9-2-2012

The Public Face of the 'Litigation State:' Federal Empowerment of Litigation by State Governments

Paul Nolette
Marquette University, paul.nolette@marquette.edu

Accepted version. *American Political Science Association Annual Meeting*. 2012 American Political Science Association Conference New Orleans, LA, August 29-September 2, 2012. Paper presentation. Publisher Link.

The Public Face of the "Litigation State": Federal Empowerment of State Litigation

Paul Nolette

Department of Political Science, Marquette University
Milwaukee, WI

Abstract

Scholars have recently begun exploring the construction of what Sean Farhang has termed the "litigation state" – namely, the distinctly American way in which contemporary federal programs are enforced by means of litigation. The attention in this literature to date has focused on why Congress has encouraged *private* litigation to enforce various statutory programs. This paper examines the emergence of a related and no less important development – the federal government's encouragement of *state government* litigators to help enforce federal regulatory programs, especially state attorneys general ("AGs"). Examining several decades' worth of congressional actions, court decisions, and federal administrative initiatives that have empowered state AGs, this paper explores how and why Congress and other federal institutions have placed increasing reliance on state AGs to enforce federal law. This question has become important not only because this federal empowerment has been a major driver of the prominent regulatory role state AGs have taken on in recent years, but because the political dynamic concerning state litigation differs from other aspects of the litigation state.

American Political Science Association Annual Meeting, (August 30-September 2, 2012). Publisher Link.

Introduction

Courts and litigation play a crucial role in policymaking in the United States, particularly as compared to other democratic political systems. While law and legal institutions have long been important in American politics, the relationship between litigation and policy implementation has grown considerably stronger since the 1960s and 70s. As Sean Farhang has explained, the number of private lawsuits relying upon federal statutory law has risen dramatically in the past few decades. This growth is not simply a reflection of large-scale cultural or technological changes in American society, but has resulted from congressional choices encouraging the use of such private litigation as a method of regulatory enforcement of federal law.[1]

While the growth of private litigation has been a key part of the new American regulatory state, it has not been the only manifestation of this larger trend. Another key development in the politics of litigation has been the rapid rise of litigation by state governments. States have led increasingly coordinated litigation campaigns in areas including environmental policy, health care, antitrust enforcement, and consumer protection. This litigation has increasingly been used to achieve policy and regulatory goals. The most famous example probably remains the massive settlement state AGs reached with the nation's largest tobacco companies in 1998, which sent billions of dollars into state coffers and placed a variety of new regulatory requirements on the industry.[2] Since that time, entrepreneurial state litigators including former New York Attorney General Eliot Spitzer have conducted litigation campaigns targeting a variety of alleged corporate misdoings as well as the federal government itself. Recent high-profile litigation campaigns have included the investigation and eventual settlement with the nation's largest banks as part of the foreclosure crisis as well as state-led lawsuits against the Affordable Care Act.[3]

Much like the growth of the private litigation state, the emergence of this new set of *public* actors – especially the state AGs who control nearly all state litigation – has not simply been a reflection of broader changes in American society since the 1960s. It has resulted largely because of the efforts of various federal institutions to

make state litigators a partner in the pursuit of federal regulatory objectives. The federal empowerment of state litigation has taken various forms, including congressional and judicial expansions of state standing to sue, federal grants to assist state enforcement, and federal agency partnerships with states aimed at building state litigation capacity. At the heart of this federal empowerment has been the reliance on cooperative federalism, which emphasizes the need of state and federal authorities working together to solve common problems. The cooperative model is a particularly important part of the new social regulation of the 1960s and 70s, which targeted quality of life issues such as health care and the environment. It has been in these area in which state litigation has played the most prominent role in contemporary American politics.

Understanding the construction of the litigation state's public face has become increasingly important as state AGs have emerged as prominent actors in American regulatory politics. It is also important because the political dynamic concerning state litigation differs from other aspects of the litigation state. For one, Congress and the courts have been particularly sympathetic to expanding states' capacity to enforce federal law through litigation even while they act to reduce the role of private litigation. This suggests that the emergence of state litigation as a national policymaking tool has and perhaps will continue to avoid the sorts of attacks levied against the private litigation state. Additionally, while the federal government has encouraged state litigation as a way to enlist state AGs as partners in carrying out federal regulatory schemes, one of the effects has been to establish a powerful new set of political actors with their own often conflicting agendas. These actors have increasingly served as opportunity points for opponents of federal policies to challenge and reshape those federal policies in court. Thus, the ironic result of the federal government's increasing AG capacity has been that state AGs have used this congressionally-assisted capacity building to frustrate, challenge, and reverse congressional initiatives in recent years. Understanding this dynamic helps to shed light on prominent recent state-driven litigation campaigns, including state challenges to federal environmental and health care policy.

The Growth of State Litigation

States have engaged in litigation since the creation of the American republic. Indeed, the history of state attorneys general, who are the officials tasked with representing their state's legal interests, predates the U.S. Constitution. For much of American history, however, state litigation was relatively limited in scope. State AGs rarely attracted much attention nationally as they typically focused on issues of importance to their particular state. This included their responsibility to defend state laws and state agencies against legal challenges, as well as enforcing provisions of state civil and criminal statutes against alleged violators.[4]

However, the picture of state litigation has changed more recently. Beginning in the 1960s and 70s, state AG offices began to take on an increasing amount of enforcement responsibilities, particularly issues concerning consumer protection, antitrust enforcement, health care, and the environment. AG offices grew from only a few attorneys and staff to larger offices containing new civil divisions reflecting their new enforcement responsibilities. Throughout the late 1970s and early 1980s, state AG budgets outpaced the growth of general government spending in every state.[5]

As state AG offices grew in size, so did the scope of their litigation. State litigation became increasingly coordinated across state lines. Prior to the 1980s, such multistate litigation was rare. Beginning in the 1980s, however, multistate litigation has become a primary tool for states to deal with large-scale enforcement issues across a variety of policy areas.

The most important consequence of the emergence of multistate litigation is that this tool has served as the primary vehicle for state AGs to have influence over regulatory policy on a national scale. Several of the multistate litigation campaigns waged by state AGs have involved high-profile concerns also being dealt with by national political institutions, including health care, environmental policy, and the foreclosure crisis. In some instances, state litigators have formed a cooperative relationship with federal enforcers to conduct joint investigations of alleged corporate malfeasance. Such investigations

have frequently led to major settlements requiring corporate defendants to not just pay civil and criminal penalties but to adhere to new codes of conduct. In many other instances, however, state AGs have employed multistate litigation as a tool to challenge the policy priorities of the federal government.

This occurs most explicitly when state litigators bring high-profile lawsuits against the federal government directly, challenging various policy choices of federal agencies. This multistate activity was particularly prevalent throughout the 2000s in the area of environmental law, as several mostly Democratic state AGs challenged the Bush Administration's approach to global warming and the regulation of air pollution from power plants and automobiles. Among other successes in court, the state AGs spearheaded the litigation resulting in the U.S. Supreme Court's landmark 2007 decision in *Massachusetts v. EPA*, which forced the Bush Administration's Environmental Protection Agency to address carbon dioxide emissions under the Clean Air Act.[6] Since the start of the Obama Administration, several state AGs have employed multistate litigation to challenge various federal policy decisions. In addition to challenging new environmental regulations promulgated by the Lisa Jackson-led EPA, several state AGs helped lead the charge against the Affordable Care Act.[7]

Multistate litigation has also challenged national regulatory policy more subtly as well through large-scale litigation against private corporations. The vast majority of multistate investigations are never tested in court, as the states and their corporate targets reach out-of-court settlements resolving the states' allegations. These settlements frequently contain numerous provisions reflecting the states' regulatory aims. In what remains perhaps the most famous example, state AGs across the country sued several of the nation's largest tobacco firms beginning in the mid-1990s. This effort culminated in a Master Settlement Agreement (MSA) that sent more than $200 billion to the states and created a massive new regulatory regime restricting the sales and marketing of tobacco products.[8] Among many other restrictions, the MSA prohibited tobacco firms from targeting youth through the use of cartoons in cigarette advertising, banned the advertising of cigarettes in public transit facilities, and prohibited the

use of cigarette brand names on merchandise. The MSA also created a complicated structure of payments from the tobacco industry to states treasuries that amounted to a new uniform national tax on tobacco products.[9] This MSA was signed only after Congress had declined to enact a comprehensive bill attempting to regulate the industry in a similar way.

Since the tobacco MSA, state AGs have used litigation as a regulatory device in numerous policy areas. Former New York Attorney General Eliot Spitzer, along with several other state AGs, frequently criticized the alleged failure of the Securities and Exchange Commission under the Bush Administration to adequately punish financial fraud. These state officials decided to act independently by conducting a series of litigation campaigns against national insurance and brokerage firms based upon a variety of allegedly illegal industry practices – efforts resulting in new codes of conduct applying across the national insurance industry.[10] Similar efforts to fill "regulatory gaps" allegedly left open by the failure of federal policymaking institutions have been increasingly common in numerous areas of policy as well. The largest growth area in multistate litigation growth area in recent years has been lawsuits against manufacturers of pharmaceuticals. Through regulatory settlements with leading members of the industry, state AGs have managed to institute regulatory requirements not required of drug companies under federal law.[11]

The growth of state litigation, particularly litigation with a national regulatory focus, reflects in part a pair of interrelated societal trends that have been an important part of politics since the 1960s. The first is the increased focus on "post-materialist" or "quality-of-life" concerns, which include issues such as consumer protection and environmentalism as opposed to the materialist economic concerns that dominated the New Deal era.[12] Congress, as well as state legislatures, enacted numerous new laws dealing with these emerging quality of life issues. Much of the growth of state AG offices in the 1960s and 70s reflected increased responsibilities placed on these state actors to enforce these new enactments.

