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The New Class Action Federalism

Mark Moller

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THE NEW CLASS ACTION FEDERALISM

*Mark Moller**

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INTRODUCTION

In an article published in 2008, Richard Marcus hypothesized that the Class Action Fairness Act (CAFA)¹ might “boomerang” against some of its proponents.² Once federal courts got a taste for control over nationwide litigation, he argued, they might actually expand, not constrict, the scope of class certification—the better to bring a decisive end to the litigation they find themselves in charge of.³ Moreover, Marcus noted, federal courts could even cite CAFA’s “jurisdictional policies”—particularly its stated policy that nationwide class actions should be “considered” in federal court—as a formal hook for doing so.⁴

1. Class Action Fairness Act of 2005 [hereinafter CAFA], Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified as amended in scattered sections of 28 U.S.C.).

2. Richard L. Marcus, *Assessing CAFA’s Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765, 1789 (2008).

3. *Id.* at 1817.

4. *Id.*

Now, ten years after CAFA's passage, it's worth checking in to see whether this possibility is actually coming to pass. At least if we focus on the Supreme Court, it hasn't. Far from it. A series of seminal Supreme Court class action decisions since 2011 have instead made marketable claims even more resistant to class certification than they were pre-CAFA.

The result is turning out to be a victory not for mass tort nationalism, but somewhat surprisingly, for federalism. The reason is straightforward. Class certification is many things—an engine for economizing on the disposition of claims, for leveling the playing field between institutional defendants and individual plaintiffs, for buying “global peace.” But in federal courts' hands, as Marcus noted, it is also a mechanism for federal consolidation of control over mass claims.⁵ By making wholesale class certification of nationwide disputes harder to obtain at the federal level, the Roberts Court has tended to decentralize mass tort litigation—spreading the disposition of interests at issue in that litigation back among state and federal courts in the process.

Professor Maria Glover has termed this “happenstantial” federalism—the accidental federalism of a Court that has constricted the federal class action for reasons independent of federalism concerns.⁶ And it is certainly true that the Roberts Court has not invoked federalism per se in its biggest class action cases. Even so, this Article raises the possibility that the Court's class action cases might, in fact, reflect an un-theorized or intuitive sense that federalism principles shape federal courts' use of the class action.

This connection is most evident in what seems to be a minor entry in the Roberts Court's canon of class action-related decisions, *Smith v. Bayer Corp.*⁷ *Bayer* is that most arcane creature, an Anti-Injunction Act⁸ case. It has largely been ignored in treatments of the Roberts Court's class action canon. But it points to a larger, interesting idea: namely, that narrow constructions of the federal class action rule reinforce Congress's control of federal courts' role in the federal system.⁹ Because separation

5. *Id.* at 1769.

6. J. Maria Glover, *Mass Litigation Governance in the Post-Class Action Era: The Problems and Promise of Non-Removable State Actions in Multi-District Litigation*, 5 J. TORT LAW 1, 5, 7 (2014).

7. *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (U.S. 2011).

8. 28 U.S.C. § 2283 (2012).

9. See generally Mark Moller, *Agenda Setting and the Class Action* (Soc. Sci. Research Network, Aug. 11, 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2478953 (developing this idea in much greater detail).

of powers is “an aspect of federalism”¹⁰—a mechanism through which federalism is protected—this idea helps connect the Court’s “happenstantial” class action federalism with constitutional principle.

This Article develops this idea in three parts. Part I briefly summarizes Richard Marcus’s account of CAFA’s potential to catalyze a kind of hyper-aggressive mass tort nationalism. Part II then reviews how the Roberts Court’s stinting approach to class actions is, to the contrary, throwing a lifeline to federalism. Part III ends by showing how *Bayer* points to a link, so far undeveloped in the case law, between that stinting approach and the separation of powers—a link that, were it to be developed further in future cases, could make federalism not just “happenstantial,” but integral to our understanding of the scope and reach of federal class actions.

I. THE END OF MASS LITIGATION FEDERALISM?

Prior to passage of the Class Action Fairness Act, several features of the framework for diversity jurisdiction conspired to make it relatively easy to file nationwide class actions in state court: the complete diversity requirement; the bar in *Zahn v. International Paper* on aggregating, or adding together, the separate and distinct claims of individual class members to meet the amount in controversy requirement;¹¹ the rule barring removal if any defendant is a citizen of the forum state;¹² the requirement that defendants unanimously consent to removal;¹³ and the one year sunset on defendant’s removal rights in cases where original jurisdiction is founded on 28 U.S.C. § 1332.¹⁴

CAFA expands federal courts’ control over multi-state class actions in several ways. First, it jettisons the complete diversity rule and makes the citizenship of putative class members count toward minimum diversity.¹⁵ Second, it abrogates the *Zahn* rule, permitting plaintiffs to aggregate the value of individual class members’ claims while setting an aggregate amount in controversy requirement of \$5 million.¹⁶ It also gets rid of a number of constraints on removal, like the home state and

10. Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L. J. 75, 128 (2001).

11. *Zahn v. Int’l Paper Co.*, 414 U.S. 291, 302 (1973).

12. 28 U.S.C. § 1441(b)(2) (2012).

13. 28 U.S.C. § 1446(2)(A) (2012).

14. *Id.* § 1446(c)(1).

15. 28 U.S.C. § 1332(d)(2)(A) (2012).

