

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

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The mechanisms of law – what courts are to deal with which causes and subject to what conditions – cannot be dissociated from the ends that law subserves. So-called jurisdictional questions treated in isolation from the purposes of the legal system to which they relate become barren pedantry. After all, procedure is instrumental; it is the means of effectuating policy. Particularly is this true of the federal courts.¹

I. Introduction

Jurisdictional legislation, like the law of procedure with which it tends to be grouped, can become disembodied from the political and social contexts in which it was enacted, the political and social contexts in which it functions, and the historical and institutional circumstances that affect if not determine its significance. Scholars who are preoccupied with doctrine, and courts who must try to make sense of jurisdictional legislation and precedent interpreting it, may be content (or constrained) simply to grapple with the technical details. Those who seek to understand law's significance, however, require perspectives in addition to the internal logic of technical reasoning. Particularly when the law in question is labeled "procedure," they must resist the temptation to accept a doctrinal question at face value (that is, to regard doctrine as an

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¹ FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 2 (1928).

end in itself), to view such a question apart from the litigation dynamics it engenders, and otherwise to ignore issues of power that may be at stake in its resolution.

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

How, one might wonder (particularly after reading supporters’ protestations to the contrary), could a statute that purportedly does not change the state substantive law usually applicable in federal diversity litigation be considered “tort reform?”⁶ The answer is simple. Members of Congress now realize what most informed observers have long realized, to wit, that

² Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).

³ See, e.g., “Tort Reform” Bill Dies in the Senate, 2003 CQ ALMANAC, at 13-10; *Fearing Spate of Amendments, Frist Pulls Class Action Bill after Senate Cloture Vote Fails*, CQ WEEKLY 1691 (July 10, 2004); *Republicans Win on Class Action*, CQ WEEKLY 460 (FEB. 21, 2005).

⁴ See Brett Curry, *Institutions, Interests, and Judicial Outcomes: The Politics of Federal Diversity Jurisdiction*, 60 POL. R.Q. 454 (2007); *id.* at 464 (App. A, “Summary of Diversity-Curbing Legislation, 1875-2004”). For much more modest departures from that history that may have influenced the deliberations concerning CAFA, see Act of Nov. 2, 2002, Pub. L. No. 107-273, Div. C, Title I, § 11020(b)(1), 116 Stat. 1826 (codified at 28 U.S.C.A. § 1369 (West 2006)) (“Multiparty, multiforum jurisdiction”) and Pub. L. No. 106-37, 113 Stat. 185 (1999)(codified at 15 U.S.C. § 6601 et seq.) (the Y2K Act) ; *infra* text accompanying notes 284-88.

⁵ See Stephen Labaton, *Senate Approves Measure to Curb Big Class Actions*, N.Y. TIMES, Feb. 11, 2005, at A1 (“Republicans say they hope the vote will provide momentum for two other major bills overhauling the tort law system, one on asbestos litigation, the other on curbs on medical malpractice lawsuits.”); Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. ____, ____ (2008) [TAN 293-98].

⁶ See, e.g., S. REP. NO. 109-2, at 56 (2005) (“S. 5 is court reform – not tort reform”). *But see* “Tort Reform” Bill Dies in the Senate, *supra* note 3.

procedure is power.⁷ More specifically, all informed observers of the litigation process now understand that Federal Rule of Civil Procedure 23 and state class action rules, although regulating the process of litigation, can have major substantive impact.⁸ Even if such rules do not change the substantive law directly, they can change the practical enforcement of substantive rights, whether by enabling plaintiffs to sue who would not otherwise be able to do so, or by exerting irresistible pressure on defendants to settle cases that they regard as lacking in merit.

It has also long been clear that plaintiffs' lawyers react to changes that make litigation more difficult in one court system by moving their cases to other court systems, while defense counsel seek forum advantages for their clients by using the tools available to them to affect the site of litigation. Forum shopping is not necessarily, indeed not usually, a ground for criticism of lawyers or their clients, as the existence and historic rationale of diversity of citizenship jurisdiction in the federal courts suggest.⁹ Moreover, a price of federalism is that people can sue and perhaps secure relief in one state who could not sue, or would not secure relief, in another. Forum shopping may, however, be a good reason to reexamine the constellation of legal rules that cause it. One's normative assessment of any particular forum shopping phenomenon should consider differences in the ability of different types of litigants to benefit from forum shopping,

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

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

⁹ See Debra Lynn Bassett, *The Forum Game*, 84 N.C. L. REV. 333 (2006).

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

Id. at 395. See Alan B. Morrison, *Removing Class Actions to Federal Court: A Better Way to Handle the Problem of Overlapping Class Actions*, 57 STAN. L. REV. 1521, 1524-25, 1530 (2005) (same). For the historic rationale of diversity jurisdiction, see *infra* text accompanying notes 75-76.

the purposes for which a forum is being selected, the fairness of the forum selected to the parties and legal systems concerned, and the proportionality of forum choice.¹⁰

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

CAFA’s jurisdictional provisions, by contrast, are detailed, complicated and replete with both undefined terms and ambiguous phrases. Having worked hard to close off avenues of forum choice that are available in the jurisdictional regime that CAFA largely replaces for class actions, its architects were forced by the need to compromise (and perhaps inclined by a strategic preference for ambiguity) to leave some questions implicating forum allocation unanswered.¹²

¹⁰ Cf. ARTHUR TAYLOR VON MEHREN, THEORY AND PRACTICE OF ADJUDICATORY AUTHORITY IN PRIVATE INTERNATIONAL LAW: A COMPARATIVE STUDY OF THE DOCTRINE, POLICIES AND PRACTICES OF COMMON-AND CIVIL-LAW SYSTEMS 68 (2003) (discussing proportionality as a basic concern in the design of judicial jurisdiction, one that seeks to provide appropriate forums that are “sufficient in number” but not so numerous as to encourage “unjustified forum shopping”).

¹¹ Pub. L. No. 109-2, § 2(b), 119 Stat. 4, 5 (2005). CAFA’s antecedent findings report the importance and value of class actions “when they permit the fair and efficient resolution of legitimate claims of numerous parties,” and the existence over the preceding decade of abuses that had harmed both deserving plaintiffs and innocent defendants, “adversely affected interstate commerce,” and “undermined public respect for our judicial system.” *Id.*, § 2(b)(1)-(2). After enumerating ways in which class members, who “often receive little or no benefit from class actions,” have sometimes been harmed by them, *id.*, § 2(b)(3), the statute states:

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

- (A) keeping cases of national importance out of Federal court;
- (B) sometimes acting in ways that demonstrate bias against out-of-state defendants; and
- (C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

Id., § 2(b)(4).

¹² They sought to answer many of those questions in legislative history. A number of federal courts have declined to rely on the 2005 Senate Report, *see* S. REP. NO.109-14 (2005), for this reason. *See, e.g.*, Brill v. Countrywide Home Loans, Inc. 427

They thus guaranteed years of work for lawyers and courts that is unrelated to the merits of the underlying disputes.¹³

As courts confront, and commentators begin to write about, the many jurisdictional questions that emerged from CAFA's long and messy legislative process, I propose instead to set that legislation in context. The contexts that, given my training and interests, I find most revealing concern the history of federal diversity of citizenship litigation in general and, within that larger story, the history of diversity class actions in federal court. Because all questions of federal court subject matter jurisdiction implicate the "happy relations of States to Nation,"¹⁴ both accounts will necessarily pay attention to state court litigation and to the impact of doctrinal change on the federal-state equilibrium. To focus on one to the exclusion of the other – on class actions to the exclusion of ordinary diversity litigation, or on federal litigation to the exclusion of state litigation – risks a critical loss of perspective. The same risk attends the failure to mark the peculiar history of corporate citizenship for jurisdictional purposes. It is my view that the true measure of CAFA's significance is to be found not so much in its technical details as in the historical and institutional circumstances that brought it forth.

F.3d 447, 448 (7th Cir. 2005) ("naked legislative history has no legal effect"). Others have also inferred that the legislative history was not available to Senators when they voted. *See, e.g.,* Blockbuster, Inc. v. Galeno, 472 F.3d 53, 58 (2d Cir. 2006) ("the Senate Report was issued ten days after the enactment of the CAFA statute"). Yet, it has been contended that, although not ordered to be printed until after CAFA was signed into law, the 2005 Senate Report was "submitted to Congress before CAFA became law." H. Hunter Twiford, III, et al., *CAFA's New "Minimal Diversity" Standard for Interstate Class Actions Creates a Presumption that Jurisdiction Exists, with the Burden of Proof Assigned to the Party Opposing Jurisdiction*, 25 MISS. C. L. REV. 7, 17 n.28. (2005) (citing 151 CONG. REC. S978 (Feb. 3, 2005)). *See also* Lowery v. Alabama Power Co., 483 F.3d 1184, 1206 n.50 (11th Cir. 2007) ("While the report was issued ten days following CAFA's enactment, it was submitted to the Senate on February 3, 2005, while that body was considering the bill."). Moreover, although there was no House Report, there was a House Sponsors' Statement, *see* 151 CONG. REC. H723-02, at H727-29 (daily ed. Feb.17, 2005); Twiford et al., *supra*, at 17, 19, and extensive discussion and debate on the House floor. Finally, it should be noted that much of the 2005 Senate Report was contained in a 2003 Senate Report. *See* S. REP. NO. 108-123(2003); *infra* note 56.

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

¹⁴ FRANKFURTER & LANDIS, *supra* note 1, at 2.

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

This work suggests reasons for concern about the impact that CAFA may have on the enforcement of state law. In addressing that concern, I consider whether changes in the litigation landscape since 1958, when Congress formally embraced corporate citizenship, might be thought to justify the changes in the balance of power in forum selection that CAFA brings about. Critical to my views in that regard are the failures of the Supreme Court effectively to police interstate forum shopping through constitutional control of personal jurisdiction or choice of law and the steroidal effect of the modern (post-1966) class action on the incentives that drive forum choice. I recognize that the state court abuses cited by CAFA’s supporters tended to be episodic and transient. I also recognize that some of what they alleged as abuses go to the heart of the modern class action. At the same time, however, at least where nationwide class actions are concerned, it takes only one state court to declare an empire, and what the political process takes away, it can restore.

In the circumstances, and given the stakes involved, I conclude that it was not unreasonable for Congress to assert a federal interest in regulating the process by which and the forums in which nationwide and multistate (collectively, “multistate”) class action decisions are made. To be sure, the interest in question bears little relation to the historic account of diversity jurisdiction with which we are familiar. But, as Section IV demonstrates, it *is* consistent with the policy that the Supreme Court in fact pursued when umpiring ordinary diversity litigation in the late nineteenth and early twentieth centuries, and consistent as well with the policy that Congress

¹⁵ See Stephen B. Burbank, *Procedure, Politics and Power*, 52 J. LEG. ED. 342 (2002).

¹⁶ See *infra* text accompanying notes 31-48.

¹⁷ See *infra* text accompanying notes 49-73.

¹⁸ See *infra* text accompanying notes 74-174.

¹⁹ See *infra* text accompanying notes 175-297.

²⁰ See *infra* text accompanying notes 298-397.

pursued in its 1958 amendments to the diversity statute.²¹ Neither the Court nor Congress has limited diversity jurisdiction to accord with the traditional account of the reasons for the constitutional grant. In my view, therefore, CAFA's basic approach – which is similarly not so limited and is in that respect continuous with past practice -- should not be tarred with the motives of some who supported the statute, and neither should the federal judiciary.

I reach a very different conclusion with respect to the numerous class actions within CAFA's reach that are not in any meaningful sense "multistate." Although the 1958 Congress effectively blessed the fictions of corporate citizenship created by the federal judiciary, it left in place (if it did not enhance) the instruments of countervailing power for plaintiffs that had developed in the system and that made the fictions tolerable. The 2005 Congress dismantled those instruments in order to open federal courts to multistate class actions. It conveniently forgot them when it came time to fashion exceptions. In the process, Congress neglected the critical role they played in equilibrating not just plaintiffs' and defendants', but federal and state, interests. Ultimately, a combination of special interest overreaching, abetted by the fictions of corporate citizenship, and confusion about legislative aims, abetted by the institutional federal judiciary's schizophrenia regarding overlapping class actions, led Congress to lose sight of its duty, when fashioning CAFA's exceptions, to preserve the "happy relation of States to Nation."²² As a result, CAFA represents an affront to federalism in two respects and a potential affront in a third.

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

The last concern also highlights questions about the effects that the increased federal caseload attributable to CAFA – consisting of substantial numbers of new District Court cases that are notoriously demanding and of appeals from orders granting (or denying) motions to

²¹ See *infra* text accompanying notes 298-339.

²² FRANKFURTER & LANDIS, *supra* note 1, at 2. See *supra* text accompanying note 14.

²³ See *infra* text accompanying notes 340-381.

remand -- will have on the ability of the federal courts to deal fairly with all of their cases. Concerns about the effect that CAFA's predecessor bills would have on the federal courts' workload were long-standing and legitimate. It is thus surprising that, through inability to speak clearly with one voice, the Judicial Conference allowed a vision of the gathering powers of federal courts to compound the potential damage. It appears that federal courts are now seeking to minimize that damage by resisting some of the more blatant overreaching by CAFA's supporters. If so, the phenomenon marks a return to a more sober view of institutional self-interest and in so doing contributes to understanding of the federal judiciary as an interest group.²⁴

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

²⁴ See *infra* text accompanying notes 382-89.

²⁵ See Pub. L. No. 109-2, § 3(a), 119 Stat. 4, 6 (2005) (adding 28 U.S.C. § 1712).

²⁶ See *id.*, 119 Stat. 4, 7 (adding 28 U.S.C. § 1713 ("Protection against loss by class members") and § 1714 ("Protection against discrimination based on geographic location")). Professor Walker suggests that the former was based on one case and the latter on testimony in a congressional hearing). See Laurens Walker, *The Consumer Class Action Bill of Rights: A Policy and Political Mistake*, 58 HASTINGS L.J. 849, 869 (2007). See also Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts; An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. ___, ___ (2008) (suggesting that the case that led to section 1713 "is a case of one, an anecdote based on an unusual case."). The December 2003 compromise that enabled CAFA's ultimate passage is also suggestive in this respect. One of its elements, tying attorney compensation to either coupon redemption or hours actually billed, put teeth into the regulation of coupon settlements, while another removed a ban on any compensation for named class representatives that might reasonably have been regarded as intended to deter even the "legitimate" class actions that CAFA purports to celebrate. See 149 CONG. REC. S16102-01 (2005).

For a discussion of federal rulemaking that arguably made (most of) CAFA's provisions regulating class action settlements unnecessary in federal court, see Richard L. Marcus, *Assessing CAFA's Stated Jurisdictional Policy*, 156 U. PA. L. REV. ___, ___ (2008) [TAN 124-56].

this Symposium.²⁷ Moreover, descriptions of the supposed class action abuses that CAFA's provisions address are suggestive of a crabbed view of the proper role of class actions,²⁸ one that some of the statute's supporters evidently hoped is (or will be) shared by the federal courts. This is, however, primarily an account of jurisdictional law, one in which provisions like those in CAFA that regulate class action settlements are part of the changing mix of incentives and disincentives that determine how jurisdictional law in the books affects litigation behavior and the enforcement of the substantive law.²⁹

²⁷ See Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. ____ (2008).

The fact that S. 2062 purports to protect absent class members, but does not allow them to remove when defendants and class counsel collude to bring about an unfair settlement, further demonstrates that the bill is not about fairness to class members, but solely about protecting defendants.

Morrison, *supra* note 9, at 1548.

²⁸ See S. REP. NO. 109-2, at 14-20 (2005); *id.* at 58-59.

Even if the critics were correct that deterrence was an intended purpose of class actions, that assertion is self-defeating because, in the Committee's view, the concept of class actions serving a "private attorney general" or other enforcement purpose is illegal.

Id. at 59. See John H. Beisner, Matthew Shores & Jessica Davidson Miller, *Class Action "Cops": Servants or Private Entrepreneurs?*, 57 STAN. L. REV. 1441, 1451-62 (2005) (criticizing "private attorney general" model of law enforcement through class actions); David Marcus, Erie, *The Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1286 (2006) ("Some of the law's principal proponents identified the supposed illegitimacy of large-scale economic regulation through private litigation based on state law causes of action as a chief rationale for the statute.") (footnote omitted). *But see infra* text accompanying note 186 (discussing Advisory Committee's intent to facilitate the litigation of negative value claims in the 1966 amendments to Rule 23).

²⁹ A study of publicly available opinions found only one case that involved disputes about CAFA's provisions targeting alleged class action abuses. See Clermont & Eisenberg, *supra* note 13, at ____ n.4. Their speculation that "this may be because reformers had exaggerated the degree of the abuse," *id.*, neglects the irony noted in the text that those abuses were said to occur primarily in state courts, to which the provisions do not apply. See, e.g., S. REP. NO. 109-14, at 53-54 (2005). Professor Walker suggests that "[s]urely soon ... cases commenced after the effective date will reach the settlement stage and the judicial application process will begin." Walker, *supra* note 26, at 850 n.6. Moreover, he argues that "the Consumer Class Action Bill of Rights ...is ...the most significant provision of the new law." *Id.* at 849. His prediction in

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

II. Subject Matter Jurisdiction over Class Actions in the Default Regime

A. Original Jurisdiction

that regard is based on the supposed political incentives of state attorneys general to respond vigorously to the notices of settlement that CAFA requires, *see id.* at 853-54, and on the supposed role that these officials might play under Fed. R. Civ. P. 24. *See id.* at 856-58. I doubt that it is sensible to liken their role under CAFA to "enforcement opportunities." *Id.* at 854. In addition, Professor Walker may overestimate both the possibilities for intervention under Rule 24 and the freedom of an intervenor to participate in the litigation. *See Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987) (concluding in the course of denying interlocutory appeal that limitations on permissive intervenors not so onerous as to constitute a denial of intervention). He may also underestimate the combined forces of budgetary constraints, priorities, and inertia. For these and other reasons attorneys general, if they decide to become involved at all, may prefer to "convey their views informally to parties rather than file official complaints or intervene in cases." Peter Geier, *State AGs Eschew CAFA Review*, NAT'L L.J. 5 (Oct. 23, 2006). For a case where this provision may have made a difference, see *Figueroa v. Sharper Image Corp.*, 2007 U.S. Dist. LEXIS 78316 (S.D. Fla. Oct. 11, 2007); Marcus, *supra* note 16, at [TAN 158]; Linda Mullenix, *CAFA and Coupons*, NAT'L L. J. 24 (Nov. 12, 2007). Ongoing research by the Federal Judicial Center "will document ... any appearance by a public official at a settlement review hearing." Lee & Willging, *supra* note 26, at ____.

I also do not propose to consider so-called "mass actions," which CAFA largely assimilates to class actions for jurisdictional purposes. Civil actions "in which monetary relief claims of 100 or more persons are proposed to be *tried* jointly on the ground that plaintiffs' claims involve common questions of law or fact," 28 U.S.C. A. §1332(d)(11)(B)(i) (West 2006) (emphasis added), are apparently not common. The same study unearthed only two cases that involved a mass action and only three others that discussed them. *See Clermont & Eisenberg, supra* note 13, at ____ n.5. *See also* Elizabeth J. Cabraser, Fabrice Vincent & Paulina do Amaral, *The Class Action Fairness Act of 2005: The Federalization of U.S. Class Action Litigation*, 43 CAN. BUS. L.J. 398, 399 (2006) ("Plaintiffs should therefore be able to keep 'mass actions' in state court if they adhere to current practices, which typically avoid the filing of complaints seeking the joint trial of plaintiffs in numbers even remotely approaching 100."). For my purposes, in any event, they would be a distraction.

³⁰ *See Purcell, supra* note 5.

Before turning to CAFA's jurisdictional provisions, it is worthwhile to recall the law governing federal subject matter jurisdiction that it replaces for cases within its reach. The law in question concerns, and only concerns, jurisdiction predicated on diversity of citizenship. Moreover, even as to diversity class actions, that law continues to provide the rules with respect to cases that are not subject to CAFA, as for instance putative class actions in which the class consists of fewer than 100 persons or in which the aggregate amount in controversy does not exceed \$5,000,000. For this reason I shall refer to it as the "default regime."

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

As to the amount in controversy, which is currently in excess of \$75,000 exclusive of interest and costs for diversity jurisdiction generally,³⁵ the default regime was for many years unclear as a result of conflicts among the lower courts concerning the effect, if any, of the 1990 supplemental jurisdiction statute,³⁶ on the rule, established by the Supreme Court through interpretation, that the claim of every member of a plaintiff class must satisfy the amount in controversy requirement.³⁷ Shortly after CAFA was enacted, the Supreme Court held that, so

³¹ See *Snyder v. Harris*, 394 U.S. 332, 340 (1969); *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921). The same rule applies to defendant class actions which, because of their rarity, will not be mentioned again.

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

³³ See 28 U.S.C. § 1332(c)(1) (2000).

³⁴ See *United Steel Workers v. R. H. Bouligny, Inc.*, 382 U.S. 145, 149-151 (1965) (acknowledging artificiality of distinguishing labor unions from corporations for diversity purposes but stating that any change was for Congress). So also with partnerships. See *Carden v. Arkoma Assoc.*, 494 U.S. 185 (1990).

³⁵ See 28 U.S.C. § 1332(a) (2000).

³⁶ See 28 U.S.C. § 1367 (2000).

³⁷ See *Zahn v. International Paper Co.*, 414 U.S. 291 (1973).

long as the required diversity of citizenship exists, supplemental jurisdiction can be exercised over the claims of all members of a class when at least one named representative has a claim satisfying the amount in controversy requirement.³⁸ That decision does not, however, disturb the default regime's rule that claims cannot usually be aggregated to meet the amount in controversy requirement,³⁹ and thus the default regime continues to require that at least one claim meet that requirement.

B. Removal Jurisdiction

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

Because federal courts are courts of limited jurisdiction, they have a duty to ensure the existence of jurisdiction, constitutional and statutory, at all times and at every level of the federal court system.⁴⁴ Since the advent of various abstention doctrines⁴⁵ and the general embrace of the *forum non conveniens* doctrine⁴⁶ in the 1940's, it has been hard to take seriously lofty language that once posited a similar duty on the federal courts to exercise jurisdiction that Congress has

³⁸ See *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005).

³⁹ See *Snyder v. Harris*, 394 U.S. 332 (1969).

⁴⁰ See 28 U.S.C. § 1441(a) (2000).

⁴¹ See *id.* Compare 28 U.S.C. § 1441(c) (separate and independent claim removal in federal question cases).

⁴² See 28 U.S.C. § 1441(b) (2000).

⁴³ See 28 U.S.C. § 1446(b) (2000).

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

⁴⁵ See, e.g., *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

⁴⁶ See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

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

III. CAFA’s Jurisdictional Provisions

A. Original Jurisdiction

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

1. Carve-outs

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

⁴⁷ See *Coherns v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (“We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.”). The qualifier that the obligation is “virtually unflagging,” *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 818 (1976), does not help (to take “the lofty language” seriously).

⁴⁸ See 28 U.S.C. § 1447(d) (2000) (providing, however, an exception for civil rights cases removed under section 1443). This provision originated in a 1887 statute. See Act of March 3, 1887, ch. 373, 24 Stat. 552, 553. The Judiciary Act of March 3, 1875, which substantially expanded the jurisdiction of the federal courts, had authorized review of remand orders by appeal or writ of error. See Act of March 3, 1875, ch. 37, 18 Stat. 470, 472. The 1887 provision rescinding that authority was inserted without discussion, see 18 CONG. REC. 2543 (March 2, 1887), during Senate debate on a House bill that was designed “to diminish the jurisdiction of the circuit courts and the Supreme Court of the United States, to promote the convenience of the people, and to lessen the burden and expense of litigation.” *Id.* at 613 (Jan. 13, 1887). See *Gay v. Ruff*, 292 U.S. 25 (1934). The provision was preserved virtually unchanged in the 1911 codification of laws relating to the judiciary. See Pub. L. No. 61-475, 36 Stat. 1094, 1095. It was inadvertently omitted from the 1948 codification, prompting legislation to restore it the following year. See Act of May 24, 1949, ch. 139, § 84, 63 Stat. 102. The exception for civil rights cases was added in 1964. See Pub. L. No. 88-352, § 901, 78 Stat. 266.

⁴⁹ Federal subject matter jurisdiction may, however, exist under the default regime.

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

I should also mention here the exclusions for class actions involving solely a claim either “concerning a covered security as defined [in the Securities Acts],”⁵³ or “that relates to the internal affairs of a corporation or other form of business enterprise” under the law of the state of incorporation or organization,⁵⁴ or that relates to rights, duties and obligations relating to or created by any security as defined by federal securities law.⁵⁵ According to the Senate Report, “[t]he purpose of this provision is to avoid disturbing in any way the federal vs. state court jurisdictional lines already drawn in the securities class action litigation context by the enactment of the Securities Litigation Uniform Standards Act of 1998 (P.L. 105-353).”⁵⁶

2. Diversity and Amount in Controversy

⁵⁰ 28 U.S.C.A. § 1332 (d)(5)(A) (West 2006).

⁵¹ 28 U.S.C.A. § 1332 (d)(5)(B) (West 2006).

⁵² See S. REP. NO. 109-14, at 42 (2005). Compare *Lapides v. Board of Regents*, 535 U.S. 613 (2002) (removal waives sovereign immunity with respect to state law claims for which immunity was waived in state court). The federal courts could learn a valuable lesson from this in their administration of the *forum non conveniens* doctrine in diversity cases. Why should state courts that do not have any such doctrine, or follow a version that is less robust, be deprived of the power to hear a case that would be dismissed on that ground on motion of the removing party? This suggests a reason either to require federal courts to apply state *forum non conveniens* law in diversity cases or to hold that, by removing, the defendant “has thereby waived any personal privilege he might have had to be sued in another [court].” *Sayles v. Northwestern Ins. Co.*, 21 F.Cas. 608 (C.C.D.R.I. 1854) (No. 12,421) (upholding personal jurisdiction in removed case involving attachment of property that could not have been maintained originally in the federal court to which it was removed).

⁵³ 28 U.S.C.A. § 1332 (d)(9)(A) (West 2006).

⁵⁴ 28 U.S.C.A. § 1332 (d)(9)(B) (West 2006).

⁵⁵ See 28 U.S.C.A. § 1332 (d)(9)(C) (West 2006).

⁵⁶ S. REP. NO. 109-14, at 45 (2005). Identical language can be found in the 2003 Senate Report. See S. REP. NO. 108-123, at 46 (2003). For an interesting and valuable analysis of the interplay between CAFA and SLUSA, arguing that Congress was mistaken in believing that the latter had solved the relevant problems and thus in refusing to extend CAFA to securities cases, see Jeffrey T. Cook, *Recrafting the Jurisdictional Framework for Private Rights of Action under the Federal Securities Laws*, 55 AM. U. L. REV. 621 (2006).

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

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

3. Definitions

The provisions of new subsection 1332 (d) are subject to definitions, the most important of which for present purposes is the definition of a “class action” as “any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action.”⁶⁰ For jurisdiction this means that status as a putative class action suffices. This is also clear from another provision, which states that subsection (d) “shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.”⁶¹ The question arises, however, whether jurisdiction subsists when in a case brought in, or removed to, federal court under CAFA, the court declines to certify a class. The importance of that question is likely to be greatest in a case removed from state court, and the implications of the answer to it may be most dramatic with respect to subsequent attempts to litigate in state court.⁶²

⁵⁷ 28 U.S.C.A. § 1332 (d)(2)(A) (West 2006). Subsections (d)(2)(B) &(C) carry out the same plan for cases involving aliens and foreign states.

⁵⁸ See 28 U.S.C.A. § 1332 (d)(10) (West 2006). This provision was apparently added “to ensure that unincorporated associations receive the same treatment as corporations for purposes of diversity jurisdiction.” S. REP. NO. 109-14, at 45-46 (2005). From the perspective of unincorporated associations alone, it could have the effect of *reducing* access to federal court in a minimal (as opposed to complete) diversity regime, although it would very rarely make a difference in that regard.

⁵⁹ 28 U.S.C.A. § 1332 (d)(6) (West 2006).

⁶⁰ 28 U.S.C.A. § 1332 (d)(1)(B) (West 2006).

⁶¹ 28 U.S.C.A. § 1332 (d)(8) (West 2006).

⁶² The decisions to date are split. *Compare, e.g.,* Genenbacher v. Century Fiber Co. II, LLC, 500 F. Supp.2d 1014 (2007) (denial of class certification did not affect subject matter jurisdiction) *with* Hoffer v. Cooper Wiring Devices, Inc., 2007 U.S. Dist. LEXIS 75806 (N.D. Ohio Sept. 28, 2007) (dismissing for lack of subject matter jurisdiction after class certification denied). The 2003 Senate bill contained a provision

4. Exceptions⁶³

CAFA divides the universe of cases in which the basic requirements (minimal diversity and more than \$5,000,000 in controversy) are met into four sets, with its exceptions applying to three of them. In the first set are cases in which (1) one third or fewer of the members of all proposed plaintiff classes in the aggregate (“class members”) are citizens of the state in which the action was originally filed (the “original state”). Even if all defendants are citizens of that state, a federal court has no discretion to decline jurisdiction: there is no exception for such cases. In the second and third sets are cases where *both* the “primary defendants” and either (2) between one-third and two-thirds⁶⁴ or (3) two thirds or more⁶⁵ of class members are citizens of the original state. A federal court must decline jurisdiction in the third set (the “home state exception”), and it has discretion to decline jurisdiction in the second (the “discretionary exception”) based on a consideration of six factors, the first of which is “whether the claims asserted involve matters of national or interstate interest,”⁶⁶ and the last of which is “whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.”⁶⁷

requiring the court to dismiss a case in which certification had been denied, and one of the elements of the compromise that enabled the passage of the 2005 legislation was the deletion of that requirement. Senator Dodd asserted that the “compromise eliminates the dismissal requirement, giving federal courts discretion to handle Rule 23 ineligible cases appropriately. Potentially meritorious suits will thus not be automatically dismissed because they fail to comply with the class certification requirements of rule 23.” 149 CONG. REC. S16102-01 (2005). Of course, even if a court consulted this legislative history, it might conclude that the “appropriate” treatment of the “Rule 23 ineligible cases” would be to see whether they are within federal subject matter jurisdiction.

