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### The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View

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## ARTICLES

### THE CLASS ACTION FAIRNESS ACT OF 2005 IN HISTORICAL CONTEXT: A PRELIMINARY VIEW<sup>†</sup>

STEPHEN B. BURBANK<sup>††</sup>

*The mechanism of law—what courts are to deal with which causes and subject to what conditions—cannot be dissociated from the ends that law subserves. So-called jurisdictional questions treated in isolation from the purposes of the legal system to which they relate become barren pedantry. After all, procedure is instru-*

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<sup>†</sup> © Stephen B. Burbank 2008.

<sup>††</sup> David Berger Professor for the Administration of Justice, University of Pennsylvania Law School. I have presented various drafts of this work and received helpful comments at the Western State University College of Law Symposium on State Civil Procedure, the University of Minnesota Law School, the University of Pennsylvania Law School faculty retreat, the Duke University School of Law, and the *University of Pennsylvania Law Review's* 2007–2008 Symposium. In addition, Kevin Clermont, Frank Goodman, Jim Pfander, Ed Purcell, David Shapiro, Cathie Struve, Steve Subrin, and Tobias Wolff provided extremely useful comments on various drafts. Michael O'Connor, University of Pennsylvania Law School Class of 2009, provided excellent research assistance. Michael Eisenkraft, Harvard Law School Class of 2004, and Polly Graham, Harvard Law School Class of 2008, both provided helpful contributions to the underlying research.

*mental; it is the means of effectuating policy. Particularly true is this of the federal courts.*

Felix Frankfurter & James M. Landis<sup>1</sup>

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INTRODUCTION

Jurisdictional legislation, like the law of procedure with which it tends to be grouped, can become disembodied from the political and social contexts in which it was enacted, the political and social contexts in which it functions, and the historical and institutional circumstances that affect—if not determine—its significance. Scholars who are preoccupied with doctrine, and courts that must try to make sense of jurisdictional legislation and precedent interpreting it, may be content (or constrained) simply to grapple with the technical details. Those who seek to understand law’s significance, however, require

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<sup>1</sup> FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 2 (1927).

perspectives in addition to the internal logic of technical reasoning. Particularly when the law in question is labeled “procedure,” they must resist the temptation to accept a doctrinal question at face value (that is, to regard doctrine as an end in itself), to view such a question apart from the litigation dynamics that it engenders, and otherwise to ignore issues of power that may be at stake in its resolution.

Some of the political and social implications of the Class Action Fairness Act of 2005 (CAFA)<sup>2</sup> are hard to miss. That statute, after all, resulted from years of intense lobbying (on both sides of the aisle by interest groups associated with both plaintiffs and defendants), partisan wrangling, and, following two successful filibusters, fragile compromises.<sup>3</sup> Not only does CAFA mark a sharp break from a nearly uniform history of congressional contraction of diversity jurisdiction.<sup>4</sup> The scope of putative class actions that, at the end of the day, the statute brings within the subject matter jurisdiction of the federal courts is very broad. Those facts—coupled with the legislation’s place in a trio of “tort reform” measures sought by the Bush administration, and with unrelenting attacks on lawyers in general and plaintiffs’ lawyers in particular—help to understand why some critics regard the compromises as insufficient and the ultimate legislation as inimical to the interests of numerous groups of potential litigants.<sup>5</sup>

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

<sup>3</sup> See, e.g., “Tort Reform” Bill Dies in the Senate, in 59 CQ ALMANAC PLUS 13-10 (2003); Seth Stern, *Fearing Spate of Amendments, Frist Pulls Class Action Bill After Senate Cloture Vote Fails*, 62 CQ WKLY. 1691 (2004) (describing the Senate’s failure to pass a previous version of CAFA in 2004); Seth Stern, *Republicans Win on Class Action*, 63 CQ WKLY. 460 (2005) (calling CAFA’s enactment “the capstone of a six-year slog through Congress”).

<sup>4</sup> See Brett Curry, *Institutions, Interests, and Judicial Outcomes: The Politics of Federal Diversity Jurisdiction*, 60 POL. RES. Q. 454, 456-58, 464 app. A (2007). For much more modest departures from that history of contraction that may have influenced the deliberations concerning CAFA, see the 21st Century Department of Justice Appropriations Authorizations Act, Pub. L. No. 107-273, § 11020(b)(1), 116 Stat. 1758, 1826-27 (2002) (codified at 28 U.S.C. § 1369 (Supp. V 2005)), which provides for federal jurisdiction in cases arising from certain accidents in which at least seventy-five people have died; the Y2K Act, Pub. L. No. 106-37, § 15(c), 113 Stat. 185, 201-02 (1999) (codified at 15 U.S.C. § 6614 (2000)), which grants federal district courts jurisdiction over Y2K-related class actions; and *infra* text accompanying notes 293-297.

<sup>5</sup> See Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823; Stephen Labaton, *Senate Approves Measure To Curb Big Class Actions*, N.Y. TIMES, Feb. 11, 2005, at A1 (“Republicans say they hope the vote will provide momentum for two other major bills overhauling the tort law system, one on asbestos litigation, the other on curbs on medical malpractice lawsuits.”).

How, one might wonder (particularly after reading supporters' protestations to the contrary), could a statute that purportedly does not change the state substantive law usually applicable in federal diversity litigation be considered "tort reform"?<sup>6</sup> The answer is simple. Members of Congress now realize what most informed observers have long realized, to wit, that procedure is power.<sup>7</sup> More specifically, all informed observers of the litigation process now understand that Federal Rule of Civil Procedure 23 and state class action rules, although regulating the process of litigation, can still have major substantive impact.<sup>8</sup> Even if such rules do not change the substantive law directly, they can change the practical enforcement of substantive rights, whether by enabling plaintiffs to sue who would not otherwise be able to do so, or by exerting irresistible pressure on defendants to settle cases that they regard as lacking in merit.

It has also long been clear that plaintiffs' lawyers react to changes that make litigation more difficult in one court system by moving their cases to other court systems, while defense counsel seek forum advantages for their clients by using the tools available to them to affect the site of litigation. Forum shopping is not necessarily, indeed not usually, a ground for criticism of lawyers or their clients, as the existence and historic rationale of diversity of citizenship jurisdiction in the federal courts suggest.<sup>9</sup> Moreover, a price of federalism is that people

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<sup>6</sup> See, e.g., S. REP. NO. 109-14, at 56 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 53 ("S. 5 is court reform—not tort reform."). But see "Tort Reform" Bill Dies in the Senate, *supra* note 3.

<sup>7</sup> See Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1703 (2004).

<sup>8</sup> "[T]his Court's rulemaking under the enabling Acts has been substantive and political in the sense that the rules of procedure have important effects on the substantive rights of litigants." *Mistretta v. United States*, 488 U.S. 361, 392 (1989). In a footnote, the Court invoked Rule 23 as an example of a procedural rule with important substantive effects. See *id.* at 392 n.19.

<sup>9</sup> As Debra Bassett argues,

Forum shopping is not a form of "cheating" by those who refuse to play by the rules. Playing by the rules includes the ability of plaintiff's counsel to select—and defense counsel to seek to counter—the set of rules by which the litigation "game" will be played. The availability of more than one legally-authorized forum results in legitimate choice, and lawyers ethically are compelled to seek the most favorable forum to further their clients' interests. Selecting the most favorable forum is a rational strategy . . . The widespread criticism of forum shopping simply does not withstand scrutiny.

Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 395 (2006); see also Alan B. Morrison, *Removing Class Actions to Federal Court: A Better Way To Handle the Problem of Overlapping Class Actions*, 57 STAN. L. REV. 1521, 1524-25, 1530 (2005) (making similar

who can sue and perhaps secure relief in one state can't sue, or can't secure relief, in another. Forum shopping may, however, be a good reason to reexamine the constellation of legal rules (and other influences) that causes it. One's normative assessment of any particular forum-shopping phenomenon should consider differences in the ability of different types of litigants to benefit from forum shopping, the purposes for which a forum is being selected, the fairness of the forum selected to the parties and legal systems concerned, and the proportionality of forum choice.<sup>10</sup>

CAFA begins with statements of findings and purposes, the latter pitched at a high level of generality. The statute's stated purposes are to "(1) assure fair and prompt recoveries for class members with legitimate claims; (2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and (3) benefit society by encouraging innovation and lowering consumer prices."<sup>11</sup>

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arguments). For the historic rationale of diversity jurisdiction, see *infra* text accompanying notes 77-79.

<sup>10</sup> Cf. Arthur Taylor von Mehren, *Theory and Practice of Adjudicatory Authority in Private International Law: A Comparative Study of the Doctrine, Policies and Practices of Common and Civil-Law Systems*, in 295 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9, 68 (2002) (discussing proportionality as a basic concern in the design of judicial jurisdiction, one that seeks to provide appropriate forums that are "sufficient in number" but not so numerous as to encourage "unjustified forum-shopping").

<sup>11</sup> CAFA § 2(b), 28 U.S.C. § 1711 note (Supp. V 2005). CAFA's antecedent findings report the importance and value of class actions "when they permit the fair and efficient resolution of legitimate claims of numerous parties," but they also assert a decade of abuses that had harmed both deserving plaintiffs and innocent defendants, "adversely affected interstate commerce," and "undermined public respect for our judicial system." *Id.* § 2(a)(1)-(2). After enumerating ways in which class members, who "often receive little or no benefit from class actions," *id.* § 2(a)(3), have sometimes been harmed by them, the statute states,

(4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are—

(A) keeping cases of national importance out of Federal court;

(B) sometimes acting in ways that demonstrate bias against out-of-state defendants; and

(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

*Id.* § 2(a)(4).

CAFA's jurisdictional provisions, by contrast, are detailed, complicated, and replete with both undefined terms and ambiguous phrases. Having worked hard to close off avenues of forum choice that are available in the jurisdictional regime that CAFA largely replaces for class actions, CAFA's architects were forced by the need to compromise (and perhaps inclined by a strategic preference for ambiguity) to leave some questions implicating forum allocation unanswered.<sup>12</sup> They thus guaranteed years of work for lawyers and courts that is unrelated to the merits of the underlying disputes.<sup>13</sup>

As courts confront, and commentators begin to write about, the many jurisdictional questions that emerged from CAFA's long and messy legislative process, I propose to set that legislation in context. The contexts that I find most revealing concern the history of federal diversity-of-citizenship litigation in general and, within that larger story, the history of diversity class actions in federal court. Because all questions of federal court subject matter jurisdiction implicate the "happy relation of States to Nation,"<sup>14</sup> both accounts will necessarily pay attention to state court litigation and to the impact of doctrinal

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<sup>12</sup> They sought to answer many of those questions in legislative history. A number of federal courts have declined to rely on the 2005 Senate Report, S. REP. NO. 109-14 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, for this reason. *See, e.g., Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005) (rejecting the use of the Senate Report because "naked legislative history has no legal effect"). Other courts have also inferred that the legislative history was not available to senators when they voted. *See, e.g., Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006) ("[T]he Senate Report was issued ten days after the enactment of the CAFA statute . . ."). Yet, it has been contended that, although not ordered to be printed until after CAFA was signed into law, the 2005 Senate Report "was submitted to Congress before CAFA became law." H. Hunter Twiford, III et al., *CAFA's New "Minimal Diversity" Standard for Interstate Class Actions Creates a Presumption that Jurisdiction Exists, with the Burden of Proof Assigned to the Party Opposing Jurisdiction*, 25 MISS. C. L. REV. 7, 17 n.28 (2005) (emphasis omitted) (citing 151 CONG. REC. S978 (daily ed. Feb. 3, 2005)); *see also Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1206 n.50 (11th Cir. 2007) ("While the report was issued ten days following CAFA's enactment, it was submitted to the Senate on February 3, [2005]—while that body was considering the bill."). Moreover, although there was no House Report, there was a House Sponsors' Statement, *see* 151 CONG. REC. H727-29 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner), and extensive discussion and debate on the House floor. Finally, it should be noted that much of the 2005 Senate Report was contained in a 2003 Senate Report. *See* S. REP. NO. 108-123 (2003); *see also infra* note 56.

<sup>13</sup> *See* Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553, 1554 (2008) (decrying "social waste by litigation"); *id.* at 1565 ("This sloppily drafted statute created a lot of useless social friction and costly litigation by not foreseeing things like effective-date problems." (footnote omitted)); *id.* at 1592 ("Our study of these decisions shows most of this litigation to have been socially wasteful.").

<sup>14</sup> FRANKFURTER & LANDIS, *supra* note 1, at 2.

change on the federal-state equilibrium. To focus on one to the exclusion of the other—on class actions to the exclusion of ordinary diversity litigation, or on federal litigation to the exclusion of state litigation—risks a critical loss of perspective. The same risk attends the failure to mark the peculiar history of corporate citizenship for jurisdictional purposes. It is my view that the true measure of CAFA's significance is to be found not so much in its technical details as in the historical and institutional circumstances that brought it forth.

Although mastery of technical reasoning is not a sufficient condition for illuminating scholarship about procedural law, it is a necessary condition.<sup>15</sup> Readers of this Article should have what they need to evaluate for themselves the potential significance of the changes CAFA effected in jurisdictional law, as well as of changes in the law that it did not attempt. For that reason, I will begin in Part I with a description—a snapshot, if you will—of the jurisdictional rules governing federal diversity class action litigation prior to CAFA,<sup>16</sup> as a prelude to a description, in Part II, of the changes in jurisdictional law that CAFA ushered in (or may have ushered in).<sup>17</sup> Readers who are familiar with those details may want to move directly to Part III, where I review the history of ordinary diversity litigation in the federal courts, with particular attention to the status and role of corporate litigants,<sup>18</sup> and to Part IV, where I revisit pre-CAFA diversity class action litigation in the context of the broader world of modern federal and state class actions and of overlapping class actions.<sup>19</sup> Finally, in Part V and the Conclusion, I seek preliminary answers to the question of CAFA's significance.<sup>20</sup>

This work suggests reasons for concern about the impact that CAFA may have on the enforcement of state law. In addressing that concern, I consider whether changes in the litigation landscape since 1958, when Congress formally embraced corporate citizenship, might be thought to justify the changes in the balance of power in forum selection that CAFA brings about. Critical to my views in that regard are the failures of the Supreme Court to police interstate forum shopping effectively through constitutional control of personal jurisdiction or

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<sup>15</sup> See Stephen B. Burbank, *Procedure, Politics, and Power*, 52 J. LEGAL EDUC. 342, 343 (2002).

<sup>16</sup> See *infra* Part I.

<sup>17</sup> See *infra* Part II.

<sup>18</sup> See *infra* Part III.

<sup>19</sup> See *infra* Part IV.

<sup>20</sup> See *infra* Part V and Conclusion.



choice of law, and the steroidal effect of the modern (post-1966) class action on the incentives that drive forum choice. I recognize that the state court abuses cited by CAFA's supporters tended to be episodic and transient. I also recognize that some of what they alleged as abuses go to the heart of the modern class action. At the same time, however, at least where nationwide class actions are concerned, it takes only one state court to declare an empire, and what the political process takes away, it can restore.

In the circumstances, and given the stakes involved, I conclude that it was not unreasonable for Congress to assert a federal interest in regulating the process by which, and the forums in which, nationwide and multistate (collectively, "multistate") class action decisions are made. To be sure, the interest in question bears little relation to the historic account of diversity jurisdiction with which we are familiar. But, as Part IV demonstrates, this interest *is* consistent with the policy that the Supreme Court pursued when umpiring ordinary diversity litigation in the late nineteenth and early twentieth centuries, and consistent as well with the policy that Congress pursued in its 1958 amendments to the diversity statute.<sup>21</sup> Neither the Court nor Congress has limited diversity jurisdiction to accord with the traditional account of the reasons for the constitutional grant. In my view, therefore, CAFA's basic approach—which is similarly not so limited and is in that respect continuous with past practice—should not be tarred with the motives of some who supported the statute, and neither should the federal judiciary.

I reach a very different conclusion with respect to the numerous class actions within CAFA's reach that are not in any meaningful sense "multistate." Although the 1958 Congress effectively blessed the fictions of corporate citizenship created by the federal judiciary, it left in place (if it did not enhance) the instruments of countervailing power for plaintiffs that had developed in the system and that made the fictions tolerable. The 2005 Congress dismantled those instruments in order to open federal courts to multistate class actions. It conveniently forgot them when it came time to fashion exceptions. In the process, Congress neglected the critical role the exceptions played in equilibrating not just plaintiffs' and defendants' interests, but also federal and state interests. Ultimately, a combination of special interest overreaching, abetted by the fictions of corporate citizenship, and confusion about legislative aims, abetted by the institutional federal

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<sup>21</sup> See *infra* text accompanying notes 307-348.

judiciary's schizophrenia regarding overlapping class actions, led Congress to lose sight of its duty, when fashioning CAFA's exceptions, to preserve the "happy relation of States to Nation."<sup>22</sup> As a result, CAFA represents an affront to federalism in two respects and a potential affront in a third.

First, CAFA deprives states of the ability to regulate matters of intense local interest by enlisting for that purpose the regulatory potential of the class action as the states conceive it, on the basis of a definition of national interest that rests on legal fictions and on a vision of aggregate litigation that ignores the costs of complexity. Second, and quite apart from the regulatory void that CAFA may entail, the means by which Congress reached that result are deplorable. Working with exceptions so complicated that even some academics have been unable to penetrate them—and in a fog of ambiguity and hypocrisy—Congress sacrificed transparency and accountability in the interests of preserving deniability. Third, by exalting the gathering powers of the federal courts, Congress has created incentives for litigants and courts to create ever bigger "litigations." Whether in the form of multistate class actions or through nonclass aggregations, such litigation packages may replicate in federal court some of the supposed abuses in state court class actions to which CAFA supposedly responded, including the subordination of factual and legal differences of intense interest to individual states.<sup>23</sup>

The last concern also highlights questions about the effects that the increased federal caseload attributable to CAFA—consisting of substantial numbers of new district court cases that are notoriously demanding and also of appeals from orders granting (or denying) motions to remand—will have on the ability of the federal courts to deal fairly with all of their cases. Concerns about the effect that CAFA's predecessor bills would have on the federal courts' workload were long-standing and legitimate. It is thus surprising that, through inability to speak clearly with one voice, the Judicial Conference allowed a vision of the gathering powers of federal courts to compound the potential damage. It appears that federal courts are now seeking to minimize that damage by resisting some of the more blatant overreaching by CAFA's supporters. If so, the phenomenon marks a return to a more sober view of institutional self-interest and in so doing

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<sup>22</sup> FRANKFURTER & LANDIS, *supra* note 1, at 2; *see also supra* text accompanying note 14.

<sup>23</sup> *See infra* text accompanying notes 349-391.

contributes to an understanding of the federal judiciary as an interest group.<sup>24</sup>

I do not propose to treat discretely or in detail those sections of CAFA that address class action settlements. The provisions in question, such as those requiring heightened scrutiny of, and regulating attorney compensation for, so-called “coupon settlements,”<sup>25</sup> are not without interest for one who seeks to divine CAFA’s significance. The fact that some of them reflect legislation by anecdote may be evidence of an unarticulated agenda, as may the fact that, although the provisions in question apply to all class actions in federal court—where by 2005 they were arguably unnecessary—they do not apply to any state court class actions, in some of which they still might be useful.<sup>26</sup> Indeed, the incentives created by their differential application are a potentially important part of the story of the vastly expanded privilege of forum choice that CAFA confers on defendants, one that my colleague, Tobias Wolff, explores in his article for this Symposium.<sup>27</sup> Moreover, descriptions of the supposed class action abuses that CAFA’s provisions address are suggestive of a crabbed view of the

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<sup>24</sup> See *infra* text accompanying notes 396-399.

<sup>25</sup> 28 U.S.C. § 1712 (Supp. V 2005).

<sup>26</sup> See 28 U.S.C. §§ 1713–1714 (protecting class members against loss and against “discrimination based on geographic location”). Professor Laurens Walker suggests that § 1713 was based on one case and § 1714 on testimony in a congressional hearing. See Laurens Walker, *The Consumer Class Action Bill of Rights: A Policy and Political Mistake*, 58 HASTINGS L.J. 849, 860 (2007); see also Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1723, 1740 (2008) (suggesting that the evidence that led to § 1713 “is a class of one, an anecdote based on an unusual case”). The December 2003 compromise that enabled CAFA’s ultimate passage is also suggestive in this respect. One of its elements, tying attorney compensation to either coupon redemption or hours actually billed, put teeth into the regulation of coupon settlements, while another removed a ban on any compensation for named class representatives that might reasonably have been regarded as intended to deter even the “legitimate” class actions that CAFA purports to celebrate. See 149 CONG. REC. S16,102-03 (daily ed. Dec. 9, 2003) (statement of Sen. Dodd) (describing the compromise that led to CAFA’s passage).

For a discussion of federal rulemaking that arguably made (most of) CAFA’s provisions regulating class action settlements unnecessary in federal court, see Richard L. Marcus, *Assessing CAFA’s Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765, 1793-96 (2008).

<sup>27</sup> See Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2042 (2008) (noting that CAFA does not prevent defendants from seeking collusive settlements in state court). “The fact that S. 2062 purports to protect absent class members, but does not allow them to remove when defendants and class counsel collude to bring about an unfair settlement, further demonstrates that the bill is not about fairness to class members, but solely about protecting defendants.” Morrison, *supra* note 9, at 1548.

proper role of class actions,<sup>28</sup> one that some of the statute's supporters evidently hoped is (or will be) shared by the federal courts. This Article is, however, primarily an account of jurisdictional law, one in which provisions like those in CAFA that regulate class action settlements are part of the changing mix of incentives and disincentives that determine how jurisdictional law in the books affects litigation behavior and the enforcement of the substantive law.<sup>29</sup>

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<sup>28</sup> See S. REP. NO. 109-14, at 14-20, 58-59 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 14-21, 54-55 (arguing that lawyers received a disproportionate share of class action settlements and also that class actions should not be used to create "private attorneys general"). "Even if the critics were correct that deterrence was an intended purpose of class actions, that assertion is self-defeating because, in the Committee's view, the concept of class actions serving a 'private attorney general' or other enforcement purpose is illegal." *Id.* at 59, 2005 U.S.C.C.A.N. at 55; see also John H. Beisner, Matthew Shores & Jessica Davidson Miller, *Class Action "Cops": Public Servants or Private Entrepreneurs?*, 57 STAN. L. REV. 1441, 1451-62 (2005) (criticizing the "private attorney general" model of law enforcement through class actions); David Marcus, Erie, *The Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1286 (2006) ("Some of the law's principal proponents identified the supposed illegitimacy of large-scale economic regulation through private litigation based on state law causes of action as a chief rationale for the statute."). But see *infra* text accompanying note 190 (discussing the Advisory Committee's intent to facilitate the litigation of negative-value claims in the 1966 amendments to Rule 23).

<sup>29</sup> A study of publicly available opinions found only one case, *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292 (S.D. Fla. 2007), that involved disputes about CAFA's provisions targeting alleged class action abuses. See Clermont & Eisenberg, *supra* note 13, at 1555 n.4. Clermont and Eisenberg's speculation that this lack of cases "may be because reformers had exaggerated the degree of the abuse," *id.* at 1556 n.4, neglects the irony, noted in the text, that those abuses were said to occur primarily in state courts, to which the provisions do not apply. See, e.g., S. REP. NO. 109-14, at 53-54, reprinted in 2005 U.S.C.C.A.N. at 49-50. Professor Walker suggests that "[s]urely soon . . . cases commenced after the effective date will reach the settlement stage and the judicial application process will begin." Walker, *supra* note 26, at 850 n.6. Moreover, he argues that "the Consumer Class Action Bill of Rights [is] the most significant provision of the new law." *Id.* at 849. His prediction in that regard is based on the supposed political incentives of state attorneys general to respond vigorously to the notices of settlement that CAFA requires, see *id.* at 853-54, and on the supposed role that these officials might play under Federal Rule of Civil Procedure 24, see *id.* at 856-58. I doubt that it is sensible to liken their role under CAFA to "enforcement opportunities." *Id.* at 854. In addition, Professor Walker may overestimate both the possibilities for intervention under Rule 24 and the freedom of an intervenor to participate in the litigation. See *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 378 (1987) (concluding in the course of denying an interlocutory appeal that extensive limitations on a permissive intervenor were not so onerous as to constitute a constructive denial of intervention). He may also underestimate the combined forces of budgetary constraints, priorities, and inertia. For these and other reasons, attorneys general, if they decide to become involved at all, may prefer to "convey their views informally to parties rather than file official complaints or intervene in cases." Peter Geier, *State AGs Eschew CAFA Review*, NAT'L L.J., Oct. 23, 2006, at 5. For a case where these provisions may have made a difference, see *Figueroa*, 517 F. Supp. 2d 1292. See also Marcus, *supra* note 26, at

I stress at the outset that this Article is a preliminary effort that does not pretend to exhaust the history explored, even for the purpose of assessing CAFA's legal significance. Fortunately, this Symposium also includes an assessment of CAFA's social significance from one of this country's best legal historians (on whose prior work I rely heavily in Part III).<sup>30</sup> My hope is that, in combination, our work will provide useful perspectives for those who follow us.

## I. SUBJECT MATTER JURISDICTION OVER CLASS ACTIONS IN THE DEFAULT REGIME

### A. *Original Jurisdiction*

Before turning to CAFA's jurisdictional provisions, it is worthwhile to recall the law governing federal subject matter jurisdiction that CAFA replaces for cases within its reach. The law in question concerns, and only concerns, jurisdiction predicated on diversity of citizenship. Moreover, even as to diversity class actions, this law continues to provide the rules with respect to cases that are not subject to CAFA, for instance, putative class actions in which the class consists of fewer than 100 persons or in which the aggregate amount in controversy does not exceed \$5 million. For this reason, I shall refer to this jurisdictional law as the "default regime."

Under the default regime, the existence or absence of diversity of citizenship is determined by considering only the citizenship of

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1796 (citing *Figuroa* as an example of a case where the opposition of attorneys general to a proposed settlement may have swayed the court); Linda S. Mullenix, *CAFA and Coupons*, NAT'L L.J., Nov. 12, 2007, at 24 (noting the importance of the *Figuroa* case). Ongoing research by the Federal Judicial Center will "document any appearance by a public official at a settlement review hearing." Lee & Willging, *supra* note 26, at 1740.

I also do not propose to consider so-called "mass actions," 28 U.S.C. § 1332(d)(11) (Supp. V 2005), which CAFA largely assimilates to class actions for jurisdictional purposes. Civil actions "in which monetary relief claims of 100 or more persons are proposed to be *tried* jointly on the ground that plaintiffs' claims involve common questions of law or fact," 28 U.S.C. § 1332(d)(11)(B)(i) (emphasis added), are apparently not common. Clermont and Eisenberg's study unearthed only two cases that involved a mass action and only three others that discussed a mass action. See Clermont & Eisenberg, *supra* note 13, at 1556 n.5; see also Elizabeth J. Cabraser et al., *The Class Action Fairness Act of 2005: The Federalization of U.S. Class Action Litigation*, 43 CAN. BUS. L.J. 398, 408 (2006) ("Plaintiffs should therefore be able to keep 'mass actions' in state court if they adhere to current practices, which typically avoid the filing of complaints seeking the joint trial of plaintiffs in numbers even remotely approaching 100."). For my purposes, in any event, mass actions would be a distraction.

<sup>30</sup> See Purcell, *supra* note 5.

named class representatives and of defendants. As to those parties, however, complete diversity is required, with the result that jurisdiction cannot be exercised if any named plaintiff is a citizen of the same state as any defendant.<sup>31</sup> This aspect of the default regime, perhaps more than any other, empowers class action plaintiffs who desire to litigate in state court.<sup>32</sup> In addition, whereas the default regime treats corporations as citizens only of the states by which they are incorporated and of the state of their principal place of business,<sup>33</sup> it treats unincorporated associations as citizens of every state of which their members are citizens.<sup>34</sup>

As to the amount in controversy, which is currently in excess of \$75,000 exclusive of interest and costs for diversity jurisdiction generally,<sup>35</sup> the default regime was for many years unclear as a result of conflicts among the lower courts concerning the effect, if any, of the 1990 supplemental jurisdiction statute<sup>36</sup> on the rule—established by the Supreme Court through interpretation—that the claim of every member of a plaintiff class must satisfy the amount-in-controversy requirement.<sup>37</sup> Shortly after CAFA was enacted, the Supreme Court held that, so long as the required diversity of citizenship exists, supplemental jurisdiction can be exercised over the claims of all members of a class when at least one named representative has a claim satisfying the amount-in-controversy requirement.<sup>38</sup> That decision does not, however, disturb the default regime's rule that claims cannot usually be

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<sup>31</sup> See *Snyder v. Harris*, 394 U.S. 332, 340 (1969); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 366 (1921). The same rule applies to defendant class actions which, because of their rarity, will not be further discussed in this Article.

<sup>32</sup> Subject to very weak control by the federal courts under the rubric of "fraudulent joinder," see CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* 189 (6th ed. 2002), class counsel need only designate as a named plaintiff someone who is a citizen of the same state as one of the defendants, or a defendant who is a citizen of the state from which a named plaintiff hails, in order to destroy statutory diversity.

<sup>33</sup> 28 U.S.C. § 1332(c)(1) (2000).

<sup>34</sup> See *United Steelworkers of America v. R. H. Bouligny, Inc.*, 382 U.S. 145, 149-51 (1965) (acknowledging the artificiality of distinguishing labor unions from corporations for diversity purposes but stating that any change was for Congress to enact). The same is true of partnerships. See *Carden v. Arkoma Assocs.*, 494 U.S. 185, 192-96 (1990).

<sup>35</sup> 28 U.S.C. § 1332(a).

<sup>36</sup> *Id.* § 1367.

<sup>37</sup> See *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 294-95 (1973).

<sup>38</sup> See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 559 (2005).

aggregated to meet the amount-in-controversy requirement,<sup>39</sup> and thus the default regime continues to require that at least one claim meet that requirement.

### B. *Removal Jurisdiction*

The default regime's treatment of class actions for purposes of removal from state to federal court tracks the treatment of ordinary litigation. That is to say, a class action cannot be removed unless it would fall within the original jurisdiction of the federal courts under the rules summarized above.<sup>40</sup> In addition, when diversity jurisdiction alone is claimed, all defendants must join in (i.e., consent to) the notice of removal;<sup>41</sup> removal is not permitted when any (properly joined and served) defendant is a citizen of the state in which the action was brought,<sup>42</sup> and although removal is possible (if timely sought) if the removal results from subsequent developments in the state litigation that make the case removable for the first time, there is a one-year limitation (from the commencement of the state action).<sup>43</sup> Each of these requirements for removal creates additional options for class counsel to structure and/or conduct class action litigation so as to keep it in state court.

Because federal courts are courts of limited jurisdiction, they have a duty to ensure the existence of jurisdiction—constitutional and statutory—at all times and at every level of the federal court system.<sup>44</sup> Since the advent of various abstention doctrines<sup>45</sup> and the general embrace of the *forum non conveniens* doctrine<sup>46</sup> in the 1940s, it has been hard to take seriously lofty language that once posited a similar duty on the federal courts to exercise jurisdiction that Congress has

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<sup>39</sup> See *Snyder v. Harris*, 394 U.S. 332, 341 (1969) (approving the lower courts' practice of allowing aggregation where claims are "joint and common," but not where claims are "separate and distinct").

<sup>40</sup> See 28 U.S.C. § 1441(a) (2000).

<sup>41</sup> See *id.*; *cf. id.* § 1441(c) (allowing removal of separate and independent claims in federal question cases).

<sup>42</sup> *Id.* § 1441(b).

<sup>43</sup> *Id.* § 1446(b).

<sup>44</sup> The exercise of this duty has famously led the Supreme Court, on its own motion, to dismiss for lack of subject matter jurisdiction cases, fully adjudicated below, in which all parties sought review on the merits. See, e.g., *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 151-54 (1908).

<sup>45</sup> See, e.g., *Burford v. Sun Oil Co.*, 319 U.S. 315, 332-34 (1943); *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500-01 (1941).

<sup>46</sup> See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507-12 (1947).

conferred on them.<sup>47</sup> It is another mark of this different attitude toward putatively erroneous findings of no jurisdiction that, in the default regime, Congress has generally forbidden appellate review, “on appeal or otherwise,” of orders remanding removed cases.<sup>48</sup>

## II. CAFA’S JURISDICTIONAL PROVISIONS

### A. *Original Jurisdiction*

CAFA opens the federal courts to class actions that could not be brought there under the default regime. The provisions of new subsection 1332(d) change the default regime in a number of significant respects. Before discussing those changes, however, it is useful to understand the cases that are explicitly excluded from the legislation’s reach, the so-called jurisdictional carve-outs.<sup>49</sup>

#### 1. Carve-Outs

CAFA’s jurisdictional provisions do not apply to any class action in which “the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed

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<sup>47</sup> See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (“We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.”). The qualifier that the obligation is “virtually unflagging,” *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976), does not help (to take “the lofty language” seriously).

<sup>48</sup> See 28 U.S.C. § 1447(d) (2000) (providing, however, an exception for civil rights cases removed under 28 U.S.C. § 1443). This provision originated in an 1887 statute. See Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 552, 553. The Judiciary Act of March 3, 1875, which substantially expanded the jurisdiction of the federal courts, had authorized review of remand orders by appeal or writ of error. See Act of Mar. 3, 1875, ch. 137, § 5, 18 Stat. 470, 472. The 1887 provision rescinding that authority was inserted without discussion, see 18 CONG. REC. 2543 (Mar. 2, 1887), during Senate debate on a House bill that was designed “to diminish the jurisdiction of the circuit courts and the Supreme Court of the United States, to promote the convenience of the people, and to lessen the burden and expense of litigation.” 18 CONG. REC. 613 (Jan. 13, 1887); see also *Gay v. Ruff*, 292 U.S. 25, 36-37 (1934) (noting that congressional legislation had restricted the jurisdiction of the federal trial court). The provision was preserved virtually unchanged in the 1911 codification of laws relating to the judiciary. See Act of Mar. 3, 1911, ch. 231, § 28, 36 Stat. 1087, 1095. It was inadvertently omitted from the 1948 codification, prompting legislation to restore it the following year. See Act of May 24, 1949, ch. 139, § 84, 63 Stat. 89, 102. The exception for civil rights cases was added in 1964. See Civil Rights Act of 1964, Pub. L. No. 88-352, § 901, 78 Stat. 241, 266.

<sup>49</sup> Federal subject matter jurisdiction may, however, exist under the default regime.



from ordering relief,<sup>50</sup> and they also do not apply to actions in which “the number of members of all proposed plaintiff classes in the aggregate is less than 100.”<sup>51</sup> It is apparent that the latter carve-out was designed to leave actions on behalf of small groups of people in state court, while the former acknowledges the unfairness of permitting state officials to remove cases, only to plead the bar of sovereign immunity.<sup>52</sup>

I should also mention here the exclusions for class actions involving solely a claim “concerning a covered security as defined [in the Securities Acts],”<sup>53</sup> “relat[ing] to the internal affairs or governance of a corporation or other form of business enterprise” under the law of the state of incorporation or organization,<sup>54</sup> or “relating to the rights, duties, . . . and obligations relating to or created by any security” as defined by federal securities law.<sup>55</sup> According to the Senate Report, “[t]he purpose of this provision is to avoid disturbing in any way the federal vs. state court jurisdictional lines already drawn in the securities litigation class action context by the enactment of the Securities Litigation Uniform Standards Act of 1998.”<sup>56</sup>

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<sup>50</sup> 28 U.S.C. § 1332(d)(5)(A) (Supp. V 2005).

<sup>51</sup> *Id.* § 1332(d)(5)(B).

<sup>52</sup> See S. REP. NO. 109-14, at 41-42 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 39-40; cf. *Lapides v. Bd. of Regents*, 535 U.S. 613, 618-24 (2002) (holding that removal waives sovereign immunity with respect to state law claims for which immunity was waived in state court). The federal courts could learn a valuable lesson from this in their administration of the forum non conveniens doctrine in diversity cases. Why should state courts that do not have any such doctrine, or that follow a version that is less robust, be deprived of the power to hear a case that would be dismissed on that ground on motion of the removing party? This suggests that federal courts should either apply state forum non conveniens law in diversity cases or hold that, by removing, the defendant “has thereby waived any personal privilege he might have had to be sued in another [court].” *Sayles v. Nw. Ins. Co.*, 21 F. Cas. 608, 608 (C.C.D. R.I. 1854) (No. 12,421). In *Sayles*, the court upheld personal jurisdiction in a removed case involving the attachment of property. The case could not have been maintained originally in the federal court to which it was removed. See *id.* For a recent decision holding that Louisiana waived whatever sovereign immunity it had against removal under CAFA by joining with its claims against insurers the claims of a putative class of Louisiana and non-Louisiana citizens, see *In re: Katrina Canal Litigation Breaches*, No. 08-30145, 2008 U.S. App. LEXIS 7933 (5th Cir. Apr. 11, 2008).

