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**ERIE, THE CLASS ACTION FAIRNESS ACT, AND SOME
FEDERALISM IMPLICATIONS OF DIVERSITY
JURISDICTION**

DAVID MARCUS*

ABSTRACT

The Class Action Fairness Act of 2005 (CAFA) expands diversity jurisdiction to allow most significant class actions based on state law to proceed in federal court. Hoping to limit the application of state law through class actions, CAFA's supporters believe that federal judges harbor a collective animosity toward the large, multistate class actions the statute targets. CAFA has no substantive component, and it does not tighten Rule 23's certification requirements. Nonetheless, if supporters are right about judicial preferences and their likely impact on certification decisions, CAFA will weaken the regulatory reach of state law.

*Arguments about diversity jurisdiction and judicial preferences made during CAFA debates bear a number of striking resemblances to arguments made for and against diversity jurisdiction during the decades leading up to *Erie Railroad v. Tompkins*. Many Progressive Era lawyers believed that, although no positive law instructed them to do so, federal judges shared a set of policy preferences that made them particularly receptive to corporate interests. As an expression of these preferences, the general common law attracted attention for its interference with the application of state law. By destroying the general common law, *Erie* limited the implications of judicial preferences for the federalism balance of power.*

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This Article examines the similar justifications given for diversity jurisdiction during the decades leading up to Erie and during the debates over CAFA. It describes a shift in approaches to choice-of-law problems in class actions as evidence of a hostility in federal courts toward the cases that come within CAFA's reach. The Article then uses Erie to criticize CAFA's federalism implications. Erie stands for the proposition that Congress, not judicial preferences unmoored from positive law, should bear responsibility for the displacement of state law. To achieve its intended effect, CAFA will rely on a perceived hostility toward large state law class actions in federal courts rather than a positive instruction from Congress. The statute thus contradicts Erie's message about the proper role federal judges should play in the federalism balance of power.

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INTRODUCTION

In 1923, Louis Brandeis complained to his protégé, then-Professor Felix Frankfurter, that few of his colleagues on the U.S. Supreme Court “realize that questions of jurisdiction are really questions of power between States and Nation.”¹ At the time, Brandeis, a committed federalist, was dissenting repeatedly as the Supreme Court, under the guidance of Chief Justice William Howard Taft, vigorously asserted the power of the federal judiciary to protect interstate commerce from the reach of state law.² This federal judicial activism laid bare what Brandeis and Frankfurter knew well: fights over the boundaries of federal jurisdiction had serious implications for the allocation of sovereign power between states and the federal government.³

Since 1938, one head of federal jurisdiction—diversity jurisdiction, as provided for in 28 U.S.C. § 1332⁴—seems much removed from these questions of power. Because of *Erie Railroad Co. v. Tompkins*, Brandeis’s valedictory blow for state sovereignty, federal judges no longer can use general common-law-making powers to displace state law.⁵ Federal judges become instruments of state law, minus the local bias that taints their state counterparts.

Erie notwithstanding, many lawyers continue to believe that the choice of forum for state law causes of action matters in ways that cannot be accounted for by the local bias justification for diversity jurisdiction.⁶ In any particular case, federal procedural rules might favor one side or the other, and practitioners know that procedure

1. Mary Brigid McManamon, *Felix Frankfurter: The Architect of “Our Federalism,”* 27 GA. L. REV. 697, 713 (1993) (quoting a conversation between Brandeis and Frankfurter).

2. See Robert Post, *Federalism in the Taft Court Era: Can It Be “Revived”?*, 51 DUKE L.J. 1513, 1518-19 (2002).

3. See, e.g., *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 274 (1957) (Frankfurter, J., dissenting); Philip B. Kurland, *Mr. Justice Frankfurter, the Supreme Court and the Erie Doctrine in Diversity Cases*, 67 YALE L.J. 187, 187 (1957).

4. 28 U.S.C. § 1332 (2000).

5. 304 U.S. 64, 78-80 (1938).

6. THOMAS E. WILLGING & SHANNON R. WHEATMAN, FED. JUDICIAL CTR., AN EMPIRICAL EXAMINATION OF ATTORNEYS’ CHOICE OF FORUM IN CLASS ACTION LITIGATION 13 (2005), available at [http://www.fjc.gov/public/pdf.nsf/lookup/CIAct05.pdf/\\$file/CIAct05.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CIAct05.pdf/$file/CIAct05.pdf).

can decide cases.⁷ Personalities of particular judges obviously factor into the choice as well. In addition, many lawyers share beliefs about the federal judiciary that go beyond the procedural posture of particular cases or the reputations of individual judges. Recently, for example, class action lawyers who represent plaintiffs have demonstrated a preference for state courts, whereas their adversaries think that federal judges share attitudes that better serve their clients' interests in complex mass litigation.⁸

Empirical data necessary to confirm that federal judges share a set of common motivations is notoriously difficult to gather.⁹ But the notion that the members of the federal judiciary share some set of preferences with respect to particular types of cases is not without precedent. Burt Neuborne famously postulated that preferences and predilections shared by federal judges set them apart from state judges in the way they handle constitutional cases.¹⁰ If sociological and psychological phenomena can drive decision making in some systematic way in constitutional litigation, a shared set of preferences may possibly drive decision making in diversity litigation as well.

If federal judges truly differ in some systematic way from their state counterparts, these collective motivations create federalism implications for diversity jurisdiction. Particularly when federal judges systematically favor defendants in categories of disputes for which state law provides the rule of decision, the federal exercise of jurisdiction may mean that state law will receive less enforcement than if cases stay in state court. Diversity jurisdiction then affects the power of states to regulate the types of conduct that become the subject of these disputes. The assertion of federal jurisdiction thereby alters the federalism balance, and does so without a positive law enacted through the democratic process.

One imperfect measure of shared judicial preferences is the perception about these preferences held by actors—namely practitio-

7. See, e.g., *id.* at 22.

8. *Id.* at 9-10.

9. See Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 255-73 (1988).

10. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1124-27 (1977). For a contemporary critique of Professor Neuborne's thesis, see generally William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599 (1999).

ners and legislators—whose opinions on these matters weigh heavily on the scope and practical effect of federal jurisdiction. Two important episodes in the history of diversity jurisdiction give examples of perceptions of shared federal judicial preferences and how lawyers and lawmakers believed these preferences impacted decision making in some systematic way. During the first—the debates over the general common law and diversity jurisdiction during the decades leading up to *Erie*—many lawyers believed that the federal judiciary as a whole harbored procorporate, antiregulatory tendencies that limited the reach of state law.¹¹

The second episode involved the debates leading up to the enactment of the Class Action Fairness Act of 2005 (CAFA).¹² CAFA changed the requirements for diversity jurisdiction for class actions. Instead of requiring complete diversity, CAFA allows litigants into federal court if they are minimally diverse, that is, if one class member hails from a different state than one defendant.¹³ Also, CAFA creates an aggregate amount-in-controversy requirement, changing the one-time rule for diversity jurisdiction that required each class member to satisfy 28 U.S.C. § 1332's amount-in-controversy requirement.¹⁴ CAFA supporters hope that this federalization of multistate class actions will result in fewer certified classes and thereby relieve defendants of liability for state law causes of action.¹⁵ Their faith in the statute rests on what they perceive to be an emergent hostility in the federal courts toward multistate class actions that allege state law causes of action.

These two episodes do more than illustrate the idea that shared judicial preferences may drive decision making in diversity cases. Striking similarities between the respective debates over the proper scope of diversity jurisdiction suggest that the interests of corporate defendants, which federal judges were perceived to have favored

11. See *infra* notes 79-105 and accompanying text.

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

13. 119 Stat. at 9 (codified at 28 U.S.C. § 1332(d)(2)(A)).

14. *Id.* (codified at 28 U.S.C. § 1332(d)(2)). For the pre-CAFA amount-in-controversy rule for class actions, see *Zahn v. International Paper Co.*, 414 U.S. 291, 300 (1973). After CAFA's enactment, the Supreme Court allowed supplemental jurisdiction to extend to include claims by class members that fall short of the amount-in-controversy requirement. See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2615 (2005).

15. See *infra* Part III.B.

during the decades before *Erie*, match the present-day interests that diversity jurisdiction advances. Moreover, the exercise of jurisdiction in diversity cases furthered and continues to further these interests in similar ways, by limiting the regulatory reach of state law.

Finally, the endpoint of the first episode, the *Erie* decision, offers both a way to appreciate CAFA's federalism implications and a basis to criticize the statute. *Erie* came at the end of an era during which Progressive lawyers lamented the tendencies of federal judges to favor certain classes of litigants. The general common law, in Brandeis's estimation, licensed federal judges in diversity cases to encroach unconstitutionally on state sovereign prerogatives.¹⁶ It gave them a mechanism to turn their preferences into law. *Erie*, by destroying this mechanism, took judicial substantive preferences out of the federalism equation and left the political branches to decide when and how to displace state rules of decision.

CAFA, in one sense, does the opposite of *Erie*. It empowers shared preferences as to the proper scope of class certification in a manner that supporters hope will weaken the regulatory reach of state law. In other words, the statute inserts shared judicial preferences into the federalism equation, albeit indirectly, through a procedural mechanism. In so doing, it strengthens the nonpolitical branch to impact the allocation of substantive power between the states and the federal government.

My discussion proceeds as follows. In Part I, I describe how the federalism implications of the various heads of jurisdiction differ. I argue that diversity jurisdiction is unique in the way it impacts federal-state relations, because it does its work in important part through federal judges' shared preferences and not through a positive source of substantive law. In Part II, I situate *Erie* in Progressive Era debates over the general common law and diversity jurisdiction. I argue that *Erie*'s constitutional analysis, viewed through the lens of this history, expresses that federal judicial preferences should have little impact on the allocation of substantive power in diversity cases between the states and the federal government. I turn to CAFA in Part III. After giving background to

16. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938).

its enactment, I describe congressional debates over the statute and identify parallels to Progressive Era arguments. Using choice-of-law decisions as an indicator, I trace the evolution of federal court discomfort with the cases CAFA targets and argue that this hostility provided the chief motivation for the statute's expansion of diversity jurisdiction. CAFA betrays *Erie*'s notion of proper governance. Its effectiveness is premised on the empowerment of federal judicial preferences and their interference with the federalism balance in diversity cases.

I. FEDERALISM AND THE CATEGORIES OF FEDERAL JURISDICTION

The head of jurisdiction under which a case comes to federal court determines the role the judge, as opposed to Congress or the President, plays in the allocation of power between states and the federal government. Although the most notable federalism cases of the last decade involved federal questions,¹⁷ these cases typically addressed how far Congress or the President could go in displacing state authority. Of course, the federal judge's role as the umpire has significant bearing on the limits of congressional or presidential power vis-à-vis the states. For example, a federal judge might have to decide whether a federal statute preempts a state cause of action, or whether the Constitution authorizes Congress to federalize an area of substantive law. In such instances, however, congressional intent or the constitutional allocation of power matters. A positive source of law mediates the judge's task, and so she ultimately plays a supporting role in the federalism drama that the federal question creates.

At first blush, habeas jurisdiction seems to move the federal judge closer to center stage.¹⁸ A petition for a writ of habeas corpus requires the federal judge to adjudicate a dispute concerning criminal law and policy, which traditionally has been a preserve of state sovereignty.¹⁹ Habeas review by a federal district court occurs

17. See, e.g., *United States v. Morrison*, 529 U.S. 598, 600-01 (2000); *Printz v. United States*, 521 U.S. 898, 902 (1997); *United States v. Lopez*, 514 U.S. 549, 551-52 (1995).

18. For a review of federalism issues created by habeas review, see Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 748, 762-64 (1986-1987).

19. See Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1138-39 (1995).

after multiple levels of a state judiciary have already rejected claims of constitutional error. The notion that a federal judge should step into the constitutional breach purportedly neglected by state courts suggests an untoward indictment of state legal aptitude.²⁰

The federal judge's role, however, is again secondary. A positive source of law, usually the Constitution, tells the federal judge how to decide a particular petition. In a small minority of habeas cases, the federal judge decides the constitutionality of a state statute or rule of criminal procedure.²¹ Although these cases require the federal judge to measure state policies by the yardstick of federal rights, the Constitution provides the rule of decision. Of course, much of the constitutional law that habeas petitions bring into play is judge-made.²² But as with federal questions, the judge's role is, in the end, mediated by a positive instruction, however vague.

The vast majority of habeas petitions, although they might challenge the quality of justice available in state courts, target no state policies at all. The petitioner asks the federal court to review a conviction for procedural errors committed in the trial court. The state has no policy commitment to the misapplication of constitutional law, and the federal judge takes no interest in the underlying state substantive or procedural rule.²³ The federalism implications of habeas litigation are usually limited to possible disrespect for individual state judges' application of federal constitutional law.

Since 1938, cases in federal court pursuant to diversity jurisdiction seem to have little relevance to the federalism balance. The end *Erie* brought to the displacement of state common law with principles of general common law explains why, in Judge Dolores

20. See *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976) ("In sum, there is 'no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to the [consideration of Fourth Amendment claims] than his neighbor in the state courthouse.'" (quoting Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 509 (1963)) (alteration in original)).

21. See, e.g., *Smith v. Robbins*, 528 U.S. 259, 264-65 (2000) (holding constitutional the California procedure for determining whether a request to withdraw an appeal by an indigent defendant is frivolous); *Sumner v. Shuman*, 483 U.S. 66, 67, 85 (1987) (declaring the California mandatory death penalty statute unconstitutional).

22. See Stephen F. Smith, *Activism as Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057, 1068-69 (2002).

23. Admittedly, comity and abstract interests of state autonomy factor into the federalism equation. See *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004) (Breyer, J., dissenting).

Sloviter's words from a decade ago, "little or no attention has been given to diversity jurisdiction's impact on the principles of federalism that federal judges must otherwise assiduously follow."²⁴ Of course, the very grant of diversity jurisdiction is itself a federalism-tinged insult, since it implies that organs of state government cannot properly ensure a just proceeding. Since *Erie*, however, federal judges, as some derisively put it, merely echo their state counterparts.²⁵

Judge Sloviter finds the dearth of attention to the federalism implications of diversity jurisdiction puzzling in light of what she deems "the unavoidable intrusion of the federal courts in the lawgiving function of state courts."²⁶ Federal judges in diversity cases often must extend existing state law, a task magnified by the evolution of state supreme courts into certiorari tribunals.²⁷ Judge Sloviter thinks the federalization of state policymaking through common law development is particularly problematic because "judges ... are not selected under the state's system and ... are not answerable to its constituency."²⁸ Also, federal judges often make the "wrong" prediction, creating precedent that generates instability and uncertainty as future federal and state courts try to sort out the proper rule.²⁹

Although this federalism problem has gone largely unaddressed, the Supreme Court has at least recognized that it exists. Federal courts usually must decide diversity cases even if the state rule of decision is underdeveloped.³⁰ According to the Supreme Court in *Louisiana Power & Light Co. v. City of Thibodaux*, however, when a case presents a particularly important question of state policy, and when the controlling state law is unclear, federal courts must abstain from deciding.³¹ The rationale for this abstention lies partly

24. Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1671 (1992).

25. See *Sybron Transition Corp. v. Sec. Ins. of Hartford*, 258 F.3d 595, 597 (7th Cir. 2001).

26. Sloviter, *supra* note 24, at 1675.

27. *Id.* at 1677.

28. *Id.* at 1687.

29. See *id.* at 1677-81; see also Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 709 (1995) (arguing that *Erie* fails to tell judges "how to ascertain state law").

30. See *Meredith v. Winter Haven*, 320 U.S. 228, 237 (1943).

31. 360 U.S. 25, 29 (1959); see *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593, 594 (1968) (per curiam); see also *Colo. River Water Conservation Dist. v. United States*, 424 U.S.

in the need to prevent “a dubious and tentative forecast” of what state law is from interfering with policy concerns “intimately involved with [the state’s] sovereign prerogative.”³² As the Court explained, abstention arises from the need “for the maintenance of harmonious federal-state relations in a matter close to the political interests of a State.”³³ Also, a federal court can avoid wrong predictions by certifying a question of state law to the appropriate state supreme court, provided that the supreme court accepts the certified question.³⁴

Diversity jurisdiction can also have implications for federal-state relations even when the state liability rule at issue is clear. A particular federal judge may simply dislike one side in a dispute, and the result might differ from what it would have been had the case proceeded in state court. The federal summary judgment standard might privilege a defendant in a certain case, for example, such that a dispute that might go before a jury in state court never makes it to trial in federal court.³⁵

One important set of federalism implications created by diversity jurisdiction has received less recent attention. When the federal judiciary as a whole shares preferences or biases in favor of a type of litigant or against a category of claim, diversity jurisdiction does not merely affect the outcome of a particular case but alters the application of state law in a more systematic way. When these preferences favor defendants, they mean that state law does not get enforced when it might have had more impact had the case proceeded in state court. No positive law like the Constitution or a federal statute mediates the judge’s role. The judge alone tips the federalism balance.

The systematic preferences that create these federalism implications are slippery, indeterminate, and ephemeral. It is difficult to

800, 814 (1976) (describing the *Thibodaux* abstention).

32. *Thibodaux*, 360 U.S. at 28-29.

33. *Id.* at 29.

34. See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 12.3, at 789-90 (4th ed. 2003). The Ninth Circuit, for example, will ask for authoritative answers when “state law questions ... present significant issues, including those with important public policy ramifications.” *Kremen v. Cohen*, 325 F.3d 1035, 1037 (9th Cir. 2003).

35. JoEllen Lind, “Procedural Swift”: *Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717, 766-70 (2004).

prove that they exist, that they influence judicial decision making, and, if they do, whether they favor one class of litigants or another. Major policy debates, however, have revolved around the perception that federal judges' hearts beat in unison with respect to certain issues. The two episodes I turn to next show how many lawyers believe that shared judicial inclinations play an important role in limiting the reach of state substantive law.

II. *ERIE* AND FEDERALISM

Diversity jurisdiction before 1938 gave rise to perhaps the most significant federalism concerns of any head of jurisdiction.³⁶ Under the Rules of Decision Act, originally adopted as part of the Judiciary Act of 1789, federal courts must apply "[t]he laws of the several states" in diversity cases.³⁷ In *Swift v. Tyson*, with Justice Story writing for the majority, the Supreme Court ratified the general understanding that "the laws of the several states" referred to inherently "local" law,³⁸ or law that addressed "areas of peculiarly local concern," like real property.³⁹ Throughout the nineteenth century, federal judges consistently expanded—and arguably perverted—*Swift's* mandate to craft a body of general common law that displaced otherwise applicable state common law in diversity cases.⁴⁰ On occasion, federal courts even assumed fairly substantial power to ignore state statutes, as well as otherwise authoritative interpretations of such statutes from state supreme courts.⁴¹

In theory, *Erie* put an end to this encroachment. With a single phrase—"[t]here is no federal general common law"—the decision

36. Federal question jurisdiction was not as important before the New Deal, in large measure due to the dearth of federal statutes. See Henry J. Friendly, *Federalism: A Forward*, 86 YALE L.J. 1019, 1023-24 (1977); Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1254-55 (2002).

37. 28 U.S.C. § 1652 (2000).

38. 41 U.S. (16 Pet.) 1, 12-13 (1842).

