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COMMENT: THE INTERSTATE **CLASS ACTION** JURISDICTION ACT OF 1999: ANOTHER CONGRESSIONAL ATTEMPT TO FEDERALIZE STATE LAW

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SUMMARY:

... Targeting individual plaintiffs has long been the strategy of corporate defendants, so defense counsel are right to fear the danger of ruinous liability that the **class action** poses to national, corporate defendants. ... Some enterprising attorneys filed a nationwide **class action** in Alabama state court, on behalf of 700,000 persons, claiming that the defendants did not promptly post interest to real estate escrow accounts. ... Although some trial judges seem to be certifying classes without a careful adherence to either the state **class action** rule or federal case law, the Alabama Supreme Court has explored this area thoroughly over the past several years and has disfavored certification. ... A footnote in the Exxon opinion explicitly recognized the basis for the court's continual reliance on federal case law: "Because [Alabama's **class action** rule] is substantially identical to [the federal rule], in interpreting our Rule 23 we use cases interpreting the federal rule as persuasive authority. ... While Alabama's **class action** rule is substantially similar to Federal Rule 23, other states have **class action** rules that differ significantly in their language. ... In California, a state with a **class action** rule different from Federal Rule 23, two appellate courts recently issued writs of mandamus directing the trial courts to vacate nationwide class certification orders. ...

I'll let you write the substance ... and you let me write the procedure, and I'll screw you every time.

U.S. Representative John Dingell ¹

TEXT:

[*1305] I. Introduction

For decades, large corporations have avoided having to "pay the piper" for inflicting various harms on society by "using or abusing every possible procedural device for the purpose of discouraging plaintiffs' attorneys from bringing [mass tort] cases by guaranteeing that their expenses will exceed any possible recovery." ² Following the dismissal of several individual suits, one attorney for R.J. Reynolds wrote:

The aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiff's lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of [RJR's] money, but by making that other son of a bitch spend all of his. ³

Targeting individual plaintiffs has long been the strategy of corporate defendants, so defense counsel are right to fear the danger of ruinous liability that the **class action** poses to national, corporate defendants. Indeed, the **class action** is a device capable of achieving tremendous economies of scale due to its aggregative capacity. Accordingly, the modern **class action** has been championed by many as a means of leveling the playing field between large corporations and individual citizens by nullifying defendants' ability to wage such [*1306] warfare. ⁴ In instances in which a large number of people have each sustained relatively small injuries, the **class action** can overcome the disincentive for any individual to bring an individual action to prosecute her rights. ⁵ Moreover, "hailed as a great equalizer and denounced as an engine of destruction," ⁶ the **class action** has engendered more impassioned debate than other civil procedure tools operating within the traditional, individualized, case-by-case adjudication model. ⁷

Because of its massive leveling potential, the damages **class action** has remained at the center of the discourse concerning the proper relationship between the federal and state court systems over the past several decades. ⁸ For the first couple of decades after the 1966 amendments to Federal Rule of Civil Procedure 23 ("Federal Rule 23"), ⁹ the damages **class action's** role in federal court was uncertain. However, by the mid-1990s, federal courts became increasingly hostile toward damages class certification. Federal courts have conveyed their newfound opprobrium in various ways, sometimes by interpreting the language of Federal Rule 23, and other times in more general [*1307] terms. ¹⁰ Because of this hostility, many claimants have begun filing class claims in state courts and have achieved relative success. ¹¹ The Interstate **Class Action** Jurisdiction Act (the "Act"), ¹² the subject of this Comment, is intended to harmonize the traditional **class action** device with the exigencies of modern mass litigation. ¹³ By vastly increasing federal courts' original jurisdiction over **class actions** and liberalizing removal procedures, the Act would essentially move the bulk of state-law **class actions** out of state courts and into federal courts. ¹⁴

In Part II, this Comment offers some prefatory history of the **class action** device, including its evolution. Part II then analyzes the recent treatment of **class actions** in federal court, and examines various state courts' treatment of **class actions**. Many defense-oriented legislators and commentators perceive some state courts' relative flexibility with respect to certifying **class actions** as having created a "state court **class action** crisis." ¹⁵ To evaluate the Act, it is necessary to determine to what extent such a "crisis" truly exists. This Comment argues that **Congress** has ignored state courts of appeals, and explores the extent to which courts protect litigants against abuse via **class action** procedure.

In Part III, this Comment discusses the purposes and provisions of the Act, and what impact the Act will have on existing law. Part III then discusses critical perspectives on **diversity** jurisdiction, and the extent to which its purposes are consistent with the Act. This part assumes the constitutionality of this congressional activity, and focuses on whether

Congress has carefully considered the modern role of **diversity** jurisdiction. This Comment then compares two opposing models of federalism. First, this Comment presents [*1308] the idea that state courts should invariably define issues of state law because they are indeed the primary expositors of rights created under state law. *Erie Railroad Co. v. Tompkins*¹⁶ and *Railroad Commission of Texas v. Pullman Co.*¹⁷ are paradigmatic of this position. In contrast, this Comment presents the "disparity" model, based on the seminal article by Professor Burt Neuborne. Under that view, federal courts possess a number of advantages, both technical and procedural, that make them the preferable forum for adjudicating complex claims. Because the Act seeks to address a scenario that falls between the two poles - the Act would prevent state courts from hearing state law claims, but not under the forum state's law - this Comment argues in favor of the former model. As a matter of propriety, competence, and practicality, state courts should retain jurisdiction over the majority of **class actions** arising under state law, even if laws of multiple states apply.

Most of the arguments that have been put forth by proponents of the Act (including protecting absentee class members from harm, state courts' inability to administer interstate **class actions**, and state judges' alleged laxity with respect to applying class certification standards) are intended to obfuscate the real purpose of the Act: the reduction of corporate defendants' exposure to massive liability. Throughout, this Comment raises different instances that, when examined collectively and in the proper context, will illustrate that the Act is, to a large extent, a smokescreen. Judge Richard Posner honestly articulated the concerns upon which the Act is predicated when he expressed his contempt for using a **class action** to resolve claims brought by thousands of HIV-infected hemophiliacs: "One jury, consisting of six persons ... will hold the fate of an industry in the palm of its hand."¹⁸

II. A Brief Survey of **Class Actions**

A. **Class Action** in the United States, Prior to the 1990s

Class actions originally were created in state courts of law and equity,¹⁹ and in 1849 became statutory under the Field Code, which several states adopted.²⁰ [*1309] The first codified **class action** rule was Rule 38 of the Federal Equity Rules of 1912.²¹ In 1938, Professor James William Moore drafted a new federal **class action** rule which became the original Federal Rule 23.²² This so-called "Moore rule" was heavily criticized because it was too abstract and difficult to apply.²³ In 1966, however, Federal Rule 23 was substantially amended, and the three theoretical categories of the earlier version were replaced with functional tests aimed at ensuring that the underlying policies of the **class action** are satisfied.²⁴ The Field Code, the original Federal Rule 23, and [*1310] amended Federal Rule 23 remain the three models for present-day **class action** rules. Currently, thirty-eight states have adopted amended Federal Rule 23; five states still use rules modeled on the original Federal Rule 23; four use Field Code-based class rules; and three states permit **class actions** at common law despite the absence of formal class rules.²⁵

Federal Rule 23 was subsequently amended to clarify and broaden the use of the **class action**, particularly with respect to damages **class actions**.²⁶ This was a direct response to Federal Rule 23's relative impotence in its pre-1966 form due to two main limitations: (1) the requirement that there be a "jural relationship"²⁷ between the parties to support class certification, and (2) the rule that negative judgments were not binding on all class members.²⁸ However, [*1311] due to a variety of early abuses in **class action** litigation, the amended Federal Rule 23 quickly fell into disfavor in federal courts.²⁹

Ambition and stability marked the "first phase" of **class action** litigation in federal courts after the 1966 amendments.³⁰ Some commentators believe that the district courts and class counsel were careless in handling **class action** litigation and were therefore responsible for the negative reaction felt in the early 1970s.³¹ District courts often approved settlements and fee petitions without proper attention, and often certified classes without rigorous application of the requirements of Federal Rules 23(a) and (b).³² The reaction against this unstudied

approach was strong.³³ Critics pointed to the motives of attorneys, the excessive burdens imposed upon the federal court system, excessive fee [*1312] awards, and the beginnings of "in kind"³⁴ compensation for class members as the most flagrant manifestations of abuse. The Supreme Court acted in accordance with this reactive tide in handing down several restrictive decisions during this period: *Snyder v. Harris*,³⁵ *Zahn v. International Paper Co.*,³⁶ and *Eisen v. Carlisle & Jacquelin*.³⁷

In the mass tort³⁸ context in particular, federal district courts in the 1970s were wholly inhospitable. The three reasons most often proffered by various federal district courts for not certifying plaintiff classes were that: (1) consideration for litigant autonomy should counsel against allowing control over litigation to be ceded to the class;³⁹ (2) **class actions** encourage unethical conduct on the part of attorneys because of the large value of aggregated class claims;⁴⁰ and (3) the issues in tort litigation in particular are too claimant-specific to be considered en masse.⁴¹

However, it was in the "mass tort" context that the pendulum swung back beginning in the late 1970s and continuing through the late 1980s. Several decisions were handed down at roughly the same time, each evincing a dramatically different view of the proper role of federal courts, and of the **class action** device. The Fifth Circuit Court of Appeals was the first appellate court officially to approve a mass tort claim class certification. In *Jenkins v. Raymark Industries, Inc.*,⁴² the court upheld the plan crafted by Judge Robert Parker in the Eastern District of Texas, certifying a class of approximately three thousand plaintiffs, all residing within the same district, as to the limited issues of: (1) the "state of the art" defense; (2) product identification; (3) product defectiveness; [*1313] and (4) punitive damages.⁴³ Judge Parker's willingness to use a novel "limited issues" class under Federal Rules 23(b)(3) and (c)(4) stood at the forefront of a renewed interest in a liberal usage of Federal Rule 23 in federal court. The trial court innovatively interpreted that common questions in a (b)(3) **class action** must "predominate" to mean only that common issues constitute a "significant part" of the individual cases, and that class jury findings on the class questions will "significantly advance the resolution of the underlying hundreds of cases."⁴⁴ The Fifth Circuit observed: "Judge Parker's plan is clearly superior to the alternative of repeating, hundreds of times over, the litigation of the state of the art issues with, as that experienced judge says, 'days of the same witnesses, exhibits and issues from trial to trial.' ... Necessity moves us to change and invent."⁴⁵

Federal courts seemed to have come full circle. In one of the last major appellate opinions to approve Federal Rule 23(b)(3) as applied to a mass tort context, the Fourth Circuit in 1989 espoused its belief that the proper view of Federal Rule 23 was a liberal reading favoring certification.⁴⁶ These sentiments had been absent in federal courts since the optimistic days of the late 1960s, right after the amendments to Rule 23.⁴⁷ But just as the Supreme Court and various courts of appeals had reacted against perceived carelessness in class [*1314] certifications in the early 1970s, federal appellate courts began to react to the innovative use of **class actions** which had characterized the mid and late 1980s.

B. Recent State-Law **Class Action** Experience in Federal Court

There have been two leading appellate cases since the mid-1990s that are generally viewed as paradigmatic of the federal judiciary's amenability to state law **class actions** in the Federal Rule 23(b)(3) context.⁴⁸ The first was a Seventh Circuit opinion by Chief Judge Posner in *In re Rhone-Poulenc Rorer, Inc.*,⁴⁹ and the second was the Fifth Circuit case *Castano v. American Tobacco Co.*⁵⁰ Class certification opponents in the federal judiciary have widely and consistently embraced these opinions,⁵¹ and they are influential enough to warrant further examination.

In *Rhone-Poulenc*, the plaintiffs were thousands of hemophiliacs who had received HIV-tainted blood factors in transfusions between the late 1970s and 1984, before AIDS testing was widely available.⁵² After all the pending federal cases were transferred and consolidated,

the trial court certified a limited issue class under Federal Rules 23(b)(3) and (c)(4) solely to determine liability.⁵³ If the jury found liability, then the individual plaintiffs were to return to their transferor courts to proceed on the issues of causation, damages, and individual defenses.⁵⁴ On appeal, Judge Posner went to the extraordinary [*1315] measure of issuing a writ of mandamus against the trial judge, decertifying the class.⁵⁵

Judge Posner's opinion relied on two main arguments. First, he suggested that because the defendant had won twelve of the thirteen trials already litigated, a contrary conclusion would be somehow mistaken.⁵⁶ Second, Posner focused on the pressure that class certification would encourage for the defendant to settle, because of the concomitant enlarged exposure.⁵⁷ Without attempting to demonstrate that the putative plaintiff class did not meet the requirements of Federal Rule 23, the Seventh Circuit decertified the class.⁵⁸ Significantly, this case opened the door for other courts to engage in a cursory analysis of certification decisions under Federal Rule 23, relying instead on the current "environment of diminished respect" accorded class certification in federal courts.⁵⁹ It is a fundamental tenet of federal **class action** law that a court should not evaluate the merits of a claim at the certification stage.⁶⁰ The Seventh Circuit's analysis of past trials was, however, just such a "merits assessment" [*1316] in thin disguise."⁶¹ In addition, the idea that certification of a large class creates too much pressure on a defendant to settle is an inappropriate consideration for the court to be making in its class certification analysis.⁶² Despite the implicit preference of the Federal Rules for the consistency and finality of common class adjudication of class issues, the Rhone-Poulenc court stated that a common trial "need not be tolerated when the alternative exists of submitting an issue to multiple juries constituting in the aggregate a much larger and more diverse sample of decision-makers."⁶³ Such reasoning suggests that there is an obstacle to certification more fundamental than any deficiencies in the proposed class. It seems that the court felt that common trials are, in a general sense, inappropriate.⁶⁴

In the wake of the Rhone-Poulenc decision, the Fifth Circuit proceeded to decertify "what may [have] been the largest **class action** ever attempted in federal court."⁶⁵ In *Castano v. American Tobacco Company*,⁶⁶ the proposed class consisted of fifty million nicotine-dependent persons nationwide who asserted that tobacco companies fraudulently failed to disclose the addictive nature of nicotine and manipulated nicotine levels in order to create and sustain addiction.⁶⁷ The district court had only certified the class with respect to the "core liability" issue that satisfied Federal Rule 23(b)(3)'s twin requirements [*1317] of superiority and predominance.⁶⁸ In reaching its decision, the district court held that variation in state laws did not threaten the predominance prong, and that the expected efficiency gains outweighed manageability concerns.⁶⁹

The Fifth Circuit reversed, concluding that the trial court had abused its discretion in certifying the class. The Court of Appeals found: (1) that the district court had not engaged in the requisite "extensive analysis"⁷⁰ in evaluating the variations in state law to justify its predominance determination under Federal Rule 23(b)(3);⁷¹ (2) that the district court had erred in using the Jenkins test requiring only that common issues must constitute a "significant portion of the individual trials" and must "significantly advance" the underlying subsequent individual trials;⁷² and (3) that the class could not have satisfied the superiority requirement of Federal Rule 23 because the plaintiffs had alleged a so-called "immature tort."⁷³ The Court of Appeals contended that an "immature tort" is one that lacks a "prior track record of trials from [*1318] which the district court can draw the information necessary to make the predominance and superiority analysis."⁷⁴ In the court's view, class certification based on immature torts creates an unacceptably "higher than normal risk that the **class action** may not be superior to individual adjudication."⁷⁵ The immature tort argument, coupled with the Fifth Circuit's rejection of the more liberal Jenkins test, has lead one commentator to remark that the guiding concern of the Fifth Circuit (as well as of the Seventh Circuit) is a "judicial solicitude for the economic well-being of class defendants."⁷⁶

The inhospitable opinions of the Fifth Circuit in *Castano* and the Seventh Circuit in *Rhone-*

Poulenc seem to be aimed at the fundamental propriety of the **class action** device in the mass tort context. ⁷⁷ These opinions question some of the basic assumptions upon which the **class action** device was founded, such as the effectiveness or the value of the **class action** in avoiding the confusion and burden of duplicative litigation. ⁷⁸

[Castano] serves as a bookend to the **class action** litigation over the previous twenty years, resurrecting, as did the court in *In re Rhone-Poulenc Rorer*, the underlying primary barrier to **class action** certification in the mass tort cases - the dogged dedication to the individual case-by-case adjudication model as the only means of securing fair, efficient case resolution. Despite the defendants' common course of conduct toward society, and the denial of access to the judicial system of a significant portion of the injured population, the court adhered to the rigid individualized adjudication model. ⁷⁹

[*1319] For the most part, federal trial and appellate courts alike have taken cues from these and other recent opinions that seem to decline class certification based not so much on the language of Federal Rule 23, but on a palpable judicial antipathy toward the **class action** device. ⁸⁰

C. The Retreat to State Courts

In the early days of amended Federal Rule 23, state courts were far less likely to certify damages classes under Federal Rule 23(b)(3) than were federal courts. ⁸¹ In the early 1970s, Congress even attempted to expand federal jurisdiction over consumer **class actions** because of the perceived harshness of the state tribunals. ⁸² The disparity between the two court systems inevitably led to vastly increased **class action** filing in federal courts, stimulating the Supreme Court to limit access to federal courts. ⁸³

Today the situation is entirely reversed. It is clear from testimony and the House Report that the Act's proponents think that there is a "severe state court **class action** crisis." ⁸⁴ However, the extent to which such a crisis exists is difficult to ascertain. In the recently completed study by the RAND Institute for [*1320] Civil Justice, the findings are characterized by uncertainty at best. ⁸⁵ On the one hand, some statistics seem to indicate a surge in recent years in damages **class actions** filed, particularly in state courts and in the consumer area. ⁸⁶ The RAND Institute estimates that almost sixty percent of the **class actions** filed between 1995 and 1996 arose in state courts, ⁸⁷ leading one to believe that a large share of **class action** litigation overall takes place in state courts. ⁸⁸ However, as the study points out, there is a dearth of statistical information available, ⁸⁹ and many of those actions filed are quickly dropped or settled. ⁹⁰

Also, a 1999 survey of major company experiences with **class actions** between 1988 and 1998 reported a 1,042% increase in pending **class action** litigation in state courts as opposed to a 338% increase in federal courts. ⁹¹ Although comprehensive data are not available, many commentators believe that there is indeed a trend toward state-law damages **class actions** being filed in state courts and that the phenomenon is attributable mainly to federal courts' perceived distaste for these sorts of suits. ⁹²

The fact that plaintiffs' attorneys are filing many more **class actions** in state courts, however, is not the sole impetus for the Act. There is some anecdotal evidence that plaintiffs' lawyers file a relatively large number of "frivolous" [*1321] **class actions** in state courts. ⁹³ The legislative history of the Act reveals an acute mistrust of state courts in handling damages **class actions**. ⁹⁴ Proponents of the Act believe that state courts are adjudicating these suits in an irresponsible manner wholly inconsistent with the example set by federal courts. ⁹⁵ While there are certain "horror stories" that various experts presented to Congress during hearings, for the most part, state appellate courts have followed the federal jurisprudence in adjudicating non-federal question **class actions**. ⁹⁶

1. State Trial Courts Have Run Amok

The debate over the existence of state court abuses with respect to **class actions** has been fraught with anecdotes. Specifically, proponents of the Act have cited several examples of egregious laxity on the part of state courts. For example, at the March 1998 House hearing, Ralph Wellington, a Philadelphia attorney, elaborated on an infamous example of abuse commonly known as the **Bank of Boston litigation**.⁹⁷ Some enterprising attorneys filed a nationwide **class action** in Alabama state court, on behalf of 700,000 persons, claiming that the defendants did not promptly post interest to real estate escrow accounts.⁹⁸ The attorneys settled the case and few of the class members opted out or objected to the settlement, because the maximum award per class member was roughly nine dollars.⁹⁹ After the state court judge approved the settlement, most of the class members were awarded a small amount, but then had their **[*1322]** escrow accounts reduced by approximately ten times that amount to pay for the several million dollars in attorneys' fees.¹⁰⁰ As one of the attorneys for the defendants testified: "In short, having been included in a lawsuit that they never envisioned, [the class members] had their own money from their own <clb>escrow<crb> accounts taken to pay class counsel ... for what many believe <clb>to have been<crb> a dubious benefit."¹⁰¹

Another case that seems to have raised the ire of all who favor the Act is the case of **Cox v. Shell Oil Co. (Polybutylene Pipe Litigation)**.¹⁰² After years of individual suits and failed attempts at aggregated litigation in federal court, the chancery court of Union City Tennessee in Obion County approved a settlement worth about \$ 950 million.¹⁰³ Even though this case is dissimilar from Kamilewicz (the Bank of Boston case) in that the class members in Cox actually received a substantial benefit (\$ 1,433.29 per class member, in cash and repairs)¹⁰⁴ and the attorneys' fees were relatively low (about 8.5% of the total settlement),¹⁰⁵ critics have expressed dismay over the case because it represents plaintiff forum-shopping.¹⁰⁶ One professor claimed that the reason that plaintiffs' counsel chose a forum such as Union City, Tennessee, was because it is so remote. Indeed, this commentator remarked of Union City: "No one could get there, you couldn't fly in to object. And that's common. Often these state courts are picked, and they are in the middle of nowhere. You can't have access to the documents" ¹⁰⁷

Aside from forum-shopping and inadequate settlement supervision, proponents of the Act further charge that many of the **class actions** filed and certified in state court violate basic principles of federalism.¹⁰⁸ In applying the forum **[*1323]** state's laws to the claims of the entire class, most of whom are residents of other states, these critics believe that the forum court is essentially compromising the autonomy of other states.¹⁰⁹ Moreover, by interpreting its **class action** rule loosely, these courts are also, according to the Act's supporters, creating a **procedural race to the bottom**.¹¹⁰ **Smith v. General Motors Corp.**,¹¹¹ a case filed on behalf of twenty million people nationwide against the three largest United States auto manufacturers in sparsely-populated (eleven thousand residents) **Coosa County, Alabama**, is often cited as the paradigm for these problems. Even though a small minority of the proposed class contained Alabama residents (about 2%), the trial court had attempted to decide all claims under Alabama law.¹¹² In addition, the trial court had apparently certified the class before the defendants were served - another abusive habit - derisively known as "**drive-by certification**" and commonly ascribed to such trial courts.¹¹³

These examples represent themes common to the arguments in favor of congressional action to curb state court abuses. To the extent that these cases represent common phenomena in state trial courts, however, the critics have **[*1324]** ignored the role played by state courts of appeals. Many of the states had or have since diverged from the procedural obstacles that had existed in the federal courts prior to the 1998 amendment to Federal Rule 23 (which now allows for interlocutory review of class certification decisions).¹¹⁴ While it may be the general rule that denials of class certification are interlocutory orders and thus not immediately appealable,¹¹⁵ a large number of state courts have held that class certification orders are

immediately appealable despite their being interlocutory pursuant to a statute or rule permitting such appeals as a matter of right or as a matter of discretion. ¹¹⁶

[*1325] Some states have interpreted their rules to allow appeals as of right from certification rulings even though the rules do not expressly permit it. ¹¹⁷ Other states have only allowed appeals as of right where certification has been denied, ¹¹⁸ while some have only allowed appeals as of right where certification has been granted. ¹¹⁹ Some states have even amended their **class action** rules to allow for appeals of class certification decisions. ¹²⁰ A few states do not allow appeals as of right at all, ¹²¹ but these states, such as Nevada, have permitted "quasi appeals" through writs of mandamus in such situations. ¹²² A cursory

[*1326] examination of recent developments in state appellate case law in the area of non-federal question damages **class actions** reveals an apparatus already in place to restrain undisciplined state trial courts.

2. State Appellate Courts Tame the Beast, Even in Alabama

One of the experts who testified during hearings on the Act pointed out that Alabama is one of the states plaintiffs' attorneys have targeted in filing **class action** suits. ¹²³ As a result of increased filing, there is a relatively well-developed body of case law on damages **class actions** there. Although some trial judges seem to be certifying classes without a careful adherence to either the state **class action** rule or federal case law, ¹²⁴ the Alabama Supreme Court has explored this area thoroughly over the past several years and has disfavored certification. ¹²⁵

In *Ex parte Green Tree Financial Corporation* ("Green Tree II"), plaintiffs brought suit in Alabama state court on behalf of a nationwide class of borrowers alleging several common law causes of action including fraud, contracts, and negligence. ¹²⁶ After the trial court had entered a certification order over the defendants' objection, the defendants petitioned the Alabama Supreme Court for a writ of mandamus. ¹²⁷ Two years earlier the Alabama Supreme Court had first issued a writ of mandamus requiring the trial court to set aside **[*1327]** its class certification order for want of evidentiary findings. ¹²⁸ The plaintiffs then renewed their motion to certify, and significantly expanded their class proposal. ¹²⁹ The defendants again petitioned the Alabama Supreme Court for a writ of mandamus, this time seeking to vacate the trial court's order. ¹³⁰

The court began its analysis by citing leading federal case law for the proposition that a trial court must identify the substantive law that applies to the Federal Rule 23(b)(3) class at the outset to determine its propriety. ¹³¹ The court noted that such an inquiry is "particularly important" where the putative class is "multistate" and requires the application of divergent state laws because "variations in state law may swamp any common issues and defeat a finding of predominance." ¹³² The court then determined that the plaintiffs had not carried their burden of demonstrating that class certification was proper because they failed to adequately address the variations in all of the relevant states' laws. ¹³³ Finally the court remarked that a trial court "may not merely rely on the assurances of counsel that any problems with predominance or superiority arising from variations in state law can be overcome." ¹³⁴

The court then cited federal case law for the Federal Rule 23(b)(3) "superiority" analysis as well. The court noted that the greater the number of individual issues in a putative **class action**, the less likely it is that a court may properly find that class treatment is "superior" to individual adjudication. ¹³⁵ The court then found that for the plaintiffs' breach of contract claim the factfinder would have to ascertain the intent of the parties for all of the class members. ¹³⁶

With a single exception, the *Green Tree II* Court cited only to federal case law in interpreting the requirements of the **class action** rule. The Alabama Supreme Court closed the opinion with dicta that reveal the extent to which the court sought to align its own practice with the

federal **class action** jurisprudence: [*1328] "Indeed, we have grave concerns as to whether any national class of plaintiffs in an action involving the application of the differing laws of numerous states can satisfy the requirements of [Federal Rule 23(b)(3)]." ¹³⁷

The Green Tree II decision is not anomalous in Alabama case law. The state supreme court has consistently required the trial courts to conduct a detailed inquiry into class certification motions based upon substantial evidentiary findings. ¹³⁸ Trial court certification orders that "merely parrot the formulaic language of Rule 23" are insufficient. ¹³⁹ The court, citing the Fifth Circuit in Castano and the Supreme Court in General Tel. Co. v. Falcon ¹⁴⁰ for authority, has even suggested that a trial court look behind the pleadings to examine the "nature of the claims and defenses, the relevant facts, and the substantive law" in certain cases. ¹⁴¹ The court has been so adamant in requiring the trial court to conduct the requisite evidentiary Federal Rule 23 analysis that it has granted mandamus writs decertifying even putative classes limited only to Alabama residents. ¹⁴²

The Alabama Supreme Court has demonstrated its concern for defendants' due process rights in ruling that ex parte certification orders (in which the defendant does not have notice of the suit or an opportunity to oppose the motion) do not satisfy the requirements of Federal Rule 23 unless the class proponent demonstrates a "compelling reason" for such procedure. ¹⁴³ The court has further shown sensitivity for the due process concerns inherent in applying the law of a state court to the claims of a nationwide class. In Ex parte Exxon Corp., ¹⁴⁴ the court granted a writ of mandamus ordering the lower appellate court to decertify a nationwide class based on the lower court's merely "cursory review" of the choice-of-law issues. ¹⁴⁵ The court remarked that the lower [*1329] court failed to consider the Supreme Court's instructions in Phillips Petroleum Co. v. Shutts ¹⁴⁶ regarding constitutional protections, and also ignored the federal courts' decisions on how complex choice-of-law issues affect the Federal Rule 23 (b)(3) predominance inquiry. ¹⁴⁷ A footnote in the Exxon opinion explicitly recognized the basis for the court's continual reliance on federal case law: "Because [Alabama's **class action** rule] is substantially identical to [the federal rule], in interpreting our Rule 23 we use cases interpreting the federal rule as persuasive authority." ¹⁴⁸ While the state trial courts may be lax on occasion in their treatment of **class actions**, the Alabama Supreme Court has consistently been vigilant in its strict adherence to federal authority when defining the contours of Federal Rule 23.

3. Alabama Appellate Courts Are Not Alone

While Alabama's **class action** rule is substantially similar to Federal Rule 23, other states have **class action** rules that differ significantly in their language. Nonetheless, many of these states have also followed federal case law in interpreting their rules. In California, a state with a **class action** rule different from Federal Rule 23, ¹⁴⁹ two appellate courts recently issued writs of mandamus directing the trial courts to vacate nationwide class certification orders. In Cannon U.S.A., Inc. v. Superior Ct., ¹⁵⁰ the court decertified a nationwide class due to the problems posed by variation among the laws of all fifty states. While the court did not rule on whether such a class could ever be certified, it predicated its order on federal case law requiring the plaintiff to demonstrate how variations in state law could be handled so that class treatment was manageable. ¹⁵¹

[*1330] In Norwest Mortgage Inc. v. Superior Ct., ¹⁵² the California Court of Appeal considered another proposed nationwide class and the due process concerns involved in a fifty-state choice-of-law analysis. The court carefully dissected the Shutts holding, and noted that because personal jurisdiction over a foreign defendant is distinct from the question of constitutional limitations on choice-of-law, the fact that the defendant corporation was incorporated and did business in California did not mean that the forum law could be applied to the claims of nonresident plaintiffs. ¹⁵³ The court concluded that applying California law to the claims of certain foreign class members would be "arbitrary and unfair," and would transgress due process limitations. ¹⁵⁴

In Louisiana, where a recent study determined it to be the leading state with respect to both the number and the rate of mass tort **class action** filings, the appellate courts have explicitly stated their intention to follow federal **class action** precedent.¹⁵⁵ Courts have held variation in state law in a nationwide class to defeat commonality and predominance, and have cited all of the usual leading federal cases.¹⁵⁶ In addition, Louisiana courts have reversed trial court settlement class orders for not adhering to the Supreme Court's guidelines as set out in *Amchem Products, Inc. v. Windsor*.¹⁵⁷ Indeed, in a recent opinion, the Louisiana appellate court lamented the current status of the **class action** device where the current "practice ... is either to use class certification to extort settlement from defendants who are not liable or to prevent recovery to plaintiffs who are entitled to an award" ¹⁵⁸ Most of the other states' appellate courts have followed suit,¹⁵⁹ and it appears that the only certification orders that are being upheld on appeal are for classes limited to the forum state's residents.¹⁶⁰

[*1331] Although it is near impossible to discern the precise extent of "abusiveness" of state courts in the **class action** arena, it appears that the state courts of appeals apply the **class action** requirements with rigor equal to their federal counterparts.¹⁶¹ Even though defending these cases is costly, the prospect of an expedited interlocutory review of the certification decision reduces the incidence of "extortionate" tactics. Some states already have amended their own **class action** rules to permit interlocutory review, and others essentially allow for such review via writs of mandamus. The bleak prospects for appeal or interlocutory review observed by the House Report seem to be exaggerated.¹⁶² Therefore, even though its proponents have characterized the Act as a "modest, well-reasoned answer" to the "state court **class action** crisis," it is in fact a severe measure when considered in relation to the actual magnitude of the problem.¹⁶³

III. The Interstate **Class Action** Jurisdiction Act of 1999

A. How the Statute Would Change Existing Law

The Act proposes to change existing law by expanding federal court original jurisdiction and by relaxing **removal** procedures. In individual litigation, the Supreme Court has required a rule of complete **diversity** under which no plaintiff and defendant can be citizens of the same state in order to satisfy **diversity** [*1332] jurisdiction.¹⁶⁴ However, in the **class action** context, the Supreme Court has interpreted federal question jurisdiction at 28 U.S.C. 1332 to require that only the named parties to a **class action** suit be considered for **diversity** purposes, while the unnamed class members are ignored.¹⁶⁵ Such a reading gives plaintiffs wide leeway in structuring the suit. In contrast, the Supreme Court has interpreted the amount in controversy requirement stringently with respect to **class actions**. While the Court first declared only that class members' claims could not be aggregated to meet the jurisdictional minimum where no individual plaintiff's claim was sufficient,¹⁶⁶ it later proclaimed that every member of a class must individually satisfy the statutory minimum where the claims asserted are not joint.¹⁶⁷

[*1333] The Act would amend 1332 to grant original federal jurisdiction in federal courts to hear interstate **class actions** in which any member of the proposed class was a citizen of a state different from any defendant.¹⁶⁸ This would change the current rule of "complete **diversity**" to one of "minimal **diversity**."¹⁶⁹ There would be several exceptions to the new amendment, allegedly to exempt **class actions** which are "truly local" in nature.¹⁷⁰ The "intrastate" exception would require federal courts to refuse to hear any case in which the claims would be governed primarily by the law of the state in which it was originally filed, and in which the "substantial majority" of the plaintiff class members and the primary defendants were all citizens of the same state.¹⁷¹ The "limited scope" exception would exclude those **class actions** with fewer than one hundred class members or in which the aggregate amount in controversy was less than \$ 1 million (exclusive of interest and costs).¹⁷² The amount in controversy requirement would no longer apply in **class actions**, except as it relates to the "limited scope" exception.¹⁷³

[*1334] The Act would also establish new rules governing **removal of class actions** filed in state court. First, unnamed plaintiff class members would be allowed to remove to federal court those **class actions** in which their claims were being asserted.¹⁷⁴ As the law stands today, only defendants have **removal** capability.¹⁷⁵ Second, parties would be allowed to remove without the consent of any other party;¹⁷⁶ whereas currently, a case can only be removed when all of the defendants consent.¹⁷⁷ Third, **removal** would be available to any defendant regardless of whether the defendant was a citizen of the state in which the action was brought.¹⁷⁸ Under the current rule, if a defendant is a citizen of the state in which the action is brought the suit is not removable.¹⁷⁹ Fourth, the bar to **removal** of suits after one year would be eliminated with respect to **class actions**.¹⁸⁰ If the federal court to which the suit were removed determined that the case could not be maintained as a **class action** under Federal Rule 23, the case would be dismissed without prejudice.¹⁸¹ If the suit were refiled in a new state court and again fell under the newly expanded jurisdiction of federal courts, it could again be removed.¹⁸²

[*1335]

B. Purposes and Policies of the Act

The Act is an attempt by **Congress** to handle the difficult issue of tort reform via procedural legislation.¹⁸³ The Act's supporters endorse the way federal courts have handled state law **class actions**, and some even believe that state courts are not protecting litigants' due process rights.¹⁸⁴ The drafters of the legislation are attempting to cure a major defect that has frustrated past efforts in this area,¹⁸⁵ as the primary focus of the Act eliminates state courts as a viable forum for the plaintiffs' bar to file multistate **class action** lawsuits.¹⁸⁶ The proponents of the Act essentially rely on two main arguments to support their case for "minimal **diversity**" in state-law **class actions**: (1) that foreign defendants need protection from discrimination by state courts and juries; and (2) that the federal system is "better" than the state system institutionally.¹⁸⁷ The proponents of the Act assert that "multistate **class action** suits¹⁸⁸ are the paradigm [*1336] candidates for **diversity** jurisdiction,¹⁸⁹ and the fact that they are excluded by the current federal **diversity**-of-citizenship jurisdiction statute is merely a "technical flaw."¹⁹⁰ The proponents of the Act favor the way that the federal judiciary has handled **class actions** in the latter half of the 1990s,¹⁹¹ but perceive several evils that have developed since the plaintiffs' bar has retreated to the state courts.

