

**“PROCEDURAL *SWIFT*”: COMPLEX LITIGATION
REFORM, STATE TORT LAW, AND DEMOCRATIC
VALUES**

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I. INTRODUCTION

Increasingly, the judicial power of the federal courts is being deployed to limit state tort law¹ in violation of the spirit, if not the letter, of *Erie Railroad Co. v. Tompkins*.² This phenomenon intersects vitally with the phenomenon of complex litigation, for calls to address the problems of complexity are being commandeered to reshape state substantive law. The technique for achieving this result is to exploit the power of the national government to regulate procedure in diversity cases. Through recent legislation, amendments to the Federal Rules of Civil Procedure (“FRCP”), and judge-made procedural principles, the federal courts offer an ever-more-enticing package of rules that can conflict with state practice and produce profoundly different outcomes in cases. Were these results neutral, they would not be so troublesome; however, procedural differences in the federal courts typically disadvantage plaintiffs, not defendants, and so provide an increasing incentive for defendant forum shopping.

The growing hostility of the federal courts to plaintiffs’ tort claims is old news to repeat defendants who have always found the national

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1. By the phrase “tort law,” I include not only the standard torts, such as negligence, but the modern concepts of strict products liability and related topics.

2. 304 U.S. 64 (1938) (overruling *Swift v. Tyson*, 41 U.S. 1 (1842), by holding that there is no federal general common law and that except in matters governed by the Constitution or congressional legislation, the law to be applied by federal courts in diversity cases is the law of the state).

courts more congenial.³ However, with Congress' recent efforts to enlarge diversity jurisdiction through the Multiparty Multiforum Jurisdiction Act⁴ of 2002 (sometimes referred to as the "MPMFJA") and the pending Class Action Fairness Act (sometimes referred to as the "CAFA"),⁵ the invitation to enter the federal arena is overt. Now the

3. See Elizabeth J. Cabraser, *Class Action Update 2002: Mass Tort Trends, Choice of Law Rule 23(f) Appeals, and Proposed Amendments to Rule 23*, in *Civil Practice and Litigation Techniques in Federal and State Courts*, SH009 ALI-ABA 1189, 1193 (2002) [hereinafter Cabraser 2002]. A recently published study by the Federal Judicial Center shows that defense attorneys have a strong perception in class action cases that the federal forum is more beneficial to their clients' interests and that they remove cases based on state law to the federal courts for that reason. See Thomas E. Willging and Shannon R. Wheatman, *Attorney Reports on the Impact of Anchem and Ortiz on Choice of a Federal or State Forum in Class Action Litigation, A Report to the Advisory Committee on Civil Rules Regarding A Case-based Survey of Attorneys*, 4- 5,7-8, 18, 29-31 (Federal Judicial Center, April 2004) [hereinafter "FJC, Attorney Reports"], available at http://www.fjc.gov/newweb/jnetweb.nsf/autoframe?openform&url_r=pages/556&url_l=index (last visited May 12, 2004). Whether the defendant attorneys' belief is justified is an open question. The study indicates that the rate of class certification by state and federal judges for the sample involved is virtually the same. However, the study also reported that federal judges were more than twice as likely to deny class certification. *Id.* at 4, 8-9. This puzzling result is in part attributable to the fact that in the majority of cases, state courts never reached the certification question. *Id.* at 34-36. Other factors that make the study hard to assess are that it was based on attorney survey responses and only 39% responded, and that comparative data were culled from cases that had been removed to federal court and then remanded on the assumption that the removed-then-remanded cases were not significantly different from the cases retained by the federal courts. For the study methodology, see *id.* at 2, 8-9.

4. 28 U.S.C. § 1369 (West 2003) (providing that federal district courts shall have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 75 natural persons have died in an accident at a discrete location under specified circumstances).

5. The proposed Class Action Fairness Act passed the House of Representatives in 2003. See Class Action Fairness Act of 2003, H.R. 1115, 108th Cong. (2003) [hereinafter CAFA, H.R. 1115]. The Senate version is still pending and is the subject of compromise. See Class Action Fairness Act of 2003, S. 274, 108th Cong. (2003) [hereinafter CAFA, S. 274]. Since the late 1990s, a number of bills have been introduced in Congress that can be broadly denominated as dealing with class action fairness or jurisdiction. For instance, a bill entitled the "Interstate Class Action Jurisdiction Act of 1999," appeared in the House of Representatives in 1999. H.R. 1875, 106th Cong. (1999). 1999 also saw the introduction of a bill in the Senate. Class Action Fairness Act of 1999, S. 353, 106th Cong. (1999); see also 67 U.S.L.W. 2723 (June 8, 1999). Similarly in 2001, H.R. 2341, the Class Action Fairness Act of 2001, appeared. See H.R. 2341, 107th Cong. (2001). The Senate version was also the Class Action Fairness Act of 2001, S. 1712, 107th Cong. (2001). H.R. 2341 passed the House in 2001. See 70 U.S.L.W. 2574 (March 19, 2002). The legislation died in the Senate, as it never emerged from the Senate Judiciary Committee. See 71 U.S.L.W. 2583 (March 18, 2003). The House of Representatives tried again in 2003 with the introduction of CAFA, H.R. 1115, an act that was substantially similar to H.R. 2341. CAFA, H.R. 1115 passed the House of Representatives on June 12, 2003. See 149 Cong. Rec. H5307 (daily ed. June 12, 2003). CAFA, S. 274, the Senate version, then became the focal point of debate and compromise, because unlike the previous year, the bill was approved by the Senate Judiciary Committee and passed out to the full Senate for consideration. See 71 U.S.L.W. 2661 (April 22, 2003). Opposition to CAFA, S. 274, was strong and an attempt to invoke cloture to cut off debate was defeated by one vote. See 72

national government intentionally uses its power to displace substantive law historically reserved to the states, but indirectly. I dub this phenomenon "Procedural *Swift*." It is the strategy of creating federal tort law through the guise of regulating procedure. Beyond its impact on substantive law or even federal-state relations, the phenomenon of Procedural *Swift* is most important for its corrosive effect on democratic values. Defendants' assertions that they are burdened by the American litigation system should be considered seriously. But, when they pursue remedies designed to mask the changes in law they seek, this creates problems for democratic principles. It is one thing to search for solutions to complex cases in a federal system; it is another to use complex litigation to hide law reform that could not gain public approval if its consequences were better known.

My discussion is made in the spirit of an essay and proceeds in four major parts. *Part II, Diversity Jurisdiction and Democracy*, describes the problematic connection between democratic values and diversity jurisdiction.⁶ It explains that when Congress deploys minimal diversity to make access to federal courts available in class action and mass tort cases there are potential risks to the role of states in promoting the democratic values of political participation, transparency, and accountability. *Part III, Complex Litigation—The Rationale for Intrusion* relates these issues to the specific reforms in complex litigation recently initiated by Congress.⁷ *Part IV, Tilting the Playing Field*, shows how, once state-based cases are redirected to the federal forum by this legislation, the procedural regime there can yield substantially different results than state proceedings.⁸ The particular examples analyzed are federal standards for class certification, federal standards for summary judgment, and the development of federal "summary judgment substitutes." Together, they implicate a regime of "Procedural *Swift*," in which state tort law is being reshaped through the national power to regulate procedure in diversity actions. Finally, *Part V, Diversity and Democracy Revisited* concludes with the question whether the rationale of a uniform procedure for the federal courts really supports

U.S.L.W. 2476 (February 17, 2004). In February 2004, S. 2062, the Class Action Fairness Act of 2004, was introduced in the Senate. See Class Action Fairness Act of 2004, S. 2062, 108th Cong. (2004). Its jurisdictional provisions are substantially similar to CAFA, S. 274, insofar as the key strategy is to rely on minimal diversity. For the moment, action on S. 2062 appears to have stalled. See 150 Cong. Rec. S1014, S1191 (daily ed. February 11, 2004)(placing S. 2062 on the calendar); see also 72 U.S.L.W. 2476 (February 17, 2004).

6. See *infra* notes 10-106 and accompanying text.

7. See *infra* notes 107-215 and accompanying text.

8. See *infra* notes 216-352 and accompanying text.

the risks to democratic principles that it currently represents.⁹

II. DIVERSITY JURISDICTION AND DEMOCRACY

Federal diversity jurisdiction raises questions about democratic values. To show this, I assume three hallmarks of a genuinely democratic system that should be noncontroversial: access to political participation, transparency in the process of lawmaking (whether by legislators or judges), and lawmakers' accountability to the people for the consequences of their policy choices. Using procedure to affect substantive law undermines all three.

First, procedural principles are technical and arcane; by their nature they limit the information to people to make good decisions about the policy issues that are at stake. This acts as a barrier to political participation and impedes transparency. If a citizen cannot see the probable consequences of a change in mere "housekeeping" rules,¹⁰ lawmaking becomes opaque, not transparent. Secondly, many procedural principles are applied by judges, and judges are not as accountable to democratic majorities as are legislators. This can create negative synergy. When it is difficult to predict the consequences of procedural change and when either judges, legislators, or both might initiate it, holding policymakers accountable is more unlikely. Finally, judicial decisions are dispersed and not as concentrated as legislation, so locating the focal points of policy shifts and overcoming coordination problems to oppose them are challenging. Reorienting the locus of procedural change from the states to the federal forum magnifies these antidemocratic effects.

Obviously, procedural maneuvering at the national level takes place one step removed from the political process of state lawmaking. The democratic majority of any particular state has only a diluted effect on ultimate results.¹¹ When procedural innovation emanates from the federal judiciary, accountability is a faint hope, for federal judges enjoy lifetime tenure. Another problem is that one of the major sources of federal procedure is particularly undemocratic, namely the process of

9. See *infra* notes 353-55 and accompanying text.

10. See generally Judith Resnick, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909 (1990) (emphasizing the misleading nature of the term "housekeeping").

11. This results from the composition of Congress. See U.S. CONST. art. I, §§ 2-3 (providing that the U.S. House of Representatives shall be composed of representatives from the several states, selected by people from the several states).

rulemaking established by the Rules Enabling Act ("REA").¹² Pursuant to the REA, important modifications in the Federal Rules of Civil Procedure are initiated not by popularly elected legislators, but by an elite group of specialists who make up the Advisory Committee.¹³ All these phenomena are troublesome for the democratic values embodied in the structural blueprint of the United States Constitution.

To link questions about diversity jurisdiction with claims about democracy implicates federalism.¹⁴ This is complex, because the constitutional boundaries of federalism have been changing as the United States Supreme Court restricts Congress' power to directly legislate on substance. At the same time, debates over the normative values and ideologies associated with federalism suggest a greater willingness on the part of some academic commentators to promote the role of the federal government.¹⁵ Many who explore the "New Federalism" seek a more sophisticated and nuanced understanding of state/federal relations, particularly in the context of modern modes of living where territorial boundaries seem less important and issues of genuinely national concern never contemplated by the Founders arise.¹⁶ Nonetheless, it is useful to remember the democratic virtues that can flow from conceiving states as prime instrumentalities of democracy on a smaller scale. Akhil Amar has identified five different views of federalism.¹⁷ Among them are the concepts that states provide political safeguards of legal rights, associated with Herbert Wechsler and Justice William Brennan,¹⁸ that states are more decentralized political entities

12. 28 U.S.C. § 2072 (2000) (providing that the Supreme Court shall have the power to prescribe the general rules of practice and procedure for federal courts and that all laws in conflict with such rules shall be of no further force or effect).

13. For a discussion of the rulemaking process pertinent to the Federal Rules of Civil Procedure in general, and the role of the Advisory Committee in particular, see Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1103-12 (2000).

14. For instance, Martin H. Redish directly connects federalism to issues of political legitimacy and democratic theory but from an institutionalist perspective that stresses separation of powers. See Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretative Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761, 766-67 (1989) [hereinafter Redish]. One wonders whether his claim that Congress is more attentive to the claims of states than the federal courts holds true today.

15. See, e.g., Symposium, *Constructing a New Federalism: Jurisdictional Competition and Competence*, 14 YALE J. ON REG. 1 (1996).

16. See Judith Resnick, *Afterward: Federalism's Options*, 14 YALE J. ON REG. 465, 485-503 (1996) [hereinafter Resnick, *Federalism's Options*].

17. Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229 (1994).

18. *Id.* at 1240-46.

competing with the federal government, associated with Alexis de Tocqueville and Justice Sandra Day O'Connor,¹⁹ and that states are laboratories for social and political experiment, associated with Justice Felix Frankfurter and Justice Louis Brandeis.²⁰ None of these theories alone constitutes a complete account of federalism, but all three contain a common element—the positive effects of the states as core units of government for citizen participation and the protection of citizen rights. In this sense, they directly link the states with democratic norms through the filter of federalism and it is this link that I will develop here.

Herbert Wechsler wrote that federalism calls for “government responsiveness to the will of the full national constituency, without the loss of responsiveness to lesser voices, reflecting smaller bodies of opinion, in areas that constitute their own legitimate concern.”²¹ As the states were invested with plenary power under the Constitution, Wechsler argued that,

National action has thus always been regarded as exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case. This point of view cuts even deeper than the concept of the central government as one of granted, limited authority The political logic of federalism thus supports placing the burden of persuasion on those urging national action.²²

The states' authority over most ground-level legal rights and duties tracks without our intuitions that the rules of law that govern everyday relations—how we make contracts, buy and sell property, whether we are liable for harms we cause by accident or intentionally—should be regulated at the communal echelon of social relations and in the localities in which they occur. In the context of tort law, and underscoring the role of states as providers of smaller scale democracy, the fact that liability determinations are typically fixed by state juries, who are more closely connected to events than are federal juries, advances this role.²³ But a cautionary note is needed here. Any account

19. *Id.* at 1236-40.

20. *Id.* at 1233-36.

21. See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543 (1954).

22. *Id.* at 544-45.

23. This is because the geographic region from which the federal jury is selected is significantly larger than a state jury pool. See 28 U.S.C. § 1861 (2000). For the effect that moving to the federal forum has on the composition of juries in the criminal context, particularly as the relevant political community is implicated, see Laura Gaston Dooley, *The Dilution Effect: Federalization, Fair Cross Sections, and the Concept of Community* (forthcoming 2004, manuscript on file with author).

of democratic principles that focuses on state power must confront the sordid reality that states' rights have been used to facilitate discrimination. In fact, it is in just this area of social relations that federal power is most needed.²⁴ But the wretched history of race, sex and other forms of discrimination practiced by local state political majorities does not mean that the ideal of democracy on a small scale is in principle unjustified. In a healthy-functioning federal system, citizens should have the opportunity to participate in policy decisions on a plane close to them culturally, economically, and geographically—especially on the question of the continued relevance of common law principles determining their everyday relations. The primacy of localism and community must be checked by the national power, for example, when they become excuses for disadvantaging persons on the basis of suspect classifications.²⁵ Seen in this light, focusing on the states as the repositories of tort law should not impinge on the federal government's essential role in insuring individual and civil rights. To hold otherwise is tantamount to jettisoning the states as essential democratic units of government in the American system altogether.

All these considerations should be related to Congress' efforts to enlarge the national judicial power using complex litigation as the justification. What to do about complex litigation is not a neutral question of modernizing procedure. Because a significant portion of these cases—for instance class actions based on products liability—depend on state law, problematizing complex litigation problematizes the question of which sector of government, state or federal, has the authority to resolve the policy questions that arise. As Deborah R. Hensler notes, the empirical data regarding their worth is equivocal.²⁶ It follows that deciding whether state class actions are warranted is a political judgment.²⁷ Richard A. Nagareda's work on opt-out in settlements of damage class actions underscores this point.²⁸ For him, damage class actions are institutional rivals to lawmaking and ought to

24. See Resnick, *Federalism's Options*, *supra* note 16, at 493-94.

25. *United States v. Carolene Products*, 304 U.S. 144, 153 n.4 (1938).

26. See DEBORAH R. HENSLER ET AL., *CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN* 466-67 (2000) [hereinafter HENSLER ET AL., *DILEMMAS*].

27. See Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 *DUKE J. COMP. & INT'L L.* 179, 204 (2001) [hereinafter Hensler, *Revisiting*].

28. See generally Richard A. Nagareda, *The Preexistence Principle and the Structure of Class Actions*, 103 *COLUM. L. REV.* 149 (2003) [hereinafter Nagareda] (arguing in favor of the development of a coherent explanation for the distinction between mandatory and opt-out classes in order to arrive at a theory of the class action as a whole).

occupy a role intermediate between public law and private litigation.²⁹ For this reason, maintaining the individual's right to opt-out of court-imposed class actions settlements must be preserved to limit the monopoly power that might obtain to class counsel in the class action context.³⁰ Importantly, Nagareda connects this issue to the problems of political accountability:

The preexistence principle [the notion that claimants have preexisting rights that cannot be settled without their consent] stands as a brake upon the tendency of the class action toward a kind of "central planning," a cautionary check upon the temptation characteristics of all central planning schemes of governance to impose contested enterprises of law reform in a manner insulated from political accountability.³¹

If court-imposed settlements in class actions show central planning features, procedurally based rationales for redirecting these actions to the federal arena are more suspect on accountability grounds. These phenomena connect to what Judith Resnick has described as the "programmatically" federal judiciary,³² one in which the Judicial Conference, outside the role of deciding cases, affects access to the federal forum and finds itself conscripted by tort reform and other groups to lobby Congress on legislation affecting their interests.³³ But this raises another point that must be uncovered and analyzed. It is the implicit claim to "tit-for-tat" that lies behind tort reform efforts to enlarge federal subject matter jurisdiction.

Clearly tort reform advocates feel sorely used by the states.³⁴ In that connection they decry what they take as illegitimate *plaintiff* forum shopping to state, not federal, tribunals.³⁵ Behind their complaints lies the suppressed premise that all forum shopping should be treated equally

29. *Id.* at 153-58 (suggesting that one must understand what the class action device is and is not before productive debate over its suitability as a vehicle for achieving external policy goals can begin).

30. *Id.* at 162.

31. *Id.* at 196-97 (footnote omitted).

32. See Judith Resnick, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 296 (2003) [hereinafter Resnick, *Constricting Remedies*].

33. *Id.* at 297-298.

34. See, e.g., American Tort Reform Association, *Facts About Tort Liability and its Impact on Consumers*, available at http://www.atra.org/files.cgi/7366_Facts-Impact-On-Economy03.htm (last visited Apr. 11, 2004).