39. See William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1527-28 (1984).

40. See, e.g., EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958, at 61 (1992) (observing that, by the close of the nineteenth century, a general common law in the federal courts had displaced state common law of tort and contract).

41. *Id.* at 60.

sounded a resounding triumph for state sovereignty by requiring federal courts to follow the common law forged by their state brethren.⁴² To put it in much-abbreviated terms, *Erie* gave diversity jurisdiction what courts have subsequently deemed its “sole purpose”: the “protect[ion of] out-of-state defendants from local bias.”⁴³

Erie rests on an enigma. Although Brandeis gave three reasons for *Swift*'s demise, he insisted that its chief flaw was constitutional. Brandeis declared that “the unconstitutionality of the course pursued has now been made clear.”⁴⁴ He gave little explanation why this was so, preferring instead to quote at length from earlier dissents authored by Justices Holmes and Field.⁴⁵ The Supreme Court's post-*Erie* decisions have done little to clarify why the Constitution required *Swift*'s demise.⁴⁶

One key to *Erie*'s constitutional mystery is the course federal courts pursued during the *Swift* Era. *Erie* emerged from decades of turbulent debate on the proper role the federal courts should play in the regulation of interstate commerce. Running throughout these debates was a perception, shared particularly by Progressive lawyers, that federal courts favored corporate interests and stood in the way of state reform efforts.⁴⁷

42. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Judge Posner pronounced *Erie* “a very substantial blow struck for federalism in its modern sense of state autonomy.” RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 54 (1985).

43. *Schwartz v. Elec. Data Sys., Inc.*, 913 F.2d 279, 287 n.5 (6th Cir. 1990); see also *Burford v. Sun Oil Co.*, 319 U.S. 315, 337 (1943) (Frankfurter, J., dissenting) (describing the protection of out-of-state litigants from bias as “the theory of diversity jurisdiction”).

44. *Erie*, 304 U.S. at 77-78. Professor Wright labeled the constitutional discussion in *Erie* “perplex[ing].” CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* § 56, at 381 (5th ed. 1994).

45. *Erie*, 304 U.S. at 78-79.

46. According to Justice Harlan, the Supreme Court in *Hanna v. Plumer*, its most significant post-*Erie* decision, “misconceived the constitutional premises of *Erie*.” 380 U.S. 460, 474 (1965) (Harlan, J., concurring). For summaries of the Supreme Court's post-*Erie* contortions, see Richard D. Freer, *Some Thoughts on the State of Erie After Gasperini*, 76 TEX. L. REV. 1637, 1637-39 (1998), and Allan Ides, *The Supreme Court and the Law To Be Applied in Diversity Cases: A Critical Guide to the Development and Application of the Erie Doctrine and Related Problems*, 163 F.R.D. 19, 19-20 (1995).

47. See, e.g., EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* 64 (2000); Melvin I. Urofsky, *State Courts and Protective Legislation During the Progressive Era: A Reevaluation*, 72 J. AM. HIST. 63, 63-64 (1985).

A. *The Progressive Era Debate over Diversity Jurisdiction and Swift*

For a topic as seemingly mundane as diversity jurisdiction, it and *Swift* attracted a fair amount of heated debate during the decades after the Civil War and particularly during the Progressive Era. However agreeably Justice Story's contemporaries accepted *Swift* in 1842,⁴⁸ by the turn of the century Progressive lawyers denounced *Swift* as a "cancerous growth,"⁴⁹ an "excrescence[],"⁵⁰ and a "parasite."⁵¹ This rhetoric fueled action. Progressives proposed a number of bills, virtually all unsuccessful, to eliminate or significantly restrict diversity jurisdiction.⁵² Brandeis himself initiated one of these efforts in response to the Supreme Court's notorious decision in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*⁵³ Lawyers for the other side fought back, labeling diversity jurisdiction's critics "socialists and near socialists" and suggesting that its elimination would wreak economic havoc in the country.⁵⁴

48. See, e.g., GRANT GILMORE, *THE AGES OF AMERICAN LAW* 34 (1977) (observing that "the doctrine of the general commercial law was warmly welcomed and expansively construed, not only by the lower federal courts but by the state courts as well").

49. William M. Meigs, *Decisions of the Federal Courts on Questions of State Law*, 45 AM. L. REV. 47, 48 (1911).

50. *Id.* at 75.

51. Gurney E. Newlin, *Proposed Limitations upon Our Federal Courts*, 15 A.B.A. J. 401, 404 (1929). Charles Dawson, a federal district court judge, sympathized with "all intelligent laymen," who "c[ould] not understand why the law should be one thing in a State Court and something else in the Federal Court." Charles I. Dawson, *Conflict of Decisions Between State and Federal Courts in Kentucky, and the Remedy*, 20 KY. L.J. 3, 4 (1931).

52. With a single fairly insignificant exception, these attempts failed. See *Burford v. Sun Oil Co.*, 319 U.S. 315, 337 (1943) (Frankfurter, J., dissenting).

53. 276 U.S. 518, 519 (1928). A Kentucky company had contracted with a Kentucky railroad company for exclusive rights to solicit business at its stations. A Kentucky-based competitor threatened to compete. Knowing that Kentucky law viewed such contracts as unlawful restraints of trade, the first company reincorporated in Tennessee and filed suit in federal court. There, it could take advantage of a general common law rule that did not prohibit the contract. The Supreme Court countenanced the company's blatant forum shopping by applying the general common law rule. After the decision, Brandeis wrote to Frankfurter, suggesting that a bill be drafted to abolish the general common law, and instructed him to give the bill to a particular senator. See PHILIPPA STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* 378-79 (1984).

54. See John J. Parker, *The Federal Jurisdiction and Recent Attacks upon It*, 18 A.B.A. J. 433, 434 (1932).

Swift and diversity jurisdiction attracted so much attention because, in Purcell's words, "[d]iversity jurisdiction symbolized for both Progressives and their adversaries the de facto alliance between corporations and the national judiciary."⁵⁵ The Progressive assault on *Swift* is a familiar story, as is the larger context of Progressive disenchantment with diversity jurisdiction. I summarize the era's debates to stress the important role played by many lawyers' belief that federal judges shared a systematic bias in favor of corporate interests and an unfettered national economy. Allusions to these preferences appear in several of the main debates over diversity jurisdiction during the Progressive Era, three of which I describe next. Proponents of diversity jurisdiction insisted, and opponents disputed, that the federal courts played an essential role in the protection of out-of-state litigants against local bias. Proponents also claimed that *Swift* engendered doctrinal uniformity necessary for the smooth operation of interstate commerce. A third justification offered for diversity jurisdiction and *Swift*—that the federal courts rather than their state counterparts better appreciated that interstate commerce needed to operate freely, without meddlesome state regulation—also played an important role.

1. Local Bias

Defenders of diversity jurisdiction during the Progressive Era constantly invoked diversity's foundational rationale that local bias necessitated federal courts to protect out-of-state litigants from local bias. The President of the American Bar Association (ABA),⁵⁶ writing in 1929, insisted that "[w]hile perhaps the danger of local prejudices or bias has somewhat abated during the past century, yet it has by no means disappeared to such an extent that it is a negligible factor, in present day affairs."⁵⁷ He chalked up the danger of prejudice in part to state judges' "desire for re-election."⁵⁸ In a

55. PURCELL, *supra* note 47, at 64.

56. The ABA was known to be staunchly probusiness and opposed to Progressive reform efforts. See *id.* at 30, 69. The vehemence with which its members denied any such bias perhaps reflects this orientation. See Paul Howland, *Shall Federal Jurisdiction of Controversies Between Citizens of Different States Be Preserved?*, 18 A.B.A. J. 499, 500 (1932).

57. Newlin, *supra* note 51, at 403.

58. *Id.*

famous 1932 article, John Parker, a Fourth Circuit judge and staunch advocate for both diversity jurisdiction and the *Swift* regime, declared that the bias rationale for diversity jurisdiction "is as valid today as it was in 1787," due in measurable part to the fact that "the state trial judge is generally a local man with a local outlook."⁵⁹ In 1932 the University of Chicago law faculty opposed various bills designed to limit or abolish diversity jurisdiction in part because state judges "are under obligations to the lawyers appearing before them to a greater extent than federal judges."⁶⁰

Opponents of diversity jurisdiction scorned the local bias rationale. Some insisted that any residual local bias disappeared with technological advances—particularly the advent of "steam and electricity"⁶¹—and the emergence of a post-Civil War nationalist spirit. Felix Frankfurter argued in 1928:

Whatever may have been true in the early days of the Union, when men felt the strong local patriotism of the politically *nouveaux riches*, has not the time come now to reconsider how justifiable the apprehensions, how valid the fears? The Civil War, the Spanish War, and the World War have profoundly altered national feeling, and the mobility of modern life has greatly weakened state attachments.⁶²

Based on an evaluation of affidavits submitted by defendants to describe local prejudice and to secure a federal forum, Purcell contends that nineteenth-century corporations had a difficult time articulating specific incidents of bias.⁶³ He concludes that

59. Parker, *supra* note 54, at 437. In 1949, Judge Parker wrote an article lamenting the *Erie* Doctrine. John J. Parker, *Erie v. Tompkins in Retrospect: An Analysis of Its Proper Area and Limits*, 35 A.B.A. J. 19 (1949). He also issued a ringing endorsement of diversity and the *Swift* rule from the bench. See *Hewlett v. Schadel*, 68 F.2d 502, 503-05 (4th Cir. 1934). Judge Parker found himself enmeshed in another of the twentieth century's great legal disputes when, in 1951, he authored a majority opinion holding that school segregation did not violate the Fourteenth Amendment. *Briggs v. Elliott*, 98 F. Supp. 529 (E.D.S.C. 1951), *rev'd sub nom. Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

60. Members of Chi. Univ. Law Faculty, Comment, *Limiting Jurisdiction of Federal Courts—Pending Bills*, 31 MICH. L. REV. 59, 63 (1932).

61. Alfred Russell, *Avoidable Causes of Delay and Uncertainty in Our Courts*, 25 AM. L. REV. 776, 795 (1891).

62. Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 521 (1928).

63. In 1867, Congress passed the Local Influence Act, which expanded removal

proponents of diversity jurisdiction offered the local bias rationale as a readily available "stock justification."⁶⁴

As discussed in Part III, local bias, with some empirical evidence suggesting that it does exist, continues to serve as a modern-day justification for diversity jurisdiction. Progressives may well have prematurely declared its demise. Moreover, there may have been some truth to fears that state courts harbored anticorporate biases, if not geographical ones.⁶⁵ Contemporary lawyers sensed that this was so. As one put it in 1933, "[w]hatever prejudice there may be against the foreign corporation is probably not geographical but economic in its nature. It is a popular dislike of the foreign corporation, not because it is foreign, but because it is a corporation."⁶⁶ Similarly, then-Judge Taft, in an 1895 speech, argued that diversity jurisdiction was a necessary antidote to "the deep-seated prejudice" local courts harbored against national business interests.⁶⁷ In 1922, Taft, by this time Chief Justice, insisted that diversity jurisdiction and impartial federal courts were essential factors in the development of the "newer parts" of the country, because they gave investors confidence in the mechanism for legal redress.⁶⁸

2. Uniformity

Defenders of diversity jurisdiction also lauded it and *Swift* for the doctrinal uniformity they engendered.⁶⁹ A 1906 corporate law treatise declared:

jurisdiction but required the intended beneficiaries of the statute to show, by way of affidavit, bias against them in state tribunals. Analyzing decisions that commented on such filings, Purcell concluded that corporate defendants found it hard to tell a compelling story of prejudice. PURCELL, *supra* note 40, at 129.

64. *Id.*

65. See TONY FREYER, HARMONY AND DISSONANCE: THE *SWIFT* AND *ERIE* CASES IN AMERICAN FEDERALISM 109 (1981); Tony A. Freyer, *The Federal Courts, Localism, and the National Economy, 1865-1900*, 53 BUS. HIST. REV. 343, 344-45 (1979).

66. George W. Ball, *Revision of Federal Diversity Jurisdiction*, 28 ILL. L. REV. 356, 361 (1933) (footnote omitted).

67. William H. Taft, *Criticisms of the Federal Judiciary*, 29 AM. L. REV. 641, 650-51 (1895).

68. William H. Taft, *At the Cradle of Its Greatness*, 8 A.B.A. J. 333, 335 (1922).

69. See Alton B. Parker, *The Common Law Jurisdiction of the United States Courts*, 17 YALE L.J. 1, 10 (1907). For a post-*Erie* version of this argument, see Arthur John Keeffe et al., *Weary Erie*, 34 CORNELL L.Q. 494, 504 (1949).

Without the power to assert the common law of the United States or the power to assert the law upon the basis of reason of universal application throughout the United States, there could be no real union, and the existence of a court with the power to assert such law is inseparable from existence as a nation.⁷⁰

As one federal judge argued in 1932, "[w]hatever may be thought of the reasoning of Mr. Justice Story in *Swift v. Tyson*, the result arising from it is of great practical importance in standardizing the law of the federal courts, thus enabling them to do justice between citizens of different states."⁷¹

Certainly the Progressives were not opposed to the idea of a uniform law.⁷² But they doubted that *Swift*'s defenders sought uniformity for uniformity's sake. *Swift*'s defenders tended to have in mind a particular goal for uniformity. Interstate commerce required uniformity; national industries needed to be able to predict how the law would apply should they find themselves in court in some faraway state. Justice Clifford, an early expositor of this rationale, wrote in an 1880 concurrence that, "[s]hould this court adopt a principle of decision which ... would establish as many different rules for the determination of commercial controversies as there are States in the Union, it would justly be considered a public calamity."⁷³ Later, Judge Parker argued that *Swift* and a uniform common law were essential for "the free development of trade and commerce ... so that the citizen who trades, or travels, or makes investments, in states other than that of his residence, may know with substantial certainty what his rights and liabilities in a given situation will be."⁷⁴

Considerations of political economy aside, a legion of contemporary commentators attacked the uniformity rationale as a specious

70. FRANK HENDRICK, *THE POWER TO REGULATE CORPORATIONS AND COMMERCE: A DISCUSSION OF THE EXISTENCE, BASIS, NATURE, AND SCOPE OF THE COMMON LAW OF THE UNITED STATES* 445 (1906).

71. *Cent. Vt. Ry. Co. v. S. New Eng. R. Corp.*, 1 F. Supp. 1004, 1006 (D. Mass. 1932).

72. Many Progressives supported the uniform law movement, for example. See William Graebner, *Federalism in the Progressive Era: A Structural Interpretation of Reform*, 64 J. AM. HIST. 331, 332 (1977).

73. *R.R. Co. v. Nat'l Bank*, 102 U.S. 14, 58 (1880) (Clifford, J., concurring in the judgment); see William R. Casto, *The Erie Doctrine and the Structure of Constitutional Revolutions*, 62 TUL. L. REV. 907, 914-17 (1988).

74. *Hewlett v. Schadel*, 68 F.2d 502, 504 (4th Cir. 1934).

and demonstrably baseless excuse.⁷⁵ As Judge Friendly, who studied with Frankfurter at Harvard and clerked for Brandeis, explained several decades later, the Supreme Court could not ensure substantive unity in the legal doctrine that affected interstate commerce. State statutes trumped the general common law, and *Swift's* writ did not extend, at least formally, to statutory law.⁷⁶ Also, the growth of judicial activity in the nineteenth century and the growing importance of federal question jurisdiction to the Supreme Court's docket prevented diversity jurisdiction from playing this role.⁷⁷

3. *Business and Diversity Jurisdiction*

A third justification—the federal courts better appreciated the needs of an interstate economy—reveals diversity jurisdiction's federalism implications. This rationale's appearance in the era's debates, and the Progressive reaction to it, suggest that, at the very least, lawyers of the day believed that systematic procorporate, antiregulatory preferences influenced federal judges' decisions in diversity cases.

In his 1932 defense of *Swift*, Judge Parker argued that diversity jurisdiction played an essential role in the creation of a national economy:

No power exercised under the Constitution has, in my judgment, had greater influence in welding these United States into a single nation; nothing has done more to foster interstate commerce and communication and the uninterrupted flow of capital for investment into the various parts of the Union; and

75. See, e.g., Ball, *supra* note 66, at 362; Henry M. Hart, Jr., *The Business of the Supreme Court at the October Terms, 1937 and 1938*, 53 HARV. L. REV. 579, 607 (1940); Benno Schmidt, *Substantive Law Applied by the Federal Courts—Effect of Erie R. Co. v. Tompkins*, 16 TEX. L. REV. 512, 517 (1938); Harry Shulman, Comment, *The Demise of Swift v. Tyson*, 47 YALE L.J. 1336, 1348 (1938).

76. Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405-06 (1964).

77. *Id.* For an example of a Progressive Era commentator who urged that Story's goal could be preserved if the Supreme Court played a more active role in the supervision of the common law, see Henry Schofield, *Swift v. Tyson: Uniformity of Judge-made State Law in State and Federal Courts*, 4 ILL. L. REV. 533, 537-39, 548 (1910).

nothing has been so potent in sustaining the public credit and the sanctity of private contracts.⁷⁸

Judge Parker echoed a claim made in 1922 by Justice Taft, who applauded the federal courts' appreciation of business needs: "No single element in our governmental system has done so much to secure capital for the legitimate development of enterprises throughout the West and South as the existence of federal courts there, with a jurisdiction to hear diverse citizenship cases."⁷⁹ In Judge Parker's mind, federal courts were so essential to the economic health of the country that, if Progressives succeeded in their efforts to restrict diversity jurisdiction, their campaign could worsen the Great Depression: "It certainly seems to me that this time of financial distress is not a propitious one for the passage of laws which will frighten capital out of states which stand so badly in need of it."⁸⁰

Justice Taft's and Judge Parker's faith in the federal courts as engines of economic development rested on a venerable assumption that these judges appreciated that they had a certain role to play as guarantors of a national free market.⁸¹ In an article he wrote for Felix Frankfurter's seminar at Harvard on the federal courts, Henry Friendly argued that Congress in 1789 crafted diversity jurisdiction to protect out-of-state creditors against debtor-friendly state courts.⁸² Later John Frank agreed, arguing that the founders created diversity jurisdiction to enable commercial interests to litigate cases before judges more "firmly tied to their own interests."⁸³

78. Parker, *supra* note 54, at 437.

79. *Id.* at 439 (quoting a speech given by William H. Taft to the ABA in 1922).

80. *Id.*

81. See Samuel Issacharoff & Catherine Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1398-404 (2006). But see C. Douglas Floyd, *The Inadequacy of the Interstate Commerce Justification for the Class Action Fairness Act*, 55 EMORY L.J. 487, 499-507 (2006) (arguing that diversity jurisdiction was not intended to have an overtly commercial purpose).

82. Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 496-97 (1928); see also FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 9 (1928) (arguing that diversity jurisdiction was created to provide merchant classes with acceptable fora).