16. *Id.* § 1332(d)(2).

unanimity rules, while also giving removal rights to class members.¹⁷

Since CAFA's passage, several leading procedural scholars have suggested the statute may prove to be a catalyst for what amounts to an aggressively nationalist approach to the resolution of claims arising out of mass injury events. In an article entitled "Assessing CAFA's Stated Jurisdictional Policy," Richard Marcus summarized (although not uncritically) this idea.¹⁸ "CAFA," he wrote, "was justified on the basis of essentially two jurisdictional policies: it provided that federal class action procedures would be available for handling many state law class action cases, and it ensured a federal forum for cases of national significance."¹⁹ Marcus's article goes on to describe how federal courts, relying on these policies, "may take what Judge Easterbrook famously called the 'central planner' attitude of preferring settlements that offer a national solution for all class members," achieved through more "creative" and expansive uses of class device.²⁰

To be sure, Marcus noted, some of CAFA's proponents had hoped that federal courts, kitted out by Republican appointed judges, would be more hostile to class actions than their state counterparts.²¹ But things change. Later generations of federal judges may prove less hostile.²² More importantly, given their new responsibility for nationwide litigation conferred through CAFA, they may come to feel responsible for bringing that litigation to a decisive and fair conclusion.²³ All of this might lead federal courts, over time, to liberalize the availability of the class device.²⁴ This might involve the loosening of *Amchem v. Windsor*'s requirement that settlement class actions must satisfy a heightened "predominance" inquiry.²⁵ Or it might involve loosening the conditions on certification of limited fund class actions, along the lines suggested recently by Sergio Campos.²⁶

Marcus suggested (although, again, not uncritically) that federal

17. 28 U.S.C. § 1453(b) (2012).

18. See Marcus, *supra* note 2.

19. *Id.* at 1789.

20. *Id.* at 1769.

21. *Id.*

22. *Id.*

23. *Id.* at 1821 (noting the potential "slippery slope" effect of federal courts' sense of "expanded responsibility" for national market litigation).

24. *Id.* at 1769; see also *id.* at 1821.

25. *Id.* at 1818. Marcus suggests the possibility obliquely, *id.* at 1818 (noting criticism of this aspect of *Amchem*), but then argues that abandoning *Amchem* is not necessary to achieve CAFA's jurisdictional policies. *Id.* at 1819.

26. See generally Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059 (2012).

courts might, moreover, claim some formal support for doing so in CAFA's "findings" section, which includes a statement of congressional policies—including an endorsement of the use of class actions to protect consumers as well as a stated preference for national solutions to mass litigation.²⁷

To appreciate Marcus's point that the line to federal resolution of mass tort litigation leads through the class action, you have to appreciate class actions not just as a "joinder" mechanism, but also as a mechanism for transferring or shifting litigation into federal court. It's easiest to understand this shifting effect of class certification by thinking through the trajectory of a non-class proceeding.

Taking away the class action option in a mass tort puts control over litigation on behalf of the victims of the tort in the hands of each individual claim owner. As I discuss at length in another article, this decentralization inevitably spreads litigation across the federal state boundaries for two reasons. First, in a non-class setting, claim owners often have a choice between federal and state forums, and can exercise some control over where their case proceeds in either line of courts. They can sue in federal court by asserting a federal theory of relief. Or they can keep their case in state court by manipulating the party structure of the suit (i.e., joining non-diverse parties), the amount in controversy, or the forum (i.e., suing in the defendant's home state).²⁸ Second, claim owners invariably have different forum preferences. As a result, giving claim owners complete control over how their claims are prosecuted tends to lead to different theories of relief and different party structures supporting different forum choices—spreading class litigation, in turn, among competing federal and state forums.²⁹

Federal class actions change all of this, again for two reasons. First, they put the named plaintiff in control of the class members' claim. The named plaintiff picks the legal theory. The named plaintiff picks the defendants to sue. And the named plaintiff makes the initial choice of forum. By giving the named plaintiff who prefers a federal forum a monopoly over the structure and forum choice of the class members' claims, the result, inevitably, is to force some claims into the federal court system that would otherwise have proceeded in state court if prosecuted according to the preferences of their owners.³⁰

Second, the rules of subject matter jurisdiction applicable to class

27. Marcus, *supra* note 2, at 1769.

28. See Moller, *supra* note 9, at 35-37.

29. *Id.*

30. *Id.*

actions exacerbate the shifting effect of the federal class action, because those rules suck some claims into federal court that could not be litigated there if prosecuted independently. This was true pre-CAFA. The class mode of litigation triggered a loophole in the usual rules of diversity jurisdiction: It allowed federal courts to exercise jurisdiction over non-diverse class members who lacked federal rights to sue simply by virtue of diversity between the defendants and named plaintiffs.³¹

Post-CAFA, the class action loophole is wider still. The presence of minimum diversity between (1) either a single named plaintiff or putative class members, on one hand, and (2) just one defendant, on the other, triggers jurisdiction over the other class members, again, regardless of their lack of diversity with the defendant or their inability to assert a federal cause of action.³²

All of this makes the class action a tremendous device for shifting and consolidating federal control over litigation that would otherwise disperse among multiple forums, including state forums. It accordingly would be an essential tool for federal courts seeking to take “responsibility” for concluding the national litigation over which CAFA gives them control.³³ And because it is such an essential tool, there is an air of plausibility to what, as Marcus said, would be a supremely ironic scenario: that CAFA, in the end, might lead federal courts to “expand[] the importance of [federal] class action[s].”³⁴

II. THE ROBERTS COURT THROWS FEDERALISM A LIFELINE

The Roberts Court, though, has not proven amenable, so far, to the type of complex-litigation nationalism sketched by Professor Marcus. This is no slam against his article. His predictions were not about what would happen, but what *could*; they were focused on much longer-term time horizons and they were also focused, arguably, less on the Supreme Court than on lower courts.

The last focus, incidentally, makes evident good sense: procedural law sometimes develops “bottom up” rather than “top down”; meaning, transformation in governing doctrine often bubbles up from trial courts as they adapt the law pragmatically to meet immediate case management challenges.³⁵ Those changes, which often involve a mixture of

31. Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 364 (1921).

32. 28 U.S.C. § 1332 (2012).