<sup>53</sup> 28 U.S.C. § 1332(d)(9)(A).

<sup>54</sup> *Id.* § 1332(d)(9)(B).

<sup>55</sup> *Id.* § 1332(d)(9)(C).

<sup>56</sup> S. REP. NO. 109-14, at 45, reprinted in 2005 U.S.C.C.A.N. at 42. Identical language can be found in the 2003 Senate Report. See S. REP. NO. 108-123, at 46 (2003). For an interesting and valuable analysis of the interplay between CAFA and the Securities Litigation Uniform Standards Act of 1998 (SLUSA), Pub. L. No. 105-353, 112 Stat. 3227 (codified in scattered sections of 15 U.S.C.), arguing that Congress was mistaken

## 2. Diversity and Amount in Controversy

Turning then to the main event, CAFA changes the default regime by predicating jurisdiction on minimal diversity. Thus, the statute confers jurisdiction, subject to the amount-in-controversy requirement, over any civil action that is a class action in which “any member of a class of plaintiffs is a citizen of a State different from any defendant.”<sup>57</sup> Moreover, unincorporated associations are assimilated to corporations, in that they are deemed to be citizens only of the state where they have their principal place of business and the state under whose law they are organized.<sup>58</sup>

As for the amount in controversy, CAFA again changes the default regime, first by raising the required amount to in excess of “the sum or value of \$5,000,000, exclusive of interest and costs,” and also by providing that “the claims of the individual class members shall be aggregated to determine” whether the required amount is in controversy.<sup>59</sup>

## 3. Definitions

The provisions of new subsection 1332(d) are subject to definitions, the most important of which for present purposes is the definition of a “class action” as “any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action.”<sup>60</sup> For jurisdiction, this means that status as a putative class action suffices. This is also clear from another provision, which states that subsection 1332(d) “shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.”<sup>61</sup> The question arises, how-

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in believing that the latter had solved the relevant problems and thus also mistaken in refusing to extend CAFA to securities cases, see Jeffrey T. Cook, *Recrafting the Jurisdictional Framework for Private Rights of Action Under the Federal Securities Laws*, 55 AM. U. L. REV. 621, 646-47 (2006).

<sup>57</sup> 28 U.S.C. § 1332(d)(2)(A). Subsections 1332(d)(2)(B) & (C) carry out the same plan for cases involving aliens and foreign states.

<sup>58</sup> *Id.* § 1332(d)(10). This provision was apparently added “to ensure that unincorporated associations receive the same treatment as corporations for purposes of diversity jurisdiction.” S. REP. NO. 109-14, at 45-46, *reprinted in* 2005 U.S.C.C.A.N. at 42-44. From the perspective of unincorporated associations alone, it could have the effect of *reducing* access to federal court in a minimal (as opposed to complete) diversity regime, although it would very rarely make a difference in that regard.

<sup>59</sup> 28 U.S.C. § 1332 (d) (6).

<sup>60</sup> *Id.* § 1332(d)(1)(B).

<sup>61</sup> *Id.* § 1332(d)(8).

ever, whether jurisdiction subsists when, in a case brought in or removed to federal court under CAFA, the court declines to certify a class. The importance of this question is likely to be greatest in a case removed from state court, and the implications of the answer to it may be most dramatic with respect to subsequent attempts to litigate in state court.<sup>62</sup>

#### 4. Exceptions<sup>63</sup>

CAFA divides the universe of cases in which the basic requirements (minimal diversity and more than \$5 million in controversy) are met into four sets, with its exceptions applying to three of them. In the first set are cases in which one-third or fewer of the members of all proposed plaintiff classes in the aggregate (“class members”) are

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<sup>62</sup> The decisions to date are split. *Compare, e.g.*, *Genenbacher v. CenturyTel Fiber Co. II*, 500 F. Supp. 2d 1014, 1016-17 (C.D. Ill. 2007) (reasoning that a denial of class certification did not affect the court’s subject matter jurisdiction), *with Hoffer v. Cooper Wiring Devices, Inc.*, No. 06-0763, 2007 U.S. Dist. LEXIS 75806, at \*3-4 (N.D. Ohio Sept. 28, 2007) (dismissing a case for lack of subject matter jurisdiction after class certification was denied). *See also* *Good v. Ameriprise Fin., Inc.*, No. 06-1027, 2008 U.S. Dist. LEXIS 3982, at \*46-50 (D. Minn. Jan. 18, 2008) (inviting parties to submit supplemental briefs, and reviewing the decisions of other courts, on a “new and evolving legal issue,” whether a court has jurisdiction over individual claims after CAFA class certification has been denied). The 2003 Senate bill contained a provision requiring the court to dismiss a case in which certification had been denied, *see* Class Action Fairness Act of 2003, S. 274, 108th Cong. § 4(a)(2) (2003), and one of the elements of the compromise that enabled the passage of the 2005 legislation was the deletion of that requirement. Senator Chris Dodd asserted that the “compromise eliminates the dismissal requirement, giving federal courts discretion to handle Rule 23-ineligible cases appropriately. Potentially meritorious suits will thus not be automatically dismissed simply because they fail to comply with the class certification requirements of Rule 23.” 149 CONG. REC. S16,102-03 (daily ed. Dec. 9, 2003). Of course, even if a court consulted this legislative history, it might conclude that the “appropriate” treatment of the “Rule 23-ineligible cases” would be to see whether they are within federal subject matter jurisdiction.

<sup>63</sup> “Exceptions” is a loaded word in this context, because labeling a statutory provision as such, rather than, for instance, as an “exclusion,” may have unjustified influence in determining the location of the burden of persuasion concerning the existence of subject matter jurisdiction. *See generally* Lonny Sheinkopf Hoffman, *Burdens of Jurisdictional Proof*, 59 ALA. L. REV. (forthcoming 2008) (manuscript at 11-12), available at <http://ssrn.com/abstract=1005477> (“The notion that one can divine legislative intent by somehow distinguishing certain provisions as ‘exceptions’ immediately raises a number of perplexing questions.”); Stephen J. Shapiro, *Applying the Jurisdictional Provisions of the Class Action Fairness Act of 2005: In Search of a Sensible Judicial Approach*, 59 BAYLOR L. REV. 77, 98-102 (2007) (concluding that plaintiffs should not bear the burden of proving jurisdiction where a small subset of cases is carved out from a very broad grant of jurisdiction, regardless of the linguistic label applied to such a carve-out). I use “exceptions” here only as a concession to the shortness of life.

citizens of the state in which the action was originally filed (the “original state”).<sup>64</sup> Even if all defendants are citizens of that state, a federal court has no discretion to decline jurisdiction: there is no exception for such cases. In the second and third sets are cases where *both* the “primary defendants” and either between one-third and two-thirds<sup>65</sup> or two-thirds or more<sup>66</sup> of class members are citizens of the original state. A federal court must decline jurisdiction in the third set (the “home-state exception”), and it has discretion to decline jurisdiction in the second (the “discretionary exception”) based on a consideration of six factors, the first of which is “whether the claims asserted involve matters of national or interstate interest,”<sup>67</sup> and the last of which is “whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.”<sup>68</sup>

CAFA’s fourth set, triggering the “local controversy exception,” comprises cases in which (1) greater than two-thirds of class members are citizens of the original state; (2) there is at least one defendant from whom “significant relief” is sought, whose alleged conduct forms a “significant basis” for the claims asserted, and who is a citizen of the original state; and (3) “principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred” in the original state.<sup>69</sup> Even if all of those requirements are met, the exception’s duty to decline to exercise jurisdiction does not apply unless “during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons.”<sup>70</sup>

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<sup>64</sup> See 28 U.S.C. § 1332(d)(3)–(4).

<sup>65</sup> See *id.*

<sup>66</sup> See *id.* § 1332(d)(4)(B).

<sup>67</sup> See *id.* § 1332(d)(3)(A).

<sup>68</sup> *Id.* § 1332(d)(3)(F). The other factors focus attention on the laws that will govern the claims asserted, “whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction,” whether the original state has a “distinct nexus with the class members, the alleged harm, or the defendants,” and whether class membership is disproportionately composed of citizens of the original state. See *id.* § 1332(d)(3)(B)–(E).

<sup>69</sup> *Id.* § 1332(d)(4)(A)(i).

<sup>70</sup> *Id.* § 1332(d)(4)(A)(iii).

### B. Removal Jurisdiction

Although CAFA may prove a boon to putative class members who would prefer, as an original matter, to litigate in federal court,<sup>71</sup> one would have thought that, in the near term at least, its major impact would be felt as a result of its removal provisions.<sup>72</sup> These provisions

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<sup>71</sup> This would include litigants in states, like Texas, whose courts have made the path to class certification not only significantly more difficult in recent years, but also more difficult than it is in many federal circuits. See, e.g., *Citizens Ins. Co. of Am. v. Daccach*, 217 S.W.3d 430, 439-42 (Tex. 2007); see also *infra* note 263.

<sup>72</sup> Note in that regard accounts of multiple state court filings in anticipation of CAFA, see Seth Stern, *Lawyers Seek Loopholes in Class Action Overhaul*, 63 CQ WKLY. 494, 494 (2005) (“[O]nce Congress put the bill on the fast track this year there was a last-minute dash by plaintiffs’ lawyers to the courthouses that have been particularly friendly to class action plaintiffs.”), and the amount of post-CAFA litigation concerning the effect, if any, of amendments to state court complaints on the question of whether the action was “commenced” prior to CAFA’s effective date (February 18, 2005). See Lonny Sheinkopf Hoffman, *The “Commencement” Problem: Lessons from a Statute’s First Year*, 40 U.C. DAVIS L. REV. 469 (2006) (examining the issues posed by these post-CAFA complaint amendments and ultimately concluding that state law should define when an action is “commenced”); see also Linda S. Mullenix, *The Cost of CAFA*, NAT’L L.J., Aug. 27, 2007, at 13 (discussing the risk that corporate defendants will have to pay plaintiffs’ attorneys’ fees for improper removal, as these defendants “reflexively remove all state class actions into federal court”). Yet, the Federal Judicial Center’s (FJC) empirical studies do not support the supposition in the text; its data indicate that a majority of CAFA cases have been filed as original actions in federal court. See Lee & Willging, *supra* note 26, at 1752.

Although both diversity removals and original proceedings increased, comparing the pre- and post-CAFA periods, the greatest increase is observed in the original proceedings. Pre-CAFA, the average number of monthly removals of diversity class actions was 16.6; post-CAFA the comparable figure was 23.7, an increase of, on average, about 7 class actions. But pre-CAFA, the average number of monthly original proceedings of diversity class actions was 10.8; post-CAFA, the comparable figure was 31.5, an increase of about 20 class actions per month.

*Id.* It may be worth determining the extent to which these findings were affected by the FJC’s decision—for all consolidated cases, including those subject to the multidistrict litigation (MDL) process—to include only lead cases in their analysis database. See *id.* at 1746. That decision is understandable for purposes of workload and resource studies, but it is not obviously appropriate in comparing filing and removal rates (particularly pre- and post-CAFA rates).

The FJC’s researchers suggested in an earlier report that plaintiffs’ counsel, preferring state court but not confident about their ability (or not willing) to structure the litigation so as to keep it there, may have decided that the game was not worth the candle. See THOMAS E. WILLGING & EMERY G. LEE III, FED. JUDICIAL CTR., *THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: THIRD INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 16-17* (2007). Moreover, as that report also points out, by filing in federal court originally, plaintiffs’ counsel preserved the choice of forum (where personal jurisdiction and

change the default regime in at least four respects. First, the statute enables any defendant to remove, whether or not other defendants consent.<sup>73</sup> Second, it extends that privilege even to in-state defendants.<sup>74</sup> Third, CAFA eliminates the default regime's one-year time limitation on removal.<sup>75</sup> Fourth, it provides for discretionary appeals from orders granting or denying motions to remand.<sup>76</sup>

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venue law afford choice). *Id.* at 17; *cf.* 28 U.S.C. § 1441(a) (2000) (prescribing the venue of a removed case as “the district court of the United States for the district and division embracing the place where such action is pending”). Additional analyses have shown that the mix of post-CAFA original and removed cases varies among the circuits, prompting the researchers to look for correlations between those circuits attracting larger percentages of either original filings or removed cases and circuit reputations for liberality or conservatism in class certification. *See* Lee & Willging, *supra* note 26, at 1761-62 (reporting mixed data as to whether such a correlation exists). Part of that inquiry—as, for instance, concerning the high percentage of removed cases in the Fifth Circuit—should include attention to state certification law and practice. *See supra* note 71 and accompanying text.

Finally, the contrary (nationwide) finding of empirical work based on opinions publicly available—that cases removed under CAFA do dominate those originally filed—may indeed be one more piece of evidence of the risks of empirical research that relies on published opinions:

Probably the difference shows merely that among CAFA class actions, removed cases are the ones generating pitched battles and hence published opinions, and especially opinions that expressly mention CAFA. The difference between the two studies thus may reflect the danger of relying only on published cases to get a picture of what is really happening on the ground.

Clermont & Eisenberg, *supra* note 13, at 1563. Note, however, the question above about the FJC data concerning consolidated cases and the fact that the composite FJC data mask differences among the circuits.

<sup>73</sup> 28 U.S.C. § 1453(b) (Supp. V 2005).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* § 1453(c)(1). The removal provisions contain carve-outs mirroring those under revised § 1332. *Compare id.* § 1453(d) with *supra* Part I.B. To my knowledge, the federal courts have not wrapped themselves in knots over the potential problem created by § 1453's failure to require explicitly that there be original jurisdiction under § 1332(d)(2), as contemplated by the legislative history. *See* Clermont & Eisenberg, *supra* note 13, at 1557 (assuming the usual requirement that the removed action be one that could have been entertained by federal court as a matter of original jurisdiction “in accordance with the clear legislative history despite the absence of appropriate statutory wording”); Adam N. Steinman, *Sausage-Making, Pigs' Ears, and Congressional Expansions of Federal Jurisdiction: Exxon Mobil v. Allapattah and its Lessons for the Class Action Fairness Act*, 81 WASH. L. REV. 279, 292-98 (2006) (discussing this disconnect between CAFA's text and its legislative history regarding the requirement of original jurisdiction under § 1332(d)(2)); *see also* Palisades Collections LLC v. Shorts, No. 07-0098, 2008 U.S. Dist. LEXIS 6354, at \*29 (N.D. W. Va. Jan. 29, 2008) (“ATTM, therefore, may not rely on CAFA to circumvent the long-standing requirement that only a true defendant may remove a case to federal court.”).

## III. DIVERSITY LITIGATION IN HISTORICAL CONTEXT

More than two centuries have not shed much light on the reasons why the Constitution includes in Article III a grant of judicial power in “Controversies . . . between Citizens of different States.”<sup>77</sup> Early on, however, the Supreme Court embraced what has become the traditional view, and the Court has never abandoned it. Under that view the constitutional grant of diversity-of-citizenship jurisdiction was intended to make available a neutral forum for litigants worried about local bias in the courts of states other than their own.<sup>78</sup> Consistently with that view, the Court, in 1806, interpreted the statute implementing the grant of judicial power for inferior courts to require complete diversity.<sup>79</sup>

Apart from its pedigree in decisions of the Supreme Court, the traditional view has in its favor that it was the rationale advanced by Hamilton in the *Federalist Papers*<sup>80</sup> and, according to Henry Friendly, the rationale most frequently invoked when Article III was debated in state ratifying conventions.<sup>81</sup> The fact that Friendly’s research in pre-1787 decisions of state appellate courts found no evidence of actual

<sup>77</sup> U.S. CONST. art III, § 2, cl. 1.

<sup>78</sup> See *Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 87-88 (1809).

<sup>79</sup> See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). In cases kept from federal court by that interpretation, a state court intent on disfavoring an out-of-state citizen would also have to disfavor one of its own. This is not to say that an interpretation not requiring complete diversity would in all circumstances be inconsistent with the traditionally ascribed purpose. Moreover, the fact that—from the beginning and still today—a plaintiff can (as a matter of subject matter jurisdiction) sue an out-of-state defendant in a federal court in the plaintiff’s state is inconsistent with the traditional account. This “anomaly” may be evidence of the existence of reasons for the constitutional grant other than, or in addition to, the fear of bias. Congress has long been urged to eliminate the anomaly. See, e.g., *Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 92d Cong. 128 (1971) (testimony of Richard H. Field, Professor, Harvard Law School) (“Now, so far as the in-state plaintiff is concerned, this represents about half of the diversity cases.”); ALL STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1302(a), at 123-24 (1969) [hereinafter STATE-FEDERAL STUDY] (proposing to prohibit the invocation of diversity jurisdiction, either originally or on removal, by an in-state citizen). Although Congress has declined to do so, it has eliminated the twin anomaly of a venue option of plaintiff’s residence. See *Judicial Improvements Act of 1990*, Pub. L. No. 101-650, § 311, 104 Stat. 5089, 5114 (codified at 28 U.S.C. § 1391 (2000)); REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 94 (1990) (advocating the elimination of the venue anomaly).

<sup>80</sup> See THE FEDERALIST NO. 80, at 478-79 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>81</sup> See Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 492 (1928).

bias<sup>82</sup> may only confirm that a different kind of bias—publication bias—was acute in the eighteenth century.<sup>83</sup> Research designed to determine the extent of actual bias does not in any event speak to the existence of solicitude for the fear of biased treatment on which the Court in fact relied.<sup>84</sup> Certainly, as John Frank observed, there was evidence of biased treatment of some aliens, namely British creditors, sufficient to insulate from question the basis for the cognate grant of judicial power in “Controversies . . . between a State, or the Citizens

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<sup>82</sup> See *id.* at 493-95.

<sup>83</sup> “Publication bias” refers to the confounding effect in studies based on published opinions of nonrandom differences in the rate of publication. It may account for the prominence of cases removed under CAFA in publicly available opinions. See *supra* note 72. A vivid example of the phenomenon was revealed by the Second Circuit’s observation that it published decisions reversing grants of summary judgment far more often than decisions affirming them. See *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir. 1986). John Frank analyzed (for different purposes) “5[9]4 reported cases in seven colonies and states from 1658 to 1787 . . . [which comprised] substantially all available reported cases.” John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 24 (1948). I have corrected the figure given in the original quotation (554) to accord with Frank’s Table 3—it now says 594. See *id.* at 25 tbl.3. Even noting a likely appeal bias in cases of “diverse origin” and coding generously in favor of that group, Frank found that the group contained only fifty-five of the 594 total cases, and many of the fifty-five were “not interstate cases, but English-state cases.” *Id.* at 24-25 & tbl.3. In comments on a draft of this Article, Kevin Clermont suggested that there may also have been a selection effect at work:

[T]he last place I think you would see actual bias in old cases is in the cases themselves. Litigants would be painfully conscious of bias, and would not sue or settle to avoid the bias. The reported cases would turn out to read just like cases in a total absence of bias. As we showed in our *Xenophilia* articles, [Kevin M. Clermont & Theodore Eisenberg, Commentary, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120 (1996)] and [Kevin M. Clermont & Theodore Eisenberg, *Xenophilia or Xenophobia in U.S. Courts? Before and After 9/11*, 4 J. EMPIRICAL LEGAL STUD. 441 (2007)], win rates can show whether bias is more or less than the parties expect, but cannot show whether bias exists or not.

E-mail from Kevin M. Clermont to author (Nov. 18, 2007) (on file with author).

<sup>84</sup> See *supra* text accompanying note 78. Friendly acknowledged that a change to a bill in the first Congress was “clearly in line with the theory, already orthodox [in 1789!], that the purpose of diversity jurisdiction was to prevent the baneful effects of local prejudice.” Friendly, *supra* note 81, at 501. Of course, CAFA itself may represent an example of solicitude for the fear of biased treatment that either does not exist or is statistically insignificant. See Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does it Make?*, 81 NOTRE DAME L. REV. 591, 653 (2006) (finding “little difference in the rulings issued by the two sets of courts,” notwithstanding attorney beliefs that “state courts are more permissive toward class actions” than are federal courts). But see *infra* note 367 (discussing methodological and interpretive questions raised by this study).



thereof, and foreign States, Citizens or Subjects.”<sup>85</sup> Moreover, Frank also provided reasons to believe that Madison “and his colleagues obviously thought of national and international diversity together.”<sup>86</sup>

Whatever the role of actual bias or fear of bias in its creation, the diversity clause elicited only a “tepid”<sup>87</sup> defense by Marshall in the ratification effort.<sup>88</sup> Just as proponents may have been loath to articulate a bill of particulars against biased state courts, so too may they have been content to mask their true goals for the diversity clause in the supposed apprehensions of their countrymen. In that regard, Article III contains a number of grants of judicial power that, Frank argued, were “of actual practical significance to large landholders.”<sup>89</sup> Moreover, Madison’s remark on which Frank relied for the conflation of

<sup>85</sup> U.S. CONST. art. III, § 2, cl. 1; *see also* Frank, *supra* note 83, at 24 (“There can be no doubt, for example, of direct bias in the administration of justice against British creditors in Virginia.”).

<sup>86</sup> Frank, *supra* note 83, at 27.

<sup>87</sup> Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 520 (1928).

<sup>88</sup> *See* Friendly, *supra* note 81, at 487-88. Friendly acknowledged Felix Frankfurter’s assistance. *See id.* at 483 n.\*; Henry J. Friendly, *In Praise of Eric—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 383 (1964) (noting that Friendly, in 1927, was “working, under the guidance of Professor Frankfurter . . . on a paper”). Frankfurter, in turn, relied heavily on Friendly’s article in an article of his own published the same year. *See* Frankfurter, *supra* note 87, at 520-21. Proceeding from the doubts that Friendly’s research had engendered about the existence of the problem that the constitutional grant was traditionally viewed as addressing, Frankfurter launched a vigorous attack on the need for diversity jurisdiction in 1928, stressing its controversial nature and political and social costs. An advocate of abolishing statutory diversity jurisdiction, he argued that, in any case, “[c]ertainly the obvious abuses of diversity jurisdiction should be promptly removed by legislation.” *Id.* at 523. Moreover, he made it clear that in his mind the most obvious of such abuses was corporate diversity litigation. *See id.* at 523-26. Frankfurter also used his article to advocate passage of a Senate bill that would have overruled *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), *see* Frankfurter, *supra* note 87, at 529-30 & n.152, revealing neither that he wrote the bill nor that he did so at the suggestion of Justice Brandeis. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1109 n.433 (1982). The circle was closed when Brandeis cited Frankfurter’s article in his opinion for the Court in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 73 n.6 (1938). *See infra* note 162 (noting the repeated citations to Frankfurter’s article in Justice Brandeis’s opinion).

<sup>89</sup> Frank, *supra* note 83, at 20. Although Frank acknowledged that the grant in cases “between Citizens of the same State claiming Land under Grants of different States,” U.S. CONST. art. III, § 2, cl. 1, was the “most obvious relevant clause,” he argued that “the diversity and treaty clauses were the jurisdictional clauses most immediately affecting large landed interests.” Frank, *supra* note 83, at 20. He also concluded that the “Supreme Court aided virtually every land speculator who came before it from 1790 to 1815.” *Id.* at 22; *see also id.* at 20 (discussing the favorable treatment given to landholders by the Constitution).

interstate and international diversity also linked “justice” to “foreigners” with the promotion of trade.<sup>90</sup> Whether or not, as Friendly concluded, “the desire to protect creditors against legislation favorable to debtors was a principal reason for the grant of diversity jurisdiction,”<sup>91</sup> it surely was one reason animating some of its supporters.<sup>92</sup> As I have previously argued,

An important reason for the existence of Article III federal judicial power in diversity (including alienage diversity) cases and for the First Congress’s decision to create lower federal courts had to do with concerns that state courts were hostile to creditors. Although this concern was at its height in connection with British creditors, the discriminatory treatment of whom might prove a cause of war, it was by no means confined to such cases. In the period immediately preceding the Constitutional Convention there was ample evidence of the propensity of states to favor debtors. Indeed, concerns about the impact of such laws on contract and property rights and on the ability of the new country to progress to a developed commercial state led to more than a head of judicial power; they contributed to a substantive restriction in the Constitution, the prohibition against the impairment of contracts.<sup>93</sup>

There is thus evidence that the grant of diversity jurisdiction in Article III was designed to make available a forum where the creditor class would receive “justice.” Moreover, as Frank suggested, although the “typical case [in 1787] was still *A v. B* for a cow,”<sup>94</sup> the framers and

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<sup>90</sup> See Frank, *supra* note 83, at 27; *supra* text accompanying note 86.

<sup>91</sup> Friendly, *supra* note 81, at 496-97; see also Frankfurter, *supra* note 87, at 520 (citing Friendly and arguing that fear of state legislatures, not state courts, motivated diversity jurisdiction); Friendly, *supra* note 81, at 498 (“There was a vague feeling that the new courts would be strong courts, creditors’ courts, business men’s courts.”).

<sup>92</sup> Note in that regard Hamilton’s argument that judicial independence would serve to temper “unjust and partial laws”:

But it is not with a view to infractions of the Constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws.

THE FEDERALIST NO. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>93</sup> Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291, 1323-24 (2000) (footnotes omitted); see also *id.* at 1325-26 (discussing *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46-47 (1825), an intensely controversial decision in which Chief Justice Marshall candidly discussed the perceived problem of state court bias and speculated “about the reason Congress conferred local federal power to alter state final process law in the Process Act of 1789”).

<sup>94</sup> Frank, *supra* note 83, at 26.

ratifiers of the Constitution should perhaps be credited with imagining developments in interstate and international commerce with which they had no experience.<sup>95</sup>

One development that those responsible for the Constitution surely did not anticipate, but that was uppermost in the minds of CAFA's supporters, was the role of corporations in the economy. Business corporations in the modern sense hardly existed in 1787,<sup>96</sup> and for some fifty years thereafter their creation in most states required special legislation—generally in the form of charters.<sup>97</sup> During that period, the ability of corporations to sue or be sued in federal court was restricted by the requirement of complete diversity. Since

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<sup>95</sup> Both Friendly and Frank also suggested, with very little evidence, that the constitutional diversity grant was intended to provide possible refuge from state courts that were inefficient or worse. See Frank, *supra* note 83, at 27 (“Poorly paid, short-term state judges were, in the minds of the Philadelphia Convention, sometimes incompetent and inept.”); Friendly, *supra* note 81, at 497-98 (suggesting that “[t]he method of appointment and the tenure of the judges [in state courts] were not of the sort to invite confidence”).

<sup>96</sup> As Henry Butler explains,

Following the American Revolution, there was almost universal assent to the proposition that the power to form corporations was vested in the state legislatures. All corporate charters were issued one by one by individual legislative acts, and the overwhelming majority of the corporations chartered in the late 1700s were banks, insurance companies, water companies, and companies organized to build or run canals, turnpikes, and bridges. Many of the public utility or transportation corporations were awarded monopoly privileges and police powers of the state (for example, eminent domain) in exchange for the financing and construction of quasi-public goods by the private firms.

Henry N. Butler, *Nineteenth-Century Jurisdictional Competition in the Granting of Corporate Privileges*, 14 J. LEGAL STUD. 129, 138 (1985) (footnote omitted); see also JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES: 1780-1970*, at 7 (1970) (“There is no evidence of significant demand for corporate charters for local enterprise until about 1780; both opportunity and means were lacking for undertakings ambitious enough to invite using the corporation.”); *id.* at 17 (noting that, of the 317 special charters enacted in the states between 1780 and 1801, “less than 4 per cent were for general business corporations”); Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 300 (1990) (“At the time of the adoption of the Constitution, there were very few corporations.”).

“Common issue” class actions, of course, also hardly existed in 1787. “Thus, the form was entirely absent from the Founders’ thinking.” Purcell, *supra* note 5, at 1860.

<sup>97</sup> New York enacted the first general incorporation statute of widespread applicability in 1811, but until 1845 only two other states (New Jersey and Connecticut) followed suit. See Butler, *supra* note 96, at 143. “The special chartering system inherently possessed the potential for rent-seeking behavior, and many examples show how charter applicants strained to get more generous terms from their legislators than those obtained by rival groups already in the field.” *Id.* at 141.

corporations were not themselves viewed as citizens at that time, courts employed the technique of looking to the citizenship of their shareholders instead.<sup>98</sup> In a move that heralded, if it did not reflect, the increasingly important role that corporations played in an increasingly interstate economy,<sup>99</sup> the Supreme Court, in a confusing<sup>100</sup> but heroic bit of fiction-making, blundered to the solution that corporations would be accorded the benefits of citizenship for diversity purposes through an irrebuttable presumption that their shareholders were citizens of the incorporating state.<sup>101</sup> As a result, corporations

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<sup>98</sup> See *Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 64-66 (1809); Blumberg, *supra* note 96, at 302-03 (discussing the rationale behind Justice Marshall's decision, in *Deveaux*, to tie the citizenship, for jurisdictional purposes, of a corporation to the citizenship of that corporation's shareholders); Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1598 (1988) (noting that looking to the citizenship of a corporation's shareholders precluded many federal courts from exercising jurisdiction in many corporate suits).

<sup>99</sup> Butler suggests that the replacement of special charters with general incorporation statutes (the two systems coexisted in many states for much of the nineteenth century) was due to the increase in interstate commerce and the development of a competitive market for incorporation. The competitive market emerged when it became clear that states were constitutionally required to allow foreign corporations to conduct interstate commerce within their borders. See *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1868) (upholding the constitutionality of a Virginia statute requiring the payment of a fee by out-of-state insurance companies seeking to do business in Virginia, but expressly resting this decision on the propositions that insurance does not constitute commerce and that a corporation is not a "citizen" protected by the Fourteenth Amendment); see also Butler, *supra* note 96, at 133, 155-56 (explaining that *Paul* forbade states from discriminating against foreign corporations by implicitly holding that a state could not exclude a corporation from engaging in interstate, rather than intrastate, commerce); *id.* at 150-51 ("Prior to the 1850s, it was either assumed or required that the operations of corporations—both special and general law—would be confined to their chartering state.").

<sup>100</sup> The confusing nature of the Court's opinions on corporate citizenship may have contributed to confusion about their effects. Thus, one commentator described *Deveaux* as "allow[ing] easy access to federal courts because it was easy to demonstrate diversity of citizenship." Jess M. Krannich, *The Corporate "Person": A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61, 73 (2005). Given the requirement of complete diversity, this cannot be right.

<sup>101</sup> See *Louisville, Cincinnati, & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 555-56 (1844) (holding that a corporation created by a state is to be deemed a citizen of that state); *Marshall v. Balt. & Ohio R.R. Co.*, 57 U.S. (16 How.) 314, 328-29 (1854) (holding that stockholders of a corporation are presumed to be citizens of the corporation's state of incorporation); see also Blumberg, *supra* note 96, at 304-05 (describing the legal fiction, arising in *Letson* and *Marshall*, that gave the corporation "jurisdictional opportunities" without according it "citizenship"); Frankfurter, *supra* note 87, at 523 ("[L]egal metaphysics about corporate 'citizenship' has produced a brood of incoherent legal fictions concerning the status of a corporation . . ."). As Hovenkamp observes, the logic of the *Marshall* decision "was undermined two years later by *Dodge v. Woolsey*," 59 U.S. (18 How.) 331 (1855), "which entertained a diversity action between a

were treated as if they were outsiders, potentially subject to biased treatment, in the courts of all states but one.<sup>102</sup>

It was not just the federal law of subject matter jurisdiction that impeded corporate litigation well into the nineteenth century (and that makes a suggestion of the framers' prescience look like wishful thinking). In combination with a conception of corporations as entities that could not act outside of the chartering state<sup>103</sup> or could do so only with express or implied consent of other states,<sup>104</sup> state personal jurisdiction law, which was highly favorable to defendants,<sup>105</sup> made it

shareholder and a corporation." Hovenkamp, *supra* note 98, at 1599. For the role that decisions about corporate citizenship for diversity purposes may have played in the subsequent recognition of corporations as "persons" under the Fourteenth Amendment, see *id.* at 1642-43; Krannich, *supra* note 100, at 76-80, 91-92.

<sup>102</sup> Charles Warren described the *Marshall* decision as follows:

This malignant decision has resulted in allowing a corporation sued in the State in which it actually does business, to remove the suit into a Federal Court on the ground of diverse citizenship, simply because it happens to be chartered in another State. No single factor has given rise to more friction and jealousy between State and Federal Courts, or to more State legislation conflicting with and repugnant to Federal jurisdiction, than has the doctrine of citizenship for corporations. And this diverse citizenship jurisdiction created by the Constitution and intended to allay friction and to afford equal and identical law to citizen and non-citizen in a State, has resulted in putting foreign corporations in a more favorable situation than domestic corporations . . . .

Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 90 (1923); see also Frankfurter, *supra* note 87, at 524-25 (describing the potential for unfairness arising out of the use of diversity jurisdiction by corporations).

<sup>103</sup> See *supra* note 99 (Butler quotation). "Logically applied, this theory of non-migration prevented suit in a non-chartering state, for the corporation could not be there." *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 169 (1939).

<sup>104</sup> See *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 589 (1839) ("Every power . . . which a corporation exercises in another state, depends for its validity on the laws of the sovereignty in which it is exercised; and a corporation can make no valid contract without their sanction, express or implied."). Compare Hovenkamp, *supra* note 98, at 1649 ("In *Bank of Augusta*, the Supreme Court held that a state could more-or-less arbitrarily exclude foreign corporations from doing business within its territory."), with HURST, *supra* note 96, at 64 (describing the *Bank of Augusta* Court as erecting a presumption "that a foreign corporation might do business within a state unless it were positively shown that the state's policy was one of exclusion"). For a discussion of the gradual recognition of "the right of corporations to work in multistate markets," see Hovenkamp, *supra* note 98, at 1650; *supra* note 99.

<sup>105</sup> I have argued this point in another paper:

The traditional grounds of adjudicatory jurisdiction in this country (domicile, tag jurisdiction, and *quasi in rem* jurisdiction) are general. In times when travel was costly and difficult, they favored defendants, requiring the plaintiff to sue where the defendant lived, unless he or she could be served while present in some other state (or had property in another state).

hard to sue them anywhere else.<sup>106</sup> As calls for a local forum for those harmed by the activities of entities that did in fact operate outside of their respective states of incorporation became more insistent, the states responded with fictions of their own.<sup>107</sup> In 1856, the Supreme Court rejected the argument that a state court judgment was not entitled to full faith and credit because the rendering court's jurisdiction was predicated on implied consent to service of process on an in-state agent.<sup>108</sup> *But it was not until 1871 that the Court explicitly blessed federal corporate litigation outside of the incorporating state,<sup>109</sup> and not until 1878*

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Stephen B. Burbank, *All the World His Stage*, 52 AM. J. COMP. L. 741, 745 (2004) (book review).

<sup>106</sup> If you could not arrest a corporation, you could not tag it with service under the power theory that was dominant in the nineteenth century. *Cf. Neirbo*, 308 U.S. at 171-72 ("The deletion of 'in which he shall be found' [in an 1887 venue provision] was not directed toward any change in the status of a corporate litigant. The restriction was designed to shut the door against service of process upon a natural person in any place where he might be caught. It confined suability, except with the defendant's consent, to the district of physical habitation."). The other main antidote to traditional pro-defendant jurisdictional rules, quasi in rem jurisdiction, apparently was available as against foreign corporations through attachment of their property, at least in some states. If diversity existed, such cases could be removed even though they could not have been maintained as original actions in federal court. *See, e.g., Sayles v. Nw. Ins. Co.*, 21 F. Cas. 608, 608 (C.C.D.R.I. 1854) (No. 12,421); *Bliven v. New Eng. Screw Co.*, 3 F. Cas. 715, 715 (C.C.S.D.N.Y. 1853) (No. 1550); JOHN F. DILLON, REMOVAL OF CAUSES FROM STATE COURTS TO FEDERAL COURTS 27 (St. Louis, G.I. Jones & Co. 1876).

<sup>107</sup> "The fact that corporations did do business outside their originating bounds made intolerable their immunity from suit in the states of their activities. And so they were required by legislatures to designate agents for service of process in return for the privilege of doing local business." *Neirbo*, 308 U.S. at 170. As Purcell has observed,

In 1870 . . . only a half-dozen states had enacted laws that required foreign corporations to consent to jurisdiction in order to do business within their borders. By 1900, however, forty states had adopted such laws, and by 1910 virtually every state in the nation had done so. Most immediately relevant, the statutes often authorized jurisdiction over corporations on causes of action that arose in other states, thus allowing nonresident plaintiffs asserting claims that arose in their home states to secure personal jurisdiction over corporations in the enacting states.

EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958, at 181 (1992) (footnote omitted).

<sup>108</sup> *See Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 407-08 (1856).

