The innovative procedural form of class actions thus improved the enforcement of federal rights, often *against* state and local defendants. As for the focus on the consumer, securities, and antitrust cases, the drafters of Rule 23 assumed that groups of plaintiffs, assisted by lawyers attracted by fees, would enable federal judges to enforce federal regulations aimed at corporate misbehavior.

In their efforts to ease access to the federal courts, civil rulemakers did not rely on the class action rule alone. Their project was integrative, in that they addressed multiparty rules as a related packet. Coupled with opportunities for discovery and other statutory innovations, the leaders of the bench and bar who wrote those rules were of the view that bringing lawsuits was a positive method of regulating misbehavior.

The 1966 class action reforms had doctrinal and legislative counterparts of the same era—new rights to counsel in criminal cases,³⁶ the creation of the Legal Services Corporation (LSC) in 1974,³⁷ and the Civil Rights Attorney's Fees Awards Act of 1976³⁸—that sought to equip litigants seeking relief in court.³⁹ Central to this story was the enactment of new federal substantive rights, exemplified by the Civil Rights Act of 1964, the Fair Housing Act, the Clean Air Act, and the like.⁴⁰ Yet another facet is the Supreme Court's decision in *United Mine Workers v. Gibbs*, affirming federal power over pendent state

³⁵ See generally Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

³⁶ See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

³⁷ See Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378 (1974).

³⁸ Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (2000)).

³⁹ In this context, the Supreme Court's limitation on the 1966 Rule in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175 (1974), requiring that plaintiffs bear the costs of identifying and sending notice to all members of 23(b)(3) class actions, was subjected to a great deal of criticism for undercutting the utility of the Rule. See, e.g., Kenneth W. Dam, *Class Action Notice: Who Needs It?*, 1974 SUP. CT. REV. 97. The judicial response to the 1966 rule may be paralleled in the response, reported by Clermont and Eisenberg, of judicial reluctance to implement CAFA. See Clermont & Eisenberg, *supra* note 21, at 1579-84.

⁴⁰ See, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.); Fair Housing Act, Pub. L. No. 90-284 §§ 801-819, 82 Stat. 81 (1968); Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1963) (codified as amended in scattered sections of 42 U.S.C.).

claims and thereby outlining the contours of a doctrine now called supplemental jurisdiction.⁴¹

One more piece of the allocation of jurisdiction between state and federal courts of that era needs to be excavated before moving forward forty years. The 1960s rule drafters thought that their new class action rule did not and should not cover torts.⁴² In a once-famous comment to 23(b)(3), the drafters advised against tort class actions:

A “mass accident” resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.⁴³

As one can see from this text, the 1960s drafters had three reasons why class actions were not “right” for such tort cases. First, the drafters thought that tort plaintiffs had little need for the equipage provided by their new procedures. Unlike many consumers (including some individuals who were stockholders) who had small damage claims that were not attractive to lawyers, the system of contingent fees enabled tort plaintiffs to obtain legal assistance.⁴⁴ In contrast, when individuals were “without effective strength to bring their opponents into court at all,” class actions were needed to vindicate rights.⁴⁵

Second, the drafters thought that the distinctions among tort victims (even if involved in the same incident)—as to fact and to law—made aggregation inappropriate or very difficult. The then-paradigm tort cases were personal injuries from car accidents or medical malpractice, and hence the sense of individualization was strong. In Kaplan’s words, “individual questions of liability and defense will over-

⁴¹ 383 U.S. 715 (1966). The Court explained that, if “a plaintiff’s claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming sustainability of the federal issues, there is power in federal courts to hear the whole.” *Id.* at 725 (emphasis omitted). In the era of *Gibbs*, the terminology used was “pendent” and “ancillary” claims and parties. The current statute addressing these ideas speaks of “supplemental jurisdiction.” See 28 U.S.C. § 1367 (2000).

⁴² I analyzed the interaction and development of this approach, and its reflection in the minutes and letters of the Advisory Committee in Resnik, *From “Cases” to “Litigation,” supra* note 31, at 6-15.

⁴³ See FED. R. CIV. P. 23 advisory committee’s note, *reprinted in* 39 F.R.D. 69, 103 (1966).

⁴⁴ Benjamin Kaplan stated that “where the stake of each member bulks large and his will and ability to take care of himself are strong,” class treatment was not necessary. Kaplan, *Continuing Work, supra* note 31, at 391.

⁴⁵ Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969).

whelm the common questions.”⁴⁶ Further, at the time, large cases (then called “mass accidents”) were exemplified by a train wreck, or a plane crash, or a fire at a circus or in a hotel. Not in sight were what has come to be: mass consumer tort cases involving harms from asbestos, smoking, pharmaceuticals, and environmental hazards. Further, to the extent that concerns about duplication were then apparent, federal judges responded by facilitating the consolidation of cases already filed through proposing the enactment of the multidistrict litigation statute.⁴⁷ That statute, in turn, coupled with the bankruptcies in the 1980s of Johns-Manville and A.H. Robins, helped to frame the plausibility of bundling mass torts into class actions.⁴⁸

Third, the drafters of the 1960s Class Action Rule thought that class treatment of tort cases was not “right” given their views on federalism. Unpacking the federalism threads of the 1960s class action discussion brings me to the topic of diversity jurisdiction. Recall that *Erie* was in its heyday in the 1960s⁴⁹ and that *Hanna v. Plumer*⁵⁰ was decided while the drafters were working on what became the 1966 Rule. Moreover, in the 1960s, the Judicial Conference of the United States was officially on record as supportive of continuing diversity jurisdiction, albeit with some limitations.⁵¹

⁴⁶ Kaplan, *Continuing Work*, *supra* note 31, at 393.

⁴⁷ 28 U.S.C. § 1407 (2000).

⁴⁸ See Resnik, *From “Cases” to “Litigation,” supra* note 31, at 28-35 & n.103.

⁴⁹ As Silberman notes, “[T]he federal courts in these class action choice of law cases felt bound under *Erie*. . . to adopt the choice of law approach of the respective states in which they sat, and thus were limited as to how they might expressly shape choice of law to accommodate aggregate litigation.” See Silberman, *supra* note 23, at 2015; see also Sherry, *supra* note 18, at 2138-39.

⁵⁰ 380 U.S. 460 (1965). That decision, which concluded that the state method of service of process need not be used, underscored the authority of federal procedural rules to govern diversity cases.

⁵¹ In the 1930s, federal judges were proponents of diversity jurisdiction, which has long been a significant portion of the docket. Indeed, when a proposal to abolish diversity was pending in the 1930s, neither Chief Justice Hughes, presiding at the Conference of Senior Circuit Judges (the predecessor of the Judicial Conference of the United States) nor his colleagues were enthusiastic about that proposal. Yet the group thought that it would be inappropriate and inept to submit a formal statement in opposition. Moreover, the Conference thought that its power to report on the “business of the federal courts” did not authorize it to opine on the wisdom of the proposed re-configuration of federal jurisdiction. See Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 962-63 (2000).

Furthermore, before 1938 and the *Erie* decision, diversity cases provided federal judges with opportunities to fashion federal rules of decision. Diversity jurisdiction thus served as a vehicle for federalization, in that judges developed national common

By then, however, opposition to diversity was growing within the federal judiciary. As civil rights cases were gaining their persona as “national” or “federal” cases pushing filings upward, efforts were made to differentiate and designate other cases as “state” cases—lawsuits that may have found their way onto the federal docket but had a lesser claim to it. Working with Chief Justice Earl Warren, in 1969 the ALI completed its overview of federal and state court jurisdiction; its report proposed making access to federal courts for federal claims easier by eliminating the amount in controversy requirement of 28 U.S.C. § 1331.⁵² At the same time, the ALI also affirmed important arenas for state court authority.

Similarly, materials such as the Annual Reports of the Judicial Conference of the United States (the policymaking body within the federal judiciary) do not then suggest distrust of state lawmaking on torts. To the extent that state judges were shaping new liability rules and remedies, so were federal judges in other kinds of cases. Moreover, a drumbeat against expansion of federal jurisdiction (“federalization”) was beginning as judges bemoaned growing caseloads as well as the doctrinal elaboration of rights. By 1977, under Chief Justice Warren Burger, the Judicial Conference officially announced its support for the abolition of diversity jurisdiction, as the Conference began to shape arguments that Congress had turned too much and too often to the federal courts.⁵³

law and created incentives for lawyers to bring cases in federal court to be governed by those precepts.

⁵² ALI, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 172-76 (1969). As the study explained, “the stated requirement of an amount in controversy in fact has relatively little impact on the volume of federal question litigation. The few cases there are, however, that must satisfy the § 1331 requirement are likely to involve matters particularly deserving of a federal forum.” *Id.* at 172. Further,

the simple fact that more cases might be better—or more efficiently—tried in a federal court is not of itself sufficient justification for such jurisdiction. The problems involved here [in the discussion of multiparty, multistate diversity] do not relate simply to trial efficiency at large, but grow out of the multi-state nature of our Union. . . . To the extent that the need for a federal forum to handle these multi-state cases is great enough, such incursion must of course be accepted. The problem thus becomes one of balance, and of judgments that can perhaps be better made in somewhat more specific contexts.