35. See SENATE COMM. ON THE JUDICIARY, CLASS ACTION FAIRNESS ACT OF 2003, S. REP. NO. 108-123 § IV.B.4 (2003) [hereinafter SENATE REPORT] (observing that sometimes class counsel will file similar class actions before different courts in an effort to find a receptive judge who will rapidly certify a class).

and that plaintiffs' choice of state courts for their claims is properly countered by defendants' resort to the federal courts. But this approach ignores the allocation of power to determine substantive law made in the Constitution itself. The states are invested with plenary power over everyday law. Thus, when state law creates substantive liability the forum selection question is not neutral. The surface features of diversity jurisdiction concede this. First, the traditional requirement of complete diversity of citizenship makes it more, not less, difficult to elect the federal forum.³⁶ Even where diversity jurisdiction is possible, the *Erie* doctrine stands for the principle that moving from the state to the federal spheres is not supposed to yield a different outcome in terms of substantive law. But, if this is the case, why do defendants so vigorously agitate to open up the federal courts? Understanding this requires understanding the trajectory of the tort reform movement over the last decades and the potential for affecting substance through procedure notwithstanding the intended limits of *Erie*.

A. *The Pathways of Tort Reform*

The most aggressive proponents of tort reform would simply federalize state tort law,³⁷ but they have not been able to achieve this goal. There are a variety of reasons for this. The first, as might be surmised from the preceding discussion, is the structural framework of the Constitution itself. It allocates the power to make law between the federal government and the states, and in so doing, instantiates the American brand of federalism. The key feature of federalism is that it retains the states as unavoidable components of government. Entities that act on a national basis still must contend with the power of states to promulgate laws that will govern their duties and liabilities. In fact, as John S. Baker, Jr., has pointed out, national actors are reluctant to acknowledge the implications of federalism:

Federalism itself promotes a certain "bias" against corporations and businesses that operate interstate. As compared to a confederation, federalism does facilitate trade; but compared to a unitary state, federalism can present obstacles to the efficiency of trade. State laws regularly raise transaction costs for corporations because the laws of one state differ from the laws of other states. Indeed, when national

36. See *Strawbridge v. Curtiss*, 7 U.S. 267, 267 (1806) (establishing the principle of complete diversity).

37. See American Tort Reform Association, *ATRA's Agenda: Fair Laws, Fair Judges, Fair Courts*, available at <http://www.atra.org> (last visited Apr. 11, 2004).

corporations challenge particular state laws under the “dormant” Commerce Clause, they claim a particular law “discriminates” either in purpose or effect against or has too great an impact on interstate commerce. Large interstate corporations tend not to favor federalism because they think it reduces the size of their potential profit.³⁸

Despite this reality, and according to the standard account, the federal government was conceived as a government of limited, enumerated powers.³⁹ The division of lawmaking power found in Article I cabins Congress’ ability to pass legislation to a list of specified topics of particularly national interest.⁴⁰ In contrast, the Tenth Amendment declares that the “powers not delegated to the United States” are “reserved to the States . . . or to the people.”⁴¹ While commentators have disputed the ultimate range of Congress’ power to affect the common law,⁴² when the Constitution was ratified, everyday relations were generally governed by well-established principles of the common law or tenets of equity inherited from the English legal system and embodied in cases. Despite the controversy that raged between Federalists and Republicans over the federal common law of crimes in the era of the Alien and Sedition Acts,⁴³ it is unlikely that the Framers intended the common law of contracts, torts, domestic relations, and

38. See John S. Baker, Jr., *Respecting a State’s Tort Law, While Confining Its Reach to that State*, 31 SETON HALL L. REV. 698, 704 (2001) [hereinafter Baker] (footnotes omitted).

39. How powerful the new national government actually would be of course was the sticking point in the Federalist/Antifederalist debate over the ratification of the Constitution. See JoEllen Lind, *Liberty, Community, and the Ninth Amendment*, 54 OHIO ST. L.J. 1259, 1293-96 (1993).

40. That is, laws to provide for the national defense, to establish bankruptcy and copyright protection, and to regulate interstate commerce, among others. See U.S. CONST. art. I, § 8. Congress was also imbued with the power to establish the lower federal courts.

41. U.S. CONST. amend. X.

42. For instance Stewart Jay makes this point:

Apart from cases in which Congress has conferred authority on courts to develop substantive rules of decision, the modern Supreme Court has restricted federal common law to ‘such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.’ Federal common law is often referred to as ‘specialized.’ It is invoked as a ‘necessary expedient’ in a ‘few and restricted’ instances. . . . In short, the difference between the ‘general’ jurisdiction of state judiciaries and the ‘limited’ jurisdiction of federal courts lies in the conception of the common law appropriate for the respective systems. . . . For federal courts, there is yet another aspect of the matter, which is an apparent preference—shared by many in the federal and state judiciaries—for maintaining power and responsibility at the state and local levels. . . . [T]his federalism concern is partly inspired by the attitude that diffusion of decisionmaking is more likely to promote democratic values.

Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1007-08 (1985) (footnotes omitted) [hereinafter Jay].

43. *Id.* at 1014-19.

typical crimes to be within the routine power of the federal courts. Certainly, after the appearance of *Erie R.R. Co. v. Tompkins* in 1938, there has been little practical question that the states' plenary power over common law actions was final, subject to the protection of the Bill of Rights,⁴⁴ or the national government's ability to make substantive law through the Commerce Power.⁴⁵

Given this structural barrier, the first attempts to realize the agenda of tort reform were directed at states.⁴⁶ Over more than two decades, states have passed legislation capping noneconomic damages, restricting the collateral source rule, revamping punitive damages, limiting medical malpractice liability, shortening the statute of limitations for tort claims, limiting attorneys' fees in classes of cases, and instituting other techniques to cure the alleged explosion of supposedly meritless cases earning unjustifiably large verdicts from "runaway" juries.⁴⁷ But another reason why the proponents of tort reform have not been able to redefine the law as they wish soon arose—legislative and judicial opposition. While some states passed tort reform, others did not in the face of stringent objections by consumers, trial lawyers, and other groups. Even in states where new laws replaced old principles,⁴⁸ these

44. Individual rights guarantees from the Bill of Rights are incorporated against the states through the Fourteenth Amendment and trump contrary state law. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 482-86 (2d ed. 2002) [hereinafter CHERMERINSKY] (tracing the evolution and current resolution of the incorporation debate).

45. Historic, demographic, and technologic changes such as the rise of the national corporation, mass marketing, World War II, and even the Civil Rights Movement, all contributed to a significant expansion of the commerce power. See *Wickard v. Filburn*, 317 U.S. 111 (1942) (concluding that regulating the growing of winter wheat on a small farm for home consumption comes within federal commerce power). Only in the last decade has the United States Supreme Court tried to put the genie back into the bottle with a series of cases designed to reign in Congress' prerogatives under the Commerce Clause. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (holding that a federal statute, providing a civil remedy for victims of gender-motivated violence, exceeded Congress' Commerce Clause authority because gender-motivated violence is not an economic activity that substantially affects interstate commerce); *United States v. Lopez*, 514 U.S. 115 (1995) (holding that the Gun-Free School Zones Act, making it an offense for an individual to knowingly possess a firearm in a school zone, exceeded Congress' Commerce Clause authority because possession of a gun in a school zone is not an economic activity that substantially affects interstate commerce).

46. See DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 170 (3d ed. 2002) [hereinafter LAYCOCK].

47. Hence the title of John Grisham's book. See JOHN GRISHAM, THE RUNAWAY JURY (1996). It is difficult not to lapse into the hyperbolic language of proponents of tort reform who typically describe the state of American litigation in extreme terms. See, e.g., American Tort Reform Association, *Bringing Justice to Judicial Hellholes*, available at <http://www.atra.org/reports/hellholes> (last visited Apr. 11, 2004).

48. See LAYCOCK, *supra* note 46, at 170. For a general history of the tort reform movement that is highly critical of the phenomenon, see Michael L. Rustad & Thomas H. Koenig, *Taming the*

could be taken away when the courts of a state struck reform legislation as unconstitutional on state grounds.⁴⁹ The inability to achieve tort reform across the board as a bottom-up strategy became especially significant with the rise of the nationwide state class action.⁵⁰ This meant that if even one holdout jurisdiction existed, it might become a magnet for litigation with nationwide implications on a defendant's conduct.⁵¹ In fact, many states did not pass the complete package of laws desired by proponents.⁵² In response to these phenomena and with the changing fortunes of the national political parties, the tort reform movement began to contemplate the power of the federal government as a tool to impose its program on recalcitrant states.

In 1994, when it gained control of Congress, the Republican Party introduced the "Contract With America."⁵³ This legislation would have federalized significant areas of state tort law.⁵⁴ Its focal points were the proposed "Common Sense Products Liability Reform Act," and the "Common Sense Legal Standards Reform Act."⁵⁵ Opposition was immediate, public, and multifaceted. Moreover, President Clinton vetoed the legislation that did pass and commentators expressed doubt as to its constitutionality.⁵⁶ Where did that leave the movement for reform? If the states proved resistant to the tort reform agenda and if direct federal assaults on state tort law were too difficult to achieve, what of the federal judicial power, diversity jurisdiction, and the reality on the

Tort Monster: The American Civil Justice System as a Battleground of Social Theory, 68 BROOK. L. REV. 1 (2002).

49. See, e.g., *Smith v. Dept. of Insurance*, 507 So. 2d 1080 (Fla. 1987) (holding that a Florida statute capping non-economic damages violated Florida's constitution because neither an overpowering public necessity for abolishment nor an alternative method of redress was shown). For a "map" of the status of state tort reform, see American Tort Reform Association's, *Civil Justice Reforms*, available at <http://www.atra.org/states> (last visited Apr. 11, 2004).

50. Most commentators ascribe the increase in state class actions to the Supreme Court's 1985 opinion in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), which held that minimum contacts need not be shown between unnamed plaintiff class members and the forum state; opening the way for state class actions with extra-territorial reach.

51. In fact, counties in Illinois, Louisiana, Mississippi, Missouri, Texas and other states have been so characterized. See American Tort Reform Association, *Bringing Justice to Judicial Hellholes*, available at <http://www.atra.org/reports/hellholes> (last visited on Apr. 11, 2004).

52. See LAYCOCK, *supra* note 46, at 170.

53. See Michael J. Rustad, *Nationalizing Tort Law: The Republican Attack on Women, Blue Collar Workers and Consumers*, 48 RUTGERS L. REV. 673, 674-82 (1996).

54. *Id.* at 674.

55. See Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699, 700-34 (1995). See also Mark J. Wolff, *Sex, Race, and Age: Double Discrimination in Torts and Taxes*, 78 WASH. U. L.Q. 1341, 1433-34 nn.591-92 (2000).

56. See generally Patrick Hoopes, Note, *Tort Reform in the Wake of United States v. Lopez*, 24 HASTINGS CONST. L.Q. 785 (1997).

ground that procedural rules can profoundly impact substantive results?

B. The Federal Judicial Power, the Erie Doctrine, and Manipulating Diversity

The “judicial power” of the federal government typically connotes the landmark principle of judicial review, which was established by Chief Justice Marshall’s celebrated opinion in *Marbury v. Madison*⁵⁷ and which secured the unique role of the United States Supreme Court in the checks-and-balances scheme of the federal system.⁵⁸ However, in discussing the federal judicial power here, I mean to focus on its role vis-à-vis the states in terms of the structural constitution.⁵⁹ In this context, it is key that Congress has the authority under Article I to establish the lower federal courts.⁶⁰ But, in keeping with the notion that the federal government is one of limited power, Article III binds the federal judiciary so that the subject matter jurisdiction of federal courts is restricted, not general.⁶¹ Consistent with this theme, Article III gives federal courts original jurisdiction over federal questions—matters of uniquely national concern, for they involve treaties, the federal constitution, or congressional enactments made under Article I.⁶² Article III also invested the federal courts with the power to hear claims based on state law if they were between citizens from more than one state, or a state and a foreign nation.⁶³ This was the concept of “diversity” jurisdiction that was deeply distrusted by the Antifederalists, who were wary of the impact of a strong national government on local democratic majorities.⁶⁴

57. 5 U.S. 137 (1803).

58. See generally William Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1 (1969) (examining the historical context of the decision and analyzing the opinion in terms of various approaches that might have been used by Chief Justice Marshall).

59. The judicial power is established by Article III of the United States Constitution. See U.S. CONST. art. III.

60. The only federal court that must exist according Article III is the United States Supreme Court: “The judicial Power of the United States, shall be vested in one supreme Court, and in such other inferior Courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1. See also U.S. CONST. art. I, § 8, cl. 9 (establishing Congress’ power to establish federal courts inferior to the United States Supreme Court).

61. U.S. CONST. art. III, § 2.

62. *Id.*

63. *Id.*

64. The Antifederalists were also deeply concerned about the impact on states from suits by out-of-state creditors to enforce revolutionary debt. See Paul E. McGreal, *Saving Article I from Seminole Tribe: A View from the Federalist Papers*, 55 SMU L. REV. 393, 399-402 (2002). See also, Christina G. Heslinga, Note, *The Founders Go On-Line: An Original Intent Solution to a Jurisdictional Dilemma*, 9 WM. & MARY BILL RTS. J. 247, 250-51 (2000). See generally Wythe

In fact, whether the lower federal courts should exist at all was a major point of contention during the Constitutional Convention.⁶⁵ The reasons the Framers adopted diversity jurisdiction are contested.⁶⁶ Certainly diversity jurisdiction made it possible for state policies expressed by local juries to be obviated by the device of placing a controversy in the hands of a federal instrumentality.⁶⁷ Alexander Hamilton argued in the *Federalist* that the federal courts were needed, among other reasons, because the independence of state court judges from local influence was in doubt.⁶⁸ Ironically, however, the first statute creating the lower federal courts, the Judiciary Act of 1789,⁶⁹ did not invest them with general federal question jurisdiction, but only authorized diversity jurisdiction. Perhaps in an attempt to mediate between the concerns for local democratic majorities and problems of national scope, the Judiciary Act of 1789⁷⁰ did require that the rules of decision in diversity cases must be premised on “[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress shall otherwise provide.”⁷¹ However, the statute’s general reference to “laws” left an ambiguity that was to prove a major obstacle to federalism in the following century.

The period from 1789 up to 1938, when the Federal Rules of Civil Procedure were promulgated,⁷² witnessed an odd, even counterintuitive, amalgam of principles governing federal courts. First, diversity actions and proceedings generated by specialized federal statutes made up federal cases until Congress granted a more general federal question

Holt, *“To Establish Justice”: Politics and the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421; Jay, *supra* note 42, at 1012-13; Stewart Jay, *Origins of Federal Common Law, Part Two*, 133 U. PA. L. REV. 1231 (1985).

65. See CHEMERINSKY, *supra* note 44, at 35.

66. See Holt, *supra* note 64, at 1467-75.

67. *Id.*

68. See Michael G. Collins, *Judicial Independence and the Scope of Art. III—A View from the Federalist*, 685-91 U. RICH. L. REV. (2004).

69. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79 (1789) (current version at 28 U.S.C. § 1332 (2000)) [hereinafter Judiciary Act of 1789]. Federal questions were actually handled by state courts; it was not until 1875 that general original federal question subject matter jurisdiction was invested in the lower federal courts, save for a brief grant effectuated by the “Midnight Judges Act,” the subject of *Marbury*, in 1801. See RICHARD D. FREER & WENDY COLLINS PERDUE, *CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS* 221, 221 n.* (3d ed. 2001).

70. Judiciary Act of 1789 § 14. See also Redish, *supra* note 14, at 762.

71. Judiciary Act of 1789 § 34 (current version at 28 U.S.C. § 1652 (2000)).

72. See generally Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 BROOK. L. REV. 1 (1988) [hereinafter Weinstein] (discussing the judicial and social change influenced by the passage and evolution of the Rules Enabling Act).

authority after the Civil War.⁷³ Secondly, the *procedural* rules for the federal courts were not national, but instead borrowed from states pursuant to the Conformity Act.⁷⁴ Thus, the technique of manipulating procedural principles to indirectly control results in diversity cases was not available. More important, it was not needed, for in the mid nineteenth century, the federal courts took a direct route: they embarked upon a project of developing federal common law to supplant the common law of the states.

As we have seen, the Antifederalists worried that the judicial power could provide the national government with a back door for intruding on state prerogatives. Their concern proved well-founded⁷⁵ when, in 1852, federal courts began to erect a federal national law, usually one that facilitated trade and economic interests.⁷⁶ The decision that initiated the regime was *Swift v. Tyson*.⁷⁷ *Swift* created a topsy-turvy world in diversity cases—federal, not state, substantive law was applied, but state, not federal, procedure governed. During this era, plaintiffs and defendants shopped to the federal forum whenever they could gain the benefit of a different rule of law.⁷⁸ Often, the parties who profited most were repeat defendants, who sought the federal forum wherever

73. See Act of Mar. 3, 1875, ch. 137, 18 Stat. 470.

74. The regime was instituted by the Conformity Act, Act of June 1, 1872, ch. 255, §§ 5-6, 17 Stat. 196, 197. It was not until Congress passed the Rules Enabling Act in 1938, 28 U.S.C. § 2072 (2000), authorizing the creation of the Federal Rules of Civil Procedure and instituting the modern regime of federal rulemaking, that a uniform procedure in the federal courts became a normative principle undergirded by the Constitution.

75. See Holt, *supra* note 64, at 1466-71.

76. See generally EDWARD PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA 1870-1958 (1992) (analyzing the litigation process from the 1870s to the 1940s between individual plaintiffs and national corporations over contract claims for insurance benefits and tort claims for personal injuries).

77. 41 U.S. 1 (1842), *overruled by* Erie R.R. v. Tompkins, 304 U.S. 64 (1938). In *Swift*, New York's common law rule that assignees of contracts are subject to the underlying claims and defenses, including fraud, of one who seeks to avoid performance, was trumped by the emerging federal commercial concept of “the holder-in-due-course,” an entity who could sue to enforce a note immune from such defenses. *Id.* at 2-3. Premising its conclusions on a contested and now largely discredited jurisprudential theory—that judges do not make law but merely find it—Justice Story opined that the phrase “laws of the several states” from the Rules of Decision Act did not include the common law. *Id.* at 4-6. Thus, with regard to issues of “general law,” and where no state statute or constitutional provision applied, the federal courts were free to identify the general principles themselves. Justice Story suggested that federal courts were just as competent, if not more competent, in “finding” general law than state courts, and so could ignore state common law cases. *Id.* at 8-12.