33. Marcus, *supra* note 2, at 1821.

34. *Id.*

35. Mark Moller, *Procedural Siloing*, PRAWFSBLAWG (Aug. 21, 2012), <http://prawfsblawg.blogs.com/prawfsblawg/2012/08/procedural-siloing.html>.

tendentious interpretations and outright noncompliance with existing doctrine, are then later ratified by the Supreme Court. So, in the long run, the Roberts Court may have remarkably little effect on the development of class action law.

Even so, there's no doubt that the Supreme Court, even if it doesn't fully control the development of procedural law, is an important influence. Bottom-up law or not, it's still well worth paying attention to what the Court says about procedure. And, whether by accident or not, the Roberts Court has actually tended to rescue to a degree, federalism from CAFA, at least in the near term.

This is the product of two developments, which I explore in the next two sections.

A. *Containing Class Actions, Decentralizing Mass Litigation*

The first of these developments is the Roberts Court's treatment of the federal class action. CAFA, Professor Marcus has argued, may catalyze more aggressive or "creative" federal uses of the class device to fashion national settlements of mass claims.³⁶ Yet, in *Wal-Mart Stores Inc. v. Dukes*³⁷ and *Comcast v. Behrend*,³⁸ the Court has gone the other way, amping up the limits on federal class actions.

In *Wal-Mart*, the Court rejected efforts to ground certification on the pleadings and required, instead, that plaintiffs, to meet their Rule 23 burden, must demonstrate that their claims can be resolved based on common proof and, therefore, are susceptible to common answers.³⁹ In addition, *Wal-Mart* seems to largely doom efforts to certify damages claims under Rule 23(b)(2) and casts significant doubt on the continued viability of econometric models of proof as a vehicle for rendering mass claims amenable to Rule 23(b)(3) classing.⁴⁰

Comcast is an equivocal decision that, read one way, affects availability of class certification very little and, read differently, may extend *Wal-Mart's* "common answers" test to the damages phase, in effect requiring plaintiffs to show that damages can be calculated based on common proof. This would make certification of large-scale damages claims particularly difficult in cases where there is a large degree of variability in the extent of class members' injuries.⁴¹

36. Marcus, *supra* note 2, at 1769.

37. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (U.S. 2011).

38. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (U.S. 2013).

39. *Wal-Mart*, 131 S. Ct. at 2551-52.

40. *Id.* at 2557-59, 2561.

41. See Mark Moller, *Common Problems for the Common Answers Test: Class Certification*

All of this has led Professor Glover and others to call the Roberts Court era (with some self-conscious exaggeration) a “post-class action era.”⁴² Of course, the class action is still with us and will remain a major part of federal civil litigation for the foreseeable future. But the Court’s cases have given real teeth to the idea that it is an “exception to the usual rule that litigation is conducted by and on behalf of the named parties only.”⁴³ In the process, the Court has made it very difficult, if not impossible, to certify large-scale class actions, particularly in suits where the claims are individually marketable. In the broad run of cases, mass torts have to proceed, if at all, either on an individual basis or through multiple smaller-scale class actions.

Relative to a counterfactual world in which certification of nationwide classes were more readily available, the effect of the Roberts Courts’ certification decisions can be characterized as pro-federalism. Litigation that would be sucked into federal court if nationwide certification were available is, because it is not available, washing back into state court in the form of small-scale or individualized litigation that is not removable. Professor Glover’s article catalogues the steady drumbeat of state-level, non-aggregated mass tort litigation post-CAFA.⁴⁴ The pattern reflected in the notorious *Vioxx* litigation⁴⁵ has been typical. There, in the absence of the class action option, suits representing 20,000 plaintiffs were (as of 2008) filed against the pharmaceutical giant in, or removed to, federal court (and transferred by the Judicial Panel on Multidistrict Litigation to Judge Fallon in the U.S. District Court for the Eastern District of Louisiana), while actions representing an even larger number of plaintiffs (30,000) remained pending in state court.⁴⁶

This pattern is not due to state or federal courts’ improper application of CAFA. A small part of the story is that CAFA itself preserves some room for state-level class litigation through its home state and local controversy exceptions.⁴⁷ But the much larger part of the story is that CAFA only expands federal jurisdiction over aggregated proceedings. Non-aggregated proceedings—i.e., individual suits that are not proposed to be joined with lots of similar claims for a joint trial—

in *Amgen and Comcast*, 2013 CATO SUP. CT. REV. 301, 323.

42. Glover, *supra* note 6, at 7.

43. *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979).

44. Glover, *supra* note 6, at 8-10.

45. See generally *In re Vioxx Products Liab. Litig.*, 501 F. Supp. 2d 789 (E.D. La. 2007).

46. Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action is Not Possible*, 82 TUL. L. REV. 2205, 2214 (2008).

47. 28 U.S.C. § 1332(d)(3)-(4) (2012).

proceed under the usual pre-CAFA jurisdictional rules and, under those rules, are much easier to lock into state court (whether through joinder of non-diverse parties, or through suit in the defendant's home state).

The result is a victory of sorts not only for the decentralized model of mass tort management, but also for federalism. Proposed nationwide class actions are removable to federal court, but the upshot of removal is to break them apart, remitting them to individualized litigation or smaller state-by-state class actions, which inevitably spread across the federal-state boundary.

There are certainly pros and cons associated with this development. On the con side, the model is potentially costly—for defendants, who have to incur the cost of duplicative discovery, and for the judicial system as a whole, which must oversee that duplicative discovery. But Professor Glover has shown that federal and state courts post-CAFA are expanding “bottom up” efforts to coordinate their management of mass litigation.⁴⁸ As a result, the “version” of complex litigation federalism we get in a post-CAFA world may be a new form of cooperative federalism—what might, borrowing from Professor Glover, be called “post-class action federalism”⁴⁹—in which federal and state judges have new incentives to collaboratively resolve litigation arising out of mass injury events.