Id. at 378-79.

⁵³ See Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575, 1603-04 (2006).

In sum, during the 1960s and into the 1970s, Congress, the courts, and the drafters of the Federal Rules of Civil Procedure shared a vision for the federal courts as instruments of policy. The policies embodied substantive commitments to increasing the rights of racial minorities, to responding to some of the inequalities predicated on gender, and to equipping consumers with mechanisms to enforce fair practices in commerce. Set forth through constitutional interpretation and statutes, one of the mechanisms for implementation was the ability of litigants to bring class actions in federal courts. The “federalism” story that grows out of the 1960s is one celebratory of federal judicial power, even (and sometimes particularly) if aimed at malfeasance by state officials.

On some metrics, that vision “succeeded.” Between the 1960s and the 1990s, Congress enacted legislation creating more than 400 new federal causes of action. By looking at the “marketplace” for rights enforcement and watching filing rates, one can see that many litigants (or more accurately, their lawyers) chose the federal forum; the federal court caseload tripled during that period. Understandings of the possible meanings of the word “case” changed—such that tens of thousands of people are now understood as somehow together (individually aggregated or, as David Shapiro instructs, as an “entity”⁵⁴) in something called a “litigation” that can result on occasion in institutional reform or in millions of dollars distributed to thousands of individuals as compensation for injuries.

IV. BEMOANING ADJUDICATION’S OPPORTUNITIES: CAFA AND ITS COHORT

Turn now to the contemporary era to place CAFA’s normative predicates into context. As in the 1960s, Congress, the federal rule-makers, and the Supreme Court are more or less on the same page, but it is a different one. Today’s national lawmakers are skeptical about the utility of litigation and leery of enabling lawsuits, especially those with the power of collective actions. Once again, federalization is the answer.⁵⁵

⁵⁴ David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 917 (1998).

⁵⁵ See Purcell, *supra* note 2, at 1856-60.

A. CAFA's Attitudes Toward Federalism

Like the 1960s class action reforms, CAFA has goals vis-à-vis consumers, civil rights plaintiffs, and the federal courts. In CAFA, Congress stated three purposes: litigant protection (to “assure fair and prompt recoveries for class members with legitimate claims”⁵⁶); utilitarian welfare maximization (to “benefit society by encouraging innovation and lowering consumer prices”⁵⁷); and reassertion of national sovereign authority (to “restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction”⁵⁸).

What is the content of CAFA's vision of federalism? First, CAFA seeks to redefine what is considered a “state case” and a “federal case” by adding a description that another category exists: cases of “national importance” that arise from state-based causes of action and that affect the national economy. CAFA's explication of the problem of class actions in state courts is that such litigation undermines the integrity of the “national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction” because state and local courts were “keeping cases of national importance out of Federal court.”⁵⁹ According to this view, state and local courts were biased against sets of defendants, making judgments that imposed their view of the law on other states, and binding the rights of the residents of other states.⁶⁰

Does Congress have the constitutional authority to enact CAFA? Parallel questions were asked eight years ago in the context of the constitutionality of congressional creation of what it termed the “Civil Rights Remedy” within the Violence Against Women Act.⁶¹ Opponents argued that Congress had no authority, under either the Commerce Clause or the Fourteenth Amendment, to enact a provision authorizing private damage actions in federal courts by victims of violence animated by gender bias.

⁵⁶ CAFA § 2(b)(1), 28 U.S.C. § 1711 note (Supp. V 2005).

⁵⁷ *Id.* § 2(b)(3).

⁵⁸ *Id.* § 2(b)(2).

⁵⁹ *Id.* § 2(a)(4)–(a)(4)(A).

⁶⁰ *See id.* § 2(a)(4)(A)–(C).

⁶¹ *See* Violence Against Women Act of 1994, Pub. L. No. 103-322, § 40302, 108 Stat. 1902, 1941 (codified at 42 U.S.C. § 13981 (2000)), *invalidated by* United States v. Morrison, 529 U.S. 598 (2000).

In response, about one hundred law professors (myself included) and thirty-six state attorneys general took an approach akin to an understanding of congressional power exemplified by CAFA. We argued in amici filings in the United States Supreme Court that Congress could create a federal cause of action about a problem—violence against women—that both affects the national economy and is a form of discrimination against women.⁶² We lost in *United States v. Morrison*, as a five-person majority held that, because the Constitution required a distinction between that which was “truly local” and “truly national” and because, in the majority’s view, such violence fell within the category of “local,” the remedy was beyond congressional power to enact.⁶³

As I argued in that context and elsewhere, efforts to denote problems as exclusively belonging to one level of government are mistaken, for many are both “national” and “local.”⁶⁴ Congress has the constitutional power through an interaction between the Commerce Clause and the Bill of Rights to identify such problems and to respond through forms of regulation. However, unlike some, I do not believe that what falls within the categories of the “local” and the “national” is fixed, predicated on some essentialist understanding of a particular category (such as “the family” or “criminal law”), or necessarily enduring. Further, because one sector has historically been perceived to have dominion over certain issues does not require that authority to continue in the future.⁶⁵ Rather, the content of that which is understood to be within the purview of “state,” “federal,” and “national” governments is ever-changing,⁶⁶ as “state” and “federal” interests are not fixed sets but interactive and interdependent conceptions that vary over time. Moreover, many cases should be understood as both “state” and “federal” in the sense that they raise legal issues that span the jurisdictional divide. The language of federal jurisdictional law—describing cases as having

⁶² See Brief of Law Professors as Amici Curiae in Support of Petitioners, *Morrison*, 529 U.S. 598 (No. 99-5), 1999 WL 1032805.

⁶³ See 529 U.S. at 617-18.

⁶⁴ See Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 629-70 (2001) [hereinafter Resnik, *Categorical Federalism*].

⁶⁵ But see Kenneth W. Starr, *Preface* to FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS, at xi, xiv (Richard A. Epstein & Michael S. Greve eds., 2007) [hereinafter FEDERAL PREEMPTION]. There, Dean Starr commented, “Crime eradication, poverty relief, family governance, morals regulation, together with primary and secondary education, have in the past formed the core responsibilities of state and local government, and they should continue to do so today.” *Id.*

⁶⁶ See Resnik, *Categorical Federalism*, *supra* note 64, at 619-26; see also Judith Resnik, *Afterword: Federalism's Options*, 14 YALE L. & POL'Y REV. 465, 479-85 (1996) [hereinafter Resnik, *Federalism's Options*].

“federal ingredients” or involving “supplemental” state claims—captures the many instances in which state and federal laws overlap, often operating together through a layered regulatory regime.⁶⁷

But in CAFA, Congress reined in litigants’ ability to select among jurisdictions with overlapping competencies by enlarging the set of cases qualifying for diversity jurisdiction. As a result, more cases arising under state law can and must be litigated in federal court. Unlike Rule 23 (which was not overtly friendly to state-based claims), and unlike the Supreme Court (which had developed doctrinal interpretations making it difficult to bring diversity class actions into federal courts⁶⁸), Congress has taken cases that were formerly conceived as “state” cases, recategorized them as “national,” and then assumed that, if national, they are properly within federal jurisdiction and control.

Above, I pointed out that congressional powers under the Commerce Clause support CAFA. Another constitutional hook is Article III’s provisions for diversity litigation. My view—shared by others—is that Congress has the authority under Article III to create minimal diversity requirements. Less widely shared is my view that *Erie* was wrongly decided as a matter of constitutional law and that the constitutional grant of federal judicial authority over cases in which citizens are diverse can (like the federal question clause in Article III) be a grant for federal common law lawmaking.

Indeed, I view *Erie* itself as an example of federal common law lawmaking, a doctrine of discretion akin to many others. Thus, I also interpret applications of the independent and adequate state law ground doctrine of *Murdock v. Memphis*⁶⁹ to be exercises of discretion. *Erie* and *Murdock* work in tandem, one at the trial level and the other at the Supreme Court level, to recognize and hence to help shape the identity, integrity, and autonomy of state law. Although not constitutionally required, the precept of *Erie*—that federal judges ought to defer to state officials when interpreting substantive rules of liability in cases raising state-based rights—is a useful prudential accommodation that supports state authority.⁷⁰ As the parameters of that practice are

⁶⁷ One illustration is the recent decision in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, stating the rule that “in certain cases federal-question jurisdiction will lie over state-law claims that implicate significant federal issues.” 545 U.S. 308, 312 (2005).

⁶⁸ See, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978).