<sup>109</sup> *See R.R. Co. v. Harris*, 79 U.S. (12 Wall.) 65, 83-84 (1871); PURCELL, *supra* note 107, at 17-18. *Harris* was not a diversity case, but rather "[i]t was controlled by acts of Congress local to the [District of Columbia]." *Harris*, 79 U.S. at 86. That may explain why lower courts failed to follow its logic in diversity cases. *See infra* note 110.

that the Court made it clear that the same rule applied in diversity actions<sup>110</sup> and (in dictum) that such suits could be removed to federal court.<sup>111</sup>

These last developments were key contributing factors to the “system of corporate diversity litigation” so brilliantly chronicled by the legal historian Edward Purcell.<sup>112</sup> Purcell’s book, which should be required reading for all who teach and write about federal courts and federal practice and procedure, shows how and why corporate litigants used the federal courts, primarily through removal from the state courts, to gain litigation advantages over their opponents, particularly the growing number of individuals injured in “Industrial America” and, with the spread of insurance, the growing number of policyholders. The litigation advantages they sought included, first, the opportunity to inflict punishing expense and delay on, and extract favorable settlements from, opponents with fewer resources to spend on litigation. The value of this strategy decreased when automobiles became ubiquitous, federal courts became more numerous, and the population became more urban.<sup>113</sup> The second advantage was the opportunity to secure more favorable rules of substantive law, especially after the federal courts expanded the sphere of application of general

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<sup>110</sup> See *Ex parte Schollenberger*, 96 U.S. 369, 378 (1878) (noting “the practice in the circuit courts generally . . . to decline jurisdiction in this class of suits,” but reasoning that the cases relied on by the lower courts were “in conflict with the rule [in *Harris*]”).

<sup>111</sup> See *id.* at 377 (“As the company, if sued in a State court, could remove the cause to the Circuit Court, and thus compel a citizen of the State to submit to that jurisdiction, we see no reason why the citizen may not, if he desires it, bring the company into the same jurisdiction at the outset.”). “As a result of *Ex parte Schollenberger*, it was clear that a corporation came within the provisions of the removal statutes so as to give jurisdiction to the circuit court in every state in which the corporation transacted business through an agent.” FRANKFURTER & LANDIS, *supra* note 1, at 90 (footnote omitted). As Purcell observes, “Although *Harris* and *Schollenberger* had opened the federal courts to foreign corporations in the 1870s, both explained that they did so to assist individuals who wanted to sue those corporations in federal court.” PURCELL, *supra* note 107, at 18.

<sup>112</sup> See PURCELL, *supra* note 107, at 4.

<sup>113</sup> These considerations led Judge Dillon to recommend raising the amount in controversy, or increasing the number of federal courts or judges, in 1876:

In view of the inconvenience and expense of litigating in the Federal courts, held often more than one hundred miles distant from the residence of the parties; the crowded state of their dockets; and considering that removals, especially by foreign insurance and railway corporations, often have the effect to delay, if not to oppress, those having claims against them, it is quite clear that the amount to justify a removal should be enlarged, or the Federal courts multiplied, or at all events their judicial force increased.

DILLON, *supra* note 106, at 25-26.

federal common law and the Supreme Court became enamored with freedom of contract (i.e., increasingly in the period Purcell studied, until the 1930s). The third advantage that corporate litigants sought in this period was the possibility that the federal courts might act in accordance with the view of them held by many people—namely as bastions of business interests—especially in times of social upheaval (i.e., intermittently in the period Purcell studied).

In addition, corporate litigants came to understand that although Congress closed the avenues for remedial dispensation that judgment creditors had sought in actions at law, where federal diversity courts were required to apply state procedure,<sup>114</sup> no such constraint applied to equitable remedies (e.g., injunctions), as to which conformity had never been required.<sup>115</sup> Finally, late in the period Purcell studied, a (Democratic) Congress added to the federal courts' remedial arsenal a discretionary remedy—the declaratory judgment—that quickly became an additional incentive for corporate forum shopping, particularly in insurance litigation.<sup>116</sup>

Once corporate litigants were given broader access to federal court, plaintiffs' lawyers devised tactics to deny them the litigation advantages they sought by keeping cases in the state courts. In line with the growing popular view that the federal courts favored business in-

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<sup>114</sup> See Burbank, *supra* note 93, at 1327 (explaining that, in response to the Supreme Court's controversial decision in *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825), "the proponents of change secured legislation in Congress that required federal courts to follow state laws concerning final process as of 1828 and that channeled their power to alter state law on final process in one direction, namely the adoption of post-1828 state laws").

<sup>115</sup> See Burbank, *supra* note 88, at 1039 ("Equity had remained free of any requirement of conformity [with state procedure] since the beginning of the Republic . . ."). But see Burbank, *supra* note 93, at 1321 ("[E]ven prior to 1938, federal courts tended to follow state law that expanded the remedial rights of litigants, and assertions concerning the inability of state law to affect federal equity from that period must be carefully evaluated . . ."). For a description of the use of federal equity in insurance litigation, see PURCELL, *supra* note 107, at 206-09. Note also railroads' use of state court injunctions against Federal Employers' Liability Act (FELA) litigation in allegedly inconvenient forums, which the Court put a stop to through interpretations of the statute's venue provision. See *id.* at 222-24, 370 n.82.

<sup>116</sup> See PURCELL, *supra* note 107, at 212-13. An interesting article by Andrew Bradt has rescued Congress's 1934 statute from oblivion, reminding us of the multiple purposes that animated its chief promoters, who were law professors, and at least one of whom (Edson Sunderland) was a progressive/realist. See Andrew Bradt, "Much To Gain and Nothing To Lose": *Implications of the History of the Declaratory Judgment for the (b)(2) Class Action*, 58 ARK. L. REV. 767, 771-91 (2006). The perspective taken in the text suggests that further research may reveal that this statute, like the Rules Enabling Act of 1934, enacted the same year, was welcomed by people of very different political persuasions.



terests,<sup>117</sup> some states sought to assist plaintiffs in that effort, including by attempting to domesticate corporations that they licensed to do business.<sup>118</sup> As Purcell describes, the Supreme Court put an end to this maneuver in 1896, at the height of a period when its decisions might well be thought to have justified the popular view.<sup>119</sup> Thereafter and more typically, stuck with an increasingly implausible view of corporate citizenship (under the traditional view of the purpose of the diversity grant), plaintiffs' lawyers relied on various stratagems to defeat removal.

The most promising techniques for defeating removal were the joinder of nondiverse defendants<sup>120</sup> and the manipulation of the damages claimed,<sup>121</sup> either of which could prevent corporate defendants from satisfying the requirements of original jurisdiction. Each of these maneuvers elicited countermeasures from corporate defendants, and the federal courts were required to umpire the system through the interpretation of the jurisdictional statutes.

Key to defending against the joinder stratagem was a provision permitting the removal of separable controversies (now separate and independent claims).<sup>122</sup> Long treated by scholars as complex if not obscure, and having been amended in recent years to reach only federal question claims, this provision is still a fertile source of doctrinal questions.<sup>123</sup> It once was much more than that. Purcell shows how corporate defendants—and in particular railroads—sought access to

<sup>117</sup> See PURCELL, *supra* note 107, at 26 (“The belief that federal judges tended to favor business was a widely shared part of American political culture . . .”); Frankfurter, *supra* note 87, at 522 (“Moreover, it is politically highly unwise to permit the federal courts to be used as an escape from state tribunals and thus to associate the federal court in the public mind as the resort of powerful litigants.”).

<sup>118</sup> See PURCELL, *supra* note 107, at 18 (describing the development of corporate domestication); Frankfurter, *supra* note 87, at 521 (“With a view to circumventing this use of jurisdiction by foreign corporations, states have resorted to every variety of legislation, frequently frustrated by the Supreme Court.”); *supra* note 102 (Warren quotation).

<sup>119</sup> See *St. Louis & S.F. Ry. Co. v. James*, 161 U.S. 545, 562-63 (1896) (holding that state law cannot change corporate citizenship for purposes of diversity jurisdiction); PURCELL, *supra* note 107, at 18 (“*James*, in other words, ensured that corporations could restrict their jurisdictional citizenship to only one state and thereby preserve diversity with citizens of every other state in the union.”); *id.* at 267 (discussing two Supreme Court decisions that “expanded corporate removal rights” by allowing removal by corporations to the federal courts in the state of filing, even where neither party was a citizen of that state).

<sup>120</sup> See PURCELL, *supra* note 107, at 104-26.

<sup>121</sup> See *id.* at 90-97.

<sup>122</sup> See 28 U.S.C. § 1441(c) (2000); PURCELL, *supra* note 107, at 106-07.

<sup>123</sup> See, e.g., WRIGHT & KANE, *supra* note 32, at 235-42.

federal court by contending, among other arguments, that claims against the (diverse) corporation and a (nondiverse) employee were not “joint” because they were based on different theories of liability; how some lower courts (led by the future Chief Justice, William Howard Taft) accommodated them by accepting this contention;<sup>124</sup> and how the Supreme Court vacillated and temporized before ultimately remitting the answer to state law, which tended to be favorable to plaintiffs (foreclosing removal by treating the claims as joint).<sup>125</sup>

Plaintiffs pursued a wide variety of antiremoval tactics involving the amount in controversy,<sup>126</sup> some less seemly than others. It suffices here to mention two. First, some plaintiffs deliberately alleged damages less than the amount required for diversity in their state court complaints, only to amend the ad damnum after the time for removal had passed. Corporate defendants responded to delayed upward amendments by removing and arguing that federal jurisdiction should not be defeated through fraudulent pleading.<sup>127</sup> Having avoided the question in a case squarely presenting it in 1890,<sup>128</sup> the Court eventually approved the view of lower courts that rejected this tactic, holding (in a case involving an amendment to drop a nondiverse party from state litigation) that postcommencement developments making a case removable restarted the time limit.<sup>129</sup>

Second, a more interesting and apparently far more common tactic was the conscious discounting of claims that might yield recovery in excess of the required amount in controversy for diversity jurisdic-

<sup>124</sup> See PURCELL, *supra* note 107, at 111-12.

<sup>125</sup> See *id.* at 118-21. Purcell notes that even then plaintiffs faced difficulty because of lower court intransigence, the problems created by the need to keep the nondiverse party (who might be a coworker) in the case, or corporate defendants' determination to impose expense even in cases where removal was clearly improper. See *id.* at 120-21.

<sup>126</sup> The amount in controversy was raised from in excess of \$500 to in excess of \$2000 in 1887, and to in excess of \$3000 in 1911. PURCELL, *supra* note 107, at 91. For an argument in favor of raising the amount by a sitting federal judge in 1876, see *supra* note 113.

<sup>127</sup> See PURCELL, *supra* note 107, at 95-97.

<sup>128</sup> See *N. Pac. R.R. Co. v. Austin*, 135 U.S. 315, 318 (1890); PURCELL, *supra* note 107, at 95-97.

<sup>129</sup> See *Powers v. Chesapeake & Ohio Ry. Co.*, 169 U.S. 92, 102 (1898); PURCELL, *supra* note 107, at 112-14. The value of this rule to defendants was diluted in 1988, long after the disintegration of the system of corporate diversity litigation, when Congress enacted an overarching one-year limitation. See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016(b)(2)(B), 102 Stat. 4642, 4669 (codified at 28 U.S.C. § 1446(b) (2000)). But see *infra* note 317 (suggesting that CAFA's elimination of the one-year limitation on removal will provide further opportunities for collusion by defendants).

tion.<sup>130</sup> This tactic became more attractive when that amount was raised from in excess of \$500 to in excess of \$2000 in 1887, and to more than \$3000 in 1911.<sup>131</sup> Even so, it is sufficiently arresting to prompt a reminder of the historical context—in particular, the facts that federal court litigation could be significantly more expensive and less convenient for plaintiffs than state court litigation;<sup>132</sup> that some defendants did not scruple to remove even in cases where it must have been apparent that they had no right to do so; and that some lower federal courts were happy to oblige those defendants, even in the teeth of Supreme Court precedent. On that view, apart from any perceived advantages of litigation in state court, by discounting, plaintiffs sought insurance against the transaction costs of removal battles. More broadly, according to Purcell,

[T]he development of a collection of highly technical and apparently trivial procedural rules centering on the jurisdictional amount helped forge one of the great, if largely unspoken, social and legal compromises of the late nineteenth and early twentieth centuries. The operative rule was simple and well understood. If plaintiffs agreed to keep their claims reasonably small, they could guarantee themselves a state forum.<sup>133</sup>

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<sup>130</sup> See PURCELL, *supra* note 107, at 90-97. At that time, according to Purcell, a plaintiff's recovery was generally restricted by state law to the amount stated in the complaint. *See id.* at 91. Changes in pleading rules since that time have already caused difficulties in litigation under CAFA. *See, e.g.,* Guglielmino v. McKee Foods Corp., 506 F.3d 696, 704 (9th Cir. 2007) (O'Scannlain, J., specially concurring) (criticizing *Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994 (9th Cir. 2007), for imposing a higher burden of proof (to a "legal certainty") on a removing defendant when the plaintiff alleges a specific amount less than the jurisdictional threshold, because "[s]ome states do not allow any mention of damages in state court complaints"); *Morgan v. Gay*, 471 F.3d 469, 477 (3d Cir. 2006) ("We admonish that a verdict in excess of the demand could well be deemed prejudicial to the party that sought removal to federal court when the party seeking remand uses a damages-limitation provision to avoid federal court."); *Strawn v. AT & T Mobility, Inc.*, 513 F. Supp. 2d 599, 602-03 (S.D. W. Va. 2007) (observing that an ad damnum below the jurisdictional amount is not sufficient to deny federal jurisdiction in West Virginia, where recovery is not limited to the amount demanded in the complaint). For a valuable discussion of the doctrinal puzzles lurking in jurisdictional-amount requirements, both in the default regime and under CAFA, see *Clermont & Eisenberg, supra* note 13, at 1568-79; *see also* *Shapiro, supra* note 63, at 116-21 (discussing the validity of plaintiffs' self-imposed caps on recovery and the complications introduced by these voluntary caps in CAFA cases).

<sup>131</sup> *See* PURCELL, *supra* note 107, at 91, 99.

<sup>132</sup> Purcell notes that the popularity of discounting by plaintiffs endured even after developments, such as the automobile and increases in the number of federal courts, that made federal litigation less onerous for individual plaintiffs. *See id.* at 148, 154-60.

<sup>133</sup> *Id.* at 251.

If the refusal of federal courts to follow state law concerning final remedies—thereby favoring creditors—proved intensely controversial in the 1820s,<sup>134</sup> it is hardly surprising that, once the system of corporate diversity litigation was fully operational, the advantages it unquestionably conferred (and those that many people feared it conferred) on corporations in litigation against individuals also provoked intense controversy. We have seen that various efforts by states to thwart removal, such as by attempting to domesticate foreign corporations, were unsuccessful.<sup>135</sup> The controversy was equally intense in the halls of Congress, where repeated efforts to abolish corporate citizenship or otherwise curtail corporate access to federal court found substantial support in the House—a number of the bills passed there—but always failed in the Senate.<sup>136</sup>

In his rich and nuanced account of the system of corporate diversity jurisdiction in the late nineteenth and early twentieth centuries, Purcell vividly evokes the thrust and parry, not just of the litigants, but, as it were, of the federal courts. He demonstrates that the Supreme Court responded differently, indeed inconsistently, to the interpretive questions posed, and that, even when the Court had appeared to settle a question, some lower courts did not get the message—at least if it was one that disfavored the interests of corporate defendants. Acknowledging that it is difficult to read the Court's decisions in the 1890s as something other than a conscious effort to enable corporate

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<sup>134</sup> See *supra* note 114 and accompanying text.

<sup>135</sup> See *supra* notes 118-119 and accompanying text. For the checkered history of state statutes tying a corporation's permission to do business to its remaining in state court, see PURCELL, *supra* note 107, at 201-02, 205. Purcell notes that such statutes were of particular salience to insurance companies. Since insurance was not "commerce," those selling it across state lines were not protected by the Commerce Clause from the power to exclude. "If a state revoked an insurance company's license [because it removed a case to federal court], then, the company would simply be out of business in that state." *Id.* at 202. These statutes ceased to be enforceable as a result of *Terral v. Burke Construction Co.*, 257 U.S. 529 (1922), in which the Court affirmed an injunction barring the Arkansas Secretary of State from revoking a corporation's license to do business because it had violated a state statute by suing an Arkansas citizen in federal court and removing another case brought by an Arkansas citizen to federal court. *Id.* at 532-33. The *Terral* Court remarked that "the Federal Constitution confers upon citizens of one State the right to resort to federal courts in another," and "that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void." *Id.* at 532.

<sup>136</sup> See FRANKFURTER & LANDIS, *supra* note 1, at 88-93, 136-45. The House passed bills that would have eliminated corporate citizenship in 1880, 1883 (twice), and 1892; a bill that would have limited Supreme Court review in diversity cases in 1890; and a bill that would have eliminated railroad citizenship in 1894. See Curry, *supra* note 4, at 464 app. A.

access to federal court, Purcell is careful both to note the larger political environment that probably contributed to that impulse and, identifying cycles of pro- and anti-access decisions, to eschew any one causal explanation for the Court's behavior, let alone a narrowly ideological causal explanation.<sup>137</sup>

Felix Frankfurter appeared to accept Friendly's argument that the Constitution's diversity grant was more likely animated by the purpose of enabling creditors to escape prodebtor state legislation (and more generally, perhaps, of providing "business men's courts") than it was by the purpose ascribed to it by the traditional view.<sup>138</sup> Yet when advocating the abolition of the system of corporate diversity, he was equally happy to point out that some of the Supreme Court's decisions providing corporate access could not be justified according to the traditional view.<sup>139</sup> Purcell follows Frankfurter in pointing out the inconsistencies, but, as a historian not constrained by the decisions of the Supreme Court (or the incentives of an advocate of change), he digs deeper, ranges more broadly, and is more sensitive both to causal multiplicity and to the transformation of law in the books.

Evaluating experience under the removal provision of the Local Prejudice Act,<sup>140</sup> Purcell provides evidence that bias against foreign corporations was a rare and isolated phenomenon in the late nineteenth century.<sup>141</sup> Prejudice was, however, a very serious problem for

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<sup>137</sup> See PURCELL, *supra* note 107, at 121-26, 193, 262-91.

<sup>138</sup> See Frankfurter, *supra* note 87, at 520-21 (quoting Friendly, *supra* note 81, at 498).

<sup>139</sup> See *id.* at 525-26 (criticizing removal jurisdiction for state court cases between two nonresidents, removal of a whole controversy under the separable controversy provision, and receiverships based on diversity of citizenship); *infra* note 152 and accompanying text.

<sup>140</sup> Act of Mar. 2, 1867, ch. 196, 14 Stat. 558, 558-59. As Purcell explains,

The original local prejudice act allowed nonresidents to remove regardless of whether they were plaintiffs or defendants and to do so "at any time before the final hearing or trial." To remove under the act, parties had only to submit affidavits stating that they had reason to believe that from "prejudice or local influence" they would be unable to obtain justice in the state courts.

PURCELL, *supra* note 107, at 129 (footnote omitted) (quoting Act of Mar. 2, 1867, ch. 196, 14 Stat. at 559). For a description of amendments to the Act in 1887-1888, see *id.* at 130-31.

<sup>141</sup> See PURCELL, *supra* note 107, at 137-42 (finding "several reasons to doubt whether local prejudice constituted a major and pervasive threat to corporate defendants," including the absence of evidence from noncorporate spokespersons and reported decisions showing that "corporate defendants failed to produce evidence of local prejudice in any significant number of cases").

the putative beneficiaries of the removal provision of the Civil Rights Act of 1866.<sup>142</sup> Comparing the Court's decisions under the two statutes in light of the general provisions concerning diversity jurisdiction, Purcell finds that "[i]n diversity cases federal law was willing simply to presume the existence of prejudice and to grant a broadly effective remedy; in civil rights cases it was content to ignore the prejudice and to offer only a paper remedy."<sup>143</sup> This is part of the powerful case he makes for the proposition that

a better explanation [than the traditional view] for the actual shape that the Supreme Court gave diversity jurisdiction over the years—or, at least, from the 1870s to the 1940s—was simply that the Justices generally if implicitly believed that they should maintain federal jurisdiction over issues and interests that they regarded as having national importance.<sup>144</sup>

Purcell's account of federal diversity litigation after the early years of the twentieth century is equally rich and nuanced, and equally fascinating. The advent of the automobile, the proliferation of federal trial courts, and the movement to urban living reduced the advantages of removal for corporate litigants,<sup>145</sup> while the Federal Employers' Liability Act (FELA), which was quickly amended to bar removal,<sup>146</sup> and state workers' compensation laws<sup>147</sup> both provided attractive alternatives to a brutally laissez-faire general federal common law and empowered plaintiffs who desired to litigate in state tribunals. The loosening of restrictions on state court personal jurisdiction over corporations encouraged an increasingly entrepreneurial plaintiffs' personal-injury bar to turn the tables on corporate opponents by ven-

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<sup>142</sup> Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27, 27.

<sup>143</sup> PURCELL, *supra* note 107, at 147.

<sup>144</sup> *Id.* at 256; *see also* HURST, *supra* note 96, at 143 ("Conceptions of the legal character and the social uses and dangers of the corporation deeply colored the ideas of national interest which the Court pursued."). At times, however, Purcell may retroject to political actors in 1787 and 1789 the much later belief system and motivation of the Court (or of Congress). Consider in that regard the following:

The respective jurisdictions were created and construed not on the basis of any showing about the dangers of "local prejudice" or any considered evaluation of the need for various carefully tailored remedies but, rather, on a desire to accomplish divergent and ulterior social goals. For its part, diversity jurisdiction was simply designed to favor nonresidents who engaged in interstate commerce. In a variety of ways, some intended and others not, it did just that.

PURCELL, *supra* note 107, at 147.

<sup>145</sup> *See* PURCELL, *supra* note 107, at 154-60.

<sup>146</sup> *See id.* at 165-72.

<sup>147</sup> *See id.* at 161-63.

turing into other states in search of forum advantage. Noting that the advantages sought often reposed not in rules of substantive law, but rules of “procedure” broadly defined,<sup>148</sup> Purcell describes the attractions of one state favored by plaintiffs, Minnesota, as follows:

The legal system in Minnesota was distinctly favorable to plaintiffs. It recognized a far-reaching rule of personal jurisdiction over foreign corporations, placed the burden of proving contributory negligence on the defendant, provided that plaintiffs were not subject to examination before trial, and applied a generous employer-employee joinder rule, thus making a critical antiremoval device readily available. Its supreme court, too, construed remedial statutes liberally. The Minnesota jury was especially attractive. State law provided for a nonunanimous verdict by ten of twelve jurors and gave its juries considerable latitude in fixing the amount of damages. Equally or more important, its juries had a reputation for bringing in handsome verdicts for plaintiffs.<sup>149</sup>

Corporate defendants that for decades had used the burdens of distance and expense as tactical weapons to wear down individual plaintiffs through removal started to protest the burdens that interstate forum shopping imposed on them.<sup>150</sup> Moreover, ever eager to

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<sup>148</sup> See *id.* at 179 (explaining the effect that “procedure’s” “broad and often uncertain scope” had on creating significant differences, including outcome differences, among state courts); Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 573-74 (1989) (providing examples of cases in which procedural concerns trumped substantive concerns for plaintiffs, and arguing that conflict of law rules often cannot prevent procedural forum shopping).

<sup>149</sup> PURCELL, *supra* note 107, at 185 (footnotes omitted); see also *id.* at 184 (“Of all the states that offered attractive forums, however, none rivaled Minnesota in its combination of both favorable law and an enterprising plaintiffs’ bar.”). Minnesota continued to provide jurisdictional and choice of law rules that were very favorable to plaintiffs long after the period that Purcell chronicles, and it also continued to provide cases in which the Supreme Court sought to use the Constitution to put on the brakes. See *Rush v. Savchuk*, 444 U.S. 320, 328-31 (1980) (holding unconstitutional Minnesota’s exercise of jurisdiction where the defendant’s only contact with the state was the fact that his insurer did business, and “held” his insurance policy, there). Indeed, because of a very long statute of limitations for personal injury actions, Minnesota is still a “hotbed for out-of-state plaintiffs.” Mark Hansen, *Lawsuits Travel Up North*, A.B.A. J., Dec. 2007, at 16, 16-17.

<sup>150</sup> As Purcell writes,

In their efforts to establish a doctrine of *forum non conveniens* and to have out-of-state suits enjoined, corporations exhibited a keen awareness of the burdens that distance imposed on litigants. . . . Indeed, in a good many imported cases the distance was less than the additional distance that removal imposed on numerous individual plaintiffs. Nevertheless, when distance became a plaintiffs’ tool, corporate defendants loudly proclaimed its unfairness and vigorously sought relief from its oppression.

PURCELL, *supra* note 107, at 189 (footnote omitted).

take advantage of more favorable rules of general federal common law—in a litigation environment where, because of “legislative encroachments,”<sup>151</sup> those rules had less scope of application—they sought and ultimately (in 1923) secured reversal of a 1906 Supreme Court decision that, consistently with the traditional view of diversity litigation, had barred removal from the courts of a state in which neither the plaintiff nor the defendant resided.<sup>152</sup> Purcell describes how, in that 1923 decision and by other means, the Court in the 1920s and 1930s sought to police interstate forum shopping. Central to those efforts were attempts to use the Constitution to restrain state court jurisdiction and state choice of law.<sup>153</sup> Both efforts proved short-lived, as the Court apparently realized that the Commerce<sup>154</sup> and Full Faith and Credit<sup>155</sup> Clauses were equilibration instruments entirely too blunt for the dynamics of forum selection.

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<sup>151</sup> See *id.* at 160-66 (describing how both Congress and the states removed some of the power of federal common law by enacting various statutory schemes, including the states’ workers’ compensation laws and Congress’s FELA).

<sup>152</sup> See *id.* at 191-93. The decisions in question were *Ex parte Wisner*, 203 U.S. 449, 460-61 (1906), in which the Court prevented the removal of a case brought in a district in which neither the plaintiff nor the defendant resided, and *Lee v. Chesapeake & Ohio Railway Co.*, 260 U.S. 653, 658-61 (1923), in which the Court overruled *Wisner* and held that a case otherwise removable can be removed without regard to the original venue requirements. Note Professor Frankfurter’s criticism of this result in terms of the historic rationale for diversity jurisdiction. See *supra* note 139 and accompanying text. When writing for the Court in *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939), Justice Frankfurter had reason to think better of *Lee*, at least insofar as it cut a path to making a federal court available to a plaintiff suing a defendant that had appointed an agent for service of process in a state of which neither was a citizen. See *Neirbo*, 308 U.S. at 168, 171 n.8 (praising *Lee* for allowing parties to litigation to waive statutory venue requirements).

<sup>153</sup> See PURCELL, *supra* note 107, at 192-99 (explaining the Court’s “numerous efforts . . . to develop constitutional doctrines of judicial forum control”).

<sup>154</sup> Compare *Davis v. Farmers Co-Operative Equity Co.*, 262 U.S. 312, 315 (1923) (holding the assertion of jurisdiction under a Minnesota statute, based solely on the presence of a “solicitation agent” of the railroad and not on the locale of the litigated incident, unconstitutional under the Commerce Clause), with *Int’l Milling Co. v. Columbia Transp. Co.*, 292 U.S. 511, 517 (1934) (“[*Davis*] was confined narrowly within the bounds of its own facts.”).

<sup>155</sup> Compare *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 159 (1932) (requiring a New Hampshire court to apply Vermont’s workers’ compensation statute as a matter of full faith and credit), with *Alaska Packers Ass’n v. Indus. Accident Comm’n*, 294 U.S. 532, 548-50 (1935) (distinguishing *Clapper* into oblivion in allowing California to enforce its own workers’ compensation statute in a case arising from injuries suffered in Alaska). In Purcell’s understated formulation, the Court in the latter claimed “some-what unconvincingly to be consistent with *Clapper*.” PURCELL, *supra* note 107, at 198.



The failed constitutional experiments of the 1920s and 1930s set the stage for the Court's decision in *Erie Railroad Co. v. Tompkins*<sup>156</sup> and for its embrace of a broad forum non conveniens doctrine,<sup>157</sup> the former antithetical to corporate interests and the latter something that those interests had long advocated. Purcell here<sup>158</sup> lays the groundwork for his subsequent, equally brilliant book, *Brandeis and the Progressive Constitution*,<sup>159</sup> confirming what a close reading of the *Erie* decision and its progeny reveal. Quite apart from the "unconstitutionality of the course pursued"<sup>160</sup> under *Swift v. Tyson*,<sup>161</sup> the Court was intent to address the "defects, political and social" of the system of corporate diversity litigation by eliminating the forum-shopping incentives that different rules of decision created.<sup>162</sup>

Scholars have tended to view *International Shoe Co. v. Washington*<sup>163</sup> as contributing to the development of the modern market for litigation by enhancing opportunities for forum shopping.<sup>164</sup> Although

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<sup>156</sup> 304 U.S. 64 (1938).

<sup>157</sup> See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947) (refusing to "catalogue the circumstances" that will justify applying the forum non conveniens doctrine, so as to leave the courts with discretion).

<sup>158</sup> See PURCELL, *supra* note 107, at 224-30.

<sup>159</sup> EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* (2000).

<sup>160</sup> *Erie*, 304 U.S. at 77-78.

<sup>161</sup> 41 U.S. (16 Pet.) 1 (1842).

<sup>162</sup> *Erie*, 304 U.S. at 74; see PURCELL, *supra* note 159, at 141-91 (describing Justice Brandeis's political and social concerns in writing the *Erie* opinion). A very close reading of the *Erie* decision reveals a number of citations to Frankfurter's 1928 article, *supra* note 87, where, despairing of a judicial remedy to *Swift*, the author advocated the legislative fix that Brandeis had urged upon him. See *Erie*, 304 U.S. at 73 n.6, 77 nn.20-21; see also *supra* note 88.

<sup>163</sup> 326 U.S. 310 (1945).

<sup>164</sup> I have previously taken the view that

the greater latitude to assert jurisdiction afforded the states by *International Shoe* and its progeny dramatically enhanced the opportunities for interstate forum shopping and, coupled with loose federal control of state choice of law, the incentives of both litigants and state courts to run a race to judgment, creating a market for litigation in which the voluntary extension of wholly domestic lis pendens doctrine to interjurisdictional litigation would constitute surprising self-restraint.

Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law*, 49 AM. J. COMP. L. 203, 210 (2001) (footnotes omitted); see also Bassett, *supra* note 9, at 353 n.59.

Purcell makes no such claim,<sup>165</sup> his account raises the question whether *International Shoe* was actually animated in part by the desire to *reduce* forum shopping against corporations. By enabling states to assert activity-based personal jurisdiction without resort to fictions such as corporate presence, the Court may have hoped to change the balance of incentives in favor of suit in the state where the corporate activity grounding the claim occurred. The Justices may have hoped thereby to reduce the incidence, and set the stage for a reconsideration, of what we now call “general doing-business” jurisdiction.<sup>166</sup> If so, rather than contributing to the impulses that led the Court, two years later, to embrace *forum non conveniens* (a view that is in any event suspect insofar as that doctrine has little if any role to play in cases of specific jurisdiction<sup>167</sup>), *International Shoe* should be seen as part of a

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<sup>165</sup> PURCELL, *supra* note 107, at 220-21 (“The [*International Shoe*] decision limited the ability of foreign corporations to structure their business so that they could carry on activities in a state but remain beyond the reach of its courts, and it made it easier for plaintiffs to sue foreign corporations in their home states.”).

<sup>166</sup> As I have previously observed,

Apparently a creation of the courts, but subsequently adopted in the jurisdictional statutes of some states, doing-business jurisdiction was justified under traditional theory by the fiction of presence. When that fiction was undressed in *International Shoe*, a case that involved an assertion of what we would now call specific jurisdiction but that reasoned to a new paradigm by surveying cases of both specific and general jurisdiction, the future of this jurisdictional ground was put in doubt. It is still in doubt.

Burbank, *supra* note 105, at 750 (footnotes omitted). This discussion prompted David Shapiro to ask,

[I]sn’t it true that the contemporary justifications for asserting personal jurisdiction over out-of-state corporations were both over and under-inclusive? That is, they might reach some cases where the corporation had “consented” in order to do business (or was “present” in some abstract sense) yet the case had no connections with the state, but wouldn’t reach others in which the underlying facts had significant contacts with the state?

E-mail from David Shapiro to author (Oct. 31, 2007) (on file with author).

<sup>167</sup> See Stephen B. Burbank, *Jurisdiction to Adjudicate: End of the Century or Beginning of the Millennium?*, 7 TUL. J. INT’L & COMP. L. 111, 120-21 (1999) (evaluating Robert Casad’s view, as put forth in Robert C. Casad, *Jurisdiction in Civil Actions at the End of the Twentieth Century, Forum Conveniens and Forum Non Conveniens*, 7 TUL. J. INT’L & COMP. L. 91, 105-06 (1999), that *forum non conveniens* is limited to cases involving only general jurisdiction). Both of the Court’s 1947 decisions embracing a broad *forum non conveniens* doctrine, *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), and *Koster v. (American) Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947), were federal diversity actions. Purcell describes them as a “respon[se] to the general rise in interstate forum shopping,” PURCELL, *supra* note 107, at 235, and suggests that they may have contributed to the defeat of a bill that would have restricted venue options in FELA cases. *Id.*

concerted attempt to develop alternatives to the failed constitutional experiments of the 1920s and 1930s.

Whether or not *International Shoe* was animated by a goal of reducing interstate forum shopping against corporations, the role that the forum non conveniens doctrine and its statutory successor<sup>168</sup> were perceived to play in policing that phenomenon is evidence that, by the late 1940s, diversity jurisdiction had come to be seen by many not as a magnet for abusive litigation behavior by corporations, but as a source of protection against such behavior on the part of plaintiffs. Of course, the new role was linked no more closely to the traditional view of diversity jurisdiction than that which it replaced. Moreover, it would only have traction until such time as the Court or Congress came up with alternative and more direct ways of restraining state court overreaching.

Purcell persuasively argues that, by the 1950s, the changes wrought by *Erie* and its progeny, and the changed complexion of the federal judiciary, effectively rendered the federal courts more likely to be sought than feared by individual plaintiffs.<sup>169</sup> Thus, at a time when the federal courts were under attack for unpopular constitutional decisions, but when diversity cases were proving a burden, Congress rejected a bill sponsored by a southern congressman that, by eliminating corporate citizenship entirely, might have cut the federal civil docket by as much as twenty-five percent.<sup>170</sup> Instead, Congress raised the amount in controversy to in excess of \$10,000 and addressed what were perceived to be the last vestiges of the system of corporate diversity litigation: giving plaintiffs in workers' compensation cases the same privilege of forum choice as under the Federal Employers' Liability Act, and eliminating the abuse of tactical reincorporation famously blessed in the *Black & White Taxicab* case.<sup>171</sup> The latter was ac-

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at 235-36. He also notes the likely influence in that regard of the transfer provision in the draft Judicial Code, which was enacted in 1948 as 28 U.S.C. § 1404. *Id.*

<sup>168</sup> See 28 U.S.C. § 1404 (2000). Added by the 1948 revision of the Judicial Code, this provision authorizing transfer (rather than dismissal) of cases in which there is subject matter jurisdiction, personal jurisdiction, and proper venue had the effect of confining the federal forum non conveniens doctrine to cases in which the alternative forum is foreign.

<sup>169</sup> See PURCELL, *supra* note 107, at 230-43.

<sup>170</sup> See *id.* at 241-42 ("The Tuck bill would have cut the diversity docket by almost two-thirds and sliced the entire federal civil docket by 25 percent.").

<sup>171</sup> See *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 529-31 (1928) (upholding the application of general federal common law different from Kentucky law in a lawsuit brought in federal court in Kentucky by a local company that had strategically reincorporated from Kentucky to Tennessee).

completed by providing that corporations are citizens both of the states by which they are incorporated and of the state that is their principal place of business.<sup>172</sup>

Purcell's discussion of the 1958 legislation adumbrates the point that he develops at length in *Brandeis and the Progressive Constitution* with respect to Henry Hart and *Erie* scholarship, namely that by this point the actors had lost sight of the social meaning of the system of corporate diversity litigation.<sup>173</sup> As a result, the actors deemed the unusual and essentially local problem involved in the *Black & White Taxicab* case as emblematic of that system.

Whether those responsible for the 1958 legislation had forgotten or were simply unaware of the serious and widespread social problems that the system of corporate diversity litigation engendered, the manifest absurdity of treating modern business corporations as outsiders, vulnerable to local prejudice, in all states but two cannot have escaped them.<sup>174</sup> Or rather, it could not have escaped them if they had been

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<sup>172</sup> See Act of July 25, 1958, Pub. L. No. 85-554, § 2, 72 Stat. 415 (codified as amended at 28 U.S.C. § 1332(c)(1)).

<sup>173</sup> See PURCELL, *supra* note 159, at 229-57.

