2008

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Recommended Citation
156 University of Pennsylvania Law Review 1823-1927 (2008)

THE CLASS ACTION FAIRNESS ACT IN PERSPECTIVE: THE OLD AND THE NEW IN FEDERAL JURISDICTIONAL REFORM

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INTRODUCTION

The Class Action Fairness Act of 2005 (CAFA)[1] was the product of an extended and well-organized political campaign. In Congress, its passage required a grinding eight-year effort, several modifications to the original proposal, numerous committee hearings, multiple reports by both Houses, political compromises that drew some Democratic support, two unsuccessful attempts to terminate debate in the Senate by imposing cloture, and strenuous efforts to amend in both the House and Senate when the bill came to the floor for a final vote.[2] Passage also required Republican control of both Houses of Congress and the presidency as well.

Compared to the determined political campaign necessary to secure its passage, CAFA itself might seem a relatively minor measure. Ostensibly, it altered no substantive law, denied no one a judicial forum, left the federal judicial power untouched, relied on established congressional authority, and bowed to federalism by limiting its extension of national authority to class actions with significant interstate connections. Indeed, the changes it made might appear to some nar-

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

[2] For the initial version, the Class Action Jurisdiction Act of 1998, see H.R. 3789, 702, 105th Cong. (1998). For discussions of the history of the various versions in Congress, see, for example, Anna Andreeva, *Class Action Fairness Act of 2005: The Eight-Year Saga Is Finally Over*, 59 U. MIAMI L. REV. 385 (2005); Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View of the Statute's Legal Significance*, 156 U. PA. L. REV. 1439 (2008); Patrick Woolley, Erie *and Choice of Law After the Class Action Fairness Act*, 80 TUL. L. REV. 1723 (2006). For the vote on the Democratic substitute amendment in the House, see 151 CONG. REC. H752 (daily ed. Feb. 17, 2005). The Senate vote is available at 151 CONG. REC. S1249 (daily ed. Feb 10, 2005).

row and technical. Principally, CAFA provided for federal diversity jurisdiction over multistate class actions[3] and established a "Consumer Class Action Bill of Rights" that imposed mild limitations on certain types of settlements and required that defendants give notice of proposed settlements to state and federal officials.[4] The Senate Judiciary Committee, in fact, termed CAFA a "modest" measure.[5]

The apparent contrast between the "modest" label and the eight-year congressional battle might seem puzzling, and the seeming discordance between effort and result suggests the utility of seeking some historical perspective. Has such discordance been common in jurisdictional reform efforts? Was CAFA a relatively ordinary and typical measure, or did it involve new or unusual elements? Was it truly a "modest" reform? Indeed, what, exactly, did it seem likely to accomplish?

Pursuing those questions, this Article proceeds in four sections. Part I considers five basic characteristics that marked federal jurisdictional reform in the past, and Part II examines CAFA in light of those traditional characteristics. Part III then identifies some aspects of CAFA that are relatively new in the history of federal jurisdictional reform. Finally, Part IV considers what the historical comparison suggests about federal jurisdictional reform and, more broadly, about the operations of American law and government.

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[3] The jurisdictional provisions appear in section 4 (original jurisdiction) and section 5 (removal jurisdiction). *See* CAFA, §§ 4–5 119 Stat. at 9-13 (codified at 28 U.S.C. §§ 1332(d), 1453). The former extends jurisdiction to class actions where the aggregated value of the class members' claims exceeds the sum of $5 million and where diversity of citizenship exists between any class member and any defendant (minimum diversity). It also contains complex provisions limiting that jurisdiction when class members and defendants are predominantly from a single state. The latter provision authorizes removal of class actions and liberalizes the ordinary rules by allowing removal at any time during the suit, allowing any single defendant to remove, and allowing removal even when one or more defendants are citizens of the forum state. It also makes remand orders reviewable by interlocutory appeal. *See id.* § 5, 119 Stat. at 12-13 (codified at 28 U.S.C. § 1453).

[4] The "Consumer Class Action Bill of Rights" appears in section 3. *See id.* § 3, 119 Stat. 5-9 (codified at 28 U.S.C. §§ 1711–1715). It requires that each participating defendant provide detailed notice of any proposed settlement to relevant state and federal officials, prohibits the court from giving final approval to any proposed settlement until ninety days after such notice has been given, and imposes certain restrictions on all settlements involving coupons, net losses to class members, or differential payments to class members based solely on geographical proximity to the forum.

[5] *See, e.g.*, S. REP. NO. 109-14, at 5 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 6. The Act also contains a number of other less central provisions, definitions, and exclusions.

I. TRADITIONAL FEDERAL JURISDICTIONAL REFORM

Since the drafting of the U.S. Constitution, efforts to establish and alter the rules of federal jurisdiction have exhibited five prominent characteristics. Together, those characteristics suggest the complexities of federal jurisdictional reform and highlight not only its multifaceted legal nature but also its inherently political and social nature.

A. *Practicality*

Above all, jurisdictional reform in the United States has been an intensely practical matter, a series of pragmatic responses to pressing real-world problems. Over the centuries those problems came in many forms, and they found their sources in the multitude of diverse social, racial, ethnic, cultural, political, and economic interests that energized and divided the American people. As the nation changed, the nature of both the problems and the interests changed, but their dynamic interplay remained ever present. "Legislation concerning judicial organization throughout our history," Felix Frankfurter concluded some eight decades ago in his classic study of federal jurisdictional reform, "has been a very empiric response to very definite needs."[6]

At the nation's outset, the Founders battled over the most basic question: whether or not the new national government should even have its own courts. They finally agreed on the serviceable but uncertain "Madisonian Compromise," mandating "one supreme Court" but punting to the legislative branch the decision whether to establish "inferior" federal courts.[7] When the First Congress subsequently decided to establish a system of lower courts, its efforts were understandably

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[6] FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 13 (1928); *see also id.* at 263 ("The empirical nature of judiciary legislation is strikingly illustrated by the anomalous condition of appellate jurisdiction over cases arising in the District of Columbia."); *id.* at 281 ("The entire history of judiciary legislation demonstrates its inevitably empiric character.").

[7] U.S. CONST., art. I, § 8, cl. 9; *id.* art. III, § 1. "[T]he compromise's insignificance as a tool for reasoning about state-federal court relations probably lies in ambiguities surrounding its meaning at the time of framing and ratification . . . ." Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 44 (1995). *See generally* Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990) (evaluating Akhil Amar's challenge to the theory that the Constitution gives Congress plenary authority over federal court jurisdiction); Martin H. Redish & Curtis E. Woods, *Congressional Power To Control the Jurisdiction of the Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 40 (1975).

shaped by compelling political and practical considerations. In the First Judiciary Act, Congress balanced a belief that the new nation needed its own system of courts against state pressures to rely exclusively on existing local courts and a variety of other serious practical concerns, including the heavy expenses that a system of national courts would impose on the new government, the uncertain nature of the substantive law they would enforce, and the burdens of travel and inconvenience they would impose on poorer and distantly located litigants.[8]

Over the next two centuries alterations to that original structure were equally products of practical needs, and jurisdictional reforms often came only belatedly and as a result of far-reaching social changes and decades of intensifying pressures.[9] It required more than a century of westward expansion, population growth, and swelling dockets to convince Congress to end circuit riding by Supreme Court Justices and to establish a tier of intermediate appellate courts, and only the Civil War and a dozen strife-filled years of Reconstruction could induce it to confer general federal question jurisdiction on the national courts.[10] Even more limited jurisdictional changes, however, also commonly required similar concentrations of practical and political pressures. For example, Congress enacted the first statutes allowing removal of actions against federal officials only to counter extreme threats of state resistance—first, New England's effort to interfere with the collection of customs duties during the War of 1812, and then, South Carolina's announced determination to block federal tariff laws in the nullification crisis of 1832–1833.[11] Similarly, other spe-

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[8] Maeva Marcus & Natalie Wexler, *The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation?*, *in* ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789 at 13, 13-14 (Maeva Marcus ed., 1992). The First Judiciary Act was "a response to the practical problems and controversies of our early history." FRANKFURTER & LANDIS, *supra* note 6, at 6. On the Act generally, see WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789 (Wythe Holt & L.H. LaRue eds., 1990).

[9] Commonly, "inertia and the usual slowness of response to the need for judicial reform maintained the system." FRANKFURTER & LANDIS, *supra* note 6, at 53.

[10] On legislative efforts between 1793 and 1891 to curtail and eliminate circuit riding, see *id.* at 22, 25, 30-32, 49, 51, 81, 100-01; on the effort to establish intermediate appellate courts, see *id.* at 69-77, describing a failed attempt to create intermediate federal courts as part of the Act of 1869, and *id.* at 93-102, describing the legislative history of the Circuit Court of Appeals Act of 1891, which established the circuit courts of appeal; and for the conferral of federal question jurisdiction, see *id.* at 56-69, describing the expansion of federal court jurisdiction through the conferral of federal question jurisdiction by the Judiciary Act of 1875.

[11] Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195, 198-99; Act of Mar. 2, 1833, ch. 57, §§ 2–3, 4 Stat. 632, 632-34.

cific extensions of federal jurisdiction—to civil rights cases, habeas corpus to state officials, broadened categories of diversity suits, and actions against federal officials and federally chartered corporations[12]—came only with the crises of secession, the Civil War, and continuing and violent Southern resistance to national authority.

The years that followed the Civil War brought not only turmoil but transformation, as new social and economic conditions generated new challenges for the federal judicial system. Drives for reform in the early republic had arisen for the most part from sectional conflicts and the politics of federalism, but in the late nineteenth century those driving conflicts began to arise increasingly from the all-encompassing social consequences of urbanization, industrialization, and economic nationalization. When Congress responded to those new conflicts in the early twentieth century by repeatedly restricting the jurisdiction of federal judges to issue injunctions,[13] it was seeking to limit the ability of those who used the federal courts to fight government regulation, and when it prohibited removal under the Federal Employers' Liabil-

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[12] *See* Act of July 27, 1868, ch. 255, § 2, 15 Stat. 226, 227 (providing for the right of removal of actions against all nonbanking corporations chartered by the United States); Act of Mar. 2, 1867, ch. 196, 14 Stat. 558 (authorizing the removal of cases on a showing of "prejudice or local influence"); Act of Feb. 5, 1867, ch. 27, 14 Stat. 385, 385 (granting jurisdiction to issue writs of habeas corpus to state officials); Act of July 27, 1866, ch. 288, 14 Stat. 306, 306 (providing for a right of removal of separable controversies); Act of Apr. 9, 1866, ch. 31, § 3, 14 Stat. 27, 27 (providing a right of removal of actions arising under the Civil Rights Act of 1866); Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 755, 756 (providing for the right of removal of actions against federal officials for acts committed during the Civil War). *See generally* STANLEY I. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS (1968); William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863–1875*, 13 AM. J. LEGAL HIST. 333 (1969) (explaining the five primary ways in which Congress expanded federal jurisdiction during Reconstruction).

[13] *See* Act of Mar. 4, 1913, ch. 160, 37 Stat. 1013, 1014; Mann-Elkins Railroad Act of 1910, ch. 309, § 17, 36 Stat. 539, 557; Act of June 29, 1906, ch. 3591, § 5, 34 Stat. 584, 592; Act of Feb. 11, 1903, ch. 544, 32 Stat. 823, 823. *See generally* David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 6-7 (1964) (describing an appendage to the Mann-Elkins Railroad Act, which barred the issuance of a federal interlocutory injunction against unconstitutional state statutes, except by a district court composed of three judges); John E. Lockwood, Carlyle E. Maw & Samuel L. Rosenberry, *The Use of the Federal Injunction in Constitutional Litigation*, 43 HARV. L. REV. 426 (1930) (describing statutory restrictions on the use of injunctions, particularly the Clayton Act, 38 Stat. 730 (1914)). When Congress sharply restricted the jurisdiction of such three-judge district courts in 1976, political concerns were equally in play though the make-up and practical concerns of the opposing forces were understandably quite different. Michael E. Solimine, *Congress, Ex Parte Young, and the Fate of the Three-Judge District Court* (Univ. of Cincinnati Col. of Law Pub. Law & Legal Theory, Paper No. 07-25, 2007), *available at* http://ssrn.com/abstract=1026003.

ity Act (FELA) in 1910[14] and then again under the Jones Act ten years later, it was seeking to assist injured workers who sought compensation from their employers.[15] Indeed, in 1914 when Congress altered the Supreme Court's appellate jurisdiction by making a technical change in what seemed a relatively abstruse area of law, it was intervening in a fiercely contested issue: the constitutionality of state workers' compensation statutes.[16]

As those examples suggest, over the course of the late nineteenth and twentieth centuries federal jurisdictional reform became more closely intertwined not just with issues of institutional structure and federal-state relations but also with issues of private economic conflict and public social policy. More particularly, reform efforts became increasingly intertwined with what might be called "litigation-generated" issues, that is, issues that arose not from traditional structural or institutional conflicts but from pervasive and socially resonant patterns of litigation, especially the rapidly escalating number of cases that pitted national corporations against a wide variety of claimants—suppliers, customers, employees, and adversely affected third parties. Indeed, much if not most of the "law of the federal courts" during the first half of the twentieth century could be studied simply by considering the

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[14] Act of Apr. 5, 1910, ch. 143, 36 Stat. 291, 291 (codified as amended at 45 U.S.C. §§ 56, 59 (2000)).

[15] Act of June 5, 1920, ch. 250, § 33, 41 Stat. 988, 1007. For the congressional aim of helping injured workers, see, for example, S. REP. NO. 61-432, at 2 (1910), stating that "[i]t was the intention of Congress . . . to shift the burden of the loss resulting from these casualties from 'those least able to bear it' and place it upon those who can."

[16] *See* FRANKFURTER & LANDIS, *supra* note 6, at 193-98 (explaining how workers' compensation legislation met with fierce opposition in state courts); Edward Hartnett, *Why Is the Supreme Court of the United States Protecting State Judges from Popular Democracy?*, 75 TEX. L. REV. 907, 933 (1997) (explaining that the 1914 amendment's expansion of Supreme Court jurisdiction was prompted largely by a prior New York Court of Appeals decision that struck down a state workers' compensation statute on federal constitutional grounds). The Supreme Court also responded to those changing conditions. It construed jurisdictional statutes to allow the federal courts to hear cases that seemed of greatest national importance, for example, and it gradually expanded the permissible reach of the courts over nonresident corporations engaged in interstate commerce. On the former, see EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958, at 262-91 (1992); on the latter, see Philip B. Kurland, *The Supreme Court, the Due Process Clause and the in Personam Jurisdiction of State Courts from* Pennoyer *to* Denckla*: A Review*, 25 U. CHI. L. REV. 569, 577-86 (1958).

litigation between employers and employees that arose under a single responsive statute, the FELA.[17]

B. *Debating and Adapting Diversity Jurisdiction*

A second characteristic of federal jurisdictional reform was its relatively continuous debate over diversity jurisdiction, especially during the century and a half after the Civil War.[18] Attacked at the nation's inception, diversity came to be relatively well accepted by the mid-nineteenth century and served, along with admiralty, as a mainstay of the federal docket.[19] The intensely practical nature of federal jurisdiction and the rise of litigation-generated problems in the late nineteenth century, however, transformed it into a perennial battleground. One obvious reason for its centrality was that it was the jurisdictional basis that allowed the federal courts to hear the controversial and rapidly multiplying number of cases between national corporations and their numerous adversaries. In 1906, in his famous address, *The Causes of Popular Dissatisfaction with the Administration of Justice*, Roscoe Pound emphasized the disruptive and wasteful excesses

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[17] 45 U.S.C. §§ 51–60 (2000). By 1915, litigation under the FELA and related statutes accounted for almost ten percent of the cases that reached the Supreme Court's docket. *See* S. REP. NO. 64-775, at 2-3 (1916). Those intense litigation battles gave rise to important decisions developing federal law dealing with venue, anti-removal provisions, the doctrine of forum non conveniens, the jurisdictional line between intrastate and interstate commerce, the applicability of the Seventh Amendment to state courts, the constitutional obligation of state courts to hear federal claims, the mandate that state courts hearing federal claims conform to certain federal procedural requirements, and the authority of federal courts to make new substantive rules of law when construing federal statutes—together with the far-reaching 1948 congressional statute that authorized the transfer of cases from one federal district to another. PURCELL, *supra* note 16, at 165-72, 221-24, 233-37.

[18] At various times, of course, reform efforts and debates involved, in one way or another, every basis of federal jurisdiction. *See generally* FRANKFURTER & LANDIS, *supra* note 6. None of those other grounds, however, was as continuously and commonly debated as diversity jurisdiction.

[19] *See* Henry J. Friendly, *The Historic Basis of the Diversity Jurisdiction*, 41 HARV. L. REV. 483, 487 (1928) ("On no section of the new Constitution was the assault more bitter than on the provisions for the federal judiciary. And while the main attack was directed to the failure to make provisions for trial by jury, diversity of citizenship jurisdiction came in for its share of criticism."); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 81 (1923) ("There was no part of the Federal jurisdiction which had sustained so strong an attack from the Anti-Federalists, or which had received so weak a defense from the Federalists as that which gave them power over 'controversies between citizens of different states.'" (footnote omitted)).

involved in diversity litigation against corporations,[20] and by the end of the 1920s two types of diversity cases—tort and insurance claims brought by individuals against corporations—accounted for seventy percent of all the diversity cases on the federal docket.[21]

There were, however, two additional reasons why diversity became a central battleground for jurisdictional reformers. One was that it became increasingly apparent that the jurisdictional grant was exceptionally flexible. The Constitution referred to it only in the barest of phrases, authorizing jurisdiction over controversies "between Citizens of different States."[22] Initially, Congress and the Court shaped the jurisdiction narrowly, the former adding an amount in controversy requirement and restrictions on diversity removals,[23] and the latter holding that diversity between plaintiffs and defendants had to be complete and that corporations were not "citizens" for jurisdictional purposes.[24] Over the years, however, both branches repeatedly stretched the jurisdiction until it seemed that the constitutional authorization could be shaped in almost any way Congress and the Court desired.

The key accordion points were familiar. Most obvious was the fact that the jurisdictional amount and other more specific restrictions on the jurisdiction were only statutory limits, and Congress could vary them as it wished.[25] Less obvious but more important, both Congress

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[20] Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 411 (1906), *reprinted in* 40 AM. L. REV. 729, 744-45 (1906).

[21] PURCELL, *supra* note 16, at 21.

[22] U.S. CONST. art. III, § 2.

[23] The First Judiciary Act established the jurisdictional amount at $500, Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78-79 (codified as amended at 28 U.S.C. § 1332(a) (2000)), and it limited removal under diversity to three classes of defendants: aliens, nonresident defendants sued by residents of the forum, and defendants in certain actions involving state-granted titles to land. Thus, the Act denied the right of removal to, among others, resident defendants sued by out-of-state plaintiffs. *Id.* § 12, 1 Stat. at 79-80 (1789).

[24] Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267-68 (1806) (holding that section 11 of the Judiciary Act requires complete diversity for the federal courts to exercise jurisdiction); Bank of the U.S. v. Deveaux, 9 U.S. (5 Cranch) 61, 86 (1809) (holding that corporations were not "citizens" for purposes of diversity jurisdiction).

[25] Congress repeatedly altered the jurisdictional amount, raising it to $2000 in 1887, $3000 in 1911, $10,000 in 1958, $50,000 in 1988, and then $75,000 in 1996. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 304 (4th ed. 2003). In the federal interpleader statute it provided for a special and lower jurisdictional amount of $500. 28 U.S.C. § 1335(a) (2000). Similarly, Congress repeatedly changed the limitations on diversity removal jurisdiction. In 1866, it authorized removal by fewer than all defendants in certain types of cases, Act of July 27, 1866, ch. 288, 14 Stat. 306, 306-07, and in 1875 it authorized removal by plaintiffs, Act of Mar. 3, 1875, ch. 137, § 2, 18 Stat. 470, 470-71. It subsequently abolished the latter provision. Act of Mar. 3, 1887, ch. 373,

and the Court came to realize that the concept of "citizenship" for diversity purposes could be manipulated to serve a wide variety of policy goals. Before the Civil War, the Court extended jurisdictional "citizenship" to corporations[26] and then worked out additional rules for determining how to treat the "citizenship" of other jurisdictionally ambiguous entities—partnerships, unincorporated associations, and "classes" involved in representative suits.[27] Even more boldly, it ruled that federal jurisdiction simply did not extend to citizens seeking relief in matrimonial or probate matters even when their actions met the jurisdiction's explicit statutory requirements.[28] Similarly, Congress decided that the jurisdiction should not extend to diverse parties who had brought themselves within its requirements "improperly or collusively,"[29] and it subsequently redefined the meaning of jurisdictional citizenship for corporations[30] and a variety of other special categories—insurance companies,[31] permanent resident aliens,[32] citizens of

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§ 2, 24 Stat. 552, 553, *amended by* Act of Aug. 13, 1888, ch. 866, 25 Stat. 433, 434. For the expansive power of Congress over the jurisdiction of lower federal courts, see *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850).

[26] The change began with *Louisville Railroad Co. v. Letson*, which argued that the Court's decisions in *Strawbridge* and *Deveaux* went too far and asserted that "[a] corporation created by a state to perform its functions under the authority of that state . . . seems to us to be a person . . . and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that state." 43 U.S. (2 How.) 497, 555 (1844). For later developments, see GERARD CARL HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW 50-76 (1918).

[27] *See, e.g.*, United Steelworkers of Am. v. R. H. Bouligny, Inc., 382 U.S. 145, 150-51 (1965) (using the citizenship of an unincorporated association's members to determine the association's citizenship); Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 363-64 (1921) (determining that in class actions only the citizenship of the named class representatives is relevant for jurisdictional purposes); Great S. Fire Proof Hotel Co. v. Jones, 177 U.S. 449, 456 (1900) (holding that the citizenship of partnerships was determined by the citizenship of each partner).

[28] *See, e.g., In re* Burrus, 136 U.S. 586, 593-94 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not the laws of the United States."); Barber v. Barber, 62 U.S. (21 How.) 582, 584 (1858).

[29] 28 U.S.C. § 1359. The current statute derives ultimately from a provision in the First Judiciary Act. *See* Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 79.

[30] Act of July 25, 1958, Pub. L. No. 85-554, 72 Stat. 415 (codified as amended at 28 U.S.C. § 1332(c)(1)) (providing that for jurisdictional purposes corporations were to be considered citizens of the state of their incorporation and of the state of their "principal place of business").

[31] The Supreme Court held that an insured was not an indispensable party in a tort action seeking recovery for the insured's alleged wrongdoing but brought only against his or her insurance company. Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 52 (1954). At least two states, Wisconsin and Louisiana, had "direct action" statutes that encouraged such suits. *See* Donald T. Weckstein, *The 1964 Diversity Amendment:*

the District of Columbia[33] and Puerto Rico,[34] and representatives of decedents, infants, and incompetent persons.[35] Finally, and of greatest potential significance, Congress and the Court came to understand "complete diversity" as only a statutory requirement. Expanding the jurisdiction to reach specific targeted classes of cases,[36] they agreed

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Congressional Indirect Action Against State "Direct Action" Laws, 1965 WIS. L. REV. 268, 272. Congress responded in 1964 by amending the diversity statute to provide that "in any direct action against the insurer of a policy or contract of liability insurance," where the insured was not joined, "such insurer shall be deemed a citizen of the State of which the insured is a citizen" in addition to retaining its otherwise proper citizenship for diversity purposes. *See* Act of Aug. 14, 1964, Pub. L. No. 88-439, 78 Stat. 445 (codified as amended at 28 U.S.C. § 1332(c)(1)). The amendment was designed to prevent the "manipulation" of diversity and to limit the federal docket. S. REP. NO. 88-1308 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 2778. For a critical analysis, see Weckstein, *supra*, at 272-82.

[32] In 1988, Congress amended 28 U.S.C. § 1332(a) to provide that, for diversity purposes, aliens admitted to the United States for permanent residence would be deemed "citizens" of their state of domicile. Judicial Improvements and Access to Justice Act, Pub. L. 100-702, § 203(a), 102 Stat. 4642, 4646 (1988).

[33] Congress, in effect, overruled an early Court decision, *Hepburn v. Ellzey*, which held that Article III, Section 2, of the Constitution does not consider a citizen of the District of Columbia to be a citizen of a state. 6 U.S. (2 Cranch) 445, 452-53 (1805). This result had been repeatedly reaffirmed, *e.g.*, Barney v. Baltimore City, 73 U.S. (6 Wall.) 280, 287-88 (1867), before Congress provided that citizens of the District of Columbia were to be considered "citizens" of a "state" for diversity purposes, Act of Apr. 20, 1940, Pub. L. No. 76-463, ch. 117, 54 Stat. 143, 143 (codified as amended at 28 U.S.C. § 1332(e) (Supp. V 2005)); *see also* H.R. REP. NO. 76-1756, at 1, 3 (1940) (characterizing the Act of April 20, 1940, as a "reasonable exercise of the constitutional power of Congress"). The Court upheld the constitutionality of the statute, though the five Justices in the majority could not agree on a rationale, and four Justices dissented. Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949).

[34] In addition, Congress extended jurisdictional citizenship to territorial citizens and to citizens of the Commonwealth of Puerto Rico. Act of July 26, 1956, Pub. L. No. 89-808, 70 Stat. 658, 658 (codified as amended 28 U.S.C. § 1332(e)).

[35] In 1988, Congress amended 28 U.S.C. § 1332(c) to provide that, for diversity purposes, legal representatives of the estates of decedents and of infants and incompetent persons would be deemed citizens of the same state as the decedents, infants, and incompetents. Judicial Improvements and Access to Justice Act § 202(a), 102 Stat. 4642, 4646.

[36] *See, e.g.*, Act of Jan. 20, 1936, Pub. L. No. 74-422, 49 Stat. 1096 (codified as amended at 28 U.S.C. §§ 1335, 1397, 2361 (2000)) (extending the remedy by bill of interpleader to cases where the claimants are citizens of different states and the amount in controversy is $500 or more). During the first half of the twentieth century, the Court was cautious in modifying the complete diversity requirement. *See, e.g.*, Treinies v. Sunshine Mining Co., 308 U.S. 66, 71 (1939) (avoiding the constitutional question of whether Article III required "complete diversity" and upholding the 1936 federal interpleader act on the ground that there was diversity between the "adverse" interpleaded parties). The relevant provision of the current federal interpleader statute is codified at 28 U.S.C. § 1335(a).

during the second half of the twentieth century that the Constitution itself required not "complete" but only "minimum" diversity.[37]

Equally important in ensuring diversity's plasticity was its ostensible rationale, so vague and uncertain that it could be shaped almost at will.[38] The historical record gave sparse indication why the framers and ratifiers adopted the jurisdiction, and the scattered bits of evidence suggested only that they intended it to provide protection against some kind of bias or unfairness, real or anticipated, that nonresidents might encounter in the states.[39] In 1978 the House Judiciary Committee concluded simply that the "debates of the Constitutional Convention are unclear as to why the Constitution made provision for [diversity] jurisdiction."[40] Over the years, moreover, the Court used

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[37] "Minimum diversity" requires only that some one plaintiff be diverse from some one defendant, with the citizenship of all other parties being irrelevant. *See* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 531 (1967) (finding diversity jurisdiction to be within the constitutional grant of Article III "so long as any two adverse parties are not co-citizens"); *accord* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373 n.13 (1978) (citing several cases to conclude that "[i]t is settled that complete diversity is not a constitutional requirement"). Congress subsequently utilized the "minimal diversity" standard in the Y2K Act, Pub. L. No. 106-37, § 15(c)(2), 113 Stat. 185, 201 (1999), and the Multiparty, Multiforum Trial Jurisdiction Act of 2002, Pub. L. 107-273, sec. 11020(b)(1)(A), § 1369(b)–(c), 116 Stat. 1758, 1826.

[38] For the argument that there are constitutional limits on the scope of diversity jurisdiction, see C. Douglas Floyd, *The Limits of Minimal Diversity*, 55 HASTINGS L.J. 613, 695 (2004), which argues that expansions of federal jurisdiction should be evaluated under the "necessary and proper" standard of Article III, and C. Douglas Floyd, *The Inadequacy of the Interstate Commerce Justification for the Class Action Fairness Act of 2005*, 55 EMORY L.J. 487 (2006), which challenges Congress's articulation of an "interstate commerce" theory of the Diversity Clause to justify the CAFA.

[39] The classic cites for the proposition that the jurisdiction was established to provide protection against bias in state courts are *Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809), and *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816). Twentieth-century scholars have emphasized the desire of the Founders to protect commercial interests not so much from bias in state courts as from the prodebtor policies of state legislatures. *See* Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for* Erie *and* Klaxon, 72 TEX. L. REV. 79, 86-110 (1993); Friendly, *supra* note 19; Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421. Most scholars accept the idea that at least many of the Founders saw diversity as a protection against some kind of bias or disadvantage that might harm nonresidents. *See* John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 22-28 (1948); Hessel E. Yntema & George H. Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869, 874-76 (1931). For recent balanced assessments, see Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291, 1323-24 (2000); and Larry Kramer, *Diversity Jurisdiction*, 1990 BYU L. REV. 97, 119-21.

[40] H.R. REP. NO. 95-893, at 2 (1978).

the jurisdiction to serve a variety of purposes, for the most part shaping it pragmatically to bring into the federal courts the kinds of cases it deemed of national importance.[41] Indeed, insofar as Congress and the Court were motivated by any actual concern about bias and local prejudice in the states, they were highly selective at best—and severely derelict at worst—in shaping federal jurisdictional rules to combat those dangers.[42]

The amorphous nature of diversity's rationale offered jurisdictional reformers a perennial opportunity. The complexities of legal processes and the variety of conditions that existed in the states made charges of bias or unfairness endemic, and repeat-player parties who preferred federal forums advanced them regularly. Further, diversity's purported rationale could readily be stretched to any level of generality, for the dangers of bias or local prejudice could easily be broadened to include a wide range of alleged flaws or inadequacies in state courts—including different procedures or institutional arrangements—that arguably caused risks to nonresident litigants and therefore demonstrated the need for federal jurisdiction.[43]

The other reason why diversity became a focus of jurisdictional reform was that changing conditions in the late nineteenth and twentieth centuries began to alter prevailing ideas about federalism and increasingly made the jurisdiction seem anomalous and illogical. On one hand, the transformations wrought first by the Civil War and Reconstruction and then by industrialization, urbanization, and economic centralization spurred expanding exercises of national legislative and judicial power. On the other hand, a concurrent transformation in American legal thought—declining belief in natural law and the declaratory theory and the growing intellectual domi-

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[41] PURCELL, *supra* note 16, at 254-56.

[42] *Id.* at 142-47. Judge Richard A. Posner questioned the "bias" rationale by pointing out that the first Congress allowed plaintiffs to use diversity to bring federal suits in their home states and in states where they were nonresidents and, further, that it allowed defendants to remove diversity actions even when the plaintiff was a nonresident of the forum state. Those provisions, he argued, suggest that the Founders did not shape the jurisdiction to combat bias against nonresidents and gave little weight to the bias rationale. RICHARD A. POSNER, THE FEDERAL COURTS 212 (2d ed. 1996).

[43] *See, e.g.*, ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 105-10 (1969) [hereinafter, ALI, STUDY]; James W. Moore & Donald T. Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 HARV. L. REV. 1426, 1449-50 (1964); *see also* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 278-79 (2000) (describing how the ALI's *Study* stretched the "original purpose" of diversity jurisdiction).

nance of empirical science and jurisprudential positivism—increasingly identified "law" with sovereignty, instrumental policy-based rules, and the idea of a government's proper "legislative jurisdiction."[44] The first transformation led to the establishment of federal question jurisdiction, the proliferation of congressional legislation, and the establishment of ever more muscular national constitutional rights. The latter transformation made federal question jurisdiction seem the natural and logical field for the federal courts, while casting diversity jurisdiction as ill-fitting and discordant, a view that the Supreme Court strengthened in 1938 when it abolished the federal "general" common law and required federal courts to follow the common law decisions of the state courts.[45] The federal courts, the standard argument began to run, should not waste their resources and squander their expertise on cases that held merely local interest and that were, in any event, governed by state law. Instead, they should concentrate on questions of national law and the kinds of broad national issues that properly commanded the attention of the national judiciary.[46]

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[44] *See generally* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 (1977); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY (1992); BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW 11-76 (2006).

[45] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

[46] By the second half of the twentieth century there were repeated calls for the restriction or abolition of diversity jurisdiction. ALI, STUDY, *supra* note 43, at 162-94; FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 38-42 (1990) [hereinafter FCSC, REPORT]; Robert H. Bork, *Dealing with the Overload in Article III Courts*, *in* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 150, 155 (A. Leo Levin & Russell R. Wheeler eds., 1979); William H. Rehnquist, *State of the Federal Judiciary, 1987*, *in* STATE OF THE FEDERAL JUDICIARY: ANNUAL REPORTS OF THE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES 1, 7 (Shelly L. Dowling ed., 2000). In 1977, the Conference of Chief Justices of the states approved a resolution calling for the complete abolition of diversity jurisdiction. A. Leo Levin & Russell R. Wheeler, *Epilogue*, *in* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE, *supra*, at 292. Between the late 1960s and the late 1970s, two distinguished specialists in federal jurisdiction, Professors Richard H. Field and Charles Allen Wright, moved from supporting diversity to urging its abolition. Robert J. Sheran & Barbara Isaacman, *State Cases Belong in State Courts*, 12 CREIGHTON L. REV. 1, 27 n.123 (1978). Many other judges and scholars joined the campaign. *See, e.g.*, David P. Currie, *The Federal Courts and the American Law Institute* (pt. 1), 36 U. CHI. L. REV. 1, 49 (1968); Elmo B. Hunter, *Federal Diversity Jurisdiction: The Unnecessary Precaution*, 46 UMKC L. REV. 347 (1978); Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963 (1979). As late as 1957 the Judicial Conference of the United States opposed any significant restriction of "the ancient diversity jurisdiction." *Jurisdiction of Federal Courts Concerning Diversity of Citizenship: Hearing on H.R. 2516 and H.R. 4497 Before Subcomm. No. 3 of the H. Comm. on the*

As a result, legal rules inconsistent with that positivist assumption, such as the "well-pleaded complaint rule," came to seem not merely undesirable but facially illogical.[47] The federal courts should serve as the authoritative voice of federal law and national interests, and state courts should serve as the authoritative voices of state law and local interests. By the 1950s, Henry M. Hart, Jr. saw those principles as obvious corollaries of an inherent "logic of federalism,"[48] and a decade later Judge Henry J. Friendly became ecstatic when he contemplated their jurisprudential elegance. The paired principles were "so beautifully simple, and so simply beautiful," he exclaimed, "that we must wonder why a century and a half was needed to discover them."[49] The revealing element of Friendly's rapture, of course, was his statement that "a century and a half" was needed to "discover" them, that is, that the principles had presumably existed all along in the Constitution itself rather than being newly shaped legal constructs that flowed not from the Constitution but from a distinctly twentieth-century jurisprudential positivism.[50]

Judiciary, 85th Cong. 13 (1957) (arguing that the development of robust national commerce requires maintaining "the confidence of investors that when they invest their moneys in distant States or in enterprises serving those States, their rights will be protected by the power of the [Federal] Government" (quoting Report of the Committee on Jurisdiction and Venue of the Judicial Conference of the United States)). It too subsequently changed its views. H.R. REP. NO. 95-893, at 1 (1978) (describing a "bill to abolish diversity of citizenship as a basis of jurisdiction of Federal district courts"). *See generally* Edward A. Purcell, Jr., *Reconsidering the Frankfurterian Paradigm: Reflections on Histories of Lower Federal Courts*, 24 LAW & SOC. INQUIRY 679, 691-98 (1999) (discussing twentieth-century reconsiderations of diversity jurisdiction); James M. Underwood, *The Late, Great Diversity Jurisdiction*, 57 CASE W. RES. L. REV. 179 (2006) ("In the area of federal courts, the last few decades witnessed an escalating call for the abolition of diversity jurisdiction . . . .").