⁶³ “Exceptions” is a loaded word in this context, because labeling a statutory provision as such, rather for instance than as an “exclusion,” may have unjustified influence in determining the location of the burden of persuasion concerning the existence of subject matter jurisdiction. See Lonny Sheinkopf Hoffman, *Burdens of Jurisdictional Proof*, 59 ALA. L. REV. ____ (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1005447; Stephen J. Shapiro, *Applying the Jurisdictional Provisions of the Class Action Fairness Act of 2005: In Search of a Sensible Judicial Approach*, 59 BAYLOR L. REV. 77, 98-102 (2007). I use it here only as a concession to the shortness of life.

⁶⁴ See 28 U.S.C.A. § 1332 (d)(3) (West 2006).

⁶⁵ See 28 U.S.C.A. § 1332 (d)(4)(B) (West 2006).

⁶⁶ 28 U.S.C.A. § 1332 (d)(3)(A) (West 2006).

⁶⁷ 28 U.S.C.A. § 1332 (d)(3)(F) (West 2006). The other factors focus attention on the laws that will govern the claims asserted, “whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction,” whether the original state has a

CAFA's fourth set, triggering the "local controversy exception," is comprised of cases in which (1) greater than two-thirds of class members are citizens of the original state, (2) there is at least one defendant from whom "significant relief" is sought, whose alleged conduct forms a "significant basis" for the claims asserted, and who is a citizen of the original state, and (3) "principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred" in the original state.⁶⁸ Even if all of those requirements are met, the exception's duty to decline to exercise jurisdiction does not apply unless "during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons."⁶⁹

B. Removal Jurisdiction

Although CAFA may prove a boon to putative class members who would prefer, as an original matter, to litigate in federal court,⁷⁰ one would have thought that, in the near term at least, its major impact would be felt as a result of its removal provisions.⁷¹ These change the default

"distinct nexus with the class members, the alleged harm, or the defendants," and whether class membership is disproportionately composed of citizens of the original state. *See id.* § 1332 (d)(3)(B)-(E).

⁶⁸ 28 U.S.C.A. § 1332 (d)(4)(A)(i) (West 2006).

⁶⁹ 28 U.S.C.A. § 1332 (d)(4)(A)(ii) (West 2006).

⁷⁰ This would include litigants in states, like Texas, whose courts have made the path to class certification not only significantly more difficult in recent years, but also more difficult than it is in many federal circuits. *See Citizens Ins. Co. of America v. Daccach*, 217 N.W.3d 430 (2007); *infra* note 256.

⁷¹ Note in that regard accounts of multiple state court filings in anticipation of CAFA, *see Lawyers Seek Loopholes in Class Action Overhaul*, CQ WEEKLY 494 (Feb. 28, 2005) ("once Congress put the bill on the fast track this year there was a last-minute dash by plaintiffs' lawyers to the courthouses that have been particularly friendly to class action plaintiffs"), and the amount of post-CAFA litigation concerning the effect, if any, of amendments to state court complaints on the question whether the action was "commenced" prior to CAFA's effective date (February 18, 2005). *See* Lonny Sheinkopf Hoffman, *The "Commencement" Problem: Lessons from a Statute's First Year*, 40 U.C. DAVIS L. REV. 469 (2006). *See also* Linda S. Mullenix, *The Costs of CAFA*, NAT'L L.J., Aug. 27, 2007, at 13 (discussing risk of attorney fees award for improper removal "[a]s corporate defendants remove all state class actions into federal court"). Yet, the Federal Judicial Center's empirical studies do not support the supposition in the text; their data indicate that a majority of CAFA cases have been filed as original actions in federal court. *See Lee & Willging, supra* note 26, at ____.

Although both diversity removals and original proceedings increased, comparing the pre- and post-CAFA periods, the greatest increase is observed in the original proceedings. Pre-

CAFA, the average number of monthly removals of diversity class actions was 16.6; post-CAFA the comparable figure was 23.7, an increase of, on average, about 7 class actions. But pre-CAFA, the average number of monthly original proceedings of diversity class actions was 10.8; post-CAFA, the comparable figure was 31.5, an increase of almost 20 class actions per month.

Id.

It may be worth determining the extent to which these findings were affected by the FJC's decision -- for all consolidated cases, including those subject to the MDL process - - to include only lead cases in their analysis database. *See Lee & Willging, supra* note 26, at ___ [TAN 66]. That decision is understandable for purposes of workload and resource studies, but it is not obviously appropriate in comparing filing and removal rates (particularly pre- and post-CAFA rates).

The FJC's researchers suggested in an earlier report that plaintiffs' counsel, preferring state court but not confident about their ability (or not willing) to structure the litigation so as to keep it there, may have decided that the game was not worth the candle. *See Thomas E. Willging & Emery G. Lee III, The Impact of the Class Action Fairness Act of 2005 on the Federal Courts 16-17 (FJC 2007)*. Moreover, as that report also points out, by filing in federal court originally, plaintiffs' counsel preserved the choice of forum (where personal jurisdiction and venue law afford choice). *See id.* Compare 28 U.S.C. § 1441 (a) (2000) (prescribing venue of removed case as "the district court of the United States for the district and division embracing the place where such action is pending"). Additional analyses have shown that the mix of post-CAFA original and removed cases varies among the circuits, prompting the researchers to look for correlations between those circuits attracting larger percentages of either original filings or removed cases and circuit reputations for liberality or conservatism in class certification. *See Lee & Willging, supra* note 26, at ___-___. Part of that inquiry -- as for instance, concerning the high percentage of removed cases in the Fifth Circuit -- should include attention to state certification law and practice. *See supra* note 70.

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

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

regime in at least four respects. First, the statute enables any defendant to remove (whether or not other defendants consent). Second, it extends that privilege even to in-state defendants. Third, CAFA eliminates the default regime's time limitation on removal.⁷² Fourth, it provides for discretionary appeals from orders granting or denying motions to remand.⁷³

IV. Diversity Litigation in Historical Context

More than two centuries have not shed much light on the reasons why the Constitution includes in Article III a grant of judicial power in "Controversies ... between Citizens of different States."⁷⁴ Early on, however, the Supreme Court embraced what has become the traditional view, and the Court has never abandoned it. Under that view the constitutional grant of diversity of citizenship jurisdiction was intended to make available a neutral forum for litigants worried about local bias in the courts of states other than their own.⁷⁵ Consistently with that view, in 1806 the Court interpreted the statute implementing the grant of judicial power for inferior courts to require complete diversity.⁷⁶

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

⁷² See 28 U.S.C.A. § 1453(b) (West 2006).

⁷³ See 28 U.S.C.A. § 1453(c)(1) (West 2006). The removal provisions contain carve-outs mirroring those under revised section 1332. See *id.* § 1453(d); *supra* text accompanying notes 40-46. To my knowledge, the federal courts have not wrapped themselves in knots over the problem potentially created by section 1453's failure explicitly to require that there be original jurisdiction under section 1332(d)(2), as contemplated by the legislative history. See Adam N. Steinman, *Sausage-Making, Pigs' Ears, and Congressional Expansions of Federal Jurisdiction: Exxon Mobil v. Allapattah and its Lessons for the Class Action Fairness Act*, 81 WASH. L. REV. 279, 292-98 (2006); Clermont & Eisenberg, *supra* note 13, at ____ [TAN 6] (assuming usual requirement that removed action be one that could have been entertained by federal court as a matter of original jurisdiction "in accordance with the clear legislative history despite the absence of appropriate statutory wording").

⁷⁴ U.S. CONST. art III, § 2.

⁷⁵ See *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809).

⁷⁶ See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). In cases kept from federal court by that interpretation, a state court intent on disfavoring an out-of-state citizen would also have to disfavor one of its own. This is not to say that an interpretation not requiring complete diversity would in all circumstances be inconsistent with the traditionally ascribed purpose. Moreover, the fact that -- from the beginning and still today -- a plaintiff can (as a matter of subject matter jurisdiction) sue an out of state defendant in a federal court in the plaintiff's state is inconsistent with the traditional account. This "anomaly" may be evidence of reasons for the constitutional grant other than, or in addition to, the fear of bias. Congress has long been urged to eliminate it. See,

Apart from its pedigree in decisions of the Supreme Court, the traditional view has in its favor that it was the rationale advanced by Hamilton in the Federalist Papers⁷⁷ and, according to Henry Friendly, the rationale most frequently invoked when Article III was debated in state ratifying conventions.⁷⁸ The fact that Friendly's research in pre-1787 decisions of state appellate courts found no evidence of actual bias⁷⁹ may only confirm that a different kind of bias -- publication bias -- was acute in the 18th century.⁸⁰ Research designed to determine the extent of

e.g., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 12 (§ 1302(a)), 123-124 (1969) (hereinafter STATE-FEDERAL STUDY); *Hearings before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary on S. 1876, The Federal Court Jurisdiction Act of 1971*, 92d Cong. 128 (1971) (testimony of Professor Richard Field) (“Now, so far as the in-state plaintiff is concerned, this represents about half of the diversity cases”). Although Congress has declined to do so, it has eliminated the twin anomaly of a venue option of plaintiff's residence. *See* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 94 (1990); Act of Dec. 1, 1990, Pub. L. No. 101-650, Tit. III, § 311, 104 Stat. 5114.

⁷⁷ *See* THE FEDERALIST NO. 80 (Alexander Hamilton).

⁷⁸ *See* Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 492 (1928).

⁷⁹ *See id.* at 493-95.

⁸⁰ “Publication bias” refers to the confounding effect in studies based on published opinions of non-random differences in the rate of publication. It may account for the prominence of cases removed under CAFA in publicly available opinions. *See supra* note 71. A vivid example of the phenomenon was revealed by the Second Circuit's observation that it published decisions reversing grants of summary judgment far more often than decisions affirming them. *See Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir.1986), *cert. denied*, 480 U.S. 932 (1987). John Frank analyzed (for different purposes) “5[9]4 reported cases in seven colonies and states from 1658 to 1787 ...[which comprised] substantially all available reported cases.” John P. Frank, *Historical Bases of the Federal Judicial System*, 13 L. & CONTEMP. PROBS. 3, 24 (1948). I have corrected the figure given in the quotation (554) to accord with Table 3. *See id.* at 25. Even noting a likely appeal bias in cases of “diverse origin” and coding generously in favor of that group, Frank found that it contained only 55 of the total, many of which were “not interstate cases, but English-state cases.” *Id.* In comments on a draft of this article, Kevin Clermont suggested that there may also have been a selection effect at work:

[T]he last place I think you would see actual bias in old cases is in the cases themselves. Litigants would be painfully conscious of bias, and would not sue or settle to avoid the bias. The reported cases would turn out to read just like cases in a total absence of bias. As we showed in our *Xenophilia* articles, 109 Harv. L. Rev. 1120-43 (1996) and 4 J. Empirical Legal

actual bias does not in any event speak to the existence of solicitude for the fear of biased treatment that the Court in fact relied on.⁸¹ Certainly, as John Frank observed, there was evidence of biased treatment of some aliens, namely British creditors, sufficient to insulate from question the basis for the cognate grant of judicial power in “Controversies ... between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”⁸² Moreover, Frank also provided reasons to believe that Madison “and his colleagues obviously thought of national and international diversity together.”⁸³

Whatever the role of actual bias or fear of bias in its creation, the Diversity Clause elicited only a “tepid” defense by Marshall in the ratification effort.⁸⁴ Just as proponents may have been

Stud. 441-64 (2007), win rates can show whether bias is more or less than the parties expect, but cannot show whether bias exists or not.

E-mail from Kevin M. Clermont to Stephen B. Burbank (Nov. 18, 2007) (available from author).

⁸¹ See *supra* text accompanying note 75. Friendly acknowledged that a change to a bill in the first Congress was “clearly in line with the theory, already orthodox [in 1789!], that the purpose of diversity jurisdiction was to prevent the baneful effects of local prejudice.” Friendly, *supra* note 78, at 501. Of course, CAFA itself may represent an example of “solicitude for the fear of biased treatment” that either does not exist or is statistically insignificant. See Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does it Make?*, 81 NOTRE DAME L. REV. 591, 653 (2006) (finding “little difference in the rulings issued by the two sets of courts” notwithstanding attorney beliefs that “state courts are more permissive toward class actions”). But see *infra* note 358 (discussing methodological and interpretive questions raised by this study).

⁸² U.S. CONST. art III, § 2. See Frank, *supra* note 80, at 24.

⁸³ Frank, *supra* note 80, at 27.

⁸⁴ Friendly, *supra* note 78, at 487. Friendly acknowledged Felix Frankfurter’s assistance. See *id.* at 483; Henry J. Friendly, *In Praise of Erie – and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 383 (1964) (“working under the guidance of Professor Frankfurter as he then was, on a paper”). Frankfurter, in turn, relied heavily on Friendly’s article in an article of his own published the same year. See Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 520-21 (1928). Proceeding from the doubts that Friendly’s research had engendered about the existence of the problem to which, under the traditional view, the constitutional grant was directed, Frankfurter launched a vigorous attack on the need for diversity jurisdiction in 1928, stressing its controversial nature and political and social costs. An advocate of abolishing statutory diversity jurisdiction, he argued that, in any case, “certainly the obvious abuses of diversity jurisdiction should be promptly removed by legislation... .” *Id.* at 523. Moreover, he made it clear that in his mind the most

loath to articulate a bill of particulars against biased state courts, so may they have been content to mask their true goals for the diversity clause in the supposed apprehensions of their countrymen. In that regard, Article III contains a number of grants of judicial power that, Frank argued, were “of actual practical significance to large landholders.”⁸⁵ Moreover, the remark of Madison on which he relied for the conflation of interstate and international diversity also linked “justice” to “foreigners” with the promotion of trade.⁸⁶ Whether or not, as Friendly concluded, “the desire to protect creditors against legislation favorable to debtors was a principal reason for the grant of diversity jurisdiction,”⁸⁷ it surely was one reason animating some of its supporters.⁸⁸ As I have previously argued:

An important reason for the existence of Article III federal judicial power in diversity (including alienage diversity) cases and for the

obvious of such abuses was corporate diversity litigation. *See id.* at 523-26. Frankfurter also used his article to advocate passage of a Senate bill that would have overruled *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), *see id.* at 530 n.152, without revealing either that he wrote the bill or that he did so at the suggestion of Justice Brandeis. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1109 n.433 (1982). The circle was closed when Brandeis cited Frankfurter’s article in his opinion for the Court in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). *See infra* note 158.

⁸⁵ Frank, *supra* note 80, at 20. Although Frank acknowledged that the grant in cases “between Citizens of the same State claiming Lands under Grants of different States,” U.S. CONST. art III, § 2, was the “most obvious relevant clause,” Frank, *supra* note 80, at 20, he argued that “the diversity and treaty clauses were the jurisdictional clauses most immediately affecting large landed interests.” *Id.* He also concluded that the “Supreme Court aided virtually every land speculator who came before it from 1790 to 1815.” *Id.* at 22 (footnote omitted). *See id.* at 20.

⁸⁶ *See supra* text accompanying note 83; Frank, *supra* note 80, at 27.

⁸⁷ Friendly, *supra* note 78, at 493. *See id.* at 495 (“There was a vague feeling that the new courts would be strong courts, creditors’ courts, business men’s courts.”); Frankfurter, *supra* note 84, at 520.

⁸⁸ Note in that regard Hamilton’s argument that judicial independence would serve to temper “unjust and partial laws”:

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

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

First Congress's decision to create lower federal courts had to do with concerns that state courts were hostile to creditors. Although this concern was at its height in connection with British creditors, the discriminatory treatment of whom might prove a cause of war, it was by no means confined to such cases. In the period immediately preceding the Constitutional Convention there was ample evidence of the propensity of states to favor debtors. Indeed, concerns about the impact of such laws on contract and property rights and on the ability of the new country to progress to a developed commercial state led to more than a head of judicial power; they contributed to a substantive restriction in the Constitution, the prohibition against the impairment of contracts.⁸⁹

There is thus evidence that the grant of diversity jurisdiction in Article III was designed to make available a forum where the creditor class would receive "justice." Moreover, as Frank suggested, although the "typical case [in 1787] was still *A. v. B for a cow*,"⁹⁰ the framers and ratifiers of the Constitution should perhaps be credited with imagining developments in interstate and international commerce with which they had no experience.⁹¹

One development that those responsible for the Constitution surely did not anticipate, but that was uppermost in the minds of CAFA's supporters, was the role of corporations in

⁸⁹ Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power – A Case Study*, 75 NOTRE DAME L. REV. 1291, 1323-24 (2000) (footnotes omitted). *See id.* at 1325-26 (discussing *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46-47 (1825), an intensely controversial decision in which Chief Justice Marshall candidly discussed the perceived problem and speculated "about the reason Congress conferred local federal power to alter final state process law in the Process Act of 1789." *Id.* at 1326.).

⁹⁰ Frank, *supra* note 80, at 26.

⁹¹ Both Friendly and Frank also suggested, with very little evidence, that the constitutional diversity grant was intended to provide possible refuge from state courts that were inefficient or worse. *See* Friendly, *supra* note 78, at 497-99; Frank, *supra* note 80, at 27, 28.

the economy. Business corporations in the modern sense hardly existed in 1787,⁹² and for some fifty years thereafter, their creation in most states required special legislation (charters).⁹³ During that period, the ability of corporations to sue or be sued in federal court was restricted by the requirement of complete diversity, the view that corporations were not themselves citizens and the technique of looking to the citizenship of their shareholders.⁹⁴ In a move that heralded if it did not reflect the increasingly important role that corporations played in an increasingly interstate economy,⁹⁵ the Supreme Court, in a confusing⁹⁶ but heroic bit of fictionmaking, blundered to the

⁹² Following the American Revolution, there was almost universal assent to the proposition that the power to form corporations was vested in the state legislatures. All corporate charters were issued one by one by individual legislative acts, and the overwhelming majority of the corporations chartered in the late 1700s were banks, insurance companies, water companies, and companies organized to build or run canals, turnpikes, and bridges. Many of the public utility or transportation corporations were awarded monopoly privileges and police powers of the state (for example, eminent domain) in exchange for the financing and construction of quasi-public goods by the private firm.

Henry N. Butler, *Nineteenth Century Jurisdictional Competition in the Granting of Corporate Privileges*, 14 J. LEG. STUD. 129, 138 (1985) (footnotes omitted). See Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 300 (1990) (“At the time of the adoption of the Constitution, there were very few corporations.”).

The same is, of course, true of “common issue” class actions. “Thus, the form was entirely absent from the Founders’ thinking.” Purcell, *supra* note 5, at [TAN 121].

⁹³ New York enacted the first general incorporation statute of widespread applicability in 1811, but until 1845 only two other states (New Jersey and Connecticut) followed suit. See Butler, *supra* note 92, at 143. “The special chartering system inherently possessed the potential for rent-seeking behavior, and many examples show how charter applicants strained to get more generous terms from their legislators than those obtained by rival groups already in the field.” *Id.* at 141.

⁹⁴ See *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809); Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1598 (1988); Blumberg, *supra* note 92, at 302-03.

⁹⁵ Butler suggests that the replacement of special charters with general incorporation statutes (the two systems co-existed in many states for much of the Nineteenth Century) was due to the increase in interstate commerce and the competitive market for incorporation that developed when it became clear that states were constitutionally required to allow foreign corporations to conduct interstate commerce within their borders. See Butler, *supra* note 92, at 133, 155; *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869). See also Butler, *supra* note 92, at 150-51 (“Prior to the 1850s, it was

solution that corporations would be accorded the benefits of citizenship for diversity purposes through an irrebuttable presumption that their shareholders were citizens of the incorporating state.⁹⁷ As a result, corporations were treated as if they were outsiders, potentially subject to biased treatment, in the courts of all states but one.⁹⁸

It was not just the federal law of subject matter jurisdiction that impeded corporate litigation well into the nineteenth century (and that makes a suggestion of the framers' prescience look like wishful thinking). In combination with a conception of corporations as entities that could

either assumed or required that the operations of corporations – both special and general law – would be confined to the chartering state.”(footnote omitted)).

⁹⁶ The confusing nature of the Court's opinions on corporate citizenship may have contributed to confusion about their effects. Thus, one commentator described *Deveaux* as “allow[ing] easy access to federal courts because it was easy to demonstrate diversity of citizenship.” Jess M. Krannich, *The Corporate “Person”: A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61, 73 (2005). Given the requirement of complete diversity, this cannot be right.

⁹⁷ See *Louisville, Cincinnati & Charleston Railroad v. Letson*, 43 U.S. (2 How.) 497 (1844); *Marshall v. Baltimore & Ohio R. Co.*, 57 U.S. (16 How.) 314 (1853); Blumberg, *supra* note 92, at 304-05. Frankfurter, *supra* note 84, at 523 (“legal metaphysics about corporate ‘citizenship’ has produced a brood of incoherent legal fictions concerning the status of a corporation”). As Hovenkamp observes, the logic of the *Marshall* decision “was undermined two years later by [*Dodge v. Woolsey*, 59 U.S. (18 How.) 331 (1855)], which entertained a diversity action between a shareholder and a corporation.” Hovenkamp, *supra* note 94, at 1598. For the role that decisions about corporate citizenship for diversity purposes may have played in the subsequent recognition of corporations as “persons” under the Fourteenth Amendment, see *id.* at 1642-43; Krannich, *supra* note 96, at 76-79, 91-92.

⁹⁸ This malignant decision has resulted in allowing a corporation sued in the State in which it actually does business, to remove the suit into a Federal Court on the ground of diverse citizenship, simply because it happens to be chartered in another State. No single factor has given rise to more friction and jealousy between State and Federal Courts, or to more State legislation conflicting with and repugnant to Federal jurisdiction than has the doctrine of citizenship for corporations. And this diverse citizenship jurisdiction created by the Constitution and intended to allay friction and to afford equal and identical law to citizen and non-citizen in a State, has resulted in putting foreign corporations in a more favorable situation than domestic corporations.

Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 90 (1923). See Frankfurter, *supra* note 84, at 524-25.

not act outside of the chartering state⁹⁹ or could do so only with express or implied consent of other states,¹⁰⁰ state personal jurisdiction law, which was highly favorable to defendants,¹⁰¹ made it hard to sue them anywhere else.¹⁰² As calls for a local forum for those harmed as a result of the activities of entities that did in fact operate outside of the state of incorporation became more insistent, the states responded with fictions of their own.¹⁰³ In 1856 the Supreme Court rejected the

⁹⁹ See Butler, *supra* note 92, at 150-51 (quoted *supra* note 95). “Logically applied, this theory of non-migration prevented suit in a non-chartering state, for the corporation could not be there.” *Neirbo Co. v. Bethlehem Shipbuilding Corp., Ltd.*, 308 U.S. 165, 169 (1939) (footnote omitted).

¹⁰⁰ See *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839). “In *Bank of Augusta*, the Supreme Court held that a state could more-or-less arbitrarily exclude foreign corporations from doing business within its territory.” Hovenkamp, *supra* note 94, at 1649 (footnote omitted). For gradual recognition of “the right of corporations to work in multistate markets,” see *id.* at 1650; *supra* note 95.

¹⁰¹ The traditional grounds of adjudicatory jurisdiction in this country (domicile, tag jurisdiction, and *quasi in rem* jurisdiction) are general. In times when travel was costly and difficult, they favored defendants, requiring the plaintiff to sue where the defendant lived, unless he or she could be served while present in another state (or had property in another state).

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

¹⁰² If you could not arrest a corporation, you could not tag it with service under the power theory that was dominant in the nineteenth century. *Cf. Neirbo*, 308 U.S. at 172 (“The deletion of ‘in which he shall be found’ [in a 1887 venue provision] was not directed toward any change in the status of a corporate litigant. The restriction was designed to shut the door against service of process upon a natural person in any place where he might be caught. It confined suability, except with the defendant’s consent, to the district of physical habitation.”). The other main antidote to traditional pro-defendant jurisdictional rules, *quasi in rem* jurisdiction, apparently was available as against foreign corporations through attachment of their property, at least in some states. If diversity existed, such cases could be removed even though they could not have been maintained as original actions in federal court. See, e.g., *Sayles v. Northwestern Ins. Co.*, 21 F. Cas. 608 (C.C.D.R.I. 1854) (No. 12,421); *Bliven v. New England Screw Co.*, 3 F. Cas. 715 (C.C.S.D.N.Y. 1853) (No. 1,550); HON. JOHN F. DILLON, REMOVAL OF CAUSES FROM STATE COURTS TO FEDERAL COURTS 27 (1876).

¹⁰³ “The fact that corporations did do business outside their originating bounds made intolerable their immunity from suit in the states of their activities. And so they were required by legislatures to designate agents for service of process in return for the privilege of doing local business.” *Neirbo*, 308 U.S. at 170.

In 1870 ... only a half-dozen states had enacted laws that required

argument that a state court judgment was not entitled to full faith and credit because the rendering court's jurisdiction was predicated on implied consent to service of process on an in-state agent.¹⁰⁴ *But it was not until 1871 that the Court blessed federal corporate litigation outside of the incorporating state,*¹⁰⁵ *and not until 1878 that the Court made it clear that the same rule applied in diversity actions*¹⁰⁶ *and (in dictum) that such suits could be removed to federal court.*¹⁰⁷

These last developments were key contributing factors to the “system of corporate diversity litigation” so brilliantly chronicled by the legal historian, Edward Purcell.¹⁰⁸ Purcell's book, which should be required reading for all who teach and write about federal courts and federal practice and procedure, shows how and why corporate litigants used the federal courts, particularly through removal from the state courts, to gain litigation advantages over their opponents, particularly the

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

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

¹⁰⁴ See *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 407-08 (1856).

¹⁰⁵ See *Railroad Company v. Harris*, 79 U.S. (12 Wall.) 65 (1871); PURCELL, *supra* note 103, at 17-18. *Harris* was not a diversity case. “It was controlled by acts of Congress local to the [District of Columbia].” *Harris*, 79 U.S. at 86. That may explain why lower courts failed to follow its logic in diversity cases. See *infra* note 106.

¹⁰⁶ See *Ex parte Schollenberger*, 96 U.S. 369, 378 (1878) (noting “the practice of the circuit courts generally ... to decline jurisdiction in this class of suits,” but reasoning that the cases relied on by the lower courts “were in conflict with the rule [in *Harris*]”).

¹⁰⁷ See *id.* at 377 (“As the company, if sued in a State court, could remove the cause to the circuit court, and thus compel a citizen of the state to submit to that jurisdiction, we see no reason why the citizen may not, if he desires it, bring the company into the same jurisdiction at the outset.”). “As a result of *Ex parte Schollenberger*, it was clear that a corporation came within the provisions of the removal statutes so as to give jurisdiction to the circuit court in every state in which the corporation transacted business through an agent.” FRANKFURTER & LANDIS, *supra* note 1, at 90 (footnote omitted). As Purcell observes:

Although *Harris* and *Schollenberger* had opened the federal courts to foreign corporations in the 1870s, both explained that they did so to assist individuals who wanted to sue those corporations in federal court.

PURCELL, *supra* note 103, at 18.

¹⁰⁸ See PURCELL, *supra* note 103.

growing number of individuals injured in “Industrial America” and, with the spread of insurance, the growing number of policy holders. The litigation advantages they sought included (1) the opportunity to inflict punishing expense and delay on, and extract favorable settlements from, opponents with fewer resources to spend on litigation, especially before automobiles became ubiquitous, federal courts more numerous, and the population more urban (i.e., decreasingly in the period Purcell studied),¹⁰⁹ (2) the opportunity to secure more favorable rules of substantive law, especially after the federal courts expanded the sphere of application of general federal common law and the Supreme Court became enamored of freedom of contract (i.e., increasingly in the period Purcell studied, until the 1930's), and (3) the possibility that the federal courts might act in accordance with the view of them held by many people – namely as bastions of business interests -- especially in times of social upheaval (i.e., intermittently in the period Purcell studied).

In addition, corporate litigants came to understand, that, although Congress closed the avenues for remedial dispensation that individual judgment creditors had sought in actions at law, where federal diversity courts were required to apply state procedure,¹¹⁰ no such constraint applied to equitable remedies (e.g., injunctions), as to which conformity had never been required.¹¹¹

¹⁰⁹ These considerations led Judge Dillon to recommend raising the amount in controversy, or increasing the number of federal courts or judges, in 1876:

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

DILLON, *supra* note 102, at 25-26.

¹¹⁰ See Burbank, *supra* note 89, at 1327 (in response to the Supreme Court's controversial decision in *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825), “the proponents of change secured legislation in Congress that required federal courts to follow state laws concerning final process as of 1828 and that channeled their power to alter state law on final process in one direction, namely the adoption of post-1828 laws”).

¹¹¹ See Burbank, *supra* note 84, at 1039 (1982). *But see* Burbank, *supra* note 89, at 1321 (“even prior to 1938, federal courts tended to follow state law that expanded the remedial rights of litigants, and assertions concerning the inability of state law to affect federal equity from that period must be carefully evaluated”). Note also railroads' use of state court injunctions against FELA litigation in allegedly inconvenient forums, which the Court put a stop to through interpretations of the statute's venue provision. See

Finally, late in the period Purcell studied, a (Democratic) Congress added to the federal courts' remedial arsenal a discretionary remedy – the declaratory judgment – that quickly became an additional incentive for corporate forum shopping, particularly in insurance litigation.¹¹²

Once corporate litigants were given broader access to the federal courts, plaintiffs' lawyers devised tactics to deny them the litigation advantages they sought there by keeping cases in the state courts. In line with the growing popular view that the federal courts favored business interests,¹¹³ some states sought to assist plaintiffs in that effort, including by attempting to domesticate corporations that they licensed to do business.¹¹⁴ As Purcell describes, the Supreme Court put an end to this maneuver in 1896, at the height of a period when its decisions might well be thought to have justified the popular view.¹¹⁵ Thereafter and more typically, stuck with an increasingly implausible view of corporate citizenship (under the traditional view of the purpose of the diversity grant), plaintiffs' lawyers relied on various stratagems to defeat removal.

The most promising techniques for defeating removal were the joinder of non-diverse defendants¹¹⁶ and the manipulation of the damages claimed,¹¹⁷ either of which could prevent corporate defendants from satisfying the requirements of original jurisdiction. Each of these

PURCELL, *supra* note 103, at 222-24, 370 n.82. *See also id.* at 206-09 (use of federal equity in insurance litigation).