The second societal trend has been the increased turn to adversarial legalism to resolve complex issues of public policy. As Robert Kagan has explained, Americans' reliance on litigation in the policy process reflects the tension between the public's demand for government action to solve problems on the one hand and the reality of America's fragmented political system on the other. Because political power is separated among different branches of government, this makes government action more difficult. This in turn leads policy advocates to seek alternative venues for achieving their policy goals, including the courts.[13]

Both of these broad societal trends are important background factors that have helped drive the growth of state litigation. Nevertheless, these broad factors do not fully explain the emergence of state litigation specifically, as distinct from litigation more generally. As explained below, the development of state litigation has received a crucial assist from various elements of the federal government that have encouraged state AGs to take on an expanded role in national policymaking.

Federal Empowerment of State Litigation

Litigation and Cooperative Federalism in American Regulation

The federal social legislation enacted in the 1960s and 70s reflected concerns also being addressed in other democratic nations. The American approach to these issues differed from the approach taken in other industrialized democracies, however, reflecting the peculiar institutional arrangements existing in the United States.

One characteristic of much of the American social legislation was an emphasis on litigation as an enforcement mechanism, which both reflected and encouraged the broader trend towards adversarial legalism in America. Many of the new statutes empowered private attorneys general to bring lawsuits enforcing the terms of the statutes in court. Several of the early civil rights statutes incentivized private litigants to bring suit against alleged violators of the statutes.[14] The Clean Air Act of 1970 built upon this approach by including a citizen suit provision allowing "any person" to enforce the terms of the

statute, an approach Congress adopted in several subsequent environmental statutes as well.[15] As Sean Farhang has explained, this effort reflected broader tensions in the American system of separation of powers. Empowering private litigants to bring suit under federal statutes increased enforcement of federal law in a way that did not rely upon the actions of large federal bureaucracies. In a period when the political goals of the federal legislative and executive branches were frequently at odds, this approach helped ensure enforcement of federal law even when control of the federal bureaucracy (and thus federal enforcement) was in the hands of political opponents.[16]

The structure of much of the social legislation enacted during this period also reflected the fragmentation of the American political system in another crucial way. While federal legislation increased the authority of the federal government in areas including the environment and health care, it also carved out an important role for the states in policy implementation. Efforts to reduce pollution and to provide medical services for the poor were explicitly based upon a theory of cooperative federalism in which state and federal governments would work together to achieve common objectives.[17]

The emphasis on cooperative federalism meant that states would have to address objectives dictated by the federal government but in a way that afforded states flexibility about how to implement these objectives. The Clean Air Act, for example, specified a number of minimum standards for air pollution reductions, but allowed states to experiment with various regulatory approaches to reach these pollution reduction targets. Most federal environmental statutes have likewise adopted this cooperative model. The Medicaid system, enacted in 1965 with the goal of providing health services for the poor, is also built around a frame of cooperative federalism. The federal government and the states jointly finance Medicaid, but states retain the responsibility of administering the program. In areas in which Congress has adopted a cooperative federalism approach, states have built up regulatory bureaucracies alongside federal agencies.

The adoption of the cooperative federalism model for much of the new social regulation was a legislative choice and not an inevitability. European nations, facing the same demands for new

public policies as Americans, adopted more centralized bureaucratic means of addressing emerging quality-of-life problems.[18] Even within the United States, moreover, not every program was based upon the model of cooperative federalism. Medicare, for example, was enacted simultaneously with Medicaid but was designed to be fully funded and administered by the federal government. The cooperative federalism framework defining many different regulatory areas enacted during the 1960s and 70s was the product of legislative choice, and would dramatically influence the shape of American regulation in the contemporary era. This approach meant that states would play a prominent role in many American national regulatory programs, in terms of both direct regulation as well as enforcement.

The initial establishment of new statutory approach of cooperative federalism in the 1960s and 1970s opened the door to increased importance of state litigation in national policy, both by making litigation an important aspect of enforcement and by explicitly making state governments a partner in the running of various federal regulatory regimes. Since that time, particularly from the 1990s onward, the federal government has pushed that door further open by explicitly empowering state litigators to conduct litigation with a national focus. Congress, the courts, and the federal bureaucracy have all been facilitators of state litigation, and have continued to do so even as they have sought to reduce reliance on private litigation as a enforcement mechanism.

Congress as Facilitator of State Litigation

The choice to adopt a cooperative model of regulation led to many efforts to help coordinate state and federal regulation among agencies tasked with implementing new federal regulations. Moreover, this cooperative vision included enforcement as well as regulation. Both Congress and federal enforcers within DOJ and other key federal agencies saw state litigators as a potential partner to help enforce the complex array of new programs that had been enacted in the 1960s and 70s.

The first indication of this was contained in the citizen suit provisions in environmental law. Citizen suit provisions, beginning with

the Clean Air Act in 1970, allowed "any person [to] commence a civil action on his own behalf" against private parties alleged to have violated the law as well as the federal agency with regulatory authority in that area.[19] Although this provision did not focus on specifically empowering state litigation, these statutes defined "any person" to include states in addition to individuals and corporations.[20] This was different than earlier uses of citizen suit provisions in civil rights statutes that did not explicitly include states as parties entitled to bring suits under the law.

Beginning later in the 1970s, Congress began focusing more specifically on state litigation as a way to help enforce federal law. The first major federal provisions specifically empowering state litigators were in the area of antitrust enforcement. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 authorized state AGs to sue in federal court based on alleged antitrust violations of the Clayton Act.[21] Under the law, state AGs could recover damages on behalf of the consumers of their state allegedly caused by a civil violation of federal antitrust law.[22] Crucially, the change allowed state AGs to recover treble damages for violations established under this statute, granting the states the same incentive to pursue these actions that private parties already enjoyed under the Clayton Act.[23] The same Congress also aimed to bolster state enforcement efforts by providing direct grants to state litigators. The Crime Control Act of 1976 provided about $25 million in grants for state antitrust enforcement through the new State Antitrust Grant Program, which enabled twenty-five states to create antitrust divisions in the AGs' offices for the first time.[24]

Shortly after increasing state litigation capacity to assist with antitrust enforcement, Congress provided a significant boost to state litigation by empowering states to deal with emerging problems with the federal health care regime that had then been in place for about a decade. As enacted in 1965, the original Medicaid and Medicare programs had few controls in place to combat fraud.[25] Increasingly, this led to concerns about the existence of widespread abuse in the system, such as so-called "Medicaid mills" that allegedly provided improper health care to large numbers of poor patients in order to drive up the provider's reimbursements under the program. In

response, Congress enacted the Medicare-Medicaid Anti-Fraud and Abuse Amendments of 1977. This law granted the states considerable resources to establish Medicaid Fraud Control Units (MFCUs) consisting of special prosecutors specifically tasked with tackling fraud within the government-funded Medicaid system. After an initial three-year period in which the federal government covered 90% of the costs of the MFCUs, Congress decided to make the federal funding of these units permanent.

The grants provided by Congress proved crucial in building capacity in the office of the AG. According to an assistant attorney general in Virginia, the federal seed money contained in the Crime Control Act of 1976 represented "the most important shot in the arm that state antitrust enforcement has ever received."[26] The grants provided as part of the Medicare-Medicaid Anti-Fraud and Abuse Amendments enabled states to create specialized prosecution teams, nearly all housed within state AG offices, which conduct wide-ranging investigations of health care providers and pharmaceutical firms. Today, the federal government continues to fund the majority (typically 75%) of each state's MFCU. The grant amounts to the states under the MFCU program now total over $150 million, enabling these units to employ over 1,800 staff members collectively.[27]

The cooperative model of enforcement embraced by Congress in these early efforts to create a new partner in the enforcement of federal law expanded as Congress addressed additional quality-of-life issues. After enacting five provisions empowering state litigation in the late 1970s and early 1980s, Congress began explicitly expanding the jurisdiction of state AGs in new federal statutes, particularly in the area of consumer protection. In the 1990s, Congress enacted eleven new federal provisions specifically authorizing state AGs to enforce the provisions of federal law. This approach to cooperative enforcement of federal objectives has continued through the past decade, with an additional sixteen provisions expanding the enforcement authority of state litigators enacted in the 2000s. Table 1 displays several of the most important of these empowerment statutes.

[TABLE 1 HERE]

A subtle but significant aspect of these federal statutes is the way in which Congress has relied upon a changing view of whom state AGs are supposed to represent. As noted earlier, the office of the state AG had long been viewed as representing the interests of the state in legal matters. In other words, the client of the state AG was the state itself. Modern congressional statutes, beginning with the Hart-Scott-Rodino amendments and continuing through to today, reflect a different conception.