[47] *See* Franchise Tax Bd. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 4 (1983) (noting that the "well-pleaded complaint rule" was based on "reasons involving perhaps more history than logic"); *see also* Donald L. Doernberg, *There's No Reason For It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597, 599 (1987) (arguing that the well-pleaded complaint rule "for all its venerability, produces neither reason nor coherence, is not dictated by sound judicial policy, and ought to be abandoned").

[48] Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 532 (1954).

[49] Henry J. Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 422 (1964), *reprinted in* HENRY J. FRIENDLY, BENCHMARKS 155, 195 (1967). Discovery of the principles, Friendly argued, stemmed largely from the impact of *Erie*. *Id.*

[50] Hart made a similar ahistorical assumption. PURCELL, *supra* note 43, at 248-49. Interestingly, while Hart was a strong defender of diversity jurisdiction, *id.* at 246, Friendly was a long-time opponent. *See* HENRY J. FRIENDLY, FEDERAL JURISDICTION 139-

By the second half of the twentieth century those nationalist and positivist attitudes underlay most formal jurisdictional thinking in the United States, and their logic underwrote a broadening consensus that led Congress, the Court, and many prominent judges and scholars to support the steady narrowing or abolition of diversity jurisdiction and the concomitant expansion of federal question jurisdiction.[51] In the 1970s Chief Justice Warren E. Burger urged the outright abolition of diversity jurisdiction and complained that it "still plagues us, despite numerous studies which advocate such jurisdiction of federal courts be curtailed or abolished."[52] At the Pound Conference on civil justice reform in 1976, Lawrence E. Walsh, president of the American Bar Association, commented that "the suggestion of curbing diversity cases . . . seemed to provoke relatively little opposition."[53] Two years later, when the House Judiciary Committee recommended a bill to abolish diversity jurisdiction, its report declared that, after extensive

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52 (1973) (asserting that diversity jurisdiction has had no significant justification for many years).

[51] The legislative steps were many, but four examples suffice. First, in 1958 Congress limited diversity jurisdiction over corporations by making them citizens, for jurisdictional purposes, of the state where they had their "principal place of business," as well as their state of incorporation. Act of July 25, 1958, Pub. L. No. 85-554, § 2, 72 Stat. 415. Second, in 1964 and then again in 1988, Congress amended § 1332 to narrow diversity jurisdiction by negating tactics plaintiffs commonly used to "create" diversity of citizenship. Act of Aug. 14, 1964, Pub. L. No. 88-439, § 1, 78 Stat. 445, 445; Judicial Improvements and Access to Justice Act, Pub. L. 100-702, §§ 202(a), 203(a), 102 Stat. 4642, 4646 (1988). Third, in 1980 Congress abolished the jurisdictional amount in cases brought under general federal question jurisdiction, Act of Dec. 1, 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2369, 2369, while maintaining the jurisdictional amount in diversity actions and subsequently raising it from $10,000 to $50,000 in 1988, Judicial Improvements and Access to Justice Act § 201(a), and to $75,000 in 1996, Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 205, 110 Stat. 3847, 3850. Fourth, in 1990 Congress abolished pendant and ancillary jurisdiction and replaced it with a new "supplemental jurisdiction" that extended jurisdiction to the constitutional limit in federal question cases but limited it in diversity actions. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 310(a), 104 Stat. 5089, 5113-14 (codified as amended at 28 U.S.C. § 1367 (2000)). *See generally* John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvement Acts of 1988 and 1990*, 24 U.C. DAVIS L. REV. 735 (1991).

[52] Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, *in* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE, *supra* note 46, at 23, 28 [hereinafter Burger, *Agenda for 2000*]. For Chief Justice Burger's position on diversity, see Warren E. Burger, *Report on the Federal Judicial Branch—1973*, 59 A.B.A. J. 1125, 1126 (1973).

[53] Lawrence E. Walsh, *Improvements in the Judicial System: A Summary and Overview*, *in* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE, *supra* note 46, at 280, 286.

hearings, there was "virtual unanimity" that "diversity jurisdiction be abolished or curtailed."[54]

The influence of those positivist assumptions was limited not so much by theory but by practical interests. Diversity's supporters seemed to lose the jurisprudential debate, but they won the political battle, working assiduously to maintain their favored jurisdiction. Increasingly, they were identified with the practicing bar, especially its trial lawyers and corporate counsel, whose views seemed rooted in professional and client interest.[55] Although they advanced a variety of arguments for retaining the jurisdiction, their defense seemed animated ultimately by neither jurisprudential principles nor ideas of systemic efficiency but by the desire of litigators to protect an exceptionally useful tactical tool and by the preference of elite lawyers and their corporate clients for federal forums. In 1977, as the push for abolition intensified, the American Bar Association's House of Delegates reaffirmed its long support for diversity, and some of its members even urged that it be expanded.[56] When the House held hearings on its bill to abolish the jurisdiction, the measure's most outspoken opponents included the American Bar Association, the American College of Trial Lawyers, and the Association of Trial Lawyers of America.[57]

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[54] H.R. REP. NO. 95-893, at 6 (1978).

[55] The trial lawyers generally took the position that they represented ordinary individuals, not large corporations. *Diversity of Citizenship Jurisdiction/Magistrates Reform—1979: Hearings on H.R. 1046 and H.R. 2202 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 96th Cong. 96 (1979) [hereinafter *1979 House Hearings*] (statement of Robert G. Begam, past President, Association of Trial Lawyers of America).

[56] *See* Sheran & Isaacman, *supra* note 46, at 29; *see also, e.g.*, Brent Caslin, Provident Savings Life Assurance Society v. Ford*: 120 Years of Shenanigans Designed To Destroy Diversity Jurisdiction*, 42 WILLAMETTE L. REV. 439 (2006) (arguing that Congress should prevent the destruction of diversity jurisdiction by sham transaction in the same way it has prohibited the creation of diversity by sham transaction). Similarly, corporate interests had opposed serious limitations on diversity when Congress had considered the issue in both 1932 and 1958. *See* PURCELL, *supra* note 43, at 77-85, 265-69, 271-72, 280.

[57] *See, e.g.*, *1979 House Hearings*, *supra* note 55, at 52 (statement of Edward M. Mullinix, Council Member, Section of Litigation, and John C. Shepherd, Chairman, House of Delegates, American Bar Association); *id.* at 95 (statement of Robert G. Begam, past President, Association of Trial Lawyers of America); H.R. REP. NO. 95-893, at 6-7. The American College of Trial Lawyers opposed significant limitations on diversity jurisdiction, while the other two groups opposed all proposed limitations. H.R. REP. NO. 95-893, at 6-7. In addition, the Department of Justice supported only "partial elimination" of diversity. *Id.* Similar professional battle lines had appeared a decade earlier when Chief Justice Earl Warren, speaking to the ALI, proposed the severe restriction of diversity in order to rationalize federal jurisdiction according to "principles

Those two qualities of diversity jurisdiction—its plasticity and its so-called "illogical" jurisprudential nature—inspired quite different agendas. They meant that the jurisdiction would appear particularly dubious to general theorists and those interested in systemic judicial efficiency but would seem particularly useful to practicing lawyers and those who strove to serve the interests and preferences of repeat-player clients. Thus, diversity jurisdiction increasingly became a battleground between those who sought, usually for general and systemic reasons, to curtail or abolish it and those who sought, commonly for narrower professional or client-based reasons, to retain or expand it.

C. *Obscured Duality: Goals and Results*

A third characteristic of federal jurisdictional reform was its sometimes-obscured dual nature. Efforts to reform substantive law addressed practical issues and interests directly, and reformers' announced goal was to alter the way people behaved and to change substantive outcomes in relevant cases. Efforts to reform jurisdictional law, however, tended to downplay such particular issues and interests and to highlight broader and more socially abstracted institutional goals, such as increasing fairness, efficiency, neutrality, rationality, and coherence in the legal system as a whole.

Regardless of formal goals and institutional rhetoric, however, federal jurisdictional reform invariably brought twin results: it altered, supposedly for the better, the operations of the legal system, and it shifted the balance of advantage and disadvantage among at least some of the system's different litigant groups.[58] Those two different types of results were widely understood, though not always acknowledged. Thus, jurisdictional reform efforts commonly reflected two quite distinct and often conflicting goals that were usually blended in debate. Many reformers sought to make the American legal system fairer, more rational, and more efficient; many others sought to shape it in ways that would advantage some particular social group. The former advanced proposals that would, as a matter of practice if not intent, bring differential social results; the latter ad-

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of federalism." *Id.* at 1. Then, the National Association of Claimants Counsel of America and the National Board of the American Trial Lawyers Association joined in opposing the jurisdiction's "emasculation." PURCELL, *supra* note 43, at 280.

[58] Such duality, characteristic of much legal reform, seems particularly acute in this area, for jurisdictional and procedural matters are generally and in theory considered to be separate and distinct from "substantive" law issues.

vanced proposals, draped in the language of fairness and efficiency, designed to achieve such differential results.

The paradigmatic example of such blending was Felix Frankfurter and James M. Landis's famous 1928 study, *The Business of the Supreme Court.*[59] Bristling with appeals to science, neutral standards, objectivity, professionalism, empirical evidence, and disinterested judgment, the book pleaded for a set of laudable institutional goals—the rationalization of federal jurisdiction, the maintenance of high professional standards on the federal bench, the achievement of judicial efficiency by organizing the national judiciary as a coherent "system" of courts, and the establishment of jurisdictional rules that would enhance the ability of the Supreme Court to serve its essential role as the voice of the Constitution and the umpire of the federal system. All that, however, was only the surface story. On another level the book was a shrewd and carefully calculated effort designed to serve a variety of distinctly Progressive political goals. Its analysis and prescriptions were intended to assert the power of Congress over the anti-Progressive federal judiciary, limit the ability of the lower federal courts to block state regulatory efforts, deny corporations many of the practical litigation advantages they enjoyed under existing jurisdictional rules, and stop the Supreme Court from hearing certain types of cases and from reaching the constitutional issues that it used to invalidate Progressive legislation.[60]

The dual nature of Frankfurter's work was broadly illuminating. Lawyers and scholars like Frankfurter understandably led efforts to reform federal jurisdiction, and that fact severely complicated ensuing debates. It meant that cleverness was at a premium and that almost any reform proposal—and any opposition to such proposals—could and would be robed in eminently plausible and seemingly public-oriented raiments. Further, it meant that many of those who participated in the debates were likely representing, formally or informally, the interests of clients or distinct social groups and that the litigation needs of those groups shaped their views and arguments.[61] Judging

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[59] FRANKFURTER & LANDIS, *supra* note 6.

[60] Purcell, *supra* note 46, at 698-706.

[61] *See* JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 200-202 (2005) ("[L]awyers' views on the whole[] may be more consistently sympathetic to big business . . . . [and] appear to be generally congruent with those of their clients."); ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM 278, 281-82, 287, 289 (1988) (describing how lawyers shape core societal values to serve large-client interests).

the true need for, and wisdom of, various jurisdictional reform proposals, then, was generally an exceptionally perplexing and demanding task.

D. *Limited and Inadequate Empirical Evidence*

As Frankfurter suggested, empirical evidence about the operation of the judicial system seemed essential to wise jurisdictional reform. Over the course of more than two centuries, however, advocates and opponents advanced little such evidence to support their positions. Instead, they relied for the most part on legal and constitutional arguments, anecdotes based on personal experience, and collections of supposedly illustrative and allegedly representative cases found in the law reports. Beginning in the early twentieth century, jurisdictional reformers began to seek more comprehensive statistical evidence, but their efforts commonly produced little more than compilations drawn from general caseload statistics and, beginning in the 1920s, occasional studies of dockets in individual states or federal judicial districts.[62] In terms of data on the judicial system, Charles E. Clark and William O. Douglas concluded in 1933 that the United States was "still in the 'prestatistical age.'"[63] Until comprehensive and reliable statistics became available, they emphasized, jurisdictional debates would involve little more than "conflicting, uncertain opinions and vague speculations."[64]

Southerners and Progressives, for example, had sought to restrict or abolish diversity jurisdiction for more than half a century after Reconstruction, but over that entire period they produced little statistical evidence to support their charges that the jurisdiction caused systemic unfairness to those who sued national corporations. Four times between 1880 and 1887 the House passed bills eliminating corporate

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[62] One of the earliest significant efforts to produce a comprehensive statistical survey was a 1934 study of the work of thirteen federal judicial districts. *See* ALI, A STUDY OF THE BUSINESS OF THE FEDERAL COURTS (1934). Its findings were for the most part unilluminating, and it inspired no immediate change in federal jurisdiction.

[63] Charles E. Clark & William O. Douglas, *Law and Legal Institutions*, *in* 2 PRESIDENT'S RESEARCH COMM. ON SOC. TRENDS, RECENT SOCIAL TRENDS IN THE UNITED STATES: REPORT OF THE PRESIDENT'S RESEARCH COMMITTEE ON SOCIAL TRENDS 1430, 1449 (1933).

[64] *Id.* at 1453.

citizenship for diversity purposes,[65] but statistical evidence added little to the discussion beyond showing that dockets were expanding and that corporations did, in fact, commonly use diversity jurisdiction. Why corporations did so, and whether their use of the jurisdiction was unfair or abusive, remained matters of deep dispute.

As late as 1932, when Progressives made another concerted effort to abolish diversity, they could offer little more in the way of evidence than a collection of testimonial letters from plaintiffs' attorneys and law professors and a survey of federal judges showing that diversity cases accounted for approximately twenty-seven percent of the civil caseload.[66] Their opponents did little better. Representatives of the insurance industry produced a compilation of almost 18,000 insurance cases, but their numbers showed only that most such cases were brought in state courts and that the companies seemed to invoke federal jurisdiction when they could.[67]

For its part, even the U.S. government could add nothing more in the way of statistical data. To counter the Progressive effort, President Herbert Hoover presented an alternate proposal that would preserve diversity jurisdiction while limiting its corporate use, but he offered no new evidence to support his proposal. The President, Clark and Douglas noted, "was unable, for lack of data, to advise Congress on the simple and primary questions of how much of a burden . . . [diversity] jurisdiction casts upon the federal courts and to what extent his proposal would relieve the congestion of their dockets."[68]

Even in the later twentieth century, jurisdictional reformers continued to rely primarily on legal arguments, case reports, and personal anecdotes rather than comprehensive and meaningful statistical stud-

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[65] *See* FRANKFURTER & LANDIS, *supra* note 6, at 90, 136 ("[T]he House in 1887, by an overwhelming vote, for the fourth time sought to withdraw from the federal courts the growing volume of litigation drawn to them by the fiction of corporate citizenship.").

[66] *See* S. REP. NO. 72-530, at 10-21 (1932). From the survey of federal judges the committee reported that, during the calendar year 1929, there had been 34,774 cases filed in the district courts and that 9,630 of them were diversity actions. *Id.* at 9-10.

[67] *See Limiting Jurisdiction of Federal Courts: Hearings on S. 937, S. 939, and S. 3243 Before a Subcomm. of the S. Comm. on the Judiciary*, 72d Cong. 44-47 (1932) (statement of Hobart S. Weaver, Attorney, Association of Life Insurance Presidents) (stating that in a study of life insurance companies over a five-year period, 530 cases were removed to the federal court); PURCELL, *supra* note 16, at 21, 298 nn.49-50 (citing similar numbers).

[68] Clark & Douglas, *supra* note 63, at 1449. Even if meaningful statistics had been available, the administration would likely not have used them, as Hoover's counterproposal was merely a tactic designed to help defeat the Progressives' abolition bill. *See* PURCELL, *supra* note 43, at 82.

ies. In 1948, when the railroads pushed Congress to adopt a provision for the interdistrict transfer of cases between federal courts, they introduced a compilation of some 3000 cases to demonstrate what no one denied: that FELA claimants frequently filed their suits in federal districts where neither the accident occurred nor the plaintiff resided at the time of injury.[69] Ten years later, Congress decided to make workers' compensation claims nonremovable on the basis of simple caseload statistics that came primarily from a single state,[70] and in 1964 it amended the diversity statute to keep "direct action" suits against insurers out of the federal courts on the basis of similar docket evidence from two states.[71] As late as 2002, when Congress expanded diversity jurisdiction to reach a new class of multiparty and multiforum disputes,[72] it offered almost no empirical evidence to show its likely impact.[73] Indeed, the year before the statute's passage, Deborah Hensler reported that she had "been able to find only one empirical analysis of multi-district litigation."[74]

The failure of jurisdictional reformers to produce comprehensive statistical evidence was, of course, entirely understandable. The federal government did not even begin to gather docket data systematically until the 1870s, and relatively comprehensive and reliable statistics were not available until the twentieth century. Worse, it was not until the late twentieth century that most states began to collect reli-

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[69] *See* H.R. REP. NO. 80-613, at 3 (1947) (citing more than 2500 cases).

[70] *See* S. REP. NO. 85-1830, at 7-9 (1958), *as reprinted in* 1958 U.S.C.C.A.N. 3099, 3105; 104 CONG. REC. 12,683 (1958) (describing the heavy burden that workers' compensation cases placed on judges in Texas).

[71] *See* S. REP. NO. 88-1308, at 2 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 2778, 2779-80 (describing the effect of "direct action" statutes in Louisiana and Wisconsin). At the time, only two states had such "direct action" statutes, and Congress feared that others might adopt similar measures. *Id.*

[72] *See* Multiparty, Multiforum Trial Jurisdiction Act of 2002, Pub. L. 107-273, § 11020(b)(1)(A), 116 Stat. 1758, 1826 (2002) (codified at 28 U.S.C. § 1369 (Supp. III 2003)).

[73] The provision constituted one small part of a much larger bill. The House Report discussed it only briefly, offered no statistical evidence, and cited the testimony of just one airline attorney. It justified the provision by pointing to the practical problems and "waste of judicial resources" that resulted when single accidents led to the filing in different states of multiple suits raising the same legal and factual problems. H.R. REP. NO. 107-685, at 199-200 (2002), *as reprinted in* 2002 U.S.C.C.A.N. 1120, 1151-52. *See generally* Laura Offenbacher, *The Multiparty, Multiforum Trial Jurisdiction Act: Opening the Door to Class Action Reform*, 23 REV. LITIG. 177 (2004); Angela J. Rafoth, *Congress and the Multiparty, Multiforum Trial Jurisdiction Act of 2002: Meaningful Reform or a Comedy of Errors?*, 54 DUKE L.J. 255 (2004).

[74] 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, 195 n.42 (2001).

able—though often still not fully comparable—sets of judicial statistics, and without state data it was impossible to evaluate the overall operations of the dual federal-state judicial system.[75] Worst of all, however, was the fact that the increasingly comprehensive and reliable sets of state and federal docket statistics failed to answer the truly pivotal practical and social questions that ultimately underlie debates over jurisdictional reform. Those available collections understandably focused on the formal characteristics of cases—jurisdictional basis, nature of claim, number and type of motions filed, manner of disposition, appeals taken, and duration from filing to termination—that failed for the most part to illuminate the driving issue that animated jurisdictional politics: who held, and who was vulnerable to, the different types of legal and practical leverage that were available under existing rules, as well as who would benefit, and who would suffer, from proposed changes that would shift the balance of litigation advantage.

The relatively extensive judicial statistics that gradually became available during the twentieth century, then, proved useful primarily for two purposes: demonstrating the growing caseload of the courts and identifying its general sources by jurisdictional head and type of claim.[76] Thus, statistical evidence tended to become a stock resource for those who sought, for whatever reason, to curtail federal jurisdiction. Limitation, they insisted, would provide a remedy for "congestion." Conversely, those who opposed such restrictions or sought to expand federal jurisdiction downplayed such statistical evidence and stressed the compelling practical goals the jurisdiction served. In the late nineteenth and early twentieth century, Southerners and Progressives portrayed their restrictive proposals as remedies for a growing "congestion" that burdened the federal courts,[77] while their opponents discounted statistics and emphasized the protections the na-

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[75] The president of the American Bar Association complained in 1976 that the legal profession "just doesn't have the necessary funds to conduct proper studies." Walsh, *supra* note 53, at 288.

[76] As a general matter, federal caseloads rose during the late nineteenth and early twentieth centuries, dropped during the 1930s and 1940s as a result of the Depression and war, and then rose sharply from the 1950s onward. *See* David S. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65, 84-88 (1981).

[77] Progressives tried to abolish diversity jurisdiction in 1932 because they saw it as an unfair corporate litigation tool, but they naturally advanced their proposal, in part, as a measure "to relieve congestion in Federal courts." S. REP. NO. 72-530, at 10 (1932).

tional courts provided against "the perils of sectional bitterness, narrow prejudices, or local indifference to integrity and honor."[78]

The pattern continued throughout the twentieth century. When Congress again tried to abolish diversity jurisdiction in the late 1970s, the House Judiciary Committee supported its proposal by citing docket statistics showing that "some reduction in intake is imperative" and that abolishing diversity jurisdiction would be "an important step in reducing endemic court congestion."[79] Opponents discounted the statistics, rejecting the very idea that "the cure for any overburdened justice system is to limit the public's access to the system by reducing the scope of its jurisdiction."[80]

While statistical data demonstrated the continuing growth of the federal caseload, by themselves they seldom overcame congressional reluctance to impose significant jurisdictional limitations. Instead, Congress tended to respond to caseload pressures by increasing the number of federal judgeships and expanding the judiciary's institutional resources.[81] The growing availability of elaborate sets of judicial statistics, then, had relatively little impact on the rules of federal jurisdiction.[82]

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[78] FRANKFURTER & LANDIS, *supra* note 6, at 92 (quoting Representative George D. Robinson, a Massachusetts Republican, arguing in 1880 that diversity jurisdiction was necessary to protect eastern capital). *See generally id.* at 77-102 (detailing the efforts to relieve court congestion between 1875 and 1891).

[79] H.R. REP. NO. 95-893, at 2-3 (1978). Statistics showed that during 1977 there were 31,678 diversity cases filed in the federal courts, a quarter of the civil caseload, and that there were 1714 diversity cases in the courts of appeals, approximately eleven percent of the appellate caseload. *Id.* For the contemporaneous debate, see, for example, Adrienne J. Marsh, *Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts*, 48 BROOK. L. REV. 197 (1982), arguing that diversity jurisdiction should be modified to accentuate its strengths rather than abandoned; and Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: The Silver Lining*, 66 A.B.A. J. 177 (1980), arguing that the benefits of abolishing diversity jurisdiction outweigh the costs.

[80] *1979 House Hearings*, *supra* note 55, at 55 (statement of Edward W. Mullinix, Council Member, Litigation Section, American Bar Association).

[81] "The most obvious solution is to increase the capacity of the system . . . . Another possibility is to improve the efficiency of the system." *Id.*; *see also* DEBORAH J. BARROW & THOMAS G. WALKER, A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM (1988) (examining the decision of Congress to divide the Fifth Circuit Court of Appeals into two circuits); Edward A. Purcell, Jr., *Caseload Burdens and Jurisdictional Restrictions: Some Observations from the History of the Federal Courts*, 46 N.Y.L. SCH. L. REV. 7, 11-14 (2002) (noting various methods Congress has used to control the caseload burdens on federal judges).

[82] By the late twentieth century, the expanded administrative capacities of the federal courts generated more sophisticated data sets, and judicial reform efforts became increasingly professionalized. When jurisdictional issues impinged on social interests

E. *The Question of State-Federal "Parity"*

The last characteristic of federal jurisdictional reform was the debate it provoked over "parity," the question of whether the state courts were truly equal to the federal courts in quality and fairness.[83] There were, of course, many differences between federal and state courts and consequently many reasons why a party in any given case might prefer one to the other. Federal and state courts could differ in procedural rules (e.g., scope of allowable discovery), institutional characteristics (e.g., elected versus life-tenured judges), docket conditions (e.g., time to trial or final judgment), and informal contextual factors (e.g., the social make-up of jury pools). Whether those and other such observable differences led to any systematic differences in results, and whether any such differences were caused by "bias" or resulted in "unfairness," were the decisive questions.

While debates over proposed reforms usually raised the parity question, they never resolved it, at least as a general matter. Instead, participants gave voice to widely varying perceptions, with advocates of federal jurisdiction extolling the superiority of the national courts and their adversaries trumpeting the equal virtues of state courts. Judicial statistics, even in the early twenty-first century, provided little enlightenment. In specific areas they sometimes revealed problems with particular courts or with certain types of cases, but they furnished no general answer to the two basic questions of federal-state parity. Ulti-

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and seemed to affect judicial outcomes, however, the changes did not detract from the role played by ideology and politics. *See, e.g.*, BARROW & WALKER, *supra* note 81, at 32-51 (tracing significant motivation for the Fifth Circuit division to politically unpopular decisions made by that court during the civil rights era); PETER GRAHAM FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 427-37 (1973) (discussing the competing demands of political conformity and judicial independence in the administration of the federal judiciary); Brett Curry, *Institutions, Interests, and Judicial Outcomes: The Politics of Federal Diversity Jurisdiction*, 60 POL. RES. Q. 454 (2007) (suggesting that Congress's approach to diversity jurisdiction is more influenced by political and policy-based concerns when jurisdictional decisions involve areas in which the individual members take an interest); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 949-95 (2000) (outlining "the origins and components of the federal judicial agenda and explain[ing] how the federal judiciary functions as an interest group").

[83] For a contemporary discussion of the parity debate, see MICHAEL E. SOLIMINE & JAMES L. WALKER, RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM 29-62 (1999).

mately, Erwin Chemerinsky concluded, "the issue of parity is an empirical question for which no empirical measure is possible."[84]

Not surprisingly, the parity debate often revolved around the stock rationale of diversity jurisdiction. Advocates of preserving or expanding federal jurisdiction stressed the grave dangers of "bias" and "local prejudice," while those who sought to limit or abolish the jurisdiction minimized or denied these dangers. The former presented little in the way of affirmative evidence and wholly disregarded other evidence suggesting that, if "bias" and "local prejudice" did affect the judicial system, they might influence federal as well as state courts.[85] The lat-

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[84] Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 256 (1988). For a general discussion of the issue, see *id.* at 255-80. For some empirical evidence suggesting that state and federal courts handle civil rights cases similarly, see SOLIMINE & WALKER, *supra* note 83, at 73-79. As a general matter, many, and perhaps most, lawyers continued to believe that "local prejudice" of some kind remained a factor on at least some occasions, in some types of cases, or in some jurisdictions. One study found that local prejudice was a significant factor only in rural districts. *See* Kristin Bumiller, *Choice of Forum in Diversity Cases: Analysis of a Survey and Implications for Reform*, 15 LAW & SOC'Y REV. 749, 761 (1981) (suggesting that the "provincialism" of rural areas may create a greater risk of bias against out-of-state residents than would be the case in urban areas). Another found that bias against nonresidents was significant only in the South. *See* Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 407-12 (1992) ("Generally, defense attorneys in the Northeast, the industrialized Midwest, and the Far West reported low levels of bias against out-of-state litigants compared to attorneys elsewhere. By contrast, attorneys in most Southern States [sic] and the less industrialized Midwest reported such bias as affecting their forum filing decisions in high proportions." (footnotes omitted)). Most commentators also seemed to assume that whatever "prejudice" existed was not generally directed against foreign corporations but rather primarily against various disfavored social, racial, or ethnic groups. *See, e.g.*, ALI, STUDY, *supra* note 43, at 106 (claiming that any "local prejudice" that still exists is not based on a party's out-of-state status but arises from other social sources such as race, religion, and economic status). For other studies of "local prejudice," see POSNER, *supra* note 42, at 212-16 ("[E]mphasis on bias is misplaced for a variety of reasons unrelated to the alleged secular decline in sectional bias . . . ."); Jerry Goldman & Kenneth S. Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry*, 9 J. LEGAL STUD. 93, 104 (1980) (surveying Chicago-area lawyers and concluding that "fear of local bias does enter the calculus of decision in selecting a judicial forum"); Marvin R. Summers, *Analysis of Factors that Influence Choice of Forum in Diversity Cases*, 47 IOWA L. REV. 933, 937-38 (1962) (finding that geographic convenience, the availability of broader discovery procedures, and the belief that federal juries render higher awards were the most frequently indicated reasons for preferring a federal court in Wisconsin, rather than local bias); Note, *The Choice Between State and Federal Court in Diversity Cases in Virginia*, 51 VA. L. REV. 178, 180-84 (1965) ("Of the 163 Virginia lawyers who returned questionnaires, 19 per cent reported that they 'often' encounter local prejudice against out-of-state parties. Moreover, 60 per cent assigned it as a reason for proceeding in a federal court when representing an out-of-state plaintiff . . . .").

[85] *Cf.* POSNER, *supra* note 42, at 213, 215-16 (claiming that among practicing lawyers the role of local prejudice "isn't believed to differ greatly between state and fed-

ter relied primarily on simple assertions of skepticism about the existence of such bias or prejudice.[86] In pushing its bill to abolish diversity in 1978, for example, the House Judiciary Committee simply declared that it was "doubtful that prejudice against an individual because he is from another State is any longer a significant factor in this country's State courts."[87] The bill's opponents responded with predictable, but equally unproven, assertions. "There is local prejudice," representatives of the American Bar Association maintained.[88] "Nearly every lawyer who has significant trial experience has encountered local prejudice . . . ."[89]

Except in the most obvious and egregious cases, charges of "bias" and "local prejudice" were exceptionally difficult—if not impossible—to prove. Differences in results could readily flow from any number of fair and reasonable differences between individual courts and judicial

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eral court"). In the House hearings on a bill to abolish diversity jurisdiction in 1932, a bank attorney appeared in opposition and defended diversity jurisdiction as a protection against "local prejudice," but he pointed to only one example of such bias, an incident that occurred "some years ago in the *Federal* court." *Limiting Jurisdiction of Federal Courts: Hearing on H.R. 10594, H.R. 4526, and H.R. 11508 Before the H. Comm. on the Judiciary*, 72d Cong. 63 (1932) (statement of Washington Bowie, representing the Fidelity and Deposit Co. of Baltimore, Maryland) (emphasis added). For a similar statement about prejudice in the federal courts from a defender of diversity jurisdiction, see *1979 House Hearings*, *supra* note 55, at 55 (statement of Edward M. Mullinix, Council Member, Section of Litigation, and John C. Shepherd, Chairman, House of Delegates, American Bar Association). *See generally* PURCELL, *supra* note 16, at 137-42 (pointing to the inability of diversity defenders to cite significant evidence of "local prejudice" in state courts in the late nineteenth and early twentieth centuries). Other evidence suggested that, to the extent "bias" and "local prejudice" existed, they could operate in favor of corporate defendants that retained leading local attorneys to represent them before local juries and exercised a pervasive influence in many communities through their connections with local civic leaders, government officials, and business and professional groups. *Id.* at 30, 138; *accord* WILLIAM G. THOMAS, LAWYERING FOR THE RAILROAD: BUSINESS, LAW, AND POWER IN THE NEW SOUTH 69-99, 137-63 (1999) (discussing the means used by railroad companies to defend against personal injury suits, including employing local lawyers to act as lobbyists and to advise about when to remove a case to federal court to avoid local bias).

[86] *See* H.R. REP. NO. 80-308, at A133 (1947) (asserting that jurisdiction based on existence of local prejudice has no place in twentieth-century America); FCSC, REPORT, *supra* note 46, at 40 (conceding that prejudice "may be a problem in some jurisdictions," but claiming that this fact was not enough to justify retaining diversity jurisdiction).

[87] H.R. REP. NO. 95-893, at 4 (1978).

[88] *1979 House Hearings*, *supra* note 55, at 55 (statement of Edward M. Mullinix, Council Member, Section of Litigation, and John C. Shepherd, Chairman, House of Delegates, American Bar Association).

[89] *Id.* Revealingly, the statement continued to say that prejudice existed "not just in state courts but sometimes in federal courts as well." *Id.*

systems. Judges could rely, for example, on different but equally reasonable interpretations of legal rules, especially when the rules contained vague terms or required application of a "reasonableness" standard. Similarly, juries could easily draw differing but equally plausible conclusions when evaluating the credibility of witnesses or deciding hotly contested issues of fact. Any number of other factors, including differing but equally legitimate procedural rules and institutional arrangements, could also explain any noticeable differences in results between the two court systems. "There are perfectly sound tactical reasons for a lawyer in a given case to welcome the presence of diversity jurisdiction," Chief Justice William Rehnquist commented in 1993, "but they have almost nothing to do with" the existence of bias or local prejudice.[90]

Perceived differences between federal and state courts were, in fact, often based on assumptions about the differing political and social orientation of the judges themselves. For more than half a century, from Reconstruction to the New Deal, tort plaintiffs suing national corporations preferred state courts, in part because they believed that federal judges were biased against them. It was for that reason, among others, that Congress conferred a jurisdictional boon on FELA claimants when it made their actions nonremovable. It was for the same reason that, with no change in substantive law, FELA claimants suddenly began to bring their actions in federal court after World War II when Democratic appointments had transformed the political and social orientation of the federal judiciary.[91] Similarly, civil rights plaintiffs favored the federal courts after *Brown v. Board of Education*[92] and *Monroe v. Pape*,[93] but they began to hesitate and reconsider their preferences during the 1980s after Republicans began remaking the federal bench.[94] The political and social values of judges

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[90] William H. Rehnquist, Address, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WISC. L. REV. 1, 6.

