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S. The Role of the State Attorney General

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Should State AGs Be Setting National Policy?

A Case Study of Mandatory Consumer Credit-Card Arbitration

I. Introduction

On July 14, 2009 the Minnesota State Attorney General (MN AG) filed suit against the National Arbitration Forum (NAF), alleging that NAF misled consumers with its representations of neutral arbitration practices because NAF had financial ties to the credit card companies for whom it was arbitrating.1 Three days later, NAF signed a Consent Judgment with a proclaimed purpose of “the complete divestiture by the NAF entities of any business related to the arbitration of consumer disputes.”2 That is, the state of Minnesota secured injunctive relief on a national scale by filing a lawsuit in state court. NAF’s quick agreement to stop accepting consumer arbitrations caused a domino effect. The MN AG sent a letter to the American Arbitration Association (AAA), the world’s largest arbitration service company, asking it to suspend its national debt collection operations voluntarily.3 Although AAA had just finished a high-volume debt collection program in June of 2009, it decided to “place[] a moratorium on the

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administration of any consumer debt collection arbitration programs." Bank of America and JPMorgan Chase, creditors who employed arbitration clauses, soon followed suit by ceasing to file debt collection arbitration actions. Congress is now considering regulation of consumer arbitration, perhaps as part of the planned federal consumer protection agency.

In one fell swoop, a single state Attorney General was able to bring the highly profitable world of credit card arbitration to its knees. The MN AG was not only able to secure reformed practices for its home state, but across the entire nation. This single action effectively put a halt to the national practice of collecting credit card debts through mandatory arbitrations. This result seems disproportionate to the MN AG’s responsibility to protect her own state’s citizens. With this case, the critics of state Attorneys General (AGs) have the perfect test case for a critique of AGs’ policymaking aggrandizement, with all of its democratic accountability and federalism components. I will discuss three separate critiques:

1) A single state AG should not set national policy because it violates structural and textual principles of federalism;

2) A single state AG should not set national policy because that AG is not democratically accountable to the entire nation or to the citizens of individual states;

3) A single state AG should not set national policy because an AG does not have the institutional competency to do so, i.e. AGs unwisely rely on anecdotes instead of hard data when making policy.

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4 Naimark, supra note 3, at. 1-2.
6 The House of Representatives Domestic policy Subcommittee of the Oversight and Government Reform Committee held a hearing on this issue on July 22, 2009. See supra note 3.
These criticisms apply to AGs involved in multistate litigation generally, but this case magnifies these concerns. Single states have fewer frictions on decision-making. There are no other states in the litigation to provide contrary interests or more information based on the experiences of another state’s citizens. If a single state does consider national interests and make national policy, then the chain of accountability and principles of federalism might be destroyed. This type of state action seems to present a dilemma: a state either imprudently makes policy or violates constitutional principles.

In this paper, I will describe the systemic problems of mandatory credit-card arbitration and the specific facts and alleged state law violations of the NAF case. This background will lay out the facts for subsequent argument and will demonstrate the strength and independent validity of Minnesota’s case against NAF. I will then compare two empirical studies of consumer arbitration, which will demonstrate the practical difficulties of regulating in the face of uncertainty and will frame the debate about proper policymaking.

I will argue that the actions taken by the MN AG do not violate principles of federalism or democratic accountability, and, in fact, contribute to policymaking by creating an atmosphere of regulatory competition and cooperation. First, in terms of federalism, actions by a single state are more easily justified than in multistate litigation, because the state is pursuing a perfectly valid course of action by enforcing its own laws. No procedural, structural, or textual restrictions prevent this action. Second, practical frictions on policymaking and the corporation’s voluntary

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The suspension of national activities dissolve the democratic accountability problems. Third, states serve an essential function in policymaking by acting on anecdotal evidence: gathering initial information and bringing problems to the attention of federal policymakers.