⁶⁹ 87 U.S. (20 Wall.) 590 (1874).

⁷⁰ Thus, Professor Sherry and I agree that *Erie* is optional but may disagree about the wisdom of exercising that option. See Sherry, *supra* note 18, at 2139-40.

artifacts of federal common law, however, Congress has the power to alter them, again with the caveat that it may be unwise to do so as a general matter.

More of CAFA's views on federalism can be understood by considering what is excluded under CAFA in relation to the states. Whereas Rule 23 authorized civil rights plaintiffs to seek injunctions against state actors, CAFA specifically exempts from its aegis cases in which "the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief."⁷¹ CAFA is thus consistent with the Eleventh Amendment jurisprudence of the last decade, in which the Court has also insulated states from certain forms of congressional and judicial oversight. Further, CAFA is in sync with *Pennhurst State School & Hospital v. Halderman*, in which the Court held (in a five-to-four decision with opinions marking a bitter divide) that state litigants seeking remedies against the state under state law could find no relief in federal court.⁷² CAFA's constraints on access for certain kinds of cases also coheres with the Prison Litigation Reform Act, limiting prisoner access to federal courts and imposing limits on the duration of consent decrees.⁷³

Another reflection of congressional solicitude to state-elected or state-appointed officials is CAFA's provision requiring that state attorneys general or other state regulatory officials (as well as relevant federal officials) be notified about settlements. CAFA precludes federal judges from approving settlements until ninety days after service on the appropriate regulatory authority in the state in which a class member resides.⁷⁴ CAFA thus empowers state actors to participate in

⁷¹ 28 U.S.C. § 1332(d)(5)(A) (Supp. V 2005). Also excluded are cases involving proposed classes of one hundred or fewer members. *Id.* § 1332(d)(5)(B).

⁷² 465 U.S. 89, 117 (1984) (5-4 decision).

⁷³ Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321, 1321-66 (1996).

⁷⁴ CAFA requires that,

Not later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement.

CAFA § 3, 28 U.S.C. § 1715(b).

"Notice" must consist of a copy of the complaint and related materials, notice of any scheduled judicial hearing, any proposed or final notification to class members, any proposed or final class action settlement, any settlement or other agreement made between class counsel and defense counsel, any final judgment or notice of dismissal,

settlement negotiations and may—by having claims brought to their attention—also prompt state officials to file their own lawsuits.⁷⁵ Furthermore, CAFA attends to state officials in their role as plaintiffs as well as potential defendants and participatory commentators. CAFA excludes from the category of “mass actions” that can be removed to federal court those cases in which “all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action.”⁷⁶

B. CAFA’s Context: Bell Atlantic, Mandatory Arbitration, and Preemption

Other statutes and doctrinal developments share many of CAFA’s approaches to federalism, the utility of litigation, and the role of the federal courts. CAFA’s predicate goal of constraining “abusive litigation”⁷⁷ is not, according to either the Congress or the courts, limited to class actions. That attitude was vividly evident in the 2007 U.S. Supreme Court decision in *Bell Atlantic Corp. v. Twombly*,⁷⁸ which may have brought about a major change in the law of pleading.

Justice Souter wrote on behalf of a majority of seven about the misuses of class action litigation in the context of antitrust. One way to read the decision is that the Court has taken it upon itself to import features of the Private Securities Litigation Reform Act⁷⁹ into antitrust law by imposing comparably exacting standards for complaints alleging restraints on trade and monopolistic practices. Another reading is that the case, with its negative references to the 1957 decision of *Conley v. Gibson*⁸⁰ (which had stated a liberal pleading rule), is that the

and—depending on feasibility—the names of class members who reside in each State and their estimated share of the settlement. *Id.* § 1715(b)(1)–(7).

⁷⁵ See Rubenstein, *supra* note 25 (manuscript at 26-27) (suggesting that drafters in Congress may not have focused on the degree to which CAFA’s settlement notice provision provides opportunities for state officials to receive notice of, and therefore potentially to affect, the settlements of class actions).

⁷⁶ CAFA § 4, 28 U.S.C. § 1332(d)(11)(B)(iii)(III).

⁷⁷ See generally Elizabeth C. Burch, *CAFA’s Impact on Litigation as a Public Good*, 29 CARDOZO L. REV. (forthcoming 2008); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103 (2006).

⁷⁸ 127 S. Ct. 1955 (2007).

⁷⁹ See Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 21D(b)(1)–(3), 109 Stat. 737, 747 (codified at 15 U.S.C. § 78u-4(b)(1)–(3) (2000)).

⁸⁰ 355 U.S. 41 (1957).

Court aimed to impose new and higher requirements,⁸¹ broadening the movement toward fact pleading in all cases.⁸² The decision's charge to judges—to assess the “plausibility” of pleadings—is a potentially open-ended charter.

Bell Atlantic is one of several developments expanding the discretionary powers of district court judges, although exactly how has already proved to be perplexing. By searching LexisNexis from May 21, 2007 (the date of *Bell Atlantic*), through October 31, 2007, one learns that within its first five months, the decision inspired about 2200 citations⁸³ as lower court judges puzzled over how to square it with *Erickson v. Pardus*,⁸⁴ decided a few weeks thereafter. *Erickson* declined to permit the dismissal of a complaint filed by a pro se litigant and arguably applied a test of complaints that is inconsistent with that of *Bell Atlantic*.⁸⁵

The ruling in *Bell Atlantic* has special relevance to CAFA because of the Court's critical discussion of *Conley v. Gibson*.⁸⁶ When filed in the 1950s, the complaint in *Conley* styled itself a class action, as “Negro” members of a local branch of a union for railroad workers ob-

⁸¹ The majority commented,

We could go on, but there is no need to pile up further citations to show that *Conley's* “no set of facts” language has been questioned, criticized, and explained away long enough. To be fair to the *Conley* Court, the passage should be understood in light of the opinion's preceding summary of the complaint's concrete allegations, which the Court quite reasonably understood as amply stating a claim for relief. But the passage so often quoted fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.

Bell Atlantic, 127 S. Ct. at 1969.

⁸² See generally Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986).

⁸³ As of that date, the Supreme Court had cited *Bell Atlantic* twice—in *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007), and in *Credit Suisse Securities (USA) LLC v. Billing*, 127 S. Ct. 2383, 2398 (2007). State courts provided fifteen citations, and 2169 came from the lower federal courts.

⁸⁴ 127 S. Ct. 2197 (2007).

⁸⁵ The Court concluded that the pro se pleader's allegations that his medication was withheld, that he was still in need of treatment, and that the prison official refused to provide treatment sufficed under Rule 8(a)(2). *Id.* at 2200. For discussion of whether *Bell Atlantic* and *Erickson* cohere, see *Iqbal v. Hasty*, 490 F.3d 143, 155-59 (2d Cir. 2007), *cert. granted*, No. 07-1015, 2008 WL 336310 (June 16, 2008).

⁸⁶ 355 U.S. 41 (1957).

jected that the union had discriminated against them.⁸⁷ That group of plaintiffs made their way into federal court based on liberal rules of pleading and a refusal by the Court to insist on the joinder of the railroad, which would have divested the federal courts of jurisdiction.⁸⁸ In contrast, the door-closing attitude expressed by the *Bell Atlantic* majority aligns with stated concerns of some of CAFA's supporters, who saw that legislation as a corrective to overreliance on courts.

CAFA's intent to cut back on class actions—and thereby to limit the way in which aggregate litigation can be used to respond to the economic barriers to litigation that I raised at the outset—should also be put in the context of the lack of congressional interest in finding other ways to subsidize litigation. As in the 1960s, when Rule 23 was in sync with the creation of the Legal Services Corporation, CAFA coheres with the 1996 restrictions on LSC lawyers and congressional prohibitions on LSC-funded lawyers bringing class actions.⁸⁹ Just as Rule 23 once worked with the Civil Rights Attorney's Fees Awards Act of 1976, CAFA mirrors the narrowing of the reach of that Act. Congress has also cut back by statute on fee awards for attorneys representing prisoners.⁹⁰ Further, when interpreting fee-shifting statutes in civil

⁸⁷ *Id.* at 42-43.

⁸⁸ *Id.* at 44-45.

⁸⁹ See 45 C.F.R. § 1617.3 (2007) ("Recipients [of LSC funding] are prohibited from initiating or participating in any class action."). The Court has, however, rejected the view that state funding of legal services through Interest on Lawyers' Trust Account (IOLTA) funds violated attorneys' rights. See *Brown v. Legal Found.*, 538 U.S. 216, 231-35 (2003).

