THE RULE OF LAW PROBLEM: UNCONSTITUTIONAL CLASS ACTIONS AND OPTIONS FOR REFORM

MARK MOLLER*

* Senior fellow in constitutional studies, Cato Institute; editor-in-chief, *Cato Supreme Court Review*. I would like to thank my former colleagues at Gibson Dunn & Crutcher LLP, including Miguel Estrada, Mark Perry, Richard Doren, Kevin Nowicki, Daniel Nelson, and Kay Kochenderfer, for introducing me to many of the legal questions analyzed herein. Of course, the views asserted in this article are wholly my own. Thanks, also, to Marla Kanemitsu, Bob Levy, Roger Pilon, and Andrew Tulumello for constructive comments on early drafts and Madison Kitchens and Cathy Lauren for helpful research assistance. By way of disclosure, I represented Aetna Inc. and its subsidiaries in class action litigation discussed at various intervals in this article.

I. INTRODUCTION

Imagine that relief depends on the will of a man, called the Judge, who possesses the power to force "wrongdoers" to compensate "victims." Busy and indecisive, the Judge hasn't formulated a coherent set of laws. Instead, when a citizen asserts a grievance, the Judge changes the rules based on principles he does not announce in advance. As a result, no one can predict when he will be hauled into court because there is, quite simply, no commonly accepted language for what is "wrong," who is a victim, and when coercive legal process is proper.

This article suggests that contemporary class action litigation mirrors this imaginary legal world. Utilizing an often neglected strain of due process analysis, the article explains how class actions frequently unsettle defendants' expectations about their rights and defends the proposition that class actions thereby violate due process. The article then applies this due process analysis to launch a new framework for class action reform, one that flows naturally from conceptualizing class action abuse as a constitutional problem.

It is well known that rights are often ignored or changed when litigants assert claims on behalf of a class. To see this problem concretely, consider the following hypothetical: Congress passes a law that outlaws the use of "profane" words, but excuses a defendant who utters profanity when physically injured. An onlooker sues you for damages under the statute after you stub your toe and assault him

with choice words. At trial, you produce a witness—a tourist who videotaped the incident—but the judge disregards the evidence, deciding he will not enforce the "physical injury" defense on this occasion. Clearly, your rights have been altered. A potent defense (stubbing your toe) is not available to you, and your liability is assessed by a standard different than the law had allowed.

When courts aggregate many individual lawsuits through the class device, they are inevitably tempted to change defendants' rights in this fashion. Imagine, now, that one citizen files a class action against you under this anti-profanity statute, alleging you violated the rights of 10,000 persons in as many different individual encounters. It would be impossible for the court to ascertain whether the physical injury defense applied to each claim, since no single court could examine each of your interactions with 10,000 class members. So, inevitably, the plaintiff, to secure aggregation, will argue that your liability can be proven in a more lenient fashion. If the court accepts the plaintiff's invitation, the rules that govern your conduct are changed.

The hypothetical illustrates a pervasive problem plaguing class litigation: When claims are aggregated, courts are often tempted to change parties' burdens of proof to ease management of the case, altering the rights of the parties in the process. Because courts alter rights in this fashion without reference to any intelligible principle, defendants, plaintiffs, and courts lack a common benchmark for identifying wrongdoing that deserves compensation. This is the rule of law problem at the heart of the class action debate.

The rule of law problem is of constitutional dimension. The Due Process Clause[1] protects individual autonomy (specifically, "liberty").[2] Yet parties cannot meaningfully exercise their autonomy unless they can apprehend what the law requires of them. Their apprehension, in turn, depends on the existence of predictable rules of conduct, including stable burdens of proof and advance warning of the conditions under which the burdens may be changed. For these reasons, I argue that the Due Process Clause limits courts' authority to unsettle the rules governing proof of claims in the class context.

Sadly, the rule of law problem has been ignored, utterly, by class action reformers. Now in his second term, President Bush has placed class action reform on the front burner,[3] but the recently enacted Class

1. U.S. CONST. amends. V, XIV.

2. U.S. CONST. amend. V ("No person shall ... be deprived of life, liberty, or property without due process of law").

3. *See, e.g.*, Dave McKinney, *Bush in State to Push Tort Reform*, CHICAGO SUN-TIMES,

Action Fairness Act—the showcase class action reform of President Bush's second term—merely expands federal "diversity jurisdiction" over "interstate" class actions (i.e., class suits that aggregate the claims of persons residing in more than one state).[4] This reform does nothing to address the rule of law problem spawned by claim aggregation. Alas, this problem simply isn't on the reform radar.

This article suggests, for the first time, that court procedures can be harnessed to create concrete incentives for constitutional scrutiny of class action litigation. In Part I of this article, I begin by examining the due process implications of the rule of law problem. I describe the relationship between burdens of proof and substantive rights and defend the proposition that *ad hoc* alteration of rights in the class context is a violation of due process. I then turn to the structural features of class litigation—that is, criteria for aggregating and centralizing complex litigation—that dampen due process scrutiny of class actions.

Turning to reform, Part II of the article begins by critiquing the Class Action Fairness Act—a statute likely to exacerbate the rule of law problem without providing any countervailing benefits. Then, I examine a series of alternative procedural solutions. First, I argue that certain commonly proposed changes to the class action procedure—including requirements that courts, prior to certification, consider the merits of the case and that absent class members opt in to the class—will promote due process and the rule of law in ways that commentators have ignored. Second, I argue that Congress can create new incentives for securing federal due process scrutiny of certification orders while prodding states to undertake procedural reforms that protect defendants' due process rights.[5] To do so, I argue that Congress can and must conditionally preempt state judicial procedure.

Jan. 5, 2005, at 19, *available at* http://www.suntimes.com/output/news/cst-nws-bush06.html (noting that President Bush announced a push for tort reform in "Madison County, [Illinois,] ranked by legal industry critics as America's worst 'judicial hellhole' because it is a favored venue for lawyers filing class action lawsuits.").

4. *See* S. 5, 109th Cong., 1st Sess., discussed at notes 102–119, *infra*, and accompanying text.

5. This article limits its critiques to class actions for damages—which are currently regulated by Federal Rule of Civil Procedure 23(b)(3). While it is possible that some class actions for injunctive relief (under Rule 23(b)(2)) may also raise due process problems, see Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998), the problems raised by class actions for injunctive relief are sufficiently unique to warrant separate analysis and therefore will not be addressed herein. For a discussion of the due process problems raised by injunctive classes from a practitioners' perspective, see Evan M. Tager, *The Constitutional Limitations On Class Actions*, MEALEY'S LITIGATION REPORT: CLASS ACTIONS, Jan. 2001, at 6–7, *at* http://www.appellate.net/articles/Tagercom.pdf.

II. THE RULE OF LAW PROBLEM

If a claim may be proven only by investigating unique aspects of a class member's transaction with the defendant, a court that aggregates tens of thousands of these claims faces an impossible task: conducting tens of thousands of mini-trials. Many courts therefore change the governing substantive law in order to pave the way for aggregation—violating, in the process, defendants' due process rights. Below, I briefly describe how class actions alter rights and then analyze that alteration as a due process violation.

A. Defining Rights

Consider two kinds of rights, which I will term "individual rights" and "group rights." Individual rights are, put simply, rights whose content is determined by reference to individualized proof and whose violation is refuted by individualized defenses. An ordinary tort, for example, is proven with reference to a specific, individual transaction: if A hits B, the law of tort directs us to assess A's intent, A's care, B's contributory negligence, and the extent of harm. Those elements of liability, in turn, force us to consider the circumstances surrounding the event (whether A was pushed into B, or B had threatened A, etc.). Such questions, in the ordinary course of things, cannot be answered without scrutinizing the individual case.

Group rights, by contrast, are those vested in a group of strangers who share no common injury but whom the law treats as a litigating unit for some reason of policy. Imagine, for example, a statute that permits a purchaser to sue a corporation for publishing false advertisements—even though the advertisements didn't inflate the price of the good the plaintiff bought or induce her to buy it. Under this hypothetical statute, the defendant is liable if it acted in an unjust way toward consumers as a group. The inquiry, which asks whether the defendant engaged in a proscribed act, eliminates questions of causation.[6] I call the resulting form of proof, in which individualizing

6. In essence, this is how California's infamous, now defunct, "Unfair Competition Law," CAL. BUS. & PROF. CODE § 17200, operated. *See* James Wheaton, *California's Unfair Competition Law: The Biggest Hammer in the Tool Box?*, ENVTL. L. NEWS, Spring 2000, at 26 ("Doctrines of standing, causation, and injury all vanish under Section 17200, leaving lawyers familiar with those doctrines ... in unfamiliar territory."). *See also* Stan Karas, Note, *The Role of Fluid Recovery in Consumer Protection Litigation:* Kraus v. Trinity Management Services, 90 CAL. L. REV. 959, 967 & n.40 (2002) (discussing California's Unfair Competition Law). A "group rights" statute might also require that some consumers have been harmed and the company has been enriched, but not require that a plaintiff prove he has personally been injured. In this case, the statute treats an injury

elements like causation are abandoned, "collective proof" to distinguish it from "individualized" proof.

The common law typically has preferred individualized proof of liability,[7] but has authorized departures from individuated proof when practicality demands. For example, contracts are interpreted according to the intent of the parties, but in some cases the intent is impossible to discern. In these cases, intent may be construed by reference to what most people would prefer (so-called majoritarian default rules).[8] Here, interpretation aims to establish individual intent; but proof turns on what most people would have intended and so is not a specific, individualized analysis of the unique transaction. The common law mediates the choice between individual rights and group rights in this way, by prescribing the conditions for, and the degree of departure from, individualized proof.

Class actions can alter rights by changing the manner in which a plaintiff proves that her rights were violated. Although others have analyzed this dynamic at some length,[9] a recent case nicely demonstrates the point. In widely publicized litigation against managed care companies (HMOs),[10] a handful of plaintiffs brought suit on behalf of nearly 600,000 managed care network physicians, alleging that major HMOs—including Aetna, Cigna, Humana, and United Health Care—deliberately misrepresented the scope of

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to any consumer as one that inheres in consumers as a group, and seeks to redistribute wealth from a corporate defendant to consumers as a whole; any consumer can vindicate that violation by suing the company. In either case, the right of recovery inheres in a group of individuals as a unit, regardless of the ability of its members to prove individualized injury.

7. *See, e.g.*, Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403, 418 (1992) (noting that common law relationships are typically bipolar (individualized), because "the concepts and many of the principal doctrines of the common law—for example, offer and acceptance, consideration, unconscionability, and expectation damages in contract law; and causation, fault, and compensatory damages in tort law—determine the victim's entitlement against the injurer by tracing the normative and physical sequence of wrongfulness from its origin in the defendant's action to its terminus in the plaintiff's suffering.").

8. Ian Ayres & Robert Gertner, *Majoritarian vs. Minoritarian Defaults*, 51 STAN. L. REV. 1591, 1591 (1999) (majoritarian default rules "simply ask[] what most parties would have contracted for had they written a complete contract").

9. *See, e.g.*, Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. CHI. LEGAL F. 475, 489–90 (discussing the ways in which class litigation may distort underlying substantive rights).

10. Other analysts also have considered the managed care litigation a unique window into the most disturbing features of class action practice. *See, e.g.*, 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, 505–07 (2000) (discussing managed care litigation as a "case study" of the "new style class action"); WALTER OLSON, THE RULE OF LAWYERS 81 (St. Martin's 2003) (discussing HMO litigation).

medical fees payable to doctors under patients' HMO plans.[11] The doctors sought relief under the Racketeer Influenced and Corrupt Organizations Act (RICO)[12] and under fraud statutes derived from the common law,[13] which required the plaintiffs to show that they "reasonably relied" on the misrepresentations.[14] The reasonable reliance requirement individualized liability under each statute by forcing courts to distinguish bona fide victims from plaintiffs who simply made poor judgments in transactions and should, therefore, suffer their own losses.[15] Applied to the doctors' claims, the reliance requirement mandated that each doctor show that a false representation by an HMO induced her to make reasonable decisions that she otherwise would not have made.[16]

The reasonable reliance requirement rendered aggregation of these claims difficult since the requirement directed courts to undertake case-by-case scrutiny of each doctor's transactions—some 600,000 in all. Some doctors, for example, might have joined an HMO out of loyalty to patients who were HMO insureds, knowing they would receive less money. The employers of other doctors (for example, those employed by large physician groups) may have required them to service HMO patients. Other doctors may have bet that an HMO's referral and advertising resources would result in a net gain of income regardless of the content of the fee schedule.[17] Scrutinizing 600,000 individual transactions was obviously not in the cards; hence, argued the defendants, the claims were not susceptible to class treatment.[18]

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11. Pls.' Consol. Reply Mem. in Support of Pls.' Mot. for Class Cert. at 33, Shane v. Humana, Inc., No. 00-1334-MD-MORENO (S.D. Fla. filed Jan. 3, 2001) ("Defendants have systematically defrauded physicians by passing along costs of health care that the doctors did not agree to assume.").

12. 18 U.S.C. §§ 1961–1968 (2000).

13. Pls.' Consol. Reply Mem. in Support of Pls.' Mot. for Class Cert. at 45, 55, *Shane* (No. 00-1334-MD-MORENO).

14. Bank of China v. NMB LLC, 359 F.3d 171, 176 (2d Cir. 2003) ("It is well established in this Circuit that where mail fraud is the predicate act for a civil RICO claim, the proximate cause element articulated in *Holmes* requires the plaintiff to show 'reasonable reliance.'"); Holmes v. Secs. Inv. Protection Corp., 503 U.S. 258, 268 (1992) (holding that a showing of proximate causation is a prerequisite for establishment of RICO liability).

15. For a discussion of the "reasonable reliance" requirement, see Sikes v. Teleline, Inc., 281 F.3d 1350, 1360–61 (11th Cir. 2002).

16. *Id.*

17. *See, e.g.*, Appletree Square I, Ltd. P'ship v. W.R. Grace & Co., 29 F.3d 1283, 1286 (8th Cir. 1994) ("In order to establish injury to business or property 'by reason of' a predicate act of mail or wire fraud, a plaintiff must establish detrimental reliance on the alleged fraudulent acts.").

18. Br. of Pet'rs Aetna, Health Net, Humana, Pacificare, Prudential, United and Wellpoint at 21, Aetna Inc. v. Klay, No. 02-16333-C (11th Cir. filed Dec. 30, 2002)

The doctors, in turn, appealed to considerations of fairness,[19] a value they claimed excused them from proving each claim individually. "The individual claims of many [doctors]," said the plaintiffs "are so small that the cost of individual litigation would be far greater than the value of those claims."[20] Unless a class were certified, they argued, no doctors would file suit, leaving the medical profession without a remedy.[21] Accordingly, they contended that it would be fair to eliminate the elements of proof that made class litigation untenable: individuated reliance and proof of actual damages.[22]

The doctors' appeal to fairness underscored that their motion for class certification rested on fuzzy normative assumptions. While described in general terms such as fairness, these assumptions are susceptible to a more nuanced description. For example, individual rights grounded in individualized proof might be characterized as a corrective model of rights—one designed to protect against an unjust transfer of wealth resulting from a discrete wrongful transaction between individuals.[23] Departures from this corrective model of remedying harms might be termed a distributive theory of justice, one that equalizes resources of a powerful economic actor and a smaller,

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("Evaluated under the correct legal standard, the myriad individualized factual inquiries necessary to properly adjudicate the essential elements of these plaintiffs' RICO claims preclude certification of the sprawling class action ordered below.").