78. Probably the most extreme example, one regaled in the casebooks and *Erie* itself, is *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518 (1928), in which a party disincorporated in one state and reincorporated in another just to gain the benefit of diversity jurisdiction and the opportunity to rely on federal, not state, common law.

possible. According to some commentators, *Swift* secured the federal courts as “business courts” used by corporations to resist the claims of workers seeking redress for injuries.⁷⁹ In 1938, this topsy-turvy world was reoriented by two monumental developments: the creation of the Federal Rules of Procedure and the overruling of *Swift* by Justice Brandeis’ historic decision in *Erie Railroad Co. v. Tompkins*.⁸⁰

The rationale for uniform procedural rules seems obvious from our contemporary vantage point. The idea of one body of rules that would determine federal court practice regardless of jurisdiction is intuitively appealing and produces obvious efficiencies. Moreover, having all the federal rules emanate from one source and making them subject to a regularized rulemaking process overseen by the United States Supreme Court and Congress created an opportunity for a coordinated modernization. One of the greatest achievements of the FRCP was the merger of law and equity, so that litigants were no longer faced with the risk of falling between two different court systems,⁸¹ as well as the initiation of modern concepts of discovery⁸² and notice pleading.⁸³ The initial package of federal rules still provides the core principles of litigation in the federal courts today. *Erie* appeared in the same year as the FRCP and the relationship between the two would prove intricate and problematic over time.

Understood at its most direct level, *Erie* overruled *Swift* for the purpose of establishing that the national enterprise of making common law through the federal courts was improper. Justice Brandeis’ words, though often noted, bear repeating here:

There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or “general,” be they commercial law or the law of torts. And no clause in the Constitution purports to confer such a power on the federal courts.⁸⁴

Despite this unmistakable message, its legal underpinnings have

79. See HOWARD FINK & MARK TUSHNET, FEDERAL JURISDICTION: POLICY AND PRACTICE 190 (2d ed. 1987). As Ann Woolhandler and Michael G. Collins describe it, federal courts employed diversity jurisdiction after *Swift* particularly to protect contract and property rights in the face of local majorities and in a way that was ineluctably tied to policing the jury. See Ann Woolhandler & Michael G. Collins, *The Article III Jury*, 87 VA. L. REV. 587, 600 (2001).

80. 304 U.S. 64 (1938).

81. See FED. R. CIV. P. 3.

82. See FED. R. CIV. P. 26-37.

83. See FED. R. CIV. P. 8(a); Conley v. Gibson, 355 U.S. 41 (1957).

84. *Erie*, 304 U.S. at 78.

been unclear and disputed.⁸⁵ Yet, the gravitational pull of *Erie* is decidedly constitutional, and its clear direction is that federal courts in diversity are to constitute themselves as quasi-state tribunals, applying the law of the state giving rise to the claims presented. Thus, federal courts in diversity cases supposedly have to take state law as they find it, for better or worse, subject to their ability to force state-based claims within the form and mode of federal litigation. This simple prescription did not last long, as the difficulty of discerning what is substance and what is procedure soon arose.

To make a very long story short, by the decision in *Guaranty Trust v. York*,⁸⁶ the Supreme Court introduced a test for determining how to classify a conflict between state and federal law in a diversity action as substantive or procedural—the test of outcome determination. But this standard proved too much and exposed the FRCP to attack on *Erie* grounds.⁸⁷ After all, almost any FRCP might determine the outcome in a case. Following *York*, an era of temporizing ensued in which the Court attempted to avoid the problem by defining away apparent clashes between state practice and the federal rules.⁸⁸ In 1957, *Byrd v. Blue Ridge Rural Electrical Cooperative*⁸⁹ introduced a balancing test to blunt the impact of the outcome determination standard and reduced the need for legal fictions.⁹⁰ But, as with all balancing tests, *Byrd* could not insure the immunity of the FRCP to *Erie* attack under all circumstances. Finally with its opinion in *Hanna v. Plumer*⁹¹ the Court introduced a new analytical framework for assessing the status of a federal rule that conflicts with a state practice in a diversity case.

For the *Hanna* court, the FRCP (and federal procedural statutes) do

85. On one level, the decision could simply be premised on the idea that *Swift* misread the Rules of Decision Act and erroneously excluded common law from the “laws” of the states. If it did not, this is in tension with the opinion of some that diversity jurisdiction itself might have been used to confer a power on the federal courts to craft a national law designed to remove bias against out-of-staters. See John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 701-02 (1974) [hereinafter Ely, *Myth*]; Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 6-8 (1985).

86. 326 U.S. 99 (1945).

87. *Hanna v. Plumer*, 380 U.S. 460 (1965).

88. See, e.g., *Ragan v. Merchts. Transfer & Warehouse Co.*, 337 U.S. 530 (1949) (holding that FRCP 3 does not apply to determine tolling of statute of limitations for state-based claims); *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949) (deciding what law should apply when corporation fails to register to do business in a state); *Cohen v. Beneficial Indust. Loan Corp.*, 337 U.S. 541 (1949) (holding the FRCP 23.1 bond requirement inapplicable to state-based derivative action).

89. 356 U.S. 525 (1958).

90. *Id.* at 537-39.

91. 380 U.S. 460 (1965).

not implicate *Erie* at all, as they trace their pedigree to a different origin than federal judge-made rules, i.e., in the case of the FRCP, to the Rules Enabling Act.⁹² In turn, the REA traces to a proper exercise of one of Congress' powers enumerated in Article I—the power to establish the inferior federal courts. And, the need for a uniform procedure to run those courts falls within the scope of the Necessary and Proper Clause of Article I.⁹³ Thus, the application of a FRCP is no real problem for federalism for, if it arguably regulates procedure, it traces to Congress' Article I authority. There is one catch however. According to the REA itself, a federal rule that displaces state law too much could still be prohibited.⁹⁴ However, this limitation in the REA has proven toothless over the years, as FRCP that affect substantive rights (for instance FRCP 35, which abridges the right of privacy)⁹⁵ have survived challenge. And, recently, the difficulty of keeping the *Erie* line of cases distinct from the *Hanna* line has become more challenging, as federal courts continue to issue decisions that construe the meaning of open-textured provisions of federal rules much in the manner of common law decision-making.⁹⁶

What is clear in the evolution from *Swift* through *Erie* to *Hanna* is that the opportunity for reshaping or displacing state law utilizing the federal judicial power persists through the federal courts' power to regulate procedure. With the appearance of *Hanna v. Plumer* in 1965, the Federal Rules of Civil Procedure and federal procedural statutes were effectively immunized from displacement by conflicting state law.⁹⁷ This underscores that diversity jurisdiction and the *Erie/Hanna* line of decisions themselves are as much about democracy as they are about forum shopping and the inequitable administration of the laws.⁹⁸ While they do impose restrictions and limitations on the federal judiciary, they also preserve the constitutional space for federal courts to determine procedural policies, in the main. When this power over procedure intersects with diversity jurisdiction, it creates the risks for political participation, transparency, and accountability that I have identified. Moreover, because the possibility exists of effecting

92. *Id.* at 472. See also Weinstein, *supra* note 72, at 23.

93. U.S. CONST. art. I, § 8, cl. 19.

94. 28 U.S.C. § 2072(b) provides: "Such rules shall not abridge, enlarge, or modify any substantive right."

95. See *Sibbach v. Wilson & Co.*, 312 U.S. 1, 18 (1941).

96. Consider, for example, the dispute between Justices Ginsburg and Scalia over which line of cases governed the dispute over grounds for new trial in *Gasperini v. Center for the Humanities*, 518 U.S. 415, 467-68 (1996) (Scalia, J., dissenting).

97. *Id.*

98. *Id.* at 468.

substance through procedure via diversity, those who cannot achieve changes in law at the state level now wish to make federal diversity jurisdiction, more, not less, available. This raises the next point—Congress’ rediscovery of “minimal diversity.”

In the 1806 decision of *Strawbridge v. Curtiss*,⁹⁹ Chief Justice Marshall established what is known as the requirement of “complete diversity,”¹⁰⁰ meaning that no commonality of citizenship can be shared by opposing parties. Complete diversity is a substantial impediment to moving state cases to the federal forum, for in controversies involving numerous parties, some commonality of citizenship is likely, or a litigant seeking to prevent diversity jurisdiction can add a nondiverse party, so long as the requirements of joinder are present.¹⁰¹ However, in light of the policy that federal subject matter jurisdiction is limited, not plenary, and to reduce the intrusion on state prerogatives that diversity jurisdiction can present, the requirement of complete diversity is coherent. This restricts resort to federal courts for state-based litigation only where prejudice against noncitizens is likely to be significant. Until recently, Congress and the federal judiciary had been considering jettisoning diversity jurisdiction altogether as modern travel and mass communications have made the assumptions of parochialism underpinning it unjustified.¹⁰² Even though these factors have not produced the total elimination of diversity jurisdiction, Congress continues to increase the amount in controversy requirement so that only larger cases reach the federal courts.¹⁰³ Thus, economics trumps the potential for prejudice under the current diversity statute. All these considerations indicate that the requirement of complete diversity should not be relaxed absent extraordinary reasons. One such extraordinary circumstance may have presented itself in 1917 when Congress passed the federal interpleader statute, thereby introducing the concept of minimal diversity as a way of opening up the federal courts.¹⁰⁴

Minimal diversity requires only that *some* degree of difference in

99. 7 U.S. 267 (1806).

100. *See id.* at 267-68.

101. These arise from Federal Rule of Civil Procedure 20 and require that liability stem from the same transaction or occurrence, or series thereof, and demonstrate at least one issue of law or fact in common to the parties joined. *See* FED. R. CIV. P. 20(a).

102. *See generally* AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 101 (1969) [hereinafter ALI, STUDY OF DIVISION]. *See also* Frank M. Coffin, *Judicial Gridlock: The Case for Abolishing Diversity Jurisdiction*, 10 BROOKINGS REV. 34, 34-39 (1992).

103. *See* 28 U.S.C. § 1332 (2000), in which the current amount in controversy is set at \$75,000.

104. 28 U.S.C. § 1335(a) (2000).

citizenship between adverse parties be present. In the interpleader statute, minimal diversity is provided if at least two adverse claimants to the same stake hail from different states.¹⁰⁵ It is instructive that in the history of federal subject matter jurisdiction from 1806 to the present the requirement of complete diversity has rarely been relaxed and then only primarily to remedy through interpleader the obvious justice problems created for a defendant who must pay the same obligation twice.¹⁰⁶ Yet the proponents of tort reform argue that minimal diversity should be used again to save them from the vagaries of state law.

III. "COMPLEX LITIGATION"—THE RATIONALE FOR INTRUSION

Litigation can be "complex" for a variety of reasons. The legal issues presented could be novel or intellectually challenging, the parties could be numerous, or the dispute could cross various state lines and generate multiple lawsuits in different locales. Modernly, the meaning of "complex litigation" has come to stand for class action practice or multidistrict litigation involving mass torts (sometimes both) and is closely associated with federal techniques that have been developed to deal with these phenomena, such as Federal Rule of Civil Procedure 23 governing class actions,¹⁰⁷ the multidistrict litigation statute,¹⁰⁸ and the Manual on Complex Litigation.¹⁰⁹

The first and most benign federal foray into the problems of complex litigation arose in the late 1960s in response to the problem of what has been called "scattered litigation,"¹¹⁰ that is, litigation involving

105. *Id.* The purpose of making the federal forum more available in this form of proceeding was generated by the result in *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518 (1916), where, due to the intersection of principles of personal jurisdiction and the characterization of interpleader actions as in personam, New York Life Insurance ended up having to pay the proceeds of a life insurance policy twice. To avoid the possibility of this double liability being visited on frequent stakeholders, Congress acted and passed a package of legislation that provided for easy entry to a federal court, a minimal amount in controversy requirement of \$500, nationwide service of process, and generous venue. In *State Farm Fire & Casualty v. Tashire*, 386 U.S. 523, 530-31 (1967), the Supreme Court explicitly upheld the constitutionality of minimal diversity by making it clear that *Strawbridge* only construed the diversity statute, not the requirements of Article III.

106. Allowing "pendent party" jurisdiction so long as minimal diversity is present can be treated as another exception. For instance, pendent party jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. §1330, is possible so long as there is minimal diversity. See 13B CHARLES ALAN WRIGHT ET. AL., FEDERAL PRACTICE AND PROCEDURE §3567.2, at n.48 (Supp. West 2004).

107. FED. R. CIV. P. 23.

108. 28 U.S.C. § 1407 (2000).

109. See generally DAVID F. HERR, ANNOTATED MANUAL FOR COMPLEX LITIGATION (3d ed. 2003) [hereinafter MANUAL FOR COMPLEX LITIGATION].

110. See Thomas D. Rowe & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty*,

multiple parties from various jurisdictions making it difficult to confine the proceedings to one forum.¹¹¹ In 1968, Congress dealt with the phenomenon of multiple parallel actions pending in the federal courts with the passage of legislation providing for transferring them to one court for pre-trial proceedings.¹¹² The legislation also created a panel on Multidistrict Litigation ("MDL") to administer the process.¹¹³ While the emergence of MDL practice provided for consolidation of scattered federal litigation, access to the MDL option still required that cases be within the subject matter jurisdiction of the federal courts in the first instance. Since many multidistrict events involve torts, which are creatures of state law, the requirement of complete diversity must be satisfied. And, the more parties that are involved in an accident the less likely complete diversity can be shown. This raised the possibility that in mass torts, multiple actions might be filed in different states that could not be consolidated in one location and generated calls to reform the diversity jurisdiction of the federal courts, much as it had been modified in 1917 to address interpleader.¹¹⁴ As with interpleader, the possibility of opening the federal forum depended upon utilizing the principle of minimal diversity.

Three things are notable about the calls for reform that arose before the mid-1980s: they were sensitive to the plight of all parties, not just defendants; they were not overtly aimed at producing particular substantive outcomes; and they predated innovations in federal procedure that have increasingly burdened plaintiffs, such as changes in standards for class action certification, changes in summary judgment procedure, and the evolving principles governing expert opinion evidence.

A. *The Multiparty, Multiforum Jurisdiction Act of 2002*

After many attempts over more than a decade,¹¹⁵ the Multiparty,

Multiforum Jurisdiction, 135 U. PA. L. REV. 7, 11-12 (1986) [hereinafter Rowe & Sibley]. See also Linda S. Mullenix, *Unfinished Symphony: The Complex Litigation Project Rests*, 54 LA. L. REV. 977 (1994) [hereinafter Mullenix, *Unfinished Symphony*] (documenting the work that remains of the ALI's Complex Litigation Project agenda).

111. See Linda Mullenix, *Complex Litigation Reform and Article III Jurisdiction*, 59 FORD. L. REV. 169, 220-21 (1990).

112. Under the current version of the statute, cases are to be returned to their home fora for trial. See 28 U.S.C.A. § 1407 (2000); see also *Lexecon Inc. v. Milberg Weiss Beshad Hynes & Lerach*, 523 U.S. 26 (1998). See *infra* text accompanying notes 117-120.

113. 28 U.S.C. § 1407 (2000).

114. See ALI, *STUDY OF DIVISION*, *supra* note 102, at 375-76.

115. See, e.g., *Multiparty, Multiforum Jurisdiction Act of 1989*, H.R. 3406, 101st Cong., 1st

Multiforum Jurisdiction Act became law in 2002 (“the MPMFJA” or “the Act”).¹¹⁶ A factor precipitating Congress’ attention to the problem of multidistrict litigation was its desire to redress *Lexecon Inc. v. Milberg Weiss Beshad Hynes & Lerach*,¹¹⁷ in which the Supreme Court concluded that cases transferred to a particular court as MDL matters could not be retained by that court for trial.¹¹⁸ Ironically, the version of the Act as passed does not address this problem.¹¹⁹ Instead, it makes dramatic changes in federal subject matter jurisdiction, because the Act constitutes the first grant of subject matter jurisdiction.

The direct history of the multiparty, multiforum legislation that was enacted is sparse, as the bill was part of an omnibus package involved primarily with budgetary matters. However committee reports to prior versions of the bill, such as H.R. 860, show that legislators were concerned over how federalizing mass accident cases would impact litigants and the states themselves. As Representative Watt described it:

For those of us who have been strong advocates for States’ rights, I think this is a radical departure. When you start telling to a plaintiff who lives in a State, who is suing a defendant who lives in the same State, and you are going to apply that State’s laws that that case has to be litigated for that plaintiff, he has to go into the U.S. District Court, the Federal court, to litigate his claim, I think that is a radical departure from where we are at this point. . . . Now let me just tell you that every small-town person on this committee ought to be alarmed by this, because in small towns there are not U.S. District Courts. There are, in every county, State courts where individual plaintiffs can walk right down the street, file a lawsuit, and get their claim litigated. You all make it sound like the whole purpose for the court system is for the convenience of the courts. That is not the purpose of the court system. The purpose of the court system is for the convenience of litigants.¹²⁰

Sess. (1989); Multiparty, Multiforum Jurisdiction Act of 1990, H.R. 3406, 101st Cong., 2d Sess. (1990).

116. Pub. L. No. 107-273, § 11020(b)(1)(A), 116 Stat. 1826 [hereinafter MPMFJA]. As originally proposed, the Act required only twenty-five deaths; efforts are underway in Congress to amend the Act to reduce the number from seventy-five deaths to twenty-five deaths. See Multidistrict Litigation Restoration Act of 2004, H.R. 1768, 108th Cong. (2004) [hereinafter Multidistrict Restoration Act]. See also 150 Cong. Rec. H. 1378 (daily ed. March 24, 2004).

117. 523 U.S. 26 (1998).

118. *Id.* at 40-41.

119. However the pending Multiforum Jurisdiction Restoration Act does allow retention for trial on liability of MDL consolidated matters and makes technical amendments to the MPMFJA. Compare MPMFJA, *supra* note 116, and Multidistrict Restoration Act, *supra* note 116.

120. HOUSE COMM. ON THE JUDICIARY, MULTIDISTRICT, MULTIPARTY, MULTIFORUM TRIAL JURISDICTION ACT OF 2001, H.R. REP. NO. 107-14, at 30 (2001) [hereinafter House Report H.R.