The legislative history has identified various methods employed by the plaintiffs' bar for "gaming the system" and defeating **diversity** jurisdiction.¹⁹² Once in state court, plaintiffs' counsel can take advantage of the allegedly "lax" application of class certification standards.¹⁹³ Such lax application allows for quick certification and often leaves the defendant no choice but to settle [*1337] rather than face such greatly increased liability.¹⁹⁴ In addition, the House Committee argues that state courts are ineffective (or even incompetent) in supervising class settlements, allowing class counsel to settle cheaply (often through "in kind" settlements) to maximize the value of their own time on the case.¹⁹⁵ The last general area in which the Committee has found state courts to [*1338] be lacking is in their overly broad application of state laws. Indeed, the Committee believes that certain states are effectively dictating the laws of other states, thus raising "federalism" concerns.¹⁹⁶

1. **Diversity** Jurisdiction

Probably the most widely accepted basis for **diversity** jurisdiction is its intention to provide a neutral forum for out-of-state residents who would otherwise be subject to local bias in state courts.¹⁹⁷ The legislative history suggests, [*1339] by quoting particular federal case law, that protection from local bias is a primary impetus for the Act.¹⁹⁸ However, the legislative history seems at times to conflate "bias" with "scale" by arguing that the largest cases with the most money at stake and the largest number of people involved are the types of cases that "most clearly fit the historic rationale" for federal **diversity** jurisdiction.¹⁹⁹ Whether that "historic rationale" for **diversity** jurisdiction is so clearly delineated however, is questionable

because the original purposes of **diversity** jurisdiction remain subject to dispute. ²⁰⁰

One important purpose of **diversity** jurisdiction entailed protecting creditors from pro-debtor sympathies. ²⁰¹ Also, before *Erie Railroad Co. v. Tompkins*, ²⁰² **diversity** jurisdiction provided the federal judiciary an opportunity to create a uniform federal common law. ²⁰³ Some commentators therefore believe that the state court "prejudice" that **diversity** jurisdiction was intended to counteract was in fact the "prejudice engendered by aberrational state laws." ²⁰⁴ Under this view, the feared bias emanated from state legislatures and not from state courts. Furthermore, research concludes that the most common forms of bias confronting litigants in contemporary society are predicated on race or class, as opposed to state citizenship. ²⁰⁵ Under that view, the Act's supporters would be [*1340] technically correct in stating that bias is a significant consideration in litigation, but it would not counsel in favor of expanded federal jurisdiction. Because the same substantive state laws would still have to be applied in the federal forum after **removal**, there would be little justification on these grounds for the reallocation. ²⁰⁶

Not only is it unclear whether "protection from prejudice" was or remains the true basis of **diversity** jurisdiction, it does not even appear that the Act's proponents are relying on that basis. The Act would amend the current 1441(b) so that a class suit could be removed without regard to whether the removing defendant is a citizen of the forum state. ²⁰⁷ This indicates that **Congress** is relying much more heavily on a "facilitation of interstate commerce" rationale for **diversity** jurisdiction than on the "bias against out-of-staters" argument. Although promoting interstate commerce was likely part of the original impetus behind **diversity**, ²⁰⁸ without the prospect of judicial "home cooking" it seems improbable that that is a sufficient reason. Otherwise, the current 1332 would have the citizenship of the parties and the amount in controversy requirement as alternative requirements, rather than as conjunctive conditions. Indeed, 1441(b) in its current form recognizes the primacy of the "bias rationale" in allowing only foreign defendants to remove a case. ²⁰⁹ The legislative history similarly misconstrues the purpose of the amount in controversy requirement, which was included in 1332 to perform a gate-keeping function, so that federal courts are not swamped with trivial cases. ²¹⁰ However, that [*1341] does not imply that cases placing a large amount of money at stake are necessarily deserving of a federal forum.

Chief Justice William Rehnquist pointed out in his 1998 Year-End Report on the Federal Judiciary that while the "protection from prejudice" rationale was valid when the Judiciary Act of 1789 was enacted, changed conditions over the last two centuries have eviscerated such institutional disparities between the court systems. ²¹¹ Whatever the true basis for **diversity** jurisdiction, it seems likely that the Act's proponents have oversimplified the issue, rendering their analysis incomplete. Coupled with the fact that it is questionable to what extent the proponents rely on the grounds proffered, the basis for granting "minimal" **diversity** to such a broad category of cases is simply not established.

2. Federalism and Parity

Even if the Act was consistent with the purposes of **diversity** jurisdiction, it would still violate the principles of federalism. Essentially, *Erie Railroad Co. v. Tompkins* ²¹² and *Railroad Commission v. Pullman Co.*, ²¹³ taken together, stand for the proposition that state courts are the exclusive, proper arbiters of state law. On the other hand, Professor Neuborne and the other proponents of the "disparity" between state and federal courts have argued that the federal court system is superior to the state systems. ²¹⁴ Even though the parity debate has focused on relative advantages in the adjudication of federal constitutional claims, some believe that the same institutional advantages counsel in favor of the federal courts having jurisdiction over **class actions** that are national in [*1342] scope even though they arise under state law. ²¹⁵ The scenario that the Act is meant to address falls somewhere in between the two poles. The sorts of cases that the Act would remove would arise under state law, but involve one state's adjudicating other states' laws. Because this case is more closely analogous to the "exclusive province of the states" model, and because of the inapplicability

or invalidity of most of the arguments proffered in support of the Act, it is an unwise intrusion into state matters.

a. Erie and Pullman

In Erie, the plaintiff Tompkins, a citizen of Pennsylvania, had been injured by a train in Pennsylvania and brought a negligence suit in federal court in New York. ²¹⁶ The defendant asserted that Pennsylvania substantive law controlled, and under that law it would not be held liable. ²¹⁷ The district court refused to apply Pennsylvania law, because, under the rule of Swift v. Tyson, ²¹⁸ in **diversity** cases of "general law" federal courts were free to exercise independent judgment as to state substantive law. ²¹⁹ Justice Brandeis, writing for the Supreme Court, declared that the laws of the states are simply not matters of federal concern. ²²⁰ He suggested that such interference by federal courts is unconstitutional, ²²¹ and cited Justice Field in the case of Baltimore & Ohio Railroad Co. v. Baugh:

Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either ... is an invasion of the authority of the State and ... a denial of its independence. ²²²

The Court's rejection of the Swift doctrine recognized the essential role of the state, both through its courts and its legislature, in promulgating and defining state law.

[*1343] Several years later, the principle that certain state-law issues must be decided in state court, as opposed to federal court, received its "classic statement" in Railroad Commission v. Pullman Co. ²²³ In Pullman, the controversy concerned an order of the Texas Railroad Commission requiring that white conductors, rather than black porters, supervise sleeping cars. ²²⁴ The Pullman Company, the railroads, and the intervening black porters asserted that the order violated the federal Constitution and exceeded the commission's statutory authority. ²²⁵ The Court sought to avoid deciding the constitutional question by abstaining from adjudicating the state law matter. ²²⁶ Writing for the Court, Justice Felix Frankfurter justified abstention on two main grounds: (1) avoiding unnecessary adjudication of constitutional claims; and (2) avoiding needless interference with legitimate state policies. ²²⁷ He emphasized that a federal decision on the meaning of the controlling Texas law, though it would be competent, would still be unwise: "No matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination. The last word on the meaning of ... the Texas Civil Statutes ... belongs neither to us nor to the district court but to the supreme court of Texas." ²²⁸

Underlying both the Court's abrogation of a "general" federal common law under Swift and the Pullman abstention doctrine is a profound respect for state courts and recognition that they are the authoritative interpreters of state law. ²²⁹ Courts and commentators generally agree with the premise, inherent in Justice Frankfurter's opinion, that state courts provide superior forums for state-law claims. ²³⁰ Scholars have noted that in the area of interpreting state **[*1344]** constitutions, state courts are the superior, definitive forum. ²³¹ Similarly, some have argued that federal courts are allowed to exercise supplemental jurisdiction over state claims solely for reasons of efficiency and judicial administration, rendering federal adjudication of state law "at best a necessary evil." ²³² The supplemental jurisdiction statute itself contemplates the sort of concern for the state's primary role in defining state law, by allowing the federal court to refuse jurisdiction over a state claim if it "raises a novel or complex issue of State law." ²³³ Under this view, the Act would contravene an axiomatic premise of our dual-court system: it would prevent state courts from adjudicating those disputes arising solely under state law.

b.

(Dis)parity

In his seminal article in the Harvard Law Review, *Myth of Parity*, Professor Burt Neuborne asserted that institutional distinctions between the federal and state court systems make litigating in either fundamentally different.²³⁴ Professor Neuborne's thesis was that federal courts are superior to state courts for adjudicating federal constitutional rights because they enjoy a number of institutional advantages.²³⁵ Scholars have since debated the historical antecedents of the dual-system judiciary,²³⁶ and because the choice of forum often has a direct impact on outcome, scholars and legislators continue to debate vigorously the comparative advantages either system affords.²³⁷ "In its purest form, the parity [*1345] debate concerns whether state courts can be trusted to enforce federal constitutional rights."²³⁸ While the cases affected by the Act would arise under state law, the Act's proponents have essentially relied on the arguments comprising the "disparity" canon for their conclusion that state courts are an inferior forum for resolving multistate **class actions**. Indeed, under this view all litigation that crosses a certain threshold of complexity and breadth belongs in federal court. In this section, this Comment presents the main tenets of the disparity contingent in conjunction with the arguments proffered in favor of the Act. By juxtaposing the two camps, this Comment will show how the Act's supporters have appropriated the Neuborne model and applied it to the multistate **class action** context.

One of the critical themes that runs throughout the legislative history and testimony is that the judges in state court are "biased" in applying their substantive laws to foreign citizens' claims.²³⁹ This results in bias toward the defendant, who will have to litigate under presumably disadvantageous law. This also might offend the sovereignty of other states, in that a foreign forum will be applying its own laws to citizens of another state. Such bias is the result of state judges' susceptibility to local pressures, and they are susceptible to such pressures because they are elected, and not appointed.²⁴⁰ While federal judges enjoy life tenure with undiminished salary,²⁴¹ state judges usually are elected and often are subject to periodic retention elections.²⁴² A state judge may be influenced to engage in a cursory, expedited analysis of the **class action** prerequisites, essentially depriving the defendant of a neutral forum or even of due process.²⁴³ The Neuborne camp believes that the protections embodied in [*1346] Article III of the Constitution make federal judges necessarily superior in enforcing constitutional rights.²⁴⁴ The argument is that, in an area likely to arouse popular opposition to reform, insulation from that opposition facilitates superior adjudication.²⁴⁵ Although the Article III protections were intended to insulate federal judges with respect to enforcing constitutional rights,²⁴⁶ champions of the Act would argue that hordes of local constituents suing a foreign corporation implicate the same concerns by pressuring locally elected judges.²⁴⁷ Stated differently, under this view federal judges are more likely to [*1347] conduct the choice-of-law analysis attendant in a multistate **class action** in an unbiased fashion, and will rigorously apply the requirements of the **class action** rule.

Professor Neuborne also identified the superior technical competence of federal judges. Federal judges are appointed from a much smaller pool of candidates, and are paid higher salaries,²⁴⁸ ensuring superior talent.²⁴⁹ The federal judicial selection process is premised on identifying ability and skill, while election to the state bench is "less concerned with professional competence once a minimum level has been attained."²⁵⁰ Even though the federal docket is currently bursting at the seams,²⁵¹ it probably remains less crowded than the [*1348] dockets of state courts of general jurisdiction.²⁵² The caliber of the clerks that federal judges employ is another advantage of the federal system; while the federal clerks are usually recent law school graduates at the top of their respective classes, state court clerks are often career bureaucrats.²⁵³ On the whole, the relatively superior technical competence of the federal judiciary persuaded Professor Neuborne to argue that the "federal trial courts tend to be better equipped to analyze complex, often conflicting lines of authority and more likely to produce competently written, persuasive opinions than are the state trial courts."²⁵⁴

The proponents of the Act would argue that such technical competence likewise counsels in favor of expanded federal jurisdiction. Multistate **class actions** require complex choice-of-law determinations to comply with the constitutional strictures of *Phillips Petroleum Co. v. Shutts*.²⁵⁵ Some have argued that experiential advantages of federal courts, coupled with the "larger staffs"²⁵⁶ and more ample resources²⁵⁷ make the federal forum superior for adjudicating multistate **class actions**.

The House Report identifies several other "institutional" advantages available only in federal courts. Because of the federal multidistrict litigation statute, duplicative litigation in federal courts may be transferred and consolidated for pretrial purposes.²⁵⁸ In the state system, absent informal cooperation between courts, no state court need defer to any other state's courts.²⁵⁹ **Congress [*1349]** apparently labored under the assumption that such cooperation between states is rare, as it identified the "increasing frequency" with which such "copycat" suits are being filed.²⁶⁰ Federal judges also have the luxury of magistrate judges, who handle more of the pretrial matters, such as discovery motions and status conferences.²⁶¹ This allows federal judges more time to monitor potentially collusive settlement negotiations and to assess diligently whether the prerequisites of class treatment, such as adequate representation, continue to be met. Similarly, the new availability of discretionary appeals of class certification orders counsels for expanded jurisdiction,²⁶² as there is no uniform right to such review in state courts.²⁶³ Moreover, in federal courts there is the possibility of authorizing nationwide service of process, whereas state courts will remain subject to the personal jurisdiction analysis outlined in *International Shoe Co. v. Washington*²⁶⁴ and *Phillips Petroleum Co. v. Shutts*.²⁶⁵

Under this model, federal courts would be better able to produce unbiased, expert analyses of multistate legal issues. This would be fairer to foreign defendants, and especially to other states. Federal courts would be able to effectuate a primary purpose underlying **diversity** jurisdiction (provision of a neutral forum), would promote commercial expansion, and probably would enhance uniformity as well. In the words of one expert, increased federal jurisdiction would allow for state courts to operate within their proper sphere in adjudicating "divorce pleas, petty theft prosecutions and dog bite cases,"²⁶⁶ and federal courts would be left to handle all cases requisitely "complex" regardless of whether the suit is brought under federal or state law.

[*1350]

c. The Multistate, State-Law Suit Belongs in the State Courts

If state courts actually were guilty of abuses in **class action** adjudication, it should not have raised the ire of any legislators unless they fundamentally believed that the state court system was structurally inferior to the federal court system.²⁶⁷ Indeed, the notion of a national court system that is fundamentally unequal is inherent in the criticisms that state courts are "lax" or "fail to recognize the power of the class <clb>action<crb> device."²⁶⁸ In addition, although experts identified attorneys' fees as the "root cause" of the perceived **class action** problems, no provision in the current version of the bill addresses them.²⁶⁹ Thus, one of the underlying assumptions of the proponents of the Act is that federal courts are somehow more capable of supervising class settlements than are state courts. These are simply variations on the same themes of "propriety," "bias," and "relative advantage" identified throughout this Comment. Essentially the Act is based on a single premise: that the state court system is less able to adjudicate multistate class suits.

The "disparity" arguments proffered in favor of federal court jurisdiction are vulnerable to criticism for several reasons. First, the "parity" debate was a response to the issue of adjudication of federal constitutional claims by state courts.²⁷⁰ One of the main concerns underlying the preference for hearing federal constitutional claims in federal courts was that state courts would "be grudging when local authority <clb>was<crb> attacked on federal

grounds." ²⁷¹ A fundamental qualitative difference exists between those sorts of claims and the garden-variety state tort or contract claims at issue here. There is an undeniable [*1351] difference between talking about what forum is preferable for hearing an equal protection challenge to a gerrymandering scheme, and which system is appropriate for hearing a breach of warranty claim. The sorts of ideological biases implicated by federal constitutional litigation simply are not relevant when talking only about monetary remedy, as in the damages **class action**. In other words, because of the nature of the claims at issue, the parity arguments should not be invoked.

To emphasize the extent to which the parity debate is content-dependent, some critics have noted that the "disparity" between the court systems is less pronounced in the areas of civil rights and family law. ²⁷² In that view, federal courts may enjoy institutional advantages in adjudicating civil liberties claims because their "insulation and scholarly tradition" makes them more intellectually responsive to such claims. ²⁷³ The crucial qualitative difference lies in the idea that adjudication of civil liberties claims is an abstract intellectual enterprise, ²⁷⁴ and the fact that this sort of endeavor is the area of expertise for those federal judges schooled in the "libertarian tradition" of Locke and Mill. ²⁷⁵ The repeat nature of civil liberties in state courts breeds a familiarity that actually gives state courts an advantage. ²⁷⁶ If the disparity between the court systems is reduced in the context of civil rights claims in the area of common law fraud the reduction is even more significant.

Other persuasive arguments show that, even if appropriate, the parity arguments that the Act's supporters rely upon are weak. As discussed earlier, the state appellate courts have, and will continue to be, a bulwark against bias and abuse in class certification litigation. ²⁷⁷ In addition, a significant percentage of federal judges are native to the area where they are appointed. ²⁷⁸ This suggests that if bias is in fact correlated with geographic ties, then federal judges should [*1352] be susceptible to such shortcomings as well. ²⁷⁹ Evidence also shows that even state court trial judges seldom decide cases in a way that they perceive will win them votes. ²⁸⁰ Studies have shown that state judges win such a high percentage of retention elections that, ²⁸¹ combined with the fact that few cases are highly enough publicized, it is unlikely that judicial electioneering occurs in decisionmaking. ²⁸²

Professor Neuborne also noted that the comparative advantages of federal district courts over state trial courts are substantially diminished when comparing state appellate courts with federal district courts. ²⁸³ In fact, Professor Neuborne noted that the "competence gap" between federal judges and state appellate judges might even favor the latter. ²⁸⁴ Several incidents occurred over the past several years in which federal courts have been equally remiss in properly supervising class settlements as any state court. ²⁸⁵ Other scholars have noted that the gap in "prestige" that distinguishes the two systems also may be minimal, when the comparison is between state appellate judges and federal judges. ²⁸⁶ The fears of local bias and technical incompetence that permeate [*1353] the House Report and testimony therefore are not as imminent as the Act's supporters hold.

Another argument states that state trial judges are better at applying state laws due to their intimate familiarity with them. This reasoning informed Justice Frankfurter's opinion in *Pullman*, ²⁸⁷ and suggests that state court judges possess certain "nuanced instincts" in the area of state law?even if the "state law" they are applying is from another state. ²⁸⁸ Professor Neuborne recognized that the federal judges are afflicted with an "ivory tower" syndrome, and that it was precisely their unfamiliarity with the gritty realities of the typical state court docket that made them superior in the federal constitutional context. ²⁸⁹ Although many courts, mostly federal, have held that variation of state law should counsel against multistate class certification, ²⁹⁰ other scholars believe that the differences are not insuperable. ²⁹¹ Whether the variation is indeed prohibitive, however, should be a determination made by those jurists most intimately acquainted with state law in general.

Aside from their relative skill-based advantages in adjudicating state law claims, a strong "propriety" argument stresses that states should hear such claims. Implicit in the Fifth

Circuit's reasoning in *Castano* was that many of the state laws involved in the proposed nationwide class suit were "immature," and had to be defined by state courts before they would be ripe for federal class certification.²⁹² In this view, the court was not holding that such a class never could be certified, but rather that state courts should get the first crack at deciding untested issues. Implicit in the *Castano* holding is that adjudication of untested [*1354] state law issues is safer in state courts because they can arrive at innovative, potentially inconsistent solutions to novel questions through trial and error without the "all or nothing" effect of a single federal court opinion.²⁹³ This deference for the propriety of state courts defining state laws is also mandated by *Erie*, and further counsels against expanding federal court jurisdiction over state law class suits.²⁹⁴ A related concern is that, if federal courts are forced to handle rights created by state laws that have yet to be defined, they will be unlikely to give a more progressive interpretation than will state courts. Such a concern is especially powerful in the **class action** context, in which some states have **class action** rules different from the federal rule, and have interpreted them more broadly.²⁹⁵ This phenomenon would be a function of unfamiliarity rather than bias, but would result in more uniformly conservative substantive law nonetheless.²⁹⁶

Still another argument against federal courts' superiority in this context is that the drain on judicial resources that would flow from the Act's passage would threaten any advantages extant. The federal courts' supposed superiority emanates from the small, elite federal trial bench and the federal courts' limited jurisdiction.²⁹⁷ To underscore the difference, there are about twice as [*1355] many trial judges in California as there are in the entire federal system, and about three times as many cases.²⁹⁸ As noted earlier, Chief Justice Rehnquist has implored **Congress** not to expand federal jurisdiction any further out of concern for the federal court system's health, stating that "the number of cases brought to federal courts is one of the most serious problems facing them today."²⁹⁹ Rather than opening up the federal courts by expanding **diversity** jurisdiction, numerous proposals have been presented for contracting federal court **diversity** jurisdiction - precisely out of concern for a burgeoning federal case load.³⁰⁰ One scholar has even suggested eliminating **diversity** jurisdiction entirely due to the tension it causes between the state and federal court systems.³⁰¹

In addition, the Commission on Structural Alternatives for the Federal Courts of Appeals, chaired by retired Justice Byron R. White, in its Final Report emphasized the importance of: "restraint in conferring new jurisdiction on the federal courts, particularly in areas traditionally covered by state law and served by state courts."³⁰² Indeed, Justice White noted nearly twenty years ago that **Congress** had asked the Judicial Committee headed by Chief Justice Burger not to create the new bankruptcy judges under Article III so as to keep the federal judiciary's elite position and superior judicial product intact.³⁰³ Although some experts testified that the efficiencies made possible through consolidation in federal courts would offset the increased caseload,³⁰⁴ the Act [*1356] would overburden the federal courts and threaten the very superiority that supposedly animates the federal judiciary.³⁰⁵

One final argument that cuts against the appropriateness of the Act is the extent to which it would deny the states the right to enforce the laws that their legislatures promulgate. Even though the states would retain the authority to create rights and causes of action commensurate with the exigencies of their unique locales, they would be deprived of a significant way of enforcing those rights. In certain circumstances, as in consumer protection legislation, the economic realities of litigation, which provided the original impetus for the amendments to the Federal Rule 23 in 1966,³⁰⁶ again would thwart redress in the courts.

This Comment's task in demonstrating that the parity debate is inapposite in the state law context has been relatively unchallenging, considering that Professor Paul Bator made the "uphill" argument persuasively in the federal constitutional context in which this debate first arose.³⁰⁷ He averred that it was a "virtual certainty" that state courts would continue to do the work of enforcing federal constitutional principles.³⁰⁸ Bator said this not because some sort of [*1357] consensus would be reached regarding allocation between the court systems, but because "the institutional costs" of an alternative system (where the states

were excluded from such cases) would "inevitably be assessed as too high." ³⁰⁹ In the instant case, the states should be allowed to continue to adjudicate complex cases arising under state law; that is the function that they were intended to perform. The institutional costs in the form of a loss of comity between the court systems, the flood of litigation in federal courts, and the affront to state sovereignty that would flow from the Act are simply too high.

IV. Conclusion

The supporters of the Act are trying to effectuate a change in the substantive law of the United States and attempting to cloak that purpose in the more benign attire of procedural law. It is not fortuitous that federal courts in the last decade have shut their doors on the state law **class action**, and that the Act's framers have recently proposed such a massive reallocation of responsibility between the court systems. Armed with a handful of inflammatory anecdotes, they have sought to accomplish what would amount to the most radical federalization of traditional state law ever. They have ignored not only the best interests of the hundreds of thousands of plaintiffs, present and future, who would be without a means of legal redress, and not only the state courts and legislatures which they would relegate to second-class citizens in our system of supposedly limited federal government, but they have ignored the stark practical realities of limited federal judicial resources. It is telling that in all the hearings that were conducted over the past two years, the Act's supporters only once, in a footnote, addressed the superlative abilities of the state appellate courts in maintaining the guarantees of due process in administering **class action** litigation. It is also telling, and somewhat ironic, that they have appropriated a canon of arguments that was developed to assure litigants the most careful and expansive reading of federal constitutional rights, and have applied those arguments in the least appropriate context. It is crucial that we critically analyze the situation, and that the "crisis" in state courts is seen for what it is: at most, a moderate disturbance worthy of consideration by state court judges and state legislators.

FOOTNOTES:

↑n1. Regulatory Reform Act: Hearings on H.R. 2327 Before the Subcomm. on Admin. Law and Govtl. Regulations of the House Comm. on the Judiciary, 98th Cong. 312 (1983) ("Hearings on H.R. 2327") (statement of Rep. Dingell).

↑n2. Interstate **Class Action** Jurisdiction Act of 1999: Hearings on H.R. 1875 Before the House Comm. on the Judiciary, 106th Cong. 81 (1999) ("Hearings on H.R. 1875") (Statement of Professor Richard Daynard, J.D., Ph.D., Law Professor at Northeastern University Law School and Chairman of the Tobacco Liability Project).

↑n3. Haines v. Liggett Group, Inc., 814 F. Supp. 414, 421 (D.N.J. 1993) (citation omitted).

↑n4. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 185-86 (1974) (Douglas, J., dissenting):

I think in our society that is growing in complexity there are bound to be innumerable people in common disasters, calamities, or ventures who would go begging for justice without the **class action** but who could with all regard to due process be protected by it... . The **class**

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

Id.

†n5. See, e.g., Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985); Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980); Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997); see also William W Schwarzer, Structuring Multicclaim Litigation: Should Rule 23 Be Revised?, 94 Mich. L. Rev. 1250, 1255 (1996).

†n6. Stephen C. Yeazell, Group Litigation and Social Context: Toward a History of the **Class Action**, 77 Colum. L. Rev. 866, 867 (1977) (footnote omitted).

†n7. For a discussion of **class action** and the view that the adversary system may not be the best method for resolving disputes in our society, see Carrie Menkel-Meadow, The Trouble with the Adversary System in a Postmodern, Multicultural World, 38 Wm. & Mary L. Rev. 5 (1996).

†n8. See, e.g., Complex Litigation: Statutory Recommendations and Analysis with Reporter's Study (1994). The report raised some of the serious federalism concerns associated with federal reform in the area of mass torts. The study advocated coordination between the state and federal court systems, wherein a federal complex litigation panel would designate a state court as a transferee forum to adjudicate complex consolidated cases. See id. at 177. The American Law Institute ("ALI") asserted that state courts should retain nationwide service of process in order to obtain jurisdiction over these cases. See id. at 192. See also William W Schwarzer et al., National Conference on State-Federal Judicial Relationships, Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts, 78 Va. L. Rev. 1689 (1992) (discussing possible means to coordinate overlapping litigation between the state and federal court systems).

†n9. Fed. R. Civ. P. 23.

†n10. See infra notes 46-47 and accompanying text.

†n11. See infra notes 81-96 and accompanying text.

†n12. H.R. 1875, 106th Cong. (1999); H.R. Rep. No. 106-320 (1999). On September 23, 1999, the House of Representatives passed the Act, and it was received in the Senate on November 19, 1999.

¶n13. Justice Oliver Wendell Holmes commented on the nature of contemporary use of ancient legal devices:

When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal.

Adolf Homburger, State **Class Actions** and the Federal Rule, 71 Colum. L. Rev. 609, 609 (1971) (quoting Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897) (address at Boston University School of Law, Jan. 8, 1897)).

¶n14. Both sides of the debate concede that the Act would move the vast majority of **class actions** arising under state law into the federal courts. See H.R. Rep. No. 106-320, at 20.

¶n15. Hearings on H.R. 1875, supra note 2 (prepared statement of John H. Beisner, Esq., O'Melveny & Myers LLP, Washington D.C.).

¶n16. 304 U.S. 64 (1938).

¶n17. 312 U.S. 496 (1941).

¶n18. In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300 (7th Cir. 1995).

¶n19. See Charles Alan Wright, **Class Actions**, 47 F.R.D. 169, 169 (1969) (citing Montgomery Ward & Co. v. Langer, 168 F.2d 182, 187 (8th Cir. 1948) ("The **class action** was an invention of equity ... mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs.")). Specifically, the **class action** traces its origins back to England:

The **class action** is a seventeenth-century invention created by English chancery courts to cope with disputes between such groups as rural tenants and landlords, and parishioners and parsons. Because each tenant or parishioner had a similar interest at stake, it was economical to settle common questions of law and fact in a single chancery suit. Further, because many were often people of small means, they welcomed the opportunity to pool their resources and allow their trusted leaders to champion their cause. In these **class-action** case precursors, the parties were interested in a single piece of property, or the tithe, or the village common. English judges then slid easily from the church and the village common to the joint-stock company and the financial syndicate, extending the rules to include them.

Still, the **class action** was one that involved a multitude, each with a common interest... . No matter how refined, how revised, or how evolved this flashy import becomes, the goal of the **class action** remains the same - justice for the lowly, the tenants, the parishioners, the multitudes.

Wood River Area Dev. Corp. v. Germania Fed. Sav. and Loan Ass'n, 555 N.E.2d 1150, 1152 (Ill. App. Ct. 1990).

¶n20. The Field Code required numerous parties and a common interest in law or fact. It reads, in part: "When the question is one ... of many persons, or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole." 3 Herbert Newberg & Alba Conte, Newberg on **Class Actions** 13.04, at 14-17 (3d ed. 1997).

¶n21. Federal Equity Rule 38 (1912) provided: "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole." Fed. Equity R. 38, 226 U.S. 659 (1912); Hopkins, Federal Equity Rules (8th ed. 1933).

¶n22. At common law, the original rule recognized three types of **class actions**. The "true" **class action** involved joint rights in which a class decision was binding on all class members. See Smith v. Swormstedt, 57 U.S. 288 (1853). The "hybrid" category involved several rights relating to a specific property, and was also binding on all class members. See *id.* The "spurious" **class action** involved several rights affected by a common question of law or fact affecting the right and a common relief was sought, but it was not accorded a binding effect on all class members. See James Wm. Moore, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 Geo. L.J. 551, 570-76 (1937); see also All American Airways v. Elder, 209 F.2d 247, 248 (2d Cir. 1954).

¶n23. See Zechariah Chafee, Jr., Some Problems of Equity 243-95 (1950); Harry Kalven, Jr. & Maurice Rosenfield, The Contemporary Function of the Class Suit, 8 U. Chi. L. Rev. 684, 695-714 (1941).