<sup>174</sup> This is not to deny that members of Congress, or others considering the legislation enacted in 1958, echoed the traditional account of reasons for the diversity grant, or that they entertained the possibility of prejudice against national corporations doing interstate business. It is, however, to suggest that their hearts were not in it and thus to agree with Purcell's interpretation of the legislative record. Consider that, in identical language, the House and Senate Reports (1) espoused the goal of "reducing the number of cases involving corporations which come into Federal district courts on the fictional premise that a diversity of citizenship exists," H.R. REP. NO. 85-1706, at 3 (1958), S. REP. NO. 85-1830, at 3 (1958); (2) stated that the "jurisdictional amount should not be so high as to convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies," H.R. REP. NO. 85-1706, at 3, S. REP. NO. 85-1830, at 4; (3) having articulated the "underlying purpose of diversity of citizenship legislation," went on to observe that "[w]hatever the effectiveness of this rule, it was never intended to extend to local corporations which, because of a legal fiction, are considered citizens of another State," H.R. REP. NO. 85-1706, at 4, S. REP. NO. 85-1830, at 4; and (4) noted that the change "will not eliminate those corporations which do business over a large number of States, such as the railroads, insurance companies, and other corporations whose businesses are not localized in one particular State." H.R. REP. NO. 85-1706, at 4, S. REP. NO. 85-1830, at 5. Consider also that in his testimony before a House Subcommittee on behalf of the Judicial Conference, which originally proposed the legislation, Judge Maris acknowledged that there were intermediate measures Congress could take between expanding corporate citizenship by adding the principal place of business and simply making diversity jurisdiction unavailable to corporations. See *Jurisdiction of Federal Courts Concerning Diversity of Citizenship: Hearing on H.R. 2516 and H.R. 4497 Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 85th Cong. 30, 34-35 (1957) (statement of Judge Albert B. Maris). Moreover, he stated that the measure proposed (and ultimately enacted) "is the minimum, . . . and it is the one which the Conference felt it was proper for it to recommend." *Id.* at

thinking about diversity jurisdiction in the traditional way. Whatever the framers and ratifiers of the Constitution may have intended in Article III, Congress in 1958—with far better reason (at least as a matter of institutional legitimacy) than the Court in the late nineteenth and early twentieth centuries—had moved on, confirming what its repeal

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30. Given that formulation, his additional comment that “[y]ou could go further and say that a corporation shall be regarded as a citizen of any State in which it is doing business, whether that is its principal place of business or not, though that would eliminate many more corporations,” *id.*, might have seemed an invitation. In that regard, Judge Maris also testified that the Judicial Conference had considered and rejected making corporations citizens of all states in which they were (doing or) qualified to do business because “that would really eliminate American business, which is mostly now incorporated, from access to the Federal courts.” *Id.* at 35. Withal, when asked about possible opposition from “people representing corporations,” to the various possible measures discussed at the hearing, *id.*, Judge Maris observed that they “seem to regard pretty highly their privilege of taking their litigation into the Federal courts in States remote from their headquarters where they don’t know the local people, and they fear for the results that might be reached in the State court. They seem to feel that way.” *Id.* at 35-36. He added that “it is the basis, I suppose, for the diversity jurisdiction, when all is said and done; why it was originally put in the Constitution.” *Id.* at 36.

Finally, the congressional materials informing the interpretation of the 1958 legislation are markedly different in this respect from some of the Judicial Conference materials they include. Most notable is the March 12, 1951, report of the Conference’s Committee on Jurisdiction and Venue, *see* H.R. REP. NO. 85-1706, at 12-27; S. REP. NO. 85-1830, at 15-30, chaired by Judge John Parker, no stranger to the system of corporate diversity litigation in the 1920s and 1930s. *See* John J. Parker, *The Federal Jurisdiction and Recent Attacks upon It*, 18 A.B.A. J. 433, 434 (1932) (defending diversity jurisdiction against critics he called “socialists and near socialists”); *see also* Marcus, *supra* note 28, at 1262 (describing Parker as a “staunch advocate for both diversity jurisdiction and the *Swift* regime”). The Judicial Conference Committee insisted that “local prejudice continues to exist.” H.R. REP. NO. 85-1706, at 15; S. REP. NO. 85-1830, at 18. Tellingly, however, much of the support it adduced for that proposition in connection with corporations came from the 1920s and 1930s, including the 1932 hearings that Purcell discusses, *see* PURCELL, *supra* note 107, at 242, and a 1922 speech by Chief Justice Taft, one of the architects of the system of corporate diversity litigation. *See* H.R. REP. NO. 85-1706, at 16-17; S. REP. NO. 85-1830, at 19-20; *supra* text accompanying note 124 (noting then-Judge Taft’s hostility to the tactic of joining nondiverse defendants to defeat removal). What emerges from the Judicial Conference Committee’s report is the conviction that corporate access to federal courts is essential to “cultivat[ing] a national outlook” and ensuring that “there is the freest communication and intercourse, with unrestricted flow of capital and commerce into the various parts of the Union.” H.R. REP. NO. 85-1706, at 16; S. REP. NO. 85-1830, at 19. To that end corporations need not only “protection . . . against local prejudice,” but also “the benefit of the salutary rules and practice of the Federal courts.” H.R. REP. NO. 85-1706, at 17; S. REP. NO. 85-1830, at 20.

of the Local Prejudice Act ten years earlier had suggested.<sup>175</sup> As Purcell observes, the important thing, rather, was

to recognize the dominant role of large corporations in the nation's economy and to accord their activities the time and attention of the national courts. The distinction that Congress drew between local and national corporations—for which it cited no significant evidence—allowed it for the first time to give its formal blessing to the judicially developed doctrine of corporate citizenship and to confer on national businesses the statutory right of access to the federal courts. That policy judgment was profoundly if subtly different from the traditional premise that justified diversity jurisdiction. In 1958 Congress was not concerned with protecting corporations against the dangers of local prejudice but with keeping in the hands of the national courts what it regarded as in every realistic sense the basic affairs of the nation.<sup>176</sup>

Purcell's point about "los[ing] contact with the social history of [diversity jurisdiction and the federal common law]"<sup>177</sup> is, however, far more telling with respect to Hart than it is with respect to the 1958 Congress. For, as Purcell demonstrates, the system of corporate diversity litigation had been dismantled by 1958. Even if (or perhaps because) it reconceived the function of diversity jurisdiction in accord with the Court's actual practice during the system of corporate diversity litigation, Congress in that year did not alter the aspects of prior law that had bestowed countervailing power on plaintiffs, and it did not alter any aspect of *Erie* jurisprudence. Attacks on that jurisprudence are vulnerable to criticism to the extent that they manifest ignorance of the social and institutional contexts that elicited it. The attacks are more troublesome to the extent that, if successful, they might so alter the balance of power as to pave the way for a return of the system of corporate diversity litigation.<sup>178</sup>

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<sup>175</sup> See PURCELL, *supra* note 107, at 238 ("[R]epeal of the local prejudice act dramatically captured the profound ambivalence and ambiguity that continued to underlie diversity jurisdiction.").

<sup>176</sup> *Id.* at 241.

<sup>177</sup> *Id.* at 239.

<sup>178</sup> See Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1938-44 (2006) [hereinafter Burbank, *Aggregation*] (rejecting the argument that courts can and should use CAFA as authorization to fashion federal choice of law rules to govern class actions); *infra* text accompanying note 250. Professor Hazard's contribution to this Symposium seems to me problematic in both respects. See Geoffrey C. Hazard, Jr., *Has the Erie Doctrine Been Repealed by Congress?*, 156 U. PA. L. REV. 1629, 1629 (2008) (interpreting CAFA as a congressional statement that "the *Erie* Doctrine is seriously erroneous"). Moreover, to view CAFA as repealing the *Erie* doctrine is wishful thinking that is contradicted *both* by most courts' unwillingness to interpret CAFA silently to overrule long-standing precedent, *see, e.g.*,

## IV. DIVERSITY CLASS ACTIONS IN HISTORICAL CONTEXT

A. *Federal Class Actions in General and the Revolution of 1966*<sup>179</sup>

Class actions fascinate scholars, enrich lawyers, and are greeted as either an instrument of salvation or an engine of destruction by clients. Although of ancient lineage, they have come to play consequential roles in American litigation chiefly within the last forty years. Their fortunes during that period, moreover, well capture perhaps the most critical dilemma of modern procedure, that is, how to provide sufficient access to court in a society that depends heavily upon private litigation for compensation for injury and the enforcement of important social norms with (1) fidelity to those norms, (2) due attention to the interests of litigants and others affected by litigation, and (3) adequate attention to the limited capacity of American courts. One view of the history I will sketch is that we have been fabulously successful in affording access to court and that we are now experiencing the agonizing reappraisals of those who are the victims of their success.

Like so much in American law and American society, the class action can be traced to England,<sup>180</sup> although the parent might deny responsibility.<sup>181</sup> Yet, it should not cause surprise that the problem of

Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448 (7th Cir. 2005) (refusing to read CAFA as overturning the long-standing rule that the proponent of federal jurisdiction bears the burden of persuasion), and the statute's legislative history. See Burbank, *Aggregation*, *supra*, at 1943 (noting evidence that Congress did not intend to alter *Erie's* federal-state lawmaking balance); *infra* text accompanying notes 360-361. Without authority in an act of Congress, lower federal courts "lack the freedom of law professors to overrule the Court." Stephen B. Burbank, *Afterwords: A Response to Professor Hazard and a Comment on Marrese*, 70 CORNELL L. REV. 659, 660 (1985) [hereinafter Burbank, *Afterwords*]. Withal, CAFA may support a limited departure from precedent. See Burbank, *Aggregation*, *supra*, at 1949-52 (suggesting that, where state choice of law rules reflect a bias favoring aggregate litigation, CAFA's jurisdictional policy may require federal courts to apply federal choice of law rules); *infra* note 361.

<sup>179</sup> This Section draws heavily on Stephen B. Burbank, *The Class Action in American Securities Regulation*, in 4 ZEITSCHRIFT FÜR ZIVILPROZESS INTERNATIONAL 321 (Dieter Leipold & Rolf Stürner eds., 1999).

<sup>180</sup> For the history of the class action in England and the United States, see STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987); Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849 (1998).

<sup>181</sup> I am reminded of the (undoubtedly apocryphal) story of Queen Elizabeth II's visit to Philadelphia during the Bicentennial of American Independence. Having met the then-Mayor of Philadelphia, a former police captain by the name of Rizzo, the Queen is supposed to have remarked, "If this is democracy, I want no part of it." I can imagine the Lord Chief Justice saying the same thing about the contemporary American class action.

determining the rights of groups of people occupied the attention of English lawyers and judges from very early times. That was, after all, a society filled with groups—guilds, societies, etc.—and one in which, for many people, group identity was central to personal identity. In such a society, it made sense that one who already represented a group—the Mayor of the City of York, for example—also should be able to represent that group in litigation on questions affecting the interests of all equally.<sup>182</sup> Moreover, it was not overly adventurous for English courts to extend the principle of representation to other situations in which litigation could not proceed to decision without affecting the interests of those not before the court. A privateer's action to divide the spoils of capture is not, in that respect, very different from a proceeding to settle an estate, and the difference—relative certitude about the identity of those whose interests are affected—cuts in favor of, not against, binding adjudication.<sup>183</sup>

These are the types of cases in which group litigation was permitted in England at the time its wayward child insisted on independence, and they are, roughly, the types of cases in which class actions were permitted in the United States during most of our history. The year 1966 is thus as important to American class actions as the year 1066 is to English history. In that year, amendments to the Federal Rules became effective that, we now know, facilitated, if they did not initiate, a revolution in the use of group litigation. The formal stated agenda of the rulemakers in revising Rule 23 was largely uncontroversial. They sought, in connection with Rule 23 as with other joinder rules (i.e., Rules 19 and 24), to turn federal jurisprudence from abstract inquiries to functional analysis—analysis that considers the practical, as well as the formal legal, effects of litigation. But they also reconceptualized the categories appropriate for class action treatment

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<sup>182</sup> See YEAZELL, *supra* note 180, at 52-69; *Mayor of York v. Pilkington*, (1737) 25 Eng. Rep. 946 (Ch.) (upholding equity jurisdiction in a suit seeking a bill of peace on behalf of the residents of York).

<sup>183</sup> See YEAZELL, *supra* note 180, at 182-83 (reviewing British courts' willingness to allow suits on behalf of all of a privateer's crew members in disputes over money due to the crew); Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 265-67 (1990) (reviewing YEAZELL, *supra* note 180) (explaining that courts in the privateer cases respected individual litigants' rights, only giving the "full benefits and burdens of the suit" to the present class members).



and specified different procedural requirements depending upon the category.<sup>184</sup>

It was the third category (Rule 23(b)(3)) that has marked the 1966 amendments to Rule 23 as a major event in American legal development.<sup>185</sup> Here—remembering that all putative class actions must satisfy the four requirements of numerosity, commonality, typicality, and adequate representation<sup>186</sup>—a court may certify a case as a class

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<sup>184</sup> See FED. R. CIV. P. 23 (1966). The goals of the Advisory Committee can be found in the Advisory Committee Note accompanying the 1966 amendments. For further discussion of these amendments, see generally Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497 (1969); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356 (1966).

The first category (Rule 23(b)(1)), where “the prosecution of separate actions by or against individual members of the class would create a risk” either of “inconsistent or varying adjudications . . . [that] would establish incompatible standards of conduct for the party opposing the class” or of “adjudications . . . [that] would as a practical matter be dispositive of the interests of other members not parties,” pretty accurately captured the core of traditional class action practice. FED. R. CIV. P. 23(b)(1) (1966); see also *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842-43 (1999) (noting that Rule 23(b)(1) was designed to stay close to the “historical model”); *infra* note 185.

The second category (Rule 23(b)(2)), where “the party opposing the class has acted or refused to act on grounds generally applicable to the class,” FED. R. CIV. P. 23(b)(2) (1966), while somewhat further removed from that core, was still within its conceptual reach. Moreover, both the published and unpublished material of the drafters make clear their intention to enlist the revised rule in the struggle for racial equality that was then the dominant social issue in the United States. Thus, the primary illustration of the new subdivision was “various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration.” FED. R. CIV. P. 23 advisory committee’s note (1966).

<sup>185</sup> The Supreme Court described the development of this Rule as follows:

Although the Committee crafted all three subdivisions of the Rule in general, practical terms, without the formalism that had bedeviled the original Rule 23, the Committee was consciously retrospective with intent to codify pre-Rule categories under Rule 23(b)(1), not forward-looking as it was in anticipating innovations under Rule 23(b)(3).

*Ortiz*, 527 U.S. at 842 (citation omitted); see also *id.* at 861-62 (“[I]t was also the Court’s understanding that the Rule’s growing edge for that purpose [mass tort litigation] would be the opt-out class authorized by subdivision (b)(3) . . . .”); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (“In the 1966 class-action amendments, Rule 23(b)(3), the category at issue here, was ‘the most adventuresome’ innovation.”).

<sup>186</sup> Rule 23(a) provides that

one or more members of a class may sue or be sued as representative parties on behalf of all only if

- (1) the class is so numerous that joinder of all members is impracticable,
- (2) there are questions of law or fact common to the class,

action if it finds that “the questions of law or fact common to the class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”<sup>187</sup> If the court does so certify, the rule requires that notice be given to the members of the class and that they thereby be given an opportunity to opt out of the action, avoiding its preclusive effects.<sup>188</sup>

There has been much debate about the goals of the drafters of Rule 23(b)(3). Study of the published and unpublished material relating to their work persuades me that, although they did not foresee, and could not have foreseen, all of the effects of this change, they were aware that they were breaking new ground and that those effects might be substantial. Seeking to ensure that members of a class would be bound by an adverse judgment as well as benefit from one that was favorable,<sup>189</sup> the drafters recognized that Rule 23(b)(3) would enable those with small claims for whom individual litigation would be economically irrational to band together in group litigation against a common adversary.<sup>190</sup> But for most people so situated, notice and an

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(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and

(4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a).

<sup>187</sup> FED R. CIV. P. 23(b)(3).

<sup>188</sup> FED R. CIV. P. 23(c)(2)(B).

<sup>189</sup> See *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974) (“The 1966 amendments were designed, in part . . . to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments.”).

<sup>190</sup> See Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 AM. J. COMP. L. 675, 684 (1997). As the Court has indicated,

The use of the class-action procedure for litigation of individual claims may offer substantial advantages for named plaintiffs; it may motivate them to bring cases that for economic reasons might not be brought otherwise. Plainly there has been a growth of litigation stimulated by contingent-fee agreements and an enlargement of the role this type of fee arrangement has played in vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost. The prospect of such fee arrangements offers advantages for litigation by named plaintiffs in class actions as well as for their attorneys. For better or worse, the financial incentive that class actions offer to the legal profession is a natural outgrowth of the increas-

opportunity to opt out are hardly important, which raises the question why the drafters attached those procedural incidents to this subdivision and not to the others.

On this question the unpublished record is fascinating, revealing that the right to opt out of a Rule 23(b)(3) class and the notice system necessary to effect it were added very late in the drafting process. Prior to that decision, the draft rule had made the provision of notice discretionary.<sup>191</sup> The Advisory Committee settled on notice and opt-out rights to meet the expressed concern that (b)(3) classes might be used by class counsel, in league with defendants, to force those with substantial individual claims into group litigation inimical to their interests.<sup>192</sup>

This account of the 1966 amendments to Rule 23(b)(3) suggests that, where the amended Rule went beyond the traditional uses of the class action, it did so because of the drafters' desire to enlist procedure in an effort to facilitate access to court for those for whom individual litigation was prohibitively expensive. In addition, the drafters were intent to equalize the risks of benefit and burden and to take advantage of the potential of the class action to reduce aggregate litiga-

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ing reliance on the "private attorney general" for the vindication of legal rights; obviously this development has been facilitated by Rule 23.

Deposit Guar. Nat'l Bank of Jackson, Miss. v. Roper, 445 U.S. 326, 338 (1980) (footnotes omitted); *see also id.* at 338 n.9 (describing the facilitation of negative-value claims as "a central concept of Rule 23"); U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 403 (1980) ("This 'right' [to have a class certified if the Rule's requirements are met] is more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the 'personal stake' requirement."); Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 266 (1972) ("Rule 23 . . . provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture.").

<sup>191</sup> Professor Kaplan explained this discretionary notice provision to his colleagues on the Advisory Committee as follows:

Then we have subdivision (d), which reminds the court of the artillery of orders that can be made in a class suit, and attention is called notably to the possibility of orders requiring notice to be given to the class. Of course, notice may be useful in any given number of different directions. I cite only one: to make sure that the representation[] is adequate, or as an invitation to intervene in order that the class be properly represented, or that a sub-class within the class receive proper protection.

Proceedings of Meeting of the Advisory Committee on Rules of Civil Procedure 3 (Oct. 31–Nov. 2, 1963) (statement of Benjamin Kaplan) (on file with author).

<sup>192</sup> *See* Burbank & Silberman, *supra* note 190, at 684 & n.34. The history of settlement classes suggests that, in this respect at least, the drafters of the 1966 amendments had more foresight than is normally accorded them. *See infra* text accompanying notes 229–230.

tion expense. Finally, we see that concern about the implications of their handiwork for access to court also played a crucial role in the innovation of notice and opportunity to opt out that is required in (b)(3) class actions, but that the concern was possible use of the device to foreclose, rather than to open up, access.

### B. *The Supreme Court Leads a Counterrevolution*

It is perhaps inevitable that courts will interpret jurisdictional statutes with attention to their own institutional interests. The Supreme Court, for example, narrowed the apparent reach of the general federal question statute shortly after it was enacted in 1875.<sup>193</sup> It did not take long for the Court to realize the impact that amended Rule 23 could have on the federal caseload and to deploy interpretations of the diversity statute in self-defense.

In an environment of proliferating statutory law and of greater competition within the legal profession, the potential of the 1966 amendments both to serve the purposes espied by the drafters and to enrich attorneys was quickly realized. There followed a period of rapid growth in filings, of paeans, and of equally fervent denunciations.<sup>194</sup> Painted over a legal landscape that had previously known them only in the corners, class actions soon occupied the foreground.

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<sup>193</sup> See, e.g., *Gold-Washing & Water Co. v. Keyes*, 96 U.S. 199, 202-04 (1877) (setting forth the well-pleaded complaint rule). For early cases imposing other restrictive interpretations on the statutory “arising under” language, see *WRIGHT & KANE*, *supra* note 32, at 102-10. As Purcell explains,

[T]he principal reason for the Court’s abrupt decision to establish the plaintiff’s pleading rule was most likely the belief that cutting federal question removal was a necessary trade-off to balance the swollen caseload that would result from the Court’s contemporaneous decisions that expanded the opportunities of corporate tort defendants to remove diversity suits.

PURCELL, *supra* note 107, at 271.

<sup>194</sup> See generally Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality and the “Class Action Problem,”* 92 HARV. L. REV. 664 (1979). In 1981, the Supreme Court observed:

Class actions serve an important function in our system of civil justice. They present, however, opportunities for abuse as well as problems for courts and counsel in the management of cases. Because of the potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties.

*Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99-100 (1981) (footnote omitted).

A major dilemma was presented by what our economist friends call inefficient overenforcement.<sup>195</sup>

Although Americans seem to abhor legal wrong without legal remedy as nature abhors a vacuum, rules of substantive law enforceable through private litigation were traditionally framed using a model of individual litigation. Too often it has not been clear whether the lawmaker contemplated even private enforcement.<sup>196</sup> In such a world, the economic irrationality of individual enforcement may be understood not as a problem to be solved but as the contemplated price of economic progress.<sup>197</sup> Class actions can change that calculus.<sup>198</sup>

And so they did in the 1970s, prompting Congress to amend some statutes where the fit was notoriously imperfect, such as the Truth in Lending Act,<sup>199</sup> and prompting the Supreme Court to use its control

<sup>195</sup> See Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 52-53 (1975).

<sup>196</sup> See FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE 143-44 (5th ed. 2001) ("The most persistently controverted issue concerning actions arising under federal law is whether a federal statute creating a duty also implies a private right of action.").

<sup>197</sup> I have previously elaborated this suggestion:

[I]t seems entirely possible that—prior to the introduction of the small claims class action—a legislature may have been aware, and (collectively) content, that in some circumstances the right and its attendant statutory remedy were worth only the paper on which they were written. Indeed, perhaps the legislature was counting on the complex of other laws and institutions that determine whether rights can be vindicated to serve as filters. That view appears particularly plausible with respect to a legislature that has sought only selectively to change one of the most important such filters—the market for legal services—by providing for an award of attorney's fees to prevailing plaintiffs. It is also a view that will be familiar to those who have studied foreign legal systems in which rights often go unenforced through private litigation and may not be enforced at all.

Burbank, *Aggregation*, *supra* note 178, at 1929 (footnote omitted).

<sup>198</sup> As Justice Powell observed,

At the very least, the result should be consistent with the substantive law giving rise to the claim. Today, however, the Court never pauses to consider the law of usury. Since Mississippi law condemns the aggregation of usury claims, the Court's concern for compensation of putative class members in this case is at best misplaced and at worst inconsistent with the command of the Rules Enabling Act.

Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 355 (1980) (Powell, J., dissenting) (footnotes omitted).

<sup>199</sup> 15 U.S.C. § 1640 (2000); see also Pub. L. No. 93-495, tit. IV, 88 Stat. 1500, 1517-21 (1974); Pub. L. No. 94-222, § 3, 90 Stat. 197, 197-98 (1976). For more recent

of the interpretation of federal jurisdiction statutes measurably to reduce the impact of Rule 23 by keeping out of federal court small state law class actions. In *Snyder v. Harris*<sup>200</sup> and *Zahn v. International Paper Co.*,<sup>201</sup> the Court refused to permit aggregation of the claims of class members to meet the amount-in-controversy requirement in the diversity statute and interpreted that requirement to apply to the claims of all members of the class, named and unnamed. Neither decision was foreordained, as there was precedent that could have been invoked to support the contrary result.<sup>202</sup> Indeed, the Court's refusal to permit absent members of the class to ride on the coattails of their named representative for this purpose sat quite uneasily with the continuing willingness to ignore the citizenship of such members.<sup>203</sup> For, like corporations, classes enjoy privileged access to federal court through a fiction that eases satisfaction of the requirement of complete diversity. In any event, that the Court was consciously making policy was clear from the tenor of the opinions, although the policy

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amendments affecting class actions, see the Truth in Lending Class Action Relief Act of 1995, Pub. L. No. 104-12, 109 Stat. 161 (codified at 15 U.S.C. § 1640). The original legislation, enacted at a time when the general federal question statute imposed an amount-in-controversy requirement (which was eliminated in 1980), contained a targeted jurisdictional grant that did not impose such a requirement. See Consumer Credit Protection Act, Pub. L. No. 90-321, § 130(e), 82 Stat. 146, 157 (1968).

<sup>200</sup> 394 U.S. 332 (1969).

<sup>201</sup> 414 U.S. 291 (1973).

<sup>202</sup> See *id.* at 308-10 (Brennan, J., dissenting); *Snyder*, 394 U.S. at 348-49 (Fortas, J., dissenting); Marcus, *supra* note 26, at 1773-75. Note also the suggestion that *Snyder* ignores the possibility "that the controlling amount is either the value to the plaintiff or the cost to the defendant, whichever is higher." RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1482 (5th ed. 2003).

<sup>203</sup> See *Snyder*, 394 U.S. at 355 (Fortas, J., dissenting) ("Indeed, the promulgation of the old Rule 23 provided a new means for resolving in a single federal litigation, based on diversity jurisdiction, the claims of all members of a class, even though some in the class were not of diverse citizenship from parties on the other side."); Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 366 (1921). In a very interesting recent article, Professor Pfander questions the pedigree of doctrine extending *Ben-Hur*'s treatment of diversity jurisdiction to cases certified under Rule 23(b)(3). See James F. Pfander, *Protective Jurisdiction, Aggregate Litigation, and the Limits of Article III*, 95 CAL. L. REV. 1423, 1454-59 (2007); *id.* at 1456 n.147 ("As part of its expression of policy concerns, the majority opinion of Justice Black [in *Snyder*] described the docket-expanding potential of the [*Ben-Hur*] rule as if it applied to all class actions; the opinion failed to distinguish between the spurious or (b)(3) actions at issue in *Snyder* and the true class action that, in *Cauble* itself, had been seen as justifying the exercise of ancillary jurisdiction.").

sought to be served related to the workload of the federal courts, not to the enforcement of state law.<sup>204</sup>

A federal judge applied the epithet "Frankenstein monster" to a securities law class action in the late 1960s,<sup>205</sup> and that case elicited a use of the Supreme Court's interpretive powers to cut back on small-claims federal law class actions as it had cut back on small-claims state law (i.e., diversity) class actions.<sup>206</sup> The mechanism for doing so was Rule 23(c)(2)'s requirement that, in an action maintained under Rule 23(b)(3), the court "direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."<sup>207</sup> The Court held that the representatives of a putative class (or more realistically, their lawyers) must pay for sending such individual notice to (in *Eisen*, millions of) reasonably identifiable class members<sup>208</sup> and, in another securities law case, that they must usually pay the cost of identifying its recipients.<sup>209</sup>

These decisions, too, were not foreordained, and, although admittedly less transparent than the diversity class action decisions, may have masked concerns not only about workload but about issues of social policy that largely escaped notice in 1966, including both positive and normative questions regarding the respective roles of administrative and private enforcement of the securities laws and, more generally, the goals of civil process.<sup>210</sup> Certainly, in any event, controversy at

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<sup>204</sup> Broader reform efforts, whether legislative or judicial, foundered on widely shared awareness, as a result of experience under the 1966 amendments, that class action reform has predictable substantive implications and hence attracts well-defined and well-financed interest groups. See Miller, *supra* note 194, at 684-93.

<sup>205</sup> *Eisen v. Carlisle & Jacquelin (Eisen II)*, 391 F.2d 555, 572 (2d Cir. 1968).

<sup>206</sup> See *Eisen v. Carlisle & Jacquelin (Eisen III)*, 417 U.S. 156 (1974). I have never believed that this decision can plausibly be read as an interpretation of the Due Process Clause rather than of Rule 23. Its vulnerability as an interpretation of either, in the context of a negative-value class action, is enhanced by knowledge of the drafting history recounted above. See *supra* text accompanying notes 189-192.

<sup>207</sup> FED. R. CIV. P. 23(c)(2)(B) (1966).

<sup>208</sup> *Eisen III*, 417 U.S. at 178-79.

<sup>209</sup> See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 359-63 (1978).

<sup>210</sup> See Hal S. Scott, Comment, *The Impact of Class Actions on Rule 10b-5*, 38 U. CHI. L. REV. 337 (1971); Kenneth E. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937, 940-45 (1975) (noting that *Eisen II* and *Eisen III* resulted from the normative judgment that the purpose of class actions should be to compensate individuals rather than to change behavior). Justice Douglas's dissent in *Eisen III* framed the issue in terms of the more general goals of the civil litigation process:

I think in our society that is growing in complexity there are bound to be innumerable people in common disasters, calamities, or ventures who would go

the time centered on class actions seeking recovery on behalf of thousands or millions of investors, each one of whom could allege only a small amount of damage but whose damages in aggregate were substantial indeed.

Decisions like *Eisen III* may have dampened the enthusiasm of the class action bar, but in an increasingly sophisticated and competitive environment<sup>211</sup>—I refer to the legal profession, not financial markets—they could not for long restrain the entrepreneurial zeal of plaintiffs' lawyers. Pooling resources and using the proceeds of successful litigation to fund other litigation, the securities class action bar was not about to be deterred by the requirement that they frontload resources in promising "investments," that is to say, litigation.<sup>212</sup>

As a result of the Supreme Court's efforts to discipline the effects of Rule 23, and of other developments in the broader American legal culture, the frenzy of the 1970s yielded to a period, lasting through the 1980s, of relative quiescence. Indeed, in 1989, Stephen Yeazell, the foremost American historian of the class action, posed the ques-

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begging for justice without the class action but who could with all regard to due process be protected by it. Some of these are consumers whose claims may seem *de minimis* but who alone have no practical recourse for either remuneration or injunctive relief. . . . Or the unnamed individual may be only a ratepayer being excessively charged by a utility, or a homeowner whose assessment is slowly rising beyond his ability to pay.

The class action is one of the few legal remedies the small claimant has against those who command the status quo. I would strengthen his hand with the view of creating a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth.

*Eisen III*, 417 U.S. at 185-86 (Douglas, J., dissenting) (footnote omitted).

<sup>211</sup> See Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and Its Values*, 59 BROOK. L. REV. 931, 938-46 (1993).

<sup>212</sup> There is, of course, a vigorous debate about what made the investment promising, that is, whether the merits mattered in private securities class actions or whether simply filing the suit as a class action was sufficient to induce a settlement. Compare Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 499-501 (1991) (concluding that, in a "significant and identifiable class of settlements," the merits have "little or nothing to do with determining the amount of the settlement"), with James D. Cox, *Making Securities Fraud Class Actions Virtuous*, 39 ARIZ. L. REV. 497, 503-04 (1997) (criticizing and ultimately rejecting Alexander's study and conclusion that the merits do not matter). For more recent work on this question, see, for example, Stephen J. Choi, *The Evidence on Securities Class Actions*, 57 VAND. L. REV. 1465, 1476-1507 (2004), which summarizes recent empirical evidence; Marilyn F. Johnson et al., *Do the Merits Matter More? The Impact of the Private Securities Litigation Reform Act*, 23 J.L. ECON. & ORG. 627 (2007), which finds that the Private Securities Litigation Reform Act increased the correlation "between litigation and both earnings restatements and abnormal insider selling." *Id.* at 627.



tion whether his entire legal career had been spent studying something about to become extinct.<sup>213</sup>

He need not have worried. What I have called “the broader American legal culture” is sensitive to changes in the economy and in the locus of political power. Yet, although the economy and politics help to explain both the Phoenix-like rebirth of the class action as a litigation force and its return to center stage as a subject of reform debate, they do not provide the entire explanation. Three related phenomena seem to me especially important: federal mass tort and settlement class actions, the growth of class action practice in state courts, and the resulting phenomenon of overlapping federal and state class actions.

### C. *Mass Tort*<sup>214</sup> and Settlement Classes in Federal Court

Recall that the drafters of the 1966 amendments to Rule 23 added the requirement of notice and an opportunity to opt out in Rule 23(b)(3) class actions in response to the expressed fear that, otherwise, that category might become a tool of defendants and class counsel to deprive individuals of the benefits of individual litigation.<sup>215</sup> In part for the same reason, the Advisory Committee Note accompanying the amendments expressed the view that class certification under Rule 23(b)(3) would rarely be appropriate in “mass accident” cases, cases involving a common disaster such as a hotel fire, bridge collapse, or the like.<sup>216</sup> And for many years one did not find many certified mass tort class actions in federal court, and certainly not many involving

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<sup>213</sup> See Burbank & Silberman, *supra* note 190, at 685 & n.40. Also in 1989, the Supreme Court observed that “Rule 23 . . . has inspired a controversy over the philosophical, social, and economic merits and demerits of class actions.” *Mistretta v. United States*, 488 U.S. 361, 392 n.19 (1989).

<sup>214</sup> “Mass tort” is a category that is differently formulated depending on the speaker. See Deborah R. Hensler, *Has the Fat Lady Sung? The Future of Mass Toxic Torts*, 26 REV. LITIG. 883, 890-91 (2007). I use it “to describe a large number of tort claims arising out of the same factual circumstances and alleging the same or similar injuries,” *id.* at 890, including both mass accidents and so-called “mass toxic torts” such as “claims arising out of exposure to asbestos, Agent Orange, and use of pharmaceutical products.” *Id.*

<sup>215</sup> See *supra* text accompanying notes 190-192.

<sup>216</sup> See FED. R. CIV. P. 23 advisory committee’s note (1966) (“A ‘mass accident’ resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways.”); see also Burbank & Silberman, *supra* note 190, at 684 & n.35.

widely dispersed injuries apparently caused by common agents such as pharmaceutical drugs.<sup>217</sup>

Because most tort law is state law, those seeking to bring mass tort class actions in federal court are required to satisfy the requirements of diversity jurisdiction. From the perspective of the plaintiff class, the major jurisdictional hurdle confronting other (diversity) state law class actions—meeting the amount-in-controversy requirement as interpreted in *Snyder* and *Zahn*—was not likely to be a problem even before the supplemental jurisdiction statute was found to overrule *Zahn*.<sup>218</sup> The problem lay elsewhere. Following a few mass tort class certifications that survived appellate review,<sup>219</sup> the federal courts of appeals began to insist on careful attention to the requirements of Rule 23(b)(3).<sup>220</sup> This ultimately proved fatal to most attempted multistate class actions, including but not limited to mass tort class actions. Absent a persuasive showing that, under the governing state choice of law rules, the claims of class members would be governed by the law of only one state, or perhaps of a few—and quite apart from factual dif-

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<sup>217</sup> Eventually, however, the federal courts became more hospitable to mass accident class actions, at least those governed by the law of only one state.

<sup>218</sup> See *supra* text accompanying notes 36-39. This was particularly true in cases seeking both compensatory and punitive damages.

<sup>219</sup> See, e.g., *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297 (5th Cir. 1998); *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1008-11 (3d Cir. 1986), *cert. denied*, 479 U.S. 852 (1986); *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (5th Cir. 1986); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y. 1983), *aff'd*, 818 F.2d 145 (2d Cir. 1987); Richard L. Marcus, *They Can't Do That, Can They? Tort Reform via Rule 23*, 80 CORNELL L. REV. 858, 866-71 (1995) (discussing mass tort cases in which the class action had been used). Professor Hensler's recent article on the future of mass toxic torts contains an extremely useful table listing all of the "thirty-five product-related mass personal injury litigations that arose between 1960 and the late 1990s," Hensler, *supra* note 214, at 896, that had been uncovered by two previous studies and by her additional research. See *id.* at 897-903. She summarized as follows:

Half (seventeen) of the mass personal injury litigations identified by the studies were consolidated and transferred to a single federal court under the multi-district statute. Only one-third (twelve) were resolved wholly or to a significant degree by a class action settlement, although class certification was sought and denied (or granted but then vacated by appellate action) in a larger number, and in two instances class actions settled a small fraction of cases (asbestos) or related litigation (Dalkon Shield).

*Id.* at 903. Two of the twelve listed settled class actions were state court cases. See *id.* at 901.

<sup>220</sup> Under Rule 23(b)(3), in order to certify the class the court must find "that the questions of law or fact common to the class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3).

ferences among those claims—the federal appellate courts came to the view that mass tort class actions could not satisfy the predominance and superiority requirements of Rule 23(b)(3).<sup>221</sup> In the process, the federal appellate courts developed a healthy respect for the “likely difficulties in managing a class action,”<sup>222</sup> and refused to treat trial as a fiction in a world dominated by settlements.<sup>223</sup> Moreover, federal appellate courts have increasingly insisted that certification decisions be based on an inquiry that gets beneath the allegations of the complaint, even if that inquiry overlaps with the merits.<sup>224</sup> Finally, since the advent of discretionary interlocutory appeals of class certification decisions in 1998,<sup>225</sup> federal appellate courts have been in a better position both to develop class action jurisprudence and to police adherence to it by the district courts.