¹¹² *See* PURCELL, *supra* note 103, at 212-13. An interesting article by Andrew Bradt has rescued Congress's 1934 statute from oblivion, reminding us of the multiple purposes that animated its chief promoters, who were law professors, and one of whom at least (Edson Sunderland) was a progressive/realist. *See* Andrew Bradt, "Much to Gain and Nothing to Lose": Implications of the History of the Declaratory Judgment for the (b)(2) Class Action, 58 ARK. L. REV. 767, 771-91 (2006). The perspective taken in the text suggests that further research may reveal that this statute, like the Rules Enabling Act of 1934, enacted the same year, was welcomed by people of very different political persuasions.

¹¹³ *See* PURCELL, *supra* note 103, at 26; Frankfurter, *supra* note 84, at 522 ("Moreover, it is politically highly unwise to permit the federal courts to be used as an escape from state tribunals and thus to associate the federal court in the public mind as the resort of powerful litigants.").

¹¹⁴ *See* PURCELL, *supra* note 103, at 18; Frankfurter, *supra* note 84, at 521 ("With a view to circumventing this use of jurisdiction states have resorted to every variety of legislation, frequently frustrated by the Supreme Court.") (footnote omitted); Warren, *supra* note 98, at 90, *quoted supra* note 98.

¹¹⁵ *See* St. Louis and San Francisco Railroad Co. v. James, 161 U.S. 545 (1896); PURCELL, *supra* note 103, at 18 ("*James*, in other words, ensured that corporations could restrict their citizenship to only one state and thereby preserve diversity with citizens of every other state in the union.") (footnote omitted); *id.* at 267.

¹¹⁶ *See* PURCELL, *supra* note 103, at 104-26.

¹¹⁷ *See id.* at 87-103.

maneuvers elicited counter-measures from corporate defendants, and the federal courts were required to umpire the system through the interpretation of the jurisdictional statutes.

Key to defense against the joinder strategem was a provision permitting the removal of separable controversies (now separate and independent claims).¹¹⁸ Long treated by scholars as complex if not obscure, and having been amended in recent years to reach only federal question claims, this provision is still a fertile source of doctrinal questions.¹¹⁹ It once was much more than that. *Purcell* shows how corporate defendants, in particular railroads, sought access to federal court by, among other arguments, contending that claims against the (diverse) corporation and a (nondiverse) employee were not “joint” (because based on different theories of liability), how some lower courts (led by the future Chief Justice, William Howard Taft), accommodated them,¹²⁰ and how the Supreme Court vacillated and temporized before ultimately remitting the answer to state law, which tended to be favorable to plaintiffs (foreclosing removal by treating the claims as joint).¹²¹

Plaintiffs pursued a wide variety of anti-removal tactics involving the amount in controversy,¹²² some less seemly than others. It suffices here to mention two. First, some plaintiffs deliberately alleged damages less than the amount required for diversity in their state court complaints, amending the *ad damnum* after the time for removal had passed. Corporate defendants responded to delayed upward amendments by removing and arguing that federal jurisdiction should not be defeated through fraudulent pleading.¹²³ Having avoided the question in a case squarely presenting it in 1890,¹²⁴ the Court eventually approved the view of lower courts that rejected the tactic, holding (in a case involving an amendment to drop a non-diverse party from state litigation) that post-commencement developments making a case removable (re)triggered the time limit.¹²⁵

¹¹⁸ *See id.* at 106-07; 28 U.S.C. § 1441(c) (2000).

¹¹⁹ *See, e.g.,* WRIGHT & KANE, *supra* note 32, at 235-42.

¹²⁰ *See* PURCELL, *supra* note 103, at 111-12.

¹²¹ *See id.* at 115-21. *Purcell* notes that even then plaintiffs faced difficulty, because of lower court intransigence, the problems created by the need to keep the non-diverse party (who might be a co-worker) in the case, or corporate defendants’ determination to impose expense even in cases where removal was clearly improper. *See id.* at 120-21.

¹²² It was raised from > \$500 to >\$2,000 in 1887, and to >\$3,000 in 1911. For advocacy of raising the amount by a sitting federal judge in 1876, see *supra* note 109.

¹²³ *See* PURCELL, *supra* note 103, at 87-95.

¹²⁴ *See id.* at 95-97; *Northern Pacific Railroad Co. v. Austin*, 135 U.S. 315 (1890).

¹²⁵ *See* PURCELL, *supra* note 103, at 112-14; *Powers v. Chesapeake and Ohio Railway Co.*, 169 U.S. 92 (1898). The value of this rule to defendants was diluted in 1988, long after the disintegration of the system of corporate diversity litigation, when Congress enacted a one-year limitation. *See* Pub. L. No. 100-702, Title X, § 1016(b), 102 Stat. 4869 (codified at 28 U.S.C. § 1446(b) (2000)); *infra* note 308.

A more interesting and apparently far more common tactic of plaintiffs intent on remaining in state court was the conscious discounting of claims that might yield recovery in excess of the required amount in controversy for diversity jurisdiction.¹²⁶ This tactic became more attractive when that amount was raised from >\$500 to >\$2,000 in 1887 (and to >\$3,000 in 1911).¹²⁷ Even so, it is sufficiently arresting to prompt a reminder of the historical context, in particular the circumstances that litigation in federal court could be significantly more expensive and less convenient for plaintiffs than state court litigation,¹²⁸ that some defendants did not scruple to remove even in cases where it must have been apparent that they had no right to do so, and that some lower federal courts were happy to oblige those defendants, even in the teeth of Supreme Court precedent. On that view, apart from any perceived advantages of litigation in state court, by discounting plaintiffs sought insurance against the transaction costs of removal battles. More broadly, according to Purcell:

the development of a collection of highly technical and apparently trivial procedural rules centering on the jurisdictional amount helped to forge one of the great, if largely unspoken, social and legal compromises of the late nineteenth and early twentieth centuries. The operative rule was simple and well understood. If plaintiffs agreed to keep their claims reasonably small, they could guarantee themselves a state forum.¹²⁹

¹²⁶ See PURCELL, *supra* note 103, at 90-103. At that time, according to Purcell, a plaintiff's recovery was generally restricted by state law to the amount stated in the complaint. *See id.* at 91. Changes in pleading rules since that time have already caused difficulties in litigation under CAFA. *See Morgan v. Gay*, 471 F.3d 469 (3d Cir. 2007); *see also* Guglielmino v. McKee Foods Corp., 2007 U.S. App. LEXIS 23654, *23 (9th Cir. 2007) (O'Scannlain, J., specially concurring) (criticizing *Lowdermilk v. U.S. Bank National Ass'n*, 479 F.3d 994 (9th Cir. 2007) for imposing higher ("to a legal certainty") burden of proof on removing defendant when plaintiff alleges specific amount less than the jurisdictional threshold, because "[s]ome states do not allow mention of damages in state court complaints"); *Strawn v. AT&T Mobility, Inc.*, 2007 U.S. Dist. LEXIS 74877 ***7-8 (S.D.W.Va. Sept. 26, 2007) (observing that *ad damnum* below jurisdictional amount not sufficient to deny federal jurisdiction in West Virginia, where recovery not limited to amount demanded in complaint). For a valuable discussion of the doctrinal puzzles lurking in jurisdictional amount requirements, both in the default regime and under CAFA, see Clermont & Eisenberg, *supra* note 13, at ___ - ___. *See also* Shapiro, *supra* note 63, at 116-21 ("Voluntary Limitation of Damages").

¹²⁷ *See* PURCELL, *supra* note 103, at 91, 99.

¹²⁸ Purcell notes that the popularity of discounting by plaintiffs endured even after the developments, such as the automobile and increases in the number of federal courts, that narrowed the gap. *See id.* at 91-92.

¹²⁹ *Id.* at 251.

If the refusal of federal courts to follow state law concerning final remedies, thereby favoring creditors, proved intensely controversial in the 1820s,¹³⁰ it is hardly surprising that, once the system of corporate diversity litigation was fully operational, the advantages it unquestionably conferred and those many people feared it conferred on corporations in litigation against individuals also provoked intense controversy. We have seen that various efforts by states to thwart removal, as by attempting to domesticate foreign corporations, were unsuccessful.¹³¹ The controversy was equally intense in the halls of Congress, where repeated efforts to abolish corporate citizenship or otherwise to curtail corporate access to federal court found substantial support – a number of the bills passed – in the House, but always failed in the Senate.¹³²

In his rich and nuanced account of the system of corporate diversity jurisdiction in the late nineteenth and early twentieth centuries, Purcell vividly evokes the thrust and parry, not just of the litigants, but, as it were, of the federal courts. He demonstrates that the Supreme Court responded differently, indeed inconsistently, to the interpretive questions posed, and that, even when the Court had appeared to settle a question, some lower courts did not get the message, at least if it was one that disfavored the interests of corporate defendants. Acknowledging that it is difficult to read the Court's decisions in the 1890s as other than a conscious effort to enable corporate access to federal court, Purcell is careful both to note the larger political environment that probably contributed to that impulse and, identifying cycles of pro- and anti-access decisions, to eschew any one causal explanation for the Court's behavior, let alone a narrowly ideological explanation.¹³³

Felix Frankfurter appeared to accept Friendly's argument that the Constitution's diversity grant was more likely animated by the purpose of enabling creditors to escape pro-debtor state legislation (and more generally, perhaps, of providing "business men's courts") than it was by the purpose ascribed to it by the traditional view.¹³⁴ Yet, he was equally happy, when advocating abolition of the system of corporate diversity, to point out that some of the Supreme Court's

¹³⁰ See *supra* text accompanying note 110.

¹³¹ See *supra* text accompanying note 114. For the checkered history of state statutes tying a corporation's permission to do business to its remaining in state court, see PURCELL, *supra* note 103, at 201-02, 205. Purcell notes that such statutes, while in force (i.e., until invalidated under *Terral v. Burke Construction Co.*, 257 U.S. 529 (1922)), were of particular salience to insurance companies. Since insurance is not "commerce," those selling it across state lines are not protected by the Commerce Clause from the power to exclude. "If a state revoked an insurance company's license [because it removed a case to federal court], the company would simply be out of business in that state." *Id.* at 202.

¹³² See FRANKFURTER & LANDIS, *supra* note 1, at 90-93, 136-41; Curry, *supra* note 4, at 464 (App. A). The House passed bills that would have eliminated corporate citizenship in 1880, 1883 (twice), and 1892, a bill that would have limited Supreme Court review in diversity cases in 1890, and a bill that would have eliminated railroad citizenship in 1894. See *id.*

¹³³ See PURCELL, *supra* note 103, at 121-26, 193, 262-91. .

¹³⁴ See Frankfurter, *supra* note 78, at 520-21.

decisions providing corporate access could not be justified according to the traditional view.¹³⁵ Purcell follows Frankfurter in pointing out the inconsistencies, but, as a historian not constrained by the decisions of the Supreme Court (or the incentives of an advocate of change), he digs deeper, ranges more broadly, and is more sensitive both to causal multiplicity and to the transformation of law in the books.

Evaluating experience under the removal provision of the Local Prejudice Act,¹³⁶ Purcell provides evidence that bias against foreign corporations was a rare and isolated phenomenon in the late 19th century.¹³⁷ Prejudice was, however, a very serious problem for the putative beneficiaries of the removal provision of the Civil Rights Act of 1866.¹³⁸ Comparing the Court's decisions under the two statutes in light of the general provisions concerning diversity jurisdiction, Purcell finds that "[i]n diversity cases federal law was willing simply to presume the existence of prejudice and to grant a broadly effective remedy; in civil rights cases it was content to ignore the prejudice and to offer only a paper remedy."¹³⁹ This is part of the powerful case he makes for the proposition that "a better explanation [than the traditional view] for the actual shape that the Supreme Court gave diversity jurisdiction over the years – or at least from the 1870s to the 1940s – was simply that the justices generally if implicitly believed that they should maintain federal jurisdiction over issues and interests that they regarded as having national importance."¹⁴⁰

¹³⁵ See *id.* at 525-26 (criticizing removal jurisdiction for state court cases between two non-residents, removal of whole controversy under separable controversy provision, and receiverships based on diversity of citizenship); *infra* note 148.

¹³⁶ Act of March 2, 1867, 14 Stat. 558 (1867).

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

PURCELL, *supra* note 103, at 129 (footnotes omitted). For a description of amendments to the act in 1887-88, see *id.* at 130-31.

¹³⁷ See *id.* at 137-42.

¹³⁸ 14 Stat. 27 (1866).

¹³⁹ PURCELL, *supra* note 103, at 147.

¹⁴⁰ *Id.* at 256. At times, however, Purcell may retroject to political actors in 1787 and 1789 the much later belief system and motivation of the Court (or of Congress). Consider in that regard:

The respective jurisdictions were created and construed not on the basis of any showing about the dangers of "local prejudice" or any considered evaluation of the need for various carefully tailored remedies but, rather,

Purcell's account of federal diversity litigation after the early years of the 20th century is equally rich and nuanced, and equally fascinating. The advent of the automobile, the proliferation of federal trial courts, and the movement to urban living reduced the advantages of removal for corporate litigants,¹⁴¹ while the Federal Employer Liability Act, which was quickly amended to bar removal,¹⁴² and state worker compensation laws,¹⁴³ both providing attractive alternatives to a brutally laissez faire general federal common law, empowered plaintiffs who desired to litigate in state tribunals. The loosening of restrictions on state court personal jurisdiction over corporations encouraged an increasingly entrepreneurial plaintiffs' personal injury bar to turn the tables on corporate opponents by venturing into other states in search of forum advantage. Noting that the advantages sought often reposed not in rules of substantive law, but rules of "procedure" broadly defined,¹⁴⁴ Purcell describes the attractions of one state favored by plaintiffs, Minnesota, as follows:

The legal system of Minnesota was distinctly favorable to plaintiffs. It recognized a far-reaching rule of personal jurisdiction over foreign corporations, placed the burden of proving contributory negligence on the defendant, provided that plaintiffs were not subject to examination before trial, and applied a generous employer-employee joinder rule, thus making a critical antiremoval device readily available. Its supreme court, too, construed remedial statutes liberally. The Minnesota jury was especially attractive. State law provided for a nonunanimous verdict by ten of twelve jurors and gave its juries considerable latitude in fixing the amount of damages. Equally or more important, its juries had a reputation for bringing in handsome verdicts for plaintiffs.¹⁴⁵

on a desire to accomplish divergent and ulterior social goals. For its part, diversity jurisdiction was simply designed to favor non-residents who engaged in interstate commerce. In a variety of ways, some intended and others not, it did just that.

Id. at 147.

¹⁴¹ *See id.* at 154-60

¹⁴² *See id.* at 165-72.

¹⁴³ *See id.* at 160-63.

¹⁴⁴ *See id.* at 179; Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TULANE L. REV. 553, 573-74 (1989).

¹⁴⁵ PURCELL, *supra* note 103, at 185. *See id.* at 184 ("Of all the states that offered attractive forums, however, none rivaled Minnesota in its combination of both favorable law and an enterprising plaintiffs' bar."). Note that Minnesota continued to provide jurisdictional and choice of law rules that were very favorable to plaintiffs long after the period that Purcell chronicles, and it also continued to provide cases in which the Court sought to use the Constitution to put on the brakes. *See Rush v. Savchuk*, 444 U.S. 320 (1980); *infra* note 246. Indeed, because of a very long statute of limitations for personal

Corporate defendants that for decades had used the burdens of distance and expense as tactical weapons to wear down individual plaintiffs through removal started to protest the burdens that interstate forum shopping imposed on them.¹⁴⁶ Moreover, ever eager to take advantage of more favorable rules of general federal common law – in a litigation environment where, because of “legislative encroachments”¹⁴⁷ those rules had less scope of application -- they sought and ultimately (in 1923) secured reversal of a 1906 Supreme Court decision that, consistently with the traditional view of diversity litigation, had barred removal from the courts of a state in which neither the plaintiff nor the defendant resided.¹⁴⁸ Purcell describes how, in that decision and by other means, the Court in the 1920s and 1930s sought to police interstate forum shopping. Central to those efforts were attempts to use the Constitution to restrain state court jurisdiction and state choice of law.¹⁴⁹ Both efforts proved short-lived, as the Court apparently realized that the commerce¹⁵⁰ and full faith and credit clauses¹⁵¹ were equilibration instruments entirely too blunt for the dynamics of forum selection.

injury actions, Minnesota is still a “hotbed for out-of-state plaintiffs.” Mark Hansen, *Lawsuits Travel Up North*, ABA J. 16, 16-17 (Dec. 2007).

¹⁴⁶ In their efforts to establish a doctrine of forum non conveniens and to have out-of-state suits enjoined, corporations exhibited a keen awareness of the burdens that distance imposed on litigants. ... Indeed, in a good many imported cases the distance was less than the additional distance that removal imposed on numerous individual plaintiffs. Nevertheless, when distance became a plaintiffs’ tool, corporate defendants loudly proclaimed its unfairness and vigorously sought relief from its oppression.

PURCELL, *supra* note 103, at 189 (footnote omitted).

¹⁴⁷ *Id.* at 160.

¹⁴⁸ *See id.* at 192-93. The decisions in question were *Ex Parte Wisner*, 203 U.S. 449 (1906) (no removal of case brought in district in which neither plaintiff nor defendant resided), and *Lee v. Chesapeake & Ohio Railway Co.*, 260 U.S. 653 (1923) (case otherwise removable can be removed without regard to original venue requirements). Note Professor Frankfurter’s criticism of this result in terms of the historic rationale for diversity jurisdiction. *See supra* note 135 and accompanying text. When writing for the Court in *Neirbo Co. v. Bethlehem Shipbuilding Corp., Ltd.*, 308 U.S. 165 (1939), Justice Frankfurter had reason to think better of *Lee*, at least insofar as it cut a path to making a federal court available to a plaintiff suing a defendant that had appointed an agent for service of process in a state of which neither was a citizen. *See Neirbo*, 308 U.S. at 168, 171 n.8.

¹⁴⁹ *See id.* at 192-99; *infra* notes 150-51 and accompanying text.

¹⁵⁰ *Compare* *Davis v. Farmers Co-Operative Equity Co.*, 262 U.S. 312 (1923) *with* *International Milling Co. v. Columbia Transportation Co.*, 292 U.S. 511, 517 (1934) (*Davis* “confined narrowly within the bounds of its own facts”).

¹⁵¹ *Compare* *Bradford Elec. Light Co., Inc. v. Clapper*, 286 U.S. 145 (1932) *with* *Alaska Packers Assoc. v. Industrial Accident Comm’n of California*, 294 U.S. 535 (1935).

The failed constitutional experiments of the 1920s and 1930s set the stage for the Court's decision in *Erie RR v. Tompkins*¹⁵² and for its embrace of a broad *forum non conveniens* doctrine,¹⁵³ the former antithetical to corporate interests and the latter something that those interests had long advocated. Purcell here¹⁵⁴ lays the groundwork for his subsequent, equally brilliant book, *Brandeis and the Progressive Constitution*,¹⁵⁵ confirming what a close reading of the *Erie* decision and its progeny reveal. Quite apart from the "unconstitutionality of the course pursued"¹⁵⁶ under *Swift v. Tyson*,¹⁵⁷ the Court was intent to address the "defects, political and social" of the system of corporate diversity litigation by eliminating the forum-shopping incentives that different rules of decision created.¹⁵⁸

Scholars have tended to view *International Shoe v. Washington*¹⁵⁹ as contributing to the development of the modern market for litigation, enhancing opportunities for forum shopping,¹⁶⁰

In Purcell's understated formulation, the Court in the latter claimed "somewhat unconvincingly to be consistent with *Clapper*." PURCELL, *supra* note 103, at 199.

¹⁵² 304 U.S. 64 (1938).

¹⁵³ See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

¹⁵⁴ See PURCELL, *supra* note 103, at 224-30.

¹⁵⁵ EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* (2000).

¹⁵⁶ *Erie*, 304 U.S. at 77-78.

¹⁵⁷ 41 U.S. (16 Pet.) 1 (1842).

¹⁵⁸ *Erie*, 304 U.S. at 74. See PURCELL, *supra* note 155, at 141-89. A very close reading of the *Erie* decision reveals a number of citations to Frankfurter's 1928 article, where, despairing of a judicial remedy to *Swift v. Tyson*, the author advocated the legislative fix that Brandeis had urged upon him. See *Erie*, 304 U.S. at 73 n.6, 77 n.20, 77 n.21; *supra* note 84.

¹⁵⁹ 326 U.S. 310 (1945).

¹⁶⁰ [T]he greater latitude to assert jurisdiction afforded the states by *International Shoe* and its progeny dramatically enhanced the opportunities for interstate forum shopping and, coupled with loose federal control of state choice of law, the incentives of both litigants and courts to run a race to judgment, creating a market for litigation in which the voluntary extension of wholly domestic *lis pendens* doctrine to interjurisdictional litigation would constitute surprising self-restraint.

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

Although Purcell makes no such claim,¹⁶¹ his account raises the question whether *International Shoe* was actually animated in part by the desire to *reduce* forum shopping against corporations. By enabling states to assert activity-based personal jurisdiction without resort to fictions such as corporate presence, the Court may have hoped to change the balance of incentives in favor of suit in the state where the corporate activity grounding the claim occurred. The justices may have hoped thereby to reduce the incidence, and set the stage for a reconsideration, of what we now call general doing business jurisdiction.¹⁶² If so, rather than contributing to the impulses that led the Court, two years later, to embrace *forum non conveniens* (a view that is in any event suspect insofar as that doctrine has little if any role to play in cases of specific jurisdiction),¹⁶³ *International Shoe* should be seen as part of a concerted attempt to develop alternatives to the failed constitutional experiments of the 1920s and 1930s.

¹⁶¹ “The decision limited the ability of foreign corporations to structure their business so that they could carry on activities in a state but remain beyond the reach of its courts, and it made it easier for plaintiffs to sue foreign corporations in their home states.” PURCELL, *supra* note 103, at 221.

¹⁶² Apparently the creation of the courts but subsequently adopted in the jurisdictional statutes of some states, doing business jurisdiction was justified under traditional theory by the fiction of presence. When that fiction was undressed in *International Shoe*, a case that involved an assertion of what we would now call specific jurisdiction but that reasoned to a new paradigm by surveying cases of both specific and general jurisdiction, the future of this jurisdictional ground was put in doubt. It is still in doubt.

Burbank, *supra* note 101, at 750 (footnotes omitted). This discussion prompted David Shapiro to ask,

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

E-mail from David Shapiro to Stephen Burbank (Oct. 31, 2007).

¹⁶³ See Stephen B. Burbank, *Jurisdiction to Adjudicate: End of the Century or Beginning of the Millennium?*, 7 TULANE J. INT'L & COMP. L. 111, 120-21 (1999). Both of the Court's 1947 decisions embracing a broad *forum non conveniens* doctrine were federal diversity actions. Purcell describes them as a “respon[se] to the general rise in interstate forum shopping,” PURCELL, *supra* note 103, at 235, and suggests that they may have contributed to the defeat of a bill that would have restricted venue options in FELA cases. See *id.* at 235-36. He also notes the likely influence in that regard of the transfer provision in the draft Judicial Code, which was enacted in 1948 as 28 U.S.C. § 1404.

Whether or not *International Shoe* was animated by a goal of reducing interstate forum shopping against corporations, the role that the *forum non conveniens* doctrine and its statutory successor¹⁶⁴ were perceived to play in policing that phenomenon is evidence that, by the late 1940s, diversity jurisdiction had come to be seen by many not as a magnet for abusive litigation behavior by corporations but as a source of protection against such behavior on the part of plaintiffs. Of course, the new role was linked no more closely to the traditional view of diversity jurisdiction than that it replaced. Moreover, it would have traction until such time as the Court or Congress came up with alternative and more direct ways of restraining state court overreaching.

Purcell persuasively argues that by the 1950s the changes wrought by *Erie* and its progeny and the changed complexion of the federal judiciary effectively rendered the federal courts forums more likely to be sought than feared by individual plaintiffs.¹⁶⁵ Thus, at a time when the federal courts were under attack for unpopular constitutional decisions but when diversity cases were proving a burden, Congress rejected a bill sponsored by a Southern Congressman that, by eliminating corporate citizenship entirely, might have cut the federal civil docket by as much as twenty-five percent.¹⁶⁶ Instead, Congress raised the amount in controversy to >\$10,000 and addressed what were perceived to be the last vestiges of the system of corporate diversity litigation, giving plaintiffs in workers compensation cases the same privilege of forum choice as under the FELA, and eliminating the abuse of tactical reincorporation famously blessed in the *Black & White Taxicab* case.¹⁶⁷ The last was accomplished by providing that corporations are citizens both of states by which they are incorporated and of the state that is their principal place of business.¹⁶⁸

Purcell's discussion of the 1958 legislation adumbrates the point that he develops at length in *Brandeis and the Progressive Constitution* with respect to Henry Hart and *Erie* scholarship, namely that by this point the actors had lost sight of the social meaning of the system of corporate diversity litigation.¹⁶⁹ As a result, they deemed the unusual and essentially local problem involved in the *Black & White Taxicab* case as emblematic of that system.

¹⁶⁴ See 28 U.S.C. § 1404 (2000). Added by the 1948 revision of Judicial Code, this provision authorizing transfer (rather than dismissal) of cases in which there is subject matter jurisdiction, personal jurisdiction and proper venue, had the effect of confining the federal *forum non conveniens* doctrine to cases in which the alternative forum is foreign.

¹⁶⁵ See PURCELL, *supra* note 103, at 230-43.

¹⁶⁶ See *id.* at 240-42; *id.* at 241 (“The Tuck bill would have cut the diversity docket by almost two-thirds and sliced the entire federal civil docket by 25 percent.”) (footnote omitted).

¹⁶⁷ *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928).

¹⁶⁸ See Pub. L. No. 85-554, § 2, 72 Stat. 415 (1958).

¹⁶⁹ See PURCELL, *supra* note 155, at 229-57.

Whether those responsible for the 1958 legislation had forgotten or were simply unaware of the serious and widespread social problems that the system of corporate diversity litigation engendered, the manifest absurdity of treating modern business corporations as outsiders, vulnerable to local prejudice, in all states but two cannot have escaped them.¹⁷⁰ Or rather, it could

¹⁷⁰ This is not to deny that members of Congress or others considering the legislation enacted in 1958 echoed the traditional account of reasons for the diversity grant, or that they entertained the possibility of prejudice against national corporations doing interstate business. It is, however, to suggest that their hearts were not in it and thus to agree with Purcell's interpretation of the legislative record. Consider that, in identical language, the House and Senate Reports (1) espoused the goal of "reducing the number of cases involving corporations which come into Federal district courts on the fictional premise that a diversity of citizenship exists. H.R.REP. NO. 85-1706, at 3 (1958); S. REP. NO. 85-1830, at 3 (1958); (2) stated that the "jurisdictional amount should not be so high as to convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies;" HOUSE REPORT, *supra*, at 3; SENATE REPORT, *supra*, at 4; (3) having articulated the "underlying purpose of diversity of citizenship legislation," went on to observe that "[w]hatever the effectiveness of this rule, it was never intended to extend to local corporations which, because of a legal fiction, are considered citizens of another State;" HOUSE REPORT, *supra*, at 4; SENATE REPORT, *supra*, at 4, and (4) noted that the change "will not eliminate those corporations which do business over a large number of States, such as the railroads, insurance companies, and other corporations whose businesses are not localized in one particular State." HOUSE REPORT, *supra*, at 4; SENATE REPORT, *supra*, at 5. Consider also that in his testimony before a House Subcommittee on behalf of the Judicial Conference, which originally proposed the legislation, Judge Maris acknowledged that there were intermediate measures Congress could take between expanding corporate citizenship by adding the principal place of business and simply making diversity jurisdiction unavailable to corporations. *See Jurisdiction of Federal Courts, Concerning Diversity of Citizenship: Hearing Before the Subcomm. of the H. Comm. on the Judiciary, 85th Cong. 30, 34-35 (1957)*. Moreover, he stated that the measure proposed (and ultimately enacted) "is the minimum ... and it is the one which the Conference felt it was proper for it to recommend." *Id.* at 30. Given that formulation, his additional comment that "[y]ou could go further and say that a corporation shall be regarded as a citizen of any state in which it is doing business, whether that is its principal place of business or not, though that would eliminate many more corporations" might have seemed an invitation. In that regard, Judge Maris also testified that the Judicial Conference had considered and rejected making corporations citizens of all states in which they were (doing or) qualified to do business because "that would really eliminate American business, which is mostly now incorporated, from access to the federal courts." *Id.* at 35. Withal, when asked about possible opposition from "people representing corporations," *id.*, to the various possible measures discussed at the hearing, Judge Maris observed that they "seem to regard pretty highly their privilege of taking their litigation into the Federal courts in States remote

not have escaped them if they been thinking about diversity jurisdiction in the traditional way. Whatever the framers and ratifiers of the Constitution may have intended in Article III, Congress in 1958, with far better reason (at least as a matter of institutional legitimacy) than the Court in the late nineteenth and early twentieth centuries, had moved on, confirming what its repeal of the Local Prejudice Act ten years earlier had suggested.¹⁷¹ As Purcell observes, the important thing, rather, was

to recognize the dominant role of large corporations in the national economy and to accord their activities the time and attention of the national courts. The distinction that Congress drew between local and national corporations – for which it cited no significant evidence – allowed it for the first time to give its formal blessing to the judicially developed doctrine of corporate citizenship and to confer on national businesses the statutory right of access to the federal courts. That policy judgment was profoundly if subtly different from the traditional premise that justified diversity jurisdiction. In

from their headquarters, where they don't know the local people, and they fear for the results that might be reached in the State court. They seem to feel that way. *Id.* at 36. He added that “it is the basis, I suppose, for the diversity jurisdiction, when all is said and done; why it was originally put in the Constitution.” *Id.*

Finally, the congressional materials informing the interpretation of the 1958 legislation are markedly different in this respect from some of the Judicial Conference materials they include. Most notable is the 1951 report of the Conference's Committee on Jurisdiction and Venue, chaired by Judge John Parker, no stranger to the system of corporate diversity litigation in the 1920's AND 1930's. *See* John J. Parker, *The Federal Jurisdiction and Recent Attacks under It*, 19 A.B.A. J. 433, 434 (1932) (defending diversity jurisdiction against critics he called “socialists and near socialists”); Marcus, *supra* note 18, at 1261-62. The Committee insisted that “local prejudice continues to exist.” HOUSE REPORT, *supra*, at 15; SENATE REPORT, *supra*, at 18. Tellingly, however, much of the support it adduced for that proposition in connection with corporations came from the 1920's and 1930's, including the 1932 hearings that Purcell discusses, *see* PURCELL, *supra* note 103, at 242, and a 1922 speech by Chief Justice Taft, one of the architects of the system of corporate diversity litigation. *See* HOUSE REPORT, *supra*, at 15-17; SENATE REPORT, *supra*, at 18-20; *supra* text accompanying note 120. What emerges from the Judicial Conference Committee's report is the conviction that corporate access to federal courts is essential to “cultivat[ing] a national outlook” and ensuring that “there is the freest communication and intercourse, with unrestricted flow of capital and commerce into the various parts of the Union.” *See* HOUSE REPORT, *supra*, at 16; SENATE REPORT, *supra*, at 19. To that end corporations need not only “protection ...against local prejudice,” but also “the benefit of the salutary rules and practice of the Federal courts.” HOUSE REPORT, *supra*, at 17; SENATE REPORT, *supra*, at 20.

