ASSESSING CAFA'S STATED JURISDICTIONAL POLICY

RICHARD L. MARCUS

INTRODUCTION

Anyone who addresses jurisdictional policy must contend with the fact—proclaimed at the outset of Professors Wright and Kane's Federal Courts treatise—that "there is to this day no consensus as to the historical justification or the contemporary need for diversity jurisdiction." Even if one could discern the original objectives, they add,

---

1 Horace O. Coal ('57) Chair in Litigation, University of California, Hastings College of the Law. I served as Special Reporter of the Advisory Committee on Civil Rules during its 2000-2003 work on amending Rule 23, and served as Associate Reporter to the Federal Courts Study Committee in 1989-1990, when it produced recommendations on using minimal diversity jurisdiction to deal with dispersed litigation. Both of these subjects are discussed in this paper, and in discussing them I am speaking only for myself and not for either committee or anyone else. I am indebted to Mary Kay Kane for reading an earlier draft of this paper and making many helpful comments.

"[t]he conditions that existed, or were feared to exist, in 1789 are irrelevant in determining the continued necessity for diversity jurisdiction."\(^2\) Thus, although one may fashion a general theory about the appropriate use of the federal judicial power,\(^3\) one is also left with strong competing currents. At least in Congress, those currents often respond more to political pressure than to elegant general jurisdictional policies.

Until recently, political currents have not often focused on procedural issues, so jurisdictional policy has hardly occupied Congress. As we are all aware, however, that has changed during the last two decades, and Congress has acted—and has given serious consideration to further acting—on procedural issues with some frequency.\(^4\) It is hardly surprising that Congress might focus eventually on the class action. A decade ago, for example, Judge Becker reported that "[i]n my 27 years on the bench, I have never seen an area in as much ferment as this class action area is."\(^5\) Since then, the ferment surely has not abated.

Identifying the stated jurisdictional policy of the Class Action Fairness Act of 2005 (CAFA)\(^6\) is not difficult. Congress said that the Act was designed to redress overreaching by state courts handling multi-state class actions, to ensure that these cases involving nationally important issues could be brought into federal court, and to provide protections for class members.\(^7\) It is, of course, easy to denounce these justifications for CAFA as window dressing, and to regard the Act as a naked power grab. That is an understandable reaction, and

---

\(^2\) Id. at 145.

\(^3\) For an elegant general theory that offers a seven-factor method for evaluating questions of jurisdictional allocation, see Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"


has been voiced by very reasonable observers.\textsuperscript{8} It is in keeping with Professor Purcell's analysis of the uses of diversity jurisdiction during the late nineteenth and early twentieth centuries.\textsuperscript{9} But that approach leaves no room for considering jurisdictional policy on its own merits, since it proceeds on a premise that there has been a "take no prisoners" legislative effort. Moreover, there is nothing inherently wrong with justifying expansions of federal jurisdiction as a method for improving results for a favored class of litigants.\textsuperscript{10} Whether or not the proponents of CAFA should have been more candid about their motivations, this paper treats the stated grounds for CAFA seriously.

The existence of "conspiracy" theories about CAFA is not surprising. Anyone who recently has worked on procedural reform knows that even small changes often stir large passions and strong rhetoric.\textsuperscript{11} The magnitude of the issues surrounding class actions was sufficiently large that for a quarter century after amending the rule in 1966 the

\begin{itemize}
  \item For an example, see Alan B. Morrison, \textit{Removing Class Actions to Federal Court: A Better Way to Handle the Problem of Overlapping Class Actions}, 57 STAN. L. REV. 1521, 1522-23 (2005), stating:
  \begin{quote}
    "There is, of course, talk about fairer procedures in federal courts, about how appropriate it is for national class actions to be in federal court before a single judge, and about how it would be much more efficient to hear disparate class actions that are filed in different states, but that involve very similar claims, in one forum. But no one should be fooled by such talk. These proposals are unabashed efforts at forum shopping because defendants believe they will improve their chances of success markedly in class actions if they are in federal courts. This conclusion is made clear by the fact that the impact of the removal provisions on state court class actions would far exceed the rationales offered for the amendments. Even when the vast overinclusiveness of these removal provisions was pointed out, the bill's proponents did not back off or agree to narrowing amendments."
  \end{quote}

  \item See Edward A. Purcell, Jr., \textit{Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870-1958} ch. 2 (1992) (describing the manifold ways in which corporate defendants used access to federal court as a method of defeating or frustrating plaintiffs' claims against them).


  \item I have in mind in part my experience since 1996 as Special Reporter of the Advisory Committee on Civil Rules. In this paper, I speak only on my own behalf and not on behalf of that Committee or anyone else.
\end{itemize}
Advisory Committee on Civil Rules "stayed on the sidelines because of a self-imposed moratorium on Rule 23 revisions." In 1996, the Committee put out for comment a preliminary draft of possible revisions of the standards for certifying class actions, and a cascade of strong public commentary followed. In 2003, the rule was amended to refine and strengthen the judicial handling of class actions—not to alter the standards for certifying a class action—and very substantial controversy nonetheless attended these developments. If CAFA is "the most significant change in class action practice" since the 1966 amendment of Rule 23, it was unavoidable that it would incite heated controversy.

Combining the absence of a clear contemporary policy for diversity jurisdiction with the enormous controversy about the contemporary class action therefore presents one evaluating the jurisdictional policy of CAFA with a challenge. I propose to approach that topic by looking, first, at whether class action jurisdictional doctrine before CAFA protected important jurisdictional policies, and then considering how class action theory might inform those jurisdictional issues. I then will turn to the unique importance attached to subject matter jurisdiction, and the potential implications of that treatment for the thorny issues that CAFA requires a court to resolve in determining whether it has jurisdiction.

Focusing on the stated objectives of CAFA itself, it seems to me that most concede that there were valid arguments for using diversity jurisdiction in at least some class actions that could not have been in federal court before the Act was adopted, although one can certainly contend that the problems were not as great as urged and that CAFA's solution was overbroad. Accepting that CAFA furthers some legitimate jurisdictional policies, I will then turn to some possible implica-

---

12 John K. Rabiej, The Making of Class Action Rule 23—What Were We Thinking?, 24 Miss. C. L. Rev. 323, 347 (2005). Rabiej goes on to describe the Judicial Conference's instruction in 1991 that the "committee . . . review Rule 23 with a view to amending it to accommodate the demands of asbestos mass-tort litigation." Id.

13 See generally REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES AND THE WORKING GROUP ON MASS TORTS TO THE CHIEF JUSTICE OF THE UNITED STATES AND TO THE JUDICIAL CONFERENCE OF THE UNITED STATES (1999) (compiling a variety of materials on related topics); Working Papers of the Advisory Committee On Civil Rules on Proposed Amendments to Civil Rule 23 (May 1, 1997) (unpublished, on file with the author) (compiling, in four volumes of roughly 800 pages each, commentary on the 1996 preliminary draft of possible amendments to Rule 23).

tions of this use of jurisdiction that have been urged by others: the withering of the *Erie* restraint on substantive lawmaking by federal judges in diversity cases, and the possible relaxation of the *Klaxon* requirement that federal judges follow the choice of law principles of the states in which they sit. Finally, I will caution that even if *Erie* and *Klaxon* are outwardly respected after CAFA, there is a possibility that federal judges in CAFA cases may take what Judge Easterbrook famously called the "central planner" attitude of preferring settlements that offer a national solution for all class members. Whether or not those results could be regarded as flowing from jurisdictional policy, they seem worthy of attention as possible consequences of this change in jurisdiction.

What remains after one moves beyond strident statements, then, is a rather modest reorientation of jurisdictional policy that seems consistent with what might be called the "liberal" orientation of thirty years ago but that is now adopted at the behest of business interests. This is surely not the first time that such ironic turns have occurred in federal procedural legislation, but it suggests that today's preferences may also be transitory. 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, so one 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. That impulse might be furthered by the congressional acknowledgement in CAFA that class actions are a valuable technique for aggregating claims. By the 1980s and 1990s, consternation about the 1966 expansion of class actions shifted markedly as defendants learned how to use class ac-

15 *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002), cert. denied, 537 U.S. 1105 (2003). For a pertinent invocation of this phrase at the outset on a topic I will examine later, see infra text accompanying notes 246-262; see also Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1355 (2006).


tions to accomplish the goals they wanted to achieve.\textsuperscript{18} So also, a quarter century from now, many may look back at CAFA as enabling legislation that furthered the goal of consumer class actions rather than the interests of the business establishment that pressed for its passage.

I. PRE-CAFA JURISDICTIONAL DOCTRINE: SOMETHING WORTH PRESERVING?

Because CAFA changed existing jurisdictional doctrine, it seems useful to start with that doctrine. Although application could be difficult,\textsuperscript{19} the rules were clear enough. But that hardly means that they made sense; probably few would endorse them as an original matter, even though they may have been comfortable because they were familiar until CAFA changed them.

On the complete diversity prong, the Supreme Court's 1921 decision in \textit{Supreme Tribe of Ben-Hur v. Cauble} held that only the citizenship of the named plaintiffs needed to be considered in determining whether the complete diversity requirement was satisfied.\textsuperscript{20} It reached this conclusion by analogizing the class action to a creditors' bill and invoking an 1885 decision in which it held that there was jurisdiction to permit intervention by nondiverse parties after the suit was initiated by diverse parties.\textsuperscript{21} But this form of ancillary jurisdiction seemed to weaken the complete diversity requirement, since one could arrange to have the diverse parties sue first and then add the others later. Similarly, in a class action, a lawyer could initially name only diverse class members and use the class device to broaden the case to include the nondiverse ones.


1960s enthusiasm for using the class action as a method of banding claimants together has given way to 1980s and 1990s uneasiness that use of the device will trammel the rights of plaintiffs and permit defendants to steal a march on plaintiffs' individual control of their litigation destinies. Although the 1966 perspective might have been that a number of "establishment defendants" would blanch at the increased availability of class actions, the perspective a quarter century later is not so one-sided. Some defendants may view class actions as an important tool to deal with widespread liability.

\textsuperscript{19} See infra text accompanying notes 109-110.

\textsuperscript{20} 255 U.S. 356, 365-66 (1921).

\textsuperscript{21} \textit{id.} at 365 (relying on \textit{Stewart v. Dunham}, 115 U.S. 61 (1885)). In \textit{Stewart}, the Court held that once there was jurisdiction as between the original plaintiffs and defendants, "the court, in exercising jurisdiction between the parties, could incidentally decree in favor of all other creditors coming in under the bill." 115 U.S. at 64.
The intervention route was closed by the Supplemental Jurisdiction Act in 1990, but the class action wrinkle was not mentioned in that statute, leading to the Supreme Court's 2005 holding in *Exxon Mobil Corp. v. Allapattah Services, Inc.* that, at least as to amount in controversy (discussed below), supplemental jurisdiction exists for claims of class members that do not satisfy the jurisdictional minimum so long as the proposed class representative can satisfy the jurisdictional minimum. Perhaps having in mind the "potentially gaping hole in the complete diversity requirement" that this reading could create with regard to Rule 20 joinder of additional plaintiffs, the Court was quick to emphasize that the complete diversity requirement was not necessarily eroded by its relaxation of the jurisdictional-amount requirement:

The complete diversity requirement is not mandated by the Constitution or by the plain text of § 1332(a). The Court, nonetheless, has adhered to the complete diversity rule in light of the purpose of the diversity requirement, which is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants. The presence of parties from the same State on both sides of a case dispels this concern, eliminating a principal reason for conferring § 1332 jurisdiction over any of the claims in the action. . . . Incomplete diversity destroys original jurisdiction with respect to all claims, so there is nothing to which supplemental jurisdiction can adhere.

The lower courts have read this admonition as justifying continued adherence to the complete diversity requirement, in Rule 19 and Rule 20 situations, thereby closing the discrepancy about which Justice Ginsburg was concerned.

---

25 See *Exxon*, 545 U.S. at 589 n.8 (Ginsburg, J., dissenting) (discussing the impact of the majority's analysis on *Rosario Ortega v. Star-Kist Foods, Inc.*, the companion case to *Exxon* involving a Rule 20 joinder situation).
26 *Id.* at 553-54 (majority opinion) (internal citations omitted).
27 See, e.g., Merrill Lynch & Co. v. Allegheny Energy, Inc., 500 F.3d 171, 179 (2d Cir. 2007) ("Exxon makes clear that its expansive interpretation of § 1367 does not extend to additional parties whose presence defeats diversity."); General Refractories Co. v. First State Ins. Co., 500 F.3d 306, 312 (3d Cir. 2007) (finding that if a nonparty was "indispensable" under Rule 19(b) but was not diverse, the action should be dismissed); see also DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 351 (2006) (stating that *Exxon*
But what of Rule 23? Under *Ben-Hur*, that rule seems to permit a suit to be in federal court even though there are plaintiff class members—indeed, the vast majority of class members—who have the same citizenship as the defendant. Maybe the answer is that this coincidence of citizenship is less obvious in a class action, although that might not be true in Rule 20 situations with large numbers of plaintiffs. Perhaps a better answer is that, despite the Court’s repeated admonition about its objective, the complete diversity requirement never really served that purpose. The point for our purposes is that the existing treatment of the complete diversity requirement in class actions left a good deal to be desired before *Exxon* and still presented challenges (aside from CAFA) after that decision. Under *Ben-Hur*, of course, the requirement became entirely elective whenever one diverse class member could be the named class representative and another member was nondiverse. It is hard to believe, however, that giving plaintiffs’ lawyers the election in class actions absolutely to control the existence of diversity was the jurisdictional policy embraced in *Ben-Hur*.

Things were not that much better on the amount-in-controversy prong. Before 1966, the rule had not permitted aggregation of class members’ claims unless they were “joint,” which would lead to treating the case as a “true” class action under original Rule 23. Perhaps that classification scheme sometimes posed no problems, but often it did. Certainly the 1966 amendments abandoned it, substituting a func-

allows “a federal court in a diversity action to exercise supplemental jurisdiction over additional *diverse* plaintiffs whose claims failed to meet the amount-in-controversy threshold” (emphasis added)).

28 Recall Judge Henry Friendly’s early criticism of the complete diversity requirement:

[W]ho can say whether a Vermont jury, concentrating attention on the one Vermont defendant, would shut its eyes to the merits of the complainants’ case, or, realizing that its fellow citizen was only one of a crowd, would deal fairly and squarely with all? A theory so little founded on realities could hardly be expected to furnish a satisfactory answer to a new and difficult question.