Ideally anyway, this cooperative effort can not only mitigate the transaction costs of decentralized management, but can also hedge against the risk that one judge's skewed view of the case colors the merits and settlement negotiations across the entire mass tort,⁵⁰ provide parties with better information about the merits of mass tort at the settlement table by giving them a wider sample of litigated cases,⁵¹ and inject more sensitivity to local conditions and local law into management of cross-border disputes.

B. CAFA's Limits

What, though, of CAFA's findings? Richard Marcus suggested these findings as, if not the source, then the formal cover for the hypothesized “boomerang” effect he described, in which CAFA ends up

48. Glover, *supra* note 6, at 12-15.

49. *Id.* at 7.

50. Cf. Ernest A. Young, *Stalking the Yeti: Protective Jurisdiction, Foreign Affairs Removal, and Complete Preemption*, 95 CALIF. L. REV. 1775, 1795 (2007).

51. *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002); see also Glover, *supra* note 6, at 25-31 (proposing that “coordinated redundancy” can help improve the information available to settling parties and enhance the construction of mass tort settlement grids).

fuelling, not curtailing, class action enforcement.⁵² His argument, as mentioned above, looks to the long term, and so recent trends hardly falsify his hypothesis. Even so, the idea that CAFA's findings might fuel a rethink of all the different doctrines that constrain federal courts' authority over mass litigation is having, at best, mixed success so far in the Roberts Court.

CAFA's findings are an outgrowth of the principles that govern the interpretation of Congress's jurisdictional enactments. In a series of cases, the Court has laid down the principle that Congress's control over federal jurisdiction is safeguarded through interpretation—meaning through narrow default constructions of those jurisdictional grants, coupled with a clear statement rule that requires Congress to speak clearly if it wants to override the default and expand federal jurisdiction.⁵³ Together, the narrow defaults and clear statement condition for overriding them reflect the familiar idea that separation of powers is a federalism safeguard. The narrow constructions funnel expansive definitions of federal courts' jurisdiction back through the political process; the clear statement condition for overriding these constructions reinforces the political process's "procedural safeguards for federalism" (that is, the hurdles that federal law must surmount in order to get passed).⁵⁴

One obvious goal of CAFA's findings section, in turn, was to provide the requisite "clear statement" needed to counter the traditional rule of narrow jurisdictional construction. The Roberts Court adopted this understanding of the findings quite recently in *Dart Cherokee Operating Basin Co., LLC v. Owens*,⁵⁵ where the Court considered whether a removing party has to include in the notice of removal proof that the suit meets the amount in controversy threshold.⁵⁶ The decision stemmed from an appeal of an order denying a motion to remand a case removed under CAFA, and the plaintiff in the case argued that CAFA, like all removal statutes, should be construed "narrowly," meaning

52. Marcus, *supra* note 2, at 1789.

53. See, e.g., *Stoneridge Inv. Partners, LLC v. Scientific Atlanta, Inc.*, 552 U.S. 148, 164-65 (2008) (quoting *Am. Fire & Cas. Ins. Co. v. Finn*, 341 U.S. 6, 17 (1951)) (emphasizing the "established principle that '[t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation . . ."); *Tafflin v. Levitt*, 493 U.S. 455, 459-60 (1990); *Finley v. United States*, 490 U.S. 545, 554 (1989).

54. Cf. Bradford R. Clark, *The Procedural Safeguards of Federalism*, 83 NOTRE DAME L. REV. 1681, 1683 (2008).

55. *Dart Cherokee Operating Basin Co., LLC v. Owens*, 135 S. Ct. 547 (U.S. 2014).

56. *Id.* at 551.

construed in a way that raises more, not fewer, hurdles to removal.⁵⁷ Justice Ginsburg rejected this argument, largely based on the plain meaning of applicable federal removal provisions.⁵⁸

But in a key passage, Justice Ginsburg also invoked CAFA's findings section: "We need not," she wrote, "here decide whether such a[n] [antiremoval] presumption is proper in mine-run diversity cases. It suffices to point out that no antiremoval presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court."⁵⁹ Justice Ginsburg then cited CAFA's statement, in its findings and purposes section, that its objective is to "ensur[e] '[f]ederal court consideration of interstate cases of national importance.'"⁶⁰

The question that *Dart*, viewed in conjunction with Professor Marcus's earlier article, raises is how far the Court will take this invocation of CAFA's statutory purposes. *Dart* is most obviously significant for a number of disputes about the interpretation of CAFA's home state and local controversy exceptions.⁶¹ Lower courts across several circuits have adopted interpretations of these provisions that preserve some fairly significant wiggle room for plaintiffs to keep single-state class actions in state court by manipulating the definition of the class and the party-structure of the lawsuit.⁶² The Court's affirmance

57. *Id.* at 554.

58. *Id.* at 553.

59. *Id.* at 554.

60. *Id.* (quoting CAFA, Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4, 5).

61. 28 U.S.C. § 1332(d)(3)-(4) (2012).

62. One common strategy is to divide a class into a number of different micro classes composed of fewer than 100 members. Another strategy presents itself in cases where a mass tort involves the distribution of a product or service through a chain of locally incorporated subsidiaries or distributors. Here, rather than sue a diverse, deep-pockets manufacturer or parent company, plaintiffs sue the locally incorporated or headquartered subsidiary or distributor on behalf of a state-only class in order to take advantage of the home state exception, with recovery sometimes dependent upon the subsidiaries' success in seeking contribution or indemnification from the out-of-state parent or manufacturer. When the defendant in turn impleads the parent or manufacturer, the success of the strategy depends on whether (1) diverse third party defendants' citizenship counts toward CAFA's grant of original minimum diversity jurisdiction and (2) whether they count as primary defendants within the meaning of the home state exception to removal. The former issue may be the subject of some evolving disagreement among the circuits. *See Schwartz v. SCI Funeral Servs. of Fla., Inc.*, 931 F. Supp. 2d 1191, 1196 (S.D. Fla. 2013) (holding that third party defendants' citizenship counts for diversity jurisdiction under 28 U.S.C. § 1332(d)); *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 334 (4th Cir. 2008) (holding that third party defendants are not "defendants" within the meaning of 28 U.S.C. § 1453). At least some federal circuits, by contrast, seem to be converging on the view that third party defendants do not count as "primary." *See, e.g., Vodenichar v. Halcón Energy Proprs., Inc.*, 733 F.3d 497, 504-06 (3d Cir. 2013) (reviewing authorities).

in *Dart* that CAFA's findings section overcomes any "antiremoval presumption with respect to CAFA" may presage a significant narrowing of some of these loopholes.