II. Background

A. Systemic Practices in Mandatory Credit-Card Arbitration

In describing the systemic problems with mandatory credit-card arbitration, I will be using the example of NAF’s practices and procedures.\(^8\) Although NAF appears to be a worst-case offender and hence potentially misleading as a representative example, AAA’s suggested national reforms and procedures and AAA’s concerns about fairness support the claim that these practices are widespread.\(^9\) The systemic problems fall into three general categories: 1) bias, e.g. repeat-player bias and arbitrators’ favoring industry, 2) notice procedures, e.g. ignoring service requirements, and 3) failure to comply with state reporting requirements.\(^10\)

Several practices and procedures point to anti-consumer bias in the arbitration system. First, the arbitration organization assigns cases to arbitrators, allowing that organization, which has a financial stake in continued business with creditors, to choose the distribution of cases.\(^11\) The data show that arbitrators who favor industry typically receive more cases than those who...
favor consumers.\textsuperscript{12} Second, different arbitrators decided identical cases differently, providing a strong appearance of bias and reinforcing the potential for bias with assignment of cases.\textsuperscript{13} Third, creditors can remove cases from consumer-friendly arbitrators by using peremptory challenges.\textsuperscript{14} Fourth, the lack of respect for these procedures results in the exclusion of some legitimate defenses to a default judgment, such as identity theft.\textsuperscript{15} Fifth, creditors need not provide proof of the debt amount when collecting a default judgment; the arbitrator is required to award the full amount requested by the creditor.\textsuperscript{16} Sixth, NAF does not even require proof of an arbitration agreement before entering an award, nor does it require the statute of limitations to be satisfied.\textsuperscript{17}

Service of process and notice of proceedings present a microcosm of the systemic problems with mandatory credit-card arbitration. First, the creditor serves and verifies process, i.e. NAF often failed to independently verify delivery receipts and signatures before sending the case to the arbitrator.\textsuperscript{18} The Staff Report found several troublesome instances of sending service to the wrong address, receiving signatures of “x” or “John Doe,” or delivering notices in English when the customer received bills in Spanish.\textsuperscript{19} Second, even when deficiencies in service were

\textsuperscript{12} Id. at 7. See also Arbitration” or “Arbitrary”: The Misuse of Arbitration to Collect Consumer Debts before the H. Oversight and Government Reform Comm., Domestic Policy Subcomm., 11th Cong. 8-9 (2009) (statement of F. Paul Bland, Jr., Staff Attorney, Public Justice).

\textsuperscript{13} Staff Report at 9. “There is no procedure to correct a decision that is against the law or a decision that totally different [sic] from another decision issued by that arbitrator or another arbitrator. Our review disclosed decisions that were totally opposite, depending on whether or not the arbitrator was concerned with deficiencies in the claim documents or ignored them entirely (citation omitted).”

\textsuperscript{14} Id. at 8. “When a case is assigned to an arbitrator whom the creditor considers unfavorable, the creditor can remove the arbitrator with a simple form letter, without any need to recite a justification. …In Maine, one arbitrator who was actually following NAF’s rules, and dismissing cases that were deficient, found himself without any subsequent case assignments.” See also Bland at 7-8.

\textsuperscript{15} Id. at 10; Bland, supra note 11, at 16.

\textsuperscript{16} Bland, supra note 11, at 7, 14-15.

\textsuperscript{17} Id. at 20-21.

\textsuperscript{18} Staff Report at 7.

\textsuperscript{19} Id. at 7.
found, NAF pushed the cases on to the arbitrators when procedures required dismissal.\textsuperscript{20} If those arbitrators then dismissed the cases for insufficient service, they received fewer cases.\textsuperscript{21} Third, these failures in service allow the creditor to obtain easy default judgments, giving the creditor a strong incentive to be lax in service procedure.\textsuperscript{22}

NAF has also failed to comply with California’s legally-mandated reporting requirements. NAF did not publish the results of thousands of arbitrations, which results in an incomplete set of data.\textsuperscript{23} This failure to publish also aided creditors in “seeking and obtaining awards of attorney’s fees that violate Delaware Law.”\textsuperscript{24} By having closed proceedings and no way to review the results, NAF has created an arbitration system rife with opportunity for arbitrariness and fraud.

\textbf{B. Minnesota’s Case Against NAF}

The MN AG’s complaint and Congressional testimony paint a sordid picture of NAF’s role in the business of consumer credit-card arbitration. The core of the problem with NAF’s alleged practices is that NAF deceptively promotes itself as an independent and neutral party in the arbitration process.\textsuperscript{25} For example, NAF’s advertisements and websites typically include a claim such as:

“Q: Is the FORUM affiliated with credit card companies or other businesses that use pre-dispute arbitration agreements?

\begin{itemize}
\item \textsuperscript{20} Id. at 9.
\item \textsuperscript{21} Id. at 9.
\item \textsuperscript{22} Id. at 7.
\item \textsuperscript{23} Id. at 8.
\item \textsuperscript{24} Id. at 8 (citing Del. Code Ann., tit. 10, § 3912).
\item \textsuperscript{25} Complaint at ¶ 19.
\end{itemize}
A: No. The FORUM is an independent administrator of alternative dispute resolution services… We are not beholden to any company or individual that utilizes our services.”