29 See ZECHARIAH CHAFEE, JR., *SOME PROBLEMS OF EQUITY* 200, 257 (1950) (stating that the author had as much difficulty distinguishing a “common” from a “several” right as in deciding whether some ties were green or blue, and adding that “[t]he situation is so tangled and bewildering that I sometimes wonder whether the world would be any the worse off if the class-suit device had been left buried in the learned obscurity of Calvert on *Parties to Suits in Equity*”).
tional scheme. But even though the Court recognized this change, it held in Snyder v. Harris that the claims of all the class members could not be combined to satisfy the jurisdictional minimum. But even though the Court recognized this change, it held in Snyder v. Harris that the claims of all the class members could not be combined to satisfy the jurisdictional minimum. Soon thereafter it added, in Zahn v. International Paper Co., that pendent or ancillary jurisdiction could not be used to add the claims of class members that were too small even though the class representative satisfied the jurisdictional minimum. Exxon, of course, holds that the Supplemental Jurisdiction Act overturned Zahn, but left Snyder undisturbed.

It could certainly have been different. In dissent in Snyder, Justice Fortas (joined by Justice Douglas) denounced the majority's refusal to give jurisdictional effect to the recasting of Rule 23. Shortly after the decision in Snyder, Professor Kaplan, the Reporter for the Advisory Committee in drafting the 1966 revisions to Rule 23, said that "[t]he net effect of the decision is to disfavor the small fellow and thereby to defeat a main purpose of the Rule revision." In 1976, Professor Goldberg drove home a similar point in criticizing these amount-in-controversy decisions:

If there is an established federal interest in hearing all "substantial" controversies between citizens of different states and leaving more minor disputes to state courts, then a procedural change enlarging the res judicata effect of a class action may increase the substantialness of the lawsuit and hence the federal interest in entertaining it.

---

30 See Snyder v. Harris, 394 U.S. 332, 335 (1969) (recognizing that "[t]he 1966 amendment to Rule 23 replaced the old categories with a functional approach to class actions").

31 Id. at 338.


33 See 394 U.S. at 348 (Fortas, J., dissenting) ("There is certainly no reason the specific application of this body of federal decisional law to class actions should be immune from reevaluation after a fundamental change in the structure of federal class actions has made its continuing application wholly anomalous."); see also Redish, supra note 3, at 1808 (arguing that the majority's conclusions in Snyder that the pre-1966 rules were not difficult to apply and that the change in the rules was insufficient to warrant a change in jurisdictional doctrine were "simply wrong").

There was certainly a counterargument to this position, based in part on Rule 82 and also on the limits of the rulemakers' power to affect jurisdiction by rule provision. For arguments on why those limitations do not affect the relevance of the 1966 amendments to the question presented in Snyder, see id. at 1809, which asserts that "[t]he Court's reasoning in Snyder effectively shields the judicial decision not to alter purely judge-made aggregation rules behind a wall of legislative inertia."


Moreover, as also is emphasized in the contemporary academic literature, the treatment of the amount-in-controversy requirement in class actions seemed incompatible with the treatment of the complete diversity requirement. Snyder and Zahn could be (and were) viewed as symptoms of a more general souring in the 1970s of the federal courts' attitudes toward class action practice under amended Rule 23.

At that time, the prevailing academic view was that federal courts were more attractive to plaintiffs, as epitomized by Professor Neuborne's seminal 1977 article on the myth of parity between federal and state courts. Since then, we have become more cautious about this notion. Professor Purcell's thorough work has taught us that, from the mid-nineteenth century until the mid-twentieth century, plaintiffs usually feared and avoided federal courts, while corporate defendants preferred them, and more recently, defendants have come to prefer federal courts for class actions in particular. Others have concluded that parity is impossible to measure.

Whatever the academic view, the practicing plaintiffs' bar's attitude is clear. Consider the vigorous antipathy toward federal court jurisdiction recently displayed in Trial magazine:

36 See David P. Currie, Pendent Parties, 45 U. CHI. L. REV. 753, 762-63 (1978) (noting that "[i]t is when interests are several that an out-of-state party is most likely to need the jurisdiction provided by Ben-Hur to protect him from bias in the local court; when interests are joint, a biased tribunal may be unable to injure the outsider without harming a local coparty as well").


38 Burt Neuborne, The Myth of Parity, 90 HARV. L. REV. 1105, 1106 (1977) (criticizing the view of "parity" between federal and state courts, under which state courts could be trusted to provide sufficient protection for federal rights).

39 See PURCELL, supra note 9, ch. 2 (detailing the various ways in which corporate defendants benefited from having cases in federal court). It is worth noting that most of those advantages seem inapplicable in modern class actions affected by CAFA. The inconvenient location of federal courts in large cities, for example, is unlikely to deter modern class action plaintiffs' lawyers.

40 See Morrison, supra note 8, at 1526 ("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." (footnote omitted)).

41 See Erwin Chemerinsky, Parity Reconsidered: Defining a Role for the Federal Judiciary, 36 UCLA L. REV. 233, 255-56 (1988) (emphasizing that questions of parity or inequality between the federal and state courts depend on empirical judgments for which there is no empirical measure); see also Martin H. Redish, Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights, 36 UCLA L. REV. 329, 330-31 (1988) (arguing that institutional factors such as caseload, support staff, and lifetime appointments mean that the federal courts are preferable).
Plaintiff attorneys’ preference for state courts is undisputed and understandable. Reasons for avoiding federal court range from the mundane (greater familiarity with state procedure) to the strategic (greater likelihood of securing justice for clients).

In most cases, local judges are elected by the very people whose disputes they will hear, motivating speedy and fair adjudication. Federal judges are appointed for life, and their courts are clogged with criminal cases. The so-called war on drugs has so overburdened the federal judiciary that getting a civil case tried at all in many federal courts is nearly impossible.

To reduce their burgeoning dockets, federal courts have increasingly engaged in stringent control of discovery, aggressive encouragement of settlement, and more frequent granting of summary judgment. As a result, litigation in federal court is more expensive and time-consuming. . . . Finally, but significantly, lawsuits in federal court are increasingly being consolidated into multidistrict, pretrial litigation proceedings, where they often languish for years. 42

As within the bar, academic winds have shifted somewhat, and opposition to CAFA partly reflects the shift toward recognition of the enduring reality of attitudes like those portrayed by Professor Purcell. All of this bears on the controversy attending CAFA: guarding the ability of plaintiffs’ lawyers to avoid federal court has achieved salience that would probably have surprised academics analyzing these problems in the 1970s.

The point is that Snyder could easily have turned out differently, with obvious implications for Zahn. Consider how different things would have been for the issues raised by CAFA had that occurred: The jurisdictional minimum would not have posed a significant obstacle to federal court jurisdiction for most state law class actions for money, and under Ben-Hur, plaintiffs’ lawyers would have had almost complete discretion to decide whether their cases should qualify for federal jurisdiction by choosing the class representative carefully. The whole notion that consumer class actions were somehow "reserved" for state court determination would have been much more difficult to maintain. But the clash in treatment of the diversity and jurisdic-


An additional factor prompting many plaintiffs’ lawyers to prefer state court is the federal courts’ "gatekeeper" function under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). For example, another article in Trial magazine says that Daubert "has had a devastating effect on civil plaintiffs," and "has made trying cases in federal court a riskier . . . enterprise than at any time in the last 50 years." Ned Miltenberg, Out of the Fire and into the Fryeing Pan or Back to the Future, TRIAL, March 2001, at 18, 19-20.
tional-amount issues seems too much to ignore. In sum, there is little to favor the pre-CAFA jurisdictional treatment of class actions except that it was already there.

II. INVOKING CLASS ACTION THEORY

A generation ago, Professor Chayes remarked that he found it "unlikely that the class action will ever be taught to behave in accordance with the precepts of the traditional model of adjudication." A few years later, he suggested that the class can "be seen as a single jural entity capable of suing and being sued, not unlike the more familiar organizational litigants—corporations, unions, [and] government departments." Perhaps the handling of jurisdictional issues would work better with a comprehensive theory of the class action. At least two efforts have emerged since Professor Chayes wrote.

A decade ago, Professor Shapiro followed up Professor Chayes's lead and argued that the class should be regarded as the party. Professor Shapiro saw a choice between an "aggregation" model and an "entity" model. He also likened the entity model to "a whole range of voluntary private associations—congregations, trade unions, joint stock companies, corporations"—noting, however, that not all "voluntary associations" are entirely voluntary. Even in the mass tort situation, then, he argued that the entity approach would be preferable. He pursued the analysis through a variety of issues, such as the attorney-client relationship, and urged that class members should be given a method for influencing the handling of the case. Although Pro-

45 See David L. Shapiro, Class Actions: The Class as Party and Client, 73 NOTRE DAME L. REV. 913, 919 (1998) (advocating the "entity" view of the class action in which the class, rather than any particular individual, is the lawyer's client). Professor Shapiro noted the parallels between his views and Professor Chayes's work. Id. at 918 n.7.
47 Shapiro, supra note 45, at 921 (citing trade unions, congregations, and municipal governmental entities as "voluntary" organizations in which members may have limited say in their litigation activities).
48 Id. at 927-34.
49 See id. at 939 (arguing that "if the class is seen as the litigating entity, then it should be regarded not only as the party plaintiff but as the client"). On this score, consider FED. R. CIV. P. 23(g)(4), which directs that "[c]lass counsel must fairly and adequately represent the interests of the class."
Professor Shapiro's analysis was not focused on jurisdictional issues, it may offer a way of approaching them.

Such an approach could begin with the history of the class action. The distant background for the modern class action, as Professor Yeazell tells us, was the medieval group action, which was brought on behalf of a group that actually existed in society, somewhat like the organizational litigants mentioned by Professor Shapiro.® Although the "true" class actions of original Rule 23 may have slightly echoed this concept, the functional 1966 rewriting of the rule does not readily lend itself to a theory of the class as some sort of independent entity. This does not mean, however, that a class recognized by a court might not become a functioning social entity as well, perhaps even permitting precisely the sorts of control that Professor Shapiro favored for the class action.51 Consider, for example, the following description of a group of neighbors who banded together in nonclass litigation to make claims for exposure to toxic waste dumped near their homes:

Despite their lack of common ailments or history, they still had to devise a way to speak with one voice. So they wrote a full constitution, complete with checks and balances. The charter is divided into six articles—only one fewer than the U.S. Constitution. Article II delimits the powers of the Steering Committee and enumerates the duties of the Business, Property, Health and Guardian ad Litem subcommittees. There are definitions of a quorum, methods for the conduct of business, and bylaws regarding the election of officers. Article VI details the proceedings for impeachment.52

50 See Stephen C. Yeazell, From Medieval Group Litigation to the Modern Class Action ch. 2 & 3 (1987) (describing the medieval origins of suits on behalf, for example, of the residents of a given village).

51 For his discussion of the topic, see Shapiro, supra note 45, at 940:

This approach does not imply that class members should be deprived of a significant role in litigation brought on behalf of the class. Even if the class is the relevant litigating entity, it is not one that can act, think, or communicate on its own. In the case of a trade union or corporation, there are preexisting individuals who have been authorized to speak for the entity and who normally would be the ones to work with counsel. In the case of a class that is, in effect, created for purposes of a particular litigation, there is likely to be no preexisting structure, and methods should be devised for creating that structure and endowing it with the widest representation consistent with efficient case management.

One can surely challenge Professor Shapiro's ideas by stressing the reality that class actions are usually constructs approved (indeed, created) by the court's certification order. Certainly the Rule 23(b)(3) common-question class action does not intrinsically have many characteristics that correspond to existing social institutions. Yet the recent amendment to Rule 23, providing that class counsel owes a primary duty to the class as a whole, is consistent with this notion of the class as a discrete interest. Consider the relevance of this approach to jurisdictional questions; certainly the entity theory would lead to a different result in Snyder, for it is difficult to doubt that the claims of the entire entity are before the court. A corporation's claim or a labor union's claim would also be treated in this manner.

But could Ben-Hur survive this analysis? In regard to partnerships, labor unions, and even limited partnerships, the Court has held that the citizenship of each member of these voluntary associations must be considered in determining whether complete diversity exists. The entity theory, then, seems to preclude diversity jurisdiction whenever there is a single nondiverse class member. But, as Professors Wright and Kane note, the class action rule "would be totally unworkable in a diversity case if the citizenship of all members of the class, many of them unknown, had to be considered." The only analogy that is consistent with the treatment accorded to class actions in Ben-Hur is the handling of the corporation. This treatment, of course, flows directly from the diversity statute. Given

describes her experiences meeting with class members to discuss and work through differences.

53 See FED. R. CIV. P. 23(g)(4) (requiring that class counsel "fairly and adequately represent the interests of the class").

54 See, e.g., Chapman v. Barney, 129 U.S. 677, 682 (1889) (holding that citizenship of "mere partnership" must be determined by the citizenship of its members).

55 See United Steelworkers of Am. v. R.H. Bouligny, Inc., 382 U.S. 145, 152-53 (1965) (holding that an unincorporated labor union is not a citizen for purposes of diversity jurisdiction).

56 See Carden v. Arkoma Assocs., 494 U.S. 185, 196-97 (1990) (holding that a limited partnership is not a citizen of its home state for purposes of diversity jurisdiction).

57 WRIGHT & KANE, supra note 1, at 524 (footnote omitted). As discussed below, however, a similar sort of analysis may be necessary to apply the exceptions to CAFA jurisdiction for cases in which a set percentage of class members are local. See infra text accompanying notes 87-108 (providing examples of suits that illustrate the difficulty of applying CAFA's exceptions, which depend on showing that percentages of class members are citizens of the forum state).

58 See 28 U.S.C. § 1332(c)(1) (2000) (providing that, for purposes of diversity, "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business").
the customary argument for diversity jurisdiction (protecting outsiders against prejudice), Professor Burbank notes that CAFA "shines a spotlight on the manifest absurdity of continuing to treat a corporation engaged in national commerce (and likely to have a national or international shareholder base) as if it were an outsider in forty-eight out of fifty states." Indeed, a corporation might even contrive to incorporate or locate its headquarters in a given state in order to affect its access to federal court under that statute.

_Ben-Hur_, without even the benefit of a statute, permits this litigative "entity" to obtain or avoid access to federal court based entirely on the counsel's choice as to which class member is named the class representative. Even if only one class member shared citizenship with the defendant, then counsel could preclude federal court jurisdiction by naming that class member as the representative. Similarly, if only one class member were diverse, counsel desiring access to federal court could ensure diversity by naming only that class member as the representative. Even corporations cannot readily make their choices about where to incorporate or locate their principal places of business entirely to permit or prevent access to federal court for specific cases. An entity theory would seem to invite the courts to develop some constraint on counsel to preclude this sort of activity. At a minimum, the entity theory appears to confine federal court jurisdiction for class actions very strictly.