[91] PURCELL, *supra* note 16, at 165, 220. On the reasons for the different forum preferences, see *id.* at 28-86.

[92] 347 U.S. 483 (1954).

[93] 365 U.S. 167 (1961), *overruled on other grounds by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

[94] *See, e.g.*, Sheldon Goldman et al., *Picking Judges in a Time of Turmoil: W. Bush's Judiciary During the 109th Congress*, 90 JUDICATURE 252, 283 (2007) [hereinafter Goldman et al., *Picking Judges*]; Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282 (1993) [hereinafter Goldman, *Bush's Judicial Legacy*].

shaped their articulation and application of the law;[95] presidents generally selected appointees whose political values and policy preferences reflected their own;[96] and lawyers and their clients understood that reality and responded accordingly.

The fact that judges were influenced by their personal political and social views was an awkward fact, for it called attention to an inherently political element in the nation's heralded "rule of law." For that reason, perhaps, the availability of a stock rationale—fear of "bias" and "local prejudice"—proved particularly serviceable. It allowed participants to make practical comparisons between federal and state courts—and to account implicitly for perceived differences in the social and political values of their respective judges—on grounds that were sanctioned by tradition and built in as justifications for the nation's dual court system. Thus, such charges could be advanced generally and without need for specific accusations. Charges of "bias," in fact, often emphasized merely "anticipated" as opposed to actual "bias"; when they did became specific, they were usually directed at local juries or local "popular" opinion. Moreover, when complaints did nod toward state judges, the blame often fell on the institution of elective judgeships, which purportedly placed undue political pressures on an otherwise fair-minded bench. Regardless of the covering

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[95] *Cf.* LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR (1997) (surveying research that has identified a variety of motivations influencing judges); LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE, at xiii (1998) ("[T]he choices of justices can best be explained as strategic behavior, not solely as responses to either personal ideology or apolitical jurisprudence."); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 208-60 (1993) ("[P]olitical attitudes are crucial to understanding the decisions made by Supreme Court justices."); CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 147 (2006) ("We have found striking evidence of a relationship between the political party of the appointing president and judicial voting patterns."). There is some evidence, too, that judges may be influenced by contributions to their election campaigns. *See* Deborah Goldberg, *Interest Group Participation in Judicial Elections*, *in* RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 73 (Matthew J. Streb ed., 2007); Madhavi M. McCall & Michael A. McCall, *Campaign Contributions, Judicial Decisions, and the Texas Supreme Court: Assessing the Appearance of Impropriety*, 90 JUDICATURE 214 (2007) (suggesting a link between campaign contributions and judicial decisions in the Texas Supreme Court).

[96] *See* SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 361 (1997) ("In short, the evidence presented in this book at the least suggests that presidential agendas and judicial selection are intimately tied and that the policy agenda tends to predominate in times of political realignment."). "Many, perhaps most, of the [George H.W.] Bush appointees actively share Bush's judicial philosophy and conservative views. This surely is a legacy to be reckoned with." Goldman, *Bush's Judicial Legacy*, *supra* note 94, at 297.

rhetoric, however, debates over the parity question were often influenced by the participants' perceptions of the political and social orientations of federal and state judges.

II. CAFA: JURISDICTIONAL REFORM IN THE CLASSIC MODE

Considered in light of those five characteristics, CAFA appeared for the most part a typical example of federal jurisdictional reform. With two notable exceptions—its innovative exploitation of diversity's plasticity and its unusually blunt attack on state courts—CAFA followed the classic reform path in genesis, shaping, and enactment.

A. *Practicality*

CAFA was surely a response to practical problems that were both weighty and pressing. To a large extent those problems grew out of the 1966 amendments to Rule 23 of the Federal Rules of Civil Procedure, which introduced in subsection (b)(3) a new and expanded form of class action based on the presence of "common issues" of law and fact.[97] After witnessing an initial burst of class action litigation, the federal courts held the new form in tight check until the mid-1980s when rapidly expanding docket pressures from mass tort claims induced them to begin certifying "common issue" class actions.[98] Those actions quickly proliferated in number and expanded in variety for a decade until the federal courts again changed course and demonstrated a growing suspicion, if not outright hostility, toward them.[99]

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[97] FED. R. CIV. P. 23(b)(3).

[98] From the late 1960s into the early 1980s, the federal courts were unwilling to certify even relatively simple "single event/single situs" mass accident torts as class actions, but by the late 1980s they were certifying far more complicated and multifaceted "mass exposure" class actions. *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1344-45 & nn.2-3, 1358 (1995). In 1984 the Second Circuit affirmed the certification of a Rule 23(b)(3) mass tort class action in *In re Diamond Shamrock Chemicals Co.*, 725 F.2d 858, 860-61 (2d Cir. 1984), *aff'g In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718 (E.D.N.Y. 1983), and two years later the Third and Fifth Circuits affirmed class certifications in similar mass tort class actions. *See In re* School Asbestos Litig., 789 F.2d 996 (3d Cir. 1986); Jenkins v. Raymark Indus., 782 F.2d 468 (5th Cir. 1986). The next decade brought a growing number of such cases into the national courts. "The hypothesis that best explains this puzzling inconsistency," John Coffee wrote, "is that the burden on the courts from a failure to certify was far greater in the latter context where individual actions would otherwise proliferate," and "the end of saving the federal docket justified means that otherwise might seem improper." Coffee, *supra*, at 1358, 1364.

[99] Two decisions are commonly cited as pivotal: the Fifth Circuit's decision in *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996), and the Seventh Circuit's de-

That change in attitude spurred plaintiffs' attorneys to turn to the state courts where "common issue" class actions were sometimes treated more sympathetically and certified more readily.[100] Indeed, during the preceding decade the Supreme Court had, in effect, encouraged such state court class actions by upholding the power of state courts to enter judgments binding out-of-state class members who lacked "minimum contacts" with the forum state.[101]

It was in that context that Congress took up the issue in the late 1990s,[102] seeking to remedy a range of problems attributed to class actions, their rapidly expanding use, and their shift into the state courts. First were difficulties that inhered in the representative form itself. Class members were generally unable to monitor and control class attorneys, and during the course of litigation many critical decisions were made with inadequate or no notice given to class members. Further, the form created potential conflicts of interest among class members, between class members and their named representatives,

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cision, written by Judge Richard A. Posner, *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1304 (7th Cir. 1995).

[100] *See, e.g.*, Glenn A. Danas, *The Interstate Class Action Jurisdiction Act of 1999: Another Congressional Attempt To Federalize State Law*, 49 EMORY L.J. 1305, 1308-26 (2000); *Developments in the Law—The Paths of Civil Litigation*, 113 HARV. L. REV. 1752, 1819-20 (2000). RAND reported that in 1995–1996 approximately sixty percent of the class actions it identified had been filed in state court. DEBORAH R. HENSLER ET AL., RAND INST. FOR CIVIL JUSTICE, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 56 (2000). A similar shift toward state courts occurred in shareholder class actions under the securities laws after Congress tightened requirements on such actions in the Private Securities Litigation Reform Act of 1995. While only twenty percent of securities class actions had been filed in the state courts in 1995, reports indicated that some forty percent were filed in state courts during the first ten months of the following year. Richard H. Walker, David M. Levine & Adam C. Pritchard, *The New Securities Class Action: Federal Obstacles, State Detours*, 39 ARIZ. L. REV. 641, 644 (1997). For the advantages offered in state courts, see *id.* at 677-83.

[101] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 806-12 (1985) (holding that a state court does not violate due process when it asserts personal jurisdiction over absent members of a Rule 23(b)(3) plaintiff class who have been given opt-out notice, even when some members do not otherwise have minimum contacts with the forum state). Two other decisions also contributed: *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367, 386-87 (1996), which held that the state court class action judgment based on a settlement is binding under the Full Faith and Credit Clause, notwithstanding the fact that the settlement released claims within exclusive jurisdiction of federal courts, and *Sun Oil Co. v. Wortman*, 486 U.S. 717, 731 (1988), which refused to review a state court choice of law decision applying forum-state law in a multistate class action on the ground that the law of other potentially relevant states was the same as that of the forum state.

[102] For discussions of congressional criticisms of the class action form, see Andreeva, *supra* note 2, at 392-99; Justin D. Forlenza, *CAFA and* Erie*: Unconstitutional Consequences?*, 75 FORDHAM L. REV. 1065, 1083-89 (2006).

and between class members and their attorneys.[103] Thus, the form was susceptible to abuse because class members had little knowledge of or control over the litigation and because potential conflicts of interest created opportunities for class representatives and attorneys to collude with class adversaries.

Second were problems that arose because most class actions were settled out of court and, increasingly, filed solely as comprehensive settlement devices.[104] Such settlements, many critics charged, often provided little or no monetary relief to class members and functioned primarily to allow defendants to buy a cheap "global peace" by paying large legal fees to class attorneys.[105] The practice raised even more acute problems when settlements sought to resolve claims that had not yet matured or that belonged to class members who had not yet been identified.[106]

Third were problems that class actions posed for courts. Such suits often involved massive numbers of class members, exceptionally complex legal and factual issues, and unusually heavy administrative burdens.[107] In addition, they increasingly induced the courts to adopt a variety of procedural shortcuts and experiments to make cases more manageable. Such ad hoc approaches often fit poorly with ostensibly

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[103] It is questionable whether attorneys representing classes are, in fact, subject to less supervision than attorneys representing most individual clients. *See, e.g.*, DOUGLAS ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? (1974); AUSTIN SARAT & WILLIAM L.F. FELSTINER, DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS (1995). On the importance of "client-centered" representation in class actions, see Lawrence M. Grosberg, *Class Actions and Client-Centered Decisionmaking*, 40 SYRACUSE L. REV. 709 (1989).

[104] A study by the Federal Judicial Center found that of 152 suits certified as class actions in the mid-1990s, fifty-nine were certified for settlement purposes only. In addition, class actions settled at a high rate and were two to five times more likely to settle than uncertified cases that contained class allegations. THOMAS E. WILLGING, LAURAL L. HOOPER & ROBERT F. NIEMIC, FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS 7, 10 (1996).

[105] *See* Coffee, *supra* note 98, at 1349-52, 1373-84; John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 243-46 (1983); Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 CORNELL L. REV. 811, 817 (1995).

[106] Richard L. Marcus, *They Can't Do That, Can They? Tort Reform via Rule 23*, 80 CORNELL L. REV. 858, 882-95 (1995); Young K. Lee, Note, *Beyond Gatekeeping: Class Certification, Judicial Oversight, and the Promotion of Scientific Research in "Immature" Pharmaceutical Torts*, 105 COLUM. L. REV. 1905, 1923-38 (2005) (suggesting procedural mechanisms to handle such cases).

[107] One study found that, compared to nonclass civil actions, class actions tended to take two to three times longer to move from filing to disposition and to require five times more "judicial time." WILLGING, HOOPER & NIEMIC, *supra* note 104, at 7.

controlling rules of law, and creative adaptations sometimes generated as many or more problems as they resolved.[108] Further, class actions required special judicial scrutiny at both the certification and settlement stages, compelling judges to apply vague rules to massively complex facts and to make exceptionally difficult and essentially pragmatic judgments.[109]

Fourth, the modern class action also raised a variety of federalism-related issues. Class action attorneys shopped for the most promising forum, and when they wished to avoid the federal courts in suits raising state law claims they were able to do so by adding diversity-destroying parties or bringing small-claims actions.[110] Further, multistate class actions based on state law claims raised complex choice of law problems and generated pressure for the application of a single state's law or for the creation of supervening national rules that would allow class actions to be relatively easily and uniformly resolved. Perhaps most important for at least some critics, multistate class actions gave state courts a major role in resolving cases of broad national significance, cases that involved parties from many states, issues that affected all Americans, and disputes that were central to interstate and international commerce. Thus, some argued, such actions placed state courts in the inappropriate position of establishing rules and rights that were national in scope and impact.[111]

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[108] *See, e.g.*, Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 956-60 (1995) (noting that such innovative approaches undermine the predictability that induces efficient settlements). Because they "were not free to fashion law as they saw fit" in state law class actions, federal judges "continued to grind their teeth about state law." Marcus, *supra* note 106, at 863; *see also id.* at 872-82 (discussing *Erie* problems raised by class actions).

[109] Cramton, *supra* note 105, at 822-23. The breadth of class action settlements and judgments even led to the charge that the form was an affront to democracy and democratic lawmaking. *See* Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71.

[110] S. REP. NO. 109-14, at 10 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 11. For a summary of criticisms directed at the state courts, see Danas, *supra* note 100, at 1321-31.

[111] CAFA's supporters attacked what they called "false federalism," the alleged practice of state courts adjudicating multistate class actions to apply their own law and thereby ignore the interests of the other states and the applicability of their laws. *See* S. REP. 109-14, at 62; S. REP. 108-123, at 61-62 (2003); H.R. REP. 108-144, at 15 (2003). "This practice is an affront to federalism," the House Judiciary Committee declared, "because it results in one State court judge effectively making the law of that State applicable nationwide." H.R. REP. 108-144, at 13. Yet, it was not clear that such state court class actions commonly or necessarily transgressed any constitutional limit on either state choice of law rules or state assertions of jurisdiction over nonresident class members. *See, e.g.*, Sun Oil v. Wortman, 486 U.S. 717, 730-31 (1988) ("To constitute a violation of the Full Faith and Credit Clause or the Due Process Clause, it is not

Finally, in the view of some critics, class actions brought harmful consequences to American society generally. They created the lure of large fees that could spur attorneys to file "frivolous," and sometimes duplicative and "dueling," suits designed to compel "deep pocket" defendants to fund nuisance settlements that included large fee awards for class attorneys.[112] The result was unnecessary litigation that wasted the resources of both courts and parties. Further, the potentially massive damages that class actions threatened could unfairly intimidate honest businesses and force them into paying for baseless claims. Even worse, massive judgments could disrupt industries, destroy companies, and increase bankruptcies. Most broadly, some critics charged, class actions severely handicapped the entire economy by raising business costs and making American corporations less competitive in world markets.

To the extent that those problems existed—issues that were sharply and widely contested—they were truly serious, indeed grave. What was perhaps most intriguing about CAFA, however, was that it chose not to address most of those problems, at least not directly.[113] The statute's principal provisions simply gave the federal courts original and removal diversity jurisdiction over most multistate class actions involving state law claims.[114] Beyond that, its "Consumer Class Action

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enough that a state court misconstrue the law of another state. Rather, our cases make plain that the misconstruction must contradict the law of the other State that is clearly established and that has been brought to the court's attention."); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 816 (1985) (requiring a "material" conflict "with any other law which could apply" to prove a Due Process violation); Woolley, *supra* note 2, at 1726-35 (reviewing *Shutts*, *Sun Oil*, and other cases).

[112] *See* Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 462 (2000) (stating that dueling class actions "are rampant," and that they "enhance the pressure to settle and increase the likelihood of inadequate settlements").

[113] CAFA summarized the findings on which Congress acted. "Over the past decade," it declared, "there have been abuses of the class action device," including harm to plaintiffs, defendants, interstate commerce, and the nation's judicial system. CAFA § 2(a)(2), 28 U.S.C. § 1711 note (Supp. V 2005). More specifically, the statute identified two general types of harm that the abuses caused: harm to class members (inadequate remedies for class members, excessive fees for class attorneys, discrimination between class members, and confusing notices to class members), and harm to the economy and the judicial system (due to the fact that, when state courts hear interstate cases, they keep cases of national importance out of the national courts, sometimes demonstrate "bias" against "out-of-[s]tate defendants," and improperly impose local laws on other states and parties resident in those other states). *Id.* § 2(a)(3)–(4).

[114] *Id.* §§ 4–5, 28 U.S.C. §§ 1332, 1453. The provisions contained various elaborate exceptions designed to allow class actions rooted overwhelmingly in a single state (those in which most class members and principal defendants were citizens of the fo-

Bill of Rights" addressed only three narrow settlement situations,[115] and its provision requiring defendants to serve notice of proposed settlements on government officials imposed no duties or responsibilities on those officials.[116] Thus, CAFA's design seemed apparent. It sought to reverse the litigation trend of the preceding decade by bringing most multistate class actions into the national courts, and it sought to reduce or eliminate the problems that class actions created by subjecting them to what would purportedly be the superior and more exacting supervision of the federal courts.

B. *Debating and Adapting Diversity Jurisdiction*

In seeking to use diversity jurisdiction to resolve class action problems, CAFA reflected continuity with the past. It followed a long line of reform proposals that sought to adapt the jurisdiction to changing social, political, and economic conditions. It also relied for the most part on established doctrines in doing so. In altering the amount in controversy requirement and the technical rules of removal, it employed long-established techniques, and in utilizing the newer doctrine of "minimum diversity," it followed the path marked out by several recent statutes.[117]

CAFA was atypical, however, in two related respects. First, it moved against the general trend toward limiting diversity jurisdiction that had marked most reform campaigns since the late nineteenth century and, unlike the majority of those restrictive efforts, became

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rum state, especially if the alleged unlawful conduct occurred in the forum state) to remain in the courts of that state.

[115] *Id.* § 3, 28 U.S.C. §§ 1711–1715. The section dealt with settlements involving (1) possible "net loss" to class members, (2) awards giving class members different recoveries based on "geographic proximity to the court," and (3) fee awards to plaintiffs' attorneys in "coupon settlements." *Id.* § 3, 28 U.S.C. §§ 1713, 1714, 1712. Although the Act imposed certain strictures on such settlements, it did not proscribe any of them but left their evaluation to the judgment of the court. Even much-maligned "coupon settlements," for example, had their defenders. *See* James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 GEO. J. LEGAL ETHICS 1443 (2005). For a general criticism of CAFA's settlement provisions, see Robert H. Klonoff & Mark Herrmann, *The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements*, 80 TUL. L. REV. 1695 (2006).

[116] CAFA § 3, 28 U.S.C. § 1715(f).

[117] Congress passed a series of federal interpleader acts that are currently codified at 28 U.S.C. § 1335. Other recent statutes include the Multiparty, Multiforum Trial Jurisdiction Act of 2002, Pub. L. No. 107-273, § 11020, 116 Stat. 1758, 1826 (codified at 28 U.S.C. § 1369) and the Y2K Act, Pub. L. No. 106-37, 113 Stat. 185 (codified at 15 U.S.C. §§ 6601–6617 (2000)).

law.[118] Second, it opened new vistas for the expanded and highly flexible use of the jurisdiction by exploiting its two most potentially powerful instrumental characteristics: its nearly illimitable plasticity and its precise targeting capability. CAFA illuminated and exploited the vast potential for expanded federal power that was inherent in combining "minimum" diversity with congressional authority to establish special rules for particular categories of litigants. Thus, CAFA showed that diversity jurisdiction—for the past century largely scorned as an inappropriate jurisdiction for the national courts—was capable of becoming a particularly supple and far-reaching tool of national power, and of providing the elastic basis for a potentially vast and sharply focused federal "protective jurisdiction."[119]

Indeed, the statute and its underlying theory construed the Constitution in a way that would allow Congress to extend federal jurisdiction to any case involving any kind of state law claim or any particular

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[118] *See* Curry, *supra* note 82, at 455-56.

[119] *See* James E. Pfander, *The* Tidewater *Problem: Article III and Constitutional Change*, 79 NOTRE DAME L. REV. 1925, 1927-28 (2004) ("Congress may have the authority to protect an area of federal interest from potentially hostile state court adjudication by shifting the litigation into the presumptively more friendly confines of a federal court . . . ."). The idea of a federal "protective jurisdiction" was advanced in the famous casebook, HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 371-72, 744-47 (1st ed. 1953). Essentially, they argued that Congress could extend federal jurisdiction to cases involving some kind of federal interest even in the absence of both diversity jurisdiction and a claim based on federal law. Although there are Supreme Court decisions that arguably support the concept of protective jurisdiction, the Court has never expressly adopted it and has appeared, rather, to reject it. *See, e.g.*, Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 497 (1983) (upholding jurisdiction over a suit between a foreign corporation and a foreign government on the ground that the suit involved a preliminary issue of federal law); Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 456-57 (1957) (upholding jurisdiction on the ground that a federal jurisdictional statute also conferred authority on federal courts to make substantive federal law to govern cases brought under the statute); Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949) (plurality opinion) (upholding the constitutionality of a statute extending diversity jurisdiction to suits between citizens of the District of Columbia and a state). Ironically, it was Justice Felix Frankfurter, a determined opponent of diversity, who suggested that the jurisdiction constituted a kind of "protective jurisdiction" operating within the limits of Article III. *See Textile Workers Union*, 353 U.S. at 473-77 (Frankfurter, J., dissenting); *see also* Linda Mullenix, *Complex Litigation Reform and Article III Jurisdiction*, 59 FORDHAM L. REV. 169 (1990) (discussing theories of jurisdiction and critically analyzing actions by Congress to alter the rules of federal jurisdiction); Louise Weinberg, *The Power of Congress over Courts in Nonfederal Cases*, 1995 BYU L. REV. 731 (examining congressional power over state courts and reasoning that it is the national interest that defines the general scope of Congress's powers over both federal and state courts); Note, *The Theory of Protective Jurisdiction*, 57 N.Y.U. L. REV. 933 (1982) (describing the "forum-based" theory of protective jurisdiction).

category of party as long as the case involved, somehow and somewhere along the line, a diverse party.[120] In the context of twenty-first-century commerce and communications, the reach of such a jurisdiction seemed, with respect to cases of any social or economic resonance, virtually unlimited. By combining the statutory definition of corporate citizenship with the minimum diversity doctrine, for example, Congress could extend federal jurisdiction to any and all suits between any corporation in the world and any citizen of any state in the Union.[121] Further, were Congress to combine its power to shape diversity jurisdiction with the specification of "necessary" and "indispensable" parties, it could single out and pull into the national courts any kind of suit it wished to control.[122] Indeed, were Congress to try to stretch its power to make certain kinds of claims "exclusive" to the national courts, it might even be able to exclude selected state law actions entirely from the state courts.[123]

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[120] A constitutional "case" is a broad concept. *See* United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 & n.12 (1966) (defining a constitutional "case" broadly to include all claims that arise out of the same "common nucleus of operative fact").

[121] For diversity purposes, a corporation is considered a citizen of the state of its incorporation and of the state where its "principal place of business" is located. 28 U.S.C. § 1332(c)(1) (2000). Thus, except for corporations whose "principal place of business" is located in their state of incorporation, every corporation could be considered minimally diverse from every human person who is a citizen of any state. In addition, using alienage jurisdiction, 28 U.S.C. § 1332(a)(2), Congress could extend jurisdiction to foreign corporations or foreign citizens or subjects, limited only by the requirement that a citizen of a state be a party to the suit.

[122] Given the de facto conditions of twenty-first-century life, CAFA's "originalist" rationale for diversity jurisdiction—combined with the doctrine of "minimum diversity" and the liberal joinder provisions of the Federal Rules of Civil Procedure—would allow Congress to provide for federal jurisdiction over almost any lawsuit in which one original or subsequently added party sought a federal forum. At the same time, the ability to identify particular categories of cases, define "citizenship for diversity purposes," raise or lower jurisdictional amounts, and impose other special restrictions or definitions would allow Congress to pick and choose carefully among the cases it wished to see brought into the federal courts.

[123] Some form of preemption might be advanced as a justification for accomplishing such a goal. *See, e.g.*, Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 77p (2000) (preempting certain state law claims involving securities fraud and requiring removal of such cases to federal court); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353 (2006); Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures*, 44 VILL. L. REV. 1 (1999); Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227 (2007). Congress has provided for federal jurisdiction over certain special categories of tort cases and mandated that "substantive law" in actions under the statutes "shall be derived from" state law. Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, § 11(b), 102 Stat. 1066, 1076 (codified as amended at 42 U.S.C. § 2014(hh) (2000)) (concerning actions arising out of nuclear

Further, CAFA strengthened the legitimacy of such a potentially vast and pliable protective jurisdiction with its originalist constitutional justification, asserted not once but twice in the statute's statement of "Findings and Purposes." Its goal, CAFA declared, was to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction."[124] CAFA was soundly based, the Senate Judiciary Committee explained, because the "Framers established diversity jurisdiction to ensure fairness for all parties in litigation involving persons from multiple jurisdictions."[125] President Bush assured Americans on the same point. "If I were someone who was out there wondering whether or not we were making the right decision [in enacting CAFA], I would go back and harken back to the papers of the Founding Fathers, when they talked about adjudicating disputes like this."[126] CAFA, the President declared, was rooted in "the framers' view of how a fair system is to work."[127] Indeed, the Senate Judiciary Committee maintained that class actions were an ideal fit with the Founders' original intent. "Interstate class actions which often involve millions of parties from numerous states—present *the precise concerns that diversity jurisdiction was designed to prevent* . . . ."[128] Such cases, the Committee continued, were often subjected to "state court provincialism against out-of-state defendants or a judicial failure to recognize the interests of other states in the litigation."[129]

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incidents); Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 408(b), 115 Stat. 230, 240-41 (2001) (codified as amended at 49 U.S.C. § 40101 note (Supp. III 2003)) (concerning actions arising out of four airline crashes on September 11, 2001). Justifications for such statutes—for example, that Congress can provide a form of "protective" jurisdiction over any claim that serves a legitimate Article I concern—could be used to support the same goal. *See, e.g.*, Eric J. Segall, *Article III as a Grant of Power: Protective Jurisdiction, Federalism and the Federal Courts*, 54 FLA. L. REV. 361 (2002).

[124] CAFA § 2(b)(2), 28 U.S.C. § 1711 note (Supp. V 2005). For the other "originalist" reference, see § 2(a)(4), which refers to diversity jurisdiction as being "intended by the Framers of the United States Constitution."

[125] S. REP. NO. 109-14, at 6 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 7.

[126] Remarks in a Discussion on Class-Action Lawsuit Abuse, 41 WEEKLY COMP. PRES. DOC. 200, 204 (Feb. 9, 2005).

[127] *Id.*

[128] S. REP. NO. 109-14, at 6, *reprinted in* 2005 U.S.C.C.A.N. at 7 (emphasis added). The House Judiciary Committee stressed that the "procedural limitations regarding interstate class actions are policy decisions, *not* constitutional ones." H.R. REP. NO. 108-144, at 10 (2003).

[129] S. REP. NO. 109-14, at 6, *reprinted in* 2005 U.S.C.C.A.N. at 7.

Those varying formulations of diversity's "original" rationale—especially the alleged intent to reach "cases of national importance," protect the "interests" of other states, and guard against state "provincialism"—were essentially boundless. Exhibiting the amiable and inviting free-form potential of "originalism," those rationales could easily justify Congress in stretching diversity jurisdiction to reach almost any type of lawsuit it wished—and do so, of course, with the full blessing of the Founders themselves. The expansive potential of CAFA's "originalist" rationale was particularly broad, too, because nothing like the modern class action, especially in its "common issue" form, had existed in eighteenth-century America.[130] Thus, the form was entirely absent from the Founders' thinking. In adapting those elastic rationales and exhibiting diversity's powerful nationalizing potential, CAFA opened new possibilities for future federal jurisdictional reform and for the virtually unlimited—if precisely targeted—expansion of federal judicial power.[131]

C. *Obscured Duality: Goals and Results*

In its goals and anticipated consequences, CAFA was entirely typical. Efforts to address troublesome legal problems blended with efforts to secure benefits for favored interests, and efforts to serve accepted public values blurred with efforts to shape those values into weapons of partisan advantage. The statute's final shape, moreover, was determined by two classic conditioning factors. No reform, how-

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[130] Although the class action had indirect roots in earlier English practice, the form did not appear in America until the early nineteenth century. *See* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 213 (1987) ("Group litigation first comes to light in reported American cases in 1820."). It was not until 1833, moreover, that the federal courts adopted their first equity rule providing for group litigation. HENSLER ET AL., *supra* note 100, at 10. CAFA's rationale thus contradicts the originalist principle, advanced by Justice Scalia in the substantive due process context, that constitutional concepts should be interpreted at their "most specific level" of meaning and should not be raised to higher levels of abstraction in order to make them more capacious than they were "originally." Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (Scalia, J., announcing the judgment of the Court, joined in note 6 only by Rehnquist, C.J.).

[131] Scholars have long focused on the question of congressional power to limit the jurisdiction of the national courts. *See, e.g.*, Gerald Gunther, *Congressional Power To Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984) (differentiating between Congress's power to curb the Supreme Court's appellate jurisdiction, its power to change lower federal courts, and the wisdom of doing either). CAFA may inspire them to focus on the issue from an entirely different perspective.

ever well intentioned, could alter federal jurisdiction in an entirely "neutral" way, and not even the wisest reform could become law without the support of powerful political and social interests.

The statute's final version was a product of legislative compromise.[132] Early drafts were designed to sweep class actions into the federal courts more broadly, and they provided narrower exclusions and required a smaller jurisdictional minimum of only one million dollars.[133] Subsequent versions attempted to clarify and broaden the exceptions and eventually raised the jurisdictional amount to five million dollars.[134] Further, under continued prodding from critics, Congress added the statute's notice and consumer rights provisions.[135]

The political battle lines were clear and sharp, and some observers attributed the bill's final passage to Republican congressional gains in the 2004 election.[136] One of CAFA's principal drafters was John Beisner, a partner at O'Melveny & Myers, who was a leading class action defense attorney.[137] The statute's passage was the product of Republican majorities whose support for the bill was virtually unanimous. In the House, 229 Republicans supported it, while 1 opposed, and in the Senate, 53 Republicans voted in favor and none against.[138] Further,

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[132] *See* Burbank, *supra* note 2, at 1441; Woolley, *supra* note 2, at 1748-49 & n.134.

[133] Early drafts did not impose a jurisdictional amount as such but provided for an exclusion for class actions seeking a total of less than one million dollars. The amount was to be calculated by aggregating the claims of all class members. *See* Interstate Class Action Jurisdiction Act of 1999, H.R. 1875, 106th Cong. § 3(a); Class Action Jurisdiction Act of 1998, H.R. 3789, 105th Cong. § 2(a). On both bills, the House Judiciary Committee quoted the Congressional Budget Office report stating that passage of the bills would mean that "most class-action lawsuits would be heard in [f]ederal district court rather than State court." H.R. REP. NO. 106-320, at 20 (1999); *accord* H.R. REP. NO. 105-702, at 11 (1998) (alteration in original but not marked). For a discussion of the earlier version of the act, see Danas, *supra* note 100.

[134] *See* Andreeva, *supra* note 2, at 387-88. CAFA rejected the standard rule in diversity actions that plaintiffs' claims may not be aggregated to reach the jurisdictional minimum by providing that "the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000." CAFA § 4(a), 28 U.S.C. § 1332(d)(6) (Supp. V 2005).

[135] For a history of the changes made in the various predecessor drafts, see Robert Pitard Wynne, *Diversity Class Actions in Louisiana: A Resolution to the National Class Action Debate?*, 50 LOY. L. REV. 749, 760-82 (2004), and sources cited *supra* note 2.

[136] *See Bush Signs Bill Curbing Lawsuits*, FOXNEWS.COM, Feb. 20, 2005, http://www.foxnews.com/story/0,2933,148003,00.html (noting the significance of Republican gains and the fact that, after the election, several Democrats "defected on the issue").

[137] Edward F. Sherman, *Class Actions After the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1593, 1609 n.62 (2006).

[138] Office of the Clerk, U.S. House of Representatives, Final Vote Results for Roll Call 38, http://www.clerk.house.gov/evs/2005/roll038.xml (last visited Apr. 15, 2008);

business groups lined up solidly in support. Public Citizen, a consumer rights organization, counted more than one hundred large corporations and business associations that supported CAFA and helped push the bill to passage. [139] In addition to other assistance, those organizations enlisted the services of almost five hundred Washington lobbyists.[140] During the preceding three election cycles from 2000 to 2004, moreover, twenty-nine of them had given Republicans approximately $49 million in contributions.[141] Finally, some companies forthrightly announced the bill's operative purpose. Citicorp boasted that CAFA's "practical effect" would be "that many cases will never be heard," while *Forbes* magazine predicted approvingly that the bill would "make it more difficult for plaintiffs to prevail."[142]

U.S. Senate, Roll Call Votes, 109th Congress—1st Session, http://www.senate.gov/legislative/LIS/roll_call_lists/vote_menu_109_1.htm (follow link for vote 00009) (last visited Apr. 15, 2008).

[139] Allan Kanner, *Interpreting the Class Action Fairness Act in a Truly Fair Manner*, 80 TUL. L. REV. 1645, 1659 (2006).

[140] *See id.*

[141] *Id.*

[142] *See id.* at 1660 (quoting 151 CONG. REC. H726 (daily ed. Feb. 17, 2005) (statement of Rep. Conyers)). For Conyers's views, see John Conyers, Jr., *Class Action "Fairness"—A Bad Deal for the States and Consumers*, 40 HARV. J. ON LEGIS. 493 (2003). Fox News similarly reported that "[f]ederal courts are expected to allow fewer large class-action suits to go forward." *See Bush Signs Bill Curbing Lawsuits*, *supra* note 136. Two attorneys at the prominent Houston firm Fulbright & Jaworski similarly announced that the bill "will put class actions in the hands of federal judges who may apply class action rules more strictly than plaintiff-friendly state courts." DANIEL M. MCCLURE & PATRICK BISHOP, THE CLASS ACTION FAIRNESS ACT OF 2005 SIGNIFICANTLY EXPANDS FEDERAL JURISDICTION OVER CLASS ACTIONS 1 (2005), *available at* http://www.martindale.com/class-actions-law/article_Fulbright-Jaworski-L.L.P._126234.html; *see also* Andreeva, *supra* note 2, at 409 ("[CAFA] is designated to funnel class action suits with plaintiffs in different States out of State courts and into the Federal court system, which is typically much less sympathetic to such litigation." (quoting 151 CONG. REC. H733 (daily ed. Feb. 17, 2005) (statement of Rep. Markey, a Massachusetts Democrat))).