NAF also claims that it does not receive any funds from other sources, except for the arbitration fees it collects. Perhaps the greatest example of NAF’s proclamations of neutrality is its comparison with court procedures: “These arbitral procedures provide truly excellent due process protections, and meet or exceed the rights parties would have in any court or before an administrative law judge.”

NAF, however, is far from neutral. Through a tangled corporate web, NAF is affiliated with debt collection parties. Essentially, a hedge fund owns both NAF and debt collection agencies, creating a conflict of interest which NAF and its ownership allegedly actively worked to conceal.

Beyond this structural affiliation, NAF also allegedly actively markets itself to businesses as an anti-consumer forum that will improve the bottom line for credit-card and debt collection companies. First, some NAF employees allegedly work on a commission basis for convincing companies to use pre-dispute mandatory arbitration clauses in their contracts. Second, NAF

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26 Id. at ¶ 21.
27 Id. at ¶ 24.
28 Id. at ¶ 25.
29 Complaint at ¶¶ 26-85. See also Appendix A to this paper, which contains the corporate organizational charts used in the complaint.
30 Id. at ¶ 87.
31 Id. at ¶ 92.
markets itself as a cost-effective alternative to litigation.\textsuperscript{32} Third, these marketing strategies also include statements of the coercive power of this method of arbitration:

“The customer does not know what to expect from Arbitration and is more willing to pay”

“They [customers] ask you to explain what Arbitration is then basically hand you the money”

“You have all the leverage and the customer really has little choice but to take care of this account.”\textsuperscript{33}

Fourth, NAF assists in drafting the mandatory arbitration clauses, and promotes these clauses as a method of taking control of the risk associated with debt collection.\textsuperscript{34} Fifth, NAF assists companies in preparing arbitration claims through, e.g., draft forms, advice on legal trends, and referrals to an affiliated debt collection law firm, Mann Bracken.\textsuperscript{35}

The MN AG argues that these allegations add up to multiple violations of three Minnesota statutes. First, NAF allegedly violated Minnesota’s Prevention of Consumer Fraud Act, which prohibits “The act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise…”\textsuperscript{36} Second, NAF allegedly violated Minnesota’s Uniform Deceptive Trade Practices Act, which provides that “A person engages in a deceptive trade practice when, in the course of business, vocation, or occupation,
the person: (5) represents that good or services have…characteristics…benefits…that they do not have…"

Third, NAF allegedly violated Minnesota’s False Statements in Advertising Act, which provides that “Any person, firm, corporation or association who with intent to sell or in anywise dispose of merchandise securities, service, or anything offered… to the public, … which advertisement contains any material assertion, representation, or statement of fact which is untrue, deceptive, or misleading, shall, … be guilty of a misdemeanor.”

Although NAF admits to no wrongdoing, the MN AG obviously had a very strong case. NAF decided to settle mere days after the complaint was filed and did not even file an answer, which suggests an acknowledgement that a defense would likely be unsuccessful. The plain language of the statute, as applied to the facts, also seems to be a clear-cut case: NAF represented itself as neutral when it, in fact, was not. This case is a clear example of a fraudulent action in violation of state law, and, when coupled with the magnitude of harm to consumers here, is sufficient reason for an AG to bring a case. Whatever theoretical interpretations of setting “national policy” one might proffer, this reasoning remains the practical reality. The MN AG had a strong case and an obligation to the people of Minnesota, she acted appropriately in bringing a lawsuit under state law, and the only “national” policy to come out of it is the consequence of a voluntary corporate action.

C. Empirical Data: The Searle Study and the Center for Responsible Lending

37 Minn. Stat. § 325D.44, subd. 1.
39 Consent Judgment.
40 Press Release, supra note 3. Other explanations for this decision are also possible, e.g. the corporation wanted to head off any further lawsuits and had to act quickly, or perhaps acting quickly and nationally would be a showing of good faith that could minimize reputational damage. Nevertheless, these alternate explanations still suggest the strong underlying merit of Minnesota’s case.
Both the consumer advocates and those who favor arbitration agree that policymaking should be done on the basis of empirical data, not on anecdotal evidence.\textsuperscript{41} This position is appealing, as legislation in the wake of a moral panic often results in unintended consequences or fails to solve the problem.\textsuperscript{42} The problem for arbitration policy, however, is that the set of empirical data is limited and incomplete. Of the major studies to look at consumer arbitration practices, all have looked to two main data sets: the required disclosures of arbitration results in California and the self-reported data by the AAA.\textsuperscript{43} The Searle study generally defends arbitration practices, while the Center for Responsible Lending study finds arbitration to be problematic.