¶n24. See Richard L. Marcus and Edward F. Sherman, Complex Litigation: Cases and Materials on Advanced Civil Procedure 210 (3d ed. 1998). Current Federal Rule 23 allows a matter to be brought as a **class action** in federal court if:

(a)(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23. In addition, one of the following must be shown:

(b)(1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications ... which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a **class action** is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a **class action**.

Id.

†n25. See Thomas A. Dickerson, **Class Actions: The Law of 50 States**, 1.02[3], 1.04[3] (Release 8, 1999); Homburger, *supra* note 13, at 626 n.94, 631 n.133. Alaska, Georgia, New Mexico, North Carolina, and Rhode Island have modeled their **class action** rules on the original Federal Rule 23. California, Nebraska, South Carolina, and Wisconsin have modeled their rules on the Field Code. Mississippi, New Hampshire, and Virginia have common law **class action** guidelines, but do not have any formal rules. See generally 1 Herbert B. Newberg, *Newberg on Class Actions* 3 (2d ed. 1985); Note, *State Class Action Statutes: A Comparative Analysis*, 60 Iowa L. Rev. 93 (1974).

†n26. See, e.g., *Wright*, *supra* note 19, at 177-79. See generally Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action* 238-66 (1987).

†n27. The "jural relationship" was based on the "right" that the proponents of the suit were seeking to enforce. Rights were categorized as "several," "joint," "common," "secondary," or "primary." *Fed. R. Civ. P. 23* (308 U.S. 689-90 (1939) (revised 1966)).

†n28. See *Wright*, *supra* note 19, at 175-77.

†n29. See Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"*, 92 Harv. L. Rev. 664, 678-79 (1979).

†n30. In the early days, Federal Rule 23(b)(3) **class actions** were viewed as particularly helpful in securities suits in which the class members' claims were relatively small. See, e.g.,

Richard O. Cunningham, Editorial Note, **Class Action** Treatment of Securities Fraud Suits Under the Revised Rule 23, 36 Geo. Wash. L. Rev. 1150, 1150 (1968) (citing 3 Louis Loss, Securities Regulation 1819 (1961)). Id.

For the purposes of this historical analysis, this Comment refers to Federal Rule 23(b)(3) ("damages") **class actions** unless otherwise noted. This is because most of the controversy in courts, and consequently in **Congress** as well, has been centered around this variety of **class action**. Federal Rules 23(b)(1) and 23(b)(2) both deal with classes based on the dispositive effect of inconsistent adjudications on limited funds and equitable relief, respectively, and are generally considered inappropriate for mass tort **class actions**, consumer **class actions**, or other claims in which money damages are the primary form of relief sought. The limited fund class, however, is often sought in cases in which a defendant may be subject to excess liability over its net worth, or some similar measure, and claimants will seek a **class action** to allocate that limited fund. See, e.g., In re Asbestos Litigation, 90 F.3d 963 (5th Cir. 1996). Although the Committee Report recommending the Act to the Senate did not expressly discuss (b)(1) or (b)(2) **class actions**, the language of the Report indicates that abuses due to attorney avarice and excessively large state court verdicts, inter alia, largely were responsible for the proposal. These concerns would be minimal, or non-existent, if the type of **class action** targeted by **Congress** was not the Federal Rule 23 "money damages" **class action**. "[These] interstate **class actions** ... typically put the most money in controversy, involve the most people, and have the most interstate commerce ramifications." H.R. Rep. No. 106-320, at 7 (1999).

†n31. See Miller, *supra* note 29, at 678 (citing lack of supervision over attorneys' fees, and careless analysis of and supervision over settlements as among the most significant problems which plagued the newly amended **class action** in practice).

†n32. See *id.* ("Cases were certified as **class actions** on the basis of rather conclusory assertions of compliance with Rule 23(a) and (b).").

†n33. See, e.g., Francis R. Kirkham, Complex Civil Litigation - Have Good Intentions Gone Awry?, 70 F.R.D. 199 (1976):

In the nearly half century of my practice I have never seen a single other circumstance which has created the cynicism at the bar that has arisen from the settlement negotiations in [**class actions**] and the accompanying maneuvering for fees... . It is not the finest hour of a profession that produced a Lord Coke to challenge the Crown, and a David Dudley Field to challenge the right even of a Lincoln to suspend the writ of habeus corpus.

Id. at 207.

†n34. "In kind" compensation refers to forms of relief other than cash. This includes coupons, replacement parts, or other tangible items.

†n35. 394 U.S. 332 (1969) (holding that, inter alia, class members could not aggregate their

separate and distinct claims to satisfy the amount in controversy requirement in federal courts).

¶n36. 414 U.S. 291 (1973) (holding that the amount in controversy requirement is met in a **class action** only if each of the class members individually seeks damages in excess of the statutory minimum).

¶n37. 417 U.S. 156 (1974) (holding that individual notice and an opportunity to "opt out" must be given to all identifiable class members in a Federal Rule 23(b)(3) class).

¶n38. For a discussion of mass torts, see Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941 (1995); see also Deborah R. Hensler and Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 Brook. L. Rev. 961 (1993)

¶n39. See 7B Charles Alan Wright et al., *Federal Practice and Procedure* 1783 (2d ed. 1986).

¶n40. See, e.g., Deborah L. Rhode, *Class Conflicts in **Class Actions***, 34 Stan. L. Rev. 1183 (1982) (analyzing ethic concerns presented by plaintiff **class actions** seeking structural institutional reform); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 Nw. U. L. Rev. 469 (1994) (discussing the complexity of the ethical tensions pulling on corporate defendants, plaintiffs' counsel, the bench, the scientific community, and the other branches of government).

¶n41. See *Miller*, *supra* note 29, at 685-93.

¶n42. 782 F.2d 468 (5th Cir. 1986).

¶n43. See *id.* at 469, 471.

¶n44. *Id.* 472-73.

¶n45. *Id.* at 473. The court cited two contemporaneous cases for the proposition that class certification could be used in such a flexible way, as to certify a class only as to the resolution of particular issues using Federal Rule 23(C)(4)(A). The Fifth Circuit noted the now famous case of *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y. 1983), *aff'd*, 725 F.2d 858 (2d Cir. 1984). In that case, Judge Jack B. Weinstein found that the main defenses

to liability in Agent Orange cases - the government contractor defense and the lack of scientific evidence of causation - were "common" and therefore class certification was proper. Id. at 721-24. The Fifth Circuit in Jenkins also cited with approval the Third Circuit's certification of a limited issue class in In re School Asbestos Litig., 789 F.2d 996 (3d Cir. 1986). The court agreed with the Jenkins court that the "threshold of commonality is not high" when considering that prong of Federal Rule 23(a), and agreed that the rule only requires that "resolution of the common questions affect all or a substantial number of the class members." Id. at 1010. The Third Circuit best articulated the progressive spirit which had informed these three, and many other opinions, when it noted that:

Determination of the liability issues in one suit may represent a substantial savings in time and resources. Even if the action thereafter "degenerates" into a series of individual damage suits, the result nevertheless works an improvement over the situation in which the same separate suits require adjudication on liability using the same evidence over and over again.

Id. at 1008 (citing Hernandez v. Motor Vessel Skyward, 61 F.R.D. 558 (S.D. Fla. 1973)).

✚n46. See In re A.H. Robins Co., 880 F.2d 709, 729 (4th Cir. 1989), cert. denied, 493 U.S. 959 (1989).

✚n47. See, e.g., Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 563 (2d Cir. 1968) ("[the amended Federal Rule 23] should be given a liberal rather than a restrictive interpretation"); Esplin v. Hirschi, 402 F.2d 94, 99 (10th Cir. 1968), cert. denied, 394 U.S. 928 (1969) ("If there is to be an error made, let it be in favor and not against the maintenance of the **class action** ...").

✚n48. See, e.g., Mass Torts and **Class Action** Lawsuits: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 105th Cong. (1998) ("Mass Torts Hearing") (testimony of Elizabeth Cabraser, Esq., Lief, Cabraser, Heimann & Bernstein, LLP). Cf. Mary J. Davis, Toward the Proper Role for Mass Tort **Class Actions**, 77 Or. L. Rev. 157, 194-205 (1998) (discussing Rhone-Poulenc as an example of the courts of appeals' wholesale rejection of the mass tort **class action**, and that Castano, along with Rhone-Poulenc, serves as a bookend to the **class action** litigation over the past twenty years, along with Rhone-Poulenc, a resurrection of the "dogged dedication" to the case-by-case adjudication model which has served as the primary barrier to class certification in mass tort cases).

✚n49. 51 F.3d 1293 (7th Cir. 1995).

✚n50. 84 F.3d 734 (5th Cir. 1996).

✚n51. See, e.g., In re American Med. Sys., Inc., 75 F.3d 1069 (6th Cir. 1996). The court followed the reasoning of the Seventh Circuit in Rhone-Poulenc, by stating that the lower

court "failed to consider how the law of negligence differs from jurisdiction to jurisdiction, a consideration dictated by *Erie R.R. v. Tompkins*." *Id.* at 1085. The Sixth Circuit further asserted that legal variation among the common laws of the fifty states prevented the trial court from being able to properly instruct a jury. See *id.* See also *In re Teletronics Pacing Sys., Inc.*, 168 F.R.D. 203, 210 (S.D. Ohio 1996) (declining to adopt Judge Posner's "economic theories" and insisting on adherence to the federal rules), *rev'd*, 221 F.3d 870 (6th Cir. 2000). But see, e.g., *In re Copley Pharm., Inc.*, 161 F.R.D. 456, 460 (D. Wyo. 1995) ("The Court declines [defendant's] invitation to follow the Seventh Circuit's application of economic justice to the Federal Rules of Civil Procedure.").

¶n52. See *Rhone-Poulenc*, 51 F.3d at 1295-96.

¶n53. *Id.* at 1296-97.

¶n54. See *id.* at 1297.

¶n55. See *id.* at 1304.

¶n56. *Id.* at 1299.

¶n57. *Id.* The idea that the certification of a class is essentially the equivalent of placing a loaded gun at the defendant's head is not new. That a Federal Rule 23(c)(1) class certification is "Armageddon," or that class certification in general is "legalized blackmail" was noted over two decades ago. See *Miller, supra* note 29, at 679 (citing A. Miller, An Overview of Federal **Class Actions**: Past, Present, and Future (Federal Judicial Center ETS-77-8, 1977)); see also *Miller, supra* note 29, at 665 n.8 (citing Milton Handler, The Shift from Substantive to Procedural Innovations in Antitrust Suits - The Twenty-Third Annual Antitrust Review, 71 Colum. L. Rev. 1, 9 (1971)). Professor Miller did note that the defendants' treatment of class certification as disastrous is not entirely unfounded, as the "size of the potential liability takes on a frightening dimension." *Miller, supra* note 29, at 679 n.63. This fear continues today, and has provided much of the impetus for the Act. In fact, one witness at a Committee hearing noted that when **class actions** are not properly controlled by the courts handling them there can be:

The perverse result that companies that have committed no wrong find it necessary to pay ransom to plaintiff's lawyers because the risk of attempting to vindicate their rights through trial simply cannot be justified to their shareholders. Too frequently, corporate decisionmakers are confronted with the implacable arithmetic of the **class action**: even a meritless case with only a 5% chance of success at trial must be settled if the complaint claims hundreds of millions of dollars in damages.

Mass Torts Hearing, *supra* note 48 (prepared statement of John L. McGoldrick, Esq., Senior Vice President and General Counsel, Bristol-Myers Squibb Company). For a study that refutes

the contention that **class actions** constitute frivolous "strike suits" that use the remote threat of huge judgments to induce quick settlements, see Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. Rev. 74, 177 (1996).

†n58. See *Rhone-Poulenc*, 51 F.3d at 1304.

†n59. *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 418-19 (E.D. La. 1997).

†n60. See *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 177-78 (1974); *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975); see also *Wright*, *supra* note 39, 1785, at 125 (discussing *Eisen* and the Court's express rejection of a preliminary hearing to determine the merits of the litigation).

†n61. *Mass Tort Hearings*, *supra* note 48 (Testimony of Elizabeth J. Cabraser, Esq., Lief, Cabraser, Heimann & Bernstein, LLP); see also *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1232 (9th Cir. 1996) (noting that the concern in *Rhone-Poulenc* over whether the plaintiff's legal claims lacked merit at the certification stage "does not appear to be in line with the law of [the 9th Circuit] that has not looked favorably upon granting extraordinary relief to vacate a class certification.").

†n62. See *Rhone-Poulenc*, 51 F.3d at 1307-08 (Rovner, J., dissenting).

The majority's arguments addressed to the propriety of forcing "defendants to stake their companies on the outcome of a single jury trial" ... seem to me at odds with Fed. R. Civ. P. 23 itself. That rule expressly permits class treatment of such claims when its requirements are met, regardless of the magnitude of potential liability.

Id. (internal citations omitted); see also *In re Copley Pharm., Inc.*, 161 F.R.D. 456, 460 (D. Wyo. 1995). See generally Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973).

†n63. *Rhone-Poulenc*, 51 F.3d at 1300.

†n64. See *id.* at 1308 (Rovner, J., dissenting) ("The majority's preference for avoiding a class trial and for submitting the negligence issue "to multiple juries constituting in the aggregate a much larger and more diverse sample of decisionmakers' is a rationale for amending the rule, not for avoiding its application in a specific case.").

↑n65. Castano v. American Tobacco Co., 84 F.3d 734, 737 (5th Cir. 1996).

↑n66. 84 F.3d 734 (5th Cir. 1996).

↑n67. See Castano v. American Tobacco Co., 160 F.R.D. 544, 548, 550 (E.D. La. 1995).

↑n68. Id. at 552-58; see also Fed. R. Civ. P. 23(b)(3). The court certified the class conditionally pursuant to Federal Rule 23(c)(1). See Castano, 160 F.R.D. at 559-60. The court additionally certified the class only as to particular issues, pursuant to Rule 23(c)(4)(A). See id. at 559.

↑n69. See 160 F.R.D. at 554-56.

↑n70. See Castano, 84 F.3d at 742 (quoting In re School Asbestos Litig., 789 F.2d 996, 1010 (3d Cir. 1986)).

↑n71. At least one scholar has noted that, upon closer inspection, the court moved from requiring a "consideration of variations" to a requirement that a court must "know which law will apply" before making a predominance determination. Davis, *supra* note 48, at 203 & n.197. She concluded that to reason in this way is to confuse the "pre-dominance" inquiry with the "manageability" question which undergirds the "superiority" analysis. Id. at 204.

↑n72. Castano, 84 F.3d at 744-45.

↑n73. Id. at 746-47. One criticism of the Fifth Circuit's maturity test is that its difficulty in definition, as well as in application, strongly counsels against its inclusion in the **class action** process. See Recent Case, Castano v. American Tobacco Co., 110 Harv. L. Rev. 977, 978-79 (1996). The court did not attempt to define any quantitative parameters for guiding a maturity analysis, other than the scenario in which no individual trials have taken place. See id. at 979. If a quantitative analysis were sufficient, then the negative value class suit, which by definition has no track record, would always be "immature" and never eligible for class certification. See id. However, the Fifth Circuit claimed that the "negative value" suit provides the "most compelling rationale" for a superiority finding. See id. at 980. Also, the maturity test would result in an "institutional inertia" which would confer "unneeded advantages" upon defendants. Id. at 982 (citing Barry F. McNeil & Beth L. Fancsali, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 517-18 (1996); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1359 (1995); David Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 B.U. L. Rev. 695, 709-11 (1989)).

For an additional argument that the Castano court's reliance on the maturity test is misplaced, see Davis, *supra* note 48, at 206 (arguing that the immaturity argument is relevant to the fundamental nature of the product in the market, the scientific proof of the causal connection, or the novelty of the underlying claim, but that there is nothing "novel" about fraud, misrepresentation, or breach of warranty which are the essence of the Castano class's claims). See also Rosenberg, *supra*, at 708 (arguing that the Fifth Circuit's ability to subsume its distaste for novelty within the purportedly objective maturity test raises the concern that other judges may use the test in order to implement their personal beliefs about the appropriateness of the **class action**).

↑n74. Castano, 84 F.3d at 747.

↑n75. *Id.* The court added that "immature torts do not inherently fail Rule 23's predominance requirement; rather a court's inability to make an adequate predominance finding creates risks of judicial error and waste that lead to a failure of the superiority requirement." Recent Case, *supra* note 73, at 978 & n.15 (1997).

↑n76. See Recent Case, *supra* note 73, at 979.

↑n77. In a Louisiana appellate opinion, the court remarked that "the Castano reasoning, if carried to its logical conclusion, would eliminate **class actions** altogether." Scott v. American Tobacco Co., 725 So. 2d 10, 13 (La. App. 1998).

↑n78. See "Mass Tort Hearings," *supra* note 48 (prepared statement of Elizabeth J. Cabraser, Lief, Cabraser, Heimann & Bernstein, LLP) ("Thus, we must dispense with the notion that one purpose of **class actions** is to avoid the burden and confusion of piecemeal litigation; [under Castano] we must have such piecemeal litigation first.").

↑n79. Davis, *supra* note 48, at 202-03. But see Valentino v. Carter-Wallace, Inc., 97 F.3d 1227 (9th Cir. 1996). In that case, the Ninth Circuit considered the district court's certification of a class of epilepsy sufferers who acquired aplastic anemia as a side effect of using the defendant's epilepsy drug, Felbatol. *Id.* at 1228. The court disagreed with the Seventh Circuit's profound concern for the fiscal welfare of the defendants in Rhone-Poulenc, stating that such a thinly veiled effort at evaluating the plaintiff's claims as to the merits was improper at the certification stage. *Id.* at 1232. The court also reaffirmed that Federal Rule 23(C)(4)(A) authorizes the district court to sever common issues for class treatment. *Id.* at 1234.

↑n80. See, e.g., In re Masonite Corp. Hardboard Siding Prods. Liab. Litig., 170 F.R.D. 417 (E.D. La. 1997). The court denied class certification in a "classic" example of an appropriate mass-tort class: property damage claims of fairly small value arising out of defective house siding manufactured by only one defendant. The court held that Castano stated that federal courts should not certify cases that arise under state law, nor should they certify "novel"

cases. Similarly, class certification was denied to users of Norplant contraceptive device specifically based on the Castano court's statement that immature torts were not certifiable class claims. In re Norplant Contraceptive Prods. Liab. Litig., 168 F.R.D. 577 (E.D. Tex. 1996). In Arch v. American Tobacco Co., 175 F.R.D. 469 (E.D. Pa. 1997), the district court held that even in a **class action** in which all of the plaintiff class members are citizens of the same state, the law of only one state would have to be applied, and certification as to the issue of liability alone was tenable, immaturity doctrine and "general inappropriateness" counseled against certification. Davis, *supra* note 48, at 210 n.231. Cf. Barreras Ruiz v. American Tobacco Co., 180 F.R.D. 194 (D.P.R. 1998); Smith v. Brown and Williamson Tobacco Corp., 174 F.R.D. 90 (W.D. Mo. 1997).

↑n81. See Homburger, *supra* note 13, at 640.

↑n82. See Robert C. Eckhardt, Consumer **Class Actions**, 45 Notre Dame Law. 663 (1970) (citing S. 3092, 91st Cong. (1969); H.R. 3092, 91st Cong. (1969)). See also Christopher P. Bisgaard, Comment, Expanding the Impact of State Court **Class Action** Adjudications to Provide an Effective Forum for Consumers, 18 UCLA L. Rev. 1002 (1971).

↑n83. See Snyder v. Harris, 394 U.S. 332 (1969) (foreclosing jurisdiction over **diversity class actions** in which the claims of each of the representative parties do not meet the amount in controversy requirement). Cf. Zahn v. International Paper Co., 414 U.S. 291 (1973) (the claim of each class member must meet the amount in controversy requirement).

↑n84. H.R. Rep. No. 106-320, at 7 (1999) (citing Hearing on H.R. 1875, *supra* note 2 (prepared statement of John H. Beisner, Esq., O'Melveny & Meyers LLP, Washington, D.C.)).

↑n85. See Peter H. Schuck, Class Clarity, Am. Law., Jan. 2000, at 41, 41 (citing RAND Study, **Class Action** Dilemmas: Pursuing Public Goals for Private Gain, at 4 ("RAND Study") ("No one can reasonably estimate how much **class action** litigation exists or how the number of lawsuits has changed over time. Incomplete reporting of cases also means that it is impossible to select a random sample of all **class action** lawsuits for quantitative analysis.")).

↑n86. See RAND Study, *supra* note 85, at 5.

↑n87. *Id.* at 6.

↑n88. See *id.*

¶n89. Id. at 4:

Enormous methodological obstacles confront anyone conducting research on **class action** litigation... . No national register of lawsuits filed with **class action** claims exists... . Until recently, data on the number and types of federal **class actions** were substantially incomplete, and data on the number and types of state **class actions** are still virtually non-existent.

Id.

¶n90. See id. at 1, 5.

¶n91. Hearing on H.R. 1875, supra note 2 (prepared statement of John H. Beisner, Esq., O'Melveny & Meyers LLP, Washington, D.C.) (citing Analysis: **Class Action** Litigation?A Federalist Society Survey, 1 **Class Action** Watch I (visited Nov. 14, 2000) <<http://www.fed-soc.org/classwatchv101.htm>>). The study also seeks to establish that plaintiffs' counsel "forum-shop" in deciding where to file **class actions**. The report noted that in Texas **class action** filing grew 110% between 1988 and 1993, as compared with 338% growth between 1993 and 1998 due to a number of "certification friendly" decisions by the Texas intermediate appellate courts during the latter time period. Id.

¶n92. See, e.g., Timothy E. Eble, Emerging Issues in State Filings of Non-Federal Question **Class Actions**, 612 PLI/Lit 359, 361 (1999).

¶n93. See Hearing on H.R. 1875, supra note 2 (prepared statement of John H. Beisner, Esq., O'Melveny & Meyers LLP, Washington, D.C.) (quoting the RAND study: "<clb>M<crb>any attorneys (including some plaintiffs' counsel) [have] observed that 'too many non-meritorious [**class action** lawsuits] are [being] filed and certified' for class treatment.").

¶n94. See H.R. Rep. No. 106-320, at 7, 8 (stating that "some State courts are not properly supervising class settlements," and that "some State courts fail to recognize the power of the **class action** device and the need to carefully control its usage.").

¶n95. See id. ("The record contains examples of cases in which federal courts denied class certification based on due process concerns, but state courts subsequently certified classes anyway.") (citing Mass Tort Hearing, supra note 48 (prepared statement of John W. Martin, Jr., Vice President-General Counsel, Ford Motor Co.)). In addition, Dr. John B. Hendricks cited a docket study of Alabama trial courts prepared by Stateside Associates for additional evidence of state court non-conformity. Mass Torts Hearing, supra note 48 (prepared statement of Dr. John B. Hendricks, President, Ala. Cryogenic Engineering Inc.). A judge in the Seventh Judicial Circuit in Alabama had not denied certification to a putative **class action** for the three years during which the study was conducted. Id. Moreover, during 1996 and 1997 that same judge had granted motions to certify thirty-five **class actions**, which,

compared to the fact that all nine hundred federal district judges had certified only thirty-eight **class actions** in 1997, was an outrageous and presumptively wrongful figure. Id.

¶n96. See infra notes 123-63 and accompanying text.

¶n97. See Mass Tort Hearings, supra note 48 (statement of Ralph G. Wellington Esq., Schnader, Harrison, Segal & Lewis, LLP, Phila., Pa.).

¶n98. See Kamilewicz v. Bank of Boston Corp., 100 F.3d 1348 (7th Cir. 1996).

¶n99. See id.

¶n100. See id.

¶n101. Mass Tort Hearings, supra note 48 (statement of Ralph G. Wellington Esq., Schnader, Harrison, Segal & Lewis, LLP, Phila., Pa.); see also James T. Ferreni & Michael R. Grimm Sr., In the Wake of Kamilewicz: A Claim of Predatory Class Counsel Fees, 64 Def. Couns. J. 581 (1997); Susan P. Koniak & George M. Cohen, Under Cloak of Settlement, 82 Va. L. Rev. 1051 (1996).

¶n102. No. CIV.A. 18844, 1995 WL 775363 (Tenn. Ch. Nov. 17, 1995).

¶n103. See id.

¶n104. See RAND Study, supra note 85, at 19; see also Stacey Singer and Robin Fields, Lawyers Court **Class Actions**: Cases Double, But Consumers Rarely Get What They Expect, Sun-Sentinel (Ft. Lauderdale, Fla.), Feb. 22, 1998, at 1A (citing the Polybutylene Pipe litigation as an example of a **class action** that succeeded in vindicating class members' interests).

¶n105. RAND Study, supra note 85, at 22.

¶n106. See Hearings on H.R. 1875, supra note 2 (prepared statement of John H. Beisner, Esq., O'Melveny & Meyers LLP, Washington, D.C.).

¶n107. See id. (quoting Professor Susan Koniak, a member of the faculty of Boston University Law School) (alteration in original).

¶n108. See id. (quoting statement of Walter E. Dellinger III, former Solicitor General).

¶n109. See id. ("[A] state of course does not have any cognizable, federalism-based interest in interpreting, applying, and thereby dictating the substantive law of other states ... and because the state court decision has binding effect everywhere by virtue of the Full Faith and Credit Clause, the other states will have no way of revisiting the interpretation of their own laws.").

¶n110. That the plaintiffs' counsel had been forum-shopping was not lost on the Seventh Circuit in the Kamilewicz case. When Judge Evans asked one of the attorneys who had originally filed the Bank of Boston **class action** in Alabama state court how the forum was selected, he responded:

They could only surmise and if I could <clb>sic<crb> share their surmise with you which is not in the record ... that Alabama is a very friendly jurisdiction to **class actions** and to plaintiffs' classes in terms of the legal climate down there and that there are a lot of **class actions** brought in Alabama as opposed to other jurisdictions because of the perception, true or false by plaintiffs' counsel, it's a very good forum to go to.

Mass Torts Hearing, supra note 48 (prepared statement of Ralph G. Wellington Esq., Schnader, Harrison, Segal & Lewis, LLP, Phila., Pa.).

¶n111. Civ. A. No. 97-39 (Cir. Ct. Coosa County, Ala. 1997); cf. Peters v. Brants Grocery, Civ. A. No. 96-29 (Cir. Ct. Coosa County, Ala. 1996) (proposed nationwide class of every person who lives or owns property within 250 feet of a present or former gas station site anywhere in the U.S.).

¶n112. The trial court was subsequently ordered to lift class certification. See Hearings on H.R. 1875, supra note 2 (prepared statement of John H. Beisner, Esq., O'Melveny & Meyers LLP, Washington, D.C.).

¶n113. Id. at n.17. John W. Martin Jr., Vice President-General Counsel of Ford Motor Company, testified that a nationwide **class action** was filed on behalf of twenty-three million owners of Ford, Lincoln, and Mercury vehicles in a Tennessee state court in 1996. Mass Torts Hearing, supra note 48 (statement of John W. Martin, Jr., Vice President-General Counsel, Ford Motor Company) (citing Order Granting Nationwide Class Certification, Sweet v. Ford Motor Company, Civ.A. No. L-10463 (Cir. Ct. for Blount County, Tenn.) (filed July 10, 1996)). The court had been in possession of complaint and all amended materials for only several

hours, and certified the class before the defendants were even notified of the suit. *Id.* Mr. Martin referred to this ex parte procedure as "drive-by class certification." *Id.*

¶n114. In the federal court system, appeals are generally limited to final decisions on the merits. See 28 U.S.C. 1291 (1994). Because class certification decisions are generally considered interlocutory, they were thus not immediately appealable. See 2 Herbert H. Newberg & Alba Conte, Newberg on **Class Actions** 7.38, 7-111 (3d ed. 1992). Although the collateral order doctrine, see *Cohen v. Beneficial Indus. Loan Corp.*, 377 U.S. 541 (1949), provides a means by which some interlocutory orders can be appealed, the Supreme Court in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), held that orders denying or granting class certification are unappealable under the narrow collateral order exception. Even after *Coopers & Lybrand*, a litigant could still seek discretionary review of a class ruling under 28 U.S.C. 1292(b). See *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 336, reh'g denied, 446 U.S. 947 (1980) ("Our ruling in *Livesay* was not intended to preclude motions under 28 U.S.C. 1292(b) seeking discretionary interlocutory appeal for review of the certification ruling ..."). However, in 1998, Federal Rule 23 was amended, and the new section (f) allows interlocutory appeals of all class certification decisions as of right. See Fed. R. Civ. P. 23(f) (amended 1998).

Writs of mandamus in the federal courts are authorized under 28 U.S.C. 1651(a) ("The All Writs Act"), and authorize federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Unlike a discretionary appeal under 1292(b) that is appropriate for misinterpretations of questions of law, mandamus is appropriate for abuses of discretion. See Newberg & Conte, *supra*, 7.42, 7-128. It may lie if the district court, in determining the propriety of the **class action**, acts outside its jurisdiction, without regard for applicable procedural safeguards, or applies or refuses to apply the criteria of Federal Rule 23 in an arbitrary manner. See *id.* While writs of mandamus in the federal courts may be "extraordinary remedies" that are not frequently granted, Richard D. Freer & Wendy Collins Perdue, *Civil Procedure, Cases, Materials and Questions*, 853 (2d ed. 1997), in the state courts it appears that mandamus review is more commonly invoked and in some states the exclusive means through which to obtain review of a class order. See, e.g., *Ex parte AmSouth Bacorporation*, 717 So. 2d 357, 361 (1998) ("A petition for a writ of mandamus is the proper means for reviewing an order certifying a case as a **class action**." (citations omitted)).

¶n115. See *Millett v. Atlantic Richfield Co.*, 760 A.2d 250 (Me. 2000).

¶n116. See, e.g., *Nolan v. Sea Airmotive, Inc.*, 627 P.2d 1035, 1038 (Alaska 1981) (allowing appeal of class certification order pursuant to appeal rule permitting discretionary review of interlocutory orders of substance and importance); *Reader v. Magma-Superior Copper Co.*, 494 P.2d 708, 709 (Ariz. 1972) (en banc) (allowing appeal from denial of class certification pursuant to statute permitting appeals from orders affecting substantial rights). *Arkansas State Bd. of Educ. v. Magnolia Sch. Dist. No. 14*, 769 S.W.2d 419, 419 (Ark. 1989) (allowing appeal from class certification pursuant to appellate rule); *Aetna Cas. & Sur. Co. v. Cantrell*, 399 S.E.2d 237, 238 (Ga. Ct. App. 1990) (allowing appeal from class certification which trial court certified for immediate review); *Martin v. Amana Refrigeration, Inc.*, 435 N.W.2d 364, 366 (Iowa 1989) (allowing appeal from class certification pursuant to rule specifically allowing appeal from class certification order); *Carr v. GAF, Inc.*, 702 So. 2d 1384, 1385 (La. 1997) (noting that appeals from grant of class certification are appealable pursuant to rule permitting appeals from interlocutory orders which cause irreparable injury); *Faulkenbury v. Teachers' and State Employees' Retirement Services*, 424 S.E.2d 420, 429 (N.C. Ct. App.

1993) (granting discretionary appeal from order granting class certification pursuant to North Carolina appellate rule); Rogelstad v. Farmers Union Grain Terminal Ass'n, Inc., 224 N.W.2d 544, 548 (N.D. 1974) (allowing appeal from denial of class certification pursuant to statute permitting appeals from orders affecting substantial rights); Bell v. Beneficial Consumer Discount Co., 348 A.2d 734, 736 (Pa. 1975) (holding class certification orders as final for purposes of an appeal statute); McAllen Medical Center v. Cortez, 17 S.W.3d 305, 308 (Tex. App. 2000) (noting that class certification order is appealable pursuant to statute). But see Eaton v. Unifies Sch. Dist. No. 1 of Pima County, 595 P.2d 183, 184-85 (Ariz. Ct. App. 1979) (dismissing appeal from certification of defendant class as interlocutory and not appealable and distinguishing Reader on ground that Reader involved denial of class certification); Hanson v. Fed. Signal Corp., 679 A.2d 785, 787 (Pa. Super. Ct. 1996) (noting amendments to appeal statute and interpreting Bell as holding that such orders come within the collateral order exception to the final judgment rule).

†n117. See, e.g., Iowa R. of Ct. 42.4(c); Martin v. Amana Refrigeration, Inc. 435 N.W.2d 364 (Iowa 1989) (holding that appeals from certification decisions are permitted because they conserve judicial resources and have no relationship to the merits of the case); see, e.g., also N.D. R. of Civ. P. 23(d)(3); Holloway v. Blue Cross, 294 N.W.2d 902 (N.D. 1980) (permitting appeal from order of certification).

†n118. See, e.g., Ammons v. American Family Mut. Ins. Co., 897 P.2d 860 (Colo. App. 1995); Dix v. American Bankers Life Ins. Co., 367 N.W.2d 896 (Mich. App. 1985); Sarrat v. Lincoln Benefit Life Co., 323 N.W.2d 81, 83-84 (Neb. 1982).