83. John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 28 (1948).

As evidenced by *Swift*, Justice Story was perhaps the nineteenth century's greatest proponent of this role for federal judges. Story intended that the federal courts would serve as expositors of a national commercial law and thereby help immunize the national economy from provincial regulation.⁸⁴ Nineteenth-century corporations exhibited an overwhelming preference for federal fora during the decades after the Civil War, indicating that Story successfully influenced federal courts' perceptions of themselves.⁸⁵ In a 1933 article, Dean Charles Clark observed that corporations were either the plaintiff or defendant in three-fourths of federal cases for which state law provided the rule of decision.⁸⁶ A survey of thirteen federal districts reported that eighty-seven percent of cases removed to federal court in 1929 and 1930 involved a corporate litigant.⁸⁷ Other data suggest that corporations succeeded significantly more frequently in federal court as compared to state court.⁸⁸

As Purcell explained, litigation in federal court favored corporate interests for a number of reasons, only one of which was the substance of the general common law. Federal courts were often much further away than local county courts for individual litigants, increasing expenses and compelling early and cheap settlements.⁸⁹ Also, local plaintiffs' lawyers were less familiar with litigation in federal fora than their corporate defense counterparts.⁹⁰ The mere existence of the general common law helped corporations too, because they could often argue for one of two possible rules of decision to apply when cases proceeded in federal court.⁹¹

84. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780-1860*, at 250 (1977). Professor Horwitz argues that federal courts imposed a uniform commercial law "on unwilling state courts." *Id.* Others argue that Justice Story captured the era's prevailing understanding of the commercial law and the federal courts' proper role as expositors. See generally Charles A. Heckman, *The Relationship of Swift v. Tyson to the Status of Commercial Law in the Nineteenth Century and the Federal System*, 17 AM. J. LEGAL HIST. 246, 249 (1973) (arguing that Justice Story's approach to the general common law coincided with that of contemporary commentators).

85. PURCELL, *supra* note 40, at 21.

86. Charles E. Clark, *Diversity of Citizenship Jurisdiction of the Federal Courts*, 19 A.B.A. J. 499, 502 (1933).

87. *Id.*

88. PURCELL, *supra* note 40, at 22.

89. *Id.* at 45-46.

90. *Id.* at 54.

91. *Id.* at 63-64.

The substance of the corporate-friendly general common law played an important supporting role.⁹² In the early nineteenth century, state and federal courts alike applied the same general law in certain classes of cases.⁹³ Indeed, Justice Story would have found alien the notion that there existed a "federal" general common law as distinct from state common law. The distinction was between general law, about which federal judges in diversity cases could exercise independent judgment, and local law.⁹⁴ By the turn of the century, however, federal courts had expanded *Swift's* mandate far beyond its original boundaries. They took license to ignore state tort and contract law,⁹⁵ a particularly important power in light of the increasingly corporate-friendly general common law.⁹⁶ In several famous diversity cases, the Supreme Court ignored authoritative state interpretations of state constitutions and even refused to apply state statutes.⁹⁷ Most notoriously, in some 250 cases, the Supreme Court held that the general common law trumped statutes agrarian states had enacted to protect local debtors against Eastern-owned railroad creditors,⁹⁸ provoking resentment in state courts.⁹⁹ In

92. *Id.* In a 1908 campaign speech, William Howard Taft gave an illustrative example of the interaction among the several factors Purcell identified:

A non-resident railway corporation had removed the case which had been brought in the local court of the county in which the injured employee lived, to the Federal court, held, it may be, at a town forty or one hundred miles away. To this place at great expense the plaintiff was obliged to carry his witnesses. The case came on for trial, the evidence was produced and under the strict Federal rule as to contributory negligence or as to non-liability for the negligence of fellow servants, the judge was obliged to direct the jury to return a verdict for the defendant. Then the plaintiff's lawyer had to explain to him that if he had been able to remain in the State court, a different rule of liability of the company would have obtained, and he would have recovered a verdict.

William Howard Taft, *The Delays of the Law*, 18 YALE L.J. 28, 37 (1908).

93. Fletcher, *supra* note 39, at 1519.

94. *Id.*; see also PURCELL, *supra* note 40, at 59-60.

95. See PURCELL, *supra* note 40, at 61.

96. *Id.*

97. See *Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall.) 175, 175-76 (1863) (refusing to apply a state statute that set aside debts owed to railroads); *Rowan v. Runnels*, 46 U.S. (5 How.) 134, 139 (1847) (refusing to follow a Mississippi Supreme Court interpretation of a slavery clause in the Mississippi state constitution). Federal courts did not ignore positive sources of state law particularly frequently. See WRIGHT, *supra* note 44, § 54, at 371.

98. See Alan F. Westin, *Populism and the Supreme Court*, in YEARBOOK 1980, at 62, 62-63, 67 (Supreme Court Historical Soc'y ed., 1980); see also Freyer, *supra* note 65, at 347, 350 (putting the figure at three hundred cases).

99. The Iowa Supreme Court issued an indignant federalist response to the *Gelpcke*

1895, then-Judge Taft, a tireless supporter of diversity jurisdiction throughout this era, observed that “[t]he capital invested in great enterprises in the South and West is owned in the East or abroad” and praised the federal courts for protecting the sanctity of these investments from local courts, which served “a corporation-hating community.”¹⁰⁰

Certainly the Supreme Court’s stewardship of the general common law explains some of this development as a path-dependent phenomenon. By the turn of the century, however, the Supreme Court’s burgeoning federal question docket limited its ability to supervise the general common law as carefully.¹⁰¹ Without a positive law or authoritative precedent requiring lower federal courts to act in a certain way, the exercise of lawmaking powers from the bench to favor systematically corporate interests indicates that shared preferences drove decision making.

These procorporate tendencies may well have been the side effect of a common legal philosophy that privileged stasis over creative evolution to meet newly arisen social needs.¹⁰² Also, commentators dispute whether procorporate tendencies, either overt or indirect, existed at all.¹⁰³ As Progressive Era debates over *Swift* and diversity jurisdiction indicate, however, many lawyers of the day clearly believed federal judges were so motivated.¹⁰⁴ Regardless of the

decision, insisting that it “launched [the country] upon the stormy sea of judicial conflict between State and federal courts.” *McClure v. Owen*, 26 Iowa 243, 258 (1868).

100. William Howard Taft, *Criticisms of the Federal Judiciary*, 29 AM. L. REV. 641, 650-51 (1895).

101. See *Cole v. Pa. R. Co.*, 43 F.2d 953, 957-57 (2d Cir. 1930).

102. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 288 (3d ed. 2005); GRANT GILMORE, *THE AGES OF AMERICAN LAW* 62-63 (1977); PURCELL, *supra* note 47, at 13; Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 396 (1950).

103. See, e.g., WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS 1890-1937*, at 16 (1994). But see WILLIAM F. SWINDLER, *COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE NEW LEGALITY 1932-1968*, at 3 (1970); David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 7-8 (2003). See generally Paul Kens, *Dawn of the Conservative Era*, 1997 J. SUP. CT. HIST. 1 (surveying and analyzing the *laissez-faire* era).

104. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1420-28 (2001) (discussing “overwhelming [turn-of-the-century] commentary that outright accused judges of importing their [*laissez-faire* and class] biases in to the law”).

origins of the procorporate bias, and regardless of whether it was conscious or subconscious, lawyers believed that it affected decision making.¹⁰⁵

Progressives' sensitivity to federal judicial activism in favor of corporate interests reflected their political objectives and preferences, which often included the empowerment of state regulation of commerce, a distaste for unchecked corporate power, and an inclination for the legislative over the judicial branch. Progressives were committed federalists who often pursued economic regulation at the state level,¹⁰⁶ where, not incidentally, they had their greatest success.¹⁰⁷ Brandeis, for example, preached a consistent federalist message that favored states over the federal government.¹⁰⁸ Political institutions worked best when they responded to the will of the people,¹⁰⁹ and the diversity of conditions in a place as large as the

105. Many reform-minded lawyers, including Brandeis, thought that judges shared a *laissez-faire*, social Darwinist ideology that interfered with efforts to achieve progressive legal change. Brandeis claimed that, up until the chief justiceship of Edward White,

[c]ourts continued to ignore newly arisen social needs. They applied complacently 18th century conceptions of the liberty of the individual and of the sacredness of private property. Early 19th century scientific half-truths like "The survival of the fittest," which translated into practice meant "The devil take the hindmost," were erected by judicial sanction into a moral law.

Louis D. Brandeis, *The Living Law*, 10 ILL. L. REV. 461, 464 (1916). Felix Frankfurter, Brandeis's protégé, in 1916 denounced the Brewer/Peckham Courts as a period "in which the prevailing philosophy was naturally enough *laissez-faire*." Editorial, NEW REPUBLIC, Feb. 5, 1916, reprinted in FELIX FRANKFURTER ON THE SUPREME COURT: EXTRAJUDICIAL ESSAYS ON THE COURT AND THE CONSTITUTION 43, 44 (Philip B. Kurland ed., 1970). Brandeis continued to worry that the federal courts let systematic bias in favor of corporate interests influence decisions upon his appointment to the Court in 1916. PURCELL, *supra* note 47, at 119. Certainly, an archconservative reaction under Chief Justice Taft, and his procorporate approach to the general common law, did nothing to dispel this concern. Post, *supra* note 2, at 1592-93.

106. Graebner, *supra* note 72, at 332 (observing that Progressives favored uniform state legislation instead of federal legislation); *id.* at 348 (observing that Progressives shared a "consensus ... on the virtue of federalism"). Given the inefficacy of state-level solutions to large-scale national problems, Progressives at times favored national regulation at the federal level. See, e.g., Theodore M. Davis, Jr., Note, *Corporate Privileges for the Public Benefit: The Progressive Federal Incorporation Movement and the Modern Regulatory State*, 77 VA. L. REV. 603, 622-25 (1991).

107. Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, in YEARBOOK 1983, at 53, 56 (Supreme Court Historical Soc'y ed., 1983).

108. David W. Levy, *Brandeis and the Progressive Movement*, in BRANDEIS AND AMERICA 110 (Nelson L. Dawson ed., 1989).

109. PHILIPPA STRUM, *BRANDEIS: BEYOND PROGRESSIVISM* 76 (1993).

United States made the local and diverse exercise of governmental power important.¹¹⁰ Hence, Brandeis maintained strong support for state regulatory efforts as social experiments that tracked the needs of citizenry.¹¹¹

Brandeis's distaste for large-scale corporate enterprise also illustrates an important strain of the Progressive philosophy of political economy.¹¹² Brandeis labeled corporations "Frankenstein monster[s],"¹¹³ responsible in large measure for the onset of the Great Depression.¹¹⁴ He believed that the soul-crushing control they exercised over the lives of their workers undermined democratic citizenship.¹¹⁵ According to one of his biographers, Brandeis saw the role of the judiciary as assisting the government to rein in large corporations and to restore economic organization to the small scale it would have operated on but for the monopolistic and plutocratic practices of large corporations and the politicians who helped them.¹¹⁶ He believed that the elite bench and bar enjoyed a cozy relationship with corporations that prevented them from helping "the people."¹¹⁷

Progressives also demonstrated a preference for legislation over judicial fiat. Barry Friedman observed that, "[a]t the height of the Populist/Progressive era, the *sine qua non* of democracy was

110. Brandeis made clear his preference for small government, as responsive to diverse conditions nationwide, in his first dissent. See *N.Y. Cent. R.R. Co. v. Winfield*, 244 U.S. 147, 169 (1917) (Brandeis, J., dissenting).

111. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); STEPHEN W. BASKERVILLE, *OF LAWS AND LIMITATIONS: AN INTELLECTUAL PORTRAIT OF LOUIS DEMBITZ BRANDEIS* 259-60, 305 (1994); STRUM, *supra* note 109, at 84.

112. See Melvin I. Urofsky, *Proposed Federal Incorporation in the Progressive Era*, 26 AM. J. LEGAL HIST. 160, 162 (1982).

113. *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 567 (1933) (Brandeis, J., dissenting in part).

114. *Id.* at 566-67; see also *New State Ice Co.*, 285 U.S. at 306-07 (Brandeis, J., dissenting) (noting that "[t]he people of the United States are now confronted with an emergency more serious than war," and that "[m]ost of them realize that failure to distribute widely the profits of industry has been a prime cause of our present plight").

115. See *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 410 (1928) (Brandeis, J., dissenting); Louis Brandeis, *Big Business and Industrial Liberty*, reprinted in *THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS* 38, 38-39 (Osmond K. Fraenkel ed., 1935); Louis Brandeis, *True Americanism*, reprinted in *BRANDEIS ON DEMOCRACY* 28 (Philippa Strum ed., 1995).

116. STRUM, *supra* note 109, at 88.

117. Louis Brandeis, *The Opportunity in the Law*, reprinted in *BRANDEIS ON DEMOCRACY*, *supra* note 115, at 57.

responsiveness to popular preference.”¹¹⁸ As Purcell explained, “[t]he legislative branch was popularly elected and hence closer to the people, and it had the authority to investigate social problems methodically and ameliorate them broadly.”¹¹⁹ Brandeis’s emphasis on judicial restraint as courts considered the constitutionality of legislation exemplifies this orientation.¹²⁰ So too does Progressive distaste for aggressive judicial review, which was viewed as anti-democratic.¹²¹

With tools like preemption and substantive due process in their arsenal, federal courts hampered many state legislative projects, much to Progressive frustration.¹²² Insofar as the common law in the absence of a comprehensive statutory regime played a significant role in economic regulation,¹²³ federal court displacement of state common law with a more corporate-friendly general common law also stirred Progressive resentment.¹²⁴

The belief that federal courts ruled—and formulated rules—systematically in favor of corporate interests was a constant theme in the campaign Progressives waged against diversity jurisdiction and *Swift*. The Democratic Party’s 1896 platform accused federal judges of “becom[ing] at once legislators, judges and executioners,” “in contempt of the laws of the States and rights of citizens.”¹²⁵ A speaker at an 1891 ABA convention declared that, because of

118. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law’s Politics*, 148 U. PA. L. REV. 971, 1002 (2000).

119. PURCELL, *supra* note 47, at 13; *see also id.* at 165-66 (noting that “Brandeis viewed the courts as obstacles to reform and the legislature, however imperfect, as the means of achieving it”).

120. Melvin I. Urofsky, *Louis D. Brandeis: Advocate Before and on the Bench*, 30 J. SUP. CT. HIST. 31, 38 (2005).

121. *See, e.g.*, William Trickett, *The Great Usurpation*, 40 AM. L. REV. 356, 376 (1906).

122. *See* Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 495 (1997).

123. *See* Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1192 (1986) (observing that tort law represented the primary means of regulation during the late nineteenth century).

124. *See* Gardbaum, *supra* note 122, at 495; Issacharoff & Sharkey, *supra* note 81, at 1406; *see also* Armistead M. Dobie, *Seven Implications of Swift v. Tyson*, 16 VA. L. REV. 225, 228 (1930).

125. Democratic Platform of 1896, *reprinted in* NATIONAL PARTY PLATFORMS 1840-1960, at 97, 99 (Kirk H. Porter & Donald Bruce Johnson eds., 1961). A trio of decisions on the Sherman Antitrust Act, the federal income tax, and the imprisonment of Eugene Debs—none having to do with *Swift* or diversity jurisdiction—can claim significant credit for this position. *See* Friedman, *supra* note 104, at 1392-93; Westin, *supra* note 98, at 68-69.

diversity jurisdiction and the tendencies of federal judges to favor corporate interests, citizens "have smarted under the impression that the general government was a hostile and unfriendly government, not having the good of the people at heart."¹²⁶ A North Carolina state judge derided federal judges "as truly beyond the will of the people as the Czar of all the Russias" and advocated for popular judicial elections.¹²⁷ Roscoe Pound in 1906 denounced diversity jurisdiction and the *Swift* regime as central culprits to blame for the rise of popular discontent with the judiciary.¹²⁸ In 1933, Dean Clark argued that the systematic preference of corporations for federal fora "[d]id not add to the prestige of the federal judicial establishment."¹²⁹ Later, Frankfurter insisted that corporate abuse of diversity jurisdiction, which reached its zenith during the Progressive Era, demonstrated diversity jurisdiction's fundamental unworthiness.¹³⁰ Even Taft admitted in 1895 that "[t]he constant struggle of most corporations to avoid State tribunals ... and to secure a Federal forum ... is chiefly the cause for the popular impression in those States that the Federal courts are the friends of corporations and the protectors of their abuses."¹³¹

The general common law attracted a great deal of attention from Progressive lawyers who believed that federal judges shaped it consciously to aid corporations. Then-Solicitor General Robert Jackson, in a 1938 article praising *Erie*, argued that "[p]erhaps the chief beneficiaries of the doctrine of *Swift v. Tyson* were corporations doing business in a number of states."¹³² A reform-minded professor insisted that "Mr. Justice Story and his colleagues must bear a heavy share of the blame for the hatred of federal courts entertained by so many citizens of the United States."¹³³ In 1908, Taft, hardly a Progressive, admitted that the general common law had contributed

126. Alfred Russell, *Avoidable Causes of Delay and Uncertainty in Our Courts*, 25 AM. L. REV. 776, 795 (1891).

127. Walter Clark, *The Revision of the Constitution of the United States*, 32 AM. L. REV. 1, 8 (1898).

128. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 46 J. AM. JUDICATURE SOC'Y 54, 62-63 (1962).

129. Clark, *supra* note 86, at 503.

130. *Lumberman's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 55 (1954) (Frankfurter, J., concurring).

131. Taft, *supra* note 100, at 652.

132. Robert H. Jackson, *The Rise and Fall of Swift v. Tyson*, 24 A.B.A. J. 609, 613 (1938).

133. Dobie, *supra* note 124, at 240.

to the popular impression that federal judges systematically favored corporations:

How could a litigant thus defeated [by a general common law rule less favorable than a state counterpart], after incurring the heavy expenses incident to litigation in the Federal court, with nothing to show for it, have any other feeling than that the Federal courts were instruments of injustice and not justice, and that they were organized to defend corporations and not to help the poor to their rights?¹³⁴

Thus, both defenders and opponents of *Swift* and diversity jurisdiction believed that the federal courts existed to facilitate commerce, served as preserves of corporate power, and developed the general common law to help protect the operation of interstate commerce unencumbered by state laws.¹³⁵ No positive source of law required federal judges to act as bulwarks against state interference. The perception that they had shouldered this responsibility may evidence shared preferences and their systematic influence on decision making. Corporate-friendly general common law rules, crafted by judges perceived to have had policy biases with no roots in democratically enacted positive law, displaced state-created common law. This phenomenon unmasked these judges as central actors in the federalism drama.

B. Erie's Constitutional Spirit

When Brandeis declared in *Erie* that “the unconstitutionality of the course pursued has now been made clear,”¹³⁶ he quite likely had in mind the expansion of the general common law, the perception of a corporate-friendly judiciary, and their impact on state sovereignty as the “course pursued” under *Swift*. Brandeis was a Progressive lawyer par excellence: he had helped lead the Progressive assault on *Swift* and diversity jurisdiction, and he espoused many of the Progressive beliefs about judges’ biases.¹³⁷ The constitutional nail

134. Taft, *supra* note 92, at 37.

135. PURCELL, *supra* note 40, at 25, 61, 251.

136. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 77-78 (1938).

137. See PURCELL, *supra* note 47, at 143; Brandeis, *supra* note 105, at 464.

Erie hammered into *Swift*'s coffin responds neatly to Progressive concerns about the reach and exercise of federal judicial power.