Only by presenting H.R. 860 as a very narrow expansion of diversity jurisdiction applying only to a very restricted body of cases were proponents able to garner bipartisan support.¹²¹ As the Minority Report to H.R. 860 stated:

It is our understanding that [the bill] would only apply to a very narrowly defined category of cases, such as, plane, train, bus, boat accidents and environmental spills, many of which may already be brought in federal court. However, it would not apply to mass tort injuries that involve the same injury over and over again such as asbestos and breast implants.¹²²

Moreover, H.R. 860 added features to limit intrusions on state power, such as increasing the threshold for the relevant amount in controversy that previous versions of the bill did not contain.¹²³ Backers were also eager to assure skeptics that multiforum legislation was not meant to create a presumption that Congress could easily invoke minimal diversity to displace state power or to smooth the path for other pending bills such as the Interstate Class Action Act, which threatened to redirect whole categories of proceedings based on state law to the federal sphere. As Representative Sheila Jackson Lee put it:

H.R. 860 is a sharp distinction from the “Interstate Class Action Jurisdiction Act of 1999.” Unlike H.R. 860, the class action bill requires only minimal diversity for all civil actions brought as class actions in federal court, regardless of the individual amounts in controversy, the number of separate incidents or injuries that may give rise to a class action, or the state-based nature of the claim. Rather than providing a reasonable, limited modification to diversity jurisdiction, the class action bill—which I strongly oppose—represents a radical rewrite of the class action rules and would ban most forms of state class actions.¹²⁴

Despite all these caveats and limitations, the MPMFJA as enacted does intrude significantly on state power and in a way that undermines the democratic values of participation, transparency, and accountability. To understand why this is so, it is useful to review the legislation in some detail.

As the discussion of its predecessor, H.R. 860, indicates, key

860].

121. *See id.*

122. *Id.* at 39 (Minority Report).

123. *Id.*

124. *See* House Report H.R. 860, *supra* note 120.

provisions of the MPMFJA affect diversity and removal jurisdiction, as well as intervention, venue, service of process, and subpoenas. In essence, the Act opens up the federal forum for mass accident cases based on state law by exploiting the principle of minimal diversity and then by expanding removal jurisdiction and intervention. The amendments to the removal statute especially enable defendants to negate a plaintiff's choice of the state forum. The Act has been likened to a "vacuum cleaner" that can "suck up" all the cases, including state proceedings, arising from a mass accident tort.¹²⁵

To apply, a single accident must occur in a "discrete location" that results in the deaths of at least seventy-five natural persons.¹²⁶ The federal district courts have original jurisdiction in such a situation if there is minimal diversity between adverse parties¹²⁷ and other conditions are met. Significantly and notwithstanding the concerns expressed in the debate over H.R. 860, no amount in controversy is required.¹²⁸ Following previous suggestions for multidistrict litigation reform, the statute introduces the concept of "residence" as significant.¹²⁹ The presence of minimal diversity provides the bare constitutional predicate for jurisdiction under Article III for the MPMFJA, but the Act further requires: that a defendant "reside" in one state and a "substantial" portion of events takes place in another; that two defendants "reside" in different states; or that "substantial" parts of the accident take place in different states.¹³⁰ However, this focus on residency does not function as a real limitation on the reach of the statute because under the Act a corporation is deemed to reside in any state in which it is registered or has a license to do business.¹³¹ Thus, most corporate defendants will have multiple residences and any of them can suffice to activate the MPMFJA. For example, in a mass tort in which a nationwide oil company might be a defendant, so long as one of the plaintiffs is a citizen of a state different from the oil company, minimal diversity is met and Article III is satisfied.¹³² Although on these facts at

125. See Peter Adomeit, *The Station Nightclub Fire and Federal Jurisdictional Reach: The Multidistrict, Multiparty, Multiforum Jurisdiction Act of 2002*, 25 W. NEW ENG. L. REV. 243, 247 (2003).

126. 28 U.S.C. § 1369(a) (West 2003).

127. *Id.*

128. 28 U.S.C. § 1369 (West 2003).

129. See Rowe & Sibley, *supra* note 110, at 10-11.

130. 28 U.S.C. § 1369(a) (West 2003).

131. 28 U.S.C. § 1369(c) (West 2003).

132. This follows from the Supreme Court's conclusion that the requirement of complete diversity is congressional, not constitutional. See *State Farm & Cas. Co. v. Tashire*, 386 U.S. 523, 531 (1967).

least one plaintiff must be a citizen of a state different from a defendant, the residency requirement will be met easily, as the oil company is a "resident" of many (perhaps every) state and one of those states will likely be in a different location from the accident.¹³³ By its express terms, the statute designates that it is irrelevant whether a defendant is also a resident where a substantial portion of the events took place or whether defendants with two different residences are also residents of the same state. Unlike the manner in which corporate citizenship functions, multiple corporate residences will make it easier to qualify for the Act's grant of subject matter jurisdiction, not harder. While the enlargement of original federal subject matter jurisdiction under MPMFJA is novel, the effect the statute has on removal is particularly important, for it negates the plaintiff's forum choice in a way that injects uncertainty into the question of when and whether removal will be sought.

Traditionally, removal is parasitic of original subject matter jurisdiction, so that one may remove a claim where the plaintiff's well-pleaded complaint presents a federal question or where diversity jurisdiction would have allowed the plaintiff to file originally in the federal forum.¹³⁴ However, when the plaintiff has chosen to go to a defendant's home state court on a state claim, removal is *not* available.¹³⁵ The rationale is that the defendant need not typically be concerned with achieving a more neutral forum, when the plaintiff has submitted to the very state court system from whence the defendant hails.¹³⁶ The MPMFJA dispenses with this limitation so that even where plaintiffs have gone to a defendant's home state court to litigate causes of action created by state law, the defendant may still remove to the federal forum.¹³⁷ But, the removal right goes further. The statute also

133. As Rowe and Sibley put it: "This situation will always exist if defendants have different residences as it will if a defendant has a certain residence and at least part of the acts or omissions occurred elsewhere." See Rowe & Sibley, *supra* note 110, at 26-27 (footnotes omitted). It is important to note that the statute retains the standard definition of corporate citizenship for purposes of meeting the minimal diversity requirement as the place of incorporation and the principal place of business. See 28 U.S.C. § 1369(c) (West 2003).

134. See 28 U.S.C. § 1441(a) (West 2003).

135. See 28 U.S.C. § 1441(b) (West 2003).

136. See 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3723, at 568 (1998).

137. Among other things, the Act's amendments to the removal statute provide:

(e) (1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if—

(A) the action could have been brought in a United States district court under section

provides that if a defendant is a party in an existing MPMFJA action (or even in an action that is not brought under the Act, but could have been) and that defendant is also a party in a state proceeding that arises from the “same accident,” the defendant can remove the state court action, even if it could not have been brought originally in a federal court on its own.¹³⁸ Apparently this could apply even in the circumstance where parties in the state court action are citizens of the same state, because upon removal and consolidation with the MPMFJA action, minimal diversity would exist, so that Article III’s minimum requirements would be met.¹³⁹ Perhaps this is just a variation on the theme of supplemental jurisdiction, but one in which the action that provides the anchor claim itself does not satisfy complete diversity. In this way, the MPMFJA does function as a kind of vacuum cleaner and allows the defendant tremendous latitude to turn on the switch. When it is remembered that the claims for relief subject to the Act do not all themselves have to be claims for death, but can encompass claims for personal injury and property damage, the significant expansion of removal jurisdiction that this represents becomes more stark.

The procedure for removal requires intricate coordination with state courts. Unlike traditional removal, the defendants do not have to be unanimous in their decision to seek the federal forum—only one defendant need petition.¹⁴⁰ Perhaps most critically for plaintiffs, the time limit for removal is very uncertain as the petition may be filed “at any time before trial of the action in State court” so long as it is within thirty days of the time when the removing defendant first becomes a party to the MPMFJA action.¹⁴¹ Even this limit is not dependable, as the federal court has the discretion to allow even later removal.¹⁴² One can only imagine the kind of strategic lever this gives defendants, who may wish to escape state proceedings that are not going well and in which

1369 of the title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

28 U.S.C. § 1441(e)(1) (West 2003).

138. See 28 U.S.C. § 1441(e)(1)(B) (West 2003).

139. The statute provides: “An action removed under this subsection [28 U.S.C. § 1441(e)] shall be deemed to be an action under section 1369 [the MPMFJA] and an action in which jurisdiction is based on section 1369 of this title.” See 28 U.S.C. § 1441(5) (West 2003).

140. See 28 U.S.C. § 1441(e)(1) (West 2003) (providing that “a defendant . . . may remove” (emphasis added)).

141. See 28 U.S.C. § 1441(e)(1)(B) (West 2003).

142. *Id.*

plaintiffs have already invested time and money.

Once removed to the federal court, the state matter resides there until a liability determination has been made. Thereafter, it is remanded to the state court for assessment of damages, unless the federal court finds that it should be retained for convenience and justice reasons.¹⁴³ The decision to remand to state court is not reviewable “by appeal or otherwise.”¹⁴⁴ When the matter is removed to the federal court, the court may transfer it or dismiss it on grounds of inconvenient forum.¹⁴⁵ In parallel fashion, the Act also provides a right to intervene in any federal action “which is or could have been brought” as an MPMFJA action, even if the intervenor could not have brought her claim originally in federal court. Once an action is in federal court on the basis of 28 U.S.C. § 1369—either originally, on removal, or as an intervenor’s claim—the district court must promptly notify the federal MDL panel that the action is pending. This is obviously a requirement to facilitate the transformation of an MPMFJA matter into an MDL matter under 28 U.S.C. § 1407.

Relaxed subject matter jurisdiction is not the only benefit that the MPMFJA brings. Like the interpleader statute, it allows for liberal venue and personal jurisdiction. The legislation amends the venue statute to provide that venue can be had in any district where any one defendant resides or where a substantial portion of the events took place.¹⁴⁶ There is no need that all defendants reside in the same state. Following this theme, the Act provides for nationwide and international service of process,¹⁴⁷ but it goes even further and also authorizes nationwide and international service of *subpoenas* so that witnesses can be required to travel long distances to comply with the court’s directions.¹⁴⁸

Clearly the MPMFJA imposes heavy burdens on plaintiffs in actions subject to its reach and can create real administrative problems for state courts that will not be able to predict or effectively manage mass accident tort actions filed in their systems given the open-textured nature of the removal/remand possibilities. Perhaps sensitive to the encroachment on state prerogatives that it can produce, the Act includes

143. 28 U.S.C. § 1441(e)(3) (West 2003).

144. 28 U.S.C. § 1441(e)(4) (West 2003).

145. 28 U.S.C. § 1441(e)(6) (West 2003).

146. 28 U.S.C. § 1391(g) (West 2003).

147. 28 U.S.C. § 1697 (West 2003).

148. 28 U.S.C. § 1785 (West 2003). The applicant for such a subpoena must show good cause.

Id.

an abstention provision. Unfortunately, its operation is ambiguous, so that no one in the multidistrict drama will be able to predict with confidence whether abstention might occur. The statute directs that a federal court “must abstain” from exerting its section 1369 power, if (1) “a substantial majority of all plaintiffs are citizens of a single State of which the primary defendants are also citizens,” and (2) “the claims asserted will be governed primarily by the laws of that State.”¹⁴⁹ Unfortunately the MPMFJA makes no attempt to define “substantial majority,” “primary defendants,” or “governed primarily.”¹⁵⁰

What is the impact of the MPMFJA on the democratic values of participation, transparency, and accountability? First and most obviously, by redirecting these cases to the federal forum, the controversies they involve are farther removed from the reach of local political communities, both geographically and conceptually. As Representative Watt pointed out, no longer is the plaintiff simply able to walk down the street to the local county court, but she may be required to travel significant distances to litigate her claims.¹⁵¹ This physical distance problem is only magnified when a mass accident tort, after being funneled to the federal forum, is sent to an even more distant federal court for coordinated MDL proceedings. But, it is not just the litigants who have a stake in the outcome; the community most affected by the mass tort does as well. By literally “distancing” these constituencies from proceedings, federalization limits their participatory opportunities. At a more conceptual level, many of the critical rulings in mass accident proceedings will be procedural. As I have described, procedural means for affecting substantive results make participation, transparency, and accountability values much more difficult to sustain. Procedure is arcane and therefore less accessible to laypersons. Procedural rulings made in a distant forum by a federal, not a state, judge confuse questions of accountability. When citizens become aware of the possibility that the results in mass accident cases in federal courts may vary significantly from those in state proceedings, mobilizing a political response will prove more difficult, as the intricate legislative/judicial dance bringing it about will be hard to understand. But perhaps these consequences are tolerable when balanced against the particular and isolated problems of mass accident torts. When the same considerations are applied to class actions, serious questions of

149. 28 U.S.C. § 1369(b) (West 2003).

150. See 28 U.S.C. § 1369(c) (West 2003).

151. See *supra* note 121 and accompanying text.

democratic legitimacy arise.

B. The Class Action Fairness Act (“CAFA”)

This issues raised by class action reform on the model of CAFA are hotly contested and it is possible that proponents will not be able to muster sufficient backing to see the legislation enacted by both houses of Congress in the near future.¹⁵² Nonetheless support for federal legislation controlling class actions is strong in the business community.¹⁵³ For this reason it is unlikely that the technique of using the judicial power of the national government to achieve the effect of substantive legislation in this area will be jettisoned. Hence, close study of the CAFA is warranted. To see clearly the policy questions that are at stake, I have used S. 274, the Class Action Fairness Act of 2003, as the focus of the discussion because it was the lightning rod for sustained policy debate. A revised version of S. 274, S. 2062 is currently pending. Its jurisdictional provisions are substantially similar.¹⁵⁴

Doubtless many would be surprised to learn that diversity jurisdiction under Article III of the Constitution gives Congress independent power to regulate interstate commerce (and one the backers of the CAFA hope will be resistant to the United States Supreme Court’s cases restricting the commerce power under Article I).¹⁵⁵ This high wire act of an indirect and unregulated commerce power is to be accomplished under the CAFA through the concept of an “interstate” class action.

In general, proponents of the CAFA charge that a mere “glitch”¹⁵⁶ in federal diversity jurisdiction—the requirement of complete diversity—has allowed the plaintiff’s bar to unfairly “game the system,”

152. For instance, in October 2003, a motion to invoke cloture in regard to S. 274 failed by one vote. See 72 U.S.L.W. 2476 (February 17, 2004). In February of 2004, S. 2062, the Class Action Fairness Act of 2004, was introduced in the Senate. It is the successor legislation to S. 274 and S. 1751. On February 11, 2004 Senate Majority Leader William Frist delayed consideration of the legislation indefinitely due the possibility of unrelated amendments being introduced by Democrats. *Id.* For a list of bills dealing with the topic of class action fairness and jurisdiction see *supra* note 5.

153. Study and compromise regarding the legislation is still ongoing. In March 2004, Professors Arthur Miller and Samuel Issacharoff met with Senate staff regarding the effect of the legislation. In addition, some senators previously opposed to class action legislation indicate that they may support S. 2062, see *Senate Staff Confers with Legal Experts on Possible Changes to Class Action Bill*, 72 U.S.L.W. 2559-60 (March 23, 2004).

154. See Class Action Fairness Act of 2004, S. 2062, 108th Cong. (2004). One of the primary concerns in this legislation is the phenomenon of the coupon settlement.

155. See SENATE REPORT, *supra* note 35.

156. The Senate Report actually uses the term “glitch.” See SENATE REPORT, *supra* note 35, § IV.

by filing nationwide class actions in state courts that are then mishandled to the detriment of corporate defendants by incompetent or overburdened state judges. Thus, it is *plaintiffs'* lawyers who are unfairly abusing the current diversity and removal jurisdiction of the federal courts. According to the Senate Majority Report on CAFA, these lawyers perpetrate this abuse by joining nondiverse parties so as to keep their state-based claims in the state courts.¹⁵⁷ The majority finds this desire illegitimate, for according to it, diversity jurisdiction itself negates the rule that a plaintiff's choice of forum should carry weight or the constitutional principle that, in general, state courts should determine claims based on state law.

Beyond its contested reading of diversity jurisdiction, the CAFA redresses a number of specific harms alleged to flow from the current system of state class action litigation— that plaintiffs' lawyers receive too much money in fees;¹⁵⁸ that “judicial blackmail” by state judges forces settlement of “frivolous cases”;¹⁵⁹ that the due process rights of defendants are being harmed;¹⁶⁰ that copycat state class actions arise and allow plaintiffs' attorneys to unfairly shop among state forums,¹⁶¹ that inadequate notice and representation to absent class members are afforded;¹⁶² and that settlements improperly give named class representatives a “bounty” or geographically prefer certain class members to others.¹⁶³ In addition, reformers argue that the ability of one state to apply its law to determine issues in a nationwide class action violates principles of “horizontal” federalism, because it does not respect the laws of sister states.¹⁶⁴

157. Of course, just who is playing games is in the eye of the beholder. The Senate Report has nothing to say about the widespread defendant practice of removing state-based actions to the federal forum whenever diversity is present, and to go to tremendous lengths to make sure that it is present. Consider, for instance, the litigation strategy of Audi and Volkswagen of America in the celebrated personal jurisdiction case, *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980). These defendants spent large amounts of money litigating personal jurisdiction all the way to the United States Supreme Court in order to achieve the dismissal of their non-diverse codefendants. *See id.* at 299. When this strategy worked and the plaintiffs were forced to amend their complaint, the remaining defendants removed the action to the federal forum, where they eventually won the action on liability.

158. *See* SENATE REPORT, *supra* note 35, § IV.D.1. *But see* FCJ, *Attorney Reports*, *supra* note 3 (raising doubts concerning the difference in class certification in the state and federal courts).

159. *Id.* § IV.D.2.

160. *Id.* § IV.D.3.

161. *Id.* § IV.D.4.

162. *Id.* § IV.D.5.

163. *See* SENATE REPORT, *supra* note 35, § IV.D.6.

164. *Id.* § IV.E. However, this too is limited by constitutional principles laid down by the Supreme Court in *Phillips Petroleum v. Shutts*, 472 U.S. 797, 834-35 (1985) (holding that the Full

The list makes clear that by manipulating the diversity jurisdiction of the federal courts, the authors of the CAFA hope to reduce the amount of money plaintiffs' lawyers can earn in state-based cases, to facilitate the dismissal of cases they find "frivolous," and to regulate the terms and conditions on which parties may settle. More globally, the CAFA is designed to make it much more difficult for products liability actions and mass tort cases to be brought as class actions at all, because the legislation specifically requires that the federal standards for class certification—an increasingly demanding requirement—be applied to them and the bill's drafters assume that these actions will not be certified.¹⁶⁵ Critics charge that another motive of the legislation is to foreclose any remedy for small consumer claims, and to delay and impede state environmental and civil rights litigation through the complex and uncertain removal/remand process that the statute introduces.¹⁶⁶ Just how might these consequences arise? How does the statute work?