†n119. See, e.g., Ex parte Gold Kist, Inc., 646 So. 2d 1339 (Ala. 1994); Stevens v. Thomas, 357 So. 2d 800, 803 (Ga. 1987); Skalbania v. Simmons, 443 N.E.2d 352 (Ind. App. 1982); Albriton v. Hartsville Gas Co., 655 S.W.2d 153 (Tenn. App. 1983).

†n120. See, e.g., Jerome A. Hoffman, Respecting the Rules: The Legislature Tinkers with Rule 23, 60 Ala. Law. 404, 405 (1999) (citing 6-5-642 of the Alabama Code, amending Ala. R. Civ. P. 23(c)(1) ("[a] court's order certifying a class or refusing to certify a **class action** shall be appealable in the same manner as a final order to the appellate court which would otherwise have jurisdiction over the appeal from a final order in the action.")).

†n121. See, e.g., Life of the Land v. Land Use Comm'n, 623 P.2d 431 (Haw. 1981); Wenthold v. AT&T Techs., Inc., 491 N.E.2d 1263 (Ill. App. 1986); Bellarmino College v. Hornung, 662 S.W.2d 847 (Ky. App. 1983); Ralph v. American Family Mut. Ins. Co., 809 S.W.2d 173 (Mo. App. 1991); Trapp v. Madera Pac., Inc., 390 N.W.2d 558 (S.D. 1986).

†n122. See, e.g., Meyer v. Eighth Judicial Dist. Ct., 885 P.2d 622 (Nev. 1994). See generally 54 A.L.R. 3d 595 (1973). Alabama, a state that traditionally allowed for frequent class certification review via writs of mandamus, see *infra* notes 117, 122 and accompanying text, has recently amended its **class action** rule to permit interlocutory review of class certification orders as of right, thus codifying the mandamus process. For an early discussion of interlocutory appeals of class certification in both federal and state courts, see Alan J.

Howard and Cary I. Klafter, Note, Appealability of a **Class Action** Dismissal: The "Death Knell" Doctrine, 39 U. Chi. L. Rev. 403 (1972); cf. Note, Multistate Plaintiff **Class Actions**: Jurisdiction and Certification, 92 Harv. L. Rev. 718, 728 (1979) (hypothesizing about the future of jurisdiction over multistate **class actions** in the days prior to Shutts v. Philips Petroleum, 472 U.S. 797 (1985)); Barry Abrams, Note, Toward a Policy-Based Theory of State Court Jurisdiction over **Class Actions**, 56 Tex. L. Rev. 1033 (1978).

¶n123. Dr. Hendricks cited the Stateside Associates study of Alabama dockets to support his assertion that "the number of **class actions** being filed in Alabama state courts appears to be increasing." Mass Torts Hearing, *supra* note 48 (prepared statement of Dr. John B. Hendricks, U.S. Chamber of Commerce). In the Circuit Court for Marengo County, no **class actions** were filed in 1995. *Id.* But seven were filed in 1996, and "at least" nine were filed in 1997. *Id.* The majority of these suits involved out-of-state defendants and absentee class members. *Id.* Also, in Greene County, the study reported that almost 10% of all civil cases filed were **class actions**. *Id.* See also RAND study, *supra* note 85, at 7 ("Consumer **class actions** were more prevalent in Alabama [between 1995-1996] than one would expect on the basis of population ... ").

¶n124. See *supra* note 111.

¶n125. See, e.g., Ex parte Green Tree Fin. Corp., 723 So. 2d 6 (Ala. 1998) ("Green Tree II"); Ex parte Water Works and Sewer Board, 738 So. 2d 783 (Ala. 1998); Ex parte AmSouth Bancorporation, 717 So. 2d 357 (Ala. 1998); Ex parte Exxon Corp., 725 So. 2d 930 (Ala. 1998); Ex parte Exide Corp., 678 So. 2d 773 (Ala. 1996).

¶n126. 723 So. 2d at 8-9.

¶n127. In Alabama, a petition for a writ of mandamus is the proper means for obtaining review of a trial court's certification of a class. See, e.g., Ex parte Green Tree Fin. Corp., 684 So. 2d 1302 (Ala. 1996) ("Green I"). The legislative history suggests that the availability of interlocutory review of class certification decisions via Federal Rule 23(f) is one of the structural protections that counsel use for moving most **class action** litigation into federal courts. H.R. Rep. No. 106-320, at 10 (1999).

¶n128. See Green Tree I, 684 So. 2d at 1302.

¶n129. See Green Tree II, 723 So. 2d at 8 ("The [plaintiffs] subsequently renewed their motion for class certification, but they altered the motion to broaden the scope of the purported class, seeking [to represent] a nationwide class of [all] persons who had loans with [defendant].").

¶n130. See id. at 6.

¶n131. Id. at 9 (citing Alabama v. Blue Bird Body Co. Inc., 573 F.2d 309, 316 (5th Cir. 1978)).

¶n132. Id. (citing Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996).

¶n133. See id. at 10.

¶n134. Id. (citing Alabama v. Blue Bird Body Co., 573 F.2d at 316; Castano v. American Tobacco Co., 84 F.3d 734); cf. Ex parte First Nat'l Bank, 717 So. 2d 342, 345 (Ala. 1997) (citing In re Hotel Tel. Charges, 500 F.2d 86, 90 (9th Cir. 1974) ("the trial court cannot simply 'rely on the 'imagination' of [the putative representative's] counsel to provide solutions' to Rule 23 problems.") (avertion in original).

¶n135. Green Tree II, 723 So. 2d at 9 (citing In re American Sys., 75 F.3d 1069 (6th Cir. 1996)).

¶n136. See id.

¶n137. Id. at 11 (emphasis added).

¶n138. See, e.g., Ex parte Water Works and Sewer Board, 738 So. 2d 783, 786 (Ala. 1998) (mandamus issued to decertify a class because the proponent failed to provide sufficient evidence of Federal Rule 23 criteria); Ex parte Citicorp Acceptance Co., 715 So. 2d 199, 203 (Ala. 1997) (same); Ex parte Exide Corp., 678 So. 2d 773 (Ala. 1996) (same); Ex parte Blue Cross & Blue Shield of Alabama, 582 So. 2d 469 (Ala. 1991) (same).

¶n139. Green Tree I, 684 So. 2d 1302, 1307 (Ala. 1996).

¶n140. 457 U.S. 147 (1982).

¶n141. Ex parte AmSouth Bancorporation, 717 So. 2d 357, 362 n.6 (Ala. 1998) (citing General Tel. Co. v. Falcon, 457 U.S. at 160 ("Sometimes the issues are plain enough from the pleadings ... and sometimes it may be necessary for the court to probe behind the pleadings

before coming to rest on the certification question.")). But see Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-81 (1974).

†n142. See, e.g., Ex parte Equity Nat'l Life Ins. Co., 715 So. 2d 192 (Ala. 1997).

†n143. Ex parte Frontier Corp., 709 So. 2d 1197 (Ala. 1998); Ex parte First Nat'l Bank, 717 So. 2d 342, 346 (Ala. 1997).

†n144. 725 So. 2d 930 (Ala. 1998).

†n145. Id. at 931, 934.

†n146. 472 U.S. 797 (1985).

†n147. See Ex parte Exxon Corp., 725 So. 2d at 932 (citing In re Ford Motor Co. Ignition Switch Prods. Liab. Lit., 174 F.R.D. 332, 349 n.2 (D.N.J. 1997) ("Plaintiffs bear the burden of providing an 'extensive analysis' of state law variations to determine whether there are 'insuperable obstacles' to class certification"); see also In re American Med. Sys., Inc., 75 F.3d 1069, 1085 (6th Cir. 1996); Castano v. American Tobacco Co., 84 F.3d 734, 750 (5th Cir. 1996)).

†n148. 725 So. 2d at 933 n.2; Ex parte Masonite Corp., 681 So. 2d 1068, 1086 (Ala. 1996) (citing Bracy v. Sippial Electric Co., 379 So. 2d 582 (Ala. 1980)).

†n149. Compare Cal. Civ. Proc. Code 382 (West 1973) ("When the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue for the benefit of all."), with Fed. R. Civ. P. 23.

†n150. 79 Cal. Reprtr. 2d 897 (Cal. Ct. App. 1998).

†n151. See id. at 8 (citing Walsh v. Ford Motor Co., 807 F.2d 1000, 1016-17 (D.C. Cir. 1986); In re Ford Motor Co. Ignition Switch Prod. Liab. Lit., 174 F.R.D. 332, 350 (D.N.J. 1997)).

¶n152. 85 Cal. Repr. 2d 18 (Cal. Ct. App. 1999).

¶n153. See id. at 25-26.

¶n154. Id. at 26.

¶n155. See, e.g., Carr v. GAF Inc., 711 So. 2d 802, 807 n.2 (La. Ct. App. 1998).

¶n156. See id. at 807 (citing Philips Petroleum Co. v. Shutts, 472 U.S. 797, 814-23 (1985); Castano v. American Tobacco Co., 84 F.3d 734, 741 (5th Cir. 1996)).

¶n157. 521 U.S. 591 (1997); see White v. General Motors Corp., 718 So. 2d 480 (La. Ct. App. 1998) (discussing the requirements of Amchem); cf. General Motors Corp. v. Bloyed, 916 S.W.2d 949, 955 (Tex. 1996) (citing In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig., 55 F.3d 768, 795-96 (3d Cir. 1995) for the proposition that, even if a class is to be certified for settlement purposes only, the requirements of Texas **class action** Rule 42 must be "scrupulously met, in their entirety").

¶n158. Hampton v. Illinois Cent. R.R., 730 So. 2d 1091, 1097 (La. App. 1999) (Kuhn, J., concurring in reversal of certification).

¶n159. See, e.g., Carroll v. Celco Partnership, 713 A.2d 509, 513-16 (N.J. Super. Ct. App. 1998) (certification improper where claims involved at least five different contracts with five different choice of law provisions, multiple causes of action, and significant factual differences necessitating individual proofs); Small v. Lorillard Tobacco Co., 252 A.D. 2d 1 (N.Y. App. Div. 1998) (holding that even a New York residents-only class was unmanageable due to the need for individualized determinations of reliance); Zarella v. Minnesota Mut. Life Ins. Co., No. 96-2782, 1999 WL 226223 (R.I. Super. Apr. 14, 1999) (when choice of law inquiry shows that the laws of numerous jurisdictions will apply to the case, unless plaintiffs present a workable plan to eliminate legal variation problems, class certification is improper).

¶n160. See, e.g., R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39 (Fla. Dist. Ct. App. 1994) (Florida Appellate Court modified what had been a nationwide class because of problems of manageability, limiting coverage to Florida residents only); Scott v. American Tobacco Co., 725 So. 2d 10 (La. Ct. App. 1998) (holding that limiting the plaintiff class to Louisiana residents eliminates the problems over which the Castano and Rhone-Poulenc courts were concerned).

¶n161. See Elizabeth Cabraser, Recent Developments in Nationwide Products Liability

Litigation: The Phenomenon of Non-Injury Product Cases, The Impact of Amchem, and the Trend Toward State Court Adjudication, and the Continued Viability of Carefully Constructed Nationwide Classes in the Federal Courts, 33 A.L.I.-A.B.A. 1, 10 (1998):

The experience of those involved in [state court **class action** litigation] has been that the near universal utilization and application of Federal Rule 23 ... by state courts, and the adoption and adaptation of the extensive body of federal **class action** jurisprudence to state substantive law ... results in equivalent standards ... and due process.

¶n162. See H.R. Rep. 106-320, at 10 (1999) ("Without the ability to remove [**class actions**] to Federal court, a defendant has no realistic opportunity to challenge the propriety of class certification.").

¶n163. The trial court was subsequently ordered to lift class certification. Hearings on H.R. 1875, supra note 2 (prepared statement of John H. Beisner, Esq., O'Melveny & Meyers LLP, Washington, D.C.).

¶n164. Federal courts are courts of limited subject matter jurisdiction and are confined to the areas explicitly granted by the Constitution and statutes. The Constitution authorizes subject matter jurisdiction in nine situations, one of which is in cases "between Citizens of different States." U.S. Const. art. III, 2, cl. 2. While the Constitution authorizes **diversity** jurisdiction, the actual grant is by statute. See 28 U.S.C. 1332 (1994 & Supp. III 1997). The Supreme Court has interpreted 1332 to require "full **diversity**" of parties, meaning that no plaintiff can have the same citizenship as any defendant. See Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806); Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373 (1978). Thus, the requirement of full **diversity** is not a Constitutional necessity, but a statutory interpretation. "In a variety of contexts [federal courts] have concluded that Article III poses no obstacle to the legislative extension of federal jurisdiction, found on **diversity**, so long as any two adverse parties are not co-citizens." State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530-31 (1967) (citing American Fire & Cas. Co. v. Finn, 341 U.S. 6, 10 n.3 (1951); Wichita R.R. & Light Co. v. Public Util. Comm'n, 260 U.S. 48 (1922); Barney v. Latham, 103 U.S. 205, 213 (1881)); see also Carden v. Arkoma Assocs., 494 U.S. 185, 187 (1990); Newman-Green Inc. v. Alfonzo-Larran, 490 U.S. 826, 829 n.1 (1989). Also, **diversity** jurisdiction is concurrent and not exclusive, so that cases involving fully-diverse parties may be litigated in state court if the parties choose. See Patrick J. Borchers, The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon, 72 Tex. L. Rev. 79, 133 n.1 (1993).

¶n165. See Snyder v. Harris, 394 U.S. 332, 340 (1969); Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921), overruled in part by Toucey v. New York Life Ins. Co., 314 U.S. 118 (1941).

¶n166. See Snyder, 394 U.S. at 340. The rule of **Snyder** barring **aggregation** of claims in

order to satisfy the jurisdictional amount still applies. See, e.g., In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 607 (7th Cir. 1997) ("The court cannot just add up the damages sought by each member of the class.").

†n167. See **Zahn** v. International Paper Co., 414 U.S. 291, 300 (1973). There has been some debate in recent years as to whether 1367, the supplemental jurisdiction statute, overrules **Zahn**. Compare Thomas C. Arthur & Richard D. Freer, Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute, 40 Emory L.J. 963 (1991) (arguing that **Zahn** is overruled by 1367); Richard D. Freer, Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute, 40 Emory L.J. 445 (1991), with Thomas D. Rowe, Jr. et al., Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer, 40 Emory L.J. 943, 960 n.90 (1991) (arguing that the legislative history of 1367 was intended to correct an "oversight" in drafting, and that 1367 does not overrule **Zahn**). Section 1367(a) grants district courts supplemental jurisdiction over claims that are part of the same "case or controversy" as the claim(s) over which it has original jurisdiction. 28 U.S.C. 1367(a) (1994). While 1367(b) limits supplemental jurisdiction in **diversity** cases, the limitation does not apply to **class actions**. See 28 U.S.C. 1367(b) (1994). The legislative history nevertheless says that "[t]his section is not intended to affect the jurisdictional requirements of 28 U.S.C. 1332 in **diversity**-only **class actions**" Marcus & Sherman, supra note 24, at 413 (citing H.R. Rep. No. 101-734, at 29 (1990), reprinted in 1990 U.S.C.C.A.N. 6860, 6875).

†n168. See H.R. Rep. No. 106-320, at 11 (1999).

†n169. Id.

†n170. Id.

†n171. Id. at 21. The legislative history adds that these exceptions are to be construed very narrowly. Id. For a **class action** to fall within the "intrastate" exception, "virtually all" of the members of the proposed class must all be citizens of a single state of which all "primary defendants" are also citizens. Id. "Primary defendants" are defined as those "who would be expected to incur the most loss should liability be found." Id. In addition, no defendant can be considered a "primary defendant" unless she is the subject of legitimate claims by all class members. Id. at 22. So, alleging that a defendant "conspired" to commit wrongdoing will not be sufficient to make her a "primary defendant." Id. This tight definition is intended to prevent plaintiffs' lawyers from "gaming the system" by naming token defendants in order to fall within the purview of the exception. Id. at 25.

Finally, when determining the citizenship of a corporate defendant, 1332(c) provides that a corporation is a citizen of both the state in which it was incorporated and of its principal place of business. See id. at 23. Under the Act, a plaintiff class member would be deemed a citizen of a state different from a defendant corporation only if that individual was a citizen of a state different from all states of which the defendant corporation is a citizen. See id. at 23-24.

¶n172. See *id.* at 21. The legislative history also makes clear that the "limited scope" exception should be interpreted narrowly. See *id.* at 22. The committee cautions that if a district court is unsure as to whether "all matters in controversy" in the aggregate exceed \$ 1 million, it should err on the side of exercising jurisdiction. *Id.* The other main exception to the proposed 1332(b) would be the "state action" case. *Id.* This would cover suits in which the primary defendants are states, state officials, or governmental entities against whom the district court may be foreclosed from ordering relief. See *id.* In addition, claims concerning a "covered security," as well as suits based solely on matters of corporate governance arising out of state law, will both be excluded from the new 1332(b) jurisdiction. *Id.*

¶n173. *Id.*

¶n174. See *id.* at 12, 24.

¶n175. See 28 U.S.C. 1441(a) (1994).

¶n176. H.R. Rep. No. 106-320 at 12, 24 (1999).

¶n177. See *id.* at 12.

¶n178. H.R. Rep. No. 106-320, at 12.

¶n179. See 28 U.S.C. 1441(b).

¶n180. See H.R. Rep. No. 106-320, at 24 (citing the current rule of 28 U.S.C. 1446(b)). The elimination of the one-year bar to **removal** would prevent class counsel from amending complaints to include new damages claims or new defendants. Under the current law, a new defendant cannot remove a case after one year even if she moves to do so immediately upon being named a party. *Id.* at 25. Currently, 1446(b) requires **removal** within thirty days of receipt of a paper (such as a pleading, motion, or order) from which it may be ascertained that the case is removable. See 28 U.S.C. 1446(b). The Act would change 1446(b) by adding that the party seeking to remove beyond the thirty-day window must exercise "due diligence." H.R. Rep. No. 106-320, at 25. This is intended to make it harder for a lone plaintiff to come in on the eve of settlement or during a trial and remove the case. See *id.*

¶n181. H.R. Rep. No. 106-320, at 25.

✚n182. Id. The committee acknowledged that a bar on re-**removal** is tenable, but that it would promote "bad policy." Id. Its argument is that that would be tantamount to asking the state court to review and overrule the decision of the federal court given that most state **class action** rules are substantially similar to Federal Rule 23. Id. This argument is substantially flawed. First, it is significant to note that twelve states, comprising a significant percentage of the U.S. population have opted not to adopt Federal Rule 23. See *supra* note 25 and accompanying text for a list of the different states. Even if a state has adopted the wording of Federal Rule 23 verbatim, it is still free to interpret its own rule in a manner commensurate with its local exigencies. *Felder v. Casey*, 487 U.S. 131, 138 (1988) ("<clb>It is an<crb> unassailable proposition ... that States may establish the rules of procedure governing litigation in their own courts.").

In the constitutional context, a state court may interpret its own constitution such that it provides more protection to its citizens than does the federal Constitution. See, e.g., William J. Brennan Jr., *The Bill of Rights and the States: The Revival of State Constitutions As Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535, 548 (1986); Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 Roger Williams U. L. Rev. 79, 79 (1982) (citing *Michigan v. Long*, 463 U.S. 1032 (1983)). The U.S. Constitution is merely a baseline that the states may not fall under. If the federal court decision in the instant context based its decision not to grant class certification on due process grounds, then the state should indeed be precluded from revisiting that decision, unless the class structure were modified.

✚n183. Congressional action that regulates the procedures to be employed by state courts regarding their handling of state law issues has been decried as "stealth preemption." Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures*, 44 Vill. L. Rev. 1 (1999). While the Act would not mandate that state courts apply any particular procedure to **class actions** brought, **Congress** is essentially legislating a substantive result in denying states the ability to adjudicate state law claims. It is clear from the legislative history that one of the main state court abuses at which the Act is directed is application of class certification standards which lack sufficient "rigor." H.R. Rep. No. 106-320, at 8. ("[Some] State court judges simply do not rigorously apply the appropriate class certification prerequisites, such that they will afford class treatment to virtually any kind of case"). This is problematic because it may be an end-run around *Erie*, and such "stealth preemption" also is of "questionable constitutionality." Parmet, *supra*, at 10.

✚n184. See H.R. Rep. No. 106-320, *passim*; see also *supra* note 183.

✚n185. See Richard H. Walker et al., *The New Securities Class Action: Federal Obstacles, State Detours*, 39 Ariz. L. Rev. 641, 641 (1997) (discussing how the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995), which was enacted in order to curtail perceived abusive securities **class action** litigation, had the unintended consequence of dramatically increasing the number of securities **class actions** filed in state courts).

✚n186. See H.R. Rep. No. 106-320, at 21.

Overall, the [Act] is intended to expand substantially Federal court jurisdiction over **class actions**. For that reason, its provisions should be read expansively; they should be read as stating a strong preference that interstate **class actions** be heard in Federal court if so desired by any purported class member or any defendant.

Id.

↑n187. See infra notes 256-66 and accompanying text.

↑n188. "Multistate" **class actions** are those that involve plaintiffs and defendants from several states, and call for the interpretation and application of the laws of many different states. Hearings on H.R. 1875, supra note 2 (statement of Hon. Walter E. Dellinger, III).

↑n189. See, e.g., Davis v. Carl Cannon Chevrolet-Olds, Inc., 182 F.3d 792 (11th Cir. 1999); accord In re Prudential Ins. Co. Am. Sales Practices Litig., 148 F.3d 283 (3d Cir. 1998). Judge Anthony Scirica (chair of the Judicial Conference's Standing Committee on Rules and Procedure) observed that "national (interstate) **class actions** are the paradigm for federal **diversity** jurisdiction because, in a constitutional sense, they implicate interstate commerce, foreclose discrimination by a local state, and tend to guard against any bias against interstate enterprises." In re Prudential, 148 F.3d at 305. Indeed, the legislative history echoes the Fifth Circuit in finding that interstate **class actions** "typically put the most money in controversy, involve the most people, and have the most interstate commerce ramifications. In short, they are the types of cases that most clearly fit the historic rationale for Federal **diversity** jurisdiction." H.R. Rep. No. 106-320, at 7.

↑n190. H.R. Rep. No. 106-320, at 4.

↑n191. See id. at 10 (1999) (citing Davis, 182 F.3d at 797). In Davis, the Eleventh Circuit offered an "apologia" for the current "anomaly" in **diversity** jurisdiction, in which the "matter in controversy" requirement of 1332 must be evaluated through the plaintiff's eyes, even though it often leads to what the court considered unfair results in the **class action** context. Davis, 152 F.3d at 797; see also Hearings on H.R. 1875, supra note 2, at 58 (statement of Hon. Walter E. Dellinger, III) ("Federal courts ... have exhibited particular sensitivity for the variations in substantive law among the different states, in accordance with core principles of federalism."); Mass Torts Hearing, supra note 48 (statement of John L. McGoldrick, Senior Vice President and General Counsel for Bristol-Myers Squibb Company) (quoting with approval Judge Posner's opinion in Rhone-Poulenc, 51 F.3d 1293, 1295 (7th Cir. 1995) ("[class certification] often, perhaps typically, inflicts irreparable injury on the defendants ...").

↑n192. H.R. Rep. No. 106-320, at 7. Defendants perceive state courts as more willing to certify classes. To avoid this, many defendants would rather remove a suit to federal court. In order to defeat this tactic, plaintiffs' counsel have employed several strategies to "destroy **diversity**." Id. One is by recruiting a plaintiff from the same state in which a corporate defendant is headquartered, even though the bulk of the plaintiff class members are from

another state. See *id.* Another method is adding a local "manager, agent or retailer" of an out-of-state corporation where the plaintiffs listed on the pleadings are "in-state." *Id.* Still another tactic that has been cited is waiting until one year has passed after the filing of the initial complaint (1446(b) states that no action can be removed after one year on **diversity** grounds), and then amending the complaint to include punitive damages. See *id.* In this way, even though each of the plaintiffs and all of the absentee class members would have met the \$ 75,000 amount in controversy requirement, the case cannot be removed to federal court. See *id.*

¶n193. See *id.* at 8 ("Although class certification standards do not differ radically among Federal and State courts, some State courts have shown very lax attitudes toward class certification.").

¶n194. A certified **class action** coerces settlement without regard for the case's merit or lack thereof, and amounts to a "strike suit." See, e.g., Willging et al., *supra* note 57, at 141. However, another perspective on the relationship between certification and settlement views certification as a "settlement event" that would "affect substantially the potential value of a settlement," "clarify uncertainty about the value of the case," and "let lawyers gauge the approach of the judge." *Id.* at 144 (citing Bryant G. Garth, *Studying Civil Litigation Through the Class Action*, 62 *Ind. L.J.* 497, 501 (1987)). Under this view, the "impetus to discuss settlement flows from a realistic assessment of the liability the litigation might be expected to impose," rather than gargantuan liability predicated on worthless claims. *Id.*

¶n195. Proponents of the bill believe that, under the inept supervision of state courts, class counsel have become the primary beneficiaries of class settlements while the class members get "coupon" or "paper" settlements. See *Davis v. Carl Cannon Chevrolet-Olds*, 182 F.3d 792, 798-99 (11th Cir. 1999) ("Actual monetary compensation rarely reaches the class members."). Whether this view of plaintiffs' class counsel is the norm is difficult to say. The RAND study found: "The wide range of outcomes that we found in the lawsuits contradicts the view that damage **class actions** invariably produce little for class members, and that **class action** attorneys routinely garner the lion's share of settlements." RAND Study, *supra* note 85, at 18. At the time of the hearings, the most comprehensive study of **class action** litigation that had been completed was the 1994-95 study conducted by the Federal Judicial Center and analyzed by Willging et al., *supra* note 57. That study rebutted claims that most **class actions** constituted frivolous strike suits, and that attorneys were benefiting disproportionately from **class actions**. See *id.* at 175-77. That study found that the typical recoveries of most class members "were in amounts that could not be expected to support individual actions." *Id.* at 177. As Benjamin Kaplan (then Reporter of the Civil Rules Advisory Committee) described the 1966 amendments which created the current Federal Rule 23:

<clb>T<crb>he entire reconstruction of the Rule bespoke an intention to promote more vigorously than before the dual missions of the **class-action** device: (1) to reduce units of litigation by bringing under one umbrella what might otherwise be many separate but duplicating actions; (2) even at the expense of increasing litigation, to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.

Benjamin Kaplan, A Prefatory Note, 10 *B.C. Indus. & Com. L. Rev.* 497, 497 (1969). The Willging study's findings, therefore, seem consistent with the intent of the drafters of Federal

Rule 23. See Hearings on H.R. 1875, *supra* note 2, at 60-68 (statement of Brian Wolfman, Staff Attorney, Public Citizen Litigation Group).

The danger of collusion between class and defense counsel has been explored at length in academic literature. See, e.g., John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 *Colum. L. Rev.* 1343, 1367-84 (1995) (discussing collusive arrangements between plaintiffs' and defendants' counsel in exchanging higher attorneys' fees for lower overall settlements); John C. Coffee Jr., *Understanding the Plaintiffs' Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 *Colum. L. Rev.* 669, 714-20 (1986) (arguing that principal-agent relationship makes class and derivative actions particularly susceptible to collusion between defendants' and plaintiffs' attorneys); see also *supra* note 39.

Federal courts have also recognized the danger of collusion between plaintiffs' and defendants' counsel. In *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348 (1996), Judge Easterbrook noted:

Representative plaintiffs and their lawyers may be imperfect agents of the other class members - may even put one over on the court, in a staged performance. The lawyers support the settlement to get fees; the defendants support it to evade liability; the court can't vindicate the class's rights because the friendly presentation means it lacks essential information. This possibility, a staple of the literature about **class actions** ... enjoys judicial recognition.

Id. at 1352 (citations omitted); see also Samuel Issacharoff, *Class Action Conflicts*, 30 *U.C. Davis L. Rev.* 805 (1997); Weinstein, *supra* note 40.

¶n196. Hearings on H.R. 1875, *supra* note 2, at 57-58 (prepared statement of Hon. Walter E. Dellinger, III). The Committee report relies on the testimony of Walter Dellinger. Dellinger provided several examples of different state courts applying the law of the forum state to the claims of plaintiffs from multiple states. See *id.* The committee reasoned that the forum state applying its own laws to all claims, where "inconsistent with the laws of [the] other jurisdictions" is a *per se* violation of due process. ("Some years ago, the U.S. Supreme Court has declared this practice to constitute a denial of due process, but it continues."). H.R. Rep. No. 106-320, at 8 (1999) (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985)).

However, the Committee has conflated a general "federalism"-type argument with the Due Process argument. All that Due Process and Full Faith and Credit require is for the forum state to have a "significant contact or significant **aggregation** of contacts" to the claims asserted by each member of the plaintiff class, contacts "creating state interests" to ensure that "the choice of [a forum state's] law is neither arbitrary nor fundamentally unfair." *Phillips Petroleum Co.*, 472 U.S. at 818 (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)). Conflict between the forum state's law and the laws of other jurisdictions involved is not dispositive of the constitutionality of choice of substantive law; rather, it is a factor to be considered. See *id.*; see generally Arthur R. Miller and David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions* After *Phillips Petroleum Co. v. Shutts*, 96 *Yale L.J.* 1 (1986).

¶n197. See, e.g., *Davis v. Carl Cannon Chevrolet-Olds Inc.*, 182 F.3d 792, 797 n.5 (11th Cir. 1999). In *Davis*, the court quoted *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 111 (1898), regarding the "protection from local bias" basis for **diversity** jurisdiction:

The object of the provisions of the constitution and statutes of the United States in conferring upon the circuit courts of the United States jurisdiction of controversies between citizens of different States of the Union ... was to secure a tribunal presumed to be more impartial than a court of the state in which one litigant resides.

Davis, 182 F.3d at 797 n.5 (quoting Barrow, 170 U.S. at 111).

The court also quoted Alexander Hamilton, writing in the Federalist Papers, who clearly articulated the "bias" rationale:

In order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the union will be entitled, the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspicious to the principles on which it is founded.

The Federalist No. 80, at 537-38 (Alexander Hamilton) (Jacob E. Cooke ed. 1961).

¶n198. H.R. Rep. No. 106-320, at 10-11 (quoting Davis, 182 F.3d at 797; In re Prudential Ins. Co. Am. Sales Practices Litig., 148 F.3d 283, 305 (3d Cir. 1998)).

¶n199. H.R. Rep. No. 106-120, at 7. There is evidence that **diversity** jurisdiction was intended to facilitate economic expansion by allowing enterprises to invest in other states. See Freer & Perdue, *supra* note 114, at 189-91 (quoting William Howard Taft <clb>Possible and Needed Reforms in the Administration of Justice in Federal Courts, 8 A.B.A. J. 601, 604 (1922)<crb> asserting that **diversity** jurisdiction "was the single most important element in securing capital for the development of the southern and western United States.").

¶n200. See, e.g., Abolition of **Diversity** of Citizenship Jurisdiction: H.R. Rep. No. 95-893, at 2 (1978) ("The debates of the Constitutional Convention are unclear as to why the Constitution made provision for [**diversity**] jurisdiction; nor is pertinent legislative history much aid as to why the First **Congress** exercised its prerogative to vest **diversity** jurisdiction in the Federal courts."); see also Roger J. Miner, *The Tensions of a Dual Court System and Some Prescriptions for Relief*, 51 Alb. L. Rev. 151, 153 (1987) ("The original reasons for the establishment of **diversity** of citizenship jurisdiction in the inferior federal courts are unclear.").

¶n201. Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 Cal. L. Rev. 1409, 1442 & n.141 (1999) (citing Wythe Holt, "To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 Duke L.J. 1421, 1453-66).

↑n202. 304 U.S. 64 (1938).

↑n203. See Schapiro, *supra* note 201, at 1443.

↑n204. See Borchers, *supra* note 164, at 132; see also Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483, 495-97 (1928) ("[A] careful reading of the arguments of the time [of the Constitutional Convention] will show that the real fear was not of state courts so much as of state legislatures.").

↑n205. Almost thirty years ago, the authors of the ALI study on federal jurisdiction expressed the sentiment thus:

As to the matter of prejudice, the conventional justification for general **diversity** jurisdiction, none of the significant prejudices that beset our society today begins or ends when the state line is traversed There are prejudices on racial, religious, economic, and other grounds that affect the administration of justice in actions between co-citizens as much as in those involving an out-of-stater.

See Borchers, *supra* note 164, at 79-80 n.3 (citing Am. Law Inst., *Study of the Division of Jurisdiction Between State and Federal Courts* 99, 106 (1969)); see also Larry Kramer, **Diversity Jurisdiction**, 1990 BYU L. Rev. 97, 119-20 (1990) (summarizing both sides of the debate on whether the "bias" rationale remains vital).