Opposing passage were most congressional Democrats[143] and literally "dozens of civil rights, consumer, environmental and public interest advocates and several state Attorneys General."[144] The opposition included almost every well-known "liberal" organization in the country,[145] as well as many highly respected nonpartisan organizations, such as the American Association of Retired Persons, the American Cancer Society, the Consumer Federation of America, the National Resources Defense Council, and the Sierra Club.[146] Joining them in opposition were national organizations that represented all state judges and all state legislators.[147] Indeed, the Judicial Conference of the United States, while acknowledging that it might be "appropriate" to bring some class actions into the national courts, seemed to remain true to its long-standing opposition to expanding federal jurisdiction and refused to support the bill. CAFA's provisions, the Judicial Conference had declared in 2003, "would add substantially to the workload of the Federal courts and are inconsistent with principles of federalism."[148]

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[143] On the final vote some Democrats—50 in the House and 18 in the Senate—supported CAFA, but the great majority—147 in the House and 26 in the Senate—remained opposed. *See* Office of the Clerk, *supra* note 138; U.S. Senate, *supra* note 138. The same party lines marked earlier procedural votes. When the Senate voted on cloture on a predecessor bill in 2004, 42 of the 44 votes to terminate debate came from Republicans. Three Republicans voted against cloture, as did 39 Democrats. On a similar vote the previous year, 50 Republicans voted to terminate debate along with 8 Democrats and 1 independent. Thirty-eight Democrats voted against, as did 1 Republican. Wynne, *supra* note 135, at 751 n.8. More generally, a study of congressional voting on twenty related issues found that "Democrats voted for the prolitigation side on an average of 67 percent of the [time], Republicans 17 percent." THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY 188 (2002); *accord* Thomas J. Campbell, Daniel P. Kessler & George B. Shepherd, *The Causes and Effects of Liability Reform: Some Empirical Evidence* 23-24, 38 (Nat'l Bureau of Econ. Research, Working Paper No. 4989, 1995).

[144] S. REP. NO. 109-14, at 82-83 (2005), *reprinted in* 2005 U.S.C.C.A.N. at 3, 75-76 (footnote omitted) (reporting "Minority Views").

[145] Included in opposition were the AFL-CIO, Americans for Democratic Action, Friends of the Earth, Greenpeace, Lawyers' Committee for Civil Rights Under Law, the Mexican-American Legal Defense and Educational Fund, the NAACP, the National Asian Pacific American Legal Consortium, the National Association of Consumer Advocates, the National Center on Poverty Law, the National Consumers League, the National Organization for Women, and People for the American Way. *Id.* at 83 n.4.

[146] *Id.*

[147] Posting of nimda to Nader.org, Ralph Nader, Statement on the Passage of S.5, The Misnamed "Class Action Fairness Act," http://www.nader.org/index.php?/archives/2005/02.html (follow the hyperlink for "Thursday, February 10. [sic] 2005") (Feb. 10, 2005).

[148] Letter from Leonidas Ralph Mecham, Sec'y, Judicial Conference of the U.S., to Orrin Hatch, Chair, Senate Judiciary Comm. (Mar. 26, 2003), *in* 149 CONG. REC.

The conviction that animated most of CAFA's supporters was that the federal courts were much less likely to certify suits as class actions than were state courts and that denials of certification would, one way or another, quickly and abruptly end many, if not most, of them.[149] The federal courts imposed more rigorous certification standards and refused certification in larger numbers of cases.[150] Moreover, at early dates, they also dismissed many class actions, often before they even decided the certification issue.[151] Indeed, most plaintiffs' attorneys

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S12876-77 (daily ed. Oct. 20, 2003). The Senate Judiciary Committee minimized the opposition of the Judicial Conference. *See* S. REP. NO. 109-14, at 12, *reprinted in* 2005 U.S.C.C.A.N. at 13. For the Judicial Conference view when CAFA was passed, see *Sentencing Appeals and Class Action Lawsuits Will Cost the Judiciary*, THE THIRD BRANCH, Mar. 2005, http://www.uscourts.gov/ttb/mar05ttb/appeals/; Press Release, Admin. Office of the U.S. Courts, Judiciary Asks Congress To Ease Financial Hardships of Courts (Apr. 12, 2005), http://www.uscourts.gov/Press_Releases/FY06Budget.pdf; Statement of Leonidas Ralph Mecham, Dir., Admin. Office of the U.S. Courts Before the Subcomm. on Transp., Treasury, Hous. & Urban Dev., the Judiciary & D.C. Comm. on Appropriations of the U.S. House of Representatives (Apr. 12, 2005), http://www.uscourts.gov/Press_Releases/mecham041205.pdf. On the somewhat equivocal position of the Judicial Conference after 2003, see Burbank, *supra* note 2, at 1512-16.

[149] CAFA § 4(a), 28 U.S.C. § 1332(d)(1)(B) (Supp. V 2005), defines "class action" to mean any civil suit filed under Fed. R. Civ. P. 23 or any similar state rule authorizing representative suits. Thus, CAFA makes the allegation of "class action" status dispositive for jurisdictional purposes under the act.

[150] "Since 1995, federal courts have articulated an increasingly conservative class action jurisprudence that has directed federal courts to stringently scrutinize proposed litigation and settlement classes." Linda Mullenix, *Abandoning the Federal Class Action Ship: Is There Smoother Sailing for Class Actions in Gulf Waters?*, 74 TUL. L. REV. 1709, 1709 (2000); *see also* Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 1015-16 (2006) (discussing the denial of certification after removal to federal court); Danas, *supra* note 100, at 1314-20 (discussing recent state law class action cases in federal court); James E. Pfander, *The Substance and Procedure of Class Action Reform*, 93 ILL. B.J. 144, 144 (2005) ("By providing for removal of these and other cases, the class action reform legislation will shift cases from certification-friendly state judges to more cautious federal judges . . . ."); Ryan Patrick Phair, Comment, *Resolving the "Choice-of-Law Problem" in Rule 23(b)(3) Nationwide Class Actions*, 67 U. CHI. L. REV. 835, 835-36 (2000) (noting federal courts' resistance to certifying cases where multiple states' laws would be applied).

[151] A study of four judicial districts by the Federal Judicial Center found that approximately thirty percent of federal class actions were terminated by a motion to dismiss or for summary judgment. WILLGING, HOOPER & NIEMIC, *supra* note 104, at 8, 33. The study also found that "approximately two of five cases were dismissed in whole or in part or had summary judgment granted in whole or in part in two districts and that approximately three out of five cases were so treated in the other two districts." *Id.* at 33. As a result, "at least one-third of the cases in our study, judicial rulings on motions terminated the litigation without a settlement, coerced or otherwise." *Id.* at 34. Three of the four districts decided motions to dismiss before certification in more than seventy percent of the cases; the fourth district did so in sixty percent of its cases. In all

were convinced that federal courts were less likely to certify and more likely to dismiss than were state courts.[152]

In addition to bringing most multistate class actions into the federal courts, CAFA promised to impose a de facto federal certification requirement on state court class actions within its coverage. Qualifying actions would presumably be removed and, if dismissed by a federal court and subsequently refiled in state court, removed again and again as necessary. Thus, because CAFA allowed defendants to remove at any time, it would prevent covered suits from going forward in state courts unless those courts, at a minimum, applied federal standards stringently and denied certification on their own.[153]

Congress finessed the critical constitutional question as to its power to force such a de facto national class certification standard on the states. First, it avoided the substance of the problem by claiming as a matter of formal law that "there are no wide variations between federal and state court class action policies."[154] Second, it implied, though it did not explicitly claim, that the "lax" application of state court certification rules violated the "due process rights of both unnamed class members and defendants."[155] Thus, it suggested, the federal standard should properly be applied in the state courts because it was consistent with existing state law and, more fundamentally, because it represented a federal constitutional requirement. The former claim was exaggerated, and the latter unsettled and uncertain.[156]

Under reigning federal standards, the biggest de facto obstacle to certification appeared to be the choice of law difficulty. In multistate class actions based on state law claims, federal courts were required to apply the choice of law rules of the state within which they sat. That,

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four districts, more than twenty percent of the rulings on summary judgment motions occurred prior to rulings on class certification. *Id.* at 30.

[152] THOMAS E. WILLGING & SHANNON R. WHEATMAN, FED. JUDICIAL CTR., AN EMPIRICAL EXAMINATION OF ATTORNEYS' CHOICE OF FORUM IN CLASS ACTION LITIGATION 31 & tbl.7 (2005).

[153] *See* Clermont, *supra* note 150, at 1015-17 (arguing that there is "no difficulty" in saying that a suit is a "class action" for removal purposes but nonetheless not certifiable as a class action for purposes of going forward). CAFA allows a defendant to remove at any time. CAFA § 5(a), 28 U.S.C. § 1453(b).

[154] S. REP. NO. 109-14, at 14 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 14.

[155] *Id.*

[156] For illuminating discussions of many of the unsettled complexities of due process analysis in class actions, see Samuel Issacharoff & Richard A. Nagareda, *Class Action Settlements Under Attack*, 156 U. PA. L. REV. 1649 (2008); Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035 (2008).

in turn, often forced them to look to the substantive laws of many different states and to determine which state's law was properly applicable to which class members and to apply that law correctly to each. Such complex analyses were extremely burdensome and bore directly on the Rule 23(a) requirements of commonality, typicality, and adequacy of representation. More important, in dealing with "common issue" classes—CAFA's paramount target—the difficulty of conducting such multistate choice of law analyses was a major factor in determining whether an action met the rule's additional "predominance" and "manageability" requirements.[157] Since the mid-1990s the federal courts had, in fact, commonly found such complex choice of law problems a fatal bar to class certification,[158] and the Supreme Court's 1997 decision in *Amchem Products, Inc. v. Windsor* strengthened that tendency by instructing the lower courts to construe Rule 23 cautiously and seek "narrowly defined class certifications."[159]

CAFA's supporters relied heavily on this choice of law difficulty to achieve the practical results they sought. The statute's legislative history is replete with references to the choice of law problem and the belief that it "would effectively bar nationwide class actions" based on

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[157] Stephen R. Bough & Andrea G. Bough, *Conflict of Laws and Multi-State Class Actions: How Variations in State Law Affect the Predominance Requirement of Rule 23(b)(3)*, 68 UMKC. L. REV. 1, 26 (1999); *see also* Patrick Woolley, *Choice of Law and the Protection of Class Members in Class Suits Certified Under Federal Rule of Civil Procedure 23(b)(3)*, 2004 MICH. ST. L. REV. 799, 828 (noting the role of choice of law in common issue classes).

[158] *E.g.*, *In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1015, 1018 (7th Cir. 2002); Stirman v. Exxon Corp., 280 F.3d 554, 561-62 (5th Cir. 2002); Castano v. Am. Tobacco Co., 84 F.3d 734, 741, 742 n.15 (5th Cir. 1996); Georgine v. Amchem Prods., Inc., 83 F.3d. 610, 617-18, 634-35 (3d Cir. 1996), *aff'd sub nom.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); *see also* JoEllen Lind, *"Procedural* Swift*": Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717, 755-57, 762 (2004); David Marcus, Erie, *The Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1306-08 & n.319 (2007); Richard Nagareda, *Bootstrapping in Choice of Law After the Class Action Fairness Act*, 74 UMKC L. REV. 661, 683 (2006); Edward F. Sherman, *Class Action Practice in the Gulf South*, 74 TUL. L. REV. 1603, 1616-18 (2000); Sherman, *supra* note 137, at 1610-14; Woolley, *supra* note 2, at 1747-69; Jeremy T. Grabill, Comment, *Multistate Class Actions Properly Frustrated by Choice-of-Law Complexities: The Role of Parallel Litigation in the Courts*, 80 TUL. L. REV. 299, 309-11 (2005). Choice of law problems do not necessarily and invariably prevent certification. *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 731 (1988) (refusing to review a state court choice of law decision applying forum-state law in a class action on the ground that the law of other potentially relevant states was the same as that of the forum state); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 823 (1985) (upholding certification in a Kansas state court); *see also* Grabill, *supra*, at 312-14 (noting "three limited exceptions" where varying state laws are not fatal to certification).

[159] 521 U.S. at 629.

diversity jurisdiction.[160] The minority report of the Senate Judiciary Committee underscored the point. "Federal courts," it declared, "are not certifying class actions involving the laws of multiple states."[161] Consequently, Democratic senators tried to amend CAFA during the floor debate to prevent the federal courts from denying certification on choice of law grounds. Republicans denounced the amendment, acknowledging in the process the centrality of the choice of law issue to their goals.[162] Senator Charles Grassley, CAFA's principal sponsor, charged that the Democratic amendment "guts" the bill; Senator Jeff Sessions insisted that it would perpetuate the "abuses that the legislation seeks to end"; and Senator Trent Lott called it "a poison pill."[163] The amendment went down 38-61 on an overwhelmingly party-line vote.[164] Revealingly, as soon as CAFA became law, one of its drafters argued in court that the statute's legislative history showed that it was intended to make most multistate state law class actions noncertifiable in either federal or state court because of the choice of law problem.[165]

Beyond CAFA's likely anti-plaintiff operation, other considerations pointed similarly to the highly partisan nature of the statute's substance and purposes. One was the proffered justification for the statute, what might be called its "belonging" theory. CAFA's advocates insisted that national class actions properly "belong" in the federal

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[160] Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1862 & n.89 (2006).

[161] S. REP. NO. 109-14, at 82, 86 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 75, 79 ("Minority Views").

[162] Democratic Senators Diane Feinstein and Jeff Bingaman offered an amendment that would have prevented the federal courts from denying class certification "in whole or in part, on the ground that the law of more than one State will be applied." Woolley, *supra* note 2, at 1749 n.134. For the proposed amendment, see 151 CONG. REC. S1215 (daily ed. Feb. 9, 2005), and for the vote, see U.S. Senate, Roll Call Votes, 109th Congress—1st Session, http://www.senate.gov/legislative/LIS/roll_call_lists/vote_menu_109_1.htm (follow link for vote 0007) (last visited Apr. 15, 2008).

[163] All three quotes are cited in Marcus, *supra* note 158, at 1309-10 (quoting 151 CONG. REC. S1166 (daily ed. Feb. 9, 2005); *id.* at S1174; and 151 CONG REC. S1082 (daily ed. Feb. 8, 2005)). The senators' objections were especially interesting because the Senate Judiciary Committee expressly denied that CAFA would aid defendants and claimed it would merely create "a level playing field." S. REP. NO. 109-14, at 57, *reprinted in* 2005 U.S.C.C.A.N. at 53; S. REP. NO. 108-123, at 57 (2003).

[164] Woolley, *supra* note 2, at 1749 n.134 (citing 151 CONG. REC. S1184 (daily ed. Feb. 9, 2005)). Every Republican voted against the amendment except Senator Arlen Spector (with Senator John Sununu not voting). Thirty-seven Democrats voted in favor, while seven voted against (Senators Bayh, Carper, Dodd, Kohl, Lieberman, Lincoln, and Nelson). *See* U.S. Senate, *supra* note 162.

[165] Sherman, *supra* note 137, at 1609.

courts because they involve important national issues.[166] The problem with the theory, however, was that a great many categories of cases similarly "belong" in federal court and yet are consigned to state court adjudication.[167] Professor Paul Bator, a distinguished conservative critic of the Warren Court, demonstrated more than a quarter of a century ago the dual fallacy of the "belonging" theory. First, the nation's dual federal-state court system meant that many categories of cases within federal jurisdiction—including both federal question and diversity cases—"belonged" every bit as much in the state courts as they did in federal courts; second, most of the cases that "belong" in federal court would, and necessarily must, remain in state court for the simple reason that the federal judicial system could not possibly handle them all.[168] The decision to confer federal jurisdiction over some selected category of cases from among the innumerable categories that arguably "belong" in federal court, then, was necessarily a decision of policy and practicality, not one of normative theory or constitutional principle. Thus, believing that national class actions "belong" in the federal courts was, at most, a reason why one *might* choose to send them there, not a sufficient reason for actually doing so. Indeed, for the previous thirty years, Congress—and the Burger and Rehnquist Courts—had firmly believed that those very same state law class actions properly "belonged" in the state courts, not the federal courts.[169] CAFA's supporters, then, could not have chosen to send

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[166] "Because interstate class actions typically involve more people, more money, and more interstate commerce ramifications than any other type of lawsuit, the Committee firmly believes that such cases properly belong in federal court." S. REP. NO. 109-14, at 5, *reprinted in* 2005 U.S.C.C.A.N. 3, 6; *see also id.* at 22, *reprinted in* 2005 U.S.C.C.A.N. at 24 ("National Class Actions Belong in Federal Court Under Traditional Notions of Federalism"); S. REP. NO. 108-123, at 54 ("[L]arge interstate class actions belong in federal court."); H.R. REP. NO. 108-144, at 24 (2003) (same).

[167] Large numbers of cases involving federal law defenses and counterclaims, for example, are excluded from federal question jurisdiction by the "well-pleaded complaint" rule.

[168] *See* Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981) (discussing the role of state courts in interpreting the Federal Constitution). On the constitutional authority of state courts to exercise concurrent jurisdiction over federal law claims absent express preemption by Congress, see, for example, *Tafflin v. Levitt*, 493 U.S. 455 (1990), which held that state courts have concurrent jurisdiction over RICO claims; *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820 (1990), which allowed concurrent jurisdiction in Title VII Civil Rights Act actions; and *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981), which held that federal courts do not have exclusive jurisdiction over claims arising under the Outer Continental Shelf Lands Act.

[169] *See* Zahn v. Int'l Paper Co., 414 U.S. 291, 301 (1973) (holding that each class member in a state law class action had to meet the jurisdictional amount require-

class actions to the federal courts simply because those cases "belong" there. Rather, they had to have had some additional reason for acting, a reason of practical policy and anticipated consequences. That reason, the evidence suggests, was their belief that CAFA would terminate large numbers of class actions and prevent many more from ever being filed.

Equally revealing was the extent to which, in justifying CAFA, its conservative, Republican, and business supporters abandoned substantial elements of their familiar rhetoric. For decades, business groups had sought to resolve their disputes out of court, methodically pursuing private settlements and seeking to impose, where possible, court-excluding mandatory arbitration.[170] Defending CAFA, however, they suddenly claimed to see the disadvantages that unsophisticated plaintiffs faced in out-of-court settlements and insisted on the need for judicial protections to ensure that they were treated fairly.[171] Similarly, they altered their views about the amount and kind of evidence that was proper to prove causation. Persistently, business interests had criticized tort plaintiffs and accused them of relying on dubious evidence and "junk" science, while class action defendants from the early tobacco cases to the more recent Vioxx litigations had insisted on the

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ment). The Court held to the *Zahn* rule until 2005 when, within months of CAFA's passage, five justices overruled the case on the basis of a fifteen-year-old statute. *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 566-67 (2005). In supporting CAFA in 2005, the Senate Judiciary Committee pronounced the *Zahn* result "nonsensical." S. REP. NO. 109-14, at 11, *reprinted in* 2005 U.S.C.C.A.N. at 12.

[170] The settlement process contains a variety of problems. *See, e.g.*, Albert W. Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1820-31 (1986). Mandatory arbitration clauses, which compel out-of-court resolutions, often serve as effective instruments of defeating class actions. *See* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000).

[171] On these disadvantages in other contexts, see, for example, Alschuler, *supra* note 170; Jean R. Sternlight, *Compelling Arbitration of Claims Under the Civil Rights Act of 1866: What Congress Could Not Have Intended*, 47 U. KAN. L. REV. 273 (1999); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996). The law has long promoted out-of-court settlements. *See, e.g.*, Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1 (1992). Empirical evidence from the 1990s suggested that "settlement rates in class actions were generally comparable to settlement rates in other civil cases." Judith Resnik, *Litigating and Settling Class Actions: The Prerequisites of Entry and Exit*, 30 U.C. DAVIS L. REV. 835, 840 (1997); *accord* WILLGING, HOOPER & NIEMIC, *supra* note 104, at 90; *see also* DONNA STIENSTRA & THOMAS E. WILLGING, FED. JUD. CTR., ALTERNATIVES TO LITIGATION: DO THEY HAVE A PLACE IN THE FEDERAL DISTRICT COURTS? 33-36 (1995) (discussing the practical difficulties of evaluating the impact of alternative dispute resolution on trial rates).

most stringent and demanding standards for proving causation.[172] In heralding the evil consequences of class actions, however, those same groups made sweeping charges and readily accepted as proof evidence that was manifestly inadequate, often dubious or unreliable, and sometimes simply false.[173] Their views about conflicts of interest also seemed to shift. Republicans, business spokespersons, and economic conservatives often downplayed or denied the significance of conflicts that flourished within the structure of corporate governance and in the close relationships that existed among banks, corporations, rating agencies, accounting and brokerage firms, and those who moved back and forth between those institutions and the government agencies entrusted with regulating them. Generally, they criticized or opposed efforts to regulate and restrict such conflicts. In contrast, however, when they addressed the class action, they immediately recognized the presence of conflicts of interest, portrayed them as inordinately dangerous and abusive, and demanded that they be subject to exacting judicial scrutiny.[174] Along the same lines, many had embraced then-Professor Richard A. Posner's economic theory of negligence, which seemed a useful way to defend narrow standards of corporate liability.[175] Among its central elements, Posner's theory held that plaintiffs'

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[172] Reagan's "Tort Policy Working Group," for example, blamed many of the nation's woes on "a veritable explosion of tort liability in the United States" and attributed much of the problem to the "undermining of causation through a variety of questionable practices and doctrines," including the use of "junk science." TORT POLICY WORKING GROUP, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 2, 35 (1986) [hereinafter TPWG, REPORT].

[173] *See infra* notes 246-251 and accompanying text.

[174] Egregious abuses arising from such conflicts led Congress to enact the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745. *See, e.g.*, BETHANY MCLEAN & PETER ELKIND, THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON (2003). Many business representatives, however, criticized the Act as restrictive, burdensome, or unnecessary. Such conflicts, however, continue to exist. *See, e.g.*, Stephen J. Choi & Jill E. Fisch, *How To Fix Wall Street: A Voucher Financing Proposal for Securities Intermediaries*, 113 YALE L.J. 269 (2003) (proposing, as an alternative, a voucher system to pay financial analysts and reduce conflicts of interest); Steven M. Davidoff, *Fairness Opinions*, 55 AM. U. L. REV. 1557 (2006) (discussing the judicial scrutiny of fairness opinions). It is doubtful that conflicts of interest in class actions are as dangerous, pervasive, and lucrative as the conflicts that exist among business entities.

[175] Professor Posner originally advanced his theory in Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972). For an economic analysis by another conservative federal judge, see *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1017 & n.1 (7th Cir. 2002) (Easterbrook, J.). Whether and to what extent tort law actually deters negligent behavior is a disputed question. *See, e.g.*, Gary T. Schwartz, *Reality in the Economic*

attorneys' fees had no economic significance, for the only requirement for economic efficiency was that defendants paid in damages an amount equal to the total "costs" of the injuries they negligently caused.[176] Yet, in the class action context, CAFA's supporters suddenly focused on large plaintiffs' attorneys' fees as an outrageous abuse that demanded reform, wholly abandoning Posner's once useful theory of economic efficiency.[177]

Even more obviously, CAFA inspired an astonishing reversal in the attitude of conservatives and Republicans toward the state courts. For half a century they had praised the state courts and stressed the necessity of allowing them wide latitude to hear not only state claims but federal claims as well. Indeed, they demanded respect for state courts as a fundamental principle of American law, and their profound commitment to that principle inspired some of the loftiest assertions of modern judicial conservatism.[178] Under both Chief Justice Warren Burger and Chief Justice William Rehnquist, the Court's conservative Justices repeatedly sought to prevent federal courts from intruding into the operations of state courts and repeatedly stressed the neces-

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Analysis of Tort Law: Does Tort Law Really Deter?, 42 UCLA L. REV. 377 (1994) (finding that tort law provides limited and partial deterrence).

[176] That theory held that the "important point, viewing the negligence system as a system for bringing about an efficient quantum of safety and accidents, is that the total costs of the accidents in which the defendant is negligent be made costs to the defendant." Posner, *supra* note 175, at 93. Thus, plaintiffs' litigation costs, and the ultimate "adequacy" of the compensation they received, were irrelevant as matters of economic efficiency. The only relevant issue was whether all of the "costs" of accidents were transferred to defendants. Thus, under Posner's theory, it would not make any economic difference whether most or even all of a defendant's costs went to plaintiffs' attorneys. On the complexity of any true "cost-benefit" analysis, see generally MATTHEW D. ADLER & ERIC A. POSNER, NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS (2006).

[177] As Senator Frank E. Moss noted more than thirty years ago, corporate attacks on class action attorneys' fees were hardly lacking in irony: "Staunch defenders of the right to make a profit worry about profits for consumers' attorneys." HENSLER ET AL., *supra* note 100, at 17.

[178] Paul Bator wrote:

> But there is a different, richer, and more coherent account of lawmaking which asserts that it is a cooperative enterprise in which each participant, including the citizen, shares in the privilege and duty of principled elaboration. And this competing account is not inapplicable to federal constitutional law. In respect to federal constitutional principles, too, there is a moral and legal community which is mutually and reciprocally charged with the mutual and reciprocal elaboration of these principles. We are not entitled to deny to state court judges the competence to participate in this process; to do so would deny them *pro tanto* membership in this cooperative moral and legal community.

Bator, *supra* note 168, at 634-35.

sity of giving those latter courts the high respect and deference they deserved. Rejecting the idea that there was any reason for "a general distrust of the capacity of the state courts to render correct decisions on constitutional issues," the Burger Court announced its "emphatic reaffirmation" of its "confidence in their ability to do so."[179] The Rehnquist Court, too, insisted that state courts be recognized as proper forums for the resolution of all legal issues, including those of federal law. It underscored the need to honor the "deeply rooted presumption in favor of concurrent state court jurisdiction,"[180] a presumption that "lies at the core of our federal system."[181] Indeed, in 1996 the Republican Congress seemed to embrace those same views, broadening the leeway of state courts to decide federal law issues by severely constraining federal habeas corpus and requiring expanded deference to state adjudicatory bodies in prison litigations.[182]

When conservatives and Republicans turned to support CAFA, however, that fundamental principle suddenly fell from view, replaced by its opposite. "Four legs good," they now seemed to shout, "two legs *better*."[183] Now, they saw state courts as "lax" tribunals that applied the rules of law "inconsistently."[184] Worse, they saw the state courts as perpetrating "judicial inefficiencies," demonstrating a dysfunctional "provincialism," and actively promoting "collusive activity."[185] Indeed, compared to the federal courts, they saw the state courts as simply "less careful."[186] Led by the American Tort Reform Foundation, many of CAFA's supporters went even further. Some state courts were not only inferior tribunals but horrifying "judicial hellholes."[187] When

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[179] Allen v. McCurry, 449 U.S. 90, 105 (1980). A "proper respect for state functions," the Burger Court declared, requires "a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." Younger v. Harris, 401 U.S. 37, 44 (1971).

[180] Tafflin v. Levitt, 493 U.S. 455, 459 (1990) (O'Connor, J.).

[181] Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 826 (1990) (Stevens, J.).

[182] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 18, 28, and 49 U.S.C.); Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended in scattered sections of 11, 18, and 28 U.S.C.).

[183] GEORGE ORWELL, ANIMAL FARM 112 (Harcourt, Brace & Co. 1946).

[184] S. REP. NO. 109-14, at 14, 4 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 14, 5.

[185] *Id.* at 6, 4, *reprinted in* 2005 U.S.C.C.A.N. at 7, 6.

[186] *Id.* at 14, *reprinted in* 2005 U.S.C.C.A.N. at 14; *accord* H.R. REP. NO. 108-144, at 12-16 (2003).

[187] AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 2007 (2007), *available at* http://www.atra.org/reports/hellholes.

those same groups had supported limitations on federal jurisdiction over habeas corpus petitions and civil rights suits by prisoners, of course, they had given neither heed nor mention to the terrors that lurked in any such "judicial hellholes."

The content of CAFA's "Consumer Class Action Bill of Rights"[188] was equally revealing. It dealt with only three relatively minor risks to class members,[189] and its requirements for notice to government officials seemed more likely to complicate and delay suits than to improve settlements.[190] More importantly, although the class action form presented a variety of potential risks for class members, CAFA did not eliminate them.[191] Rather, it left defendants who sought to collude with plaintiff-class attorneys entirely free to do so,[192] for it allowed them to choose to remain in state court and free from federal supervision.[193] CAFA imposed restrictions, for example, on "coupon settle-

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[188] CAFA § 3, 28 U.S.C. §§ 1711–1715 (Supp. V 2005).

[189] The "Bill of Rights" limits coupon settlements, "negative" settlements, and differential payments to members based on geography. *See id.* The first may sometimes work effectively as a class remedy, Tharin & Blockovich, *supra* note 115, at 1445, and in any event was used in only a small percentage of class actions, THOMAS E. WILLGING & SHANNON R. WHEATMAN, FED. JUDICIAL CTR., ATTORNEY REPORTS ON THE IMPACT OF *AMCHEM* AND *ORTIZ* ON CHOICE OF A FEDERAL OR STATE FORUM IN CLASS ACTION LITIGATION 46 (2004) (finding coupons were used in only "9% of cases with a class recovery"). The second limitation in the "Bill of Rights" was apparently based on the settlement in a single infamous case. Laurens Walker, *The Consumer Class Action Bill of Rights: A Policy and Political Mistake*, 58 HASTINGS L.J. 849, 860 (2007) (discussing Kamilewicz v. Bank of Boston Corp., 92 F.3d 506 (7th Cir. 1996), "in which members of a plaintiff class suffered a net loss in the settlement of an action for fraud related to escrow account charges"). On the minimal likely impact of the "Bill of Rights," see Klonoff & Herrmann, *supra* note 115.

[190] For discussions of the notice provisions, see Walker, *supra* note 189, at 851-58.

[191] Consumers' advocates had strongly criticized certain class settlements and called for heightened judicial scrutiny in Rule 23(b)(3) cases. HENSLER ET AL., *supra* note 100, at 50-51. The use of Rule 23(b)(1) classes may also put absent class members at risk, and CAFA ignored this problem. Linda S. Mullenix, *No Exit: Mandatory Class Actions in the New Millennium and the Blurring of Categorical Imperatives*, 2003 U. CHI. LEGAL F. 177.

[192] "[T]he modern class action is in some contexts increasingly becoming a shield for defendants." Coffee, *supra* note 98, at 1350; *see also* HENSLER ET AL., *supra* note 100, at 79-85, 119-20, 409-10; Coffee, *supra* note 98, at 1349-55, 1364-84; David Crump, *What Really Happens During Class Certification? A Primer for the First-Time Defense Attorney*, 10 REV. LITIG. 1, 8-9 (1990).

[193] In addition, CAFA was not tailored to the reasons that purportedly justify it, and Congress could have served its announced purposes with a narrower and more precisely drawn statute. *See* Alan B. Morrison, *Removing Class Actions to Federal Court: A Better Way To Handle the Problem of Overlapping Class Actions*, 57 STAN. L. REV. 1521, 1535-50 (2005).

ments,"[194] a device that could be used to shortchange class members by enabling class attorneys to collude with defendants and exchange sweetheart settlements for handsome attorneys' fees. If class attorneys and defendants wished to use a "coupon settlement" as a collusion device, however, the statute did not stop them. Class attorneys had merely to file in state court and have defendants refuse to remove. CAFA, in other words, guaranteed class members no protection from the precise dangers it purported to check.[195]

Worse, CAFA handed defendants a new weapon that could actively encourage the very collusion the statute purported to end. CAFA conferred on defendants the right to remove to federal court at any time they wished.[196] That right, then, allowed defendants to remain in state court while continuously threatening class attorneys with removal—and the accompanying risk that a federal court would deny certification, dismiss the suit at an early date, or severely diminish any fees they might ultimately win—unless the class attorneys agreed to collude on a mutually profitable sweetheart settlement in a "lax" state court. Thus, CAFA not only failed to provide meaningful protection against the dangers to class members that it invoked, but its provisions magnified those very dangers by giving the power of forum control—and with it added leverage to promote anti-class collusion—to the parties whose interests were directly adverse to the interests of the class.

Worst of all, CAFA appeared to give that added leverage to defendants quite purposely, for in preparing the statute's final form, its supporters made a critical change. They deleted a provision contained in earlier drafts that allowed for removal by any plaintiff class member who was not a named party or class representative.[197] Previously, both the House and Senate Judiciary Committees had identified the purpose of that provision: it was intended, in the words of the

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[194] A "coupon settlement" involves payment to class members, in whole or in part, in the form of coupons providing some kind of discount on future purchases of a defendant's products. Allegedly, such payments give class members little or nothing of value while conferring significant benefits to defendants (cheap settlements as well as continued patronage).

[195] Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1941 (2006).

[196] CAFA eliminated the one-year time limitation on removal petitions that applied to general diversity actions. CAFA § 4(a), 28 U.S.C. § 1453(b) (Supp. V 2005). Thus, defendants could hold the threat of removal over class attorneys for an extended period of time.

[197] *See* Class Action Fairness Act of 2003, H.R. 1115, 108th Cong., sec. 5(a), § 1453(b)(2) (as passed by House, June 12, 2003).

former, to "combat collusiveness between a corporate defendant and a plaintiffs' attorney who may attempt to settle on the cheap in a State court at the expense of the plaintiff class members."[198] The final Senate Report failed to note the deletion, much less to offer an explanation for it.[199] The practical significance of the deletion, however, seemed apparent.

Equally salient was the attitude of CAFA's supporters toward the "costs" and "burdens" of litigation. They consistently showed a deep and pervasive solicitude for the plight of defendants, especially for the intense pressure to settle that the threat of potentially massive class action damages exerted.[200] They portrayed plaintiffs and their attorneys—especially the demonized figure of the rapacious class action attorney—as persistently using "judicial blackmail" to collect on "frivolous" claims.[201] The Senate Judiciary Committee expressly denied the charge that CAFA "would unfairly tilt the playing field by providing an advantage to defendant corporations at the expense of consumers," and it insisted that its bill was designed to "ensure that all parties can litigate on a level playing field."[202] Yet, at no point did Congress or the Judiciary Committee of either house seriously consider whether the playing field that existed was in fact "level." Instead, they focused on

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[198] H.R. REP. NO. 108-144, at 42 (2003). For the Senate language, see S. REP. NO. 108-123, at 48-49 (2003).

[199] *See* S. REP. NO. 109-14, at 49 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 46.

[200] The threat, many claimed, allowed plaintiffs' attorneys to "blackmail" defendants into settling weak or "frivolous" claims. *See* Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) ("[C]lass certification creates insurmountable pressure on defendants to settle, whereas individual trials would not."); *In re* Rhone-Poulenc, Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.) ("[Defendants] 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."). Many scholars agreed. "[M]ost mass tort defendants can successfully defeat almost every claim, yet still be threatened with bankruptcy if even a single adverse jury decides to impose ruinous liability." Peter H. Schuck, *Judicial Avoidance of Juries in Mass Tort Litigation*, 48 DEPAUL L. REV. 479, 480 (1998). More broadly, Richard Epstein argued that "the aggregation of individual claims within the class-action format leads to a distortion of the substantive law that works typically in favor of the plaintiffs." Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. CHI. LEGAL F. 475, 490.