But the types of arguments surveyed by Richard Marcus cast well beyond the provisions of CAFA and so suggest the possibility future courts may find in the language quoted by Justice Ginsburg a hook for expanding, for example, the scope of federal class actions. *Smith v. Bayer Corp.*, though, indicates that the Court, at least for the time being, seems to be taking a much narrower view of the interpretive value of CAFA's findings section. This is the second major federalism-reinforcing development in the Roberts Court's class action canon.

Bayer involved mass litigation targeting Bayer for injuries linked to Baycol, one of the pharmaceutical company's anti-cholesterol drugs.⁶³ Federal suits against the company were consolidated in the District of Minnesota by the Judicial Panel on Multidistrict Litigation.⁶⁴ Two different plaintiffs, however, filed duplicative class actions on behalf of West Virginia Baycol purchasers.⁶⁵ One of these (the *McCullins* class action) was removed to federal court and swept into the MDL.⁶⁶ The other (the *Smith* class action) named two non-diverse West Virginia companies as defendants and, because it was filed before CAFA's effective date, was not removable.⁶⁷

The federal MDL court denied certification of the *McCullins* class action.⁶⁸ Bayer then moved to enjoin the plaintiff in the *Smith* action from relitigating the certification of the West Virginia class.⁶⁹ Although the Anti-Injunction Act generally forbids the issuance of injunctions against proceedings in state court, it contains an exception permitting injunctions to prevent relitigation of issues foreclosed by binding federal judgments, which Bayer invoked.⁷⁰ The key question in the case, then, was whether the exception applied, which turned on (1) whether the certification issues in the *Smith* action were the same as those resolved in the *McCullins* action, and (2) whether the *Smith* plaintiffs, who were members of the putative federal class in the *McCullins* action, were sufficiently in privity with the *McCullins* plaintiffs, such that they could

63. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2373 (U.S. 2011).

64. *Id.* at 2373.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 2374.

69. *Id.*

70. See 28 U.S.C. § 2283 (2012); *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988).

be bound by the federal class certification order.

In its briefs before the Supreme Court, Bayer invoked CAFA's policies, among other arguments:

CAFA reflects Congress's judgment that duplicative state-court class actions serve no useful purpose, harm interstate commerce, and cause an "enormous waste" of party and judicial resources by forcing "multiple judges of different courts [to] spend considerable time adjudicating precisely the same claims asserted on behalf of precisely the same people." *The same policies that Congress found supported the expansion of federal jurisdiction in CAFA should be weighed here in determining under federal common law whether a federal judgment denying class certification may be relitigated in state court.*⁷¹

The Court, however, sided with the plaintiff for a couple of reasons. First, it said, in the "absence of a certification under [Rule 23], the precondition for binding Smith was not met."⁷² "Neither a proposed class action nor a rejected class action," it noted, "may bind nonparties."⁷³ "What does have this [binding] effect is a class action approved under Rule 23," the Court continued. "But McCollins' lawsuit was never that."⁷⁴

Moreover, stressed the Court, "as we said more than thirty years ago, and have consistently maintained since that time, '[a]ny doubts [about the propriety of antisuit injunctions] should be resolved in favor of permitting the state courts to proceed.'"⁷⁵ Under this approach, close cases have easy answers: The federal court should not issue an injunction.

The Court noted that Congress could change these principles by authorizing preclusion of members of a putative class.⁷⁶ But it hadn't. What it had done, instead, was pass CAFA, which provides "a remedy that does not involve departing from the usual rules of preclusion"—namely, removal of duplicative putative classes into federal court.⁷⁷ That remedy was admittedly "cold comfort" to Bayer, given that the plaintiffs' action had been filed before the effective date of CAFA's removal provisions; but it is the "remedy" the political process has

71. Brief for Respondent at 17, *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (U.S. 2011) (No. 09-125) (emphasis added).

72. *Bayer Corp.*, 131 S. Ct. at 2380.

73. *Id.*

74. *Id.*

75. *Id.* at 2382 (quoting *Atlantic Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 297 (1970)).

76. *Id.* at 2382 n.12.

77. *Id.* at 2381-82.

provided and the one, the Court implied, that future defendants must rely on.⁷⁸

III. THE ROBERTS COURT AND MASS LITIGATION: A CASE OF ACCIDENTAL FEDERALISM?

While *Bayer* did not explicitly discuss the effect of CAFA's findings, the upshot of the decision is clear: CAFA's policy (which its findings and purposes section describes) has no bearing on settled principles governing the scope of federal courts' power over mass-injury-event litigation that were not addressed in CAFA, like the scope of antisuit injunctions.

After *Bayer*, some defense-side commentators suggested the case is a relatively minor decision, one with little real significance post-CAFA (since, under CAFA, duplicative state level litigation of the type at issue in *Bayer* could simply be dealt with by removing it into federal court).⁷⁹ *Bayer* may in fact stand for something more significant—a set of structural principles that connect back to the Roberts Court's approach to class certification and, in the process, provide a basis of a principled, wholesale defense of the Roberts Court's seemingly accidental mass litigation federalism. This part develops this idea.