↑n206. Erie Railroad v. Tompkins, 304 U.S. 64, 65 (1938).

↑n207. H.R. Rep. No. 106-320, at 24 (1999). Currently 1441(b) bars **removal** if any of the defendants is a citizen of the forum state. See 28 U.S.C. 1441(b) (1994). This restriction is justified on the ground that a resident of the forum state "hardly can expect to encounter prejudice against out-of-staters in the courts of his home state," and there is consequently no reason for extending federal jurisdiction over the action. Jack H. Friedenthal et al., *Civil Procedure*, 2.11, at 60 (3d ed. 1999).

↑n208. See Freer & Perdue, *supra* note 114.

↑n209. See 1441(b).

¶n210. The purpose of the jurisdictional amount requirement has been to set a figure "not so high as to convert the Federal courts into courts of big business nor so as to fritter away their time in the trial of petty controversies." S. Rep. No. 85-1830, at 4 (1958).

¶n211. 1998 Admin. Office of the U.S. Courts, Ann. Year-End Rep. of the Federal Judiciary 31. Chief Justice Rehnquist noted that:

Diversity Jurisdiction was enacted as part of the Judiciary Act of 1789 when there was reason to fear that out-of-state litigants might suffer prejudice at the hands of local state court judges and juries, and there was legitimate concern about the quality of state courts. Conditions have changed drastically over two centuries. At the very least, there is simply no need to allow in-state plaintiffs to avail themselves of **diversity** jurisdiction to remove matters to federal court. These lawsuits account for a substantial percentage of the federal caseload, and as state law is applied in such cases in any event, there is no good reason to keep them in federal court.

Id. at 3-4.

¶n212. 304 U.S. 64 (1938).

¶n213. 312 U.S. 496 (1941).

¶n214. See, e.g., Akhil Reed Amar, Parity as a Constitutional Question, 71 B.U. L. Rev. 645 (1991) (arguing that federal courts must be allowed the last word on all federal questions). Martin H. Redish, Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights, 36 UCLA L. Rev. 329 (1988) (arguing that the institutional superiority of federal courts in the adjudication of constitutional questions is a necessary by-product of Article III protection of judicial independence).

¶n215. See, e.g., Hearing on H.R. 1875, supra note 2 (prepared statement of John H. Beisner, Esq., O'Melveny & Myers LLP. Washington, D.C.).

¶n216. 304 U.S. at 69.

¶n217. See id. at 70.

¶n218. 41 U.S. (16 Pet.) 1 (1842) overruled by Erie, 304 U.S. at 64.

¶n219. Erie, 304 U.S. at 70.

¶n220. Id. at 78 ("And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.").

¶n221. Id.

¶n222. 149 U.S. 368, 401 (1893).

¶n223. Schapiro, supra note 201, at 1419 (referring to Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941)).

¶n224. Id.

¶n225. Pullman, 312 U.S. at 497-98.

¶n226. Id. at 498.

¶n227. Id.; see also Martha A. Field, The Abstention Doctrine Today, 125 U. Pa. L. Rev. 590, 590 (1977).

¶n228. Pullman, 312 U.S. at 499-500.

¶n229. But see, e.g., Michael Wells, Naked Politics, Federal Courts Law, and the Canon of Acceptable Arguments, 47 Emory L.J. 89, 117 n.173 (1998) (citing Field, supra note 227, at 602 for the proposition that Pullman abstention may also "be applied as much for substantive ends as it is for the purpose of achieving jurisdictional policies like respect for jurisdictional competence.").

¶n230. See, e.g., Schapiro, supra note 201, at 1436 (citing Martha A. Field, Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine, 122 U. Pa. L. Rev. 1071, 1084-85 (1974)); cf. Paul M. Bator, The State Courts and Federal Constitutional Litigation, 22 Wm. & Mary L. Rev. 605, 607 (1981) (attributing to Charles Alan Wright the statement that "federal courts should adjudicate issues of federal law; state courts should adjudicate issues

of state law"))).

¶n231. See Schapiro, *supra* note 201, at 1442 ("In one sense, the decision of the state court, as reviewed through the state appellate system, defines the contour of the state constitutional right... . Disparity between the state and federal courts thus necessarily evidences error by the federal tribunal.").

¶n232. See *id.* at 1436-37. "Supplemental jurisdiction ... prevents plaintiffs from being forced to split their claims between federal and state forums and may permit the federal court to avoid a federal constitutional ruling." *Id.* (quoting Jack H. Friedenthal et al., *Civil Procedure* 2.12, at 69 (2d ed. 1993)).

¶n233. 28 U.S.C. 1367(c)(1) (1994).

¶n234. Burt Neuborne, *The Myth of Parity*, 90 *Harv. L. Rev.* 1105, 1105 (1977).

¶n235. *Id.*

¶n236. For a brief history of the debate, see Erwin Chemerinsky, *Parity Reconsidered, Defining a Role for the Federal Judiciary*, 36 *UCLA L. Rev.* 233, 239-55 (1988). Compare Bator, *supra* note 230, at 607 (arguing that the state courts have been the prime protectors of constitutional rights) with Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 *B.U. L. Rev.* 205, 230 (1985) (arguing that the framers distrusted state courts and gave federal courts the preeminent role in defending federal rights); Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 *Ind. L. Rev.* 71, 105 (1998) ("The fact that state courts are deemed technically competent to adjudicate federal law reflects not an assumption of parity, but rather merely a recognition of the practical necessity of the need both to spread the federal adjudicatory burden and to preserve federal supremacy.").

¶n237. See, e.g., Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 *B.U. L. Rev.* 609, 609 (1991); Michael Wells, *Is Disparity a Problem?*, 22 *Ga. L. Rev.* 283, 286 (1988) ("In the judicial federalism cases, we observe lawyers on both sides grasping for nothing more noble than the equivalent of the home court advantage.").

¶n238. William B. Rubenstein, *The Myth of Superiority*, 16 *Const. Comment.* 599, 621 (1999).

¶n239. See, e.g., Hearings on H.R. 1875, *supra* note 2, at 58 (statement of Walter E. Dellinger) (quoting California state court as having said "California's more favorable laws may properly apply to benefit non-resident plaintiffs when their home states have no identifiable interest in denying such persons full recovery.").

¶n240. See, e.g., Redish, *supra* note 214, at 333-34 (arguing that state judges' political accountability creates a potential for biased adjudication).

¶n241. See U.S. Const. art. III, 1.

¶n242. Three general methods for selecting state trial judges are currently in use: (1) appointment; (2) election, either partisan or nonpartisan; and (3) initial appointment followed by retention election. See Neuborne, *supra* note 234, at 1127 n.81 (citing Sari S. Escovitz et al., *Judicial Selection and Tenure* 11-12 (1975)). In four states, Massachusetts, Rhode Island, New Hampshire, and New Jersey, trial judges are appointed with life tenure, the latter's being conditioned on reappointment after one seven-year term. See *id.* All other states require re-election at intervals from one to fourteen years. See *id.*

¶n243. Some scholars have noted that the lack of procedural safeguards ensuring state court independence might even violate the Due Process clause of the Federal Constitution. See Schapiro, *supra* note 201, at 1439 n.126 (citing Martin H. Redish, & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 *Yale L.J.* 455 (1986) (citations omitted)).

¶n244. See, e.g., Neuborne, *supra* note 234, at 1127-28.

¶n245. See *id.* at 1126; Redish, *supra* note 214, at 333-34 (arguing that state judges' political accountability creates a potential for biased adjudication).

¶n246. See Neuborne, *supra* note 234, at 1127.

¶n247. One scholar had this to say regarding electoral selection of state court judges: "There is no legitimate place ... for the election of judges. There is very little about judicial service to bring a judge into the public eye, and even the candidates for the highest judicial posts of the state are apt to be strangers to the general public." Glenn R. Winters, *Judicial Selection and Tenure* 23 (1973). From this perspective, it would be an understatement to aver that state court judges are less able to be objective decision-makers, due to their being popularly elected:

Some years ago, the Detroit Saturday Night, a tabloid newspaper ... printed the following editorial entitled "How to be Elected Circuit Judge in Detroit":

Applicants for this position should possess the digestion of an ostrich, a firm right hand with a capacity of at least three thousand shakes a day, a keen memory for faces and names, dignity tempered by geniality and affability, a fluent tongue coupled with the ability to talk to all sorts and conditions of men?and women?and say nothing offensive and leave the listeners with an impression that the speaker is a person of vast wisdom, good humor and tolerance.

...

If you believe that we have overdrawn the case, stir about town a little and observe the actions of the members of the circuit bench, all of whom are candidates for reelection None has yet blossomed out as a song and dance artist, but short of that they seem to be omitting nothing calculated to win the voters' favor. We might imagine from the newspapers theses days that they are everywhere but on the bench.

Winters, *supra*, at 27-28.

However, the role that bias and self-interest play within the federal bench is also highly influential with respect to their decision-making, even if it may emanate to a lesser extent from institutional structure. In fact, some critics have suggested that the federal bench's disproportionate concern for their own status, autonomy, and power has mobilized them against **Congress's** continual expansion of federal jurisdiction. Christopher E. Smith, *Judicial Self-Interest: Federal Judges and Court Administration* 131 (1997). For example, the federal bench organized in the early 1990s to lobby **Congress** for salary increases, threatening to resign if **Congress** did not increase their compensation. See *id.* at 48-50. Although their committee report asserted that, at their pre-raise salary levels federal judges lived in "poverty," and bemoaned their waning ability to send their children to college, only 5.3% of American families shared the federal judges' annual income level of \$ 90,000 in 1989. *Id.* at 57 (citing Bureau of the Census, *Money Income and Households*, 1988 and 1989, 19).

As one author has noted, the self-bias that affects the federal judiciary is also qualitatively distinct from that which has been the focus on state court adjudication of multi-state **class actions**. Federal judges shape the consequences of legislation by determining the court administrative procedures to be followed in their own courthouses. *Id.* at 130. In this way they can subvert the intent of federal legislation, particularly when it serves to exacerbate the federal courts' already overburdened dockets. One example the author provided was the extent to which the federal bench has abdicated its duty to preside over certain civil trials by delegating responsibility to magistrates without complying with the Magistrate's Act of 1979. *Id.*

¶n248. As a general proposition, state court judges are paid less than federal judges. In 1986, the mean salary for associate justices of the highest state courts was \$ 67,434, for state intermediate appellate judges was \$ 67,172, and for state trial judges was \$ 60,097. Handbook on State Judicial Salaries, Appendix M, at 41 (1986). The salary for a federal district judge was just under \$ 90,000 in the late 1980s until **Congress** increased it to \$ 129,500 in 1992. Smith, *supra* note 247, at 62. Significantly, in New York, the highest appellate judges were paid \$ 115,000, and its trial judges \$ 95,000. See *id.* at 54. California paid its appellate judges \$ 97,000, while Michigan paid its appellate judges \$ 96,000. See *id.* (citing Committee on the Judicial Branch of the Judicial Conference of the United States, Simple Fairness: The Case for Equitable Compensation of the Nation's Federal Judges (Washington, D.C.: Administrative Office of the U.S. Courts, 1988)).

Also, it is significant that many federal judges have substantial assets and holdings. For example, Justice Sandra Day O'Connor in 1992 reported combined holdings of between \$ 1.77 million and \$ 4.53 million. See *id.* (citing Souter and Thomas Report Least Assets of All Justices," N.Y. Times, May 17, 1992, at 18). Justice Stevens reported holdings between \$ 1.13 million and \$ 2.5 million; Justice Blackmun reported between \$ 300,000 and \$ 830,000. *Id.* Federal judges of the lower courts also held comparable assets. Of the 22 U.S. District judges in Ohio, 2 held at least \$ 1 million, and 16 held at least \$ 100,000. *Id.* (citing Net Value of Judges' Holdings, Akron Beacon J., June 5, 1989, at C1). These numbers indicate that the disparity in salaries between federal and state judges may play a smaller role in determining the quality and objectivity of the decisions rendered by either group when viewed as a mere fraction of the overall financial returns enjoyed. It would appear that, if the relatively "elite" pool from which the federal judiciary came also have greater assets and holdings than do their state court counterparts, then they would have a greater general inclination for bias in adjudicating class suits with hundreds of millions of dollars at stake. Indeed, as Judge Posner pointed out in In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300 (7th Cir. 1995), an entire industry may hinge on the outcome of some of these class suits.

¶n249. Neuborne, *supra* note 234, at 1121.

¶n250. *Id.* at 1122.

¶n251. See *infra* note 299 and accompanying text.

¶n252. Neuborne, *supra* note 234, at 1122.

¶n253. *Id.* at 1122 n.66 (praising Judicial Clerkships: A Symposium on the Institution, 26 Vand. L. Rev. 1123 (1973)).

¶n254. *Id.* at 1120.

¶n255. 472 U.S. 797 (1985).

†n256. See e.g., Hearings on HR 1875, *supra* note 2 (prepared statement of Walter E. Dellinger).

†n257. *Id.* (statement of Hon. Griffin Bell, former United States Attorney General).

†n258. 28 U.S.C. 1407 (1994). But see William W Schwarzer et al., *Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts*, 73 Tex. L. Rev. 1529 (1995).

†n259. Scholars and practitioners have noted that coordination between state courts from different states and between state courts and federal courts is advantageous and also more common than some suspect. See, e.g., *Manual for Complex Litigation* 31.31 (3d ed. 1995) (endorsing federal court-state court coordination); Cabraser, *supra* note 161, at 44 n.7 (describing *Managing Mass Tort Cases: A Resource Book for State Court Trial Judges*, a resource book which includes, as appendices, a comprehensive set of case management, discovery, pleadings and consolidation orders on diskette so that nationwide class suits brought under state consumer protection statutes can be coordinated); Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 Brook. L. Rev. 961, 1054-55 (1993) (discussing Judge Schwartz's 1992 case study of federal-state court coordination); William W Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 Va. L. Rev. 1689 (1992) (seminal article discussing eleven cases, nine of which concerned personal injuries, in which federal and state judges established procedures for coordinating pretrial activities and engaging in joint settlement efforts). Cf. Joan Steinman, *Reverse Removal*, 78 Iowa L. Rev. 1029, 1032 (1993) (evaluating process wherein "cases ... initiated in or removed to federal court could be sent to ... state court for consolidation and adjudication with related state court cases").

†n260. H.R. Rep. No. 106-320, at 9 (1999).

†n261. See 28 U.S.C. 636 (1994); Fed. R. Civ. P. 72. Due to their increasingly integral role in the federal court system, one circuit court remarked: "Given the bloated dockets that district courts have come to expect as ordinary, the role of the magistrate in today's federal judicial system is nothing less than indispensable." *Government of the Virgin Islands v. Williams*, 892 F.2d 305, 308 (3d Cir. 1989).

†n262. See Fed. R. Civ. P. 23(f) (amended 1998).

†n263. See *supra* notes 114-22 and accompanying text.

¶n264. 326 U.S. 310 (1945).

¶n265. 472 U.S. 797 (1985). **Congress** has the power to legislate nationwide service of process for federal courts. The only example of this capability is codified in the interpleader statutes. See 28 U.S.C. 1335, 1397, 2361 (1994).

¶n266. Mass Tort Hearing, *supra* note 48 (prepared statement of Dr. John B. Hendricks, U.S. Chamber of Commerce).

¶n267. One expert testified that, "**Congress** could enact federal legislation simply prohibiting state courts from using the **class action** device at all." Hearings on H.R. 1875, *supra* note 2 (prepared statement of John H. Beisner, Esq., O'Melveny & Meyers LLP, Washington, D.C.). One commentator believes that the Constitution (Article I, 8, enumerated powers, read in conjunction with the Necessary and Proper clause) mandates an unequal distribution of power between the federal and state systems, wherein federal courts have the power to "commandeer" state courts. See Redish & Sklaver, *supra* note 236, at 88-89. One such scholar has recognized the "troubling implications of the commandeering power for the irrebuttable presumption of parity which the Supreme Court has universally [recognized]." (citations omitted). See *id.* at 92.

¶n268. See H.R. Rep. No. 106-320, at 8 (1999).

¶n269. See The **Class Action** Fairness Act of 1999: Hearings on S. 353 Before the Subcomm. on Administrative Oversight and the Courts of the U.S. Senate Comm. on the Judiciary, 106th Cong. (1999) (summary of written statement of John H. Beisner, O'Melveny & Meyers LLP, Washington, D.C.) ("Attorney's fees are the root cause of the tidal wave of **class actions** that we are experiencing and of [sic] the most serious **class action** abuses that we are seeing."). Apparently, the attorneys' fees provisions that Mr. Beisner went on to refer to had been introduced in the Senate version of the bill but were subsequently deleted. They do not appear in the House Report version that postdates the Senate version.

¶n270. See Neuborne, *supra* note 234.

¶n271. Bator, *supra* note 230, at 623.

¶n272. See Rubenstein, *supra* note 238, at 622-23.

¶n273. *Id.*

¶n274. See *id.*

¶n275. See Neuborne, *supra* note 234, at 1126. Professor Neuborne emphasized that the federal bench is comprised of men and women drawn from the most highly educated, economically privileged stratum of society, and were therefore similarly oriented in this way. *Id.*

¶n276. See Rubenstein, *supra* note 238, at 623.

¶n277. See *supra* notes 123-63, and accompanying text; cf. Rubenstein, *supra* note 238, at 625 n.66 (noting "insensitive" treatment of certain civil rights issues in Florida and New Hampshire state appellate courts as further evidence of an institutional distinction between appellate and trial courts).

¶n278. See Neuborne, *supra* note 234, at 1120 n.56 (citing a survey that found that 51.3% of all federal judges were born in the district in which they sit, 56.1% attended law school in the district, and 89% had held government positions in the state prior to appointment).

¶n279. See, e.g., Erwin Chemerinsky, Federal Courts, State Courts, and the Constitution: A Rejoinder to Professor Redish, 36 *UCLA L. Rev.* 369, 372 (1988) (asserting that federal judges, who live in the same community and may desire higher judicial office, may be subject to the same pressures as state judges).

¶n280. See *id.*

¶n281. See *id.* at 371 n.7 (citing studies demonstrating that judges are generally retained about 98-99% of the time).

¶n282. See Erwin Chemerinsky, Ending the Parity Debate, 71 *B.U. L. Rev.* 593, 599 (1991) (stating that few voters are able to distinguish between judges at retention elections due, in part, to low visibility of most cases).

¶n283. See Neuborne, *supra* note 234, at 1116 n.45.

¶n284. *Id.*; see also Bator, *supra* note 230, at 630 (stating that "<clb>s<crb>tate supreme court justices as a group are as well paid and have as much prestige as federal judges. Those that I have met seem to me to be as expert ... as are federal judges."). It is ironic to note that during the 104th **Congress**, while the Republican Party was extolling the virtues of state courts in the context of their efforts to limit habeas corpus rights (which permit individuals to challenge unconstitutional state law convictions in federal court), Chairman Henry J. Hyde (also a member of the House Committee on the Judiciary, and in favor of the Act) stated:

I simply say the State judge went to the same law school, studied the same law and passed the same bar exam that the Federal judge did. The only difference is [that] the Federal judge was better politically connected and became a Federal judge. But I would suggest ... when the judge raises his hand, State court or Federal court, they swear to defend the U.S. Constitution, and it is wrong, it is unfair to assume, ipso facto, that a State judge is going to be less sensitive to the law, less scholarly in his or her decision than a Federal judge.

H.R. Rep. No. 106-320, at 35 n. 26 (1999).

¶n285. See, e.g., Hanlon v. Chrysler Corp., 150 F.3d 1011 (9th Cir. 1998) (class members got a promise that had already been made, but attorneys received \$ 5 million); In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768 (3d Cir. 1995) (class members received \$ 1000 coupons towards purchase of a new truck but attorneys received \$ 9.5 million).

¶n286. See Neuborne, *supra* note 234, at 1116 n.45; *infra* note 303 and accompanying text.

¶n287. See *supra* notes 212-33 and accompanying text.

¶n288. Rubenstein, *supra* note 238, at 613.

¶n289. See Neuborne, *supra* note 234, at 1125-26.

¶n290. See, e.g., *supra* note 71 and accompanying text.

¶n291. See, e.g., Larry Kramer, Choice of Law in Complex Litigation, 71 N.Y.U. L. Rev. 547, 584 (1996) ("Because variation in the legal rules is not great, once the state-by-state survey is completed, judges will find a relatively small number of conflicts and an equally small number of approaches to choice of law."); In re School Asbestos Litig., 789 F.2d 996, 1010 (3d Cir. 1986) (holding that plaintiffs demonstrated that the variation in the states' laws to be applied was manageable); In re Copley Pharm., Inc., 161 F.R.D. 456, 459 (D. Wyo. 1995) (same). For a survey of the products liability laws of the fifty states finding very little variation, see John F. Vargo, *The Emperor's New Clothes: The American Law Institute Adorns*

a "New Cloth" for Section 402A Products Liability Design Defects - A Survey of the States Reveals a Different Weave, 26 U. Mem. L. Rev. 493 (1996).

✚n292. See supra note 73 and accompanying text. The tobacco-related claims asserted by the plaintiff class in Castano were only one example of state law issues that have yet to be resolved. Another example is the "economic loss" doctrine which was at issue in *In re Ford Motor Co. Bronco II Products Liability Litigation*, No. Civ.A MDL-991-G, U.S. Dist. LEXIS 3507 (E.D. La. Mar. 21, 1995). Whether other states recognize this doctrine will have profound consequences for forum selection in the future. See Cabraser, supra note 161, at 23 & 44 n.33.

✚n293. Although it has been exhausted in the literature, Justice Brandeis's famous characterization of the states as laboratories is applicable to this argument disfavoring increased federal jurisdiction. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.") The "states-as-laboratories" argument is strongest in the context of social and economic relations. See Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 Va. L. Rev. 389, 394 n.18 (1998).

✚n294. See Schapiro, supra note 201, at 1467 ("Erie Railroad v. Tompkins ... requires federal courts to defer to states' interpretations of their states' law.").

✚n295. See Thomas A. Dickerson, **Class Actions: The Law of 50 States**, 1.02[3], 1.04[3] (Release 8, 1999) (noting different states that have interpreted their **class action** statutes more loosely than the federal courts have interpreted the federal rule).

✚n296. Several experts and scholars have noted that the Act might raise Erie concerns of a more direct character than this Comment asserted for this reason. Over time, the body of state substantive law that would emerge as a result of continued federal court adjudication of novel issues would amount to federal common law. See, e.g., Hearings on H.R. 1875, supra note 2 (testimony of Richard A. Daynard, J.D., Ph.D., Professor of Law, Northeastern University School of Law, Chairman, Tobacco Products Liability Project). However, after Erie, the idea of a federal common law is no longer tenable. See, e.g., Schapiro, supra note 201, at 1443. Professor Bator identified this danger almost twenty years ago, when considering a scheme which would have all cases in which the defendant asserted a constitutional defense be instantly removable: "Such a scheme would impose a large and unnecessary burden on the federal courts It would gratuitously buy us a whole new host of Erie problems ... [and] constitute a gross interference with the power of the states to design their own institutional schemes for enforcing state law and policy." Bator, supra note 230, at 611-12. Perhaps these concerns also have informed Michael Wells's theory that the parity debate is basically an outcome-determinative struggle. See Wells, supra note 237, at 609.

✚n297. See Neuborne, supra note 234, passim.

↑n298. See *id.* at 1121 n.60, 1122 n.67.

↑n299. 1998 Admin. Office of the U.S. Courts, Ann. Year-End Rep. of the Federal Judiciary 31.

↑n300. In 1965, the ALI proposed that plaintiffs be barred from bringing **diversity** actions in their home states; that business enterprises be prohibited from invoking **diversity** jurisdiction, either originally or by **removal**, in any state where they maintain a local establishment; and that natural persons be denied access to the federal courts in the state where they have their principle place of business. See Miner, *supra* note 200, at 157 (citing American Law Institute, study of the Division Between State and Federal Court, pt. I, 2-3 (1965 Official Draft)). There have also been proposals that appeals to the United States courts in **diversity** cases be made discretionary and that federal courts be authorized to abstain in **diversity** cases if adequate and timely state remedies exist. See *id.* at 157-58 (citations omitted).

↑n301. See Miner, *supra* note 200, at 158.

↑n302. 1998 Admin. Office of the U.S. Courts, *supra* note 299. Justice Antonin Scalia also has made it clear that he feels that further expansion of federal jurisdiction and the concomitant bureaucratization needed to handle the increase in cases filed. See Stuart Taylor, Scalia Proposes Major Overhaul of U.S. Courts, N.Y. Times, Feb. 16, 1987, at 1.

↑n303. Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (White, J., dissenting). Even if appointing many new Article III judges would not threaten the integrity of the federal bench, the appointment process itself is rife with political posturing and is absurdly protracted. See Neuborne, *supra* note 234, at 1122 n.62 (citing Harold W. Chase, *Federal Judges: The Appointing Process* (1972); Joel B. Grossman, *Lawyers and Judges* (1965)).

↑n304. See, e.g., Hearings on HR 1875, *supra* note 2, at 52 (prepared statement of Hon. Griffin Bell, former United States Attorney General).

To be sure, there may be some increase in caseload as litigants test the new statutes. But the large numbers of **class actions** that we are seeing in state courts are due ... to counsel filing overlapping [suits]... . Federal courts (unlike state courts) are able to consolidate such matters before a single judge and thereby achieve great efficiencies. What would have been five distinct suits before five different state court judges can become a single proceeding before a single judge in the federal court system.

Id.

¶n305. Justice Frankfurter, almost fifty years ago, expressed strong views on the prospect of increasing the federal courts' work load. See Lumberman's Mut. Cas. Co. v. Elbert, 348 U.S. 48 (1954) (Frankfurter, J., concurring). In response to that **diversity** case, Justice Frankfurter described the nature of the federal courts, and how the entire United States justice system would be adversely effected by an expansion of federal **diversity** jurisdiction and concomitantly, of federal judges. He wrote:

the business of courts ... is drastically unlike the business of factories. The function and role of the federal courts and the nature of their judicial process involve impalpable factors, subtle but farreaching, which cannot be satisfied by enlarging the judicial plant... . In the farthest reaches of the problem a steady increase in judges does not alleviate; in my judgment, it is bound to depreciate the quality of the federal judiciary and thereby adversely to affect the whole system... . <clb>Inflation of the number of district judges<crb> will result, by its own Gresham's law, in a depreciation of the judicial currency and the consequent impairment of the prestige and of the efficacy of the federal courts.

Id. at 59. See Leo Kanowitz, Deciding Federal Law Issues in Civil Proceedings: State Versus Federal Trial Courts, 3 Hastings Const. L.Q. 141, 164 (1976) (emphasis added).

¶n306. See, e.g., supra notes 4, 30.

¶n307. Bator, supra note 230.

¶n308. Id. at 621.

¶n309. Id.

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NOTE: WIELDING THE SLEDGEHAMMER: LEGISLATIVE SOLUTIONS FOR **CLASS ACTION**
JURISDICTIONAL REFORM

Thomas Merton Woods *

* I wish to thank Professor Linda Silberman. I wish also to thank the members of the New York University Law Review, especially Dan Reynolds, Carol Kaplan, Inna Reznik, David Yocis, Derek Ludwin, Rafael Pardo, Troy McKenzie, and Sally Kesh. I owe a debt of gratitude to Marla Weston and Geraldine Woods. I wish finally to thank Professor Alan Morrison for inspiring me to write about civil procedure.

SUMMARY:

... Woods begins by analyzing the problems of forum shopping and overlapping classes in current practice. ... The publicity surrounding the proposed Texas settlement led competing counsel to file an identical **class action** in Alabama state court. ... Because current practice lacks a firm policy justification and exacerbates the problems of forum shopping and overlapping classes, there is growing support in Congress for a complete overhaul of federal **class action** jurisdiction. ... Instead of requiring complete diversity between named plaintiffs and defendants for both original and removal jurisdiction, the current proposals require only minimal diversity between any class member (named or unnamed) and any defendant. ... The congressional proposals, therefore, seek to alleviate abuse in the current **class action** environment by allowing virtually all classes to be filed in or removed to federal court and by guaranteeing that any federally decertified classes may not return to state court without threat of re-removal. ... It is possible, under this proposal, that counsel could decide to file a **class action** in a plaintiff-friendly state, defining the class in a gerrymandered style so that just barely one-third of class are state residents, thereby preventing removal. ... The **House** proposal seems to take this course by providing for minimal diversity but raising the jurisdictional amount to an aggregate of one million dollars. ...

TEXT:

[*507]

In this Note, Thomas Woods examines recent congressional proposals that would allow virtually all **class actions** to be filed in or removed to federal court. Woods begins by analyzing the problems of forum shopping and overlapping classes in current practice. Woods then argues that, while the congressional proposals would alleviate these problems, the proposals would exacerbate federalism and docket congestion concerns. Woods concludes with a proposal for expanding the exceptions to federal jurisdiction proposed by Congress.

Introduction

Since the late 1970s, polybutylene (PB) pipes have been installed in over six million homes.¹ It was later discovered that PB did not tolerate the chlorine commonly added to drinking water.² Massive leaks and extensive property damage occurred.³

In 1993, a nonprofit organization filed a nationwide **class action** against several PB manufacturers in Texas state court.⁴ The parties reached a \$ 750 million settlement⁵ a year later, which the presiding judge, without comment, refused to approve.⁶ The publicity surrounding the proposed Texas settlement led competing counsel to file an identical **class action** in Alabama state court.⁷ Meanwhile, the Texas counsel left state court and filed an identical suit in Texas federal [*508] court.⁸ When class counsel experienced difficulties in federal court, they abandoned Texas in favor of an identical suit in Tennessee.⁹

With competing suits now in Alabama and Tennessee state courts, "a war between the... state **class actions** erupted."¹⁰ The competing class counsel each tried to discredit publicly the competing action.¹¹ Both counsel hired public relations firms and ran disparaging advertisements on television and in local newspapers.¹² Eventually, a California state judge held a settlement conference for the competing counsel¹³ and convinced them to settle in Tennessee state court.¹⁴ The ensuing Tennessee settlement "did little to improve benefits for the class" relative to the original proposed Texas settlement.¹⁵ However, the new settlement not only assured that both sets of class counsel would be entitled to attorneys' fees,¹⁶ but also allowed for substantially more attorneys' fees relative to the rejected Texas state court settlement.¹⁷

The PB litigation exemplifies the rampant abuse that occurs in current **class action** practice. Class counsel have virtually unlimited discretion to choose a state or federal forum;¹⁸ the initial PB counsel [*509] were able to move from Texas state court, to Texas federal court, and to Tennessee state court merely by amending the pleadings. As the PB experience shows, such discretion encourages forum shopping.¹⁹ Furthermore, under current practice defendants are unable to consolidate competing **class actions**. This result is unjustified.

In response to the problems of forum shopping and competing classes, Congress is currently considering proposals that would allow virtually all²⁰ classes to be filed in, or removed to, federal court.²¹ While **class action** jurisdictional²² reform is necessary, the current congressional [*510] proposals are overbroad. Giving both class counsel and defendants virtually unlimited access to federal court would swamp an already heavily congested federal docket and stymie future attempts to enlarge federal question jurisdiction. Such proposals also raise serious federalism concerns.

A balance must be struck between current practice and the current congressional proposals. This Note argues that, rather than allowing virtually all **class actions** into federal court, Congress must enlarge the current exceptions to jurisdiction contained in the proposals. Enlarging the exceptions will allow states to retain control over more **class actions**, which will minimize the federalism and docket congestion concerns raised by federalizing all classes. Part I of this Note examines the current **class action** jurisdictional framework. Part II discusses how the congressional proposals attempt to alter this framework and also identifies the concerns raised by the proposals. Part III advocates modification of the congressional proposals.

I

Current Practice: Class Counsel's Virtually

Unfettered Discretion

A. Doctrinal Framework and Class Counsel Manipulation

Class counsel currently have enormous discretion to choose a state or federal forum.²³ Diversity of citizenship is satisfied if the jurisdictional amount in controversy is met²⁴ and there is complete diversity **[*511]** between all of the named plaintiffs and defendants.²⁵ Because only the named plaintiffs²⁶ are considered in determining diversity,

under current doctrine, if one member of a class is of diverse citizenship from the class' opponent, and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant and have nothing to fear from trying the lawsuit in the courts of their own State.²⁷

Conversely, jurisdiction may be defeated by naming a nondiverse plaintiff.²⁸ While the judicially created doctrine of "fraudulent joinder" circumscribes the ability of counsel to manipulate the pleadings,²⁹ the doctrine is limited.³⁰ Therefore, class counsel have **[*512]** enormous discretion to manipulate the pleadings either to create or to destroy diversity.³¹

If class counsel choose a state forum, counsel also have additional tactics available to make classes "removal proof." One tactic is for counsel to limit artificially the class's claims to below the jurisdictional amount.³² This puts defendants in the uncomfortable position of arguing that plaintiff's claim is worth more than the plaintiff says it is. Because the jurisdictional amount is not satisfied, the defendants cannot remove unless they can show that the claims are worth more than the jurisdictional amount.³³ Class counsel can also make cases "removal proof" by joining a sympathetic defendant who will agree not **[*513]** to support a removal petition.³⁴ Because removal requires unanimity among defendants,³⁵ a removal petition will be defeated.