Brandeis gave three reasons why *Swift v. Tyson* had to go. The first—that Justice Story erred in his interpretation of the Rules of Decision Act—found support in the “recent research of a competent scholar,” Charles Warren.¹³⁸ For his second reason, Brandeis weighed *Swift*'s “defects, political and social,” against the benefits that general common-law-making powers had failed to achieve.¹³⁹ By the early twentieth century, *Swift* no longer delivered the promised doctrinal uniformity in the common law. Concomitantly, the regime it licensed resulted in discrimination against in-state litigants, who were denied “equal protection of the law” when their cases were removed to federal court by out-of-state litigants.¹⁴⁰

Brandeis stressed the importance of his third reason—*Swift*'s unconstitutional interpretation of the Rules of Decision Act—with the acknowledgement that the social and political defects he identified alone would not compel the Court “to abandon a doctrine so widely applied throughout nearly a century.”¹⁴¹ The threat *Swift* created to state sovereignty became clear as federal judges took the jurisgenerative powers *Swift* provided and crafted a corporate-friendly general common law that displaced state law. The resulting harm was the “course” Brandeis believed to be constitutionally unacceptable. But why did this lived experience unveil a constitutional problem?

Erie delivered its constitutional blow to the general common law in two sentences:

Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or “general,” be they commercial law or a part of the law of torts.

138. *Erie*, 304 U.S. at 72-73. Warren claimed that an earlier draft of the 1789 Act made clear that federal courts were supposed to apply state common law in diversity cases. See Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 84-88 (1923). His interpretation of the earlier draft likely was incorrect. See Fletcher, *supra* note 39, at 1514-15; Friendly, *supra* note 76, at 389-90.

139. *Erie*, 304 U.S. at 74.

140. *Id.* at 74-75.

141. *Id.* at 77.

And no clause in the Constitution purports to confer such a power upon the federal courts.¹⁴²

As these twin observations suggest, *Erie*'s constitutional footing stands in an understanding of the proper balance between states and the federal government, with a separation of powers overlay.¹⁴³

Federalism lies at *Erie*'s heart, but the question of what constitutional garb Brandeis's federalism wore is disputed. Brandeis complained that *Swift* licensed the federal courts to "invade[] rights which ... are reserved by the Constitution to the several States."¹⁴⁴ Under the Tenth Amendment, powers not given to the federal government are "reserved to the States."¹⁴⁵ Richard Freer asserts that "everyone seems to agree that the holding is based upon the Tenth Amendment."¹⁴⁶ A number of commentators concur.¹⁴⁷

The Tenth Amendment, however, is an imperfect candidate. Two years before *Erie*, the Supreme Court had rendered the Tenth Amendment largely powerless to limit the federal government's displacement of state substantive authority.¹⁴⁸ Moreover, Brandeis quoted at length from an 1893 dissent by Justice Field, which expressly relied on the Tenth Amendment to establish *Swift*'s

142. *Id.* at 78.

143. At least one scholar has cited to Brandeis's lament that *Swift* frustrated the "equal protection of the law," *id.* at 74-75, as evidence that he rooted the decision in the Fifth Amendment. See John R. Leathers, *Erie and Its Progeny as Choice of Law Cases*, 11 HOUS. L. REV. 791, 795-96 (1974). It is highly doubtful that Brandeis had the Fifth Amendment in mind in 1938. The Supreme Court would not read equal protection into the Fifth Amendment until 1954. See *Bolling v. Sharpe*, 347 U.S. 497 (1954); John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 713 n.114 (1974).

144. *Erie*, 304 U.S. at 80; see also Donald L. Doernberg, *Juridical Chameleons in the "New Erie" Canal*, 1990 UTAH L. REV. 759, 764 ("It appears that the *Erie* Court intended generally to prevent the federal courts from making substantive policy decisions that the Constitution left to the states."); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 13 (1985) (describing federalism as "the key principle invoked in *Erie*").

145. U.S. CONST. amend. X.

146. RICHARD D. FREER, INTRODUCTION TO CIVIL PROCEDURE § 10.4, at 467 (2006).

147. See, e.g., George D. Brown, *Of Activism and Erie—The Implication Doctrine's Implications for the Nature and Role of the Federal Courts*, 69 IOWA L. REV. 617, 621 (1984); *Ides*, *supra* note 46, at 27.

148. See *United States v. California*, 297 U.S. 175, 183-84 (1936).

constitutional defects.¹⁴⁹ With this blueprint available, Brandeis's decision not to cite to the amendment seems quite deliberate.¹⁵⁰

Brandeis's silence speaks volumes. *Swift* failed its constitutional test not because the general common law violated a textual provision of the Constitution, but because the Constitution did not give the federal courts the sort of general common-law-making powers they had exercised in the decades leading up to *Erie*. John Hart Ely insists that "the lack of a relevant provision was precisely the point."¹⁵¹ The federal courts' interpretation of the Rules of Decision Act "was unconstitutional because nothing in the Constitution provided the central government with a general lawmaking authority of the sort the Court had been exercising under *Swift*."¹⁵² "As the general structure of the Constitution"—not just the Tenth Amendment—requires, the federal government is a government of limited powers. Because the Constitution does not explicitly give instruments of the federal government the power to craft substantive common law, they may not do so.¹⁵³ *Erie*'s emphasis on the negative—Congress "has no power" to create a general common law, "[a]nd no clause in the Constitution purports to confer such a power" on the courts—underscores Professor Ely's interpretation.¹⁵⁴

149. *Baltimore & Ohio Railroad Co. v. Baugh*, 149 U.S. 368 (1893), was an 1893 tort case that concerned the fellow servant rule, an old common law doctrine that prevented an employee from holding his or her employer liable for the negligence of a fellow employee. In response to the majority's displacement of a state common law rule with a principle of general common law, Justice Field declared that "[t]he law of the State on many subjects is found only in the decisions of its courts, and when ascertained and relating to a subject within the authority of the State to regulate, it is equally operative as if embodied in a statute." *Id.* at 397 (Field, J., dissenting). The dissent is something of an *Erie* urtext. Anticipating Brandeis's terse declaration, Field insisted that "[t]here is no unwritten general or common law of the United States on the subject." *Id.* at 394. He explicitly identified the Tenth Amendment as the textual provision that prohibits *Swift*'s regime, *id.* at 399, and argued that "[s]upervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specially authorized or delegated to the United States." *Id.* at 401. "Any interference with either," Field reasoned, "is an invasion of the authority of the State and, to that extent, a denial of its independence." *Id.*

150. See PURCELL, *supra* note 47, at 178-80.

151. Ely, *supra* note 143, at 702.

152. *Id.* at 703.

153. Merrill, *supra* note 144, at 13-14 (explaining this principle and concluding that "any assertion by the judiciary of a general power to make law would encroach upon the powers reserved to the states").

154. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

This interpretation of the general common law's federalism affront clarifies why it took a "course pursued" before *Swift's* constitutional pockmarks were "made clear."¹⁵⁵ In 1842 the reliance on a general common law rule of decision in a commercial case did not injure state sovereignty. Such matters were understood to be general and as such not particularly within the "local" concern of states. In short, the division between the general common law and local law neatly matched the division between federal and state prerogatives. The general common law's expansion, and with it increased interference with the application of state law, made manifest a serious federalism problem.

Federalism, however, is only half of the *Erie* equation. Separation of powers and *Erie's* emphasis on legislative primacy place another important check on federal courts' lawmaking powers. *Erie's* constitutional analysis begins, "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied ... is the law of the State."¹⁵⁶ Congress can displace state law when authorized to do so by the Constitution,¹⁵⁷ but even when Congress has this power, the federal courts may not exercise it. Put differently, even if Congress may displace a state rule of decision, the federal courts may not do so of their own accord, because they lack this lawmaking power.¹⁵⁸

Erie's reliance on the separation-of-powers doctrine reflects a number of Progressive values, including deference to legislatures and a fervent belief in democratic participation as a source of legitimacy. Congress's power to legislate in areas traditionally governed by state common law is now quite expansive. This state of affairs makes *Erie's* separation of powers all the more important as a present-day check on federal courts' jurisgenerative powers and

155. *Id.*

156. *Id.*

157. Although Brandeis insisted that "Congress has no power to declare substantive rules of common law applicable in a State ... be they commercial law or a part of the law of torts," *id.*, this statement is certainly no longer true, as the Interstate Commerce Clause, invigorated only three years after *Erie*, makes certain. See generally *United States v. Darby*, 312 U.S. 100 (1941). Indeed, as Paul Mishkin has argued, the evolution of the Interstate Commerce Clause may have rendered Brandeis's statement incorrect even in 1938. Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682, 1684 n.10 (1974).

158. See Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 11-12 (1975) (stating that *Erie* "recognizes that federal judicial power to displace state law is not coextensive with the scope of dormant congressional power").

their temptation to trespass onto territory left for state governments.¹⁵⁹ Here lies the tidy intersection between the federalism and separation-of-powers halves of *Erie*'s constitutional equation. With an invigorated federal power to displace state law at the ready, what keeps federal courts from working a federalism injury to states by crafting a usurpative general common law is their institutional incompetence to do so. As Professor Mishkin argued, *Erie* reflects the belief, widely held among Progressives and frustrated by *Swift* run rampant, "that courts are inappropriate makers of law intruding upon the states' views of social policy in the areas of state competence."¹⁶⁰

Erie came at the end of an era during which Progressives and their adversaries waged a hard-fought battle over the proper scope of federal judicial power as exercised in diversity cases. The "course pursued" under *Swift* led federal courts to usurp both state and congressional power. The product of this usurpation—the general common law—was authored by a judiciary that many believed shared a procorporate bias that interfered with state regulatory efforts.¹⁶¹ *Erie* rendered judicial preferences much less relevant to the federalism balance of power by denying federal courts common-law-making powers. Also, by framing its attack on *Swift* in terms of a "course pursued," *Erie* expressed an opinion on proper governance in a federalist political system. The political branches, with their particular expertise and, more importantly, their accountability to an electorate, could legitimately encroach on state regulatory prerogatives.¹⁶² Federal judges, with no such structural mechanisms

159. See Peter Westen, Comment, *After "Life for Erie"—A Reply*, 78 MICH. L. REV. 971, 973 (1980) ("Since there are so few limits on *what* is decided, the real limits, if any, must be on *who* decides.").

160. Mishkin, *supra* note 157, at 1686-87.

161. See *supra* Part II.A.3.

162. Herbert Wechsler and Henry Hart adopted *Erie* as their own in the subsequent decades. See Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 694 (1989) (reviewing PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (3d ed. 1988)) (giving April 25, 1938, when the Supreme Court decided *Erie*, as the birthdate of the legal process school). They did not believe any federalism limitations on Congress's power were needed. For them, the fealties legislators owed to their constituents and their states would exercise an effective check—Wechsler's "Political Safeguards of Federalism"—on Congress's temptation to flex its muscle at states' expense. See generally Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). See also Bradford R.

in place to ensure that their preferences did not interfere inappropriately with state sovereignty, could not.

III. THE CLASS ACTION FAIRNESS ACT AND DIVERSITY JURISDICTION'S CONTINUED FEDERALISM IMPLICATIONS

If viewed as an attempt to take shared judicial policy preferences out of the federalism equation, *Erie's* success is mixed. Eighty years later, many lawyers continue to believe that, all else held equal, substantive outcomes differ depending on which sovereign decides the dispute due to judges' collective inclinations.¹⁶³ CAFA has its origins in these beliefs.

CAFA expands diversity jurisdiction to give defendants the option to require that most significant class actions with members from more than one state proceed in federal court.¹⁶⁴ Its supporters believe that the statute will result in fewer certified classes. This result would mean fewer settlements and verdicts in plaintiffs' favor, which in turn would limit the regulatory reach of the sorts of state laws often enforced by way of class actions. Most states' class action procedures are quite similar to Rule 23,¹⁶⁵ so the differences in applicable procedural law cannot account for supporters' confidence. Recent amendments to Rule 23 certainly favor defendants,¹⁶⁶ as do recent Supreme Court decisions,¹⁶⁷ but these also insufficiently explain why supporters pursued federalization.¹⁶⁸

Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1419 (2001) (discussing *Erie* and the political safeguards of federalism). For recent discussions of Wechsler's theory, see John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1315 (1997), and Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

163. THOMAS E. WILLGING & SHANNON R. WHEATMAN, FED. JUDICIAL CTR., ATTORNEY REPORTS ON THE IMPACT OF *AMCHEM* AND *ORTIZ* ON CHOICE OF A FEDERAL OR STATE FORUM IN CLASS ACTION LITIGATION: A REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES REGARDING A CASE-BASED SURVEY OF ATTORNEYS 8 (Apr. 2004).

164. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 4, 119 Stat. 4, 9 (2005).

165. Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 786 & n.34 (1985).

166. FED. R. CIV. P. 23(f).

167. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 864 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-28 (1997).

168. A recent Federal Judicial Center study reported that *Amchem* and *Ortiz* had no measurable impact on lawyers' decisions to prosecute class actions in federal versus state courts. See WILLGING & WHEATMAN, *supra* note 163, at 4.

A dramatic change in federal courts' receptivity to the most important types of state law class actions—mass tort and consumer protection cases brought on behalf of class members from multiple states—explains why CAFA came into existence when it did, and why federalization might prove an effective way to limit the regulatory reach of state law for a category of cases. Since the mid-1990s, federal courts have demonstrated a systematic impatience with the aggressive use of Rule 23 in multistate cases with state law causes of action.¹⁶⁹ This hostility, which is traceable through federal courts' choice-of-law decisions, does not directly result from a formal change in the law but instead appears to reflect an emerging consensus against certain uses of the class action device. CAFA supporters' confidence in federalization rests in large measure on a perception of this shared hostility.

Class actions are an important mechanism for the enforcement of various kinds of state law. CAFA's expansion of diversity jurisdiction for multistate class actions brings shared judicial inclinations to bear significantly on the regulatory reach of this law. In other words, though *Erie* tried to neutralize judicial biases, CAFA consciously injects policy preferences into the federalism equation. Striking similarities between the debates over CAFA and pre-*Erie* debates over diversity jurisdiction suggest that the statute's supporters expect CAFA to function in a manner not dissimilar from the general common law: it is an avenue through which federal judges' shared preferences can limit the regulatory reach of state law, at least for a small but important subset of claims typically brought as class actions. Although CAFA does not bear *Swift's* precise constitutional flaws, it contradicts *Erie's* message regarding proper governance in a federalist system, particularly the decision's emphasis on the separation of powers as a federalism safeguard. After describing the background to CAFA, I trace these similarities to show how CAFA creates some of the federalism implications *Erie* intended to minimize.

169. See *infra* notes 314-18 and accompanying text.

A. Background to CAFA

1. *The Rise and Fall of the Multistate Class Action in Federal Court*

State law class actions, particularly multistate mass tort and products liability cases, have stirred particularly heated controversy since the beginning of Rule 23's modern period in 1966.¹⁷⁰ That year, the Advisory Committee singled out mass torts and similar cases as ill-suited for class treatment.¹⁷¹ Not long afterwards, however, federal courts began to accept the propriety of such multistate classes.¹⁷² In 1991, Judith Resnik observed that "most agree that aggregate processing—in some forum—and aggregate treatment of some mass torts in *federal* courts are essential,"¹⁷³ and the debate *du jour* was not whether to certify these sorts of cases "but what if any limits to impose" on Rule 23.¹⁷⁴ Indeed, some proposed that mass tort class actions be consolidated in the federal courts; the defense bar's opposition to legislation to this effect suggests that federal courts were hospitable climes for these cases.¹⁷⁵

The solutions federal courts offered to one of the more vexing problems posed by multistate class actions underscore the nature of the equilibrium reached by the early 1990s. Choice of law in multistate damages class actions is an extremely important hinge

170. See FED. R. CIV. P. 23 (Advisory Committee Notes to 1966 amendments). Charles Alan Wright, one of the members of the Advisory Committee responsible for the 1966 amendments to Rule 23, originally stated that mass torts should be excluded entirely from Rule 23(b)(3). He later seemed to change his mind, in large measure due to the costly and repetitive nature of modern day mass torts. Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS. 5, 17 n.53 (1991). Professor Wright later backed away from any wholesale embrace of class certification of mass torts. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.19 (5th Cir. 1996) (quoting letter from Charles Alan Wright).

171. FED. R. CIV. P. 23 (Advisory Committee Notes to 1966 amendments, subdiv. (b)(3)).

172. Arthur R. Miller, Comment, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 679-80 (1979).

173. Resnik, *supra* note 170, at 21.

174. *Id.* at 45.

175. See Robert W. Kastenmeier & Charles Gardner Geyh, *The Case in Support of Legislation Facilitating the Consolidation of Mass-accident Litigation: A View from the Legislature*, 73 MARQ. L. REV. 535, 535-36 (1990); Linda S. Mullenix, *Mass Tort Litigation and the Dilemma of Federalization*, 44 DEPAUL L. REV. 755, 786-87 (1995). For the defense bar's reaction to this proposed legislation, see Charles Gardner Geyh, *Complex-litigation Reform and the Legislative Process*, 10 REV. LITIG. 401, 410 (1991).

on which certification often turns.¹⁷⁶ In a mass tort, product liability, or consumer protection lawsuit, the judge must decide which state's substantive law to apply to each class member's claim. If the judge concludes that the law of each class member's home state applies, class certification raises serious concerns of commonality,¹⁷⁷ predominance,¹⁷⁸ and superiority.¹⁷⁹ For example, if a different state's law applies to each class member's claim, how can a judge give a jury a sensible liability instruction? In such a case, individual proceedings may seem more manageable and thus superior to a single gargantuan proceeding.

Federal and state courts have addressed the choice-of-law difficulty in several ways. Some courts have chosen a single state's law to apply to all class members' claims, usually the law of the defendant's principal place of business or the law of the state where a product was manufactured or designed.¹⁸⁰ Other courts recognize that they can decertify a class at a later stage in the litigation if the case proves unmanageable, and they grant certification and postpone choice of law.¹⁸¹ Pragmatic judges know that certification may encourage settlement, so they may ignore predominance or superiority problems under the assumption that cases will never reach the summary judgment motion or trial phase.¹⁸² Third, courts have grouped class members into manageable subclasses according to similarities among various states' laws.¹⁸³ Finally, at least in the past, courts have granted certification notwithstanding the applicability of multiple states' laws on the

176. See Barbara Ann Atwood, *The Choice-of-law Dilemma in Mass Tort Litigation: Kicking Around Erie, Klaxon, and Van Dusen*, 19 CONN. L. REV. 9, 38-40 (1986); Russell J. Weintraub, *Choice of Law as an Impediment to Certifying a National Class Action*, 46 S. TEX. L. REV. 893, 894-95 (2005); Ryan Patrick Phair, Comment, *Resolving the "Choice-of-law Problem" in Rule 23(b)(3) Nationwide Class Actions*, 67 U. CHI. L. REV. 835, 835 (2000).

177. *E.g.*, Lichoff v. CSX Transp., Inc., 218 F.R.D. 564, 574 (N.D. Ohio 2003).

178. *E.g.*, Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620, 626-27 (5th Cir. 1999).

179. *E.g.*, *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 209 (D. Minn. 2003).

180. *E.g.*, Simon v. Philip Morris Inc., 124 F. Supp. 2d 46, 78 (E.D.N.Y. 2000); *In re Kirschner Med. Corp. Sec. Litig.*, 139 F.R.D. 74, 84 (D. Md. 1991).

181. *E.g.*, Steinberg v. Nationwide Mut. Ins. Co., 224 F.R.D. 67, 78 (E.D.N.Y. 2004).