19. Pls.' Consol. Reply Mem. in Supp. of Pls.' Mot. for Class Cert. at 4–5, Shane v. Humana, Inc., No. 00-1334-MD-MORENO (S.D. Fla. filed Jan. 3, 2001). In later briefing with respect to class certification, plaintiffs alleged that reliance could be proven by "circumstantial" evidence. Br. of Resp'ts at 25–31, Aetna Inc. v. Klay, No. 02-16333-C (11th Cir. filed Feb. 7, 2003). As defendants argued, however, there is no circumstantial evidence that can plausibly permit class-wide proof that all 600,000 class members relied similarly. To assume otherwise is to denude the reliance inquiry of any substance, and replace it with a legal fiction designed to promote plaintiffs' asserted remedial interests. Reply Br. of Pet'rs Aetna, Health Net, Humana, Pacificare, Prudential, United and Wellpoint, at 4, Aetna Inc. v. Klay, No. 02-16333-C (11th Cir. filed March 13, 2003). In other words, allowing plaintiffs to circumstantially prove reliance across 600,000 individuals is just a legalistic way of saying the reliance element will be effectively excused.

20. Pls.' Consol. Reply Mem. in Supp. of Pls.' Mot. for Class Cert. at 5, *Shane*, No. 00-MDL-1334-MORENO (quoting *In re* Domestic Air Trans. Antitrust Litig., 137 F.R.D. 677, 693–94 (N.D. Ga. 1991)).

21. *Id.* ("[T]he only way that the injuries to the provider class will ever be remedied is via the class action device.").

22. *Id.* at 34–36.

23. *See* Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403, 408–09 (1992) (corrective justice "focuses on a quantity that represents what rightfully belongs to one party but is now wrongly possessed by another party and therefore must be shifted back to its rightful owner .... Presenting corrective justice as a quantitative equality captures the basic feature of private law: a particular plaintiff sues a particular defendant").

less powerful group.[24]

The managed care litigation highlights three perplexing features of class litigation. First, it underscores that a decision to litigate claims as a class can change the parties' rights. By eliminating causation and permitting proof of injury on a statistical basis, plaintiffs' fairness theory stripped RICO of its individualized components, transforming the statute into something it was not when the lawsuit commenced. Obviously, the rights of the defendants were changed in the process. Second, the managed care litigation illustrates that the plaintiffs' burden of proof has a direct and powerful effect on the defendants' liability risks.[25] Third, the case suggests that the choice between individualized and collective proof may implicate a number of contentious normative questions. Unfortunately, the managed care litigation does not tell us how to resolve the competing arguments for these different burdens of proof.

B. Due Process and the Rule of Law

The Due Process Clause requires courts to respect the burdens of proof that would have been applied absent the request for class certification—a requirement implicit in the Clause's concern for party autonomy (i.e., its proviso that no person shall be deprived of liberty without due process of law). To introduce the link between autonomy interests and due process, Section 1 begins by considering the Supreme Court's application of federalism principles to class action lawsuits. The Court recognizes that states have specific, albeit circumscribed, autonomy interests at stake in class litigation: the sovereignty, or freedom within constitutional boundaries, to set policy within their borders. Out of respect for these interests, courts have dismantled class actions that abridge settled choice of law rules. Section 2 argues that the Due Process Clause provides to individuals the same protection that federalism principles supply to the states. It regulates the allocation of the parties' burdens of proof, which, much

24. *Id.* at 408 ("Distributive justice divides a benefit or burden in accordance with some criterion. An exercise of distributive justice consists of three elements: the benefit or burden being distributed, the persons among who it is distributed, and the criterion according to which it is distributed.").

25. The total liability exposure imposed on HMOs by the class litigation was large. In the class certification briefs, the lawyers for the smaller (i.e., 600,000 person) doctor class reckoned that class-wide losses for a single year totaled $100 million. Pls.' Mot. for Class Cert., Shane v. Humana Inc., No. 00-1334-MD-MORENO (S.D. Fla. filed Oct. 20, 2000). Since the class spanned all doctors who had treated patients over 10 years, the total liability could have been as much as $1 billion.

like choice of law, determines how rights are defined and applied in a given case. The Due Process Clause does so out of respect for a form of personal sovereignty: individuals' liberty to plan their conduct against a backdrop of predictable rules and consequences.

1. Introduction to Due Process in the Class Action Context: Federalism and State Autonomy Interests

Federalism is another word for "dual sovereignty,"[26] our system "in which the state and federal governments . . . exercise concurrent authority"[27] and are "protected from incursion by . . . other [states]."[28] Federal courts recognize that judicial management of complex civil litigation may violate federalism principles, allowing us to draw an analogy between state "sovereignty" and individual autonomy interests.

To see this analogy, begin by considering two common problems. The first occurs when class action plaintiffs plead legal claims under the law of many different states, prompting the trial court to decide the case under general legal principles in order to make one centralized proceeding manageable. *In re Rhone-Poulenc Rorer, Inc.*,[29] a case in which AIDS-infected hemophiliacs sued drug companies that supplied HIV-contaminated blood to hospitals, is an example. The plaintiffs sought to represent all similarly situated hemophiliacs,[30] but applicable choice of law rules required the court to try the case under the tort laws of all fifty states. Unsurprisingly, this posed a serious logistical problem. The trial judge tried to solve this problem by devising a single negligence principle, supposedly abstracted from the common law of the several states.[31] The Seventh Circuit in turn ordered the class decertified, arguing that the district court had violated the Constitution's structural preference for the simultaneous application of multiple state legal regimes to a multi-state regulatory problem.[32]

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26. Printz v. United States, 521 U.S. 898, 918 (1997).

27. *Id.* at 919–20.

28. *Id.* at 920 (citing Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J. concurring)).

29. 51 F.3d 1293, 1294 (7th Cir. 1995).

30. *Id.* at 1294.

31. *Id.* at 1300 ("The assumption is that the common law of the 50 states and the District of Columbia, at least so far as bears on a claim of negligence against drug companies, is basically uniform and can be abstracted in a single instruction.").

32. *Id.* at 1297–1304. *See, e.g.*, *id.* at 1301 (were it permissible to certify a class based on an amalgam of state common law that did not resemble the "actual law of any jurisdiction," "one begins to wonder why this country bothers with different state legal

The second problem arises when plaintiffs attempt to use the laws of one state to secure a remedy for persons living in several states. This problem is governed by *BMW of North America v. Gore*,[33] in which the Supreme Court held that one state's policy cannot be projected extra-territorially when doing so supplants or frustrates other states' contrary policies.[34] *BMW* involved a legal challenge to an Alabama punitive damages judgment that awarded a local doctor $4 million because BMW scratched and secretly repainted his "new" BMW automobile prior to sale.[35] Though the state justified the award as a spur to automobile manufacturers' disclosure of such minor repairs, the Supreme Court struck down the judgment, reasoning that it was grossly disproportionate to the harm inflicted upon Alabama residents.[36] The award would not simply deter BMW conduct in Alabama, but would affect BMW's out-of-state conduct—an outcome that undermined the independence of other states to set their own disclosure policies.[37] Applying *BMW*, federal courts entrusted with management of class litigation have barred plaintiffs from suing on behalf of a multi-state class under the laws of a single state.[38] As these courts have recognized, permitting the class to sue under the laws of a single state disrupts sister states' sovereign power to apply their laws to class members injured within their borders—an infringement of state comity no less problematic than that encountered in *BMW*.[39]

At first glance, these cases appear to say little about individual autonomy. But a second look is warranted: federalism is designed to

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systems").

33. 517 U.S. 559 (1996).

34. *Id.* at 586 (noting that while each state has ample power to protect its own consumers, a state may not use punitive damages as a means of imposing its regulatory policies on the nation).

35. *Id.* at 563–65.

36. *Id.* at 580.

37. *Id.* at 572 ("But by attempting to alter BMW's nationwide policy, Alabama would be infringing on the policy choices of other States."). *See also* White v. Ford Motor Co., 312 F.3d 998, 1018 (9th Cir. 2002) (suggesting that *BMW* stands for the principle that "no state is entitled, in our federal republic, to impose its policy on the other").

38. *See, e.g.*, *In re* Managed Care Litig., 298 F. Supp. 2d 1259, 1296–97 (S.D. Fla. 2003) (rejecting plaintiffs' argument that Connecticut law governed nationwide class claims against Aetna simply because Aetna is headquartered in Connecticut; and holding that federalism principles require individual consumers to sue under the law of the place of injury, thereby ensuring that different states retain control over their own remedial policies).

39. *See In re* Ford Motor Co., Bronco II Prods. Liab. Litig., 177 F.R.D. 360, 371 & n.30 (E.D. La. 1997) (emphasizing that choice of law in a class action must be undertaken in a way that ensures that the policies of each state that has contacts with the transaction are respected, and warning that application of the law of one state can interfere with the policies of other states). *See also* Tager, *supra* note 5, at 4–6 (discussing similar cases).

protect state sovereignty, which might be described as the specialized autonomy of persons acting in an official policymaking capacity. In cases like *Rhone-Poulenc* and *BMW*, courts recognize that state policymakers must have a well-defined sphere in which to set and implement policy (subject, of course, to constitutional restraints). And policymakers' needs, in turn, limit the power of courts to manipulate choice of law to achieve a remedy.[40] Otherwise, state policy will be nearly impossible to implement because policymakers lack confidence that the laws they pass, rather than those of some other state or those of a court's own devising, will apply. Their expectations, and hence their policies, will be frustrated or undermined by the tactical litigation interests of class litigants.[41]

Yet, federalism and state sovereignty are not ends in themselves; states are, the Supreme Court declares, instruments for the protection of individual freedom.[42] In a constitutional framework in which the

40. *In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig, 288 F.3d 1012, 1020 (7th Cir. 2002) ("Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court.") (citations omitted).

41. Conflict of laws is a subject rich with analytical complexity, and one in which a pristine and predictable set of choice of law rules is difficult to achieve. *See* Larry D. Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 320–21 (1990) ("Many choice of law scholars believe that any effort to formulate rules for choice of law—even presumptive rules—is bound to fail ... . Even conceding that rules provide imperfect uniformity and unpredictable results, they are plainly superior in this regard to what replaced them."). Even so, there is no gainsaying that when claims are aggregated, courts have been solicitous of each state's right to regulate with respect to its own consumers and have resolved difficult choice of law disputes in favor of applying the laws of several states, and against applying the law of a single state. This is a kind of presumption—in favor of applying the remedial laws of more than one state in tough choice of law cases—to which states would likely agree *ex ante*. *Compare* Kramer, *supra*, at 324 ("When one state's law may be rendered unenforceable if it is not applied, it is fair to assume ... that both states would agree to apply that law."). As I argue below, due process requires, at a minimum, a somewhat similar presumption against arguments by plaintiffs that an exception to settled burdens of proof should be created for the administrative convenience of a class proceeding.

42. *See* United States v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring) ("It was the insight of the Framers that freedom was enhanced by the creation of two governments, not one."); New York v. United States, 505 U.S. 144, 181 (1992) ("[T]he Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end it itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'") (quoting Coleman v. Thompson, 501 U.S. 722, 729 (1991) (Blackmun, J., dissenting)); Gregory v. Ashcroft, 501 U.S. 452, 459 (1991) ("In the tension between federal and state power lies the promise of liberty."). For a discussion on the connection between liberty, federalism, and judicial procedure, which makes a similar point, see Adam C. Pritchard, *Constitutional Federalism, Individual Liberty, and the Securities Litigation Uniform Standards Act of 1998*, 78 WASH. U. L. Q. 435, 450–56 (2000) (describing the "constrained libertarianism" that informs the modern federalism precedents of the Supreme Court).

liberty interests of individuals are preeminent, it is hard to justify denying individual autonomy interests the same judicial protection afforded to the specialized autonomy interests of public officials.[43] After all, if the autonomy of officialdom depends on judicial enforcement of predictable choice of law principles, analogous protections are surely no less essential to the autonomy of persons acting in the private sector. Below, I argue that the Due Process Clause provides protection to individuals similar to that official policymakers receive in cases like *Rhone-Poulenc*: Due process directs courts that manage class litigation to respect pre-existing rules that define the elements of private liability, thereby safeguarding individual autonomy to plan conduct based on a predictable, pre-existing distribution of rights and obligations.

2. *The Rule of Law and Class Actions*

Considering a concrete case can help us refine our understanding of due process and its application to particular problems. *Hansberry v. Lee*,[44] an early civil rights case and one of the very first cases in which parties raised the rule of law objection to class proceedings, is an appropriate place to start. In *Hansberry*, a Chicago neighborhood tried to close its doors to African-Americans by imposing a restrictive covenant on neighborhood property. The covenant included a condition precedent: 95 percent of all "frontage" homeowners must have signed the agreement before a court could enforce it.[45] As it turned out, the proper quota of signatures was not satisfied, making the covenant unenforceable.[46] In order to uncover the failure of the

43. *Compare In re* Bridgestone/Firestone, Inc., 288 F.3d at 1020 ("Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court."); *In re* Ford Motor Co., 177 F.R.D. at 371 ("It is simply incorrect to assume that the overriding interest in all consumer-oriented cases is protection of the consumer"; rather, the "polices" of each state must be respected, even if doing so comes at the expense of consumer interests).

44. 311 U.S. 32 (1940).

45. *See* Burke v. Kleiman, 277 Ill. App. 519, 522 (Ill. App. Ct. 1934) (accepting a stipulation that the individual signatures had been obtained, obviating a need for case-by-case investigation of the number of actual valid signatures.).

46. The Hansberrys offered evidence that only 54 percent of the necessary signatures had been validly obtained. Lee v. Hansberry, 24 N.E.2d 37, 38–39 (Ill. 1939). The Illinois trial court, while conceding that the Hansberrys had proven the covenant's lack of enforceability, ruled that the res judicata effect of the class action precluded re-litigation of the validity of the convenant's execution. *See* Br. of Pet'rs at 13–14, Hansberry v. Lee, 311 U.S. 32 (1940) (No. 40-29) (noting that chancellor had found that only 54 percent of the signatures had been obtained, but "reluctantly" upheld the prior litigation of this fact as preclusive).

condition precedent, a court would have to scrutinize the individual circumstances of each signature, examining, for example, whether the notary had personal knowledge of the signer's identity and his property rights (as state law required), or whether the signatures were forged.[47]

Enter the class action. To solve their problem with the unenforceable covenant, the residents manipulated the class action device to prevent African-Americans from effectively challenging the covenant's validity. One white homeowner filed a (likely collusive)[48] class action on behalf of all covenant holders against four persons who had acquired a property interest in the neighborhood.[49] In the course of the litigation, the plaintiffs and defendant entered a stipulation that the minimum number of signatures had been obtained.[50] Based on this stipulation, the Illinois Supreme Court enforced the covenant with respect to the entire class of signatory homeowners.[51] In this way, the white residents hoped to preclude future African-American purchasers from relitigating the covenant's enforceability. Since African-American purchasers could only obtain title from a former class member whose rights were settled by the litigation,[52] the owners expected that the validity of the condition precedent, resolved in a final judgment in their favor, was therefore insulated from a future legal challenge.