The expansion of AG authority in most of the statutes listed in Table 1 relied upon expansions of the common law power of parens patriae (literally, "parent of the nation"). This power traces its origins to medieval England, originally referring to the power and responsibility of the king, through his attorney general, to represent the interests of those unable to take care of themselves, such as minors, "lunatics," or others under legal disability.[28] Early American courts consistently held that this common law power had flowed to state attorneys general.[29] By the beginning of the 1900s, courts began interpreting parens patriae powers more expansively, and began to support the idea that state AGs had the authority to sue to vindicate the state's "sovereign" or "quasi-sovereign" interests in the name of all of its citizens.[30] By the post-New Deal era, the Supreme Court had applied parens patriae to antitrust enforcement, granting a state AG the ability to use this common law doctrine to sue to enjoin several allegedly anticompetitive corporate activities.[31]

However, later courts limited state AGs' use of parens patriae, particularly in lawsuits seeking damages in addition to injunctions.[32] Several courts expressed concern that states were trying to stretch the doctrine as to circumvent the limitation that parens patriae be invoked only when the states' own interests were directly implicated, as opposed to "merely litigating as a volunteer the personal claims of its citizens."[33] In other words, states could not act solely as representatives of a class of injured consumers because the state itself had not been injured. As several courts noted, Congress had already made it easier for classes of consumers to bring lawsuits through incentivizing private litigation, so the expansion of parens patriae was even less justified.[34]

This is when Congress began stepping in to expand state parens patriae authority beyond what federal courts were willing to do. As noted earlier, the Hart-Scott-Rodino Amendments explicitly reversed judicial limitations of parens patriae by enabling states to use this power to seek damages in addition to injunctions in the field of antitrust. As one of the House sponsors put it, "since the several States already have the right to sue as parens patriae to prevent or repair harm to a State's quasi-sovereign interests," the law should be amended to "allow the States to sue as parens patriae on behalf of their citizens or for injuries to their own general economies."[35] Under this approach of expanding parens patriae, therefore, state AGs could sue in a representative capacity even when the state they represented was not directly injured. Several groups outside Congress, including the American Bar Association, raised concerns early on that "damages to the general economy" and similar justifications for the state exercise of parens patriae was simply too remote to damages to the state.[36] Congress proceeded despite these concerns, however, and later built upon this innovation to grant state AGs the power to seek damages and injunctions in a variety of areas of consumer protection.

This expansion in state AGs' parens patriae is important because it enables state AGs to take on a wider range of litigation, much of it serving as a stand-in of sorts for mass class action litigation. Private class actions, in which a small number of representative plaintiffs bring suit on behalf of a large number of injured persons, became considerably more common with significant revisions of Rule 23 of the Federal Rules of Civil Procedure in 1966. One of the purposes of the revised Rule 23, which governs the modern American class action, was to even the playing field between injured consumers and powerful corporations.[37] By granting broader authority to state AGs to conduct representative litigation on the behalf of consumers in their state, Congress essentially empowered AGs to bring an equivalent to class action litigation in a number of areas of law. I will return to this point later in the paper.

Federal Courts as Facilitators of State Litigation

Congress has not been alone in expanding opportunities for state litigation. The federal judiciary has also been a source of capacity-building for state AGs. Through statutory interpretation of federal law, courts have expanded the ability of states to engage in litigation by loosening standing requirements faced by state litigators. This has been particularly true after Congress signaled its intentions to empower state litigators.

One of the ways courts empowered state litigation was by allowing states to sue under citizen suit provisions even when the statutes themselves did not mention states. As noted previously, many of the citizen suit provisions in federal law, particularly in environmental law, included states in the definition of the "any persons" entitled to enforce the provisions of the statutes. In several other areas, however, especially in federal civil rights statutes, the definition of "persons" entitled to sue did not explicitly include states. Nevertheless, federal courts have held that Congress "implicitly" intended for states to have enforcement powers under these statutes. With only a few exceptions, courts have generally allowed states to maintain parens patriae actions to enforce federal statutes, including Title VII of the Civil Rights Act, the Americans with Disabilities Act, and the Fair Housing Act.[38]

Also crucial has been the federal courts' general approach to state parens patriae powers, which has tracked the shift in thinking about the purposes of attorneys general also illustrated by Congress's expansion of this common law power. The courts have interpreted this doctrine in a way allowing states to bring litigation even when state interests were only loosely related to the alleged harms. In *Alfred L. Snapp & Son v. Puerto Rico* (1982), the leading modern Supreme Court case describing parens patriae, the Court referenced early twentieth century cases allowing states to sue to abate public nuisances but noted that a state's "*parens patriae* interests extend well beyond the prevention of such traditional public nuisances." While the Court referred to the traditional rule that states invoke parens patriae must allege more than simply injury to an identifiable group of individual residents, the Court stated that courts considering state

standing to sue must consider any "indirect effects of the [alleged] injury" to determine whether the state is representing the interests of a sufficiently substantial segment of its population as opposed to only a small number of individuals. The three justice concurrence in the case, written by Justice Brennan, put it more bluntly. "A State is no ordinary litigant. As a sovereign entity, a State is entitled to assess its needs, and decide which concerns of its citizens warrant its protection and intervention."[39]

This view of parens patriae was an important shift from earlier conceptions of what it meant for states to allege a sovereign or "quasi-sovereign" interest in litigation. While states still could not simply act as stand-ins for the interests of a few individuals, courts considerably lowered the bar that states had to pass in order to successfully allege that the state's interests were harmed by the defendant's conduct. This point was not lost on some of the justices, who saw this expansion as unwarranted. Justice Rehnquist's dissent in *Maryland v. Louisiana*, a case holding that states "may act as the representative of its citizens in original actions where the injury alleged affects the general population of a State in a substantial way," provides such a view. "The basic problem with the Court's opinion," Rehnquist wrote, "is that it articulates no limiting principles that would prevent this Court from being deluged by original actions brought by States simply in their role as consumers or on behalf of groups of their citizens as consumers."[40] Rehnquist understood that this view of parens patriae would potentially allow states to allege damage claims having only an attenuated connection to actual state interests.

This concern has reappeared in several policy contexts. Several states relied upon the parens patriae doctrine in the tobacco litigation in the late 1990s, for example, alleging that the tobacco industry committed violations of tort law that had a detrimental impact on the health and welfare of their states' residents. This, in turn, caused the state injury because of increased costs to the states' Medicaid budget to cover tobacco-related injuries.[41] This use of parens patriae raised concerns because it involved the states using an attenuated claim of state harm to essentially aggregate private tort claims.[42] The validity of this claim remained untested since the states' litigation was settled before most of the state suits were resolved in court, though one

federal court appeared to view this use of parens patriae favorably.[43] Since the tobacco litigation, states have employed broad uses of parens patriae, particularly in lawsuits against the pharmaceutical industry. State AGs have found much success in these litigation efforts, which, much like the tobacco litigation, typically ends in settlements with the underlying claims remaining untested in court.[44]

It is perhaps not surprising that defendant companies have chosen to settle rather than fight expansive state assertions of their parens patriae powers, particularly since the federal courts have continued to assist this expansion. The Supreme Court's 2007 decision in *Massachusetts v. EPA*, recognized as one of the Court's most important in the area of environmental law, was also crucially important for its characterization of state standing. The case involved several state AGs' challenge to the Bush Administration EPA's decision not to regulate greenhouse gases under the Clean Air Act. The states argued that the EPA's decision would contribute to climate change, which in turn would "have serious adverse effects on human health and the environment." The states claimed that their quasi-sovereign interests were involved because climate change – allegedly made more likely by the EPA's refusal to regulate greenhouse gases – would affect environmental conditions within the states, such as rising sea levels causing damage to coastal property. Standing was a key aspect of the case, particularly because the Court had long demanded that plaintiffs demonstrate a "concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury."[45] The lower court rejected the states' connection between EPA action and alleged harms as too speculative, but the Supreme Court sided with the states.

Echoing Justice Brennan's earlier characterization of state litigation, Justice Stevens' opinion held that "States are not normal litigants for the purposes of invoking federal jurisdiction."[46] Instead, the majority held, states act under the ancient common law principle of parens patriae to protect "the well being of [the] populace."[47] According to the majority, this use of parens patriae was particularly justified here because the states have a special interest when the federal government fails to protect them. For that reason, they should

be treated differently than private litigants. Although the Court went on to discuss how Massachusetts met the standing requirements applicable to all plaintiffs, it did so with the understanding that the state was to be afforded what they called "special solicitude" in this analysis.[48]

The importance of this "special solicitude" standard was noted in Chief Justice Roberts' dissenting opinion, which argued that the decision "recalls the previous high-water mark of diluted standing requirements."[49] He noted that Massachusetts and the other states were trying to act as a stand-in for the alleged interests of states' citizens against the federal government, under the guise of the state's "quasi-sovereign interests." The problem with this, Roberts argued, was that it conflicted with the long-standing doctrine that it is "the United States, not the State, [which] represents the citizens as parens patriae in their relations to the federal government."[50] What the new rule did, according to Roberts, is treat public and private litigants differently when it comes to standing.