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<sup>221</sup> See, e.g., *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 740-41 (5th Cir. 1996); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 624-34 (3d Cir. 1996), *aff'd sub nom. Amchem Prods. v. Windsor*, 521 U.S. 591 (1997); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1084-86 (6th Cir. 1996); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1296-97 (7th Cir. 1995); Marcus, *supra* note 28, at 1282-86, 1305-08; Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001, 2007-11 (2008) (exploring cases in which circuit courts have denied mass tort class certification). *Amchem*, one of the three federal appellate decisions Professor Marcus singles out as influential, see Marcus, *supra* note 28, at 1285-86, involved a settlement class. See *infra* text accompanying notes 228-238.

<sup>222</sup> FED. R. CIV. P. 23(b)(3)(D); see also, e.g., *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018-20 (7th Cir. 2002) (holding that a single nationwide class would be unmanageable because the case would need to apply different law for the residents of each state and because there were many distinct factual issues); *Castano*, 84 F.3d at 743-44.

<sup>223</sup> See, e.g., *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 421 (E.D. La. 1997) (“Differences among state laws . . . can combine with fact differences . . . making the class model unmanageable and inefficient.”); *id.* at 423 (“[T]his Court cannot imagine managing a trial under the law of 51 jurisdictions on the defectiveness of Masonite siding.”); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 350 (D.N.J. 1997) (noting that “plaintiffs have the burden of designing a workable plan for trial embracing all claims and defenses prior to class certification”).

<sup>224</sup> See, e.g., *In re IPO Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) (“[T]he obligation to make such determinations [regarding Rule 23 requirements] is not lessened by overlap between a Rule 23 requirement and a merits issue . . . .”); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675-76 (7th Cir. 2001) (“[I]t is not possible to evaluate impending difficulties without making a choice of law, and not possible to make a sound choice of law without . . . mak[ing] a preliminary inquiry into the merits.”); *Castano*, 84 F.3d at 744 (stating that “[g]oing beyond the pleadings is necessary” to properly reach a certification decision).

<sup>225</sup> See FED. R. CIV. P. 23(f). “By the mid-1990s, defendants in class actions began to favor federal courts, just as plaintiffs once did. Conversely, many plaintiffs’ lawyers began to prefer state courts.” Morrison, *supra* note 9, at 1526 (footnote omitted).

For a time, however, it appeared that one type of class action might escape the growing skepticism of the federal courts about multistate class actions. The occasion for hope came in asbestos litigation, which inundated American courts, state and federal, in the 1980s, and which, after a certain period, became “mature” in the sense that the underlying facts concerning the defendants’ conduct were known, the legal questions had been litigated to death, the values of cases were well established, and each additional case was, in many respects, a rerun of hundreds of others.<sup>226</sup> Yet, the asbestos cases in the federal courts seemed to defy efficient resolution, as federal judges tried first one and then another technique to spare themselves and litigants the extraordinary expense and delay of the traditional treatment, while Congress turned a deaf ear to repeated pleas for a legislative solution. One of the techniques that proved largely unavailing was class actions for litigation.<sup>227</sup> But something changed.

Companies that had previously reviled the class action came to see it, or at least one form of it, as a potential instrument of salvation, and so did many federal judges. I refer to the so-called settlement class action, involving in its most familiar form the virtually simultaneous filing of a class action and of a proposed settlement. Here, it was hoped, was a vehicle by which plaintiffs could secure prompt relief at less cost and mass tort defendants could receive a comprehensive resolution of a litigation problem that might otherwise consume years, if not dec-

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<sup>226</sup> See Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 659 (1989).

<sup>227</sup> See *supra* text accompanying notes 219-220. *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir. 1986), was an unusual case both because it involved only claims previously filed in Texas and because the court of appeals seemed intent on using the occasion to chastise Congress for failing to provide a legislative solution for the asbestos crisis and perhaps to scare it into action by foreshadowing the extent to which that crisis was forcing departures from the traditional approach to litigation:

Courts have usually avoided class actions in the mass accident or tort setting. Because of differences between individual plaintiffs on issues of liability and defenses of liability, as well as damages, it has been feared that separate trials would overshadow the common disposition for the class. The courts are now being forced to rethink the alternatives and priorities by the current volume of litigation and more frequent mass disasters. If Congress leaves us to our own devices, we may be forced to abandon repetitive hearings and arguments for each claimant’s attorney to the extent enjoyed by the profession in the past.

*Id.* at 473 (citations omitted); see also *id.* (“Necessity moves us to change and invent.”). As we shall see, the Fifth Circuit’s *cri de coeur* was not unique. See *infra* note 238.

ades. For defendants seeking “global peace,” the settlement class action seemed just the thing.<sup>228</sup>

There had been many settlement class actions in other areas, including the securities area, before the technique was tried in the asbestos litigation.<sup>229</sup> Those cases revealed potential abuses of the sort that concerned the Advisory Committee in the 1960s, since in some of the cases it appeared that class counsel had sold out the class to defendants anxious to purchase quick and global peace on the cheap. And both the flowering of settlement class actions and the perception of abuses played a role in the Advisory Committee’s decision to reexamine Rule 23, a process that continued for more than a decade and that, until 2003, yielded only the amendment authorizing discretionary interlocutory appellate review of class certification decisions.<sup>230</sup>

Also affecting the timing and content of the Advisory Committee’s work were the Supreme Court’s decisions in two cases involving attempts to resolve asbestos litigation through the mechanism of the settlement class action. In both cases, *Amchem*<sup>231</sup> and *Ortiz*,<sup>232</sup> the attempt was unsuccessful. Moreover, the Court left seriously in doubt the circumstances in which settlement classes could be certified and settlements approved in mass tort class actions—indeed, in any multistate class action involving numerous different state laws. Although the Court in *Amchem* disagreed with the Third Circuit’s view that manageability is as much a concern in considering certification of a settle-

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<sup>228</sup> See Burbank & Silberman, *supra* note 190, at 685-88.

<sup>229</sup> See Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rule-making Challenges*, 71 N.Y.U. L. REV. 74, 146 (1996).

<sup>230</sup> See FED. R. CIV. P. 23(f); see also *supra* text accompanying note 225. One reason for the paucity of amendments during this period is that for a time the rulemakers were waiting for the report of the ad hoc Working Group on Mass Torts appointed by the Chief Justice. The report was made public in early 1999. See ADVISORY COMM. ON CIVIL RULES & WORKING GROUP ON MASS TORTS, REPORT ON MASS TORT LITIGATION (1999). It recommended the creation of a follow-on body to make concrete recommendations for change, *id.* at 67-70, a recommendation that Chief Justice Rehnquist treated with neglect the quality of which (benign or not?) may be inferred from subsequent developments. The creation of the Working Group, in any event, can be seen to reflect the judiciary’s awareness that mass torts present special problems, some of which are not amenable to solutions by court rule.

<sup>231</sup> See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622-25 (1997) (affirming a reversal of a judgment that approved a settlement, on the ground that the case could not properly be certified under Rule 23(b)(3)).

<sup>232</sup> See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 864-65 (1999) (reversing the approval of a settlement on the ground that the case could not properly be certified under Rule 23(b)(1)(B)).

ment class as it is when a litigation class is in question,<sup>233</sup> the Court gave even greater prominence to the requirement of predominance.<sup>234</sup> Moreover, the Court's treatment of the requirement that "the representative parties will fairly and adequately protect the interests of the class"<sup>235</sup> in both *Amchem*<sup>236</sup> and *Ortiz*<sup>237</sup> highlighted the difficulties of structuring class actions so as to avoid possible conflicts without creating so many subclasses as to make the case unmanageable.<sup>238</sup>

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<sup>233</sup> See *Amchem*, 521 U.S. at 619-20. But see *id.* ("But, as we earlier observed, the Court of Appeals in fact did not ignore the settlement . . . ." (citation omitted)).

<sup>234</sup> See *id.* at 622-25. In my view, treating predominance as a basic structural protection instead of the warrant of efficiency that the rulemakers intended was an error that may have been caused by the Court's determination to avoid some of the thorny constitutional questions that the case presented, including in particular questions relating to so-called "futures"—people who had not manifested adverse physical consequences from their occupational exposure to asbestos or, less plausibly in that particular context, were not even aware that they had been exposed. See generally Geoffrey C. Hazard, Jr., *The Futures Problem*, 148 U. PA. L. REV. 1901 (2000).

<sup>235</sup> FED. R. CIV. P. 23(a)(4).

<sup>236</sup> 521 U.S. at 625-28.

<sup>237</sup> 527 U.S. at 856-59.

<sup>238</sup> Professor Nagareda has described the resulting incentives: "With the prospects for class settlements in the mass tort area dimmed, if not entirely extinguished, by the Court's decisions, the new terrain for peacemaking predictably has shifted outward in both directions—to aggregate settlements on the immediate left and to Chapter 11 reorganizations on the immediate right." Richard A. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 U. CHI. L. REV. (forthcoming 2008) (manuscript at 26-27) (footnote omitted), available at <http://ssrn.com/abstract=1014659>. The directional language refers to a schematic moving from purely private on the left to purely public on the right. In the omitted footnote, Professor Nagareda discusses the settlement class approved in the Diet Drugs (Fen-Phen) litigation, noting the practical problems plaguing its implementation. See *id.* (manuscript at 26 n.117); see also *In re Diet Drugs Prods. Liab. Litig.*, 226 F.R.D. 498, 506-07 (E.D. Pa. 2005). But note studies showing that, although federal mass tort (personal injury and property damage) class action filings declined after *Amchem*, they increased after *Ortiz*, and that such filings remained more or less constant from 2001 through 2005. See Hensler, *supra* note 214, at 910. Finally, note Hensler's data on "mass toxic torts of the 2000s." See *id.* at 912, 913 tbl.2 (finding only two mass tort federal class actions, one of them partial, in nine litigations).

Even though *Amchem's* analysis is not confined to the domain of mass torts, the Third Circuit was at pains to call attention to the fact that a settlement class action before it did not involve either a mass tort or "futures." See *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 289 (3d Cir. 1998). The review it afforded the district court's choice of law, and hence that court's predominance analysis, was hardly searching. See *id.* at 315. The explanation may lie in Judge Scirica's *cris de coeur*, which are reminiscent of *Jenkins*, see *supra* note 227, and might be thought to have invited legislation like CAFA:

It may be argued that problems national in scope deserve the attention of national courts when there is appropriate federal jurisdiction. Because of the extraordinary number of claims, fairness counsels that plaintiffs similarly in-

## D. State Court Class Actions

The discovery in the mid-1990s that the class action data generated by the Administrative Office of the United States Courts were unreliable has prompted the Federal Judicial Center to begin to fill the empirical vacuum with data based on docket studies.<sup>239</sup> I am aware of no reliable data, historical or current, concerning state court class actions, and I doubt that reliable data exist for most states.<sup>240</sup> We do know, however, that most states have used Rule 23 as the model for their own class action provisions, and it seems safe to assume that class actions did not become, if they ever have been, a major player in litigation in any state's courts until some years after 1966. Indeed, given Purcell's reminder that since the 1950s the federal courts had become an attractive forum for plaintiffs,<sup>241</sup> and the fact that the class action revolution started in the federal courts, one would have expected no great urgency to follow the federal model were it not for the counter-revolution led by the Supreme Court.

As we have seen, the Court's decisions in *Snyder* and *Zahn* closed the door of the federal courthouse to cases seeking relief under state

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jured by the same course of deceptive conduct should receive similar results with respect to liability and damages.

*In re Prudential*, 148 F.3d at 290.

From a policy standpoint, it can be argued that national (interstate) class actions are the paradigm for federal diversity jurisdiction because, in a constitutional sense, they implicate interstate commerce, foreclose discrimination by a local state, and tend to guard against any bias against interstate enterprises. Yet there are strong countervailing arguments that, at least under the current jurisdictional statutes, such class actions may be beyond the reach of the federal courts.

*Id.* at 305.

<sup>239</sup> See Willging et al., *supra* note 229, at 178-79. This is tedious and time-intensive work. The task has, however, become greatly simplified with the conversion of the federal courts to electronic case files. The FJC's studies of experience under CAFA, *see* Lee & Willging, *supra* note 26, at 1743-62, are critical to an evaluation of the impact of that legislation on the workload of the federal courts. It may be impossible to replicate that research for the state courts, although CAFA supporters have presented some data concerning so-called "judicial hellholes." *See* John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case of It . . . in State Court*, 25 HARV. J.L. & PUB. POL'Y 143, 160-68 (2001); *infra* note 367.

<sup>240</sup> *See* Lee & Willging, *supra* note 26, at 1763 ("The lack of state court data on class actions stems from multiple sources, including the lack of necessary resources to collect the data in the state systems and the lack of common computerized case management systems."). *But see id.* at 1748 n.84 (referencing preliminary data from California).

<sup>241</sup> *See* PURCELL, *supra* note 107, at 240-43; *supra* text accompanying note 169.

law in which there were not sufficient putative class members with claims meeting the amount-in-controversy requirement of the diversity statute to satisfy Rule 23(a)'s numerosity requirement.<sup>242</sup> By 1973 (at the latest), therefore, would-be counsel for such groups had an incentive to seek changes in state law that would enable the maintenance of these cases in state court.<sup>243</sup> Moreover, they could expect a favorable response from those responsible for the rules of procedure in many states, whether because the lawmakers shared the aspirations of the Advisory Committee that wrote the 1966 amendments to Rule 23<sup>244</sup> or, perhaps more commonly, because their practice was generally to follow the federal model.

Once class action treatment on the federal model became widely available in the state courts, it is likely (but in the absence of reliable data one can hardly be confident) that for many years most of the cases brought there were those to which *Snyder* and *Zahn* had closed the federal courthouse, that is, small-claims state law class actions.<sup>245</sup> Eventually, however, departures from the federal model, in the language of the governing state law provision or its interpretation, might lead class counsel (who had a choice) to select state court. So too might the general constellation of rules and institutional practices that, after *Erie* and its progeny, still affected choice between a state and federal forum.

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<sup>242</sup> See *supra* text accompanying notes 199-204.

<sup>243</sup> For the dates when states that acted in response to the 1966 amendments did so, see *infra* Appendix. As suggested below, probably the most common reason states followed the model of amended Rule 23 was their general practice of following the Federal Rules. In that regard, eight of the eleven states that embraced the 1966 Rule 23 amendments between 1966 and 1971, and nine of the twelve states that did so between 1970 and 1974, were found to be "replica" states in a 1986 study. Compare John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1377 (1986) (listing the twenty-three jurisdictions—twenty-two states and the District of Columbia—that "meet all nine of our criteria for systematic replication of the Federal Rules"), with *infra* text accompanying notes 416-445 (listing the states adopting class action rules similar to the 1966 amendments to Federal Rule 23 between 1966 and 1971 and between 1970 and 1974). In other words, seventeen of twenty-two "replica" states had followed the federal lead on class actions by 1974.

<sup>244</sup> Note in that regard another major innovation of the 1966 amendments, the (b)(2) class for injunctive relief, the major animating purpose of which—the facilitation of civil rights class actions—is discussed *supra* note 184.

<sup>245</sup> See Cabraser et al., *supra* note 29, at 399 ("But 'small claims' consumer class actions have typically proceeded in the state courts, because each class member did not have the requisite \$75,000 in damages to trigger federal jurisdiction.").



Two sets of rules that are not supposed to affect that choice (unless Congress otherwise provides) are the rules respecting personal jurisdiction and choice of law. The force of the mandate for vertical uniformity was long clearer as to the latter than the former. But the 1993 overhaul of Rule 4 of the Federal Rules of Civil Procedure should have put any doubts about the requirement of jurisdictional uniformity to rest, particularly in diversity cases.<sup>246</sup> Similarly, a peremptory per curiam opinion insisting on the application of state choice of law rules in diversity cases<sup>247</sup> settled the continuing vitality of *Klaxon Co. v. Stentor Electric Manufacturing Co.*<sup>248</sup> Doubts on that score may have been due to the fact that *Klaxon* was an object of scorn by Henry Hart<sup>249</sup> and remains unpopular in some academic circles today. *Klaxon's* continuing vitality is instead both unremarkable and wholly defensible, albeit not constitutionally required. Or at least it is for one who understands the Court's goal of dismantling the system of corporate diversity litigation.<sup>250</sup>

*Klaxon* did nothing, however, to discipline state choice of law, a task that the Court had undertaken in the 1920s and 1930s, only to abandon it because the constitutional tools—due process and full faith and credit—were not adequate to the task.<sup>251</sup> For a time in the late 1970s and early 1980s, it appeared that the Court was revisiting the question whether the Constitution might provide more robust federal protection against state court overreaching that encouraged interstate forum shopping through both aggressive assertions of personal jurisdiction and aggressive applications of forum law. As it

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<sup>246</sup> See FED. R. CIV. P. 4(k)(1)(A). Given the Court's peculiar decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), see *infra* text accompanying notes 257-264, this statement requires refinement to the extent that adjudication of the claims of absent class members is thought to present a problem of personal jurisdiction. Whatever the merits of the Court's approach in state court litigation, it has no bearing on litigation in federal court. See *infra* note 259.

<sup>247</sup> *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3, 4-5 (1975).

<sup>248</sup> 313 U.S. 487 (1941) (holding that federal courts in diversity cases must apply the choice of law rules of the state in which they sit).

<sup>249</sup> See, e.g., Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 513-15 (1954); *supra* text accompanying notes 173 and 177.

<sup>250</sup> See Burbank, *Aggregation*, *supra* note 178, at 1938-44 (commenting on Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839 (2006)); *supra* text accompanying note 178. For a very useful summary of academic reactions to *Klaxon* by successors of Hart who question his views about that case, see FALLON, MELTZER & SHAPIRO, *supra* note 202, at 636-42.

<sup>251</sup> See *supra* notes 153-155 and accompanying text.

turned out, a 1981 decision by a badly fractured Court revealed that the prospects for robust protection in the choice of law realm had not changed since the 1930s.<sup>252</sup> On the other hand, starting in 1977, the Court issued a series of decisions evidently aimed at curbing aggressive assertions of personal jurisdiction, through interpretations of the Due Process Clause.

Unfortunately, however, most of the cases that the Court chose for the latter purpose did not involve problematic interstate forum shopping in any meaningful sense, whether or not one agrees with the Court's conclusions concerning the constitutionality of the exercises of jurisdiction.<sup>253</sup> This is not surprising to the extent that, like *Interna-*

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<sup>252</sup> See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 n.10 (1981). Nor have those prospects changed since 1981. See *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 496 (2003) ("In light of this experience, we abandoned the balancing-of-interests approach to conflicts of law under the Full Faith and Credit Clause." (citing *Hague*, 449 U.S. at 308 n.10)); *id.* at 499 ("Without a rudder to steer us, we decline to embark on the constitutional course of balancing coordinate States' competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause."). It is, of course, a separate question whether the Court should have assimilated the sovereign-immunity question in *Hyatt* to the choice of law questions presented in those earlier cases.

<sup>253</sup> See *Burnham v. Superior Court*, 495 U.S. 604 (1990) (jurisdiction permitted) (wife who, with husband's consent, moved to California with children upon separation and sued there for divorce and alimony); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987) (jurisdiction not permitted) (Taiwanese defendant in state court action brought after a motorcycle accident in the forum state impleaded Japanese component-part manufacturer); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (jurisdiction permitted) (plaintiff franchisor sued Michigan franchisee in Florida, the franchisor's state of incorporation and corporate headquarters, for breach of franchise agreement containing Florida choice of law clause); *Calder v. Jones*, 465 U.S. 783 (1984) (jurisdiction permitted) (plaintiff brought libel suit in her home state, where she likely sustained the greatest injury); *World-Wide Volkswagen Corp., v. Woodson*, 444 U.S. 286 (1980) (jurisdiction not permitted) (plaintiffs sought damages in Oklahoma for accident in that state, where they were hospitalized); *Kulko v. Superior Court*, 436 U.S. 84 (1978) (jurisdiction not permitted) (plaintiff sought domestication and modification in California of Haitian divorce decree after she had moved to California following separation, and after defendant had subsequently consented to daughter moving to California to live with her mother); *Shaffer v. Heitner*, 433 U.S. 186 (1977) (jurisdiction not permitted) (shareholder brought derivative action in Delaware against officers and directors of a Delaware corporation on the basis of acts in other states that caused financial damage to the corporation, treating defendants' stock and stock options as property for quasi in rem purposes). But see *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) (jurisdiction permitted) (libel suit in New Hampshire by resident of New York, after initial suit against Ohio corporation in Ohio was barred by the state's statute of limitations); *Rush v. Savchuk*, 444 U.S. 320 (1980) (jurisdiction not permitted) (plaintiff brought suit in after-acquired domicile of Minnesota for accident-related injuries sustained in Indiana, where the plaintiff then lived, by treating the defendant's insurance policy as property located in Minnesota). Note that *World-Wide Volkswagen* was an instance of state-federal forum shopping, rather than

*tional Shoe* itself, the cases in question involved assertions of specific jurisdiction,<sup>254</sup> as to which the Court's 1945 decision may have been calculated to reduce rather than increase interstate forum shopping.<sup>255</sup> It is therefore even more unfortunate, and it *is* surprising, that "problematic interstate forum shopping" also was not involved in the two post-1945 cases in which the Court has analyzed the limitations that due process imposes on state court assertions of general doing-business jurisdiction. As a result, one of the most dubious tools of interstate forum shopping by plaintiffs remains in play, in class actions as in ordinary litigation.<sup>256</sup>

Even before the growing skepticism of federal courts about multi-state (particularly, but not exclusively, mass tort) class actions provided a powerful incentive for class counsel (who had a choice) to opt for state courts—that is, at a time when state courts were (probably)

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interstate forum shopping. Deep-pocket diverse defendants financed appellate litigation by their nondiverse codefendants in the hope that the latter would be dismissed from a lawsuit in a plaintiff-friendly state court, enabling removal by the diverse defendants to federal court (an ultimately successful strategy that eluded Justice Blackmun). See *World-Wide Volkswagen*, 444 U.S. at 317 (Blackmun, J., dissenting) (admitting that he was "somewhat puzzled why the plaintiffs . . . are so insistent that the regional distributor and the retail dealer, the petitioners here, who handled the ill-fated Audi automobile involved in this litigation, be named defendants"); Charles W. Adams, *World-Wide Volkswagen v. Woodson—The Rest of the Story*, 72 NEB. L. REV. 1122, 1140 (1993) ("Neither Justice Blackmun nor the other Justices could have been expected to know of Creek County's pro-plaintiff juries . . .").

<sup>254</sup> See Burbank, *supra* note 105, at 746-47. And even in some of the cases not involving specific jurisdiction (because the plaintiffs' claims did not bear the prescribed relationship to the activity on which jurisdiction was predicated), both the plaintiffs and the states involved had a legitimate interest in locating litigation in the chosen forum. See *supra* note 253.

<sup>255</sup> See *supra* text accompanying notes 163-167.

<sup>256</sup> See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (jurisdiction not permitted); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952) (jurisdiction permitted); Burbank, *supra* note 105, at 749-53. My normative judgment about forum shopping in *Perkins* is influenced by the fact that Ohio, where the defendant conducted essentially all of its (very limited) business during and immediately after World War II, was the only domestic court conceivably—and given problems in the Philippines in that period it may have been the only court—available for adjudication of the dispute. Similarly, Texas, where the defendant in *Helicopteros* bought the helicopter whose crash caused the plaintiffs' decedents' deaths and where the employee pilots were trained, was the logical choice if any domestic court was permissible. On the relevance of the status of the defendant as a domestic or foreign corporation, see Stephen B. Burbank, *Jurisdictional Conflict and Jurisdictional Equilibration: Paths to a Via Media?*, 26 HOUS. J. INT'L L. 385, 389-92 (2004). For an interesting recent article also calling into question the constitutionality of general doing-business jurisdiction, see A. Benjamin Spencer, *Jurisdiction To Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 655-57 (2006).

presiding over mostly small claims class actions—the allure of the state class action litigation format as an instrument of interstate forum shopping became apparent. At least it did when the Supreme Court decided *Phillips Petroleum Co. v. Shutts*,<sup>257</sup> a class action in which the Kansas courts had applied Kansas law to the claims for interest on delayed royalty payments of all members of a multistate class. As is well known, the Court in *Shutts* articulated constitutional limitations on both the assertion of personal jurisdiction and the choice of law. The question of jurisdiction, however, did not concern the defendant's interest in freedom from litigation in an exorbitant forum. Rather, the Court accepted the defendant's invitation to opine about the constitutionality of the assertion of adjudicatory power over the claims of the absent members of the plaintiff class.<sup>258</sup> Rejecting the defendant's argument that due process required those individuals' consent, the Court arguably made the mistake of accepting the premises of the argument. In any event, in its jurisdictional aspect *Shutts* is one of the more mischievous opinions in the field of procedure, further obscuring the distinction between procedural and substantive due process.<sup>259</sup>

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<sup>257</sup> 472 U.S. 797 (1985).

<sup>258</sup> See *id.* at 806-14.

<sup>259</sup> A state cannot deprive its own residents of property without affording them the procedural protections that a balancing of all of the relevant interests indicates are minimally required. Granting that members of a multistate plaintiff class lose something of value when claims brought on their behalf are rejected on the merits, why should due process require anything more than what *Hansberry v. Lee*, 311 U.S. 32 (1940), suggested that it requires in the class action context, namely adequate representation? *Id.* at 42-45. And if adequate representation is not sufficient, why isn't notice and an opportunity to be heard, coupled with adequate representation, sufficient?

The *Shutts* Court's distinctions between the burdens that litigation imposes on defendants and those imposed on absent members of a plaintiff class, see 472 U.S. at 810-11, might be thought to support a conclusion that adequacy of representation is all that due process requires, at least in a negative-value class action. On that view, the Court erred in taking seriously the argument, predicated on the analogy to defendants, that (in the absence of minimum contacts) consent was required. In any event, the Court's opinion appears to move unthinkingly from the observation that Kansas did afford notice, an opportunity to be heard, and an opportunity to opt out to the conclusion that in class actions seeking predominantly monetary relief, due process requires all of those things. See *id.* at 811-12.

*Shutts*'s jurisdictional holding is inapposite in federal court class actions on behalf of U.S. residents, where the question could only arise in any event in a Rule 23(b)(1) or (b)(2) class action. Such residents have minimum contacts with the relevant territorial unit, and Rule 4(k)(1)(A) makes state law relevant only with respect to defendants.

Although *Shutts* has given rise to the fallacy that it speaks with binding precedential effect to problems of due process that do not implicate geography, and/or to federal class actions, as Tobias Wolff points out, we should not neglect the possibility that

It is, however, no barrier to damages class actions in state court so long as the state provides what Rule 23 requires in such a case.

Although one can regret the Court's approach to the question whether the laws of other interested states were in conflict with the law of Kansas,<sup>260</sup> it is apparent that the Justices' main goal was to draw a line in the sand, making clear that the occasion of a class action does not entrain immunity from constitutional limitations on state choice of law, however slight they may be. Attempts to read more into *Shutts*, and in particular a constitutional prohibition against "bootstrapping"—i.e., applying a different choice of law rule in class actions to enable certification as against predominance and manageability objections—are, in my view, not persuasive.<sup>261</sup> Indeed, for the class action bar, the Court's decision may have been like a limiting instruction, inviting attention by discouraging it.<sup>262</sup>

Certainly, the bar would have realized—it was a common topic of discussion in law school classrooms soon after *Shutts*—that a decision applying the law of Oklahoma, the defendant's principal place of business, to all claims probably would not have been vulnerable under the Court's reasoning, whether or not that decision involved bootstrapping.<sup>263</sup> Attentive members of the bar would also have been

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in some circumstances procedural due process requires an opportunity to opt out. See Wolff, *supra* note 27, at 2076-80.

<sup>260</sup> See *Shutts*, 472 U.S. at 816-18 (discussing possible conflicts but leaving "more thoroughgoing treatment" to the state court on remand).

<sup>261</sup> See Burbank, *Aggregation*, *supra* note 178, at 1944-48. For an argument in favor of such a bootstrapping prohibition, see Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1839, 1911-18 (2006) [hereinafter Nagareda, *Discontents*]; Richard A. Nagareda, *Bootstrapping in Choice of Law After the Class Action Fairness Act*, 74 UMKC L. REV. 661, 664-65 (2006).

<sup>262</sup> See Elizabeth J. Cabraser, *The Manageable Nationwide Class: A Choice-of-Law Legacy of Phillips Petroleum Co. v. Shutts*, 74 UMKC L. REV. 543, 543 (2006) ("*Shutts* confirmed the authority of state courts to exercise jurisdiction over class actions and certify classes of nationwide scope."); *id.* at 545 ("From the perspective of plaintiffs' advocates, *Shutts* seemed like a godsend . . ."); *id.* at 553 (stating that federal courts "were able to evade application of the *Shutts* rule, and avoid dealing with multistate classes at all").

<sup>263</sup> Of course, one hopes that, in considering the tactical implications of *Shutts*, the bar also attends to the potential problems of professional responsibility, and indeed of adequate representation, that single-minded pursuit of class certification can entail. Thus, in the hypothetical variant of *Shutts* mentioned in the text, what if Oklahoma law were less favorable to some members of the putative class? A recent decision of the Supreme Court of Texas has put such problems in relief by insisting on the application of conventional preclusion law to class actions even in situations where the claims precluded could not have been made in the class action (because they would have pre-

aware that the defendant's choice of law victory proved short-lived and partial, and that the Supreme Court's ability to police the state courts effectively is theoretical.<sup>264</sup> In sum, *Shutts* may have done more harm than good both to the cause of restraining interstate forum shopping and to the jurisprudence of due process.

We have seen that, notwithstanding a few early certifications of Rule 23(b)(3) multistate mass tort class actions in the federal courts, the federal appellate courts pretty quickly put an end to that phenomenon, usually finding a lack of predominance because of differences in the law to be applied (and/or the facts relevant under different laws) and insuperable problems of manageability.<sup>265</sup> We have also seen that, notwithstanding a change of heart on the part of some defendants who, in a search for global peace, joined with plaintiffs in seeking certification of mass tort classes and approval of prepackaged settlements, the Supreme Court made it very difficult for the lower federal courts to certify in such cases, first under Rule 23(b)(3) in *Amchem*, and then under Rule 23(b)(1) in *Ortiz*.<sup>266</sup>

These developments, particularly the first of them, added substantially to entrepreneurial plaintiffs' class action lawyers' incentives to test the class action waters in state courts. They also provided incen-

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vented class certification). See *Citizens Ins. Co. of Am. v. Daccach*, 217 S.W.3d 430 (Tex. 2007).

<sup>264</sup> See *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730-34 (1988) (rejecting contentions that the Supreme Court of Kansas unconstitutionally distorted other states' laws on remand after *Shutts*). This prompted Justice O'Connor to protest:

Faced with the constitutional obligation to apply the substantive law of another State, a court that does not like that law apparently need take only two steps in order to avoid applying it. First, invent a legal theory so novel or strange that the other State has never had an opportunity to reject it; then, on the basis of nothing but unsupported speculation, "predict" that the other State would adopt that theory if it had the chance.

*Id.* at 749 (O'Connor, J., concurring in part and dissenting in part).

Class counsel may also be aware of Patrick Woolley's interesting argument that choice of law and class certification burdens are analytically discrete and that, by conflating them, some federal courts have erroneously placed both burdens on the party seeking class certification. See Patrick Wooley, *Erie and Choice of Law After the Class Action Fairness Act*, 80 TUL. L. REV. 1723, 1739-43 (2006). On this view, state courts so inclined can blunt some of the force of *Shutts* and of recent federal and state case law emphasizing the plaintiff's burden of demonstrating compliance with Rule 23 (or its state equivalent). Thus, they can insist that the choice of law question be addressed first, invoke a presumption that forum law is applicable, and place on the party seeking to displace that law the burden of demonstrating that some other law is applicable. See *id.*

<sup>265</sup> See *supra* text accompanying notes 219-225.

<sup>266</sup> See *supra* text accompanying notes 226-238.

tives to seek certification of multistate classes stating claims under other bodies of substantive law, particularly commercial law, in both federal and state courts. Moreover, the prospect that the state courts might replace the increasingly inhospitable federal courts as the preferred venue for multistate class actions arose at a time when the plaintiffs' bar was vying with business groups for the election of state court judges thought to be sympathetic to their respective interests in the larger "tort reform" debate, although the existence of any causal relationship between the two phenomena remains unclear.<sup>267</sup>

In any event, it is clear that, for a time at least, some plaintiff class action lawyers were successful in securing certifications in multistate class actions that could not have been certified under developing federal class action jurisprudence.<sup>268</sup> Moreover, in some of these cases state courts held that the law of one state governed the claims of all class members, while in others they accepted class counsel's argument, perhaps supported by the "expert" reports of law professors, that there were no meaningful differences in state law and/or that any such differences were manageable.<sup>269</sup> It is also clear, however, that the

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<sup>267</sup> See, e.g., Deborah Goldberg, *Interest Group Participation in Judicial Elections, in RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 73 (Matthew J. Streb ed., 2007). "It bears emphasis that empirical research has yet to explore systematically the relationship, if any, between class certification and the involvement in state judicial elections of interest groups for whom such rulings might well be a major topic of concern—whether the local plaintiffs' bar or business-side interests." Nagareda, *supra* note 238 (manuscript at 8-9). Professor Nagareda notes defense-side research that "documents substantial political contributions from the local plaintiffs' bar to state-court judges in a jurisdiction often dubbed a magnet for nationwide class actions." *Id.* (manuscript at 9 n.31); see also *infra* text accompanying notes 270-271 (noting that changes in interpretation of state class action law tended to correlate with changes in political complexion of the state supreme court).

<sup>268</sup> This is not to disagree with Elizabeth Cabraser, who contends that "the post-*Shutts* era has seen relatively few [state court] nationwide class actions actually granted at the trial level, or affirmed on appeal, for trial purposes." Cabraser, *supra* note 262, at 545. Yet, as Judge Easterbrook observed, a "single positive trumps all the negatives." *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 766-67 (7th Cir. 2003); see also Nagareda, *supra* note 238 (manuscript at 9) (discussing the "game of finding the one state court inclined to certify"). Although not claiming "to address empirical proof," Cabraser states that "a survey of complex litigation practitioners would yield corroborating data that most successful state court nationwide class actions served as settlement vehicles, which the defendants embraced and supported as their preferred mechanism of resolution." Cabraser, *supra* note 262, at 545. Finally, she asserts that "[i]n mass torts particularly, the overwhelming majority of multistate class certification decisions were rendered by federal courts, and most grants of class certification were issued for settlement purposes rather than to structure trials." *Id.* at 545-46.

<sup>269</sup> See, e.g., *Ysbrand v. DaimlerChrysler Corp.*, 81 P.3d 618, 624-26 (Okla. 2003) (upholding, in part, a class certification after determining that the law of only one

identity of these state court magnets changed over time,<sup>270</sup> and those changes tended to follow in the wake of personnel changes in the highest court of a state that had previously been a magnet.<sup>271</sup> It remains (and will always remain) unclear whether, if CAFA had not been enacted, the perceived abuses associated with state magnet courts would have continued, or whether the political processes that ended them in some states (or some other processes) would have accomplished the same thing wherever they arose.

### E. *Overlapping Class Actions*

Contemporary class action practice seems to confound the basic assumptions of preclusion law by preferring multiple cases to just one. This has long been true in certain substantive fields, such as securities law, and the phenomenon of multiple duplicative or overlapping class actions<sup>272</sup> has increased as the class action bar has become more entrepreneurial, more sophisticated, and more competitive.

The federal courts have a well-developed system for disciplining the chaos of overlapping class actions. Enacted in 1968 to permit the federal judiciary to refine and extend the reach of techniques developed informally in order to deal with a flood of antitrust cases involv-

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state, Michigan, would apply). For other such cases regarded as abusive, see S. REP. NO. 109-14, at 24-26 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 24-26; Marcus, *supra* note 28, at 1301 n.294; Silberman, *supra* note 221, at 2012-14. The quality of the “expert” opinions offered by distinguished law professors in some cases involving differences in state law—which they sought to wish away—is embarrassing. Indeed, I accepted a rare engagement as an expert (as opposed to consulting lawyer) in part because of my concern about the phenomenon. See Opinion of Stephen B. Burbank, Expert Report, *Alvis v. Hewlett-Packard Co.*, No. A-164,880 (Tex. Dist. Ct. Apr. 28, 2003) (on file with author).

<sup>270</sup> See Cabraser, *supra* note 262, at 547-48 (discussing changes in class action law in Alabama and Louisiana, with both states becoming less receptive to class actions); Marcus, *supra* note 28, at 1294-95 (describing legislative attempts to end “drive-by” certification in Alabama, Texas, and Mississippi).