¹⁷¹ *See* PURCELL, *supra* note 103, at 238.

1958 Congress was not concerned with protecting corporations against the dangers of local prejudice but with keeping in the hands of the national courts what it regarded as in every realistic sense the basic affairs of the nation.¹⁷²

Purcell's point about "los[ing] contact with the social history of [diversity jurisdiction and the federal common law]"¹⁷³ is, however, far more telling with respect to Hart than it is with respect to the 1958 Congress. For, as Purcell demonstrates, the system of corporate diversity litigation had been dismantled by 1958. Even if (or perhaps because) it reconceived the function of diversity jurisdiction in accord with the Court's actual practice during the system of corporate diversity litigation, Congress in that year did not alter the aspects of prior law that had bestowed countervailing power on plaintiffs, and it did not alter any aspect of *Erie* jurisprudence. Attacks on that jurisprudence are vulnerable to criticism to the extent that they manifest ignorance of the social and institutional contexts that elicited it. They are more troublesome to the extent that, if successful, they might so alter the balance of power as to pave the way for a return of the system of corporate diversity litigation.¹⁷⁴

V. Diversity Class Actions in Historical Context

A. Federal Class Actions in General and the Revolution of 1966¹⁷⁵

Class actions fascinate scholars, enrich lawyers and are greeted as either an instrument of salvation or an engine of destruction by clients. Although of ancient lineage, they have come to play consequential roles in American litigation chiefly within the last forty years. Their fortunes during that period, moreover, well capture perhaps the most critical dilemma of modern

¹⁷² *Id.* at 241.

¹⁷³ *Id.* at 239.

¹⁷⁴ See Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1938-44 (2006); *infra* text accompanying note 243. Professor Hazard's contribution to this Symposium seems to me problematic in both respects. See Geoffrey C. Hazard, Jr. *Erie Doctrine Repealed by Congress?*, 156 U. PA. L. REV. ____ (2008). Moreover, to view CAFA as repealing the *Erie* doctrine is wishful thinking that is contradicted by *both* most courts' unwillingness to interpret CAFA silently to overrule longstanding precedent, *see, e.g.*, Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 447 (7th Cir. 2005), and the statute's legislative history. See Burbank, *supra*, at 1943; *infra* text accompanying notes 350-51. Without authority in an act of Congress, lower federal courts "lack the freedom of law professors to overrule the Court." Stephen B. Burbank, *Afterwords: A Response to Professor Hazard and a Comment on Marrese*, 70 CORNELL L. REV. 659, 660 (1985). Withal, CAFA may support a limited departure from precedent. See Burbank, *supra*, at 1949-52; *infra* note 351.

¹⁷⁵ This section draws heavily on Stephen B. Burbank, *The Class Action in American Securities Regulation*, ZZPINT 4, at 321 (1999).

procedure, that is, how to provide sufficient access to court in a society that depends heavily upon private litigation for compensation for injury and the enforcement of important social norms with: (1) fidelity to those norms, (2) due attention to the interests of litigants and others affected by litigation, and (3) adequate attention to the limited capacity of American courts. One view of the history I will sketch is that we have been fabulously successful in affording access to court and that we are now experiencing the agonizing reappraisals of those who are the victims of their success.

Like so much in American law and American society, the class action can be traced to England,¹⁷⁶ although the parent might deny responsibility.¹⁷⁷ Yet, it should not cause surprise that the problem of determining the rights of groups of people occupied the attention of English lawyers and judges from very early times. That was, after all, a society filled with groups – guilds, societies, etc. – and one in which, for many people, group identity was central to personal identity. In such a society, it made sense that one who already represented a group – the Mayor of the City of York, for example -- should be able also to represent that group in litigation on questions affecting the interests of all equally.¹⁷⁸ Moreover, it was not overly adventurous for English courts to extend the principle of representation to other situations in which litigation could not proceed to decision without affecting the interests of those not before the court. A privateer's action to divide the spoils of capture is not, in that respect, very different from a proceeding to settle an estate, and the difference – relative certitude about the identity of those whose interests are affected – cuts in favor of, not against, binding adjudication.¹⁷⁹

These are the types of cases in which group litigation was permitted in England at the time its wayward child insisted on independence, and they are, roughly, the types of cases in which class actions were permitted in the United States during most of our history. 1966 is, thus, as important to American class actions as 1066 is to English history. In that year, amendments to the Federal Rules became effective that, we now know, facilitated, if they did not initiate, a revolution in the use of group litigation. The formal stated agenda of the rulemakers in revising Rule 23 was

¹⁷⁶ For the history of the class action in England and the United States, see STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (1987); Geoffrey C. Hazard, Jr., John L. Gedid & Stephen Sowle, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849 (1998).

¹⁷⁷ I am reminded of the (undoubtedly apocryphal) story of Queen Elizabeth's visit to Philadelphia during the Bicentennial of American Independence. Having met the then Mayor of Philadelphia, a former Police Captain by the name of Rizzo, the Queen is supposed to have remarked: "If this is democracy, I want no part of it." I can imagine Lord Chief Justice saying the same thing about the contemporary American class action.

¹⁷⁸ See YEAZELL, *supra* note 176, at 52-68; *Mayor of York v. Pilkington*, 25 Eng. Rep. 946 (Ch. 1737).

¹⁷⁹ See YEAZELL, *supra* note 176, at 182; Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L.REV. 213, 267 (1990).

largely uncontroversial. They sought, in connection with Rule 23 as with other joinder rules (i.e., Rules 19 and 24), to turn federal jurisprudence from abstract inquiries to functional analysis, analysis that considers the practical, as well as the formal legal, effects of litigation. But they also reconceptualized the categories appropriate for class action treatment and specified different procedural requirements depending upon the category.¹⁸⁰

It was the third category (Rule 23(b)(3)) that has marked the 1966 amendments to Rule 23 as a major event in American legal development.¹⁸¹ Here -- remembering that all putative class

¹⁸⁰ See FED. R. CIV. P. 23 (1966). The stated goals of the Advisory Committee can be found in the Advisory Committee Note accompanying the 1966 amendments. See also Benjamin Kaplan, *A Prefatory Note*, 10 B.C. IND. & COM. L. REV. 497 (1969); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (I), 81 HARV. L. REV. 356 (1966).

The first category (Rule 23(b)(1)), where “the prosecution of separate actions by or against individual members of the class would create a risk” either of “inconsistent or varying adjudications ... [that] would establish incompatible standards of conduct for the party opposing the class” or of “adjudications ... [that] would as a practical matter be dispositive of the interests of other members not party” pretty accurately captured the core of traditional class action practice. See Kaplan, *Continuing Work*, *supra*, at 394; *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842-43 (1999); *infra* note 181.

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

¹⁸¹ Although the Committee crafted all three subdivisions of the Rule in general practical terms, without the formalism that had bedeviled the original Rule 23 ... the Committee was consciously retrospective with intent to codify pre-Rule categories under Rule 23(b)(1), not forward-looking as it was in anticipating innovations under Rule 23(b)(3).

Ortiz v. Fibreboard Corp., 527 U.S. 815, 842 (1999). See *id.* at 861-62 (“it was also the Court’s understanding that the Rule’s growing edge for that purpose [mass tort litigation] would be the opt-out class authorized by subdivision (b)(3)”); *Amchem Prods. v. Windsor*, 521 U.S. 591, 614

actions must satisfy the four requirements of numerosity, commonality, typicality and adequate representation¹⁸² – a court may certify a case as a class action if it finds that “the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.”¹⁸³ If the court does so certify, the rule requires that notice be given to the members of the class and that they thereby be given an opportunity to opt out of the action, thereby avoiding its preclusive effects.¹⁸⁴

There has been much debate as to the goals of the drafters of this provision. Study of the published and unpublished material relating to their work persuades me that, although they did not foresee, and could not have foreseen, all of the effects of this change, they were aware that they were breaking new ground and that those effects might be substantial. Seeking to ensure that members of a class would be bound by an adverse judgment as well as benefit from one that was favorable,¹⁸⁵ the drafters recognized that Rule 23(b)(3) would enable those with small claims for whom individual litigation would be economically irrational to band together in group litigation against a common adversary.¹⁸⁶ But for most people so situated, notice and an opportunity to opt

(1997) (“In the 1966 class-action amendments, Rule 23(b)(3), the category at issue here, was ‘the most adventuresome’ innovation.”).

¹⁸² One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

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

¹⁸³ FED R. CIV. P. 23(b)(3).

¹⁸⁴ See FED R. CIV. P. 23(c)(2).

¹⁸⁵ See *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974) (“The 1966 amendments were designed, in part ... to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments.”).

¹⁸⁶ See Stephen B. Burbank & Linda J. Silberman, *Civil Procedure in Comparative Context: The United States of America*, 45 AM. J. COMP. L. 675, 684 (1997).

The use of the class-action procedure for litigation of individual claims may offer substantial advantages for named plaintiffs; it may motivate them to bring cases that for economic reasons might not be brought otherwise. Plainly there has been a growth of litigation stimulated by contingent-fee agreements and an enlargement of the role this type of fee arrangement has played in vindicating the

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

On this question the unpublished record is fascinating, revealing that the right to opt out of a (b)(3) class and the notice system necessary to effect it were added very late in the drafting process. Prior to that decision, the draft rule had made the provision of notice discretionary.¹⁸⁷ The Advisory Committee settled on notice and opt out rights to meet the expressed concern that (b)(3) classes might be used by class counsel, in league with defendants, to force those with substantial individual claims into group litigation inimical to their interests.¹⁸⁸

rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost. The prospect of such fee arrangements offers advantages for litigation by named plaintiffs in class actions as well as for their attorneys. For better or worse, the financial incentive that class actions offer to the legal profession is a natural outgrowth of the increasing reliance on the "private attorney general" for the vindication of legal rights; obviously this development has been facilitated by Rule 23.

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

¹⁸⁷

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

Proceedings of Meeting of Advisory Committee on Rules of Civil Procedure 3 (Oct. 31-Nov. 2, 1963) (Professor Kaplan) (available from author).

¹⁸⁸ *See Burbank & Silberman*, *supra* note 186, at 684. The history of settlement classes suggests that, in this respect at least, the drafters of the 1966 amendments had more foresight than is normally accorded them. *See infra* text accompanying notes 224-25.

This account of the 1966 amendments to Rule 23(b)(3) suggests that, where the amended Rule went beyond the traditional uses of the class action, it did so because of the drafters' desire to enlist procedure in an effort to facilitate access to court for those for whom individual litigation was prohibitively expensive. In addition, the drafters were intent to equalize the risks of benefit and burden and to take advantage of the potential of the class action to reduce aggregate litigation expense. Finally, we see that concern about the implications of their handiwork for access to court also played a crucial role in the innovation of notice and opportunity to opt out that is required in (b)(3) class actions, but that the concern was possible use of the device to foreclose, rather than open up, access.

B. The Supreme Court Leads a Counter-Revolution

It is perhaps inevitable that courts will interpret jurisdictional statutes with attention to their own institutional interests. The Supreme Court narrowed the apparent reach of the general federal question statute shortly after it was enacted in 1875.¹⁸⁹ It did not take long for the Court to realize the impact amended Rule 23 could have on the federal caseload and to deploy interpretations of the diversity statute in self-defense.

In an environment of proliferating statutory law and of greater competition within the legal profession, the potential of the 1966 amendments both to serve the purposes espied by the drafters and to enrich attorneys was quickly realized. There followed a period of rapid growth in filings, of paeans of praise and equally fervent denunciations.¹⁹⁰ Painted over a legal landscape that had

¹⁸⁹ See, e.g., *Gold-Washing & Water Co. v. Keyes*, 96 U.S. 199 (1877) (well-pleaded complaint rule). For early cases imposing other restrictive interpretations, see *WRIGHT & KANE, supra* note 32, at 100-08 (“The Meaning of ‘Arising Under’”).

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

PURCELL, supra note 103, at 271.

¹⁹⁰ See Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality and the “Class Action Problem,”* 92 HARV. L. REV. 664 (1979). In 1981, the Supreme Court observed:

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

previously known them only in the corners, class actions soon occupied the foreground. A major dilemma was presented by what our economist friends call inefficient overenforcement.¹⁹¹

Although Americans seem to abhor legal wrong without legal redress as Nature abhors a vacuum, rules of substantive law enforceable through private litigation were traditionally framed using a model of individual litigation. Too often it has not been clear whether the lawmaker contemplated even private enforcement.¹⁹² In such a world, the economic irrationality of individual enforcement may be thought not a problem to be solved but the contemplated price of economic progress.¹⁹³ Class actions can change that calculus.¹⁹⁴

governing the conduct of counsel and parties.

Gulf Oil Co. v. Bernard, 452 U.S. 89, 100 (1981).

¹⁹¹ See Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47 (1975).

¹⁹² See FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR., & JOHN LEUBSDORF, CIVIL PROCEDURE 143-44 (5th ed. 2001) (“Implied Rights of Action”).

¹⁹³ [I]t seems entirely possible that – prior to the introduction of the small claims class action – a legislature may have been aware, and (collectively) content, that in some circumstances the right and its attendant statutory remedy were worth only the paper on which they were written. Indeed, perhaps the legislature was counting on the complex of other laws and institutions that determine whether rights can be vindicated to serve as filters. That view appears particularly plausible with respect to a legislature that has sought only selectively to change one of the most important such filters – the market for legal services – by providing for an award of attorney’s fees to prevailing plaintiffs. It is also a view that will be familiar to those who have studied foreign legal systems in which rights often go unenforced through private litigation and may not be enforced at all.

Burbank, *supra* note 174, at 1929 (footnotes omitted).

¹⁹⁴ At the very least, the result should be consistent with the substantive law giving rise to the claim. Today, however, the Court never pauses to consider the law of usury. Since Mississippi law condemns the aggregation of usury claims, the Court’s concern for compensation of putative class members in this case is at best misplaced and at worst inconsistent with the command of the rules Enabling Act.

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

And so they did in the 1970's, prompting Congress to amend some statutes where the fit was notoriously imperfect, such as the Truth in Lending Act,¹⁹⁵ and prompting the Supreme Court to use its control of the interpretation of federal jurisdiction statutes measurably to reduce the impact of Rule 23 by keeping out of federal court small state law class actions. In *Snyder v. Harris*,¹⁹⁶ and *Zahn v. International Paper Co.*,¹⁹⁷ the Court refused to permit aggregation of the claims of class members to meet the amount in controversy requirement in the diversity statute and interpreted that requirement to apply to the claims of all members of the class, named and unnamed. Neither decision was foreordained, as there was precedent that could have been invoked to support the contrary result.¹⁹⁸ Indeed, the Court's refusal to permit absent members of the class to ride on the coattails of their named representative for this purpose sat quite uneasily with the continuing willingness to ignore the citizenship of such members.¹⁹⁹ For, like corporations, classes enjoy privileged access to federal court through a fiction that eases satisfaction of the requirement of complete diversity. In any event, that the Court was consciously making policy was clear from the tenor of the opinions, although the policy sought to be served related to the workload of the federal courts, not to the enforcement of state law.²⁰⁰

A federal judge applied the epithet "Frankenstein monster" to a securities law class action in the early 1970's,²⁰¹ and that case elicited a use of the Supreme Court's interpretive powers to cut

¹⁹⁵ 15 U.S.C. § 1640 (2000). See Pub. L. No. 93-495, 88 Stat. 1518 (1974); Pub. L. No. 94-222, 90 Stat. 197 (1976). For more recent amendments affecting class actions, see Pub. L. No. 104-12, 109 Stat. 161 (1995). The original legislation, enacted at a time when the general federal question statute imposed an amount in controversy requirement (which was eliminated in 1980), contained a targeted jurisdictional grant that did not impose such a requirement. See Pub. L. No. 90-321, § 130(e), 82 Stat. 157 (1968).

¹⁹⁶ 394 U.S. 332 (1969).

¹⁹⁷ 414 U.S. 291 (1973).

¹⁹⁸ See *Zahn*, 414 U.S. at 310-12 (Brennan, J., dissenting); *Snyder*, 394 U.S. at 348-57 (Fortas, J., dissenting); Marcus, *supra* note 26, at [TAN 28-40]. Note also the suggestion that *Snyder* ignores the possibility "That the controlling amount is either the value to the plaintiff or the cost to the defendant, whichever is higher." RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1482 (5th ed. 2003).

¹⁹⁹ See *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); *Snyder*, 394 U.S. at 355 (Fortas, J., dissenting) ("Indeed, the promulgation of the old rule 23 provided a new means for resolving in a single federal litigation, based on diversity jurisdiction, the claims of all members of a class, even though some in the class were not of diverse citizenship from parties on the other side.") (footnote omitted).

²⁰⁰ Broader reform efforts, whether legislative or judicial, foundered on widely shared awareness, as a result of experience under the 1966 amendments, that class action reform has predictable substantive implications and hence attracts well-defined and well-financed interest groups. See Miller, *supra* note 190, at 684-94.

²⁰¹ *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 572 (2d Cir. 1968) (Eisen II).

back on small claims federal law class actions as it had cut back on small claims state law (i.e., diversity) class actions.²⁰² The mechanism for doing so was Rule 23(c)(2)'s requirement that, in an action maintained under Rule 23(b)(3), the court "direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."²⁰³ The Court held that the representatives of a putative class (or more realistically, their lawyers) must pay for sending such individual notice to (in *Eisen*, millions of) reasonably identifiable class members and, in another securities law case, that they must usually pay the cost of identifying its recipients.²⁰⁴

These decisions, too, were not foreordained, and, although admittedly less transparent than the diversity class action decisions, may have masked concerns not only about workload but about issues of social policy that largely escaped notice in 1966, including both positive and normative questions regarding the respective roles of administrative and private enforcement of the securities laws and, more generally, the goals of civil process.²⁰⁵ Certainly, in any event, controversy at the time centered on class actions seeking recovery on behalf of thousands or millions of investors, each one of whom could allege only a small amount of damage but whose damages in aggregate were substantial indeed.

²⁰² See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (Eisen III). I have never believed that this decision can plausibly be read as an interpretation of the Due Process Clause rather than of Rule 23. Its vulnerability as an interpretation of either, in the context of a negative value class action, is enhanced by knowledge of the drafting history recounted above. See *supra* text accompanying notes 185-88.

²⁰³ FED. R. CIV. P. 23(c)(2)(B).

²⁰⁴ See *Oppenheimer Fund v. Sanders*, 437 U.S. 340 (1978).

²⁰⁵ See Hal Scott, *The Impact of Class Actions on Rule 10b-5*, 38 U. CHI. L. REV. 337 (1971); Kenneth E. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937 (1975). Justice Douglas' dissent in *Eisen* framed the issue from that perspective:

I think in our society that is growing in complexity there are bound to be innumerable people in common disasters, calamities, or ventures who would go begging for justice without the class action but who could with all regard to due process be protected by it. Some of these are consumers whose claims may seem de minimis but who alone have no practical recourse for either remuneration or injunctive relief. ... Or the unnamed individual may be only a ratepayer being excessively charged by a utility, or a homeowner whose assessment is slowly rising beyond his ability to pay ... The class action is one of the few legal remedies the small claimant has against those who command the status quo. I would strengthen his hand with the view of creating a system of law that dispenses justice to the lowly as well as to those liberally endowed with wealth and power.

Eisen III, 417 U.S. at 186 (Douglas, J, dissenting) (footnote omitted).

Decisions like *Eisen* may have dampened the enthusiasm of the class action bar, but in an increasingly sophisticated and competitive environment – I refer to the legal profession not financial markets –²⁰⁶ they could not for long restrain the entrepreneurial zeal of plaintiffs’ lawyers. Pooling resources and using the proceeds of successful litigation to fund other litigation, the securities class action bar was not about to be deterred by the requirement that they frontload resources in promising investments, that is to say, litigation.²⁰⁷

As a result of the Supreme Court’s efforts to discipline the effects of Rule 23, and of other developments in the broader American legal culture, the frenzy of the 1970’s yielded to a period, lasting through the 1980’s, of relative quiescence. Indeed, in 1989, Stephen Yeazell, the foremost American historian of the class action posed the question whether his entire legal career had been spent studying something about to become extinct.²⁰⁸

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

²⁰⁶ See Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and its Values*, 59 BROOK. L. REV. 931 (1993).

²⁰⁷ There is, of course, a vigorous debate about what made the investment promising, that is, whether the merits mattered in private securities class actions or whether simply filing the suit as a class action was sufficient to induce a settlement. Compare Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991) with James D. Cox, *Making Securities Fraud Class Actions Virtuous*, 39 ARIZ. L. REV. 497, 503-04 (1997) (criticizing Alexander’s study and conclusion that the merits do not matter). For more recent work on this question, see, e.g., Stephen J. Choi, *The Evidence on Securities Class Actions*, 57 VAND. L. REV. 1465 (2004) (summarizing recent empirical evidence); Marilyn F. Johnson et al., *Do the Merits Matter More? The Impact of the Securities Litigation Reform Act*, J. L. ECON. & ORG. (forthcoming), available at <http://ssrn.com/abstract=883684> (finding “a significantly greater correlation between litigation and both earnings restatements and abnormal insider selling after the PSLRA”).

²⁰⁸ See Burbank & Silberman, *supra* note 186, at 685. Also in 1989, the Supreme Court observed that “Rule 23 ... has inspired a controversy over the philosophical, social, and economic merits and demerits of class actions.” *Mistretta v. United States*, 488 U.S. 361, 392 n.19 (1989).

C. Mass Tort²⁰⁹ and Settlement Classes in Federal Court

Recall that the drafters of the 1966 amendments to Rule 23 added the requirement of notice and an opportunity to opt out in Rule 23(b)(3) class actions in response to the expressed fear that, otherwise, that category might become a tool of defendants and class counsel to deprive individuals of the benefits of individual litigation.²¹⁰ In part for the same reason, the Advisory Committee Note accompanying the amendments expressed the view that class certification under Rule 23(b)(3) would rarely be appropriate in “mass accident” cases, cases involving a common disaster such as a hotel fire, bridge collapse or the like.²¹¹ And for many years one did not find many certified mass tort class actions in federal court, and certainly not many involving widely dispersed injuries apparently caused by common agents such as pharmaceutical drugs.²¹²

Because most tort law is state law, those seeking to bring mass tort class actions in federal court are required to satisfy the requirements of diversity jurisdiction. From the perspective of the plaintiff class, the major jurisdictional hurdle confronting other (diversity) state law class actions – meeting the amount in controversy requirement as interpreted in *Snyder* and *Zahn* -- was not likely to be a problem even before the supplemental jurisdiction statute was found to overrule *Zahn*.²¹³ The problem lay elsewhere. Following a few mass tort class certifications that survived appellate review,²¹⁴ the federal courts of appeals began to insist on careful attention to the requirements of

²⁰⁹ “Mass tort” is a category that is differently formulated depending on the speaker. See Deborah R. Hensler, *Has the Fat Lady Sung? The Future of Mass Toxic Torts*, 26 REV. LIT. 883, 890-91 (2007). I use it “to describe a large number of tort claims arising out of the same factual circumstances and alleging the same or similar injuries,” *id.* at 890, including both mass accidents and so-called “mass toxic torts” such as “claims arising out of exposure to asbestos, Agent Orange, and use of pharmaceutical products.” *Id.*

²¹⁰ See *supra* text accompanying notes 186-88.

²¹¹ See Burbank & Silberman, *supra* note 186, at 684 with n.35.

²¹² Eventually, however, the federal courts became more hospitable to mass accident class actions, at least those governed by the law of only one state.

²¹³ See *supra* text accompanying notes 36-39. Particularly was this true in cases seeking both compensatory and punitive damages.

²¹⁴ See, e.g., *In re “Agent Orange” Product Liability Litigation*, 100 F.R.D. 718 (E.D.N.Y. 1983), *aff’d*, 818 F.2d 145 (2d Cir. 1987); *In re School Asbestos Lit.*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986); *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir. 1986); *Cimino v. Raymark Industries*, 151 F.3d 297 (5th Cir. 1998); Ricahrd L. Marcus, *They Can’t Do That, Can They? Tort Reform via Rule 23*, 80 CORNELL L. REV. 858 (1995). Professor Hensler’s recent article on the future of mass toxic torts contains an extremely useful table listing all of the “thirty-five product-related mass personal injury litigations that arose between 1960 and the late 1990s,” Hensler, *supra* note 209, at 896, that had been uncovered by two previous studies and by her additional research. See *id.* at 897-903. She summarized as follows:

Half (seventeen) of the mass personal injury litigations identified

Rule 23(b)(3).²¹⁵ This ultimately proved fatal to most attempted multistate class actions, including but not limited to mass tort class actions. Absent a persuasive showing that, under the governing state choice of law rules, the claims of class members would be governed by the law of only one state, or perhaps of a few – and quite apart from factual differences among those claims – the federal appellate courts came to the view that mass tort class actions could not satisfy the predominance and superiority requirements of Rule 23(b)(3).²¹⁶ In the process, the federal appellate courts developed a healthy respect for the “difficulties likely to be encountered in the management of a class action,”²¹⁷ and refused to treat trial as a fiction in a world dominated by settlements.²¹⁸ Moreover, federal appellate courts have increasingly insisted that certification

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

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

²¹⁵ Under Rule 23(b)(3), in order to certify the class the court must find “that the questions of law or fact common to the members of the class predominate over any question affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” FED. R. CIV. P. 23(b)(3).

²¹⁶ *See, e.g.,* In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995); Castano v. The American Tobacco Co., 84 F.3d 734 (5th Cir. 1996); In re American Medical Systems, Inc., 75 F.3d 1069 (6th Cir. 1996); Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. ____ (2008); Marcus, *supra* note 19, at 1282-86, 1305-08. Georgine v. Amchem Prods, Inc., 83 F.3d 610 (3d Cir. 1996), *aff’d sub nom.* Amchem Prods. v. Windsor, 521 U.S. 591 (1997), one of the three federal appellate decisions Professor Marcus singles out as influential, involved a settlement class. *See infra* text accompanying notes 223-33.

²¹⁷ FED. R. CIV. P. 23(b)(3). *See, e.g.,* Castano v. The American Tobacco Co., 84F.3d 734, 744-45 (5th Cir. 1996); In re Bridgestone-Firestone, Inc., 288 F.3d 1012, 1018-19 (7th Cir.), *cert. denied*, 537 U.S. 1105 (2003).

²¹⁸ *See, e.g.,* In re Masonite Corp. Hardboard Siding Products Liability Lit., 170 F.R.D. 417, 423 (E.D. La. 1997) (interpreting *Castano* as “imposing stringent tests on potential class plaintiffs that district courts must apply”); *id.* at 425 (“this court cannot imagine managing a trial under the law of the jurisdictions on the defectiveness of Masonite siding”); In re Ford Motor Co. Ignition Switch Prods. Liab. Litig., 174 F.R.D.

decisions be based on an inquiry that gets beneath the allegations of the complaint, even if that inquiry overlaps with the merits.²¹⁹ Finally, since the advent of discretionary interlocutory appeals of class certification decisions in 1998,²²⁰ federal appellate courts have been in a better position both to develop class action jurisprudence and to police adherence to it by the district courts.

For a time, however, it appeared that one type of class action might escape the growing skepticism of the federal courts about multistate class actions. The occasion for hope came in asbestos litigation, which inundated American courts, state and federal, in the 1980's, and which, after a certain period, became "mature" in the sense that the underlying facts concerning the defendants' conduct were known, the legal questions had been litigated to death, the values of cases were well established, and each additional case was, in many respects, a rerun of hundreds of others.²²¹ Yet, the asbestos cases in the federal courts seemed to defy efficient resolution, as federal judges tried first one and then another technique to spare themselves and litigants the extraordinary expense and delay of the traditional treatment, while Congress turned a deaf ear to repeated pleas for a legislative solution. One of the techniques that proved largely unavailing was class actions for litigation.²²² But something changed.

332, 356 (D.N.J. 1997) (class counsel should submit a "blueprint for trial"); *id.* at 349 (expressing concern about "overwhelming jurors with hundreds of interrogatories and a verdict form as large as an almanac").

²¹⁹ *See, e.g.*, *In re IPO Securities Litigation*, 471 F.3d 24 (2d Cir. 2006); *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir. 2001); *Castano*, 84 F.3d at 744 ("[g]oing behind the pleadings is necessary").

²²⁰ *See* FED. R. CIV. P. 23(f).

By the mid-1990s, defendants in class actions began to favor federal courts, just as plaintiffs once did. Conversely, many plaintiffs' lawyers began to prefer state courts.

Morrison, *supra* note 9, at 1526 (footnote omitted).

²²¹ *See* Francis McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989).

²²² *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir. 1986), *see supra* text accompanying note 214, was an unusual case both because it involved only claims previously filed in Texas and because the Court of Appeals seemed intent on using the occasion of its opinion to chastise Congress for failing to provide a legislative solution for the asbestos crisis and perhaps to scare it into action by foreshadowing the extent to which that crisis was forcing departures from the traditional approach to litigation.