The Searle study makes the following findings. With regard to arbitration outcomes, business claimants won some relief in 83.6\% of the cases they filed and recovered an average of 93\% of the amount claimed.\textsuperscript{44} Consumer claimants won some relief in 53.3\% of the cases they filed and recovered an average of 52.1\% of the amount claimed.\textsuperscript{45} The study provides two reasons to account for the disparities in win-rate and in amount recovered. First, the types of claims brought by businesses and consumers differ in kind. Businesses typically bring claims for amounts owed for rendered services, whereas consumers bring defective product or inadequate


\textsuperscript{42} See, e.g., Carol Sanger, \textit{Infant Safe Haven Laws: Legislating in the Culture of Life}, 106 Colum. L. Rev. 753, 787-88 (2006) (discussing short-sighted policies in response to moral panics such as the Columbine shooting and zero tolerance policies, infant abandonment and Safe Haven laws, and day-care child abuse in the 1980s).


\textsuperscript{44} Searle Civil Justice Institute, \textit{supra} note 42, at xiii. Rounds, \textit{supra} note 40, at 3.

\textsuperscript{45} Searle Civil Justice Institute, \textit{supra} note 42, at xiii. Rounds, \textit{supra} note 40, at 3.
services claims. The consumer suits typically involve “more difficult questions of proving both liability and damages,” whereas businesses can more easily prove the amounts owed and establish liability. Second, many consumers default when businesses bring arbitration claims. Additionally, the study proposes using outcomes of court actions as a baseline for comparison, and its preliminary data and analysis suggest that arbitration and litigation reach similar results.

The Searle study also dismisses the allegation of repeat-player bias in consumer arbitrations. It recognizes that the compensation structure, i.e. arbitrators’ getting paid per case decided, gives rise to a fear of bias. The study uses two definitions of “repeat-player” to interpret the data. First, under a traditional definition of “a business that appears more than once in the AAA dataset,” there is no statistically significant difference between win rates of repeat and non-repeat players. Second, under an alternative definition that accounts for different AAA business categorizations in enforcing its Consumer Due Process Protocol, the study found a statistically significant difference between repeat and non-repeat players, but it ascribes this difference to repeat players’ better claim-screening methods.

The Center for Responsible Lending (CRL) analyzed a dataset from California, where state law requires public disclosure of consumer arbitration results. All of the arbitrations in

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46 Searle Civil Justice Institute, supra note 42, at 70. Rounds, supra note 40, at 3-4.
47 Rounds, supra note 40, at 3-4.
48 Searle Civil Justice Institute, supra note 42, at 70 n.59. Rounds, supra note 40, at 4.
49 Rounds, supra note 40, at 5-7.
51 Searle Civil Justice Institute, supra note 42, at xiii.
52 Id. at xiii.
this dataset were conducted by NAF.\textsuperscript{54} The vast majority of these consumer arbitrations were credit-card debt-collection actions.\textsuperscript{55} CRL made three findings that undermine the Searle study’s conclusions: 1) there is a statistically significant repeat-player bias in the narrow context of consumer credit-card arbitrations, 2) individual arbitrators who decide cases in favor of credit card companies receive more cases in the future, and 3) the presence of forced arbitration clauses did not correlate with a reduced lending rate, suggesting that the industry’s claims that these clauses are cost-effective and essential to its survival are false.\textsuperscript{56}

As to the finding of repeat-player bias, CRL specifically repudiates several points underpinning the Searle study’s analysis. First, CRL worked with a data set specific to consumer credit-card arbitration, whereas the Searle study used a broader array of consumer arbitration cases.\textsuperscript{57} Second, CRL’s more appropriate dataset allowed it to more accurately control for claim selection by individual firms. Even after accounting for individual firms’ selection of claims, CRL still found a statistically significant repeat-player bias.\textsuperscript{58} Third, CRL claims that the disparity in outcome between consumer-initiated and creditor-initiated cases is not due to a difference in strength of case, because consumers would likely not go through a costly arbitration if their cases were weak.\textsuperscript{59}