<sup>271</sup> The Texas/Oklahoma litigation saga recounted by Professor Silberman is an example of both of the last two propositions. See Silberman, *supra* note 221, at 2015-19; see also Anthony Champagne, *Tort Reform and Judicial Selection*, 38 LOY. L.A. L. REV. 1483, 1483-86 (2005) (detailing movements for tort reform in, among other states, Texas, Alabama, and Mississippi); Goldberg, *supra* note 267, at 81 (“The new judges completely changed tort law in Texas, so that it became more favorable to defendants.”); Editorial, *Swing of Torts*, TIMES DAILY (Florence, Ala.), Nov. 13, 2007, available at <http://www.timesdaily.com/article/20071113/news/711130304> (discussing the perception that “change in political complexion” of the Supreme Court of Alabama affected the results in cases involving business litigants).

<sup>272</sup> I use the term “overlapping class actions” to refer to both duplicative and overlapping class actions.



ing the electrical equipment industry, the Multidistrict Litigation Statute<sup>273</sup> empowers the Judicial Panel on Multidistrict Litigation (JPML) to transfer all cases having common questions of fact to a single federal court, where they are subject to coordinated or consolidated pretrial proceedings. So long as a case has been filed in federal court or can be removed there, it can be transferred by the JPML, and it is no surprise that overlapping class actions are particularly likely to receive multidistrict treatment.

Although the statute requires remand of actions to the transferor courts upon the completion of pretrial proceedings unless they have been previously terminated,<sup>274</sup> few are in fact remanded for trial.<sup>275</sup> That too is no surprise. Less than two percent of federal civil cases terminate at or after trial.<sup>276</sup> Most class actions settle, just as most other cases settle, and a transferee judge under § 1407 is empowered to decide dispositive pretrial motions, a form of disposition that, across the entire federal civil docket, now accounts for far more terminations than trials do.<sup>277</sup> That is not to say, however, that a transferee judge is similarly situated to a judge in ordinary litigation in her capacity to bring about nontrial dispositions. Like counsel who could not take a case (or claim) to trial, a multidistrict transferee judge may be thought disarmed in the quest for a global settlement by the inability to try the case. That, in any event, appears to be a reason why the federal judiciary was so upset by the Supreme Court's decision in the *Lexecon* case,<sup>278</sup> disapproving the prior practice whereby transferee courts had transferred cases to themselves for trial purposes,<sup>279</sup> and why it has worked so hard to secure a legislative fix.<sup>280</sup>

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<sup>273</sup> 28 U.S.C. § 1407 (2000).

<sup>274</sup> See *id.* § 1407(a) ("Each action so transferred shall be remanded . . . to the district from which it was transferred unless it shall have been previously terminated . . .").

<sup>275</sup> See Gregory Hansel, *Extreme Litigation: An Interview with Judge Wm. Terrell Hodges, Chairman of the Judicial Panel on Multidistrict Litigation*, ME. B.J., Winter 2004, at 16, 21 ("It is only occasionally that cases are remanded for trial.").

<sup>276</sup> See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 461 (2004) (noting a decline in the trial termination rate from 11.5% in 1962 to 1.8% in 2002).

<sup>277</sup> See Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 617-18 (2004) (estimating an increase in the summary judgment termination rate from 1.8% in 1960 to 7.7% in 2000).

<sup>278</sup> *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

<sup>279</sup> Under the practice disapproved in *Lexecon*, the transfer was pursuant to § 1404, which meant that the transferee district had to be one where the case could originally

Prior to CAFA, there was no provision in federal law that permitted the removal of overlapping state court class actions that were otherwise not removable. In the increasingly entrepreneurial and competitive environment described above, that meant that all of the efforts of a transferee federal court to broker a settlement of overlapping federal class actions might come to naught because a state court class action was settled first, with preclusive effect.<sup>281</sup> A great deal of time and effort by the court and the parties might, therefore, be wasted. Even if not, the coexistence of overlapping class actions before different courts could cause serious problems in the conduct of the coordinated or consolidated proceedings called for under the statute.

The incentives that the federal parties and federal transferee courts have to avoid such difficulties can elicit very creative interpretations of federal law. Similar incentives operate when those subject to federal court judgments seek to evade their preclusive effect in state courts. In that situation, many federal courts approved the removal of the state court actions under the All Writs Act.<sup>282</sup> The Supreme Court put an end to this tactic, which bordered on the frivolous,<sup>283</sup> in the *Syngenta* case.<sup>284</sup> Both before and after *Syngenta*, some transferee

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have been filed (as a matter of personal jurisdiction and venue as well, of course, as of subject matter jurisdiction). See 28 U.S.C. § 1404 (2000); *Hoffman v. Blaski*, 363 U.S. 335, 342-44 (1960).

<sup>280</sup> As Judge Hodges explained,

It would obviously be a lot more efficient if the transferee judge had the authority to try the cases that remain. That would add another settlement tool into the calculus that normally produces settlement anyway. It would probably be more efficient, which is why the Judicial Conference and the panel supported legislation that would change that part of the statute and alter the result required by *Lexecon*, but I can't say we are not able to function efficiently for the want of it at the moment.

Hansel, *supra* note 275, at 21.

<sup>281</sup> The Supreme Court's decision in *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1995), made it clear that there would be very little room for class members who did not opt out of the state court class action to avoid its binding effect, even if the settlement purported to release claims within the exclusive subject matter jurisdiction of the federal courts. *Id.* at 375-86.

<sup>282</sup> 28 U.S.C. § 1651; see also, e.g., *Xiong v. Minnesota*, 195 F.3d 424, 427 (8th Cir. 1999) (holding that removal of a class action was proper under the All Writs Act); *Sable v. Gen. Motors Corp.*, 90 F.3d 171, 175 (6th Cir. 1996) (same).

<sup>283</sup> See Lonny Sheinkopf Hoffman, *Removal Jurisdiction and the All Writs Act*, 148 U. PA. L. REV. 401, 470 (1999) ("Permitting federal courts to expand the scope of removal jurisdiction by resort to the All Writs Act only distorts the analysis for determining when intervention is appropriate.").

<sup>284</sup> *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 33-34 (2002).

courts sought to make overlapping state court class actions go away through the use of injunctions. Recalling the role of injunctions in the jockeying for forum control under the system of corporate diversity litigation,<sup>285</sup> these efforts confront exceptions in the Anti-Injunction Act<sup>286</sup> that, as interpreted by the Supreme Court, are very narrow.<sup>287</sup>

Uncertain about the availability of authority in existing law to secure the removal of overlapping state court class actions,<sup>288</sup> and seriously constrained by Supreme Court precedent under the Anti-Injunction Act, key members of the federal judiciary responded by initiating consideration of possible amendments to the Federal Rules of Civil Procedure and to federal statutes that might ease the burdens posed by overlapping class actions dispersed between the federal and state courts. The Advisory Committee on Civil Rules developed a variety of proposals that would have authorized a federal court to enjoin (1) state court certification of a class substantially similar to one that the court had previously refused to certify, and (2) state court approval of a proposed class action settlement substantially similar to one that the court had previously refused to approve.<sup>289</sup>

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<sup>285</sup> See *supra* text accompanying note 115.

<sup>286</sup> 28 U.S.C. § 2283.

<sup>287</sup> See, e.g., *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 635-39 (1977) (holding that § 16 of the Clayton Act did not provide an express exception to the Anti-Injunction Act, the prohibitions of which “exist separate and apart from those traditional principles [of equity and comity]”). For a sensitive treatment of the exceptions, see *In re Diet Drugs*, 282 F.3d 220, 233-39 (3d Cir. 2002). As Martin Redish and I have previously argued, and as Tobias Wolff develops in his article for this Symposium, the Anti-Injunction Act is in need of a complete overhaul. See Burbank, *supra* note 164, at 215, 228-30; Martin H. Redish, *Intersystemic Redundancy and Federal Court Power: Proposing a Zero Tolerance Solution to the Duplicative Litigation Problem*, 75 NOTRE DAME L. REV. 1347 (2000); Wolff, *supra* note 27, at 2054-66. Until then, the best hope for a jurisprudence that transcends labels (i.e., does not stretch to assimilate a particular case to one involving jurisdiction over property) seems to me the insight that the exception for injunctions that are “necessary in aid of its jurisdiction,” 28 U.S.C. § 2283, calls for careful consideration of “jurisdictional” policy. A federal transferee court exercising jurisdiction under § 1407 should be able to enjoin overlapping state court class actions when they are actually interfering with the conduct of coordinated and consolidated pretrial proceedings.

<sup>288</sup> *Syngenta* was decided in 2002, while the rulemaking effort discussed here occurred in 2001. Yet, as my gentle description of the view of the All Writs Act rejected in *Syngenta* suggests, see *supra* text accompanying note 283 (“border[ing] on the frivolous”), the technique was widely recognized to have very bleak prospects.

<sup>289</sup> See Edward H. Cooper, Reporter’s Call for Informal Comment: Overlapping Class Actions 8-19 (Sept. 2001), available at [http://www.uscourts.gov/rules/comment2002/Reporter\\_Call\\_for\\_Comment.pdf](http://www.uscourts.gov/rules/comment2002/Reporter_Call_for_Comment.pdf).

Made aware of serious doubts about the existence of power to implement such changes by court rule,<sup>290</sup> the rulemakers convened a panel to consider the proposals at a conference in Chicago in 2001. The panelists were virtually unanimous in the view that, whatever the merits of the proposals, they were beyond the rulemaking power, and the rulemakers abandoned the effort.<sup>291</sup> The conclusion that effective action would require legislation prompted the Civil Rules Committee to recommend to the Committee on Rules of Practice and Procedure (“Standing Committee”) and to the Federal-State Jurisdiction Committee that they “support the concept of minimal diversity for large, multi-state class actions, in which the interests of no one state are paramount, with appropriate limitations or threshold requirements so that the federal courts are not unduly burdened and the states’ jurisdiction over in-state class actions is left undisturbed.”<sup>292</sup>

The federal judiciary was already on record supporting a limited use of minimal diversity, and its eagerness to secure a legislative fix for *Lexecon*<sup>293</sup> is evident in the comments submitted, in March 2001, on legislation containing both such a fix and also provisions for sweeping mass disaster litigation into federal court under a theory of minimal diversity.<sup>294</sup> Although, as enacted in 2002, this legislation has very lim-

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<sup>290</sup> See Letter from Geoffrey C. Hazard, Jr. to author (May 22, 2001) (attaching a letter responding to Judge Scirica’s request that Professor Hazard and the author of this Article provide their views on the proposals that, as revised, were subject to the request for comment cited *supra* note 289) (on file with author).

<sup>291</sup> See, e.g., Committee on Rules of Practice and Procedure, Minutes of Meeting of Jan. 10-11, 2002, at 4; Stephen B. Burbank, Class Action Conference: Preliminary Remarks (Oct. 23, 2001) (on file with author). The other members of this panel were Judge Diane Wood and Professors Daniel Meltzer, Linda Mullenix, Martin Redish, and David Shapiro. See E-mail from author to Judge Lee Rosenthal, U.S. Dist. Court, S. Dist. of Tex. (Oct. 18, 2001) (on file with author). A judge who attended the conference and thus heard one of the panelists (the author of this Article) suggest, albeit *dubitante*, that a federal court might be able to accomplish the same thing as a matter of federal common law, persuaded a panel of his court to do just that. Judge Easterbrook’s opinion in *In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation*, 333 F.3d 763 (7th Cir. 2003) is creative. It is also highly problematic as a matter of preclusion law and as an interpretation of the Anti-Injunction Act. *But see* Wolff, *supra* note 27, at 2074-76.

<sup>292</sup> Memorandum from David F. Levi, Chair, to Civil Rules Advisory Comm. 17 (May 7, 2002), reprinted in Report of the Civil Rules Advisory Committee (May 20, 2002), available at <http://www.uscourts.gov/rules/Reports/CV5-2002.pdf>.

<sup>293</sup> See *supra* text accompanying note 280.

<sup>294</sup> See Letter from Leonidas Ralph Mecham, Sec’y, Judicial Conference of the U.S., to Representative F. James Sensenbrenner, Jr., Chairman, Comm. on the Judiciary, U.S. House of Representatives, at 1 (Mar. 13, 2001), reprinted in 147 CONG. REC. H896-97 (daily ed. Mar. 14, 2001) (expressing “the support of the federal judiciary for

ited application (it requires, among other things, that “at least 75 natural persons have died in the accident at a discrete location”<sup>295</sup>), it might be deemed a forerunner to CAFA in the use both of minimal diversity<sup>296</sup> and of an exception that, if only by insisting on the traditional definition of corporate citizenship, evidently takes a narrow view of state interests.<sup>297</sup>

Prior to the Judicial Conference’s meeting in March 2003, and notwithstanding the May 2002 memorandum from the Civil Rules Committee,<sup>298</sup> the Federal-State Jurisdiction Committee wrote a report urging continued opposition to the use of minimal diversity to bring class actions into federal court. As a fallback position, that Committee urged the Conference to support only such proposed legislation as

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H.R. 860, the ‘Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001’). Section 2 of this bill contained a *Lexecon* fix designed “to allow a judge with a transferred case to retain it for trial or to transfer it to another district.” *Id.* at 1, 147 CONG. REC. at H896. The letter noted that in 1988 the Judicial Conference “approved in principle the creation of federal jurisdiction that would rely on minimal diversity to consolidate multiple litigation [sic] . . . arising out of a single event.” *Id.*

<sup>295</sup> 28 U.S.C. § 1369(a) (Supp. V 2005); *see also* supra note 4. As enacted, however, it did not contain a *Lexecon* fix.

<sup>296</sup> This statute provides in pertinent part,

(a) IN GENERAL.—The district courts shall have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 75 natural persons have died in the accident at a discrete location, if—

(1) a defendant resides in a State and a substantial part of the accident took place in another State or other location, regardless of whether that defendant is also a resident of the State where a substantial part of the accident took place;

(2) any two defendants reside in different States, regardless of whether such defendants are also residents of the same State or States; or

(3) substantial parts of the accident took place in different States.

28 U.S.C. § 1369(a).

<sup>297</sup> The relevant exception provides,

(b) LIMITATION OF JURISDICTION OF DISTRICT COURTS.—The district court shall abstain from hearing any civil action described in subsection (a) in which—

(1) the substantial majority of all plaintiffs are citizens of a single State of which the primary defendants are also citizens; and

(2) the claims asserted will be governed primarily by the laws of that State.

*Id.* § 1369(b).

<sup>298</sup> *See supra* text accompanying note 292 (discussing this memorandum). The Federal-State Jurisdiction Committee’s fallback position, on the other hand, may have been consistent with the position advocated by the Civil Rules Committee.

left in state court cases in which the states had legitimate interests, defined to include cases in which substantially all members of the class were from a single state or were people alleging death, personal injury, or property damage within the state. As to both, the Committee specifically contemplated leaving in place the default regime's jurisdictional rules.<sup>299</sup>

The report of the Federal-State Jurisdiction Committee elicited a response from the Standing Committee that offered somewhat different, and somewhat inconsistent, rationales in opposition to the proposed definition of the universe of cases that should remain in state court.<sup>300</sup> On the merits, the Standing Committee seemed to want to bring statewide class actions into federal court for coordinated or consolidated proceedings, noting that a defendant might be sued on the same claim in all fifty states.<sup>301</sup> At the same time, the Standing Com-

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<sup>299</sup> See SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON FEDERAL-STATE JURISDICTION (Agenda E-9) (Mar. 2003) (on file with author); ADDENDUM TO THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON FEDERAL-STATE JURISDICTION, CLASS ACTION LEGISLATION (Agenda E-9), at 5 n.9 (Mar. 2003) [hereinafter AGENDA E-9 ADDENDUM] (on file with author) ("The Committee's proposed approach . . . would leave the determination of the citizenship of the defendants, and the satisfaction of the complete diversity requirement, to be made in accordance with current jurisdictional rules."). For other accounts of this history that mute the disagreement between the two Conference committees, see Lee & Willging, *supra* note 26, at 1726-33; Marcus, *supra* note 26, at 1801-03. Morrison seems to have been unaware of it. See Morrison, *supra* note 9, at 1541 (noting the change in the position of the Judicial Conference without exploring the reason, and contending that the Conference "plainly has not endorsed S. 2062 and its companion bills"). In fact, disagreement between the Rules Committees and the Federal-State Jurisdiction Committee on this subject existed from at least 1999. See Letter from Judge Paul V. Niemeyer, Chair, Civil Rules Advisory Comm., to Judge Wm. Terrell Hodges, Middle District of Florida, at 2 (Aug. 10, 1999) (on file with author) ("[I]t is apparent that there is a *federal* problem that Congress can properly address.").

<sup>300</sup> See REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, OVERLAPPING, COMPETING, AND DUPLICATIVE CLASS ACTIONS (Agenda E-18) (Mar. 2003), at 13-16 [hereinafter RULES AGENDA E-18], available at <http://www.uscourts.gov/rules/Reports/ST3-2003.pdf>.

<sup>301</sup> The Standing Committee noted,

The [Federal-State] Committee's proposal would prevent the filing in, or removal to, federal court of most actions where the class is limited to nearly all in-state plaintiffs—no matter what the primary defendants' relationship is to the state or whether that state's law governed—so long as one non-diverse defendant was joined. The likely consequence would be that a defendant might find itself litigating statewide class actions in many states. While avoiding potential concerns about a state court applying its law nationwide, many of the consequences associated with multiple actions would remain. A federal court could still find itself competing with as many as fifty overlapping class actions; the litigants might still find themselves competing for recovery; and the de-

mittee observed that such details were heavily freighted with politics and should be left to Congress.<sup>302</sup>

In the revised report of the Federal-State Jurisdiction Committee, which had the concurrence of the Standing Committee, the recommendation did not clearly signal the former committee's views on allocation,<sup>303</sup> and they were watered down in the accompanying explanation.<sup>304</sup> Moreover, a March 26, 2003, letter to Congress on behalf of the Judicial Conference repeated the watered-down version.<sup>305</sup> Finally, when Senator Leahy requested that the federal judiciary submit "legislative language" to implement its views about the appropriate allocation of jurisdiction over class actions, the response on its behalf evinced the same lack of clarity that characterized the Federal-State Jurisdiction Committee's revised recommendation and "deliberately avoided specific legislative language, out of deference to Congress's judgment and the political process."<sup>306</sup>

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defendants might still seek protection under the bankruptcy laws, because they offer the sole means of consolidating and resolving multiple claims.

*Id.* at 14-15; *see also* Cabraser et al., *supra* note 29, at 399 ("[A] U.S. defendant might face multiple state class actions asserting claims arising from the same product or course of conduct, and claims arising from the nation-wide marketing of a standard product had no sure means of being centralized in a single federal court.").

<sup>302</sup> *See* RULES AGENDA E-18, *supra* note 300, at 15-16 ("We do not believe the Judicial Conference should involve itself in the specific provisions of proposed legislation.").

<sup>303</sup> *See* SECOND ADDENDUM TO THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON FEDERAL-STATE JURISDICTION, CLASS ACTION LEGISLATION (Agenda E-9) (Mar. 2003), at 1-2 (on file with author).

<sup>304</sup> *See id.* at 2 ("Parallel in-state class actions in which the plaintiff class is defined as limited to the citizens of the forum state are not included within the term 'significant multi-state class action litigation.'"); *id.* at 4 ("While the relationship of the defendant to the forum may have some bearing on state adjudicatory power, an insistence that all primary defendants maintain formal in-state citizenship is too limiting and may preclude in-state class actions where a defendant has sufficient contacts with the forum state, regardless of citizenship.").

<sup>305</sup> *See* Letter from Leonidas Ralph Mecham, Sec'y, Judicial Conference of the U.S., to Representative F. James Sensenbrenner, Jr., Chair, Comm. on the Judiciary, U.S. House of Representatives, at 1 (Mar. 26, 2003) (on file with author).

<sup>306</sup> Letter from Leonidas Ralph Mecham, Sec'y, Judicial Conference of the United States, to Senator Patrick J. Leahy, Ranking Member, Comm. on the Judiciary, U.S. Senate, at 3 (Apr. 25, 2003), *reprinted in* 150 CONG. REC. S7686-87 (daily ed. July 6, 2004) (statement of Sen. Carper).

## V. CAFA'S SIGNIFICANCE: A PRELIMINARY VIEW

Our culture of “adversarial legalism” relies on litigation to provide compensation for injury and to enforce important social norms to an extent probably unique in the world.<sup>307</sup> There is reason for concern that CAFA will retard state regulation of harmful activity by including within its jurisdictional sweep not just multistate class actions, but also class actions that are of intense interest to individual states, whose law will govern all or most of the claims. Of course, that concern should only arise to the extent that CAFA alters the balance of power in forum selection that existed in the default regime. To that extent, however, it would be exacerbated by evidence suggesting that some of CAFA’s supporters hold—and evidently would have the federal courts adopt—an essentialist and prerealist view of the proper role of aggregation.<sup>308</sup>

CAFA unquestionably changes the balance of power in forum selection. Educated about the litigation dynamics created by the default regime, or at least about the willingness and ability of entrepreneurial class counsel, as they pejoratively put it, to “game the system,”<sup>309</sup> the statute’s supporters understood that changes in the provisions concerning diversity and the amount in controversy, although necessary for the attainment of their objectives, would not be sufficient. Thus, even if class counsel could not prevent removal by naming a nondiverse defendant, it might be possible to include a friendly defendant

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<sup>307</sup> See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM* 3 (2001) (“Compared to other economically advanced democracies, . . . [t]he United States more often relies on lawyers, legal threats, and legal contestation in implementing public policies, compensating accident victims, striving to hold governmental officials accountable, and resolving business disputes.”); Stephen B. Burbank, *The Complexity of Modern American Civil Litigation: Curse or Cure?*, 91 *JUDICATURE* 163 (2008). As Professors Hazard, Gedid, and Sowle have noted,

There is little prospect of legislation that will displace personal injury litigation with some form of social insurance, or displace consumer litigation with more stringent administrative regulation. On the contrary, the litigation form for resolution of social disputes—proceedings under the aegis of courts—is an essential part of our culture, as de Toqueville long ago observed.

Hazard et al., *supra* note 180, at 1948.

<sup>308</sup> See *supra* text accompanying note 28 (describing the views of some CAFA supporters towards class actions); *infra* text accompanying notes 364 (same); see also Burbank, *Aggregation*, *supra* note 178, at 1953 (commenting on Nagareda, *Discontents*, *supra* note 261, and “argu[ing] that it takes an essentialist view, shaped by current federal arrangements, on normative questions, including questions of institutional legitimacy”).

<sup>309</sup> S. REP. NO. 109-14, at 5 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 6.



who would not agree to removal,<sup>310</sup> to sue the target defendant in its home state, or to keep the litigation's true scope and ambitions hidden until the default regime's one-year limitation on removal had passed. As we have seen, CAFA's removal provisions address each of those tactics, allowing any defendant to remove (apparently, the entire case), and eliminating both the removal disability of in-state (diversity) defendants and the one-year limitation on removal.<sup>311</sup>

CAFA's supporters were aware that the federal judiciary long opposed predecessor class action bills on workload and federalism grounds. They were also aware of the default regime's other hurdles for state court defendants seeking to remove to federal court: first, the rule that the party seeking access to federal court has the burden of establishing the existence of jurisdiction,<sup>312</sup> and second, the general precept to construe the removal statute strictly against jurisdiction.<sup>313</sup> Finally, if for either reason they anticipated a hostile reception to CAFA removals, they knew that the general statutory ban on appellate review of remand orders could frustrate their goals.<sup>314</sup>

CAFA itself addresses appellate review, however fecklessly, by permitting a party aggrieved by an order granting or denying a remand motion to petition for review to the court of appeals, and by setting strict limits on the time within which that court must render a de-

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<sup>310</sup> This tactic contributed to the Judicial Conference's 1987 recommendation that removal be permitted by "any defendant," instead of "the defendant or the defendants," under § 1441(a). See *Court Reform and Access to Justice Act: Hearings on H.R. 3152 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 100th Cong. 93 (1987-1988) [hereinafter *House Hearings*]. This was the only one of five recommendations concerning removal not enacted. Compare *id.* at 93-94 with *Judicial Improvements and Access to Justice Act*, Pub. L. No. 100-702, § 1016, 102 Stat. 4642, 4669-70 (1988). It is tempting to view the choices as reflecting the preferences of a Congress controlled by Democrats. Yet the Judicial Conference had previously rejected the recommendation, probably because it would increase the workload of the federal courts, see *House Hearings*, *supra*, at 95, and the Reagan Administration's Department of Justice did oppose it on that ground. See *Judicial Branch Improvements Act of 1987: Hearing on S. 1482 Before the Subcomm. on Courts and Admin. Practice of the Sen. Comm. on the Judiciary*, 100th Cong. 202-03 (1988) ("This would add more cases to an already overburdened federal judiciary that the state courts are perfectly adequate to handle."). Court workload, not the balance of power between plaintiffs and defendants, dominated this round of jurisdiction reform, suggesting that in Congress, as in the courts, the 1980s were an interlude of quiet before the storm that led to CAFA. See *supra* text accompanying note 213.

<sup>311</sup> See *supra* Part II.B.

<sup>312</sup> See WRIGHT & KANE, *supra* note 32, at 253 n.12.

<sup>313</sup> See *id.* at 235 & n.68.

<sup>314</sup> See *supra* text accompanying notes 48 & 76 (discussing discretionary appellate review of remand decisions under CAFA).

cision in a case in which it grants review.<sup>315</sup> CAFA's supporters sought to assist state court defendants in crossing the default regime's other hurdles to removal through the use of legislative history.<sup>316</sup>

It evidently did not trouble CAFA's supporters that, by eliminating a provision in the 2003 bill that would have enabled unnamed members of a putative class to remove, they were giving defendants the option to "game the system"—as, for instance, by choosing to remain in a state court that was hospitable to abusive settlements of the type that CAFA regulates in federal court.<sup>317</sup> Moreover, by focusing only on the techniques of forum manipulation available to plaintiffs (and then only in the default regime as of 2005), they pretermitted the historical and institutional perspective necessary to make a reliable judgment as to whether "gaming the system" (by either side) should carry a pejorative connotation.<sup>318</sup>

We have seen that when Congress first formally blessed the definition of corporate citizenship for diversity purposes in 1958, it left largely in place the existing balance of power in forum selection between plaintiffs and defendants.<sup>319</sup> In order to make a reliable judg-

<sup>315</sup> See 28 U.S.C. § 1453(c) (Supp. V 2005). The correction of the scrivener's error, "not less than 7 days after entry of the order," to the intended "not more than 7 days after entry of the order" has proved challenging only for those who embrace theories of statutory interpretation with a fervor usually reserved for religion. See generally Adam N. Steinman, "Less" Is "More"? *Textualism, Intentionalism, and a Better Solution to the Class Action Fairness Act's Appellate Deadline Riddle*, 92 IOWA L. REV. 1183, 1230 (2007) (discussing this error).

<sup>316</sup> Some courts have deemed significant the juxtaposition of these methods of attempting to change the status quo. See, e.g., *Schwartz v. Comcast Corp.*, No. 05-2340, 2005 U.S. Dist. LEXIS 15396, at \*24 (E.D. Pa. July 28, 2005) ("[B]y making substantive changes with respect to the aggregation rule, but failing to express a concomitant change in the burden of proof, Congress implicitly acknowledged and adopted the long-standing rule that a removing defendant bears the burden of proof for establishing diversity jurisdiction."), *rev'd on other grounds*, No. 06-4855, 2007 U.S. App. LEXIS 27617 (3d Cir. Nov. 30, 2007).

<sup>317</sup> See *supra* note 27; see also Allan Kanner, *Interpreting the Class Action Fairness Act in a Truly Fair Manner*, 80 TUL. L. REV. 1645, 1653 (2006) (noting that CAFA gives defendants a "wait-and-see" option for removal). Professor Purcell correctly observes that CAFA's elimination of the default regime's one-year limitation on removal "handed defendants a new weapon that could actively encourage the very collusion the statute purported to end." Purcell, *supra* note 5, at 1874.

<sup>318</sup> See *supra* text accompanying notes 9-10 (noting that forum shopping need not be a ground for criticism).

<sup>319</sup> See *supra* text accompanying notes 177-178. It seems unlikely that any of the post-1958 changes in federal statutory law had a major impact on the general balance of power in forum choice for ordinary diversity litigation. As to the diversity statute, Congress raised the amount-in-controversy requirement to in excess of \$50,000 in 1988, see *Judicial Improvements and Access to Justice Act*, Pub. L. No. 100-702, § 201,

ment about the need for the change in that balance that CAFA effects, a number of developments since the disintegration of the system of corporate diversity litigation seem to me particularly salient.

It is one thing to call for realism about the likelihood of local bias against corporations engaged in national commerce. If, as Charles Warren and Felix Frankfurter argued, it was nonsense to treat (some) such corporations as outsiders in almost all states in the 1920s,<sup>320</sup> it is nonsense on stilts today.<sup>321</sup> It is quite another thing, however, to advocate that the fiction of corporate presence, which *International Shoe* sought to banish, should be replaced by a fiction of multiple corporate domiciles in the law of personal jurisdiction. A perspective on the American litigation system that takes a dynamic and comparative

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102 Stat. 4642, 4646 (1988), and to in excess of \$75,000 in 1996, *see* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 205, 110 Stat. 3847, 3850 (1996) (codified at 28 U.S.C. § 1332(a) (2000)). In addition, Congress addressed problems arising in discrete categories of cases in 1964 (citizenship of liability insurance companies sued under state direct action statutes), *see* Act of Aug. 14, 1964, Pub. L. No. 88-439, § 1, 78 Stat. 445, 445 (codified at 28 U.S.C. § 1332 (c)(1)), and in 1988 (citizenship of representatives of estates of decedents, infants, or incompetents, and citizenship of permanent resident aliens), *see* Judicial Improvements and Access to Justice Act §§ 202(a), 203(a), 102 Stat. at 4646 (codified at 28 U.S.C. §§ 1332(c)(2), 1332(a)). In 1990, Congress passed the supplemental jurisdiction statute. *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 310(a), 104 Stat. 5089, 5113-14 (codified at 28 U.S.C. § 1367). As to the removal statute, in 1988 Congress enacted two changes with implications for forum shopping. First, it provided that defendants sued under fictitious names (“John Doe defendants”) be disregarded in determining whether diversity exists. *See* Judicial Improvements and Access to Justice Act § 1016(a), 102 Stat. at 4669 (codified at 28 U.S.C. § 1441(a)). Second, it enacted a one-year limitation on removal (from the time a case is commenced in state court) in diversity cases. *See id.* § 1016(b), 102 Stat. at 4669 (codified at 28 U.S.C. § 1446(b)). Thereafter, in 1990, Congress abolished the much-vexed institution of separate and independent claim removal in diversity cases. *See* Judicial Improvements Act of 1990 § 312, 104 Stat. at 5114 (codified at 28 U.S.C. § 1441(c)). Recall that this provision was once a redoubt of corporate defendants but had long since been deprived of its utility. *See supra* text accompanying notes 122-125. Finally, Congress made numerous changes to the general venue statute affecting diversity cases between 1958 and 2005. Such changes applied (or apply) only to cases brought originally in federal court and thus have no obvious relevance to the federal-state forum game. *See* Clermont & Eisenberg, *supra* note 13, at 1558 n.8 (“Our coding turned up not a single dispute over venue.”). Since the removal statute has its own venue provision, however, the desire to secure a more favorable venue in a case that could be removed may prompt a plaintiff to file in federal court. *See supra* note 72 (noting that a majority of CAFA cases have been originally filed in federal court).

<sup>320</sup> *See supra* note 102.

<sup>321</sup> *See* STATE-FEDERAL STUDY, *supra* note 79, at 13 (proposing a statutory provision barring a corporation or other business organization from access to federal court in any state where it has maintained “local establishment” for more than two years in any action arising out of that establishment’s activities).

view of constitutional requirements and has regard for proportionality should not tolerate most exercises of general doing-business jurisdiction over domestic (i.e., U.S.) corporations.<sup>322</sup> One holding such a view may conclude that a federal diversity forum, and the possibility of transfer within the federal court system, should be available to a corporate defendant that is sued in a state in which it is not incorporated and does not have its principal place of business on claims having nothing to do with its activities in that state, at least if the plaintiff is not a resident of the state.<sup>323</sup>

Arthur von Mehren and Donald Trautman argued, in the context of judgment-recognition practice, that a polity's rules concerning jurisdiction are a "hallmark" of the fairness with which that polity handles "litigation involving significant foreign elements."<sup>324</sup> In the contemporary litigation market, a plaintiff's choice of a forum that lacks either a regulatory interest over the plaintiff's claims (which it would have if specific jurisdiction existed and perhaps, but more controversially, if the plaintiff were a resident) or an abiding relationship with—which may include a regulatory interest over—the defendant (such as the state of incorporation, at least, would have), is reason for worry whether the quest is for legitimate litigation advantage.

Apart from exorbitant assertions of state court adjudicatory authority that twenty years of Supreme Court neglect could only have encouraged,<sup>325</sup> the litigation market for which Congress legislated in 1958 was a very different market from that to which Congress responded in 2005. The most important changes occurred because of the transformative power of the modern (post-1966) class action.

Purcell's description of how an entrepreneurial plaintiffs' bar evolved and devised tactics first to counteract removal by corporate defendants and then, once developments in the law of personal jurisdiction permitted, to shop for (and keep) a favorable forum among

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<sup>322</sup> See Burbank, *supra* note 105, at 749-53 (criticizing general doing-business jurisdiction); see also *supra* text accompanying notes 166, 253-256 (noting limited and equivocal Supreme Court authority on doing-business jurisdiction).

<sup>323</sup> Cf. *Davis v. Farmers Co-Operative Equity Co.*, 262 U.S. 312, 317 (1923) ("[O]rderly, effective administration of justice clearly does not require that a foreign carrier shall submit to a suit in a State in which the cause of action did not arise, in which the transaction giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad, and in which the plaintiff does not reside.").

<sup>324</sup> Arthur T. von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and Suggested Approach*, 81 HARV. L. REV. 1601, 1610 (1968).

<sup>325</sup> The Court did not decide a case involving the constitutional limitations on state court jurisdiction between 1958 and 1977.

the states,<sup>326</sup> seems almost quaint today. The modern class action is not just an extraordinarily powerful instrument of law enforcement. For a plaintiffs' bar that is ever more entrepreneurial and competitive, it is an extraordinarily powerful addition to the mix of incentives and disincentives that drive forum choice.

Recurrent attempts by the Supreme Court to police interstate forum shopping through constitutional control of choice of law have also proved largely ineffective.<sup>327</sup> It is usually very easy for a state court that is so minded to find in the complex underlying facts a constitutionally cognizable contact in the state whose law that court wants to apply, and usually just as easy to interpret the law as animated by at least one policy that the contact implicates, thereby triggering a constitutionally adequate basis for its application. When the choice of law question arises in a putative class action, and when the answer to the question will determine whether a class can be certified, nothing in the Constitution prevents the state court from "bootstrapping" in order to overcome predominance and manageability problems.<sup>328</sup> Moreover, particularly for putative negative-value class actions, "bootstrapping" may not be necessary, since proponents of such litigation have emphasized the realm of deterrence in which policies that can lead to the application of one state's law (i.e., that of the defendant's headquarters) are likely to be found.<sup>329</sup>

I suspect that the phenomenon of "drive-by class certification"<sup>330</sup> was on the cutting edge of obsolescence in the state courts in 2005. I also suspect that the phenomenon of ever-changing magnet courts ("judicial hellholes") might well have run its course if left, not to its

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<sup>326</sup> See *supra* text accompanying notes 117-133, 145-149.

<sup>327</sup> See *supra* text accompanying notes 153-155, 257-264.

<sup>328</sup> See *supra* text accompanying note 261 (discussing the constitutionality of "bootstrapping").

<sup>329</sup> Recent scholarship has correctly noted the weakness of an agency-costs critique when applied to negative-value class actions in which the main goal can plausibly be deemed deterrence rather than compensation. See, e.g., Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103 (2006); William Rubenstein, *On What A "Private Attorney General" Is—And Why It Matters*, 57 VAND. L. REV. 2129 (2004). In my view, however, those authors have not succeeded in articulating a principled method for determining when deterrence is plausibly deemed the main goal of litigation (which surely requires attention to the substantive-law scheme), or in suggesting means to prevent inefficient overenforcement.

<sup>330</sup> S. REP. NO. 109-14, at 22 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 22.

own devices, but to the political process.<sup>331</sup> Even if so, however, what politics takes away, politics can restore. Moreover, not all of the cases or types of cases that caused CAFA's supporters heartburn can be assigned to politics, lack of resources and experience, or the other dimensions that feed invidious comparisons of the state and federal courts. Some state courts were certifying multistate classes because they shared the commitments of the federal rulemakers in 1966, because they believed that either one state's law or a manageable group of state laws could and should be applied, and because they otherwise thought certification appropriate under their governing rules.