182. See, *e.g.*, Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 427 (4th Cir. 2003); *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1009 (3d Cir. 1986); Georgene M. Vairo, *Georgine, the Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims Resolution*, 31 LOY. L.A. L. REV. 79, 115 (1997) ("A primary purpose of class certification, however, is to facilitate the aggregated resolution of a mass tort through settlement.").

183. *E.g.*, O'Keefe v. Mercedes-Benz USA, LLC, 214 F.R.D. 266, 291 n.19 (E.D. Pa. 2003).

assumption that there are few differences among states' liability rules.¹⁸⁴

Employing such techniques of case management, several federal circuits in the 1980s upheld class certification notwithstanding seemingly insuperable choice-of-law obstacles. In the *Agent Orange* case, the Second Circuit affirmed Judge Weinstein's certification of a nationwide mass exposure class, in spite of the likelihood that New York's choice-of-law rules would lead to the application of fifty states' tort laws in a single proceeding. The court noted that common questions of law, most notably the availability of a certain federal common law defense, predominated to such an extent that its resolution in a single proceeding would bring about an efficient conclusion to the litigation; the court also intimated, however, that Judge Weinstein had stretched Rule 23 to its breaking point.¹⁸⁵ Similarly, the Sixth Circuit in the *Bendectin* case rejected the defendants' argument that every state's tort law should apply and upheld the certification of a nationwide class alleging products-liability claims. Because the tortious conduct occurred where the defendants manufactured the drug in question, the court held that "the law of the state of manufacture of the product [was] more significant in this type of case than that of the state where an individual plaintiff happens to live."¹⁸⁶ Consistent with *Bendectin*, a draft proposal from the American Law Institute in 1993 recommended that mass torts could best be treated as class cases in a single forum under a single substantive rule.¹⁸⁷

Perhaps in response to the aggressive use of Rule 23 in the 1980s and 1990s, the pendulum swung in the opposite direction in the mid-1990s. Again, the treatment of choice of law proved a central battleground. The Third, Fifth, and Seventh Circuits in the mid-1990s—with decisions one prominent plaintiffs' lawyer deemed an "unholy trinity"¹⁸⁸—expressed unmistakable skepticism to the

184. *E.g.*, *Wadleigh v. Rhone-Poulenc Rorer, Inc.*, 157 F.R.D. 410, 419 (N.D. Ill. 1994), *rev'd sub. nom. In re Rhone-Poulenc Rorer Inc.*, 51 F. 3d 1293 (7th Cir. 1995). For a discussion of ways by which federal judges resolved the choice of law problem, see Atwood, *supra* note 176, at 27-33.

185. *In re Diamond Shamrock Chems. Co.*, 725 F.2d 858, 860-61 (2d Cir. 1984).

186. *In re Bendectin Litig.*, 857 F.2d 290, 305 (6th Cir. 1988).

187. See AM. LAW INST., COMPLEX LITIGATION PROJECT § 6.01 cmt. a, at 398 (Proposed Final Draft Apr. 5, 1993).

188. Elizabeth J. Cabraser, *Life After Amchem: The Class Struggle Continues*, 31 LOY. L.A.

notion that choice of law problems in multistate class actions are surmountable. In *In re Rhone-Poulenc Rorer Inc.*, the Seventh Circuit issued a writ of mandamus to decertify a class composed of persons with hemophilia who had allegedly contracted HIV through tainted blood treatment products.¹⁸⁹ The district court reasoned that differences among the fifty states' tort laws were sufficiently negligible such that a single case aggregating claims of a nationwide class could proceed in a manageable fashion. The Seventh Circuit vacated this decision with thinly veiled hostility. Citing *Erie*, it skewered the district court's choice of law agnosticism with impatience: if the defendants' liability did not hinge on "the precise way in which a state formulates its standard of negligence....[,] one begins to wonder why this country bothers with different state legal systems."¹⁹⁰

The Fifth Circuit in *Castano v. American Tobacco Co.* relied on *Rhone-Poulenc* to decertify a nationwide class of smokers alleging negligence claims against the tobacco industry.¹⁹¹ The district court had postponed the choice-of-law decision.¹⁹² The Fifth Circuit held that this postponement was improper,¹⁹³ and further "[f]ound] it difficult to fathom how common issues could predominate [under Rule 23(b)(3)] when variations in state law are thoroughly considered."¹⁹⁴ The Fifth Circuit also invoked *Georgine v. Amchem Products, Inc.*, an asbestos decision in which the Third Circuit decertified a settlement class in significant part because the choice-of-law calculus meant that individual issues predominated over common ones.¹⁹⁵

As discussed further below, this trio of cases heralded a seismic shift in federal judicial attitudes toward the propriety of multistate classes.¹⁹⁶ Guided by choice of law and by other emerging difficul-

L. REV. 373, 375 (1998).

189. 51 F.3d 1293, 1304 (7th Cir. 1995).

190. *Id.* at 1301.

191. 84 F.3d 734, 741-42 (5th Cir. 1996).

192. *Castano v. Am. Tobacco Co.*, 160 F.R.D. 544, 554 (E.D. La. 1995).

193. *Castano*, 84 F.3d at 741.

194. *Id.* at 742 n.15.

195. *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 627, 630 (3d Cir. 1996).

196. See Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 385-88 (2005).

ties, plaintiffs' lawyers began to abandon federal courts for state fora.¹⁹⁷ This shift proved instrumental to the genesis of CAFA.

2. Regulatory Reform and CAFA

Federal courts' growing hostility to the aggressive use of Rule 23 in multistate cases with state law causes of action provided the soil for CAFA's germination. To understand why supporters found federalization attractive, it helps to consider whose interests these class actions impact.

Lawyers and commentators have long recognized that class actions play significant roles as instruments of economic regulation.¹⁹⁸ In the absence of an invigorated administrative apparatus in the United States, class action litigation shoulders a particularly large share of regulatory responsibilities.¹⁹⁹ As the Supreme Court has declared, "[t]he 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."²⁰⁰ The debates leading up to CAFA's passage confirm the importance of class actions as mechanisms for regulation through the enforcement of state law. 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.²⁰¹

197. Cabraser, *supra* note 188, at 386 ("It is no secret that class actions—formerly the province of federal diversity jurisdiction—are being brought increasingly in the state courts."); Paul D. Rheingold, *Prospects for Managing Mass Tort Litigation in the State Courts*, 31 SETON HALL L. REV. 910, 910 (2001).

198. Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 687 (1941) (recognizing the potential for class actions to serve as complements to administrative regulation); *see also* Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 94-95 (2003).

199. *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959) ("The obligation to pay compensation [through an award of damages] can be, indeed is designed to be, a potent method of governing conduct and controlling policy."); Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 350 (2003); Edward F. Sherman, *Consumer Class Actions: Who Are the Real Winners?*, 56 ME. L. REV. 223, 236 (2004).

200. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980).

201. *See* Victor E. Schwartz & Leah Lorber, *State Farm v. Avery: State Court Regulation Through Litigation Has Gone Too Far*, 33 CONN. L. REV. 1215, 1215-16 (2001).

In light of the economics and vagaries of litigation, class certification is often the crucial event on which a case's trajectory turns. Settlement dynamics illustrate class certification's central importance as a litigation event.²⁰² The prospect of a class trial on behalf of every victim of an industrial accident or a poorly designed drug, rather than individual cases, each with idiosyncratic evidentiary difficulties, may significantly ratchet up the settlement pressure on a defendant.²⁰³ Conversely, denial of class certification may well force plaintiffs facing the prospect of a small recovery to lower their settlement threshold or even abandon their claims altogether.²⁰⁴

The empowerment of the multistate class action in federal court in the 1980s meant that underlying state law had more regulatory bite. At the same time, conservative policymakers initiated an antiregulatory backlash, targeting in particular state law that they believed had a deleterious effect on the operation of interstate commerce.²⁰⁵ One prominent Reagan Administration lawyer remarked in 1983 that regulatory relief was a "cornerstone of" the administration's economic policy, and that fundamental change to the American product liability system through the federalization of substantive law was a critical element in this reform.²⁰⁶ Perhaps unsuspectingly paying homage to Judge Parker and other defenders of the early twentieth-century general common law regime, this lawyer insisted that "[t]he wide differences in state laws ... make it practically impossible for manufacturers of products sold throughout the United States to determine the standards of conduct to which they will be held."²⁰⁷

One attempt at substantive change came to fruition in 1996, when the Contract With America Congress passed the Common

202. THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 10 (1996) (observing that "a substantial majority of certified class actions" settle); see also Douglas E. Abrams, *The Place of Procedural Control in Determining Who May Sue or Be Sued: Lessons in Statutory Interpretation From Civil RICO and Sedima*, 38 VAND. L. REV. 1477, 1532-33 (1985).

203. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

204. *Klay v. Humana, Inc.*, 382 F.3d 1241, 1275-76 (11th Cir. 2004).

205. See TIMOTHY CONLAN, FROM NEW FEDERALISM TO DEVOLUTION: TWENTY-FIVE YEARS OF INTERGOVERNMENTAL REFORM 296, 313-14 (1998).

206. C. Boyden Gray, *Regulation and Federalism*, 1 YALE J. ON REG. 93, 96 (1983).

207. *Id.* at 97.

Sense Product Liability Legal Reform Act (PLLRA).²⁰⁸ The bill would have placed strict limits on punitive damages available to plaintiffs,²⁰⁹ ended strict liability for product sellers,²¹⁰ and expressly preempted state law to the contrary.²¹¹ Business interests lobbied heavily for the bill, which they believed would greatly restrict the reach of state product liability laws.²¹² With Brandeisian rhetoric, President Clinton vetoed the bill, reasoning that “the States should have, as they always have had, primary responsibility for tort law. The States traditionally have handled this job well, serving as laboratories for new ideas and making needed reforms.”²¹³

The idea for CAFA formed about the time that the product liability law failed,²¹⁴ and the Third, Fifth, and Seventh Circuits had staked out their hostile positions on multistate class actions. CAFA was the brainchild of a group of Fortune 100 corporate counsel named the Civil Justice Reform Group (CJRG).²¹⁵ The CJRG’s mission is to try to address what its members believe to be a civil justice system that has spiraled out of control.²¹⁶ The CJRG considered various proposals, including caps on damages and other fundamental changes to the American tort system, before settling on what it believed to be a more politically palatable idea.²¹⁷ The group drafted CAFA, found Congressional support, and spent between \$50 and \$200 million lobbying for its enactment.²¹⁸

208. Common Sense Product Liability Legal Reform Act of 1996, H.R. 956, 104th Cong. (2d Sess. 1996).

209. *Id.* § 108(b).

210. *Id.* § 103(a).

211. *Id.* § 102(b).

212. See Cynthia C. Lebow, *Federalism and Federal Product Liability Reform: A Warning Not Heeded*, 64 TENN. L. REV. 665, 672 (1997) (noting that “[t]he Congressional findings preceding the statutory language of the PLLRA ... [t]o a large extent ... echoed the complaints of the business community”).

213. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING HIS VETO OF H.R. 956, A BILL TO ESTABLISH LEGAL STANDARDS AND PROCEDURES FOR PRODUCT LIABILITY LITIGATION, AND FOR OTHER PURPOSES, H.R. DOC. NO. 104-207, at 1 (1996).

214. For a suggestion that tort reformers turned to procedural remedies after the failure of substantive tort reform in the mid-1990s, see Lind, *supra* note 35, at 728-29.

215. Sue Reisinger, *Ms. Rabiteau Goes to Washington*, CORP. COUNS., June 2005, at 82.

216. *Id.* at 83.

217. *Id.* at 82-83.

218. *Id.* at 82.

Despite substantial backing from the business community,²¹⁹ CAFA, which Senator Herb Kohl introduced in the Senate in 1997,²²⁰ did not pass until February 2005. A version had passed the House in 2003 but did not survive a Democratic filibuster in the Senate.²²¹ Perhaps emboldened by their successes at the polls in 2004, Republican senators were able to push the bill through shortly after the election.

3. CAFA

CAFA has several main provisions.²²² The first substantive section, entitled in part “Consumer Class Action Bill of Rights,” requires that attorneys’ fees in settlements in which class members get coupons must depend on the value of coupons actually redeemed, as opposed to the face value of coupons distributed.²²³ This provision is designed to prevent plaintiffs’ attorneys from colluding with defendants to craft settlements that are quite large in nominal terms, thereby supporting a large award of fees, but really cost very little because few class members actually redeem their coupons.²²⁴ Second, CAFA requires defendants who have agreed to propose settlements of class actions to serve a copy of the proposed settlement agreement on designated state and federal officials.²²⁵

CAFA’s heart is its third substantive section. The statute gives the federal courts original jurisdiction over every class action with an aggregate amount in controversy that exceeds \$5 million, when at least one class member comes from a different state than at least one defendant.²²⁶ This provision is designed to correct what CAFA

219. See PUB. CITIZEN, UNFAIRNESS INCORPORATED: THE CORPORATE CAMPAIGN AGAINST CONSUMER CLASS ACTIONS 28 (2003), available at <http://www.citizen.org/documents/ACF2B13.pdf> (charting the number of corporate lobbyists that lobbied for a federal class action statute in the years prior to CAFA’s enactment).

220. See 143 CONG. REC. S897 (daily ed. Jan. 30, 1997) (statement of Sen. Kohl).

221. Sheryl Gay Stolberg, *Class-action Legislation Fails in Senate*, N.Y. TIMES, Oct. 23, 2003, at A23.

222. For a section-by-section analysis of CAFA, see Sarah S. Vance, *A Primer on the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1617 (2006).

223. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 1712(a), 119 Stat. 4, 6 (2005).

224. For a short discussion of coupon settlement issues, see DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 488-89 (2000).

225. Class Action Fairness Act § 1715(b), 119 Stat. at 7.

226. *Id.* § 4(a)(2), 119 Stat. at 9.

supporters believe to be two defects in diversity jurisdiction. The first was occasioned by the Supreme Court's requirement of complete diversity under the general diversity statute, 28 U.S.C. § 1332,²²⁷ and the second stemmed from the Court's (one-time) refusal to extend supplemental jurisdiction to cover class members' claims that did not meet § 1332's amount-in-controversy requirement.²²⁸ CAFA also expands removal jurisdiction by making any case that meets these criteria a candidate for removal.²²⁹ In effect, CAFA gives defendants in any substantial multistate class action a federal forum option.

Most multistate class actions with the requisite amount in controversy will come within the mandatory jurisdiction of the federal courts. For some class actions, this jurisdiction is discretionary. A federal court may apply a set of factors provided for in the statute and decline to exercise jurisdiction over a class action where more than one-third and fewer than two-thirds of class members come from one state.²³⁰ The legislative history, however, makes clear that federal courts are supposed to do so very reluctantly.²³¹ Also, the federal courts shall decline to exercise jurisdiction over cases where more than two-thirds of class members are from a single state, provided that at least one defendant, whose alleged conduct is a significant part of the lawsuit, is a citizen of the state.²³²

B. Rationales for CAFA

In 1979 Arthur Miller declared that "much of the controversy [over class actions] has been highly emotional, often focusing on particular events in individual cases that have been transmogrified over the years into cosmic anecdotes."²³³ The heated debate over CAFA, with many irrelevant arguments made by both sides, gave this observation contemporary resonance. Medical malpractice

227. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806).

228. *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 301 (1973), *overruled by* *Exxon Mobil Co. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2615 (2005); *see supra* note 14 (discussing *Zahn* and *Allapattah*).

229. Class Action Fairness Act § 5, 119 Stat. at 12-13.

230. *Id.* § 4(a)(3), 119 Stat. at 9-10.

231. 151 CONG. REC. H723, 728 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).

232. Class Action Fairness Act § 4(a)(4), 119 Stat. at 10.

233. Miller, *supra* note 172, at 664-65.

abuse,²³⁴ the very existence of representative litigation,²³⁵ and even the supposed deleterious impact of class actions on “our veterans” were some of the non sequiturs supporters bandied about under the Capitol dome during the debates leading up to the statute’s passage.²³⁶ Opponents responded with the specter of Enron, a financial disaster that, because it triggered mostly federal causes of action, would have fallen outside CAFA’s intended scope.²³⁷

Through this rhetorical morass several chief justifications for the law emerged. A principal argument—that CAFA would protect consumers and other prospective class members against predatory plaintiffs’ lawyers²³⁸—is beyond the scope of this article. Given its tenuous empirical basis, it likely provided political cover but was not a chief motivation for supporters.²³⁹ Three other justifications

234. In one floor debate Senator Voinovich complained about medical malpractice abuse, a type of litigation that rarely proceeds in class form. 151 CONG. REC. S1241 (daily ed. Feb. 10, 2005) (statement of Sen. Voinovich). Senator Frist similarly used CAFA as a jumping-off point for a general, broad-based attack on the American tort system. See 151 CONG. REC. S996 (daily ed. Feb. 7, 2005) (statement of Sen. Frist).

235. One of the chief lobbyists for CAFA said the following in testimony before a Senate subcommittee: “If I told you that the House had just passed a new bill that would allow lawyers to bring lawsuits without first obtaining permission from the parties on whose behalf the lawsuit supposedly was being brought, you presumably would be shocked.” *The Class Action Fairness Act of 1999: Hearing on S. 353 Before the S. Subcomm. on Administrative Oversight and the Courts of the S. Comm. on the Judiciary*, 106th Cong. 126-27 (1999) [hereinafter *Hearing*] (prepared statement of John H. Beisner, Esq., O’Melveny & Myers LLP, Washington, D.C.). Another lobbyist observed that,

in the class actions we are seeing today, class members are the forgotten participants. No one checks to see if the putative class members really want to have their claims asserted in a class action. No one asks the class members how or where they wish their claims to be asserted. No one confers with class members to find out if they wish to have their claims litigated.

Id. at 111 (statement of Stephen G. Morrison, Gen. Counsel, Policy Management Systems Corp.). This feature of class actions—that lawyers can bring cases without the participation of absent class members—is an essential feature of aggregate litigation and is the basis for the notice and opt-out requirements of Rule 23(c).

236. 151 CONG. REC. H686 (daily ed. Feb. 16, 2005) (statement of Rep. Davis).

237. *E.g.*, 149 CONG. REC. S12876 (daily ed. Oct. 20, 2003) (statement of Sen. Leahy). For a discussion of some of these causes of action, see *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 235 F. Supp. 2d 549, 563, 568-613 (S.D. Tex. 2002).

238. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4, 4-5 (2005); *NewsHour with Jim Lehrer: Class Actions* (PBS television broadcast Feb. 11, 2005), available at http://www.pbs.org/newshour/bb/congress/jan-june05/lawsuits_2-11.html.

239. The notion that federal courts do a better job than state courts in policing settlements to make sure that plaintiffs’ lawyers do not take advantage of their clients lacks empirical support. See Theodore Eisenberg & Geoffrey P. Miller, *Attorneys Fees in Class Action*

quite closely track arguments supporters of diversity jurisdiction and the general common law made in favor of powerful federal courts during the Progressive Era. Local bias and uniformity resurfaced as rationales for CAFA. Most importantly, supporters stressed that federal courts somehow better appreciate the needs of interstate commerce to operate without unnecessary regulation. This last justification hints at an important role played by shared judicial preferences with regard to class actions.