[201] S. REP. NO. 109-14, at 20, *reprinted in* 2005 U.S.C.C.A.N. at 21; S. REP. NO. 108-123, at 18. "Avarice among many plaintiffs' lawyers has clogged our civil courts, drastically changed the practice of medicine, and costs American companies and consumers more than $150 billion a year." AM. PRESIDENCY PROJECT, REPUBLICAN PARTY PLATFORM OF 2000 (John T. Wooley & Gerhard Peters eds., 2000), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=25849.

[202] S. REP. NO. 109-14, at 56-57, *reprinted in* 2005 U.S.C.C.A.N. at 53-54.

the disadvantages that class actions imposed on defendants and ignored the disadvantages that the alternative form—separate actions by individuals—imposed on members of plaintiff classes. Congress did not, in other words, seriously consider either the social and economic conditions that limited the ability of wronged individuals to pursue their claims or the powerful pressures that frequently compelled them to settle out of court for a relative pittance or abandon their claims entirely.[203] And CAFA did nothing to remedy any of those problems.

Indeed, by strengthening the ability of corporate defendants to defeat class actions, CAFA seemed to promise that those corporations would be able to operate more effectively in the out-of-court claims attrition and discounting process where they enjoyed their greatest practical advantages—and reaped their greatest rewards—against individual claimants. There, corporations knew with statistical certainty that most potential plaintiffs would settle their suits relatively cheaply or, better, fail to file suits in the first place or, better yet, fail to secure lawyers to represent them in negotiations or, best of all, fail even to understand that they had cognizable claims to assert. The decisive advantage for corporations in limiting class actions, then, arose not from their ability to win favorable decisions in court, but from their ability to profit systematically from the fact that—once class standing was denied—most individual claimants would either settle relatively cheaply, abandon their claims altogether, or remain wholly unaware that they even had claims to assert. Thus, CAFA's greatest practical significance lay in the way it tilted the playing field even more sharply in favor of

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[203] There is a vast literature exploring the wide range of reasons why ordinary individuals are frequently unable to enforce their legal rights. *See, e.g.*, DAVID M. ENGEL & FRANK W. MUNGER, RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES 245-49 (2003) (discussing self-identity formulation difficulties that hampered disabled Americans in seeking to enforce their rights); Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1126 (examining costs and risks involved in securing and using expert testimony); Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. REV. 423, 440-59 (1992) (discussing many practical burdens that dissuaded claimants from suing or induced them to settle cheaply). On the inability of many people to secure legal representation and the consequent disadvantages, see Stephen Daniels & Joanne Martin, *The Texas Two-Step: Evidence on the Link Between Damage Caps and Access to the Civil Justice System*, 55 DEPAUL L. REV. 635, 646 & n.7 (2006) (citing Stephen Daniels et al., *Why Kill All the Lawyers? Repeat Players and Strategic Advantage in Medical Malpractice Claims* (Am. Bar Found., Working Paper No. 9210, 1993)); and Carol Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419 (2001).

corporate defendants by expanding the scope of the out-of-court claims attrition and discounting process.[204]

CAFA's obvious failure to balance its pro-business provisions with effective new remedies for class members was stark. Almost two decades ago, Linda Mullenix identified the class action problem as a "political" challenge that required a substantive national solution. Bringing class actions within the federal courts, without providing an effective federal program for compensation, she argued, could not provide a fair and reasonable solution.[205] Indeed, a wide range of individuals and organizations had addressed class action problems and advanced a variety of thoughtful proposals designed to minimize or eliminate the kinds of litigation abuses that CAFA purported to remedy while, at the same time, providing more reliable and effective methods for ensuring compensation to injured and defrauded persons.[206] Neither CAFA nor its supporters, however, even made a pre-

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[204] The same point was true if CAFA were considered from the point of view of the judicial system as a whole. The "inefficiencies" of class actions are far less than the inefficiencies of litigating 10,000 or 100,000 or a million individual lawsuits. Thus, class actions are "inefficient" only if the demands they place on the judicial system are compared to the demands placed by a relatively miniscule number of individual actions. To assume that limiting class actions would make the judicial system more efficient, in other words, means that one has to assume that the overwhelming majority of class members would, in fact, never bring their claims to court.

[205] Mullenix, *supra* note 119, at 197, 222; *see also* Linda S. Mullenix, *Federalizing Choice of Law for Mass-Tort Litigation*, 70 TEX. L. REV. 1623, 1630 (1992).

[206] The federal black lung compensation program provided just one example of such alternative models. *See* Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, §§ 401–426, 83 Stat. 742, 792-98 (codified as amended in scattered sections of 30 U.S.C.). For two similar examples, see Radiation Exposure Compensation Act, Pub. L. No. 101-426, 104 Stat. 920 (1990) (codified at 42 U.S.C. § 2210 note (2000)); National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, §§ 301–323, 100 Stat. 3755 (codified as amended at 42 U.S.C. §§ 300aa-10–300aa-34 (2000)). For general discussions and remedial proposals, see, for example, 2 ALI, REPORTERS' STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY (1991); JERRY L. MASHAW, BUREAUCRATIC JUSTICE (1983); STEPHEN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW (1989); Coffee, *supra* note 98; John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987); John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625 (1987); Deborah R. Hensler & Thomas D. Rowe, Jr., *Beyond "It Just Ain't Worth It": Alternative Strategies for Damage Class Action Reform*, 64 LAW & CONTEMP. PROBS. 137 (2001); Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89; Jonathan R. Macey & Geoffrey P. Miller, *Auctioning Class Action and Derivative Suits: A Rejoinder*, 87 NW. U. L. REV. 458 (1993); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984); David Rosenberg, *Class Actions for Mass Torts:*

tense of attempting as much. Four years before CAFA was enacted, the conservative scholar Robert A. Kagan acknowledged the point: "Republican reform advocates," he concluded, "have not proposed any meaningful alternatives, such as reliable, administratively operated compensation plans, which would satisfy the public's and the Democratic Party's concern about adequate care and income replacement for accident victims."[207]

The wide range of remedial proposals that CAFA's sponsors ignored, together with the narrow and defendant-oriented provisions they did adopt, support only one conclusion. Putting it "charitably," Stephen B. Burbank fairly concluded, "any sentient reader of the statute's statement of findings and purposes" would recognize that it was, "at best, window dressing."[208] In truth, as Georgene Vairo declared more bluntly: "Congress appears to be seeking to dump its dirty work, disempowering plaintiffs' attorneys and protecting its corporate constituents, on the federal courts."[209] Considering both what CAFA did

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Doing Individual Justice by Collective Means, 62 IND. L.J. 561 (1987); Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815 (1992); Edward F. Sherman, *Class Actions and Duplicative Litigation*, 62 IND. L.J. 507 (1987); Stephen D. Sugarman, *Taking Advantage of the Torts Crisis*, 48 OHIO ST. L.J. 329 (1987); Randall S. Thomas & Robert G. Hansen, *Auctioning Class Action and Derivative Lawsuits: A Critical Analysis*, 87 NW. U. L. REV. 423 (1993); Leon E. Trakman, *David Meets Goliath: Consumers Unite Against Big Business*, 25 SETON HALL L. REV. 617 (1994). It is worth noting that in his address to the Pound Conference in 1976, Chief Justice Warren Burger suggested nine areas where reform was necessary in the judicial system (including limiting litigation and curbing abuses in pretrial procedures), but he also included two suggestions emphasizing the need to provide reasonable compensation to those who suffered injuries from negligence. *See* Burger, *Agenda for 2000*, *supra* note 52, at 32-35.

[207] ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 247 (2001). Kagan criticized "tort reformers," *id.* at 150, 152-53, and Democrats, *id.* at 245-46, for the same failure. He noted that both political parties failed to advance such reforms for their own interests and that both had, in fact, sponsored "reforms" that would exacerbate many of the problems caused by what he called "adversarial legalism." *Id.* at 245-47.

> Both in principle and in practice, the most potent method of reducing social inequality is not to provide the socially marginalized with lawyers and rights to litigate but to provide more generous governmental funding for high quality education, job training, and social welfare programs and for well-staffed bureaucracies to administer them.

Id. at 242.

[208] Burbank, *supra* note 195, at 1942.

[209] Georgene Vairo, *Judicial v. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort Cases and Other Complex Litigation*, 33 LOY. L.A. L. REV. 1559, 1610 (2000). CAFA's intent, Edward F. Sherman declared, "is obviously more to

and what it failed to do, there seems to be no ground for disagreeing with such assessments.

D. *Limited and Inadequate Empirical Evidence*

Not surprisingly, given the difficulties involved, neither CAFA's proponents nor opponents were able to produce convincing evidence about the statute's ultimate impact and significance.[210] The only results that seemed obvious were that hundreds of additional class actions would pour into the federal courts, largely by removal,[211] and that large numbers of them would be denied certification or dismissed outright.[212] Whether those anticipated results would actually occur, whether they would achieve the lofty goals the statute proclaimed, and whether they would prove fair to all litigants remained, at the time of CAFA's enactment, matters of dispute.

To show the need for CAFA, its advocates relied for the most part on two types of evidence.[213] First, they cited several empirical studies to establish that there had been a rapid increase in state court class action filings over the past decade and that disproportionate numbers of class actions had been filed in a handful of "small" counties with "magnet" courts.[214] Few disputed those two propositions, and by

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shield defendants than to protect class members from abuses." Edward F. Sherman, *Consumer Class Actions: Who Are the Real Winners?*, 56 ME. L. REV. 223, 230 (2004).

[210] There were, of course, some empirical studies that cast light on one or another aspect of class action litigation. For examples, see Hensler, *supra* note 74, at 180-81, and the sources cited therein, especially in footnotes 4 and 8.

[211] Were CAFA enacted, the Congressional Budget Office reported, it "expect[ed] that a few hundred additional cases would be heard in federal court each year. According to the Administrative Office of the United States Courts, class-action lawsuits tried in federal court cost the government, on average, about $23,000." S. REP. NO. 109-14, at 77 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 72. The total estimated cost of CAFA to the federal judiciary, then, would be "about $7 million annually." *Id.*

[212] *See* WILLGING & WHEATMAN, *supra* note 152, at 8, 30-34 (discussing the perception of defense attorneys that federal judges are less receptive to class actions).

[213] The evidence suggested that some problems, such as duplicative suits and unwise or improper state court decisions, did exist. *See, e.g.*, S. REP. NO. 109-14, at 21-23, *reprinted in* 2005 U.S.C.C.A.N. at 21-24.

[214] H.R. REP. NO. 108-144, at 11-12 (2003). The report cited a study by the Manhattan Institute that identified Madison County in Illinois, Jefferson County in Texas, and Palm Beach County in Florida as "magnets," *id.* at 12, and one of its own studies to show that "six 'small' counties in Alabama were experiencing a tidal wave of class action filings," *id.* at 11-12. The Senate Judiciary Committee singled out two Illinois counties, Madison and St. Clair, as "magnet courts." S. REP. NO. 109-14, at 13, *reprinted in* 2005 U.S.C.C.A.N. at 14. It noted that Madison County was "mostly rural" and home to "less than one percent of the U.S. population," that the number of class actions filed

themselves they established little more than that ordinary and traditional federal-state and interstate forum shopping existed.

Second, they pointed to dozens of cases in which various kinds of alleged abuses had occurred.[215] The cases were inconclusive at best.[216] Most obvious, CAFA's supporters made no showing that the cases were representative.[217] Indeed, the cited cases constituted a minuscule percentage of class actions, most likely less than one-tenth of one percent of the total number filed since the early 1990s.[218] Further, many of them illustrated little more than the fact that class counsel received

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in its court rose from 2 in 1998 to 39 in 2000 and then to 106 in 2003, and that most of the class actions filed there "had little—if anything—to do with" the county. *Id.* During his remarks as he signed the Act, President Bush also singled out Madison County, "where juries have earned a reputation for awarding large verdicts." Remarks on Signing the Class Action Fairness Act of 2005, 41 Weekly Comp. Pres. Doc. 265, 266 (Feb. 18, 2005).

[215] *See, e.g.*, S. REP. NO. 109-14, at 15-27, *reprinted in* 2005 U.S.C.C.A.N. at 6 (citing and commenting on several dozen illustrative cases); S. REP. NO. 108-123, at 12-26 (2003) (discussing or citing a similar number of cases); H.R. REP. NO. 108-144, at 12-22 (discussing a similar number of individual cases, many or most of which appeared in the Senate Report). Supporters, for example, highlighted the "Bank of Boston" case, Kamilewicz v. Bank of Boston Corp., 92 F.3d 506 (7th Cir. 1996), in which class counsel earned more than $8.5 million in fees, while many class members received no monetary award and some wound up owing money to their attorneys. *See* S. REP. NO. 109-14, at 14-15, *reprinted in* 2005 U.S.C.C.A.N. at 14-16.

[216] They were nonetheless politically effective. "On Capitol Hill, the wise advice is to come armed with a good story. . . . Congress frequently moves the law in response to anecdotes. Washington insiders know this well." MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS 50 (2005). In addition to their dramatic and humanizing impact, such stories are particularly useful because they can be "brought forth when they fit" an immediate political need "but more easily disregarded when they [do not]." *Id.* at 60; *see also* WILLIAM HALTOM & MICHAEL MCCANN, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS (2004); Michael McCann et al., *Java Jive: Genealogy of a Juridical Icon*, 56 U. MIAMI L. REV. 113 (2001) (discussing the impact on the popular imagination of the case of the woman burned by McDonald's coffee). At CAFA's signing, President Bush introduced three individuals—two class members and the owner of a drugstore—and told stories of their terrible experiences with class actions. Remarks on Signing the Class Action Fairness Act of 2005, *supra* note 214, at 266.

[217] Supporters insisted that the instances of abuse they identified were "common," "prevalent," or—in an especially dubious fall-back characterization—"not unique." S. REP. NO. 109-14, at 21-22, 25, *reprinted in* 2005 U.S.C.C.A.N. at 21-22, 25.

[218] There are no comprehensive statistics available. John H. Beisner, one of CAFA's drafters and most ardent supporters, told the House Judiciary Committee that "[e]very year, thousands of class actions are filed in the United States." *Class Action Fairness Act of 2003: Hearing on H.R. 1115 Before the H. Comm. on the Judiciary*, 108th Cong. 16 (2003) [hereinafter *2003 House Hearing*] (statement of John H. Beisner, Partner, O'Melveny & Myers LLP). Available studies support the inference that there may have been in excess of 50,000 class actions filed since the early 1990s. *See, e.g.*, HENSLER ET AL., *supra* note 100, at 63-67.

large fees and that individual class members received little or no monetary relief.[219] That, of course, proved nothing of significance. One of the principal reasons why the class action form was created, after all, was precisely to make small claims viable; hence it was only to be expected that large numbers of class actions would bring but the smallest monetary awards to individual class members. Indeed, statistical evidence showed that potential recoveries for class members would usually have been inadequate to support the litigation of individual actions and hence that the class action form was necessary if those claims were to be pursued. More importantly, available statistical evidence contradicted the claim that abuses involving settlements and attorneys' fees were common. To the contrary, it suggested that abuses were relatively rare and that class members usually made worthwhile gains from class settlements.[220] Perhaps of greatest significance, CAFA's supporters commonly slighted or assumed away such issues as the wrongfulness of defendants' underlying conduct, the salutary deterrent effects of the suits, the general social value of ensuring that legal norms were enforced, and the basic question of whether class members—and the broader general public—were safer, more fairly treated, or otherwise better off as a result of the suits than they would have been without them.

There were, of course, relatively few comprehensive statistical studies of class actions available, and those that existed were generally unable to answer critical questions about the ultimate utility and social value of existing class action rules.[221] The Federal Judicial Center pro-

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[219] "Through several hearings over the past several years, the Committee has become aware of numerous class action settlements approved by state courts in which most—if not all—of the monetary benefits went to the class counsel . . . ." S. REP. NO. 109-14, at 15, *reprinted in* 2005 U.S.C.C.A.N. at 16. Some of the cases cited seemed to have little probative value. One involved an allegedly improper settlement that the Senate Judiciary Committee acknowledged in a footnote "ultimately did not proceed," and another was a case that was "properly dismissed" by the court. *Id.* at 15 n.52, 21.

[220] *See* WILLGING, HOOPER & NIEMIC, *supra* note 104, at 11, 90; Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27, 60 tbl.3 (2004). Indeed, if one accepted Posner's economic theory of negligence, the way in which defendants' costs were divided between parties and their attorneys was irrelevant.

[221] "[P]olicymakers who hear calls to reform class action rules have little objective evidence on class action processes or outcomes to guide their decisions." HENSLER ET AL., *supra* note 100, at 5. The few reliable empirical studies of class actions that are available include, in addition to the work just cited, WILLGING & WHEATMAN, *supra* note 189; WILLGING & WHEATMAN, *supra* note 152; WILLGING, HOOPER & NIEMIC, *supra* note 104; and Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591 (2006)

duced a useful study in 1996, for example, but it examined only four federal judicial districts and covered only cases that had been filed during a single two-year period.[222] The most extensive study available, a RAND Study on class action dilemmas published in 2000, concentrated on in-depth examinations of ten individual class actions while compiling more general survey evidence that was useful but—by RAND's own admission—limited, incomplete, and inconclusive.[223] Worse, there seemed little or no useful comparative data on class actions in the state courts. "I am aware of no reliable data, historical or current, concerning state court class actions," Stephen B. Burbank reported, "and I doubt that reliable data exist for most states."[224]

Most scholars agreed that the available evidence was inadequate and inconclusive. Reviewing the RAND Study, Peter Schuck noted that its "most striking finding is uncertainty" and concluded that partisans would consequently be able to continue to "confuse the issues surrounding class actions, exaggerate their claims, and cite misleading analogies, atypical cases, and unrepresentative anecdotes."[225] Revealingly, the authors of the RAND Study largely agreed. "Because there is so little systematic data on state court class actions," they admitted, "we have no empirical basis for assessing the argument that federal judges generally manage damage class actions better than state court judges."[226] Ultimately, convincing and objective empirical evidence could not resolve class action disputes, they explained, for the class action dilemma was "a deeply political question, implicating fundamental beliefs about the structure of the political system, the nature of society, and the roles of courts and law in society."[227]

Thus, like earlier jurisdictional reforms, CAFA was based on limited and inadequate data, evidence that consisted for the most part of impressions, anecdotes, partisan interpretations, and biased collections of allegedly "representative" cases. "Thus, as with many legal

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[hereinafter Willging & Wheatman, *Attorney Choice of Forum*]. For the handful of earlier class action studies, see HENSLER ET AL., *supra* note 100, at 39 n.38.

[222] *See* WILLGING, HOOPER & NIEMIC, *supra* note 104, at 4. The study warned that the "four districts were not selected to be a scientific sampling of class actions nationwide" and that "our results cannot and should not be viewed as representative of all federal district courts." *Id.* at 5.

[223] *See* HENSLER ET AL., *supra* note 100, at 141-43.

[224] Burbank, *supra* note 2, at 1500.

[225] Peter H. Schuck, *Class Clarity*, AM. LAW., Jan. 2000, at 41.

[226] HENSLER ET AL., *supra* note 100, at 482.

[227] *Id.* at 472; *accord* Hensler, *supra* note 74, at 205 (explaining the difficulties involved in analyzing whether the benefits of class actions outweigh the costs).

matters," Edward F. Sherman concluded, "we ultimately have to rely on anecdotal evidence to assess to what extent consumers as a class benefit from class action litigation."[228] Indeed, he continued, echoing the conclusions of the RAND Study, "the assessment of the merits of class actions is heavily bound up with social and political considerations that do not provide a definitive solution as to what should be done in the future."[229]

E. *The Question of State-Federal "Parity"*

Not surprisingly, CAFA's supporters criticized state courts and accused them of bias and unfairness. In certain states and counties, the American Tort Reform Foundation charged, the "judges systematically apply laws and court procedures in an unfair and unbalanced manner, generally against defendants in civil lawsuits."[230] Coming from partisans in jurisdictional debates, such charges were standard.

CAFA, however, was unusual in the extent to which such charges came not just from private groups pressing for advantage but from Congress itself. In the past the House and Senate had usually remained circumspect, framing their reports and legislation to avoid direct and harsh accusations against state courts. Not, however, in CAFA. Indeed, Congress leveled the ultimate accusation in the statute itself: "State and local courts," CAFA announced baldly, were "sometimes acting in ways that demonstrate bias against out-of-State defendants."[231] The Judiciary Committees of both houses, moreover, seemed to hint at even more sinister charges. The House committee noted suspiciously that state courts would "rubber-stamp" settlements "that offer little if anything to the class members while enriching their lawyers,"[232] and the Senate Committee warned darkly that "judicial integrity" was "strongly implicated by class actions."[233]

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[228] Sherman, *supra* note 209, at 233.

[229] *Id.* at 237.

[230] AM. TORT REFORM FOUND., *supra* note 187, at ii.

[231] CAFA § 2(a)(4), 28 U.S.C. § 1711 note (Supp. V 2005).

[232] H.R. REP. NO. 108-144, at 8 (2003). The accusation echoed the charge of John H. Beisner, the class action defense attorney who helped draft the statute. Some state courts, Beisner told the House Judiciary Committee, "are rubber-stamping class action settlements with little regard to whether they benefit the plaintiffs on whose behalf the cases were supposedly brought." *2003 House Hearing*, *supra* note 218, at 15 (statement of John H. Beisner, Partner, O'Melveny & Myers LLP).

[233] S. REP. NO. 109-14, at 8 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 9; S. REP. NO. 108-123, at 10 (2003).

Both Judiciary Committees, in fact, indicted the state courts bluntly and directly. "[T]he class action abuse problem, particularly with respect to class settlements," the Senate Committee charged, "is primarily a state court issue."[234] The extent to which abuses took place in federal court "in no way even approaches the level of abuse evidencing itself in state court."[235] There had been a "dramatic increase" in state court class actions, and the increase was attributable not to differences in formal rules for class certification but to the characteristics of the state courts themselves.[236] First, "some state court judges are less careful than their federal court counterparts when applying the procedural requirements that govern class actions."[237] In following the law, the committee charged, they were unacceptably "lax."[238] Second, "a large number of state courts lack[ed] the necessary resources to supervise proposed class settlements properly."[239] The result was an "inconsistent administration of class actions in state courts" and, consequently, "several forms of abuse."[240]

The House Judiciary Committee was equally harsh. Class action "abuses are occurring primarily in our State court system," it announced, and "considerable evidence" showed that there were "increasing problems with State court class actions."[241] Indeed, "abuse has become pervasive in certain county courts."[242] They "ignore the procedural requirements that govern class actions" and "readily certify classes or approve settlements with little—if any—regard for class certification standards."[243] As a result, inadequate and collusive settlements were "far more prevalent in State courts than in Federal courts."[244] Indeed, the House Committee charged sweepingly, "abusive State court settlements abound."[245]

Insofar as CAFA's supporters sought to invoke the rationale of diversity jurisdiction by charging the state courts with "bias" or "local

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[234] S. REP. NO. 108-123, at 54.

[235] *Id.*

[236] *Id.* at 14.

[237] *Id.* at 14-15.

[238] *Id.* at 15.

[239] *Id.*

[240] S. REP. NO. 109-14, at 14 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 15.

[241] H.R. REP. NO. 108-144, at 7-8 (2003). The House Judiciary Committee did not submit a new report on CAFA in the 109th Congress.

[242] *Id.* at 8.

[243] *Id.* at 12.

[244] *Id.* at 16.

[245] *Id.*

prejudice," their claims were dubious and, in any event, unproven. First, there was no evidence that bias or unfairness existed in state courts generally, and in spite of their extreme and sweeping rhetoric, not even CAFA's most unrestrained advocates purported to show otherwise.[246] Second, CAFA's supporters identified only a handful of counties that hosted the dreaded "magnet" courts. Thus, on the basis of their specific accusations, whatever problems existed were limited, at most, to a few counties in a few states.[247] Remedying such a localized problem neither justified nor required CAFA's wholesale expansion of federal jurisdiction.[248] Indeed, even assuming the worst about

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[246] In spite of commonly accepted views to the contrary, a study by the Federal Judicial Center found that state courts "were not typically more favorable for plaintiffs, and federal forums were not typically more favorable for defendants." Willging & Wheatman, *Attorney Choice of Forum*, *supra* note 221, at 654. The "bias" argument that CAFA's supporters advanced was also somewhat inconsistent. While they claimed that a bias existed against out-of-state defendants, they designed CAFA to cover most "nationwide" and "multistate" class actions, that is, class actions that involved class members who resided in many different states. If there were state court "bias" against those from out of state, then, it would likely have affected not only defendants but also most members of plaintiff classes.

[247] The Senate Judiciary Committee singled out two counties in Illinois—Madison and St. Clair—as "magnet courts." *See supra* note 214 and accompanying text; *see also* H.R. REP. NO. 108-144, at 11-12 (2003) (suggesting that nine counties in four states hosted "magnet[]" courts). In the House, Congressman James Sensenbrenner, a Wisconsin Republican who sponsored the bill, emphasized that it was designed to check "[t]he infamous handful of magnet courts." 151 CONG. REC. H726 (daily ed. Feb. 17, 2005); *see also id.* (identifying Madison County, Illinois, and Jefferson County, Texas, by name). John Beisner acknowledged that the class action problem "is a problem only with a select number of state courts"; indeed, he also admitted that other state courts "handle class actions admirably." *2003 House Hearing*, *supra* note 218, at 17 n.2 (2003) (statement of John H. Beisner, Partner, O'Melveny & Myers LLP). On the scant empirical evidence about "magnet courts," see *Class Action "Judicial Hellholes": Empirical Evidence Is Lacking*, CONGRESS WATCH (Pub. Citizen, Wash. D.C.), Jan. 2005, http://www.citizen.org/documents/OutlierReport.pdf [hereinafter *Empirical Evidence*].

[248] In 1990, moreover, the Federal Courts Study Committee had discounted the importance of such spotty appearances of "bias" and concluded that they did not justify retaining diversity jurisdiction. FCSC, REPORT, *supra* note 46, at 40. Further, Congress could have remedied the alleged problem by allowing removal only in certain narrow and carefully tailored circumstances: when, for example, class actions were filed in (1) courts in particularly inconvenient locations, (2) courts with a certain number of other class actions already pending on their dockets, (3) courts where defendants could show that rulings on certification or other preliminary matters violated due process, (4) counties with less than a certain population, (5) counties having less than a certain number of class members as residents, or (6) courts located in states that lack appellate procedures allowing interlocutory appeals of class action certification decisions. In addition, Congress could have limited removal to cases where there was evidence that actual "bias" or "local prejudice" might actually influence the court. Over the years, many federal judges urged an "actual prejudice" standard for diversity

any "magnet" court, state judicial systems provided a variety of remedies by way of appellate review, and, to the extent that such remedies were inadequate in any particular state, the most obvious and effective solution was to press for reforms in that state's appellate procedures.[249] Third, even in the counties that CAFA's supporters singled out as containing "magnet" courts, there was little, if any, evidence of actual bias or prejudice. Nor was there significant evidence that, in selecting those forums, plaintiffs' attorneys were hoping to exploit bias and prejudice, rather than seeking advantage from any number of other legitimate characteristics of those courts, including judges or jurors who viewed the class action form more favorably. Forum shopping based on lawful differences between federal and state courts was a long-established and long-accepted—indeed, an inherent and inevitable—characteristic of the federal structure's dual court system.

If evidence of actual bias or local prejudice in state courts was thin or nonexistent, another factor helped explain why CAFA's supporters denounced state court abuses and worked to bring multistate class actions into the federal courts. The simple fact was that they strongly preferred federal forums for compelling practical reasons that had nothing to do with state court bias.[250] Based on more than 700 ques-

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removal or suggested other similar "discretionary" removal provisions. *See, e.g.*, Purcell, *supra* note 81, at 20-21.

[249] John Beisner argued that the reason plaintiffs' attorneys would file in a "magnet court" was "a simple one." There, he explained, they were able "to get a class certified quickly, scare defendants into a settlement, and take home a lot of money—even if they ha[d] very weak legal theories and d[id] very little legal work." *2003 House Hearing*, *supra* note 218, at 20. For examples of such cases, see S. REP. NO. 109-14, at 21-22, *reprinted in* 2005 U.S.C.C.A.N. at 22 (criticizing "drive-by class certification," which occurs before defendants can respond to the complaint). To the extent that such hasty certifications occurred, an expedited interlocutory appeal process in the state courts would constitute the most effective and carefully targeted reform available. Between 1997 and 2004, largely at the behest of defendants, at least eleven states changed their procedures for dealing with class actions. *See Empirical Evidence*, *supra* note 247, at 6-8.

[250] Such reasons included the federal courts' liberalized approach to summary judgment, more stringent rules on the admissibility of evidence, and a stricter approach to case management under Rule 16. *See* Lind, *supra* note 158, at 766-76; Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003) (examining the increase in pretrial resolution of federal cases); *cf.* Suja A. Thomas, Essay, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007) (arguing that the use of summary judgment has expanded). Further, much, if not most, of the battle for forum control between parties involved various types of perceived "nonlegal" advantages, such as differences between state and federal courts with respect to jury pools, docket backlogs, pace of litigation, geographical location, ability to select individual judges, time to final judgment on appeal, and a variety of practical convenience factors for oneself and inconvenience factors for the adversary.

tionnaire responses from class action attorneys, the Federal Judicial Center found that defendants' attorneys overwhelmingly favored the federal courts because they saw them as offering "an almost totally favorable *legal environment* for their clients"—a legal environment marked by "a convergence of judicial receptivity, predispositions, and favorable substantive and procedural rules."[251] Recent amendments to the Federal Rules of Civil Procedure, for example, had notably enhanced defendants' position by allowing interlocutory appeals of class certification decisions,[252] granting judges broader power to select class counsel,[253] mandating more rigorous standards for awarding attorneys' fees,[254] and adding additional safeguards against unfair settlements.[255] Thus, CAFA did not so much save defendants from biased state courts as reward them with access to an alternate forum that they regarded as more favorable to their interests.

The fact that defense attorneys believed that the federal courts showed "receptivity" and "predispositions" in their favor suggests, moreover, that a broad institutional change also helped fire the determination of CAFA's supporters. Class action plaintiffs largely had turned to state forums in the 1990s for the same reason that plaintiffs in civil rights actions and other similar types of cases had previously. In the decades after 1969, and especially since 1981, the federal courts—particularly the Supreme Court—had increasingly fallen under the domination of Republican appointees and conservative political values, and the federal courts consequently grew ever more suspicious of plaintiffs who sued government and business and ever more sympathetic to large institutional defendants, both public and private.[256] The change reversed the assumptions that had marked the

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[251] Willging & Wheatman, *Attorney Choice of Forum*, *supra* note 221, at 53 (emphasis added); *see also* WILLGING & WHEATMAN, *supra* note 152, at 4 (reporting similar findings).

[252] *See* FED. R. CIV. P. 23(f) (effective Dec. 1, 1998). What seemed a facially neutral rule gave additional leverage to defendants as a practical matter. *See Developments in the Law—The Paths of Civil Litigation*, *supra* note 100, at 1819 ("[T]he practical effect of this amendment may be to mitigate only those process problems affecting defendants.").

[253] *See* FED. R. CIV. P. 23(g) (effective Dec. 1, 2003).

[254] *See* FED. R. CIV. P. 23(h) (effective Dec. 1, 2003).

[255] *See* FED. R. CIV. P. 23(c) (effective Dec. 1, 2003) (accelerating certification and other decisions); FED. R. CIV. P. 23(e) (effective Dec. 1, 2003) (requiring hearings on settlements and disclosure of "side agreements," and authorizing courts to order additional opt-out opportunities for class members). The Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737, imposed even tighter restrictions on plaintiffs' attorneys in federal securities class actions.

[256] On the manifestation of this phenomenon in the Rehnquist Court, see Purcell, *supra* note 203, at 508 (arguing that the Rehnquist Court "tended to burden individual

long period from 1933 to 1969 and restored the institutional assumptions that had existed during the half century prior to the New Deal.[257] The "general perceptions about state and federal judges are now quite the opposite of what they once were," summarized one public interest attorney in 1999: "[f]ederal judges are no longer seen as friends of plaintiffs."[258] Empirical evidence supported that claim.[259] Whatever the role of "bias" and "local prejudice," then, CAFA (like most of the contested jurisdictional reforms over the previous century) is explained in large part by the perceived political and social orientation of the federal courts themselves.

III. CAFA: NEW FACTORS IN FEDERAL JURISDICTIONAL REFORM

While CAFA, with two notable exceptions, fits the classic mold of federal jurisdictional reform, it also involved important new factors. If continuity with the past was apparent, so was the influence of those new factors. CAFA was to a large extent the product of three sweeping, interrelated, and relatively recent developments: the institutionalization of a powerful business-oriented "tort reform" movement, a broad shift in the ideological assumptions that underlay American so-

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litigants who [sought] relief against large private and governmental institutions" and "strengthened the ability of those institutions to defeat such suits"); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 224-25 (2003) (discussing the Rehnquist Court's presumption against the creation of new federally enforceable rights); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1107 (2006) ("[T]he Rehnquist Court has expressed a profound hostility to litigation.").

[257] Though not isolating class actions from other types of actions, empirical evidence suggested that defendants did better in cases removed to federal court than they did in state courts. *See* Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 584 (1998).

[258] Morrison, *supra* note 193, at 1529.

[259] *E.g.*, Kevin M. Clermont & Theodore Eisenberg, *Anti-Plaintiff Bias in the Federal Appellate Courts*, 84 JUDICATURE 128, 131 (2000) (noting that appellate courts seem to be warier of pro-plaintiff bias in jury decisions than in decisions made by judges); *cf.* Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 243 (1999) (confirming the correlation between a judge's party and ideology). Plaintiffs' class action attorneys preferred the state courts because of the "perceived animus toward class actions on the part of federal judges." HENSLER ET AL., *supra* note 100, at 66. About three-quarters of defendants' class action attorneys regarded the federal courts as favorable forums, while only a quarter of the plaintiffs' class action attorneys did so. WILLGING & WHEATMAN, *supra* note 152, at 29 tbl.6. For the views of defendants' attorneys, see *id.* at 8-9, 18, 29-31.

cial and political thought, and the galloping processes of globalization that were transforming the world.