The *Hansberry* litigation ensued when an African-American family, the Hansberrys, purchased property in the neighborhood, prompting their new neighbors to sue for enforcement of the covenant

47. For example, the Hansberrys, as discussed below, produced evidence that many of the signatories had signed the agreement, but had not "acknowledged" the terms of the covenant, as Illinois law required. *See* Br. of Pet'rs at 37, *Hansberry* (No. 40-29) ("the defense of improper acknowledgement in the instant case was available to each of the parties signatory by reason of the fact that the purported signatures to the agreement are *wholly unconnected and separated from the purported acknowledgements* which do not appear and are not attached to the *same* document or paper upon which the signatures appear.") (italics in original). The Hansberrys also offered proof that some signatures were obtained by fraud or had not been properly notarized. *Id.* at 36–37 (adducing evidence that one signatory party (and a plaintiff in the case), Ira Katz, had signed his name to paper that was represented as being a "petition" for "neighborhood improvement," and had admitted under oath that he had no knowledge of the content of the petition, and that another signatory party, Eva Sommerman, did not take any oath with respect to her signature, as required).

48. *See id.* at 14 (quoting trial courts' determination that the stipulation was likely collusive).

49. *Id.* at 15.

50. *Id.*

51. Lee v. Hansberry, 24 N.E.2d 37, 38–40 (Ill. 1939).

52. *Hansberry*, 311 U.S. at 39–40.

and rescission of the sale.[53] The Hansberrys, in turn, argued that the Due Process Clause entitled them to offer evidence that the signatures had not been properly obtained, despite the prior class litigation. The Supreme Court concluded that (1) there was an irremediable conflict of interest between the Hansberrys and the white property owners and (2) the Hansberrys therefore could not be bound by the "representative" litigation because the class representatives failed to represent the Hansberrys' interests.[54] The Court ignored, however, a broader argument advanced by the Hansberrys, one that did not turn on a conflict within the class: namely, that altering burdens of proof to suit the remedial interests of a preferred group of litigants itself violates due process.[55] Does this argument have any merit?

There are three ways to defend this proposition. The first is the "day in court" entitlement, which prohibits the government from "depriv[ing] a person of all existing remedies for the enforcement of a[n] [existing] right . . . unless there is, or was, afforded to him some real opportunity to protect it."[56] The attorneys for the Hansberrys, for example, suggested that they had been denied their day in court because they did not have an opportunity to raise their defenses in the

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53. *Lee*, 24 N.E.2d at 38.

54. *Hansberry*, 311 U.S. at 44 ("All those alleged to be bound by the [covenant] would not constitute a single class in any litigation brought to enforce it. Those who sought to secure its benefits by enforcing it could not be said to be in the same class with or represent those whose interest was in resisting performance."). *Id.* at 45–46 ("The plaintiffs in the *Burke* case sought to compel performance of the [covenant] in behalf of themselves and all others similarly situated ... . In seeking to enforce the [covenant] the plaintiffs in [the *Burke*] suit were not representing the petitioners here whose substantial interest is in resisting performance."). *See also* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 808 n.1 (1985) ("The holding in *Hansberry*, of course, was that petitioners in that case had not a sufficient common interest with the parties to a prior lawsuit ...").

55. First, they contended that the affirmative defenses regarding the satisfaction of the condition precedent required, as a practical matter, individualized scrutiny of the circumstances surrounding each signature on the restrictive covenant. Br. of Pet'rs at 36–37, Hansberry v. Lee, 311 U.S. 32 (1940) (No. 40-29) (arguing that defenses to each signature required, by their very nature, a case-specific inquiry into the facts surrounding each signature, including "forgery, fraud, or trickery," lack of authority by agents putatively acting on behalf of owners, and lack of the required statutory personal knowledge of the Notary regarding the signers' identity and ownership interest, and that therefore they were not amenable to collective proof in a class proceeding). Second, the Hansberrys argued that even if as a practical matter the proof could be undertaken without case-by-case scrutiny of the circumstances of each signature, the defenses, as a matter of state law, inhered to individuals, and therefore legally could be proven only on an individualized, rather than a collective, basis. *Id.* at 34–35 ("The issue as to whether a property owner is bound is as to each, inherently personal as to individual execution and acknowledgement, in respect to which latter facts no property owner can be represented."). In either case, the Hansberrys argued that their due process rights had been violated. *Id.* at 38.

56. Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 682 (1930).

first class lawsuit. [57] This formulation is suspect, however, because giving the prior class action proceeding preclusive effect did not deprive the Hansberrys of an opportunity to appear in court and argue that the class proceedings should be ignored; it simply meant that they had lost the argument. The suggestion that the Hansberrys had been deprived of their day in court is metaphorical, suggestive of a more primary principle.

The second avenue would treat a defense to civil litigation as "property" that deserves heightened protection, perhaps akin to the protection guaranteed by the Takings Clause. This answer, however, is also unsatisfactory because countless procedures can be characterized as a burden on or interference with a defendant's ability to raise substantive defenses. For example, a defendant can easily characterize a procedure that requires her to raise a defense within a given time period[58] as an interference with her possession of the defense. Taken for all it is worth, treating defenses as property could result in procedural paralysis. A more flexible, pragmatic concept of due process seems necessary.

The third approach has been suggested by Professor William Van Alstyne: due process guarantees freedom from arbitrary judicial process, even in cases where property, however defined, is not at stake. Van Alstyne treats this concept of due process as a liberty protection.[59] His analysis has powerful explanatory force in *Hansberry*: if the Due Process Clause is to provide meaningful restraint on arbitrary exercise of judicial power, courts must scrutinize any procedural innovations that result in a difference between a right

57. *Cf.* Br. of Pet'rs at 31, *Hansberry* (No. 40-29) ("The holding of the *Burke v. Kleiman* suit to be a representative suit and *res judicata* against the petitioners, deprived the petitioners of the benefit of notice and a real opportunity to defend.") (emphasis added). It is also the formulation frequently suggested by modern day defense attorneys. *See* Tager, *supra* note 5, at 3 ("[B]asic to the right to a fair trial—indeed, basic to the very essence of the adversarial process—is that each party have the opportunity to adequately and vigorously present any material claims and defenses.") (quoting S.W. Ref. Co. v. Bernal, 22 S.W.3d 425, 437 (Tex. 2000)).

58. *See, e.g.*, FED. R. CIV. P. 59(b) (motion for new trial shall not be filed later than 10 days after final judgment).

59. William Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 488 (1977) ("The idea of freedom from adjudicative procedural arbitrariness as an element of personal liberty does not lack text, logic, flexibility, or precedent ... . It is, moreover, wholly reasonable to regard the matter as one of liberty (freedom from something threatened by government) ... insofar as all that one claims is an exemption or immunity from governmental action that proceeds by certain means, i.e., fundamentally unfair, biased, arbitrary, summary, peremptory ... means that without justification create an intolerable margin of probable error or prejudice.").

articulated *ex ante* and applied *ex post*. This formulation respects liberty because it protects a person's capacity to act as a responsible agent. Liberty (understood as freedom to plan one's future conduct) is diminished when persons cannot ascertain what the law requires of them or detect the sphere of autonomy from government coercion. This is especially true when the right is abridged to advance the strategic interests of one set of individuals at the expense of another. In *Hansberry*, for example, the combined use of the class action procedures and the signature stipulation not only altered the law as it had been understood by eviscerating individualized defenses, but also furthered the property owners' parochial, strategic interests in securing a favorable judgment.[60] The Illinois courts used class litigation to cement an evidentiary fiction and immunize it from further challenge for the transient benefit of a favored group of litigants. Yet, the foundation of a system of predictable laws rests on the guarantee that legal prescriptions will be applied in a neutral fashion. If they are not so applied, the disfavored party represents his interests at the pleasure and mercy of the decision maker.

This explanation helps to refine an important intuition: altering the plaintiffs' burden of proof in *Hansberry* would have been improper even if the Hansberrys had not been represented in the prior litigation and therefore appeared before the Supreme Court as unadorned defendants (i.e., pure adversaries whose rights had not been previously litigated in a prior, putatively binding proceeding.) The propriety of using legal procedure to insulate weak evidence from challenge (with judicial support) for the benefit of one party cannot turn on formal party labels. From the liberty-oriented perspective, the alteration is no more justified when it disadvantages a formal adversary than when it is used, in bad faith, to defeat the interests of a functional adversary purportedly represented as an absent class member.

The intuition and theory fit. But how would a court administer the rule against altering burdens of proof? The obvious option is to enforce the burdens of proof that would have been assigned to the parties in the absence of class litigation. That inquiry is guided by a relatively objective baseline: the cause of action stated in the plaintiff's complaint, applied consistently with governing choice of law principles and without reference to the administrative demands of class action litigation. This is a familiar inquiry. In statutory causes of

60. Lee v. Hansberry, 24 N.E.2d 37, 41 (Ill. 1939) (Shaw, J., dissenting).

action, ascertaining the appropriate burden depends on the traditional tools of statutory interpretation—text, legislative history, and legislative purpose. For example, courts have suggested that RICO, because it is premised on criminal concepts of wrongdoing, incorporates relatively strict notions of causation and actual injury.[61] Similarly, courts have interpreted antitrust statutes against the background principles of proximate cause, albeit in fashion that balances common law concepts with the legislative purpose of the antitrust framework.[62] In non-statutory cases, the common law of contract, tort, and property regulates burdens of proof. And in statutory cases where the statute is wholly ambiguous, the Court has held that gaps must be construed consistently with the common law rules applicable under state law (i.e., those that would be chosen under applicable choice of law rules).[63] None of these benchmarks—statutory text, history, and purpose, and the common law—require strictly individualized proof in every case. For example, default rules for contract interpretation can depend on a supposition about what the majority of similarly situated parties would do. The concept of due process articulated above does not require a holistic preference for individualized proof or collective proof; it requires reference to an external baseline, grounded in governing substantive law, and established without regard for the needs of class plaintiffs, in which the tradeoffs between the two normative interests have already been made.[64]

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61. Holmes v. Secs. Inv. Prot. Corp., 503 U.S. 258, 268 (1992) (holding, based on analysis of text and legislative history of RICO, that a showing of proximate causation is a prerequisite for establishment of RICO liability).

62. Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 529–35 (1983) (interpreting antitrust causation in light of common law principles of proximate causation and the aims of the antitrust statute).

63. *See, e.g.*, O'Melveny & Myers v. FDIC, 512 U.S. 79, 84–85 (1994) (rejecting lower courts' assumption that in interpreting a federal statute, federal courts write on a "clean slate" and may fill gaps with "federal common law"; directing courts to apply federal law consistently with governing state legal principles); Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 98 (1991) ("we have indicated that federal courts should 'incorporat[e] [state law] as the federal rule of decision,' unless 'application of [the particular] state law [in question] would frustrate specific objectives of the federal programs.'") (quoting United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979)). The Hansberrys similarly emphasized that the lower courts, by treating the stipulation as a preclusive and binding "proof" of the validity of the covenant, had lessened plaintiffs' burden of proof in a fashion contrary to state common law. Br. of Pet'rs at 36–37, Hansberry v. Lee, 311 U.S. 32 (1940) (No. 40-29) (arguing that by denying the Hansberrys the right to offer evidence relating to the condition precedent, the lower courts had abridged "[t]he personal defenses ... [which] are as a matter of state law available in the trial of civil cases involving contracts ... . The[se] [defenses] are a part of the common law adopted by most of the states of the Union.").

64. Constitutional text is another guide. The Takings Clause arguably bars use of a class

Critics might charge that it is difficult to formulate a precise, predictable assignment of burdens of proof in advance in all cases. This is not a frivolous objection. Even so, some attempt to define and police predictable, neutral evidentiary standards, even if incomplete, is superior to open-ended judicial discretion to alter the established burdens of proof at will. Moreover, the courts' efforts to protect federalism demonstrate, as a constitutional matter, that they already police against the use of class procedure to distort a constitutionally preferred distribution of rights. The courts perform this function in deference to the expectations of official policymakers. The due process inquiry proposed above incorporates a similar, and no less administrable, standard—albeit one applied in a more inclusive fashion.

Critics might also argue that any allocation of burdens of proof must reflect some equitable criteria such as fairness to plaintiffs or the administrative costs of multiple litigation.[65] Both are problematic under the concept of due process articulated in this article because neither contains a limiting principle. To see the problem with fairness considerations, recall the doctors' argument in the managed care litigation. They asked the court to discard individual burdens of proof because the claims of class members were so insignificant that they could not be brought individually, leaving the doctors without a remedy.[66] By hinging the argument for certification on the need to remedy injuries to the class, the theory seems to assume what the lawsuit had been filed to prove—that the defendant HMOs had injured individual plaintiffs. Their fairness defense was circular; it assumed that class members had been individually injured and therefore required a remedy, even as the plaintiffs argued that the defendants should be denied the opportunity to counter that assumption by putting each class member to his individual proof on a

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certification order to sweep under the carpet certain individuated facts that establish a right to exclude or a right to take possession of property. The petitioners in *Hansberry* argued a similar point. They noted that the class device used in *Hansberry* squashed consideration of individuated facts relevant to the operation of restrictive covenants on particular parcels, thereby depriving the African-American purchasers of their right to possession under a covenant in fee. Br. of Pet'rs at 50–51 ("The decree entered by the Chancellor in the trial court deprived the petitioners of their rights in the arbitrary seizure of their property by a Master in Chancery ... . The result of this action was the forceful transfer of the property of one citizen to another. That this harsh and oppressive action is violative of the Fourteenth Amendment is readily apparent.") (citing Chicago, B & Q. R. Co. v. Chicago, 166 U.S. 226, 236, 237 (1897) (applying takings analysis under the Due Process Clause)).

65. *See* Pls.' Consol. Reply Mem. in Supp. of Pls.' Mot. for Class Cert., *supra* note 11, at 5.

66. *Id.* ("[T]he only way that the injuries to the provider class will ever be remedied is via the class action device.").

case-by-case basis.

The circularity could have been avoided in two ways, both problematic. First, the fairness theory might be premised on a qualitative balancing of the plaintiffs' and defendants' interests at stake (i.e., a choice between competing, normative models of remediation—corrective or distributive justice). However, the choice is highly abstract, and different courts, left to their own devices, are likely to resolve it in different ways.[67] Predictable and impartial adjudication, however, requires a different outcome: that courts converge on settled ground-rules imposing ascertainable limits on official discretion. This requires courts to use, whenever possible, established burdens of proof, which mediate the choice between the competing normative principles.

Second, the fairness theory might presume some threshold likelihood of success by plaintiffs before a class may be certified. In theory, this threshold inquiry would impose limits on the equitable discretion of courts, so long as the threshold is announced in advance. Unfortunately, current class action procedures do not provide any threshold; indeed, they bar consideration of the likelihood of success on the merits, ensuring that any such consideration takes place off the record.[68] But even if the class action procedures could be changed, a regime in which class certification is contingent on such an inquiry would still raise due process problems. Consider, first, a threshold inquiry that asks a court to assess the likelihood that *all* or *most* aggregated claims are meritorious. In many cases, determining a likelihood of success on this scale would require many of the same case-by-case inquiries that exist under the current regime, raising more problems of circularity; it is hard to tell whether a class of plaintiffs raising claims of fraud, for example, is likely to succeed without examining whether reliance is common across the class.

Courts might limit the threshold inquiry to the merits of the discrete claims asserted by named plaintiffs; that inquiry, while narrower, is no less problematic. Imagine A touches 1,000 persons and lives in a

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67. *See, e.g.*, Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871, 895 (1991) ("The risk of confusion [about the province of a rule] is even greater if the reason for creating an exception is equity or justice rather than the single purpose behind a single rule. For if a rule will be applied only when it is consistent with justice, then it turns out once again that talk of exceptions, or of the power to create them, is largely distracting. The power to create an exception to a rule when required by justice is equivalent to the power to do justice *simpliciter*."). *Cf.* Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 355 (1992) ("Boosting the level of generality ... can be a method of liberating judges *from* rules.").