1. *Local Bias*

Progressive lawyers insisted in the first decades of the twentieth century that technological advances and nationalism had undercut the local bias rationale for diversity jurisdiction. Reports of the demise of local bias continue to the present.²⁴⁰ Nonetheless, debates over CAFA demonstrate the continuing vitality of the local bias justification.

As was the case with local bias in the Progressive Era, empirical evidence attesting to or debunking the existence of local bias is scant. Studies of attorneys' perceptions—the best extant empirical data available—lead to mixed conclusions. A 1992 study reported that twenty-seven percent of plaintiffs' lawyers surveyed declared that local bias against the defendant motivated state courts, whereas fifty-one percent of their colleagues in the defense bar did the same.²⁴¹ Another study concluded that perceptions of bias vary

Settlements: An Empirical Study, 1 J. EMPIRICAL LEGAL STUD. 27 (2004) (manuscript at 23, on file with authors). Moreover, virtually every major nonprofit consumer organization in the United States opposed CAFA. See 149 CONG. REC. S12880-81 (daily ed. Oct. 20, 2003) (statement of Sen. Leahy) (listing organizations). The CAFA Senate Report referenced a 1999 RAND study as its empirical support for its claim. See S. REP. NO. 109-14, at 53 (2005). The study actually concludes that "there is no empirical basis for assessing the arguments that ... federal judges generally manage damage class actions better than state judges." DEBORAH HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN, EXECUTIVE SUMMARY 28 (1999). The Senate Report's misuse of the RAND study has spawned continued misrepresentation of the empirical robustness of this claim. See, e.g., Warren W. Harris & Erin Glenn Busby, *Highlights of the Class Action Fairness Act of 2005*, 72 DEF. COUNS. J. 278 (2005).

240. See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 39-40 (1990).

241. Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 408-09 (1992).

depending on the location, with attorneys who practice in rural areas believing that it continues to play a role.²⁴²

Whether real or imagined, local bias fairly frequently spurred arguments in CAFA debates. As its backers claimed, out-of-state defendants in class actions need expansive diversity jurisdiction to protect them from “be[ing] home-towned by local judges and juries.”²⁴³ Federal courts would be a bulwark against “home cooking,”²⁴⁴ and a shield against corrupt local judges whose election coffers are filled by the local plaintiffs’ bar.²⁴⁵ The findings section of the statute declares “that State and local courts are ... sometimes acting in ways that demonstrate bias against out-of-State defendants.”²⁴⁶

Many of CAFA’s backers put a finer point on this local bias argument. They claimed that trial courts in certain states—the so-called “magnet” jurisdictions in particular counties in Illinois, Texas, Alabama, and Mississippi—were beholden to local lawyers, had spun out of control, and would certify meritless classes to coerce extortionate settlements.²⁴⁷ The odd frequency with which multistate class actions found their ways to certain isolated counties suggests that there may be something to the magnet jurisdiction claim.²⁴⁸

242. See Kristin Bumiller, *Choice of Forum in Diversity Cases: Analysis of a Survey and Implications for Reform*, 15 LAW & SOC’Y REV. 749, 752-60, 772 (1980-81); see also Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L.Q. 119, 136-40 (2003).

243. 148 CONG. REC. H842 (daily ed. Mar. 13, 2002) (statement of Rep. Cox).

244. 151 CONG. REC. S1229, 1230 (daily ed. Feb. 10, 2005) (statement of Sen. Graham).

245. *E.g.*, *Hearing, supra* note 235, at 97 (statement of E. Donald Elliott, Prof. of Law, Yale Law School) (“Many out-of-state defense lawyers have had the experience of arriving at a state courthouse, only to see their opponent drive up in a car bearing a campaign sticker from the judge’s last election.”); 149 CONG. REC. S12954 (daily ed. Oct. 21, 2003) (statement of Sen. Sessions) (“[Class actions] would be better in a more objective tribunal of Federal court where judges have lifetime appointments. They are not so tied to the plaintiff lawyer who may go to church with them or have contributed to their campaign That is just a fact.”).

246. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(4)(A)-(B), 119 Stat. 4-5 (2005).

247. *E.g.*, 149 CONG. REC. S12994 (daily ed. Oct. 22, 2003) (statement of Sen. Chambliss) (“To a great extent, the bulk of the tort reform—that is needed in this country needs to be handled at the State level.... However, as the tort system now stands, there are about a handful of State court jurisdictions in the United States where a tremendously disproportionate number of class action lawsuits are filed.”).

248. John H. Beisner & Jessica Davidson Miller, *They’re Making a Federal Case Out of It ... in State Court*, 25 HARV. J.L. & PUB. POL’Y 143, 159 (2001).

CAFA supporters identified *Avery v. State Farm Mutual Auto Insurance Co.*,²⁴⁹ pursued in Madison County, Illinois, as the emblematic abusive class action brought in a magnet jurisdiction.²⁵⁰ There, a trial court certified a nationwide class under Illinois law, in spite of the fact that most other states' laws did not support the plaintiffs' theory of liability.²⁵¹ The Illinois Supreme Court ultimately reversed the certification decision,²⁵² so *Avery* is not a great example of a single county court exercising unchecked power over nationwide conduct. The application of the uniquely restrictive Illinois law to the whole country, however, does illustrate the potentially abusive power one remote county court could exercise.

States' responses to magnet jurisdictions in their midst illustrate the questionable need for a federal solution to class action abuse at the state level. The willingness of Madison County courts to certify classes appears to be fairly limited.²⁵³ Moreover, the *Avery* decision highlights the fact that, even if a faraway trial court may abuse the class certification process, state appellate courts remain a potent check on abuse.²⁵⁴ CAFA supporters attacked an Alabama practice known as "drive-by" certification, whereby plaintiffs would file a motion for class certification with the complaint and get a decision before the defendant had a chance to file a responsive pleading.²⁵⁵ The Alabama Supreme Court put an end to these drive-by certifications in 1997.²⁵⁶ Backers complained of laxity by state courts in Jefferson County, Texas,²⁵⁷ but state legislation passed in 2003 allows for interlocutory appeals of class certification orders to an appellate judiciary perceived as hostile to class actions.²⁵⁸ The worst horror story of class action abuse came from a county in Mississippi, where plaintiffs repeatedly joined a local pharmacy owner as a

249. 835 N.E.2d 801 (Ill. 2005).

250. *E.g.*, 151 CONG. REC. H685, 687 (daily ed. Feb. 16, 2005) (statement of Rep. Goodlatte).

251. *Avery*, 835 N.E.2d at 813-14 (describing class certification order).

252. *Id.* at 824.

253. See 151 CONG. REC. S1239 (daily ed. Feb. 10, 2005) (statement of Sen. Clinton); 149 CONG. REC. S12881 (daily ed. Oct. 20, 2003) (statement of Sen. Durbin).

254. *Avery*, 835 N.E.2d at 824. For precisely this observation, see James E. Pfander, *Avery Raises Doubts About the Class Action Fairness Act*, 93 ILL. B.J. 648, 649 (2005).

255. See 151 CONG. REC. H689 (daily ed. Feb. 16, 2005) (statement of Rep. Keller); PUB. CITIZEN, CLASS ACTION "JUDICIAL HELLHOLES": EMPIRICAL EVIDENCE IS LACKING 6 (2005).

256. PUB. CITIZEN, *supra* note 255, at 6.

257. See 151 CONG. REC. S1177, 1179 (daily ed. Feb. 9, 2005) (statement of Sen. Hatch).

258. PUB. CITIZEN, *supra* note 255, at 8.

defendant to frustrate removal and stay before friendly state judges.²⁵⁹ Mississippi in 2004 changed its venue and joinder rules to prevent this sort of harmful gamesmanship.²⁶⁰

As was the case during the Progressive Era, some speculate that a different sort of bias, if bias exists, fuels defendants' desire to get into federal court. As Judge Friendly observed in 1973, if a state judge is prejudiced in favor of the plaintiff, it is likely because the defendant is a corporation, not because the defendant has its headquarters or principal place of business in another state.²⁶¹ A 1980 study of lawyers' perceptions of bias lends support to this argument.²⁶² The converse of this suggestion is that the federal courts, not state judges, harbor a preference that runs in the opposite direction, in favor of corporate defendants.

2. Uniformity

CAFA's backers took a page from their turn-of-the-century forbears, arguing that the federalization of class actions is necessary to provide uniform standards for the regulation of interstate commerce. As Walter Dellinger, whose law firm played a significant role in the bill's passage, put it in his Congressional testimony, "[c]lass actions squarely implicate the Framers' concern with preserving national standards for regulating and protecting interstate commerce through the exercise of diversity jurisdiction."²⁶³

CAFA backers did not explain how, without general common-law-making powers, federal courts in diversity cases could create national regulatory standards. Federal judges ostensibly apply the disparate substantive state law standards of the fifty states in the

259. See 151 CONG. REC. S1166 (daily ed. Feb. 9, 2005) (statement of Sen. Feinstein). Defendants may not remove a case that otherwise meets the requirements for diversity jurisdiction if one of them is a citizen of the state where the plaintiff files suit. 28 U.S.C. § 1441(b) (2000).

260. PUB. CITIZEN, *supra* note 255, at 7.

261. HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 147-48 (1973).

262. See Jerry Goldman & Kenneth S. Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry*, 9 J. LEGAL STUD. 93, 102-03 (1980).

263. *Class Action Litigation: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 97-98 (2002) [hereinafter *Hearing*] (prepared statement of Walter Dellinger, Professor, O'Melveny & Myers, Washington, D.C.).

class actions affected by CAFA.²⁶⁴ Perhaps latent in Professor Dellinger's comment is the belief that, when confronted with a class action potentially implicating the substantive laws of many states, federal courts will choose to deny certification and thereby not apply any state standards at all.

Even assuming that federal judges had some means to craft uniform standards for state law cases, one wonders whether this prospect truly motivated CAFA's backers. What injury doctrinal disunity in tort, consumer protection, and other state laws inflicts on interstate commerce is still uncertain.²⁶⁵ Indeed, corporate interests often benefit from a multitude of substantive rules. As discussed above, substantive disunity gave corporations an advantage during the *Swift* Era. Even without a favorable federal rule that preempts state law, a corporation can still benefit from having at least two state standards to choose between when making its choice-of-law argument in a particular case.²⁶⁶ Finally, the multitude of state laws complicates choice of law and therefore makes certification of multistate classes more difficult.

3. Interstate Federalism and Choice of Law

a. Interstate Federalism and the Probusiness Federal Courts

The uniformity rationale makes sense when viewed in light of a third justification for CAFA. Echoing proponents of diversity jurisdiction from eighty years ago, CAFA's supporters frequently asserted that the federal courts somehow intuitively appreciate the needs of a national economy better than state courts, and therefore federal judges should supervise litigation that has such enormous regulatory impact.²⁶⁷ This rationale ultimately rests on the perception of an emergent hostility in the federal courts to the certification of multistate cases. If, as supporters believe, CAFA results in fewer certified classes, uniformity is a less pressing concern. Fewer state

264. *Id.* at 102.

265. Compare Robert L. Rabin, *Federalism and the Tort System*, 50 RUTGERS L. REV. 1, 15 (1997), with *Dawson v. Chrysler Corp.*, 630 F.2d 950, 953 (3d Cir. 1980).

266. See Stephen D. Sugarman, *Should Congress Engage in Tort Reform?*, 1 MICH. L. & POL'Y REV. 121, 128 (1996).

267. See *infra* notes 271-74 and accompanying text.

standards will apply at all to regulate commercial affairs, because fewer large-scale classes will be certified and proceed to judgment.

Among CAFA's findings are the observations that class action abuses have "adversely affected interstate commerce"²⁶⁸ and that federalization would "benefit society by encouraging innovation and lowering consumer prices."²⁶⁹ According to one chief lobbyist, state courts' inability to control class action abuse has wreaked economic havoc.²⁷⁰ The federal courts, in contrast, won praise for their guardianship of interstate commerce. The 2005 Senate Report argued as follows:

Article III of the Constitution ensures that there will be a fair, uniform, and efficient forum (a federal court) for adjudicating interstate commercial disputes, *so as to nurture interstate commerce*. Some scholars have persuasively argued that diversity jurisdiction, of all the powers exercised under the Constitution, has had the greatest influence in melding the United States into a single nation, *by fostering interstate commerce*, communication and the uninterrupted flow of capital for investment into various parts of the Union, and sustaining the public credit and the sanctity of private contracts.²⁷¹

This excerpt has deep roots in the *Swift* Era. It reproduces nearly verbatim an identical argument from Judge Parker's 1932 article in praise of *Swift*.²⁷²

CAFA's supporters gave their probusiness rationale a constitutional gloss with the argument that state court supervision of large-scale class actions violates federalism principles that assign such regulation of interstate commerce to the federal government.²⁷³ The

268. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(2)(B), 119 Stat. 4, 4 (2005).

269. *Id.* § 2(b)(3), 119 Stat. at 5.

270. *E.g., Rights for Participants in Class Action Suits: Hearing on H.R. 2341, The Class Action Fairness Act of 2001, Before the H. Comm. on the Judiciary*, 2002 WL 188779 (2002) (statement of John H. Beisner, Esq., O'Melveny & Myers LLP, Washington, D.C.) ("I have also personally witnessed the enormous economic waste that this inexplicable situation imposes on targeted companies, diverting attention and resources from job-creating innovation efforts").

271. S. REP. NO. 109-14, at 57 (2005) (emphasis added).

272. Parker, *supra* note 54, at 437.

273. One of CAFA's enumerated purposes is to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." Class Action Fairness Act § 2(b)(2), 119

statute's proponents named the doctrine in support of this argument "false federalism," although others have referred to it as interstate federalism or horizontal federalism.²⁷⁴ This doctrine's roots in the Constitution are uncertain. The interstate federalism justification is better viewed not as an argument about the allocation of power the Constitution requires but instead as an expression of CAFA supporters' faith in federal courts' shared preferences.

The interstate federalism doctrine motivated two arguments during debates. The first addressed the damage to one state's sovereignty caused when a second state's court either applies its own laws to the first state's citizens, as has happened in multistate class actions;²⁷⁵ interprets and applies the first state's law;²⁷⁶ or, through the coercive pressure of a large damages class action, forces a manufacturer to hew to the most restrictive state's regulatory regime.²⁷⁷ This version of the interstate federalism rationale made

Stat. at 5.

274. See WALTER DELLINGER, PROGRESSIVE POLICY INST., *THE CLASS ACTION FAIRNESS ACT: CURBING UNFAIRNESS AND RESTORING FAITH IN OUR JUDICIAL SYSTEM* 6 (Mar. 2003), http://www.ppionline.org/documents/Class_Action_0303.pdf (using "false federalism"); Robert H. Abrams & Paul R. Dimond, *Toward a Constitutional Framework for the Control of State Court Jurisdiction*, 69 MINN. L. REV. 75, 99-100 (1984) (discussing this problem using the term "interstate federalism"); Scott Fruehwald, *The Rehnquist Court and Horizontal Federalism: An Evaluation and a Proposal for Moderate Constitutional Constraints on Horizontal Federalism*, 81 DENV. U. L. REV. 289 (2003); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689 (1987).

275. See *Hearing*, *supra* note 263, at 100-01 (statement of Walter Dellinger, Professor, O'Melveny & Myers LLP, Washington, D.C.) ("Under the current system, many state courts faced with interstate class actions have undertaken to dictate the substantive laws of other states by applying their own laws to all other states, resulting in a breach of federalism principles by fellow states (not by the federal government). And because the state court decision has binding effect everywhere by virtue of the Full Faith and Credit Clause, the other states have no way of revisiting the interpretation of their own laws."); 149 CONG. REC. S12885, 12886 (daily ed. Oct. 20, 2003) (statement of Sen. Grassley); see also S. REP. NO. 109-14, at 61 (2005) ("Why should a state court judge be able to overrule other state laws and policies? Why should state courts be setting national policy?").

276. S. REP. NO. 109-14, at 61 (2005) ("Why should a state court judge elected by the several thousand residents of a small county in Alabama tell New York or California the meaning of their laws?").

277. See, e.g., 151 CONG. REC. H687 (daily ed. Feb. 16, 2005) (statement of Rep. Goodlatte) ("So, in terms of restoring States' rights, that is exactly what this legislation does. It makes sure that the rights of all 50 States are protected in the judicial proceedings related to class-action lawsuits and that one State does not have the opportunity to establish policy that directly affects other States."). For an example of this version of the interstate federalism argument, see Michael S. Greve, *Federalism's Frontier*, 7 TEX. REV. L. & POL. 93, 100-01 (2002).

its way into CAFA itself, whose findings complain that state courts have “ma[de] judgments that impose their view of the law on other States and bind the rights of residents of those States.”²⁷⁸ Second, CAFA backers insisted that state courts improperly trespass on federal terrain when they control multistate class actions that substantially affect interstate commerce.²⁷⁹

The state sovereignty version of the interstate federalism argument—one state should not interfere with another’s regulatory powers—has an unclear relationship to the Constitution’s federalism architecture. Commentators have argued for a robust interstate federalism restriction on state power, but acknowledge that the Supreme Court has largely ignored possible sources for this limit—the Full Faith and Credit Clause and the dormant Commerce Clause—since the New Deal.²⁸⁰ In two recent punitive damages decisions, the Supreme Court struck down large awards from state courts based on conduct that was lawful in other states because the awards violated principles of state sovereignty.²⁸¹ The Court did not clarify, however, which constitutional doctrine compelled these limits on one state’s power vis-à-vis the others.²⁸²

The Due Process Clause of the Fourteenth Amendment has also served as a venue for battles over interstate federalism. In *World-Wide Volkswagen Corp. v. Woodsen*, the Supreme Court insisted that “principles of interstate federalism” are “express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment,” and that these principles limited the exercise of personal jurisdiction over out-of-state defendants.²⁸³ The Court quickly backed away from even this weak constraint on jurisdiction, insisting two years later that the Due Process Clause “makes no mention of federalism concerns.”²⁸⁴ Moreover, even if *World-Wide*

278. Class Action Fairness Act § 2(a)(4)(C), 119 Stat. at 5.

279. S. REP. NO. 109-14, at 24 (2005) (“Clearly, a system that allows state court judges to dictate national policy on these and numerous other issues from the local courthouse steps is contrary to the intent of the Framers when they crafted our system of federalism.”).

280. See Fruehwald, *supra* note 274, at 291.

281. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003); *BMW of N. Am. v. Gore*, 517 U.S. 559, 572 (1996).

282. See Michael P. Allen, *The Supreme Court, Punitive Damages, and State Sovereignty*, 13 GEO. MASON L. REV. 1, 21 (2004).

283. 444 U.S. 286, 293 (1980).

284. *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 & n.10 (1982); see Allen R. Kamp, *The Multistate Consumer Class Action: Local Solutions*,

Volkswagen's interpretation of the Fourteenth Amendment had persisted, principles of interstate federalism would have required only minimum contacts between a defendant and a state before jurisdiction existed. In short, even under a robust interstate federalism interpretation of the Fourteenth Amendment, the Constitution requires only some minimal relationship between a state and a defendant before the state may legitimately exercise its regulatory powers.²⁸⁵ Indeed, the interstate federalism limits on a state applying its law outside its boundaries are arguably even weaker than those governing personal jurisdiction.²⁸⁶ Certainly the test for applying a state's law beyond its boundaries—that the state have a “significant contact” with the conduct at issue²⁸⁷—passes *World-Wide Volkswagen's* interstate federalism threshold.