59 Burbank, _supra_ note 8, at 1941-42. For further development of this point, see Burbank, _supra_ note 17, at 1465, who examines the treatment of corporations for purposes of diversity and claims that it was a "blunder[]" in 1844 that first gave them access to federal court on this ground.

60 _But see_ Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 522-23 (1928) (describing a situation in which a corporation did reincorporate in another state to create diversity and thereby make a contract enforceable under the "general" common law available in federal court, even though it was illegal under state law).

61 As a practical matter, however, such a theory might be only partially effective exactly because the class is "assembled" solely for purposes of litigation. Sometimes there may be an argument that a class definition is underinclusive, but often plaintiffs' counsel can simply leave out those potential class members whose involvement would prove inconvenient, such as the nondiverse ones.

62 Of course, one could try to solve this problem by defining a class to exclude citizens of the states of which defendant was a citizen. But that sort of misshapen class underscores the artificiality of this contrivance to obtain federal court jurisdiction, and might even be difficult to justify at the class certification stage. Certainly, one could not meaningfully defend an entity view of the class at the same time as one excluded those who would seem clearly to be part of the entity.
If Professor Shapiro’s approach would unduly constrict federal jurisdiction in class actions, the other major effort at class action theory—largely focused on jurisdictional issues—might unduly empower plaintiffs’ counsel to control it. A quarter century ago, then-Professor Hutchinson analyzed the Supreme Court’s failure to choose between a “joinder” and a “representational” characterization for class actions. See Diane Wood Hutchinson, Class Actions: Joinder or Representational Device?, 1983 SUP. CT. REV. 459, 459 (lamenting that “the Court has shown no awareness of the choices it has been making”).

The joinder model, she explained, “focus[es] on each individual member of the class.” Id. at 482. The representation model, on the other hand, focuses only on the named representative before the court. Id. at 497.

Drawing in part on the analogy of unions that represent their members, Professor Hutchinson urged that Rule 23 and the ability of class members to challenge adequacy of representation in collateral litigation “legitimize representation [as the model] for the modern class action.” Id. at 499. Invoking also the history of the class action, she concluded, by contrast, that “[a] serious adoption of the joinder approach would take the Court back even further than the original Rule 23.”

The net effect of Professor Hutchinson’s analysis would be that plaintiffs’ counsel could control whether the diversity prong was satisfied and that, given the current $75,000 jurisdictional minimum, they would very frequently be able to ensure that it was not. But they could not so regularly ensure that the jurisdictional minimum would be satisfied, since often the sorts of claims asserted in consumer class actions could not conceivably warrant such an individual recovery. Put differently, in her view things should be exactly as they would have been after the Exxon decision had CAFA not been enacted.

See Hutchinson, supra note 63, at 504 (“The history of the class action, in the end, provides significantly greater support for the representation model than the alternative, even though the nature of the action has changed dramatically over time.”).
In sum, at least these two major theoretical efforts to refine a concept of the class action do not seem to solve the jurisdictional problem that CAFA addressed. If so, that means that neither existing doctrine nor theoretical possibilities necessarily are preferable to the CAFA approach. Whether Congress had some theory of class actions in mind when it passed CAFA is unclear. It seems that Congress regarded the class action largely as a device used by lawyers to magnify the importance of their suits. That attitude is consistent with one that the Supreme Court has sometimes adopted regarding class actions, although it seems a stretch to say that the Court has articulated an overarching theory.

III. THE POLICY RAMIFICATIONS OF THE UNIQUENESS OF JURISDICTIONAL QUESTIONS

Before turning to CAFA's jurisdictional policy, it is useful to pause to consider some additional factors that should bear on jurisdictional policy. Such an analysis raises questions about CAFA's jurisdictional reality.

As all are aware, subject matter jurisdiction enjoys a special status: it cannot be waived and can be raised at any time. As I tell my students, it is a time bomb in the plaintiffs' suit. One can challenge the idea that jurisdiction is somehow different and even support that challenge with some Supreme Court precedent.

Thus, in *Eisen v. Carlisle & Jacquelin*, the Court said that "the plaintiff must pay for the cost of notice [to the class] as part of the ordinary burden of financing his own suit." 417 U.S. 156, 179 (1974). Since it will be the lawyer, not the class representative, who pays this cost, the thrust of this statement seems to be to regard the class action as counsel's device. Somewhat similarly, in *Deposit Guaranty National Bank v. Roper*, the Court said that "the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims." 445 U.S. 326, 332 (1980).

See, e.g., FED. R. CIV. P. 12(h)(3) (directing the court to dismiss the case if at any time it determines that it lacks subject matter jurisdiction).

See Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 HASTINGS L.J. 1613, 1615-27 (2003) (arguing that there is no qualitative difference between "jurisdictional" questions and "merits" questions); see also Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 656-62 (2005) (discussing courts' practice of erroneously treating factual elements of a plaintiff's claim as jurisdictional in nature); cf. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510, 516 (2006) (noting that the Court "has sometimes been profligate" in using the term "jurisdiction" and holding that the need to prove that the defendant employed fifteen employees in order to maintain a suit under Title VII was not "jurisdictional").

Thus, although the Court has said that "jurisdictional" issues must be resolved first, see *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998), it has also said that "there is no unyielding jurisdictional hierarchy," and that personal jurisdic-
nonetheless, committed to this absolutist attitude about the perils of failing to satisfy jurisdictional requirements.\textsuperscript{73}

Given the fatal consequences of being wrong about jurisdiction, clear and easily applied rules should be an important objective of jurisdictional policy. Measured by this standard, CAFA bristles with difficulties. Consider that a "class action" is removable under CAFA only when at least two basic requirements are satisfied:

(1) There are at least 100 class members.\textsuperscript{74} In many instances that is easy to determine, but with some frequency it is not. It certainly has happened in the past that classes turn out to consist of far fewer people than was initially supposed.\textsuperscript{75} Moreover, the statute refers to "proposed plaintiff classes,"\textsuperscript{76} which may mean that a defendant (if plaintiff has filed in state court) must decipher the plaintiffs' class definition before it can even begin to determine how large the class is.

(2) The "matter in controversy" exceeds $5 million.\textsuperscript{77} Satisfying this provision may be easy in a number of instances, but given the room for debate about how large the class is, and about the dimensions of individual claims, there will be cases in which it will be uncertain whether this requirement is satisfied.

Further, the grounds for remanding or declining jurisdiction then offer multiple additional uncertainties:

\textsuperscript{73} See, e.g., Bowles v. Russell, 127 S. Ct. 2360, 2367 (2007) (holding that the appeal of a habeas corpus petitioner had to be dismissed for lack of jurisdiction because the notice of appeal was filed late, even though the district judge had made a mistake about when the notice was due and the petitioner had filed it before the date specified by the district judge). Justice Souter denounced the majority's decision as a "bait and switch," \textit{id. at} 2367 (Souter, J., dissenting), and the decision was harshly criticized in the press. \textit{See, e.g., Editorial, Don't Listen to What the Man Says, N.Y. TIMES, June 17, 2007, § 4, at 11 (attacking the decision as "wrong and mean-spirited").}


\textsuperscript{75} Admittedly there may be a limited risk of later dismissal due to an incorrect determination at the outset that the class has at least 100 members. Indeed, it could be that the ultimate class is defined much differently than the one originally proposed. But the existence of these variables underscores the possibility of active litigation about the scope of CAFA jurisdiction.

\textsuperscript{76} 28 U.S.C. § 1332(d)(3).

\textsuperscript{77} \textit{Id.} § 1332(d)(2).
(1) The class may be subject to a required remand if more than two-thirds of the class members are citizens of the state in which the case was filed. For both the plaintiffs and the defendants, this determination may be extremely difficult. Given the difficulties that often attend working up a list of class members to give them notice of class certification, making this calculation at the beginning of a case will be at least as difficult. The determination may also include figuring out whether fewer than one-third of the class members are citizens of the forum state because that bears on whether the court may decline to exercise jurisdiction.

(2) It may be critical whether all the "primary defendants" are citizens of the state in which the suit was filed. Making this determination may require the court to scrutinize the grounds for liability (without making a "merits" determination) in terms of CAFA's criteria.

(3) Alternatively, it may be critical to determine whether, if one of the defendants is a citizen of the state in which the suit was filed, that defendant is one "from whom significant relief is sought" and "whose alleged conduct forms a significant basis for the claims asserted." If these criteria are satisfied, it must also be shown that "principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred" in the forum, in which case a remand will be ordered.

(4) Finally and additionally, one must determine whether, during the three years before this case was filed, any other class action against any of the defendants was filed "asserting the same or similar factual allegations against any of the defendants."

On its face, this gauntlet is extremely difficult to satisfy, but for our purposes the key point is that there could be considerable debate or uncertainty about whether any of these criteria have been satisfied.

CAFA thus presents the parties (and the courts) with a series of difficult determinations to be made under the jurisdictional sword of Damocles. Arguably, a good deal of discovery would be necessary to
apply these provisions. Although the legislative history sought to stave off this result, defense lawyers promptly saw the possibility.

At least some decisions show that these difficulties are real. For example, in one case, the Eleventh Circuit was presented with a claim of toxic contamination of property in Anniston, Alabama over an eighty-five-year period. The claim was brought on behalf of a class consisting of property owners or lessees of the allegedly contaminated property and people who suffered personal injury from coming in contact with the deposited waste substances on this property. After removal, plaintiffs sought remand, relying on the affidavit of their attorney, which asserted that she had reviewed or interviewed over 10,000 potential plaintiffs, determined that some 5200 were members of the class, and that 93.8% of those 5200 were Alabama citizens. Reversing a district court order remanding the case, the appellate court found this evidence insufficient to show that more than two-thirds of the class members were Alabama citizens. It emphasized that plaintiffs' counsel did not explain how she selected the 10,000 people she considered, and that the class defined in the complaint was "ex-


The Committee understands that in assessing the various criteria established in all these new jurisdictional provisions, a federal court may have to engage in some fact-finding, not unlike what is necessitated by the existing jurisdictional statutes. . . . However, the Committee cautions that these jurisdictional determinations should be made largely on the basis of readily available information. Allowing substantial, burdensome discovery on jurisdictional issues would be contrary to the intent of these provisions to encourage the exercise of federal jurisdiction over class actions.

For a discussion of this impact, see William Sullivan & James Fazio III, Changing the Game: Jurisdiction Maneuvering and Early Settlements Likely Results of Class Action Fairness Act, RECORDER (S.F.), June 8, 2005, available at GALE GENERAL ONEFILE, Doc. No. A13313222:

These determinations would appear to require significant discovery from defendants early in the litigation. If defendants are forced to reveal considerable information about the size and location of plaintiff-customers and the injuries they have sustained, that would seem to encourage early settlement because it would give plaintiffs' counsel more information about their claims and potential damages earlier than they might otherwise obtain it.

See also Eron Ben-Yehuda, Class-Action Law Could Spark Growth of Jurisdiction Experts, S.F. DAILY J., Aug. 26, 2005, at 1 (suggesting that there might be a need for expert testimony on whether two-thirds of the class members are citizens of one state).

Evans v. Walter Indus., Inc., 449 F.3d 1159, 1161 (11th Cir. 2006).

Id. at 1166.
tremely broad, extending over an 85-year period." As a result, the court had "no way of knowing what percentage of the plaintiff class are Alabama citizens."

Contrast that example with a suit brought on behalf of a class of patients in a New Orleans hospital and their next of kin, alleging that the hospital failed to have proper emergency procedures at the time that Hurricane Katrina struck the city. A list of the 256 patients in the hospital at the time of the hurricane showed that only 2.83% indicated an out-of-state address, and that of the thirty-five patients who died, all but two had Louisiana addresses. The district court granted a remand motion, and the appellate court affirmed, relying on CAFA’s provision permitting discretionary remand when over one-third of the class members are citizens of the forum and other circumstances showed a strong local interest. Nonetheless, the diaspora of New Orleans residents in the wake of the hurricane raised questions about whether even one-third of the class members should still be considered Louisiana citizens. A defendant who opposed remand hired a private investigator to trace the current mailing addresses of known class members, and the investigator’s information showed that many then resided outside Louisiana. The remand proponents submitted statements from eight potential class members then residing outside Louisiana who affirmed their intention to return to New Orleans when able to do so. Another argument against remand was that the precise size of the class had not been decided, making the one-third calculation impossible. Stressing that the defined class "clearly involves a finite group of persons," the appellate court affirmed remand because "the submitted evidence provides an adequate

89 Id.
90 Id.
91 Preston v. Tenet Healthsystem Mem’l Med. Ctr., Inc., 485 F.3d 804, 808 (5th Cir. 2007).
92 Id. at 815.
93 Id. at 808-09.
94 Id. at 823-24.
95 Id. at 815.
96 One defendant joined in the remand motion, and plaintiffs eventually dropped their support for the motion.
97 Preston, 485 F.3d at 817.
98 Id. at 820 ("Arguably, without knowing the number of persons in the class, the court cannot determine whether one-third of the class members are citizens of Louisiana.").
99 Id. at 821.
basis for the district court to make a credible estimate of the class members domiciled in Louisiana,"^{100} which excused "exhaustive discovery capable of determining the exact class size to an empirical certainty."^{101} It therefore distinguished the Eleventh Circuit's decision in the toxic contamination case, but suggested that in a comparable case it might reach a similar conclusion.^{102}

The same Fifth Circuit panel confirmed this suggestion in reversing the remand of a companion Katrina case on behalf of patients in another New Orleans medical facility.^{103} "Despite the undeniably local character of this class action lawsuit," this remand was not based on the discretionary local controversy provision of CAFA, and the plaintiffs had to show that two-thirds of the class members were Louisiana residents.^{104} A critical difference was that the case discussed above—in which remand was justified—was filed about a month after the hurricane, while this case was filed nearly a year after the events in question. As in the first case, the medical records indicated that the great majority of the patients had Louisiana addresses.^{105} But the court concluded that it could not presume, without more, that these Louisiana residents were also Louisiana citizens, since that depends on domicile, which in turn depends on the intention to remain in the state. The court refused to conclude that "the medical records serve as a proxy for domicile."^{106} At least by the time this case was filed, the court held, the pre-Katrina addresses in the medical records failed to satisfy the

---

^{100} Id. at 820.
^{101} Id. at 821.
^{102} The court stated, id.:

We would probably invoke a different analysis if, for example, the class definition included persons trapped in the Ninth Ward in the hours and days following Hurricane Katrina and the levee breach. Under this hypothetical, the ability to quantify such a class, much less parse renters from property owners and other relevant complications, would require more evidence than before the court in this appeal. Here, we know the number of patients. We also know the patients' names, emergency contact information for the deceased patients, and the discrete time period of the episodic event giving rise to the litigation. Moreover, we are not dealing with a class of patients receiving medical care from a national hospital that regularly services out-of-state patients. Memorial Medical Center is a local health care facility primarily servicing the local citizens of New Orleans, as evinced by the local addresses and phone numbers found in the medical records.