Just because the Constitution does not foreclose such decisions does not mean that there is no federal interest in regulating the process by which or the forums in which they are made.<sup>332</sup> Yet, we have seen that, even as revised by Friendly and Frank,<sup>333</sup> the traditional view of Article III's diversity grant (the only view that the Supreme Court has ever espoused) seems rather far removed from the vision projected in CAFA. There we are told that the "framers . . . provid[ed] for Federal court consideration of interstate cases of national importance under diversity jurisdiction."<sup>334</sup> For that reason alone, Douglas Floyd's work on the constitutional infirmities of CAFA must be taken seriously.<sup>335</sup> Unless the Supreme Court were to disavow the traditional

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<sup>331</sup> See Class Action "Judicial Hellholes": *Empirical Evidence Is Lacking* (Pub. Citizen, Wash. D.C.), Jan. 2005, <http://www.citizen.org/documents/OutlierReport.pdf>, at 6-8 (2005) (summarizing recent legislative changes in state class action systems).

<sup>332</sup> Sherman identifies such an interest:

But more important than the [federal courts'] resource and expertise issue was the argument that national corporations should not be subjected to multi-state class actions in state courts and particularly in target venues that would define their legal liability nationwide. This was a powerful argument, and the defection of a number of Democratic senators from their leadership's opposition to CAFA seems to have been influenced by this concern.

Edward F. Sherman, *Class Actions After the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1593, 1608 (2006) (footnote omitted).

<sup>333</sup> See *supra* text accompanying notes 77-95.

<sup>334</sup> CAFA § 2(b)(2), 28 U.S.C. § 1711 note (Supp. V 2005); see also *supra* text accompanying note 11.

<sup>335</sup> See generally C. Douglas Floyd, *The Inadequacy of the Interstate Commerce Justification for the Class Action Fairness Act of 2005*, 55 EMORY L.J. 487 (2006) [hereinafter Floyd, *Inadequacy*]; C. Douglas Floyd, *The Limits of Minimal Diversity*, 55 HASTINGS L.J. 613 (2004) [hereinafter Floyd, *Limits*] (examining the origins and validity of pivotal assumptions underlying federal jurisdiction expansion enactments). More recently, Professor Pfander has provided other reasons, having to do with the proper role of ancillary jurisdiction, to limit the reach of minimal diversity. See Pfander, *supra* note 203, at 1449-59; *infra* note 339.

view of the purposes of the Constitution's diversity grant, for which it is largely responsible, the Justices might have difficulty explaining how the exercise of jurisdiction in some of the cases covered by CAFA's very broad reach can be justified.<sup>336</sup>

As Floyd points out, that task should be even harder for a Court that has promoted the constitutional values of federalism.<sup>337</sup> It should not be sufficient simply to cite the *Tashire* case,<sup>338</sup> the Court's perfunctory blessing (decades after the event) of minimal diversity in one of the very few contexts in which Congress has previously provided for it.<sup>339</sup> Moreover, congressional attempts to buoy the constitutional case for CAFA by invoking interstate commerce are, as Floyd demonstrates in another article, also vulnerable to close analysis.<sup>340</sup> Indeed, the kitchen-sink quality of CAFA's statements of findings and purposes might be thought evidence of either congressional hypocrisy<sup>341</sup> or, more charitably, a legislative phenomenon akin to alternative judicial

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<sup>336</sup> See Floyd, *Limits*, *supra* note 335, at 652-71 (identifying the lack of fit between most of CAFA's stated purposes and the purposes of the grant of judicial power in Article III).

<sup>337</sup> See *id.* at 645-50 (discussing Supreme Court cases with the theme of preservation of federalism and dual sovereignty).

<sup>338</sup> *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523 (1967); see also Floyd, *Limits*, *supra* note 335, at 632-33 (discussing *Tashire*).

<sup>339</sup> Federal jurisdiction for statutory interpleader is a far easier sell than is the existence of federal judicial power in a putative class action on behalf of 101 members, 100 of whom, including the named class representative, are from the state where it was brought against a local defendant who then removed it. That such a case would be within one of CAFA's mandatory exceptions, requiring the court to decline jurisdiction, does not alter the fact that the statute purports to confer it. Consider the views of Professor Pfander:

[T]he Court's decision [in *Tashire*] to uphold the exercise of jurisdiction over claims in the nature of interpleader represents only a modest extension of the doctrine of ancillary jurisdiction rather than a wholesale endorsement of minimal diversity. Earlier decisions had required diversity between the stakeholder and one set of claimants to the fund, and had permitted the exercise of ancillary jurisdiction over other, nondiverse claimants to the same fund. *Tashire* might be viewed as having simply clarified that this ancillary conception of interpleader was available in an original proceeding.

Pfander, *supra* note 203, at 1453-54 (footnote omitted).

<sup>340</sup> See Floyd, *Inadequacy*, *supra* note 335, at 507-20; *id.* at 532 ("[T]he repeated invocation of the language of the Commerce Clause in the statement of findings and purposes and the legislative history . . . is a red herring.")

<sup>341</sup> See Burbank, *Aggregation*, *supra* note 178, at 1942 ("Less charitably, they meet the philosopher Harry Frankfurt's definition of 'bullshit,' because they are made with apparent indifference to their truth content.")

determinations, confidence in any one of which is undermined by the concern that none of them fully engaged the court's attention.<sup>342</sup>

There would nonetheless be serious irony in a decision by the Supreme Court holding CAFA unconstitutional (in some applications), however persuasive it might be in light of the traditional account of the diversity grant in Article III. For, although there is essentially no support for CAFA's articulated vision of diversity litigation in the Supreme Court's decisions explaining the purposes of the grant—and only partial and equivocal support in the legal literature<sup>343</sup>—as Purcell demonstrates, the Court was hardly consistent in practicing what it preached while umpiring the system of corporate diversity litigation. Indeed, CAFA's vision of diversity jurisdiction as opening the federal courts to “interstate cases of national importance” is pretty close to—a twenty-first century update of—that which drove the Court during the late nineteenth and early twentieth centuries, when corporate diversity litigation was a staple of the federal courts' docket.<sup>344</sup> It is also pretty close to that which animated Congress when it first defined corporate citizenship for jurisdictional purposes in 1958.<sup>345</sup>

A reasonable member of Congress—even one who was aware that in the period from 1875 to 2004, “the overall importance of diversity cases to the construction of judicial policy ha[d] waned”<sup>346</sup>—could thus have concluded that there was a need to change the balance of power in forum selection for class litigation between plaintiffs and defendants. The Supreme Court had been no more consistent in adjusting federal diversity jurisdiction to the pressures and demands of the modern class action than it had been during the system of corporate diversity litigation. It had failed in efforts to use the Constitution to control the excesses of state court personal jurisdiction and choice of law that added to the allure of state court class actions when the federal courts were not available and when they ceased to be hospitable.<sup>347</sup> Some state courts were clearly rubber-stamping multistate classes proffered by class counsel, and although there were reasons to believe that the situation was improving, at least one of those rea-

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<sup>342</sup> See RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. i (1982) (explaining the rationale for the rule that a judgment based on alternative determinations is not preclusive except to the extent affirmed on appeal).

<sup>343</sup> See *supra* text accompanying notes 77-95.

<sup>344</sup> See *supra* text accompanying note 144.

<sup>345</sup> See *supra* text accompanying notes 174-176.

<sup>346</sup> Curry, *supra* note 4, at 463.

<sup>347</sup> See *supra* text accompanying notes 246-264.



sons—personnel changes on courts whose members are elected—provided no protection against recrudescence.<sup>348</sup> Finally, although reasonable minds could differ as to whether a state court’s application of one law to the claims of all members of a multistate class was itself an abuse, there was little question that (1) certification in such cases would usually prompt settlement; (2) the choice of law, even if constitutional, might subordinate important interests of other states; (3) in negative-value class actions, there was a risk of inefficient overenforcement; and (4) consumers would ultimately absorb many of the costs of any judgment or settlement, retrospective or prospective.

The same conclusion, however, by no means follows for class actions that are not in any meaningful sense “multistate.” CAFA’s supporters sought to meet both workload and federalism objections in a variety of ways. First, they relied on a small-class carve-out and on the aggregate amount-in-controversy requirement to keep smaller class actions, defined from either perspective, in state courts and out of federal courts.<sup>349</sup> From the first predecessor bill on which the federal judiciary commented to the statute that was enacted, although the size of the carve-out remained at 100, the amount in controversy rose from in excess of \$1 million to in excess of \$5 million, exclusive of interest and costs.<sup>350</sup> Second, rightly or wrongly, CAFA’s supporters concluded that Congress had already worked out a satisfactory adjustment of federal and state interests for securities and shareholder class actions, and that such adjustment could simply be incorporated in CAFA.<sup>351</sup> Third, and most controversially, they relied on a number of “exceptions” to jurisdiction that were designed to permit or require a federal district court to decline to exercise jurisdiction where the interests of the states in keeping class actions in their courts were thought to outweigh the federal interests sought to be advanced in CAFA.<sup>352</sup>

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<sup>348</sup> See *supra* text accompanying notes 267-271. For the confounding effect of “outlier” courts on attempts to discipline public policy with the fruits of methodologically sound empirical research, see *infra* note 367.

<sup>349</sup> The latter has been a tried and true technique of deflecting attempts to abolish or narrow diversity jurisdiction generally.

<sup>350</sup> See Letter from Leonidas Ralph Mecham, Sec’y, Judicial Conference of the U.S., to Representative Henry J. Hyde, Chairman, Comm. on the Judiciary, U.S. House of Representatives, at 2 (Aug. 23, 1999) (on file with author) (describing the exceptions to the grant of jurisdiction in H.R. 1875).

<sup>351</sup> See *supra* text accompanying notes 53-56; *supra* note 76.

<sup>352</sup> See *supra* Part II.A.4. The “local controversy exception” was added late in the long legislative process of refinement, a critical part of the compromise that permitted the statute to pass. See 151 CONG. REC. S1006 (daily ed. Feb. 7, 2005) (statement of Sen. Hatch).

Reliance on the amount-in-controversy requirement to meet federalism objections recalls Purcell's insight that "one of the great, if largely unspoken, social and legal compromises of the late nineteenth and early twentieth centuries . . . [was that] [i]f plaintiffs agreed to keep their claims reasonably small, they could guarantee themselves a state forum."<sup>353</sup> We should also recall, however, that when the system of corporate diversity litigation evolved, doctrine that treated a corporation as a citizen of only one state was counterbalanced by jurisdictional (including removal) provisions that, as interpreted, enabled many plaintiffs to keep their cases in state court, notably but not exclusively by joining a nondiverse defendant. Moreover, in slightly expanding corporate citizenship in 1958 but not changing the removal regime, Congress in fact further empowered plaintiffs desiring to litigate in state court.<sup>354</sup>

Let us by all means acknowledge the force of Purcell's argument that the Court's actual implementation of the system of corporate diversity litigation reveals a conception of the jurisdictional grant quite different from the traditional account and that Congress acted consistently with that reconceived vision in 1958. Let us also acknowledge that a similar vision animates CAFA itself. It was, however, disingenuous for Congress to try to have it both ways, and thus also to rely on the fictions of corporate citizenship, when fashioning exceptions to jurisdiction that were advertised as honoring the legitimate interests of the states. To be sure, Congress's purpose to deal with multistate class actions meant that the default regime's requirement of complete diversity and its removal-related instruments of countervailing power for plaintiffs could not be left in place. It would have been a simple matter, however, to acknowledge the fictions, and in the process, actually to serve state interests when crafting exceptions.

CAFA's exceptions, or some of them, are numbingly complicated and, as already observed, well calculated to keep lawyers and courts busy for years in work that advances the cause of substantive justice not one wit.<sup>355</sup> For present purposes, however, the details need not detain us. It suffices to note that *none of the exceptions permits a state court to retain (if the defendant chooses to remove) a class action brought on behalf solely of the citizens of that state, alleging injuries sustained in the state*

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<sup>353</sup> PURCELL, *supra* note 107, at 251; *see also supra* text accompanying note 133.

<sup>354</sup> *See supra* text accompanying notes 170-178. Recall that Congress also raised the amount in controversy to in excess of \$10,000 in 1958.

<sup>355</sup> *See* Clermont & Eisenberg, *supra* note 13, at 1565-67 (stating that CAFA creates social waste).

as a result of the in-state activities of an out-of-state corporation doing substantial business in the state. Such a case is, therefore, defined as of “national importance.”

This is the sort of case that class counsel in the default regime usually could keep in state court through the joinder of a nondiverse defendant. It is also the sort of case in which there could be no concern about an exorbitant exercise of personal jurisdiction, no doubt about the existence of the forum state’s regulatory interest, no constitutional question about a choice of forum law, and, likely, no reason to fear ad hoc manipulation of state law. Moreover, any such manipulation designed to permit aggregation (as for instance through a presumption of reliance in a class action alleging fraud under state law)<sup>356</sup> would represent a policy choice that was within the prerogatives of state institutions, the internal allocation of power among which presents no question of federal interest.

With eyes not blinded by fictions,<sup>357</sup> the reason for federal subject matter jurisdiction in such a case might seem to be a desire to give the corporate defendant a choice to seek, not a neutral forum, but a more favorable forum.<sup>358</sup> On that view, by yielding to the overreaching of CAFA’s supporters, Congress gave new life to the view that the federal courts are “business men’s courts.”<sup>359</sup> Less tendentiously, the mere fact that a corporation is engaged in interstate commerce makes state

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<sup>356</sup> See Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1471 (1987) (book review) (noting the use of “dubious substantive strategies that enable packaging”).

<sup>357</sup> See Shapiro, *supra* note 63, at 123-24 (“Now, it could be said that the problem here lies not with CAFA, but with the definition of corporate citizenship used for all diversity purposes. . . . [I]t would have made more sense to choose some other basis than citizenship, such as residence or corporate presence, to determine a party’s connection to the forum state.” (footnote omitted)); see also *id.* at 136 (“By using citizenship (domicile) of both the plaintiffs and defendants as the measure of how localized a controversy is, Congress has insured that many controversies that are very closely connected to only one state will not be able to fit the exceptions no matter how the courts interpret the statute.”).

<sup>358</sup> See Cabraser, *supra* note 262, at 548 (“It is indisputable that the primary political goal of CAFA was to remove state class actions to the federal system, where, it was assumed, they would be dealt with severely (either through active denial of class certification, or simply by being warehoused indefinitely by an overwhelmed judiciary).”); Purcell, *supra* note 5, at 1887 (“CAFA did not so much save defendants from biased state courts as reward them with access to an alternate forum that they regarded as more favorable to their interests.”).

<sup>359</sup> See Friendly, *supra* note 81, at 498 (“There was a vague feeling that the new courts would be strong courts, creditors’ courts, business men’s courts.”); see also *supra* note 91 and accompanying text.

law class action litigation against it (in all states but two) a matter of such strong “national interest” as to trump the interests of the several states.

What precisely are those interests? After all, CAFA does not purport to change *Erie* jurisprudence,<sup>360</sup> and thus federal courts exercising the jurisdiction it confers are seemingly bound to apply state “substantive” law (including the specific state law(s) selected by the choice of law rules of the state in which the federal court sits).<sup>361</sup> Yet, federal courts sitting in diversity are famously not authoritative sources of state law, and the exercise of diversity jurisdiction has, even in the recent past, been at cross purposes with the evolution of state law.<sup>362</sup> These potential costs of ordinary diversity litigation are much more salient when state courts can, and predictably will, be stripped of the capacity to use a potent remedial form to implement substantive policy in a jurisdictional world that is no longer meaningfully concurrent.<sup>363</sup>

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<sup>360</sup> See, e.g., S. REP. NO. 109-14, at 49 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 46 (“[T]he Act does not change the application of the *Erie* Doctrine.”); *id.* at 61, 66 (same); Burbank, *Aggregation*, *supra* note 178, at 1943 & n.129 (noting evidence that Congress did not intend to change the allocation of lawmaking authority under *Erie*); *supra* note 178.

<sup>361</sup> I have previously sketched an argument that would justify a federal court under CAFA in refusing to apply a state choice of law rule that “bootstrapped” to enable aggregation, on the ground that such a rule would be inconsistent with CAFA’s jurisdictional policy. See Burbank, *Aggregation*, *supra* note 178, at 1949-52.

<sup>362</sup> See Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism after Erie*, 145 U. PA. L. REV. 1459, 1463-65 (1997) (discussing problems when “federal courts may be precluded from exercising similar judicial creativity [to that exercised by state courts] by principles of judicial federalism”); Heather Scribner, *Protecting Federalism Interests After the Class Action Fairness Act of 2005: A Response to Professor Vairo*, 51 WAYNE L. REV. 1417, 1440-42 (2005) (arguing that federal courts should abstain from deciding diversity cases when the applicable state law is unclear); Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1677-82 (1992) (criticizing diversity jurisdiction for interfering with the development of state law); see also S. REP. NO. 109-14, at 87, reprinted in 2005 U.S.C.C.A.N. at 80 (Minority Views of Senators Leahy, Kennedy, Biden, Feingold, and Durbin) (“[T]he class action legislation will slow—and in some cases thwart—the continual interpretation of state law.” (internal quotation omitted)).

<sup>363</sup> See Marcus, *supra* note 28, at 1311-12 (arguing that CAFA ultimately weakens “the regulatory effect of state law”); Scribner, *supra* note 362, at 1441-42 (same). As Alan Morrison states,

[I]t is my experience that class actions often raise claims that seek to push the boundaries of legal liability to new levels, and when the claim is based on state law, but is in federal court, federal judges, not state judges, will have the last word on the meaning of state law.

Morrison, *supra* note 9, at 1527; see also *In re Hydrogen Peroxide Antitrust Litig.*, No. 05-0666, 2006 WL 999955, at \*1 n.2 (E.D. Pa. Apr. 11, 2006) (“Under CAFA, plaintiffs

We know that some of CAFA's supporters were not seeking different class action law so much as they were seeking different attitudes towards class certification. They hoped that many of the putative class actions removed under CAFA would be denied certification and go away. We also know that the authors of the Senate Report rejected a major premise of the 1966 amendments to Rule 23, deeming institutionally illegitimate the goal of promoting law enforcement through negative-value class actions enabled by court rule.<sup>364</sup> Congress could, of course, alter that policy judgment respecting negative-value class actions on a transsubstantive basis, as it has done occasionally in specific substantive contexts.<sup>365</sup> But if it were to do so, one would hope,

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attorneys must now bring most indirect purchaser class actions under state antitrust law in federal court. . . . [T]his means that, as a practical matter, state courts will rarely get to interpret their own state antitrust laws." (internal quotation marks and citation omitted)). Indeed, Cabraser argues that federal courts should take a "fresh approach" to enabling "multi-state classes to proceed under a class action framework" because "we no longer enjoy the safety valve of dual state-federal court systems where such class actions are involved." Cabraser, *supra* note 262, at 567. She continues, "CAFA has eliminated the state court 'safe harbor' in which single-state class actions can be litigated." *Id.* Professor Nagareda's interesting discussion of the uncomfortable role that choice of law plays in class certification perhaps implicitly recognizes the latter point. For he observes that, "[i]n institutional terms, [choice of law] principles crafted to mediate the authority of competing state sovereigns turn out to sort the parallel roles of class action litigation and the administrative state—of private and public—potentially leaving only the latter." Nagareda, *supra* note 238, at 10. Presumably that is not a concern to the extent that statewide class actions can pick up the slack.

<sup>364</sup> See *supra* note 28 and accompanying text. In this respect, the Senate Report calls to mind a 1980 dissenting opinion of Justice Powell. In response to the Court's observation that reliance on private attorneys general had been "facilitated by Rule 23," *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980), and that the empowerment of those with negative-value claims was "a central concept of Rule 23," *id.* at 338 n.9, Justice Powell argued that "predicating a judgment on these concerns amounts to judicial policymaking with respect to the adequacy of compensation and enforcement available for particular substantive claims." *Id.* at 354-55 (Powell, J., dissenting). He added that "[s]uch a judgment ordinarily is best left to Congress" and that, "[a]t the very least, the result should be consistent with the substantive law giving rise to the claim." *Id.* at 355; see also *supra* note 198 (quoting more of Justice Powell's opinion).

<sup>365</sup> See *supra* note 199 and accompanying text (discussing the Truth in Lending Act, which did not have an amount-in-controversy requirement); Burbank, *Aggregation*, *supra* note 178, at 1928-30 (describing the possibility that a legislature could view negative-value class actions as a "'vehicle' or 'format' for the vindication of substantive rights"). An alternative strategy to capping class recoveries would be to bar class actions in certain types of cases where the risk of inefficient overdeterrence seems particularly great. In that regard, a provision of New York law, N.Y. C.P.L.R. § 901(b) (McKinney 2005), prohibits class actions seeking to recover a statutory penalty or a minimum measure of recovery (i.e., statutory damages) unless the statute specifically authorizes their use. In *Sperry v. Crompton Corp.*, 863 N.E.2d 1012, 1013 (N.Y. 2007), the New York Court of Appeals held that treble damages authorized by a state antitrust

first, that it would act transparently, and second, that in doing so, it would attend to at least one difference, to wit, the source of the governing substantive law. In any event, if the federal courts were to follow the lead of the Senate Report, the costs of their altered stance toward negative-value class actions would be incurred by the states, which would be largely denied the ability to pursue a different vision of justice in their courts through the class action.<sup>366</sup>

It remains to be seen, of course, whether, like some kinds of federal preemption, CAFA will create the federal uniformity of a regulatory void.<sup>367</sup> In any event, at a time when the Supreme Court has re-

statute constitute a penalty for this purpose. Still another strategy is to bar class actions in cases seeking recovery of very small individual amounts. Thus, South Carolina requires that each member of a damages class have a claim putting in controversy more than \$100. See S.C. R. CIV. P. 23(a)(5) (“[I]n cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class.”); *Gardner v. Newsome Chevrolet-Buick, Inc.*, 404 S.E.2d 200, 201-02 (S.C. 1991) (applying Rule 23(a)(5)).

<sup>366</sup> As one court has observed,

[W]hen faced with almost identical medical monitoring class certification motions, state courts are generally more amenable to granting certification than are federal courts.

Further, this dichotomy carries serious implications in light of CAFA. As noted above . . . the likelihood that federal jurisdiction will attach to even a single-state class action is much higher after passage of CAFA. To the extent that some areas of state substantive law are only adjudicated in the form of class actions, CAFA will thus work to preclude state courts from any opportunity to address certain areas of law. More to the point at issue here, CAFA will also remove from state courts the chance even to apply their own civil *procedural* rules to determine the threshold question of whether certification of a medical monitoring class is appropriate. The upshot of CAFA, then, is to move questions of medical monitoring class certification out of state courts and into federal courts—a move, which, based on existing precedent, favors defendants.

*In re Welding Fume Prods. Liab. Litig.*, 245 F.R.D. 279, 308 (N.D. Ohio 2007) (internal quotation marks and footnotes omitted).

<sup>367</sup> See Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 497-98 (2008) (discussing how federal preemption in the products-liability context can lead to remedial and enforcement voids that can leave consumers without recourse); *cf. Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) (“The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government.”).

Professor Walker’s prediction that CAFA’s consumer-protection provisions will prove the “most significant” part of the statute, Walker, *supra* note 26, at 849-50, reflects another prediction, to wit, that CAFA’s “jurisdictional provision . . . will have little independent effect.” *Id.* at 849; *see also id.* at 851; *id.* at 867 (predicting that removals

discovered the constitutional safeguards of federalism, and whether or not Professor Floyd's views about CAFA's constitutional infirmities persuade, it hardly seems too much to expect clarity about the reasons thought to warrant access to federal court. Moreover, however troublesome some of the policy choices animating the 1966 amendments to Rule 23 may now appear from the perspective of political legitimacy, it hardly seems too much to expect such clarity when federal jurisdictional legislation enables litigants to deprive states of the ability to implement similar policy choices as a matter of state law.<sup>368</sup>

There is, however, one element in the legislative mix not yet considered, namely, the policy of using federal jurisdiction to mitigate the costs of overlapping class actions. Even if consideration of the way in which CAFA implements that policy does not alter the conclusion that

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“will not result in different outcomes, only more class action litigation in federal court”). The latter prediction is based entirely on a pre-CAFA Federal Judicial Center study of a sample of 438 removed cases. *See generally* Willging & Wheatman, *supra* note 84. Comparing results in retained and remanded cases within a subset of 292 closed removal cases from the sample, the researchers found that “[f]ederal and state judges were about equally likely to certify a class, whether for trial and litigation or settlement.” *Id.* at 640; *see also id.* at 635 tbl.11 (finding class certification in twenty-four remanded cases (twenty percent), as compared to thirty-seven retained cases (twenty-two percent)). They also found that the median class monetary recovery or settlement in remanded (state court) cases was greater than in retained (federal court) cases, but that this was a function of class size, and that the median recovery per class member was greater in retained cases than in those remanded. *See id.* at 639 tbl.15.

Without in any way diminishing the value of such empirical work, particularly in a policy landscape dominated by anecdotes, this is a very small sample. Moreover, I doubt that removed and remanded cases are representative of pre-CAFA cases filed in state court in which there was no attempt to remove (which would include cases terminating in collusive settlements and probably many statewide—as opposed to multi-state—class actions). *See supra* text accompanying notes 353-354 (describing such cases). Finally, although the FJC authors make a sound empirical observation when noting that data from avowedly “outlier” courts are unrepresentative, *see* Willging & Wheatman, *supra* note 84, at 597 n.21 (commenting on Beisner & Miller, *supra* note 239, which focused on three outlier courts), CAFA's supporters relying on those data did not need to claim that all, or even most, state courts were “magnet courts” or “judicial hellholes.” *See* Beisner & Miller, *supra* note 239, at 155 (“[C]lass action lawyers are bringing a large number of cases in a small number of state courts that have become ‘magnets’ for interstate class actions and that thus exercise a wildly disproportionate role in adjudicating national disputes.”); *id.* at 157 (“[T]his new wave of class actions was not evenly distributed among state courts nationwide.”).

<sup>368</sup> In noting that “the sponsors of the bill were not very precise when describing how the exceptions would work,” Professor Shapiro seems not to consider that their ambiguity and inconsistency may have been deliberate and strategic. Shapiro, *supra* note 63, at 125. For the negative impact on democratic values of using “procedure” to transform legal rights, see generally JoEllen Lind, “Procedural Swift”: *Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717 (2004).

the statute was an abdication of Congress's duty to safeguard legitimate state interests, attention to it may provide cover to those among CAFA's supporters, in and out of Congress, who do not wish to be associated with the notion that the business of the federal courts is business.<sup>369</sup>

The Judicial Conference opposed the early (i.e., late-1990s) class action jurisdiction bills on workload and federalism grounds. The bills in question had a much lower amount-in-controversy requirement and fewer exceptions and carve-outs to permit class actions to remain in state court.<sup>370</sup> But the Conference supported using minimal diversity to deal with the problems of dispersed litigation arising out of a common accident or disaster.<sup>371</sup>

Between the time that the Conference opposed a pre-CAFA bill in 1999 and its reconsideration of that position in 2002–2003, a number of important developments occurred, including, first, the Chief Justice's silence in response to the recommendations of the Mass Torts Working Group and, second, the work of the rulemakers in trying to

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<sup>369</sup> In his valuable article, Morrison suggests that the primary rationale originally invoked for CAFA was “the concern that overlapping and/or duplicative class actions cannot be consolidated in a single court, which can cause inefficiencies and possibly conflicting orders,” and that it was subordinated in the debate to the “national class action rationale . . . largely because there are a number of poignant examples.” Morrison, *supra* note 9, at 1531; *see also id.* at 1539 (“As the bills proceeded in Congress, the overlapping class action concept began to take a back seat to another rationale . . .”). This is not the way I read the history, at least in the Senate (I have not reread the House history for this purpose). It is true that Senator Kohl mentioned the goal of “avoid[ing] a collusive ‘race to settlement’ by consolidating overlapping cases” in connection with S. 2083, which he co-sponsored with Senator Grassley. *See* 144 CONG. REC. 24,603 (1998) (statement of Sen. Kohl). That was not, however, the primary rationale he invoked. *See id.* (noting that S. 2083 “encourages closer scrutiny of class actions through several provisions”); *see also* Clermont & Eisenberg, *supra* note 13, at 1555 n.4 (“Class action abuses were the original target of the bill . . .”). Moreover, by the next Congress—five years before CAFA was enacted—addressing the problems created by overlapping and/or duplicative class actions was clearly secondary to the goal of bringing “interstate class actions” into federal court. *See* S. REP. NO. 106-420, at 9 (2000) (describing the key components of the proposed Class Action Fairness Act of 2000). As the discussion in the text reveals, I also do not share Morrison’s sanguine view about the “overlapping and/or duplicative class actions” rationale, although I note his acknowledgment that “there is remarkably little empirical evidence to support even a removal bill designed to solve problems from multiple unremovable class actions.” Morrison, *supra* note 9, at 1538 n.40. Finally, I certainly agree with his view that statewide class actions—that is, actions restricted to the residents or citizens of one state, even when based on the same claim—should not be removable. *See id.* at 1546 n.59.

<sup>370</sup> *See supra* text accompanying notes 350-351.

<sup>371</sup> *See supra* text accompanying notes 293-297.



devise solutions to the problems created by overlapping class actions dispersed between the federal and state courts. The rulemakers' efforts culminated in the conclusion that the problems were beyond the power of the rules process to fix. As a result, the Civil Rules Committee and the Standing Committee had become convinced that any solution to the problems created by overlapping class actions would have to come from Congress.<sup>372</sup>

The Judicial Conference's struggle to fashion a position on CAFA in 2003 suggests that key actors within the federal judiciary were divided as to both whether to support the legislation and where the line should be drawn between cases that such legislation should allow to be brought into federal court and cases that it should leave in state court.<sup>373</sup> The prospects for successful opposition on general grounds may have been slim as a matter of political reality. Moreover, the judiciary had already supported the use of minimal diversity for targeted jurisdictional purposes in connection with the 2002 legislation<sup>374</sup> (as well as in the Federal Courts Study Committee Report).<sup>375</sup> By inconsistently espousing and/or partially obscuring the specific federalism concerns of the Federal-State Jurisdiction Committee, and by refusing to respond with specifics to a request for legislative language, the federal judiciary may have ensured that politics would indeed triumph.

One who has cautioned the institutional judiciary about its communications with Congress<sup>376</sup> should probably applaud the Conference for refusing to be drawn into the intensely political battles over the line-drawing exercise that CAFA required. From that perspective, it should make no difference that the refusal occurred in response to a specific request from a member of Congress. It is one thing for the federal judiciary merely to remind Congress that proposed legislation portending a substantial diversion of cases from state courts to the federal courts should be evaluated in terms of its workload and federalism implications. It is quite another thing to specify just what proper regard for federalism requires. Yet, it is also important to recall that the institutional federal judiciary has not always been consistent in its invocation of principle, and thus that some of its communi-

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<sup>372</sup> See *supra* text accompanying notes 288-292.

<sup>373</sup> See *supra* text accompanying notes 298-306.

<sup>374</sup> See *supra* text accompanying notes 293-297.

<sup>375</sup> REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 79, at 44-45.

<sup>376</sup> See Burbank, *supra* note 7, at 1729-34 (discussing the potential costs of such communications).

cations with Congress invoking principle have been designed to advance particular policy views.<sup>377</sup>

The 1999 letter on behalf of the Conference went beyond a mere reminder to keep federalism values in mind. That letter, after all, included the assertion that “[t]ime-honored principles . . . counsel that access to the federal courts be expanded only where the expansion would serve a substantial federal interest and only where the parameters of the expansion have been carefully crafted to address the perceived problem without unnecessary adverse effects on state judicial processes.”<sup>378</sup> The March 2003 letter was even more specific.<sup>379</sup> In context, then, the subsequent refusal to provide specific legislative language in a letter that again submerged the particular federalism concerns raised by the Federal-State Jurisdiction Committee<sup>380</sup> virtually ensured that the political process would vindicate the maximalist view of the Standing Committee.

CAFA’s statement of findings and purposes gives no notice of a perceived problem arising out of overlapping class actions dispersed between the federal and state courts and also no notice of congressional purpose to address those problems.<sup>381</sup> Even without consulting the legislative history,<sup>382</sup> however, the existence of that aim can be in-

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<sup>377</sup> See *id.* at 1733 (describing the costs of the judiciary’s “taking sides in an inevitably policy preference-laden debate”); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 *IND. L.J.* 223, 308-09 (2003) (“[I]ndividual judges are discouraged from breaking ranks with the official conference policy, and the policies become an expression of norms of the judiciary by which entrants to the federal judiciary are socialized into its ranks.” (footnote omitted)).

<sup>378</sup> Letter from Leonidas Ralph Mecham to Representative Henry J. Hyde, *supra* note 350, at 5.

<sup>379</sup> See Letter from Leonidas Ralph Mecham to Representative F. James Sensenbrenner, *supra* note 305, at 2 (“Accordingly, parallel in-state class actions would not present, on a broad or national scale, the problems of state projection of law beyond its borders and would present few of the choice of law problems associated with nationwide class action litigation.”); *id.* at 3 (“While the relationship of the defendant to the forum may have some bearing on state adjudicatory power, an insistence that all primary defendants maintain formal in-state citizenship is too limiting and may preclude in-state class actions where a defendant has sufficient contacts with the forum state, regardless of citizenship.”).

<sup>380</sup> See *supra* text accompanying note 306.

<sup>381</sup> See CAFA § 2(b), 28 U.S.C. § 1711 note (Supp. V 2005); *supra* text accompanying note 11.

<sup>382</sup> See S. REP. NO. 109-14, at 23, 38, 40-41 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 23, 36-37, 38-39 (expressing Congress’s intent to minimize duplicative class actions and forum shopping); see also Shapiro, *supra* note 63, at 130-31 (discussing the proper interpretation of “principal injuries” in the “local controversy exception” in light of the

ferred from two of the statute's exceptions, the "discretionary exception" and the (mandatory) "local controversy" exception. As to the former, one consideration that a federal court is to take into account when deciding whether, "in the interests of justice," to decline to exercise jurisdiction is "whether, during the 3-year period preceding the filing of that class action, [one] or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed."<sup>383</sup> As to the latter, even if all of the other, very restrictive, conditions are met, the exception evaporates unless "during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons . . . ."<sup>384</sup>

Passing differences in language and focusing only on the "local controversy" exception, the exclusion from the exception would prevent a federal court from declining to exercise jurisdiction under CAFA if one statewide class action involving different class plaintiffs but similar claims against the same defendant had been filed within three years (even if that class action were itself not removable under CAFA!). One of the supposed selling points of the compromise enabling CAFA's passage was that it "limit[ed] a court's authority to base federal jurisdiction on the existence of similar class actions filed in other states by disallowing consideration of other cases that are more than three years old."<sup>385</sup> This was an exceedingly small point at which to stick. The exclusion effectively privileges the supposed federal interest in managing overlapping class actions over the interests of a state, even in cases where greater than two-thirds of class members and a defendant from whom significant relief is sought are citizens of that state and the principal injuries alleged were incurred there.<sup>386</sup>

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legislative history, and concluding that exceptions "were to be used for truly local controversies, not local subsets of nationwide controversies").

<sup>383</sup> 28 U.S.C. § 1332(d)(3)(F).

<sup>384</sup> *Id.* § 1332(d)(4)(A)(ii).

<sup>385</sup> 149 CONG. REC. S16,103 (daily ed. Dec. 9, 2003) (statement of Sen. Dodd).

<sup>386</sup> As the Senate Judiciary Committee noted,

The Committee wishes to stress that another purpose of this criterion is to ensure that overlapping or competing class actions or class actions making similar factual allegations against the same defendant that would benefit from coordination are not excluded from federal court by the Local Controversy Exception and thus placed beyond the coordinating authority of the Judicial Panel on Multidistrict Litigation.

S. REP. NO. 109-14, at 40-41 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 39. Many people have failed to grasp the effect of these provisions on statutory exceptions that were al-

The affront to federalism values in this provision may not simply be that the provision disables states from adjudicating cases in which they have an intense interest. Once the state court class actions are brought into federal court, they will likely be subject to the tender mercies of the multidistrict litigation process. In that process, the incentives of key participants—some counsel, defendants, and the transferee court—will be to create bigger “litigations” either by evading the restrictions on settlement classes that the Supreme Court prescribed in *Amchem* and *Ortiz* or through abandonment of the class form for nonclass aggregations. The incentives, in other words, will be to elide factual and legal differences that, although impeding certification, are what states regard as critical conditions for, or determinants of, effective regulation.<sup>387</sup>

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ready very narrow. See, e.g., Stern, *supra* note 72, at 495 (“[Mississippi trial lawyer Richard] Scruggs predicts that attorneys seeking leverage in settlement negotiations with corporations will file class action suits in a big state such as California, along with companion suits in smaller neighboring states where there might be overlapping claims—assuming they can find injured individuals who are residents of those smaller states.”). Indeed, even some academics do not seem to grasp the narrowness of the exceptions. See, e.g., Marcus, *supra* note 28, at 1313 (“Also, CAFA allows for single-state class actions in state court, so large cases in California and New York, for example, may compensate for regulation lost to the statute.”); *id.* at 1290 (inaccurately summarizing exceptions). But see, e.g., Morrison, *supra* note 9, at 1534 (“[T]he way [the exceptions] are drafted will result in virtually no cases ever being remanded.”); *id.* at 1538 (“There is only the most remote chance that a case will be sent back to state court under one of the narrow remand provisions . . .”); Shapiro, *supra* note 63, at 85-86 (“The exceptions were drafted in a way that will make it very difficult for plaintiffs to use them, even in many cases that more properly belong in state, rather than federal court.”). The FJC’s ongoing empirical work includes the question of whether CAFA’s exceptions “preserve state court jurisdiction over in-state class actions.” Lee & Willging, *supra* note 26, at 1737. If their work in that respect is to be of any value, it will be essential to define “in-state class actions” precisely and to follow that definition consistently.