Courts have usually avoided class actions in the mass accident or tort setting. Because of differences between individual plaintiffs on issues of liability and defenses of liability, as well as damages, it has been feared that separate trials would overshadow the common disposition for the class. The courts are now being forced to rethink the alternatives and priorities by the current volume of litigation and more frequent mass disasters. If Congress leaves us

Companies that had previously reviled the class action came to see it, or at least one form of it, as a potential instrument of salvation, and so did many federal judges. I refer to the so-called settlement class action, involving in its most familiar form the virtually simultaneous filing of a class action and of a proposed settlement. Here, it was hoped, was a vehicle by which plaintiffs could secure prompt relief at less cost and mass tort defendants a comprehensive resolution of a litigation problem that might otherwise consume years if not decades. For defendants seeking “global peace,” the settlement class action seemed just the thing.²²³

There had been many settlement class actions in other areas, including the securities area, before the technique was tried in the asbestos litigation.²²⁴ Those cases revealed potential abuses of the sort that concerned the Advisory Committee in the 1960's, since in some of the cases it appeared that class counsel had sold out the class to defendants anxious to purchase quick and global peace on the cheap. And both the flowering of settlement class actions and the perception of abuses played a role in the Advisory Committee's decision to reexamine Rule 23, a process that continued for more than a decade and that, until 2003, yielded only the amendment authorizing discretionary interlocutory appellate review of class certification decisions.²²⁵

Also affecting the timing and content of the Advisory Committee's work were the

to our own devices, we may be forced to abandon repetitive hearings and arguments for each claimant's attorney to the extent enjoyed by the profession in the past.

Id. at 473; *see id.* (“Necessity moves us to change and invent.”). As we shall see, the Fifth Circuit's *cri de coeur* was not unique. *See infra* note 233.

²²³ *See* Burbank & Silberman, *supra* note 186, at 685-88.

²²⁴ *See* Thomas E. Willging, et al., *An Empirical Analysis of Rule 23 to Address the Rule-making Challenges*, 71 N.Y.U. L. REV. 74, 146 (1996).

²²⁵ *See* FED. R. CIV. P. 23(f); *supra* text accompanying note 220. One reason for the paucity of amendments during this period is that for a time the rulemakers were waiting for the report of an ad hoc Working Group on Mass Torts appointed by the Chief Justice. The report was made public in early 1999. *See* 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 (Feb. 15, 1999). It recommended the creation of a follow-on body to make concrete recommendations for change, a recommendation that Chief Justice Rehnquist treated with neglect the quality of which (benign or not?) may be inferred from subsequent developments. The creation of the Working Group, in any event, can be seen to reflect the judiciary's awareness that mass torts present special problems, some of which are not amenable to solutions by court rule.

Supreme Court's decisions in two cases involving attempts to resolve asbestos litigation through the mechanism of the settlement class action. In both cases, *Amchem*²²⁶ and *Ortiz*,²²⁷ the attempt was unsuccessful. Moreover, the Court left seriously in doubt the circumstances in which settlement classes could be certified and settlements approved in mass tort class actions – indeed, in any multistate class action involving numerous different state laws. Although the Court in *Amchem* disagreed with the Third Circuit's view that manageability is as much a concern in considering certification of a settlement class as it is when a litigation class is in question,²²⁸ it gave even greater prominence to the requirement of predominance.²²⁹ Moreover, the Court's treatment of the requirement that “the representative parties will fairly and adequately protect the interests of the class”²³⁰ in both *Amchem*²³¹ and *Ortiz*²³² highlighted the difficulties of structuring class actions so as to avoid possible conflicts without creating so many subclasses as to make the case unmanageable.²³³

²²⁶ *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) (affirming reversal of judgment approving settlement on ground that case could not properly be certified under Rule 23(b)(3)).

²²⁷ *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (reversing affirmance of judgment approving settlement on ground that case could not properly be certified under Rule 23(b)(1)(b)).

²²⁸ *See Amchem*, 521 U.S. at 619-20. *But see id.* (“But, as we earlier observed, ... the Court of Appeals in fact did not ignore the settlement...”).

²²⁹ *See id.* at 622-25. In my view, treating predominance as a basic structural protection instead of the warrant of efficiency that the rulemakers intended was an error that may have been caused by the Court's determination to avoid some of the thorny constitutional questions that the case presented, including in particular questions relating to so-called “futures” – people who had not manifested adverse physical consequences from their occupational exposure to asbestos or, less plausibly in that particular context, were not even aware that they had been exposed. *See Geoffrey C. Hazard, Jr., The Futures Problem*, 148 U. PA. L. REV. 1901 (2000).

²³⁰ FED. R. CIV. P. 23(a)(4).

²³¹ *See Amchem*, 521 U.S. at 625-28.

²³² *See Ortiz*, 527 U.S. at 856-59.

²³³ With the prospects for class settlements in the mass tort area dimmed, if not entirely extinguished, by the Court's decisions, the new terrain for peacemaking has shifted outward in both directions – to aggregate settlements on the immediate left and to Chapter 11 reorganizations on the immediate right.

Richard A. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, Vanderbilt University Law School Law and Economics, Working Paper No. 07-25, at 26-27, available at <http://ssrn.com/abstract-1014659>. (footnote omitted). The directional language refers to a schematic moving from purely private on the left to purely public on the right. In the footnote, Professor Nagareda discusses the settlement class approved in the Diet Drugs (Fen-Phen) litigation, noting the practical problems plaguing

D. State Court Class Actions

The discovery in the mid-1990's that the class action data generated by the Administrative Office of the United States Courts were unreliable has prompted the Federal Judicial Center to begin to fill the empirical vacuum with data based on docket studies.²³⁴ I am aware of no reliable

its implementation. *See id.* at 26 n.117; *In re Diet Drugs Products Liability Litigation*, 226 F.R.D. 498, 506-07 (E.D. Pa. 2005). But note studies showing that, although federal mass tort (personal injury and property damage) class action filings declined after *Amchem*, they increased after *Ortiz*, and that such filings remained more or less constant from 2001 through 2005. *See Hensler, supra* note 209, at 910. Finally, note Hensler's data on "mass toxic torts of the 2000s." *See id.* at 913-16 (Table 2) (only two federal class actions, one of them partial, in nine litigations).

Even though *Amchem's* analysis is not confined to the domain of mass torts, the Third Circuit was at pains to call attention to the fact that a settlement class action before it did not involve either a mass tort or "futures." *See In re Prudential Ins. Co. of America Sales Practices Litig.*, 148 F.3d 283, 289 (3d Cir.1998). The review it afforded the district court's choice of law, and hence that court's predominance, analysis, was hardly searching. *See id.* at 315. The explanation may lie in Judge Scirica's *cris de coeur*, which are reminiscent of *Jenkins*, *see supra* note 222, and might be thought to have invited legislation like CAFA.

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

Id. at 290.

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

Id. at 305.

²³⁴ *See Willging et al., supra* note 224, at 178. This is tedious and time-intensive work. The task has, however, become greatly simplified with the conversion of the federal courts to electronic case files. The FJC's studies of experience under CAFA, *see supra*

data, historical or current, concerning state court class actions, and I doubt that reliable data exist for most states.²³⁵ We do know, however, that most states have used Rule 23 as the model for their own class action provisions, and it seems safe to assume that class actions did not become, if they ever have been, a major player in litigation in any state's courts until some years after 1966. Indeed, given Purcell's reminder that from the 1950's the federal courts had become an attractive forum for plaintiffs, and the fact that the class action revolution started there, one would have expected no great urgency to follow the federal model were it not for the counter-revolution led by the Supreme Court.

As we have seen, the Court's decisions in *Snyder* and *Zahn* closed the door of the federal courthouse to cases seeking relief under state law in which there were not sufficient putative class members with claims meeting the amount in controversy requirement of the diversity statute to satisfy Rule 23(a)'s numerosity requirement.²³⁶ By 1973 (at the latest), therefore, would-be counsel for such groups had an incentive to seek changes in state law that would enable the maintenance of these cases in state court.²³⁷ Moreover, they could expect a favorable response from those responsible for the rules of procedure in many states, whether because the lawmakers shared the aspirations of the Advisory Committee that wrote the 1966 amendments to Rule 23²³⁸ or, perhaps more commonly, because their practice was generally to follow the federal model.

Once class action treatment on the federal model became widely available in the state courts, it is likely (but in the absence of reliable data one can hardly be confident) that for many years most of the cases brought there were those to which *Snyder* and *Zahn* had closed the federal

note 16, are critical to an evaluation of the impact of that legislation on the workload of the federal courts. It may be impossible to replicate that research for the state courts, although CAFA supporters have presented some data concerning so-called "judicial hellholes." See John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case of It ... In State Court*, 25 HARV. J.L. & PUB. POL'Y 143 (2001); *infra* note 357.

²³⁵ See Lee & Willging, *supra* note 16, at ___; *id.* at ___ ("The lack of state-court data on class actions stems from multiple sources, including the lack of necessary resources to collect the data in the state systems and the lack of common computerized case-management systems."). Note, however, their reference to data from California. See *id.* at ___ n.67.

²³⁶ See *supra* text accompanying notes 195-200.

²³⁷ For the dates when states that acted in response to the 1966 amendments did so, see *infra* at ___ (Appendix). As suggested below, probably the most common reason states followed the model of amended Rule 23 was a practice generally to follow the Federal Rules.

²³⁸ Note in that regard another major innovation of the 1966 amendments, the (b)(2) class for injunctive relief, the major animating purpose of which is discussed *supra* note 180.

courthouse, that is, small claims state law class actions.²³⁹ Eventually, however, departures in state class action law from the federal model, in the language of the governing provision or its interpretation, might lead class counsel who had a choice to select state court, as might the general constellation of rules and institutional practices that, after *Erie* and its progeny, still affected choice between a state and federal forum.

Two sets of rules that are not supposed to affect that choice (unless Congress otherwise provides) are the rules respecting personal jurisdiction and choice of law. The force of the mandate for vertical uniformity was long clearer as to the latter than the former. But the 1993 overhaul of Rule 4 of the Federal Rules of Civil Procedure should have put any doubts about the requirement of jurisdictional uniformity to rest, particularly in diversity cases.²⁴⁰ Similarly, a peremptory per curiam opinion insisting on the application of state choice of law rules in diversity cases²⁴¹ settled the continuing vitality of *Klaxon v. Stentor Elec. Mfg. Co.*²⁴² Doubts on that score may have been due to the fact that *Klaxon* was an object of scorn by Henry Hart and remains unpopular in some academic circles today. It is instead both unremarkable and wholly defensible, albeit not constitutionally required. Or at least it is for one who understands the Court's goal of dismantling the system of corporate diversity litigation.²⁴³

Klaxon did nothing, however, to discipline state choice of law, a task that the Court had undertaken in the 1920's and 1930's, only to abandon it because the constitutional tools – due process and full faith and credit – were not adequate to the task.²⁴⁴ For a time in the late 1970's and early 1980's, it appeared that the Court was revisiting the question whether the Constitution might provide more robust federal protection against state court overreaching that encouraged interstate forum shopping through both aggressive assertions of personal jurisdiction and aggressive applications of forum law. As it turned out, a 1981 decision by a badly fractured Court revealed that the prospects for robust protection in the choice of law realm had not changed since the

²³⁹ See Cabraser et al., *supra* note 29, at 399 (“But ‘small claims’ consumer class actions have typically proceeded in state courts, because each class member did not have the requisite \$75,000 in damages to trigger federal jurisdiction.”).

²⁴⁰ See FED. R. CIV. P. 4(k)(1)(A). Given the Court's peculiar decision in *Shutts*, which is discussed below, this statement requires refinement to the extent that adjudication of the claims of absent class members is thought to present a problem of personal jurisdiction. Whatever the merits of the Court's approach in state court litigation, it has no bearing on litigation in federal court. See *infra* note 252.

²⁴¹ See *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3 (1975).

²⁴² 313 U.S. 487 (1941).

²⁴³ See Burbank, *supra* note 174, at 1938-44 (commenting on Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839 (2006)); *supra* note 174 and accompanying text. For a very useful summary of academic reactions to *Klaxon* by successors of Hart, who question his views about that case, see FALLON, ET AL., *supra* note 198, at 636-42.

²⁴⁴ See *supra* text accompanying notes 149-51.

1930's.²⁴⁵ On the other hand, starting in 1977 the Court issued a series of decisions evidently aimed at curbing aggressive assertions of personal jurisdiction through interpretations of the Due Process Clause.

Unfortunately, however, most of the cases that the Court chose for the latter purpose did not involve problematic interstate forum shopping in any meaningful sense, whether or not one agrees with the Court's conclusions concerning the constitutionality of the exercises of jurisdiction.²⁴⁶ This is not surprising to the extent that, like *International Shoe* itself, the cases in

²⁴⁵ See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 n.10 (1981). Nor have those prospects changed since 1981. See *Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488, 496 (2003) ("In light of this experience, we abandoned the balancing of interests approach to conflicts of law under the Full Faith and Credit Clause.") (citing *Hague*); *id.* at 499 ("Without a rudder to steer us, we decline to embark on the constitutional course of balancing States' competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause."). It is, of course, a separate question whether the Court should have assimilated the sovereign immunity question in *Hyatt* to the choice of law questions presented in those earlier cases.

²⁴⁶ See *Shaffer v. Heitner*, 433 U.S. 186 (1977) (jurisdiction not permitted) (suit in Delaware by shareholder of Delaware corporation against officers and directors for acts in other states causing financial damage to the corporation, jurisdiction based on treating defendants' stock as property for *quasi in rem* purposes); *Kulko v. Superior Court of California*, 436 U.S. 84 (1978) (jurisdiction not permitted) (plaintiff seeking domestication and modification in California of Haitian divorce decree had moved to California following separation, and defendant had subsequently consented to daughter moving to California to live with her mother); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (jurisdiction not permitted) (plaintiffs seeking damages in Oklahoma for accident in that state, where they were hospitalized); *Calder v. Jones*, 465 U.S. 783 (1984) (jurisdiction permitted) (plaintiff's libel suit brought in her home state where she likely sustained the greatest injury); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (jurisdiction permitted) (plaintiff franchisor sued Michigan franchisee in Florida, its state of incorporation and corporate headquarters, for breach of franchise agreement containing Florida choice of law clause); *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102 (1987) (jurisdiction not permitted) (Taiwanese defendant in state court action brought after motorcycle accident in that state impleaded Japanese component part manufacturer); *Burnham v. Superior Court of California*, 495 U.S. 604 (1990) (jurisdiction permitted) (wife who, with husband's consent, moved to California with children upon separation sued there for divorce and alimony); *infra* text accompanying note 247. *But see* *Rush v. Savchuk*, 444 U.S. 320 (1980) (jurisdiction not permitted) (suit in after-acquired domicile of Minnesota by car passenger injured in Indiana, where he then lived, treating insurance policy as property located in Minnesota); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) (jurisdiction permitted) (libel suit in New Hampshire by resident of New York after initial suit against Ohio corporation in

question involved assertions of specific jurisdiction,²⁴⁷ as to which the Court's 1945 decision may have been calculated to reduce rather than increase interstate forum shopping.²⁴⁸ It is, therefore even more unfortunate, and it *is* surprising, that “problematic interstate forum shopping” also was not involved in the two cases in which, since 1945, the Court has analyzed the limitations that due process imposes on state court assertions of general doing business jurisdiction. As a result, one of the most dubious tools of interstate forum shopping by plaintiffs remains in play, in class action as in ordinary litigation.²⁴⁹

Ohio barred by statute of limitations). Note that *World-Wide Volkswagen* was, instead, an instance of state-federal forum shopping. Deep-pocket diverse defendants financed appellate litigation by their non-diverse co-defendants in the hope that the latter would be dismissed from a lawsuit in a plaintiff-friendly state court, enabling removal by the diverse defendants to federal court (an ultimately successful strategy that eluded Justice Blackmun). See *World-Wide Volkswagen*, 444 U.S. at 317 (Blackmun, J., dissenting) (admitting that he was “somewhat puzzled why the plaintiffs are so insistent that the regional distributor and the retail dealer, the petitioners here, who handled the ill-fated Audi automobile involved in this litigation, be named defendants”); Charles W. Adams, *World-Wide Volkswagen v. Woodson – The Rest of the Story*, 72 NEB. L. REV. 1122 (1993).

²⁴⁷ See Burbank, *supra* note 91, at 746. And even in some of the cases not involving specific jurisdiction (because the plaintiffs' claims did not bear the prescribed relationship to the activity on which jurisdiction was predicated), both the plaintiffs and the states involved had a legitimate interest in locating litigation in the chosen forum. See *supra* note 246.

²⁴⁸ See *supra* text accompanying notes 159-63.

²⁴⁹ See Burbank, *supra* note 101, at 749-53; *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952) (jurisdiction permitted); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (jurisdiction not permitted). My normative judgment about forum shopping in *Perkins* is influenced by the fact that Ohio, where the defendant conducted essentially all of its (very limited) business during and immediately after World War II, was the only domestic court conceivably – and given problems in the Philippines in that period it may have been the only court – available for adjudication of the dispute. Similarly, Texas, where the defendant in *Helicopteros* bought the helicopter whose crash caused the plaintiffs' decedents' deaths and where the employee pilots were trained, was the logical choice if any domestic court was permissible. On the relevance of the status of the defendant as a domestic or foreign corporation, see Stephen B. Burbank, *Jurisdictional Conflict and Jurisdictional Equilibration: Paths to a Via Media?*, 26 HOUS. J. INT'L L. 385, 389-91 (2004). For an interesting recent article also calling in question the constitutionality of general doing business jurisdiction, see A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 655-57 (2006).

Even before the growing skepticism of federal courts about multistate (particularly but not exclusively mass tort) class actions provided a powerful incentive for class counsel who had a choice to opt for state courts – that is, when state courts were (probably) presiding over mostly small claims class actions – the allure of that litigation format as an instrument of interstate forum shopping became apparent. At least it did when the Supreme Court decided *Phillips Petroleum Co. v. Shutts*,²⁵⁰ a class action in which the Kansas courts had applied Kansas law to the claims for interest on delayed royalty payments of all members of a multistate class. As is well known, the Court articulated constitutional limitations on both the assertion of personal jurisdiction and the choice of law in *Shutts*. The question of jurisdiction, however, did not concern the defendant’s interest in freedom from litigation in an exorbitant forum. Rather, the Court accepted the defendant’s invitation to opine about the constitutionality of the assertion of adjudicatory power over (the claims of) the absent members of the plaintiff class.²⁵¹ Rejecting the defendant’s argument that due process required those individuals’ consent, the Court arguably made the mistake of accepting the premises of the argument. In any event, in its jurisdictional aspect *Shutts* is one of the more mischievous opinions in the field of procedure, further obscuring the distinction between procedural and substantive due process.²⁵² It is, however, no barrier to damages class actions in state court so long as the state provides what Rule 23 requires in such a case.

²⁵⁰ 472 U.S. 797 (1985).

²⁵¹ *See id.* at 806-14.

²⁵² A state cannot deprive its own residents of property without affording them the procedural protections that a balancing of all of the relevant interests indicates are minimally required. Granting that members of a multistate plaintiff class lose something of value when claims brought on their behalf are rejected on the merits, why should due process require anything more than what *Hansberry v. Lee*, 311 U.S. 32 (1940), suggested that it requires in the class action context, namely adequate representation? And if adequate representation is not sufficient, why isn’t notice and an opportunity to be heard, coupled with adequate representation, sufficient?

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

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

Although one can regret the Court's approach to the question whether the laws of other interested states were in conflict with the law of Kansas,²⁵³ it is apparent that the justices' main goal was to draw a line in the sand, making clear that the occasion of a class action does not entrain immunity from constitutional limitations on state choice of law, however slight they may be. Attempts to read more into *Shutts*, and in particular a constitutional prohibition against "bootstrapping" – i.e., applying a different choice of law rule in class actions to enable certification as against predominance and manageability objections – are, in my view, not persuasive.²⁵⁴ Indeed, for the class action bar the Court's decision may have been like a limiting instruction, inviting attention by discouraging it.²⁵⁵

Certainly, the bar would have realized – it was a common topic of discussion in law school classrooms soon after *Shutts* -- that a decision applying the law of Oklahoma, the defendant's principal place of business, to all claims probably would not have been vulnerable under the Court's reasoning, whether or not that decision involved bootstrapping.²⁵⁶ Attentive members of

Although *Shutts* has given rise to the fallacy that it speaks with binding precedential effect to problems of due process that do not implicate geography, and/or to federal class actions, as Tobias Wolff points out, we should not neglect the possibility that in some circumstances procedural due process requires an opportunity to opt out. See Wolff, *supra* note 27, at ____.

²⁵³ See *Shutts*, 472 U.S. at 816-18 (discussing possible conflicts but leaving "more thoroughgoing treatment," *id.* at 818, to state court on remand).

²⁵⁴ See Burbank, *supra* note 174, at 1944-48. For the possibility of such a prohibition, see Richard A. Nagareda, *Bootstrapping in Choice of Law After the Class Action Fairness Act*, 74 UMKC L. REV. 661 (2006); Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1911-15 (2006) (hereinafter *Discontents*).

²⁵⁵ See Elizabeth J. Cabraser, *The Manageable Nationwide Class: A Choice-of-Law Legacy of Phillips Petroleum v. Shutts*, 74 UMKC L. REV. 543, 543 (2006) (*Shutts* "confirmed the authority of state courts to exercise jurisdiction over class actions and certify classes of nationwide scope"); *id.* at 545 ("from the perspective of plaintiffs' advocates, *Shutts* seemed like a godsend"); *id.* at 553 (federal courts "were able to evade application of the *Shutts* rule, and avoid dealing with multistate classes at all").

²⁵⁶ Of course, one hopes that, in considering the tactical implications of *Shutts*, the bar also attends to the potential problems of professional responsibility, and indeed of adequate representation, that single-minded pursuit of class certification can entail. Thus, in the hypothetical variant of *Shutts* mentioned in the text, what if Oklahoma law were less favorable to some members of the putative class? A recent decision of the Supreme Court of Texas has put such problems in relief by insisting on the application of conventional preclusion law to class actions even in situations where the claims precluded could not have been made in the class action (because they would have prevented class

the bar would also have been aware that the defendant's choice of law victory proved short-lived and partial and that the Supreme Court's ability effectively to police the state courts is theoretical.²⁵⁷ In sum, *Shutts* may have done more harm than good both to the cause of restraining interstate forum shopping and to the jurisprudence of due process.

We have seen that, notwithstanding a few early certifications of Rule 23(b)(3) mass tort class actions in the federal courts, the federal appellate courts pretty quickly put an end to that phenomenon, usually finding a lack of predominance because of differences in the law to be applied (and/or the facts relevant under different laws) and insuperable problems of manageability.²⁵⁸ We have also seen that, notwithstanding a change of heart on the part of some defendants who, in a search for global peace, joined with plaintiffs in seeking certification of mass tort classes and approval of prepackaged settlements, the Supreme Court made it very difficult for the lower federal courts to certify in such cases, first under Rule 23(b)(3) in *Amchem*, and then under Rule 23(b)(1) in *Ortiz*.²⁵⁹

These developments, particularly the first of them, added substantially to the incentives that entrepreneurial plaintiff class action lawyers had to test the class action waters in state courts, as

certification). *See* *Citizens Ins. Co. Of America v. Daccach*, 217 N.W.3d 430 (Texas 2007).

²⁵⁷ *See* *Sun Oil v. Wortman*, 486 U.S. 717, 730-34 (1988) (rejecting contentions that Kansas court unconstitutionally distorted other states' laws on remand after *Shutts*).

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

Sun Oil, 486 U.S. at 749 (O'Connor, J., dissenting).

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

²⁵⁸ *See supra* text accompanying notes 213-20.

²⁵⁹ *See supra* text accompanying notes 221-33.

they did to the incentives to seek certification of multistate classes stating claims under other bodies of substantive law, particularly commercial law, in both federal and state courts. Moreover, the prospect that the state courts might replace the increasingly inhospitable federal courts as the preferred venue for multistate class actions arose at a time when the plaintiff's bar was vying with business groups for the election of state court judges thought to be sympathetic to their respective interests in the larger "tort reform" debate, although the existence of any causal relationship between the two phenomena remains unclear.²⁶⁰

In any event, it is clear that, for a time at least, some plaintiff class action lawyers were successful in securing certifications in multistate class actions that could not have been certified under developing federal class action jurisprudence,²⁶¹ and that in some of these cases state courts held that the law of one state governed the claims of all class members, while in others they accepted class counsel's argument, perhaps supported by the "expert" reports of law professors, that there were no meaningful differences in state law and/or that any such differences were manageable.²⁶² It is also clear, however, that the identity of these state court magnets changed

²⁶⁰ See, e.g., Deborah Goldberg, *Interest Group Participation in Judicial Elections*, in *RUNNING FOR JUDGE 73* (Matthew J. Streb, ed. 2007). "It bears emphasis that empirical research has yet to explore systematically the relationship, if any, between class certification and the involvement in state judicial elections of interest groups for whom such rulings might well be a major topic of concern – whether the local plaintiffs' bar or business-side interests." Nagareda, *supra* note 233, at 8-9 (footnote omitted). In the footnote, Professor Nagareda notes defense-side research that "documents substantial political contributions from the local plaintiff's bar to state court judges in a jurisdiction often dubbed a magnet for nationwide class actions." *Id.* at 9 n.31. See *infra* text accompanying notes 263-64 (changes in interpretation of state class action law with change in political complexion of state supreme court).

²⁶¹ This is not to disagree with Elizabeth Cabraser, who contends that "the post-*Shutts* era has seen relatively few [state court] nationwide class actions actually granted at the trial level, or affirmed on appeal for trial purposes." Cabraser, *supra* note 255, at 545. Yet, as Judge Easterbrook observed, a "single positive trumps all the negatives." In re *Bridgestone/Firestone, Inc. Tires Products Liability Litigation*, 333 F.3d 763, 766-67 (7th Cir. 2003). See Nagareda, *supra* note 233, at 9 (discussing the "game of finding the one state court inclined to certify"). Although not claiming "to address empirical proof," Ms. Cabraser states that "a survey of complex litigation practitioners would yield corroborating data that most successful state court nationwide class actions served as settlement vehicles, which the defendants embraced and supported as their preferred mechanism of resolution." *Id.* Finally, she asserts that "[i]n mass torts particularly, the overwhelming majority of multistate class certification decisions were rendered by federal courts, and most grants of class certification were issued for settlement purposes rather than to structure trials." *Id.* at 545-46 (footnote omitted).

²⁶² See, e.g., *Ysbrand v. Daimler Chrysler Corp.*, 81 P.3d 618 (Okla.2003). For other such cases regarded as abusive, see S. REP. 109-14, at 25-26 (2005); Silberman,

over time,²⁶³ and those changes tended to follow in the wake of personnel changes in the highest court of a state that had previously been a magnet.²⁶⁴ It remains (and will always remain) unclear whether, if CAFA had not been enacted, the perceived abuses associated with state magnet courts would have continued, or whether the political processes that ended them in some states (or some other processes) would have accomplished the same thing wherever they arose.

E. Overlapping Class Actions

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

The federal courts have a well-developed system for disciplining the chaos of overlapping class actions. Enacted in 1968 to permit the federal judiciary to refine and extend the reach of techniques developed informally in order to deal with a flood of antitrust cases involving the electrical equipment industry, the Multidistrict Litigation Statute²⁶⁵ empowers the Judicial Panel on Multidistrict Litigation (“JPML”) to transfer all cases having common questions of fact to a single federal court, where they are subject to coordinated or consolidated pretrial proceedings. So long as a case has been filed in federal court or can be removed there, it can be transferred by the JPML, and it is no surprise that overlapping class actions are particularly likely to receive multidistrict treatment.

supra note 216, at ___; Marcus, *supra* note 28, at 1301 n.294. The quality of the “expert” opinions offered by distinguished law professors in some cases involving differences in state law – which they sought to wish away -- is embarrassing. Indeed, I accepted a rare engagement as an expert (as opposed to consulting lawyer) in part because of my concern about the phenomenon. See Expert Report of Stephen B. Burbank in *Alvis v. Hewlett-Packard Co.*, Cause No. A-164,880, District Court, Jefferson County, Texas (available from author).

²⁶³ See Marcus, *supra* note 28, at 1294-95 (Alabama, Texas, and Mississippi); Cabraser, *supra* note 255, at 547-48 (discussing changes in class action law in Alabama and Louisiana).

²⁶⁴ The Texas/Oklahoma litigation saga recounted by Professor Silberman is an example of both of last two propositions. See Silberman, *supra* note 216, at _____. See also Goldberg, *supra* note 260, at 81 (Texas); Anthony Champagne, *Tort Reform and Judicial Selection*, 38 LOY. L.A. L. REV. 1483, 1483-86 (2005) (Texas, Alabama and Mississippi); *Swing of Torts*, Times Daily.com (Nov. 13, 2007) (Alabama).

²⁶⁵ See 28 U.S.C. § 1407 (2000).

Although the statute requires remand of actions to the transferor courts upon the completion of pretrial proceedings unless they have been previously terminated,²⁶⁶ few are in fact remanded for trial.²⁶⁷ That too is no surprise. Less than two percent of federal civil cases terminate at or after trial.²⁶⁸ Most class actions settle, just as most other cases settle, and a transferee judge under section 1407 is empowered to decide dispositive pretrial motions, a form of disposition that, across the entire civil docket, now accounts for far more terminations than trials do.²⁶⁹ That is not to say, however, that a transferee judge is similarly situated to a judge in ordinary litigation in her capacity to bring about non-trial dispositions. Like counsel who could not take a case (or claim) to trial, a multidistrict transferee judge may be thought disarmed in the quest for a global settlement by the inability to try the case. That, in any event, appears to be why the federal judiciary was so upset by the Supreme Court's decision in the *Lexecon* case,²⁷⁰ disapproving the previous practice whereby transferee courts had transferred cases to themselves for trial purposes,²⁷¹ and why it has worked so hard to secure a legislative fix.²⁷²

²⁶⁶ See *id.* § 1407(a) (“Each action so transferred shall be remanded to the district from which it was transferred unless it has previously been terminated.”).