^{103} Id. at 803-04.
^{104} Id. at 800.
^{105} See id. at 798 (reporting that of 299 patients, 242 listed Louisiana addresses).
^{106} Id. at 799.
plaintiffs' burden of showing that two-thirds of the class members were domiciled in Louisiana when the suit was filed.\textsuperscript{107} "Despite the logistical challenges of offering reliable evidence at this preliminary jurisdictional stage, CAFA does not permit the courts to make a citizenship determination based on a record bare of any evidence showing class members' intent to be domiciled in Louisiana."\textsuperscript{108}

As should be evident, these issues can be challenging to unravel. But before condemning the statute on that ground, one ought to consider some competing factors. First, the jurisdictional determinations that must be made are not entirely different from those that were required previously. Before Exxon, courts deciding whether there was jurisdiction over the claims of unnamed class members under Zahn had to determine whether the claim of each class member satisfied the jurisdictional minimum. That determination could require a court either to gather considerable information about those class members' claims or indulge in assumptions that might seem unwarranted given the critical importance of jurisdiction. It would also have to make this determination about class members' claims without what might be called "first move" information about what plaintiffs seek that is available when an individual plaintiff asserts a claim for relief.\textsuperscript{109} The prevailing analysis, then, is to ask whether a claim for more than the jurisdictional minimum is made in good faith,\textsuperscript{110} and that becomes a good deal more difficult when no such claim has been made. For unnamed class members, ordinarily no such individual claim is made, so the court must first hypothesize what it might be. Often that would be more difficult than determining whether the aggregate claims of the class could total more than $5 million.

Second, the courts have assigned the burdens of proof under CAFA in ways that may minimize these difficulties. Thus, it is normally held that the defendant seeking the removal must demonstrate that the numerosity and amount-in-controversy requirements are satis-

\textsuperscript{107} Id. at 802.

\textsuperscript{108} Id. For more Katrina illustrations, see generally Martin v. Lafon Nursing Facility of the Holy Family, Inc., 244 F.R.D. 348 (E.D. La. 2007), and Martin v. Lafon Nursing Facility of the Holy Family, Inc., 244 F.R.D. 352 (E.D. La. 2007), which both deal with whether the Louisiana healthcare provider privilege law precluded the discovery that the plaintiffs sought in order to address the question of remand.

\textsuperscript{109} Obviously this information is regularly harder to get in individual cases when the plaintiff sues in state court.

fied, and plaintiffs trying to invoke statutory exceptions in order to obtain remand to state court must prove that they apply. Although the courts may be enforcing those burdens so vigorously that they erode the value of the right to remove or obtain a remand, the burdens simplify the process.

Third, although these criteria for exemption from CAFA are difficult to apply, it is not clear that other criteria would be easier. Given the understandable effort in Congress to minimize the exemptions to the new jurisdiction, it may well be that any criteria would have presented difficulties of application. An entirely different arrangement might have solved these problems. Alan Morrison, for example, urged that the decision whether to permit removal be vested in a body like the Judicial Panel on Multidistrict Litigation, thus avoiding the need to have district judges make the sort of close calls that CAFA requires. Although this proposal to rely on a panel was in keeping with an earlier ALI proposal, it would introduce a new wrinkle in removal that could delay and complicate that process.

IV. THE TWO PRONGS OF CAFA’S JURISDICTIONAL POLICY

CAFA was justified on the basis of essentially two jurisdictional policies: it provided that federal class action procedures would be available for handling many state law class action cases, and it ensured

---

111 See, e.g., Lowdermilk v. U.S. Bank Nat’l Ass’n, 479 F.3d 994, 996, 1004 (9th Cir. 2007) (holding that when the plaintiff class’s prayer is for “in total, less than five million dollars,” defendant must show that actually more is at issue if it desires to remove the case to federal court (internal quotation marks omitted)); Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 678 (9th Cir. 2006) (holding that CAFA does not change the requirement that a removing defendant must show that jurisdiction has been established).

112 See, e.g., Preston, 485 F.3d at 813 (requiring plaintiffs to prove the applicability of the “local controversy” and “home state” exceptions); Serrano v. 180 Connect, Inc., 478 F.3d 1018, 1021-24 (9th Cir. 2007) (concluding that “the party seeking remand” bears the burden of proving an exception to CAFA’s jurisdiction); Hart v. FedEx Ground Package Sys., Inc., 457 F.3d 675, 679-82 (7th Cir. 2006) (finding that placing the burden of proving the applicability of one of the exceptions on the plaintiff is consistent with the statutory language, legislative history, and stated purpose of the statute).

113 See supra notes 91-108 and accompanying text (discussing the class action cases arising out of Hurricane Katrina).

114 See infra notes 200-201 and accompanying text (discussing the reasons for a congressional preference for limiting the opportunities for plaintiffs’ lawyers to avoid federal court).

115 Morrison, supra note 8, at 1523.

116 See ALI, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS § 3.02 (1994) (urging the creation of a Complex Litigation Panel to determine when cases should be shifted to a common forum).
a federal forum for cases of national significance. It seems that each of these purposes is unobjectionable on its face, although one could readily argue about matters of calibration, making questions of overbreadth relevant here.

Before turning to these policy justifications, however, it is worth noting that some of the objections to the legislation themselves seem overblown. Thus, although there were assertions that all or almost all state court class actions would end up in federal court under CAFA, at least in some states that certainly has not been the case. Objections that CAFA is pro-defendant may also be overtaken by future events. As the academic flip-flop on the desirability of litigating in federal court between the 1970s and the present illustrates, current preferences may change. Indeed, one could even make an argument that in the long run CAFA will inure to the benefit of consumer plaintiffs. Certainly the legislation includes a stated endorsement for class actions on behalf of consumers; by making federal court jurisdiction more readily available for such suits, it may enable litigation of exactly the sort that defense interests would not welcome. Moreover, should it also produce a shift away from either Erie or Klaxon, CAFA would become a more potent instrument for such suits. Thus, although some supporters of the legislation regard it as a step toward curtailing private enforcement of public law, the statute could boomerang against them.

---

117 In California, for example, preliminary data on state court class action filings do show a decline in the number of class actions filed in 2005 compared to the number filed in 2004, but the number filed in 2005 was nonetheless higher than the number filed in 2003, which in turn was higher than the number filed in 2002. Put differently, the number filed in 2005 was approximately fifty percent higher than the number filed in 2002. See Fed. Judicial Ctr., Progress Report to the Advisory Committee on Civil Rules on the Impact of CAFA on the Federal Courts 3-5 & fig.1 (2007), available at http://www.fjc.gov/public/pdf.nsf/lookup/cafa1107.pdf/$file/cafa1107.pdf.

118 Supra notes 38-40 and accompanying text.

119 Thus, the first congressional finding supporting CAFA endorses such suits. See CAFA § 2(a)(1), 28 U.S.C. § 1711 note (Supp. V 2005) ("Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.").

120 See infra Part V (discussing the possibility of a slippery slope away from Erie and Klaxon and toward the development of substantively uniform law by the federal judiciary).

121 See, e.g., John H. Beisner et al., Class Action "Cops": Public Servants or Private Entrepreneurs?, 57 Stan. L. Rev. 1441, 1451-62 (2005) (attacking the entire idea of "private attorneys general" enforcing the law via class actions).
A. Preferring and Protecting Federal Class Action Procedures

Federal procedure no longer follows state court procedure. By definition, where the two diverge, the federal version is preferred by the federal courts on grounds of superiority, and the Supreme Court has endorsed that preference. So long as rules of federal procedure are "arguably procedural," the federal courts must apply them. Although the notion that the federal rules are better ought not prompt courts to apply them to override "substantive" state law, it is certainly legitimate for Congress to treat federal procedures as preferable in making decisions about the calibration of federal court jurisdiction. In addition, the structural and operating characteristics of federal courts might legitimately be considered in making decisions about jurisdictional allocation. Thus, without taking the view that it is a violation of due process to subject parties to the decisions of elected judges, one might sensibly resist the preference of plaintiffs' lawyers for "local judges [who] are elected by the very people whose disputes they will hear," particularly if one were concerned about the litigation fate of a nonlocal corporate party. Similarly, since Congress has long been on record as favoring case management by federal courts,

Some relatively fervent opponents of CAFA nonetheless seem to appreciate the possibility that federal court class actions could advance the consumer cause. See David Marcus, Erie, the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction, 48 WM. & MARY L. REV. 1247, 1287 (2007) (noting that "[t]he empowerment of the multistate class action in federal court in the 1980s meant that underlying state law had more regulatory bite").

See Hanna v. Plumer, 380 U.S. 460, 463 n.1, 474 (1965) (explaining that the method of service of process in Federal Rule of Civil Procedure 4 is "less cumbersome" than the competing state method and must be followed by the federal court).

This, at least, is the way in which one Justice read the majority's opinion. Id. at 476 (Harlan, J., concurring).

See Martin H. Redish & Lawrence C. Marshall, Adjudicatory Independence and the Values of Procedural Due Process, 95 YALE L.J. 455, 504 (1986) ("[D]ue process is inadequately protected when an individual must depend on an adjudicator who lacks salary and tenure protection . . . to protect an entitlement to a life, liberty, or property interest.").

Walker, supra note 42, at 22; see also supra text accompanying note 42 (quoting Walker to differentiate the attitudes of elected local judges—who are under pressure to provide "fair and quick adjudication"—from those of overburdened, life-appointed federal judges—who may be more likely to limit discovery or grant summary judgment).

See Civil Justice Reform Act of 1990 §§ 102, 471, 28 U.S.C. § 471 & note (2000). This act directed all federal district courts to adopt programs to improve their handling of civil litigation, in large measure by using case management. The legislative history invoked the "benefits of enhanced case management," which it took to mean...
it should not be surprising that Congress might regard it as important to adopt jurisdictional rules that bring cases before courts that employ such methods. This is particularly true in light of the good indications that plaintiffs' lawyers shun federal court to avoid such constraint.\footnote{27}

A different procedural consideration in favor of CAFA's expansion of federal court jurisdiction is the problem of overlapping class actions. Whether or not one would favor expanding federal court jurisdiction to alleviate the difficulties presented by simultaneous class actions in different state courts, the challenges that parallel state court litigation produces for the attempt to effectively handle federal court class actions provide a justification for some legislative response—particularly if one regards federal class action procedures as preferable.

1. Improved Class Action Procedures

In many ways, the 1966 amendments to Rule 23 were a leap into the dark.\footnote{128} In at least some ways, things ultimately turned out precisely as the drafters desired they not.\footnote{129} It might properly be expected that a rulemaking response would be in order at some point, and after a quarter-century moratorium on changing Rule 23, in 1991 the Advisory Committee began studying what had actually happened under the rule. It spent a dozen years on this task, first proposing some modifications to the standards for certifying Rule 23(b)(3) class actions.\footnote{130} These proposals to change the standards for certifying class actions

\begin{quote}
\end{quote}

\footnote{127} See supra text accompanying note 42 (asserting that plaintiffs' lawyers prefer state courts because "federal courts have increasingly engaged in stringent control of discovery, aggressive encouragement of settlement, and more frequent granting of summary judgment").

\footnote{128} For a careful description of the debates that attended the adoption of the 1966 amendments, see Rabiej, supra note 12, at 333-45.

\footnote{129} After much debate, the drafters included a strong warning against use of class actions in mass torts in the Committee Note. \textit{Id.} at 341-43. Yet in the 1980s courts began to experiment with such class actions, and the Supreme Court recognized in \textit{Amchem Products, Inc. v. Windsor}, 521 U.S. 591 (1997), that the rule did not categorically exclude class actions and that "District Courts, since the late 1970's, have been certifying such cases in increasing number." \textit{Id.} at 625. At most, it concluded, the Advisory Committee's warning "continues to call for caution." \textit{Id.}

\footnote{130} See \textit{COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, CIVIL, AND CRIMINAL PROCEDURE 45-51} (1996) (setting forth several draft amendments to Federal Rule of Civil Procedure 23(b)).
actions proved both very difficult and highly controversial, and ultimately were not pursued. The only part of that amendment package that went forward was Rule 23(f)'s authorization for immediate appellate review of class-certification decisions. Although Rule 23(f) did not change standards for class certification, it provided a method to address concerns that different district courts had adopted divergent approaches to those standards and that, under existing law on timing of appellate review, there was usually no opportunity for appellate courts to speak to these questions. From 1998 forward, that gap in class action law has been plugged by this amendment to the federal rules.

But the Advisory Committee did not relent in its efforts to improve the class action procedure in federal courts. Instead, it shifted attention to the process for handling class actions, and in particular to aspects of class action practice that were not the focus of the 1966 amendments and emerged as important only in the 1980s and 1990s. The experience of those years demonstrated that the role of class counsel was central to class action practice, that attorneys' fees were a critical animating feature of that practice, and that settlement review constituted a central responsibility of the court to ensure proper functioning of class actions.

Under the 1966 version of the rule, there was virtually nothing to guide the courts on these topics that experience had shown were crucial to proper handling of class actions. True, the 1966 version of Rule 23(e) did specify that a class action could not be dismissed without court approval, but it added nothing more about how that approval should be meted out. The rule said nothing at all about class counsel, although judicial interpretation of the requirements of Rule 23(a)(4) served partially to plug that gap by focusing on the adequacy of class counsel as well as on the class representative. Serious questions nonetheless remained about the proper responsibility of class counsel should there be disagreements within the class or, worse yet, between counsel's original client (the class representative) and the interests of the class at large. A number of thoughtful observers—

---

131 See sources cited supra note 13 (detailing extensively the debate over the changes).
132 See FED. R. CIV. P. 23(f) (allowing the courts of appeals discretion to hear appeals of class certification decisions within ten days of the district court's ruling on the matter).
including Professor Shapiro\textsuperscript{135}—focused on these issues. And there was not a word in the rule about attorneys' fees, even though thoughtful commentators urged that attention to this topic would be crucial to establishing a proper balance in class action practice.\textsuperscript{134} In addition, the 1966 directive that class-certification decisions be made "as soon as practicable" had produced mischief in a number of instances, although courts have gradually developed a nuanced understanding of its application.