As to arbitrators’ incentives to favor the industry, CRL found appalling statistical corroboration of the prior anecdotal evidence: those who disfavored industry received fewer

\textsuperscript{54} See Frank, supra note 40, at 5. Public disclosures also include cases by AAA, but determining which party prevailed in these cases was very difficult. The statistical findings are thus based solely on the NAF data.
\textsuperscript{55} Id. at 6.
\textsuperscript{56} Id. at 1-2.
\textsuperscript{57} Id. at 2.
\textsuperscript{58} Id. at 8.
\textsuperscript{59} Id. at 7.
cases.\textsuperscript{60} The relationship between amount awarded to industry and cases received is a strong linear correlation.\textsuperscript{61} Because individual arbitrators are paid per case, this finding provides strong statistical evidence of an economic incentive to be biased towards the industry. The evidence is so strong as to be evidence of causation for the difference in win-rate between consumers and industry.\textsuperscript{62}

CRL also conducted an independent survey on the terms of auto loans and found that forced arbitration likely does not reduce cost to the consumer, as the Searle study claims.\textsuperscript{63} Although this survey has some methodological limitations, e.g. its small sample size, its results are still probative as a counterweight to the Searle results. First, the presence of forced arbitration clauses was never correlated with a lower loan rate.\textsuperscript{64} Second, in three of five regression analyses, the presence of forced arbitration clauses had a statistically significant correlation with annual percentage rates that were 2.1 to 2.5 percentage points higher.\textsuperscript{65} Third, up to 67.8\% of consumers did not even know that their contracts contained forced arbitration clauses, which, when coupled with auto lenders who have questionable practices, forms a perfect situation for manipulation and abuse.\textsuperscript{66}

Although the CRL data is methodologically stronger than the Searle data for the specific issue of consumer credit card arbitration, its limitations must be acknowledged. CRL’s data is based only on a limited number of cases from a single state and a small independent survey. Without a significant number of results on a national level from multiple arbitration companies,

\textsuperscript{60} Id. at 9.
\textsuperscript{61} Id. at 9.
\textsuperscript{62} Id. at 10.
\textsuperscript{63} Id. at 11-12.
\textsuperscript{64} Id. at 12.
\textsuperscript{65} Id. at 11.
\textsuperscript{66} Id. at 10-12.
it is perilous to generalize and make national policy recommendations. Also, two points about
the role of states in this policymaking context are worth noting. First, California’s state law is
responsible for one of the main empirical data sets. Second, Minnesota’s action against NAF
acted as a gadfly to federal policymakers, i.e. federal policymakers looked at this data because a
state action revealed credit card arbitration to be a problem worthy of national attention. Without
these state actions based on anecdotal evidence, the federal policymakers might not have taken
consumer arbitration on as a priority or might lack any empirical data upon which to craft policy.

III. Critiques and Defenses of Single State AG’s Setting National Policy

This section will flesh out the four critiques, apply them to the case of Minnesota v. NAF,
and refute those critiques. The critiques, as described above, are: 1) the state violates principles
of federalism, 2) the state is not democratically accountable to the nation or to other states, and
3) the state lacks the institutional competency to make national policy rationally. The

A. Federalism

In the wake of the large multistate settlement involving tobacco, many critics have
spoken out against AG multistate litigation as a state interference with federal power and a threat
to the constitutional structure grounding our society.\textsuperscript{67} Essentially, the argument is that the states, by setting national policy, usurp the proper role of Congress. In Minnesota v. NAF, the problem is magnified: a single state creates national policy instead of a group of 40 or even 50 states. Although rhetorically powerful, this critique lacks constitutional substance, as there is no specific federalism violation.

Federalism consists of express constitutional restrictions on state action and implied or conditional structural restrictions.\textsuperscript{68} Express restrictions are those restrictions listed in Article 1, Section 10, such as the prohibition on states engaging in foreign affairs and making treaties.\textsuperscript{69} Implied structural or conditional restrictions include doctrines like the dormant commerce clause, preemption and the supremacy clause, and other rarities like state power over federal bodies, e.g. taxing a federal bank in \textit{McCulloch v. Maryland}.\textsuperscript{70}

David Lynch, in his note on this topic, handily dismissed the applicability of each federalism restriction to multistate litigation.\textsuperscript{71} None of the textual or implied limitations apply. The states are enforcing their own laws, pursuant to proper constitutional authority.\textsuperscript{72} That is, each state is bringing an individual state lawsuit against a private party, which is clearly not a violation of federalism, assuming that no federal restrictions on enforcement are present, such as federal preemption. The “national policy” promulgated by these states is nothing more than the


\textsuperscript{68} Lynch, \textit{supra} note 7, at 2010-2018. I have excluded the argument about the Compact Clause from this discussion, since only one state is involved here.