Like the Multiparty Multiforum Jurisdiction Trial Act, the Class Action Fairness Act trades on the concept of minimal diversity. Amendments to the diversity statute provide that the federal courts have original jurisdiction over any civil action in which the amount in controversy exceeds \$5,000,000, is brought as a "class action," and in which any member of the class of plaintiffs is a citizen different from the state of any defendant.¹⁶⁷ Abrogating the result in *Zahn v. International Paper Co.*,¹⁶⁸ the individual claims of class members may be freely aggregated to reach this jurisdictional amount.¹⁶⁹ The difference in citizenship between any one class member and any defendant, a condition likely to exist in almost all class actions, satisfies the bare requirements of Article III. This minimal difference in citizenship taken together with the \$5,000,000 threshold for the amount in controversy (in the original House version only \$2,000,000 activated jurisdiction¹⁷⁰) apparently defines the character of the class action as "interstate," at

Faith and Credit Clause requires states to interpret the laws of other states in good faith, as those laws would be applied by the home state courts).

165. See SENATE REPORT, *supra* note 35, § VII.

166. *Id.* § X.

167. CAFA, S. 274, *supra* note 5, § 4 (proposing amendment to 28 U.S.C. § 1332(d)(2)(A)).

168. 414 U.S. 291, 301 (1973) (holding that each plaintiff in a FRCP 23(b) class action lawsuit must meet the jurisdictional requirements for standing, including amount in controversy requirements and that those who do not must be dismissed from the case). *Zahn* was superseded by the Judicial Improvements Act of 1990, codified at 28 U.S.C. § 1367 (West 2003). See, e.g., *Payne v. Goodyear Tire & Rubber Co.*, 229 F. Supp. 2d 43, 45 (D. Mass. 2002).

169. CAFA, S. 274, *supra* note 5, § 4.

170. See CAFA, H.R. 1115, *supra* note 5, § 4.

least in the eyes of the bill's advocates.¹⁷¹ Generally, no distinction is made between the types of claims being brought—for instance, between state consumer protection actions or a toxic tort occurring in one location. Amendments designed to make this distinction were generally rejected by the Senate Judiciary Committee.¹⁷²

Like the MPMFJA, the CAFA also profoundly changes removal jurisdiction. It provides that any class member, including unnamed members, may remove,¹⁷³ an innovation in light of the practice that the named class representative picks the forum. Any one defendant may remove, even if the action has been filed in the defendant's home state.¹⁷⁴ The right of removal is unilateral; no consent by any other party is required.¹⁷⁵ As with the MPMFJA, the time for removal is enlarged and made uncertain. State class actions can be removed before or *after* certification,¹⁷⁶ a *plaintiff* class member may remove anytime within 30 days of receiving notice of the pending state class action,¹⁷⁷ and the one-year outside time limit on removal is not applicable.¹⁷⁸ Removed actions that do not meet the jurisdictional requirements are subject to remand, although the Majority Committee Report exhorts that when in doubt, federal courts should err on the side of finding jurisdiction.¹⁷⁹ An order remanding a removed action to state court *is* reviewable by appeal or otherwise.¹⁸⁰

171. See SENATE REPORT, *supra* note 35, § III.

172. *Id.* § II.

173. See CAFA, S. 274, *supra* note 5, § 5 (proposing amendment to 28 U.S.C. § 1453(b)(2): “[a] class action may be removed to a district court of the United States . . . by any plaintiff class member who is not a named or representative class member without the consent of all members of such class”).

174. *Id.* (proposing amendment to 28 U.S.C. § 1453(b): “[a] class action may be removed to a district court of the United States . . . without regard to whether any defendant is a citizen of the State in which the action is brought”).

175. *Id.* (proposing amendment to 28 U.S.C. § 1453(b)(1): “[a] class action may be removed to a district court of the United States . . . by any defendant without the consent of all defendants”).

176. CAFA, S. 274, *supra* note 5, § 5 (proposing amendment to 28 U.S.C. § 1453(c): “[t]his section shall apply to any class action before or after the entry of a class certification order in the action”).

177. *Id.* (proposing amendment to 28 U.S.C. § 1453(d): “[s]ection 1446 relating to a defendant removing a case shall apply to a plaintiff removing a case . . . if a plaintiff class member files notice of removal within 30 days after receipt . . . of the initial written notice of the class action”).

178. *Id.*

179. See SENATE REPORT, *supra* note 35, § VI.4 (noting, for example, that “in cases in which it is unclear whether ‘the number of members of all proposed plaintiff classes in the aggregate is less than 100,’ a federal court should err in favor of exercising jurisdiction over the matter”).

180. See CAFA, S. 274, *supra* note 5, § 5 (proposing amendment to 28 U.S.C. § 1453(e): “notwithstanding section 1447(d), an order remanding a class action to the State court from which it was removed shall be reviewable by appeal or otherwise”).

Once a state class action is in federal court either on original jurisdiction or removal, the CAFA mandates that it shall be dismissed if the federal court determines that the action fails to meet the criteria for class certification under Federal Rule of Civil Procedure 23.¹⁸¹ This applies despite the fact that the action may already have been certified as a class action under state laws. If an action fails to achieve class certification at the federal level, the complaint may be amended and it may be filed again as a state class action, but again, it is vulnerable to the unilateral removal by any defendant or class member.¹⁸²

Some limits on this broad jurisdictional grant have been imposed. But critics charge that they are difficult to administer and will inevitably delay and unsettle ongoing state litigation to the detriment of plaintiffs. If two-thirds or more of the plaintiffs are from the same state as the "primary defendants," if the primary defendants are state actors, or if the number of all class members is less than 100, then the grant of jurisdiction does not apply and the action may proceed as a state class action.¹⁸³ In contrast, if at least one-third, but less than two-thirds, of class members are citizens of a state different from any primary defendants, then the federal court has discretion to abstain from asserting jurisdiction.¹⁸⁴ This discretion is not unfettered, but is subject to definite guidelines, and again, in cases of doubt, the drafters exhort the retention of jurisdiction.¹⁸⁵ These guidelines include whether the claims involve matters of national or interstate interest, whether they will be subject to the laws of more than one state, the dispersal of citizenship among states, and whether the action could be expected to generate "copycats."¹⁸⁶ Clearly, standards referring to matters of national interest or whether copycat litigation might be anticipated are open-textured. In addition, the CAFA does not fix the moment in time when the numerical requisites relative to class membership are to be determined, for the abstention provision or generally. This makes it very difficult for class counsel to predict whether a matter filed as a state class action would be

181. *See id.* § 4 (proposing amendment to 28 U.S.C. § 1332(d)(7)(A): "[a] district court shall dismiss any [class action lawsuit] . . . if the court determines the action may not proceed as a class action based on a failure to satisfy the prerequisites of rule 23 of the Federal Rules of Civil Procedure").

182. *See id.* (proposing amendment to 28 U.S.C. § 1332(d)(7)(B): plaintiffs may file an amended class action in Federal or State court, but "any such action filed in State court may be removed to the appropriate district court if it is an action of which the district courts of the United States have original jurisdiction").

183. *See id.* (proposing amendment to 28 U.S.C. § 1332(d)(4)).

184. *See id.* (proposing amendment to 28 U.S.C. § 1332(d)(3)).

185. *See supra* note 180 and accompanying text.

186. *See* CAFA, S. 274, *supra* note 5, § 4 (proposing amendment to 28 U.S.C. § 1332(d)(3)).

susceptible to federal jurisdiction in the first place, or to abstention later, if removed. As with the MPMFJA, this introduces a high degree of uncertainty into state class action proceedings, and motivates those who wish to avoid wasted litigation to file first in federal court. From a practical perspective, the presence of the statute converts all but a few state class actions into federal proceedings.

C. *Alternatives to Intrusion*

Despite the risks to democratic values that enlarging diversity may present, defendants' claims that state class actions expose them to unjustified abuses also deserve attention. One obvious way to take those claims seriously is to assess their factual basis. Several in-depth studies of the contested questions about class actions have been conducted by the Rand Corporation.¹⁸⁷ One comprised a case study of ten consumer class actions from 1989 to 1996.¹⁸⁸ The results were equivocal and depended on a number of preliminary normative questions. As the authors noted: "Without a consensus on what the social utility of damage class actions *should* be, there can be no consensus on how to weigh the social benefits of class actions against their costs."¹⁸⁹ Notwithstanding this caveat, the results of the study indicate that the claims of tort reformers are likely overblown. For instance, in regard to the notion that plaintiffs' lawyers initiate class actions on their own and opportunistically exploit forum possibilities, the authors stated:

Our case studies of ten class actions tell a more textured tale [than anecdotal accounts] of how damage class actions arise. Class actions are complex social dramas. Plaintiff class action attorneys play a crucial role, but so do individual consumers, regulators, journalists, and ordinary lawyers. Defendants' roles in the litigation vary: They contest some suits vigorously, but pursue certification when it appears to offer an efficient means of capping liability exposure. The choreography of the litigation is often complicated: Class action attorneys seek out jurisdictions where they think their suits will fare well, but cases move from jurisdiction to jurisdiction and new actors appear and disappear from the stage. Although lawyers drive the drama to its conclusion, it is American society and culture that provide the ingredients for the story.¹⁹⁰

187. See, e.g., HENSLER ET AL., DILEMMAS, *supra* note 26, at 5.

188. *Id.* at 140-41.

189. *Id.* at 401-02 (emphasis in original).

190. *Id.* at 402.

In fact, the study raised this possibility: "Although public commentary frequently depicts damage class actions as *plaintiff lawyers'* suits, an alternative view is that they are the creatures of *defendants'* desires to forestall more costly forms of litigation or continued consumer complaints."¹⁹¹ With regard to the question of forum choice in general, the study asserted:

Whether forum choice ought to be constrained in damage class actions poses another dilemma for public policymakers. On the one hand, broad forum choice for class action derives from our federal system of laws, which has deep historic roots and is a central feature of our democratic system of government. Moreover, the availability of multiple fora may sometimes provide access to compensation through the courts to consumers who would not otherwise have redress. Whether one views this access as good or bad depends, of course, on one's perspective on the merits of using damage class actions for such redress.¹⁹²

In general, the study suggests that the data is much more nuanced than the claims of tort reformers suggest and cannot be disaggregated from one's pre-existing normative inclinations. One of the more recent and embarrassing studies for those who argue state class actions must be reigned in is the study conducted by Theodore Eisenberg and Geoffrey P. Miller.¹⁹³ Among other things, it shows that the attorneys fees awarded to class counsel in federal cases, at least until recently, are actually *larger* on average than those awarded by state courts.¹⁹⁴ For their part, tort reformers counter with a number of empirical studies and anecdotal accounts that they believe do show significant abuses.¹⁹⁵ It seems unlikely that a resort to empirics alone can resolve the question.

Even if one were to assume for purposes of argument that many of the claims of tort reformers are true, it does not settle the question of whether state tort law should be federalized through the back door of procedural manipulation. Because the risks to democratic values may be too high, all viable alternatives to transforming diversity jurisdiction

191. *Id.* at 407 (emphasis in original).

192. HENSLER ET AL., *DILEMMAS*, *supra* note 26, at 415-16.

193. See *Civil Procedure—Class Actions: Study Disputes Rising Attorney Fees, Recoveries in Class Action Settlements*, 72 U.S.L.W. 2412 (January 20, 2004) (reporting on an examination of the results of 370 class action settlements reported for the period 1993-2002).

194. *Id.*

195. See LAYCOCK, *supra* note 46, at 172-73. See also Manhattan Institute for Policy Research, *Civil Justice Reports*, available at http://www.manhattan-institute.org/html/mi_publications_cont_1.htm#cj (last visited Apr. 12, 2004) (listing several empirical studies of class action lawsuits).

should be explored. In fact, canvassing the list of abuses identified by the backers of CAFA reveals it contains items that could be attacked directly on the federal constitutional grounds of procedural due process. This suggests that if these claims are serious, there is at least one alternative to completely reordering federal subject matter jurisdiction—defendants can directly object to the very due process abuses they allege.

The United States Supreme Court has long regulated the standards of notice and opportunity to be heard that are constitutionally required.¹⁹⁶ And, even before the modern incarnation of class action practice, the Court spoke on the due process implications of inadequate representation by named class representatives with the celebrated decision of *Hansberry v. Lee*.¹⁹⁷ Another avenue would be to pursue not just procedural, but substantive, due process claims. Obviously state laws that violate rights protected by the United States Constitution cannot trump those rights.¹⁹⁸ If the due process rights of defendants are profoundly violated, they might argue that their fundamental rights are being infringed or equal protection violated. In fact, this has been a successful campaign in the case of punitive damages.¹⁹⁹ Over the last decade the United States Supreme Court's punitive damages jurisprudence has changed from one where the only check on state practice was procedural due process,²⁰⁰ to one in which a substantive right has been conferred on defendants not to be liable for punitive damage amounts that are too large.²⁰¹ This trajectory might prove fruitful for other items of damages, especially nonpecuniary damages,²⁰²

196. See *Conn. v. Doehr*, 501 U.S. 1 (1991) (providing a multifactorial test for determining constitutionally adequate opportunity to be heard); *Snyder v. Harris*, 394 U.S. 332 (1969) (among other things, construing the constitutionality of notice in class actions); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (establishing the federal constitutional standard for adequate notice of the pendency of an action).

197. 311 U.S. 32, 42-43 (1940) (recalling that members of a "class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present"); see also Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 362-63 (1999).

198. This is axiomatic given the Supremacy Clause. See U.S. CONST. art. VI, cl. 2.

199. See Robert L. Rabin, *Federalism and the Tort System*, 50 RUTGERS L. REV. 1, 23-25 (1997).

200. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

201. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

202. This is because many of the arguments used to constitutionalize the issues involved in punitive damages have also been made in regard to nonpecuniary compensatory damages, such as awards for pain and suffering or mental distress. The Supreme Court itself recognized these similarities. See *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 467-68 (1996) (Scalia, J., dissenting). See also, JoEllen Lind, *The End of Trial on Damages? Intangible Losses and Comparability Review*, 51 BUFF. L. REV. 251, 268 (2003).

but it seems much less likely to upset the long-embedded state common-law principles of tort *liability*. And, given the distinction between economic rights and other kinds established by *United States v. Carolene Products*,²⁰³ as well as the principle that differential effects do not establish an intent to discriminate under *Washington v. Davis*,²⁰⁴ it is difficult to see what arguments repeat corporate defendants could use to strike neutrally worded state tenets of negligence, products liability, and the like as a violation of the federal Constitution.²⁰⁵ In reality, it looks as though tort reformers want to have it both ways in regard to state class actions—to invoke due process as a reason to reorder state/federal relations without having to actually put their due process claims to the test.

John S. Baker, Jr., has suggested another way to address the claims of repeat defendants without fundamentally changing the regime of diversity jurisdiction. For him, a serious charge concerning state class actions derives from the application of one state's law to determine a defendant's liability in multiple geographic areas.²⁰⁶ This is the problem of conflict of laws in the class action context. He argues that if the limitations on one state's reach established by *Phillips Petroleum v. Shutts*²⁰⁷ are not sufficient, then under the Full Faith and Credit Clause²⁰⁸ Congress might have the authority to craft a body of national class action rules that could be employed to determine contested conflicts questions in state-based, nationwide class proceedings.²⁰⁹

Leaving aside the questions of conflict of laws, another avenue to pursue would be to curb abusive state class actions in the very states where the most egregious abuses occur. In fact some states that have been identified as particularly problematic have instituted reforms on their own.²¹⁰ Dramatic reformulations of diversity jurisdiction instituted for the purpose of bypassing the states would retard this natural process of state self-correction and undercut the very role of the states in the

203. 304 U.S. 144 (1938).

204. 426 U.S. 229 (1976).

205. See Baker, *supra* note 38, at 721.

206. *Id.* at 719, 729-32.

207. 472 U.S. 797 (1985).

208. U.S. CONST. art. IV, § 1.

209. Baker, *supra* note 38, at 713.

210. For instance, this seems to be what is happening in Louisiana. See generally Donald C. Massey, Louis C. LaCour, Jr., & Valerie M. Sercovich, *Curtailing the Tidal Surge: Current Reforms in Louisiana Class Action Law*, 44 LOY. L. REV. 7 (1998) (profiling state and federal class action law with an emphasis on mass tort class actions as a backdrop for analyzing the history of Louisiana class action lawsuits and consequent reform efforts in the state).

constitutional framework.²¹¹

Finally, if after all these alternatives were exhausted and abuses still existed, the nature and extent of the changes need not be as extensive as the proponents of the CAFA intend.²¹² For instance, in a letter dated March 26, 2003, to the Senate Judiciary Committee in regard to S. 274, the Judicial Conference reiterated its disquiet about the legislation as written, out of a concern for its impact on the caseload of the federal courts and the effect on state/federal relations.²¹³ As the Conference stated: “Congress should be encouraged to include sufficient limitations and threshold requirements so that federal courts are not unduly burdened and states’ jurisdiction over in-state class actions is left undisturbed”²¹⁴ A major limitation the Conference suggested was based on the type of class action involved; i.e., in the case of consumer class actions based on fraud or warranty law, or environmental disasters, state courts should have dominance.²¹⁵ But the interest of proponents in these alternatives seems to have waned — they do not primarily bring procedural or substantive due process challenges to the basic regime of the state common law of torts, they do not wish to explore a national body of conflict rules, and they have been unmoved by claims that some actions must be retained by the states due to their fundamental local character. Why is this the case? It is possible that the real goal is to curtail mass tort class actions altogether by redirecting them to the federal forum where they will be obstructed so profoundly that defendants’ overall liability will be reduced. Tort reformers may not be interested in incremental change that preserves the democratic elements of federalism if they can limit their liability by procedural means under the radar screen of popular will.

211. See *supra* notes 21-22 and accompanying text.

212. Recall, this is the rationale for the MPMFJA. Moreover, the possibility of *states* replicating the federal MDL process in some fashion ought to be considered.

213. See Letter from the Judicial Conference to the Senate Judiciary Committee, (Mar. 26, 2002) (copy on file with author).

214. *Id.* at 1.

215. *Id.*

IV. TILTING THE PLAYING FIELD

Proponents of tort reform are intentionally harnessing procedure to displace state law that they deplore. Their strategy involves a two-step process. As I have shown, the first step is to redirect litigation into the federal forum by way of minimal diversity; the second is to rely on the different procedural rules applicable there to produce different substantive results.²¹⁶ Three areas of procedural difference, class action certification, summary judgment, and summary judgment substitutes, show just how effective this strategy can be.