A. *Mass Litigation Federalism and the Separation of Powers*

Arguments of the type surveyed by Richard Marcus treat federalism as a social mood or zeitgeist, discerned in part through the product of Congress's legislative output, like CAFA. Once the modern federalism *Weltanschauung* is glimpsed through enactments like CAFA's findings, courts draw on it as inspiration to shape and update a variety of statutory provisions that govern the area of complex litigation, including CAFA, Rule 23 itself, the Rules of Decision Act,⁸⁰ the Anti-Injunction Act,⁸¹ and more.

Bayer points toward a quite different way to think about federalism in the mass litigation context: through the lens of separation of powers. As work by Professors Brad Clark and Ernest Young explores, separation of powers is, as Professor Young put it, "an aspect of

78. *Id.* at 2382.

79. See James M. Beck, *It Should Be an Interesting Couple of Weeks*, DRUG & DEVICE LAW (June 16, 2011), <http://druganddevicelaw.blogspot.com/2011/06/it-should-be-interesting-couple-of.html> (arguing *Bayer* amounts to a minor case).

80. 28 U.S.C. § 1652 (2012).

81. 28 U.S.C. § 2283 (2012).

federalism.”⁸² Young refers to Herbert Wechsler’s familiar idea that the political process is a safeguard of federalism.⁸³ In Clark’s and Young’s updated version of the argument, Congress’s control of federal lawmaking protects state autonomy because the difficult process of federal lawmaking leads to inertia, checking or slowing the expansive tendencies of federal authority.⁸⁴

Congress’s primacy over lawmaking is compelled by constitutional text, historical practice, and functional considerations.⁸⁵ Professor Young, in turn, identifies a variety of clear-statement-type rules that federal courts have developed to enforce that primacy. All of these tend to reinforce separation of powers as a federalism safeguard by directing federal courts to interpret ambiguous federal statutes in a way that preserves state autonomy, thereby forcing decisions to make inroads on that autonomy through the political process.⁸⁶

Although Professors Young and Clark focus mostly on separation of powers in the regulatory field, the framers, by putting Congress in control of federal jurisdiction, also embraced separation of powers as a federalism safeguard in the arena of judicial federalism. Just as the Supremacy Clause puts Congress in control of federal lawmaking in order to protect states’ policymaking autonomy, Articles I and III together give Congress broad control over federal courts and federal jurisdiction in order to protect state courts from encroachment by their federal counterparts.⁸⁷ And, indeed, the well-worn idea that limits on federal courts’ authority are enforced by “interpretation” (meaning that Congress must speak pretty clearly in order to expand federal jurisdiction) is one of the oldest examples of the enforcement of the separation of powers through what amounts to a clear statement norm.⁸⁸

82. Baker & Young, *supra* note 10, at 128.

83. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558 (1954).

84. *See, e.g.*, Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001); Ernest A. Young, *A General Defense of Erie Railroad Co. v. Tompkins*, 10 J. L. ECON. & POL’Y 17 (2013).

85. *See, e.g.*, Clark, *supra* note 84, at 1326 (developing a textual argument based on the Supremacy Clause); Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733 (2005) (developing functional arguments for Congress’s supremacy).

86. *See, e.g.*, Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549 (2000).

87. Mark Moller, *The Checks and Balances of Forum Shopping*, 1 STAN. J. COMPLEX LITIG. 107, 116-17 (2012).

88. *See, e.g.*, *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164-65 (2008) (quoting *Am. Fire & Cas. Ins. Co. v. Finn*, 341 U.S. 6, 17 (1951)) (emphasizing the “established principle that “[t]he jurisdiction of the federal courts is carefully guarded against

It's easy to see these principles at work in *Bayer*, which explicitly draws on a political-process-reinforcing clear statement norm—e.g., exceptions to the Anti-Injunction Act are construed narrowly—in the course of ruling for the petitioners.⁸⁹ And, indeed, the invocation of these principles in the anti-suit injunction cases is hardly revolutionary—the Court has been invoking separation of powers norms as a reason to read the statute's exceptions narrowly for decades.

But these principles also have a strong claim apply to questions where we don't often think about them, like the proper scope of class certification. The idea that separation of powers norms are a constraint on the scope of class certification seems odd at first glance, but only because the conventional understanding is that the combined force of (1) the Fifth Amendment's Due Process Clause and (2) the underlying contours of parties' substantive rights imposes the sole external constraints on when classes can be certified under Rule 23.

What, though, if these constraints aren't as constraining as conventional wisdom thinks? Recent scholarship by David Rosenberg and Sergio Campos has chipped away at the understanding that due process imposes very significant constraints on the use of mandatory classing in the mass tort context.⁹⁰ There is also some reason to doubt that substantive law is actually as constraining as defendants' routinely argue it is.⁹¹ If these constraints prove less durable than have been imagined, the scope for federal courts' exercise of discretionary judgment to authorize representative actions may be quite broad—unless, of course, there are other reasons to cautiously or narrowly apply the class action rule.

I have argued elsewhere that one reason is the class action's role as a mechanism for preempting states' coordinate control over litigation arising out of mass events. The rules governing the scope for class certification are part of the system of rules that are constitutive of our system of judicial federalism. Because our system of separated powers places the elaboration of these framework rules in Congress's hands, Congress has a special claim to control the availability of the federal class action, no less than other framework rules that regulate federal courts' authority in the federal system.⁹²

The result, if you accept this argument, is that respect for separation

expansion by judicial interpretation . . .”).

89. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2382 (U.S. 2011).

90. *See Moller, supra* note 9, at 3-7 (reviewing these arguments).

91. *Id.* at 27-31 (making this argument).