It is still unclear just how broadly future courts will construe the "special solicitude" rule, though states have continued alleging broad conceptions of state harm as a way to gain access to the courts. This was the case in the state-led lawsuits against the Affordable Care Act (ACA) challenging the constitutionality of the individual mandate provisions in the law, among other provisions. Much like they have done in other policy contexts, the state AGs' pursued what was essentially an aggregation of individual claims by tying their claims to alleged sovereign interests. In the context of the ACA litigation, the states claimed that the individual mandate violated their sovereign interests in part because the increased enrollment in Medicaid spurred by the individual mandate would cost the states millions of dollars in additional Medicaid expenditures.[51] This specific claim was not addressed by any of the federal courts that ruled upon state standing to challenge the individual mandate because those courts relied upon other justifications for state standing offered by the states.[52] When it upheld the ACA in *NFIB v. Sebelius*, the Supreme Court did not address the issue of state standing at all.[53]

Nevertheless, the broader lesson in recent state litigation, including the ACA lawsuits, is that states have latched upon congressional and federal court expansions of state standing to increasingly rely upon attenuated claims of state harm to bring lawsuits representing the aggregation of individual claims. In this sense, the client of the state AGs has been subtly transformed. While the AGs formally maintain their role of representing the interests of their states, they have in practice increasingly been the public face of the interests of consumers and other individuals. This development has been encouraged by Congress and the federal courts, both of which have engaged in a back-and-forth exchange ratcheting up state enforcement capabilities. When the courts have limited the ability of states to being parens patriae actions, Congress expanded the doctrine through legislation. The courts then followed Congress's lead by expanding parens patriae powers further. When Congress has been silent on the ability of states to sue in certain contexts, such as enforcement of civil rights statutes, the courts have stepped in to fill the gap in a way favorable to the states.

Federal Agencies as Facilitators of State Litigation

Even as states were gaining additional legal capacity to enforce various areas of policy, federal regulatory agencies were also tasked with carrying out the same federal objectives. While this overlap can and has created tensions, federal regulatory agencies have repeatedly expressed the importance of state litigation in policy implementation. Much like Congress and the courts, federal agencies have engaged in several activities that have further empowered state litigation.

First, key federal agencies have frequently supported congressional expansions of state authority to enforce federal law. In the congressional hearings concerning the Heart-Scott-Rodino Antitrust Improvement Act, for example, the Department of Justice, which shares federal antitrust enforcement duties with the Federal Trade Commission, testified in favor of expanded state antitrust enforcement.[54] Likewise, the federal agencies with authority to pursue alleged Medicaid fraud have supported expansions of state enforcement in this area. Federal agencies with jurisdiction over

consumer protection matters have also supported concurrent state enforcement.[55]

Federal agencies have also often tried to improve relationships with state litigators even when state AGs have expressed their intentions to pursue stricter enforcement approaches than federal regulators. Indeed, when tensions between state and federal enforcement have occurred on matters of national importance, the general response has been to increase enforcement capabilities through cooperation, rather than attempt to preempt or displace the states. Several AGs disagreed with the Reagan Administration's approach to consumer protection and antitrust enforcement, for example, believing that the Reagan Administration's FTC was much too lax in initiating enforcement actions. Throughout the 1980s, state AGs brought litigation aimed at filling the alleged regulatory gap.[56] Nevertheless, the FTC expressed a desire for greater cooperation in enforcement and helped the implementation of new working groups aimed at stimulating dialogue between both sets of enforcers and pooling enforcement resources.[57]

Through these avenues of cooperation, federal agencies serve to bolster state litigation capacity. For example, since 1989 federal and state authorities have promoted antitrust enforcement collaboration through the Executive Working Group for Antitrust. While one of the group's main purposes is to avoid duplication of enforcement, federal agencies have bolstered state enforcement by providing economists and additional attorneys to the states through the group, as well as share information and legal documents otherwise costly to the states.[58] The FTC has also set up databases of consumer complaints that they have made available to state AGs through another working group concerning consumer protection issues, offering them another "free" source of information on which to rely for potential litigation. Indeed, this FTC database sometimes results in litigation pursued by state AGs independently of federal enforcers.[59] Federal agencies have also offered various seminars and meetings to train state enforcement personnel on issues like antitrust and health care, providing additional resources for state AG enforcement.[60]

Federal agencies have also placed an emphasis on cooperative enforcement actions that have helped both sets of enforcers to pool their resources and have also served to make state AGs a more important part of the enforcement of federal regulatory priorities. This federal-state partnership occurs across many areas of enforcement, with state AGs often working in conjunction with federal regulators to prosecute environmental, consumer protection, antitrust, and health care cases alike. As a FTC official described their relationship with state enforcers in the late 1990s, "the states have become our most valuable law enforcement partners….[g]iven our smaller resources, we all have to find ways to be more productive."[61] More recently, the Obama Administration has placed additional emphasis on including states as partners in the enforcement of federal law. This has included the establishment of new federal-state "strike teams" targeting alleged violations by national pharmaceutical companies and financial firms.[62]

Much of the collaboration between the states and federal agencies with concurrent regulatory jurisdiction has been encouraged by Congress. In the Federal Trade Commission Act Amendments of 1994, for example, Congress inserted a new provision requiring the FTC to consult with state AGs to determine how the agency might best share enforcement responsibilities with them.[63] More recently, the Financial Crisis Inquiry Commission established as part of the Fraud Enforcement and Recovery Act of 2009 authorized the Commission to refer information about potential violations of federal law to state AGs.64

This congressional support for closer ties between federal and state enforcers is hardly surprising, particularly since the so much of the federal regulatory structure since the 1960s has been based upon a framework of cooperative federalism. The commitment to concurrent jurisdiction in the enforcement of federal law has continued as new regulatory issues have arised, including in the areas of health care and financial fraud. This commitment has also aligned well with the general congressional goals in empowering state litigation, to which I now turn.

Explaining the Empowerment of State Litigation

Initial congressional decisions to empower state litigators occurred at a time in which the federal government had already enacted a great deal of social legislation and was considering various ways of improving enforcement of these new regulatory regimes. It also followed congressional encouragement of private lawsuits aimed at assisting the enforcement of federal law, which included the enactment of citizen suit provisions of the type prevalent in civil rights and environmental statutes, as well as procedural changes making class action lawsuits easier to bring. The impetus for the empowerment of state litigators by various federal political institutions in part tracks the building of the private litigation state. The development of state litigation power has taken its own path over time, however, as some of the reasons for why federal institutions have fostered and sustained this particular form of litigation have followed a different dynamic.

Legislative-Executive Conflict

Congress's decision to encourage private litigation as a means of enforcing federal law was in part a reflection of broader conflicts between the legislative and executive branches. Private litigation was a means to carry out enforcement at a time when distrust of the bureaucracy was high, both from Democrats concerned about agencies under-regulation and Republicans worried about over-regulation.65 A similar dynamic has been a part of the empowerment of state litigation, which Congress has viewed as ensuring that federal law would be enforced in the face of alleged federal agency inaction. During the debates over the Nutrition Labeling and Education Act, which was the first in a new line of statutes beginning in 1990 to empower state litigation, members of Congress repeatedly referred to the FDA's alleged failures in food regulation as a reason for the empowering an alternative set of enforcers. That state AGs had been particularly active in bringing lawsuits against food manufacturers during the Reagan and Bush Administrations gave members of Congress a stronger reason to believe that state AGs could fill this role.[66]

While Congress has viewed state AGs as an ally against recalcitrant federal agencies, federal agencies have also viewed state AGs as an ally against Congress or future administrations. During the 1990s, for example, several state AGs and the Clinton Administration had become frustrated at the lack of congressional action on gun control, particularly after the Columbine school shootings in 1999. That same year, the Department of Housing and Urban Development announced a major lawsuit against gun manufacturers, an action joined by several state AGs. This litigation sought settlements with the gun industry that would create a new code of conduct in the design and distributions of guns, an effort that resulted in a (albeit temporary) settlement with the largest manufacturer of handguns in the industry.[67] Though members of the gun industry were the defendants in this joint federal-state litigation, the true target were the members of Congress who had failed to enact a similar code of conduct through legislative channels.[68]

Federal agencies have also viewed state AGs as a way to carry over regulatory priorities into a new administration. This occurred near the end of the Clinton Administration when the EPA and several state AGs teamed together to pursue an innovative interpretation of the New Source Review (NSR) provisions of the Clean Air Act. The NSR program requires that utilities and other industrial pollution sources planning new construction first obtain a permit specifying what construction is allowed and what emissions limits must be met.[69] Since the program's enactment in 1977, both the EPA and industry operated under the assumption that the NSR permitting process applied only to major modifications and not routine maintenance and repair. In late 1999, several state AGs including New York's Eliot Spitzer used the citizen suit provision of the Clean Air Act as the basis for a lawsuit against several of the nation's largest electric utilities, a lawsuit the Clinton Administration later joined. The lawsuit alleged that the utilities had violated NSR by failing to obtain pre-construction permits, despite the fact that the type of construction involved had long been considered "routine maintenance."[70]

At its heart, this litigation involved a dispute over the proper statutory interpretation of the Clean Air Act. It also represented an opportunity for the Clinton Administration, along with the state AGs

who had initiated the action, to maintain a stricter regulatory approach to clean air stick even after a Republican administration took office. In December 2000, once it had become clear that George W. Bush would be the next president, the Clinton Administration and the states entered a series of settlement agreements with several large utilities. These settlements largely reflected the EPA's new interpretation of the NSR process, and required the utilities to install new pollution-reduction equipment in order to keep operating.[71] Through these midnight regulatory settlements, the Clinton Administration's interpretation of NSR rules were insulated from reversal by the incoming Bush Administration. As Clinton-era EPA Administrator Carol Browner later recalled, she was "constantly looking for ways [to make sure] that the things I cared about would continue even if there was a Republican administration. Having Eliot Spitzer in the mix was one way to do that."[72]

Creating Alternatives to Class Actions

The partnership between state AGs and sympathetic federal policymakers thus in some ways mirrored the dynamics of private litigation, particularly the ways in which state litigation could be used to achieve enforcement of federal law even when the federal bureaucracy was in the hands of political opponents. Given this justification, it is perhaps clearer why political liberals would favor the empowerment of state litigation. Much of the growth of state litigation has occurred in an era of divided government in which either Congress or the executive bureaucracy has been controlled by conservatives less willing to extend the regulatory reach of government. State litigation has been a way to bypass either Congress or the federal bureaucracy on the way to stronger protections against alleged corporate misconduct.