²⁶⁷ See Gregory Hansel, *Extreme Litigation: An Interview with Judge Wm. Terrell Hodges, Chairman of the Judicial Panel on Multidistrict Litigation*, 2 ME. BAR J. 16, 21 (Winter 2004) (“It is only occasionally that cases are remanded for trial.”).

²⁶⁸ See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMP. L. STUD. 459, 461 (2004) (decline in trial termination rate from 11.5 percent in 1962 to 1.8 percent in 2002).

²⁶⁹ See Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMP. L. STUD. 591, 617-18 (2004) (estimating increase in summary judgment termination rate from 1.8 percent in 1960 to 7.7 percent in 2000).

²⁷⁰ See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

²⁷¹ Under the practice disapproved in *Lexecon*, the transfer was pursuant to section 1404, which meant that the transferee district had to be one where the case could originally have been filed (as a matter of personal jurisdiction and venue as well, of course, as subject matter jurisdiction). See 28 U.S.C. § 1404 (2000); *Hoffman v. Blaski*, 363 U.S. 335 (1960).

²⁷² It would obviously be a lot more efficient if the transferee judge had the authority to try the cases that remain. That would add another settlement tool into the calculus that normally produces settlement anyway. It would probably be more efficient, which is why the Judicial Conference and the panel supported legislation that would change that part of the statute and alter the result required by *Lexecon*, but I can't say we are not able to function efficiently for the want of it at the moment.

Hansel, *supra* note 267, at 21 (Judge Hodges).

Prior to CAFA there was no provision in federal law that permitted the removal of overlapping state court class actions that were otherwise not removable. In the increasingly entrepreneurial and competitive environment described above, that meant that all of the efforts of a transferee federal court to broker a settlement of overlapping federal class actions might come to naught because a state court class action was settled first, with preclusive effect.²⁷³ A great deal of time and effort by the court and the parties might, therefore, be wasted. Even if not, the co-existence of overlapping class actions before different courts could cause serious problems in the conduct of the coordinated or consolidated proceedings called for under the statute.

The incentives that the federal parties and federal transferee courts have to avoid such difficulties can elicit very creative interpretations of federal law. One such was for the federal transferee court to approve, or itself to order, removal of overlapping state court class actions under the All Writs Act.²⁷⁴ The Supreme Court put an end to this tactic, which bordered on the frivolous,²⁷⁵ in the *Syngenta* case.²⁷⁶ Both before and after *Syngenta*, some transferee courts sought to make overlapping state court class actions go away through the use of injunctions. Recalling the role of injunctions in the jockeying for forum control under the system of corporate diversity litigation,²⁷⁷ these efforts confront exceptions in the Anti-Injunction Act that, as interpreted by the Supreme Court, are very narrow.²⁷⁸

²⁷³ The Supreme Court's decision in *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367 (1995), made it clear that there would be very little room for class members who did not opt out of the state court class action to avoid its binding effect, even if the settlement purported to release claims within the exclusive subject matter jurisdiction of the federal courts.

²⁷⁴ 28 U.S.C. § 1651 (2000).

²⁷⁵ See Lonny Sheinkopf Hoffman, *Removal Jurisdiction and the All Writs Act*, 148 U. PA. L. REV. 401 (1999).

²⁷⁶ *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28 (2002).

²⁷⁷ See *supra* text accompanying note 111.

²⁷⁸ See 28 U.S.C. § 2283 (2000). For a sensitive treatment of the exceptions, see In re Diet Drugs, 282 F.3d 220 (3d Cir. 2002). As Martin Redish and I have previously argued, and as Tobias Wolff develops in his article for this Symposium, the Anti-Injunction Act is in need of a complete overhaul. See Wolff, *supra* note 27, at __; Stephen B. Burbank, *Jurisdictional Equilibration, The Proposed Hague Convention, and Progress in National Law*, 49 AM. J. COMP. L. 201, 215, 228-30 (2001); Martin Redish, *Intersystemic Redundancy and Federal Court Power: Proposing a Zero Tolerance Solution to the Duplicative Litigation Problem*, 75 NOTRE DAME L. REV. 1347 (2000). Until then, the best hope for a jurisprudence that transcends labels (i.e., does not stretch to assimilate a particular case to one involving jurisdiction over property) seems to me the insight that the exception for injunctions that are "necessary in aid of its jurisdiction" calls for careful consideration of "jurisdictional" policy. A federal transferee court exercising jurisdiction under section 1407 should be able to enjoin overlapping state court class actions when they are actually interfering with the conduct of coordinated and consolidated pretrial proceedings.

Uncertain about the availability of authority in existing law to secure the removal of overlapping state court class actions,²⁷⁹ and seriously constrained by Supreme Court precedent under the Anti-Injunction Act, key members of the federal judiciary responded by initiating consideration of possible amendments to the Federal Rules of Civil Procedure and to federal statutes that might ease the burdens posed by overlapping class actions dispersed between the federal and state courts. The Advisory Committee on Civil Rules developed a variety of provisions that would have authorized a federal court to enjoin (1) state court certification of a class substantially similar to one that the court had previously refused to certify, and (2) state court approval of a proposed class action settlement substantially similar to one that the court had previously refused to approve.²⁸⁰

Made aware of serious doubts about the existence of power to implement such changes by court rule,²⁸¹ the rulemakers convened a panel to consider the proposals at a conference in Chicago in 2001. The panelists were virtually unanimous in the view that, whatever the merits of the proposals, they were beyond the rulemaking power, and the rulemakers abandoned the effort.²⁸²

²⁷⁹ *Syngenta* was decided in 2002, while the rulemaking effort discussed here occurred in 2001. Yet, as my gentle description of the view of the All Writs Act rejected in *Syngenta* suggests, see *supra* text accompanying note 275 (“border[ing] on the frivolous”), the technique was widely recognized to have very bleak prospects.

²⁸⁰ See Edward H. Cooper, Reporter’s Call for Informal Comment: Overlapping Class Actions 8-19 (September 2001) (available from author).

²⁸¹ See letter from Geoffrey C. Hazard, Jr. to Hon. Anthony Scirica (May 5, 2001) (available from author). This letter responded to Judge Scirica’s request that both Professor Hazard and the author of this article provide their views on the proposals that, as revised, were subject to the request for comment cited *supra* note 280. It included the following:

[W]e think some of the principal proposals ... are probably invalid. Specifically, we think this is true of the endeavor to give greater preclusive effect to a federal court determination concerning certification (because such a provision is “substantive” within the meaning of the Enabling Act), and the endeavor to authorize injunctions against state court class suit proceedings (because of the prohibition in the Anti-Injunction Act). On these points we respectfully disagree with the conclusions in the Memoranda attached to the Report.

Letter, *supra*, at 1.

²⁸² See, e.g., Committee on Rules of Practice and Procedure, Minutes of Meeting of Jan. 10-11, 2002, at 4; Stephen B. Burbank, Class Action Conference: Preliminary Remarks (Oct. 23, 2001) (available from author). The other members of this panel were Judge Diane Wood and Professors Daniel Meltzer, Linda Mullenix, Martin Redish and David Shapiro. See e-mail from Stephen B. Burbank to Hon. Lee Rosenthal (Oct. 18,

The conclusion that effective action would require legislation prompted the Civil Rules Committee to recommend to the Standing Committee and to the Federal-State Jurisdiction Committee “that they support the concept of minimal diversity for large, multi-state class actions, in which the interests of no one state are paramount, with appropriate limitations or threshold requirements so that the federal courts are not unduly burdened and the states’ jurisdiction over in-state class actions is left undisturbed.”²⁸³

The federal judiciary was already on record supporting a limited use of minimal diversity, and its eagerness to secure a legislative fix for *Lexecon*²⁸⁴ is evident in the comments submitted, in March 2001, on legislation containing such a fix but also provisions for sweeping mass disaster litigation into federal court under a theory of minimal diversity.²⁸⁵ Although, as enacted in 2002, this legislation has very limited application (it requires, among other things, that “at least 75 persons have died in the accident at a discrete location”),²⁸⁶ it might be deemed a forerunner to CAFA in the use both of minimal diversity²⁸⁷ and of an exception that, if only by insisting on the traditional definition of corporate citizenship, evidently takes a narrow view of state interests.²⁸⁸

2001) (available from author). A judge who attended the conference and thus heard one of the panelists (the author of this article) suggest, albeit dubitante, that a federal court might be able to accomplish the same thing as a matter of federal common law, persuaded a panel of his court to do just that. Judge Easterbrook’s opinion in *In re Bridgestone/Firestone, Inc., Tires Products Liability Lit.*, 333 F.3d 763 (7th Cir. 2003) is creative. It is also highly problematic as a matter of preclusion law and as an interpretation of the Anti-Injunction Act. *But see* Wolff, *supra* note 27, at ____.

²⁸³ Memorandum to the Standing Rules Committee re Perspectives on Rule 23 Including the Problem of Overlapping Classes 17 (May 27, 2002).

²⁸⁴ *See supra* text accompanying note 272.

²⁸⁵ *See* letter from Leonidas Ralph Mecham to Hon. F. James Sensenbrenner, Jr. 1 (March 13, 2001) (expressing “the support of the federal judiciary for H.R. 860, the ‘Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001’”). Section 2 of this bill contained a *Lexecon* fix designed “to allow a judge with a transferred case to retain it for trial or to transfer it to another district.” *Id.* The letter noted that in 1988 the Judicial Conference “approved in principle the creation of federal jurisdiction that would rely on minimal diversity to consolidate multiple litigation ... arising out of a single event”). *Id.* at 2.

²⁸⁶ 28 U.S.C. § 1369(a) (2000). *See supra* note 4.

²⁸⁷ (a) In General.— The district courts shall have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 75 natural persons have died in the accident at a discrete location, if—

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

(2) any two defendants reside in different States, regardless

Prior to the Judicial Conference's meeting in March 2003, and notwithstanding the May 2002 memorandum from the Civil Rules Committee,²⁸⁹ the Federal-State Jurisdiction Committee wrote a report urging continued opposition to the use of minimal diversity to bring class actions into federal court. As a fallback position that committee urged the Conference to support only such proposed legislation as left in state court cases in which the states had legitimate interests, defined to include cases in which substantially all members of the class were from a single state or were people alleging death, personal injury or property damage within the state. As to both the committee specifically contemplated leaving in place the default regime's jurisdictional rules.²⁹⁰

of whether such defendants are also residents of the same State or States; or

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

28 U.S.C. § 1369(a) (2000),²⁸⁸

(b) Limitation of Jurisdiction in District Courts.— The district court shall abstain from hearing any civil action described in subsection (a) in which—

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

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

28 U.S.C. § 1369(b) (2000).

²⁸⁹ See *supra* text accompanying note 283. The Federal-State Jurisdiction Committee's fallback position, on the other hand, may have been consistent with the position advocated by the Civil Rules Committee. See *supra* text accompanying note 283; *infra* text accompanying note 290.

²⁹⁰ See Summary of the Report of the Judicial Conference Committee on Federal-State Jurisdiction (Revised 2/6/03), Agenda E-9 (Summary) (available from author); Addendum to the Report of the Judicial Conference Committee on Federal-State Jurisdiction, Agenda E-9 (Addendum) (hereinafter "Addendum") (available from author); *id.* at 5 n.9 ("would leave the determination of the citizenship of the defendants, and the satisfaction of the complete diversity requirement, to be made in accordance with current jurisdictional rules").

For other accounts of this history, which mute the disagreement between the two Conference committees, see Lee & Willging, *supra* note 26, at ___-___; Marcus, *supra* note 26, at [TAN 174-80]. Mr. Morrison seems to have been unaware of it. See Morrison, *supra* note 9, at 1541 (noting change in position of Judicial Conference without exploring the reason and contending that it "plainly has not endorsed S. 2062 and its companion bills"). In fact, disagreement between the Rules committees and the Federal-State Jurisdiction Committee on this subject existed from at least 1999. See letter from Hon. Paul V. Niemeyer to Hon. Wm. Terrell Hodges (August 10, 1999) (available from author); *id.* at 2 ("it is apparent that there is a federal problem that Congress can properly address").

The report of the Federal-State Jurisdiction Committee elicited a response from the Committee on Rules of Practice and Procedure (“Standing Committee”) that sounded somewhat different, and somewhat inconsistent, rationales in opposition to the proposed definition of the universe of cases that should remain in state court.²⁹¹ On the merits, the Standing Committee seemed to want to bring state-wide class actions into federal court for coordinated or consolidated proceedings, noting that a defendant might be sued on the same claim in all fifty states.²⁹² At the same time, the Standing Committee observed that such details were heavily freighted with politics and should be left to Congress.²⁹³

In the revised report of the Federal-State Jurisdiction Committee, which had the concurrence of the Standing Committee, the recommendation did not clearly signal the former committee's views on allocation,²⁹⁴ and they were watered down in the accompanying explanation.²⁹⁵ Moreover, a March 26, 2003, letter to Congress on behalf of the Judicial

²⁹¹ See Report of the Judicial Conference Committee on Rules of Practice and Procedure, Overlapping, Competing, and Duplicative Class Actions, Agenda E-18 (Addendum) (available from author).

²⁹² The [Federal-State] Committee's proposal would prevent the filing in, or removal to, federal court of most actions where the class is limited to nearly all in-state plaintiffs – no matter what the primary defendants' relationship is to the state or whether that state's law governed – so long as one non-diverse defendant was joined. The likely consequence would be that a defendant might find itself litigating statewide classes in many states. While avoiding potential concerns about a state court applying its law nationwide, many of the consequences associated with multiple actions would remain. A federal court could still find itself competing with as many as fifty overlapping class actions; the litigants might still find themselves competing for recovery; and the defendants might still seek protection under the bankruptcy laws, because they offer the sole means of consolidating and resolving multiple claims. *Id.* at 14 (footnote omitted). See also Cabraser et al. *supra* note 29, at 399 (“a U.S. defendant might face multiple state class actions asserting claims arising from the same product or course of conduct, and claims arising from the nation-wide marketing of a standard product had no sure means of being centralized in a single federal court”).

²⁹³ See Report, *supra* note 291, at 15.

²⁹⁴ See Second Addendum to the Report of the Judicial Conference Committee on Federal-State Jurisdiction, Agenda E-9 (Addendum 2), at 1-2 (available from author).

²⁹⁵ See *id.* at 2 (“Parallel in-state class actions in which the plaintiff class is defined as limited to citizens of the forum state are not included within the term ‘significant multi-state class action litigation.’”); *id.* at 4 (“While the relationship of the defendant to the forum may have some bearing on state adjudicatory power, an insistence that all primary defendants maintain formal in-state citizenship is too limiting and may preclude in-state class actions where a defendant has sufficient contacts with the forum state, regardless of citizenship.”).

Conference repeated the watered down version.²⁹⁶ Finally, when Senator Leahy requested that the federal judiciary submit “legislative language” to implement its views about the appropriate allocation of jurisdiction over class actions, the response on its behalf evinced the same lack of clarity that characterized the Federal-State Jurisdiction Committee’s revised recommendation and “deliberately avoided specific language, out of deference to Congress’s judgment and the political process.”²⁹⁷

VI. CAFA’s Significance: A Preliminary View

Our culture of “adversarial legalism” relies on litigation to provide compensation for injury and enforce important social norms to an extent probably unique in the world.²⁹⁸ There is reason for concern that, by including within its jurisdictional sweep not just multistate class actions, but also class actions that are of intense interest to individual states, whose law will govern all or most of the claims, CAFA will retard state regulation of harmful activity. Of course, that concern should only arise to the extent that CAFA alters the balance of power in forum selection that existed in the default regime. To that extent, however, it would be exacerbated by evidence suggesting that some of CAFA’s supporters hold, and evidently would have the federal courts adopt, an essentialist and pre-realist view of the proper role of aggregation.²⁹⁹

CAFA unquestionably changes the balance of power in forum selection. Educated about the litigation dynamics created by the default regime, or at least about the willingness and ability of entrepreneurial class counsel, as they pejoratively put it, to “game the system,”³⁰⁰ the statute’s supporters understood that changes in the provisions concerning diversity and the amount in controversy, although necessary for the attainment of their objectives, would not be sufficient.

²⁹⁶ See letter from Leonidas Ralph Mecham to Hon. F. James Sensenbrenner, Jr. (March 26, 2003) (available from author).

²⁹⁷ Letter from Leonidas Ralph Mecham to Hon. Patrick J. Leahy 3 (April 25, 2003) (available from author).

²⁹⁸ See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM* (2001); Stephen B. Burbank, *The Complexity of Modern American Civil Litigation: Curse or Cure?*, 91 *JUDICATURE* ____ (2008).

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

Hazard et al., *supra* note 176, at 1948.

²⁹⁹ See *supra* text accompanying note 28; *infra* text accompanying notes 354-56; Burbank, *supra* note 174, at 1953 (commenting on Nagareda, *Discontents*, *supra* note 254).

³⁰⁰ S. REP. 109-14, at 5 (2005).

Thus, even if class counsel could not prevent removal by naming a non-diverse defendant, it might be possible to include a friendly defendant who would not agree to removal,³⁰¹ to sue the target defendant in its home state, or to keep the litigation's true scope and ambitions hidden until the default regime's one-year limitation on removal had passed. As we have seen, CAFA's removal provisions address each of those tactics, allowing any defendant to remove (apparently, the entire case), and eliminating both the removal disability of in-state (diversity) defendants and the one-year limitation on removal.³⁰²

CAFA's supporters were aware that the federal judiciary long opposed predecessor class action bills on workload and federalism grounds. They were also aware of the default regime's other hurdles for state court defendants seeking to remove to federal court: first, the rule that the party seeking access to federal court has the burden of establishing the existence of jurisdiction,³⁰³ and second, the general precept to construe the removal statute strictly against jurisdiction.³⁰⁴ Finally, if for either reason they anticipated a hostile reception to CAFA removals, they knew that the general statutory ban on appellate review of remand orders could frustrate their goals.³⁰⁵

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

³⁰¹ This tactic contributed to the Judicial Conference's 1987 recommendation that removal be permitted by "any defendant," instead of "the defendant or the defendants," under section 1441(a). *See Court Reform and Access to Justice Act: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. On the Judiciary*, 100th Cong. 93 (1987-88) (hereinafter *House Hearings*). This was the only one of five recommendations concerning removal not enacted. *Compare id.* at 93-94 with Pub. L. 100-702, § 1016, 102 Stat. 4669-70 (1988). It is tempting to view the choices as reflecting the preferences of a Congress controlled by Democrats. *See CONG. Q. ALMANAC* 3 (1989). Yet, the Judicial Conference had previously rejected the recommendation, probably because it would increase the workload of the federal courts, see *House Hearings, supra*, at 95, and the Reagan Administration's Department of Justice did oppose it on that ground. *See Judicial Branch Improvements Act of 1987: Hearing Before the Subcomm. on Courts and Admin. Practice of the Sen. Comm. on the Judiciary*, 100th Cong. 202-03 (1988). Court workload, not the balance of power between plaintiffs and defendants, dominated this round of jurisdiction reform, suggesting that in Congress as in the courts, the 1980's were an interlude of quiet before the storm that led to CAFA. *See supra* text accompanying note 208.

³⁰² *See supra* text accompanying notes 70-73.

³⁰³ *See, e.g., Kansas City, Ft. S. & M. R. Co. v. Daughtry*, 138 U.S. 298 (1891); *WRIGHT & KANE, supra* note 32, at 253 n.12.

³⁰⁴ *See, e.g., Graves v. Corbin*, 132 U.S. 571 (1890); *WRIGHT & KANE, supra* note 32, at 235 n.68.

³⁰⁵ *See supra* text accompanying notes 48, 73.

case in which it grants review.³⁰⁶ CAFA's supporters sought to assist state court defendants in crossing the default regime's other hurdles to removal through legislative history.³⁰⁷

It evidently did not trouble CAFA's supporters that, by eliminating a provision in the 2003 bill that would have enabled unnamed members of a putative class to remove, they were giving defendants the option to "game the system," as for instance by choosing to remain in a state court that was hospitable to abusive settlements of the type that CAFA regulates in federal court.³⁰⁸ Moreover, by focusing only on the techniques of forum manipulation available to plaintiffs, and then only in the default regime as of 2005, they pretermitted the historical and institutional perspective necessary to make a reliable judgment whether "gaming the system" (by either side) should carry a pejorative connotation.³⁰⁹

We have seen that when Congress first formally blessed the definition of corporate citizenship for diversity purposes in 1958, it left largely in place the existing balance of power in forum selection between plaintiffs and defendants.³¹⁰ In order to make a reliable judgment about

³⁰⁶ See 28 U.S.C.A. § 1453(c) (2006). The correction of the scrivener's error, "not less than 7 days after entry of the order," to the intended "not more than 7 days after entry of the order" has proved challenging only for judges who embrace theories of statutory interpretation with a fervor usually reserved for religion.. See Adam N. Steinman, "*Less*" is "*More*"? *Textualism, Intentionalism, and a Better Solution to the Class Action Fairness Act's Appellate Deadline Riddle*, 92 IOWA L. REV. 1183 (2007).

³⁰⁷ Some courts have deemed significant the juxtaposition of these methods of attempting to change the status quo. See, e.g., *Schwartz v. Comcast Corp.*, 2005 U.S. Dist. LEXIS 15396 *24 (E.D. Pa. July 28, 2005) ("by making substantive changes with respect to the aggregation rule, but failing to express a concomitant change in the burden of proof, Congress implicitly acknowledged and adopted the longstanding rule that a removing defendant bears the burden of proof of establishing diversity jurisdiction").

³⁰⁸ See Wolff, *supra* note 27, at ____; Morrison, *supra* note 9, at 1548, quoted *supra* note 17; Allan Kanner, *Interpreting the Class Action Fairness Act in a Truly Fair Manner*, 80 TULANE L. REV. 1645, 1653 (2006). Professor Purcell correctly observes that CAFA's elimination of the default regime's one year limitation on removal "gave defendants a new weapon that could actually encourage the very collusion the statute purported to end." Purcell, *supra* note 5, at [TAN 179].

³⁰⁹ See *supra* text accompanying notes 9-10 ("forum shopping").

³¹⁰ See *supra* text accompanying notes 173-74. It seems unlikely that any of the post-1958 changes in federal statutory law had a major impact on the general balance of power in forum choice for ordinary diversity litigation. As to the diversity statute, Congress raised the amount in controversy requirement to >\$50,000 in 1988, see Pub. L. No. 100-702, § 201, 102 Stat. 4646 (1988), and to >\$75,000 in 1996. See Pub. L. No. 104-317, § 205, 110 Stat. 3850 (1996) (codified at 28 U.S.C. § 1332(a) (2000)). In addition, Congress addressed problems arising in discrete categories of cases in 1964 (citizenship of liability insurance companies sued under state direct action statutes), see Pub. L. No. 88-

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

It is one thing to call for realism about the likelihood of local bias against corporations engaged in national commerce. If, as Charles Warren and Felix Frankfurter argued, it was nonsense to treat (some) such corporations as outsiders in almost all states in the 1920s,³¹¹ it is nonsense on stilts today.³¹² It is quite another thing, however, to advocate that the fiction of corporate presence, which *International Shoe* sought to banish, should be replaced by a fiction of multiple corporate domiciles in the law of personal jurisdiction. A perspective on the American litigation system that takes a dynamic and comparative view of constitutional requirements and has regard for proportionality should not tolerate most exercises of general doing business jurisdiction over domestic (i.e., U.S.) corporations.³¹³ One holding such a view may conclude that a federal

439, § 1, 78 Stat. 445 (1964) (codified at 28 U.S.C. § 1332 (c)(1) (2000)) and in 1988 (citizenship of representatives of estates of decedents, infants, or incompetents, and citizenship of permanent resident aliens). *See* Pub. L. No. 100-702, §§ 202(a) & 203(a), 102 Stat. 4646 (codified at 28 U.S.C. §§ 1332(c)(2) & 1332(a) (2000)). In 1990, Congress passed the supplemental jurisdiction statute. *See* Pub. L. No. 101-650, Tit. III, § 310(a), 104 Stat. 5113 (codified at 28 U.S.C. § 1367 (2000)). As to the removal statute, in 1988 Congress enacted two changes with implications for forum shopping. First, it provided that defendants sued under fictitious names (“John Doe defendants”) be disregarded in determining whether diversity exists. *See* Pub. L. No. 100-702, § 1016(a), 102 Stat. 4669 (1988) (codified at 28 U.S.C. § 1441(a) (2000)). Second, it enacted a one year limitation on removal (from the time a case is commenced in state court) in diversity cases. *See id.*, § 1016(b), 102 Stat. 4669 (codified at 28 U.S.C. § 1446(b)(2000)). *See supra* note 125. Thereafter, in 1990, Congress abolished the much vexed institution of separate and independent claim removal in diversity cases. *See* Pub. L. No. 101-650, § 312, 104 Stat. 5114 (1990) (codified at 28 U.S.C. § 1441(c) (2000)). Recall that this provision was once a redoubt of corporate defendants but had long since been deprived of its utility. *See supra* text accompanying notes 118-19. Finally, Congress made numerous changes to the general venue statute affecting diversity cases between 1958 and 2005. Such changes applied (or apply) only to cases brought originally in federal court and thus have no obvious relevance to the federal-state forum game. *See* Clermont & Eisenberg, *supra* note 13, at ___ n.7 (“Our coding turned up not a single dispute over venue.”). Since the removal statute has its own venue provision, however, the desire to secure a more favorable venue in a case that could be removed may prompt a plaintiff to file in federal court. *See supra* note 71 .

³¹¹ *See supra* note 98.

³¹² *See* STATE-FEDERAL STUDY, *supra* note 76, at 13 (proposed statutory provision barring a corporation or other business organization from access to federal court in state where it has maintained “local establishment” for more than two years in any action arising out of establishment’s activities).

³¹³ *See* Burbank, *supra* note 101, at 749-53; *supra* text accompanying notes 162, 246-49..

diversity forum, and the possibility of transfer within the federal court system, should be available to a corporate defendant that is sued in a state in which it is not incorporated and does not have its principal place of business on claims having nothing to do with its activities in that state, at least if the plaintiff is not a resident of the state.³¹⁴

Arthur von Mehren and Donald Trautman argued, in the context of judgment recognition practice, that a polity's rules concerning jurisdiction are a hallmark of the fairness with which that polity treats litigants.³¹⁵ In the contemporary litigation market, a plaintiff's choice of a forum that lacks either a regulatory interest over the plaintiff's claims (which it would have if specific jurisdiction existed and perhaps, but more controversially, if the plaintiff were a resident) or an abiding relationship with, that may include a regulatory interest over, the defendant (such as the state of incorporation, at least, would have), is reason for worry whether the quest is for legitimate litigation advantage.

Apart from exorbitant assertions of state court adjudicatory authority that twenty years of Supreme Court neglect could only have encouraged,³¹⁶ the litigation market for which Congress legislated in 1958 was a very different market than that to which Congress responded in 2005. The most important changes occurred because of the transformative power of the modern (post-1966) class action.

Purcell's description of how an entrepreneurial plaintiff's bar evolved, devised tactics first to counteract removal by corporate defendants and, once developments in the law of personal jurisdiction permitted, then to shop for (and keep) a favorable forum among the states,³¹⁷ seems almost quaint today. The modern class action is not just an extraordinarily powerful instrument of law enforcement. For a plaintiff's bar that is ever more entrepreneurial and competitive, it is an extraordinarily powerful addition to the mix of incentives and disincentives that drive forum choice.

Recurrent attempts by the Supreme Court to police interstate forum shopping through constitutional control of choice of law have also proved largely ineffective.³¹⁸ It is usually very easy for a state court that is so-minded to find in the complex of underlying facts a constitutionally cognizable contact in the state whose law that court wants to apply, and usually just as easy to

³¹⁴ Cf. *Davis v. Farmers Co-Operative Equity Co.*, 262 U.S. 312, 317 (1923) (“But orderly, effective administration of justice clearly does not require that a foreign carrier shall submit to a suit in a State in which the cause of action did not arise, in which the transaction giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad, and in which the plaintiff does not reside.”).

³¹⁵ See Arthur T. Von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and Suggested Approach*, 81 HARV. L. REV. 1601 (1968).

³¹⁶ The Court did not decide a case involving the constitutional limitations on state court jurisdiction between 1958 and 1977.

³¹⁷ See *supra* text accompanying notes 141-65.

³¹⁸ See *supra* text accompanying notes 149-51, 250-57.

interpret the law as animated by at least one policy that the contact implicates, triggering a constitutionally adequate basis for its application. When the choice of law question arises in a putative class action, and when the answer to the question will determine whether a class can be certified, nothing in the Constitution prevents the state court from “boot-strapping” in order to overcome predominance and manageability problems.³¹⁹ Moreover, particularly for putative negative value class actions, “boot-strapping” may not be necessary, since proponents of such litigation have emphasized the realm of deterrence in which policies that are most likely to lead to the application of one state’s law (i.e., that of the defendant’s headquarters) are likely to be found.³²⁰

I suspect that the phenomenon of “drive-by class certification”³²¹ was on the cutting edge of obsolescence in the state courts in 2005. I also suspect that the phenomenon of ever-changing magnet courts (“judicial hellholes”) might well have run its course if left, not to its own devices, but to the political process.³²² Even if so, however, what politics takes away, politics can restore. Moreover, not all of the cases or types of cases that caused CAFA’s supporters heartburn can be assigned to politics, lack of resources and experience, or the other dimensions that feed invidious comparisons of the state and federal courts. Some state courts were certifying multistate classes because they shared the commitments of the federal rulemakers in 1966, because they believed that either one state’s law or a manageable group of state laws could and should be applied, and because they otherwise thought certification appropriate under their governing rules.

Just because the Constitution does not foreclose such decisions does not mean that there is no federal interest in regulating the process by which or the forums in which they are made.³²³ Yet,

³¹⁹ See *supra* text accompanying note 254.

³²⁰ Recent scholarship has correctly remarked the weakness of an agency costs critique when applied to negative value class actions in which the main goal can plausibly be deemed deterrence rather than compensation. In my view, however, the authors have not succeeded in articulating a principled method for determining when deterrence *is* plausibly deemed the main goal of litigation (which surely requires attention to the substantive law scheme), or in suggesting means to prevent inefficient overenforcement. See, e.g., William Rubenstein, *On What a “Private Attorney General” is – And Why it Matters*, 57 VAND. L. REV. 2120 (2004); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103 (2006).