The prospect of a state court applying its own law to out-of-state litigants, or interpreting and applying another state's law, is typically something for choice-of-law rules, not the Constitution, to sort out.²⁸⁸ Do multistate class actions in state court present a different order of choice-of-law concerns? That is, do a large number of out-of-state class members magnify sovereignty threats that cannot be resolved through proper choice-of-law analysis? Responses to the Supreme Court's foray into these matters suggests that the answer is no. In *Phillips Petroleum Co. v. Shutts*, the Supreme Court ruled that Kansas law could not apply to a nationwide class, because the state lacked a significant contact with each class member.²⁸⁹ Although the decision affirmed that some extraterrito-

National Problems, 87 W. VA. L. REV. 271, 289-92 (1985) (discussing *Ireland's* response to *Worldwide Volkswagen*).

285. See *Quill Corp. v. North Dakota*, 504 U.S. 298, 306 (1992).

286. Although a state must have “significant contact” with the conduct at issue to apply its law to regulate it, *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981), “minimum contacts” for personal jurisdiction and “significant contact” for choice of law do not have a common denominator for the purposes of comparison. In *Shaffer v. Heitner*, the Court “rejected the argument that if a State's law can properly be applied to a dispute, its courts necessarily have jurisdiction over the parties to that dispute.” 433 U.S. 186, 215 (1977).

287. *Allstate*, 449 U.S. at 313.

288. Cf. John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1065 (1983) (“If there is a threat to federalism or state sovereignty in a multistate class action, it comes from improper choice of law.... Effective limits on choice of law ... should satisfy that concern.”).

289. 472 U.S. 797, 821-22 (1985).

rial applications of state law may violate the Due Process Clause,²⁹⁰ subsequent decisions confirm that it did not foreclose the possibility that such choice-of-law determinations may be appropriate when states do have the requisite contacts with class members.²⁹¹ Indeed, not long after *Shutts*, the ALI in 1993 proposed that courts should choose a single state's law in these cases and identified the law of the defendant's principal place of business as the correct default rule to apply.²⁹² Earlier Congresses have considered legislation that would have encouraged federal courts to certify multistate mass tort classes under a single state's law.²⁹³

If the pre-CAFA class action regime placed states in conflict with each other, state governments did not seem to mind. A number of state high and appellate courts have affirmed the certification of multistate classes under a single state's law.²⁹⁴ Moreover, the National Conference of State Legislatures²⁹⁵ and the National Association of State Attorneys General²⁹⁶ lobbied against the CAFA.

290. *Id.* at 822.

291. *See, e.g., In re Lutheran Bhd. Variable Ins. Prods. Co. Sales Practices Litig.*, 201 F.R.D. 456, 461 n.1 (D. Minn. 2001); *In re LILCO Sec. Litig.*, 111 F.R.D. 663, 669-70 (E.D.N.Y. 1986).

292. AMERICAN LAW INSTITUTE, *supra* note 187, § 6.01 cmt. f.

293. Kastenmeier & Geyh, *supra* note 176, at 565-66 (discussing the legislation); *see also* Robert A. Sedler & Aaron D. Twerski, *The Case Against All Encompassing Federal Mass Tort Legislation: Sacrifice Without Gain*, 73 MARQ. L. REV. 76, 95 (1989) (criticizing this choice of law rule).

294. *E.g., Wershaba v. Apple Computer, Inc.*, 110 Cal. Rptr. 2d 145, 160 (Cal. Ct. App. 2001) ("[A] California court may properly apply the same California statutes at issue here to non-California members of a nationwide class where the defendant is a California corporation and some or all of the challenged conduct emanates from California."); *Renaissance Cruises, Inc. v. Glassman*, 738 So. 2d 436, 439 (Fla. Dist. Ct. App. 1999) (upholding application of Florida law to a nationwide deceptive trade practices class); *Martin v. Heinold Commodities, Inc.*, 510 N.E.2d 840, 846-47 (Ill. 1987) ("[In] the instant case, it is apparent that Illinois substantive law can be applied to resolve the underlying common factual dispute."); *Peterson v. BASF Corp.*, 618 N.W.2d 821, 826 (Minn. Ct. App. 2000) (certifying a nationwide class pressing claims under the New Jersey Consumer Fraud Act); *Ysbrand v. DaimlerChrysler Corp.*, 81 P.3d 618 (Okla. 2003); *Lobo Exploration Co. v. Amoco Prod. Co.*, 991 P.2d 1048, 1054 (Okla. Civ. App. 1999) (holding that Oklahoma consumer protection law could apply to a nationwide class). A post-CAFA example is *International Union of Operating Engineers Local #68 Welfare Fund v. Merck Co.*, No. A-0450-05T1, 2006 WL 827285 (N.J. Super. Ct. App. Div. Mar. 31, 2006).

295. Letter from Representative Kip Holden, Chair, Nat'l Conference of State Legislatures, to Senator Orrin G. Hatch (June 21, 2000), available at <http://www.ncsl.org/statedfed/antis353.htm> [hereinafter Letter from Representative Kip Holden].

296. 151 CONG. REC. S1243 (daily ed. Feb. 10, 2005) (statement of Sen. Leahy).

The former seemed more concerned with the vertical version of federalism, attacking an earlier draft of the CAFA as “yet another feeble and blatant attempt to unnecessarily federalize areas of criminal and civil justice that do not beg for federal resolution” and urging lawmakers “to reject this affront to judicial federalism.”²⁹⁷

The second version of the interstate federalism argument—that state courts simply should not control cases with significant effect on interstate commerce—has roots in a traditional constitutional concern with the proper allocation of power between states and the federal government. Its federalism foothold is nonetheless tenuous. First, the text of the Constitution does not prohibit state regulation of interstate commerce. As Justice Scalia has argued, the Constitution provides that “it is for Congress to make the judgment that interstate commerce must be immunized from certain sorts of nondiscriminatory state action.”²⁹⁸ The dormant Commerce Clause, the interstitial constitutional doctrine that limits states’ regulatory power, addresses state regulations that either discriminate or unduly burden interstate commerce.²⁹⁹ No federal court has ever held that multistate class actions in state courts violate the dormant Commerce Clause.

Even if the Constitution or a modern-day interpretation of it does not explicitly assign control over multistate cases to federal courts, an isolated state court’s application of one state’s law to nationwide conduct arguably offends a federal sensibility. But, judged by its text alone, CAFA does not answer how federal court supervision of these cases remedies interstate federalism problems and reduces multistate class actions’ impact on interstate commerce. CAFA is procedural only and does not preempt substantive state law.³⁰⁰ Federal courts will continue to apply state choice-of-law rules to

297. See Letter from Representative Kip Holden, *supra* note 295.

298. *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 201 (1995) (Scalia, J., concurring in the judgment).

299. See, e.g., *Am. Trucking Ass’n, Inc. v. Mich. Pub. Serv. Comm’n*, 125 S. Ct. 2419, 2422-23 (2005); *City of New York v. Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256, 285-86 (E.D.N.Y. 2004); Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONST. COMMENT. 395, 395-96 (1986).

300. S. REP. NO. 109-14, at 61 (2005) (“[CAFA] simply allows more class action cases filed in state court to be removed to federal court. [CAFA] does not change substantive law—it is, in effect, a procedural provision only. As such, class action decisions rendered in federal court should be the same as if they were decided in state court—under the *Erie* doctrine, federal courts must apply state substantive law in diversity cases.”).

multistate class actions;³⁰¹ if state courts applying these rules would extend one state's law beyond its borders, so too should federal courts. The Senate Report simply asserts that "matters of interstate comity are more appropriately handled by federal judges,"³⁰² but why a federal imprimatur on certified multistate classes lessens interstate federalism problems is not self-evident.

As was the case in the Progressive Era, no text holds the key to the perceived effectiveness of diversity jurisdiction as a protector of interstate commerce from meddlesome interference by state law. Backers of diversity jurisdiction and *Swift* assumed that something would guide the federal courts to mold the general common law in favor of corporate interests.

CAFA supporters hint at an analogous modern-day assumption. CAFA will solve the problem of interstate federalism because "federal courts have exhibited particular sensitivity to the variations in substantive law among the different states, in accordance with core principles of federalism."³⁰³ The Senate Report contends that the Supreme Court "has repeatedly warned that courts should not attempt to apply the laws of one state to behaviors that occurred in other jurisdictions."³⁰⁴ Unlike state courts, federal courts "have consistently heeded the Supreme Court's admonitions."³⁰⁵ Indeed, the Report maintains, "over the past ten years, the federal court system has not produced any final decisions—not even one—applying the law of a single state to all claims in a nationwide or multistate class action."³⁰⁶ Walter Dellinger echoed this praise of federal courts: "In recent years, the federal courts have made heroic efforts to halt the game playing with class actions."³⁰⁷

In short, even though CAFA does nothing more than put cases in federal court, with no change to choice-of-law rules, Rule 23, or

301. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

302. S. REP. NO. 109-14, at 61 (2005).

303. *Hearing*, *supra* note 263, at 102 (statement of Walter Dellinger, Professor, O'Melveny & Myers LLP, Washington, D.C.).

304. S. REP. NO. 109-14, at 62 (2003). The Report cites an 1892 and a 1914 case for this proposition, as well as *Shutts*. Federal courts have refused to interpret *Shutts* as a *per se* bar on certification. See *supra* note 291 and accompanying text.

305. S. REP. NO. 109-14, at 63. The evidence for the Senate Report's claim is doubtful. See, e.g., *O'Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D. 266, 274 n.3 (E.D. Va. 2003) (discussing federal decisions applying one state's law in nationwide class actions).

306. S. REP. NO. 109-14, at 64.

307. DELLINGER, *supra* note 274, at 2.

substantive standards, CAFA backers believe—with good reason, as explained below—that the statute will cause fewer multistate classes to be certified because federal judges share a disinclination to certify these classes. If backers' perceptions are accurate, then federalization under CAFA will help solve the interstate federalism problem—or, rather, will help empower federal courts' business-friendly preferences—by interposing shared judicial preferences between class action defendants and their regulation by state law.

b. Does Federal Court Hostility Exist?

The Senate Report's claim that the federal courts have not allowed a single multistate class action with one state's law providing the rule of decision to proceed to final judgment is misleading. More often than not, certified class actions settle, and very few reach the summary judgment motion or trial stage.³⁰⁸ Nonetheless, the Senate Report's focus on federal courts' choice-of-law practices reveals a great deal about the soil in which CAFA is planted. Supporters' assumptions and a measurable change in federal class action case law since *Rhone-Poulenc*, *Castano*, and *Georgine* are two indicators that suggest that federal judges over the past decade have developed a shared hostility to the certification of multistate classes.

Several features of the federal judicial population as currently composed are consistent with an emergent hostility to certain types of class cases. A majority of the federal judiciary claimed Republican affiliation by the mid-1990s.³⁰⁹ Political ideology appears to play a role in decision making.³¹⁰ Perhaps relatedly, commentators have identified an antiplaintiff bias among federal appeals judges.³¹¹

Just as lawyers during the Progressive Era assumed that federal judges shared procorporate preferences, contemporary practitioners believe that federal judges have less patience for state law class

308. WILLGING ET AL., *supra* note 202, at 60.

309. See Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282, 295 (1993).

310. See Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-analysis*, 20 JUST. SYS. J. 219, 243 (1999).

311. See Kevin M. Clermont & Theodore Eisenberg, *Anti-plaintiff Bias in the Federal Appellate Courts*, 84 JUDICATURE 128, 131 (2000).

actions than their state counterparts. A significant majority of 350 defense lawyers surveyed in a 2005 Federal Judicial Center study reported that they believed federal judges would be less willing to grant certification in state law cases.³¹² Plaintiffs' lawyers, in contrast, thought that state court judges were more receptive to their clients' interests.³¹³ Another Federal Judicial Center study reported that three-fourths of defense lawyers believed that federal judges in class actions were more likely to rule in their clients' interests than state judges, as compared to one-fourth of plaintiffs' lawyers.³¹⁴

A growing impatience with multistate class actions—perhaps a corrective to the aggressive expansion of Rule 23 in the 1980s and early 1990s—is a detectable phenomenon. Federal courts' treatment of choice of law problems in multistate class actions, an indicium of this trend, provides some support for these attorneys' beliefs. As discussed above, choice of law in multistate cases has a significant impact on class certification decisions. In the 1980s, federal courts identified solutions to the choice-of-law conundrum, but, as noted, plaintiffs' efforts to certify multistate classes suffered blows in the Third, Fifth, and Seventh Circuits.³¹⁵ Although it is impossible to quantify precisely the influence of a lower court's decision, two measures suggest the extent to which *Rhone-Poulenc*, *Castano*, and *Georgine* changed the landscape of federal courts' class action jurisprudence. First, each decision has significant cross-circuit application. Courts in almost every circuit have relied on *Rhone-Poulenc* to deny certification in multistate class actions.³¹⁶ *Castano*

312. WILLGING & WHEATMAN, *supra* note 6, at 31.

313. *Id.* at 32-33. Although the Federal Judicial Center study reported no difference between class certification rates in state and federal courts, it does not disaggregate its data on certifications by type of class action, and therefore does not say whether the two sets of courts would approach large, multistate class actions the same way. *Id.* at 40-41; *see also id.* at 46 (comparing attorney perceptions to judicial practices).

314. WILLGING & WHEATMAN, *supra* note 163, at 29.

315. *See supra* notes 188-95 and accompanying text.

316. *E.g.*, *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1368 (11th Cir. 2002); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1184 (9th Cir. 2001); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1074 (6th Cir. 1996); *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 208 (D. Minn. 2003); *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 65-66 & n.34 (S.D.N.Y. 2002); *Rothwell v. Chubb Life Ins. Co. of Am.*, 191 F.R.D. 25, 33 n.7 (D.N.H. 1998); *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 222 (E.D. La. 1998); *Arch v. Am. Tobacco Co.*, 175 F.R.D. 469, 486 n.14 (E.D. Pa. 1997); *In re Stucco Litig.*, 175 F.R.D. 210, 216-17 (E.D.N.C. 1997); *Harding v.*

and *Georgine* have also proven important authority for federal courts across the country in decisions denying class certification.³¹⁷

Second, and perhaps more revealing, *Rhone-Poulenc*, *Castano*, and *Georgine* may have initiated—and at least reflect—the federal courts' retreat from earlier efforts to try to manage mass actions involving state law causes of action in an aggregated fashion. During the five years preceding the February 1995 *Rhone-Poulenc* decision, federal courts denied that choice-of-law issues interfered with certification of multistate classes much more frequently than they ruled otherwise.³¹⁸ During the five years after *Rhone-Poulenc*,

Tambrands Inc., 165 F.R.D. 623, 629 (D. Kan. 1996).

317. The *Castano* decision has been relied on to support a denial of class certification for choice-of-law reasons by courts in a number of circuits. *E.g.*, *In re Baycol*, 218 F.R.D. at 209-10; *Duncan v. Nw. Airlines, Inc.*, 203 F.R.D. 601, 613 (W.D. Wash. 2001); *Clay v. Am. Tobacco Co.*, 188 F.R.D. 483, 498 (S.D. Ill. 1999); *Carpenter v. BMW of N. Am.*, No. 99-CV-214, 1999 U.S. Dist. LEXIS 9272, at **20-21 (E.D. Pa. June 21, 1999); *Emig v. Am. Tobacco Co.*, 184 F.R.D. 379, 393 n.15 (D. Kan. 1998); *Rothwell*, 191 F.R.D. at 33 n.7.

318. Among cases for the March 1990 to March 1995 period found by the author, the ratio was approximately 2.5:1 in favor of finding no choice-of-law hurdle to class certification. In the following cases, the district courts held that choice-of-law issues did not interfere with class certification: *Castano v. American Tobacco Co.*, 160 F.R.D. 544, 554 (E.D. La. 1995), *rev'd*, 84 F.3d 734 (5th Cir. 1996); *Hickey v. Great Western Mortgage Corp.*, 158 F.R.D. 603, 613 (N.D. Ill. 1994); *In re Phar-Mor, Inc. Securities Litigation*, 875 F. Supp. 277, 280 (W.D. Pa. 1994); *In re Marion Merrell Dow Inc., Securities Litigation*, No. 92-0609-CV-W-6, 1994 WL 396190, at *8 (W.D. Mo. July 18, 1994); *Maywalt v. Parker & Parsley Petroleum Co.*, 147 F.R.D. 51, 58 (S.D.N.Y. 1993); *Endo v. Albertine*, 147 F.R.D. 164, 169 (N.D. Ill. 1993); *Simpson v. Specialty Retail Concepts*, 149 F.R.D. 94, 103 (M.D.N.C. 1993); *In re Cordis Corp. Pacemaker Product Liability Litigation*, No. MDL 850, C-3-86-543, 1992 WL 754061, at *12 (S.D. Ohio Dec. 23, 1992); *Elliott v. ITT Corp.*, 150 F.R.D. 569, 579-80 (N.D. Ill. 1992); *Lerch v. Citizens First Bancorp, Inc.*, 144 F.R.D. 247, 256-57 (D.N.J. 1992); *In re United Telecommunications, Inc., Securities Litigation*, Civ. A. No. 90-2251-O, 1992 WL 309884, at *4 (D. Kan. Sept. 15, 1992); *Church v. Consolidated Freightways, Inc.*, No. C-90-2290 DLJ, 1992 WL 370829, at **4-5 (N.D. Cal. Sept. 14, 1992); *In re Badger Mountain Irrigation District Securities Litigation*, 143 F.R.D. 693, 700 (W.D. Wash. 1992); *In re Revco Securities Litigation*, 142 F.R.D. 659, 666 (N.D. Ohio 1992); *Persky v. Turley*, Civ. Nos. 88-1830-PHX-SMM, 88-2089-PMX-SMM, 1991 WL 329564, at *4 (D. Ariz. Dec. 20, 1991); *South Carolina National Bank v. Stone*, 139 F.R.D. 325, 334 (D.S.C. 1991); *In re Kirschner Medical Corp. Securities Litigation*, 139 F.R.D. 74, 84 (D. Md. 1991); *Lai v. Anthony*, Civ. Nos. 88-00565MP, 90-00828-DAE, 1991 WL 208443, at *8 (D. Haw. July 5, 1991); *Fry v. UAL Corp.*, 136 F.R.D. 626, 631 (N.D. Ill. 1991); *In re Crazy Eddie Securities Litigation*, 135 F.R.D. 39, 41 (E.D.N.Y. 1991); *Adair v. Sorenson*, 134 F.R.D. 13, 20 (D. Mass. 1991); *In re Atlantic Financial Federal Securities Litigation*, Civ. A. No. 89-0645, 1990 WL 188927, at *6 (E.D. Pa. Nov. 28, 1990); *In re MDC Holdings Securities Litigation*, 754 F. Supp. 785, 803-04 (S.D. Cal. 1990); *Deutschman v. Beneficial Corp.*, 132 F.R.D. 359, 379-80 (D. Del. 1990); *In re Worlds of Wonder Securities Litigation*, No. C 87 5491 SC, 1990 WL 61951, at **4-5 (N.D. Cal. Mar. 23, 1990).