Indeed, the growth of state enforcement authority appeared to be a way to achieve a public version of the class action, which was in part justified on evening the playing field between individuals and the powerful corporations that allegedly injured them. As Congress and the federal courts helped to expand the states' parens patriae authority to encourage state AGs to represent the interests of groups of *individuals* rather than the state itself, state AG litigation has

increasingly resembled private class action litigation. Congress itself recognized this possibility, referring to expansions in state AG capacity as "providing the consumer an advocate in the enforcement process."[73] This view of state AG as a consumer advocate expanded along with the use of provisions specifically authorizing expanded state use of its parens patriae authority in a variety of consumer protection contexts beginning in the 1990s.

Further, state AG enforcement could be employed as a way to circumvent some of the problems with private class actions. The connection between private class actions and state AG enforcement was repeatedly made during the debates over the Hart-Scott-Rodino Antitrust Improvements Act. Several members of Congress specifically noted that fewer antitrust private class actions had been filed under Rule 23 than expected, which made it difficult to ensure that small-scale violations of the antitrust laws were being penalized. The disappointing results of Rule 23 class actions had occurred in part "because of restrictive judicial interpretations of…Rule 23 and practical problems in the proof of individual consumers' damages" under the antitrust statutes.[74] While some suggestion was made during congressional testimony to simply allow state AGs to sue under Rule 23,[75] Congress instead opted to expand parens patriae. This meant that state AGs were not subject to the requirements of Rule 23 that private attorneys had to follow, including notice requirements and separate proof of individual damages.[76]

Conservatives and Empowerment of State Litigation

However, one curious aspect of state litigation has been the consistent bipartisan support for the empowerment of state enforcement. This is particularly interesting because the empowerment of state litigation has occurred contemporaneously with growing polarization elsewhere in the politics of litigation. The claim that American society is overly litigious has become a common refrain, and many policymakers have sought to reduce private litigation through polices such as tort reform. The debate about the proper role of litigation has become increasingly polarized, with some (particularly Republicans) tending to characterize private litigation as driven by "out of control plaintiffs' attorneys" while others (particularly Democrats)

argue that private litigation is central to achieving justice for injured individuals.

Given the increasingly national regulatory role state AGs have played through their litigation, one might expect that the public litigation state would be folded in to the broader debates in the politics of litigation. Nevertheless, though not completely uncontroversial, state litigation has generated a far more subdued discussion in Congress than that surrounding private litigation. Many of the empowerment provisions enacted by Congress were accompanied by little or no legislative history at all in contrast to other substantive aspects of the bills, suggesting little controversy over these provisions. When state enforcement was mentioned, it typically garnered praise from both Democratic and Republican members.

This is explained in part because justifications for the empowerment of state litigation are compatible with the goals of political conservatives as well as political liberals. Much of the social legislation of the 1960s and 1970s was a victory for liberals seeking to extend the federal regulatory state to address emerging problems. Nevertheless, that so many of these new programs were based upon a cooperative federalism was a reflection of the continuing vitality of American federalism. Conservatives came to embrace the basic premises of cooperative federalism as a way to simultaneously avoid rejecting the (popular) general goals of the new social legislation while preventing further nationalization of regulatory policy. President Nixon's "New Federalism" sought to bring states back in to the management of government programs, in part as a way to loosen Democratic Party dominance of the national bureaucracy. President Reagan took this a step further, arguing for a shift of governmental functions to the states because "the Federal Government is overloaded...having assumed more responsibilities than it can properly manage."[77] By the 1990s, conservative Republicans in particular had seized the mantle of state's rights. House Speaker Newt Gingrich articulated an agenda of "devolution" of governmental functions to the states, arguing, "We have to decentralize power out of Washington D.C., and disperse power."[78] Providing greater regulatory and enforcement authority to the states was a way to accomplish a decentralized enforcement regime.

Further, once the cooperative federalism system was in place – a system enacted in part because of a bipartisan commitment to maintaining a strong role for states in the federal system – it seemed logical and politically neutral to try to find ways to make cooperative enforcement more efficient. This justification appears often in the congressional history surrounding state empowerment provisions. Key to increasing state antitrust capacity in the early empowerment statutes was "the promotion of cooperation in antitrust enforcement between the States and the federal government."[79] Congress required the federal DOJ to share investigative files with state AGs concerning antitrust enforcement under the guise of ensuring that the "Federal Government cooperate fully with State antitrust enforcers." Likewise, the increase in state investigative authority achieved with the Medicare-Medicaid Anti-Fraud and Abuse Amendments was aimed at encouraging more cooperation between state and federal enforcement personnel.[80]

As with private litigation, state litigation also benefited as a way to achieve a stable enforcement regime at relatively little cost to the federal government. Members of Congress advocating the empowerment provisions enacted in the 1970s noted that these provisions "strongly [support] the development of 'in house' State antitrust capabilities" that would eventually require no expenditure of additional Federal funds.[81] Likewise, concerned that states did not have adequate incentives to fight fraud in the government health care system, members of Congress hoped that providing additional investigative authority to states would "enable States to establish effective investigative entities and expand existing efforts."[82] The testimony surrounding the Nutrition Labeling and Education Act noted that the FDA itself admitted it did not have the resources available to fully enforce federal statutes and that "in an era of dwindling Federal resources, the Federal Government should encourage as much participation as possible from State enforcement authorities."[83]

Particularly for conservatives, empowering states as partners in the oversight of federal regulatory programs can be a way to claim that they are doing what they can to tackle "waste, fraud, and abuse" in burgeoning programs run in part by the federal government. The

Deficit Reduction Act of 2005 ("DRA"), enacted on a near party-line vote by a Republican Congress and signed into law by George W. Bush, illustrates the continuing vitality of the "fighting fraud" rationale for empowering state litigation. The DRA made several changes to major government programs with the purpose of reducing federal outlays, including a number of changes to Medicaid. One of these changes provided significantly more incentive for states to bring lawsuits alleging fraud in the Medicaid system.[84]

As noted earlier, the largest growth area in contemporary multistate litigation has been lawsuits alleging that health care providers and pharmaceutical companies engaged in Medicaid fraud. Most of this litigation is predicated upon the False Claims Act, which prohibits any entity from knowingly presenting fraudulent claims for government payment. When an investigation results in a multistate settlement, which is by far the most common result, the proceeds of the settlement are distributed both to the states and the federal government due to the joint federal-state nature of the Medicaid program. The DRA incentivized state involvement in Medicaid fraud litigation by providing financial incentives for states to enact and strengthen state equivalents to the federal False Claims Act. Specifically, states enacting qualified state-level False Claims Acts would recover a greater share of Medicaid recoveries in FCA settlements, thereby keeping a portion of the settlements that would otherwise be due to the federal government. To date, thirty states have now enacted state-level FCAs.[85]

Republicans praised these provisions as a method of "encouraging States to aggressively pursue Medicaid fraud" helping U.S. taxpayers "to recover the billions of dollars stolen through fraud every year."[86] As Senator John McCain put it, greater state enforcement would be a way to attack "wasteful and unnecessary" government spending.[87] The characterization of these provisions as "fighting fraud" helped insulate the policy from industry concerns that they would result in "unprecedented, overzealous investigations by regulators and law enforcement officials."[88] The rhetoric also aligned well with conservative critics of the federal government who have a political incentive to dramatize areas in which taxpayer money is allegedly being wasted.

Distinctions between Private and State Litigators

A further impetus for bipartisan support for the empowerment of state litigation is that the state AGs are themselves political actors with partisan affiliations. It is little surprise that one of the foremost proponents of increased authority of state AGs are the state AGs themselves. The attempt to achieve greater enforcement authority enjoys overwhelming support among the state AGs, and bipartisan groups of AGs have frequently sent letters to Congress defending expansions of state enforcement authority and urging Congress not to preempt the states.[89] Because the state AGs' push for greater empowerment has been overwhelmingly bipartisan, it can help convince legislators on both sides of the aisle that state empowerment will not benefit one party at the expense of the other. This dynamic differs from than debates surrounding private litigation, particularly as private litigation is increasingly viewed as empowering plaintiffs' lawyers and public interest groups, both of whom have closer ties to the Democratic Party.

This is not to say that the role of state AGs has remained wholly uncontroversial. Some concern about the potential for ambitious state AGs using litigation overzealously appeared in the legislative history concerning expanding state antitrust enforcement.[90] The role of state AGs became more controversial in the late 1990s, particularly after the tobacco settlement and a major state antitrust campaign against Microsoft.[91] Criticism of state AGs as acting with political motives has been most prominent when the AGs' litigation target is the federal government itself, as with the recent lawsuits against the Affordable Care Act orchestrated by several state AGs. A similar dynamic was seen from the other side of the political spectrum when several state AGs sued the Bush Administration on a variety of different fronts.