A. *The Modern "Tort Reform" Movement*

Organized efforts to protect business from lawsuits have a long history in the United States. In the late nineteenth century, an explosion of industrial injuries and the rise of a plaintiffs' personal injury bar led to corporate campaigns against "ambulance chasing," contingent fee agreements, and a variety of other alleged ethical abuses.[260] In the early twentieth century, for example, a group of companies, led by insurance and railroad corporations, established the Alliance Against Accident Fraud to prosecute the "professional litigants, 'fakirs,' false witnesses, shyster lawyers, tricky doctors, ambulance-chasers, and runners" who were allegedly cheating honest businesses.[261] Such abuses surely existed, but the corporate campaigns against them tended to be wholly one-sided, seeking to negate a variety of plaintiffs' tactics while ignoring pervasive and unfair tactics—legal and otherwise—that the companies themselves employed regularly and methodically.[262] Although such efforts enjoyed occasional successes at both federal and state levels, they tended to be sporadic, short-term, narrowly focused, and poorly organized.

Beginning in the 1970s, however, reacting against the broad expansion of corporate liability that had occurred during the preceding decades,[263] insurance companies and growing numbers of business interests launched what became a concerted, long-range, and seemingly permanent campaign to transform the nation's understanding of its civil justice system. Grandly, they seized the benevolent-sounding la-

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[260] *See* KEN DORNSTEIN, ACCIDENTALLY, ON PURPOSE: THE MAKING OF A PERSONAL INJURY UNDERWORLD IN AMERICA (1996) (tracing the evolution of insurance fraud); PURCELL, *supra* note 16, at 150-54 (describing efforts to counter the rise of a plaintiffs' personal injury bar); Peter Karsten, *Enabling the Poor To Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, a History to 1940*, 47 DEPAUL L. REV. 231 (1998) (describing the rise of the contingency fee and the efforts of the bar to restrict or eliminate it).

[261] PURCELL, *supra* note 16, at 152 (internal quotation marks omitted).

[262] *See* Karsten, *supra* note 260, at 258 & n.219, Edward A. Purcell, Jr., *The Action Was Outside the Courts: Consumer Injuries and the Uses of Contract in the United States, 1875–1945*, *in* PRIVATE LAW AND SOCIAL INEQUALITY IN THE INDUSTRIAL AGE 505 (Willibald Steinmetz ed., 2000).

[263] For a summary of key developments in the expansion of tort liability between 1945 and 1980, see THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 46-59 (2001).

bel "tort reform" and began vigorously and systematically to blame most of America's woes on a frightening, unjustified, and greed-inspired "litigation explosion." They methodically demonized plaintiffs' attorneys, sensationalized and distorted unrepresentative cases, submerged issues of corporate wrongdoing, and ignored the need of the injured and defrauded for just compensation. Incessantly, they hammered on their dramatic unifying themes: first, that litigation in the United States involved little but "frivolous" lawsuits brought by rapacious lawyer-pirates and intended only to cheat honest businesses; second, that allowing such litigation was wasteful, destructive, and virtually insane.[264] To cure the madness and restore "common sense" to American life and law, they urged a broad range of legislative and judicial reform measures designed to drive plaintiffs from the courts by extinguishing claims, limiting damages, tightening evidentiary rules, adding procedural complexities, imposing heavier burdens of proof, and making claimants liable for defendants' legal costs. Most fundamentally and ambitiously, they sought to alter general cultural attitudes about the American legal system itself and thereby poison the minds of judges, jurors, and the general public against anyone who dared blame business for any loss or injury.[265] While the movement

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[264] For full statements of the "tort reform" argument, see PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988), and WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1991). For a more recent statement, see generally Mark A. Behrens & Andrew W. Crouse, *The Evolving Civil Justice Reform Movement: Procedural Reforms Have Gained Steam, but Critics Still Focus on Arguments of the Past*, 31 U. DAYTON L. REV. 173 (2006).

[265] For general discussions, see HALTOM & MCCANN, *supra* note 216, decrying the inaccuracies of "tort reform" anecdotes; KOENIG & RUSTAD, *supra* note 263, countering popular anti-tort arguments; Stephen Daniels & Joanne Martin, *"The Impact That It Has Had Is Between People's Ears:" Tort Reform, Mass Culture, and Plaintiffs' Lawyers*, 50 DEPAUL L. REV. 453 (2000), expressing concern about the impact of "tort reform" on access to counsel; Marc Galanter, Essay, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 TEX. L. REV. 285 (2002), tracing the rise of the "too-much-law view" in response to the growing role of litigation; and John T. Nockleby & Shannon Curreri, *100 Years of Conflict: The Past and Future of Tort Retrenchment*, 38 LOY. L.A. L. REV. 1021 (2005), discussing the institutional assault on tort law. Some two decades ago, Marc Galanter wrote,

> [L]itigation implies accountability to public standards. The heightening of public accountability is in many quarters an unwelcome counter to deregulation or self-regulation. . . . The predominance of cases enforcing market relations has given way to tort, civil rights, and public law cases "correcting" the market. It is such litigation "up"—by outsiders and clients and dependents against authorities and managers of established institutions—that excites most of the reproach of our litigious society.

Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 38 (1986).

assaulted the civil justice system broadly, its focus and its principal successes lay in what Robert L. Rabin simply but accurately termed "victim take-away programs."[266]

The movement was well organized and well financed, and its shrill and relentless campaign drew together libertarians, economic conservatives, business interests, and the Republican party on a common platform.[267] Funding gushed from corporations, business associations, wealthy individual donors, and right-wing foundations to support literally dozens of think tanks, litigation centers, and university programs while underwriting a proliferating range of publications, conferences, and individual fellowships and grants.[268] Between 1985 and 2002, right-wing foundations contributed at least $36 million to support the development and spread of law and economics programs, while Richard Mellon Scaife and other Scaife family foundations contributed more than $19 million to the Pacific Legal Foundation, George Mason University, and the Heritage Foundation.[269] Similarly, right-wing organizations such as the Manhattan Institute—one of whose studies the House Judiciary Committee cited in support of

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[266] Robert L. Rabin, *Some Reflections on the Process of Tort Reform*, 25 SAN DIEGO L. REV. 13, 22 (1988).

[267] *See* DAVID C. JOHNSON, COMMONWEAL INST., THE ATTACK ON TRIAL LAWYERS AND TORT LAW 3-9 (2003), http://www.commonwealinstitute.org/reports/TortReport.pdf (describing the "tort reform" alliances and their funding); Walter Probert, Review Essay, *The Politics of Torts Casebooks: Jurisprudence Reductus*, 69 TEX. L. REV. 1233, 1236 n.28 (1991) (discussing divergent views on Peter Huber's attacks on modern tort law). Support for the "tort reform" movement "seems to associate with fairly standard political and socio-economic indicators," concluded two social scientists. "In this sense tort reform activity is one of the many policy outputs that is affected by contrasting ideological preferences . . . ." Euel Elliott & Susette M. Talarico, *An Analysis of Statutory Development: The Correlates of State Activity in Product Liability Legislation*, 10 POL. STUD. REV. 61, 74 (1991).

[268] For the development of right-wing think tank and foundation infrastructure, see, for example, GRAETZ & SHAPIRO, *supra* note 216, at 85-98, tracing how right-wing think tanks developed the campaign against the estate tax, which they termed the "death tax"; JEAN STEFANCIC & RICHARD DELGADO, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA 4-5 (1996), describing the growth of the conservative movement and seven of its notable campaigns; Faith Stevelman Kahn, *Pandora's Box: Managerial Discretion and the Problem of Corporate Philanthropy*, 44 UCLA L. REV. 579, 653-57 (1997), detailing the conservative movement's use of politically affiliated 501(c)(3) organizations; and Alice O'Connor, *The Politics of Rich and Rich: Postwar Investigations of Foundations and the Rise of the Philanthropic Right*, *in* AMERICAN CAPITALISM: SOCIAL THOUGHT AND POLITICAL ECONOMY IN THE TWENTIETH CENTURY 228-48 (Nelson Lichtenstein ed., 2006), describing the strategic growth of right-wing foundations.

[269] JAY M. FEINMAN, UN-MAKING LAW: THE CONSERVATIVE CAMPAIGN TO ROLL BACK THE COMMON LAW 183-85 (2004).

CAFA[270]—and the Mountain States Legal Foundation received millions upon millions of dollars from Scaife foundations and other right-wing supporters, including the Lynde and Harry Bradley Foundation, the John M. Olin Foundation, and various Coors family foundations.[271] By 1996, the ten largest right-wing think tanks had a combined budget of more than $126 million, and it was estimated that during the 1990s the top twenty would spend more than $1 billion disseminating their policy ideas.[272] Between 1985 and 1995, the Heritage Foundation was able to increase its operating budget from $10 million to $30 million per year, and a special campaign celebrating its twenty-fifth anniversary in 1997 brought in $85 million.[273] In order to curb "lawsuit abuse," the U.S. Chamber of Commerce vowed in 2000 to contribute $10 million to George W. Bush's presidential campaign, and by 2004 it had spent $100 million on anti-litigation lobbying and publicity.[274] The availability of massive funding was particularly critical, for the "tort reform" movement shifted the source of tort law from courts to legislatures, a change that made it likely that the future of American tort law would be determined largely by "legislation, politics, money, and rhetoric."[275]

The "tort reform" movement also drew strength from the changing structure of the legal profession, in particular its increase in size and its growing concentration on corporate legal services, especially among elite lawyers and large firms.[276] An elaborate study of changes

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[270] *See* H.R. REP. NO. 108-144, at 12 (2003) (citing the Manhattan Institute in support of the finding that the number of class actions is growing rapidly).

[271] *See* FEINMAN, *supra* note 269, at 183-85; *see also* STEFANCIC & DELGADO, *supra* note 268, at 142-44 (explaining how the conservative campaign used public relations and the media to promote its cause).

[272] David Callahan, *$1 Billion for Conservative Ideas*, NATION, Apr. 26, 1999, at 21, 23. For listings of grants for individual right-wing projects and institutions, see generally STEFANCIC & DELGADO, *supra* note 268 (discussing seven major campaigns that right-wing think tanks undertook to spread their messages and influence the U.S. social agenda).

[273] GRAETZ & SHAPIRO, *supra* note 216, at 91.

[274] A "tort tax," the Chamber of Commerce declared, cost every person in the country $809 per year in higher prices for goods and services. Dan Zegart, *The Right Wing's Drive for "Tort Reform,"* NATION, Oct. 25, 2004, at 13, 13, 15.

[275] F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437, 439 (2006). During the 2003–2004 election cycle, advocates and opponents of "tort reform" poured more than $100 million into campaigns in only seven states. *Id.* at 536.

[276] Corporate in-house counsel also grew in numbers and influence, and corporate clients placed increasing demands on outside counsel for services and results. HEINZ ET AL., *supra* note 61, at 295-99. The number of lawyers in the United States jumped

among Chicago lawyers between 1975 and 1995 showed declining support for government assistance to the poor, more negative attitudes toward labor unions, and a large increase in the numbers who served corporate clients.[277] By 1995 the bar's corporate sector had grown to more than double the size of its individual client sector, and corporate matters took up a far more substantial share of overall lawyers' time, jumping from fifty-three to sixty-four percent.[278] Even more important, the study showed that "the political views of lawyers appear to be importantly influenced by their work context," and divisions in attitudes about the relative advantages of government regulation and market mechanisms "reflected the interests of their clients."[279] Lawyers "may be more consistently sympathetic to big business" than the general public,[280] the study concluded, and when "their clients' interests are at stake," lawyers "can usually be counted upon to identify with those interests."[281] Another study, focused on large-firm lawyers, reached similar conclusions. It observed that

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from 355,242 in 1971 to 857,931 in 1995, and "by the close of the century, the proportionate differences in client demand and, in turn, income inequality were even greater." Carroll Seron, *The Status of Legal Professionalism at the Close of the Twentieth Century:* Chicago Lawyers *and* Urban Lawyers, 32 LAW & SOC. INQUIRY 581, 583-84 (2007). For the corporate orientation of elite law firms, see, for example, Robert L. Nelson, *The Futures of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society*, 44 CASE W. RES. L. REV. 345, 353 (1994), which presents evidence of "increasing demand for corporate legal services." Between 1967 and 1982, law firm revenues from business clients jumped from $5 billion to $34 billion, thus rising in percentage terms from thirty-nine to forty-nine percent of total law firm revenues. MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 112-13 (1991). The largest share of that swelling revenue stream, moreover, went to the large and most prestigious firms. *See id.* (hypothesizing that corporations "not only required more services," but also required more "services per legal matter").

[277] *See* HEINZ ET AL., *supra* note 61, at 181-83 (stating that between 1975 and 1995 "there was clear movement in a more conservative direction" on whether it was important for the government to help the poor and disadvantaged). During this period, lawyers' views also shifted to "a more negative view of unions." *Id.* at 185. The earlier study is presented in JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (rev. ed. 1994).

[278] HEINZ ET AL., *supra* note 61, at 316.

[279] *Id.* "The lawyers' views, sharply divided even on fundamental issues concerning the virtues of the free market, appear to be generally congruent with those of their clients." *Id.* at 200-01.

[280] *Id.* at 200. Lawyers were "more conservative than the general population on issues concerning free markets and support for large companies." *Id.* at 201.

[281] *Id.* at 202. For a series of analyses of the structure and ideology of the legal profession, see generally LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION (Robert L. Nelson et al. eds., 1992), which compiles viewpoints on lawyers' and the legal profession's changing ideologies and ethics.

members of large firms "cannot take the posture of neutral experts seeking to achieve a just resolution of conflicting positions; they must present themselves as zealous advocates."[282] Thus, the large law firm "is not an agent of rationality and justice in the law" but, rather, "the agent of private corporate power."[283] Thus, as the legal profession evolved and the influence of corporate business grew ever greater, lawyers—especially elite lawyers and large, prestigious urban firms—grew ever more committed to corporate interests and ever more wary of those who found fault with them. Among such practitioners, "tort reform" often found both a warm welcome and a helping hand.

"Tort reform," of course, provoked strong opposition, and studies repeatedly demonstrated that most of the charges its advocates launched were, at best, exaggerated or misleading and, at worst, simply false.[284] Punitive damages, for example, were hardly the problem

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[282] NELSON, *supra* note 61, at 271-72; *see also id.* at 278, 287-89 (describing the ideology of professionalism in law firms today, and how firm and client dynamics affect this ideology).

[283] *Id.* at 281. "[W]hen it comes to questions of legal policy that pertain to their practice[, large-firm lawyers] strongly identify with their clients' positions and interests. Practice thus determines lawyers' specific conceptions of law and justice." *Id.* at 282.

[284] Researchers repeatedly demonstrated excesses and inaccuracies. Contrary to claims of a tort litigation "explosion," for example, evidence showed that there was a decrease in tort filings in the state courts during the 1990s. *See* Robert S. Peck, *Tort Reform's Threat to an Independent Judiciary*, 33 RUTGERS L.J. 835, 846-50 (2002) (reporting a ten percent decline in tort filings between 1991 and 2000). More generally, the "available empirical evidence contradict[ed tort reformers'] claims." *Id.* at 836. Those claims, concluded another scholar, are often "built of little more than imagination." Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147, 1155-56 (1992). For similar critiques and conclusions, see Daniel J. Capra, Essay, *"An Accident and a Dream:" Problems with the Latest Attack on the Civil Justice System*, 20 PACE L. REV. 339, 341 (2000) (critiquing the Public Policy Institute's methodology and its conclusion that a "litigation explosion" has occurred); Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda-Building*, LAW & CONTEMP. PROBS., Autumn 1989, at 269, 310 (concluding that attacks on the jury system resulted in policy formations that do not accurately "reflect what actually happens in the system"); Thomas A. Eaton et al., *Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1990s*, 34 GA. L. REV. 1049, 1058 (2000) (collecting data from state court filings and determining that, despite the high number of claims filed, "[t]here have not been any large increases in the number of tort filings between 1994 and 1997"); Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 722 (1998) (arguing that a "jaundiced view" of litigation has been sustained despite a wealth of countervailing empirical data); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1097 (1996) (arguing that the "most prominent common-sense assertions" regarding the need for tort reform are actually misleading); Deborah Jones Merritt & Kathryn Ann Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 OHIO ST. L.J. 315, 319 (1999) (analyzing empirical evidence from Franklin

that "tort reformers" claimed. They were awarded relatively rarely and, when given, were usually small.[285] The most recent survey of the available evidence concluded that "tort reform" claims about punitive damages were, in fact, "groundless."[286] The picture of American civil litigation promoted by groups like the American Tort Reform Foundation, concluded another study, "appears generally to be wrong."[287]

As a general matter, "tort reformers" failed to consider the full picture. They refused to weigh the fact that most potential tort claimants never brought suit, that large numbers of them never sought compensation from those who injured them, and that many of those who did try to obtain relief were practically unable—for reasons apart from the merits of their claims—even to secure attorneys to handle their cases.[288] "Large numbers of potential plaintiffs in personal injury cases," a typical study found, "are told, in effect, that their cases are

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County, Ohio, and concluding that recovery rates and verdict size are decreasing); Robert S. Peck et al., *Tort Reform 1999: A Building Without a Foundation*, 27 FLA. ST. U. L. REV. 397, 399-401 (2000) (noting the decreased sympathy of jurors for tort plaintiffs and criticizing Florida's tort-reform measures)

[285] *See* Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WIS. L. REV. 15, 19 tbl.1.

[286] *See* Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 960 (2007) (reviewing available empirical studies of punitive damages since 1985).

[287] Terence Dunworth & Joel Rogers, *Corporations in Court: Big Business Litigation in U.S. Federal Courts, 1971–1991*, 21 LAW & SOC. INQUIRY 497, 558 (1996).

[288] A massive study by the RAND Institute, for example, found that in each year studied only "one injury in ten results in some sort of attempt to bring a liability claim, either by negotiating directly with the injuror or his insurer or by seeking legal representation in a claim or lawsuit." DEBORAH R. HENSLER ET AL., RAND INST. FOR CIVIL JUSTICE, COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 175 (1991), *available at* http://www.rand.org/pubs/reports/2006/R3999.pdf; *accord* PATRICIA M. DANZON, MEDICAL MALPRACTICE 225-27 (1985) (exploring ways to redesign the tort system based on empirical data); Richard L. Abel, *The Real Torts Crisis—Too* Few *Claims*, 48 OHIO ST. L.J. 443, 444 (1987) (advocating a system of social insurance to replace the current tort system); William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC. REV. 631, 632 (1981) (suggesting the possibility that "too few wrongs are perceived, pursued, and remedied"); Saks, *supra* note 284, at 1287 (concluding that only a small fraction of injuries result in claims). As a general matter, in fact, "tort reformers" ignored many of the critical facts involved in the practical operation of the legal system, as well as the fact that the weak and poor are the groups most likely to suffer as a result of the current system. *See, e.g.*, NICHOLAS M. PACE ET AL., RAND INST. FOR CIVIL JUSTICE, CAPPING NON-ECONOMIC AWARDS IN MEDICAL MALPRACTICE TRIALS: CALIFORNIA JURY VERDICTS UNDER MICRA 30-33 & tbls.3.11 & 3.12 (2004), *available at* http://www.rand.org/pubs/monographs/2004/RAND_MG234.pdf (analyzing the effect of the award cap by age and gender); Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1265 (2004) ("The caps on noneconomic loss damages . . . have a significant adverse impact on women and the elderly.").

not worth the lawyers' time."[289] Indeed, "tort reform" sought to make contingency-fee plaintiff representation riskier and less profitable, thereby depriving many more claimants of access to attorneys and, thus, to the courts.[290] Similarly, "tort reformers" seldom mentioned defendants' abuses—unjustified stonewalling, frivolous defenses, costly motions, groundless counterclaims, threats of ethical sanctions, refusal to provide proper discovery, and abusive and demeaning deposition behavior.[291] Nor did they mention out-of-court tactics designed to pressure or intimidate those who had assertable claims. While litigation excesses existed, they were hardly limited to the plaintiffs' side. "Tort reformers," however, issued no denunciations of defendants' tactics and offered no serious proposals designed to remedy their abuses.

Most broadly, "tort reformers" ignored the fact that tort liability made major contributions to American life—compensating victims, making products safer, improving work conditions, helping to eliminate unlawful discrimination, and disciplining and correcting corporate misbehavior.[292] Similarly, they ignored the fact that litigation was

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[289] HEINZ ET AL., *supra* note 61, at 278. Lower-end practitioners took less than half of the personal injury cases that came to them, and those at the higher end took only twenty-four percent. *Id.* at 278-79. The practice of turning clients away is, of course, "less likely to affect major corporations than abused spouses, petty criminals, defrauded homeowners, or injured drivers." *Id.* at 279; *see also* JOHN A. JENKINS, THE LITIGATORS: INSIDE THE POWERFUL WORLD OF AMERICA'S HIGH-STAKES TRIAL LAWYERS, at x (1989) (noting that plaintiffs' lawyers avoid cases they are unlikely to win).

[290] HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 253-55 (2004); Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1452 (1993).

[291] *See, e.g.*, JENKINS, *supra* note 289, at 148-241 (discussing the use of such tactics in tobacco litigation).

[292] *See, e.g.*, Nicholas A. Ashford & Robert F. Stone, *Liability, Innovation, and Safety in the Chemical Industry*, *in* THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION 367, 367-68 (Peter W. Huber & Robert E. Litan eds., 1991) (arguing that tort liability improves safety); Steven P. Croley & Jon D. Hanson, *What Liability Crisis? An Alternative Explanation for Recent Events in Products Liability*, 8 YALE J. ON REG. 1, 51 (1991) (outlining the benefits of punitive damages); Nockleby & Curreri, *supra* note 265, at 1036 (arguing that the tort system, by regulating safety and economic power, prevents distribution of dangerous products); Schwartz, *supra* note 175, at 382 (arguing that tort law reinforces a sense of moral duty). *See generally* KOENIG & RUSTAD, *supra* note 263, at 1-5 (defending tort law as a means of promoting justice). While "tort reformers" compare the American liability system unfavorably to that of civil law jurisdictions, there is evidence that the common law system spurs economic growth more effectively than the civil law system. *See* Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503, 504 (2001) (attributing stronger economic growth to better protection for property and contract rights).

the instrument through which the law clarified and adapted its standards, created precedents that aided in facilitating future social arrangements and dispute settlements, and discouraged highly undesirable self-help efforts by injured or wronged persons. "No list of consequences, however, can capture fully the reasons for the public provision of adjudication," Albert Alschuler explained further. "In the end, some rights are sensed as rights, not merely as economically efficient arrangements."[293] The ultimate problem with the "tort reform" movement, then, was that it offered little but slashing polemics against evil-sounding categories—"frivolous" lawsuits, "extortionist" plaintiffs, "buccaneering" lawyers, "junk" claims and "junk" science—and failed to present careful, empirically justified, and fair-minded considerations of all the objectives of tort law, all the workings of the civil justice system, and all the strengths and weaknesses of alternative approaches that were available.[294]

Regardless of criticisms, however, "tort reform" found a warm welcome in many segments of the legal profession and an enthusiastic national home in the Republican party. The Reagan administration confirmed the alliance, establishing a "Tort Policy Working Group" that deplored "the dislocations and problems generated by a malfunctioning tort system"[295] and embraced a business-sponsored proposal to enact a national product liability law that would have severely limited

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[293] Alschuler, *supra* note 170, at 1816.

[294] *See, e.g.*, BURKE, *supra* note 143, at 35-41 (assessing alternatives to litigation). Compare, for example, the "tort reform" rhetoric of the American Tort Reform Foundation, *see* AM. TORT REFORM FOUND., *supra* note 187, at 33 (suggesting that the way to address the "hellholes" is by punishing "litigation tourism" and frivolous lawsuits), with the careful and nuanced studies of tort law and its alternatives conducted by the ALI and the RAND Institute for Civil Justice. *See* ALI, *supra* note 206, at 3-29; STEPHEN J. CARROLL ET AL., RAND INST. FOR CIVIL JUSTICE, NO-FAULT APPROACHES TO COMPENSATING PEOPLE INJURED IN AUTOMOBILE ACCIDENTS 224 (1991), *available at* http://www.rand.org/pubs/reports/R4019.pdf (finding that, at least in some contexts, a no-fault system for auto insurance would lead to smaller economic losses); HENSLER ET AL., *supra* note 288, at 175 (noting that the deterrence value of tort liability differs between behaviors). *But see* Thomas J. Campbell et al., *The Link Between Liability Reforms and Productivity: Some Empirical Evidence*, 1998 BROOKINGS PAPERS ON ECON. ACTIVITY: MICROECONOMICS 107, 131 tbl.5, 132 (finding a correlation of liability restrictions with increased productivity and employment levels).

[295] TPWG, REPORT, *supra* note 172, at 30. The Group's analysis and recommendations seemed sharply slanted toward the insurance industry and designed to limit corporate liability and promote certain business-sponsored tort reforms. For a more balanced assessment of the "insurance crisis" of the 1980s, see Kenneth S. Abraham, *Making Sense of the Liability Insurance Crisis*, 48 OHIO ST. L.J. 399, 399 (1987), which argues that simplistic explanations account for only a portion of the tort crisis, and that a full explanation is necessarily complex.

consumer rights and preempted state law in a core area of traditional state control.[296] His successor, President George H.W. Bush, stayed the course, sponsoring a President's Council on Competitiveness led by Vice President Dan Quayle, which issued an *Agenda for Civil Justice Reform* that proposed fifty law-reform measures designed to protect American business from tort suits.[297] In 1994, Congressman Newt Gingrich's "Contract with America" continued the campaign.[298] Tenet Nine of the Contract called for limits on punitive damages, substantial product liability reform, and the adoption of a rule requiring that losing parties pay the winner's attorneys' fees.[299] The second President George Bush remained on message, repeatedly praising "tort reform" and urging Congress to pass a number of measures, including CAFA.[300] In his State of the Union Address in 2005, he urged Congress to "protect honest job-creators from junk lawsuits" and declared that "[j]ustice is distorted, and our economy is held back by irresponsible class actions and frivolous asbestos claims."[301] The destruction wrought by lawsuits against business, Republicans charged, was growing worse every year. In 2000, they announced that the tort system "costs American companies and consumers more than $150 billion a

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[296] TIMOTHY CONLAN, NEW FEDERALISM: INTERGOVERNMENTAL REFORM FROM NIXON TO REAGAN 213-14 (1988).

[297] "Unrestrained litigation," the *Agenda* proclaimed on its first page, "necessarily exacts a terrible toll on the U.S. economy." PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 1 (1991); *see also* Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559, 560-61 (1992) (detailing the economic impact of tort lawsuits). For critiques, see Deborah R. Hensler, *Taking Aim at the American Legal System: The Council on Competitiveness's Agenda for Legal Reform*, 75 JUDICATURE 244, 247 (1992), which theorizes that "the explanation for these costs may lie less with the liability system . . . than with American businesses' penchant for using lawyers"; and Purcell, *supra* note 203, at 499-507, which criticizes the report for relying on inadequate and biased evidence.

[298] Carl Tobias, Essay, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699, 700 (1995).

[299] Republican Contract with America, *available at* http://www.house.gov/house/Contract/CONTRACT.html (last visited Apr. 15, 2008).

[300] Executive Office of the President, Statement of Administration Policy: S. 2062—Class Action Fairness Act of 2004 (July 7, 2004), *available at* http://www.whitehouse.gov/omb/legislative/sap/108-2/s2062sap-s.pdf; Executive Office of the President, Statement of Administration Policy: H.R. 2341—Class Action Fairness Act of 2002 (Mar. 12, 2002), *available at* http://www.whitehouse.gov/omb/legislative/sap/107-2/107PDFs/HR2341-House.pdf.

[301] George W. Bush, President of the U.S., State of the Union Address (Feb. 2, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/02/20050202-11.html. President Bush repeatedly returned to the same theme. *See* Remarks in a Discussion on Class-Action Lawsuit Abuse, *supra* note 126, at 201 ("[Class action] reform is part of a larger agenda to make sure this economy of ours continues to grow.").

year,"[302] and barely five years later they warned that those costs had jumped to more than $240 billion a year.[303]

During Reagan's presidency, Republicans introduced "tort reform" bills in Congress with increasing frequency,[304] and after taking control of the House in 1994, they enacted a series of such measures. Over President Clinton's veto the Republican Congress passed the Private Securities Litigation Reform Act of 1995 (PSLRA)[305] and three years later the Securities Litigation Uniform Standards Act of 1998.[306]

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[302] AM. PRESIDENCY PROJECT, *supra* note 201 (promising to reform the legal profession by requiring higher standards for trial lawyers).

[303] Press Release, Office of the Press Sec'y, President's Statement on House Passing Class Action Reform Bill, Feb. 17, 2005, *available at* http://www.whitehouse.gov/news/releases/2005/02/20050217-5.html (commending the House for taking measures to reduce frivolous lawsuits); Richard Cheney, Vice President of the United States, Vice President's Remarks at Annual Conservative PAC Conference (Feb. 18, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/02/print/20050218-1.html (asserting that the reduction of frivolous lawsuits will help to keep the economy strong).

[304] Since 1981 numerous bills related to "tort reform" have been introduced in Congress, many of them repeatedly. They included bills to limit punitive damages, "non-economic loss" damages, and contingency-fee awards, as well as bills designed to adopt the "English rule" of "loser pays," alter the collateral sources rule to limit damages, eliminate the election of judges, and limit plaintiffs' choice of venue. *See, e.g.*, The Library of Congress, Thomas, http://thomas.loc.gov/home/multicongress/multicongress.html (enter term "tort+reform"; then select "CHECK ALL") (last visited Apr. 15, 2008).

[305] Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.). The statute placed heavier pleading burdens on plaintiffs and gave defendants a variety of procedural advantages. Revealingly, Congress failed to make other changes in securities litigation that would likely have been more effective and would have provided greater protection for shareholders, such as imposing penalties on corporate insiders responsible for wrongful corporate acts. *See* John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1538 (2006) ("[T]he goal of deterrence requires the imposition of significant financial damages . . . [that] should be shifted so that they fall more on the culpable (and less on the innocent).").

[306] Pub. L. No. 105-353, 112 Stat. 3227 (codified in scattered sections of 15 U.S.C.). The Act required that "certain State private securities class action lawsuits alleging fraud" be removed to federal court and preempted certain state law tort actions. *Id.* § 2(5), 112 Stat. at 3227. The momentum in Congress "continues to be in favor of using preemption to consolidate class action suits in the federal courts, where stringent pleading, scienter, and other pro-defendant procedural and substantive standards can be made binding and uniform." Faith Stevelman Kahn, *Bombing Markets, Subverting the Rule of Law: Enron, Financial Fraud, and September 11, 2001*, 76 TUL. L. REV. 1579, 1621 (2002). On issues surrounding these two statutes, see Joshua D. Ratner, *Stockholders' Holding Claim Class Actions Under State Law After the Uniform Standards Act of 1998*, 68 U. CHI. L. REV. 1035, 1036 (2001), which argues that courts should close the loophole in the Uniform Standards Act that allows attorneys to bring securities fraud class actions in state court; Richard H. Walker, *Evaluating the Preemption Evidence: Have the Proponents*

Both heavily favored defendants.[307] The next year Congress enacted the so-called Y2K Act to protect the information technology industry.[308] Further handicapping plaintiffs, Congress limited civil rights suits by prisoners in the Prison Litigation Reform Act of 1995[309] and restricted the authority of the federal courts to issue writs of habeas corpus, especially in cases involving the death penalty, in the Antiterrorism and Effective Death Penalty Act of 1996.[310] In a near success, it passed the Common Sense Product Liability Legal Reform Act—a classic "tort reform" title for a classic "tort reform" measure—which limited claims in product liability cases.[311] In that instance, however, President Clinton vetoed the bill,[312] and the Republican majority failed to marshal the two-thirds vote necessary to override it.

Met Their Burden?, 60 LAW & CONTEMP. PROBS. 237, 239 (1997), which discusses preemption in this statutory context; and Walker, Levine & Pritchard, *supra* note 100, at 644, which analyzes "the incentives that have drawn plaintiffs' attorneys to turn to state courts in filing securities class actions."

[307] *See* John C. Coffee, Jr., *The Future of the Private Securities Litigation Reform Act: Or, Why the Fat Lady Has Not Yet Sung*, 51 BUS. LAW. 975, 995 (1996) ("[T]he Reform Act seeks to tilt the balance in securities litigation in favor of the defendant at virtually every juncture."); Walker, Levine, & Pritchard, *supra* note 100, at 642 ("*Congress* did take sides, crediting the arguments of critics who asserted that plaintiffs' lawyers were the central problem . . . .").

[308] Pub. L. No. 106-37, 113 Stat. 185 (1999) (codified at 15 U.S.C. §§ 6601–6617 (2000)). The statute imposed strict pleading requirements on plaintiffs, limited punitive damages, and extended federal jurisdiction to certain types of class actions, including those asserting state law claims. *See also* Vairo, *supra* note 209, at 1607-08 & n.257 ("The importance of this statute is that it provides federal jurisdiction in class actions that otherwise would be beyond its jurisdictional reach.").

[309] Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended in scattered sections of 11, 18, and 28 U.S.C.). This statute limited the ability of prisoners to sue in forma pauperis, imposed exhaustion requirements on suits, restricted the award of attorneys' fees, prohibited damages for mental or emotional injury without a showing of physical injury, and severely constrained the power of the federal courts to issue injunctive relief. The Act was not passed because prison conditions no longer warranted such prisoner suits. Indeed, most prisons continue to have serious problems. *See generally* JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, COMM'N ON SAFETY & ABUSE IN AM.'S PRISONS, CONFRONTING CONFINEMENT (2006) (detailing the problematic conditions in prisons related to violence and inadequate health care); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 3-4 (2006) (discussing the societal impact of the massive increase in imprisonment in the United States).

[310] Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 18, 28, and 49 U.S.C.).

[311] *See* Common Sense Product Liability Legal Reform Act, H.R. 956, 104th Cong. (1996) ("An act [t]o establish legal standards and procedures for product liability litigation, and for other purposes.").

[312] In doing so, President Clinton declared that the bill would "hurt families," "mean more unsafe products in our homes," and "let wrongdoers off the hook." Remarks on Returning Without Approval to the House the Common Sense Product Li-

In the states, victories for "tort reform" were even more numerous.[313] During the 1970s dozens of states began screening lawsuits, encouraging arbitration, imposing damages caps, limiting the reach of the collateral source rule, restricting medical malpractice suits, and adopting no-fault insurance systems. In the following decade states moved to cap pain-and-suffering awards, limit punitive damages, and modify or eliminate joint and several liability. "In 1986 alone," two researchers concluded, "forty-one of forty-six state legislatures enacted some type of tort reform measure."[314]

The courts, too, moved in the same direction. State judges increasingly rejected efforts to expand corporate liability and, in many areas, began restricting it sharply.[315] "Tort reformers" reshaped the membership of the Texas Supreme Court, for example, substantially strengthening the position of defendants in personal injury actions.[316] Similarly, the U.S. Supreme Court repeatedly increased the burdens that plaintiffs faced in securities cases[317] and imposed new constitutional limits on punitive damages.[318] The dominant characteristic of

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ability Legal Reform Act of 1996 and an Exchange with Reporters, 32 WEEKLY COMP. PRES. DOC. 776 (May 2, 1996).