\textsuperscript{69} U.S. Const. art. I, 10, cl. 1.


\textsuperscript{71} Id.

\textsuperscript{72} Id. at 2032.
aggregation of these individually justified cases. In this sense, Minnesota v. NAF is an easier federalism case than multistate litigation, because there is no aggregation problem.\textsuperscript{73}

Furthermore, in Minnesota v. NAF, the “national policy” of striking down mandatory credit-card arbitration agreements stems not from some attempt by the state to legislate nationally, but from the voluntary action of the private party. When sued, NAF settled with Minnesota and voluntarily suspended its national arbitration practices.\textsuperscript{74} Other arbitration organizations and creditors voluntarily followed suit.\textsuperscript{75} In light of this practical reality, the critique disappears: there is no government-made national policy. In other words, Minnesota set the policy for its state by having and enforcing laws against fraud, but the private entity set the national policy for its own private activities, which in no way implicates federal government or federalism concerns. This voluntary change also defuses the problems with the national remedies in the consent judgment. As discussed above, the timing of the voluntary settlement and subsequent actions by AAA and other creditors suggests that the national consequences of the state action were the result of corporate decisions, not government actors.\textsuperscript{76}

\textbf{B. National and State-to-State Democratic Accountability}

While structural federalism arguments did not pose much of an obstacle to justifying the national consequences of a state AG’s actions, democratic accountability arguments derived

\textsuperscript{73} The aggregation equivocation, i.e. the argument that individually justified actions remain justified when aggregated, might fail constitutional scrutiny. In commerce clause jurisprudence, it is permissible to regulate activities that are individually beyond Congress’ reach if those individual activities would substantially affect commerce in the aggregate. \textit{Wickard v. Filburn}, 317 U.S. 111 (1942) (holding that regulation of purely intrastate homegrown wheat permissible because, when aggregated, has a substantial effect on interstate commerce); \textit{Gonzales v. Raich}, 545 U.S. 1 (2005) (holding that homegrown marijuana is regulable by Congress under the commerce clause where regulation of that substance is essential to a comprehensive regulatory regime). Analogously, the character of the individual action in this case is no guarantee that aggregated action shares the same character.

\textsuperscript{74} Press Release, \textit{supra} note 3.

\textsuperscript{75} Mollenkamp, \textit{supra} note 5.

\textsuperscript{76} See \textit{supra} notes 3, 37 and accompanying text.
from federalism principles pose a much muddier and more difficult set of challenges.

Democratic accountability, in the context of federalism, requires that an individual citizen be able to hold the right public official accountable, e.g. the federal government has violated this principle by blurring political accountability to the point where a state official would appear responsible for a federal policy.\textsuperscript{77} To my knowledge, only cases involving a federal imposition on state authority have been decided under this rationale. Also, those cases have relied upon the text of the 10\textsuperscript{th} Amendment as a constitutional hook, and it is not clear whether states could violate federalism principles without violating one of the structural or express restrictions discussed above. Nevertheless, it is possible to imagine that the courts could create a new principle from structural arguments in the Constitution, akin to the genesis of the dormant commerce clause, which could prevent states from interfering with democratic accountability at the federal level and from interfering with the responsibilities of other states.\textsuperscript{78}

Upon first glance, it appears that there is no accountability problem here. Minnesota has its own state laws, and the AG enforced those laws against a private entity.\textsuperscript{79} Furthermore, NAF is a Minnesota corporation, and should fall squarely within the MN AG’s jurisdiction.\textsuperscript{80} The citizens of Minnesota have a clear line of accountability to the state legislature for the statute and


\textsuperscript{78} For an argument proposing constitutional restraints on state-state action, see Scott Fruehwald, The Rehnquist Court and Horizontal Federalism: An Evaluation and a Proposal for Moderate Constitutional Constraints on Horizontal Federalism, 81 DENV. U. L. REV. 289 (2003).

\textsuperscript{79} See supra notes 33 and 34 and accompanying text.