The 2003 amendments to Rule 23 broadly responded to these concerns. In place of the former directive to resolve class certification "as soon as practicable," Rule 23(c) now says that it must be done "at an early practicable time."\textsuperscript{135} It also directs that the class-certification order define the class and the class claims, issues, or defenses, which can offer both discipline to the district court and guidance to the appellate court, if there is immediate appellate review of the certification decision.\textsuperscript{136} The amended rule also removes language that formerly appeared to prompt courts to believe it was appropriate to issue "conditional" certifications (partly to comply with the "as soon as practicable" language in the 1966 Rule) before the record was sufficient to make a determination whether to certify a class action.\textsuperscript{137} In addition, the amended rule provides considerable direction on the contents of class-certification notice to Rule 23(b)(3) class members, including the directive that the notice be "in plain, easily understood lan-

\textsuperscript{135} See Shapiro, \textit{supra} note 45, at 939 (discussing the need to "focus on the precise nature of the lawyer's professional responsibility in class actions," and suggesting that "the notion of paying special attention to ethical issues in the class action context has merit in several respects" (footnote omitted)).

\textsuperscript{134} See DEBORAH R. HENSLER ET AL., RAND CORP. & INST. FOR CIVIL JUSTICE, Executive Summary, \textit{CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN} 24 (1999), available at \url{http://www.rand.org/pubs/monograph_reports/2005/MR9691.pdf} (saying that "what judges do is key to determining the benefit-cost ratio" in class actions, and that salutary results followed when judges "took responsibility for determining attorney fees").

\textsuperscript{135} FED. R. CIV. P. 23(c)(1)(A).

\textsuperscript{136} FED. R. CIV. P. 23(c)(1)(B).

\textsuperscript{137} See FED. R. CIV. P. 23(c)(1)(C) (allowing for an order to be altered or amended only \textit{before} final judgment). As noted in the Committee Note, the former provision that class certification "may be conditional" was deleted because "[a] court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met." FED. R. CIV. P. 23 advisory committee's note (2005).
Further, it at least raises the possibility of some similar notice in Rule 23(b)(1) and (b)(2) class actions.

In addition, Rule 23(e) was substantially expanded in 2003 to direct the court (and the parties) on how to conduct a proper settlement review. It now requires a hearing, and adopts the "fair, reasonable, and adequate" standard for the proposed settlement, which is derived from the case law on the subject. To deal with the problem of "side agreements," it directs the parties to identify any such "agreement made in connection with the proposal." It makes clear that the court may decline to approve a proposed settlement in a Rule 23(b)(3) class action unless class members are accorded an opportunity to opt out after receiving notice of the actual deal. Finally, the new Rule 23(e) provides guidance on objections by class members, including a directive that objectors may only withdraw their objections with the court's approval, a provision included to deal with the problem of buy-offs of objectors.

Besides greatly expanding treatment of topics covered in the 1966 Rule, the 2003 amendments grapple with important matters not addressed in 1966. Rules 23(g) and (h) thus address the appointment of class counsel and the handling of attorneys' fee awards to them and to objectors. Responding to concerns like those raised by Professor Shapiro, the rule now states that "[c]lass counsel must fairly and adequately represent the interests of the class." It also specifies the

---

138 FED. R. CIV. P. 23(c)(2)(B).
139 See FED. R. CIV. P. 23(c)(2)(A) (granting the court discretion to direct such notice).
140 FED. R. CIV. P. 23(e)(2).
141 FED. R. CIV. P. 23(e)(3).
142 FED. R. CIV. P. 23(e)(4).
143 FED. R. CIV. P. 23(e)(5).
144 See supra note 49 and accompanying text.
145 FED. R. CIV. P. 23(g)(4). The Committee Note to the 2003 Rule 23(g)(1)(B) expands on the meaning of this directive:

The rule thus establishes the obligation of class counsel, an obligation that may be different from the customary obligations of counsel to individual clients. Appointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it. The class representatives do not have an unfettered right to "fire" class counsel. In the same vein, the class representatives cannot command class counsel to accept or reject a settlement proposal. To the contrary, class counsel must determine whether seeking the court's approval of a settlement would be in the best interests of the class as a whole.

criteria that must be considered in evaluating proposed class counsel, authorizes consideration of "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class," and suggests that the court might make provision in the order appointing class counsel about an eventual award of attorneys' fees. At a minimum, the court must ensure that class counsel is adequate, and if there is more than one applicant for the position, the court must choose the applicant "best able to represent the interests of the class." Regarding attorneys' fees, the rule explicitly recognizes the need to give notice to the class of the application for such an award and the right of class members to object.

Although individually these new provisions are hardly a radical break from the past, together they represent an important advance. Together with the 1998 addition of Rule 23(f), which facilitated the development of a body of appellate law on class-certification criteria, the new provisions provide a nationwide framework for the federal courts to deal effectively with the problems raised by contemporary class action practice. Congress could rationally favor the use of these federal criteria for class actions generally, or at least for a subset of class actions it regarded as particularly important for other reasons as well. Further, there is no doubt that Congress was attentive to at least some of the concerns addressed by the amendments to Rule 23. Earlier versions of CAFA included, for example, a "plain English" requirement for class notices that is mirrored in the amended rule. Congress, however, was unsatisfied with what the rulemakers had done on certain topics and added its own overlay with CAFA. For instance, CAFA provided special requirements for "coupon" settlements,

---

146 FED. R. CIV. P. 23(g)(1)(A).
147 FED. R. CIV. P. 23(g)(1)(B).
148 FED. R. CIV. P. 23(g)(1)(D).
149 FED. R. CIV. P. 23(g)(2).
150 FED. R. CIV. P. 23(h)(1).
151 FED. R. CIV. P. 23(h)(2).
152 Many of them were based on "best practices" that had been developed under the 1966 rule.
153 I admit that my attitude may be affected by my involvement in the drafting of these proposals. See Rabiej, supra note 12, at 381 n.240 (noting that I drafted Rules 23(g) and (h)).
154 For a more detailed explanation of the grounds for Congress to favor having nationwide class actions in federal court, see infra Part IV.B.
addressing in particular the attorneys’ fee awards in cases involving such settlements.\(^{156}\) It required that state and national regulatory authorities be given notice of a proposed class action settlement,\(^{157}\) including a provision (which appears to be mandatory) regarding side agreements that may override the more nuanced rule version.\(^{158}\) Overall, CAFA built on the 2003 amendments to the Rule and thus confirmed Congress’s preference for the regime put in place by the amendments to Rule 23.

One may certainly argue that the new provisions of Rule 23—or the additions Congress made to them—were unwise,\(^{159}\) but they are important changes that Congress could properly take into account in deciding whether to expand federal court jurisdiction. Moreover, even those who denounce CAFA’s “true” motivations concede that the Advisory Committee’s actions are not similarly questionable.\(^{160}\) Furthermore, the new provisions have had effects in some cases. For example, a district court in Miami declined to approve a coupon settlement in a consumer class action after thirty-six state attorneys general opposed it.\(^{161}\) Ensuring application of improved federal class action procedures, therefore, is one jurisdictional policy that does legitimately support CAFA.

Against this policy, however, it may be urged that “federalizing” state law class actions prevents states from using their own class action


\(^{158}\) Compare CAFA § 3, 28 U.S.C. § 1715(b)(5) (requiring service of notice on state and federal officials including “any settlement or other agreement contemporaneously made between class counsel and counsel for the defendants”), with FED. R. CIV. P. 23(e)(3) (requiring only the filing of “a statement identifying any agreement made in connection with the proposal” to settle; the full agreement need not be provided).

\(^{159}\) For an argument denouncing the required notice to state and federal regulatory authorities, see Laurens Walker, Essay, The Consumer Class Action Bill of Rights: A Policy and Political Mistake, 58 HASTINGS L.J. 849, 853-55 (2007), asserting that ambitious politicians will use the opportunity to object to proposed settlements as a platform for their personal political advancement.

\(^{160}\) See, e.g., Morrison, supra note 8, at 1598 (commenting that the Advisory Committee “is recognized as not favoring either plaintiffs or defendants in class actions”).

\(^{161}\) See Figueroa v. Sharper Image Corp., 517 F. Supp. 2d 1292, 1328 (S.D. Fla. 2007) (noting that the attorneys general, as amicus curiae, “have objected at every turn to each version of the parties’ proposed coupon settlement”); see also Julie Kay, Miami Judge Rejects Settlement in Sharper Image Class Action, RECORDER (S.F.), Oct. 15, 2007, available at GALE GENERAL ONEFILE, Doc. No. A169911289 (calling the rejection a “stunning blow” to the defendant); Linda S. Mullenix, CAFA and Coupons, NAT’L L.J., Nov. 12, 2007, at 24 (writing that “[t]he objectors’ persistence, and the substance of their criticisms” convinced the judge to reject the settlement).
procedures to enforce their laws. At first blush, there is some force
to this criticism, particularly as federal courts may have become more
demanding about class-certification criteria. To the extent that
negative-value suits are at issue, neutralizing the class action may hob-
ble private enforcement of state consumer protection laws and similar
measures. Upon further reflection, however, this argument seems less
than compelling. It largely disregards history by ignoring the fact that
it was the federal courts that served as trailblazers in their use of class
actions after the 1966 revision of Rule 23. Certainly that experience
may have prompted states to be even more adventuresome, but the
original importance of the federal rule suggests that using jurisdiction
to ensure that an improved federal rule will govern multistate class ac-
tions is a legitimate goal.

Presumably, the concern with blunting state court enforcement of
state law has force only when state courts would certify a particular
class action that federal courts would not. Although inappropriate
refusal to certify a class is a legitimate concern, inappropriate certifi-
cation is also a valid consideration. Surely there have been at least
some “drive-by certifications” in state courts, so urging that state
courts should have untrammelled authority to certify in cases where a
federal court might shy away from doing so is dubious. To the con-
trary, the federal courts—in part due to the new opportunity for im-
mediate appellate review of class-certification decisions—seem to de-
serve some deference to their decisions. True, a number of states
accused in the past of being too free with class certification have
changed their ways. But isolated incidents of voluntary reform do
not constitute a strong argument to counter Congress’s preference for
having federal judges decide such matters.

---

162 For example, speaking against an earlier version of CAFA, Representative Lee
(Dem., Texas) warned that “in cases where the federal court chooses not to certify the
state class action, the bill prohibits the states from using class actions to resolve the un-
derlying state causes of action.” Class Action Fairness Act of 2001: Hearing on H.R. 2341
Before the H. Comm. on the Judiciary, 107th Cong. 9 (2002) [hereinafter Hearing] (state-

163 See generally Linda S. Mullenix, Abandoning the Federal Class Action Ship: Is There
Smother Sailing for Class Actions in Gulf Waters?, 74 TUL. L. REV. 1709 (2000) (reporting
that scrutiny of class certification requirements in federal court class actions has be-
come more heightened in recent years than that of some Gulf Coast state courts).

164 A competing concern, which CAFA does address, is that state court certification of
multistate classes can intrude on the law-enforcement activities of other states.

165 See Marcus, supra note 121, at 1294-95 (describing states’ curtailment of aggres-
sive certification policies).
Moreover, at least in some places, it seems that CAFA is affecting how state courts handle similar issues. Regarding coupon settlements, for example, "[a]lthough the federal law doesn’t apply in state courts, legal experts say California Superior Court judges are following suit and using extra caution before approving coupon settlements." Recently, for example, a California state court class action brought against producers of smokeless tobacco products resulted in a cash settlement even though similar cases in other states had been settled for coupons. As one defense attorney explained, "[w]e’re paying cash in California basically because plaintiffs took the position that a coupon settlement would not be approved." This ripple effect of CAFA on state court practices undercuts the argument that the proper enforcement of state law depends on freeing state courts from the constraints applicable in federal court. State courts can also innovate on their own. Alameda County Superior Court in California, for example, has begun withholding part of class counsel’s fees pending completion of the claims-review process in order to give counsel an added incentive to ensure that this process goes smoothly.

Of course, it does not necessarily follow that states will promptly fall into line with current federal class action practices. Again, California provides an illustration. In early 2007, a bill was introduced in the California Legislature that would substitute a provision that virtually replicates Rule 23 for the current barebones California legislation authorizing class actions. The proposal was promoted by the Civil Justice Association of California, a "tort reform" group. Although Governor Schwarzenegger publicly supported the bill, it was killed in committee after a plaintiffs’ lawyer attacked it as "anti-consumer." After this legislative defeat, there was talk of trying to enact a similar

---

168 See Matthew Hirsch, Fees Account for “Human Nature”: Alameda Courts Delay Some Pay to Keep Class Counsel on Toes, Recorder (S.F.), Nov. 21, 2007, available at GALE GENERAL ONEFILE, Doc. No. A171853976, (describing the Alameda County Superior Court’s practice and reporting that “some attorneys say the strategy isn’t common elsewhere”).
169 See Assem. B. 1505, 2007-08 Reg. Sess. (Cal. 2007) (creating “a comprehensive set of procedures to be followed in all class actions”).
provision by initiative.\textsuperscript{171} Frankly, it is difficult to regard current Rule 23 as either anti- or pro-consumer, but this episode underscores the extent to which such labels can influence attitudes in the area. Most likely, similar attitudes influenced members of Congress in deciding whether to support CAFA. The point here is not that such influences do not matter, but rather that, independent of these concerns that the legislation favors one side or another, there are legitimate reasons for favoring federal court jurisdiction, at least for national class actions. To the extent that this means that state courts that would have permitted similar class actions do not get a chance to do so, that is an argument Congress could have rationally considered and rejected.

Additionally, it must be recognized that CAFA will not completely prevent the potential problem of evading the federal court's class action protections. The prime example would arise if the parties chose to avoid the exacting federal court settlement-approval standards by instead presenting a proposed settlement to a state court, where a follow-on class action had been filed for this specific purpose. Perhaps CAFA could have been modified to avoid this risk. One possible way of precluding such strategic maneuvering—included in earlier legislation\textsuperscript{171}—would be to permit any class member to remove the case at any time, including during consideration of settlement approval by a state court. Such a provision, however, would create its own difficulties, and the measures actually adopted in CAFA are a reasonable compromise.

2. Dealing with the Problems of Overlapping Class Actions

Beyond favoring federal court rules for handling class actions, Congress could determine that expanding federal court jurisdiction is justified in order to safeguard the ability of federal courts to manage the class actions before them. This ability could be undermined if state courts entertain class actions that overlap with those pending in federal court. For cases in federal court, the risk of such an occurrence is virtually nil, since the Judicial Panel on Multidistrict Litigation will transfer the case to avoid the risk of conflicting class-

\textsuperscript{171} Id.

\textsuperscript{172} See S. 1751, 108th Cong. § 1453(b)(2) (2003) (providing a right to remove "by any plaintiff class member who is not a named or representative class member without the consent of all members of such class").
The problem, then, is essentially limited to competing state court class actions; as soon as these can be moved into federal court, however, the mechanism exists to solve the problem.