[313] The "last two decades of tort 'crisis' have altered the lawmaking landscape for tort litigation itself. State legislators have intervened more and more often . . . ." ALI, *supra* note 206, at 581.

[314] Nockleby & Curreri, *supra* note 265, at 1031.

[315] *See id.* ("The 1980s also marked a turning point in the judicial arena as state court judges recoiled from attempts further to expand tort rights.").

[316] *See* Harry L. Reed, *Texas Oil and Gas Law in a World of Tort Reform*, 48 S. TEX. L. REV. 259, 260 (2006) ("[N]early every justice who has sat on the Supreme Court of Texas has had his or her selection . . . influenced in some degree by their potential position on tort law matters.").

[317] *See, e.g.*, Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 177-78 (1994) (declining to extend liability to acts of aiding and abetting); Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, 128 S. Ct. 761, 768-69 (2008) (examining and agreeing with *Central Bank*); *see also* Kahn, *supra* note 306, at 1619-20 (discussing *Central Bank*); Bhavik R. Patel, Note, *Securities Regulation—Fraud—Rule 10b-5 No Longer Scares the Judiciary, but May Scare Corporate Defendants: The United States Supreme Court Switches Directions*, 25 U. ARK. LITTLE ROCK L. REV. 191, 198 nn.80-88 (2002) (discussing the limits on Rule 10b-5 suits imposed by the Court).

[318] *See, e.g.*, Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 443 (2001) (requiring a more stringent de novo standard of review for determinations of punitive damages); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585-86 (1996) (overturning a $2 million damages award as unconstitutionally excessive). For statistics on punitive damages, see generally the evidence surveyed in Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 746 (2002), which examined data on judge and jury trial outcomes and concluded that "our primary claim is a negative one—the *absence* of evidence that judges and juries

the Rehnquist Court, in fact, was its persistent and broad-gauged efforts to restrict court access and limit the judicial remedies available to individual litigants.[319] Justice Scalia sounded the authentic voice of "tort reform" when he supported a narrow interpretation of the civil rights attorneys' fees statute. According to him, plaintiffs frequently asserted "phony claims," and their actions were often simply "extortionist."[320] Thus, improperly awarding them fees, he declared, would be "evil."[321] The relatively consistent prodding of the Burger and Rehnquist Courts, and the dominance of Republican appointees on the federal bench, made the national courts increasingly sympathetic to the goals, values, and assumptions of the "tort reform" movement.[322]

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behave substantially differently"; and Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 960 (2007).

[319] *See, e.g.*, sources cited *supra* note 256. There were occasional exceptions. *See, e.g.*, Jones v. Bock, 127 S. Ct. 910, 919 (2007) (refusing to allow lower courts to impose heightened pleading requirements on § 1983 actions as a means of implementing the exhaustion requirement of the Prison Litigation Reform Act of 1995).

[320] Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 618 (2001) (Scalia, J., concurring).

[321] *Id.* On the practical anti-plaintiff significance of the Court's decision, see generally Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of* Buckhannon *for the Private Attorney General*, 54 UCLA L. REV. 1087, 1089-90 (2007), which describes the outcome and aftermath of the *Buckhannon* decision and its harmful effect on public interest organizations representing civil rights claimants.

[322] By the end of 1992, "Republican presidential appointees outnumbered Democrats by more than three to one" on the federal bench, a disproportion unmatched since 1952, when the judiciary's composition reflected the legacy of twenty years of Democratic appointments. Goldman, *Bush's Judicial Legacy*, *supra* note 94, at 297. President Clinton's appointees rectified the imbalance in terms of numbers. At the beginning of the 109th Congress, however, Republican appointees in the lower courts still accounted for "52.5 percent of active judges" and almost 70 percent of senior judges. Goldman et al., *Picking Judges*, *supra* note 94, at 278. The increased sympathy in the federal courts for "tort reform" ideas exemplified what political scientists call "regime politics," the impact of relatively consistent and long-term appointments made and approved by representatives of the same political party. *See, e.g.*, MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 314-18 (2005) (discussing the Rehnquist Court's decisions limiting the availability of punitive damages in tort cases). For a discussion of the "regime" concept, see generally Thomas M. Keck, *Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools*, 32 LAW & SOC. INQUIRY 511 (2007). In cases decided in the federal courts during the first two and a half years after CAFA's passage, Republican male judges proved themselves substantially more receptive to an expansive reading of CAFA than did Democratic or female Republican judges. Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553, 1585 (2008) (noting that with respect to plaintiffs, "male Republicans . . . are the distinctive group, to a statistically significant degree").

When Congress first considered a class action jurisdiction bill in 1998, the "tort reform" movement embraced the idea enthusiastically.[323] "Consumers are being taken for a ride by a renegade legal practice," three supporters claimed, shaping the rhetoric of "tort reform" for a new target.[324] Class actions served only as "a cash cow for plaintiffs' attorneys" who sought "state courts willing to sanction sweetheart settlements that enrich the lawyers" while providing "little or no actual benefit" to class members.[325] The American Tort Reform Foundation joined the effort, publishing an annual report identifying certain state and county courts as "judicial hellholes" that "systematically" handicapped corporate defendants.[326] Its listing circulated widely among right-wing and other "tort reform" groups[327] and provided lively ammunition and partisan inspiration for CAFA's supporters, including President Bush.[328] After CAFA's passage, the American Tort Reform Foundation boasted that it "reduces business for Judicial Hellholes."[329]

While CAFA was a direct product of the "tort reform" movement, it was revealing that the Senate Judiciary Committee sought to give its product a nonpartisan sheen by belatedly denying its origin. CAFA, it announced, was "court reform—not tort reform."[330] The denial con-

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[323] *See, e.g.*, Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593 (2008) (describing the response seen in the media).

[324] Victor E. Schwartz, Mark A. Behrens & Leah Lorber, *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. ON LEGIS. 483, 483 (2000).

[325] *Id.*

[326] AM. TORT REFORM FOUND., *supra* note 187, at ii. The charges, based on business sources, were massively overblown and highly misleading. *See Empirical Evidence, supra* note 247, at 2.

[327] *See, e.g.*, John K. Drake, *Does State Advocacy for Tort Reform Work?*, AAOS NOW, May 2007, *available at* http://www.aaos.org/news/bulletin/may07/reimbursement6.asp; Stephanie K. Jones, *Texas Versus New Jersey*, INS. J., Feb. 24, 2003, *available at* http://www.insurancejournal.com/magazines/southcentral/2003/02/24/features/26631.htm; Posting of Matt Naugle to Rightometer: Daily Briefing on Conservative Blogs, Kofi's Mystery Apartment, http://www.humanevents.com/rightangle/index.php?id=19017&title=rightometer_kofi_s_mystery_apartment (Dec. 20, 2006, 11:00 AM EST); Posting of Andrew Roth to The Club for Growth, Judicial Hellholes, http://www.clubforgrowth.org/2006/12/judicial_hellholes.php (Dec. 20, 2006, 9:23 AM EST) (posting a link to the report).

[328] *See* Jim Hightower, *Toys for the Pentagon Boys*, TEX. OBSERVER, Feb. 4, 2005, *available at* http://www.texasobserver.org/article.php?aid=1872.

[329] AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 2006, at ii (2006), *available at* http://www.atra.org/reports/hellholes/2006.pdf.

[330] S. REP. NO. 109-14, at 56 (2005), *reprinted in* 2005 U.S.C.C.A.N. at 53. The statute would "simply allow federal courts to handle more interstate class actions." *Id.*

stituted an unintended homage to Bill Clinton—a dissembling public plea that "we did not have tort reform with that statute."

B. *Ideological Transformation*

On a broader level, the past four decades witnessed a tectonic shift across the world in basic assumptions about law, politics, economics, and social organization.[331] A series of tumultuous events—the subjectivist cultural revolution of the 1960s, severe and repeated economic crises during the 1970s, the increasing economic and political unification of Europe, the vigorous revival of neoclassical economic theory, the disintegration of the Soviet Union and the collapse of world Communism, and the hyperinternationalization of trade, travel, and communications—revolutionized popular and professional attitudes. These developments discredited theories of centralized national planning, undermined confidence in government regulation and the welfare state, and inspired a boisterous faith in market mechanisms, economic privatization, and the advantages of free trade.[332] The shift altered thinking across the political spectrum from left to right. In varying degrees, both the advanced and developing nations of the world moved away from commitments to governmental

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The hand of the "tort reform" movement was visible throughout CAFA's course through Congress; notably, the drafters changed its name from the original and descriptive title "Class Action Jurisdiction Act of 1998" to the final and polemicized label of "Class Action Fairness Act of 2005." Similarly, its supporters' use of dramatized and outrageous cases alleged to be representative was equally typical of "tort reform" tactics. *Cf.* McCann et al., *supra* note 216, at 117.

[331] For the decline of "progressive" thought and the rise of neoclassical economics in law and public policy, see generally Herbert Hovenkamp, *Knowledge About Welfare: Legal Realism and the Separation of Law and Economics*, 84 MINN. L. REV. 805 (2000), and Dalia Tsuk, *From Pluralism to Individualism: Berle and Means and 20th-Century American Legal Thought*, 30 LAW & SOC. INQUIRY 179 (2005).

[332] One judgment was almost universally accepted: "History has shown that central planning cannot deliver high and rapidly improving standards of living . . . ." WILLIAM J. BAUMOL ET AL., GOOD CAPITALISM, BAD CAPITALISM, AND THE ECONOMICS OF GROWTH AND PROSPERITY 7 (2007). *See generally* DALE D. MURPHY, THE STRUCTURE OF REGULATORY COMPETITION: CORPORATIONS AND PUBLIC POLICIES IN A GLOBAL ECONOMY 3-4 (2004) (discussing the use of public policy to advance corporate objectives); DANIEL YERGIN & JOSEPH STANISLAW, THE COMMANDING HEIGHTS: THE BATTLE BETWEEN GOVERNMENT AND THE MARKETPLACE THAT IS REMAKING THE MODERN WORLD 17 (1998) (discussing social transformations in different countries, including America, China, India, and the European nations); Robert O. Keohane & Joseph S. Nye, Jr., *Introduction* to GOVERNANCE IN A GLOBALIZING WORLD 1, 15 (Joseph S. Nye, Jr. & John D. Donahue eds., 2000) (describing the advantages of limited globalization).

regulation and public social programs and embraced the virtues of entrepreneurial freedom and market-based economic policies.

Those forces had a particularly powerful impact in the United States, altering the way Americans thought about economic and social policy.[333] Combining with traditional national commitments to individualism, private property, business enterprise, and economic expansionism, they generated an extreme new ideological variation that heralded "the market" as *grundnorm*, master metaphor, and faultless all-purpose social savior.[334] This absolutist ideology of "panmarketry" taught explicitly or implicitly that government was not merely inefficient and flawed, but essentially incompetent or evil. It taught that individuals were to be understood solely as self-seeking profit maximizers, that government regulation led only to inefficiencies and "rent" collection by special interests, and that free-market capitalism was inherently good, automatically self-correcting, and universally benevolent. As a result, panmarketry preached that all social relations should be consensual and contractual, and that taxation was ultimately confiscation or outright thievery.

The assumptions that shaped panmarketry were all-embracing and uncompromising. They left no room for careful and qualified analyses of both the virtues and failings of market processes,[335] and they left

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[333] A variety of premises, arguments, approaches, and conclusions helped feed this development. *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 281 (1985) (declaring that much "New Deal economic and social legislation" should be declared unconstitutional); ALBERT O. HIRSCHMAN, THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY 27-35 (1991) (discussing the "perversity thesis," which argues that attempts to improve society through regulation and welfare actually harm society in the end); MANCUR OLSON, THE RISE AND DECLINE OF NATIONS 58-73 (1982) (arguing that democracies will accumulate powerful "distributional coalitions" that will gradually suffocate the dynamics of the market, ossify their economies, and lead to their decline); Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 16 (1984) ("The burgeoning evidence show[s] that regulatory programs increase prices for consumers and profits for producers . . . ."); William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373, 396 (1988) ("[The legislative] process has built up a society dominated by regulatory constraints in which abridgements of property rights deter entrepreneurship and restrain economic growth."); Kenneth A. Shepsle & Barry R. Weingast, *Political Solutions to Market Problems*, 78 AM. POL. SCI. REV. 417, 433 (1984) ("[P]olitical interventions are no panacea for market failures . . . [and] may be positively destructive of well-functioning markets.").

[334] *See* sources cited *supra* notes 331-332.

[335] For examples of forceful statements of pro-market principles that nonetheless recognize the need for careful qualifications, detailed analyses of specific issues, and recognition of the general importance of social, cultural, and moral factors in shaping

no room for careful and qualified analyses of the cultural, religious, historical, institutional, and technological forces that conditioned economic life, shaped incentive structures, and undergirded social orders.[336] Instead, they conceived of "markets" and "market forces" as somehow existing apart from, and independent of, human beings and their social institutions and cultural inheritances. They helped inspire the rigid neoclassical economic prescriptions of the "Washington consensus" that Joseph E. Stiglitz termed "market fundamentalism."[337] Most importantly, they provided an automatic and all-purpose politi-

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economic behavior, see BAUMOL ET AL., *supra* note 332, at 248-49; and MARTIN WOLF, WHY GLOBALIZATION WORKS 138-39 (2004). For other examples of nuanced analyses, see generally YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006), describing network economies and other implications for political and cultural freedoms; ROBERT H. FRANK & PHILIP J. COOK, THE WINNER-TAKE-ALL SOCIETY (1995), describing the problems created by winner-take-all markets in modern society; THE NEW LAW AND ECONOMIC DEVELOPMENT (David M. Trubek & Alvaro Santos eds., 2006), collecting articles discussing the interactions between, and effects of, law and development; DAVID SKEEL, ICARUS IN THE BOARDROOM: THE FUNDAMENTAL FLAWS IN CORPORATE AMERICA AND WHERE THEY CAME FROM (2005), evaluating risk-taking by corporations; THE UNITED STATES AND THE WORLD ECONOMY: FOREIGN ECONOMIC POLICY FOR THE NEXT DECADE (C. Fred Bergsten & Inst. for Int'l Econ. eds., 2005) [hereinafter THE UNITED STATES AND THE WORLD ECONOMY], collecting articles concerning foreign economic policy decisions domestically and internationally; RICHARD H.K. VIETOR, CONTRIVED COMPETITION (1994), offering case studies of the significance of regulatory and market forces on large corporations, such as AT&T and American Airlines; and Michael P. Vandenbergh, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, 54 UCLA L. REV. 913 (2007), arguing that properly designed private agreements can substitute for government regimes.

[336] *See generally* KENNETH W. DAM, THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT (2006); ROMAN FRYDMAN & MICHAEL D. GOLDBERG, IMPERFECT KNOWLEDGE ECONOMICS 6-7 (2007) (discussing the effect of imperfect information on economics); DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990) (studying institutions, how they change, and the problem of human cooperation); AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999) (discussing freedom and development in relation to different social needs and changes); Jayanth K. Krishnan, *Analyzing the Friedman Thesis Through a Legal Lens: Book Review Essay Assessing Thomas L. Friedman's* The World Is Flat, 81 TUL. L. REV. 923, 938-41 (2007) (book review) (arguing that Friedman's analysis failed to adequately consider the impact of judicial inefficiency in India); Dani Rodrik, *Introduction* to IN SEARCH OF PROSPERITY: ANALYTIC NARRATIVES ON ECONOMIC GROWTH (Dani Rodrik ed., 2003) (attempting to explain the economics of growth).

[337] Stiglitz, a Nobel Prize–winning economist who served on President Clinton's Council of Economic Advisors and as Chief Economist at the World Bank, identified market fundamentalism as a rigid and uncompromising commitment to free trade, privatization, market liberalization, and minimal government, a commitment that embraced, among other things, "an oversimplified version of market economics which paid scant attention to the dynamics of change." JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 138 (2002).

cal rationale that could be used to justify any "market" phenomenon, condemn any regulatory proposal, and negate any appeal to the concepts of distributive justice and a substantive "common good."[338] At their most extreme, they inspired the kind of ideological fanaticism that led some to believe that Social Security should be abolished, that global warming was a leftist hoax, and that the introduction of free markets and popular elections would automatically bring peace, freedom, prosperity, and democracy to the entire Middle East.[339]

Panmarketry not only rejected the possibility that governments could effectively regulate "markets," but also undermined the fundamental social insurance premises that had shaped much of American public policy over the preceding century.[340] Its extreme individualism and anti-government assumptions renounced enterprise liability as an appropriate norm, scorned the idea that public risk- and cost-spreading were efficient and desirable, and denied that government-sponsored social programs could effectively provide support for the disabled, aged, unemployed, and victims of other such human misfortunes. Indeed, President Reagan's Secretary of the Treasury, Donald Regan, captured those rejections nicely when he declared that the

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[338] A central text for this position is MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962). Important early statements include BRUCE R. BARTLETT, REAGANOMICS: SUPPLY SIDE ECONOMICS IN ACTION (1981); GEORGE GILDER, WEALTH AND POVERTY 259 (1981), which identifies a conflict between economic growth and regulatory intervention; CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY, 1950–1980, at 9 (1984), which argues that poverty was propagated by policies intended to fight it; and JUDE WANNISKI, THE WAY THE WORLD WORKS: HOW ECONOMIES FAIL—AND SUCCEED, at xii (1978), which posits that political and economic development are explained by the tension between income growth and income distribution. A more recent formulation is presented in BRINK LINDSEY, AGAINST THE DEAD HAND: THE UNCERTAIN STRUGGLE FOR GLOBAL CAPITALISM (2002).

[339] *See, e.g.*, AMY CHUA, WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY 231 (2003) (emphasizing the role of ethnicity and hostility toward "market-dominant" minorities in fostering anti-Americanism and opposition to market mechanisms). For a revealing comment on the last point in the text, see JEANE J. KIRKPATRICK, MAKING WAR TO KEEP PEACE 273 (2007) (noting, apparently without ironic intent, that before 2001 "our attention to national security was subsumed by a desire to promote democracy, as if democracy alone could imbue chaotic societies and unstable governments with a respect for what we respected: the rule of law, basic human rights, and a peaceful world order").

[340] *See* THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 15-23 (1992); BARBARA YOUNG WELKE, RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865–1920, at 235-46 (2001); JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW (2004).

administration wanted "to go back to many of the financial methods and economic incentives that brought about the prosperity of the Coolidge period."[341] On the state level, the California Supreme Court reflected the impact of those same assumptions. In earlier decades, it had adopted rules that imposed liability on defendants who were in a position either to spread the costs of accidents or adopt effective accident-avoiding measures. During the last two decades of the twentieth century, however, it largely abandoned those approaches and revived strict fault requirements and other similar methods of limiting corporate liability.[342]

Less obvious but equally important, panmarketry transformed the meaning and significance of the concept of "consumers." This term came into common usage in the nineteenth century, referring to purchasers of mass-produced and mass-distributed goods that Americans no longer grew or made for themselves.[343] In part, the term carried a relatively passive meaning, merely describing those who shopped for and bought such goods. Gradually it became infused with pleasant connotations of material abundance, personal well-being, and national achievement. At the same time, it was consistently molded by business interests seeking to glamorize their products and expand their markets. On the other hand, however, the term also carried broader social and prescriptive meanings. It suggested ideals of republican independence, participatory citizenship, public control over private enterprise, and the propriety of using scientific standards to evaluate product quality and to ensure that business was serving the common good. "The Progressives identified consumers as a new category of the American citizenry," wrote Lizabeth Cohen, "an ideal broad-based constituency desirous and deserving of political and social reforms to limit the dangers of an industrializing, urbanizing, and politically corruptible twentieth-century America."[344] In 1933, sociolo-

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[341] KEVIN PHILLIPS, WEALTH AND DEMOCRACY: A POLITICAL HISTORY OF THE AMERICAN RICH 333 (2002).

[342] *See* Stephen D. Sugarman, *Judges as Tort Law Un-Makers: Recent California Experience with "New" Torts*, 49 DEPAUL L. REV. 455, 478-82 (1999).

[343] *See, e.g.*, WILLIAM LEACH, LAND OF DESIRE: MERCHANTS, POWER, AND THE RISE OF A NEW AMERICAN CULTURE 3-12 (1993) (examining the development of advertising, mass marketing, and a consumer economy in the United States); CHARLES F. MCGOVERN, SOLD AMERICAN 24 (2006) (same).

[344] LIZABETH COHEN, A CONSUMERS' REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA 21 (2003). For an example, see WALTER WEYL, THE NEW DEMOCRACY: AN ESSAY ON CERTAIN POLITICAL AND ECONOMIC TENDENCIES IN THE UNITED STATES (1912), which recounts concerns about development in American so-

gist Robert S. Lynd echoed those views and spoke for many liberals and New Dealers when he noted that "standards of consumption [were] . . . largely social rather than private in character."[345] He reasoned that "the growing variety and technical complexity of things that may be bought suggest the need for far more reliable techniques for the handling of many consumption choices," rather than leaving them to "an area of private chaos."[346] Again, during the 1960s and early 1970s, substantive and prescriptive conceptions of "consumers" were revived and used to push a substantive agenda designed to discipline businesses and improve product quality. The movement secured passage of more than thirty federal statutes designed to protect consumers in the marketplace and helped to establish or reinvigorate a dozen government agencies charged with enforcing their rights and interests.[347]

While such substantive concepts of "consumers" continued to attract adherents, their influence had been fading in both political resonance and substantive content since the New Deal.[348] In the 1980s panmarketry dealt them a lethal blow. Its assumptions defined the concept of "consumer" in the barest and most politically inconsequential terms. It stripped the idea of "consumers" of all substantive content and reduced those who purchased products to abstract economic atoms that counted for nothing beyond their "revealed preferences," that is, public manifestations of their otherwise unknowable subjective

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ciety. On the consumer roots of Progressivism, see generally DAVID P. THELEN, THE NEW CITIZENSHIP: ORIGINS OF PROGRESSIVISM IN WISCONSIN, 1885–1900 (1972). On the civic republican connotations of "consumers" in the Progressive Era, see MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 201-27 (1996).

[345] Robert S. Lynd with the assistance of Alice C. Hanson, *The People as Consumers*, *in* 2 RECENT SOCIAL TRENDS IN THE UNITED STATES 857, 868 (1933). On the importance of consumer interests in the later part of the New Deal, see Alan Brinkley, *The New Deal and the Idea of the State*, *in* THE RISE AND FALL OF THE NEW DEAL ORDER, 1930–1980, at 85, 87-100 (Steve Fraser & Gary Gerstle eds., 1989).

[346] Lynd, *supra* note 345, at 910, 911.

[347] *See* COHEN, *supra* note 344, at 360 tbl.7 (listing the regulatory "achievements of the consumer movement").

[348] *See* SANDEL, *supra* note 344, at 227-49 (describing how "civic considerations" withered and disappeared from the concept of "consumer"); INGER L. STOLE, ADVERTISING ON TRIAL: CONSUMER ACTIVISM AND CORPORATE PUBLIC RELATIONS IN THE 1930S, at 106-37 (2006) (outlining the role of the advertising industry in "defining the consumer agenda"); Thomas A. Stapleford, *Market Visions: Expenditure Surveys, Market Research, and Economic Planning in the New Deal*, 94 J. AM. HIST. 418, 444 (2007) (discussing the process by which substantive consumerist endeavors were ultimately used to serve the purposes of "corporate marketing").

desires revealed by exchanges of money for products at given prices. Panmarketry pared the legitimate "interests" of "consumers"—as well as the legitimate economic interests of the American people generally—to nothing but the desire for lower prices and wider product choices. Beyond their bare function as shopper atoms in the world marketplace, they had no role to play in the economy and, most certainly, had no valid reason to touch the market through political processes.[349]

The ideology of panmarketry came to undergird the thinking of many libertarians, economic conservatives, and right-wing Republicans, and it provided the political rhetoric that enabled them to convince many American voters that their interests were invariably identical to those of corporate producers. It transformed any proposal designed to regulate business into a proposal that automatically harmed all Americans, and any proposal designed to assist business into a proposal that automatically benefited all Americans. The American Tort Reform Association repeatedly insisted that lawsuits were not only "bad for business" but also "bad for society."[350] They imposed "a drag on our economy" and, more particularly, would inevitably "punish consumers by raising the cost of goods."[351] The rhetoric of panmarketry could, in fact, serve any pro-business purpose. Conservative attorney Theodore B. Olson deployed it to attack court judgments that granted punitive damages. "The ultimate victims, of course," Olson announced, "are policyholders and consumers who pay these judgments through higher prices [and] narrower product choices."[352] George W. Bush's Treasury Secretary, Henry Paulson, used it to attack efforts to expand liability for securities fraud. Any

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[349] Public choice theory, an approach to welfare economics that shared some of the assumptions of panmarketry, argued that it was impossible for collectives of any kind to make judgments that were fair, rational, and consistent. Thus, the only unit of meaningful analysis was individual preference: the individual's only motive was self-seeking and all group decision making was irrational and unstable. For critical evaluations, see generally JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997); and Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990). For a review of the literature on "consumers" and modern capitalism, see David Steigerwald, *All Hail the Republic of Choice: Consumer History as Contemporary Thought*, 93 J. AM. HIST. 385 (2006).

[350] Am. Tort Reform Ass'n, About ATRA, http://www.atra.org/about (last visited Apr. 15, 2008).

[351] *Id.*

[352] Theodore B. Olson, *The Dangerous National Sport of Punitive Damages*, WALL ST. J., Oct. 5, 1994, at A17.

such expansion, he warned, would pose dangers "to our economy, to our competitiveness, to jobs"—in short, to *all* Americans.[353] Then-Professor Richard Posner relied on the same claim in his torts casebook, claiming that rules imposing narrow liability on employers for industrial injuries were, in fact, a boon to working-class families because they allowed them to buy more goods at lower prices.[354]

Corporate theorists adopted the same view, urging restrictive rules of liability in shareholder suits on the ground that shareholders were simply consumers who bought a special kind of product, one that was supposed to grow in value. The corporate managers who served as their agents had only one duty, to maximize consumer-shareholder value, and consumer-shareholders had no legitimate interest beyond the expectation that the value of their investments would grow.[355] From that perspective, consumer-shareholders could have no legitimate interest in subjecting their corporations to cost-raising and value-destroying litigation supposedly designed to protect their rights, nor could they wish for anyone else to so injure them and their investments by such litigation, regardless of its actual or ostensible purpose.

For CAFA, then, panmarketry provided a perfect rationale. It taught that the only valid consumer interests were lower prices and wider choices, that government compensation schemes led only to rents and other inefficiencies, and that the market was fully self-correcting and provided consumers their only effective remedy for producer fault. It explained why there was no hope in governmental regulation, no social utility in private tort suits, and, most certainly, no need for class actions. It justified both CAFA's de facto restriction on class actions and its failure to replace the form with some more effective and efficient remedial scheme.[356]

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[353] Kara Scannell, *Big-Money Battle Pits Business vs. Trial Bar*, WALL ST. J., Oct. 9, 2007, at A1 (internal quotation marks omitted) (quoting Secretary Paulson).

[354] RICHARD A. POSNER, TORT LAW: CASES AND ECONOMIC ANALYSIS 525-26 (1982).

[355] Tsuk, *supra* note 331, at 212-15. A key early statement was Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 290-91 (1977); other statements include Kahn, *supra* note 306, at 1635-37, which argues that greater regulation of companies is justified because of the harm to shareholder value caused by financial fraud; and Dalia Tsuk Mitchell, *Shareholders as Proxies: The Contours of Shareholder Democracy*, 63 WASH. & LEE L. REV. 1503 (2006), which describes debates over the value of shareholder activism.

[356] Ironically, as fiduciary obligations were lowered in a variety of legal areas in the name of market freedom and economic efficiency, the "balance between the opportunities for illegal gains rose, and barriers to these gains were removed." TAMAR FRANKEL, TRUST AND HONESTY: AMERICA'S BUSINESS CULTURE AT A CROSSROAD 151 (2006).

Thus, the assumptions behind panmarketry made CAFA an authentic "consumer" measure. Its avowed purpose, the statute proudly announced, was to "benefit society by encouraging innovation and lowering consumer prices."[357] The statute was necessary, the Senate Judiciary Committee declared, because every abusive class action "drives up prices for all consumers,"[358] making consumers "the big losers."[359] Judged by the assumptions of panmarketry, there could be no doubt that CAFA was in everyone's best interest.

C. *Globalization*

On the broadest level, the last four decades were also marked by the stunning and revolutionary changes wrought by globalization.[360] From one point of view, those changes arguably made the availability of class actions even more necessary. The emerging international economy made ever-larger parts of life dependent on ever-larger entities that were ever-further removed from the individuals they injured or defrauded. Those entities, moreover, were ever more difficult for wronged individuals to identify and reach. Many of their products, finally, were ever more complex and sophisticated and hence ever further beyond the competence of individuals to test and evaluate on their own. China alone proved the point. Poisoned drugs, lethal toothpaste, deadly automobile tires, and food products fatal to both humans and their pets flooded world markets while governments made inadequate efforts to police the channels of trade and guarantee the safety of the goods flowing through them.[361] The spread of

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[357] CAFA § 2(b)(3), 28 U.S.C. § 1711 note (Supp. V 2005).

[358] S. REP. NO. 108-123, at 18 (2003).

[359] S. REP. NO. 109-14, at 4 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 6. The prior Senate Report emphasized the point even more strongly. *See* S. REP. NO. 108-123, at 15-22. The House Judiciary Committee also emphasized CAFA's allegedly consumer-protective nature. *See* H.R. REP. NO. 108-144, at 16-19 (2003).

[360] Early studies include RICHARD J. BARNET & JOHN CAVANAGH, GLOBAL DREAMS: IMPERIAL CORPORATIONS AND THE NEW WORLD ORDER (1994); ROBERT B. REICH, THE WORK OF NATIONS: PREPARING OURSELVES FOR 21ST-CENTURY CAPITALISM (1991); and WALTER B. WRISTON, THE TWILIGHT OF SOVEREIGNTY (1992).

[361] *See, e.g.*, David Barboza, *Food-Safety Crackdown in China*, N.Y. TIMES, June 28, 2007, at C1; Walt Bogdanich, *As F.D.A. Tracked Poisoned Drugs, a Winding Trail Went Cold in China*, N.Y. TIMES, June 17, 2007, § 1, at 1 [hereinafter Bogdanich, *Poisoned Drugs*]; Walt Bogdanich, *Chinese Chemicals Flow Unchecked to Market*, N.Y. TIMES, Oct. 31, 2007, at A1; Walt Bogdanich, *Wider Sale Seen for Toothpaste Tainted in China*, N.Y. TIMES, June 28, 2007, at A1; *Cheap Chinese Tires Blamed for Fatalities*, WORLDNETDAILY.COM, June 26, 2007, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=56369; Eric S. Lipton & David Barboza, *As More Toys Are Recalled, the Trail Ends in China*, N.Y. TIMES,

class action litigation, like other large-scale litigation, "is the consequence of socio-economic trends, *not* the cause of those trends," Deborah Hensler noted.[362] "If there is a new 'monster' at large, it is the rise of multi-national corporations and the development of a global economy that bring with them the potential for large-scale injuries resulting from worldwide product consumption."[363]

At the same time, however, globalization presents a number of difficult challenges to class actions, some legal and some practical. Questions of personal jurisdiction over foreign defendants and the extraterritorial reach of American law posed numerous difficulties for plaintiffs,[364] while choice of law issues and the defense of "regulatory compliance" created troublesome questions about controlling substantive law.[365] Furthermore, treaty provisions and the workings of the World Trade Organization's dispute settlement system generated additional uncertainties or potential barriers.[366] Finally, globalization added a new twist to class action litigation because many such actions involved, actually or potentially, class members who resided in foreign countries.[367]

Perhaps most obviously, globalization magnified plaintiffs' problems of proving fault and causation.[368] From initial product design to final consumer sale, the number of entities in standard commercial

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June 19, 2007, at A1; Louise Story & David Barboza, *Mattel Recalls 19 Million Toys Sent from China*, N.Y. TIMES, Aug. 15, 2007, at A1.

[362] Hensler, *supra* note 74, at 212.

[363] *Id.* For a discussion of the challenges globalization presents to consumer advocates and human rights attorneys, see PROGRESSIVE LAWYERING, GLOBALIZATION AND MARKETS: RETHINKING IDEOLOGY AND STRATEGY (Clare Dalton ed., 2007).

[364] *See* Andrew L. Strauss, *Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts*, 36 HARV. INT'L L.J. 373 (1995).

[365] The *New York Times* reported that China's commerce minister, Bo Xilai, defended his country's products by explaining that "50 percent of products manufactured in China were made by foreign enterprises, and that more than 60 percent of exports were made and inspected according to standards set by foreign importers and buyers." Associated Press, *China Agrees To Raise Its Product Standards*, N.Y. TIMES, Aug. 27, 2007, at A9.

[366] *See generally* JOHN H. BARTON ET AL., THE EVOLUTION OF THE TRADE REGIME: POLITICS, LAW, AND ECONOMICS OF THE GATT AND THE WTO 61-87 (2006); JOHN H. JACKSON, SOVEREIGNTY, THE WTO AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW 134-208 (2006).

[367] *See* Debra Lyn Bassett, *U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction*, 72 FORDHAM L. REV. 41, 42 (2003) (addressing the "special problem of non-U.S. class members' participation in U.S.-situated class litigation").