The problem of pleadings constructed to avoid **diversity jurisdiction** is exacerbated by the one-year bar of 1446(b). If the original case is nonremovable,³⁶ but the complaint is later amended such that the case becomes removable, the defendant may remove the case within thirty days of receiving the amended complaint.³⁷ However, under no circumstances may a defendant remove an action one year after the filing of the complaint.³⁸ Therefore, class counsel can plead a nonremovable case³⁹ and then amend the complaint to plead a removable case at any time beginning one year after the filing of the original complaint.⁴⁰ The defendant will be barred by the one-year provision from removing the case.⁴¹ The cumulative effect of current doctrine is **[*514]** that class counsel is given great discretion in choosing a state or federal forum and preventing defendants from removing state actions to federal court.

B. The Problems of Forum Shopping and Competing Classes

Giving class counsel enormous discretion in choosing a particular state or federal forum and preventing removal encourages forum shopping and competing **class actions**. Substantial anecdotal evidence⁴² and some empirical evidence⁴³ suggest that class counsel frequently **[*515]** forum shop by filing **class actions** in "plaintiff-friendly"⁴⁴ state courts even though those states have little or no connection with the underlying dispute. Soliciting plaintiff-friendly forums allows for potential abuse of defendants and class members.

Defendants face potential abuse because an improper class certification ⁴⁵ is often effectively unreviewable ⁴⁶ and forces settlement. ⁴⁷ **Class actions** can threaten defendants with bankruptcy; even if the class claims are unmeritorious, defendants will often settle the class rather than risk a large judgment against them. ⁴⁸

[*516] Absent class members also face potential abuse from forum shopping. Plaintiff-friendly forums are unlikely to scrutinize settlement proposals. Class counsel's interests at the settlement stage are not aligned with the absent class. Class counsel is interested in maximizing attorneys' fees; the class is interested in maximizing class damage payments. ⁴⁹ The defendant is indifferent ⁵⁰ to paying \$ 10 million in attorneys' fees with \$ 90 million in damage payments versus paying \$ 30 million in fees and \$ 70 million in damages. Money is fungible; the defendant seeks finality, not justice. Because **class actions** inevitably involve minimal monitoring by class members, the judge is the only party in a position to ensure the fairness of the settlement to the class. Plaintiff-friendly judges who are willing to rubberstamp any settlement proposed by class counsel only exacerbate the problems already inherent in judicial review of settlements. ⁵¹ Indeed, substantial anecdotal evidence demonstrates that particular state judges consistently **[*517]** approve settlements that are patently unfair to the absent class, but generous in attorneys' fees. ⁵²

In addition to the problem of forum shopping, giving plaintiffs enormous discretion to choose a state or federal forum also prevents the consolidation of competing **class actions**. "Competing classes" are two or more **class actions** filed by different class counsel in different forums involving the same underlying claims. ⁵³ State courts lack the power to consolidate or enjoin competing **class actions** filed in state court in different states or in federal court. ⁵⁴ Federal courts also lack the power to enjoin parallel state proceedings because of the limitations imposed by the Anti-Injunction Act. ⁵⁵ By comparison, for cases completely within the federal system, federal courts, equipped with the authority of the Judicial Panel on Multidistrict Litigation (JPML), are better able to consolidate overlapping actions. ⁵⁶ However, because class counsel may file identical suits in either state or federal court and also prevent removal, current practice inhibits consolidation of competing classes. ⁵⁷

[*518] Limited empirical ⁵⁸ and substantial anecdotal ⁵⁹ evidence suggests that competing **class actions** are a growing problem. In addition to draining systemic resources, competing **class actions** can potentially harm absent class members because defendants may conduct a "reverse auction" by soliciting the lowest "bids" for settlement of the class. ⁶⁰ The two (or more) class counsel each have an incentive to settle first, as the first party to settle is likely to receive a much larger share of attorneys' fees. ⁶¹

The most troubling aspect of current practice is that, despite the problems of forum shopping and overlapping classes, class counsel's discretion has no offsetting policy justification. ⁶² More discretion is **[*519]** given to class counsel than to an "ordinary" plaintiff, who must rely on chance to determine whether the party he or she wishes to sue is a citizen of a different state. The plaintiff's choice of forum in a **class action** should not (at the very least) be given any more deference than that accorded in an "ordinary" action. ⁶³ Further, the practice of considering only the named parties for diversity of citizenship rests on an antiquated view of unnamed class members as later joined parties. ⁶⁴

The current practice elevates form over substance. The face of the pleadings and not the composition of the class determines jurisdiction. Because current practice lacks a firm policy justification and exacerbates the problems of forum shopping and overlapping classes, there is growing support in Congress for a complete overhaul of federal **class action** jurisdiction.

II

Federalizing **Class Actions**

A. Current Congressional Proposals

Two bills have been introduced in the current Congress that would allow virtually all **class actions** to be filed in or removed to federal court. ⁶⁵ Instead of requiring complete diversity between named plaintiffs and defendants for both original and removal jurisdiction, the current proposals require only minimal diversity between any class member (named or unnamed) and any defendant. ⁶⁶ The effect **[*520]** of these proposals is to make the distinction between named and unnamed plaintiffs meaningless for jurisdictional purposes. The **House and Senate** bills also allow class members to aggregate to meet the jurisdictional amount; the **House** proposal raises the amount to \$ 1,000,000, ⁶⁷ while the **Senate** proposal retains the amount at \$ 75,000. ⁶⁸ The proposals abolish the rule requiring unanimity for removal ⁶⁹ by providing that any defendant may seek removal. ⁷⁰ The much abused one-year bar ⁷¹ of 1446(b) is eliminated in both bills. ⁷² The bills also allow absent class members to remove cases from state to federal court. ⁷³

More controversially, ⁷⁴ the two congressional proposals also provide that once an action has been removed to federal court and decertified, the action may be refiled in state court, ⁷⁵ but the refiled action may be re-removed to federal court. ⁷⁶ This circular procedure is necessary to curb forum shopping and competing classes. If this procedure **[*521]** were not available, class counsel could file an unmeritorious class in state court, the defendant could remove the class to federal court (which would decertify the class), and the plaintiff would return to state court. If the defendant were unable to remove again, the defendant would have gained nothing by the first removal other than temporary delay. ⁷⁷ And if the defendant gains nothing from removal, forum shopping and competing classes are unlikely to be curbed.

The congressional proposals provide three very limited exceptions to federal **jurisdiction** when minimal **diversity** exists. First, federal courts are required to decline removal jurisdiction ⁷⁸ if a "substantial majority" of the class and the "primary defendants" ⁷⁹ are from the state in which the action is filed and if the law of that state would apply. While a "new textualist" ⁸⁰ might read this exception as rather broad, legislative history suggests that this exception should be interpreted extremely narrowly. Committee reports accompanying the 1998 and 1999 proposals provide the following hypothetical: A class of one thousand persons sues a North Carolina corporation under North Carolina law; if 997 members are from North Carolina, a court should decline jurisdiction. ⁸¹ The **House** report cautions that this exception must be read "narrowly." ⁸² The legislative history, therefore, suggests that this exception will apply in very few cases. ⁸³

[*522] The second exception provides that courts must decline jurisdiction when the primary defendants are state officials since the Eleventh Amendment may bar plaintiff's recovery. ⁸⁴ Obviously, this exception is also very narrow. The third exception is for shareholder **class actions** asserting state law claims relating to a corporation's securities or duties owed by corporate management. ⁸⁵ Because most state law securities **class actions** are subject to exclusive federal jurisdiction under the 1998 Securities Uniform Standards Act, ⁸⁶ this exception is narrow as well. Therefore, the effect of the **House and Senate** proposals is that, subject to the jurisdictional amount requirement and three very limited exceptions, virtually all **class actions** would be eligible for federal court. Indeed, the only classes that consistently fall outside a federal court's jurisdiction are those limited to a particular state's citizens who sue defendants from that state.

The congressional proposals, therefore, seek to alleviate abuse in the current **class action** environment by allowing virtually all classes to be filed in or removed to federal court and by guaranteeing that any federally decertified classes may not return to state court without threat of re-removal. Some commentators have suggested that these proposals are unconstitutional. ⁸⁷ As discussed below, such concerns are misguided; nevertheless, serious federalism and docket congestion concerns are implicated, and the congressional proposals

should be substantially amended.

B. Unintended Consequences of the Congressional Proposals

1. Constitutional Concerns

While it is uncontroversial that Congress could provide for original and removal jurisdiction for all classes that contain minimal diversity [***523**] between any class member and any defendant,⁸⁸ some commentators⁸⁹ have suggested that the re-removal provisions of the congressional proposals run afoul of the Tenth Amendment.⁹⁰ These commentators have pointed out that re-removal has the effect of federalizing state **class action** procedure, and cite dicta in cases involving federal preemption of state procedure in federal question cases for the proposition that Congress may not regulate state procedure.⁹¹

The cases themselves are unremarkable. The fact that federal substantive law can preempt state procedure can be seen as an extension of the Supremacy Clause.⁹² If state substantive law can be preempted because it frustrates a federal statute, then surely a state cannot accomplish that same goal by recharacterizing the state substantive law as a procedural one.⁹³

However, the dicta in these cases suggest that while federal substantive statutes may not directly preempt state procedural rules, such [***524**] preemption is allowed if the purpose of the federal statute itself is to regulate state procedure.⁹⁴ This question is part of a much larger debate than that addressed by the congressional proposals; this issue has arisen in the failed 1997 proposed nationwide tobacco settlement,⁹⁵ federal tort reform proposals,⁹⁶ and the recently enacted Y2K Act.⁹⁷ This debate centers around the Tenth Amendment's prohibition on commandeering state officials.⁹⁸ The argument is that in directly prescribing [***525**] state procedure, Congress is commandeering state officials to administer a federal mandate, violating the autonomy of state processes.⁹⁹

Despite the controversial issue of direct congressional regulation of state procedure, the congressional proposals do not run afoul of the Tenth Amendment since they only indirectly regulate state procedure. The congressional proposals do not mandate that state judges implement a federal procedure. Indeed, they do not even prohibit state judges from doing anything. The effect of federalizing Rule 23 comes from federal action, as federal courts exercise removal jurisdiction. Because there is no commandeering of state officials, and hence no accountability problem, the Tenth Amendment is not violated by the congressional proposals.¹⁰⁰ The only argument, therefore, is that Congress may not encroach on state procedure at all. However, a substantive approach to the Tenth Amendment has long been abandoned.¹⁰¹ But, as will be discussed at length in the following subsections, even though there are no constitutional problems with the congressional proposals, they raise serious federalism and docket congestion concerns that warrant modification of the proposals.

2. Federalism Concerns

Federalizing all **class actions** would unduly inhibit state experimentation with **class action** procedures. Fourteen states have adopted criteria for **class action** requirements that are different from those set forth in Federal Rule 23.¹⁰² Those states that have adopted Federal Rule 23 verbatim still have the opportunity to reject the federal judiciary's jurisprudence and fashion their own.¹⁰³ Nationalizing Rule 23 will limit state experimentation with different ways to resolve class [***526**] disputes consistently with due process. With the growing importance of **class actions** in our society,¹⁰⁴ more - not less - experimentation is needed.

Federalizing **class actions** would also prevent states from deciding regional disputes. Most localized disputes would be eligible for federal court, because in **diversity jurisdiction**, citizenship is determined by domicile and not residence.¹⁰⁵ For example, consider a **class action** against a franchisee for food poisoning at a particular store location.¹⁰⁶ Almost all of

the class are citizens of the same state as the franchisee. However, if the class includes enough members who are residents of the state, but are not domiciled in the state - for instance, college students - the class would defeat the narrow "substantial majority" exception and be eligible for federal court. The broad sweep of the congressional proposals, therefore, captures not only nationwide classes but also those classes that arise from truly local disputes. Denying state courts the opportunity to deal with a substantial portion of these cases raises serious federalism and comity concerns.

Federalizing all **class actions** would also stunt the development of important state substantive law. With the growing importance of **class actions**, some consumer protection statutes typically are invoked only [*527] in the **class action** context.¹⁰⁷ By not allowing state courts to entertain **class actions**, the federal judiciary will be the exclusive institution that regulates many traditional state and local practices.¹⁰⁸ Further, while under *Erie Railroad Co. v. Tompkins*¹⁰⁹ federal judges sitting in diversity must apply the common law of the state in which they sit, in practice they are likely to interpret state precedents more narrowly than would a state court judge.¹¹⁰

If the state supreme court has not spoken on the issue, federal judges are forced into the uncomfortable position of "predicting" how the state court would rule.¹¹¹ Of course, the federal judge's prediction stands as the controlling law in the federal system until the decision is contradicted by an ensuing state court holding. Thus, federal judges [*528] would play a significant role in shaping state law while state courts would lose the opportunity to interpret their own laws due to the federalization of **class actions**.¹¹² While certification to the state supreme court is an option in most states,¹¹³ it is doubtful that federal judges and the state supreme courts will exercise the option frequently.¹¹⁴ Such constraints pose the concern that state law will be stunted, or at the very least, that only the federal judiciary will develop it.

Another concern with federalizing all **class actions** is that state courts' voices in shaping judicial methodology will be limited. State court judges challenge the federal judiciary and lead it to question its decisions and methods. State courts often apply different methodologies¹¹⁵ and are often more willing to gather input from all interested constituencies.¹¹⁶ **Class actions** provide a significant opportunity for state courts to gain a voice in national jurisprudence. By silencing this voice, our federalist system will be denied one of its greatest benefits: experimentation.¹¹⁷

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3. Docket Congestion Concerns

Federalizing all **class actions** would strain an already congested federal docket.¹¹⁸ Federal dockets remain backlogged and overcrowded relative to some of their state counterparts.¹¹⁹ The federal appellate docket increased by 21% and the district court docket by 24% from 1990 to 1997.¹²⁰ This phenomenon can be attributed to two factors: the extraordinary backlog of judicial confirmations and the flood of criminal and mass tort filings in federal court.

The **Senate** currently faces a backlog of judicial confirmations.¹²¹ As of January 10, 2000, there were seventy-eight vacancies (out of a total of approximately 850 judgeships) in the federal court system.¹²² Long-term political wrangling between **Senate** Republicans and President Clinton has dramatically hampered the pace of judicial confirmations.¹²³ Understaffing of the federal judiciary has increased the caseload¹²⁴ and has forced judges to handle cases in undesirable [*530] ways.¹²⁵ Indeed, Chief Justice Rehnquist remarked that "vacancies cannot remain at such high levels indefinitely without eroding the quality of justice."¹²⁶

In addition to the problem of judicial vacancies, the recent increase in mass tort cases and

criminal filings has plagued the federal judiciary. The rampant increase in the number of federal criminal statutes ¹²⁷ and the restrictions imposed by the Speedy Trial Act, ¹²⁸ have further delayed civil litigation. ¹²⁹ The number of federal crimes has surged in recent years. ¹³⁰ The federal criminal docket is at its **[*531]** highest level in sixty years. ¹³¹ In 1998, the number of criminal case filings in federal court increased by fifteen percent. ¹³² There were only twenty-four districts in 1972 in which criminal cases represented more than fifty percent of the trial dockets; in 1994, thirty-one districts devoted more than fifty percent of their trial dockets to criminal cases. ¹³³ The effect of the increase in the number of federal crimes and the time restrictions of the Speedy Trial Act is that judges have less time to spend on the civil docket.

Regarding mass torts, there are 200,000 backlogged asbestos cases on the federal civil docket, with an expected increase of 50,000 more per year. ¹³⁴ The Supreme Court's decisions in *Amchem Products, Inc. v. Windsor* ¹³⁵ and *Ortiz v. Fibreboard Corp.* ¹³⁶ viewed skeptically the use of single nationwide classes to settle mass tort litigation; the result, therefore, is that in the absence of any congressional action, the federal judicial system seems likely to endure individual complex mass tort cases for years to come.

The high judicial vacancy rate and the flood of criminal and mass tort cases in the federal judiciary make allowing virtually all **class actions** into federal court an unattractive option. While there is no comprehensive data on the exact number of **class actions** in state court, ¹³⁷ evidence indicates that the number of state **class actions** is not only large but increasing. ¹³⁸ Indeed, a recent study found that nearly sixty percent of appellate opinions on **class actions** come from state courts. ¹³⁹ This percentage is daunting, considering that in 1997 the **[*532]** federal system had 2641 classes pending in the district courts. ¹⁴⁰ Therefore, assuming that a comparable number of **class actions** are pending in state court (most likely a conservative assumption), federalizing all **class actions** would lead to a tremendous increase in the workload of federal courts.

Not only would such an increase further delay civil litigation and reduce the amount of time federal judges may spend on individual cases, but it would also limit Congress's future ability to increase the federal docket. ¹⁴¹ Because of federalism and docket congestion concerns, Congress cannot simply federalize all **class actions**. However, Congress also cannot ignore the unwarranted discretion given to class counsel under current practice. A middle ground between these two extremes must be implemented.

III

Modifying the Congressional Proposal

The congressional proposals provide that federal courts should decline jurisdiction if a "substantial majority" of the class and the "primary defendants" are from the state in which the action is filed and if the law of that state would apply. ¹⁴² This exception reflects some congressional recognition of the federalism and docket congestion concerns raised by federalizing **class actions**. ¹⁴³ However, this exception fails to alleviate these concerns for two reasons. First, the legislative history construes the term "substantial majority" extremely narrowly. ¹⁴⁴ Second, because corporations are citizens of at most two states, it will be rare that the "primary defendants" will be from the same state as a "substantial majority" of the class. ¹⁴⁵

[*533] Therefore, Congress should expand this exception. Part III.A will discuss the specific amendments that should be made to the proposal and how these amendments will alleviate the problems of competing classes and forum shopping, while minimizing federalism and docket congestion costs. Part III.B will discuss objections to these proposed amendments. Part III.C will conclude with a brief discussion of why both this Note's proposal and the congressional proposals will not fully solve the problems of forum shopping and competing classes.

A. The Proposal and Its Merits

The "substantial majority" exception should be amended such that federal courts should decline original jurisdiction if it is reasonably certain that a sufficient proportion of the class is from one particular state; for the sake of argument, this Note will propose one-third.¹⁴⁶ For removal jurisdiction, judges should decline jurisdiction if it is reasonably certain that one-third of the class is from one particular state and the **class action** was filed in that state.¹⁴⁷ For both original and removal jurisdiction, the third of the residents need not be from the same state as the "primary defendants." The exception would be available irrespective of the law to be applied. The re-removal provisions of the congressional proposals would be retained. Under this reformulated exception, forum shopping and competing classes would be reduced relative to current practice. Further, this exception better minimizes the federalism and docket congestion concerns raised by federalizing virtually all classes.

Forum shopping would be reduced under this proposal because class counsel would have limited discretion in choosing plaintiff- **[*534]** friendly states. Not only would all nationwide classes be eligible for federal court, but class counsel could only guarantee a plaintiff-friendly forum if a third of the class were from that forum. The re-removal provision would prevent class counsel from pursuing a suit in state court after the case had been filed first in state court, then removed to federal court and decertified.

It is possible, under this proposal, that counsel could decide to file a **class action** in a plaintiff-friendly state, defining the class in a gerrymandered style so that just barely one-third of class are state residents, thereby preventing removal. However, even in plaintiff-friendly states, such an option might not be available under state **class action** procedural rules.¹⁴⁸ Further, because of the gerrymandered shape of the class, the unusual definition of such classes will be highly visible to both the forum's judges and collateral reviewing judges, which could put any settlement or judgment at risk of vacatur for unfairness.

In addition to limiting forum shopping, competing classes would be reduced. All nationwide classes could be consolidated in federal court for pretrial purposes under the multidistrict litigation (MDL) statute.¹⁴⁹ Only two types of competing classes will continue to exist under this Note's proposal. First, a nationwide class and a limited state class could exist under this proposal. Consider a nationwide asbestos class and a second asbestos class filed in Alabama state court limited to Alabama citizens. Under the congressional proposals, these classes could be consolidated in federal court as long as one of the "primary defendants" was not from Alabama. Under this Note's proposal, this class could not be consolidated because all of the plaintiffs were from Alabama. While systemic resources will be wasted, this type of competing class does not raise the same concerns as do those competing classes that completely overlap, such as two nationwide classes. The same concerns are not raised because defendants will not be able effectively to conduct a reverse auction with the nationwide counsel. Defendants will only be able to exert minimal pressure on the nationwide counsel to settle more cheaply as settlement of the Alabama class would not terminate the nationwide suit. Therefore, the absent class in the nationwide suit is unlikely to be harmed in the same manner as absent class members are in two completely overlapping suits.

[*535] The second type of competing classes that could exist under this proposal are classes involving one-third residents from more than one state. Consider a regional dispute involving roughly one-third Illinois, Wisconsin, and Minnesota residents. Separate class counsel could file suit in Illinois, Wisconsin, and Minnesota state court, and the cases could not be removed to federal court. While not ideal, such competing classes are not overly troubling because it is doubtful that many classes will involve one-third residents from more than one state¹⁵⁰ and those classes that do will typically involve adjacent states. In addition, it is empirically uncertain whether class counsel will find competing classes economically viable if they cannot avail themselves of a plaintiff-friendly forum.

While this proposal more effectively minimizes federal docket concerns than do the congressional proposals, the impact of this proposal on federalism concerns is more controversial. Although all nationwide classes would be eligible for federal court, state courts would entertain more **class actions** involving interstate activity (even if a substantial part of the class is from a particular state) relative to the congressional proposals. However, the federal docket cannot handle all **class actions** involving interstate activity. In light of this limitation, this Note's proposal achieves a significant improvement over current practice as state courts will only entertain classes that involve a significant portion (relative to the rest of the class) of that state's residents. This effect is a significant improvement because under current practice virtually all **class action** controversies (whether they involve a significant portion of that state's residents or not) may be heard in state court. Therefore, this Note's proposal better allocates those **class actions** that should be heard in state court.

B. The Objections

There are three potential objections to this Note's proposal. First, how is a judge to determine if one-third of the class is from a particular state? Second, why not use a jurisdictional amount provision as opposed to the number of citizens from a particular state to limit **jurisdiction**? Third, why should **diversity** be defeated even though the defendants are not from the same state as the third of the class?

The first objection recognizes that the one-third standard, if strictly applied, could needlessly entangle courts. Because citizenship for diversity is determined by domicile (a fact-intensive question) and **[*536]** not by residence, ¹⁵¹ limited resources would make it impossible for a judge to determine mathematically whether a third of the residents of a putative class were from a particular state. ¹⁵² Therefore, the standard should be that it is "reasonably certain" that one-third of the class is from a particular state. This standard could be proven by circumstantial evidence without referencing any particular plaintiffs within the class. For example, consider the previously discussed hypothetical of a **class action** against a franchisee for food poisoning. ¹⁵³ If defendants wished to remove, they could use statistical evidence of current customer patterns to show that fewer than one-third of the customers visiting the store in any given month are state residents. ¹⁵⁴ Because federal courts are courts of limited jurisdiction, the burden should be on the party seeking a federal forum ¹⁵⁵ to show by a preponderance of the evidence that the standard is met.

A second objection to the proposal might be that classes should be limited by the jurisdictional amount rather than class composition. The **House** proposal seems to take this course by providing for minimal diversity but raising the jurisdictional amount to an aggregate of one million dollars. ¹⁵⁶ Raising this amount to a very high level, such as fifty million dollars, would certainly have the effect of reducing the cases eligible for federal court, thereby limiting docket congestion and federalism concerns.

There are several problems with using a high jurisdictional amount to limit cases. First, it is often extraordinarily difficult for the judge to assess whether the jurisdictional amount has been met. The judge is forced to examine the merits of the claim at a very early stage **[*537]** in the proceedings, when few facts are likely to be available. ¹⁵⁷ For this reason, the plaintiff's assertion of the amount of damages claimed is accorded great weight and may only be overcome by a very strong showing. ¹⁵⁸ Further, in the case of removal, the parties are put in the awkward situation of arguing the reverse of what they will argue at trial - the defendants argue that the claims are worth more than what is stated and the plaintiffs argue that the claims are worth less.

Another problem with using a jurisdictional amount is that it is a crude indicator of which classes belong in federal court. Why, under the **House** proposal, does a class of 1000 members, each alleging \$ 1000 in damages, gain entry into federal court but not a class of 500 people, each alleging \$ 1750? The one-third composition proposal better captures those classes that belong in federal court than does the jurisdictional amount requirement.

The third possible objection to the proposal is that it does not require defendants to be from the same state as the one-third of the class. In other words, under this objection, the proposal would read that even if there were minimal diversity, courts should decline jurisdiction if it is reasonably certain that a third of the class is from one state and defendants are from that state. ¹⁵⁹ This objection is motivated by two concerns: that state courts will decide interstate disputes and that defendants will face local bias. With respect to the former, the concern is that if a defendant is not from the state in which the case is brought, the **class action** is likely an interstate dispute that should be heard by a federal court. As discussed before, however, while the federalism issues are controversial, depriving state courts of all interstate disputes raises enormous docket congestion concerns. If defendants were required to be from the same state as the one-third of the plaintiffs, many more classes would be eligible for federal court. ¹⁶⁰

[*538] The second concern underlying this objection is that of local bias. There is enormous disagreement over the level of bias that out-of-state defendants face, particularly national corporations that conduct substantial business within the state. ¹⁶¹ Because corporations are citizens of only two states - their state of incorporation and their principal place of business ¹⁶² - being an out-of-state defendant often does not correspond with any plausible claim of bias. ¹⁶³ For example, it is difficult to imagine that the Disney Corporation (a citizen of California and Delaware) faces any local bias in Florida. ¹⁶⁴ Further, the concern over local bias is undercut by the fact that the **House** proposal removes the barrier on in-state removal. ¹⁶⁵

Ultimately, the proposal should not include a requirement that one-third of the residents be from the same state as the defendants. Even though local bias may still exist in some cases, such a modification would make too many classes eligible for federal court, raising serious federalism and docket congestion concerns. Further, this proposal already gives defendants a boon, as many more classes will be eligible for federal court than under current practice. ¹⁶⁶

[*539]

C. Problems in Common

There are two major problems that exist under both the congressional proposals and this Note's proposal that need to be briefly addressed: the defendant's incentive to remove and the inadequacy of the current MDL system.

As was discussed more fully earlier, despite higher litigation costs, defendants possess an advantage when there are competing classes; ¹⁶⁷ defendants are able to conduct a reverse auction among class counsel to reach the lowest price of settlement. The proposals may give the defendants the power to remove, but there is no requirement that they exercise it. Therefore, while it is probable that defendants will wish to remove actions filed in a plaintiff-friendly forum, it is less certain that they would wish to do so with competing actions in neutral forums. The only parties in this situation with an incentive to remove are the absent class members. While both this Note's proposal and the congressional proposals allow for absent class removal, high monitoring costs make it doubtful that in practice such an option will be exercised frequently. ¹⁶⁸

Therefore, measures other than jurisdictional reform are needed to combat this problem. One option is expanding the ability of absent class members to launch collateral attacks on settlements. ¹⁶⁹ Perhaps giving more discretion to collateral judges to invalidate settlements will provide adequate incentives for defendants to arrive at a fair settlement, thereby negating the effect of a reverse auction. Another option is strengthening the penalties or sanctions for those attorneys who bargain in bad faith. ¹⁷⁰

A second problem common to this Note's proposal and to the pending congressional bills is

the inadequacy of the MDL procedures. Competing classes are reduced under the proposals because once cases are in federal court, they may be consolidated under the MDL statute.¹⁷¹ However, the transferee court may only keep the case for **[*540]** pretrial purposes.¹⁷² The proposals do eliminate competing actions at the pretrial stage, which will reduce the risk of reverse auctions. However, if the classes do not settle, either the incentives for reverse auctions will reappear once the cases leave the transferee court, or wasteful multiple trials will result. Congress is currently considering **House** Bill 2112, which provides that the transferee court may keep consolidated cases for trial.¹⁷³ At the time of this Note's publication, the bill rested in conference committee.¹⁷⁴

However, the bill fails to address choice of law problems. Even at the pretrial stage, the choice of law problems facing the transferee court are enormous, as it must apply choice of law principles from each court in which the case was filed.¹⁷⁵

Therefore, Congress should consider overhauling the MDL system in considering **class action** jurisdictional reform.

[*541]

Conclusion

The current **class action** practice is in serious need of reform. Current practice elevates form over substance, encourages forum shopping, and prevents consolidation of competing classes. However, federalizing all classes is not the answer to these problems. While federalizing all classes would be effective in limiting forum shopping and overlapping classes, it raises serious federalism and docket congestion concerns.

A balance must be struck between the current practice and federalizing all classes. Congress should expand the current proposals' exceptions to federal jurisdiction to allow state courts greater control over **class actions**. Expanding the exceptions will minimize federalism and docket congestion concerns while limiting forum shopping and competing classes.

[*542]

FOOTNOTES:

↑n1. See Richard B. Schmitt, Leaky System: Suits over Plastic Pipe Finally Bring Relief, Especially for Lawyers, Wall St. J., Nov. 20, 1995, at A1 (chronicling polybutylene (PB) **class action** litigation).

↑n2. See id.

↑n3. See id.

↑n4. See John C. Coffee, Jr. & Susan P. Koniak, Rule of Law: The Latest **Class Action** Scam, Wall St. J., Dec. 27, 1995, at A11 (criticizing conduct of class counsel in PB **class action** litigation).

↑n5. See Schmitt, supra note 1, at A1.

↑n6. See id. Texas procedure, like the Federal Rules of Civil Procedure, requires judicial approval of any proposed class settlement. See Tex. R. Civ. P. 42(e).

↑n7. See Schmitt, supra note 1, at A1.

↑n8. See Coffee & Koniak, supra note 4, at A11.

↑n9. See Schmitt, supra note 1, at A1.

↑n10. Id.

↑n11. See id.

↑n12. See id. The Tennessee counsel leaked to the press the claim that a former topless dancer had filed a legal malpractice suit against the lead Alabama counsel. The suit charged that the Alabama counsel had gotten the dancer pregnant and then threatened to drop the dancer as his client if she did not consent to an abortion. Most of the public advertisements boasted of the previous success of each counsel in individual PB suits. See id.

↑n13. See Kathryn Ericson, Cross-Country Tri-Court Conference Produces New Plumbing Pipe Settlement, West's Legal News, Nov. 14, 1995, available in 1995 WL 911245. The California judge's intervention was motivated by an effort of California attorneys to have all California residents opt out of the two nationwide classes. See id.

↑n14. See Cox v. Shell Oil Co., Civ. A. No. 18844, 1995 WL 775363 (Tenn. Ch. Ct. Nov. 17, 1995).

↑n15. See Coffee & Koniak, *supra* note 4, at A11.

↑n16. See id.

↑n17. See Schmitt, *supra* note 1, at A1. In a well-publicized incident, the lead Alabama counsel later settled individual suits not covered by the nationwide settlement and proposed an award of attorneys' fees that the trial judge described as "excessive and indeed almost scandalous." Alison Frankel, Greedy, Greedy, Greedy, Am. Law., Nov. 1996, at 70, 72. Dissatisfied clients sued the counsel over the fees claimed. See *Spera v. Fleming, Hovenkamp & Grayson, P.C.*, 4 S.W.3d 805, 812-13 (Tex. Ct. App. 1999) (affirming trial court's refusal to certify clients as class).

↑n18. This Note addresses only those **class actions** in which federal **jurisdiction** is founded on **diversity** of citizenship. Federal question jurisdiction classes raise fewer concerns, since defendants can remove these cases to federal court. See 28 U.S.C. 1441(a) (1994). The defendants could then consolidate the classes for pretrial purposes. See id. 1407(a) (providing for consolidation of multidistrict litigation (MDL)). As will be discussed at length, the ability to consolidate classes undercuts the incentives for **class action** abuse. See *infra* notes 53-61 and accompanying text (discussing problems of competing classes).

↑n19. The problems associated with forum shopping are discussed *infra* notes 42-52 and accompanying text. Three of the states involved in the PB litigation - Texas, Alabama, and Tennessee - are magnets for nationwide **class actions**. See John C. Coffee, Jr., **Class Actions: Interjurisdictional Warfare**, N.Y. L.J., Sept. 25, 1997, at 5 (identifying Texas, Alabama, and Louisiana as host to many nationwide classes); David A. Price, **Class-Action Relief on the Way?**, Investor's Bus. Daily, June 7, 1996, at A1, available in Lexis, News Library, INVDLY file (claiming Alabama and Tennessee have become "'havens'" for nationwide classes) (quoting Fred Souk, products liability defense attorney).