For a federal court trying to manage a class action, the disruption that a competing state court class action can cause is considerable. In some cases, plaintiffs have managed to persuade state court judges to enter orders that seem designed to puncture the federal judges' efforts. In other cases, parties to a class action settlement that a federal court had found unfair appear capable, despite that disapproval, of persuading a state court judge to approve essentially the same settlement. And a federal judge's ruling that a case cannot satisfy federal class-certification standards may be nullified by a later state court ruling certifying a similar or identical class, what one might call "drive-by again" certification.

---

173 See, e.g., In re High Sulfur Content Gasoline Prods. Liab. Litig., 344 F. Supp. 2d 755, 757 (J.P.M.L. 2004) (placing particular emphasis on "prevent[ing] inconsistent pretrial rulings, especially with respect to class certification," in deciding whether to transfer for purposes of consolidation); David F. Herr, Multidistrict Litigation Manual § 5.24 (2007) (asserting that "if there are conflicting or potentially conflicting class claims in the litigation, transfer is likely regardless of the presence or absence of other factors that would otherwise favor or militate against transfer").

174 For an example, see Carlough v. Amchem Products, Inc., 10 F.3d 189 (3d Cir. 1993), in which the Third Circuit reviewed a West Virginia state court order purporting to opt all West Virginia residents out of a class action that was in settlement review in federal court. Not only did this order threaten to undermine the federal court's settlement-review process, but it also would have prevented any West Virginia class members who wanted to participate in the class settlement from doing so. Id. at 203. The Third Circuit upheld the district court's injunction against the state court order. Id. at 204.

175 For an example, see In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation, 134 F.3d 133, 137 (3d Cir. 1998), in which, after a proposed settlement was rejected in federal court, the parties "repaired to the 18th Judicial District for the Parish of Iberville, Louisiana, where a similar suit had been pending, restructured their deal, and submitted it to the Louisiana court, which ultimately approved it" as a national class action settlement. The Third Circuit held that, because by then there was no class settlement pending before the federal court, there was no justification for a federal injunction against the proceedings in state court. Id. at 145.

176 The most famous illustration involves an aggressive use of federal injunctive power to prevent such "second chance" certification. In In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation, 333 F.3d 763, 769 (7th Cir. 2003), the Seventh Circuit directed that all members of the proposed class be enjoined from seeking nationwide class certification in another court after it had ruled that nationwide certification was improper. Although the decision could be challenged in regards to the power of a federal court to enjoin state court litigation, Judge Easterbrook's opinion emphasizes the disruptive potential of parallel class-certification efforts:

Relitigation can turn even an unlikely outcome into reality. Suppose that every state in the nation would as a matter of first principles deem inappropri-
Outside the context of class action litigation, the presumption is that parallel litigation generally will be allowed to proceed, particularly if it is proceeding in both state and federal court. But the class action places great stress on this complacent attitude:

The background rule of parallel litigation does not cope well with the inherently interstate nature of large-scale class action cases. Conflicts and overlaps among jurisdictions, which are relatively uncommon in traditional litigation, become normal and expected. The large-scale class action pushes the system away from the parallel litigation model and toward the exclusive forum model. Over time, this evolutionary process can be expected to continue, either by way of judicially crafted rules or through federal or state legislation.

Alerted to these problems, the Advisory Committee began to study them in the late 1990s. The initial indication was that the problem with overlapping state-federal class actions was serious. Along with methods for improving the handling of class actions in federal court, therefore, the Advisory Committee also explored ways to deal with the difficulties of parallel proceedings. Initially Professor Cooper, Reporter to the Committee, devised some extremely aggressive legislative

ate a nationwide class covering these claims and products. What this might mean in practice is something like “9 of 10 judges in every state would rule against certifying a nationwide class” . . . . Although the 10% that see things otherwise are a distinct minority, one is bound to turn up if plaintiffs file enough suits—and, if one nationwide class is certified, then all the no-certification decisions fade into insignificance. A single positive trumps all the negatives.

Id. at 766-67. For a case that reached the opposite conclusion, see Bailey v. State Farm Fire & Casualty Co., 414 F.3d 1187 (10th Cir. 2005). There, the Tenth Circuit held that a federal court’s refusal to enjoin efforts by other plaintiffs to obtain class certification for a class that the federal court had refused to certify did not require issuance of an injunction preventing their repeat tries. The Court focused particularly on the fact that the defendant approached the federal court only after litigating class certification in state court and that the district judge “acted out of respect for the work already performed by the state court.” Id. at 1190.

177 See generally RICHARD L. MARCUS & EDWARD F. SHERMAN, COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE 164-209 (4th ed. 2004) (presenting and discussing cases that have confronted the issue of dual federal-state proceedings).


179 See Civil Rules Advisory Comm., Minutes 23 (Oct. 6-7, 1997), available at http://www.uscourts.gov/rules/Minutes/cvlo-97.htm (reporting that the data from the Federal Judicial Center showed at least one overlapping action in twenty to forty percent of the federal court class actions it had studied); see also Rhonda Wasserman, Dueling Class Actions, 80 B.U. L. REV. 461 (2000) (discussing the problems caused by overlapping class actions).
methods to achieve final "nonbankruptcy closure" in mass tort situations.\textsuperscript{180} Thereafter, at the same time its proposed amendments to Rule 23 were published for public comment, the Committee also circulated for discussion possible rule amendments to deal with overlapping class actions. The amendments would limit the ability of another court to certify a class once a federal court had denied certification, and would also prevent a state court from approving a settlement once a federal court had found a settlement inadequate. These possibilities were explored carefully during a major conference that the Committee held in the fall of 2001, and serious questions were raised about whether the Committee's rulemaking authority extended to such measures.\textsuperscript{181} Eventually, the Committee decided not to pursue a rule-based solution.

Instead, it turned its attention to the possibility of suggesting that Congress use minimal diversity jurisdiction as a method of solving these problems. It made this suggestion during the period when CAFA was being considered. The Judicial Conference had previously opposed CAFA on the ground that it would add to caseload pressures on the federal courts. These were legitimate concerns: if the proponents of the legislation were correct that some state courts became magnets for "universal venue" suits, it would be likely that federal courts in those areas would face a particularly pronounced impact. In fact, the post-CAFA increases in federal court class action filings have not been distributed evenly.\textsuperscript{182} But it could be argued that this use of federal jurisdiction was preferable to disrupting federal jurisdiction of class actions already in federal court, and for that reason the Advisory Committee urged the Conference to modify its position.\textsuperscript{183} Eventually, the Judicial Conference did agree to do so.\textsuperscript{184}


\textsuperscript{183} See Memorandum from David F. Levi, U.S. Dist. Judge, to the Civil Rules Advisory Comm. 17 (May 7, 2002) (on file with author), which concluded

For these reasons the Advisory Committee on the Federal Rules of Procedure respectfully recommends to the Standing Committee on the Rules of
Although one point made by the Advisory Committee was that national class actions appropriately should be heard in federal court, the initial prompt for its involvement was the disruption faced by federal courts trying to handle the class actions already before them, due to parallel state court class actions. Particularly when coupled with the reasonable preference that Congress could have had that such class actions be heard by the federal courts, this factor supports Congress's decision to utilize minimal diversity jurisdiction to ensure that appropriate class actions could get into federal court. The fact that CAFA grants jurisdiction that goes farther than is necessary to accomplish this goal does not undermine the legitimacy of the goal itself. Similarly, the fact that it does not explicitly expand the authority of federal courts to enjoin parallel state court class actions does not mean that it does no work in avoiding the sort of disruption federal courts have confronted in the past.

Practice and Procedure and to the Committee on Federal-State Jurisdiction that they support the concept of minimal diversity for large, multistate 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.

See Lee & Willging, supra note 182, at 1730 (reporting that in March of 2003, the Judicial Conference shifted course and adopted a resolution endorsing the premise that minimal diversity jurisdiction could be appropriate for federal court jurisdiction over multistate class actions).

See infra Part IV.B for a discussion of this rationale for CAFA. I am not contending that this objective must be viewed as "procedural" in the sense that, by itself, it would serve as a ground for rulemaking, but it certainly was a relevant point to make to Congress about legislation that would also have the advantage of solving a procedural problem.

See supra Part IV.A.1 (noting that ensuring the application of federal class action procedures could be a rational goal for Congress to have).

For arguments that CAFA significantly broadened the authority of federal courts to enjoin class action proceedings in state court, see Tobias Barrington Wolff, Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action, 156 U. PA. L. REV. 2035, pt. 1 (2008). Professors Issacharoff and Nagareda argue that CAFA should also limit the ability of class members to challenge the binding effect of federal court class action judgments. This would provide another potential way to insulate federal class action proceedings from disruption due to collateral litigation (in either state or federal court). See Samuel Issacharoff & Richard A. Nagareda, Class Settlements Under Attack, 156 U. PA. L. REV. 1649, 1659 (2008).
B. Providing the National Courts with Jurisdiction
To Hear National Class Actions

After spending considerable energy contemplating the "procedural" reasons that generally justify Congress's use of diversity jurisdiction in as it did in CAFA, I will spend much less time on the topic that occupied more of the legislative debate—the desirability of opening the national courts to cases of national importance. It is obvious to the point of being a truism that Congress could more easily justify using federal court jurisdiction for the cases covered by CAFA than for ordinary auto-accident litigation between citizens of different states. Indeed, the continued general availability of diversity jurisdiction for such commonplace cases certainly is a result of the lobbying power of lawyers more than the existence of some overarching jurisdictional policy under which access to the national tribunals should be promoted.\textsuperscript{188} This point was made, among others, by the Federal Courts Study Committee in 1990 when it recommended (over the objections of two practicing lawyers on the committee) that general diversity jurisdiction be eliminated.\textsuperscript{189} At the very same time, that Committee affirmatively recommended something like CAFA, suggesting that Congress create "a special federal diversity jurisdiction, based on the minimal diversity authority conferred by Article III, to make possible the consolidation of major multiparty, multiforum litigation."\textsuperscript{190}

Although attention had not yet focused on the potentially fearsome effects of nationwide classes certified by state courts, the germ of the CAFA jurisdictional idea was there. When one adds the possibility of overreaching by state courts applying their own law to a nationwide class, the case for considering federal court jurisdiction becomes very clear. Professor Silberman once rhetorically asked about choice of law issues in individual litigation, "Can the State of Minnesota Bind the Nation?"\textsuperscript{191} We now can see that by using a state court class action, Minnesota could indeed.\textsuperscript{192} Given that this powerful mechanism can

\textsuperscript{188} See \textit{Wright \& Kane}, \textit{supra} note 1, at 153 \& n.54 (finding that the traditional justifications for diversity jurisdiction are no longer present and positing that its endurance is due largely to lawyers' efforts to retain it).


\textsuperscript{190} Id. at 44.


\textsuperscript{192} For an example of a case in which one might make such an argument, see \textit{Mooney v. Allianz Life Insurance Co. of North America}, 244 F.R.D. 531, 534-35 (D. Minn.)
be deployed in almost any county in the country, and that there is at least some reason to suspect that some lawyers are seeking out local state court judges from whom they can get remarkable accommodations, it is easy to understand why one would consider expanding federal court jurisdiction to offer an alternative forum. Even the most vehement critics of CAFA concede that at least some of the examples its proponents paraded were embarrassments.\textsuperscript{193}

Congress clearly intended to provide a federal forum for such multistate litigation.\textsuperscript{194} One objection that has been raised to this initiative is that it insults the state courts' ability to handle important litigation themselves. On one level, that is clearly true; the legislative history is full of slights of state court judges that cannot be fully justified. Judges that embody the bad characteristics offered to rationalize CAFA are not numerous, even if some plaintiffs' lawyers try very hard to get their cases before those judges. Moreover, many states have made efforts to upgrade their handling of class actions to ensure that such misadventures will not happen.

But these palliatives are hardly binding on Congress when it determines what jurisdictional policy to pursue. At base, the mere existence of diversity jurisdiction could be said itself to represent a criticism of state courts; justifying diversity jurisdiction on the basis of concerns about bias against outsiders implicitly criticizes state courts and regards federal courts as superior. Is the continued existence of general diversity jurisdiction dependent upon a showing that state court bias against outsiders is still widespread? One could argue that the frequency of overreaching state court class actions is small, but so also is the frequency of local bias against out-of-state litigants. As suggested above, preference for federal procedures in state law cases is proper.\textsuperscript{195} A preference for federal forums to go with those procedures, at least for those cases that Congress deems of special national

\textsuperscript{193} See, e.g., Marcus, supra note 121, at 1294 (recognizing that under Avery v. State Farm Mut. Auto. Ins. Co., 835 N.E.2d 801 (Ill. 2005), "[t]he application of the uniquely restrictive Illinois law to the whole country... illustrate[s] the potentially abusive power one remote county court could exercise").

\textsuperscript{194} See CAFA § 2(b)(2), 28 U.S.C. § 1711 note (Supp. V 2005) (stating that one purpose of the legislation was to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction").

\textsuperscript{195} Supra Part IV.A.1.
concern, is also proper. Further, the argument that national concern about outsider bias in automobile tort cases somehow outstrips concern about local bias against national corporations in class actions strategically filed in remote counties is unpersuasive, or, at most, an argument for Congress to weigh.

Moreover, even though state court judges are understandably sensitive about slighting comparisons between themselves and federal judges, the criteria for federal jurisdiction are, by their own terms, designed to limit federal judges to the more important state law cases. The amount-in-controversy minimum represents an explicit preference for offering a federal forum only to more important cases, and thus is an implicit slight to state courts. Certainly one could debate whether dollars are the correct measure of a case’s importance; the abolition of the jurisdictional minimum for federal question cases a generation ago in part reflected a judgment that, at least for those cases, money is not an appropriate measure of the federal interest at stake. Whether or not it is the best measure, however, it is the measure used for diversity cases. As we have seen, that measure does not work well in class actions when applied to individual class members’ claims; CAFA, therefore, substitutes a class-wide measure that looks to whether $5 million is sought in aggregate. To claim that this is not a reasonable threshold when the amount-in-controversy requirement for most diversity cases is $75,000 is difficult indeed.

There seems, then, to be no strong criticism of the general jurisdictional policy of CAFA to open the federal courts to genuinely multistate class actions. But CAFA’s calibration of the new jurisdiction can certainly be challenged. As noted above, the contention that CAFA would funnel all class actions into federal court has not proven true. But the exceptions to the new jurisdictional requirements are both extremely hard to apply and very narrow. A strong argument can be made that much broader exceptions would more effectively ensure that only class actions of genuinely multistate character and national interest would be in federal court under CAFA.