A. Class Action Certification

A strong motive for redirecting state class actions into the federal forum is the hope of tort reformers that class certification will be much more difficult to achieve there—at least for the purpose of actually trying class action controversies.²¹⁷ The best evidence of this is the affirmative requirement in the CAFA itself that the state-based class actions must be dismissed if they do not meet the certification requirements of Federal Rule of Civil Procedure 23:

A district court shall dismiss any civil action that is subject to the jurisdiction of the court solely under this subsection [28 U.S.C. § 1369] if the court determines the action may not proceed as a class action based on a failure to satisfy the prerequisites of rule 23 of the Federal Rules of Civil Procedure.²¹⁸

When this mandate is related to the fact that under the new system it is possible for a party to seek removal of a state class *after* it has been certified by the state court, the motive becomes even clearer. These features of the legislation are an almost perfect expression of reformers' claim that one of the main "abuses" of state class actions is improper certification by state judges.²¹⁹ The Majority Report of the Senate Judiciary Committee on S. 274 shows clearly the majority's belief that there is a link between the procedure governing certification and

216. See *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973).

217. As Judith Resnick describes it, "Defendants . . . hope that, were cases channeled to federal courts, fewer cases would be certified and fewer settlements approved." Resnick, *Constricting Remedies*, *supra* note 32, at 302. As John S. Baker, Jr., has noted, proponents of changes in the diversity statute seem to assume that class certification will not occur. See Baker, *supra* note 38, at 711.

218. CAFA, S. 274, *supra* note 5, § 4.

219. See SENATE REPORT, *supra* note 35, § VII.2.

substantive outcomes:

Because class actions are such a powerful tool, they can give a class attorney unbounded leverage, particularly in jurisdictions that are considered plaintiff-friendly. The reason for this unbounded leverage in such jurisdictions is because, as a general rule, the question of whether a class is properly certified can only be appealed following a costly, and risky, trial. Thus, the Hobson's choice is to either settle frivolous suits, or invest in expensive litigation. Consequently, such leverage can essentially force corporate defendants to pay ransom to class attorneys by settling—rather than litigating—frivolous lawsuits. *This is a particularly alarming abuse because the class action device is intended to be a procedural tool rather than a mechanism that affects the substantive outcome of a lawsuit.*²²⁰

It is not hard to see that the purpose of the legislation is to employ another procedural tool — manipulation of diversity jurisdiction — to produce a different substantive outcome. The CAFA makes the two-step maneuver explicit through its goal of opening up diversity jurisdiction for the purpose of imposing the *federal*, not the state, standard for class action certification. As the ability to achieve class certification in the federal courts may be increasingly difficult, it is possible that this strategy will work.²²¹

Several factors have come together to affect class action certification in the federal forum in particular kinds of cases. In this era, the health consequences of asbestos exposure, tobacco use, mass-marketed pharmaceuticals and other products have generated the phenomenon of the mass tort class action with thousands of potential claimants seeking redress for personal injuries.²²² Because these actions involve common questions concerning defendants' conduct or products, but individual issues concerning the damages of particular class

220. *Id.* § IV.D.2 (emphasis added).

221. The new Federal Judicial Center study raises questions about how different state and federal courts actually are regarding class certification. See FJC, *Attorney Reports*, *supra* note 3.

222. See, e.g., *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (asbestos case establishing guidelines relating to certifying a class action for settlement purposed only; certification reversed); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 740-41 (5th Cir. 1996) (reversing trial court certification of class action in tobacco litigation action); *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prod. Liab. Litig.*, Nos. 1203, 99-20593, 2000 WL 1222042 (E.D. Pa. Aug. 28, 2000) (lawsuit involving more than six million class member with potential claims for personal injury from taking prescription diet drugs). Mark Weber has argued in connection with the Supreme Court's opinion in *Amchem* that the real effect of the case is not so much to police settlement as to place "a limit on the kinds of cases that may be brought as class actions." Mark C. Weber, *A Consent-Based Approach to Class Action Settlement: Improving Amchem Products, Inc. v. Windsor*, 50 OH. ST. L.J., 1155, 1177 (1998).

members, the lawsuits fall into the most controversial form of class action under Federal Rule of Civil Procedure 23, the "damage" class action under 23(b)(3).²²³ This type of action is the most difficult to certify, as the court must not only find that the basic requisites of certification under 23(a) are met,²²⁴ but that the common questions of law or fact predominate over individual matters and that the class action is the superior vehicle for resolving the controversy.²²⁵ The characteristics of mass tort class actions that have given courts problems are the need to individuate damages to class members, the choice of laws questions, and increased possibilities of a conflict of interest among class members.²²⁶

Although under Federal Rule 23, damage class actions are hardest to certify, parties and trial judges often want them to be certified to achieve an administrative regime for dealing with thousands of claims that would clog the courts if brought individually. More importantly from the defendant's perspective, they can become means to impose a "global settlement" on all class members.²²⁷ However, these goals are in tension with another set of phenomena—tort reformers and many federal judges, particularly at the appellate level, question whether mass torts should be brought as class actions at all,²²⁸ and they believe that class actions in general can lead to unjustified, often collusive, and unfair settlements.²²⁹ In fact, the attitude of the federal courts toward class actions is ambivalent.

223. In fact, under the pre 1966 revision of Rule 23, such class actions were referred to as "spurious" class actions. See John G. Harkins, Jr., *Federal Rule 23—the Early Years*, 39 ARIZ. L. REV. 705, 708 (1997).

224. See FED. R. CIV. P. 23(a) (requiring as a prerequisite to certifying a class the existence of numerous members that makes joinder impracticable, common questions of law or fact, claims or defenses of the representative typical of other members of the class, and representative parties who will fairly and adequately protect the interest of the class).

225. See FED. R. CIV. P. 23(b). The rule gives four additional factors for the court to consider in making these judgments: the interests of the litigations in individually controlling the litigation, whether other litigation is already pending, whether the litigation should be concentrated in one forum, and the difficulties of class action management. In addition, the court is instructed to direct notice to the members of the class of the right of each member to be excluded on request.

226. See, e.g., *Castano*, 84 F.3d at 740-41; see also Robert L. Rabin, *The Third Wave of Tobacco Tort Litigation*, in REGULATING TOBACCO 187-88 (Robert L. Rabin & Stephen D. Sugarman eds., 2001) (analyzing the Fifth Circuit's *Castano* decision and its aftermath).

227. See Nagareda, *supra* note 28, at 151-52 (observing that for the settling defendant, the purchase of class members' rights to sue, through claim preclusion, is one of the main purposes of defendants).

228. See SENATE REPORT, *supra* note 35. See also Greer Pagan, *Renewed Resistance?: The Federal Circuit Courts and the Problem of Mass Tort Class Actions*, 34 HOUS. L. REV. 807, 832-41 (1997).

229. Pagan, *supra* note 228, at 832-41.

The history and procedure of federal class actions have been extensively analyzed, and it is not my purpose here to go over old ground.²³⁰ The aims of the modernized class action in the federal courts are contested. Some argue that their core purpose was to facilitate civil rights litigation through the injunction class.²³¹ Others argue that a motivating force was to provide redress for litigants with claims too small to be brought efficiently on an individual basis.²³² The rule would remedy that problem by allowing small claims to be amassed in a single class action providing a controversy of pecuniary significance large enough to attract attorney representation and efficient enough through economies of scale to justify bringing the action²³³ But soon after the emergence of modern Rule 23 as a result of the 1966 revisions, the Supreme Court decided several cases that, ironically, redirected many class actions to state forums.

Under normal principles, class actions based on state causes of action must satisfy the regular requirements of diversity, that is, they must show complete diversity of citizenship and that the amount in controversy is satisfied. Perhaps surprisingly, the Supreme Court established quite early on in *Supreme Tribe of Ben-Hur v. Cauble*²³⁴ that, in litigation having a class action character, only the citizenship of the

230. See generally, STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987) (tracing the development of the class action from early progenitors in the Seventeenth Century to its modern form). See also, Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709, 714-17 (2003) (evaluating whether FRCP 23(c)(4)(A) should be amended to authorize more innovative issue class actions and placing (c)(4)(A) within the entirety of Rule 23); Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941) (positing that modern society increasingly exposes people to group injuries and the problem of fashioning an effective and inclusive group remedy is a major issue); Jack B. Weinstein, *Some Reflections on the "Abusiveness" of Class Actions*, 58 F.R.D. 299, 305 (1973) (arguing against a rigid narrowing of FRCP 23 considering that the organized character of society affords the possibility of illegal behavior accompanied by wide-spread, diffuse consequences, a procedural means should exist to remedy or deter that conduct).

231. See Hensler, *Revisiting*, supra note 27, at 179 (recalling the views expressed by members of the 1966 Civil Rules Advisory Committee who amended Rule 23 to facilitate civil rights and other class actions aimed at social reform).

232. See Bryant Garth, Ilene H. Nagel & S. Jay Plager, *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353, 397 (1988).

233. But see Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1420-21 (2003) (arguing that it is defendants who really enjoy economies of scale in the mass tort class action).

234. 255 U.S. 356 (1921); accord *Snyder v. Harris*, 394 U.S. 332, 340-41 (1969) (dictum) (observing that 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").

named parties is considered for purposes of diversity of citizenship.²³⁵ But when in the immediate post-1966 revision era the question arose of whether class claims could be aggregated, the Court did not take such a generous view. In two cases, it established that class members cannot aggregate their individual claims for damages to meet the amount in controversy requirement. *Snyder v. Harris*²³⁶ prohibited aggregation of class claims, where none, standing alone, could meet the amount in controversy requirement; *Zahn v. International Paper Co.*²³⁷ clarified that even if the claim of the named representative(s) met the jurisdictional amount, the claims of absent class members could not be aggregated with the permitted claim.²³⁸ Taken together these decisions foreclosed the federal forum for class actions based on an accumulation of small individual claims, or even in mass tort situations where smaller claims could not be added to larger ones to open the federal forum to the whole class. As a result, the locus of class action activity began to shift to the states.

It was not until the rise of the nationwide, state-based class action, a phenomenon facilitated by another important Supreme Court decision, *Phillips Petroleum v. Shutts*,²³⁹ that the move to control state class action proceedings really got underway. In an opinion by Chief Justice Rehnquist, the Court concluded that unnamed class members of a plaintiff class need have no “minimum contacts” with the forum state under principles of due process so long as they had sufficient notice, adequate representation, the right to participate, and in the case of a damages class action, the right to opt-out.²⁴⁰ In so doing, the Court sharply contrasted the situation of plaintiff class members from defendants—plaintiff members are not generally practically burdened by the need to go to a distant forum and actively participate in the litigation, and other features of the class action procedure protect their interests, things such as the requirement that the named representative be adequate, that the court supervises settlement, and the like.²⁴¹ Thus the

235. *Supreme Tribe of Ben Hur*, 225 U.S. at 364-66 (reversing a district court opinion that held that joinder of a nondiverse party in a class action lawsuit defeated diversity jurisdiction).

236. 394 U.S. 332, 336 (1969) (holding that “[w]hen two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount”).

237. 414 U.S. 291, 301 (1973) (holding that “[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case – ‘one plaintiff may not ride in on another’s coattails’”).

238. *Id.* at 301-02.

239. 472 U.S. 797 (1985).

240. *Id.* at 811.

241. *Id.* at 811-12.

Court did not impose a due process requirement that absent class members affirmatively “opt-in” to be included in class action litigation. However, the Supreme Court did impose limits in the context of choice of law, namely that in a nationwide class action, in order for the forum to apply its own law, it must “have a ‘significant contact or significant aggregation of contacts’” to the class claims to create an interest sufficient for the application of its law not to be “arbitrary or unfair.”²⁴² According to tort reformers, the net result of *Shutts* was an explosion of nationwide class actions for mass torts where state courts were called upon to make difficult conflict of laws determinations beyond their capabilities. Moreover, these nationwide classes were portrayed as subjecting corporate defendants to frivolous lawsuits and putting them under intense pressure to settle — to the detriment of themselves and unnamed class members — due to the unjustifiable willingness of state judges to certify matters as class actions. Concern for abusive class action settlements and fee arrangements arose in the academy as well, and it was not long before calls to revisit the question of mass class actions arose and efforts to amend Federal Rule of Civil Procedure 23 were undertaken.²⁴³

In 1998, the first non-technical change to Rule 23 since 1966 took effect. Apparently persuaded by the argument that decisions to grant or deny class action certification do indeed spell the death-knell for plaintiffs’ and defendants’ relative litigation positions,²⁴⁴ the Advisory Committee recommended adding a new subsection (f), granting the federal circuit courts discretion to permit an interlocutory appeal from the trial court’s decision to grant or deny class action status.²⁴⁵ The grant of this new discretionary appellate power appears to be broad:

The courts of appeals will develop standards for granting review that reflect the changing areas of uncertainty in class litigation. . . .

242. *Id.* at 821-22. For general discussions of the personal jurisdiction and conflict-of-laws implications of *Shutts*, see Michael A. Perino, *Class Action Chaos? The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions*, 46 EMORY L.J. 85 (1997) and Linda S. Mullenix, *Class Actions, Personal Jurisdiction, and Plaintiffs’ Due Process: Implications for Mass Tort Litigation*, 28 U.C. DAVIS L. REV. 871 (1995).

243. For example, the American Law Institute initiated its Complex Litigation Project in 1986. See Mullenix, *Unfinished Symphony*, *supra* note 110, at 979. See also AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT (1993). The first bills addressing the topic of multiparty, multiforum mass torts began to be introduced in Congress. See *supra* note 115.

244. The “death knell” argument was first made in connection with attempts to craft a judge-made exception to the final judgment rule of 28 U.S.C. § 1292. See *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). However, it has been unsuccessful in connection with class action certification questions. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

245. See FED. R. CIV. P. 23(f).

Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive. Permission is most likely to be granted when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation.²⁴⁶

This new opportunity for interlocutory appeal dovetailed with and facilitated an increasing hostility on the part of federal appeals courts to class action certification in the damage class actions that were located in the federal forum. The Seventh Circuit's recent class action jurisprudence is particularly revealing. Prior to the amendment, it granted a writ of mandamus to review an order certifying a mass tort class action brought on behalf of hemophiliacs who had contracted AIDS from infected blood. Two of the more controversial aspects of the decision, *In re Rhone-Poulenc Rorer Inc.*,²⁴⁷ were its consideration of the merits of the plaintiff's claim as part of the certification question and its arguable defendant bias in assessing the effect of the class action rule: "[U]nder the district judge's plan the thousands of members of the plaintiff class will have their rights determined, and the four defendant manufacturers will have their duties determined, under a law that is merely an amalgam, an averaging, of the nonidentical negligence laws of 51 jurisdictions."²⁴⁸ Moreover, throughout the opinion it was clear that the court thought little of the plaintiff's "serendipity" theory of negligence. What was most troubling was the negative attitude the court expressed toward damage class actions, an attitude that seemed projected from a defense perspective, and not one of neutral concern for both sides. Consider the court's own words:

The reason that an appeal will come too late to provide effective relief for these defendants is the sheer *magnitude* of the risk to which the class action, in contrast to the individual actions pending or likely, exposes them. . . . They might, therefore, easily be facing \$25 billion in potential liability (conceivably more), and with it bankruptcy. They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle. . . . We do not want to be misunderstood as saying that class actions are bad because they place pressure on defendants to settle. That pressure is a reality, but it must be balanced against the undoubted benefits of the class action that have made it an authorized procedure for employment by federal courts.

246. FED. R. CIV. P. 23(f) advisory committee's note.

247. 51 F.3d 1293 (7th Cir. 1995).

248. *Id.* at 1302.

We have yet to consider the balance.²⁴⁹

The decision has little to say about the practical consequences on the unnamed class members who were left with the choice to proceed with individual actions or cease litigating at all. It is not unreasonable to assume that given their health condition, many simply gave up due to scarce resources and time constraints. If this is possible, then the court's refusal to sustain class certification had real cash value to the defendant. It is hard not to conclude that by its approach to the certification question—a procedural matter—the court intentionally affected the substantive outcome in the case. As one commentator notes, “[o]bviously, the procedural rules affect the outcome of litigation. These Circuit Courts [including the Seventh Circuit] seemed to ignore the essence of Rule 23 because of their philosophical disagreement with the effects of Rule 23.”²⁵⁰

The Seventh Circuit has continued to consider the merits of plaintiffs' claims when reviewing class action certification, and it has developed the doctrine that even where the certification decision does not appear erroneous, it is entitled to grant interlocutory appeals in order to advance the general federal law governing class action practice.²⁵¹ The Seventh Circuit's recent decisions show a pattern of routinely reversing class action certification in mass tort litigation and what commentators have characterized as an animus toward the class action device itself.²⁵² The Seventh Circuit is not alone. Class action certification has been reversed in numerous significant proceedings involving tobacco, asbestos, pharmaceuticals, and other matters.²⁵³ This trend should only continue as a result of the most recent amendments to Rule 23, amendments which institute the most significant change in the nature of the rule since it was modernized in 1966.

Although the changes to Rule 23 have been described as “balanced and neutral,”²⁵⁴ commentators also acknowledge that the revisions “may prove to be more ground-breaking than they first appear,”²⁵⁵ and that

249. *Id.* at 1297-99 (citations omitted).

250. See Cabraser 2002, *supra* note 3, at 1223.

251. See Blair v. Equifax Check Serv., Inc., 181 F.3d 832, 835 (7th Cir. 1999).

252. See Cabraser 2002 *supra* note 3, at 1239 (commenting on *In re Bridgestone/Firestone Products Liability Litigation*, 288 F.3d 1012 (7th Cir. 2002)).