⁹⁰ Specifically, the Prison Litigation Reform Act of 1995 enacted the following restrictions with regard to attorneys' fees:

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility . . . [attorneys'] fees shall not be awarded, except to the extent that—

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 2 of the Revised Statutes; and

(B) (i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant.

rights cases, the Supreme Court has narrowly defined when a party “prevails”⁹¹ and has reduced fee awards by prohibiting judges from adding “multipliers” to reflect the risk entailed in bringing cases in which fees are contingent on success.⁹²

More generally, CAFA reflects and contributes to the view that lawsuits often generate more costs than benefits. Hence, it is also in line with developments in the federal law of arbitration, where the Court has elaborated a muscular interpretation of the 1925 Federal Arbitration Act (FAA). In some respects, federal arbitration law—divesting state courts of jurisdiction in a variety of ways and federalizing the law of contract to some extent—can be understood as a forerunner of CAFA. One example is the lawsuit by St. Clair Adams against Circuit City, in which the plaintiff claimed a violation of California’s prohibitions on discrimination based on sexual orientation.⁹³ The Court interpreted the 1925 FAA to apply to employee contracts other than those excluded by the text of the statute and held that mandatory agreements to arbitrate are enforceable.⁹⁴ State courts lost jurisdiction.

Arbitration law “fits” CAFA in another respect, in that many mandatory provisions for arbitration also preclude class action or aggregation in arbitration. In 2006, in *Buckeye Check Cashing, Inc. v. Cardegna*,⁹⁵ the Supreme Court further divested state courts of authority. The Court overturned the Florida Supreme Court and held that arbitrators, not state judges, were to decide in the first instance interpretative questions about arbitration provisions and severability.⁹⁶ Furthermore, just as federal judges are overseeing the decision of state court judges on arbitration, the development of law using due process to

If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18, United States Code, for payment of court-appointed counsel.

Pub. L. No. 104-134, sec. 803(d), § 7(d), 110 Stat. 1321-66, 1321-71 to 72 (1996) (codified at 42 U.S.C. § 1997e(d) (2000)).

⁹¹ See, e.g., *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001).

⁹² See, e.g., *City of Burlington v. Dague*, 505 U.S. 557, 567 (1992).

⁹³ See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 110 (2001).

⁹⁴ *Id.* at 119.

⁹⁵ 546 U.S. 440 (2006).

⁹⁶ *Id.* at 446.

control awards of punitive damages also gives federal judges the opportunity to oversee state judges in their relationship to juries.⁹⁷

The displacement of state law exemplified by the interpretation of the FAA occurs through preemption, which is the next doctrinal category to add (as Samuel Issacharoff and Catherine Sharkey have noted⁹⁸) to the stack of CAFA-like lawmaking. Preemption is a particularly powerful tool of federalization, for it directly overrides state substantive rules of law; complete preemption generates both federal substantive law and federal court jurisdiction. This growth in preemption law has now caught the attention of the academy, as can be seen in the spurt of law review articles and in a recent compendium on the topic edited by Richard Epstein and Michael Greve.⁹⁹

As this body of materials shows, the presumption against preemption is waning along with the presumption of the concurrency of state and federal regulation.¹⁰⁰ The Supreme Court has relied on federal preemption in a variety of contexts, including to override both local and state legislation on transnational human rights. Two of the major recent decisions are *Crosby v. National Foreign Trade Council*, challenging Massachusetts's efforts to ban state taxpayers' funds going to goods made with forced labor,¹⁰¹ and *American Insurance Ass'n v. Garamendi*, contesting California's efforts to insist that insurers within the state disclose Holocaust-related activities.¹⁰² In both instances, the Supreme Court rendered expansive understandings of its own doctrine of foreign affairs preemption to preclude state-based decisions. Similarly, in a case on the use of medical marijuana, *Gonzales v. Raich*, the Court concluded that state judgments on the health and welfare of their residents had to cede to federal executive enforcement prerogatives.¹⁰³

⁹⁷ See *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063-65 (2007).

⁹⁸ See Issacharoff & Sharkey, *supra* note 13, at 1365-98.

⁹⁹ See FEDERAL PREEMPTION, *supra* note 65; see also Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 471-72 (2002); Issacharoff & Sharkey, *supra* note 13, at 1433 app. (listing Supreme Court cases involving preemption).

¹⁰⁰ See, e.g., *Watters v. Wachovia Bank*, 127 S. Ct. 1559 (2007) (finding that federal banking law preempts certain state-level regulation); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (holding that federal law preempts a state common law tort action). Displaced is what *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) posited: an "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."

¹⁰¹ 530 U.S. 363 (2000).

¹⁰² 539 U.S. 396 (2003).

¹⁰³ 545 U.S. 1 (2005).

The Court's embrace of preemption is shared by many members of Congress, but before turning to recent legislative examples, a historical baseline is in order. According to Stephen Gardbaum, in the "sixteen major federal statutes from the Sherman Act of 1890 to the Fair Labor Standards Act of 1938," not "a single statute contains an express provision clearly preempting the states. Only one pre-New-Deal statute, the Clayton Antitrust Act of 1914, contains explicit preemption language, and this is an explicit nonpreemption provision."¹⁰⁴ Moreover, "at least four major pieces of New Deal legislation contain express nonpreemption provisions of various types,"—the Securities Act of 1933 and the Securities and Exchange Act of 1934, the Social Security Act of 1935, and the Fair Labor Standards Act of 1938—all in an effort to enable "cooperative federalism."¹⁰⁵

In contrast, according to a 2006 congressional monograph, "[o]ver the last five years, the House and the Senate have passed 73 separate preemption provisions, and 39 of these have become law."¹⁰⁶ This report, *Congressional Preemption of State Laws and Regulations*, was prepared at the behest of Representative Henry Waxman, a Democrat from California concerned about the trend towards preemption. Proposed congressional overrides of state law described by the report span a gamut of activities including some associated with what many claim to be core "state" arenas, such as measures related to health, welfare, and family life.¹⁰⁷ And, like CAFA's invocation of "fairness," some of these provisions also have appealing titles. One provision, the "Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users," preempts more than a dozen state laws (including those of New York, Florida, and California) that had imposed vicarious liability on car-rental agencies for injuries imposed by uninsured drivers.¹⁰⁸ Another, the "Protection of Lawful Commerce in Arms

¹⁰⁴ Stephen Gardbaum, *The Breadth vs. the Depth of Congress's Commerce Power: The Curious History of Preemption During the Lochner Era*, in FEDERAL PREEMPTION, *supra* note 65, at 48, 73.

¹⁰⁵ *Id.* at 73-74.

¹⁰⁶ MINORITY STAFF, SPECIAL INVESTIGATIONS DIV., H. COMM. ON GOV'T REFORM, 109TH CONG., CONGRESSIONAL PREEMPTION OF STATE LAWS AND REGULATIONS I (Comm. Print 2006) [hereinafter CONGRESSIONAL PREEMPTION], available at <http://oversight.house.gov/documents/20060606095331-23055.pdf>.

¹⁰⁷ Examples of legislation from the report include proposals to preempt state laws on reproduction, abortion, and end-of-life care. *Id.* at 2.

¹⁰⁸ Pub. L. No. 109-59, sec. 10208, § 30106, 119 Stat. 1144, 1935-36 (2005) (codified at 49 U.S.C. § 30106 (Supp. V 2005)). Some sixteen states imposed liability on rental-car companies when an uninsured driver of a rental car caused harm. CON-

Act,” now precludes states and localities from imposing civil liabilities on gun manufacturers.¹⁰⁹

While many bills propose to preempt judgments made at the state level, Congress has recently enacted a provision that recognizes the legitimacy of local judgments. At the end of 2007, Congress acknowledged that, under specified circumstances including the provision of notice, state and local governments had the authority to divest certain investments from Sudan.¹¹⁰ In a signing statement, however, President Bush insisted that, while the act “purports to authorize” such divestiture, “the Constitution vests the exclusive authority to conduct foreign relations with the Federal Government,” and therefore “the executive branch shall construe and enforce this legislation in a manner that does not conflict with that authority.”¹¹¹

GRESSIONAL PREEMPTION, *supra* note 106, at 19; *see, e.g.*, CAL. VEH. CODE § 17150 (West 2000) (“Every owner of a motor vehicle is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the motor vehicle, in the business of the owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner.”); N.Y. VEH. & TRAF. LAW § 388(1) (McKinney 2005) (“Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission . . . of such owner.”). Congress instead prohibited owners of vehicles from being held “liable under the law of any State” for accidents, if a car was rented and the owner not negligent. 49 U.S.C. § 30106 (Supp. V 2005). A federal district court judge in Florida has twice held this particular preemption to be an unconstitutional exercise of Commerce Clause powers. *See Vanguard Car Rental USA, Inc. v. Drouin*, 521 F. Supp. 2d 1343, 1350-51 (S.D. Fla. 2007) (Moore, J.); *Vanguard Car Rental USA v. Huchon*, No. 06-10082, 2007 WL 2875388, at *10 (S.D. Fla. Sept. 14, 2007) (Moore, J.). A Florida state court disagreed, asserting that “motor vehicle leasing transactions unquestionably affect the channels of interstate commerce, the instrumentalities of interstate commerce, and intrastate activities substantially related to interstate commerce.” *Bechina v. Enter. Leasing Co.*, No. 3D07-1225, 2007 WL 4322303, at *1 (Fla. Ct. App. Dec. 12, 2007).