[368] For a recent attempt to address the causation problem under contemporary conditions, see ARIEL PORAT & ALEX STEIN, TORT LIABILITY UNDER UNCERTAINTY (2001).

chains multiplied, and their locations were increasingly scattered across the globe. In addition, they were more frequently subject to shuffling or replacement. Every large multinational corporation, Thomas L. Friedman explained, "needs to try to produce globally—by slicing up its production chain and outsourcing each segment to the country that can do it the cheapest and most efficiently."[369] Consequently, such companies continually shifted their production segments "from country to country faster than many people realize," and they increasingly did it by "developing alliances with locally owned factories, which serve as affiliates, subcontractors and partners of the multinational firms."[370] Those "production relationships," moreover, "can be and are moved around from country to country, producer to producer, with increasing velocity in search of the best tax deals and most efficient and low-cost labor forces."[371]

A variety of commercial abuses, both systemic and random, exacerbated the problem. Mislabeled, tainted, and counterfeit pharmaceutical products, for example, caused thousands of deaths throughout the world, and even strenuous efforts by the U.S. government and other nations failed to identify the ultimate source of many of the lethal chemicals involved. This failure was due in part to the lack of cooperation from some countries and in part to certain particularly dubious practices in the international pharmaceutical markets. Products pass through many hands before reaching consumers, and intermediaries who bought, processed, blended, or transported the materials often altered or eliminated essential information on documents of sale or certificates of origin and quality. "One trader referred to this practice as 'neutralization,'" an investigator for the U.S. Food and Drug Administration reported after an extended inquiry. "I was ad-

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[369] THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION 129 (2000).

[370] *Id.* at 130.

[371] *Id.* Another commentator put it differently, explaining that

> power over the production system has shifted away from companies that view themselves primarily as manufacturers and producers into the hands of companies designed mainly to trade in the production of others . . . . [N]o one, quite naturally, is ultimately responsible for ensuring that the system is safe. . . . If anything, the nature of competition results in a race among users to exploit the common system most effectively.

BARRY C. LYNN, END OF THE LINE: THE RISE AND COMING FALL OF THE GLOBAL CORPORATION 10-11 (2005). Americans "have come now to depend on chains of activity that stretch to points far beyond the reach of our government and our law." *Id.* at 16.

vised that neutralization is a common practice among traders in order to protect their business interests."[372]

The complexities and volatilities of international trade, together with such insulating techniques as "neutralization," suggested the potentially devastating impact that one of the principal goals of the "tort reform" movement would have on consumer class actions involving products of international commerce. President Reagan's Tort Policy Working Group urged the elimination of joint and several liability in all cases "except in the limited circumstances where the plaintiff can demonstrate that the defendants have actually acted in concert to cause [the] plaintiff's injury."[373] Such a standard would, as a practical matter, create an insurmountable obstacle to relief in many or most cases. The "tort reform" campaign, however, did enjoy considerable success in attacking the doctrine. Between 1985 and 1988, thirty states modified their rules regarding joint and several liability,[374] adopting a variety of standards that generally limited plaintiffs' ability to hold joint tortfeasors accountable.[375]

While globalization generated severe new problems for plaintiffs, however, it raised even more serious questions about the ability of the United States and other nations to impose significant tort liability or other consumer protective measures on their own domestic corporations. In an ever more competitive global environment, companies assiduously sought to minimize their costs, and heavy liability standards threatened to increase their costs and weaken their international competitive positions. In 1906, when Congress passed the first federal statutes regulating food and drugs and requiring federal inspection of meat,[376] the United States was in a position to impose whatever standards of liability it chose on domestic manufacturers. A century later, however, globalization has sharply circumscribed that freedom. The United States remains a dominant world power, but its economic role in the world trade system has "waned" in recent years,

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[372] Bogdanich, *Poisoned Drugs*, *supra* note 361, §1, at 1. Insulation techniques to protect against liability are in common use. *See, e.g.*, Charles Duhigg, *At Many Homes, More Profit and Less Nursing*, N.Y. TIMES, Sept. 23, 2007, at A1 (describing techniques the nursing home industry uses to insulate itself from litigation).

[373] TPWG, REPORT, *supra* note 172, at 65.

[374] BURKE, *supra* note 143, at 32.

[375] Hubbard, *supra* note 275, at 488-92 (describing the impact of tort reform on joint and several liability).

[376] GEORGE E. MOWRY, THE ERA OF THEODORE ROOSEVELT AND THE BIRTH OF MODERN AMERICA: 1900–1912, at 207-08 (1958).

and "increasingly it has needed to cooperate with other great powers in order to govern the system."[377]

More directly to the point, if students of the international economy agreed on anything, it was the fact that globalization imposed tightly constraining limits on the ability of nation-states to enforce domestic policies that raised costs for domestic producers.[378] While Vice President Dan Quayle spoke for the "tort reform" movement when he derided American tort law as a "self-inflicted competitive disadvantage,"[379] Robert Kuttner reflected the views of many liberals when he acknowledged the same truth. "Just as Keynes feared," Kuttner remarked, "a globalized market economy leaves less room for national policy."[380] John H. Jackson, a prominent student of international law and trade, put the point simply. "More and more frequently, government leaders find their freedom of action circumscribed because of the impact of external economic factors on their national economies."[381] Globalization of the market challenged "the stringency, enforcement, and style of national regulatory systems."[382]

Milton Friedman attributed the recent dominance of the "Chicago school" to the economic crises of the 1970s and early 1980s and to the subsequent collapse of Communism and the Soviet Union. "It wasn't my talking that caused people to embrace these ideas, just as

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[377] BARTON ET AL., *supra* note 366, at 11. As globalization proceeds, it becomes more important for the United States "to retain its credibility as it urges other nations to adopt the rule of law and accountable legal systems," one scholar warned, bringing a principal theme of "tort reform" into the picture. "Even a few extreme verdicts against foreign corporations or individuals damages the foreign perception of the United States' commitment to justice." Renée Lettow Lerner, *International Pressure To Harmonize: The U.S. Civil Justice System in an Era of Global Trade*, 2001 BYU L. REV. 229, 303-04.

[378] Participation in the global economy "narrows the political and economic policy choices of those in power to relatively tight parameters." FRIEDMAN, *supra* note 369, at 103. Even scholars who offer more qualified views seem to agree on the basic point. "The compromise of embedded liberalism that created a social safety net in return for openness was successful in the second half of the twentieth century but is under new pressure." Keohane & Nye, *supra* note 332, at 36.

[379] Nockleby & Curreri, *supra* note 265, at 1032 (quoting Vice President Dan Quayle, Address to the Annual Meeting of the American Bar Association (Aug. 13, 1991), *available at* http://www.vicepresidentdanquayle.com/speeches_StandingFirm_ABA_1.html).

[380] ROBERT KUTTNER, THE END OF LAISSEZ-FAIRE: NATIONAL PURPOSE AND THE GLOBAL ECONOMY AFTER THE COLD WAR 263 (1991).

[381] JACKSON, *supra* note 366, at 137.

[382] BARTON ET AL., *supra* note 366, at 144. The ALI issued a similar warning some fifteen years ago. Heavy tort liability could create serious dangers "in an increasingly competitive international economy," especially "in a world in which no other nation has a liability regime of anywhere near the magnitude of our own." ALI, *supra* note 206, at 5-6.

the rooster doesn't make the sun rise," he explained. "Collectivism was an impossible way to run an economy. What has brought about the change is reality, fact—and what Marx called the inevitable forces of history."[383] If Friedman and Marx were right, the increasingly integrated global economy—absent either comprehensive and enforceable international agreements[384] or disastrous and shattering world developments—may make it increasingly costly, and perhaps unacceptable to a political majority, for the United States even to try to impose significant legal liabilities on its own domestic corporations.

Thus, the growing and relentless pressures of economic globalization combined with the well-organized campaign for "tort reform" and the ideological influence of panmarketry to help drive CAFA to passage. These forces seem likely to continue shaping national policy in the future in many areas, including jurisdictional reform. It seems unlikely that the United States would adopt some truly effective new governmental remedial scheme in the foreseeable future, and it seems almost certain that consumer interests would remain passive, diffuse, disorganized, and easily manipulable.[385] Thus, absent a major structural realignment in American politics or drastic changes in world affairs, it seems likely that pressures would mount for further movement along the path that CAFA marked out for additional "reforms" to limit corporate liability and weaken or deny judicial remedies to those harmed by corporate business.[386]

CONCLUSION

Considered in historical context, CAFA suggests several general conclusions. One is that the statute was—for the most part—the result of a relatively typical jurisdictional reform effort that shared all five of the basic characteristics of prior reform campaigns. It re-

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[383] YERGIN & STANISLAW, *supra* note 332, at 149.

[384] Such agreements, bringing higher standards of liability and greater protection for consumers, are practically possible outcomes. *See, e.g.*, MURPHY, *supra* note 332, at 8, 115-66 (providing examples of such agreements from the interjurisdictional regulatory context).

[385] It is now a cliché of political analysis that large groups with limited investment or only general interest in a subject lose to small groups with large and concentrated interests in that subject. *See, e.g.*, MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

[386] *See, e.g.*, Behrens & Crouse, *supra* note 264, at 176 (providing an overview of the background for debate on "key reforms" that are currently being considered by proponents of "tort reform").

sponded to pressing practical concerns, adapted diversity jurisdiction to new challenges, reflected the dual nature of jurisdictional reform, rested on partial and inadequate evidence, and centered on the issue of state-federal judicial parity. In only two respects was it unusual: its innovative exploitation of diversity's elastic potential and its reliance on unusually blunt congressional attacks on the state courts.

A second conclusion is that CAFA illustrated the classic forum-shopping dynamic that drives American law and government. Although CAFA's supporters condemned plaintiffs' "forum shopping" and insisted that class action reform was necessary to limit the ability of plaintiffs' attorneys to "game the system,"[387] they naturally played the same institutional game themselves. The overarching strategy that has guided political tactics in the complex system of American government for more than two centuries is, after all, both simple and well understood: lose in one level or branch, turn to another. CAFA's supporters did just that, trumping plaintiffs' forum shopping between judicial levels with their own forum shopping between branches. Losing in the courts, they turned to the legislature.[388] Indeed, their institutional forum shopping was entirely typical, for they sought not general reform but specific advantage. They sought neither to limit judicial forum shopping generally nor to address class action problems broadly, but only to alter the law in a way that would advantage one specific category of litigants.

A third conclusion is that CAFA points to one of the distinctive new challenges that confronts the American legal system in the twenty-first century. The interlocked pressures of "tort reform," panmarketry, and globalization seem likely to generate continuing support for further restrictions on class actions, as well as new restrictions on corporate liability and popular access to the courts.[389] CAFA, in

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[387] S. REP. NO. 109-14, at 23, 5, 10 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 23, 6, 11; *see also id.* at 13 (describing forum shopping in class action litigation).

[388] Supporting the political science concept of "regime" politics, CAFA's supporters won a simultaneous victory before the Rehnquist Court on an overlapping class action issue. *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 559 (2005) (holding that only one named plaintiff must meet 28 U.S.C. § 1332(a)'s amount in controversy requirement for a class action to proceed, provided that the other requirements of jurisdiction are satisfied). *See generally* Brian E. Foster, Note, *Serious Mischiefs:* Exxon Mobil Corp. v. Allapattah Services, Inc., *Supplemental Jurisdiction, and Breaking the Promise of* Finley, 81 NOTRE DAME L. REV. 2013, 2015 (2006) (discussing the "serious mischiefs" wrought by Congress via the 28 U.S.C. § 1367 supplemental jurisdiction statute and by *Allapattah* itself).

[389] In principle, of course, the class action form retains widespread support in Congress and the legal community, and the focus of public debate remains, at least

other words, may represent not just a single jurisdictional reform but a significant turning point in the history of the American legal system.

CAFA, then, as a response to the pressures of the world economy and an effort to strengthen the competitive position of American corporations, forces a deeply troublesome—but persistently obscured—question to the fore: what, exactly, is an "American" corporation? More importantly, to what extent does the welfare of such "American" corporations—and their improved competitive positions in the world economy—truly redound to the benefit of the nation and the American people as a whole?[390] The mere fact that a corporation is chartered domestically, or that it has some of the standard insignia of a "domestic" corporation, does not necessarily mean that its interests, successes, profits, and jobs are shared with most or even many Americans. For many domestically chartered corporations, a large percentage of their facilities, operations, employees, and sales are abroad; many of their top managers and, with the rise of foreign direct investment, substantial numbers of their shareholders are also abroad. Their welfare, moreover, frequently is tied closely not to the interests of the United States and its citizens but to the interests of one or more foreign countries, corporations, or groups.[391]

If the question "who are we as an American people?" has become pivotal in a globalizing world,[392] so too has the question "what is an

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ostensibly, on curing "abuses" rather than on abolishing the form itself. CAFA's first finding was that class actions "are an important and valuable part of the legal system." CAFA § 2(a)(1), 28 U.S.C. § 1711 note (Supp. V 2005). Such formally benign statements about class actions—and analogous statements about tort liability and court access—may have value, but they often seem mere nods to minimal decency rather than principles intended to guide substantive action. *See, e.g.*, Graham C. Lilly, *Modeling Class Actions: The Representative Suit as an Analytic Tool*, 81 NEB. L. REV. 1008, 1009 (2003) (referring to the "binding effect of a class judgment" as a "useful" way to consolidate lawsuits).

[390] The question also becomes acute when industries seek regulatory legislation ostensibly designed to raise product standards or protect consumers. *See, e.g.*, Eric Lipton & Gardiner Harris, *In Turnaround, Industries Seek U.S. Regulation*, N.Y. TIMES, Sept. 16, 2007, at A1 (discussing the rising trend of industry and trade groups seeking regulation to make themselves more internationally competitive).

[391] For example, during the last months of 2007, foreign companies or governments acquired substantial stakes in five major Wall Street financial institutions. *See* Eric Dash, *Merrill Lynch Sells a $5 Billion Stake to Singapore Firm*, N.Y. TIMES, Dec. 25, 2007, at C1 (describing the sales of significant blocks of stock in Merrill Lynch, Bear Stearns, Citigroup, Morgan Stanley, and UBS to international investors); Floyd Norris, *A Worrisome New Wrinkle in Bailouts*, N.Y. TIMES, Dec. 14, 2007, at C1 (describing the bailout by foreign governments of UBS and Citigroup).

[392] *See* SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY 9 (2004) (describing multiple considerations affecting the definition of

'American' corporation?"[393] If the United States seeks to adopt national policies designed to protect the competitive position of "American" corporations, as it has done in CAFA, then those corporations should be "American" in some truly substantial and widely shared sense. Their welfare, that is, should bring real and identifiable benefits to the nation as a whole and to all of its citizens, benefits that should provide far more than merely lower consumer prices and wider consumer choices for those with steady and ample incomes.[394]

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the American national identity in a globalizing world); Kevin R. Johnson & Bill Ong Hing, *National Identity in a Multicultural Nation: The Challenge of Immigration Law and Immigrants*, 103 MICH. L. REV. 1347, 1350 (2005) (reviewing HUNTINGTON, *supra*) (disagreeing with its conclusions regarding the effect of immigration on national identity).

[393] Many federal statutes identify "domestic," "American," or "U.S." corporations. Federal tax law adopted the traditional rule that identified the nationality of a corporation by its place of incorporation. *See* 26 U.S.C. § 7701(4) (2000) (defining a domestic corporation as one organized in the United States or under the law of the United States or any state). Recently, however, Congress adopted an exception to that rule to deal with "inverted" corporations, corporations originally chartered by the United States or a state that subsequently reincorporated abroad. *See* American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 801(a), 118 Stat. 1418, 1562-66 (taxing inverted corporations as domestic corporations, subject to some qualifications).

Congress has also provided special definitions in some contexts. *See, e.g.*, General Aviation Revitalization Act of 1994, 49 U.S.C. § 40102(a)(15) (2000) (including in the definition of "citizen of the United States" a corporation whose president and at least two-thirds of whose directors and officers are U.S. citizens, and seventy-five percent of whose voting interest is owned or controlled by U.S. citizens); *see also In re* Chawathe, Case No. A74-254-994 (U.S. Citizenship & Immigration Servs., Admin. Appeals Office Jan. 11, 2006) (construing the Immigration and Nationality Act, 8 U.S.C. § 1427(b), to define an "American firm or corporation" as a corporation chartered in the United States and whose stock is traded exclusively on a U.S. stock exchange).

In some areas, Congress has also imposed restrictions on corporations owned, operated, or controlled by foreign citizens or governments, regardless of their place of incorporation. *See, e.g.*, 10 U.S.C. § 7435 (2000) (restricting foreign-controlled corporations from leasing lands with mineral deposits if their home countries discriminate against American citizens or corporations in leasing public lands); 30 U.S.C. § 181 (2000) (imposing similar restrictions on leases of land on naval petroleum reserves); 42 U.S.C. §§ 2133(d), 2134(d) (2000) (prohibiting issuance of Nuclear Regulatory Agency licenses to any entity known or believed to be "owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government"); 47 U.S.C. § 310(a)–(b) (2000) (prohibiting foreign corporations from holding radio station licenses).

[394] A recent study concluded that incomes in the United States were $1 trillion per year higher as a result of the country's participation in the world economy since 1945 and that the offsetting costs were approximately $50 billion per year. *Executive Summary* of THE UNITED STATES AND THE WORLD ECONOMY, *supra* note 335, at xvii, xvii. Thus, international trade produced a net surplus of approximately $950 billion per year. Accordingly, a small percentage of that surplus would, in theory, make whole those who have borne the costs of that trade. *See* J. David Richardson, *Uneven Gains and Unbalanced Burdens? Three Decades of American Globalization*, *in* THE UNITED STATES

Fourth, CAFA accelerated the growing centralization of American law. As Wendy Parmet has pointed out, tort and other civil justice reforms increasingly have intruded into the operations of state courts by federalizing many of their procedures.[395] CAFA contributed to that trend by taking state law cases from the state courts and creating, in effect, a national standard for class certification. Even more striking, CAFA spotlighted that seemingly unstoppable trend toward centralization because it was the product not of Democrats and liberals, who ostensibly favor the federal government over the states, but of Republicans and conservatives who have habitually proclaimed their fervent allegiance to state government and their deep respect for state courts. However, CAFA—like the Securities Litigation Uniform Standards Act of 1998,[396] the USA PATRIOT Act,[397] the No Child Left Behind Act of 2001,[398] the Military Commissions Act of 2006,[399] and the 2007 amendments to the Foreign Intelligence Surveillance Act[400]—demonstrated that Republicans and conservatives were active centralizers and nationalizers, and that the meaning of their rhetoric depended not on the abstract principles they intoned but on the practical political and social results they sought.[401]

Fifth, CAFA demonstrated, once again, the indeterminate nature of the "principles of federalism." On one side, the Judiciary Committees of both the House and the Senate defended CAFA vigorously on

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AND THE WORLD ECONOMY, *supra* note 335, at 111, 111-18; *see also* JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 233 (2004) ("[I]t is surely more sensible, generally speaking, to go for more general and comprehensive schemes such as unemployment insurance and retraining programs for all workers who are laid off . . . .").

[395] Parmet, *supra* note 123, at 1.

[396] Pub. L. No. 105-353, 112 Stat. 3227 (codified in scattered sections of 15 U.S.C.).

[397] Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 18, 28, 31, 49, and 50 U.S.C.).

[398] Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified in scattered sections of 20, 25, and 42 U.S.C.).

[399] Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.).

[400] Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552.

[401] The point is beginning to be widely recognized even among conservatives. *See, e.g.*, Tim Conlan & John Dinan, *Federalism, the Bush Administration, and the Transformation of American Conservatism*, 37 PUBLIUS 279, 280 (2007) ("[President] Bush has been notably inattentive to federalism and supportive of centralization, as seen most clearly in his advocacy of legislation to extend the federal role in numerous policy areas . . . [including] in areas where Republicans had traditionally opposed expansion of federal power.").

federalism grounds[402] and charged that the status quo created what they described as "false federalism."[403] Under the "current system," they maintained, state court class actions often "trampled on the rights of states to manage their legal systems by allowing state court judges to interpret and apply the laws of multiple jurisdictions."[404] That practice, CAFA's advocates maintained, led state courts to "dictate the substantive laws of other states"[405] or, "even worse, to impose [their] own state law[s] on a nationwide case."[406] The "real harm to federalism [was] the status quo,"[407] both Committees agreed, and CAFA restores the "proper balance" and was thus "[t]rue to the concept of federalism."[408] On the opposing side, the Democratic minority equally took its stand on federalism grounds.[409] They argued that CAFA "unilaterally strips the state courts of their ability to use the class action procedural device to resolve state law disputes" and "will undermine state courts' independent authority."[410] CAFA "challeng[ed] the vision of our founders and the intent of the Constitution" and discarded the fundamental federalism principle that the national government was one of enumerated powers.[411] Indeed, the Democrats—hardly sounding like Democrats—warned that the statute violated, of all things, the Tenth Amendment.[412]

These stridently opposed positions presented the normative question directly. Is CAFA, in fact, consistent with the principles of federalism? Or, conversely, does it transgress those principles? History

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[402] The statute would "correct a problem in the current system that does not promote traditional concepts of federalism." S. REP. NO. 109-14, at 60 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 56.

[403] *See, e.g.*, *id.* at 60-64, *reprinted in* 2005 U.S.C.C.A.N. at 56; S. REP. NO. 108-123, at 60-62 (2003); H.R. REP. NO. 108-144, at 25-26 (2003).

[404] S. REP. NO. 109-14, at 60, *reprinted in* 2005 U.S.C.C.A.N. at 56-61; *see also* H.R. REP. NO. 108-144, at 13 (stating that the status quo was "an affront to federalism, because it results in one State court judge effectively making the law of that State applicable nationwide").

[405] S. REP. NO. 109-14, at 60, *reprinted in* 2005 U.S.C.C.A.N. at 56.

[406] *Id.* at 61, *reprinted in* 2005 U.S.C.C.A.N. at 56.

[407] *Id.*

[408] *Id.*; H.R. REP. NO. 108-144, at 26.

[409] In 2003, the Judicial Conference of the United States also opposed CAFA on federalism grounds. Letter from Leonidas Ralph Mecham, Sec'y, Judicial Conference of the U.S., to Sen. Orrin G. Hatch, Chair, Comm. on the Judiciary, U.S. Senate (Mar. 26, 2003), *reprinted in* 149 CONG. REC. S12,866, S12,876-77 (daily ed. Oct. 20, 2003).

[410] S. REP. NO. 109-14, at 92, *reprinted in* 2005 U.S.C.C.A.N. at 84.

[411] *Id.*

[412] *Id.* at 93, *reprinted in* 2005 U.S.C.C.A.N. at 85; S. REP. NO. 108-123, at 77-78 (2003).

provides the definitive answer: yes. The debate over CAFA, in other words, exemplified the ultimate truth, that the "principles of federalism" have proven so amorphous and elastic that they can readily be shaped to support almost any position on almost any issue.[413]

Holding aside abstract principles and partisan lawyering, however, CAFA's centralizing impact on American law and government seems undeniable. The statute shifted substantial power to the federal courts and constrained both the jurisdiction and authority of the state courts. Thus, however wise or desirable it might seem, CAFA represents a distinctly centralizing and nationalizing move. Indeed, combined with the "minimum diversity" rule, CAFA's elastic "originalist" rationale could justify the farthest-reaching extensions of federal jurisdiction that are imaginable.

In addition, and of even greater long-run importance, CAFA may well develop a synergy with three other factors—globalization, the commerce power, and expanding executive powers in international matters—that will generate powerful pressures for the creation of a substantive federal law to govern multistate class actions and suits involving foreign producers. The Supreme Court has already approved broad preemption of state law in many areas, and it has also allowed federal agencies to preempt state law on their own.[414] A drastically expanded federal common law or new preemptive federal statutes to govern class actions and international trade may increasingly appear to be the next logical step.[415] Regardless of abstract arguments about

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[413] *See* EDWARD A. PURCELL JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY 6 (2007) (arguing that the federal structure was "intrinsically elastic, dynamic, and underdetermined"); *see also* Andreeva, *supra* note 2, at 411 (arguing that CAFA is hostile to "notions of federalism"); Danas, *supra* note 100, at 1307-08 (considering CAFA in light of two models of federalism).

[414] For a discussion of agency preemption, see Issacharoff & Sharkey, *supra* note 123, at 1380-82, which discusses preemption of state and common law by EPA and OSHA regulations; and Sharkey, *supra* note 123, at 227-28, which describes agency preemption preambles as "a harbinger of a future where federal agency regulations come armed with directives that displace competing or conflicting state regulations or common law as a matter of course."

[415] Jonathan R. Macey and Geoffrey P. Miller argue that the Court should abandon *Erie*'s restrictions and allow the federal courts to make national law in mass tort class actions. Jonathan R. Macey & Geoffrey P. Miller, *A Market Approach to Tort Reform via Rule 23*, 80 CORNELL L. REV. 909, 910-11 (1995). Samuel Issacharoff argues for a limitation on *Erie* and especially on the choice of law rule drawn from *Erie* by *Klaxon*. Issacharoff, *supra* note 160, at 1839-42. Without overruling *Erie*, moreover, existing precedents with vast expansive potential could be construed to allow federal common law to control multistate class actions. *See, e.g.*, Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988) (holding that in areas involving "uniquely federal interests," state law

the "principles of federalism," then, CAFA represents a significant centralizing step and, potentially, a powerful catalyst for even broader centralizing developments in the future. Thus, to call CAFA a "modest" measure seems almost as misleading as calling it "court reform—not tort reform."[416]

Sixth, in terms of its long-term litigation results, CAFA's impact seems highly uncertain, for jurisdictional reform has often proved a rich source of irony.[417] In the short run, successful reforms usually have produced identifiable winners and losers, as CAFA did. Partisan reformers and their adversaries understood what they were doing and why they were doing it, and they had important practical reasons for the strenuous efforts they made. In the longer run, however, the practical litigation results of jurisdictional reform tend to shift. Any such reform, Frankfurter noted some eighty years ago, "discloses in practice aptitudes or consequences not contemplated by its framers and wholly absent from the intention of law-makers."[418] As time passed and society changed, so did both litigation patterns and the attitudes of the courts, and the social consequences of jurisdictional rules changed along with them.[419] Raising the jurisdictional amount in 1887 and 1911 was intended to keep large numbers of claims out of the federal courts, not only because many of those claims were small but also because plaintiffs' attorneys commonly discounted more sub-

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may be preempted by federal policy, even without a clear federal statutory prescription). Conversely, other scholars have tried to use *Erie* to limit CAFA. *See, e.g.*, Forlenza, *supra* note 102, at 1092.

[416] S. REP. NO. 109-14, at 56, *reprinted in* 2005 U.S.C.C.A.N. 53. Not surprisingly, the label "modest" had been suggested to Congress by John H. Beisner, a prominent class action defense attorney who was one of CAFA's principal drafters and advocates, when he testified before the House Judiciary Committee. *2003 House Hearing*, *supra* note 218, at 21 (2003) (statement of John H. Beisner, Partner, O'Melveny & Myers LLP).

[417] Several of the articles in this Symposium illustrate this truth about CAFA. *See, e.g.*, Clermont & Eisenberg, *supra* note 322, at 1579-81 (finding that judges have adopted a very narrow reading of CAFA); Erichson, *supra* note 323, at 1596 (arguing that CAFA will not restrict class actions or constrain the plaintiffs' class action bar but rather "will strengthen the upper tier of the plaintiff class action bar").

[418] FRANKFURTER & LANDIS, *supra* note 6, at 103; *see also id.* at 281 ("Jurisdictional problems are too technical and intricate to permit even the most skilled authorship to foresee all possibilities."); *cf.* Burbank, *supra* note 195, at 1952 n.179 (acknowledging the "opportunities for manipulation that CAFA presents").

[419] *See generally* PURCELL, *supra* note 16, at 4-9 (examining changing patterns of litigation and out-of-court settlements in corporate diversity litigation from the 1870s to the 1950s); Marc Galanter, *The Life and Times of the Big Six; or, the Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921, 924 (discussing the differential rise and fall of civil rights, prisoner petition, social security, recovery, contracts, and torts cases in the federal courts from 1960 to 1986).

stantial claims in order to avoid removal. When the social and political context changed after World War II and the federal courts came to seem attractive forums for individual claimants, the higher jurisdictional amount no longer served as an incentive for claim discounting. Rather, it became an incentive for its opposite—claim inflation, the tactic of pleading large damages for smaller claims in order to bring those claims into the federal courts.[420]

Indeed, the development of the modern class action illustrated the prevalence of such ironies, for its appearance transformed the practical significance of *Erie Railroad Co. v. Tompkins*.[421] Originally a Progressive and pro-plaintiff decision, *Erie* came in the late twentieth century to serve as a powerful pro-defendant tool in state law class actions. Requiring federal courts to apply state law when adjudicating state-created rights, *Erie* forced daunting choice of law problems to the forefront in those actions and thereby became a major obstacle to class certification.[422] It was precisely the obstacle that *Erie* created, of course, that made CAFA such an effective pro-defendant statute.[423]

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[420] *See* PURCELL, *supra* note 16, at 91-97, 242-43. Another more familiar irony involved the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), which shifted from a powerful tool used by conservatives and business to check government regulation, to a powerful tool used by African Americans and their liberal allies to combat racial discrimination. *See* OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 4 (1978) (arguing that *Brown v. Board of Education* gave the civil rights injunction a prominence that *Ex parte Young* had once given to the "anti-Progressivism injunction").

[421] 304 U.S. 64 (1938).

[422] *See* Marcus, *supra* note 158, at 1306-07. The broader "*Erie* doctrine" came to hold that *Erie* required federal courts adjudicating state-created rights to follow the choice of law rules of the states within which they sat. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) ("We are of opinion that the prohibition declared in [*Erie*] against such independent determinations by the federal courts, extends to the field of conflict of laws.").

[423] *See, e.g.*, *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300 (7th Cir. 1995) (Posner, C.J.) (echoing the language of Justices Holmes and Brandeis in *Erie* in denying class certification on choice of law grounds). Both the House and Senate insisted that CAFA "does not change the application of the Erie Doctrine." S. REP. NO. 109-14, at 49 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 46; *accord* H.R. REP. NO. 108-144, at 41 (2003). Further, it "does not change substantive law—it is, in effect, a procedural provision only. As such, class action decisions rendered in federal court should be the same as if they were decided in state court—under the *Erie* doctrine, federal courts must apply state substantive law in diversity cases." S. REP. NO. 109-14, at 61, *reprinted in* 2005 U.S.C.C.A.N. at 57; *accord* H.R. REP. NO. 108-144, at 26. The committee's statement that CAFA is "a procedural provision only" is, of course, misleading and unhelpful. Provisions that are "procedural only"—one thinks of the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202 (2000)—often bring far-reaching changes in litigation dynamics. *See, e.g.*, PURCELL, *supra* note 43, at 124-32, 154-55 (discussing the impact of the federal Declaratory Judgment Act on litigation practice). Another potential irony

Finally, CAFA marks another step in a relatively recent but broad-fronted effort to constrict meaningful legal remedies against corporate wrongdoing, and it highlights the all-encompassing goal of those who advocate "tort reform" and embrace the assumptions of panmarketry, the goal of sweeping the legal decks clear of "nonmarket" remedies wherever possible. Those forces oppose government programs to compensate and care for injured persons; they condemn government efforts to regulate corporate activities; they seek to capture or otherwise neutralize agencies charged with supervising corporate activities; they strive to enfeeble public supervision generally by cutting taxes and "starving" government of nonmilitary funding; they support proposals designed to deny ordinary Americans access to legal representation and judicial forums; and they seek to change the substantive rules of tort law to constrict or eliminate corporate liability. With CAFA they advanced on yet another front, successfully reshaping the rules of federal jurisdiction to limit even further the ability of ordinary Americans to secure judicial relief from corporate wrongdoing.[424]

Those last two goals, narrowing corporate tort liability and curbing the use of class actions, are particularly revealing, for they show the absolutist fervor that drives the adherents of panmarketry. Only some forty years ago, those who opposed government regulatory and compensatory programs did so on the ground that common law adjudication offered a preferable and more efficient method of remedying economic wrongdoing of all kinds. Now those groups are working to deny Americans even that last, common law remedial opportunity, and CAFA is their latest success.

In a society purporting to be democratic, and purporting as well to honor the rule of law, fair and meaningful opportunities for all Americans to seek and obtain legal redress are essential.[425] The na-

looms in the so-called *Erie* doctrine. In the longer term, CAFA may make *Erie* an inviting target for narrowing or even overruling by the Court—or for preemption by Congress—if pressures for a uniform federal law for interstate class actions, or for interstate commercial law generally, become sufficiently great. For a discussion of the choice of law issue, see generally Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001 (2008).

[424] Thus, it was not surprising that the Senate Judiciary Committee went out of its way to declare that, in its view, "the concept of class actions serving a 'private attorney general' or other enforcement purpose is illegal." S. REP. NO. 109-14, at 59, *reprinted in* 2005 U.S.C.C.A.N. at 55.

[425] As a general matter, private enforcement of private wrongs may be a preferable method of providing remedies. Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 375, 381-82 (2007) (indicating that private enforcement may be preferable to public enforcement for several reasons, including avoidance of bureaucracy and an

tional and international economies have created massive concentrations of private power, and American law has recently moved toward shackling all of the available methods of controlling those who exercise and profit from that power, and toward restricting every method of providing protection for its citizens and compensation for those injured and defrauded.[426] CAFA, at least in the current climate and context, narrows those remedies even further. As such, it is a shortsighted, highly partisan, and broadly unfortunate piece of legislation.

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increased likelihood of redress); *see also* Walker, *supra* note 189, at 863-64 (concluding that private enforcement is generally superior to public enforcement). Support from government agencies also seems essential, but agencies are often inadequate for a number of reasons, including lack of funding and political "capture." *See, e.g.*, Steven Greenhouse, *Report Cites Mine-Safety Agency Failures*, N.Y. TIMES, Nov. 18, 2007, at A24 (reporting that the Mine Safety and Health Administration failed to conduct required inspections, including an inspection of the Crandall Canyon mine, where six miners died in 2007); Gardiner Harris, *F.D.A. Advisers Say Agency Puts Lives at Risk*, N.Y. TIMES, Dec. 1, 2007, at A12 (indicating that several outsider assessments "concluded that the F.D.A. is poorly equipped to protect the public health"); Eric Lipton, *Dangerous Sealer Stayed on Shelves After Recall*, N.Y. TIMES, Oct. 8, 2007, at A1 (reporting that the Consumer Products Safety Commission failed to recall a dangerous product promptly); Eric Lipton, *Safety Agency Faces Scrutiny Amid Changes*, N.Y. TIMES, Sept. 2, 2007, at A1 (suggesting that the Consumer Products Safety Commission has been weakened by pro-business appointments and inadequate resources).

[426] "A politically free society," explained Alfred E. Kahn, the original federal deregulator, "will insist on exercising some control over its economic destiny." 2 ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 328 (1971). Both competition and regulation are "imperfect" and, if the former is generally more desirable, the latter is always necessary. *Id.* at 329. The "preferred remedy" for the imperfections of both is to make both work better. *Id.*

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