68. *See* Szabo v. Bridgeport Machines, 249 F.3d 672, 677 (7th Cir. 2001).

tort regime in which plaintiffs must show actual damages on an individual basis to sustain recovery. Now assume that among this pool of 1,000 touchings, injury is highly variable and difficult to measure; moreover, only 20% of the touched persons are injured to a degree that will sustain a lawsuit. One severely injured person sues on behalf of all 1,000 persons touched, alleging each was injured but asking the court to waive proof of actual damages for the sake of convenience. Given the variation in degree of injury across the class, the threshold merits inquiry is a crapshoot in which the integrity of a defendant's rights hangs on the accidental characteristics of the plaintiff who happens to sue. Because the defendant has no control over who steps forward, the defendant's rights are just as vulnerable to unpredictable alteration as a regime in which the law is changed arbitrarily. At the same time, this alteration is only accidentally related to any reasoned normative principle, since neither corrective nor distributive justice is served by allowing one exceptionally strong plaintiff to sue on behalf of hundreds of persons with legally insignificant injuries.[69]

"Administrative costs"—such as the cost to the judicial system of duplicative litigation—are also a problematic basis for altering burdens of proof. First, the objection carries no weight when judicial action is said to violate federalism principles.[70] It may be much easier for federal courts to litigate a number of claims in one proceeding

69. Worse, if certification compels a litigation-shy defendant to settle, the order would effectuate a wealth transfer that may bear no relationship to the scope of the actual injury inflicted by the defendant. That raises concerns about proportionality of damages similar to those that guided the Supreme Court's due process analysis of punitive damage awards. *See, e.g.*, BMW of N. Am. v. Gore, 517 U.S. 559, 574–75 (1996) ("[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty"); *id.* at 576 ("punitive damages may not be 'grossly out of proportion to the severity of the offense'"). In addition, the larger understanding of due process articulated above—the need to bar sudden, unannounced changes in the governing law when applied selectively for the benefit of parties to an individual case—is consistent with the Court's pronouncements on retroactivity in, for example, criminal habeas proceedings. *See, e.g.*, Teague v. Lane, 489 U.S. 288, 316 (1989) ("We can simply refuse to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case and to all others similarly situated."); Griffith v. Kentucky, 479 U.S. 314, 323 (1987) ("selective application of new rules violates the principle of treating similarly situated defendants the same"). In *BMW of North America v. Gore*, the Court underscored that due process protections for impartiality and predictability are also relevant to proceedings involving civil penalties. *BMW*, 517 U.S. at 574 n.22 (Breyer J., concurring) (while "[t]he strict constitutional safeguards afforded to criminal defendants are not applicable to civil cases ... the basic protection against 'judgments without notice' afforded by the Due Process Clause ... is implicated by civil penalties").

70. *See In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 288 F.3d 1012, 1020 (7th Cir. 2002).

based on an *ad hoc* amalgam of state law, but federalism bars courts from doing so out of deference to the states. Individuals count for as much as states in our federal system; indeed, as discussed above, federalism is designed to secure individual liberty.[71] Therefore, administrative costs should be weighted similarly when proposed as a justification for abridging individual rights. It will always be possible to advocate altering a burden of proof based on administrative convenience. In a consumer fraud claim, for example, a corporation is inevitably said to have failed some benchmark for proper disclosure, and plaintiffs inevitably argue that consumers should be excused from proving the injury on a case-by-case basis. It will always be convenient for courts to take plaintiffs' side and settle the claims in a single global class settlement based on collective proof, just as it was convenient for the trial court in *Rhone-Poulenc* to try class claims based on an averaging of the law of the fifty states. Thus, administrative convenience becomes an automatic excuse for trumping defendants' settled expectations. If rights are to be defined in a way that accords with these expectations, administrative concerns must not be granted much weight.[72]

In sum, due process requires the courts to articulate stable and predictable burdens of proof, announced in advance, and it sustains a strong presumption against *ad hoc* accommodation of the remedial interests of plaintiffs and the administrative concerns of courts.

3. *Class Actions and Rent-Seeking*

When applying due process principles, context matters. Above, I

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71. *See supra* notes 44–46, and accompanying text.

72. Is this analysis of due process one that modern courts might accept? A growing body of lower appellate precedent has barred class actions that frustrate defendants' ability to assert individuated defenses. The Fourth Circuit's case in *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998), is an example. There, plaintiffs who brought claims on behalf of Meineke franchisees alleged Meineke had fraudulently deprived franchisees of advertising funds owed under the terms of franchise contracts. *Id.* at 335. The Fourth Circuit reversed, citing the factual dissimilarity of the amalgamated claims, including important variations in contract language, the "shifting evidentiary sands of individualized representations to franchisees," and the need to determine individual reliance with "factual precision." *Id.* at 340–42, 344. The Court stressed that aggregation of the lawsuits had denied Meineke the opportunity to smoke out weak claims, because the trial court had excused the plaintiffs from their obligation to prove each claim individually. *Id.* at 343–44. These cases, and others, do not always analyze the issue as a matter of due process, but they reflect the overarching principle at the heart of the Due Process Clause: class actions are impermissible where they can be litigated only by warping the burden of proof that plaintiffs must meet to prove their claims. *See also* Tager, *supra* note 5, at 3, 11 n.17 (identifying cases where class action certification was denied because plaintiffs did not present claims that were sufficiently common).

defended a presumption against alteration of burdens-of-proof in the class context. However, the analysis also raised a question, which deserves further consideration: Is due process satisfied if courts could only alter burdens-of-proof in the service of class certification when plaintiffs have a reasonable likelihood of prevailing on the merits? In theory, this threshold inquiry is an intelligible, predictable rule. In Section 2, however, I suggested two reasons to think it is not a predictable rule in practice. However, there is a third, albeit complicated, reason for concern about the due process ramifications of this threshold inquiry: The very procedural framework in which courts consider requests for aggregation generates a high risk that the plaintiffs will capture the proceedings for their benefit. The threshold merits inquiry does not defuse this risk: Only a bright-line rule against special, "class action only" burdens of proof will suffice.

The risk of plaintiff rent-seeking has its roots in Section 1407 of Title 28 of the U.S. Code, which establishes the Judicial Panel on Multidistrict Litigation ("MDL Panel"), a tribunal vested with broad powers to transfer similar class actions to a single court for centralized pretrial litigation, known informally as the "MDL process."[73] When all cases are placed in one court, the transferee judge is left holding the entire portfolio of related federal litigation. Put in economic terms, the MDL process turns the transferee judge into a kind of central planner, tasked with setting a single price (the pay-out that defendants will be forced to pay) for all claims in a one-shot proceeding—a point aptly made by Judge Easterbrook in the Bridgestone and Firestone products liability litigation.[74] The judge faces two choices: take responsibility for preliminary assessment of the merits, thereby setting a price for the claims,[75] or delegate responsibility for setting the price to others (i.e., force a settlement). The first choice is unmistakably risky; when a judge takes responsibility for tens of thousands of seemingly duplicative class claims, he might select the wrong price. As Judge Easterbrook notes:

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73. 28 U.S.C. § 1407 (2005). *See also* Lexecon, Inc. v. Milberg, Weiss, Hynes, Bershad & Lerach, 523 U.S. 26, 33–34 (1998).

74. *In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 288 F.3d 1012, 1019–20 (7th Cir. 2002).

75. Although consolidated MDL proceedings are constituted for pretrial purposes only, the trial judge has broad power to assess the merits of plaintiffs' legal theories, either upon motions to dismiss or for summary judgment. At the same time, the MDL court has much power to shape the factual record, including by resolving *Daubert* challenges to key expert testimony. *See, e.g.*, Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993). All of these rulings can have an enormous effect on the merits and therefore the range of prices (i.e., liability) that a plaintiff is likely to secure at trial.

> The central planning model—one case, one court, one set of rules, one settlement price for all involved—suppresses information that is vital to accurate resolution . . . . [Even] if the law were clear, how would the facts (and thus the damages per plaintiff) be ascertained? One suit is an all-or-none affair, with high risk even if the parties supply all the information at their disposal. Getting things right the first time would be an accident.[76]

Given the risk of costs associated with a one-shot inquiry, the judge is likely to favor delegating the job to someone else—the parties. Bargaining between adversaries becomes the best available pricing mechanism, allowing the judge to escape direct responsibility for any errors that centralized pricing of the claims might involve.

But because the litigation is typically a result of the parties' failure or inability to come to a private deal, the judge is forced to use available tools to coerce parties into a bargain. The class action device is perfectly suited to that role *when it is interpreted to permit flexible certification of claims* in spite of some factual dissimilarity among the claims aggregated. Certification orders radically expand a defendant's potential liability. Accordingly, class certification orders tend to compel defendants to strike a deal with the plaintiffs, eliminating holdout problems.

The pressure to compel a settlement imposed on judges who manage centralized litigation exists independently of the value of the claims at issue. To be sure, the pressure is at its height when a court considers certifying a class of putatively "negative-value claims" (that is, claims in which the amount at stake is less than the cost of litigating them individually). When such claims are brought as class actions, an order rejecting certification sets a price on the claims—by rendering them worthless. To many MDL judges, promoting settlement seems a Solomonic alternative to such a stark outcome. However, the pressure to achieve settlement exists even if individual claims are sufficiently substantial to proceed on an individual basis. Of course, in such a case, an MDL court could avoid pricing the claims by denying certification, allowing them to proceed individually in different courts. But the MDL process is not indifferent toward that choice. Panel transfer orders repeatedly, albeit subtly, exhort the transferee judge to resolve the suits in a single centralized forum;[77] indeed, the judge who decertifies a class can

76. *In re Bridgestone/Firestone*, 288 F.3d at 1020.

77. *See, e.g.*, *In re* Ephedra Prods. Liab. Litig., 314 F. Supp. 2d 1373, 1374 (J.P.M.L. 2004) ("we point out that transfer to a single district under Section 1407 has the salutary

expect that any follow-on litigation will be transferred to his jurisdiction, since the MDL process assumes that he is the "expert" on this class of recurring claims.[78] In these circumstances, judges have psychological, institutional, and material incentives to take the reins of the litigation, no matter the amount in controversy.

The pressure that an MDL judge faces to achieve a global settlement opens the door for rent-seeking behavior by plaintiffs, a byproduct of the bipolar adversarial system in which MDL courts operate. This system hides information about the externalities that MDL settlements generate. For example, consider the recent settlement between Aetna and doctors in the managed care class action litigation discussed in Part I.[79] In their briefs before the trial court, the HMOs warned that "the whole point" of the suit was to permit doctors to "band together" to engage (through the judicial process) in the type of coercive bargaining with HMOs that "but for the Court's intercession *would* violate the antitrust laws."[80] Indeed, in other contexts, both the FTC and the DOJ have successfully prosecuted doctors for coercive collective bargaining designed to inflate medical fees, based on the theory that inflated fees harm the ultimate health care consumer—the patient.[81] But Federal Rule of Civil Procedure 23 and the MDL process provided doctors with a loophole, permitting them to engage in this otherwise proscribed collective bargaining. Centralized in a single federal district court, the litigation produced a class certification order that convinced Aetna, the country's biggest HMO, to settle. The settlement preceded any

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effect of placing all the related actions before a single judge who can formulate a pretrial program that ... ensures that pretrial proceedings will be conducted in a manner leading to the just and expeditious resolution of all actions to the overall benefit of the parties."). Most transfer orders employ similar language (a thinly veiled instruction to the transferee judge to achieve settlement).

78. *See, e.g., In re* Laughlin Prods., Inc., Patent Litig., 313 F. Supp. 2d 1380 (J.P.M.L. 2004) (transferring tag-along similar to previously consolidated suits based, in part, "on the familiarity of the MDL-1498 transferee judge with the factual issues in litigation relating to the Laughlin patent").

79. *See* notes 10–25, *supra*, and accompanying text.

80. Defs.' Joint Mot. to Dismiss Provider Pls.' Second Consol. Compl. at 17–18, Shane v. Humana Inc. (S.D. Fla. filed Oct. 18, 2002). *See also* Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 349–52 (1982) (agreement among independent physicians that established the fees that physicians could charge was a "price-fixing agreement" that is *per se* unlawful under antitrust laws).

81. *See* 67 Fed. Reg. 55258 (Fed. Trade Comm'n Aug. 28, 2002) (announcing proposed consent order in FTC Act action charging physician group with colluding on price of medical services and refusing to deal on the terms of provider contracts); 67 Fed. Reg. 36190 (Fed. Trade Comm'n May 23, 2002) (announcing consent agreement to settle Federal Trade Commission charges, under Section 5 of the FTC Act, alleging that physician association and member impermissibly agreed to fix prices and refused to deal with payers except on collectively agreed upon terms).

judgment of wrongdoing against Aetna; it was the fruit of Aetna's exposure to potentially ruinous class action liability.[82]

Whether the settlement agreement served the public interest remains in doubt. Some provisions of the agreement were slightly beneficial, such as new disclosure initiatives that may produce greater transparency about how doctors are paid.[83] But regardless of the effects of individual agreements, the big picture is startling. The Aetna settlement created a new "compliance dispute administrator" tasked with settling disputes between doctors and Aetna, including disputes over the *quality* of the HMO's payment practices.[84] The result not only will affect the parties—the doctors and Aetna—but also millions of insureds who receive coverage from the HMO, and the employers who ultimately pay for workers' health care.[85] Because these third parties depend on the managed care model to keep doctor fees and insurance costs low, both groups stood to lose from a doctor-imposed settlement that could increase the price of health care. Yet, neither group participated in a meaningful way in the certification hearing or in the settlement negotiations—a lamentable result of the inherently bipolar nature of litigation.[86]

The HMO litigation illustrates that large class actions result in twin, related evils: courts make decisions under the influence of pro-settlement incentives and, at the same time, are unable to accurately identify when settlements are simply pay-offs to abusive, rent-seeking

82. The total liability exposure faced by HMOs was colossal. In the class certification briefs, the lawyers for the smaller (i.e., 600,000 person) doctor class reckoned that class-wide losses for a single year totaled $100 million. *See* Mt. for Class Cert., Shane v. Humana Inc., No. 00-1334-MD-MORENO (S.D. Fla. filed Oct. 20, 2000). Because the lawsuit sought relief over a span of ten years, the total judgment sought by the doctor-plaintiffs could have totaled over a billion dollars. And the doctor class was the smaller of the two mega-class suits; the class of insureds was over 200 times larger. *Id.*

83. *See* Settlement Agreement of Aetna Inc., the Representative Plaintiffs, the Signatory Medical Societies, and Class Counsel §§ 7.1–7.9, Shane v. Humana Inc., No. 00-1334-MD-MORENO (S.D. Fla. 2003).

84. *Id.* § 7.16(b) (obligating Aetna to establish claim coverage polices based on "credible scientific evidence" that is "generally recognized by the medical community"); *id.* § 12.1(a) (establishing compliance dispute administrator with jurisdiction over "any enforcement" of section 7 of the Agreement).

85. *See, e.g.*, Linda J. Blumberg, *Who Pays for Employer-Sponsored Health Insurance?*, HEALTH AFF., Dec. 1999, at 58 (noting that costs of employer-sponsored health insurance can be borne by employees and employers).