¹⁰⁹ Pub. L. No. 109-92, §§ 3-4, 119 Stat. 2095, 2096-99 (2005) (codified at 15 U.S.C. §§ 7902-7903 (2006)). Other proposed preemption provisions have not yet passed both the House and the Senate. For example, one proposal would strip federal and state courts of jurisdiction over state tort remedies related to obesity. *See Personal Responsibility in Food Consumption Act of 2005*, H.R. 554, 109th Cong. §§ 3(a), 4(5) (2005). Another would preempt certain state civil actions for employing spyware while creating federal penalties. *See Internet Spyware (I-SPY) Prevention Act of 2005*, H.R. 744, 109th Cong., sec. 2, § 1030A(c) (2005).

¹¹⁰ *See Sudan Accountability and Divestment Act of 2007*, Pub. L. No. 110-174, § 3, 121 Stat. 2516, 2518-19 (Dec. 31, 2007).

¹¹¹ *See Statement on Signing the Sudan Accountability and Divestment Act of 2007*, 43 WEEKLY COMP. PRES. DOC. 1646 (Dec. 1, 2007). The President also stated that he shared “the deep concern of the Congress over the continued violence in Darfur perpetrated by the Government of Sudan and rebel groups.” *Id.* He asserted that his ad-

His views on federalization are shared by others, some writing specifically about “foreign affairs preemption” and others more generally interested in national authority. Just as the class action reforms of the 1960s were supported by sectors within the academic community, the “new” preemption doctrine has received a warm reception by some members of the bench, bar, and legal academia. As Kenneth Starr explained that position in his preface to a recent volume devoted to preemption, the doctrine’s expansion is justified because we “need judges and justices who intuitively understand the importance of protecting our vast commercial republic and who are willing to use the historic role of the federal judiciary to that end.”¹¹²

In sum, this review of the work from the 1960s to the first part of the twenty-first century reveals that federalization has been a device used repeatedly to implement policies formed at the national level. The underlying national norms change, but the method does not.

V. THE POLITICAL SAFEGUARDS OF AGGREGATIVE TRANSLOCALISM

Identifying the structural continuity linking Rule 23 and CAFA should not obscure significant changes in the landscape of federalism over the decades that lie between them. Cases—as in the diversity cases that CAFA puts into federal court—are not the only artifacts of states that have been nationalizing, and Congress has not been the only engine of nationalization. State and local officials are “going national” too as they work in institutions that crisscross state as well as national boundaries.

A. *Neither Separate Spheres nor Solo Actors*

In many discussions of federalism, states are posited as singular actors, sometimes in competition with one another but rarely described as acting in concert. Similarly, categories of activity are presumed to belong, almost naturally, either to state or to federal governance.

CAFA is one example of many breaches of this ideology of separate spheres, in that CAFA takes so-called “state” cases and turns them into

ministration would “continue its efforts to bring about significant improvements in the conditions in Sudan through sanctions against the Government of Sudan and high level diplomatic engagement and by supporting the deployment of peacekeepers in Darfur.” *Id.*

¹¹² Starr, *supra* note 65, at xv.

“federal” ones.¹¹³ Such flip-flops (state-federal or federal-state) can be seen in other arenas as well. While education and marriage were once specially identified as within state prerogatives, national actions (e.g., the No Child Left Behind Act of 2001¹¹⁴ and the Defense of Marriage Act¹¹⁵) have intervened. Moreover, the direction of change is not only toward federal authority. Through “devolution,” what were once nationally regulated income supports¹¹⁶ and speed limits on highways¹¹⁷ have become areas claimed to be better suited to state governance.

In addition to watching subject matters reassigned from the states to the national government or from federal to state governments, one can also find many examples of overstatements about exclusivity of control by either state or the federal government. Layers of authority, some state and some federal, can be seen from family life to foreign relations. Constitutional law sets some of the parameters of permissible state regulation of the qualifications for marriage, as the (aptly named) *Loving v. Virginia*¹¹⁸ made plain. Federal bankruptcy and pen-

¹¹³ As Purcell explains,

[F]or the previous thirty years Congress—and the Burger and Rehnquist Courts—had firmly believed that those very same state-law class actions properly ‘belonged’ in the state courts, not the federal courts. CAFA’s supporters, then, could not have chosen to send class actions to the federal courts simply because those cases ‘belong’ there. Rather, they had to have had some additional reason for acting, a reason of practical policy and anticipated consequences. That reason, the evidence suggests, was their belief that CAFA would terminate large numbers of class actions and prevent many more from ever being filed.

Purcell, *supra* note 2, at 1868-69.

¹¹⁴ Pub. L. No. 107-110, § 1001, 115 Stat. 1425, 1439 (2002) (codified at 20 U.S.C. 6301 (Supp. V 2005)) (establishing federal standards for public schools to “ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at minimum, proficiency on . . . State academic achievement standards and state academic assessments”).

¹¹⁵ Pub. L. No. 104-199, 110 Stat. 2419, §§ 2-3 (1996) (codified at 1 U.S.C. § 7 (2000) and 28 U.S.C. § 1738C (2000)) (defining “marriage” under federal law as “only a legal union between one man and one woman as husband and wife” and permitting states to refuse to recognize same-sex relationships that are treated as marriages under another state’s laws).

¹¹⁶ See, e.g., Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, sec. 103, § 401, 110 Stat. 2105, 2113 (codified at 42 U.S.C. § 601(a) (2000)) (increasing the “flexibility of States in operating” programs designed to aid needy families and encourage work and marriage).

¹¹⁷ See, e.g., National Highway System Designation Act of 1995, Pub. L. No. 104-59, § 205(d), 109 Stat. 568, 577 (repealing the national maximum speed limit).

¹¹⁸ 388 U.S. 1, 11-12 (1967) (declaring state antimiscegenation laws unconstitutional).

sion laws allocate property rights in and by marital units; federal law creates and enforces interfamily support obligations.¹¹⁹ Indeed, in some divorces, the largest assets to be divided are ruled by a regime of federally protected pension rights. Thus, both constitutional and statutory provisions shape a significant body of “federal laws of the family” affecting interpersonal relations.¹²⁰ Moving to “foreign” relations or international law, the state-federal interaction is similarly dense with examples ranging from state obligations to provide consular notice when detaining non-national criminal defendants to state laws divesting assets from the Sudan and affiliating with other countries in efforts to curb global warming.¹²¹

The actual autonomy—of states to each other or to the nation, and of the nation to the world—is likewise overstated. Some facets of joint venturing are long-standing, recognized in the Constitution through authorization for states to join together in compacts sanctioned by Congress.¹²² Twentieth-century examples include the Tennessee Valley Authority and the Port Authority of New York and New Jersey. Further, under the aegis of the Uniform Commission on State Laws, states have “independently” adopted parallel statutes addressing issues ranging from the Uniform Code of Commercial Law to the interstate transfer of detainees.¹²³ In addition, many federal laws rely on state implementation, prompting political scientists to use the metaphors of “marble cake,” “picket fences,” and “matrices” to capture the interdependencies of local, state, and national governance.¹²⁴

¹¹⁹ See, e.g., 29 U.S.C. § 1055 (2000).

¹²⁰ See Resnik, *Categorical Federalism*, *supra* note 64, at 644-56; Judith Resnik, “Naturally” Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. REV. 1682, 1721-29 (1991) (analyzing the ways in which family relations “can be described as a regime of joint [state and federal] governance”).

¹²¹ See, e.g., *Medellín v. Texas*, 128 S. Ct. 1346 (2008); Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31 (2007).

¹²² See U.S. CONST., art. I, § 10, cl. 3 (the “Compact Clause”) (“No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power . . .”). For a general discussion of the Compact Clause and the use of interstate compacts, see, for example, Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685 (1925); Jill E. Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 1, 3-5 (1997).

¹²³ See, e.g., Interstate Agreement on Detainers Act, Pub. L. No. 91-538, 84 Stat. 1397 (1970), *reprinted in* 18 U.S.C. app. at 1520 (2000).

¹²⁴ The classic analysis is DANIEL J. ELAZAR, *EXPLORING FEDERALISM* (1987).

But even those terms no longer suffice, as technology and globalization further interrupt a tidy narrative of federalism. Forms of jurisdiction-bending are everywhere, as subnational and transnational collectives defy conventional federalism's assumptions. Responding to their citizenry's concerns, local officials regularly cross state and national borders to deal with problems involving the production of toys and drugs, toxic spills, and crimes that respect no geographical lines.