253. See, e.g., *supra* note 223 and accompanying text.

254. See Joshua B. Gray and Michelle H. Seagull, *Class Action Reaction: Amended Rule 23 Enhances Judicial Supervision in Class Litigation*, 18 SPG-ANTITRU 91, 91 (2004). The claim is also made that Rule 23 as amended does not really change matters, because it incorporates what courts are already doing, i.e., “it appears to embody good practices.” *Id.*

255. *Id.*

they "present significant new tactical choices for class action litigants and new case management options for courts."²⁵⁶ Hence, the 2003 amendments to Rule 23 may signal a sea-change in class action practice. The changes are of three major types. First, they underscore the importance of the certification decision itself and create a chronological space for the infiltration of merits considerations into that decision. As the Advisory Committee Note states:

Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense it is appropriate to conduct controlled discovery into the "merits," limited to those aspects relevant to making the certification decision on an informed basis.²⁵⁷

Moreover, the trial court no longer has the discretion to conditionally certify a class action, but must refuse certification if there is any doubt whether the Rule 23 requirements are met.²⁵⁸

Second, the rule contemplates that courts exert much more control over settlement, and it makes the settlement process in 23(b)(3) damage classes uncertain, as it gives unnamed class members a post-settlement possibility to opt-out.²⁵⁹ While some aspects of settlement will be subjected to greater rigor, others will not. Significantly, the amended rule does not require court supervision where there is settlement of individual claims in a class action that is not yet certified.²⁶⁰ This reverses the law of most circuits. This is curious, given the concern of tort reformers, academics, and the Advisory Committee itself for "collusive" settlements between preferred class members and defendants.²⁶¹ Nonetheless, in regard to certified class actions, the court must make findings that any settlement approved is "fair, reasonable,

256. *Id.*

257. FED. R. CIV. P. 23(c)(1) advisory committee's note; see MANUAL FOR COMPLEX LITIGATION, *supra* note 109, §§ 21.213, 30.11, 30.12 (discussing the requirement that a party requesting class certification prepare a trial plan describing the issues likely to be presented at trial and tests whether the issues are susceptible to class-wide proof).

258. FED. R. CIV. P. 23(e)(1)(C) advisory committee's note.

259. FED. R. CIV. P. 23(e). The opt-out option is discretionary with the court, not mandatory. See Julie B. Strickland and Stephen J. Newman, *Recent Developments in Consumer Class Action Litigation*, 1414 PLI, CORP 9, 16-7 (2004).

260. FED. R. CIV. P. 23(e)(1)(A) advisory committee's note; see MANUAL FOR COMPLEX LITIGATION, *supra* note 109, § 30.41.

261. See *supra* notes 229-30 and accompanying text.

and adequate.”²⁶² The Advisory Committee also notes that settlement may provide another opportunity to revisit the issue of the class definition and may require additional notice.²⁶³ In general, the revisions inject uncertainty about notice and may increase notice burdens for 23(b)(3) classes.²⁶⁴

Finally, the rule attempts to control the questions of legal representation and attorneys’ fees by introducing new provisions that cede greater managerial power to courts over the question of who shall become class counsel and what and how counsel may be paid.²⁶⁵ This may reflect what courts are already doing in practice, but the explicit grant of managerial authority is significant. The Advisory Committee states:

This subdivision [new 23(g)] recognizes the importance of class counsel, states the obligation to represent the interests of the class, and provides a framework for selection of class counsel The new subdivision also provides a method by which the court may make directions from the outset about the potential fee award to class counsel in the event the action is successful.²⁶⁶

Carrying on this theme, new subsection (h) provides the court with explicit directions as to its role in supervising the award of attorneys fees. The Advisory Committee purports to be taking the law as it finds it regarding the award of attorneys fees, but consider these remarks:

In many instances, the court may need to proceed with care in assessing the value conferred on class members. Settlement regimes that provide for future payments, for example, may not result in significant actual payments to class members. In this connection, the court may need to scrutinize the manner and operation of any applicable claims procedure. In some cases, it may be appropriate to defer some portion of the fee award until actual payouts to class members are known. Settlements involving nonmonetary provisions for class members also deserve careful scrutiny to ensure that these

262. FED. R. CIV. P. 23(e)(1)(C) advisory committee’s notes. The advisory committee notes state that the standards for this determination are to be gleaned from *In re: Prudential Insurance Co. of America Sales Practice Litigation*, 148 F.3d 283, 316-24 (3d Cir. 1998) and the Manual for Complex Litigation. *Id.*

263. FED. R. CIV. P. 23(e)(1)(C) advisory committee’s notes.

264. See John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1435-6 (2003) (characterizing the current class action member notice rules as flawed for allowing judges the discretion to dispense with class notification in some categorical instances while insisting on individual notice in other categories of cases).

265. FED. R. CIV. P. 23(g).

266. FED. R. CIV. P. 23(g) advisory committee’s note.

provisions have actual value to the class.²⁶⁷

It seems obvious that with its emphasis on certification and reducing attorney autonomy in regard to settlement and fees, the revisions of Rule 23 will have a differential impact on plaintiffs. Many of the revisions bear uncanny witness to the “abuses” retailed by the proponents of the Class Action Fairness Act, and in fact, they lobbied the Judicial Conference in regard to the proposed changes in Rule 23 as well as the Act itself.²⁶⁸ Coupled with the broad discretion invested in the federal courts of appeals since 1998 to review certification decisions and their frequent refusal to affirm certification, it is no wonder that the proponents of CAFA insist that state-based class actions “shall be dismissed” if they fail to achieve certification under Rule 23. But this is apparently not enough for tort reformers. CAFA itself regulates federal class action practice in a way that goes beyond, or even conflicts, with Rule 23. Among its other features, this legislation demands particular scrutiny by federal courts over coupon or other noncash settlements, any settlement that would result in a net loss to class members after payment of counsel fees, and it affirmatively prohibits “bounty” payments to named representatives or differential payments to certain class members on the basis of geography.²⁶⁹

In addition to these requirements, the CAFA prescribes in detail a particular form of notice that must be given to absent class members.²⁷⁰ Significantly, it requires that notice be given to state and federal officials of the pendency of the class action, so that these officials might intervene, if desired, to police the fairness of the proceeding.²⁷¹ From the perspective of a state’s power, this might represent the worst of all possible worlds—a constant redirection of class action litigation from one’s state courts to the federal forum, with a concomitant need to monitor and intervene in cases in that forum. The drafters of the CAFA attempt to minimize the conflict between state and federal law by arguing that most states have adopted some version of Federal Rule of

267. FED. R. CIV. P. 23(h) advisory committee’s note. *But see* Blanchard v. Bergeron, 489 U.S. 87, 95 (1989) (recognizing that in some class action lawsuits the monetary relief obtained is not the sole determinant of an appropriate attorney fee).

268. *See* Resnick, *Constricting Remedies*, *supra* note 32, at 298 (noting that in 2002 a “group of lobbyists tried to persuade the Judicial Conference to join efforts to convince Congress to divest state courts of jurisdiction over class actions, arising under state law, but involving large sums of money and defendants doing business on a national scale”).

269. *See* CAFA, S. 274, *supra* note 5, § 3 (proposing amendment to 28 U.S.C. §§ 1712 – 1715).

270. *Id.*

271. *Id.* (proposing amendment to 28 U.S.C. § 1717).

Civil Procedure 23 and so should be following the federal standard,²⁷² or that whenever a federal court denies class certification it is likely doing so on due process grounds, so that a state's disagreement as to certifiability impliedly violates constitutional principles.²⁷³

B. Of Summary Judgment

The technique of redirecting whole categories of state-based litigation into the federal forum must be placed in a broader context—the context of the increasing anti-plaintiff impact of federal procedural principles across the board. What has happened with mass accident torts and what may happen to state-based class actions are just extreme examples of a more insidious process—the steady erosion of state substantive law through federal procedure even in normal diversity cases. Perhaps the most significant procedural benefit offered by the federal forum is the substantially greater possibility a defendant will win on summary judgment when a case is situated in the federal courts.

In general, the rationale for summary judgment is to eliminate controversies that are not trialworthy. Where the material facts are not in dispute, so that the trier of fact need not decide them, a summary procedure for determining the outcome is appropriate and does not violate the right to jury trial.²⁷⁴ Federal Rule of Civil Procedure 56, which provides for summary judgment in the federal courts, was part of the original package of federal rules enacted in 1938.²⁷⁵ The 1963 amendments to Rule 56 theoretically increased the burden on parties opposing summary judgment because it prohibited the nonmoving party from relying on the pleadings alone, and required the nonmovant instead to muster evidence beyond the pleadings gleaned from discovery or opposing affidavits.²⁷⁶ If this burden is not met, then summary judgment “shall be rendered forthwith.”²⁷⁷ The 1963 change raised a number of questions—what showing the *moving* party would have to make to shift the burden of production, how burdens of proof should affect summary judgment, and what standards a court should use in evaluating evidence

272. See SENATE REPORT, *supra* note 35.

273. *Id.*

274. See Martin B. Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L. J. 745, 747 (1974) (exploring the principal function of the motion for summary judgment).

275. See Georgene M. Vairo, *Through the Prism: Summary Judgment After the Trilogies*, in *Civil Practice and Litigation Techniques in Federal and State Courts*, SH063 ALI-ABA 577, 583 (2003) [hereinafter Vairo, *Trilogies*].

276. See FED. R. CIV. P. 56(c).

277. *Id.*

mustered by the nonmovant to avoid summary judgment. It is also important for understanding the dynamics to note that materials in affidavits must be based on personal knowledge and set forth facts that would be admissible at trial,²⁷⁸ thus, the Federal Rules of Evidence, particularly the hearsay doctrine, can come into play when determining whether a nonmovant has met the burden of producing new materials showing that the case is trialworthy.

The requirements imposed by Rule 56(c) for successfully opposing a motion for summary judgment fall more heavily on plaintiffs because they typically bear the burden of proof.²⁷⁹ Moreover, there are particular kinds of cases where fulfilling the mandate of 56(c) can be difficult, even when the plaintiff's claim has merit. For instance, where a case is based on circumstantial evidence and no eyewitnesses are available, it is challenging for plaintiffs to oppose summary judgment. When potential witnesses do not cooperate to provide nonhearsay affidavits, the evidence needed to oppose a motion can be difficult to obtain.²⁸⁰ In products liability cases, one key piece of establishing liability is product identification—the plaintiff must show that it is the particular defendant's product that has injured her. If the defendant controls access to the information needed for product identification, and the defendant is not forthcoming in discovery, the plaintiff may be unable to get to evidence to oppose the motion.²⁸¹ In less sinister circumstances, where records and memories have diminished with time, the one with the burden of producing them will inevitably lose on summary judgment.²⁸² Finally, when the theory of liability depends for causation on difficult inferences from statistical information, increasing hostility in the federal courts to so called "junk science"²⁸³ may make it impossible for a plaintiff to survive a defense motion for summary judgment.

278. See FED. R. CIV. P. 56(f).

279. See Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 81 (1990) [hereinafter Issacharoff & Loewenstein, *Second Thoughts*].

280. This may have been a reason why the plaintiff in *Adickes v. S.H. Kress & Co.*, 398 U.S. 142, 159-61 (1970), an early civil rights case concerned with desegregation of a lunch counter, found it difficult to provide standard counter-affidavits.

281. In this context, consider the stance of the defendants. See, e.g., Andrew J. McClurg, *A Thousand Words are Worth a Picture: A Privacy Tort Response to Consumer Data Profiling*, 98 NW. U. L. REV. 63, 99 n. 231 (2003) (recalling the evidentiary stonewalling on the part of the tobacco industry in the Minnesota tobacco litigation).

282. This was a key problem in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

283. Daniel Riesel, *Scientific Proof and Examination of Experts in Environmental Litigation*, SH093 ALI-ABA 383, 415 (2003) (analyzing recent Supreme Court decisions relating to the admission of expert testimony) [hereinafter Riesel, *Scientific Proof*].

In 1986 the United States Supreme Court decided three watershed cases (sometimes referred to as the “trilogy”) governing summary judgment practice in the federal courts. These cases made it much easier for defendants to secure victory through the summary judgment procedure.²⁸⁴ While it is standard doctrine that on summary judgment, the trial court is not supposed to weigh evidence—a function reserved to the trier of fact, the Supreme Court eroded that principle though its holding in *Anderson v. Liberty Lobby, Inc.*²⁸⁵ There the Court stated that, “[a] ruling on a motion for summary judgment . . . necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits.”²⁸⁶ Because the cause of action at issue there required the plaintiff to establish that the defendant acted with malice under the “clear and convincing” standard of proof, a trial court would be authorized to grant summary judgment if, in its opinion, the counter-affidavits of the plaintiff did not rise to the level of evidence required.²⁸⁷ *Matsushita Electric Industries, Co. v. Zenith Radio*²⁸⁸ further obscured the proper role of the trial judge when assessing the effectiveness of a plaintiff’s counterevidence, for it introduced the wild card of motive. There the Supreme Court argued that summary judgment was improper, because it believed the defendant had no motive to do what the plaintiff alleged: “[L]ack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence.”²⁸⁹ From the perspective of the plaintiff’s fortunes on summary judgment in the federal forum, *Celotex Corp. v. Catrett*,²⁹⁰ has proved the most problematic, for when read expansively, it obviates the necessity that a defendant who moves

284. As Georgene M. Vairo describes it:

During the Spring and Summer of 1986, the Supreme Court decided three summary judgment cases: *Anderson v. Liberty Lobby, Inc.*; *Celotex Corp. v. Catrett*; and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* Unquestionably, these cases had a significant impact on federal practice. In some respects, this trilogy represents a radical departure from past summary judgment practice under Federal Rule of Civil Procedure 56 (“Rule 56”). The decisions clearly advocate more liberal use of summary judgment and thus provide a more hospitable climate for bringing summary judgment motions.

Vairo, *supra* note 275, at 577 (citations omitted). *But see generally* Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 NOTRE DAME L. REV. 770 (1988) (arguing that an increased willingness to dispense with cases on summary judgment signaled by the trilogy is appropriate).

285. 477 U.S. 242 (1986).

286. *Id.* at 252.

287. *Id.*

288. 475 U.S. 574 (1986).

289. *Id.* at 596.

290. 477 U.S. 317 (1986).

for judgment present any affirmative evidence that the plaintiff cannot demonstrate a triable issue of fact. According to the *Celotex* plurality,²⁹¹ it is enough that the defendant merely points out—albeit by referring to pleadings, discovery, and other materials—that the plaintiff cannot establish an element of a claim. Thus, the defendant need not provide affidavits in support of its motion to shift the burden to the nonmoving party. In cases where access to evidence is difficult because it is circumstantial, witnesses are reluctant, the defendant controls it, significant time has passed, or statistical proof is controversial, federal courts are prone to grant summary judgment.

The principles of *Anderson*, *Matsushita*, and *Celotex*, though couched in the language of procedure, have a definite and substantive policy impact. Overall they tend to prevent plaintiffs in certain kinds of cases, often tort actions based on state law, from getting to a jury to prove liability.²⁹² It is possible that numerous defendants who should be liable to these plaintiffs are not held to be, given the procedural barriers imposed by the federal version of summary judgment. Most importantly for state-federal relations and the *Erie* doctrine, the net result is to make it much more likely that a defendant in federal court will obtain summary judgment than a defendant in state court. This becomes a powerful motive for defendant forum-shopping and another reason why tort reformers want to redirect tort litigation to the federal forum. Why should this be the case? Because many states, fully cognizant of the policy implications of *Anderson*, *Matsushita*, and *Celotex*, do not follow them.

For instance, state court decisions in California,²⁹³ Indiana,²⁹⁴ Kentucky,²⁹⁵ Florida,²⁹⁶ Oklahoma,²⁹⁷ Oregon,²⁹⁸ and Texas²⁹⁹ repudiate

291. *Id.* at 322-23. Although *Celotex* was a plurality opinion, its gravitational pull has decidedly changed the burdens previously allocated on summary judgment. See Issacharoff & Loewenstein, *Second Thoughts*, *supra* note 279, at 79-84.

292. Jeffrey W. Stempel argues that their net result is to change the relative power of the litigants in the federal courts. See Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 159-62 (1988).

293. *Krantz v. BT Visual Images, L.L.C.*, 89 Cal. App. 4th 164, 170 (Cal. Ct. App. 2001) (observing that "[u]nder the practice prevailing in the federal district courts since 1986, a defendant moving for summary judgment is not required to present any evidence in support of the motion. . . . a like rule does not appear ever to have prevailed under the California summary judgment statute"), *review denied*, 2001 Cal. LEXIS 5986 (Cal. 2001).

294. *Jarboe v. Landmark Cmty. Newspapers*, 644 N.E.2d 118, 123 (Ind. 1994) (observing that "Indiana's summary judgment procedure abruptly diverges from federal summary judgment practice. Under the federal rule, the party seeking summary judgment is not required to negate an opponent's claim. . . . Indiana does not adhere to *Celotex* and the federal methodology").

295. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 479 (Ky. 1991) (observing

the holding in *Celotex* and require that before a defendant can shift the burden of production to the plaintiff to avoid summary judgment, the defendant must come forward with affirmative evidence of its own showing that no genuine issue of material fact exists. Moreover, decisions in California,³⁰⁰ Georgia,³⁰¹ Illinois,³⁰² Ohio,³⁰³ and Rhode Island³⁰⁴ have either distinguished or refused to extend *Celotex*. Similarly, Alaska,³⁰⁵ Florida,³⁰⁶ Indiana,³⁰⁷ Kentucky,³⁰⁸ New Jersey,³⁰⁹ New Mexico,³¹⁰ Oregon,³¹¹ Texas,³¹² and Wyoming³¹³ decline to follow *Anderson*, and opinions from Kentucky,³¹⁴ Michigan,³¹⁵ and Oregon³¹⁶ disapprove of *Matsushita*. Collectively, these variations establish an approach to summary judgment in state jurisdictions that is significantly different from the federal approach. And, the ability to obtain a higher

that Kentucky courts “generally have cited and followed the decision in *Paintsville Hospital Co. v. Rose, Ky.*, 683 S.W.2d 255 (1985), which set the standard for summary judgment in this state and is a standard which is clearly at variance with those declared in [the trilogy]”).

296. *5G’s Car Sales, Inc. v. Fla. Dept. of Law Enforcement*, 581 So. 2d 212, 212 (Fla. Dist. Ct. App. 1991) (holding that although the lower court’s “judgment was plainly erroneous under any standard, including *Celotex* [and progeny], it should be emphasized that, to the extent that they tend to loosen the restrictions on the use of summary judgment, these cases. . . do not represent the law of Florida on the issue”).

297. *Kating v. City of Prior*, 977 P.2d 1142, 1144 (Okla. Civ. App. 1998) (observing that “the federal summary judgment standards established in *Celotex*—a case cited by City—and other related federal cases are not specifically applicable in Oklahoma appellate review of summary judgments”).

298. *Jones v. Gen. Motors Corp.*, 939 P.2d 608, 615-17 (Or. 1997) (rejecting the argument that *Celotex* and progeny should affect the interpretation of Oregon’s summary judgment statute).

299. *Casso v. Brand*, 776 S.W.2d 551, 555-56 (Tex. 1989) (observing that “summary judgments in federal courts are based on different assumptions, with different purposes, than summary judgments in Texas. . . Texas law, of course, is different. While the language of our rule is similar [to the federal summary judgment rule], our interpretation of that language is not”).