\textsuperscript{80} Complaint at ¶ 7. The fact that NAF is a Minnesota corporation might seem to undermine the democratic accountability critique completely, since AGs should protect citizens from threats within the borders of their states. This argument, however, fails to account for the company’s national operations, which would give every AG jurisdiction. Thus, the MN AG is still setting policy for those other states by achieving a national remedy.
to the AG for its enforcement. Only when NAF decided to suspend its national arbitration operations did an issue of national accountability arise. The claim that other states would see NAF change its practice and attribute that to the federal government is inapposite; NAF’s decision was not a political one, i.e. it has no political accountability. Essentially, the necessary intermediate step from state to national policy requires private action, which removes the political accountability problem.

The rise of multistate litigation in the national consciousness, however, might alter that analysis. A full exploration of this argument is beyond the scope of this paper, but I will provide a rough sketch. First, in multistate litigations, one or two AGs often take the lead on negotiating for the rest of the states involved. Second, this practical reality could pose an ethical issue, in that these AGs must now consider the welfare of states other than their own. Third, multistate litigation has become so commonplace for certain types of cases that a single state AG has the responsibility to consider other states’ welfare, even when filing alone. Fourth, this situation could create a democratic accountability problem, because the single AG could be seen as acting on a national level, thus blurring accountability. Or, similarly, there could be a horizontal

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81 Press Release, supra note 3.
83 Id.
84 This claim contains two controversial premises: 1) that multistate litigation is practically inevitable for certain cases and 2) that states would then take on an ethical responsibility for other states before they enter the fray. As to 1), I offer two disjointed pieces of evidence: the recent boom of multistate litigation related to the economic crisis, see e.g. Ruth Simon, Countrywide’s Pressures Mount, WALL ST. J., June 26, 2008, at A3 (describing the beginning of multistate litigation against subprime lender, Countrywide), and the presence of counsel in private law firms for AG issues, e.g. former New York Attorney General Robert Abrams at Stroock & Stroock, & Lavan. http://www.stroock.com/sitecontent.cfm?contentID=49&itemID=334 (“Mr. Abrams has been of particular value to corporations that have been the subject of an investigation by a state attorney general or by multi-state investigations by numerous state attorneys general.”) As to 2), this premise seems unlikely, but, if a multistate litigation is likely to ensue, it would be prudent for the AG to consider the likely actions of other states. Still, the single AG is not yet an appointed agent for the other AGs, as in an active multistate litigation.
democratic accountability problem, i.e. state to state, since citizens of other states do not have a political link to that single AG.\textsuperscript{85}

Whatever theoretical difficulties remain with the above argument, it seems to impugn Minnesota’s actions given the scope of the Consent Judgment and the MN AG’s subsequent request to AAA for complete cessation of arbitration activities.\textsuperscript{86} That is, whether a single state has an ethical duty to consider the interests of other states is irrelevant here; the MN AG asked for national remedies, which could suggest that the MN AG had national interests in mind. It is possible, however, that the interests of Minnesota citizens alone could explain the request for national remedies meaning that adequate protection of Minnesota citizens would require a remedy beyond the borders of Minnesota.\textsuperscript{87}

Even without the theoretical possibility of a national remedy being necessary, the practical reality of the AG’s office eliminates the democratic accountability problem.\textsuperscript{88} AGs start with the facts on the ground, and only move to multistate considerations if the case requires the help of other states, e.g. insufficient resources to handle a large case.\textsuperscript{89} Minnesota’s sole focus on state law violations in this case absolves it of accountability problems; any national consequences following Minnesota’s lawsuit are the result of corporate action. There is no

\textsuperscript{85} For a theoretical exposition of horizontal accountability problems and an applied analysis concerning state tort law, see Samuel Issacharoff and Catherine M. Sharkey, \textit{Backdoor Federalization}, 53 UCLA L. REV. 1353 (2006).
\textsuperscript{86} Press Release, \textit{supra} note 3; Consent Judgment at ¶¶ 1, 3.
\textsuperscript{87} The national remedy might be justified because the MN AG is striking the corporation’s nerve center. That is, the fraudulent actions started at headquarters and should end there. Alternatively, creditors might be able to choose the forum for arbitration and avoid implicating Minnesota law.
\textsuperscript{88} For a tax law example of practical realities explaining away theoretical confusion, see David Schizer, \textit{Frictions as a Constraint on Tax Planning}, 101 COLUM. L. REV. 1312 (2001).