A few specifics about the organizations that now exist and the work that they do are in order. Over the course of the last century, state and local officials built transjurisdictional networks such as the National League of Cities, the United States Conference of Mayors, the National Conference of State Legislatures, the National Governors Association, and the National Commissioners on Uniform State Laws.¹²⁵

In many respects, these organizations are themselves artifacts of federalism. Most were formed during the twentieth century as government-based "interest groups" intended to protect localities from what they viewed as national encroachments on their prerogatives and to forward municipal agendas in their own states as well as in Washington. With the nationalization and globalization of the economy, they have broadened their horizons and are forging links to other subnational entities around the world in a manner that one scholar described as beyond the ability of the national government "to control, supervise, or even monitor."¹²⁶

In the language of social movement theory, these "norm entrepreneurs" are using their institutional voices to shape policies as they define the parameters of their own concerns. But unlike the classic NGOs in the literature, these groups of public officials in private organizations sit between the public and private sectors. They are neither fully nongovernmental nor fully governmental organizations, as they get their clout and resources as a result of their roles as officials in the public sphere. Hence, another term—I suggest "translocal organizations of government actors," or TOGAs—is needed to capture their distinctive properties.

¹²⁵ For in-depth descriptions of these organizations and their import for federalism, see Judith Resnik, Joshua Civin & Joseph Frueh, *Don't Sign Kyoto; Don't Cite Foreign Law: Sovereignty, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. (forthcoming 2008); Joshua Civin, Public Official Associations: Legal Federalism in Theory and Practice 6-11 (Dec. 3, 2001) (unpublished manuscript, on file with author).

¹²⁶ EARL H. FRY, THE EXPANDING ROLE OF STATE AND LOCAL GOVERNMENTS IN U.S. FOREIGN AFFAIRS 128 (1998).

In terms of their import, as those supportive of state authority have long insisted, states and localities have been and continue to be important sites of social change; TOGAs enable more such coordinated action. At the national level, many examples of their impact on policy can be found. The federal statute on nuclear waste that the Supreme Court struck down on Tenth Amendment grounds in *New York v. United States*,¹²⁷ for example, was proposed by the National Governors Association. Local policy efforts have also recast national agendas through the work begun by a dozen or so mayors who, in 2005, crafted a joint statement on climate control.¹²⁸ As of April 2008, that statement has been adopted by more than 800 mayors representing close to 80 million Americans.¹²⁹

As with other interest groups, state-based interest groups do not always succeed in persuading national lawmakers to adopt their points of view. Two of the recent preemption statutes that I mentioned—the legislation to exempt car rental companies from liability for car accidents by uninsured renters¹³⁰ and the legislation to exempt gun manufacturers from liability¹³¹—are illustrative. The first was opposed by the National Conference of State Legislatures¹³² and the second by the United States Conference of Mayors.¹³³

CAFA itself is a mixed example in that the legislation was not derailed even though it was opposed by the Conference of Chief Justices of the State Courts,¹³⁴ the National Conference of State Legislatures,¹³⁵

¹²⁷ 505 U.S. 144 (1992).

¹²⁸ See U.S. Conference of Mayors Climate Protection Agreement, Mayors Climate Protection Center, <http://usmayors.org/climateprotection/agreement.htm> (last visited Apr. 15, 2008).

¹²⁹ List of Participating Mayors, Mayors Climate Protection Center, <http://usmayors.org/climateprotection/list.asp> (last visited Apr. 15, 2008).

¹³⁰ See *supra* note 108.

¹³¹ See *supra* note 109.

¹³² See CONGRESSIONAL PREEMPTION, *supra* note 106, at 19 & n.70 (citing Letter from Michael Balboni, Chair, Nat'l Conference of State Legislatures Comm. on Law and Criminal Justice, to Senator Bill Frist, Senate Majority Leader, and Senator Harry Reid, Senate Minority Leader (Apr. 26, 2005)).

¹³³ See Ed Somers, *Gun Immunity Considered by Congress*, U.S. MAYOR NEWSPAPER, May 9, 2005, http://www.usmayors.org/uscm/us_mayor_newspaper/documents/05_09_05/guns.asp.

¹³⁴ See Letter from Annice M. Wagner, President, Conference of Chief Justices, to Senator Patrick Leahy, Chairman, Senate Comm. on the Judiciary (Mar. 28, 2002), available at <http://www.citizen.org/documents/CCJLetter.pdf> (arguing that “[a]bsent hard evidence of the inability of the state judicial systems to hear and decide fairly class actions brought in state courts,” CAFA was not warranted). This letter was invoked in the February 28, 2005, Statement of Minority Views by Senators Leahy, Kennedy, Bi-

and by a collective of more than a dozen state attorneys general who objected that the act “unduly limits the right of individuals to seek redress for corporate wrongdoing in their state courts.”¹³⁶ In addition to that subgroup, the National Association of Attorneys General (NAAG) had sought to have CAFA specify flatly that the statute would not apply to “any civil action brought by, or on behalf of, any attorney general.”¹³⁷

Yet Congress was responsive to the collective concerns of the states and provided a measure of protection for state actors both as plaintiffs and as defendants. Although Congress did not adopt the NAAG proposal verbatim, it did exempt from federalization any case filed “on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action.”¹³⁸ Furthermore, CAFA insulates state actors as defendants; cases in which “the primary defendants are States, State officials, or other governmental entities against which the district court may be foreclosed from ordering relief” cannot be removed from state to federal court.¹³⁹

In addition, as noted earlier, CAFA gives new opportunities to state attorneys general to participate in class actions by mandating that public officials be notified of proposed agreements before settlements can be approved.¹⁴⁰ Those officials can therefore affect both processes

den, Feingold, and Durbin in opposition to CAFA. See S. REP. NO. 109-14, at 82 n.2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 75.

¹³⁵ See Letter from Michael Balboni, Chair, Nat’l Conference of State Legislatures Law and Criminal Justice Comm., to U.S. Senate (Feb. 2, 2005), *available at* <http://www.citizen.org/documents/NCSLClassActionLetter2-05.pdf> (asserting that CAFA “undermines our system of federalism, disrespects our state court system, and clearly preempts carefully crafted state judicial processes . . . regarding the treatment of class action lawsuits”).

¹³⁶ Letter from Eliot Spitzer, N.Y. Att’y Gen., et al., to Senator Bill Frist, Senate Majority Leader, and Senator Harry Reid, Senate Minority Leader (Feb. 7, 2005) [hereinafter Letter from Fifteen State Attorneys General], *reprinted in* 151 CONG. REC. H644-45 (daily ed. Feb. 16, 2005). In addition to the New York Attorney General, the letter was also sent on behalf of the Attorneys General of California, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Oklahoma, Oregon, Vermont, and West Virginia. *Id.* at H644.

¹³⁷ See 151 CONG. REC. S1215-16 (daily ed. Feb. 9, 2005) (statement of Sen. Pryor) (proposing an amendment to the bill).

¹³⁸ CAFA § 4, 28 U.S.C. § 1332(d)(1)(B)(1)(III) (Supp. V 2005). The distinction is not trivial in that specific statutes are needed rather than the inherent power to act on behalf of the state.

¹³⁹ *Id.* § 1332(d)(5)(A). Also excluded are cases involving proposed classes of fewer than one hundred members. *Id.* § 1332(d)(5)(B).

¹⁴⁰ See *id.* § 1715; see also *supra* note 25 and accompanying text.

and outcomes in cases.¹⁴¹ (The fifteen attorneys general who objected to CAFA had raised the concern that this provision could give a misleading impression that individuals' interests were "being protected by their government representatives, simply because the notice was sent" to such officials.¹⁴²)

As the mention of a group of only fifteen attorneys general taking a particular joint position on CAFA suggests, being a state official does not necessarily result in sharing views on the allocation of authority between governments or on substantive policies with other state actors. Several state-based organizations exist, and they often do not all align on the same side of an issue. Ready examples come from the recent federal cases on the United States Supreme Court docket, where amici briefs filed by various actors in state government can be found on both sides.¹⁴³ More unanimity among states comes in the context of preemption of state law, which they generally oppose.¹⁴⁴

Further, the posture of any given TOGA is not fixed over time but varies with its leadership's views in response to changing conditions. A brief review of the last fifty years of the National League of Cities provides one illustration. During the 1950s, as the Cold War was underway, the National League of Cities developed the "sister-cities" program aimed at "people-to-people" diplomacy to show the desirability of America's economic system in the face of socialism and communism.¹⁴⁵ In the 1970s, the name—National League of Cities—came to serve as the shorthand in the federal courts' jurisprudence for a Supreme Court decision recognizing a locality's (short-lived) Tenth Amendment exemption from federal regulation of fair labor laws.¹⁴⁶ The National League of Cities was then a champion of local prerogatives, in that case to prevent federal regulation of their workers' wages and hours.