86. Nineteen objections were filed during the settlement approval proceedings, including one objection by a heath care insured. The trial court summarily dismissed the insured's objections as irrelevant—solely because the insured was not a party to the settlement agreement, which governed only the claims between parties to the lawsuit (i.e., the insurers and doctors). *See* Final Approval Order and Judgment ¶ 12, *In re Managed Care Litigation*, No. 00-1334-MD-MORENO (S.D. Fla. Oct. 30, 2003).

litigants. Accountability is necessary, yet difficult to achieve. Strict due process scrutiny of class certification requests is part of the answer. Even if it is difficult for courts to ascertain whether the plaintiffs are gaming the system, courts can at least examine whether promoting a settlement requires giving the plaintiffs special treatment. When courts alter the plaintiffs' burden of proof, they necessarily accord plaintiffs special treatment—a procedural "premium" the law does not authorize. This special treatment, in turn, may constitute evidence that the procedures have been manipulated for private gains rather than public ends. The inference of manipulation is most appropriate when alterations displace burdens that were assigned by ordinary judicial or legislative processes (e.g., case precedent of the common law, or statutory enactments). In either case, those burdens reflect a balancing of interests undertaken outside the extraordinary pressures created when claims are centralized and/or aggregated in one court. For that reason, courts must hew to default burdens of proof that would apply in unaggregated cases. If the burden would not be applied in an individual case, it shouldn't be adopted in the class lawsuit. Unfortunately, as discussed, the centralized framework of the MDL process dampens the proposed due process scrutiny, creating incentives that run against the grain of judicial review, if not defusing it altogether in many cases. If the impetus for due process scrutiny does not come from the judicial branch, where can we turn?

III. CONSTITUTIONAL CLAIM AGGREGATION: PROPOSALS FOR REFORM

Our constitutional structure, organized around the principle of checks and balances, ensures that if one governmental power center is compromised, others can steer it back to compliance with constitutional duty.[87] The class action, filtered through the MDL process described above, has resulted in a kind of judicial central planning, where every related claim is funneled to one court, subjected to one mode of proof, and resolved at one settlement price. Put simply, the MDL process disables judicial review, forcing us to look to the political branches for help.

87. *See* THE FEDERALIST NO. 28, at 180–81 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.").

While the Supreme Court has held that Congress has broad authority to regulate judicial procedure,[88] Professor David Engdahl suggests that separation of powers principles limit Congress's power, and he proposes a test, rooted in the Necessary and Proper Clause, that might be called the *facilitation* test.[89] Congressional regulation of procedure, says Engdahl, is permissible only to the extent that the regulations "help rather than hinder the courts in their own exercise of the 'judicial Power of the United States.'"[90] This section suggests opportunities for reforms that facilitate a richer, more effective approach to complex case management, including measures that promote constitutional scrutiny of class actions. The following discussion first identifies three key principles of reform. Next, the article examines the Class Action Fairness Act, which Congress passed in early 2005, concluding that the Act is likely to be ineffective, especially with respect to promotion of constitutional challenges to certification. Finally, the article proposes a series of more aggressive class action reforms.

A. Principles for Reform

If, as Professor Engdahl suggests, Congress's regulation of judicial procedure must facilitate the judicial power, how do we identify the tools that promote "facilitation"? The Court's recent federalism and separation of powers decisions provide the necessary framework by describing three principles that the Court believes facilitate the operation of our system of checks and balances, of which the judicial branch is of course a part.

1. Decentralization

The Court has emphasized that decentralized decision-making is an important component of our system of checks and balances.[91] At a

88. *See, e.g.*, Sibbach v. Wilson & Co., Inc., 312 U.S. 1, 9–10 (1941) ("Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or constitution of the United States . . . .") (citations omitted).

89. David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 B.Y.U. L. REV. 75, 172–73.

90. *Id.* at 173.

91. *See, e.g.*, Printz v. United States, 521 U.S. 898, 922 (1997) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.") (quoting THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter

minimum, decentralization reduces the cost of error by any one government decision maker.[92] Further, decentralization promotes competition among the different power centers of government, and in the right circumstances, can be harnessed to promote, rather than stifle, judicial protection of individual rights.[93] Unfortunately, the MDL system treats decentralized litigation as an unmitigated disaster because it is said to breed the vice of multiple lawsuits.[94] Yet, as discussed in Part I, *supra*, there is every reason to believe that multidistrict centralization increases pressure on transferee judges to promote an early settlement (since the MDL process creates incentives for judges to treat settlement as the ultimate goal of consolidation). Sensible legal reform must reconsider the merits of decentralized in the context of multidistrict litigation.

2. *Cooperative Federalism*

Our system of checks and balances is one of dual sovereignty, in which state and federal courts are partners in the administration of justice.[95] Yet, many class action reformers view class action litigation in state courts as an unqualified danger to effective judicial administration and propose entrusting such litigation to federal

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ed., 1961)).

92. *See In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 288 F.3d 1012, 1020 (7th Cir. 2002) ("Markets instead use diversified decisionmaking to supply and evaluate information. Thousands of traders affect prices by their purchases and sales over the course of a crop year. This method looks 'inefficient' from the planner's perspective, but it produces more information, more accurate prices, and a vibrant, growing economy. When courts think of efficiency, they should think of market models rather than central-planning models.") (citing THOMAS SOWELL, KNOWLEDGE AND DECISIONS (1980)).

93. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (decentralization of power among states, the federal government, and the separate departments of each "prevent[s] the accumulation of excessive power in any one branch ... [and] will reduce the risk of tyranny and abuse from either front") (quoted in *Printz*, 521 U.S. at 921). *See also* Pritchard, *supra* note 42, at 452–54 (discussing the theme that "division of power preserves freedom" in the Court's constitutional federalism cases).

94. *See, e.g.*, H.R. REP. NO. 90-1130 (1968), *reprinted in* 2 U.S.C.C.A.N. 1898, 1899–90 (equating centralization of multiple lawsuits in one court with "just" and "efficient" management of multiple litigation).

95. *Cf. Gregory*, 501 U.S. at 470 (ambiguous federal statutes should be interpreted against alteration in pre-existing balance of power between federal and state government). *See also* Tarble's Case, 80 U.S. (13 Wall.) 397, 407 (1871) ("[N]either [federal nor state government] can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National government to preserve its rightful supremacy in cases of conflict of authority."). Preservation of joint state-federal control is a lynchpin of our system of "cooperative federalism," in which Congress may "encourage" state cooperation, rather than "compel" it, thereby ensuring "state governments remain responsive to the local electorat[e]." *See, e.g.*, New York v. United States, 505 U.S. 144, 168 (1992). For extensive discussion and a critique of the "accountability" theme in the modern Court's federalism decisions, *see* Pritchard, *supra* note 42, at 450–55.

judges, who they assume to be more competent. This approach to reform, however, is self-defeating: it overlooks state courts' role as the ultimate source of common law principles that govern how burdens of proof are allocated in most cases.[96] Accordingly, reforming the way in which burdens of proof are established and allocated in class actions must include the states, not cut them out of the process.

3. *Judicial Review*

Our constitutional framework ensures that each branch can serve as a mechanism for correcting abdication of constitutional duty by another branch. As Alexander Hamilton said, "If [citizens'] rights are invaded by [one locus of government power], they can make use of the other as the instrument of redress."[97] Implicit in Hamilton's account of checks and balances is not simply the separation of power but also the equilibration of power among the branches of government, a balance that ensures, at a minimum, a multiplicity of robust "instruments of redress" for the invasion of rights.[98] Yet, class actions truncate one of these constitutionally available avenues for redress by weakening the judicial branch as a source of protection against due process violations (and, indeed, implicating it in those violations).[99] Class actions, in effect, defuse judicial review. In

96. Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 98 (1991) ("[W]e have indicated that federal courts should 'incorporat[e] [state law] as the federal rule of decision,' unless 'application of [the particular] state law [in question] would frustrate specific objectives of the federal programs.'") (citation omitted).

97. THE FEDERALIST NO. 28, at 180–81 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

98. *Cf.* Mistretta v. United States, 488 U.S. 361, 383 (1989) (describing separation of powers inquiry as focused on "the extent to which [a provision of law] prevents [a branch] from accomplishing its constitutionally assigned functions") (quoting Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977)).

99. The principle of "separation and equilibration of powers" is most often invoked in cases where one branch attempts to aggrandize itself at the expense of others. *See, e.g.*, Printz v. United States, 521 U.S. 898, 922–23 (1997). Similar concerns about "aggrandizement" may lurk in the background when courts violate defendants' due process interests in the context of class actions. First, when courts alter burdens of proof, they are often arguably performing a legislative function, thereby usurping Congress's power to change the law. Second, even if judicial alteration of burdens of proof is not always "legislative," a larger, albeit more indirect, threat to checks and balances is nonetheless a very real product of class litigation. Class actions render the very concept of rights diffuse and malleable, subject to free alteration based on either abstract appeals to equitable norms or administrative convenience. If so, a court in the habit of ignoring defendants' due process rights in the class action context may grow out of the habit of protecting other rights (e.g., just compensation under the Takings Clause, speech under the First Amendment, or equality of legal protection under the Fourteenth Amendment) from invasion when the political branches sacrifice those interests in the name of abstract

Section C, *infra*, I argue that federal class action procedure must be amended to give parties and judges greater *structural* incentives to raise and take seriously constitutional challenges to class certification. Before turning to those reforms, however, a brief analysis of the recent class action reform law, called the Class Action Fairness Act, is in order.

B. The Class Action Fairness Act Considered

1. Summary of Provisions

The 109th Congress passed the Class Action Fairness Act into law in early 2005. The Act made two significant changes to the law.

a. Expanding Federal Diversity Jurisdiction

Prior to the Class Action Fairness Act, federal courts were authorized to hear suits based on state law under narrow circumstances in which all plaintiffs are citizens of states other than those in which defendants reside (a condition known as "complete diversity.")[100] Complete diversity, however, is not a constitutional requirement, but rather a statutory requirement of Section 1332 of Title 28 of the U.S. Code, which governs federal courts' exercise of diversity jurisdiction and can be changed by Congress.[101] The Class Action Fairness Act eliminates the complete diversity rule in cases where plaintiffs file so-called "interstate" class actions (that is, those that aggregate claims by persons who are residents of different states). That Act allows federal courts to hear, subject to certain exceptions, any class action where one named plaintiff or a specified number of class members live in a different state than the defendant.[102]

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equitable norms or administrative efficiency.

100. 28 U.S.C. § 1332 (2000). *See also* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530–31 (1967).

101. *See supra* note 100. *See also* Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 124 S. Ct. 1920, 1925 (2004) (noting that complete diversity is statutorily required for removal under 28 U.S.C. § 1441(a)).

102. *See, e.g.*, S. 5, 109th Cong., § 4(a)(2) (2005) (creating subsection d(2)(A) of Section 1332 of Title 28 of the U.S. Code, which would provide that federal district courts shall have "original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000 ... and is a class action in which ... any member of a class of plaintiffs is a citizen of a State different from any defendant"); *id.* (creating section d(1)(D) of Section 1332 of Title 28 of the U.S. Code, which would provide that the term "class members" means "the persons (named or unnamed) who fall within the definition of the proposed or certified class"); *id.* (creating sections (d)(1)(3) and (d)(1)(4) of Section 1332 of Title 28 of the U.S. Code, which provide certain exceptions to the grant of original jurisdiction, including in cases where two-thirds or more of class members reside in the same state as a "primary" or "significant" defendant).

b. Expanding Federal Removal Jurisdiction

The Act not only expands federal courts' diversity jurisdiction, but also defendants' power to remove interstate class actions from state to federal court.[103] The Class Action Fairness Act alters the removal power in three ways. First, it permits removal of interstate class actions that could have been filed in federal court.[104] Second, it changes the amount in controversy requirement.[105] Third, it overturns a longstanding rule that bars federal appellate courts from reviewing orders remanding removed cases back to state court for lack of federal jurisdiction.[106] The Act also creates a series of discretionary and mandatory safe harbors from federal jurisdiction and, therefore, removal in cases where more than one-third of the aggregate class are citizens of the state in which the action was filed.[107]

2. Will the Class Action Fairness Act Succeed?

Proponents of the Class Action Fairness Act make two principle claims. First, they claim the Act will prevent plaintiffs from using state lawsuits to extort defendants; but a key ingredient of the Act's scheme for achieving this goal faces serious constitutional problems. Second, they suggest that federal judges are sensitive to the concerns of defendants, and are therefore more likely to recognize abusive class actions. Below, I discuss each assumption in turn.

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103. *See, e.g., id.* § 5(a) (adding new Section 1453(b) of Title 28 of the U.S. Code, which would provide that "[a] class action may be removed to a district court of the United States ... without regard to whether any defendant is a citizen of the State in which the action is brought . . . .").

104. *See* S. 5, 109th Cong., § 5(a) (2005). The Act provides that "class actions" as defined in the new 28 U.S.C. § 1332(d) are removable to federal court, without specifying whether this removal power is equivalent to the scope of original jurisdiction granted over interstate class actions. S. 5, 109th Cong., § 5(a) (codified at 28 U.S.C. § 1453(b)). This removal provision is presumably read *in pari materia* with 28 U.S.C. § 1441(a), which provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant"—making removal jurisdiction over "class actions" granted by the Act equivalent in scope to federal courts' original jurisdiction over interstate class actions. Because of confusing draftsmanship, however, there is a catch. *See* note 109, *infra.*

105. *See, e.g., id.* § 4(a) (creating new Sections 1332(d)(2) and 1332(d)(6), which provide, respectively, that district courts shall have jurisdiction over civil actions in which "the matter in controversy exceeds the sum or value of $5,000,000" and that claims of absent class members will be aggregated for purposes of determining amount in controversy).

106. *Id.* § 5(a) (adding new Section 1453(c)(1) to Title 28 of the U.S. Code, which provides that "a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court ... if application is made to the court of appeals not less than 7 days after entry of the order").

107. *Id.* § 4(a) (adding new Section 1332(d)(3) (discretionary safe harbor) and Section 1332(d)(4) (mandatory safe harbor) to Title 28 of the U.S. Code).

a. Article III Problems with the Class Action Fairness Act

At the outset, the Act addresses the problem of dual, federal-state class litigation in a way that may be unconstitutional. The trouble lies with the way in which the Act treats absent class members before a class has been certified. Under the Act, federal jurisdiction would arise where *putative* class members (their existence being merely alleged within the plaintiffs' complaint) live in a state other than the state of the defendant.[108] The strategic harm supposedly addressed by the absent class member removal power is this: under our current system, plaintiffs can force a defendant to fight on two fronts by filing class actions based on the same allegations in state and federal court—one pleaded under state law, the other under federal law. So long as the lawyers recruit a named plaintiff (the person who officially files the suit) who lives in the defendant's home state, the suit cannot be removed to federal court, even if the class is a "nationwide" class lawsuit. The Act, according to proponents, would address this problem by authorizing removal of interstate class actions from state court *before* a class has been certified based on the citizenship of *unnamed class members*.[109]

It is debatable, however, whether this treatment of putative class members is consistent with Article III of the Constitution. At the time of the founding, the Anti-Federalists, ardent supporters of states-rights, bitterly disagreed with nationalist Federalists about the proper scope of federal judicial power.[110] Against the backdrop of that

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108. *See supra* note 104.