\textsuperscript{89} See generally Lynch, \textit{supra} note 7; Rachel Rosenberg, \textit{A Model Multistate: Ford, Firestone, and the Attorneys General} (unpublished student seminar paper) (January 6, 2002) (describing the practical nature of multistate litigation as fundamentally concerned with violations of state law, which is squarely within the AGs’ \textit{parens patriae} power). Of course, multistate considerations could also come into play if other states independently join an ongoing litigation.
horizontal accountability problem, because Minnesota, like every other state, has the *paren... patriae* power to bring public interest litigation, i.e. Minnesota is not stepping on other state’s toes. To find a horizontal accountability problem here would be to imperil all AG litigation that happens to affect something beyond the borders of the state. Similarly, there is no usurpation of federal power here, since Minnesota is acting only within its reserved powers and is not taking on a federal role. The only nationwide policy set here is the policy chosen by the corporation.

This defense against the federalism and democratic accountability problems relies to some extent on the voluntary agreement to a settlement. Had this case been fully litigated, perhaps the critiques would still apply. The nationwide policy would not be set by the corporation, but by the AG and by the state court.

Even if the case had gone to trial, any national consequences that flowed from the court’s decision would valid under theories of democratic accountability and federalism. The state court only has power to enforce remedies within the state’s borders, so NAF could continue its actions outside of Minnesota (at its own peril, of course). This boundary of the court’s and AG’s power solves the democratic accountability and federalism issues: any national policy is set not by the single state court or AG, but by the corporation itself or by the courts and AGs of other states. That is, either NAF would voluntarily suspend its national operations, or other AGs would bring cases in their respective states and set policy for themselves.

**C. Institutional Competence for Policymaking**

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90 *See, e.g.*, 3-26 Minnesota Civil Practice § 26.24 (describing geographical limits on state court authority to execute a judgment).
The institutional competence critique does not stem from constitutional theory, but from a theory of prudent policymaking. A competent policymaking institution should not rely on anecdotal evidence, but should base its decisions on the available empirical data and rigorous analysis.\(^1\) State AGs make policy through litigation, as opposed to holding hearings like a legislature or doing rigorous empirical analysis like an administrative agency. Even if AGs could adopt these methodologies, they likely would not have the resources to do them properly. It seems then, that AGs are constrained to making policy based on anecdotal evidence: citizens complain or the local news investigates a problem, and the AG responds by litigating (or using some extralegal means, such as the press, which I will not consider for the purposes of this argument).\(^2\) By relying on anecdotal evidence, AGs lose several essential tools for national policymaking: picking the right priorities, predicting consequences, and understanding root causes of problems.

With the big picture of the policymaking process in place, the rebuttal of this critique is simple: policymaking begins with anecdotes and moves to empirical data. Minnesota v. NAF is a perfect example of this phenomenon. The federal government did not regulate the presence of mandatory forced arbitration clauses in credit card contracts. A consumer protection problem concerning these clauses developed. The Minnesota AG, seeing the state’s citizens suffering, filled that regulatory void by bringing an action under state law.\(^3\) This action resulted in a temporary stop to credit-card arbitration and caught the attention of federal policymakers.\(^4\)

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\(^1\) Rounds, supra note 40, at 1.


\(^3\) See generally Complaint.

\(^4\) See supra note 5.
Congress held hearings on this topic in July of 2009,\textsuperscript{95} and could regulate this area soon. The genesis of policymaking from anecdotes is an essential component in the regulatory competition and cooperation between state and federal governments.\textsuperscript{96}

**IV. Conclusion**

Much like the state AGs’ role in antitrust enforcement, the MN AG acted first, in an area unregulated by the federal government, and got it right.\textsuperscript{97} It is precisely the AG’s different institutional competency – being on the ground with local problems and being able to respond quickly – that enables our nation’s policymaking process. This strong local concern also functions as a rebuff to critiques of federalism and democratic accountability. Minnesota v. NAF is not an example of a state AG eviscerating the dual-sovereign structure of our government, but rather an example of a state AG doing what’s best for her client, the people of Minnesota, within the parameters of power allocated to the state of Minnesota and the Office of the Attorney General.

\textsuperscript{95} See supra note 6.

\textsuperscript{96} For another example where regulatory competition and cooperation have fostered better policymaking, see Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 DUKE L.J. 673 (2003).

\textsuperscript{97} See Tierney, supra note 86, at 6 (“State attorneys general saw the need for consumer protection in the area of credit. They got it first. And they got it right.”).
Appendix A: NAF Corporate Organizational Chart