¹⁴¹ See Rubenstein, *supra* note 25 (manuscript at 5-8).

¹⁴² See Letter from Fifteen State Attorneys General, *supra* note 136, at H645.

¹⁴³ See, e.g., Civin, *supra* note 125 (manuscript at 27) (stating that states and government officials signed on to both sides of a dispute over the 1990 census).

¹⁴⁴ See, e.g., Brief for the States of New York et al. as Amici Curiae in Support of the Petitioner at 1, *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007) (No. 05-1342), 2006 WL 2570992, at *1 (arguing on behalf of forty-nine states that federal law ought not to be interpreted to preclude state regulation of banks operating subsidiaries or organized under state law). The Supreme Court held otherwise. *Watters*, 127 U.S. 1559.

¹⁴⁵ See Sister Cities International: Frequently Asked Questions, <http://www.sister-cities.org/sci/aboutsci/faqs> (last visited Apr. 15, 2008).

¹⁴⁶ See *Nat'l League of Cities v. Usery*, 426 U.S. 833, 852 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985).

Yet before pigeonholing the National League of Cities as taking a particular stance, one must also consider its recent network building, both locally and globally, including efforts to support an equality agenda concerned about reducing racism and promoting women as decision makers in governments around the globe. In 2005, the National League of Cities called for “full funding for Violence Against Women Act programs as well as efforts which support the abolition of international systematic cultural and state-sanctioned physical, sexual and psychological human rights abuse and oppression of women throughout the world.”¹⁴⁷

Another example of boundary-bending comes from California, where in October 2007, a new law on “toxic toys” was enacted to prohibit the sale and manufacture of toys and child-care items that contain “phthalates,” chemicals believed to harm children’s health.¹⁴⁸ This law both serves as a model for other states and used as its own model the regulations of the City of San Francisco that had in turn borrowed from and been informed by lawmaking in Europe.¹⁴⁹ (Not surprisingly, given current trends, some have argued that federal law preempts state rules of this kind.¹⁵⁰)

¹⁴⁷ National League of Cities, Resolution 2007-43: Urging More Effective Emergency Preparedness and Response and Action on Related Issues, available at <http://nlc.org/> (search for “2007-43”; follow “NLC Resolution #2006-40”).

¹⁴⁸ See Assemb. B. No. 1108, 2007-08 Leg., Reg. Sess. (Cal. 2007), available at http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_1101-1150/ab_1108_bill_20071014_chaptered.pdf.

¹⁴⁹ See S.F., CAL., HEALTH CODE art. 34 (2008); Council Directive 92/59, 1992 O.J. (L 228) 24 (EEC) (establishing product safety guidelines, including the regulation of dangerous chemicals). On December 14, 2005, the product safety ban on some dangerous chemicals (including phthalates) became permanent in the European Union. See Council Directive 2005/84, 2005 O.J. (L 344) 40 (E.C.). These European materials were cited in the analysis of the California law. See *Analysis of Assemb. B. 1108 of the S. Envtl. Quality Comm.*, 2007-08 Leg., Reg. Sess. 4-5 (Cal. 2007), available at http://leginfo.ca.gov/pub/07-08/bill/asm/ab_1101-1150/ab_1108_cfa_20070629_163701_sen_comm.html.

¹⁵⁰ See, e.g., Complaint at 2, Toy Indus. Ass’n v. City and County of S.F., No. 06-7111 (N.D. Cal. Nov. 16, 2006) (arguing that the San Francisco’s ban “is preempted in part by the [Federal Hazardous Substances Act]”); Complaint at 1, Citikids Baby News, Inc. v. City and County of S.F., No. 06-457303 (Cal. Super. Ct. Oct. 25, 2006) (arguing that San Francisco ordinance banning allegedly dangerous chemicals “is preempted by the Federal Food, Drug and Cosmetic Act”); Stipulation and Order Regarding Hearing of Pending Application for Preliminary Injunction at 2-3, *Citikids*, No. 06-457303, at 2 (Cal. Super. Ct. Jan. 8, 2007) (dismissing Citikids’ claims in exchange for nonenforcement of the ordinance); see also Jane Kay, *Health Officials Ask Supes to Alter ‘Toxic Toy’ Measure*, S.F. CHRON., Jan. 8, 2007, available at 2007 WLNR 401262 (discussing chemical and toy manufacturers’ claims that San Francisco lacks authority to regulate the use of certain allegedly toxic chemicals in children’s toys). In addition, proposals were made

B. *Safeguards but No Safety*

In the mid-1950s, Herbert Wechsler counseled that courts should generally leave the allocation of power to what he called the “political safeguards of federalism.”¹⁵¹ The idea was that, rather than have the federal judiciary respond when plaintiffs challenged federal legislation and thereby oversee Congress, state officials—unhappy with what they perceived to be overreaching by the national government—should make their arguments in Congress, where they were formally represented by senators and members of the House. Wechsler thought that state-based officials charged with national governance were better situated to make judgments about allocation of power between state and national action.

I borrow Wechsler’s phrase “political safeguards” and apply it to translocal organizations like the National League of Cities, the Conference of Mayors, and the collectives of state attorneys general, governors, and state legislators. These organizations are all exemplary of the multiplication of “national” players rooted in states yet reaching across them. Fifty years after Wechsler, as we enter a new century of federalism, the relevant public participants in policy debates extend beyond the three branches of the national government and the states, either acting alone or coordinated through Congress. Currents of laws from abroad have affected U.S. norms before, but the proliferation of translocal and transnational organizations, coupled with new technologies and media, have made such dialogues more accessible.

For me, there is solace in knowing that competition exists at the national level that will enliven debates about what the shape of regulations should be. The underlying issues of how to protect safety and well-being and how to recognize the liberty, equality, and dignitary interests of individuals are so difficult that having a wide range of viewpoints has the potential to increase understandings of the many dimensions of each issue.

To be enthusiastic about multiple layers of policymaking on these issues is not, however, to suggest that positions taken by local collectives or through translocal work should necessarily be celebrated, any more than one can presume that national regulation is necessarily wise or that all forms of collective action are generative. On the mer-

at the federal level to preempt state and local efforts if they imposed certain consumer protections that were more restrictive than federal standards. *See, e.g.*, Stockholm and Rotterdam Toxics Treaty Act of 2006, H.R. 4591, 109th Cong. § 6(e)(1).

¹⁵¹ Wechsler, *supra* note 4, at 543.

its of any particular regulatory stance, initiatives at the local level run the political gamut, seemingly “right” to some and very “wrong” to others. One current example of local divergence is the question of immigration reform, where one can find “sanctuary cities” as well as communities enacting punitive measures against undocumented individuals.¹⁵² Similarly, CAFA-like enactments (or more energetic tort reform and caps on damages) can be found in some states while other jurisdictions are more welcoming of tort litigants.¹⁵³

Putting TOGAs into the discussion of CAFA is appropriate because they too are aggregates that should be considered through theories applied in debates over class actions, as concerns have been raised about the quality of representation by group leaders and how decisions are made for a group. Further, because TOGAs are by definition entities comprised of public actors, they should also be considered in light of general democratic concerns about fairness, transparency, and accountability. Thus, much more needs to be said about what can be gained and lost with the development of subnational quasipublic organizations engaged in policymaking.

One cannot, for example, assume that as these configurations align, a diversity of policies will emerge. Coventuring by state actors can produce a great deal of overlap across states rather than the variety of policies presumed through images of experimentation (e.g., the states as laboratories)—which have been posited to be a desirable aspect of federalism. Coordination may work to diminish some of the perceived utilities of a federated system. Moreover, as Lynn Baker, Michael Greve, and others have argued as in addressing horizontal aggrandizement, some state officials may seek to exert undue influence within such groups, given that not all have equal power, resources, or populations.¹⁵⁴ On the other hand, William Rubenstein has reported that, through participation in class action cases, state attorneys general might negotiate better settlements than class counsel are able or willing to secure¹⁵⁵ and/or that joint and coordinated ven-

¹⁵² See, e.g., New Haven, Conn., Dep’t of Police Serv., General Order 06-2 (Dec. 21, 2006); *Ariz. Contractors Ass’n, Inc., v. Candelaria*, No. 07-2496, 2008 WL 343082 (D. Ariz. Feb. 7, 2008); *Lozano v. City of Hazelton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007).

¹⁵³ See, e.g., Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1149-60 (1996).

¹⁵⁴ See, e.g., Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951, 961-66 (2001); Michael S. Greve, *Cartel Federalism? Antitrust Enforcement by State Attorneys General*, 72 U. CHI. L. REV. 99, 103-08 (2005).