Whether or not the empowerment of state litigation has generated more controversy in recent years, however, Congress has continued enacting state empowerment statutes. The most recent have included some of the broadest grants of litigation authority to date. While some of the federal statutes in the 1990s were targeted towards certain relatively small-scale problems, such as telemarketing,

abortion clinics, and boxing reform, recent legislation has granting authority to state AGs to enforce a wider array of consumer product safety laws and financial regulations. As noted above, Republican state AGs have generally been as supportive of this development as Democratic AGs.

What is more, Congress and the federal courts remain supportive of *state* litigation even when these institutions have tried to reduce the quantity of *private* litigation. In 2005, President Bush signed the Class Action Fairness Act (CAFA) into law. The purpose of this law was to target a number of abuses that allegedly "harmed class members with legitimate claims," and "undermined public respect for our judicial system."[92] The act aimed to curb this "abusive" private litigation in a number of ways, including discouraging forum shopping on the part of plaintiff attorneys by forcing more class action litigation into federal court and curtailing "coupon settlements" in which private class counsel are awarded significant fees but consumers receive only coupons of limited value.

While the main purpose of CAFA was to reduce private litigation, it contained a provision bolstering state litigation capacity. Before private class-action counsel can settle a case, CAFA directed private parties to notify "the appropriate state or federal officials to allow them to evaluate the fairness to all class members of a proposed class action settlement," which includes providing these "appropriate state officials" copies of the complaint, all materials filed with the complaint, and the settlement documents themselves.[93] In this context, the "appropriate state officials" almost always refers to the state attorneys general. The purpose of this provision was to ensure that state AGs could step in and stop "abusive" private settlements benefiting lawyers rather than consumers.[94] What it also did, however, was grant state AGs additional ability to comment on proposed class actions and, most importantly, gain "easy access to information that may be used to launch an independent investigation into the defendants for consumer protection, fraud, Medicaid, criminal, antitrust, or other violations."[95] The provision could thus be used as a sort of alarm system for state AGs. Indeed, this single provision was the main reason why many state AGs came around to support CAFA in Congress.[96]

The legislative history of this provision also suggests that Congress was also careful to preserve the existing capacity of state AGs. During the Senate debate on the bill, a number of Senators raised concerns that the bill would apply to litigation by state AGs in addition to private litigants. While an amendment explicitly exempting state AGs from the class action requirements of the bill was defeated, it was clear that the bill's drafters did not intend to reduce state AGs' powers. This understanding was apparently bipartisan. For example, Senator John Cornyn (R-TX) noted that "it is very plain that no power of the State attorney general is impeded by virtue of [the Act]" and Senator Ken Salazar (D-CO) stated "that we all understand that it is going to have no impact on the powers and duties of the attorneys general."[97] Senator Orrin Hatch (R-UT) further clarified that the target of the bill was private litigation and not state litigation, remarking that is was "perfectly clear that the bill applies only to class actions, and not parens patriae actions."[98]

A similar dynamic has occurred with federal courts. Even as the courts have moved to limit private litigation, they have taken a different approach to public litigation led by state AGs. A pair of significant Supreme Court cases both decided in 2011, *Wal-Mart v. Dukes* and *AT&T Mobility v. Concepcion*, have effectively made maintaining class action lawsuits more difficult through restrictive interpretations of Rule 23 and the preemption of state law.[99] However, the Court has been more solicitous of the states' ability to maintain litigation campaigns. One significant example was *Massachusetts v. EPA*, discussed earlier, which effectively lowered standing requirements for states. Another was *Cuomo v. Clearing House Association* (2009) in which the Court, in an opinion written by Justice Scalia, held that federal law did not preempt the ability of states to enforce fair lending laws against national banks.[100] This holding, which was soon after codified into law by Congress in the Dodd-Frank Wall Street Reform and Consumer Protection Act, opened the door for states to take a lead role in investigating banks for their role in the financial crisis. Federal courts have also interpreted the Class Action Fairness Act as not applying to state litigation, thus allowing state AGs a broader choice of venue than granted to private class actions.[101]

Conclusion

One of the chief reasons for state empowerment of state litigation was to allow greater enforcement of federal law, consistent with the theory of cooperative federalism. The assumption has been that state litigation is crucial to the operation of contemporary federal regulatory programs, and federal political institutions have responded by expanding state capacity to sue. The federal government has achieved this objective to a degree, as empowering state governments has enabled additional resources to carry out federal objectives.

Nevertheless, this empowerment has had effects beyond improving cooperative federal-state relationships. By inviting state litigators to be a part of the federal regulatory scheme, they have encouraged state attorneys general to set their sights higher and become national political players through litigation campaigns. This development has been particularly important since these public actors are explicit about their litigation having regulatory goals, which differs from much private litigation brought primarily for monetary reward. Several of these regulatory goals have clashed with those of the federal government. In many cases, state litigation has had the effect of expanding public regulation outward by acting as a way to control corporate activities. State AGs have also become more aggressive in using multistate litigation and their emerging place within the federal regulatory regime to bring lawsuits against the federal government directly, claiming that the federal government has acted in a way that harms the interests of the states' citizens.

The empowerment of state litigation is thus beset with a central irony. As federal policymakers from both parties have increasingly viewed state litigation as a way of accomplishing cooperative goals, state AGs have increasingly used their empowered status to challenge the priorities of federal policymakers. Rather than helping to create a stable cooperative regime, state litigation has frequently destabilized it. At the same time members of Congress were expressing more concern about private litigation, it invited state AGs to increasingly bring lawsuits resembling private class-action litigation.

The role of state AGs has garnered more controversy recently, but the empowerment of state litigation continues apace due in part because past empowerment has created various policy feedback effects helping to entrench and expand state litigation. The congressional invitation to state AGs to be a partner in the enforcement of federal law set a new baseline assumption that state litigators ought to play an important role in national politics. This combined with Congress's provision of additional resources for states to build up their litigation capacity, allowing states greater ability to conduct litigation independently, especially complex and expensive multistate litigation. This new national role for state litigators was made more tenable by the presence of a federal regulatory structure that, due to choices congressional choices made in the 1960s and 70s, was based upon a model of cooperative federalism. When this relationship began producing federal-state conflict rather than cooperation, both Congress and federal regulatory agencies responded by attempting to promote greater coordination between federal and state enforcers – and in doing so, encouraged state litigation further.

Additionally, as states became an independent force in national politics, they were better able to advocate for the maintenance and expansion of their authority. State AGs have testified frequently in Congress advocating for state ability to enforce new federal laws and discouraging federal preemption of state regulatory authority. This effort has been overwhelmingly bipartisan, which has helped to differentiate "neutral" state litigation with what appears to be increasingly "politicized" private litigation. Because state AGs do not have closer ties to one party than another – unlike plaintiffs' lawyers – it has helped shield state litigation from the otherwise increasingly polarized debate surrounding the politics of litigation.

The empowerment of state litigation also contains some broader lessons about contemporary American politics. For one, it illustrates how institutions established with one purpose can pursue results quite at odds with the priorities of those who established the institution in the first place. Scholars studying institutional change have noted that one of the ways in which institutions change is through "conversion," or when the institution adopts "new goals, functions, or purposes."[102] In the case of state litigation, federal policymakers initially viewed

state AGs as collaborators in the enforcement of social legislation crafted around the model of cooperative federalism. Empowerment of state AGs thus would serve the purpose of providing additional enforcement of federal law at little cost to the federal government and without adding to the size of the federal bureaucracy. The functions of state AGs partially changed, however, to include forming alliances with some members of Congress and agencies in broader disputes within the system of separation of powers. The state AGs also have used their position to challenge the priorities of the federal government itself, giving state litigation a function quite different than originally intended.

The emergence of state litigators as nationally important political actors is closely tied to the cooperative federalism structure of much of the American regulatory state. This helps illustrate that the vertical distribution of power in the American separation of powers system does not involve a zero-sum battle between the federal and state governments. As Stephen Gardbaum has argued, efforts to increase the regulatory power of the federal government during the New Deal period was accompanied by an "unshackling of the states" to regulate areas of social and economic life that they had previously been unable to regulate.[103] Likewise, the enactment of significant new federal regulatory structures addressing post-materialist issues since the 1960s has been accompanied by an invitation to the states to help enforce this new regime, an invitation that the states have happily accepted. This expansion of the federal regulatory state has thus also granted additional entrepreneurial opportunities for state-level actors to influence the shape of national policy.

Further, particularly as state litigators have more of an impact on national policy, it is important to emphasize that examinations of American state capacity demands more than the traditional focus on centralized federal bureaucracies. Federal policymakers in the United States have been quite creative in the ways they have increased the reach of the state beyond classic Weberian models of implementing government policy. Part of the innovation has been to essentially privatize enforcement by incentivizing the role of private actors in enforcing federal law. Another part of the story has been the shift of

regulatory enforcement to different venues in the separation of powers system, including the states and the courts.

The role of state litigation in shaping, constraining, and extending the national regulatory state shows no signs of abating. This expansion of state litigation has allowed state AGs to become significant national political institutions in their own right. Understanding this new development in the politics of litigation will become more important as state litigation, encouraged on by federal policymakers, continues to play an increasingly important role in national policy.