That argument for broader exemptions is weakened, however, by the parallel justifications for favoring federal court jurisdiction: to en-

---

197 See supra note 117 and accompanying text (explaining research from California class action filings supporting this point).
198 See supra Part III (discussing the many difficult determinations that must be made in order to apply CAFA).
sure the application of the recently improved federal procedural apparatus for class actions and to avoid the potential disruption of pending federal court class actions by competing state court class actions. Moreover, there was considerable reason to believe that plaintiffs' lawyers would strive mightily to avoid federal court and would exploit any opportunity to do so if they could configure their cases to evade the newly created jurisdiction. In light of that concern, it may have been justified as a matter of jurisdictional policy to define the exceptions to federal court jurisdiction very narrowly so as to ensure that the new jurisdiction reaches all cases that are truly multistate. Overbreadth, then, could be a result of the desire to guarantee that lawyers cannot evade the new jurisdiction in any case for which Congress sought to afford a federal forum. Moreover, the statute has a safety valve. It gives the district judge authority to decline to exercise the new jurisdiction in a number of instances when it initially does apply, and the considerations include a focus on whether there was an effort to evade federal court jurisdiction. Thus, although strong arguments have justifiably been made that the exceptions to the new jurisdiction are too narrow, given that judges may decline to exercise that jurisdiction in any case in which fewer than two-thirds of the class members are from the forum state, it is hardly irrational to adopt such provisions as an antidote to aggressive efforts by plaintiffs' lawyers to avoid federal court.

A different, and similarly telling, criticism of the decision by Congress to pursue this jurisdictional policy is that the law's empirical foundations are built on sand. Focusing on a select set of state court jurisdictions, proponents of the legislation built a case based on the fact that in at least one Illinois county there had been a rapid and huge increase in the number of class actions, many filed by the same

199 See supra Part IV.A (supporting the legitimacy of Congress's desire to apply what it views as superior federal class action rules).

200 The poster child among witnesses before Congress on this point was Hilda Bankston, who testified about how her late husband—a Mississippi pharmacist—was named as a defendant in a large number of pharmaceutical products liability suits to defeat diversity and prevent removal to federal court. See Hearing, supra note 162, at 34-36 (testimony of Hilda Bankston, former small business owner).

201 CAFA § 4(a), 28 U.S.C. § 1332(d)(3). Among the statutory considerations relevant to the decision of whether to exercise the new jurisdiction is "whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction." § 1332(d)(3)(C).
lawyers and having no obvious connection to the county. But a more general survey done by the Federal Judicial Center (FJC) found that although plaintiffs' lawyers believed that federal judges would be more favorable to defendants with respect to both class certification and substantive issues when they filed in state court and defendants removed (and defense lawyers believed the same), neither set of beliefs could be supported by the outcomes in the actual cases. To the contrary, there was no measurable difference between class-certification decisions or settlement-approval decisions between state and federal courts.

Of course, Congress is free to disregard such evidence if it chooses to do so. For example, when Congress was considering the Civil Justice Reform Act in 1990, it had before it an important and detailed RAND Corporation study showing that there had been no actual increase in delays in civil litigation in federal district courts, but it went ahead and adopted the legislation anyway. In any case, the general class action results found by the FJC do not prove that the perceptions of counsel are wrong, or wrong enough to count against the legislation. For one thing, the methods available to even the FJC Research investigators may not be sensitive enough to detect all that matters to counsel and to Congress. For another, the possibility that a few "bad apple" counties were the main focus of the legislation could make the overall nationwide results less important to legislators.

V. TOWARDS THE SLIPPERY SLOPE? IMPLICATIONS FOR ERIE AND KLAXON

Besides ensuring that federal court procedure will be used, that federal court handling of class actions will not be disrupted by parallel state court class actions, and that these nationally important cases

---

202 See John H. Beisner & Jessica Davidson Miller, They're Making a Federal Case Out of It . . . in State Court, 25 HARV. J.L. & PUB. POL'Y 143, 160 (2001) (reporting a 1850% rise in class filings over three years in Madison County, Illinois, from two to thirty-nine).


204 Id. at 34-41.


206 Supra Part IV.A.1.

207 Supra Part IV.A.2.
can make their way to federal court, another jurisdictional policy that CAFA might serve is to enable the federal courts to develop an appropriate body of substantive law for class actions. Doing so might advance the use of class actions, which CAFA arguably supports. Recently, in a series of articles, Professor Issacharoff has offered a detailed and creative vision of an empowered federal judiciary responding to the need for nationally uniform standards by adopting such substantive law on the basis of CAFA and a general need for such judicial creativity. But if that was not the goal of the legislation, it may be viewed as a slippery slope enabled by expanded jurisdiction.

Frankly, this is a slippery slope toward which federal judges have tended for some time. Over a dozen years ago, I explored the ways that mass tort class action settlements tempted federal judges into disregarding or overriding Erie in order to effect a sort of tort reform. These judges were understandably perturbed by the prospects that (a) varying state laws might produce hugely different results for tort claimants of various states, even though the activity that was alleged to have caused the injuries was nationwide, and (b) punitive damages recoveries in early cases might so deplete available assets that later claimants would be left with no prospect of meaningful recovery. More recently, Professor Nagareda has made a similar point by emphasizing the "preexistence principle" that should constrain class actions; namely, that preexisting substantive rights should not be undercut by the class action device. At their heart, these arguments stress the limits of the power conferred by Rule 23 to modify substantive legal rules derived from state law either to facilitate class certification or to accomplish the sorts of objectives we associate with tort reform.

One surely could, to some extent, use federal court jurisdiction as a method for achieving such objectives. That sort of judicial activity—common law lawmaking—appears at the heart of the judicial function
as conceived in the eighteenth century. Indeed, one strand of argument in favor of diversity jurisdiction is that it was intended as a protection against potentially aberrant state law. But the reality is that Congress disavowed that attitude from the outset and instead adopted the Rules of Decision Act. Despite that Act, for a considerable period the regime symbolized by Swift v. Tyson prevailed, perhaps because it accorded with the notion that the judicial function normally included such lawmaking authority. Erie changed all of that and, moreover, held that its decision was constitutionally compelled.

214 Compare Arthur John Keeffe et al., Weary Erie, 34 CORNELL L.Q. 494, 497 (1949), who makes such an assertion in the twentieth century:

Unquestionably Article III of the Constitution designates the federal courts as proper forums to litigate suits between "Citizens of different States." Given jurisdiction, it would logically follow that a federal court would have the constitutional power to determine the controversy by any reasonable method. The choice of "federal common law" rather than the law of a particular state is clearly not so unreasonable as to be unconstitutional.

215 See Patrick J. Borchers, The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon, 72 TEX. L. Rev. 79, 81 (1993) (arguing that "the drafting and ratification history [of the Constitution] supports the conclusion that diversity was intended at least in part as a protection against aberrational state laws, particularly those regarding commercial transactions").

216 The Rules of Decision Act was section 34 of the Judiciary Act of 1789, ch. 20, 1 Stat. 73, 92. It is now codified, and has been since 1948 (slightly amended), in 28 U.S.C. § 1652 (2000): "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States in cases where they apply."

217 41 U.S. 1 (1842), overruled by, Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

218 See, e.g., William A. Fletcher, The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance, 97 HARV. L. Rev. 1513, 1514 (1984). Then-Professor Fletcher observed that in the mid-nineteenth century the general common law was a reasonable place to look for guidance on issues not resolved by "local" law:

In such cases, depending on the nature of the dispute, a number of different kinds of law could provide the relevant rules of decision. The general common law was by far the most important of these nonlocal and nonfederal laws. That it was not explicitly referred to in section 34 does not prove that it was not expected to be applied. Rather, the fact that it was not mentioned probably suggests quite the opposite—that its applicability was so obvious as to go without saying.

Id. at 1517.

219 See Erie, 304 U.S. at 77-78 (stating that the Court would not have overturned "a doctrine so widely applied throughout nearly a century" were it not for "the unconstitutionality of the course pursued").
For some, this was not an entirely happy change, and for them CAFA may offer hope of undoing it. That seems to be Professor Issacharoff's goal. His starting point is the view that *Erie* no longer works in today's interconnected world. There is much to be said for the notion that globalization and related developments have effected profound changes, both legal and otherwise, but *Erie* was decided at a time when the primacy of state regulation itself was in eclipse under the force of the New Deal. This had the ironic result that many legal topics formerly controlled by state law were increasingly subject to federal legislation (often with the actual regulation being delegated to administrative agencies). This, then, is a phenomenon that is almost as old as *Erie* itself, but that does not mean these evolving forces readily loosen *Erie*’s bonds. Indeed, it seems to mean that the federal courts, unlike other branches of the national government, are still subject to lawmaking constraint. Drawing on many sources, Professor Issacharoff would discard those constraints on the federal judiciary.

Sometimes a grant of jurisdiction carries with it the implied grant of such lawmaking power. The leading example is the Labor-Management Relations Act (LMRA), which granted the federal courts jurisdiction over suits to enforce collective bargaining agreements. Stressing the need for national uniformity in enforcement of such agreements, the Supreme Court found that “the legislation does more than confer jurisdiction in the federal courts,” and that it also authorized the federal courts to develop federal rules of contract inter-

---

220 In advocating such a view, Professor Issacharoff has said that

*Erie* assumed a world in which controversies arose within a state and faithful application of a state’s laws could reasonably settle the expectations of all concerned persons. But in a society in which people, goods, and services cross state lines with abandon, the premise of *Erie* seems a fleeting memory.


The Court has reached a similar conclusion with regard to ERISA. These situations would seem to be the most plausible models for treating CAFA as justifying similar action by the federal courts in handling class actions.

But the analogy to the LMRA or ERISA does not hold. For the LMRA, Congress was creating jurisdiction to deal with a particular species of legal problem, indeed one that had been the focus of much federal legislation. The legislative history of ERISA expressly stated that actions brought within the new federal court jurisdiction were to be regarded as "arising under federal law" in the same manner as those brought under the LMRA. CAFA is quite different; there are no subject-matter limits on types of cases that fall within the jurisdiction it confers. Treating it as authorizing the creation of federal common law to deal with certain topics, therefore, is much more difficult. Moreover, unlike the LMRA and ERISA, CAFA explicitly invokes diversity jurisdiction. A central problem under the LMRA was that, owing to the way labor unions were treated for purposes of diversity of citizenship, diversity jurisdiction would not work as a vehicle to bring collective bargaining agreement suits into federal court. Thus, jurisdiction had to be justified on the ground that the judge-made rules whose creation it authorized would themselves serve as a basis for federal question jurisdiction. As all recognize, Congress went to some pains not to undertake any such delegation of lawmaking power.

See id. at 456 (announcing that "the substantive law to apply in suits under § 301(a) [of the LMRA] is federal law, which the courts must fashion from the policy of our national labor laws").

See Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65 (1987) (explaining that "the language of the jurisdictional subsection of ERISA's civil enforcement provisions closely parallels that of § 301 of the LMRA").

This proposition is found in H.R. REP. No. 93-1280, at 5107 (1974) (Conf. Rep.), which states,

All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947. The U.S. district courts are to have jurisdiction of these actions without regard to the amount in controversy and without regard to the citizenship of the parties.

See supra text accompanying note 55 (regarding citizenship of a labor union for diversity purposes). Of course, Congress could direct that unions should be treated somehow like corporations, but, even then, some suits to enforce collective bargaining agreements would probably not satisfy complete diversity. As a result, federal question jurisdiction seemingly was the only way to get all such cases into federal court.

See, e.g., Burbank, supra note 8, at 1943 n.129 (citing CAFA's legislative history); Issacharoff & Sharkey, supra note 15, at 1419 ("CAFA declared its intent to leave Erie untouched ... ").
in CAFA. Were the analogy apt, CAFA would displace state law on the

topic for actions in both state and federal court, and perhaps preclude

state courts from even entertaining actions within the compass of the

federal act.

Moreover, the argument that CAFA implicitly displaces *Erie*—

while saying that it does not do so—seems both too broad and too

narrow. It is too broad because the great breadth of CAFA jurisdic-

tion includes many cases for which a national substantive rule is not

needed. Consider, for example, the difficulties that proponents of

remand have encountered in showing that the requisite proportion of

a class is local, even in cases involving such clearly local matters as

hospital treatment or land contamination. Is CAFA designed to

empower the federal courts to develop a "national" body of law for

such cases? If it were, the authority CAFA would confer on federal

courts to develop national law would verge on (and perhaps exceed)

the scope of Congress's lawmaking power under the Commerce

Clause. At the same time, the argument for overriding *Erie* is also too

narrow because CAFA focuses only on class actions. If there is such

a need for national law to deal with claims about nationwide commer-

cial activities, it is hard to understand why that lawmaking is important

only in class actions. Is General Motors sufficiently protected in its na-

tionwide distribution of products when federal courts can develop

product liability laws for class actions against it? Does it not need simi-

lar protection for individual suits?

If *Erie* does not yield to CAFA, maybe *Klaxon* should. Professor

Hart deplored *Klaxon* almost from the outset. At least in class ac-
tsions, choosing and applying a single national law would simplify the

---

230 *See supra* notes 87-114 and accompanying text.

231 Indeed, as noted below, *infra* note 251, Judge Weinstein has recommended

that CAFA be amended to cover some individual actions.


233 For Professor Hart's views on the subject, see Henry M. Hart, Jr., *The Relations


[T]he Court [in *Klaxon*] has paralyzed the capacities of the federal courts to

further one of the central desiderata of a federal system. Uniformity of formal
documentation throughout the . . . states is occasionally desirable, and where that is
so a uniform federal substantive law provides the best means of securing it. But

uniformity of obligation as between particular individuals, regardless of

the locus of litigation, is almost invariably desirable; and the essence of this

can be achieved without enacting uniform substantive laws. The promotion of

this kind of uniformity, so far as this can be done without sacrifice of greater
values, is one of the functions of the principles of the conflict of laws.
handling of the case by avoiding the management difficulties that flow from trying to apply the law of different states to sectors of the class. In that sense, relaxing *Klaxon* for cases covered by CAFA might do almost as much for unleashing such class actions as displacing *Erie*, thus launching the federal courts down the slippery slope toward which they have been tending.