92. For an extensive development of this argument, see *id.* at 31-56.

of powers offers another layer of support for the narrow interpretation of Rule 23's class provisions (like the limitation of Rule 23(b)(1)(B) to limited funds⁹³) and could favor a presumption, along the lines suggested by Richard Epstein, that Rule 23(b)(3) is unavailable for individually marketable tort claims arising out of sprawling mass torts.⁹⁴ Presented with broad and narrow interpretations of the scope of Rule 23, a notoriously indeterminate provision, federal courts ought to adopt the narrowest interpretation consistent with the Rule's text—leaving the decision to greenlight more expansive approaches to class certification, and with it greater inroads on state autonomy, to Congress and its surrogate, the federal rulemaking process.

One common objection to this idea is that Congress's delegation of rulemaking authority to federal courts obviates separation of powers or federalism concerns with more expansive judicial interpretations of the class action rule.⁹⁵ But this objection fails to grapple with the import of the 1988 amendments to the Rules Enabling Act,⁹⁶ which, as Catherine Struve shows, were intended to replicate many of the inertial, democratic checks on rulemaking that exist within the legislative system writ large.⁹⁷ The experience with the scheme set up by the 1988 amendments indeed suggests that the inertial drag on federal rulemaking is, at best, only marginally less constraining than Congress's lawmaking process—at least with respect to major, normatively contested changes to the federal procedural system.⁹⁸

Moreover, as I have argued in another article, there is good reason to think that procedural rules that force litigation into the federal system, like the class action, are at the very edge of the rulemaking power conferred under the Rules Enabling Act and consistent with it only when such rules are essential to the enforcement of litigants' substantive rights.⁹⁹ This is a reason not only for the Court, but also rulemakers, to tread cautiously when it comes to further expansion of the availability of the class action—leaving innovations to Congress by limiting the scope of the rule to cases where representative enforcement is plainly essential

93. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

94. See Richard A. Epstein, *Class Actions: The Need for a Hard Second Look*, CIV. JUST. REP., Mar. 2002, at 14.

95. See Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 336 (2012) (noting this argument for federal courts' interpretive discretion).

96. 28 U.S.C. § 2072 (2012).

97. Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099 (2002).

98. See Mark Moller, *Procedure's Ambiguity*, 86 IND. L.J. 645, 688-89 (2011).

99. Moller, *supra* note 87, at 163-66.

to the enforcement of the underlying substantive scheme.¹⁰⁰

Whether we conceive separation of powers as a reason for the Court to defer to the rulemaking process or as a reason for the Court and rulemakers to defer to Congress is, though, a side issue, and one on which I am ultimately agnostic. The bottom line is that separation of powers principles foreclose decisions by the Supreme Court to update the class action rule *unilaterally*, through interpretation of the existing rule, along the lines sketched by Richard Marcus.¹⁰¹ Doing so clearly offends separation of powers norms, and deference either to the quasi-political process of federal rulemaking or to Congress itself would be an improvement from the standpoint of fidelity to separation of powers principles.

B. *Bayer and Separation of Powers*

What's fascinating about *Bayer* is that the case actually points to this idea, albeit obliquely, in the course of discussing class preclusion. Part of the Court's holding turned on its construction of the way that the principles of federal common law of preclusion sync up with Rule 23. It held that the re-litigation exception to the Anti-Injunction Act did not apply in the case because the state litigants, members of the proposed or putative federal class action, were not yet "parties" to the federal proceeding pre-certification and so could not be bound by the federal court's decision to reject certification.¹⁰²

Although that preclusion principle, like all principles of federal preclusion, is in part a product of federal common law, it is also the product of the way the federal class action is conceptualized. The Court's holding in *Bayer* (that putative class members were not bound by an order rejecting class certification) flows from an understanding that Rule 23 is a joinder provision that does not actually bring class members "before the court" in any way important to the Court's power to bind prior to the certification order.¹⁰³

What's notable about *Bayer* is its hint (admittedly noncommittal) that this limit on class preclusion might be changed by Congress. "Nothing in our holding today," the Court was careful to underscore, "forecloses legislation to modify established principles of preclusion

100. *Id.* at 163-64.

101. *See generally* Marcus, *supra* note 2.

102. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2380-81 (U.S. 2011).

103. *See, e.g.*, Diane Wood Hutchinson, *Class Actions: Joinder or Representational Device?*, 1983 SUP. CT. REV. 459.

should Congress decide that CAFA does not sufficiently prevent relitigation of class certification motions.”¹⁰⁴

The idea that Congress can alter or expand the scope of class preclusion is not an obvious one. Many commentators have thought the opposite is true—that limits on pre-certification preclusion are simply fixed by due process. By reaching out and making this nonobvious claim, the Court at once puts this idea on the wall and, in the process, invites a legislative solution that would not otherwise have been forthcoming.

But more importantly, it also signals a sense that the adjustment to “established” preclusion principles in the class context should ordinarily come from Congress when due process gives out as a source for justifying them—not least, the Court suggests, because binding class members who would have preferred to proceed in state court jars with principles of federal-state “comity.”¹⁰⁵ There is thus at least a hint in this passage at an intuition—that limits on the scope and effect of federal class litigation are not just a function (up to a point) of due process, but also (even more deeply) a function of entrenchment generated by fidelity to basic separation of powers and federalism norms.

C. *CAFA Through a Separation of Powers Lens*

CAFA, of course, is another typical rejoinder to the idea that separation of powers principles can be invoked in favor of a narrow interpretation of the class action rule.¹⁰⁶ Following out the logic of *Bayer*, though, requires rejecting the idea that CAFA somehow provides authority for expanding the effect of the class action.

Bayer, recall, had argued CAFA provides a reason for rethinking the principle that putative class members were not bound by pre-certification judgments.¹⁰⁷ Not so, wrote the Court. “To the extent class actions raise special problems of relitigation, Congress has provided a remedy that does not involve departing from the usual rules of preclusion”¹⁰⁸ Congress, in other words, has adjusted the scope of removal—it has made federal courts into aggregation gatekeepers—but it has done nothing to adjust the preclusive effect of the federal class action.