¹⁵⁵ See Rubenstein, *supra* note 25 (manuscript at 14-21) (describing a case in which the New Jersey Attorney General secured cash payments for state citizens while class

tures by state officials might serve to monitor the quality of bargains made by class representatives themselves.¹⁵⁶

VI. FEDERALISM'S OPTIONS, COLLECTIVE NECESSITIES, AND SOVEREIGNTY-SKEPTICISM

How do these translocal and transnational activities inform evaluations of CAFA and the kind of federalization that it represents? First, the twentieth-century invention of many national organizations of state-based officials teaches that federalization ought not to be the only response when a problem is understood to be one of "national" dimensions. A national response can emerge without turning everything into a "federal case." For example, state and federal judges, presumed to be landlocked, have been involved in practices sometimes described as "judicial federalism" that reflect the interdependencies of federal and state court systems.¹⁵⁷ While CAFA represents the centralization of jurisdiction in the federal system, we have other examples in which state and federal judges worked together, sometimes literally "sitting" alongside each other and issuing separate but interrelated (or identical) decisions.¹⁵⁸ On the criminal side, the

counsel settled for coupons).

¹⁵⁶ *Id.* (manuscript at 22-31) (describing case in which thirty-six state attorneys general (or equivalent) objected to a class action settlement and the court did not approve it).

¹⁵⁷ JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS, 166 F.R.D. 49, 81 (1995). While I borrow that term, I use it differently, for there, "judicial federalism" is defined to reflect the view that state and federal courts play "different but equally significant" roles comprising an integrated justice system. *Id.*

¹⁵⁸ Some of this work stemmed from efforts, in the 1980s, when federal and state judges began to cross jurisdictional lines simply to talk. In 1990, the Conference of Chief Justices of the State Courts and the Judicial Conference of the United States authorized the creation of a "National Federal-State Judicial Council," resulting in a first-ever national conference of state and federal judges in 1992. See Malcolm M. Lucas, *Keynote Address: National Conference on State-Federal Judicial Relationships*, 78 VA. L. REV. 1663 (1992). Along with conversation came joint ventures. Despite the formal statutory and doctrinal statements (that federal and state judicial systems are distinct, with few mechanisms for interjurisdictional consolidation), federal and state judges in charge of "All Brooklyn Navy Yard" asbestos cases convened a "state and federal court," and their rulings were captioned with each court's name. See, e.g., *In re Joint E. & S. Dists. Asbestos Litig.* 737 F. Supp. 735 (E.D.N.Y., S.D.N.Y. & N.Y. Sup. Ct. 1990); *In re New York City Asbestos Litig.*, 123 B.R. 7 (E.D.N.Y., S.D.N.Y. & N.Y. Sup. Ct. 1990); *In re Joint E. & S. Dists. Asbestos Litig.*, 129 F.R.D. 434 (E.D.N.Y., S.D.N.Y. & N.Y. Sup. Ct. 1990). In the Exxon Valdez oil-spill litigation, federal and state judges coordinated scheduling and discovery. See Barnaby J. Feder, *Exxon Valdez's Sea of Litigation*, N.Y. TIMES, Nov. 19, 1989, at F1 (noting the "unusual joint sitting of the state and Federal courts"); see also Resnik, *Federalism's Options*, *supra* note 66, at 482 n.82 (describing how

“cross-designation” of federal and state agents and prosecutors makes the boundaries between state and federal crime enforcement permeable.¹⁵⁹

By attending to the invention of these relatively new formations, we can both revise the presumption of dichotomous alternatives (cases must be either in the state or federal domain) and of essentialized images (of states and of the federal government). Further, we can consider yet other arrangements that embody the interdependence of participants within and beyond the United States. For example, one can explore whether another set of courts—national but not federal—could be developed to deal with some cases that cross jurisdictions but are not governed by federal legal rules.¹⁶⁰

Second, the term “horizontal federalism” ought to be broadened beyond a focus on state-to-state interactions to include the work of these national but not federal organizations and to consider not only their regulatory impact but whether they too ought to be subject to regulation. Once the collective actions of state officials, empowered through their public persona but engaged in decision making not always licensed or regulated through public law, come into focus, so do questions familiar in other aggregate contexts: What kinds of judgments ought these organizations make? Through what internal processes? What weight should other political institutions give to their judgments? Should these state-based private organizations be conceptualized as agents, principals, or lobbyists acting on behalf of the offices they hold? These questions ought to prompt inquiries both empirical and normative.¹⁶¹

the state and federal courts “[took] turns as the lead” in the Brooklyn Navy Yard cases (internal quotation marks omitted).

¹⁵⁹ See Daniel C. Richman, “*Project Exile*” and the Allocation of Federal Law Enforcement Authority, 43 ARIZ. L. REV. 369, 370 (2001); see also Daniel C. Richman, *The Changing Boundaries Between Federal and Local Enforcement*, in 2 CRIMINAL JUSTICE 2000: BOUNDARY CHANGES IN CRIMINAL JUSTICE ORGANIZATIONS (Nat’l Inst. of Justice ed., 2000), available at http://www.ncjrs.gov/criminal_justice2000/vol_2/02d2.pdf.

¹⁶⁰ See Resnik, *Federalism’s Options*, *supra* note 66, at 476-77.

¹⁶¹ For example, under the aegis of the National Association of Attorneys General, a “Multistate Antitrust Task Force” was created, and that organization has “Guidelines” for the enforcement. See THOMAS GREENE & ROBERT L. HUBBARD, STATE ANTITRUST ENFORCEMENT 18 (2003) available at http://www.oag.state.ny.us/business/new_antitrust/papers/PLImar03.pdf. For other discussions regarding the coordinated efforts of these officials, see Cornell W. Clayton, *Law, Politics and the New Federalism: State Attorneys General as National Policymakers*, 56 REV. POL. 525 (1994); Joseph F. Zimmerman, *Interstate Cooperation: The Roles of the State Attorneys General*, 28 PUBLIUS 71 (1998); Jason Lynch, Note, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Liti-*

Third, this enriched story of American federalism gives insight into evaluations of CAFA's impact. In an earlier Part of this Article, I set forth different assessments, some celebratory and others bemoaning the enactment. I suggest that the measurement of CAFA will vary with time. In the short term, CAFA's immediate import is less powerful because it works in conjunction with other efforts limiting access to rights assertion. At the local level, many states have also cut back on remedies; at the national level, CAFA is part of several statutory and doctrinal developments operating through different rubrics such as preemption and mandatory arbitration. Rather than layered, cooperative federalism, we are seeing efforts to generate a more exclusive form of nationalism based on assertions of a need for uniformity that are made in Congress, in agencies, and by the Supreme Court.

Moving toward a slightly longer time frame, an intermediate evaluation of CAFA's impact depends in no small measure on the outcome of the 2008 election. Given the many pending bills to preempt state law, the extent of the federalization of state tort and consumer law hangs in part on who sits in Congress and in the White House, as well as who obtains governorships. More generally, both the pressures for nationalization as well as the content of the rules prescribed will be affected.

In the longer term, the framing of federalism I have offered is a reminder that we are in "medias res"—in the middle of the story. Congress, in CAFA and elsewhere, aided by federal judges and other rulemakers, may try to codify a set of problems as "national," but the world in which they are operating contests that category. Pulls from localities working hard to help people obtain goods and services with a measure of security, and the transformation of political orders outside our borders, make plain that most of our problems—the economy, the environment, physical safety, and national security—do not respect the boundaries of our shores. Claims to reallocate authority in service of a better way will be made again, and one should not assume that this particular resting place is permanent.

Rather, the category "national" is unstable, as are distinctions between "commerce" and "manufacturing," between "direct" and "indirect" effects on commerce, and between what falls within or beyond the "police powers" of states. As one watches the movements back and forth between nationalization and devolution in arenas ranging from

gation, 101 COLUM. L. REV. 1998 (2001); Note, *To Form a More Perfect Union?: Federalism and Informal Interstate Cooperation*, 102 HARV. L. REV. 842 (1989).

banking, securities, and insurance to education and marriage, it seems apt to borrow from William Butler Yeats that the “center cannot hold.”¹⁶² While I can certainly understand the claims made by nationalists about the need for national economic policy and the costs of fragmentation,¹⁶³ we also are part of international and local economies. The effort to assert unilateral sovereign control, unaffected by local or transnational rules, cannot succeed. A sense of the sovereign center, equated with the national government of the United States, exercising exclusive authority to set regulatory parameters, is ephemeral.

¹⁶² W.B. YEATS, *The Second Coming*, in W.B. YEATS: THE POEMS 187, 187 (Richard J. Finneran ed., 1983).

¹⁶³ See, e.g., Hal S. Scott, *Federalism and Financial Regulation*, in FEDERAL PREEMPTION, *supra* note 65, at 139. Further, many commentators with different points of view argue that national (or state-based) policies are “better” for consumers. See, e.g., Thomas W. Hazlett, *Federal Preemption in Cellular Phone Regulation*, in FEDERAL PREEMPTION, *supra* note 65, at 113.

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