Table 1.
Selected Federal Statutes Empowering State Litigation

Year Enacted	Federal Law	Description
1976	Hart-Scott-Rodino Antitrust Improvements Act	Expands state enforcement of federal antitrust law
1976	Crime Control Act	Provides grants for state antitrust enforcement
1977	Medicare-Medicaid Anti-Fraud and Abuse Amendments	Provides grants for state health care fraud enforcement
1983	Housing and Urban-Rural Recovery Act of 1983	Authorizes state AG enforcement of provisions of the Real Estate Settlement Procedures Act of 1974
1990	Nutrition Labeling and Education Act	Provides for state enforcement of new food labeling laws
1990	Consumer Product Safety Improvement Act	Authorizes state AG enforcement of the Federal Hazardous Substances Act of 1960 and the Flammable Fabrics Act of 1953
1994	Freedom of Access to Clinic Entrances Act	Authorizes state parens patriae suits to enforce new abortion clinic access laws
1998	Children's Online Privacy Protection Act	Authorizes state parens patriae suits to enforce new Internet child safety laws
2003	Controlling the Assault of Non-Solicited Pornography and Marketing Act	Authorizes state parens patriae suits to enforce new email communication regulations
2005	Deficit Reduction Act	Provides financial incentives for states adopting state-level False Claims Acts
2005	Class Action Fairness Act	Provides state AGs greater oversight of and information concerning private class action litigation
2005	Bankruptcy Abuse Protection Consumer Protection Act	Provides state enforcement of provisions of the bankruptcy code concerning debt relief agencies
2007	Energy Independence and Security Act	Provides state enforcement of new light bulb efficiency standards
2008	Consumer Product Safety Improvement Act	Authorizes state AG enforcement of federal product safety laws
2009	American Recovery and Reinvestment Act	Authorizes state parens patriae enforcement of the Health Insurance Portability and Accountability Act
2009	Omnibus Appropriations Act	Authorizes state parens patriae enforcement of the Truth in Lending Act
2009	Credit Card Accountability, Responsibility, and Disclosure Act	Provides additional state parens patriae enforcement of federal mortgage laws
2010	Dodd-Frank Wall Street Reform and Consumer Protection Act	Authorizes state parens patriae enforcement of federal financial consumer protection law

Notes

[1] Sean Farhang, "The Political Development of Job Discrimination Litigation, 1963-1976," *Studies in American Political Development* 23 (2009): 23-60; Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the U.S.* (Princeton, N.J.: Princeton University Press, 2010).

[2] Martha Derthick, *Up in Smoke: From Legislation to Litigation in Tobacco Politics* (Washington D.C.: CQ Press, 2005).

[3] Nelson D. Schwartz and Shalila Dewan, " States Negotiate $26 Billion Agreement for Homeowners," *New York Times*, Feb. 8, 2012; *Florida v. U.S. Department of Health and Human Services*, 648 F.3d 1235 (11th Cir. 2011).

[4] While this characterized most state litigation during most of American history, state litigation did sometimes have broader national effects, particularly litigation against the trusts in the 1890s. See Paul Nolette, "Litigating the 'Public Interest' in the Gilded Age: Common Law Business Litigation by Nineteenth-Century State Attorneys General," *Polity* 44 (2012): 373-399.

[5] Cornell W. Clayton and Jack McGuire, "State Litigation Strategies and Policymaking in the U.S. Supreme Court," *Kansas Journal of Law and Public Policy* 11 (2001), 18.

[6] *Massachusetts v. EPA*, 549 U.S. 497 (2007).

[7] See, for example, Matthew Tresaugue, "Texas Challenges EPA's Global Warming Findings," *Houston Chronicle*, February 17, 2010; *Florida v. HHS*; *Virginia v. Sebelius*, 702 F. Supp. 2d 598 (E.D.V.A. August 2, 2010).

[8] Derthick, *Up in Smoke*.

[9] Michael S. Greve, "Compacts, Cartels, and Congressional Consent," *Missouri Law Review* 68 (Spring 2003).

[10] See, for example, "Chubb Agrees to $17 Million Settlement, Ban on Contingent Commissions," *BestWire*, December 21, 2006.

[11] See, for example, Office of the New York Attorney General, "Attorney General Cuomo Announces Landmark Settlement With Eli Lilly to End Deceptive Advertising Practices and Off-Label Promotion of Antipsychotic Drug Zyprexa," October 7, 2008, accessed August 10, 2012, http://www.ag.ny.gov/press-release/attorney-generalcuomo-announces-landmark-settlement-eli-lilly-end-deceptive.

[12] Jeffrey M. Berry, *The New Liberalism: The Rising Power of Citizen Groups* (Washington, DC: Brookings Institution Press, 1999).

[13] Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge, MA: Harvard University Press, 2001).

[14] See, for example, Fair Housing Act, 42 U.S.C. §§ 3613.

[15] See, for example, Clean Water Act, 33 U.S.C. § 1365 (2006); Safe Drinking Water Act, 42 U.S.C. §§ 300f(12), 300j-8 (2006).

[16] Farhang, *The Litigation State*, at 216.

[17] Daniel J. Elazar, *American Federalism: A View From the States, 3rd ed.* (New York: Harper & Row Publishers, 1984), 2.

[18] Kagan, *Adversarial Legalism*.

[19] Clean Air Act §304(a)(1)-(2); 42 U.S.C. §7604(a)(1)-(2).

[20] Clean Air Act §302; 42 U.S.C. §7602.

[21] *Hart-Scott-Rodino Antitrust Improvements Act of 1976*, P.L. 94-435, U.S. Stat. 90 (1976): 1390.

[22] Specifically, the statute allows state AGs to bring actions on behalf of "natural persons" residing in their states.

[23] Section 4 of the Clayton Act, codified at 15 U.S.C. § 15.

[24] P. L. 94-503, Title I, §116, 90 Stat. 2415 (1976).

[25] Emily Myers and Lynne Ross, *State Attorneys General: Powers and Responsibilities, 2nd ed.* (Washington, D.C.: National Association of Attorneys General, 2007), 323.

[26] Stanley M. Lipnick, and Janis M. Gibbs, "An Overview of the Last Decade of State Antitrust Law, Including 'Little FTC Acts,' Unfair Trade Practice Legislation, Franchise and Business Opportunity Legislation, RICO, and the Rejection of *Illinois Brick*," *University of Toledo Law Review* 16 (1985): 931; Stephan Paul Mahinka and Kathleen M. Sanzo, Multistate Antitrust and Consumer Protection Investigations: Practical Concerns," *Antitrust Law Journal* 63 (1994): 234.

[27] Office of the Inspector General, "State Medicaid Fraud Control Units, FY2011 Grant Expenditures and Statistics," accessed August 10, 2012, http://oig.hhs.gov/fraud/medicaid-fraudcontrol-units-mfcu/expenditures_statistics/fy2011.asp.

[28] *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 600 (1982).

[29] *People v. Miner*, 2 Lansing (N.Y.) 396, 398-399 (1868); *Attorney General v. Chicago and Northwestern Railway Co.*, 35 Wis. 425, 1874 Wisc. LEXIS 135 (1874).

[30] *Louisiana v. Texas*, 176 U.S. 1, 19 (1900); *Missouri v. Illinois*, 180 U.S. 208, 241 (1901); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907).

[31] *Georgia v. Pennsylvania Railroad, et al.*, 324 U.S. 439, 450-451 (1945).

[32] *Hawaii v. Standard Oil*, 405 U.S. 251 (1972), *California v. Frito-Lay*, 474 F.2d 774 (9th Cir.)

[33] *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976).

[34] *Hawaii v. Standard Oil*, 405 U.S. 251 (1972), *California v. Frito-Lay*, 474 F.2d 774 (9th Cir.)

[35] House Committee on the Judiciary, Subcommittee on Monopolies and Commercial Law, *Antitrust Parens Patriae Amendments: Hearings*

Before the Subcommittee on Monopolies and Commercial Law of the Committee of the Judiciary, 93rd Cong., 2nd Sess., March 18 and 25, 1974, 12

[36] Senate Committee on the Judiciary, Subcommittee on Antitrust and Monopoly, *The Antitrust Improvements Act of 1975: Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee of the Judiciary*, 94th Cong., 1st Sess., May 7 and 8, June 3,4, and 12, 1975, 124.

[37] Marvin Frankel, Amended Rule 23 from a Judge's Point of View, 32 *Antitrust Law Journal* 295 (1966).

[38] *EEOC v. Fed. Express Corp.,* 268 F. Supp. 2d 192, 197-98 (E.D.N.Y. 2003); *Mid Hudson Med. Group*, 877 F. Supp. At 146, 149; *Support Ministries for Persons with AIDS, Inc v Village of Waterford*, 799 F Supp 272, 277 (N.D.N.Y 1992); *Pennsylvania v Porter*, 659 F2d 306, 318 (3d Cir 1981); *Vacco v Mid Hudson Medical Group*, 877 F Supp 143, 149 (S.D.N.Y 1995). The main exception has been with state suits brought under the Employee Retirement Income Security Act (ERISA). Connecticut v. Health Net, Inc., 383 F.3d 1258, 1261-62 (11th Cir. 2004).

[39] *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 600-602 (1982).

[40] *Maryland v. Louisiana*, 451 U.S. 725 (1981).

[41] Gifford, Donald G. "Impersonating the Legislature: State Attorneys General and *Parens Patriae* Product Litigation." *Boston College Law Review* 49 (2008): 913-969.

[42] Ibid.

[43] *Texas v. American Tobacco Co.*, 14 F. Supp. 2d 956, 971 (E.D. Tex. 1997).