³²¹ S. REP. 109-14, at 22 (2005).

³²² See PUB. CITIZEN, CLASS ACTION “JUDICIAL HELLHOLES”: EMPIRICAL EVIDENCE IS LACKING 6-8 (2005).

³²³ But more important than the [federal courts’] resource and expertise issue was the argument that national corporations should not be subjected to multistate class actions in state courts and particularly in target venues that would define their legal liability nationwide. This was a powerful argument, and the defection of a number of Democratic senators from

we have seen that, even as revised by Friendly and Frank,³²⁴ the traditional view of Article III's diversity grant (the only view that the Supreme Court has ever espoused) seems rather far removed from the vision projected in CAFA. There we are told that the "framers ... provid[ed] for Federal court consideration of interstate cases of national importance under diversity jurisdiction."³²⁵ For that reason alone, Douglas Floyd's work on the constitutional infirmities of CAFA must be taken seriously.³²⁶ Unless the Supreme Court were to disavow the traditional view of the purposes of the Constitution's diversity grant, for which it is largely responsible, the justices might have difficulty explaining how the exercise of jurisdiction in some of the cases covered by CAFA's very broad reach can be justified.³²⁷

As Floyd points out, that task should be even harder for a Court that has promoted the constitutional values of federalism,³²⁸ and it should not be sufficient simply to cite the *Tashire* case,³²⁹ the Court's perfunctory blessing (decades after the event) of minimal diversity in one of the very few contexts in which Congress has previously provided for it.³³⁰ Moreover, congressional attempts to buoy the constitutional case for CAFA by invoking interstate commerce are, as Floyd demonstrates in another article, also vulnerable to close analysis.³³¹ Indeed, the kitchen sink quality of CAFA's statements of findings and purposes might be thought evidence of

their leadership's opposition to CAFA seems to have been influenced by this concern.

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

³²⁴ See *supra* text accompanying notes 74-91.

³²⁵ Pub. L. No. 109-2, § 2(b), 119 Stat. 4, 5 (2005). See *supra* text accompanying note 11.

³²⁶ See C. Douglas Floyd, *The Limits of Minimal Diversity*, 55 HASTINGS L.J. 613 (2004) (hereinafter Floyd, *Limits*); C. Douglas Floyd, *The Inadequacy of the Interstate Commerce Justification for the Class Action Fairness Act of 2005*, 55 EMORY L.J. 487 (2006) (hereinafter *Inadequacy*).

³²⁷ See Floyd, *Limits*, *supra* note 326, at 652-71 (discussing lack of fit between most of CAFA's stated purposes and purposes of grant of judicial power in Article III).

³²⁸ See *id.* at 645-50.

³²⁹ *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523 (1967). See Floyd, *Limits*, *supra* note 326, at 632-33 (discussing *Tashire*).

³³⁰ Federal jurisdiction for statutory interpleader is a far easier sell than is the existence of federal judicial power in a putative class action on behalf of 101 members, 100 of whom, including the named class representative, are from the state where it was brought against a local defendant, who then removed it. That such a case would be within one of CAFA's mandatory exceptions, requiring the court to decline jurisdiction, does not alter the fact that the statute purports to confer it.

³³¹ See Floyd, *Inadequacy*, *supra* note 326, 507-20; *id.* at 532 ("[T]he repeated invocation of the language of the Commerce Clause in the statement of findings and purposes and the legislative history ... is a red herring.").

either congressional hypocrisy³³² or, more charitably, a legislative phenomenon akin to alternative judicial determinations, confidence in any one of which is undermined by the concern that no one of them fully engaged the court's attention.³³³

There would nonetheless be serious irony in a decision by the Supreme Court holding CAFA unconstitutional (in some applications), however persuasive it might be in light of the traditional account of the diversity grant in Article III. For, although there is essentially no support for CAFA's articulated vision of diversity litigation in the Supreme Court's decisions explaining the purposes of the grant, and only partial and equivocal support in the legal literature,³³⁴ as Purcell demonstrates, the Court was hardly consistent in practicing what it preached while umpiring the system of corporate diversity litigation. Indeed, CAFA's vision of diversity jurisdiction as opening the federal courts to "interstate cases of national importance" is pretty close to – a 21st century update of -- that which drove the Court during the late 19th and early 20th centuries when corporate diversity litigation was a staple of the federal courts' docket.³³⁵ It is also pretty close to that which animated Congress when it first defined corporate citizenship for jurisdictional purposes in 1958.³³⁶

A reasonable member of Congress – even one who was aware that in the period from 1875 to 2004 "the overall importance of diversity cases to the construction of judicial policy ha[d] waned"³³⁷ – could thus have concluded that there was a need to change the balance of power in forum selection for class litigation between plaintiffs and defendants. The Supreme Court had been no more consistent in adjusting federal diversity jurisdiction to the pressures and demands of the modern class action than it had been during the system of corporate diversity litigation. It had failed in efforts to use the Constitution to control the excesses of state court personal jurisdiction and choice of law that added to the allure of state court class actions when the federal courts were not available and when they ceased to be hospitable.³³⁸ Some state courts were clearly rubber-stamping multistate classes proffered by class counsel, and although there were reasons to believe that the situation was improving, at least one of them (personnel changes on courts whose members are elected) provided no protection against recrudescence.³³⁹ Finally, although reasonable minds could differ as to whether a state court's application of one law to the claims of all members of a multistate class was itself an abuse, there was little question that (1) certification

³³² See Burbank, *supra* note 174, at 1942. ("Less charitably, they meet the philosopher Harry Frankfurt's definition of 'bullshit,' because they are made with indifference to their truth content.") (footnote omitted).

³³³ See RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. i (1982).

³³⁴ See *supra* text accompanying notes 74-91.

³³⁵ See *supra* text accompanying note 140.

³³⁶ See *supra* text accompanying notes 171-72.

³³⁷ Curry, *supra* note 4, at 463.

³³⁸ See *supra* text accompanying notes 240-57.

³³⁹ See *supra* text accompanying notes 260-64. For the confounding effect of "outlier" courts on attempts to discipline public policy with the fruits of methodologically sound empirical research, see *infra* note 358.

in such cases would usually prompt settlement, (2) the choice of law, even if constitutional, might subordinate important interests of other states, (3) in negative value class actions, there was a risk of inefficient overenforcement, and (4) consumers would ultimately absorb many of the costs of any judgment or settlement, whether retrospective or prospective.

The same conclusion, however, by no means follows for class actions that are not in any meaningful sense “multistate.” CAFA’s supporters sought to meet both workload and federalism objections in a variety of ways. First, they relied on a small class carve-out and on the aggregate amount in controversy requirement to keep smaller class actions, defined from either perspective, in state courts and out of federal courts.³⁴⁰ From the first predecessor bill on which the federal judiciary commented to the statute that was enacted, although the size of the carve-out remained at 100, the amount in controversy rose from (in excess of) \$1,000,000 to (in excess of) \$5,000,000, exclusive of interest and costs.³⁴¹ Second, rightly or wrongly, CAFA’s supporters concluded that Congress had already worked out a satisfactory adjustment of federal and state interests for securities and shareholder class actions, and that such adjustment could simply be incorporated in CAFA.³⁴² Third, and most controversially, they relied on a number of “exceptions” to jurisdiction that were designed to permit or require a Federal District Court to decline to exercise jurisdiction where the interests of the states in keeping class actions in their courts were thought to outweigh the federal interests sought to be advanced in CAFA.³⁴³

Reliance on the amount in controversy requirement to meet federalism objections recalls Purcell’s insight that “one of the great, if largely unspoken, social and legal compromises of the late nineteenth and early twentieth centuries ...[was that] [i]f plaintiffs agreed to keep their claims reasonably small, they could guarantee themselves a state forum.”³⁴⁴ We should also recall, however, that when the system of corporate diversity litigation evolved, doctrine that treated a corporation as a citizen of only one state was counterbalanced by jurisdictional (including removal) provisions that, as interpreted, enabled many plaintiffs to keep their cases in state court, notably but not exclusively by joining a non-diverse defendant. Moreover, in slightly expanding corporate citizenship in 1958 and not changing the removal regime, Congress in fact further empowered plaintiffs desiring to litigate in state court.³⁴⁵

³⁴⁰ The latter has been a tried and true technique of deflecting attempts to abolish or narrow diversity jurisdiction generally.

³⁴¹ See letter from Leonidas Ralph Mecham to Hon. Henry Hyde 2 (Aug. 23, 1999) (describing exceptions to grant of jurisdiction in H.R. 1875) (available from author).

³⁴² See *supra* text accompanying notes 53-56; *supra* note 73. It is not clear, however, whether they were successful in replicating SLUSA.

³⁴³ See *supra* text accompanying notes 63-69. The “local controversy exception” was added late in the long legislative process of refinement, a critical part of the compromise that permitted the statute to pass. See 151 Cong. Rec. S999, 1006 (daily ed. Feb. 7, 2005) (statement of Sen. Hatch).

³⁴⁴ PURCELL, *supra* note 103, at 251. See *supra* text accompanying note 129.

³⁴⁵ See *supra* text accompanying notes 166-74. Recall that Congress also raised the amount in controversy to >\$10,000 in 1958.

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

CAFA's exceptions, or some of them, are numbingly complicated and, as already observed, well calculated to keep lawyers and courts busy for years in work that advances the cause of substantive justice not one wit.³⁴⁶ For present purposes, however, the details need not detain us. It suffices to note that *none of the exceptions permits a state court to retain (if the defendant chooses to remove) a class action brought on behalf solely of the citizens of that state, alleging injuries sustained in the state as a result of the in-state activities of an out-of-state corporation doing substantial business in the state.* Such a case is, therefore, defined as of "national importance."

This is the sort of case that class counsel in the default regime usually could keep in state court through the joinder of a non-diverse defendant. It is also the sort of case in which there could be no concern about an exorbitant exercise of personal jurisdiction, no doubt about the existence of the forum state's regulatory interest, no constitutional question about a choice of forum law, and, likely, no reason to fear ad hoc manipulation of state law. Moreover, any such manipulation designed to permit aggregation (as for instance through a presumption of reliance in a class action alleging fraud under state law)³⁴⁷ would represent a policy choice that was within the prerogatives of state institutions, the internal allocation of power among which presents no question of federal interest.

³⁴⁶ See Clermont & Eisenberg, *supra* note 13, at ____.

³⁴⁷ See Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1471 (1987) (book review) ("dubious substantive strategies that enable packaging"); Burbank, *supra* note 174, at 1924-25.

With eyes not blinded by fictions,³⁴⁸ the reason for federal subject matter jurisdiction in such a case might seem to be a desire to give the corporate defendant a choice to seek, not a neutral forum, but a more favorable forum.³⁴⁹ On that view, by yielding to the overreaching of CAFA's supporters, Congress gave new life to the view that the federal courts are "business men's courts."³⁵⁰ Less tendentiously, the mere fact that a corporation is engaged in interstate commerce makes state law class action litigation against it (in all states but two) a matter of such strong "national interest" as to trump the interests of the several states.

What precisely are those interests? After all, CAFA does not purport to change *Erie* jurisprudence,³⁵¹ and thus federal courts exercising the jurisdiction it confers are seemingly bound to apply state "substantive" law (including the specific state law(s) selected by the choice of law rules of the state in which the federal court sits).³⁵² Yet, federal courts sitting in diversity are famously not authoritative sources of state law, and the exercise of diversity jurisdiction has, even in the recent past, been at cross purposes with the evolution of state law.³⁵³ These potential costs of

³⁴⁸ See Shapiro, *supra* note 63, at 123 ("Now, it could be said that the problem here lies not with CAFA, but with the definition of corporate citizenship used for all diversity purposes") (footnote omitted); *id.* at 124 ("it would have made more sense to use some other basis than citizenship, such as residence or corporate presence, to determine a party's connection to the forum state"); *id.* at 136 ("By using citizenship (domicile) of both the plaintiffs and defendants as the measure of how localized a controversy is, Congress has insured that many controversies that are very closely connected to only one state will not be able to fit the exceptions no matter how the courts interpret the statute.").

³⁴⁹ See Purcell, *supra* note 5, at [TAN 277] ("Thus, CAFA did not so much save defendants from biased state courts as reward them with access to the forum they regarded as more favorably disposed to their interests."); Cabraser, *supra* note 255 at 548 ("It is indisputable that the primary political goal of CAFA was to remove state class actions to the federal system, where, it was assumed, they would be dealt with severely (either through active denial of class certification, or simply by being warehoused indefinitely by an overwhelmed judiciary.") (footnote omitted).

³⁵⁰ Friendly, *supra* note 78, at 495 ("There was a vague feeling that the new courts would be strong courts, creditors' courts, business men's courts."). See *supra* note 87 and accompanying text.

³⁵¹ See, e.g., S. REP. NO. 109-14, at 49 (2005) ("[T]he Act does not change the application of the Erie Doctrine"); *id.* at 61, 66; Burbank, *supra* note 174, at 1943. Professor Hazard's view of CAFA ignores this legislative history. See Hazard, *supra* note 174.

³⁵² I have previously sketched an argument that would justify a federal court under CAFA in refusing to apply a "bootstrapping" state choice of law rule to enable aggregation, on the ground that such a rule would be inconsistent with CAFA's jurisdictional policy. See Burbank, *supra* note 174, at 1949-52.

³⁵³ See Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1677-81 (1992); Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism after*

ordinary diversity litigation are much more salient when state courts can, and predictably will, be stripped of the capacity to use a potent remedial form to implement substantive policy in a jurisdictional world that is no longer meaningfully concurrent.³⁵⁴

We know that some of CAFA's supporters were not seeking different class action law so much as they were different attitudes towards class certification. They hoped that many of the putative class actions removed under CAFA would be denied certification and go away. We also know that the authors of the Senate Report rejected a major premise of the 1966 amendments to Rule 23, deeming the goal of promoting law enforcement through negative value class actions enabled by court rule institutionally illegitimate.³⁵⁵ Congress could, of course, alter that policy

Erie, 145 U. PA. L. REV. 1459, 1464 (1997); Heather Scribner, *Protecting Federalism Interests After the Class Action Fairness Act of 2005: A Response to Professor Vairo*, 51 WAYNE L. REV. 1417, 1440-42 (2005). See also S. REP. 109-14, at 87 (2005) (Minority Views of Senators Leahy, Kennedy, Biden, Feingold, and Durbin).

³⁵⁴ See Marcus, *supra* note 28 at 1311-12; Scribner, *supra* note 353, at 1441-42.

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

Morrison, *supra* note 9, at 1527 (footnote omitted). See also *In re Hydrogen Peroxide Antitrust Litig.*, 2006 U.S. Dist. LEXIS 18790 at *3 n.2 (E.D.Pa. April 11, 2006) (“Under CAFA, plaintiffs attorneys must now bring most indirect purchaser class actions under state antitrust law in federal court. ...As one commentator has remarked, this means that, ‘as a practical matter, state courts will rarely get to interpret their own state antitrust laws.’”) (footnote omitted). Indeed, Ms. Cabraser argues that federal courts should take a “fresh approach” to enabling “multi-state classes to proceed under a class action framework” because “we no longer enjoy the safety valve of dual state-federal court systems where such class actions are involved.” Cabraser, *supra* note 255, at 567. She continues: “CAFA has eliminated the state court ‘safe harbor’ in which single-state class actions can be litigated.” *Id.* Professor Nagareda’s interesting discussion of the uncomfortable role that choice of law plays in class certification perhaps implicitly recognizes the latter point. For he observes that “[i]n institutional terms, [choice of law] principles crafted to mediate the authority of competing state sovereigns turn out to sort the parallel roles of class action litigation and the administrative state - of private and public - potentially leaving only the latter.” Nagareda, *supra* note 233, at 10. Presumably that is not a concern to the extent that state-wide class actions can pick up the slack.

³⁵⁵ See *supra* note 28 and accompanying text. In this respect, the Senate Report calls to mind a 1980 dissenting opinion of Justice Powell. In response to the Court’s observation that reliance on private attorneys general had been “facilitated by Rule 23,” *Deposit Guar. Nat’l Bank v Roper*, 445 U.S. 326, 338 (1980), and that the empowerment of those with negative value claims was “a central concept of Rule 23,” *id.* at 338 n.9, Justice Powell argued that “predicating a judgment on these concerns amounts to judicial

judgment respecting negative value class actions on a trans-substantive basis, as it has done occasionally in specific substantive contexts.³⁵⁶ But if it were to do so, one would hope, first that it would act transparently, and second that, in doing so, it would attend to at least one difference, to wit, the source of the governing substantive law. In any event, if the federal courts were to follow the lead of the Senate Report, the costs of their altered stance toward negative value class actions would be incurred by the states, which would be largely denied the ability to pursue a different vision of justice in their courts through the class action.³⁵⁷

policymaking with respect to the adequacy of compensation and enforcement available for particular substantive claims.” *Id.* at 355 (Powell, J., dissenting). He added that “[s]uch a judgment ordinarily is best left to Congress,” and that “[a]t the very least, the result should be consistent with the substantive law giving rise to the claim.” *Id.* See *supra* note 194.

³⁵⁶ See *supra* text accompanying note 195 (Truth in Lending Act); Burbank, *supra* note 174, at 1928-30. An alternative strategy to capping class recoveries would be to bar class actions in certain types of cases where the risk of inefficient overdeterrence seems particularly great. In that regard, a provision of New York law prohibits class actions to recover a statutory penalty or a minimum measure of recovery (i.e., statutory damages) unless the statute specifically authorizes their use. See N.Y. CPLR § 901(b) (2005). In *Sperry v. Crompton Corp.*, 863 N.E.2d 1012 (N.Y. 2007), the New York Court of Appeals held that treble damages authorized by a state antitrust statute constitute a penalty for this purpose. Still another strategy is to bar class actions in cases seeking recovery of very small individual amounts. Thus, South Carolina requires that each member of a damages class have a claim putting in controversy more than \$100. See S.C. R. Civ. P. 23(a)(5) (“in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class”).

³⁵⁷ [W]hen faced with almost identical medical monitoring class certification motions, state courts are generally more amenable to granting certification than are the federal courts. Further, this dichotomy carries serious implications in light of CAFA. As noted above ... the likelihood that federal jurisdiction will attach to even a single-state class action is much higher after passage of CAFA. To the extent that “some areas of state substantive law are only adjudicated in the form of class actions,” CAFA will thus work to preclude state courts from any opportunity to address certain areas of law. More to the point at issue here, CAFA will also remove from state courts the chance even to apply their own civil procedure rules to determine the threshold question of whether certification of a medical monitoring class is appropriate. The upshot of CAFA, then, is to move questions of medical monitoring class certification out of state courts and into federal courts – a move, which, based on existing precedent, favors defendants.

In re Welding Fume Prod. Liab. Litig., 2007 U.S. Dist. LEXIS 69779 at **101-103 (N.D. Ohio Sept. 14, 2007) (footnotes omitted).

It remains to be seen, of course, whether, like some kinds of federal preemption, CAFA will create the federal uniformity of a regulatory void.³⁵⁸ In any event, at a time when the Supreme Court has rediscovered the constitutional safeguards of federalism, and whether or not Professor Floyd's views about CAFA's constitutional infirmities persuade, it hardly seems too much to expect clarity about the reasons thought to warrant access to federal court. Moreover, however troublesome some of the policy choices animating the 1966 amendments to Rule 23 may now appear from the perspective of political legitimacy, it hardly seems too much to expect such clarity

³⁵⁸ See Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. ___, ___ (2008) ("Remedial Voids"); *id.* at ___ ("Enforcement Voids"). Cf. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) ("The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government.").

Professor Walker's prediction that CAFA's consumer protection provisions will prove the "most significant" part of the statute, *see supra* note 29, reflects another prediction, to wit, that CAFA's "jurisdictional provision ... will have little independent effect." Walker, *supra* note 16, at 849. *See id.* at 851 ("little impact on the outcome of cases"); *id.* at 867 (removals "will not result in different outcomes, only more class action litigation in federal court"). The latter prediction is based entirely on a pre-CAFA Federal Judicial Center study of a sample of 438 removed cases. *See Willging & Wheatman, supra* note 81. Comparing results in retained and remanded cases within a subset of 292 closed cases from the sample, the researchers found that "[f]ederal and state judges were equally likely to certify a class, whether for trial and litigation (*sic*) or settlement." *Id.* at 648. *See id.* at 635 (24 (20%) of remanded cases certified, as compared to 37 (22%) of retained cases). They also found that the median class monetary recovery or settlement in remanded (state court) cases was greater than in retained (federal court) cases, but that this was a function of class size, and that the median recovery per class member was greater in retained cases than in those remanded. *See id.* at 639 (Table 15). Without in any way diminishing the value of such empirical work, particularly in a policy landscape dominated by anecdotes, this is a very small sample. Moreover, I doubt that removed and remanded cases are representative of pre-CAFA cases filed in state court in which there was no attempt to remove (which would include cases terminating in collusive settlements and probably many state-wide -- as opposed to multi-state -- class actions). *See supra* text accompanying notes 344-45. Finally, although the FJC authors make a sound empirical observation when noting that data from avowedly "outlier" courts are unrepresentative, *see id.* at 597 n. 21 (commenting on Beisner & Miller, *supra* note 234), CAFA's supporters relying on those data did not need to claim that all, or even most, state courts were "magnet courts" or "judicial hellholes." *See* Beisner & Miller, *supra* note 234, at 155 ("class action lawyers are bringing a large number of cases in a small number of state courts that have become 'magnets' for interstate class actions and that thus exercise a wildly disproportionate role in adjudicating national disputes"); *id.* at 157 ("new wave of class actions ... not evenly distributed among state courts nationwide").

when federal jurisdictional legislation enables litigants to deprive states of the ability to implement similar policy choices as a matter of state law.³⁵⁹

There is, however, one element in the legislative mix not yet considered, namely, the policy of using federal jurisdiction to mitigate the costs of overlapping class actions. Even if consideration of the way in which CAFA implements that policy does not alter the conclusion that the statute was an abdication of Congress's duty to safeguard legitimate state interests, attention to it may provide cover to those among CAFA's supporters, in and out of Congress, who do not wish to be associated with the notion that the business of the federal courts is business.³⁶⁰

The Judicial Conference opposed the early (i.e., late 1990's) class action jurisdiction bills on workload and federalism grounds. The bills in question had a much lower amount in controversy requirement and fewer exceptions and carve-outs to permit class actions to remain in

³⁵⁹ In noting that "the sponsors of the bill were not very precise when describing how the exceptions would work," Shapiro, *supra* note 63, at 125, Professor Shapiro seems not to consider that their ambiguity and inconsistency may have been deliberate and strategic. *See id.* For the negative impact on democratic values of using "procedure" to transform legal rights, see JoEllen Lind, "Procedural Swift": *Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717 (2004).

³⁶⁰ In his valuable article, Mr. Morrison suggests that the primary rationale originally invoked for CAFA was "the concern that overlapping and/or duplicative class actions cannot be consolidated in a single court, which can cause inefficiencies and conflicting orders," Morrison, *supra* note 9, at 1531, and that it was subordinated in the debate to the "national class action rationale, largely because there are a number of poignant examples." *Id.*; *see id.* at 1539 ("As the bills proceeded in Congress, the overlapping class action concept began to take a back seat to another rationale"). This is not quite the way I read the history, at least in the Senate (I have not reviewed the House history for this purpose). It is true that Senator Kohl mentioned the goal of avoiding "a collusive 'race to settlement' by consolidating overlapping cases" in connection with S. 2083, which he co-sponsored with Senator Grassley. *See* 144 CONG. REC. S12021 (Oct. 8, 1998). That was not, however, the primary rationale he invoked. *See id.* ("It encourages closer scrutiny of class actions through several provisions"). *See* Clermont & Eisenberg, *supra* note 13 at ___ n.4 ("Class action abuses were the original target of the bill"). Moreover, by the next Congress, five years before CAFA was enacted, addressing the problems created by overlapping and/or duplicative class actions was clearly secondary to the goal of bringing "interstate class actions" into federal court. *See* S. REP. NO. 106-420, at 9 (2000). As the discussion in the text reveals, I also do not share Mr. Morrison's sanguine view about the "overlapping and/or duplicative class actions" rationale, although I note his acknowledgment "that there is remarkably little empirical evidence to support even a removal bill designed to solve problems from multiple unremovable class actions." *Id.* at 1538 n.40. Finally, I certainly agree with his view that state-wide class actions -- that is, actions restricted to the residents or citizens of one state, even when based on the same claim -- should not be removable. *See id.* at 1546 n.59.

state court.³⁶¹ But the Conference supported using minimal diversity to deal with the problems of dispersed litigation arising out of a common accident/disaster.³⁶²

Between the time that the Conference opposed a pre-CAFA bill in 1999 and its reconsideration of that position in 2002-2003, a number of important developments occurred, including the Chief Justice's silence in response to the recommendations of the Mass Torts Working Group and the work of the rulemakers in trying to devise solutions to the problems created by overlapping class actions dispersed between the federal and state courts. The rulemakers' efforts culminated in the conclusion that the problems were beyond the power of the rules process to fix. As a result, the Civil Rules Committee and the Standing Committee had become convinced that any solution to the problems created by overlapping class actions would have to come from Congress.³⁶³

The Judicial Conference's struggle to fashion a position on CAFA in 2003 suggests that key actors within the federal judiciary were divided as to both whether any support should be given to the legislation and as to where the line should be drawn between cases that such legislation should allow to be brought into federal court and cases that it should leave in state court.³⁶⁴ The prospects for successful opposition on general grounds may have been slim as a matter of political reality. Moreover, the judiciary had already supported the use of minimal diversity for targeted jurisdictional purposes in connection with the 2002 legislation (as well as in the Federal Courts Study Commission Report).³⁶⁵ By inconsistently espousing and/or partially obscuring the specific federalism concerns of the Federal-State Jurisdiction Committee, and by refusing to respond with specifics to a request for legislative language, the federal judiciary may have ensured that politics would indeed triumph.

One who has cautioned the institutional judiciary about its communications with Congress³⁶⁶ should probably applaud the Conference for refusing to be drawn into the intensely political battles over the line-drawing exercise that CAFA required. From that perspective, it should make no difference that the refusal occurred in response to a specific request from a member of Congress. Moreover, the mere reminder that any proposed legislation portending a substantial diversion of cases from state courts to the federal courts should be evaluated in terms both of its workload and of its federalism implications cannot fairly be thought either inappropriate or inconsistent with a refusal to specify just what proper regard for federalism requires. Yet, it is also important to recall that the institutional federal judiciary has not always been consistent in its

³⁶¹ See *supra* text accompanying notes 341-42.

³⁶² See *supra* text accompanying notes 284-88.

³⁶³ See *supra* text accompanying notes 279-83.

³⁶⁴ See *supra* text accompanying notes 291-97.

³⁶⁵ See *supra* text accompanying notes 284-88, 360; REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 44-45 (1990).

³⁶⁶ See Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1729-34 (2004).

invocation of principle, and thus that some of its communications with Congress invoking principle have been designed to advance particular policy views.³⁶⁷

The 1999 letter on behalf of the Conference went beyond a mere reminder to keep federalism values in mind. That letter, after all, included the assertion that “[t]ime-honored principles ... counsel that access to the federal courts be expanded only where the expansion would serve a substantial federal interest and only where the parameters of the expansion have been carefully crafted to address the perceived problem without unnecessary adverse effects on state judicial processes.”³⁶⁸ The March 2003 letter was even more specific.³⁶⁹ In context, then, the subsequent refusal to provide specific legislative language in a letter that again submerged the particular federalism concerns raised by the Federal-State Jurisdiction Committee³⁷⁰ virtually ensured that the political process would vindicate the maximalist view of the Standing Committee.

CAFA’s statements of findings and purposes give no notice of a perceived problem arising out of overlapping class actions dispersed between the federal and state courts and no notice of congressional purpose to address those problems.³⁷¹ Even without consulting the legislative history,³⁷² however, the existence of that aim can be inferred from two of the statute’s exceptions, the “discretionary exception” and the (mandatory) “local controversy” exception. As to the former, one consideration that a federal court is to take into account when deciding whether, “in the interests of justice,” to decline to exercise jurisdiction is “whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.”³⁷³ As to the latter, even if all of the other, very restrictive, conditions are met, the exception evaporates unless “during the 3-year period

³⁶⁷ See *id.* at 1733; Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 233, 308-09 (2003)

³⁶⁸ See letter, *supra* note 3401 at 5.

³⁶⁹ See letter, *supra* note 296, at 2 (“Accordingly, parallel in-state class actions would not present, on a broad or national scale, the problems of state projection of law beyond its borders and would present few of the choice of law problems associated with nationwide class action litigation.”); *id.* at 3 (“While the relationship of the defendant to the forum may have some bearing on state adjudicatory power, an insistence that all primary defendants maintain formal in-state citizenship is too limiting and may preclude in-state class actions where a defendant has sufficient contacts with the forum state, regardless of citizenship.”).

³⁷⁰ See *supra* text accompanying note 297.

³⁷¹ See Pub. L. No. 109-2, § 2(b), 119 Stat. 4, 5 (2005); *supra* text accompanying note 11.

³⁷² See S. REP. 109-14, at 23, 38, 40-41 (2005); Shapiro, *supra* note 63, at 130-31 (discussing proper interpretation of “principal injuries” in “local controversy exception” in light of legislative history and concluding, *id.* at 131, that exceptions “were to be used for truly local controversies, not local subsets of nationwide controversies”).

³⁷³ 28 U.S.C. § 1332 (d)(3)(F) (West 2006).

preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons.”³⁷⁴

Passing differences in language and focusing only on the “local controversy” exception, the exclusion from the exception would prevent a federal court from declining to exercise jurisdiction under CAFA if one state-wide class action involving different class plaintiffs but similar claims against the same defendant had been filed within three years (even if that class action were itself not removable under CAFA!). One of the supposed selling points of the compromise enabling CAFA’s passage was that “it limit[ed] a court’s authority to base federal jurisdiction on the existence of similar class actions filed in other states by disallowing consideration of other cases that are more than three years old.”³⁷⁵ This was an exceedingly small point at which to stick. The exclusion effectively privileges the supposed federal interest in managing overlapping class actions over the interests of a state even in cases where greater than two-thirds of class members and a defendant from whom significant relief is sought are citizens of, and the principal injuries alleged were incurred in, that state.³⁷⁶

³⁷⁴ 28 U.S.C.A. § 1332 (d)(4)(A)(ii) (West 2006).