One reaction is that state choice of law doctrine might suffice to accomplish an objective seemingly sought by some federal judges in class actions: having the same law apply to all claims. It hardly needs to be emphasized now that having different legal rules apply to sectors of the class constitutes an obstacle to class certification. Judge Easterbrook went so far as to assert that "[n]o class action is proper unless all litigants are governed by the same legal rules." Without going to that extreme, one might well expect that avoiding this difficulty could loom over class action choice of law. And the obvious initial solution is to apply the same law to all the claims. That, of course, was the result of the Kansas Supreme Court's decision below in *Phillips Petroleum Co. v. Shutts* to apply Kansas law to the claims of all the class members. The U.S. Supreme Court's holding in that case that the due process analysis must be done on a claimant-by-claimant basis does not require a change in state choice of law doctrine, although it places a constitutional constraint on it. Additionally, state choice of law doctrine could more vigorously or overtly pursue one prong of the Kansas court's preference for applying its own law: making class actions work. As Professor Woolley wrote before CAFA was adopted, state choice of law rules for class actions should be respected by the federal courts under *Klaxon*. In at least some cases covered by CAFA, that would clearly seem justified. Consider, for example, the Eleventh Circuit's case involving contaminated land in Alabama, or the Fifth Circuit's post-Katrina cases against hospitals. Although former residents might claim application of another more favorable law in

---

234 See *supra* note 218 and accompanying text (discussing the constraints on the judicial power following *Erie*).

235 *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015 (7th Cir. 2002), cert. denied, 537 U.S. 1105 (2003).


238 *Supra* notes 87-90 and accompanying text.

239 *Supra* notes 91-108 and accompanying text.
individual litigation,\textsuperscript{240} it would surely be reasonable to apply forum law to the claims of all in a class action.

Perhaps, however, it is improper to treat choice of law differently in class actions from its treatment in individual suits.\textsuperscript{241} But as Professor Burbank has noted, "states remain free to view class actions differently than they do individual actions."\textsuperscript{242} Here CAFA could play an obstructive role by moving to federal court the very cases in which such choice of law doctrine might develop. The problem is that there is little indication that such specialized choice of law rules actually exist, unless the potentially overreaching preference for applying local law if at all possible actually embodies such a rule.\textsuperscript{243} That sort of rule promotes forum shopping for the state with the law most favorable to the class. Professor Burbank points out that this activity is one of the things that CAFA was designed to curtail, which may mean that it should be barred by CAFA.\textsuperscript{244} Thus, there may be a ground for finding in CAFA an implicit repeal of \textit{Klaxon} in at least some situations.


\textsuperscript{241} For an example of such an argument, see Larry Kramer, \textit{Choice of Law in Complex Litigation}, 71 N.Y.U. L. REV. 547, 549 (1996):

Because choice of law is part of the process of defining the parties' rights, it should not change simply because, as a matter of administrative convenience and efficiency, we have combined many claims in one proceeding; whatever choice-of-law rules we use to define substantive rights should be the same for ordinary and complex cases.

Note that this view seems to depend in part on an aggregation view of class actions. To the extent that one takes an entity view of the class action, and perhaps also a representative view, see supra Part II, the individualized choice of law inquiry looks less essential.

\textsuperscript{242} Burbank, supra note 8, at 1946; see also Linda Silberman, \textit{The Role of Choice of Law in National Class Actions}, 156 U. PA. L. REV. 2001, 2007 (2008) (recognizing that states may adopt choice of law methodology that would facilitate class certification in nationwide class actions, but agreeing with Professor Kramer, supra note 241, that states should not do so).

\textsuperscript{243} But see Richard A. Nagareda, \textit{Bootstraping in Choice of Law After the Class Action Fairness Act}, 74 UMKC L. REV. 661, 672-76 (2006) (finding that some states have embraced such approaches to choice of law in class actions).

\textsuperscript{244} Professor Burbank argues that [W]here state choice of law doctrine is materially influenced by state policy reflecting a bias in favor of aggregate litigation, CAFA's jurisdictional provisions—reflecting (most charitably) a policy to enable aggregation decisions unaffected by that bias—may plausibly be thought, in the words of the Rules of Decision Act, to require otherwise than that such state law applies.
Release from state choice of law provisions in cases covered by CAFA would seemingly leave the federal courts free to develop alternative choice of law rules. One view might be that they should disavow substitute rules that would facilitate class certification. That attitude might be consistent with the goals of many proponents of the legislation who largely sought to defeat class actions against them, for promoting the application of a single state's law smacks of the sort of overreaching that Congress sought to prevent. But if a federal choice of law rule made a reasonable choice among possible states' laws, that concern about overreaching could be satisfied. Moreover, the emphasis on ensuring the application of the federal class action provisions—including those governing settlement review and class counsel appointment—might lead to flexibility on the choice of law question that would facilitate class certification. If so, the existence in federal court of a ground for immediate review of class-certification decisions (seemingly including choice of law determinations integral to those decisions) could be reassuring. And it might be that, in some circumstances, promoting federal court class actions would also be an effective way to deal with the problem of overlapping class actions by making a single federal action more likely. Accordingly, in terms of CAFA's jurisdictional policies, choice of law rules that were friendly to class certification might sometimes be regarded as desirable. The slippery slope toward using jurisdiction to supplant state choice of law rules may thus beckon.

But the truly slippery slope has to do with the ordinary fate of class actions: settlement. Settlement promotion is a huge and validly controversial topic unto itself, but in class actions it takes on a new hue and greater importance than in individual litigation. This importance results, of course, from the stakes involved, and the sensitivities are heightened by the fact that one party and court-approved counsel are acting on behalf of many others. In the settlement context, there is considerable room to homogenize the legal rules to accommodate the demands of class actions and settlement. That was the phenome-

---

Burbank, supra note 8, at 1950-51; see also Nagareda, supra note 243, at 683-84 (arguing that federal courts' "judicial methodology" after CAFA should resist overreaching state choice of law doctrine in class actions).

Supra notes 8-9.

246 See generally Peter H. Schuck, The Role of Judges in Settling Complex Cases: The Agent Orange Example, 53 U. CHI. L. REV. 337 (1986) (exploring difficulties that result when the same judge promotes a settlement in a class action and is then called upon to decide whether the settlement is fair).
non I was addressing a dozen years ago, and seems to be the antici-
pation of Professors Issacharoff and Sharkey:

Although CAFA declared its intent to leave Erie untouched, once na-
tional-market cases are jurisdictionally isolated in federal courts, the
need to develop incremental decisional law to address the particular
concerns of these cases will be inescapable. . . . The likely effect of CAFA
will then be to allow a body of national law to develop that corresponds
to the demands of an undifferentiated market in which products are
manufactured and sent to consumers across a distributional chain of
ever-expanding geographic reach.

This attitude seems to embody what Judge Easterbrook called the
mindset of the “central planner.” At least some courts say that this
is their goal. In a leading case on review of a proposed settlement, for
example, the Third Circuit endorsed efforts to craft a nationwide
standard for resolving claims:

It may be argued that problems national in scope deserve the attention
of national courts when there is appropriate federal jurisdiction. Be-
cause of the extraordinary number of claims, fairness counsels that
plaintiffs similarly injured by the same course of deceptive conduct
should receive similar results with respect to liability and damages.

Others urge that CAFA should be expanded to permit removal of in-
dividual actions so they can be combined using multidistrict litigation
procedures to facilitate nationwide settlements.

247 See Marcus, supra note 211, at 866-82 (describing how class actions were used to
break the lawmaking gridlock for mass tort situations and the Erie problem that this
presented).
249 See supra note 14 and accompanying text.
250 In re Prudential Ins. Co. of Am. Sales Practices Litig., 148 F.3d 283, 290 (3d Cir.
1998). This case is the only case cited in the Committee Notes to the 2003 amend-
ments to Rule 23(e) on settlement approval. See also In re Diet Drugs Prods. Liab.
Litig., 282 F.3d 220, 236 (3d Cir. 2002) (noting that “[i]t is in the nature of complex
litigation that the parties often seek complicated, comprehensive settlements to resolve
as many claims as possible in one proceeding”).
251 Judge Weinstein made such a recommendation recently:

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. As use of the class action device to aggregate claims has become more
difficult, MDL consolidation has increased in importance as a means of
achieving final, global resolution of mass national disputes.

In re Zyprexa Prod. Liab. Litig., 238 F.R.D. 539, 542 (E.D.N.Y. 2006). For discussion of
the role in such nationwide settlements played by multidistrict transfer, see Richard
There is a great deal to be said in favor of such an attitude; indeed, for many class members the advantages of such a settlement regime might be preferable to insisting on their "right" to proceed in individual suits under alternative legal rules. For this reason, genuine consent to such a regime would seem to validate imposing it. The new emphasis on giving class members an opportunity to opt out after the proposed terms of settlement are known seems a step in this direction, and such an opportunity would seem to follow as a matter of course should settlement and certification be proposed concurrently.

But the Supreme Court's Amchem decision is a fly in the ointment. The basic thrust of the decision was that—at least in the mass tort context—Rule 23(e) is "an additional requirement, not a superseding direction." So the judge's sense that the result is fair and desirable is not enough; class-certification requirements apply with full (or even heightened) force, except for a reduced emphasis on manageability. In particular, the Court emphasized that, even though settlement might obviate concerns about manageability, the predominance inquiry must be satisfied in the settlement context. Accordingly, the district court's emphasis in Amchem on the class members' "interest in receiving prompt and fair compensation for their claims" did not suffice to permit approval of class treatment, and therefore the proposed settlement regime. Many, including Justice Breyer, are puzzled by concern about predominance in the settlement context. One function there is to alert the court to divergent interests that divide the class—one of those interests surely being divergence


See Marcus, supra note 211, at 905-06 (discussing the validation that could come in some instances from allowing class members to opt out).

See FED. R. CIV. P. 23(e)(4) (providing that the court may decline to approve a settlement unless class members are afforded a second opportunity to opt out even if they already have passed up such an opportunity).


Id. at 621.

See id. at 622-23 ("The benefits ... from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration, but it is not pertinent to the predominance inquiry." (citations omitted)).

Id. at 622.

See id. at 634 (Breyer, J., concurring in part and dissenting in part) (stating that he does not "understand how one could decide whether common questions 'predominate' in the abstract—without looking at what is likely to be at issue in the proceedings that will ensue, namely, the settlement").
in otherwise pertinent state laws. So "fairness" via class action settlements still jostles uneasily with the continuing relevance of *Erie* in the settlement context.

In many instances, however, it would seem that workable alternatives should exist. One such alternative would be some relatively simple subdivision of the class among a limited range of differing state law regimes. Yet if there is also a need to segment the class to deal with other divergences, the additional complication of subdividing further to cope with varying state law could often create complexities that would swamp a nationwide settlement. If that is so, however, one might well ask why it is so troublesome. At least a considerable number of states should be able to muster classes of sufficient magnitude to warrant litigation on their behalf alone, and, if so, the choice of law complication would seemingly be solved for those cases. That solution would offer cold comfort in situations that raise limited fund concerns, but those cases are hardly the norm, even with nationwide class settlements. For defendants who are not facing bankruptcy, the prospect of state-by-state class actions may well be less attractive than a nationwide settlement that puts the entire problem behind them. And for class counsel who hope to justify a fee on the basis of a nationwide class settlement, a statewide class may be considerably less inviting. But the notion that CAFA will entirely insulate defendants against liability in small-claim class actions due to the choice of law problem seems unjustified, and the impulse toward favoring nationwide classes in the face of important differences in otherwise applicable state law is similarly less than compelling.

In sum, CAFA does create or perpetuate conditions that could foster slippery-slope tendencies toward a blanket preference for "na-

---

259 See id. at 610 n.14 (majority opinion) (noting that California plaintiffs in mesothelioma cases regularly recover more than twice the maximum amount obtainable under the settlement in individual suits).

260 See Kramer, *supra* note 241, at 584 (proposing that problems be solved through a state-by-state survey of state law and asserting that, "because variation in the legal rules is not great, once the state-by-state survey is completed, judges will find a relatively small number of conflicts and an equally small number of approaches to choice of law").

261 In *Amchem*, for example, the Court stressed the divergent interests of those who have not yet manifested serious illnesses, by which it seemingly meant that they should be segregated into a different subclass from the class made up of those who were already ill. 521 U.S. at 602-04.

262 See, e.g., Ortiz v. Fibreboard Corp., 527 U.S. 815, 827-28 (1999) (presenting a proposal to settle claims under Rule 23(b)(1) on the ground that defendant lacks sufficient assets to pay all claims).
tional solutions" in federal court, perhaps under what would in effect emerge as federal "common law" for nationwide activities, even if designed only for individual cases. But it need not do so, and it does not depend on jurisdictional policies that favor this result.

CONCLUSION

Whether or not one regards procedure as power, it seems undeniable that jurisdiction most assuredly is power. Without it, judges are powerless to make decisions binding on parties. Jurisdiction policy, then, is addressed to choices about exercising judicial power. CAFA overtly seeks to empower federal judges to produce results different from those supposedly reached by some state court judges. No doubt some proponents of the legislation hope that federal judges will wield this new power in ways the proponents prefer.

This Article has explored somewhat different reasons for providing federal judges with additional jurisdiction in class actions—the ones put forward in support of the legislation—and found them viable. Favoring use of federal procedures for class actions makes sense, as does favoring expansion of federal court jurisdiction to cure problems created by overlapping class actions. Admittedly, the fact that defendants can escape federal court scrutiny of their class action settlements by seeking state court approval and forgoing the jurisdiction CAFA authorizes (even after initially invoking it) erodes the utility of the new jurisdiction, but this may still be preferable to alternative arrangements. Expanding jurisdiction to include multistate class actions because they are of national import similarly seems reasonable as jurisdictional policy, although the great breadth of CAFA's jurisdictional grant can include cases that do not involve significant multistate elements and require courts and parties to confront difficult and time-consuming issues to determine whether there is jurisdiction.

Hence the bottom-line question of whether this shift of jurisdictional power will prove wise will be hard to answer for some time. Nonetheless, there is little reason to think that the former approach

264 Supra Part IV.A.1.
265 Supra Part IV.A.2.
266 Supra Part IV.B.
267 Supra notes 87-108 and accompanying text.
to federal court jurisdiction for class actions had advantages that we are losing, and refining class action theory does not appear likely to solve these jurisdictional problems, even if it offers a good approach to other issues. It may be that one enduring consequence of CAFA will be that federal courts—with expanded responsibility for class actions involving nationwide consequences of activity affecting many states—will actually expand the importance of class action resolution of such problems. Should they tend towards the slippery slope of facilitating combined treatment—either overtly by finding authority in CAFA for developing national rules governing nationwide activity or authority to select choice of law rules enabling nationwide class actions, or covertly by favoring nationwide class action settlements over state-by-state class actions—that effect will be magnified. For the present, then, the enduring effect of this once-in-a-career change in class action practice remains up for grabs, and for that reason the consequences of adopting these jurisdictional policies also remain uncertain.

268 Supra Part I.
269 Supra Part II.
270 Supra Part V.
271 Supra note 14 and accompanying text.