104. *Bayer Corp.*, 131 S. Ct. at 2382 n.12.

105. *Id.* at 2382.

106. *See supra* Part I.

107. *See supra* note 71 and accompanying text.

108. *Bayer Corp.*, 131 S. Ct. at 2381-82.

The logical next step in *Bayer*'s reasoning is that CAFA also does nothing to affect the scope of federal aggregation itself. While CAFA's findings include a generic statement of support for class actions in consumer rights litigation and a diffuse statement that putative class actions should be "considered" in federal court¹⁰⁹, neither CAFA's findings nor its operative provisions say anything about *how to resolve* the class certification issue once the case is there, just as they say nothing about antisuit injunctions or class preclusion.

This is, indeed, a marker of what may be the central compromise in the statute. As Judge Lee Rosenthal wrote shortly after CAFA's passage, the pre-CAFA debate over mass tort management was characterized by a split between adherents of centralized and decentralized management models.¹¹⁰ Centralized models of mass litigation—what Judge Easterbrook once called the "central planning" model ("one case, one court, one set of rules, one settlement price for all involved")—consolidate the management and, ultimately, disposition through settlement of claims in a central national forum under the management of a single trial judge.¹¹¹

Decentralized models break national class actions apart, spreading disposition of claims arising out of a mass event across multiple courts in different jurisdictions. This, say advocates, protects horizontal or state-to-state federalism by preventing one state court from imposing its policies on every other state.¹¹² Decentralized models also have informational benefits similar to those characteristic of markets. "Markets," Easterbrook wrote in a case rejecting the certification of a nationwide class action decided just three years before CAFA's passage:

use diversified decisionmaking to supply and evaluate information. Thousands of traders affect prices by their purchases and sales over the course of a crop year. This method looks "inefficient" from the planner's perspective, but it produces more information, more accurate prices, and a vibrant, growing economy.¹¹³

The same logic applies not only to markets, but also to mass litigation—decentralization gives the judicial system and settling parties more

109. CAFA, Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4, 5.

110. Lee H. Rosenthal, *Back in the Court's Court*, 75 UMKC L. REV. 687, 705-06 (2006).

111. *In re Bridgestone/Firestone, Inc.*, 288 F.2d 1012, 1020 (7th Cir. 2002).

112. Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1416 (2006) (noting that one of the concerns "animating" CAFA was that the certification of nationwide class actions gave a state the ability to "impose its desired legal standards on national market conduct").

113. *Bridgestone*, 288 F.2d at 1020.

information about the value of mass tort claims. “When courts think of efficiency,” Judge Easterbrook concluded, “they should think of market models rather than central-planning models.”¹¹⁴

CAFA, Judge Rosenthal notes, rightly did not decide between the two approaches.¹¹⁵ That failure to decide is not only evident in CAFA’s operative provisions, which say nothing about class certification,¹¹⁶ but is also evident in the statute’s structure. Take for example CAFA’s “mass action” provision. The provision authorizes removal of non-class claims that are “proposed” to be consolidated for trial.¹¹⁷ But it leaves undisturbed state control over suits that will be resolved on the merits by separate triers of fact. CAFA also pointedly refused to authorize transfer of “mass actions” to existing federal MDL proceedings absent the approval of a majority of the plaintiffs.¹¹⁸

Thus, while the mass action provision reflects concern about state control of aggregate litigation units, whether these take a class or class-surrogate form, the statute’s solicitude for state control of claims that will be tried separately and its anti-MDL-transfer proviso signal a wariness of centralized disposition of the claims when the need to consider the propriety of aggregation is no longer relevant. It is one more marker of the compromise nature of CAFA—an agreement to extend federal control over suits that take an aggregate form in order to make federal courts the nation’s aggregation gatekeepers, coupled with an agreement *not to agree* on how widely federal courts should open the aggregation gate.

And so treating CAFA as a reason to unravel preexisting limits on aggregation is, as a result, foreclosed by *Bayer*’s key take away: that CAFA’s effect is limited to the operative provisions on which Congress could agree—namely, adjustments to jurisdiction and removal. Extending the statute’s effect further would undo the compromise that produced the statute, and, in the bargain, would also undo federal courts’ subordination to the political process.

CONCLUSION

Bayer, then, turns out to be a potentially significant decision, not a minor one. It points to separation of powers principles that reach far

114. *Id.*

115. Rosenthal, *supra* note 110, at 705-06.

116. *Id.*

117. 28 U.S.C. § 1332(d)(11) (2012).

118. *Id.* § 1332(d)(11)(C).

beyond the narrow issue in that case to much more fundamental questions, like how the Court ought to construe Rule 23. In the process, it points to a way to understand the Roberts Court's class action federalism in principled terms—not as “accidental” or “happenstantial” federalism, but as the outgrowth of a basic separation of powers (and federalism) principle: that Congress controls federal courts' role in our federal system.

One can accept that principle but be entirely agnostic on the normative value of mass tort litigation federalism. Rather than expressing a normative commitment to some particular model of federal and state power, *Bayer*, understood in the way sketched above, reflects a formal commitment to the constitutional allocation of institutional control over rules that regulate the balance of that power between federal courts and their state counterparts.

Is this structural account something the Roberts Court might eventually accept? It's certainly consistent with and, as I've suggested in this Article, hinted at fairly strongly by *Bayer*. Yet, the Court's approach to federalism and separation of powers is notoriously unsettled, and doctrinal hints in cases often have a way of never materializing.

The key value of the account here, then, is less that it offers an insight into where the Roberts Court is likely to go, and more that it offers a corrective, both to the usual overbroad assertions that CAFA dispels separation of powers and federalism concerns with national class litigation and that separation of powers and federalism have no claim to govern the elaboration of class action doctrine.

Federalism, it turns out, is alive and well after CAFA. And the Roberts Court's own cases provide the seeds for defending that result in terms of a coherent set of constitutional principles.