<sup>387</sup> See Marcus, *supra* note 26, at 1769 (“[O]ne possible result of CAFA’s jurisdictional policy could be to empower future federal courts to become more creative in favor of class action treatment than they have been in the past.”); *id.* at 1813-19 (discussing the development of choice of law rules for class actions in efforts to impede or allow class certification); Mark Moller, *Class Action Lawmaking: An Administrative Law Model*, 11 TEX. REV. L. & POL. 39, 107 (2006) (“[T]here is reason to fear that class action courts face special institutional pressures that predispose them to favor certification.”).

Interpretation of a number of Supreme Court opinions have [sic] reduced the effectiveness of the class action as a means of settling a mass conflict. This development has led a number of judges and attorneys, particularly in pharmaceutical cases, to attempt mass settlements on a consolidated and cooperative basis without the formalities of a class action. The substitute quasi-class action aggregate technique has advantages and is being closely studied.

*In re Zyprexa Prods. Liab. Litig.*, 238 F.R.D. 539, 540-41 (E.D.N.Y. 2006) (citations omitted). Those who were surprised by Judge Weinstein’s call for the expansion of

On that view, CAFA may result in the replication on a grander scale, under cover of settlement, of some of the supposed abuses in state court class actions that Congress said it wanted to stamp out. The difference would be that the balance of bargaining power in settlement would have shifted to defendants.<sup>388</sup> Indeed, in an inversion of the notion of a self-fulfilling prophecy, CAFA may dry up the market for statewide class actions,<sup>389</sup> leading counsel who understand the dynamics of the MDL process to seek to be first in line with a multi-state class action that nods and winks past a Supreme Court that has lost interest.<sup>390</sup> Whatever the potential benefits and costs of gathering

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CAFA's jurisdictional reach in this opinion, *see id.* at 542 ("It may be useful for Congress to consider expanding the Class Action Fairness Act from class actions to at least some national MDL, non-Rule 23, aggregate actions."), need look no further for an explanation. *See* Stephen B. Burbank, *The Courtroom as Classroom: Independence, Imagination and Ideology in the Work of Jack Weinstein*, 97 COLUM. L. REV. 1971, 1993-98 (1997) (discussing the "possibility that Judge Weinstein's utility function drives him to seek (or create) the extraordinary in preference to the ordinary—'litigations' rather than cases").

<sup>388</sup> Professor Stephen Shapiro's assertion that "the settlement leverage will still tilt towards the plaintiffs," Shapiro, *supra* note 63, at 131, seems to neglect the added leverage defendants will have in most MDL proceedings involving multiple statewide class actions by reason of their ability to prevent certification for litigation. *Cf.* Purcell, *supra* note 5, at 1874 (discussing the added leverage that defendants have to extract collusive settlements after CAFA by remaining in state court but threatening removal and the risk of a federal court refusing certification).

<sup>389</sup> *See* Cabraser, *supra* note 262, at 544 n.6 ("The remaining alternatives [to a state court nationwide consumer class action] would seem to be fifty separate class actions . . . or more likely, after the enactment of [CAFA], . . . a multistate class action in federal court.").

In *Figueroa*—which was not an MDL proceeding because the competing class actions were in state court—the court that ultimately declined to approve the settlement had preliminarily certified a multistate class for claims that included breach of contract, breach of express warranty, breach of implied warranty, unjust enrichment, money had and received, and unfair business practices and false advertising under statutes of all fifty states. *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1300-01, 1319 (S.D. Fla. 2007). Apparently, the court accepted plaintiffs' contentions that there were no consequential differences among state laws. *See id.* at 1300-01; *cf. supra* note 269 and accompanying text (discussing the ability of class counsel to wish away differences in state law so as to secure certification of multistate classes in state court). *But cf.* *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 730 (5th Cir. 2007) (reversing certification of a multistate class alleging breach of express and implied warranties because of failure of plaintiffs to demonstrate predominance).

<sup>390</sup> As Stern reported,

Milberg Weiss co-founder Mel Weiss sees an opportunity in the new class action bill statute [sic]. He expects smaller law firms that specialize in state courts to seek out his firm of 120 lawyers now that more class actions will wind up in federal court. "In some ways, it will help me," Weiss says.

Stern, *supra* note 72, at 495.

mass disaster litigation in the federal courts, it is difficult to understand why difficulties encountered in the management of overlapping class actions under the default regime warranted a remedy so grossly overinclusive. Indeed, it is difficult to understand why an adequate solution to those difficulties was not possible through a minor amendment to the Anti-Injunction Act.<sup>391</sup>

This aspect of CAFA raises most clearly the question whether the additional burdens that the statute imposes on the federal courts will adversely affect the quality of justice, not just in the cases that it allows to be brought to federal court, but also in the rest of the federal docket. This concern is particularly acute at a time when civil trials are vanishing,<sup>392</sup> when the resources the federal courts receive from Congress may be inadequate to handle their (pre)existing work,<sup>393</sup> and when some of those courts appear to be embracing procedural shortcuts that are themselves troublesome from the perspective of the optimal enforcement of the substantive law.<sup>394</sup> This concern is also more insistent to the extent that some key members of the federal judiciary sought (or at least welcomed) the burdens CAFA will impose. Animated by an expansive (if not imperialistic) view of the gathering powers of federal courts, some federal judges have become inured to a view of modern litigation that, by privileging the goals of reducing expense and delay, ignores the costs of complexity.<sup>395</sup>

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<sup>391</sup> Distinguish the cases in question here—in connection with the “local controversy” exception—from the kinds of cases that were the object of the aborted rules proposals and Judge Easterbrook’s *Bridgestone/Firestone* opinion, which were, by and large, multistate class actions. See *supra* note 291 and accompanying text.

<sup>392</sup> See *supra* note 277 and accompanying text (noting that more cases are terminated by summary judgment than by trial).

<sup>393</sup> See Cabraser et al., *supra* note 29, at 401 (“Since CAFA provides for no new judgeships, no additional staffing, and no new resources for the federal judiciary, CAFA will further increase the federal courts’ already heavy burdens.”); Lee & Willging, *supra* note 26, at 1726 (“From a purely administrative perspective, the resulting increase in complex cases seemed dangerous, threatening to consume scarce judicial resources and to place additional pressures on an already overburdened federal judiciary.”).

<sup>394</sup> See Burbank, *supra* note 277, at 624-25 (discussing legal and factual “carving” for purposes of granting summary judgment, both of which can subvert the substantive law); see also *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007) (redefining pleading requirements under Federal Rule of Civil Procedure 8); Editorial, *The Devil in the Details*, 91 JUDICATURE 52 (2007) (criticizing *Twombly* for constricting access to federal court). The author is chair of the Editorial Committee of the American Judicature Society, which publishes *Judicature*.

<sup>395</sup> See Burbank, *supra* note 356, at 1476-83; Burbank, *supra* note 307 (discussing complex American litigation); see also *supra* note 72 (questioning the Federal Judicial Center’s decision—for all consolidated cases, including those subject to the MDL process—to include only lead cases in their analysis of CAFA cases in federal court).

Finally, there is evidence that the federal courts are resisting some of the most egregious overreaching of CAFA's supporters.<sup>396</sup> Whether or not that is true, the experience of the federal judiciary in commenting on legislative proposals and implementing the final product may advance understanding of the institution as an interest group.

Failure to speak with one voice in the legislative process leading up to CAFA prevented the federal judiciary from checking the excesses of interest-group and partisan politics. The voice that, as a solo, might have made a difference—cautioning against overloading already burdened federal courts—was recognizable as both inflected with institutional self-interest and pitched to the interests of all litigants in federal courts.<sup>397</sup> The other voice in the federal judiciary's duet—championing the gathering powers of federal courts—not only took a narrower view of institutional interest, but it could also be enlisted in the chorus of those who, while waving the Stars and Stripes, were singing *L'Internationale*.<sup>398</sup> In such circumstances, it

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<sup>396</sup> See, e.g., Clermont & Eisenberg, *supra* note 13, at 1579-91 (presenting data seeming “to show that both the district courts and the courts of appeals have resisted an expansive reading of CAFA”).

<sup>397</sup> See Burbank, *supra* note 7, at 1733 n.254 (“On matters as to which one would expect the judiciary to try to maximize the institution’s collective preferences, . . . everyone recognizes that judges are self-interested and can discount what they say without closing off an obvious and important source of relevant information.”). *But see id.* (“[T]here are reasons to doubt the judiciary’s ability to forecast the work that new statutory rights would create.”). Speaking in July 2003, when CAFA’s prospects remained unclear, Judge Hodges, the chair of the JPML, said,

We certainly don’t want to open the floodgates to an onslaught of litigation in the federal courts that would overwhelm us and require the creation of otherwise unneeded additional federal judges or encroach upon traditional jurisdiction of the states. It is a very sensitive area. It is a question of how you strike a balance in the long run in defining what constitutes a mass tort, how many claims there should be, how many plaintiffs, what the amount of [sic] controversy should be, and to what extent you are going to relax the diversity requirements. Even then, there are always going to be some cases that would remain in state court. The so-called minimal diversity bill is pending in Congress now, and the chance of passage is anybody’s guess. I really don’t know.

Hansel, *supra* note 275, at 20.

<sup>398</sup> See *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002) (disparaging an approach to class certification that reflects “the model of the central planner”); Burbank, *supra* note 7, at 1733 (noting that the perception that the institutional judiciary’s position on proposed legislation, even though supposedly based on neutral principle, is in fact based on ideological considerations causes the judiciary to “incur the same costs as if it were actually participating on the merits of such debate”); *id.* at 1734 n.254 (arguing that the judiciary should provide data to Congress without advancing an argument about the “‘proper’ role of the federal courts”); Lee & Willging, *supra* note 26, at 1732 (“The judiciary’s concerns about caseload were balanced by its

would hardly be surprising that, once the occasion for attempted institutional unity had passed, both a more capacious view of institutional interest and divergent views about the requirements of federalism found powerful voices.<sup>399</sup>

#### CONCLUSION

The view one takes of a statute that was enacted three years ago is necessarily preliminary, at least in some dimensions. Mindful of the ease with which a federal statute's "antecedent period of travail"<sup>400</sup> can be forgotten, it seemed to me useful to record here some of the history that may illuminate an appreciation, if not the interpretation, of what is, after all, a major piece of federal legislation.

Unfortunately, although the statute's studied ambiguity on critical questions has already generated a great deal of litigation, the extent of its impact on the "happy relation of States to Nation"<sup>401</sup> remains unclear and likely will be for a long time to come. So too does its impact on the general quality of justice in the federal courts, although the Federal Judicial Center's empirical studies should provide a basis for judgment on some dimensions of that question.<sup>402</sup>

The hypocrisy and ambiguity underlying and infecting CAFA are especially vexing for one who, although informed by the political science literature on judicial behavior, has an abiding faith in the federal judiciary to prefer law to ideology when the law is clear. Nonetheless, I doubt that the federal judiciary will bring about a regulatory void—

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own interest in finding solutions to the problems associated with multiple and overlapping class action litigation in the state and federal courts."). As I have previously observed,

[A]lthough the breakdown of the congressional committee system and the other forces that have led to the dominance of party influence and party discipline in legislative politics help to explain why members of Congress might in fact regard the judiciary as just another interest group, we all suffer when it is so regarded.

Burbank, *supra* note 7, at 1741.

<sup>399</sup> See Clermont & Eisenberg, *supra* note 13, at 1589-90 ("[T]he insignificance of the factor representing docket pressure indicates that judges are not resisting CAFA merely because of a heavy workload."); see also *supra* text accompanying note 393 (noting the possible inadequacy of judicial resources).

<sup>400</sup> George H. Jaffin, *Federal Procedural Revision*, 21 VA. L. REV. 504, 504 (1935).

<sup>401</sup> FRANKFURTER & LANDIS, *supra* note 1, at 2. For the importance of looking to the impact of CAFA on state courts, see *supra* text accompanying note 14.

<sup>402</sup> For a description of the FJC's ongoing work, see Lee & Willging, *supra* note 26, at 1743 (describing Phases II and III of the FJC study).



the fondest hope of some of CAFA's supporters—in those cases where the argument in favor of federal jurisdiction is strongest. Indeed, mindful of the impact that politics (through judicial selection) has had on forum preference for class actions, viewed from the perspective of either the federal or the state courts, it seems possible that CAFA's supporters, too, may come to regret the extent of their success in opening access to federal court.<sup>403</sup> That does not allay, however, the concerns that arise from considering the likely fate of cases for which the argument in favor of federal jurisdiction reduces to the fictions of corporate citizenship and the gathering powers of federal courts.

At the end of the day, CAFA's exceedingly narrow exceptions are revealed as another depressing example of legislative overreaching by those who invoke the virtues of federalism when it is convenient to do so.<sup>404</sup> There is no need, and no good reason, to await experience under the statute, much of which, for years, will consist of jurisdictional litigation that lacks any social utility. CAFA's exceptions should be amended now to restore the balance of power between plaintiffs and defendants in class actions where a state's interest in regulation through litigation is intense and where the argument for federal jurisdiction relies on the fictions of corporate citizenship and the gathering powers of federal courts. One way to do that would be to add exceptions that allow putative class actions composed predominantly of in-state citizens and putative class actions alleging in-state injury to person or property to remain in state court if they would remain there under the default regime.<sup>405</sup> Yet, it would seem a shame to compound

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<sup>403</sup> See Marcus, *supra* note 26, at 1769 (“There is no particular reason to assume the enduring attractiveness for business interests of federal courts’, compared to state courts’, views on class certification and related matters . . . .”); *id.* at 1789 (suggesting that CAFA may in the long run benefit plaintiffs, rather than defendants).

<sup>404</sup> See Purcell, *supra* note 5, at 1871 (“CAFA inspired an astonishing reversal in the attitude of conservatives and Republicans toward the state courts.”). To the extent, however, that indignation on this score has a partisan element, it should be tempered by Professor Pfander’s account of legislation proposed by Senator Tydings in 1969 “that broadly authorized the federal courts to assert jurisdiction over consumer class actions based on state law.” Pfander, *supra* note 203, at 1445. As Pfander observes, the “apparent purpose of the legislation was . . . to shift consumer class actions into federal court to secure the application of what were then perceived as the more liberal joinder provisions of Rule 23.” *Id.* at 1446. Moreover, the proposed legislation died in part because of the “concerted opposition of the very business groups that were later to support the adoption of CAFA.” *Id.* at 1446-47.

<sup>405</sup> This appears to have been the approach of the Federal-State Jurisdiction Committee of the Judicial Conference:

In that context, this Committee endorsed an approach that it believes will preserve a greater role for the state courts than the role contemplated in the pre-

the waste of litigation fostered by jurisdictional provisions that are keyed to the number of citizens in a putative class. Moreover, citizenship ratios themselves do not reliably signal state interest. For those reasons, in a regime of minimal diversity that acknowledged the power of fictions to thwart legitimate state interests, it might make more sense to confine the additional exception to any putative class action seeking recovery only on behalf of those alleging in-state injury to person or property as a result of the activities of the defendant—without regard to the citizenship of either plaintiffs or defendants. Such a provision would have the additional value of dispensing with some of the more troublesome maneuvers by which plaintiffs can defeat removal in the default regime, notably through joinder of a nondiverse defendant.<sup>406</sup> The contemplated amendments to CAFA should also eliminate provisions in existing exceptions that are designed to enable federal court management of overlapping class actions, but which might result in recrudescence in federal court of some of the state court abuses that CAFA sought to eliminate. Finally, Congress should consider whether, in light of scholarship discussing targeted jurisdictional policy,<sup>407</sup> amendments to the Anti-Injunction Act are necessary to give the federal courts what they really need.

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vious legislative proposals. That approach would create new exceptions to any class action legislative proposal relying on minimal diversity jurisdiction. Those exceptions would preclude the use of minimal diversity where (1) substantially all members of the class are citizens of a single state, or (2) the claims arise from death, personal injury, or physical property damage within the state.

AGENDA E-9 ADDENDUM, *supra* note 299, at 5. The Committee observed that its proposed approach “would leave the determination of the citizenship of the defendants, and the satisfaction of the complete diversity requirement, to be made in accordance with current jurisdictional rules.” *Id.* at 5 n.9. See *supra* text accompanying note 299 (discussing the history of this proposal).

<sup>406</sup> See *supra* text accompanying note 356. The provision would also eliminate whatever room remained (under the Federal-State Jurisdiction Committee’s proposal), if any, for forum shopping facilitated by general doing-business jurisdiction.

<sup>407</sup> See Burbank, *Aggregation*, *supra* note 178, at 1949-52 (arguing that CAFA is animated by a different, more targeted, policy of federal jurisdiction from the policy of diversity jurisdiction implemented in *Erie*’s progeny); Wolff, *supra* note 27, at 2069-72 (noting that CAFA provides federal jurisdiction in cases that may lead to “broad commercial harms” or a decrease in confidence in the judicial system and, for these reasons, may fall within an exception to the Anti-Injunction Act in certain cases); *supra* note 287 (advocating careful consideration of “jurisdictional” policy in interpreting the “in aid of jurisdiction” exception under the Anti-Injunction Act).

## APPENDIX

**Table 1: State Adoptions of Federal Rule of Civil Procedure 23**

This table contains information on state adoptions of the 1966 amendments to Federal Rule of Civil Procedure 23. The first four sections contain states not adopting the rule or for which a date could not be found. The remaining sections are organized in chronological order.

State and Year	Description
<b>States Without Class Action (2)</b>	
Mississippi <sup>408</sup>	
Virginia <sup>409</sup>	
<b>States Retaining a Rule Not Derived from the Federal Rule (3)</b>	
California	“California’s operative general class action statute . . . was enacted in 1872 as part of California’s Field Code and has remained essentially unchanged.” <sup>410</sup> However, “California class action jurisprudence embraces and synthesizes Rule 23 and its jurisprudence.” <sup>411</sup>
Nebraska	Still retains the “procedural statutes based on the Field Code of 1849.” <sup>412</sup>

<sup>408</sup> See Don Barrett & Alfred H. Davidson IV, *Mississippi*, in STATE LAWS SUBCOMM. OF THE CLASS ACTIONS AND DERIVATIVE SUITS COMM., ABA, SURVEY OF STATE CLASS ACTION LAW 2007–2008, at 379, 379 (Dennis K. Egan et al. eds., 2007) [hereinafter ABA, SURVEY] (“The Mississippi Rules of Civil Procedure contain no section permitting class actions.”). For partial alternatives to class actions in states that do not follow Federal Rule 23, see Thomas D. Rowe, Jr., *State and Foreign Class-Action Rules and Statutes: Differences from—and Lessons for—Federal Rule 23*, 35 W. ST. U. L. REV. (forthcoming 2008) (manuscript at 102-03), available at <http://ssrn.com/abstract=1090554>.

<sup>409</sup> See Dale W. Pittman, *Virginia*, in ABA, SURVEY, *supra* note 408, at 711, 711.

<sup>410</sup> Elizabeth J. Cabraser et al., *California*, in ABA, SURVEY, *supra* note 408, at 55, 56.

<sup>411</sup> *Id.* at 76.

<sup>412</sup> Edward D. Hotz & Shawna D. Peterson, *Nebraska*, in ABA, SURVEY, *supra* note 408, at 417, 417.

State and Year	Description
Wisconsin	Rule includes only the concepts of numerosity and commonality and states them in the disjunctive. <sup>413</sup> Interpretations of the Federal Rule are nevertheless persuasive. <sup>414</sup>
<b>States Retaining the 1938 Version of the Federal Rule (1)</b>	
North Carolina <sup>415</sup>	
<b>States Adopting the 1966 Federal Rule for Which a Date Could Not Be Found (2)</b>	
Connecticut	
Maine	
<b>States Adopting the Federal Rule, 1966–1971 (11)<sup>416</sup></b>	
Arizona (1966) <sup>417</sup>	
Minnesota (1967)	Rule adopted 1951, amended 1967, and revised 1988. <sup>418</sup> The Minnesota Supreme Court indicated in 1972 that “the first two requisites” of the rule had been met in a case. <sup>419</sup> Since the 1938 Federal Rule divided class actions into types instead of providing a list of prerequisites, it can be assumed that the 1967 amendment was the conforming amendment.

<sup>413</sup> See Charles H. Barr & Dennis K. Egan, *Wisconsin*, in ABA, SURVEY, *supra* note 408, at 743, 743 (“[U]nlike the federal rule, the Wisconsin rule does not explicitly address typicality, adequate representation, predominance or superiority.”).

<sup>414</sup> *Id.* at 743-44.

<sup>415</sup> See *Crow v. Citicorp Acceptance Co.*, 354 S.E.2d 459, 463 (N.C. 1987) (discussing the North Carolina legislature’s explicit adoption in 1967 of a rule similar to the 1938 version of the Federal Rule, despite the 1966 federal amendments).

<sup>416</sup> There are three states (Colorado, Delaware, and Indiana) for which the date of adoption could be narrowed only to some time between 1966 and 1971. Homburger indicates that these states had adopted the revisions sometime before publication of his article. See Adolf Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 631 n.133 (1971) (listing states modeling their class action procedures after the 1966 Federal Rule).

<sup>417</sup> See ARIZ. R. CIV. P. 23 state bar committee’s note (1966 Amendment) (referring readers to the “official comment of the federal advisory committee . . . on the change in Federal Rule 23”).

<sup>418</sup> MINN. R. CIV. P. 23.01 credits (West 2006).

<sup>419</sup> *Klicker v. State*, 197 N.W.2d 434, 437 (Minn. 1972).

State and Year	Description
Montana (1967) <sup>420</sup>	
Washington (1967) <sup>421</sup>	
Kansas (1969) <sup>422</sup>	
Kentucky (eff. 1969)	Amendment history indicates that Kentucky's civil procedure rule was adopted in 1953 and later amended effective 1969 and 1978. <sup>423</sup> Homburger indicates it had been amended to match the Federal Rule by 1971; thus, we can assume that the 1969 amendment was the conforming amendment. <sup>424</sup>
New Jersey (eff. 1969)	Rule was effective in 1969 and amended in 1974 and subsequently. <sup>425</sup> A New Jersey appellate court discussed the rule in 1972 and gave the 1966 federal amendments as the rule's source. <sup>426</sup>
South Dakota (1969) <sup>427</sup>	
<b>States Adopting the Federal Rule, 1970–1974 (12)<sup>428</sup></b>	
North Dakota	Adopted the 1966 Rule some time between 1971 and 1973, but an exact date could not be obtained. <sup>429</sup> North Dakota has since changed its ( <i>cont.</i> )

<sup>420</sup> See Paul C. Collins et al., *Montana*, in ABA, SURVEY, *supra* note 408, at 399, 402 (“Rule 23 of the Montana Rules of Civil Procedure was completely rewritten in 1967 to adopt the language of the federal rule.”).

<sup>421</sup> See Stephen M. Rummage & Fred B. Burnside, *Washington*, in ABA, SURVEY, *supra* note 408, at 715, 715-16 (noting that Washington adopted its class action rule, which is identical to the Federal Rule, in 1967).

<sup>422</sup> Order Amending and Supplementing Certain Provisions of the Code of Civil Procedure, 203 Kan. LXII, LXXIV-LXXV (1969).

<sup>423</sup> KY. R. CIV. P. 23.01 credits (West 2007).

<sup>424</sup> See Homburger, *supra* note 416, at 631 n.133.

<sup>425</sup> N.J. Ct. R. 4:32-2 note (West 2008).

<sup>426</sup> See *Lusky v. Capasso Bros.*, 287 A.2d 736, 737 (N.J. Sup. Ct. App. Div. 1972).

<sup>427</sup> See Order No. 2, *In re* Amendment of the Rules of Civil Procedure, 83 S.D. xi, xvii-xx (1969).

<sup>428</sup> The categories (1966–1971 and 1970–1974) overlap the years 1970 and 1971 because three states cannot be confidently dated between 1966 and 1971. See *supra* note 416.

<sup>429</sup> Homburger indicates that North Dakota retained the 1938 Rule in 1971. Homburger, *supra* note 416, at 626 n.94. However, the North Dakota Supreme Court, in 1973, labeled Federal Rule 23 as identical to North Dakota Rule 23. *Horst v. Guy*, 211 N.W.2d 723, 726 (N.D. 1973).

State and Year	Description
North Dakota ( <i>cont.</i> )	rule to adopt the Uniform Class Actions Act, <sup>430</sup> as has Iowa (though Iowa did not adopt the 1966 revisions in the interim). <sup>431</sup> It appears that the Uniform Act was largely inspired by the 1966 Rule, <sup>432</sup> and these two states are thus included as adopters.
Ohio (eff. 1970) <sup>433</sup>	
Nevada (1971) <sup>434</sup>	
Tennessee (eff. 1971) <sup>435</sup>	
Utah (1971) <sup>436</sup>	
Vermont (1971)	Original undated reporter's note calls this rule "identical to Federal Rule 23." <sup>437</sup> Later code compilation states that Vermont's rules of civil procedure were first promulgated in 1971. <sup>438</sup>
Wyoming (1971) <sup>439</sup>	

<sup>430</sup> See Ronald H. McLean & Jane L. Dynes, *North Dakota*, in ABA, SURVEY, *supra* note 408, at 491, 491.

<sup>431</sup> See C. Carleton Frederici, *Iowa*, in ABA, SURVEY, *supra* note 408, at 237, 238.

<sup>432</sup> See *id.* ("The author believes that the drafters of the Uniform Act took the 1966 Fed. R. Civ. P. 23 and the case law interpreting and deciding various issues . . . and tried to codify what they thought were the best decisions . . .").

<sup>433</sup> See Barbara Quinn Smith, *Ohio*, in ABA, SURVEY, *supra* note 408, at 515, 517, 538 (noting that sections (a), (b), and (c) of the Federal Rule and the Ohio Rule are identical, and that the Ohio Rule went into effect in 1970).

<sup>434</sup> See NEV. R. CIV. P. 23 advisory committee's note (2007) (stating that the Nevada rule was revised in 1971 to match the 1966 federal change).

<sup>435</sup> See Martha S.L. Black, *Class Actions Pursuant to Tennessee Rule of Civil Procedure 23*, 46 TENN. L. REV. 556, 558 (1979) (explaining that Tennessee changed its class action rule, in 1971, to be "substantially identical" to Federal Rule 23 "in most respects").

<sup>436</sup> UTAH R. CIV. P. 23 note (Lexis 2007) (stating that Utah's class action rule was amended in 1971).

<sup>437</sup> VT. R. CIV. P. 23 reporter's notes (2000).

<sup>438</sup> See James S. Holden, *Foreword to Vermont Rules of Civil and Appellate Procedure and District Court Civil Rules*, in VT. STAT. ANN., at ix, ix (2000).

<sup>439</sup> See Patrick R. Day, *Wyoming*, in ABA, SURVEY, *supra* note 408, at 751, 755 ("Wyoming's current class action rule . . . has not been amended since 1971 when it was adopted as a counterpart to the original federal rule [sic].").

State and Year	Description
Hawaii (1972)	Original rule adopted in 1954, amended in 1972, and further amended in 1999. <sup>440</sup> Since the Hawaii Supreme Court used language consistent with the 1966 Federal Rule in 1978, 1972 must be the conforming amendment. <sup>441</sup>
Missouri (1972) <sup>442</sup>	
Alabama (1973) <sup>443</sup>	
Massachusetts (1973) <sup>444</sup>	
Oregon (1973) <sup>445</sup>	
<b>States Adopting the Federal Rule, 1975–1979 (9)</b>	
Idaho (1975) <sup>446</sup>	
Louisiana (1975)	Originally adopted a pared-down version of the 1938 Rule, permitting only “true” class actions. <sup>447</sup> The Louisiana Supreme Court chafed under this restriction, judicially expanding the scope of class actions over several decades. <sup>448</sup> The first explicit use of federal precedent was in 1975. <sup>449</sup> The Louisiana legislature revised the rule in 1997 to match the Federal Rule. <sup>450</sup>

<sup>440</sup> HAW. R. CIV. P. 23 history (LexisNexis 2007).

<sup>441</sup> See *Life of the Land v. Burns*, 580 P.2d 405, 410 n.6 (Haw. 1978).

<sup>442</sup> See MO. R. CIV. P. 52.08 committee’s note 1974 (2007) (“This is the same as Rule 23 of the Federal Rules of Civil Procedure.”); *id.* credits (West 2007) (identifying 1972 as the year of adoption).

<sup>443</sup> See ALA. R. CIV. P. 23 committee’s comments on 1973 adoption (2007) (paral-  
leling the advisory committee’s note to the Federal Rule).

<sup>444</sup> See MASS. R. CIV. P. 23 reporter’s notes—1973 (2007).

<sup>445</sup> See *Bernard v. First Nat’l Bank of Or.*, 550 P.2d 1203, 1208 (Or. 1976) (stating that Oregon enacted a modified version of Federal Rule 23 in 1973).

<sup>446</sup> See IDAHO R. CIV. P. 23 credits (2007).

<sup>447</sup> Donald C. Massey et al., *Curtailing the Tidal Surge: Current Reforms in Louisiana Class Action Law*, 44 LOY. L. REV. 7, 37 (1998) (explaining that only “true” class actions were allowed prior to a 1975 decision of the Louisiana Supreme Court).

<sup>448</sup> See *id.* at 43 (“Within a ten-year period, the Louisiana Supreme Court effectively repealed Louisiana’s restrictive class action statute, judicially enacted the broader federal rule, and extended its application to the mass tort arena . . .”).

<sup>449</sup> See *id.* at 37-38 (discussing *Stevens v. Bd. of Trustees*, 309 So. 2d 144 (La. 1975)).

<sup>450</sup> Act of July 1, 1997, No. 839, 1997 La. Sess. Law Serv. 1389 (West).

State and Year	Description
New York (1975) <sup>451</sup>	
Alaska (1976) <sup>452</sup>	
Illinois (1977) <sup>453</sup>	
Pennsylvania (1977) <sup>454</sup>	
Texas (1977) <sup>455</sup>	
New Mexico (1978)	Although the rule adopted in 1978 was similar to the 1966 Federal Rule, virtually no class actions were filed in New Mexico prior to July 1, 1995, when the rule was again revised to match the Federal Rule. <sup>456</sup>
Oklahoma (1978) <sup>457</sup>	
<b>States Adopting the Federal Rule, 1980–1984 (5)</b>	
Florida (1980) <sup>458</sup>	
Iowa (1980) <sup>459</sup>	Has adopted the Uniform Class Actions Act. <sup>460</sup>
Michigan (1983) <sup>461</sup>	

<sup>451</sup> Act of June 17, 1975, ch. 207, 1975 N.Y. Sess. Laws 313 (McKinney).

<sup>452</sup> Alaska Sup. Ct. Order No. 258 (Oct. 15, 1976) (on file with author).

<sup>453</sup> See *Eshaghi v. Hanley Dawson Cadillac Inc.*, 574 N.E.2d 760, 762 (Ill. App. Ct. 1991) (noting that the Illinois class action rule was adopted in 1977 and patterned after the Federal Rule).

<sup>454</sup> See PA. R. CIV. P. 1701 credits (West 2007).

<sup>455</sup> See *Smith v. Lewis*, 578 S.W.2d 169, 172 (Tex. Civ. App. 1979) (“The 1977 amendment to [Texas Rule of Civil Procedure] 42 was patterned after [Federal Rule] 23 with little change.”).

<sup>456</sup> See Marte D. Lightstone, *New Mexico*, in ABA, SURVEY, *supra* note 408, at 455, 455-57.

<sup>457</sup> Act of Apr. 29, 1978, ch. 245, 1978 Okla. Sess. Laws. 644.

<sup>458</sup> See *The Florida Bar, In re Rules of Civil Procedure*, 391 So. 2d 165, 168-70 (1980) (creating a new class action rule based on Federal Rule 23).

<sup>459</sup> Frederici, *supra* note 431, at 238 (stating that Iowa enacted the Uniform Class Actions Act in 1980).

<sup>460</sup> See *supra* note 432 and accompanying text (suggesting that the drafters of the Uniform Class Actions Act looked to Federal Rule 23 for guidelines).

<sup>461</sup> See Dennis K. Egan, *Michigan*, in ABA, SURVEY, *supra* note 408, at 345, 345 (explaining that Michigan’s class action rule was overhauled in 1983 to substantially match the Federal Rule).



State and Year	Description
New Hampshire (1983) <sup>462</sup>	
Maryland (1984) <sup>463</sup>	
<b>States Adopting the Federal Rule, 1985–1989 (1)</b>	
South Carolina (1985) <sup>464</sup>	
<b>States Adopting the Federal Rule, 1990–1994 (2)</b>	
Arkansas (1990)	Arkansas Supreme Court adopted a new class action rule in 1979 that replaced an earlier statute that was based on the idea of virtual representation. <sup>465</sup> Much of the 1979 rule was a “verbatim reiteration” of the previous statute, <sup>466</sup> and the court initially put substantial weight on the fact that the legislature had not adopted the Federal Rule for class actions despite adopting a number of other federal rules. <sup>467</sup> The rule was narrowly construed until about 1988, when the court found “the spirit of the federal rule” present in the state rule. <sup>468</sup> Since the court seems to have adopted the Federal Rule wholesale in 1990, that is used as the effective date. <sup>469</sup>
Rhode Island (1991) <sup>470</sup>	

<sup>462</sup> N.H. SUPER. CT. R. 27-A history (LexisNexis 2007).

<sup>463</sup> See John Parker Sweeney & Matthew T. Wagman, *Maryland*, in ABA, SURVEY, *supra* note 408, at 311, 311 (“In 1984 Maryland adopted a version of Rule 23 of the Federal Rules of Civil Procedure as its own class action rule . . .”).

<sup>464</sup> B. Randall Dong, *South Carolina*, in ABA, SURVEY, *supra* note 408, at 623, 623-24.

<sup>465</sup> Kenneth S. Gould, *New Wine in an Old Bottle—Arkansas’s Liberalized Class Action Procedure—A Boon to the Consumer Class Action?*, 17 U. ARK. LITTLE ROCK L.J. 1, 2 (1994).

<sup>466</sup> *Id.* at 8.

<sup>467</sup> *Id.* (discussing *Drew v. First Fed. Sav. & Loan Ass’n*, 610 S.W.2d 876 (Ark. 1981)).

<sup>468</sup> *Int’l Union of Elec., Radio & Mach. Workers v. Hudson*, 747 S.W.2d 81, 86 (Ark. 1988).

<sup>469</sup> *In re Changes to the Ark. Rules of Civil Procedure*, 304 Ark. 733, 738-41 (1990).

<sup>470</sup> Paul V. Curcio, *Rhode Island*, in ABA, SURVEY, *supra* note 408, at 611, 611 (labeling the Rhode Island rule, as a result of its 1991 amendments, “nearly identical” to the Federal Rule).

State and Year	Description
<b>States Adopting the Federal Rule, 1995–1999 (1)</b>	
West Virginia (1998)	Used a variation of the 1938 rule until 1998. <sup>471</sup> Nevertheless, courts occasionally used elements of the revised Federal Rule before 1998 in determining whether to certify a class. <sup>472</sup>
<b>States Adopting the Federal Rule, 2000–2004 (1)</b>	
Georgia (2003)	The state has only recently adopted the 1966 revisions, <sup>473</sup> though the ABA Survey indicates that they had effectively adopted the rule previously. <sup>474</sup> However, there is not a lot of case law and much of it is from after 2000.

<sup>471</sup> See Joseph Beeson, *West Virginia*, in ABA, SURVEY, *supra* note 408, at 735, 735 (“Rule 23 of the West Virginia Rules of Civil Procedure, adopted on April 6, 1998, is essentially identical to Rule 23 of the Federal Rules of Civil Procedure . . .”).

<sup>472</sup> *Id.* at 739 (identifying the West Virginia factor test, which is similar to the federal factor test, in class certification decisions).

<sup>473</sup> Act of June 4, 2003, § 3, 2003 Ga. Laws 820.

<sup>474</sup> See Kevin A. Maxim, *Georgia*, in ABA, SURVEY, *supra* note 408, at 165, 165 (“[I]n practice Georgia parties litigated class action issues as if the standardized text had been implemented years [prior to 2003].”).