109. Proponents of the bill have consistently assumed that it will permit defendants to remove class action complaints based on "citizenship of proposed class members." *See, e.g.*, CONG. REC. S7569 (daily ed. July 6, 2004) (statement of Sen. Grassley) (suggesting that the "citizenship of proposed class members" is relevant to removal, and must be determined "on the date plaintiffs file the original complaint or when plaintiffs amend that complaint"). However, the Act as passed may provide plaintiffs' counsel with a defense (apparently unanticipated by its Republican sponsors) against removal when jurisdiction is premised solely on the citizenship of proposed class members. 28 U.S.C. § 1441(a) provides, under the "chapter" within which the new removal provisions fall, that "the citizenship of defendants sued under fictitious names shall be disregarded." That provision has been interpreted to bar removal based on the citizenship of anonymous plaintiffs. *See, e.g.*, Parkinson v. Barr, 105 F. 81, 82 (D. Nev. 1900) ("It is the duty of the court to consider only the citizenship and residence of the parties whose real names are disclosed in the pleadings."). Since class members are typically not capable of identification at the time a complaint is filed, it is possible that courts that take a strict textual approach to interpretation of the jurisdictional statutes will interpret this provision to limit removal inquiry to the citizenship of *named* plaintiffs, despite the evident legislative history to the contrary. Nonetheless, for the sake of comprehensive analysis, I analyze the bill based on the fashion in which its proponents suggest that it works.

110. The record of debate over diversity jurisdiction during the Constitutional Convention is sparse. Supporters of broader federal judicial power, like James Madison,

dispute, Article III (its ultimate product) must be interpreted as a compromise agreement designed to set some modest textual limits around the scope of federal jurisdiction.[111] One such limit is the concept of a "party" to an action. Diversity jurisdiction, for example, arises only where *parties* to the action are citizens of different states.[112] As Chief Justice John Marshall pointed out long ago in *Osborn v. Bank of the United States*, a "party" for purposes of diversity jurisdiction is not someone who merely is "affected" by the litigation.[113] After all, the Framers knew how to extend jurisdiction

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initially proposed that federal jurisdiction extend broadly to any cases that implicated either national law or "as may involve the national peace and harmony." Notes of James Madison (Aug. 6, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 40, 46 (Max Farrand ed., rev. ed. 1937) [hereinafter RECORDS]; Journal of the Convention (June 12, 1787), in 1 RECORDS, *supra*, at 223–24. *See also* 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, 92 (1993). The Committee on Detail—assigned with hammering out compromise language (Borchers, *The Origins of Diversity Jurisdiction, id.*, at 92 n. 95)—reported more tailored language to the full Convention, including the provision for jurisdiction over controversies between citizens of different states. Committee of Detail Proceedings (June 19-Aug. 4, 1787), in 2 RECORDS, *supra*, at 186. When subsequent debate in the ratifying conventions exposed trepidation about the scope of diversity jurisdiction among Anti-Federalists, who feared federal courts would "extinguish" state courts, Federalists like John Marshall responded by assuring them that the provision, because narrowly tailored, would remove only a "small ... proportion" of causes from state oversight. *See* John Marshall, *Speech to the Va. Convention* (June 20, 1788), in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 546 (Jonathan Elliot ed., 2d ed. 1836) (suggesting the diversity jurisdiction would largely be confined to land disputes between in-state residents and foreign residents). For complete discussion of the history of Article III's ratification, with a focus on the genesis of diversity jurisdiction, *see generally* Borchers, *The Origins of Diversity Jurisdiction*, *supra*, at 87–103.

111. This interpretation is especially compelling where, as in Article III, the drafters have chosen to replace broad language (jurisdiction in cases affecting "national harmony") with narrowly tailored, detailed enumeration of specific types of jurisdiction. *See* note 110, *supra*. *Compare* John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L. J. 1663, 1665 (2004) ("just as in the case of statutes, when the Court confronts a precise and detailed constitutional text, it should adhere closely to the prescribed solution rather than stretch or contract the text in light of the apparent *ratio legis*").

112. *See, e.g.*, Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 246 & n.132 (1985) (distinguishing Article III federal question jurisdiction from Article III party-based diversity jurisdiction); John Marshall, *A Friend of the Constitution*, in JOHN MARSHALL'S DEFENSE OF *McCulloch v. Maryland* 207, 213 (G. Gunther ed., 1969) (the first three jurisdictional grants of Article II, Section 2 are defined by "the character of the cause," while the last six are characterized by "the character of the parties").

113. *See* 22 U.S. (9 Wheat.) 738, 855 (1824) (Marshall, C.J.):

> If the suit affects a foreign minister, it must be dismissed, not because he is a party to it, but because it affects him. The language of the constitution in the two cases is different. This Court can take cognizance of all cases "affecting" foreign ministers; and, therefore, jurisdiction does not depend on the party named in the record. But this language changes, when the enumeration proceeds to States. Why this change? The answer is obvious. In the case of foreign ministers, it was intended, for reasons which all comprehend, to give the national Courts

based on the effect of a case on some class of persons; they authorized federal jurisdiction over cases "affecting" ambassadors, for example.[114] The Framers, however, did not define diversity jurisdiction so broadly.

Respect for the text of Article III requires courts to interpret the distinction between "parties" and persons who are merely "affected" in a way that respects each term as a separate, discrete limit on the scope of federal jurisdiction. One approach is to define party in reference to the plaintiffs' complaint (i.e., to ask whether the plaintiff has alleged the right to represent persons living in different states, and to treat such persons as parties). That approach, however, is inconsistent with the constitutional bargain that underlies Article III. At the time a class action for damages is filed, the existence of class members (i.e., persons whose interests are sufficiently affected to qualify for representation) is merely alleged by the plaintiffs. If those allegations are sufficient to make hypothesized class members parties, the rule leaves the scope of constitutional diversity jurisdiction in the hands of federal courts, since the plaintiffs' ability to sue as a representative, and therefore to request representative status in the complaint, is regulated by federal procedure, which determines who a plaintiff is entitled to represent. The content of those procedures is controlled by federal courts, to which Congress has delegated the power to enact procedural rules.[115] In essence, a rule permitting the plaintiffs' pleadings alone to determine "party" status would leave the power to define the difference between those who are affected and

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jurisdiction over all cases by which they were in any manner affected. In the case of States, whose immediate or remote interests were mixed up with a multitude of cases, and who might be affected in an almost infinite variety of ways, it was intended to give jurisdiction in those cases only to which they were actual parties.

114. Article III's grant of original jurisdiction over cases "affecting" ambassadors is one of three grants of jurisdiction in Article III that incorporate that precise standard. U.S. CONST. art. III, § 2 ("The judicial Power shall extend ... to all Cases affecting Ambassadors, other Public Ministers and Consuls").

115. *See, e.g.*, Sibbach v. Wilson & Co., 312 U.S. 1, 9–10 (1941) ("Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or constitution of the United States") (citation omitted). Pursuant to the Rules Enabling Act, federal procedural rules are currently promulgated by the Supreme Court, with assistance of the Federal Judicial Conference's Standing Committee on Rules and the Advisory Committee on Civil Rules. *See, e.g.*, 28 U.S.C. § 2072(a) (2000) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals"); 28 U.S.C. § 2073 (authorizing the Judicial Conference, and such committees as it designates, to recommend changes to procedural rules).

those who are parties with federal decision-makers, who are institutionally biased in favor of federal jurisdiction. The term "party" would serve only as a paper limit on federal jurisdiction because the federal courts or Congress could swallow it at any time.[116]

Respect for the text of Article III requires a different benchmark for distinguishing parties and those merely affected by litigation. In the context of class actions for damages, absent class members' consent to representation may provide that benchmark. As a matter of due process, the putative representative in an action for damages is just that—"putative." He is a person who seeks to represent absent, possibly interested persons. He does not yet have a right to represent them in a fashion that might bind their interests. As the Supreme Court has held, that right arises only after the court has examined the plaintiff's suitability to represent others, and only after the absent persons are deemed to have *consented* to the representation.[117]

When assessing the boundary between "parties" (who count for purposes of establishing federal diversity jurisdiction under Article III) and potentially "affected" persons (who do not count), consent is a natural dividing line. When due process requires a person to consent to representation before his interests may be bound, that person's citizenship cannot be used to manufacture federal diversity jurisdiction.[118] In this way, control over the scope of party status

116. If federal procedure alone defined who is a party, the Supreme Court and the Federal Judicial Conference presumably could expand the scope of diversity jurisdiction by adopting a rule allowing a plaintiff to represent all persons affected by the lawsuit. This rule would effectively eviscerate the line between party-based jurisdiction and "affected persons" jurisdiction.

117. *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811–12 (1985) ("If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel .... [W]e hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court.") (citation omitted).

118. This rule is consistent with the grain of the Court's admittedly limited pronouncements on the issue. In *Osborn*, Justice Marshall denied that the residence of absent persons counts for purposes of diversity jurisdiction. *Osborn*, 22 U.S. at 856–57. The Court so held again a century later in *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921), which established that absent class members are not parties under the federal diversity statute. *Id.* at 364–65. And just two years ago, in *Devlin v. Scardelletti*, 536 U.S. 1 (2002), the Court once again stated, in dicta, that "nonnamed class members" are not parties within the meaning of statutory diversity. *Id.* at 9. Justice Scalia, dissenting in *Devlin*, put the matter even more strongly, noting derisively that not even the petitioner in that case, who favored an expansive reading of party status under the rules of federal appellate procedure, ascribed to "the novel and surely erroneous argument that a non-named class member is a party to the class action litigation *before the class is certified*."

under Article III is not left entirely to the definitional discretion of federal rulemakers. Instead, it is hemmed in, in a modest way, by the volition of private persons, respecting the bargain that lies at the heart of Article III.[119]

b. The Act's Myopic Focus on Federal Competency

The Class Action Fairness Act not only raises constitutional problems: it misses the heart of the problem with class actions that seek damages. The impulse behind the Act is that class action abuse is the handiwork of bad judges and can be eliminated by entrusting class litigation to the care of a more professional, elite judiciary. Yet, that assumption has been rejected by most commentators. As Professors Jonathan Macey and Geoffrey Miller have emphasized, federal district court judges, no less than their state counterparts, are trained to be dispute resolution managers. As such, they are "heavily conditioned by the ethos of their jobs to view settlements as desirable

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Id. at 16 n.1 (Scalia, J., dissenting) (emphasis in original).

119. What are the practical implications for the Class Action Fairness Act if this analysis is correct? Consider the Act's putative ability to deter plaintiffs from filing large nationwide class lawsuits in suspect state jurisdictions like Madison County, Illinois. If courts hold that absent class members are *not* parties for jurisdictional purposes, then the threat of removing interstate class actions may be of less use to defendants. To see why, consider this scenario: Plaintiffs' lawyers file a putative class action in Madison County against an in-state subsidiary of a major corporation. They also file a duplicate federal class action against its parent company, putting double pressure on a corporate defendant. Because state court judges may be able to postpone a certification decision for years, and draw out state-level discovery during the pendency of the class certification motion, the action may sit in state court and drain defendants' resources if the suit cannot be removed prior to certification. As a result, the plaintiff will have still gained a tactical advantage by filing the suit, and the Act will therefore not deter its filing.

Nor, in this scenario, will eventual class certification necessarily save the defendant. Because certification tends to unsettle investors and boards of directors, the opportunity to remove a certified state class to federal court may not forestall a settlement. In the managed care litigation, Aetna settled within only a few months after the certification order—even though the trial court retained the power to modify the certification order and the order had been appealed to the Eleventh Circuit. See note 121, *infra*, for further discussion. As that settlement illustrates, a certification order, even one that subsequently might be overturned, is quite valuable. This means that plaintiffs will retain an incentive to file suits in state court if the state forum is more likely than the federal forum to order certification.

Certainly, there would still be some tactical benefits to the Act. The elimination of complete diversity would mean *named* plaintiffs in state courts would have difficulty suing corporations outside the state of their incorporation. For example, if Pennsylvania residents sue a Pennsylvania corporation in Madison County for acts and injuries that occurred in Pennsylvania, there will not be sufficient contacts with the state to trigger state jurisdiction. If they add an Illinois plaintiff, they will trigger minimal diversity, and risk removal to federal court. As a result, trial lawyers who wanted to sue in Madison County would have to recruit Illinois residents to sue the Pennsylvania company's *subsidiaries* incorporated in Illinois (if there are any), making it much easier for parent corporations to avoid, or limit, exposure to liability. That would be a significant tactical improvement for the defense bar, but it is hardly a significant departure from current class action practice.

. . ."[120] In other words, federal district judges also favor certification, which typically facilitates a quick, comprehensive, Solomonic settlement, even if the achievement depends on alteration of plaintiffs' burdens of proof. RAND's survey of state and federal litigation agrees, noting that the ethos favoring settlement is a problem that transcends particular jurisdictions.[121]

Yet, the flaw in the Class Action Fairness Act is not simply the overestimation of federal care in the management of class action litigation. The Act ignores the rule of law problem raised by aggregating claims, and does nothing, for example, to combat the presumption that one centralized proceeding, rather than smaller individual trials, is a superior way to handle complex litigation. In effect, the Act takes the central planning model of efficiency, persuasively critiqued by Judge Easterbrook, for granted and attacks only the permeability of the current federal framework for centralization. But, as discussed above, the core of the problem is not duplicative lawsuits *per se*; rather, the problem is the size of modern class lawsuits, which is compounded by the fact that our current procedural framework may force defendants to defend themselves against two overlapping mega class actions at the same time. The Class Action Fairness Act attacks the latter, subsidiary problem, while ignoring the former, primary problem.

C. Designing a Better Class Litigation System

The problem with class action litigation is not the courts that oversee class actions or even duplicative litigation. Instead, it is with

120. 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, 45–46 (1991).

121. DEBORAH HENSLER, ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN, 497–98 (RAND 2000) (pro-settlement ethos endemic to federal and state systems). Even if federal appellate judges in some circuits may be more skeptical of class certification than the average state appellate judge, those judges play a relatively marginal role in class action oversight at the federal level. The decision of the trial judge often triggers settlement, even if an appeal is available, since a certification decision unsettles a defendant's investors and board of directors, creating immediate pressure for a quick end to the litigation. In the managed care litigation, for example, Aetna settled within months of the federal district courts' class certification order, even though that order had been appealed to the Eleventh Circuit. The trial court ordered the class certified on September 26, 2002. Aetna announced its settlement on May 22, 2003. *See* CBS News, *Aetna Settles With 700,000 Doctors*, May 22, 2003, *at* http://www.cbsnews.com/stories/2003/05/22/health/main555147.shtml. The Eleventh Circuit ruled on the HMO defendants' appeal of the class certification order over a year and a half after the settlement, and nearly two years after the certification order, on September 1, 2004. Klay v. Humana, Inc., 382 F.3d 1241, 1276 (11th Cir. 2004).

the class *device* itself, and the rule of law dilemma that it creates. To address this problem, I propose that Congress closely consider five reforms that are consistent with the decentralization, cooperative federalism, and judicial review principles that I articulated in Part II.A, *supra*. The first four reforms bolster judicial review in the class context, by creating enhanced incentives for courts to reject certification premised on an alteration of plaintiffs' burdens-of-proof. The fifth is designed to promote both cooperative federalism and decentralization. I discuss each in turn.

1. Enhance Transparency

The current Rule 23 forces courts to consider certification before undertaking a searching factual inquiry into the merits of the underlying claims.[122] This, in turn, has an indirect constitutional dimension. The Rule's implicit priority scale (certification over investigation of the merits) forces courts to undertake due process inquiries before the "representative" suit is actually litigated. This may in turn make courts reticent to oppose certification based on due process violations because they do not have sufficient information about the way in which the claim plays out in litigation.[123] If courts are required to address the concrete merits of the underlying claims first, however, they might confront the possibility that some claims are too factually complex and too individualized to submit the entire action to generalized class-wide proof.