In the following cases, the district courts held that choice-of-law issues prevented or

federal courts reversed course, and choice-of-law difficulties hampered class certification more often than not.³¹⁹ No change in

interfered with class certification: *Kurcz v. Eli Lilly & Co.*, 160 F.R.D. 667, 674 (N.D. Ohio 1995); *McBride v. Galaxy Carpet Mills, Inc.*, 920 F. Supp. 1278, 1286 (N.D. Ga. 1995); *In re SciMed Securities Litigation*, Civ. No. 3-91-575, 1993 WL 616692, at *7 (D. Minn. Sept. 29, 1993); *Sunbird Air Services, Inc. v. Beech Aircraft Corp.*, Civ. A. No. 89-2181-V, 1992 WL 193661, at **5-6 (D. Kan. July 15, 1992); *Wesley v. General Motors Acceptance Corp.*, No. 91 C 3368, 1992 WL 57948, at *4 (N.D. Ill. Mar. 20, 1992); *Tapken v. Brown*, No. 90-691-CIV-MARCUS, 1992 WL 178984, at *31 (S.D. Fla. Mar. 13, 1992); *Antonson v. Robertson*, 141 F.R.D. 501, 508-09 (D. Kan. 1991); *Margolis v. Caterpillar, Inc.*, 815 F. Supp. 1150, 1153 (C.D. Ill. 1991); *Church v. Consolidated Freightways, Inc.*, No. C-90-2290 DLJ, 1991 WL 284083, at **12-13 (N.D. Cal. June 14, 1991); *Walsh v. Ford Motor Co.*, 130 F.R.D. 260, 271 (D.D.C. 1990).

In the following cases, the district courts mentioned choice of law, but it did not have any material impact on their decisions: *In re Synergen, Inc. Securities Litigation*, 154 F.R.D. 265, 267 (D. Colo. 1994); *In re One Bancorp Securities Litigation*, 136 F.R.D. 526, 533 (D. Me. 1991); *Strain v. Nutri/System, Inc.*, Civ. A. No. 90-2772, 1990 WL 209325, at *1 (E.D. Pa. Dec. 12, 1990).

319. Among cases for the March 1945 to March 2000 period found by the author, the ratio had changed to 1.7:1 in favor of denying certification based in part on choice-of-law concerns. In the following cases the courts held that choice-of-law issues did not interfere with class certification: *In re General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 817-18 (3d Cir. 1995); *In re Great Southern Life Insurance Co. Sales Practices Litigation*, 192 F.R.D. 212, 217 (N.D. Tex. 2000); *Koppel v. 4987 Corp.*, 191 F.R.D. 360, 366 (S.D.N.Y. 2000); *Mowbray v. Waste Management Holdings, Inc.*, 189 F.R.D. 194, 199-200 (D. Mass. 1999); *In re Diet Drugs Products Liability Litigation*, No. CIV. A. 98-20626, 1999 WL 673066, at *16 (E.D. Pa. Aug. 26, 1999); *In re Synthroid Marketing Litigation*, 188 F.R.D. 295, 302 (N.D. Ill. 1999); *In re Hartford Sales Practices Litigation*, 192 F.R.D. 592, 607 n.14 (D. Minn. 1999); *Bussie v. Allmerica Financial Corp.*, 50 F. Supp. 2d 59, 71 (D. Mass. 1999); *Garner v. Healy*, 184 F.R.D. 598, 605 (N.D. Ill. 1999); *Bunnion v. Consolidated Rail Corp.*, No. Civ. A. 97-4877, 1998 WL 372644, at *9 (E.D. Pa. May 14, 1998); *Singer v. AT & T Corp.*, 185 F.R.D. 681, 691 (S.D. Fla. 1998); *Leszczynski v. Allianz Insurance*, 176 F.R.D. 659, 672 (S.D. Fla. 1997); *In re Teletronics Pacing Systems, Inc.*, 172 F.R.D. 271, 293 (S.D. Ohio 1997); *Gunter v. Ridgewood Energy Corp.*, 164 F.R.D. 391, 399 (D.N.J. 1996); *Kline v. First Western Government Securities, Inc.*, No. CIV.A. 83-1076, 1996 WL 153641, at *8 (E.D. Pa. Dec. 21, 1995); *In re Bell Atlantic Corp. Securities Litigation*, No. 91-514, 1995 WL 733381, at *7 n.8 (E.D. Pa. Dec. 11, 1995); *Rosen v. Fidelity Fixed Income Trust*, 169 F.R.D. 295, 302 (E.D. Pa. 1995); *In re Copley Pharmaceutical, Inc.*, 161 F.R.D. 456, 464-65 (D. Wyo. 1995).

In the following cases, the courts held that choice-of-law issues prevented or interfered with class certification: *Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996); *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 630 (3d Cir. 1996); *Cunningham v. PFL Life Insurance Co.*, No. C-98-67 MJM, 1999 WL 33656879, at **4-5 (N.D. Iowa Aug. 25, 1999); *Velasquez v. Crown Life Insurance Co.*, Nos. CIV. A. No. M-97-064, MDL 1096, 1999 WL 33305652, at *4 (S.D. Tex. Aug. 10, 1999); *Clay v. American Tobacco Co.*, 188 F.R.D. 483, 497 (S.D. Ill. 1999); *Carpenter v. BMW of North America, Inc.*, No. CIV. A. 99-CV-214, 1999 WL 415390, at *7 (E.D. Pa. June 21, 1999); *Emig*, 184 F.R.D. at 393; *Dhamer v. Bristol-Myers Squibb Co.*, 183 F.R.D. 520, 532 (N.D. Ill. 1998); *In re Jackson National Life Insurance Co. Premium Litigation*, 183 F.R.D. 217, 223 (W.D. Mich. 1998); *Weikel v. Tower Semiconductor Ltd.*, 183 F.R.D. 377, 402 (D.N.J. 1998); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 457 (D.N.J.

the substance of Rule 23 or any federal statutory enactment explains this about-face. Obviously, the district courts in the Third, Fifth, and Seventh Circuits must follow *Rhone-Poulenc* and its progeny, but rules of precedent do not bind the numerous lower courts in other circuits that have chosen to follow these decisions' lead. The federal courts' emergent difficulty with choice-of-law problems indicates that the federal courts share the Seventh Circuit's notably hostile attitude to these cases.³²⁰

The federal courts' recent choice-of-law decisions played a significant role as a motor behind CAFA.³²¹ *Rhone-Poulenc* and its progeny appeared prominently in the debates over the statute.³²² Most revealingly, congressional Democrats on the penultimate day

1998); *Marascalco v. International Computerized Orthokeratology Society, Inc.*, 181 F.R.D. 331, 339 (N.D. Miss. 1998); *Fisher v. Bristol-Myers Squibb Co.*, 181 F.R.D. 365, 369 (N.D. Ill. 1998); *Rothwell v. Chubb Life Insurance Co. of America*, 191 F.R.D. 25, 33 n.7 (D.N.H. 1998); *Poe v. Sears, Roebuck & Co.*, No. Civ A1:96-CV-358-RLV, 1998 WL 113561, at *2 (N.D. Ga. Feb. 13, 1998); *Bradshaw v. Pfizer, Inc.*, No. 1:93 CV 1619, 1997 WL 33446663, at *2 (N.D. Ohio Oct. 31, 1997); *Fischler v. AmSouth Corp.*, 176 F.R.D. 583, 589 (M.D. Fla. 1997); *In re Ford Motor Co. Ignition Switch Products Liability Litigation*, 174 F.R.D. 332, 351 (D.N.J. 1997); *Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90, 95-96 (W.D. Mo. 1997); *Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330, 341 (N.D. Ill. 1997); *In re Ford Motor Co. Bronco II Product Liability Litigation*, 177 F.R.D. 360, 371-72 (E.D. La. 1997); *In re Masonite Corp. Hardboard Siding Products Liability Litigation*, 170 F.R.D. 417, 423-24 (E.D. La. 1997); *Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 653-54 (C.D. Cal. 1996); *Ilhardt v. A.O. Smith Corp.*, 168 F.R.D. 613, 621 (S.D. Ohio 1996); *Commander Properties Corp. v. Beech Aircraft Corp.*, 164 F.R.D. 529, 541 (D. Kan. 1995).

In the following cases, the district courts mentioned choice of law, but it did not have any material impact on their decisions: *Cohn v. Massachusetts Mutual Life Insurance Co.*, 189 F.R.D. 209, 213 n.7 (D. Conn. 1999); *Cullen v. Whitman Medical Corp.*, 188 F.R.D. 226, 235-36 (E.D. Pa. 1999); *In re New England Mutual Life Insurance Co. Sales Practices Litigation*, 183 F.R.D. 33, 42 (D. Mass. 1998); *Cavaliere v. Margaretten & Co.*, No. 94CVO1928 (AHN), 1996 WL 571178, at *4 (D. Conn. July 10, 1996); *Bishop v. Saab Automobile A.B.*, No. CV 95-0721 JGD (JRX), 1996 WL 33150020, at *11 (C.D. Cal. Feb. 16, 1996).

320. For an example of the Seventh Circuit's hostility to class actions, see generally *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002). Professor Mary Davis agrees that *Rhone-Poulenc*, *Castano*, and *Georgine* heralded a change; she claims other federal courts were "intimidated by" the trio, not that the decisions activated a latent hostility. See Mary J. Davis, *Toward the Proper Role for Mass Tort Class Actions*, 77 OR. L. REV. 157, 211 (1998).

321. Others have identified choice of law as particularly important for CAFA. See Richard Nagareda, *Bootstrapping in Choice of Law After the Class Action Fairness Act*, 74 UMKC L. REV. 601, 683 (2006); Edward F. Sherman, *Class Actions After the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1593, 1610 (2006); Patrick Woolley, *Erie and Choice of Law After the Class Action Fairness Act*, 80 TUL. L. REV. 1723, 1749 (2006); see also S. REP. NO. 109-14, at 86 (2005).

322. See, e.g., *Hearing, supra* note 235, at 111 n.4 (statement of Stephen G. Morrison, General Counsel, Policy Management Systems Corp., Columbia, S.C.).

of debate in the Senate proposed the following amendment to neutralize the choice-of-law rationale for denying class certification:

Notwithstanding any other choice of law rule, in any class action, over which the district courts have jurisdiction, asserting claims arising under State law concerning products or services marketed, sold, or provided in more than 1 State on behalf of a proposed class, which includes citizens of more than 1 such State, as to each such claim and any defense to such claim—

(1) the district court shall not deny class certification, in whole or in part, on the ground that the law of more than 1 State will be applied³²³

As one Democratic senator explained, “[i]f we are going to take away the right of State judges to hear a class action, it is incumbent upon us to make sure the Federal judge is not able to not certify the class because too many state laws would apply. That would be an unfair result.”³²⁴ He then introduced a letter into the record from Arthur Miller, who suggested that the amendment would guide federal courts toward selecting a single state’s law to apply in these cases. The amendment, Professor Miller insisted, was necessary to “ensure that [CAFA] does not lead to the unintended consequence of robbing from consumers their only avenue to seek redress from corporations that violate the law.”³²⁵

CAFA supporters’ reactions revealed the role they expected choice of law to play in making CAFA effective. The statute’s chief sponsor in the Senate argued that the proposed amendment would “nickel[] and dime[]” the bill “to death.”³²⁶ “Pure and simple,” he insisted, “this amendment blows a hole in the bill and guts the modest reforms we are finally going to be able to get to the President.”³²⁷ Others joined in this chorus. One senator insisted that the amendment would “perpetuat[e] the very magnet court abuses that the legislation seeks to end.”³²⁸ Another accurately labeled the amend-

323. 151 CONG. REC. S1166 (daily ed. Feb. 9, 2005).

324. *Id.* at S1167, 1168 (statement of Sen. Bingaman).

325. *Id.* at S1169, 1170 (letter from Arthur R. Miller, Professor, Harvard Law School).

326. *Id.* at S1171 (statement of Sen. Grassley).

327. *Id.*

328. *Id.* at S1174 (statement of Sen. Sessions).

ment “a poison pill.”³²⁹ Not surprisingly, the proposed amendment did not pass. With its failure, the federal courts have been left to their own devices insofar as their preferences will effect the certification of multistate classes.

C. CAFA's Unconstitutional Spirit?

The most likely reason why the federalization of multistate classes proved attractive to CAFA's backers matches an important rationale supporters gave for diversity jurisdiction during the Progressive Era—the perception that federal courts' shared preferences favored corporate interests. Given some indication that federal judges do indeed share these tendencies, CAFA, like the general common law, may well help limit the regulatory reach of state law. There is, however, an important difference between the two. CAFA, unlike the *Swift* regime, came from Congress. The power to expand diversity jurisdiction for most multistate class actions likely is well within Congress's constitutional authority. The only apparent limit the Constitution places on Congress's stewardship of diversity jurisdiction is that the parties be minimally diverse, and CAFA provides for this.³³⁰ Arguably a deficit of democratic legitimacy is present when Congress cloaks its substantive goal of limiting liability for state law causes of action in a procedural guise. However, few participants in the debate over CAFA naively believed the statute intended simply to reshape procedure.³³¹ Moreover, procedural change is often intended to have a substantive impact.³³²

CAFA is a different breed of procedural reform, however, and in its difference lies the sort of problem *Erie* addressed—the impact federal judges' policy preferences have on the federalism balance of power. Often the substantive intent of a procedural change is implicit within the text of the statute or rule itself. For example,

329. 151 CONG. REC. S1080, 1082 (daily ed. Feb. 8, 2005) (statement of Sen. Lott).

330. See, e.g., *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530 (1967); C. Douglas Floyd, *The Limits of Minimal Diversity*, 55 HASTINGS L.J. 613, 658-59 (2004).

331. E.g., 149 CONG. REC. E1281 (daily ed. June 17, 2003) (statement of Rep. Udall); 145 CONG. REC. S1166 (daily ed. Feb. 3, 1999) (statement of Sen. Grassley).

332. See generally Jack B. Weinstein, *Procedural Reform as a Surrogate for Substantive Revision*, 59 BROOK. L. REV. 827 (1993).

the Lawsuit Abuse Reduction Act (LARA), which the House of Representatives passed in 2005, would have increased disincentives for filing civil actions by putting more teeth into Rule 11's sanction provision.³³³ The statute would tell federal judges when to impose sanctions;³³⁴ indeed, it is designed to reduce judicial discretion in this regard.³³⁵ Rule 68 is another example. If a plaintiff refuses a settlement offer but ultimately recovers less than the proposed amount, the plaintiff must pay the litigation costs the defendant incurred after making the offer.³³⁶ It is plainly designed to encourage early settlement by increasing pressure on plaintiffs.³³⁷ A risk-averse plaintiff may well abandon a meritorious claim for an insubstantial sum in response to a Rule 68 offer, rather than fear that it might have to shoulder a large bill for costs. Again, the substantive goal lurks in the text itself.

In contrast, CAFA simply expands diversity jurisdiction. It does not give federal judges any instruction in how they should decide class certification motions in multistate cases. Unlike LARA or Rule 68, its substantive effectiveness depends on whether federal judges share preferences for the proper management of class actions, and how these preferences will impact litigation. If these preferences exist, as the shift in federal choice-of-law decisions over the past decade suggests they do, CAFA's expansion of diversity jurisdiction will achieve a substantive end only because these preferences militate against the certification of large, multistate classes.

Obviously, judicial antagonism toward the aggressive use of Rule 23 will not mean the end of state law enforcement. Class actions represent quite a small subset of state law civil actions. But their importance for the enforcement of state law in a range of cases, particularly those that involve claims for small amounts, is well-established.³³⁸ Perhaps nothing reflects the enforcement role class actions play for state law quite as much as arguments that these

333. H.R. 420, 109th Cong. (1st Sess. 2005).

334. *Id.* § 2(2)(B).

335. See 151 CONG. REC. H9287, 9288 (daily ed. Oct. 27, 2005) (letter from Leonidas Ralph Mecham, Secretary, Judicial Conference of the United States, to F. James Sensenbrenner, Jr., Chairman, H. Comm. on the Judiciary).

336. FED. R. CIV. P. 68.

337. *E.g.*, *McDowall v. Cogan*, 216 F.R.D. 46, 47 (E.D.N.Y. 2003).

338. See WILLGING ET AL., *supra* note 202, at 13 (observing that in few of the class actions studied would individuals prosecute their claims absent class certification).

cases result in illegitimate regulation through litigation.³³⁹ If it works as intended, CAFA will use judicial hostility to certain types of class actions to weaken the regulatory effect of state law.

CAFA thus rests on the hope that shared preferences among federal judges—not positive instructions, either procedural or substantive, from a law or a rule—will tip the federalism balance to weaken state power. *Erie* attempted to minimize the role judicial preferences play in diversity cases. In this sense, CAFA is *Erie*'s mirror image.

Erie's constitutional analysis rests on two foundations: federalism and separation of powers. The decision expressed a message about proper governance in a federalist system. Congress could take away powers otherwise reserved to the states when so authorized under the Constitution, but federal courts, acting alone without instruction from Congress, could not. The general common law entailed a judicial usurpation of state and congressional power and thus had no constitutional support. In comparison, CAFA rests on sturdier ground.³⁴⁰ Congress has decided to take from state courts the authority to supervise multistate class actions. Although this decision impacts the federalism balance, it was made by the political branch, the proper actor by *Erie*'s metric.

In another sense, though, CAFA bears some of *Swift*'s constitutional pockmarks. Rather than displace state substantive law, or even amend Rule 23 to make class certification more difficult, Congress has punted to the courts and empowered federal judges' preferences to limit state law's substantive impact. Contrary to *Erie*'s intent, CAFA makes the beliefs of the unelected branch, a branch with no structural federalism protections, a key factor in the federalism equation.

CONCLUSION

It is much too soon to tell if CAFA will have the corporate-friendly federalism effect its supporters intend. The pendulum may swing

339. *E.g.*, Michael I. Krauss, *Regulation Masquerading as Judgment: Chaos Masquerading as Tort Law*, 71 *MISS. L.J.* 631, 685 (2001).

340. For an argument that CAFA is unconstitutional, see generally C. Douglas Floyd, *The Inadequacy of the Interstate Commerce Justification for the Class Action Fairness Act*, 55 *EMORY L.J.* 487 (2004).

back, and federal judges may once again prove receptive audiences for multistate class actions. Moreover, whether CAFA will have any discernible effect on the success rates of these cases is unclear. The perception of a corporate-friendly judiciary may prove inaccurate. Federal judges may not have differed from their state counterparts in terms of shared attitudes during the Progressive Era.³⁴¹ Similarly, it has not been established as an empirical matter that, generally speaking, federal judges and state judges approach class actions differently.³⁴² Also, CAFA allows for single-state class actions in state court, so large cases in California or New York, for example, may compensate for regulation lost to the statute.

At the least, however, legislators premised CAFA on the federalism implications of diversity jurisdiction that *Erie* tried to neutralize. If the statute works as intended, federal judicial distaste for multistate class certification—not some substantive instruction from Congress—will ultimately weaken state regulation. *Erie* suggests that power to have this federalism impact should rest in Congress's hands, not the courts'. One wonders if the "course pursued" under CAFA will engender the same sort of heated debate over the proper extent of federal courts' reach into state affairs that the general common law sparked in the decades before *Erie*.

341. Urofsky, *supra* note 47, at 91.

342. WILLGING & WHEATMAN, *supra* note 6, at 9-10.