³⁷⁵ 149 CONG. REC. S16102-01 (2005).

³⁷⁶ The committee wishes to stress that another purpose of this criterion is to ensure that overlapping or competing class actions or class actions making similar factual allegations against the same defendant that would benefit from coordination are not excluded from federal court by the Local Controversy Exception and thus placed beyond the coordinating authority of the Judicial Panel on Multidistrict Litigation.

S. REP. 109-14, at 40-41 (2005). *See* Lee & Willging, *supra* note 26, at ___ (noting that as the legislation evolved “the judicial branch expanded its conception of federalism beyond the original concern with the rights of states to control application of state law to protect state citizens”). Many people have failed to grasp, the effect of these provisions on statutory exceptions that were already very narrow.

Scruggs predicts that attorneys seeking leverage in settlement negotiations with corporations will file class actions in a big state such as California, along with companion suits in smaller neighboring states where there might be overlapping claims – assuming they can find injured individuals who are residents of those smaller states.

Lawyers Seek Loopholes in Class Action Overhaul, *supra* note 71, at 495. Indeed, even some academics do not seem to grasp the narrowness of the exceptions. *See, e.g.*, Marcus, *supra* note 28, at 1313 (“Also, CAFA allows for single-state class actions in state court, so large cases in California and New York, for example, may compensate for regulation lost to the statute.”); *id.* at 1290 (inaccurately summarizing exceptions). *But see, e.g.*, Shapiro, *supra* note 63, at 85 (“The exceptions were drafted in a way that will make it very difficult for plaintiffs to use them, even in many cases that more properly belong in state, rather

The affront to federalism values in this provision may not simply be that it disables states from adjudicating cases in which they have an intense interest. Once the state court class actions are brought into federal court, they will likely be subject to the tender mercies of the multidistrict litigation process. In that process the incentives of key participants -- some counsel, defendants and the transferee court -- will be to create bigger “litigations” either by evading the restrictions on settlement classes that the Supreme Court prescribed in *Amchem* and *Ortiz* or through abandonment of the class form for non-class aggregations. The incentives, in other words, will be to elide factual and legal differences that, although impeding certification, are what states regard as critical conditions for, or determinants of, effective regulation.³⁷⁷

than federal court.”) (footnote omitted); Morrison, *supra* note 9, at 1534 (“the way [the exceptions] are drafted will result in virtually no cases ever being remanded”); *id.* at 1538 (“only the most remote chance that a case will be sent back to state court under one of the narrow remand provisions”). The FJC’s ongoing empirical work includes the question whether CAFA’s exceptions “preserve state court jurisdiction over in-state class actions.” Lee & Willging, *supra* note 26, at _____. If their work in that respect is to be of any value, it will be essential to define “in-state class actions” precisely and to follow that definition consistently.

³⁷⁷ See Marcus, *supra* note 26, at [TAN 14]; *id.* at [TAN 235-50]; Mark Moller, *Class Action Lawmaking: An Administrative Law Model*, 11 TEXAS REV. L. & POL. 39, 107 (2006) (“special institutional pressures that predispose them to favor certification”).

Interpretation of a number of Supreme Court opinions have reduced the effectiveness of the class action as a means of settling a mass conflict. . . . This development has led a number of judges and attorneys, particularly in pharmaceutical cases, to attempt mass settlements on a consolidated and cooperative basis without the formalities of a class action. The substitute quasi-class action aggregate technique has advantages and is being closely studied. See *Principles of the Law of Aggregate Litigation*, Preliminary Draft No. 4 (American Law Institute 2006)... .

In re Zyprexa Prod. Liability Litig., 238 F.R.D. 539, 540-41 (E.D.N.Y. 2006). Those who were surprised by Judge Weinstein’s call for the expansion of CAFA’s jurisdictional reach in this opinion, *see id.* at 542 (“It may be useful for Congress to consider expanding the Class Action Fairness Act from class actions to at least some national MDL, non-Rule 23, aggregate actions”), need look no further for an explanation. See Stephen B. Burbank, *The Courtroom as Classroom: Independence, Imagination and Ideology in the Work of Jack Weinstein*, 97 COLUM. L. REV. 1993-98 (1999); *id.* at 1998 (discussing the “possibility that Judge Weinstein’s utility function drives him to seek (or create) the extraordinary in preference to the ordinary – ‘litigations’ rather than cases”).

On that view, CAFA may result in the replication on a grander scale, under cover of settlement, of some of the supposed abuses in state court class actions that Congress said it wanted to stamp out. The difference would be that the balance of bargaining power in settlement would have shifted to defendants.³⁷⁸ Indeed, in an inversion of the notion of a self-fulfilling prophecy, CAFA may dry up the market for state-wide class actions,³⁷⁹ leading counsel who understand the dynamics of the MDL process to seek to be first in-line with a multistate class action that nods and winks past a Supreme Court that has lost interest.³⁸⁰ Whatever the potential benefits and costs of gathering mass disaster litigation in the federal courts, it is difficult to understand why difficulties encountered in the management of overlapping class actions under the default regime warranted a remedy so grossly overinclusive. Indeed, it is difficult to understand why an adequate solution to those difficulties was not possible through a minor amendment to the Anti-Injunction Act.³⁸¹

³⁷⁸ Professor Shapiro's assertion that "the settlement leverage will still tilt towards the plaintiffs," Shapiro, *supra* note 63, at 131, seems to neglect the added leverage defendants will have in most MDL proceedings involving multiple state-wide class actions by reason of their ability to prevent certification for litigation. *Cf.* Purcell, *supra* note 5, at [TAN 179] (defendants' leverage to extract collusive settlement in state court by reason of ability to threaten removal to court that would not certify); *supra* note 308.

³⁷⁹ See Cabraser, *supra* note 255 at 544 n.6 ("The remaining alternatives [to a state court nationwide consumer class action] would seem to be fifty separate class actions ... or more likely, after the enactment of [CAFA] ... a multistate class action in federal court.").

In the *Figuroa* case – which was not an MDL proceeding because the competing class actions were in state court -- the court that ultimately declined to approve the settlement, see *supra* note 19, had preliminarily certified a multistate class for claims that included breach of contract, breach of express warranty, breach of implied warranty, unjust enrichment, money had and received, and unfair business practices and false advertising under statutes of all fifty states. See *Figuroa v. Sharper Image Corp.*, 2007 U.S. Dist. LEXIS 78316 **21-23, **75-76 (S.D. Fla. Oct. 11, 2007). Apparently, the court accepted plaintiffs' contentions that there were no consequential differences among state laws. See *id.* at **20, 23. *But see supra* note 262 (wishing away differences in state law to secure certification of multistate classes in state court); *Cole v. General Motors Corp.*, 484 F.3d 717 (5th Cir. 2007) (reversing certification of multistate class alleging breach of express and implied warranties because of failure of plaintiffs to demonstrate predominance).

³⁸⁰ Milberg Weiss co-founder Mel Weiss sees an opportunity in the new class action bill statute (*sic*). He expects smaller law firms that specialize in state courts to seek out his firm of 120 lawyers now that more class actions will wind up in federal court. "In some ways, it will help me," Weiss says. *Lawyers Seek Loopholes in Class Action Overhaul*, *supra* note 71, at 495.

³⁸¹ Distinguish the cases in question here, in connection with the "local controversy" exception, from the kinds of cases that were the object of the aborted rules proposals and Judge Easterbrook's *Bridgestone/Firestone* opinion, which were, by and large, multistate class actions. See *supra* note 282 and accompanying text.

This aspect of CAFA raises most clearly the question whether the additional burdens that the statute imposes on the federal courts will adversely affect the quality of justice, not just in the cases that it allows to be brought to federal court, but also in the rest of the federal docket. This concern is particularly acute at a time when civil trials are vanishing,³⁸² when the resources the federal courts receive from Congress may be inadequate to handle their (pre)existing work,³⁸³ and when some of those courts appear to be embracing procedural shortcuts that are themselves troublesome from the perspective of the optimal enforcement of the substantive law.³⁸⁴ This concern is also more insistent to the extent that some key members of the federal judiciary sought (or at least welcomed) the burdens CAFA will impose. Animated by an expansive (if not imperialistic) view of the gathering powers of federal courts, some federal judges have become inured to a view of modern litigation that, by privileging the goals of reducing expense and delay, ignores the costs of complexity.³⁸⁵

Finally, there is evidence that the federal courts are resisting some of the most egregious overreaching of CAFA's supporters.³⁸⁶ Whether or not that is true, the experience of the federal judiciary in commenting on legislative proposals and implementing the final product may advance understanding of the institution as an interest group.

Failure to speak with one voice in the legislative process leading up to CAFA prevented the federal judiciary from checking the excesses of interest group and partisan politics. The voice that, as a solo, might have made a difference – cautioning against overloading already burdened federal courts – was recognizable as both inflected with institutional self-interest and pitched to the interests of all litigants in federal courts.³⁸⁷ The other voice in the federal judiciary's duet –

³⁸² See *supra* text accompanying note 269.

³⁸³ See Cabraser et al., *supra* note 29, at 401 (“Since CAFA provides for no new judgeships, no additional staffing, and no new resources for the federal judiciary, CAFA will further increase the federal courts’ already heavy burdens.”); Lee & Willging, *supra* note 26, at ___ (“from an administrative perspective, such an increase in complex cases would consume scarce judicial resources of an already overburdened federal judiciary.”).

³⁸⁴ See Burbank, *supra* note 269; *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007) (redefining pleading requirements under Fed. R. Civ. P. 8); Editorial, *The Devil in the Details*, 91 JUDICATURE 52 (2007) (criticizing *Twombly*). The author is chair of the Editorial Committee of the American Judicature Society, which publishes *Judicature*.

³⁸⁵ See Burbank, *supra* note 347; Burbank, *supra* note 298. See also *supra* note 71 (questioning the FJC’s decision -- for all consolidated cases, including those subject to the MDL process -- to include only lead cases in their analysis database).

³⁸⁶ See, e.g., Clermont & Eisenberg, *supra* note 13, at ___ (section presenting data seeming “to show that both the district courts and the courts of appeals have resisted an expansive reading of CAFA”).

³⁸⁷ See Burbank, *supra* note 366, at 1733 n. 254 (“On matters as to which one would expect the judiciary to try to maximize the institution’s collective preferences ... everyone recognizes that judges are self-interested and can discount what they say without closing off an obvious and important source of relevant information.”). *But see id.*

championing the gathering powers of federal courts – not only took a narrower view of institutional interest; it could be enlisted in the chorus of those who, while waving the Stars and Stripes, were singing *L’Internationale*.³⁸⁸ In such circumstances, it would hardly be surprising that, once the occasion for attempted institutional unity had passed, both a more capacious view of institutional interest and divergent views about the requirements of federalism found powerful voices.³⁸⁹

VII. Conclusion

The view one takes of a statute that was enacted three years ago is necessarily preliminary, at least in some dimensions. Mindful of the ease with which a federal statute’s “antecedent period

(“reasons to doubt the judiciary’s ability to forecast the work that new statutory rights would create”). Speaking in July 2003, when CAFA’s prospects remained unclear, Judge Hodges, the Chair of the JPML, said:

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

Hansel, *supra* note 257, at 20 (Judge Hodges). For the date of the interview, see *id.* at 18.

³⁸⁸ See Lee & Willging, *supra* note 26, at ___ (“The judiciary’s concerns about caseload appear to have been overtaken by its own interest in finding solutions to the problems associated with multiple and overlapping class action litigation in the state and federal courts.”); Burbank, *supra* note 366, at 1733 (perception that institutional judiciary’s position on proposed legislation, even though supposedly based on neutral principle, is in fact based on ideological considerations causes judiciary “to incur the same costs as if it were actually participating on the merits of such debate”); *id.* at 1734 n.254.

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

Id. at 1741.

³⁸⁹ See *supra* text accompanying note 383; Clermont & Eisenberg, *supra* note 13, at [Table 9] (“the insignificance of the factor representing docket pressure indicates that judges are not simply resisting CAFA because of a heavy workload”).

of travail”³⁹⁰ can be forgotten, it seemed to me useful to record here some of the history that may illuminate an appreciation, if not the interpretation, of what is, after all, a major piece of federal legislation.

Unfortunately, although the statute’s studied ambiguity on critical questions has already generated a great deal of litigation, the extent of its impact on the “happy relations of States to Nation”³⁹¹ remains unclear and likely will be for a long time to come. So too does its impact on the general quality of justice in the federal courts, although the Federal Judicial Center’s empirical studies should provide a basis for judgment on some of the dimensions of that question.³⁹²

The hypocrisy and ambiguity underlying and infecting CAFA are especially vexing for one who, although informed by the political science literature on judicial behavior, has an abiding faith in the federal judiciary to prefer law to ideology when the law is clear. Nonetheless, I doubt that the federal judiciary will bring about the regulatory void that was the fondest hope of some of CAFA’s supporters in those cases where the argument in favor of federal jurisdiction is strongest. Indeed, mindful of the impact that politics (through judicial selection) has had on forum preference for class actions, viewed from the perspective of either the federal or the state courts, it seems possible that CAFA’s supporters, too, may come to regret the extent of their success in opening access to federal courts.³⁹³ That does not allay, however, the concerns that arise from considering the likely fate of cases for which the argument in favor of federal jurisdiction reduces to the fictions of corporate citizenship and the gathering powers of federal courts.

At the end of the day, CAFA’s exceedingly narrow exceptions are revealed as another depressing example of legislative overreaching by those who invoke the virtues of federalism when it is convenient to do so.³⁹⁴ There is no need, and no good reason, to await experience under the statute, much of which, for years, will consist of jurisdictional litigation that lacks any social utility. CAFA’s exceptions should be amended now to restore the balance of power between plaintiffs and defendants in class actions where a state’s interest in regulation through litigation is intense and where the argument for federal jurisdiction relies on the fictions of corporate citizenship and the gathering powers of federal courts. One way to do that would be by adding exceptions that allow putative class actions composed predominantly of in-state citizens and putative class actions alleging in-state injury to person or property to remain in state court if they would remain there

³⁹⁰ George H. Jaffin, *Federal Procedural Revision*, 21 VA. L. REV. 504, 504 (1935), quoted in Burbank, *supra* note 84, at 1018.

³⁹¹ FRANKFURTER & LANDIS, *supra* note 1, at 2. See *supra* text accompanying note 14.

³⁹² See Willging & Lee, *supra* note 26. For a description of the FJC’s ongoing work, see *id.* at ___ (describing Phases II and III).

³⁹³ See Marcus, *supra* note 26, at [TAN 16]; *id.* at [TAN 114-17].

³⁹⁴ See Purcell, *supra* note 5, at [TAN 163] (“CAFA inspired an astonishing reversal in the attitude of conservatives and Republicans toward the state courts”).

under the default regime.³⁹⁵ Yet, it would seem a shame to compound the waste of litigation fostered by jurisdictional provisions that are keyed to the number of citizens in a putative class. Moreover, citizenship ratios themselves do not reliably signal state interest. For those reasons, in a regime of minimal diversity that acknowledged the power of fiction to thwart legitimate state interests, it might make more sense to confine the additional exception to any putative class action seeking recovery only on behalf of those alleging in-state injury to person or property as a result of the activities of the defendant – without regard to the citizenship of either plaintiffs or defendants. Such a provision would have the additional value of (1) dispensing with some of the more troublesome maneuvers by which plaintiffs can defeat removal in the default regime, notably through joinder of a non-diverse defendant, and (2) refusing to reward forum shopping facilitated by general doing business jurisdiction.³⁹⁶ The contemplated amendments to CAFA should also eliminate provisions in existing exceptions that are designed to enable federal court management of overlapping class actions, but which might result in recrudescence in federal court of some of the state court abuses that CAFA sought to eliminate. Finally, Congress should consider whether, in light of scholarship discussing targeted jurisdictional policy,³⁹⁷ amendments to the Anti-Injunction Act are necessary to give the federal courts what they really need.

³⁹⁵ This appears to have been the approach of the Federal-State Jurisdiction Committee of the Judicial Conference.

In that context, this Committee endorsed an approach that it believes will preserve a greater role for the state courts than the role contemplated in the previous legislative proposals. That approach would create new exceptions to any class action legislative proposal relying on minimal diversity jurisdiction. Those exceptions would preclude the use of minimal diversity where (1) substantially all members of the class are citizens of a single state, or (2) the claims arise from death, personal injury, or physical property damage within the state.

Addendum, *supra* note 290, at 5 (footnote omitted). In the footnote, the committee observed that its proposed approach “would leave the determination of the citizenship of the defendants, and the satisfaction of the complete diversity requirements to be made in accordance with current jurisdictional rules.” *Id.* at 5 n.9. *See supra* text accompanying note 290.

³⁹⁶ *See supra* text accompanying notes 346-47.

³⁹⁷ *See* Burbank, *supra* note 174, at 1949-52; Wolff, *supra* note 27, at ____; *supra* note 278.

Appendix

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

States without class action: 2 (Mississippi and Virginia) 398

States retaining a rule not derived from the FRCP: 3

California: “California’s operative general class action statute . . . was enacted in 1872 as part of California’s Field Code and has remained essentially unchanged.” 399 **However, “California class action jurisprudence embraces and synthesizes Rule 23 and its jurisprudence . . .”** 400

Nebraska: Still retains “procedural statutes based on the Field Code of 1849.”401

Wisconsin: Rule includes only the concepts of numerosity and typicality and states them in the disjunctive.402 **Interpretations of the federal rule are nevertheless persuasive.**403

States retaining the 1938 rule: 1 (North Carolina)404

States adopting the 1966 rule for which a date could not be found: 2 (Connecticut, Maine)

1966-1971: 11405

Arizona (1966)406

South Dakota (1966)407

See Alfred H. Davidson IV, *Mississippi*, in *SURVEY OF STATE CLASS ACTION LAW* 357, 357 (Anne P. Wheeler et al. eds., 2006); Dale W. Pittman, *Virginia*, in *SURVEY OF STATE CLASS ACTION LAW*, *supra*, at 675, 675.

Elizabeth J. Cabraser et al., *California*, in *SURVEY OF STATE CLASS ACTION LAW*, *supra* note 1, at 49, 50. *Id.* at 70.

Edward D. Hotz & Shawna D. Peterson, *Nebraska*, in *SURVEY OF STATE CLASS ACTION LAW*, *supra* note 1, at 391, 391.

See Charles H. Barr, *Wisconsin*, in *SURVEY OF STATE CLASS ACTION LAW*, *supra* note 1, at 705, 705. *Id.* at 706.

See *Crow v. Citicorp Acceptance Co.*, 354 S.E.2d 459, 463 (N.C., 1987) (discussing how the North Carolina legislature explicitly adopted a rule similar to the 1938 rule in 1967, despite the 1966 federal amendments).

There are three states (Colorado, Delaware, Indiana) for which the date of adoption could be narrowed only to some time between 1966 and 1971. (Homburger indicates that they had adopted the revisions sometime before publication of his article. Adolf Homburger, *State Class Actions and the Federal Rule*, 71 *COLUM. L. REV.* 609, 631 n.133 (1971).)

See ARIZ. R. CIV. P. 23 1966 amendment note, ARIZ. R. CT. ANN. (LexisNexis, LEXIS through June 22, 2007).

Minnesota (1967): Rule adopted 1951, amended 1967 and 1988.⁴⁰⁸ The Minnesota Supreme Court indicated in 1972 that “the first two requisites” of the rule had been met in a case.⁴⁰⁹ Since the 1938 federal rule divided class actions into types instead of providing a list of prerequisites, it can be assumed 1967 was the conforming amendment.

Montana (1967)⁴¹⁰

Washington (1967)⁴¹¹

Kansas (eff. 1969)⁴¹²

Kentucky (eff. 1969): Amendment history indicates that it was adopted in 1953 and later amended effective 1969 and 1978.⁴¹³ Homburger indicates it had been amended by 1971; thus, we can assume that 1969 was the conforming amendment.⁴¹⁴

New Jersey (eff. 1969): The rule was effective 1969 and amended 1974 and subsequently.⁴¹⁵ A New Jersey appellate court discussed the rule in 1972 and gave the 1966 federal amendments as its source.⁴¹⁶

1970-1974: 12417

North Dakota: The state adopted the 1966 rule sometime between 1971 and 1973, but an exact date could not be obtained.⁴¹⁸ **North Dakota has since changed its rule to adopt the Uniform Class Actions Act, as has Iowa (though Iowa did not adopt the 1966 revisions in the interim).**⁴¹⁹ It appears that the Uniform Act was largely inspired by the 1966 rule,⁴²⁰ and these two states are thus included as adopters.

S.D. Sup. Ct. Order, 83 S.D. xvii (1966).

MINN. R. CIV. P. 23.01 credits, MINN. STAT. ANN. (West, Westlaw through July 29, 2007).

Klicker v. State, 197 N.W.2d 434, 437 (Minn. 1972).

See Paul C. Collins, *Montana*, in *Survey of State Class Action Law*, *supra* note 1, at 375, 378.

See Stephen M. Rummage, *Washington*, in *SURVEY OF STATE CLASS ACTION LAW*, *supra* note 1, at 679, 679-80.

Kan. Sup. Ct. Order, 203 Kan. LXXIV-LXXV (1969).

KY. R. CIV. P. 23.01, KY. REV. STAT. ANN. (West, Westlaw through May 1, 2007).

See Homburger, *supra* note 8.

N.J. CT. R. 4:32-2 history (LexisNexis, LEXIS through Aug. 24, 2007).

Lusky v. Capasso Bros., 118 N.J. Super. 369, 371-72 (App. Div. 1972).

See *supra* note 8.

Homburger indicates that North Dakota retained the 1938 rule in 1971. Homburger, *supra* note 8, at 626 n.94. However, the North Dakota Supreme Court used the language of the 1966 federal rule in 1973. Horst v. Guy, 211 N.W.2d 723 (N.D. 1973).

C. Carleton Frederici, *Iowa*, in *SURVEY OF STATE CLASS ACTION LAW*, *supra* note 1, at 221, 222.

See *id.* (“The author believes that the drafters of the Uniform Act took the 1966 Fed. R. Civ P. 23 and the case law interpreting and deciding various issues . . . and tried to codify what they thought were the best decisions”)

Ohio (1970)421

Nevada (1971)422

Tennessee (1971)423

Utah (1971)424

Vermont (1971): Original undated reporter's note calls this rule "identical to Federal Rule 23." 425 Later Code compilation states that the rules were first promulgated in 1971.426

Wyoming (1971)427

Hawaii (1972): The original rule was adopted in 1954, amended in 1972, and further amended in 1999.428 **Since the Hawai'i Supreme Court used language consistent with the 1966 federal rule in 1978, 1972 must be the conforming amendment.**429

Missouri (1972)430

Alabama (1973)431

Massachusetts (1973)432

Oregon (1973)433

1975-1979: 9

Idaho (1975)434

See Sylvia A. Goldsmith, *Ohio*, in *SURVEY OF STATE CLASS ACTION LAW*, *supra* note 1, at 485, 507.

See NEV. R. CIV. P. 23 advisory committee note, NEV. REV. STAT. ANN. (West, Westlaw through Jul. 15, 2007).

See Martha S. L. Black, *Class Actions Pursuant to Tennessee Rule of Civil Procedure 23*, 46 TENN. L. REV. 556, 558 (1979).

UTAH R. CIV. P. 23 amendment of rule (LexisNexis, LEXIS through Aug. 14, 2007).

VT. R. CIV. P. 23 reporter's note (West, Westlaw through Mar. 15, 2007).

See VT. R. CIV. P. foreword, VT. STAT. ANN. (2000).

Patrick R. Day, *Wyoming*, in *SURVEY OF STATE CLASS ACTION LAW*, *supra* note 1, at 713, 717.

See HAW. R. CIV. P. 23 (LexisNexis, LEXIS through Apr. 1, 2007).

See *Life of the Land v. Burns*, 59 Haw. 244 (1978).

See MO. R. SUP. CT. 52.08 committee's 1974 note, MO. ANN. STAT. (West, Westlaw through Aug. 1, 2007).

See ALA. R. CIV. P. 23 committee's 1973 comments, ALA. R. CT. (West, Westlaw through May 1, 2007) (paralleling comments on the federal rule).

See MASS. R. CIV. P. 23 reporter's 1973 notes, MASS. GEN. LAWS ANN. (West, Westlaw through July 1, 2007).

See Brian Stuart Campf, *Oregon*, in *SURVEY OF STATE CLASS ACTION LAW*, *supra* note 1, at 519, 520-21.

See IDAHO R. CIV. P. 23 (West, Westlaw through June 1, 2007).

Louisiana (1975): Louisiana originally adopted a pared-down version of the 1938 rule, permitting only “true” class actions.⁴³⁵ The Louisiana Supreme Court chafed under this restriction, judicially expanding the scope of class actions over several decades.⁴³⁶ The first explicit use of federal precedent was in 1975.⁴³⁷ The Louisiana legislature revised the rule in 1997 to match the federal.⁴³⁸

New York (1975)⁴³⁹

Alaska (1976)⁴⁴⁰

Illinois (1977)⁴⁴¹

Pennsylvania (1977)⁴⁴²

Texas (1977)⁴⁴³

New Mexico (1978): Although the rule adopted this year was similar to the 1966 federal rule, the differences led to virtually no class actions being filed in New Mexico prior to July 1, 1995, when the rules were again revised to match the federal rule.⁴⁴⁴

Oklahoma (1978)⁴⁴⁵

1980-1984: 5

Florida (1980)⁴⁴⁶

Iowa (1980)⁴⁴⁷: Iowa has adopted the Uniform Class Actions Act.⁴⁴⁸

Michigan (1983)⁴⁴⁹

Donald C. Massey et al., *Curtailing the Tidal Surge: Current Reforms in Louisiana Class Action Law*, 44 LOY. L. REV. 7, 37 (1998).

Id. at 36-43.

Id. at 37-38 (discussing *Stevens v. Bd. of Trustees*, 309 So. 2d 144 (La. 1975)).

1997 La. Acts 839.

1975 N.Y. LAWS ch. 207, § 1.

Alaska Sup. Ct. Order 258 (1976) (on file with author).

See Eshaghi v. Hanley Dawson Cadillac Co., 574 N.E.2d 760 (Ill. App. Ct. 1991) (noting that 735 Ill. Comp. Stat. 5/2-801, the class action rule, was adopted in 1977 and patterned after the federal rule).

See PA. R. CIV. P. 1701 credits, PA. STAT. ANN. (West, Westlaw through Aug. 1, 2007).

See Smith v. Lewis, 578 S.W.2d 169, 172 (Tex. Civ. App. 1979) (“The 1977 amendment to Tex. R. Civ. P. 42 was patterned after Fed. R. Civ. P. 23 with little change.”).

See Marte D. Lightstone, *New Mexico*, in SURVEY OF STATE CLASS ACTION LAW, *supra* note 1, at 427, 427-29.

1978 Okla. Sess. Laws. ch. 245, §§ 1-6.

Fla. Sup. Ct. Order No. 58986, 391 So.2d 165 (1980).

Frederici, *supra* note 22.

See supra note 23 and accompanying text.

New Hampshire (1983)⁴⁵⁰

Maryland (1984)⁴⁵¹

1985-1989: 1

South Carolina (1985)⁴⁵²

1990-1994: 2

Arkansas (1990): The Arkansas Supreme Court adopted a new class action rule in 1979 which replaced an earlier statute that was based on the idea of virtual representation.⁴⁵³ **Much of the 1979 rule was a verbatim reiteration of the previous statute,⁴⁵⁴ and the court initially put substantial weight on the fact that they had not adopted the federal rule for class actions despite adopting a number of other federal rules.⁴⁵⁵ The rule was narrowly construed until about 1988, when the court found “the spirit of the federal rule” present in their state rule.⁴⁵⁶ Since the court seems to have adopted the federal rule wholesale in 1990, that is used as the effective date.⁴⁵⁷**

Rhode Island (1991)⁴⁵⁸

1995-1999: 1

West Virginia (1998): The state used a variation of the 1938 rule until 1998.⁴⁵⁹ **Nevertheless, courts occasionally used elements of the revised federal rule before 1998 in determining whether to certify a class.⁴⁶⁰**

2000-2004: 1

Dennis K. Egan, *Michigan*, in SURVEY OF STATE CLASS ACTION LAW, *supra* note 1, at 323.

N.H. SUPER. CT. R. 27-A history (LexisNexis, LEXIS through June 29, 2007).

See MD. R. CIV. P. 2-231 source and credits, MD. CODE ANN. ti. 2, ch. 200 (West, Westlaw through June 4, 2007).

1985. B. Randall Dong, *South Carolina*, in SURVEY OF STATE CLASS ACTION LAW, *supra* note 1, at 585, 586.

Kenneth S. Gould, *New Wine in An Old Bottle – Arkansas’s Liberalized Class Action Procedure – A Boon to the Consumer Class Action?*, 17 U. ARK. LITTLE ROCK L.J. 1, 2 (1994).

Id. at 8.

Id. (discussing *Drew v. First Federal Savings & Loan Ass’n*, 610 S.W.2d 876 (Ark. 1981)).

Int’l Union of Elec., Radio & Mach. Workers v. Hudson, 747 S.W.2d 81, 86 (Ark. 1988).

Ark. Sup. Ct. Order, 304 Ark. 733, 738-41 (1990).

Paul V. Curcio & Linda A. Mayer, *Rhode Island*, in SURVEY OF STATE CLASS ACTION LAW, *supra* note 1, at 573, 573.

See Joseph Beeson & Jessica Blake, *West Virginia*, in SURVEY OF STATE CLASS ACTION LAW, *supra* note 1, at 697, 697.

Id. at 701.

Georgia (2003)⁴⁶¹: **The state has only recently adopted the 1966 revisions, though the ABA survey indicates that they had effectively adopted the rule previously.⁴⁶² However, there is not a lot of case law and much of it is from after 2000. The**

2003 Ga. Laws, Act. 363 § 3.

Kevin A. Maxim, *Georgia*, in *Survey of State Class Action Law*, *supra* note 1, at 155, 155.