2. Create Textual Choice of Law Requirements

Nothing in Federal Rule of Civil Procedure 23 specifies that class actions are inappropriate where governing law requires that reliance, causation, or damages be proved individually. As a result, defendants have no textual arguments against the litigation of factually dissimilar claims based on collective proof because there is no direct command to the contrary. Congress should provide that classes may not be certified where plaintiffs, in order to satisfy their burdens of proof under the governing law (whether statutory or common law), must

122. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

123. It may also exacerbate the tendency of courts to adopt implausible evidentiary presumptions that favor certification, such as liberal admission of circumstantial evidence that reliance is common across very large classes. *See, e.g.*, George Lussier Enterprises, Inc. v. Subaru of New England, Inc., Civ. A. No. 99-109-B, 2001 WL 920060, *19 (D.N.H. Aug. 3, 2001) (allegations that defendant had "unfairly" treated plaintiff class gave rise to class-wide presumption of reliance, since "one could readily infer" that plaintiffs assumed defendant would treat them fairly).

examine causation and injury on a case-by-case basis.

3. *Eliminate the Power of Named Plaintiffs to Monopolize the Market for Class Members*

The current rule governing class action claims for damages (Federal Rule of Civil Procedure 23(b)(3)) provides that all class members are bound by a judgment, unless they affirmatively request to be excluded ("opt out") from the class before trial.[124] In effect, the law presumes that putative class members consent to inclusion in a class action if they do not request exclusion. Predictably, larger class actions result, as most class members have little incentive to take an active role in protecting their rights. Even if they do nothing, someone may step forward to represent them. Their passivity subsidizes plaintiffs' lawyers who seek to aggregate large numbers of claims at a minimum cost to themselves, since the lawyers do not have to expend time and resources to convince class members that it is in their interest to join the litigation.

The opt out rule degrades due process protection, because it increases the risk that a certification order will effectively monopolize all related class claims. The risk of monopolization is the product of a simple calculus: Absent persons are presumed to favor representation by a given representative, few opt out, and inclusion in the class is binding on that party. As a result, one certification order can effectively preempt parallel litigation by class members in other courts. The threat of monopolization affects, in turn, courts' management decisions. Protecting due process rights requires courts to expend scarce time and energy because the protection depends on the judges' willingness and ability to consider individualized defenses and the nature of the proof that is necessary to establish those defenses in court. But in a world where one court can monopolize the litigation of class claims with the stroke of a pen, these protective efforts can be mooted at any moment. Engineering a settlement, by contrast, becomes more attractive because it presents the judge with greater and more immediate rewards: a settlement terminates the litigation and cannot be mooted by other courts or later decisions. Put simply, the current system tends to suppress, rather than promote, the searching judicial inquiry necessary to protect defendants' due

124. *See, e.g.*, Fed. R. Civ. P. 23(c)(2)(B) (in a class action constituted under Rule 23(b)(3), "the court will exclude from the class any member who *requests* exclusion") (emphasis added).

process rights.

One answer is to require plaintiffs' lawyers to convince absent class members to affirmatively opt in to a class action *before* those persons can be counted as part of the class. As it becomes more expensive (i.e., requires more time and effort on the part of lawyers) to aggregate claims, the size of class actions will decrease, exposing courts to less risk that a certification order in another court will moot its labor removing a key disincentive against protection of defendants' due process rights.

4. Create Structural Incentives for Litigants and Courts to Raise Constitutional Challenges to Class Certification

One of the intuitions behind expanding diversity jurisdiction is that class actions implicate federal rights, especially the constitutional guarantee of due process. While that intuition is right, merely expanding diversity jurisdiction does not create incentives for litigants to raise due process challenges, or for courts to take these constitutional challenges seriously. There is another way: Article III's "arising under" clause (granting federal courts original jurisdiction over cases "arising under" federal law) gives Congress the power to expand federal removal jurisdiction over state claims in which defendants raise a substantial issue of constitutional law.[125] Congress might, therefore, expand removal jurisdiction over class actions filed in state court that raise substantial due process problems.

Unfortunately, under modern jurisdictional statutes federal courts are unable to hear any and all legal claims that raise serious constitutional problems. Specifically, the well-pleaded complaint rule precludes federal court adjudication of a federal question unless the plaintiff raises it in the "four corners" of his complaint.[126] The well-

125. *See, e.g.*, Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 8 n.8 (1983) ("The statute's 'arising under' language tracks similar language in Art. III, § 2, of the Constitution, which has been construed as permitting Congress to extend federal jurisdiction to any case of which federal law potentially 'forms an ingredient'"); Tennessee v. Davis, 100 U.S. 257, 262 (1880) (federal question jurisdiction arises where "a Federal question or a claim to a Federal right is raised in the case"); *see also* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 823 (1824) (Marshall, C.J.) (where federal law is an "ingredient" in the "cause," the case arises under federal law). Congress authorized so-called "federal question" removal for the first time in 1875 "in an effort to expand the reach of the federal judiciary to protect ... freed former slaves." *See, e.g.*, Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U.L. REV. 609, 620 & n.89 (2004).

126. Taylor v. Andersen, 234 U.S. 74, 75–76 (1914) ("[W]hether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute ... must be determined from what necessarily appears in the

pleaded complaint rule is not fixed in stone. Congress can authorize removal of certain claims where defenses to liability arise under federal law, even if those defenses are not anticipated in the plaintiffs' complaint. Congress has done this, for example, in the "federal officer removal statute," which permits federal officers to remove cases to federal court by raising a federal defense to the plaintiff's claim.[127] In fact, between 1875 and 1887, Congress granted all state court defendants, not simply federal officials, the right to remove claims raising legitimate constitutional concerns.[128] In *Tennessee v. Davis*, one of the first cases under the federal officer removal statute, the Supreme Court affirmed this use of the removal power, holding that a question "arising under" federal law:

> [C]onsists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either. Cases aris[e] under the laws of the United States . . . whether they constitute the right or privilege, or claim or protection, or defence of the party, in whole or in part, by whom they are asserted.[129]

Constitutional challenges to class certification plainly concern "rights," "protections," and "defenses" that "depend[] upon the construction" of the Constitution. Nor can it be contested that a federal forum may be necessary to remedy these due process violations. It is more necessary than in the context of the immunity defenses raised in federal officer removal cases since, in the former class of cases, the state court is directly implicated in the violation of federal law. To be sure, the Supreme Court has held that federal defenses offer a basis for removal only when the defenses relate to the

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plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose."); *see also* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908).

127. 28 U.S.C. § 1442(a)(1) (2000).

128. This right was used by emerging national corporations to gain a federal forum for constitutional challenges to oppressive state regulation. *See, e.g.*, S. Pac. R.R. v. California, 118 U.S. 109, 110, 112–13 (1886) (removal upheld when state-created corporation raised defense under Equal Protection Clause of the Fourteenth Amendment); Railroad Co. v. Mississippi, 102 U.S. 135 (1880) (upholding removal jurisdiction over state action filed by Mississippi seeking to force removal of railroad bridge, based on federal defense asserted under the statute admitting Mississippi into the Union). *See also* Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 728 n.59 (1986) (discussing exercise of federal question jurisdiction over constitutional challenges to state regulation asserted by interstate corporations, and noting that the Contract Clause, Commerce Clause, Privileges and Immunities Clause, and Due Process Clause were the "claus[es] of choice in challenging state or local action arguably destructive of vested rights").

129. 100 U.S. 257, 264 (1880).

merits of the case.[130] But the constitutional questions discussed in this article do go to the merits of the case because the plaintiffs' ability to establish liability turns on the resolution of the constitutional question. The essence of the due process violation described in this article is that a class action deprives a defendant of an opportunity to litigate defenses to liability.

Must the class certification deprive a defendant of a legitimate due process defense before removal is permitted? The simple answer is *no*. Subject matter jurisdiction is analytically separate from, and prior to, a determination on the merits. As the Court has recognized, jurisdiction is the power to decide disputed questions of law and fact relating to the merits (i.e., to decide "cases or controversies").[131] Accordingly, the existence of Article III jurisdiction depends on only the existence of a colorable (i.e., non-frivolous) claim or defense—not a meritorious one.[132] The modern Court, and federal appellate courts, have reaffirmed this principle.[133] Thus, when due process is asserted as a defense, defendants may remove cases where they are able to include reasonable factual support (whether affidavits or exhibits) in their removal petitions substantiating the propositions that core elements of liability (causation, reliance, or injury) may be subject to individualized proof and that individual differences among the

130. *See, e.g.*, Starin v. New York, 115 U.S. 248, 258 (1885) (to justify exercise of federal jurisdiction, federal law raised in defense must be relevant to "recovery" on the substantive "cause" of action, in the sense that a determination of the federal law may "defeat the defendants" on the particular claim if construed one way or "sustain them" if construed another).

131. Bell v. Hood, 327 U.S. 678, 682 (1946) ("Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy.").

132. *Id.* at 682–83 ("[A] suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.").

133. Steel Company v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998) ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case.") (citing *Bell v. Hood, supra* note 131); Kennedy v. Connecticut Gen. Life Ins. Co., 924 F.2d 698, 700-01 (7th Cir. 1991) (Easterbrook, J.) (upholding "subject matter jurisdiction" based on "arguable" or "colorable" federal claim to ERISA preemption) (citing *Bell v. Hood, supra* note 131). *See also* Franchise Tax Bd. v. Constr. Vacation Laborers Trust, 463 U.S. 1, 8 n.8 (1983) (noting that "Art. III, § 2, of the Constitution ... has been construed as permitting Congress to extend federal jurisdiction to any case of which federal law *potentially* 'forms an ingredient'") (emphasis added).

relevant transactions are material to a determination of liability.

Expanding removal jurisdiction over constitutional questions will give litigants more incentives to raise constitutional challenges to class certification, while giving courts strategic reasons for taking defendants' constitutional claims seriously. To understand why, it is necessary to consider the typical trajectory of an MDL proceeding. The following hypothetical is illustrative. Assume the MDL Panel has transferred a number of similar federal actions to a single federal court in New York for consolidated proceedings. A class action based on state law is filed in Alabama state court. Defendants remove it to Alabama federal court based on due process problems with the class certification theory. The Alabama action and the New York consolidated action are highly similar, arising out of identical facts and involving identical class certification requests against the same defendant, Corporation X. The only difference is that the New York action is pled under a federal fraud statute (RICO), whereas the Alabama action is pled under state common law theories.

Under these circumstances, Corporation X will pursue a two-step strategy.[134] First, it will file a notice with the MDL Panel that the removed Alabama action raises similar questions to the claims involved in the New York proceedings,[135] allowing the MDL Panel to transfer the removed action to the federal court in New York even though jurisdictional questions remain pending. After notifying the MDL Panel, some time—often months—will elapse before transfer occurs. During that time, Corporation X will ask the Alabama federal court, into which the state action has been removed, to stay further proceedings relating to federal removal jurisdiction pending transfer by the Panel. The stay request is likely to be granted when the underlying jurisdictional question raises issues of federal law and related issues of fact that are common to the claims consolidated by

134. For descriptions in a concrete litigation setting, *see In re* Ivy, 901 F.2d 7, 9 (2d Cir. 1990) ("Once transferred, the jurisdictional objections can be heard and resolved by a single court and reviewed at the appellate level in due course. Consistency as well as economy is thus served. We hold, therefore, that the MDL Panel has jurisdiction to transfer a case in which a jurisdictional objection is pending"); Medical Soc'y v. Conn. Gen. Corp., 187 F. Supp. 2d 89, 91 (S.D.N.Y. 2001) ("case may be transferred under the multidistrict litigation statute even after a jurisdictional challenge has been lodged, but has also intimated that allowing the transferee court to resolve the jurisdictional question may be the preferable practice."); Meyers v. Bayer AG, 143 F. Supp. 2d 1044, 1046–47 (E.D. Wis. 2001) ("in addition to my inherent power to stay the case, Congress has granted me statutory authority to issue a stay because 28 U.S.C. § 1407 authorizes the JPML to order a case transferred despite the pendency of a jurisdictional objection.").

135. *See* J.P.M.L. RULE 7.4, 7.5 (governing procedures for notifying the Panel of a tag-along action).

the MDL Panel.[136] Once transferred, the multidistrict transferee court may preserve the stay until all common legal questions that implicate the underlying jurisdictional question have been resolved in the so-called "lead" federal case.[137] In this way, the MDL process simultaneously streamlines the litigation costs of the defendant and allows a tribunal familiar with the underlying claims to bring its expertise to bear on the resolution of the disputed jurisdictional questions.[138]

The multidistrict stay highlights why expansion of federal question removal is particularly important in the class context: it helps promote a more thorough, searching consideration of constitutional questions in the class context. Consider again our hypothetical, where defendants have removed an Alabama fraud action to federal court based on due process concerns. Once the remand proceedings are stayed and the case is transferred to New York, the New York court can consider the underlying due process questions in the context of its ongoing efforts to manage consolidated federal class certification

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136. *See, e.g.*, *In re Ivy*, 901 F.2d at 9 (jurisdiction question is "particularly well-suited for multidistrict transfer, even where their presence in federal court is subject to a pending jurisdictional objection," when "[t]he jurisdictional issue in question is easily capable of arising in hundreds or even thousands of cases in district courts throughout the nation" and "involves common questions of law and fact, some or all of which relate to the [consolidated] class action."); *Meyers*, 143 F. Supp. 2d at 1049 (transfer is appropriate where "jurisdictional issue appears factually or legally difficult, [and] ... identical or similar jurisdictional issues have been raised in other cases that have been or may be transferred to the MDL proceeding").

137. *See Med. Soc'y*, 187 F. Supp. 2d at 92 (transfer is preferred where the "jurisdictional question at hand is a complicated one" and "is an issue which the MDL court has previously addressed on numerous occasions in ... cases involving at least facially similar claims").

138. The "multidistrict stay" is at first glance inconsistent with principles of federalism since it permits greater federal control over state actions when they implicate federal MDL proceedings. But it is not inconsistent once one distinguishes the rights of states at issue: the right of states that is protected by the boundary between federal and state jurisdiction is the right to decide the merits of cases (to declare law) within state jurisdiction. *See, e.g.*, *Steel Company*, 523 U.S. at 94 ("jurisdiction is the power to declare the law") (quoting *Ex parte McCardle*, 74 U.S. (7 Wall) 506 (1868)). *See also* THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The courts must declare the sense of the law"). But the power to determine the dividing line between state and federal jurisdiction is vested with federal courts, and must be made consistently with federal courts' separate power to control the federal docket. And, as Justice Cardozo, writing for the Supreme Court, recognized in *Landis v. North American Co.*, 299 U.S. 248 (1936), the power to stay one case pending completion of relevant proceedings in a similar case is an *inherent* attribute of the judicial power to manage the federal docket, a power that does not wax or wane depending on the existence of federal subject matter jurisdiction. *Id.* at 254 ("the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants"). For an excellent discussion of the scope of judicial power to stay proceedings, *see Meyers*, 143 F. Supp. 2d at 1046.

proceedings. It will be able to consider those questions in light of an initial assessment of the merits of lead federal class claims, giving it a better understanding of the relevant jurisdictional facts (such as the existence of individualized defenses). Moreover, it will have strategic incentives to look more favorably on Corporation X's constitutional challenges because they provide a means of retaining control over duplicative state law class claims that may interfere with the management of the class litigation in federal court.[139]

In short, expanding removal jurisdiction in the manner described offers a striking opportunity to reinvigorate constitutional challenges to the class action procedure, by giving defendants and courts powerful tactical reasons to apply due process scrutiny to class certification requests.[140]

5. *Encourage Decentralization and Cooperative Federalism*

Finally, meaningful reform requires weaning federal courts from the craze for centralization at all costs, while giving states enough incentives to shoulder an equal share of the burden for taming out of control class action litigation. Unfortunately, reforms like the Class Action Fairness Act try to remove as many class actions from state control as possible, and thus exacerbate the trend toward centralization of multiple claims. A more procedurally complex solution is worth close consideration. Specifically, when defendants remove constitutionally suspect actions to federal court, Congress could provide the states with a "safe harbor" that permits them to retain jurisdiction over the matter if they adopt federal class certification standards to govern the case. These standards would include:

- a presumption against certification where the governing substantive law requires proof of causation and injury on an individual basis;
- a preliminary assessment of the merits, coupled with heightened pleading requirements; and
- opt-in procedures.