↑n20. This Note does not address those congressional proposals aimed at relaxing the diversity requirements for mass disasters and other single events. See Multidistrict, Multiparty, Multiforum Jurisdiction Act of 1999, H.R. 2112, 106th Cong. (providing for "Federal jurisdiction of certain multiparty, multiforum civil actions").

↑n21. See Interstate **Class Action** Jurisdiction Act of 1999, H.R. 1875, 106th Cong.; **Class Action** Fairness Act of 1999, S. 353, 106th Cong. For a brief discussion of the **Senate** bills, see Linda Silberman, The Vicissitudes of the American **Class Action** - With a Comparative Eye, 7 Tul. J. Int'l & Comp. L. 201, 216-17 (1999). At the time of publication, H.R. 1875 had

passed the full **House** while S. 353 remained in the **Senate** Judiciary Committee.

In the 105th Congress, the **House** Judiciary Committee passed similar legislation, the **Class Action** Jurisdiction Act of 1998, H.R. 3789, 105th Cong., which the close of Congress prevented the full **House** from considering. See Hearing on H.R. 1875, the "Interstate **Class Action** Jurisdiction Act of 1999," and H.R. 2005, the "Workplace Goods Job Growth and Competitiveness Act of 1999," Before the **House** Comm. on the Judiciary, 106th Cong. (1999) (visited Mar. 8, 2000) <<http://www.house.gov/judiciary/1.htm>> [hereinafter July 1999 Hearings] (statement of Guy Miller Struve, Ass'n of the Bar of the City of N.Y.). Similar legislation was introduced in the **Senate**, see **Class Action** Fairness Act of 1998, S. 2083, 105th Cong., but stalled in committee, see 145 Cong. Rec. S1166 (daily ed. Feb. 3, 1999) (statement of Sen. Grassley). Any relevant differences among the bills are discussed in the text. For a review of past failed legislative **class action** jurisdictional proposals, see generally George F. Sanderson III, Note, Congressional Involvement in **Class Action** Reform: A Survey of Legislative Proposals Past and Present, 2 N.Y.U. J. Legis. & Pub. Pol'y 315 (1999).

In 1999, the President signed the Y2K Act, which provides for original and removal jurisdiction over virtually all Y2K **class actions**. See Y2K Act, Pub. L. No. 106-37, 15(c), 106 Stat. 185, 201-02 (1999) (to be codified at 15 U.S.C. 6614(c)). A Y2K action is defined as a civil action commenced in federal or state court in which plaintiff's injury "arises from or is related to an actual or potential" computer failure resulting from Year 2000 transition problems. See id. 3(1), (2) (to be codified at 15 U.S.C. 6602(1), (2)).

†n22. This Note does not address congressional **class action** reform proposals outside of the jurisdictional context. The **Senate** proposal discussed in this Note contains such reform proposals. See S. 353, 106th Cong. 2 (1999) (limiting attorneys' fees and requiring state attorney general notification of proposed **class action** settlements); id. 5 (strengthening availability of Rule 11 sanctions).

†n23. See H.R. Rep. No. 106-320, at 7 (1999) ("[The] current rules can be used to game the system and keep interstate **class actions** out of Federal court."); Georgene M. Vairo, Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role for Federal Common Law?, 54 Fordham L. Rev. 167, 180 n.63 (1985) (discussing tactics class counsel may employ to "insure" federal forum); see also Geoffrey P. Miller, Overlapping **Class Actions**, 71 N.Y.U. L. Rev. 514, 519 (1996) ("The most important choices facing class counsel in determining where to bring suit are not legal but practical.").

†n24. See 28 U.S.C. 1332 (1994). It used to be clear that each individual plaintiff, whether named or unnamed, had to satisfy the jurisdictional requirement of \$ 75,000. See Zahn v. International Paper Co., 414 U.S. 291, 301 (1973) (holding that each individual class member must meet jurisdictional amount); Snyder v. Harris, 394 U.S. 332, 341-42 (1968) (finding that separate and distinct claims by class members may not be aggregated to meet jurisdictional amount).

Circuit courts have split on whether the supplemental jurisdiction statute, 28 U.S.C. 1367 (1994), has overruled Zahn and allows class members who have claims under \$ 75,000 to be included in the class as long as one named plaintiff meets the jurisdictional amount. Compare Free v. Abbott Lab. (In re Abbott Lab.), 51 F.3d 524, 527-29 (5th Cir. 1995) (finding that 1367 now allows parties who do not meet jurisdictional amount to be included in **class actions**), cert. granted, 120 S. Ct. 525 (1999), with Leonhardt v. Western Sugar Co., 160 F.3d 631, 640-41 (10th Cir. 1998) (holding that 1367 did not overrule Zahn requirement in **class actions**). A similar split has divided the circuits in the context of plaintiffs joined under Fed. R. Civ. P. 20 rather than in a **class action**. Compare Stromberg Metal Works, Inc. v. Press Mechanical, Inc., 77 F.3d 928, 931 (7th Cir. 1996) (holding that 1367 overrules Zahn requirement for claims by Rule 20 plaintiffs), with Meritcare Inc. v. Saint Paul Mercury Ins. Co., 166 F.3d 214, 222 (3d Cir. 1999) (holding that 1367 did not overrule Zahn requirement for claims by Rule 20 plaintiffs). The Supreme Court has granted certiorari on the question of

1367's effect on Zahn. See Free, 120 S. Ct. at 525.

†n25. See Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 366-67 (1921) (holding in context of **class actions** that only citizenship of named parties is considered for determining diversity).

†n26. Of course class counsel must retain nondiverse named representatives in order to defeat diversity. However, the requirements for a named representative, once retained, are not onerous. See, e.g., Howard M. Downs, **Federal Class Actions: Diminished Protection for the Class and the Case for Reform**, 73 Neb. L. Rev. 646, 657-60 (1994) (discussing limited requirements other than undivided loyalty required by representative and "nominal" role played by class representative in suit). If such representatives cannot be retained, class counsel may still avoid federal court by pleading under the jurisdictional amount. See *infra* notes 32-33 and accompanying text. If at least one class member meets the jurisdictional amount requirement, the defendant may, depending on the circuit, argue that 1367 permits aggregation of claims. See *supra* note 24 (outlining circuit split and mentioning that Supreme Court has granted certiorari to resolve split).

†n27. Snyder, 394 U.S. at 340; see also In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 161-62 (2d Cir. 1987) (rejecting argument that complete diversity is needed between all class members and defendant as settled by "66 years of Supreme Court precedent").

†n28. See Ben-Hur, 255 U.S. at 366-67.

†n29. Fraudulent joinder is the well-established doctrine that in certain limited instances, the court may ignore the citizenship of a party. Fraudulent joinder may be established if the defendant can show that there is no colorable claim against the defendant, if there is outright fraud in the plaintiff's pleading of jurisdictional facts, or if the plaintiff joins a defendant or another plaintiff who has no logical connection to the controversy as a whole. See, e.g., Triggs v. John Crump Toyota, Inc., 154 F.3d 1284, 1288 (11th Cir. 1998) (stating fraudulent joinder requirements for ignoring citizenship of defendant); Koch v. PLM Int'l, Inc., No. Civ. A. 97-0177- BH-C, 1997 WL 907917, at *4 (S.D. Ala. Sept. 24, 1997) (extending fraudulent joinder doctrine for ignoring citizenship of named plaintiffs). But see Dorsey v. Manufacturers Life Ins. Co., No. Civ. A. 97-2389, 1997 WL 703354, at *6 (E.D. La. Nov. 10, 1997) (refusing to compare named plaintiff's claims with that of unnamed class in fraudulent joinder inquiry).

†n30. See 28 U.S.C.A. 1446 (West 1994) (David D. Siegel, Commentary on 1988 Revision of Section 1446) ("The fraudulent joinder doctrine will work only rarely...."). Courts have refused to extend fraudulent joinder to situations in which only a very small proportion of the plaintiff class has claims against a particular defendant. See, e.g., Triggs, 154 F.3d at 1290 (failing to apply doctrine even though 98% of class did not have claim against particular defendant). Therefore, fraudulent joinder is only effective when the transaction between certain plaintiffs and defendants at issue are "wholly distinct" from the transactions involving the other parties. See Dorsey, 1997 WL 703354, at *6. A few courts have stretched their characterization of "wholly distinct" transactions in an effort to ignore the citizenship of a particular party. See, e.g., Koch, 1997 WL 907917, at *3 (applying doctrine in nationwide class against issuer of securities because, even though entire class purchased same securities, class did not purchase from same brokerage **houses**). Courts have undoubtedly stretched their inquiry because of the ease with which counsel can destroy diversity.

†n31. See Gray v. H.A.S., 18 F. Supp. 2d, 1320, 1322 (M.D. Ala. 1998) (recognizing such manipulation as "prevalent concern"); H.R. Rep. No. 106-320, at 7 (1999) (finding that counsel often names "irrelevant parties" or "recruits a [nondiverse] plaintiff" to destroy diversity); July 1999 Hearings, *supra* note 21 (statement of Walter E. Dellinger, Former Acting Solicitor Gen.) ("[Counsel] can easily evade federal jurisdiction by adding to the class of plaintiffs or to the list of defendants in order to ensure that at least one plaintiff and

defendant share a common state of citizenship."); *id.* (statement of John H. Beisner, Esq.) ("Lawyers who want to keep a **class action** out of federal court often manipulate the parties in an attempt to destroy complete diversity."); *id.* (statement of Rep. Bob Goodlatte) (mentioning counsel's practice of destroying diversity by naming nondiverse parties).

↑n32. See, e.g., July 1999 Hearings, *supra* note 21 (statement of John H. Beisner, Esq.) (discussing counsel's tactic of "shaving" claims). But see *supra* note 24 (discussing effect of 1367 on jurisdictional amount for **class actions**).

↑n33. Circuits are split over the weight of the burden that the defendant must sustain in showing that the alleged damages do satisfy the jurisdictional amount. Compare *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996) (mere preponderance), *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1412 (5th Cir. 1995) (same), and *NLFC, Inc. v. Devcom Mid-America, Inc.*, 45 F.3d 231, 237 (7th Cir. 1995) (same), with *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994) (legal certainty), *Gafford v. General Elec. Co.*, 997 F.2d 150, 156 (6th Cir. 1993) (same), and *Watterson v. GMRI, Inc.*, 14 F. Supp. 2d 844, 850 (S.D. W. Va. 1997) (clear and convincing); see also Russell D. Jessee, Note, Pleading to Stay in State Court: Forum Control, Federal Removal Jurisdiction, and the Amount in Controversy Requirement, 56 Wash. & Lee L. Rev. 651 (1999) (exploring three removal standards by examining two opinions on removed cases with specified damages below jurisdictional amount).

↑n34. See **Class Action** Jurisdiction Act of 1998: Hearing on H.R. 3789 Before the Subcomm. on Courts and Intellectual Property of the **House** Comm. on the Judiciary, 105th Cong. 19 (1998) [hereinafter June 1998 Hearings] (statement of John H. Beisner, Esq.) (discussing "quasi-defendants" who agree with class counsel to oppose removal); Mass Torts and **Class Action** Lawsuits: Hearings Before the Subcomm. on Courts and Intellectual Property of the **House** Comm. on the Judiciary, 105th Cong. (1998) (visited Feb. 26, 2000) <http://commdocs.house.gov/committees/judiciary/hju59921.000/hju59921_0.htm> [hereinafter March 1998 Hearings] (statement of John W. Martin, Jr., Vice President-General Counsel, Ford Motor Co.) (stating that class counsel "sometimes join a 'plaintiff-friendly' defendant with understanding that defendant will veto any removal attempt").

↑n35. See, e.g., *Balazik v. County of Dauphin*, 44 F.3d 209, 213 (3d Cir. 1995) ("It is well established that removal generally requires unanimity among the defendants."). The exception to this rule is for nominal, unknown, or fraudulently joined parties. See, e.g., *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1193 n.1 (9th Cir. 1988). Therefore, if the defendant can show that another defendant was fraudulently joined, the fraudulently joined defendant is not only ignored for citizenship purposes, but also has no right to veto a removal petition. See *supra* notes 29-30 and accompanying text (discussing fraudulent joinder doctrine).

↑n36. A case may be nonremovable if there is incomplete diversity or the claims do not satisfy the jurisdictional amount. See *supra* notes 24-28 and accompanying text.

↑n37. See 28 U.S.C. 1446(b) (1994).

↑n38. See *id.*

↑n39. Note the particularly egregious nature of this practice if the counsel represent that they claim an amount under the jurisdictional amount only to claim damages in excess of the jurisdictional amount one year after the filing of the complaint. See July 1999 Hearings, *supra* note 21 (statement of John H. Beisner, Esq.) (arguing that previous claim of damages can amount to "waiver" of damages in excess of jurisdictional amount, which raises adequacy of representation concerns).

↑n40. See H.R. Rep. No. 106-320, at 7 (1999) (observing that counsel after one year "drop

diverse parties, since at that point, current statutes bar removal of the case to Federal court" and also claim "only a very small amount of money," only later to "recant those statements"); June 1998 Hearings, *supra* note 34, at 19 (statement of John H. Beisner, Esq.) (claiming that counsel "frequently" abuse one-year provision).

†n41. Courts have applied the one-year provision rigidly. See, e.g., *Russaw v. Voyager Life Ins. Co.*, 921 F. Supp. 721, 724-25 (M.D. Ala. 1996) (holding that there is no exception to one-year bar even though plaintiff fraudulently joined defendant in lawsuit in order to defeat complete diversity); *Norman v. Sundance Spas, Inc.*, 844 F. Supp. 355, 360 (W.D. Ky. 1994) (applying one-year bar even though nondiverse defendant was dismissed from action one year after complaint was filed); *Cofer v. Horsehead Research & Dev. Co.*, 805 F. Supp. 541, 544 (E.D. Tenn. 1991) (applying one-year bar even though counsel, over one year after filing complaint, prayed for damages in excess of jurisdictional amount); see also *Royer v. Harris Well Serv., Inc.*, 741 F. Supp. 1247, 1249 (M.D. La. 1990) ("While the one year limitation could lend itself to abuses and inequities, it is for the Congress and not this Court to rewrite the provisions of section 1446(b)."). There is limited authority to the contrary. See *Cofer*, 805 F. Supp. at 543 (collecting cases but finding such support "scant" relative to strict interpretation of one-year bar).

†n42. See, e.g., H.R. Rep. No. 106-320, at 9 (1999) ("Opportunistic lawyers have identified those States and particular judges where the **class action** device can be exploited." (quoting Rep. James Moran)); Robert H. Klonoff & Edward K.M. Bilich, *The Mass Tort Class Action Gamble*, Metropolitan Corp. Counsel, Aug. 1999, at 8, available in Lexis, Legal News Library, MCC file ("Centers for mass tort litigation have developed in small, rural areas in such states as Alabama, Mississippi, Louisiana, and Texas."); Bruce T. Rubenstein, **Class Actions: That Giant Sucking Sound Revisited**, Says GC, Corp. Legal Times, July 1997, at 7, available in Lexis, Legal News Library, CORPLT file ("That giant sucking sound Ross Perot heard was not made by jobs going to Mexico.... It was made by the migration of thousands of **class actions** out of federal courts and into state courts, particularly into a few southern states that have become havens for... abuses...."); see also sources cited *supra* note 19.

One striking example of forum shopping involves an Alabama state judge who sits alone over three counties. This judge certified a total of 35 classes during 1996 and 1997. See March 1998 Hearings, *supra* note 34 (statement of Dr. John B. Hendricks, President, Ala. Cryogenic Eng'g, Inc.). This number is extraordinarily large, as the entire federal system certified only 38 classes in 1997. See *id.*

Another example involves the litigation surrounding alleged defects in the fuel tanks of General Motors trucks. The Third Circuit decertified a settlement class on several grounds. See *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 779, 822-23 (3d Cir. 1995). The same class was subsequently settled on very similar terms in Louisiana state court. See *White v. General Motors Corp.*, 718 So. 2d 480, 485 (La. Ct. App. 1998). Even though the settlement was ultimately vacated by the state appellate court, see *id.* at 491, the Third Circuit found it was without authority to question the Louisiana state court settlement. See *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d 133, 137-38 (3d Cir. 1998).

†n43. Empirical evidence of **class action** filings is limited. See Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. Rev. 74, 178 (1996) ("There is a basic need for research to determine the incidence or volume of **class actions** throughout the ninety-four districts of the federal system."). However, the limited empirical evidence available supports the conclusion that class counsel have targeted certain states. A survey of 32 Fortune 500 companies showed that in 1998, 69% of **class actions** filed against these companies were filed in five states, which included Alabama, Texas, and Louisiana. See *Class Action Litigation - A Federalist Society Survey*, Part III, **Class Action** Watch, Fall 1999, at 1, 3. A Rand Institute **class action** study also found a "pattern[]" of filings in "Gulf region" states, in particular Alabama and Louisiana. See Rand

Inst. for Civil Justice, **Class Action** Dilemmas: Pursuing Public Goods for Private Gain, Executive Summary 7 (1999).

¶n44. These plaintiff-friendly states often involve an elected judiciary. See, e.g., June 1998 Hearings, *supra* note 34, at 10-11 (statement of John H. Beisner, Esq.) (explaining connection between **class action** abuse and elected judiciary). But see Shirley S. Abrahamson, *The Ballot and the Bench*, 75 N.Y.U. L. Rev. (forthcoming 2000) (arguing that elected judges are as independent as appointed ones).

¶n45. Until recently, some Alabama state judges frequently certified classes *ex parte*. See, e.g., *Ex parte Citicorp Acceptance Co.*, 715 So. 2d 199, 205-06 (Ala. 1997) (Cook, J., concurring) (describing *ex parte* certification practice as "almost routine"); Stateside Assocs., **Class Actions** in State Courts: A Case Study of Alabama, Feb. 26, 1998, reprinted in March 1998 Hearings, *supra* note 34 (stating that 30 classes certified by one judge in 1997 were certified *ex parte*). However, the Alabama Supreme Court recently outlawed *ex parte* certifications. See *Ex parte Federal Express Corp.*, 718 So. 2d 13, 15 (Ala. 1998) ("This Court has recently rejected the practice of conditional certification of a **class action** based solely on the allegations of a complaint and without an evidentiary hearing.").

¶n46. Because class certification orders are interlocutory orders, in many states the defendant will not receive appellate review of the class certification. See Timothy E. Eble, *Non-Federal Question Class Actions* Prosecution and Defense Strategies, in *Emerging Issues in State Filings of Non-Federal Question Class Actions* 359, 363 (PLI Litig. & Admin. Practice Course Handbook Series No. H0-0068, 1999), available in Westlaw, 612 PLI/Lit 359. However, more states are likely to adopt interlocutory review in light of the fact that such review is now available in the federal system. See Fed. R. Civ. P. 23(f). Some states already provide for interlocutory appeals of class certification orders. See, e.g., Ark. R. App. P. 2(a) (9). Others also liberally allow defendants to seek a writ of mandamus compelling the trial judge to decertify the class. See, e.g., Brian W. Warwick, Note, *Claim-Jumpers Beware: Alabama Takes Another Look at Class Action Certification*, 22 Am. J. Trial Advoc. 211, 211 (1998) (describing recent Alabama Supreme Court decisions in which court decertified classes by granting writ of mandamus). Class counsel, therefore, will often not only target a particular district, but also a state with plaintiff-sympathetic appellate review.

¶n47. See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, C.J.) (arguing that defendants face enormous pressure to settle nationwide **class actions** once class is certified); Peter H. Schuck, *Judicial Avoidance of Juries in Mass Tort Litigation*, 48 DePaul L. Rev. 479, 480 n.6 (1998) (suggesting that Posner's theory explains recent settlements of weak class claims).

¶n48. See Sheila Birnbaum, *Class Certification - The Exception, Not the Rule*, 41 N.Y.L. Sch. L. Rev. 347, 350 (1997) ("Given the uncertainties of litigation, few defendants can withstand the pressure to settle after the class is certified rather than risk an adverse jury verdict in a single **class action** trial."); see also sources cited *supra* note 47.

¶n49. See, e.g., Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497, 535 (1991) ("The lawyer has a direct economic interest in the litigation: the expected fee. That interest is not the same as the interest of the class, which is in the damage recovery, net of attorneys' fees.").

¶n50. Of course, the threat of collateral attack can help motivate defendants to seek an otherwise fairer settlement than what otherwise would have been proposed. The scope of collateral review of **class action** settlements is an emerging topic that is beyond the scope of this Note. However, the prospect of collateral review has not effectively motivated class counsel and defendants to propose fair settlements, as the current scope of collateral attack is limited and courts as a rule presume that settlements are valid. See, e.g., *Epstein v. MCA, Inc.*, 179 F.3d 641, 647-50 (9th Cir. 1999) (limiting dramatically scope of collateral review of

class action settlements), withdrawing on reh'g 126 F.3d 1235 (9th Cir. 1997), cert. denied, 120 S. Ct. 497 (1999). For discussion of the effect of allowing collateral attack on **class action** settlements in the context of the now withdrawn Ninth Circuit opinion in Epstein, see Marcel Kahan & Linda Silberman, The Inadequate Search for "Adequacy" in **Class Actions**, 73 N.Y.U. L. Rev. 765, 786 (1998) (asserting process-based approach to collateral attack); William T. Allen, Finality of Judgment in **Class Actions**: A Comment on Epstein v. MCA, Inc., 73 N.Y.U. L. Rev. 1149, 1166 (1998) (arguing that federalism concerns should limit scope of collateral attack); Geoffrey P. Miller, Full Faith and Credit to Settlements in Overlapping **Class Actions**: A Reply to Professors Kahan and Silberman, 73 N.Y.U. L. Rev. 1167, 1177-78 (1998) (finding that collateral attack should be limited to cases in which benefits of overturning egregious settlements outweigh costs of reducing finality); Alan B. Morrison, The Inadequate Search for "Adequacy" in **Class Actions**: A Brief Reply to Professors Kahan and Silberman, 73 N.Y.U. L. Rev. 1179, 1180 (1998) (explaining that collateral attack should be available when state court settlement releases exclusive federal claims); Marcel Kahan & Linda Silberman, The Proper Role for Collateral Attack in **Class Actions**: A Reply to Allen, Miller, and Morrison, 73 N.Y.U. L. Rev. 1193, 1204 (1998) (noting general agreement by commentators of appropriateness of limiting collateral attack).

†n51. See, e.g., Jonathan R. Macey & Geoffrey P. Miller, The Plaintiffs' Attorney's Role in **Class Action** and Derivative Litigation: Economic Analysis and Recommendations for Reform, 58 U. Chi. L. Rev. 1, 46 (1991) (commenting that judges often have inadequate information to evaluate settlement's fairness). Docket congestion also creates incentives for judges to approve unfair settlements. See, e.g., John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort **Class Action**, 95 Colum. L. Rev. 1343, 1445 (1995) ("Eager for a docket-clearing settlement, trial courts face a temptation to close their eyes to conflicts and improprieties that they would not tolerate in other contexts.").

†n52. See, e.g., Hoffman v. BancBoston Mortgage Corp., No. 91-1880 (Ala. Cir. Ct. Jan. 24, 1994) (providing almost \$ 20 million in attorneys' fees and negative or minimal recovery for most class members), discussed in Susan P. Koniak & George M. Cohen, Under Cloak of Settlement, 82 Va. L. Rev. 1051, 1057-68 (1996); see also *id.* at 1062 n.29 (stating that through "confidential sources," authors learned of many Alabama settlements that provided negative recoveries to class but huge attorneys' fees to counsel).

†n53. See generally Miller, *supra* note 23 (proposing methods judges may utilize to minimize harm from competing actions).

†n54. See, e.g., *id.* at 520-39 (discussing problems state courts face with overlapping classes).

†n55. 28 U.S.C. 2283 (1994) (limiting ability of federal courts to enjoin proceedings in state courts); see Miller, *supra* note 23, at 531-32 (describing limitations of Anti-Injunction Act).

†n56. The Judicial Panel on Multidistrict Litigation (JPML) may transfer civil actions pending in more than one federal district involving one or more common questions of fact to any district for coordinated or consolidated pretrial proceedings if the Panel determines that transfer will be for the "convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. 1407(a) (1994). The Supreme Court recently held that the transferee court may not retain the actions for trial. See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998). While the Lexecon decision might stifle federal courts' ability to eliminate the problems with overlapping actions, the federal judiciary is clearly the superior forum relative to the states for minimizing the costs of overlapping actions. But see *infra* notes 171-75 and accompanying text (discussing need to overhaul MDL procedures).

†n57. Many commentators have proposed judicial remedies for competing **class actions**. See, e.g., Miller, *supra* note 23, at 528-29, 532-33 (discussing abstention as possible judicial

remedy). Not only have such remedies not been adopted, but the recent bills show that Congress is skeptical that such remedies will be adopted.

†n58. See *Rand Inst. for Civil Justice*, *supra* note 43, at 5 (evaluating survey recipients' response to claims of increase in competing **class actions**).

†n59. A prime anecdotal example is the Epstein litigation. In Epstein, two competing actions were filed, one in Delaware state court, the other in federal court. See, e.g., Kahan & Silberman, *supra* note 50, at 773-76 (critiquing Supreme Court and first subsequent Court of Appeals decision). Class counsel in the federal action asserted several state law claims together with a claim under the Securities Exchange Act, subject to the exclusive jurisdiction of the federal judiciary. See *Epstein v. MCA, Inc.*, 50 F.3d 644, 659-60 (9th Cir. 1995). Class counsel in the state action settled all claims first, including the Securities Exchange Act claim. See *In re MCA, Inc. Shareholders Litig.*, 598 A.2d 687, 690 (Del. Ch. 1991). The Supreme Court held that a state court settlement can include a release of exclusive federal claims. See *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 369 (1996). The Ninth Circuit, on remand, first held that collateral attack was permitted on the issue of adequacy of representation in the state court action. See *Epstein v. MCA, Inc.*, 126 F.3d 1235, 1242-48 (9th Cir. 1997). Then, on rehearing, the Ninth Circuit dramatically limited the previous opinion's scope of collateral review. See *Epstein v. MCA, Inc.*, 179 F.3d 641, 649-50 (9th Cir. 1999), cert. denied, 120 S. Ct. 497 (1999).

†n60. See, e.g., Kahan & Silberman, *supra* note 50, at 775 (discussing defendant's ability to conduct reverse auction).

†n61. See *id.* If judges scrutinized **class action** settlements, the problems with reverse auctions would be minimized. However, as shown earlier, forum shopping allows class counsel to choose a forum that is not likely to scrutinize a settlement. See *supra* notes 50-52 and accompanying text.

†n62. See Thomas D. Rowe, Jr., *Beyond the Class Action Rule: An Inventory of Statutory Possibilities to Improve the Federal Class Action*, 71 N.Y.U. L. Rev. 186, 190 (1996) (suggesting Ben-Hur decision was premised on antiquated view of absent class members as later joined parties); see also *supra* note 25 (explaining Ben-Hur decision). It is hard to justify considering only the named parties for diversity of citizenship but requiring each individual class member, whether named or unnamed, to meet the jurisdictional amount. See Rowe, *supra*, at 190-91. However, some commentators have suggested that even though the Ben-Hur rule is arbitrary, it is effective as a docket control mechanism by both allowing and limiting the number of **class actions** brought in federal court. See, e.g., *id.* at 191 (pointing out that rule effectively grants federal jurisdiction over mass tort and other large state-law **class actions**). This justification fails because the Ben-Hur rule is an extremely crude way of defining jurisdiction, since the named parties often bear no relationship to the composition of the class. Cf. Martin H. Redish, *Diversity Jurisdiction*, in 15 Moore's Federal Practice 102.12, at 102-1, 102-23 (3d ed. 1999) ("Apart from its obvious historical pedigree, it is unclear that the complete diversity requirement is any more rational a means of curbing **diversity jurisdiction** than an approach premised on the basis of a litigant's astrological sign.").

†n63. Compare, e.g., *Warrick v. General Elec. Co.*, 70 F.3d 736, 741 n.7 (2d Cir. 1995) (noting that deference to initial choice of forum by class plaintiffs is entitled to less weight than choice by individual plaintiff), *Job Haines Home for the Aged v. Young*, 936 F. Supp. 223, 228 (D.N.J. 1996) (finding less deference for class counsel's choice of forum than ordinary plaintiff's), and *Schenet v. Anderson*, No. 86 C 6124, 1986 WL 13751, at *2 (N.D. Ill. Dec. 1, 1986) ("This court has held that little rests on the choice by a plaintiff representative of a nationwide class."), with *Hayes v. Fireman's Fund Mortgage Corp.*, 649 N.E.2d 582, 587 (Ill. App. Ct. 1995) (holding that class counsel is entitled to same deference in choice of forum as ordinary plaintiff), and *Girsh v. Jenson*, 355 F. Supp. 1104, 1106 (E.D.

Pa. 1973) (same).

†n64. See Rowe, *supra* note 62, at 190.

†n65. See Interstate **Class Action** Jurisdiction Act of 1999, H.R. 1875, 106th Cong.; **Class Action** Fairness Act of 1999, S. 353, 106th Cong.; see also *supra* note 21 (discussing current state of these two bills as well as past failed proposals).

In 1993, the American Law Institute proposed an overhaul of federal jurisdictional law. See American Law Inst., Complex Litigation Project: Proposed Final Draft (1993). The proposal provided for expansive removal jurisdiction, see *id.* 4.01, at 220-21, and a federal Complex Litigation Panel, which would have enormous discretion to transfer cases within the federal judiciary, see *id.* Introductory Note, at 36-38, or to the states, see *id.* 3.07, at 177-78. For a concise overview of the proposal, see Thomas E. Willging, Mass Torts Problems and Proposals: A Report to the Mass Torts Working Group, 187 F.R.D. 328, 406-08 (1999).

†n66. See H.R. 1875 3(a), 4(a); S. 353 3, 4(a).

†n67. See H.R. 1875 3(a), 4(a).

†n68. See S. 353 3, 4(a).

†n69. See *supra* note 35 and accompanying text.

†n70. See H.R. 1875 4(a); S. 353 4(a). The **House** proposal also repeals the current prohibition on in-state defendant removal, see H.R. 1875 4(a), while the **Senate** bill is ambiguous, not mentioning any change in the current prohibition on in-state removal, but speaking of "any defendant" in the context of removal in general, see S. 353 4(a).

†n71. See *supra* notes 36-41 and accompanying text.

†n72. See H.R. 1875 4(b); S. 353 4(a).

†n73. See H.R. 1875 4(a); S. 353 4(a). The theory underlying this provision is examined *infra* note 168.

†n74. See *infra* Part II.B.1 (discussing controversial effect of this provision to regulate indirectly state **class action** procedure).

†n75. State and federal statutes of limitations are tolled under the **House** proposal during the time the action is pending. See H.R. 1875 4(e). Tolling applies to both refiled **class actions** and refiled actions asserting only individual claims. See *id.* The **Senate** proposal provides less protection. The **Senate** proposal tolls only the federal (not state) statute of limitations and only tolls the refiling of individual claims, as opposed to another **class action**. See S. 353 3 (tolling to extent of "federal law"); see also American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 552-54 (1974) (holding that statute of limitations is tolled for individuals who intervene in **class action** when Rule 23 complaint is filed); Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 350 (1983) (holding that American Pipe rule is not limited to intervenors but extends to all class members); Korwek v. Hunt, 827 F.2d 874, 879 (2d Cir. 1987) (holding that American Pipe doctrine does not extend to repleading class complaint).

†n76. See H.R. 1875 4(e). Unlike the **House** bill, the **Senate** bill contains no express permission to re-remove a filed case. However, there is nothing to suggest that re-removal would not be allowed, and it would seem that the presumption is that it would be allowed, since barring re-removal would mean that the bill's provisions would not ultimately be applicable.

For a federal court to decertify a class that a state court certified would be unsurprising. Not only do many states have a different **class action** procedure from Fed. R. Civ. P. 23, see infra note 102 and accompanying text, but even those states that have adopted Rule 23 verbatim often reject federal jurisprudence regarding the Rule. See infra note 103 and accompanying text.

The same concerns about re-removal are implicated when the case is originally filed in federal court, decertified by the federal court, and then refiled in state court. The congressional bills do not bar such removal from state court. Even though this paradigm is technically not re-removal (the case was only filed once in state court), this Note treats this paradigm under the rubric of re-removal because the underlying concerns are the same.

†n77. See, e.g., H.R. Rep. No. 106-320, at 25 (1999) (stating that if there were no re-removal provision, "that approach would allow counsel effectively to ask a State court to review and overrule the class certification decision of a Federal court").

†n78. See H.R. 1875 3(a); S. 353 3. While the **Senate** proposal explicitly applies this limitation to both original and removal jurisdiction, the **House** proposal arguably only applies to removal jurisdiction. This is because the **House** proposal limits the exception to the state where "the action was originally filed," which implies that a state action must exist for the exception to take effect. See H.R. 1875 3(a). However, this result is strange, as the exception is provided in the original jurisdiction section.