[44] See, for example, William D'Orso, "GlaxoSmithKline Settles Drug-Marketing Case for $3 Billion," *Los Angeles Times*, July 2, 2012.

[45] *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), as quoted in *Massachusetts v. EPA*, 549 U.S. 497 (2007).

[46] *Massachusetts v. EPA*, 549 U.S. at 518.

[47] *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 600-602 (1982).

[48] *Massachusetts v. EPA*, 549 U.S. at 520.

[49] *Massachusetts v. EPA*, 549 U.S. at 561. (Roberts dissenting).

[50] Ibid.

[51] Complaint (*Florida v. HHS*), Count III.

[52] As the ACA litigation proceeded in several federal courts, several states enacted legislation prohibiting any government to enforce an individual mandate for health insurance on any of its residents. The states argued that they had standing to sue because the individual mandate intruded upon their sovereign interest in enacting and enforcing state statutes shielding their residents from the requirement to purchase health insurance. While most courts addressing standing issues

granted state standing on the basis of these new statutes, the first federal court to rule in favor of the state claims cited the language of *Massachusetts v. EPA* to note, "[g]iven the stake states have in protecting their sovereign interests, they are often accorded "special solicitude" in standing analysis."

[53] *National Federation of Independent Business v. Sebelius*, 567 U.S. _____ (2012).

[54] House Committee on the Judiciary, Subcommittee on Monopolies and Commercial Law, *Antitrust Parens Patriae Amendments: Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee of the Judiciary*, 93rd Cong., 2nd Sess., March 18 and 25, 1974, 17-33. Senate Committee on the Judiciary, Committee on the Judiciary, *The Antitrust Improvements Act of 1976: Report of the Committee of the Judiciary, United States Senate*, 94th Cong., 2nd Sess., 6 May 1976, 2.

[55] [Citation to the 1977 Medicaid-Medicare congressional hearings and the Dodd-Frank congressional hearings.]

[56] Cornell Clayton, "Law Politics, and the New Federalism: State Attorneys General as National Policymakers." *Review of Politics* 56 (1994).

[57] For example, Reagan FTC appointee Terry Calvani urged greater cooperation between the FTC and the state AGs when he served as acting chair of the FTC. "Fall 1985 Consumer Protection Seminar," *Consumer Protection Report*, November 1985, 3.

[58] ABA Section of Antitrust Law, *State Antitrust Enforcement Handbook, 2d Ed* (Chicago: ABA Publishing, 2008): 51.

[59] One example was a settlement with sweepstakes marketer Contest America in 2002. In that litigation, state AGs relied upon the FTC database of consumer complaints.

[60] For example, see Department of Health and Human Services, "HIPAA Enforcement Training for State Attorneys General, available at http://www.hhs.gov/ocr/privacy/hipaa/enforcement/sag/sagmoreinfo.html, accessed August 10, 2012.

[61] David J. Morrow, "Transporting Lawsuits Across State Lines," *New York Times*, November 9, 1997.

[62] Shortly after President Obama took office, the DOJ and Department of Health and Human Services announced the creation of the Health Care Fraud Prevention and Enforcement Action Team to fight Medicare and Medicaid fraud in which states litigators would play a prominent role. President Obama used a portion of his State of the Union Address in 2012 to announce the creation of a new financial fraud task force co-chaired by New York Attorney General Eric Schneiderman.

[63] Pub. L. No. 103-312.

[64] Pub.L. No. 111-21 at §5(c)(4).

[65] Farhang, *The Litigation State*, at 216.

[66] Twenty-Seventh Report of the Committee on Government Operations, *FDA's Continuing Failure to Prevent Deceptive Health Claims for Food*, November 14, 1990.

[67] Smith & Wesson Settlement Agreement with Departments of HUD and Treasury, March 17, 2000.

[68] Bruce Reed, President Clinton's Domestic Policy Adviser, cited the deal as proof that "the public good doesn't have to be held hostage to legislative stalemate. "Bruce Reed Holds News Briefing on Gun Control Agreement With Smith & Wesson," *FDCH Political Transcripts*, March 17, 2000.

[69] Clean Air Act §§501-507; 42 U.S.C. §§4661-4661f.

[70] "New York State Announces Intent to Sue 17 Power Plants Over Transported Pollution," *Environment Reporter*, September 17, 1999, 901.

[71] Randal C. Archibald, "Tentative Deal on Acid Rain is Reached with Third Utility," *New York Times*, December 22, 2000, B10.

[72] Brooke A. Masters, *Spoiling for a Fight: The Rise of Eliot Spitzer* (New York: Times Books, 2006), 57.

[73] Report of the House Committee on the Judiciary, *Antitrust Parens Patriae Act*, 94th Cong., 1st Sess., September 22, 1975.

[74] Report of the Senate Committee on the Judiciary, *The Antitrust Improvements Act of 1976*, 94th Cong., 2nd Sess., May 6, 1976, 6.

[75] House Committee on the Judiciary, Subcommittee on Monopolies and Commercial Law, *Antitrust Parens Patriae Amendments: Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee of the Judiciary*, 93rd Cong., 2nd Sess., March 18 and 25, 1974.

[76] Id. at 18.

[77] Timothy Conlan, *From New Federalism to Devolution: Twenty-Five Years of Intergovernmental Reform* (Washington D.C.: Brookings Institution Press, 1998), 8. 78 Ibid., 297.

[79] Report of the Senate Committee on the Judiciary, *The Antitrust Improvements Act of 1976*, 94th Cong., 2nd Sess., May 6, 1976, 6.

[80] Committee on Ways and Means and Committee on Interstate and Foreign Commerce, *Medicare-Medicaid Antifraud and Abuse Amendments*, 95th Cong., 1st Sess., March 3 and 7, 1977.

[81] Report of the House Committee on the Judiciary, *Antitrust Parens Patriae Act*, 94th Cong., 1st Sess., September 22, 1975.

[82] Report of the House Committee on Ways and Means, *Medicare-Medicaid Antifraud and Abuse Amendments*, 95th Cong., 1st Sess., June 7, 1977.

[83] FDA's Continuing Failure to Prevent, 19.

[84] *Deficit Reduction Act of 2005*, Public Law 109-171, *U.S. Statutes at Large* 120 (2005): 4, codified at 42 U.S.C. 1305.

[85] "State False Claims Acts," Taxpayers Against Fraud Education Fund, accessed August 10, 2012, http://www.taf.org/statefca.htm.

[86] 151 Cong Rec S 12065.

[87] 151 Cong Rec S 14073.

[88] This statement was made in the context of the debate in New York over the adoption of a state false claims act. That proposal died largely because of efforts of the Healthcare Association of New York. PhaRMA, the main pharmaceutical industry group, also introduced similar concerns about prosecutors' use of false claims acts.

[89] See, for example, National Association of Attorneys General, "Attorneys General Support State Enforcement of Consumer Financial Protection Agency Rules," available at http://www.naag.org/attorneys-general-support-stateenforcement-of-consumer-financial-protection-agency-rules.php.

[90] Report of the House Committee on the Judiciary, *Antitrust Parens Patriae Act*, 94th Cong., 1st Sess., September 22, 1975.

[91] Early in 2012, for example, a subcommittee in the House Judiciary Committee held hearings in which several concerns about state AG enforcement of federal law were expressed, though the criticism mainly focused on how state AGs have hired private plaintiffs' attorneys on a contingency basis to conduct their litigation. Hearing before the Subcommittee on the Constitution of the House Judiciary Committee, *Contingent Fees and Conflicts of Interest in State AG Enforcement of Federal Law*, 112th Cong., 2nd Sess. February 2, 2012.

[92] Class Action Fairness Act of 2005, Public Law. No. 109-2, 119 Stat. 4 (codified in various sections of 28 U.S.C.), §2(a)(2)(A)-(C).

[93] 28 U.S.C. §§ 1332(d), 1453, 1711-15 (2006).

[94] [See Statement of Sen. Kohl in Senate hearing of July 31, 2002; CAFA 2003 Senate Report of July 31, 2003.]

[95] Ashley L. Taylor, Jr., Anthony F. Troy, and Katherine W. Tanner Smith, "State Attorneys General: The Robust Use of Previously Ignored State Powers," *The Urban Lawyer* 40 (2008): 516.

[96] Ibid. at 515.

[97] 151 Congressional Record S1162 (daily edition February 9, 2005).

[98] 151 Congressional Record S1164 (daily edition February 9, 2005).

[99] *Wal-Mart v. Dukes*, 564 U.S. ___ (2011); *AT&T Mobility v. Concepcion*, 563 U.S. ___ (2011)

[100] 557 U.S. 519 (2009).

[101] McGraw v. CVS Pharmacy Inc., 646 F.3d 169 (4th Cir. 2011); LG Display Co. Ltd. v. Madigan, 665 F.3d 768 (7th Cir. Ill. 2011); Washington v.

Chimei Innolux Corp., 659 F.3d 843 (9th Cir. 2011); Nevada v. Bank of America Corp., No. 3:11-cv-00135 (9th Cir., March 2, 2012).

[102] Wolfgang Streeck and Kathleen Thelen, eds., *Beyond Continuity: Institutional Change in Advanced Political Economies* (New York: Oxford University Press, 2005).

[103] Stephen Gardbaum, "New Deal Constitutionalism and the Unshackling of the States," *University of Chicago Law Review* 64 (1997).