300. *Union Bank v. Super. Ct.*, 31 Cal. App. 4th 573, 590-92 (Cal. Ct. App. 1995).

301. *First Nat’l Bank v. J. Reisbaum Co.*, 378 S.E.2d 317 (Ga. Ct. App. 1989).

302. *Ganci v. Washington*, 745 N.E.2d 42 (Ill. App. Ct. 2001).

303. *Mitseff v. Wheeler*, 526 N.E.2d 798 (Ohio 1988).

304. *DiBatista v. State*, 808 A.2d 1081, 1090 (R.I. 2002).

305. *Moffatt v. Brown*, 751 P.2d 939, 942-44 (Alaska 1988).

306. *5G’s Car Sales, Inc.*, 581 So. 2d at 212.

307. *Chester v. Indianapolis Newspapers, Inc.*, 553 N.E.2d 137, 141 (Ind. Ct. App. 1990).

308. *Steelvest, Inc.*, 807 S.W.2d at 479.

309. *DePrimo v. Lehn & Fink Products Co.*, 538 A.2d 461, 463 (N.J. Super. Ct. Law Div. 1987).

310. *Bartlett v. Mirabal*, 999 P.2d 1062 (N.M. App. 2000).

311. *Jones*, 939 P.2d at 615.

312. *Casso*, 776 S.W.2d at 555-56.

313. *Parker v. Haller*, 751 P.2d 372, 376-77 (Wyo. 1988).

314. *Steelvest, Inc.*, 807 S.W.2d at 479.

315. *People v. Katt*, 662 N.W.2d 12 (Mich. 2003).

316. *Jones*, 939 P.2d at 615.

incidence of victories on summary judgment in one system will have an indirect impact on substantive policy choices concerning tort liability in another. Just using one state jurisdiction—Oregon—is instructive. It rejects all three decisions in the federal trilogy, so that a defendant moving for summary judgment cannot carry its burden of production without affirmative evidence (*Celotex*), burdens of proof do not raise the risk that judges will improperly weigh the sufficiency of evidence on summary judgment (*Anderson*), and plaintiff affidavits are not discounted by way of the elusive standard of defendant motive (*Matsushita*). Presumably, it is more difficult to keep a case from the jury in Oregon state proceedings. Yet if a cause of action based on Oregon law can be redirected to the federal forum, it is possible that the defendant's chances of achieving summary judgment increase significantly. Being merely "procedural," the tenets of *Celotex*, *Anderson*, and *Matsushita* trump Oregon state practice, and we are invited to ignore the impact they might have on the policy choices made by Oregon political majorities concerning tort liability. When this possibility is related to the democratic principles of participation, transparency, and accountability, the stakes involved in enlarging diversity jurisdiction are uncovered.

C. Summary Judgment Substitutes

The difference in summary judgment between the state and federal systems is not difficult to detect; however, federal courts are developing additional procedures that are functional equivalents of summary judgment, but of a more stealthy kind. Again, procedural innovation is being deployed to manufacture particular outcomes, but in an attenuated fashion that further insulates what is happening from the attention of democratic majorities by another layer of process. These procedures can be conceived as "summary judgment substitutes"³¹⁷ and the best example of the phenomenon is the "*Daubert* hearing," under which a litigant's potential to rely on expert testimony to stave off summary judgment can be foreclosed in advance. Again, given burdens of proof, this procedure typically functions to disadvantage plaintiffs, not defendants, and it does so especially in cases where the plaintiff needs to use statistical inference via expert opinion to establish causation.

To place *Daubert* hearings in context, it is important to remember that the Federal Rules of Evidence ("FRE") govern in all cases located in

317. The concept of "summary judgment substitutes" is attributable to my colleague Ivan Bodensteiner who suggested the idea to me in conversation about this article.

the federal forum, whether those cases are based on state law or not.³¹⁸ Another way of putting this is that the FRE generally have the same status as the Federal Rules of Civil Procedure under the *Erie/Hanna* regime—they are treated as rules of procedure not substance, so that they control over conflicting state evidence rules. In 1993 the Supreme Court ushered in a new era regarding the use of expert scientific evidence with its opinion, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*³¹⁹ *Daubert* increased the power of federal trial judges to exclude relevant expert testimony by investing them with a “gatekeeper” function to determine when proffered scientific proof was not reliable enough to be considered by the trier of fact, usually a jury.³²⁰ Rather than directing the jury to consider expert testimony and allowing it to measure reliability to determine evidentiary weight, *Daubert* allows the trial judge to exclude the material altogether.³²¹ The trial judge’s determination is reviewed under the deferential abuse of discretion standard.³²² It did not take long for defendants to waken to the potential impact of *Daubert* on summary judgment.

Where liability in a proceeding turns on the opinions of conflicting experts, summary judgment would normally be precluded as a defense option because the very conflict in the experts’ opinions would present a triable issue of fact for a jury to resolve. However, if the plaintiff’s experts’ opinions can be excluded, this removes a lynchpin source the plaintiff can use to oppose summary judgment. The purpose of the *Daubert* hearing is to attack the admissibility of expert evidence in advance of trial and strategically position a party—usually the defendant—to move for summary judgment. It has become commonplace for federal courts to conduct a “*Daubert* hearing” to test the admissibility of plaintiffs’ crucial expert opinions early on in litigation,³²³ when the evidence is ruled inadmissible—a frequent phenomenon—a successful defense motion for summary judgment

318. This was actually quite controversial in regard to evidentiary privileges. See Ely, *Myth*, *supra* note 85, at 693-96.

319. 509 U.S. 579 (1993). In fact, FRE 702 was amended to conform with *Daubert*. See FED. R. EVID. 702 (establishing the preconditions for admissibility of expert testimony). Companion cases extending and refining the basic principle of *Daubert* are *General Electric Co. v. Joiner*, 522 U.S. 136, 138 (1997) (establishing abuse of discretion as the standard of review) and *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999) (extending *Daubert* to all expert testimony).

320. *Daubert*, 509 U.S. at 592-593.

321. See *Development in the Law—Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1481, 1488-89 (1995). See also *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 417 (3d Cir. 1999).

322. See *Joiner*, 522 U.S. at 138-39.

323. See *Riesel, Scientific Proof*, *supra* note 283, at 411.

typically follows.³²⁴ As one commentator has noted, the application of *Daubert*³²⁵ "has resulted in the exclusion of many more experts than it has admitted."

As with the rules in *Anderson*, *Celotex*, and *Matsushita*, a substantial number of states do not follow *Daubert*. Cases from Alabama,³²⁶ Arizona,³²⁷ California,³²⁸ Colorado,³²⁹ Georgia,³³⁰ Florida,³³¹ Illinois,³³² Kansas,³³³ Michigan,³³⁴ Mississippi,³³⁵ Missouri,³³⁶ Minnesota,³³⁷ New Jersey,³³⁸ New York,³³⁹ Nevada,³⁴⁰ South Carolina,³⁴¹ Tennessee,³⁴² Washington,³⁴³ and Wisconsin³⁴⁴ have repudiated *Daubert* or limited its application. The reasons for their reluctance are complex and involve not only policy considerations involving civil matters, but criminal ones as well. In regard to civil cases, the Arizona Supreme Court stated concerning *Daubert* and its progeny:

One of the arguments for adopting *Daubert* is to allow trial judges to put a halt to improper verdicts from jurors misled by junk science and experts ready at the drop of a hat (or a dollar) to say anything for any party. This, of course, a two-edged sword—plaintiffs' lawyers do not have a monopoly on venal or inaccurate experts. But we do not believe that *Daubert*/*Kumho* to be a perfect or even a good antidote. Implicit in *Joiner* and *Kumho* is the assumption that trial judges as a

324. See Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1104 n.623 (2003) [hereinafter Miller].

325. See Reisel, *supra* note 283, at 420, 420 n. 29.

326. *Courtaulds Fibers, Inc. v. Long*, 779 So. 2d 198, 202 (Ala. 2000) (holding that Alabama courts have not "abandoned the 'general acceptance' test stated in [*Frye*], and it has not adopted the *Daubert* standard in civil cases").

327. *Logerquist v. McVey*, 1 P.3d 113, 124-33 (Ariz. 2000).

328. *People v. Leahy*, 882 P.2d 321, 337 (Cal. 1994).

329. *Lindsay v. People*, 892 P.2d 281, 288 (Colo. 1995), *overruled by* *People v. Shreck*, 22 P.3d 68 (Colo. 2001).

330. *Norfolk S. Ry. v. Baker*, 514 S.E.2d 448, 451 (Ga. Ct. App. 1999).

331. *Spann v. State*, 857 So. 2d 845, 852 (Fla. 2003).

332. *People v. Dalcallo*, 669 N.E.2d 378, 382 (Ill. App. Ct. 1996).

333. *Armstrong v. City of Wichita*, 907 P.2d 923, 929 (Kan. Ct. App. 1995).

334. *Lacasse v. Lacasse*, No. 207639, 1998 WL 1988763 (Mich. Ct. App. Dec. 1, 1998).

335. *Watkins v. U-Haul Intern, Inc.*, 770 So. 2d 970, 974 (Miss. Ct. App. 2000).

336. *Bailey v. Cameron Mut. Ins. Co.*, 122 S.W.3d 599, 603 (Mo. Ct. App. 2003).

337. *State v. Alt*, 504 N.W.2d 38, 46 (Minn. Ct. App. 1993).

338. *State v. Doriguzzi*, 760 A.2d 336, 340-41 (N.J. Super. Ct. App. Div. 2000).

339. *People v. Wesley*, 633 N.E.2d 451, 454-55 (N.Y. 1994).

340. *Krause, Inc. v. Little*, 34 P.3d 566, 569 (Nev. 2001).

341. *Moriarty v. Garden Sanctuary Church of God*, 534 S.E.2d 672, 677-78 (S.C. 2000).

342. *Coe v. State*, 17 S.W.3d 193, 226-30 (Tenn. 2000).

343. *State v. Cannon*, 922 P.2d 1293, 1299 (Wash. 1996).

344. *Anderson v. Combustion Eng'g Inc.*, 647 N.W.2d 460, 462-63 (Wis. Ct. App. 2002).

group will be more able than jurors to tell good science from junk, true scientists from charlatans, truthful experts from liars, and venal from objective experts. But most judges like most jurors, have little or no technical training³⁴⁵

From the perspective of the Arizona Supreme Court, whether or not to adopt *Daubert* and its companion cases represented a definite policy choice concerning its effect on plaintiffs and juries. But, if the same controversy were funneled to the federal court, *Daubert* would be applicable and the availability of a pre-summary judgment, pre-trial hearing designed to remove the plaintiff's experts would be available. It is not surprising that many commentators conclude the outcome of a *Daubert* hearing determines the outcome of a case.³⁴⁶ The analysis comes full circle when the impact of *Daubert* hearings is related back to the continuing trend of considering the merits on class certification. When a defendant succeeds in removing a state-based class action to the federal court, either under normal principles or the floodgate to be opened by the CAFA, the defendant will have a high probability of achieving the effect of summary judgment through a strategic use of class certification in conjunction with *Daubert* considerations.

According to commentators, an increasing number of federal courts apply *Daubert* to the question of whether a class action should be certified, as parties utilize experts in aid of the class action determination.³⁴⁷ So far the results have been uneven. For instance, in *Sanneman v. Chrysler Corporation*³⁴⁸ a *Daubert*-style inquiry resulted in the plaintiff classes' failure to satisfy the predominance test required by 23(b)(3), because the experts could not agree on the causes of the complained damages.³⁴⁹ On the other hand, in *McNamara v. Re-X Minerals Ltd*³⁵⁰ the court concluded the defendant had not succeeded in showing that the plaintiff classes' expert was unreliable. These cases cabined the *Daubert* inquiry from merits considerations. Whether this distinction can long be maintained given the trend established by *Rhone-Poulenc Rorer*³⁵¹ and the invitation of amended Rule 23 to use the fruits of merits-based discovery is an open question. It is not hard to imagine

345. *Logerquist*, 1 P.3d at 129 (footnote omitted).

346. See Miller, *supra* note 324, at 1104 n.623.

347. See Steven Glickstein, Melissa C. Morrow, and Julie K. du Pont, *Does Daubert Apply to Class Certification Hearings?*, 695 PRACTICING LAW INSTITUTE, CLASS ACTION LITIGATION: PROSECUTION AND DEFENSE STRATEGIES 423, 425 (2003).

348. 191 F.R.D. 441 (E.D. Pa. 2000).

349. *Id.* at 451-53.

350. No. 5:97-CV-159, 2002 WL 32076175 (E.D. Tex. June 16, 2002).

351. 51 F.3d 1293 (7th Cir. 1995).

that as more mass tort class actions involving, for instance, defective pharmaceuticals, are drawn into the federal system, the very same arguments about junk science from *Daubert* will be mustered to oppose class certification, thereby combining summary judgment substitutes—the *Daubert* hearing and the denial of class certification—to curtail the litigation altogether.

D. Other Benefits

A more demanding process of class certification, a greater probability of achieving summary judgment, and the opportunity to exploit summary judgment substitutes are not the only procedural features that entice defendants to the federal forum in hopes of ensuring victory there. The Federal Rules of Civil Procedure and important decisions construing them provide a global and rich package of defendant-oriented devices that frequently displace important state policies. No less an authority than Arthur Miller has warned that federal case management under Federal Rule of Civil Procedure 16, the adoption of law and economics doctrine by certain federal circuits, and standards for judgments as a matter of law, as well as summary judgment and *Daubert* trials, are causing a “rush to judgment” that obviates the plaintiff’s right to a day in court and the role of juries.³⁵² In the context of the MPMFJA and the CAFA, these concerns play out in a more complicated dance whose consequences are even farther removed from public scrutiny.

The strategy of this legislation is to create a Catch-22, or a kind of black-hole singularity for state mass torts, especially mass tort class actions. First, state-based claims that never could have been brought into the federal forum are redirected there through the device of minimal diversity. Once there, they are subjected to the tender mercies of the MDL process and/or the CAFA, and amended Rule 23 as it informs both. In the case of the CAFA the goal is to abort class action certification—unless a binding global class settlement is desired—and subject plaintiffs to the Hobson’s choice of either proceeding to litigate their claims in state court as individual matters, which, given a particular plaintiff’s knowledge or other resources may not be likely, or to merely “lump it” and cease litigating altogether. Beyond the effect that federalization has on particular proceedings, it has a more problematic general one—the chilling effect it will cast on the willingness of lawyers

352. See Miller, *supra* note 324, *passim*.

to represent plaintiffs. The specter of having state-based litigation drawn into the federal forum at the defendant's will and time table, where attorney autonomy is curtailed and the defendant-oriented principles of class certification, summary judgment, and summary judgment substitutes are applied, will inhibit lawyers' willingness to represent plaintiffs in mass class action torts. It is the goal of CAFA that these actions be tied up in the push-pull of the system and that lawyers will recognize this. Meanwhile the ability of states to enforce their own policy choices on tort liability will have been limited by a process that never was opened to democratic deliberation over the substantive changes in law that were at stake.

V. SUMMARY—DIVERSITY AND DEMOCRACY REVISITED

In his 1989 article, "*Substance*" and "*Procedure*" in the *Rules Enabling Act*,³⁵³ Paul Carrington used a test for "substance," that suggests when a Federal Rule of Civil Procedure might unduly affect state law, i.e., whether it provokes the "organized political attention of a group of litigants or prospective litigants who (reasonably) claim to be specially and adversely affected by the rule."³⁵⁴ When this test is applied not only to the federal rules themselves but to federal procedural statutes, it is clear that the CAFA, possibly the MPMFJA, and their related procedural assumptions, appendages, and extensions flunk this test of political interest. The proponents of enlarging diversity jurisdiction do so for the avowed purpose of changing the substantive results of complex litigation emanating from the states. They are organized and political and they represent a group of litigants—defendants—who hope to be specially affected by the new procedural regime, though positively, not adversely. What price does ignoring this reality extract in terms of democratic values?

First, it makes a mockery of retaining the states as essential building blocks of political community and participation at the local level. If a group of defendants with national power can extend minimal diversity to any case they deem "interstate," there is no principled limit to the reach of the federal judiciary. By spinning the history, purpose, and effect of diversity jurisdiction in the constitutional framework, these interest groups subtly reorder the structure of the Constitution outside

353. See Paul D. Carrington, "*Substance*" and "*Procedure*" in the *Rules Enabling Act*, 1989 DUKE L.J. 281, 308 (1989). For Carrington's general account of the significance of 28 U.S.C. § 2072(b), see *id.* at 286-89.

354. *Id.* at 308.

the purview of the amendment process. But relocating more complex litigation to the federal courts has costs beyond the direct changes in federal/state relations. It erodes key constituents of democratic legitimacy, for democracy is not just transported to a different arena without residue. Instead, because the method of affecting substance through procedure is technocratic, indirect, and frequently judge-made, it retards citizen participation in the value choices the method effectuates; it replaces transparency in lawmaking with opacity, and it makes political decisionmaking too diffuse to enforce meaningful accountability. What might the quality of policy decisions made through these attenuated and indirect methods be?

Creating a regime of complex litigation designed to crudely reduce the amount of money paid by repeat defendants across the board will cause negative externalities. The true social cost of risky behavior will not be paid. What is more important, the opportunity to make difficult value choices as to the worth of defendant behavior will be removed from local democratic majorities, and it will *not* be replaced with access by *national* political majorities. This is because tort law is being remodeled by the stealthy method of employing procedural change, not by substantive legislation that would be exposed to greater political scrutiny and would have to pass the test of valid substantive legislation under Article I. Another way of saying this is that by exploiting the judicial power of the national government in diversity cases, proponents of tort reform have made it exceedingly difficult for the average citizen to identify changes in law that will affect her everyday relations and to efficiently mobilize political opposition to them. For instance, how does the normal state citizen understand and oppose something like class action certification under amended Rule 23 when they are produced by a process as complex and obscure as federal rulemaking?

It is a truism of federal law that a uniform body of procedural principles governing the conduct of the federal courts is highly desirable. But, the principle of uniformity is not so sacrosanct that it should become the means by which an era of *Swift v. Tyson* is reinstated to the detriment of democratic values. The effect of CAFA on state substance could be so significant that Congress has gone beyond any legitimate use of the Necessary and Proper Clause in conjunction with its power to establish the inferior federal courts.³⁵⁵ When minimal diversity is deployed for the very purpose of subverting the law of the states, it should be rejected as fundamentally incompatible with the structure of

355. See Baker, *supra* note 38, at 711.

the United States Constitution and the democratic principles to which we
aspire.