†n79. The word "primary" was inserted to distinguish between primary and nominal defendants. See H.R. Rep. No. 106-320, at 21 (defining "primary defendants" as "real 'targets' of the suit"); see also infra note 145 and accompanying text (discussing limited effect of "substantial majority" exception because corporations are citizens of at most two states).

†n80. New textualists focus on the plain meaning of a statute without reference to legislative history. See generally William N. Eskridge, Jr., *The New Textualism*, 37 *UCLA L. Rev.* 621 (1990).

†n81. See H.R. Rep. No. 106-320, at 21; H.R. Rep. No. 105-702, at 13 (1998).

†n82. H.R. Rep. No. 106-320, at 21.

†N83. See July 1999 Hearings, supra note 21 (statement of Eleanor D. Acheson, Dep't of Justice) ("This... exception is not likely to produce a significant reduction in the number of State **class actions** subject to removal."); id. (statement of Brian Wolfman, Public Citizen Litig. Group) (explaining that despite "substantial majority" exception, proposals "shift[] an enormous amount of power from state to federal courts").

Of course, many members of the current Supreme Court are hostile to legislative history and may, if given the chance, read "substantial majority" without reference to the legislative history. See, e.g., *Department of Commerce v. United States House of Representatives*, 119 S. Ct. 765, 779-80 (1999) (Scalia, J., concurring in part) (writing separately for Chief Justice Rehnquist and Justices Kennedy and Thomas to criticize majority's reliance on legislative history as general proposition).

The Y2K Act contains the same substantial majority exception. See Y2K Act, Pub. L. No. 106-37, 15(c)(2)(A), 106 Stat. 185 (to be codified at 15 U.S.C. 6614(c)(2)(A)). There was no legislative history explaining the exception.

†n84. See Interstate **Class Action** Jurisdiction Act of 1999, H.R. 1875, 106th Cong. 3(a); **Class Action** Fairness Act of 1999, S. 353, 106th Cong. 3.

†n85. See H.R. 1875 3(b)(4)(A); S. 353 3(7)(A); see also H.R. Rep. No. 106-320, at 22-23. The **House** Report also cautions that this exception be read "narrowly." See *id.* at 23.

†n86. 15 U.S.C.A. 77p(b) (West Supp. 1999).

†n87. See *infra* Part II.B.1.

†n88. Requiring minimal as opposed to complete diversity is consistent with Article III. See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 531 (1967) (holding that while 28 U.S.C. 1332 requires complete diversity, Article III requires only minimal diversity). It is difficult to see how expanding jurisdiction to provide minimal diversity for all classes would run afoul of Article III. It is irrelevant that minimal diversity will allow many classes into federal court that do not implicate the policy concern of local bias that underlies **diversity jurisdiction** because current jurisprudence requires no inquiry into whether a particular action implicates the concern of local bias. See *supra* note 27 and accompanying text.

†n89. See, e.g., June 1998 Hearings, *supra* note 34, at 44 (statement of Brian Wolfman, Public Citizen Litig. Group) (questioning constitutionality of re-removal provision); H.R. Rep. No. 106-320, at 34-35 (dissenting views) (same); H.R. Rep. No. 105-702, at 25 (1998) (dissenting views) (same).

†n90. The Amendment provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. X.

†n91. See, e.g., *Johnson v. Fankell*, 520 U.S. 911, 919 (1997) ("The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." (quoting *Howlett v. Rose*, 496 U.S. 356, 372 (1990) (internal quotation marks omitted))); *Felder v. Casey*, 487 U.S. 131, 138 (1988) ("No one disputes the general and unassailable proposition relied upon by the Wisconsin Supreme Court below that States may establish the rules of procedure governing litigation in their own courts."); cf. *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs.*, 398 U.S. 281, 285 (1970) ("One of the reserved powers was the maintenance of state judicial systems for the decision of legal controversies."); *The Federalist* No. 83 (Alexander Hamilton) (stressing importance of independent state judiciary in federal system).

†n92. See, e.g., *American Ry. Express v. Levee*, 263 U.S. 19, 21 (1923) ("The law of the United States cannot be evaded by the forms of local practice.").

†n93. For examples of federal preemption of state procedure, see *Felder*, 487 U.S. at 134 (holding that state notice provision was preempted by federal civil rights statute); *Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330, 335-36 (1988) (rejecting state procedure allowing prejudgment interest for Federal Employee's Liability Act claim); *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (holding that Federal Arbitration Act's procedures were valid in state court because of substantive right created by Act).

†n94. For a thorough examination of this issue, see generally Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures*, 44 *Vill. L. Rev.* 1 (1999).

¶n95. Among other things, the proposal would have prohibited state tobacco-related **class actions**. See Proposed Resolution, Title VIII B(2), June 20, 1997 (visited Mar. 6, 2000) <<http://stic.neu.edu/settlement/6-20-settle.htm>> (providing for bar on "class actions, joinder, aggregations, consolidations, extrapolations or other devices to resolve cases [arising from conduct prior to settlement] other than on the basis of individual trials"); see also A Review of the Global Tobacco Settlement: Hearing Before the **Senate** Comm. on the Judiciary, 105th Cong. 160 (1997) (statement of Professor Laurence H. Tribe) ("For Congress directly to regulate the procedures used by state courts in adjudicating state-law tort claims - to forbid them, for example, from applying their generally applicable **class action** procedures in cases involving tobacco suits - would raise serious questions under the Tenth Amendment and principles of federalism.").

¶n96. In 1996, President Clinton vetoed the Common Sense Product Liability Reform Act of 1995, which provided for specific judicial procedures in awarding punitive damages. See William J. Clinton, Message to the **House** of Representatives Returning Without Approval Product Liability Legislation, 1 Pub. Papers 681 (May 2, 1996). For constitutional criticism of the proposal, see generally Cynthia C. Lebow, Federalism and Federal Product Liability Reform: A Warning Not Heeded, 64 *Tenn. L. Rev.* 665, 677-88 (1997) (outlining objections to regulating state procedure).

¶n97. Y2K Act, Pub. L. No. 106-37, 106 Stat. 185 (1999) (to be codified at 15 U.S.C. 6601-6617). The Act imposes several procedural prerequisites to maintaining a Y2K action in state court. See generally Steven G. Burton & Charles G. Geitner, Recent Legislative Developments Impacting Year 2000 Litigation, Fla. B.J., Nov. 1999, at 10 (outlining Act's provisions).

¶n98. See *Alden v. Maine*, 119 S. Ct. 2240, 2264 (1999) ("A power to press a State's own courts into federal service to coerce the other branches of the State... is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals."); see also *Printz v. United States*, 521 U.S. 898, 933-34 (1997) (invalidating federal statute requiring state officials to perform background checks on handgun purchasers); *New York v. United States*, 505 U.S. 144, 188 (1992) (holding that Congress could not require states to implement regulatory procedures for dealing with nuclear waste). But cf. *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 771 (1982) (requiring states to follow federally mandated procedures if they choose to continue regulating public utilities); *Testa v. Katt*, 330 U.S. 386, 392, 394 (1947) (holding that state courts must entertain federal questions absent "valid excuse").

One issue raised in the greater debate over regulating state procedure is, notwithstanding the Tenth Amendment, what source of power, if any, permits Congress to regulate state procedure. See generally Martin H. Redish & Steven G. Sklaver, Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism, 32 *Ind. L. Rev.* 71 (1998). This issue is inapplicable in the **class action** jurisdictional context, as the regulation of state procedure is an indirect effect of a valid jurisdictional grant under Article III. See *supra* note 88 (explaining that minimal diversity proposals do not run afoul of Article III).

¶n99. See *Parmet*, *supra* note 94, at 41.

¶n100. See, e.g., *Reno v. Condon*, 120 S. Ct. 666, 672 (1999) (rejecting Tenth Amendment challenge to Driver's Protection Privacy Act in part because Act did not require state officials to regulate private conduct).

¶n101. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985) (overruling previous Tenth Amendment test of whether congressional act encroached on "traditional government function").

¶n102. See H.R. Rep. No. 106-320, at 37 & n.35 (1999) (dissenting views) (describing

differences among states regarding **class action** rules).

†n103. See, e.g., Arkansas La. Gas Co. v. Morris, 744 S.W.2d 709, 711 (Ark. 1988) (noting that, despite similarity between Arkansas **class action** procedure and Federal Rule 23, "there is a considerable difference in application"); Cartt v. Superior Court, 124 Cal. Rptr. 376, 383 n.16 (Ct. App. 1975) ("While our Supreme Court has repeatedly referred to Rule 23 as a useful tool it has never adopted it as a procedural straight jacket." (citations omitted)); cf. Philip Stephen Fuoco & Robert F. Williams, **Class Actions** in New Jersey State Courts, 24 Rutgers L.J. 737, 740 (1993) (finding that New Jersey state courts often look to federal jurisprudence for interpreting state **class action** statute but recognizing independent state jurisprudence).

California has consistently challenged federal **class action** jurisprudence. For example, California has rejected the Supreme Court's decision in Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974), in holding that the California **class action** rule allows a trial court to direct the defendant to bear part or all of the initial cost of notice. See Civil Serv. Employees Ins. Co. v. Superior Court, 584 P.2d 497 (Cal. 1978).

Some states have also challenged the federal judiciary's perceived hostility to using the **class action** device in consumer litigation. See Kenneth S. Gould, New Wine in an Old Bottle - Arkansas's Liberalized **Class Action** Procedure - A Boon to the Consumer **Class Action?**, 17 U. Ark. Little Rock L.J. 1, 21-24 (1994) (recognizing federal judiciary's hostility to consumer **class actions** and commenting that recent Arkansas decisions have opened door for consumer **class actions**); see also 7B Charles Alan Wright et al., Federal Practice and Procedure 1782, at 57-58 (2d ed. 1986) (noting federal judiciary's hostility toward consumer **class actions**).

†n104. Recent **class actions** have included millions of class members and claimed astronomical damages. See, e.g., Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 597 (1997) (decertifying settlement class involving all persons who had been exposed to asbestos or related to family member who had been exposed); Castano v. American Tobacco Co., 84 F.3d 734, 737 (5th Cir. 1996) (decertifying class of all smokers and their families against tobacco companies); Lindsey v. Dow Corning Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig.), No. CV 92- P-10000-S, 1994 WL 578353, at *1 (N.D. Ala. Sept. 1, 1994) (approving over four billion dollar settlement involving breast implants).

†n105. See, e.g., Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 828 (1989) (noting that for purposes of diversity, citizenship is determined by domicile).

†n106. This example is adapted and modified from an actual case. See H.R. Rep. No. 106-320, at 39 & n.48 (1999) (dissenting views) (describing litigation against Foodmaker, Inc., parent company of Jack-in-the-Box restaurants).

†n107. See Joseph Thomas Moldovan, Note, New York Creates a Private Right of Action to Combat Consumer Fraud: Caveat Venditor, 48 Brook. L. Rev. 509, 530-31 (1982) (arguing that low stakes involved in consumer fraud actions lead to **class actions** being only economically viable action under consumer fraud statutes); see also Steven E. Fineman, Consumer Protection **Class Actions** Have Important Position: Applying New York's Statutory Scheme, N.Y. L.J., Nov. 23, 1998, at S6 (discussing importance of **class actions** in enforcing New York consumer laws).

†n108. For example, many recent **class actions** have been filed against sweepstakes promoters. See Linda Goldstein, Advertising Law: In Recent Months Several **Class Actions** Have Been Filed Against Sweepstakes Promoters Alleging Fraud, But the Suits May Encounter Certification Problems, Nat'l L.J., Mar. 16, 1998, at B5 (stating that Louisiana consumer protection statute does not allow for private **class actions**, and speculating that lack of **class action** device is likely reason why no **class actions** have been filed against sweepstakes

promoters, despite national trend). If state courts are not allowed to entertain **class actions**, state courts will not be allowed to play a role in regulating this industry.

↑n109. 304 U.S. 64, 78 (1938).

↑n110. Federal judges sitting in diversity routinely ignore lower state court decisions in favor of federal decisions until the state's supreme court has spoken authoritatively, and not in dicta, on the issue. See William M. Landes & Richard A. Posner, *Legal Change, Judicial Behavior, and the Diversity Jurisdiction*, 9 J. Legal Stud. 367, 374-75 (1980) (finding that federal judges applying state law are two-and-a-half times more likely to cite federal precedent than state precedent); see also Robert A. Schapiro, *Balancing, Justice, and the Eleventh Amendment: Justice Stevens' Theory of State Sovereign Immunity*, 27 Rutgers L.J. 563, 595-96 & n.116 (1996) (finding federal judges sitting in diversity often decide cases differently than state courts eventually decide issue). For an exhaustive review of many of the problems created by Erie for federal judges regarding state precedent (or lack thereof), see generally Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. Rev. 651 (1995).

This narrow approach can be justified by a reading of Erie itself. If federal judges are given discretion to overturn or seriously alter existing law, federal judges arguably usurp the lawmaking power of the states. See Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. Pa. L. Rev. 1459, 1461 (1997) (arguing that Erie puts federal judiciary in "precarious position" of either usurping state power or unfairly disadvantaging litigants).

↑n111. See, e.g., *City of Philadelphia v. Lead Indus. Ass'n*, 994 F.2d 112, 123 (3d Cir. 1993) ("Federalism concerns require that we permit state courts to decide whether and to what extent they will expand state common law. Our role is to apply the current law of the appropriate jurisdiction, and leave it undisturbed." (citations omitted)).

↑n112. See, e.g., Clark, *supra* note 110, at 1461 (discussing "predictive approach" relative to Erie command not to create state law). Within the evolving field of products liability litigation, federal courts have faced the problem of dated state supreme court decisions that stand in contrast to a national trend of change in the law. Some federal courts have declined to predict how the state supreme court would rule on the claim and simply have applied the dated state supreme court precedent. See, e.g., *Dayton v. Peck, Stow & Wilcox Co.*, 739 F.2d 690, 694 (1st Cir. 1984) ("We must apply the law of the forum as we infer it presently to be, not as it might come to be."). Indeed, in these situations federal courts are left with the undesirable choice of either creating law through prediction or abstaining from expanding the law and inflicting a potential injustice on the plaintiff. See Clark, *supra* note 110, at 1461.

↑n113. All but six states have some form of certification procedure. See David G. Knibb, *Federal Court of Appeals Manual* 23.3, at 422-23 (4th ed. 2000).

↑n114. Certification is costly, and it forces the state supreme court to adjudicate an issue it is not deciding. See Hon. Bruce M. Selya, *Certified Madness: Ask a Silly Question...*, 29 Suffolk U. L. Rev. 677, 678 (1995) (criticizing certification process in theory and in practice from standpoint of federal judge); Mark R. Kramer, *Comment, The Role of Federal Courts in Changing State Law: The Employment at Will Doctrine in Pennsylvania*, 133 U. Pa. L. Rev. 227, 233 (1984) (discussing problems with certification).

Federal courts could choose to abstain, but abstention is an extremely narrow exception to the federal court's duty to decide diversity cases. See generally Lewis Yelin, *Note, Burford Abstention in Actions for Damages*, 99 Colum. L. Rev. 1871 (1999).

↑n115. See Ellen A. Peters, *Capacity and Respect: A Perspective on the Historic Role of the State Courts in the Federal System*, 73 N.Y.U. L. Rev. 1065, 1070 (1998) (arguing that state

courts rely more on common law than do federal counterparts); see also Hakimoglu v. Trump Taj Mahal Assocs., 70 F.3d 291, 299 (3d Cir. 1995) (Becker, J., dissenting) (commenting that state court judges may apply different "interpretative assumptions" than does federal judiciary).

↑n116. See Peters, *supra* note 115, at 1071.

↑n117. See *supra* text accompanying notes 102-04 (arguing that experimentation with **class action** procedures is needed).

↑n118. See, e.g., June 1998 Hearings, *supra* note 34, at 97 (statement of Richard H. Middleton, Jr., Ass'n of Trial Lawyers of Am.) (stating that federalizing all **class actions** will have deleterious effects on federal docket); H.R. Rep. No. 106-320, at 32 (1999) (dissenting views) (same).

↑n119. See Jeffrey E. Shuren, Legal Accountability for Utilization Review in ERISA Health Plans, 77 N.C. L. Rev. 731, 777 (1999) (commenting on congested federal docket).

↑n120. See William H. Rehnquist, The 1997 Year-End Report of the Federal Judiciary, Third Branch, Jan. 1998, at 1, 2.

↑n121. See generally Lee Renzin, Note, Advice, Consent, and **Senate** Inaction - Is Judicial Resolution Possible?, 73 N.Y.U. L. Rev. 1739, 1741-45 (1998) (describing crisis in federal judiciary).

↑n122. See Mark Preston, Inhofe Will Block All Clinton Judicial Nominations, Roll Call, Jan. 10, 2000, at 18. In 1997, the crisis reached its worst point: During 1996, Congress confirmed only 17 judges, and no appellate court judges. See Sam Fulwood III, Clinton Calls on **Senate** to Confirm Judicial Nominees, L.A. Times, Aug. 10, 1999, at A16. In 1998, the **Senate** alleviated a backlog of judicial nominations by filling 65 judgeships. See William J. Clinton, Remarks at American Bar Association in Atlanta, Georgia, 35 Weekly Comp. Pres. Doc. 1600, 1603 (Aug. 9, 1999). However, during 1999, Congress again stalled during the confirmation process such that the level of vacancies today is nearly the same as it was during its worst point in 1997. See Rehnquist, *supra* note 120, at 2 (stating that there were 82 vacancies at end of 1997).

↑n123. See, e.g., Preston, *supra* note 122, at 18 (describing Republican frustration with presidential recess appointments, which resulted in Republican hold-up of confirmation process). The backlog during the Clinton administration has been far worse than during the administration of his Democratic predecessor, President Carter. During the Clinton administration, the **Senate** has taken an average of 201 days to confirm or reject a judge, while during the Carter administration the **Senate** took only 90 days. See Timothy J. Connolly, Federal Judiciary Posts Go Begging: Pols Hamper Nomination Process, Sunday Telegram (Worcester, Mass.), Oct. 17, 1999, at A1, available in 1999 WL 5028547.

↑n124. See Steve Lash, Federal Criminal Code Shouldn't Be Widened, Justices Tell Congress, Hous. Chron., Mar. 12, 1998, at 15A (citing statements by Justices Kennedy and Souter).

↑n125. The Ninth Circuit had 10 vacancies on a 28 member court for most of 1997, prompting Chief Judge Procter Hug to cancel 600 hearings. Stephan O. Kline, The Topsy-Turvy World of Judicial Confirmations in the Era of Hatch and Lott, 103 Dick. L. Rev. 247, 266 (1999). In 1998, Second Circuit Chief Judge Ralph K. Winter, Jr., began to use only one active Second Circuit judge on some panels because of the five vacancies that existed on the 13 member court at that time. See *id.*

↑n126. Rehnquist, *supra* note 120, at 2. Sixth Circuit Chief Judge Boyce F. Martin, Jr. has argued that a recent increase in circuit splits can be attributed to the fact that less time is

available for "sitting and reading" by judges because of the backlog. See Kline, *supra* note 125, at 267; see also Nina Totenberg & Bob Edwards, *Federal Judge Shortage* (NPR radio broadcast, Sept. 23, 1997), available in Lexis, News Library, NPR file ("You cannot give [cases] the attention that they deserve. And you know that you're making a lot of mistakes... because of the speed." (quoting Southern District of California Chief Judge Judith N. Keep)).

✚n127. See generally Charles D. Bonner, Comment, *The Federalization of Crime: Too Much of a Good Thing?*, 32 U. Rich. L. Rev. 905 (1998).

✚n128. 18 U.S.C. 3161(h) (1994) (mandating dismissal of criminal matters if not tried within a specified time period). The Act has caused the federal judiciary to focus a greater amount of resources on criminal matters at the expense of civil matters. See Sara Sun Beale, Reporter's Draft for the Working Group on Principles to Use When Considering the Federalization of Criminal Law, 46 Hastings L.J. 1277, 1288-89 (1995) (remarking on increase of federal judiciary's attention to criminal matters).

✚n129. See, e.g., John A. Martin & Michelle Travis, *Defending the Indigent During a War on Crime*, 1 Cornell J.L. & Pub. Pol'y 69, 95 (1992) (describing federal docket's increase of criminal matters at expense of civil matters); see also Committee on Long Range Planning of the Judicial Conference of the U.S., *Proposed Long Range Plan for the Federal Courts* 10 (1995) ("Criminal cases have produced significant delays for civil suits in some judicial districts.").

From 1980 to 1992, the number of civil trials declined by 25% while the number of criminal trials increased by 43%. See Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States* 1993, at 206 tbl.332. Even though the number of civil trials has decreased, civil filings have continued to grow far more rapidly than criminal cases. See Beale, *supra* note 128, at 1289 (commenting on effect of federalizing crimes on federal judiciary). Chief Judge Judith N. Keep of the Southern District of California estimates that she spends more than 70% of her time on routine criminal matters. See Michael deCourcy Hinds, *Bush Aides Push State Gun Cases into U.S. Courts*, N.Y. Times, May 17, 1991, at A1.

✚n130. Forty percent of federal criminal provisions enacted since the Civil War have been enacted since 1970. See John J. Mountjoy, *The Federalization of Criminal Laws*, Spectrum, Summer 1999, at 1, 1. The trend shows no signs of abating: Over one thousand criminal bills were proposed in the 105th Congress. See *id.* at 2.

✚n131. See Rehnquist, *supra* note 120, at 4.

✚n132. See William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary*, Third Branch, Jan. 1999, at 1, 2.

✚n133. See David L. Cook et al., *Criminal Caseload in U.S. District Courts: More than Meets the Eye*, 44 Am. U. L. Rev. 1579, 1592-93 (1995) (describing increase in resources that federal judiciary devotes to criminal matters).

✚n134. See *Finding Solutions to the Asbestos Litigation Problem: Hearing on S. 758, the Fairness in Asbestos Compensation Act of 1999 Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 106th Cong. (1999) (statement of Conrad L. Mallett, Jr., Coalition for Asbestos Resolution) (visited Mar. 8, 2000) <<http://www.senate.gov/judiciary/10599cmj.htm>>. Indeed, federal district court Judge Spencer Williams has questioned whether state and federal systems will go bankrupt from the explosion in mass tort filings. See, e.g., *Complex Litigation Project*, *supra* note 65, at 17.

✚n135. 521 U.S. 591, 597 (1997) (holding that Rule 23 requirements must be met for settlement **class action**).

†n136. 119 S. Ct. 2295, 2302 (1999) (limiting use of mandatory **class actions** when defendant faces potential bankruptcy because of class claims).

†n137. There is no database on the number of **class actions** filed in state court. See Rand Inst. for Civil Justice, supra note 43, at 4.

†n138. See id. at 5 (surveying plaintiffs' and defendants' attorneys and concluding that state **class action** filings have "surged" in the "past several years").

†n139. See id. at 6 (reflecting 1995-1996).

†n140. See Leonidas Ralph Mecham, Judicial Business of the United States Courts 383 tbl.x-4 (Statistics Div., Admin. Office of the U.S. Courts 1997).

†n141. Indeed, concerns regarding increased workload have been raised recently in response to congressional consideration of new federal causes of action. See 142 Cong. Rec. S10,396 (daily ed. Sept. 12, 1996) (statement of Sen. Thompson) (criticizing revived Gun Free School Zones Act as straining already congested federal docket); Judith Resnik, The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations, 86 Geo. L.J. 2589, 2618-19 (1998) (documenting opposition to Violence Against Women Act on ground that federal judiciary could not handle new causes of action); Mary C. Michenfelder, Note, The Federal Carjacking Statute: To Be or Not to Be? An Analysis of the Propriety of 18 U.S.C. 2119, 39 St. Louis U. L.J. 1009, 1048 (1995) (criticizing federal carjacking statute for straining federal docket).

†n142. See supra notes 79-83 and accompanying text.

†n143. Indeed, the exception in the **House** bill is titled "an intrastate case." See H.R. 1875, 106th Cong. 3(a) (1999).

†n144. See supra notes 81-83 and accompanying text.

†n145. See **Class Action** Fairness Act of 1999: Hearings on S. 353 Before the Subcomm. on Admin. Oversight and the Courts of the **Senate** Comm. on the Judiciary, 106th Cong. (1999) (statement of Eleanor D. Acheson, Dep't of Justice) (visited Mar. 8, 2000) <<http://www.senate.gov/judiciary/5499wl.htm>> ("Defendants in **class actions** are likely to be corporate entities whose citizenship has no necessary relationship to where claims against them arise, so the exception for cases in which plaintiffs and defendants are predominately citizens of the same State is likely to apply to few cases.").

†n146. One-third is initially advanced in this Note because, as will be discussed later, limiting jurisdiction in this way would limit forum shopping and competing classes and minimize federalism and docket congestion concerns. However, it is ultimately an empirical question as to whether a one-third standard or some other measure will best further these aims. Raising the proportion would further limit forum shopping and competing classes but exacerbate federalism and docket congestion concerns, while lowering the number would have the opposite effect.

†n147. Therefore, if one-third of the class were from New York, the other two-thirds from various other states, and the class were filed in Alabama, the federal district court should exercise jurisdiction. If the class were filed in New York state court, the class could not be removed.

This Note's proposal would also retain the **House's** proposal that unnamed class members be allowed to remove. See infra note 168.

†n148. Cf. Nancy Morawetz, Underinclusive Class Actions, 71 N.Y.U. L. Rev. 402, 434-38

(1996) (advocating increased judicial role under current rules in scrutinizing class definitions that are drawn too narrowly and exclude otherwise proper class members).

↑n149. See supra note 56 and accompanying text.

↑n150. See supra note 146.

↑n151. See Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 828 (1989).

↑n152. This problem is not limited to this Note's proposal. The current congressional proposals exclude jurisdiction if a "substantial majority" of the class is from a particular state, the defendants are from that state, and the governing law will be of that state. See supra notes 78-83 and accompanying text. Therefore, the congressional proposals would require judges to determine the composition of the class as well.

↑n153. See supra note 106 and accompanying text.

↑n154. Defining one-third of a class that includes unknown or future plaintiffs can be handled in the same way. The party seeking to litigate in federal court will have the burden of convincing the judge with reasonable certainty that fewer than one-third of the future claimants are from the forum state. The problem of proof may be more difficult in the case of unknown class members, but the problem may be circumvented by the use of circumstantial evidence. For example, a class of "every United States person who has not been exposed to asbestos but is in fact exposed after class certification" certainly would not include one-third of residents from a particular state. Further, these same concerns arise under the congressional proposals, as a trial judge must determine whether a "substantial majority" of the class is from a particular state.

↑n155. For original jurisdiction, class counsel would have the burden; for removal jurisdiction, defendants would have the burden.

↑n156. See supra notes 67-68 and accompanying text.

↑n157. One justification for requiring great deference to the plaintiff's claim for the jurisdictional amount is that in evaluating the monetary amount of the plaintiff's claim, the judge arguably is infringing on the role of the jury. See, e.g., Jacobs v. Avisun Corp., 359 F.2d 931, 935 (3d Cir. 1966) (finding that "legal certainty" test is grounded in "fear of depriving a plaintiff of his right to a jury trial").

↑n158. For original jurisdiction, the standard is that it must appear to a legal certainty that the plaintiff in good faith cannot claim the jurisdictional amount. See Saint Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938). Courts are divided on the standard for removal jurisdiction. See supra note 33 and accompanying text.

↑n159. The "substantial majority" exception in the congressional proposal provides that not only must a substantial majority of the class be from one state, but the primary defendants must also be from that state. See supra notes 78-83 and accompanying text.

↑n160. For these reasons, the proposal should not require that the law applied be of the same state as the third of the residents.

↑n161. Compare, e.g., Krell v. Prudential Ins. Co. of Am. (In re The Prudential Ins. Co. of Am. Sales Practice Litig.), 148 F.3d 283, 305 (3d Cir. 1998) ("National (interstate) **class actions** are the paradigm for federal **diversity jurisdiction** because... they... tend to guard against any bias against interstate enterprises."), July 1999 Hearings, supra note 21 (statement of Hon. Griffin B. Bell) (arguing that out-of-state corporations face local bias in **class actions**), id. (statement of Professor E. Donald Elliott) (same), and id. (statement of

John H. Beisner, Esq.) (same), with id. (statement of Guy Miller Struve, Comm. on Fed. Courts of the Ass'n of the Bar of the City of N.Y.) (arguing that out-of-state corporations do not face such local bias), id. (statement of Brian Wolfman, Public Citizen Litig. Group) (same), and H.R. Rep. No. 106-320, at 36 (1999) (dissenting views) (same).

Of course, the debate over out-of-state bias extends beyond the mere **class action** context to the existence of **diversity jurisdiction** altogether. The bias justification underlying **diversity jurisdiction** may not actually exist in today's interstate economy. See American Law Inst., Study of the Division of Jurisdiction Between State and Federal Courts 106 (1969) ("As to the matter of prejudice, the conventional justification for **diversity jurisdiction**, none of the significant prejudices that beset our society today begins or ends when a state line is traversed."). Indeed, the **House** in 1978 passed legislation that would have completely abolished **diversity jurisdiction**. See 124 Cong. Rec. 5008 (1978).

†n162. See 28 U.S.C. 1332(c) (1994).

†n163. See, e.g., July 1999 Hearings, supra note 21 (statement of Brian Wolfman, Public Citizen Litig. Group) (arguing that out-of-state defendants no longer face local bias).

†n164. This example comes from H.R. Rep. No. 106-320, at 36 & n.34 (dissenting views).

†n165. See H.R. 1875 4(a), 106th Cong. (1999). Under current law, an action may not be removed if a defendant is a citizen of the state in which the suit is brought. See 28 U.S.C. 1441(b) (1994).

†n166. In addition, this Note's proposal would also eliminate the defendant in-state bar on removal in **class actions**. See supra note 70.

†n167. See supra notes 60-61 and accompanying text.

†n168. See June 1998 Hearings, supra note 34, at 20 (statement of John H. Beisner, Esq.) ("I am doubtful that a plaintiff removal provision would be used very frequently...."). Although perhaps in some cases, the competing federal counsel would seek to intervene and remove the class.

†n169. See supra note 50.

†n170. See Fed. R. Civ. P. 11. Rule 11 sanctions can have an effect beyond the current dispute. A court may order the sanctioned attorney to inform other judges in front of which the attorney has cases pending of her violation. See, e.g., Webster v. Omnitrition (In re Omnitrition Int'l, Inc. Sec. Litig.), No. C-92-4133 SBA, 965, 1995 WL 626529, at *1 (N.D. Cal. Feb. 21, 1995) (ordering such disclosure). Disclosure allows judges to scrutinize carefully the counsel's behavior in subsequent cases.

†n171. See supra note 56 and accompanying text.

†n172. See supra note 56.

†n173. See Multidistrict Jurisdiction Act of 1999, H.R. 2112, 106th Cong. 2.

†n174. See Bill Summary & Status for the 106th Congress (H.R. 2112) (visited Mar. 2, 2000) <<http://thomas.loc.gov/cgi-bin/bdquery/z?d106:HR02112:@@L&summ2=M&>>.

†n175. See, e.g., *In re Air Crash Disaster*, 734 F. Supp. 1425, 1429 (N.D. Ill. 1990) ("When a case is transferred, the transferee court must apply choice of law rules of the state where the transferor court sits."). Choice of law issues arise in the JPML for summary judgment and discovery disputes. See Larry Kramer, Choice of Law in Complex Litigation, 71 N.Y.U. L. Rev.

547, 553 (1996). Once the choice of law rules are determined, the transferee court must apply the rules to each precise legal claim involved. See, e.g., *id.* In a case decided before Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998) (holding that transferee court may not retain case for trial), a court in declining to consolidate cases for trial commented:

For a single trial to be held on the issue of product defect, a fairly complicated scenario would have to transpire. First, an independent application of the choice of law rules of Colorado, Ohio, Pennsylvania, Tennessee, and Missouri would have to be implemented in order to identify what state's law should apply to each MDL composite case. Once identified, the applicable laws would have to be compared. If one or more sets of laws were conflicting, would the extent of conflict render a trial so cumbersome that the initial purpose of promoting judicial economy would be subverted? Even if the trial could be held as a logistical matter, would the risk of jury confusion on the merits be so great as to obviate the prospective advantages to be gained from a single trial?

In re The Dow Co. "Sarabond Prods." Liab. Litig., 664 F. Supp. 1403, 1405 (D. Colo. 1987). These same concerns arise in consolidating **class actions** in the JPML for pretrial purposes.

Of course, one wonders if judges under the guise of efficiency will faithfully apply the choice of law analysis so that more than one law applies. See John L. Strauch & Robert C. Weber, Multidistrict Litigation, in 1 Business and Commercial Litigation in Federal Courts 11.3, at 621-36 (Robert L. Haig ed., 1998) (questioning whether judges indeed apply choice of law analysis to yield multiple laws applying in single suit); Kramer, *supra*, at 552 ("It is remarkable how often courts adjudicating mass actions nevertheless find that one law applies to all the claims or to each issue.").

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