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139. *See, e.g.*, *In re* BankAmerica Corp. Sec. Litig., 263 F.3d 795, 803 (8th Cir. 2001) (noting that "a state-court plaintiff who has won the race to the state courthouse may seize control of the litigation of the federal claims").

140. In a way, an expansion of federal question removal furthers the goal of "judicial education," recommended by RAND's Institute for Civil Justice, by creating a tactical mechanism that serves to remind judges that "damage class actions are *not* just about problem solving, that the rights of plaintiffs and defendants are at stake." (HENSLER, *supra* note 121, at 497) (emphasis in original).

The safe harbor would apply only to those lawsuits removed based on federal question jurisdiction: It would not apply, for example, to claims removed based on diversity jurisdiction under the Class Action Fairness Act.

To see how this might work, consider the following hypothetical. There are 100 claims against Corporation X. Five class actions are filed on behalf of all 100 claims: one action in federal court, and four in state courts that have adopted the procedures specified. If the federal court determines that the class suit is without merit, it will not certify a class, leaving other class members free to litigate at the state level. The state courts will have guidance from the federal courts' analysis. Better still, the class members can also refer to the federal courts' assessment, and may be less likely to join—unless plaintiffs can find a way to improve the merits of their claims.

Now imagine that the federal court determines the claims have merit and orders certification. The federal suit attracts twenty opt-ins, and the defendant settles. The four remaining state suits will compete for the remaining eighty opt-ins. Each state suit attracts twenty opt-ins, and each suit settles. We will call the four suits A, B, C, and D. Each court will be forced to assess the "fair" value of the claims, in the course of approving settlement. Court A radically under-values the claims: It approves a settlement that pays individual class members very little, but gives the plaintiffs and their lawyers a large pay-off. B, C, and D will each have a chance to correct that error: As a result, successive, decentralized litigation mitigates the error costs of aggregation and helps to police against rent-seeking behavior by plaintiffs and their attorneys.

Thus an additional virtue of the opt-in mechanism is revealed: Yoked to a safe harbor provision, it facilitates constructively decentralized proceedings, since it ensures that a federal certification order will not preempt state litigation of subsets of the class claims. The system has three inter-locking virtues: (1) it limits the error of any one court by dispersing determination of claims over multiple courts; (2) it preserves an important role for states in the management of complex litigation; and (3) it creates the possibility for courts to "learn" from successive proceedings.

Three objections to the safe harbor present themselves: *First*, one might object that the safe harbor will undermine, or even nullify, the strategic benefits of the removal procedure (i.e., prodding federal courts to take constitutional objections to class certification seriously). After all, the safe harbor will turn the removal inquiry into

a fairly mechanical examination of state legal procedure. But this objection is overstated. Federal courts must assess whether certification violates due process *before* applying the safe harbor, if they are to respect states' freedom to apply their own procedures to unproblematic claims. Accordingly, the removal procedure promotes federal attention to the constitutional dimensions of class actions whether or not it is coupled with a safe harbor.

Second, one might object that state control over class litigation adds little value. Yet, state common law is the primary source for assessing burdens of proof, not only for state claims but also for federal claims in which the burden of proof has not been specified by Congress.[141] Giving states control over some class litigation is therefore an information-forcing mechanism: Operating under a framework that forces assessment of the appropriate burden of proof,[142] under conditions designed to ensure state attention to due process concerns, more state courts will address the burdens that apply in a given case, simplifying the due process inquiry for federal courts.[143]

Third, one might contend that the safe harbor facilitates the "two-front litigation strategy" discussed earlier. Yet, the combined effect of the proposed reforms (from limits on certification of individualized claims, to a preliminary assessment of the merits, to opt-in) may reduce, in some cases drastically, the incidence of large class action suits. This is especially the case where the underlying claims are highly speculative. For example, under the "opt-in" rule, fewer persons may join a given class suit that is of little or speculative merit. Similarly, if plaintiffs must show their claim has merit before a class is certified, they may be less likely to file speculative lawsuits—since the cost-adjusted pay-off of bringing these suits will drop substantially. The drop in aggregate class actions may outweigh the

141. *See supra* notes 63 & 96, and accompanying text.

142. *See supra* Section II.C.2.

143. Additionally, some states have yet to recognize offensive nonmutual collateral estoppel, the federally recognized preclusion doctrine that, in some circumstances, precludes defendants from re-litigating issues within the scope of previous litigation against a new party; allowing successive litigation to go forward at the state level therefore may increase opportunities for defendants who lose at the federal level to contest a judgment of liability in succeeding cases against different parties. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331–32 (1979) (authorizing federal district courts to exercise broad discretion to recognize offensive nonmutual collateral estoppel). *Compare* EC v. Katz, 731 So.2d 1268, 1270 (Fla. 1999) (reaffirming mutuality requirement applies to collateral estoppel in Florida courts); Howell v. Vito's Trucking and Excavating Company, 191 N.W.2d 313, 317 (Mich. 1971) (mutuality is a prerequisite for application of collateral estoppel under Michigan law).

increase costs of multiple litigation for defendants as a whole.

Furthermore, the possibility of multiple litigation under the safe harbor must be assessed by comparison with the current system. Under the Class Action Fairness Act, multiple litigation will continue. The Act, after all, does not preclude plaintiffs from filing duplicative intrastate lawsuits against a single defendant in an attempt to pressure that defendant to settle. Nor is there any reason to think the Act will decrease defendants' litigation costs: Rather, the Act may simply shift a larger share of class litigation to large plaintiffs' firms, who can afford to file many simultaneous intrastate class suits in several states, while shifting power away from smaller plaintiffs' firms, who cannot afford this strategy. If so, the Act, perversely, may simply augment the market power of the country's richest plaintiffs' firms, without reducing defendants' litigation costs or addressing the due process problems raised by class suits. Against this backdrop, complaints about multiple litigation under the safe harbor ring hollow: Because it operates within the distribution of jurisdiction bequeathed by the Class Action Fairness Act, the safe harbor does not expand state jurisdiction. It simply gives states meaningful control over the narrower spheres of class litigation left to them, while restraining the worst abuses of the state system.

Finally, the costs of multiple litigation under the safe harbor, such as they are, can be mitigated. Consider the Securities Litigation Uniform Standards Act (SLUSA).[144] SLUSA, enacted to curb frivolous securities fraud class actions, authorizes federal courts to stay discovery in duplicative state-level securities fraud suits that cannot be removed to federal court because of potential interference with federal jurisdiction over related federal cases.[145] A similar provision could be added to the safe harbor proposal, creating the following system: the safe harbor applies to *all* removable state law claims raising federal constitutional defenses to certification, with a

144. Pub. L. No. 105-353, 112 Stat. 3227 (1998) (codified as amended at 15 U.S.C. § 78bb (1998)).

145. 15 U.S.C. §§ 77z-1(b)(4), 78u-4(b)(3)(D) ("Upon a proper showing, a court may stay discovery proceedings in any private action in a State court, as necessary in aid of its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of discovery pursuant to this paragraph"). The provisions were enacted in part to ensure that state-level suits cannot be used to evade a stay on federal discovery that applies in all federal securities fraud class actions (*see* 15 U.S.C. § 78u-4(b)(3)(B)). *See also* H. REP. NO. 105-640, at 18 (1998) (directing courts to "use [the] [stay] provision[s] liberally, so that the preservation of State court jurisdiction of limited individual securities fraud claims does not become a loophole through which the trial bar can engage in discovery not subject to the [federal discovery] stay").

reservation of power in federal courts to enjoin discovery and certification proceedings at the state level when those proceedings threaten to interfere with parallel federal class certification determinations. The power to stay might be structured to last only during the duration of class certification proceedings in the federal multidistrict proceedings, and might apply only where the state class action raises factual questions and constitutional problems that are similar to those raised in federal MDL proceedings.

If this technique were permissible, it would mitigate, though not entirely eliminate, the dual front litigation strategy. To see how, consider another hypothetical. Plaintiffs file duplicative RICO claims in federal court, and state-level fraud claims on behalf of a nationwide class of victims in a state that has adopted federal class action reforms. Defendants will be unable to remove the claims to federal court, but may obtain an injunction from further proceedings until the pretrial proceedings in the federal suit (assessment of the merits, certification, and opt-in) are completed. This will eliminate a significant amount of wastefully duplicative litigation costs. It will also improve courts' ability to set a settlement price, and give federal courts a leadership role, since subsequent state courts will benefit from federal courts' assessment of the merits and propriety of certification.

The injunction is consistent with the principles that guide our reform inquiry: decentralization, cooperative federalism, and facilitation of judicial review. Applied here, the injunction prevents litigants from using duplicative state litigation to place defendants under immense pressure to settle, which would defeat our goals by rendering the cost of litigation, and hence the opportunity to raise due process objections, too expensive.[146] As a result, the injunction promotes judicial review of constitutional claims. At the same time it supports decentralization and cooperative federalism: It does not prohibit state courts from exercising jurisdiction to decide the merits of the case; rather, it merely regulates the exercise of state jurisdiction

146. Under SLUSA, federal courts have stayed proceedings not simply to permit evasion of the federal discovery stay that applies to federal securities litigation, but out of recognition that burdensomely duplicative proceedings can by themselves indirectly defeat fair management of consolidated federal claims. *Compare In re* Adelphia Communications Corp., 293 B.R. 337, 354 (Bkrtcy. S.D.N.Y. 2003) (noting that parallel state litigation raised the risk that "earlier orders—which succeeded, after considerable effort, in maintaining a level playing field, and in juggling the conflicting needs and concerns of Adelphia, its stakeholders, the Government and the Rigases—[would be] undercut by orders entered elsewhere without full knowledge of everything this Court was trying to do.").

in a fashion designed to enhance the information available to states that are managing the underlying suits. In other words, it rationalizes decentralization by streamlining and sequencing successive litigation, and it promotes state courts' ability to assess the merits. All of these effects are consistent with the facilitation test discussed in Part II.A, *supra*.

What of the safe harbor itself? Might it be objected that conditioning federal jurisdiction on the content of state procedural rules improperly intrudes on state control over its own judicial processes? To the contrary, the safe harbor resembles a form of conditional preemption.[147] *New York v. United States*,[148] the Court's most recent analysis of conditional legislative preemption, suggested that a condition does not upset the federal-state balance so long as it allows states a choice to preserve control over a regulation within a federally preempted field.[149] Here the conditional preemption provides a tool (in the form of procedural change) for defeating federal preemption over constitutionally troublesome class claims. Under *New York*, this is more consistent with the preservation of the federal-state balance than is Congress's power to authorize *removal of the entire class* of cases within "federal question" jurisdiction, which nonetheless is clearly within the scope of the Necessary and Proper Clause.[150]

Nor are the conditions imposed by the safe harbor improper. The Court mandates that conditions imposed as a price of continued state regulation in a preempted field must bear at least a reasonable relationship to the goal animating the preemptive measures.[151] As analyzed in detail above, the conditions imposed here are unquestionably "reasonably related" to the protection of due process, the goal of the federal question removal to which the safe harbor would be coupled. Indeed, the nexus between the conditions and the

147. *See* Pritchard, *supra* note 42, at 487 (analyzing SLUSA preemption as a form of conditional preemption).

148. 505 U.S. 144 (1992).

149. *Id.* at 167 ("[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.").

150. *See, e.g.*, Tennessee v. Davis, 100 U.S 257, 265 (1880) ("The constitutional right of Congress to authorize the removal before trial of civil cases arising under the laws of the United States has long since passed beyond doubt. It was exercised almost contemporaneously with the adoption of the Constitution, and the power has been in constant use ever since").

151. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 291 (1981).

goal of federal jurisdictional preemption would likely satisfy a far more exacting standard.[152]

To be sure, the Court's suggestion in *New York* that conditional preemption gives states a "choice" against expanded federal power was somewhat strained. After all, conditional federal preemption provides the federal government with an inexpensive way to promote federal policy, and thus on balance it encourages expansion of the federal government at the expense of states. But this is not a telling objection against *New York*'s reasoning. The focus of federalism is not the protection of *state* power *simpliciter*. Rather, the individual, not the state, is the proper focus of analysis. As the Court in *New York* itself underscored, states are sovereign only to the extent that sovereignty serves as a bulwark against abusive government power.[153] The safe harbor forces states that have already enacted class action procedures to comply with standards that are designed to restrain procedural abuses that trample on due process interests, promote the benefits of decentralization, and facilitate state courts' consideration of the federal constitutional rights threatened by mass lawsuits.[154] From the standpoint of the modern Court's conditional preemption case law, and from a more principled structural perspective, the condition is fully consistent with our system of checks and balances.[155]

The removal proposal discussed above is a complicated innovation, but the basic inquiry—is there a colorable constitutional problem with the claims and, if so, has the state adopted procedural protections—is

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152. *See, e.g.*, Gary Lawson, *Making a Federal Case Out of It*: Sabri v. United States *and The Constitution of Leviathan*, 2003-2004 Cato Sup. Ct. Rev. 119, 150–51 (suggesting that nexus between condition and preemption must satisfy intermediate scrutiny under the "necessity" prong of the Necessary and Proper Clause, rather than the rational relationship test applied under *Hodel*).

153. New York v. United States, 505 U.S. 144, 181 (1992) ("The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals"). *Compare* Pritchard, *supra* note 42, at 487 (suggesting that conditional federal preemption of state judicial procedure is permissible to the extent it reduces the net reach of government).

154. *See, e.g.*, Pritchard, *supra* note 42, at 487 (making a similar argument with respect to preemption provisions of the Securities Litigation Reform Act).

155. Moreover, state courts have less claim to judicial protection from federal commandeering than state political branches. Printz v. United States, 521 U.S. 898, 907–08 (1997) (discussing judicial exception to anti-commandeering principles). *See also* Pritchard, *supra* note 42, at 470–79 (discussing the scope of the "judicial exception" to the anti-commandeering rule recognized in *Printz* and *New York*).

no more complicated than many modern removal inquiries.[156] The same could be said of our Madisonian system of federalism, with its framework for decentralized government power. Centralized systems, however, are prone to fail. It was the wisdom of the Founders to recognize that the more complex system better protects core constitutional values, including individual rights, and also promotes a healthier government by replacing a central decision-maker with multiple decision-makers, thereby enhancing liberty, reducing the error costs of government decisions, and facilitating experimentation. The same points hold for class action reform.

IV. CONCLUSION

Important constitutional principles depend on the choices of fallible individuals for their continued vitality. Specifically, working day lawyers must raise constitutional principles in court; and trial judges must take those lawyers' arguments seriously. Whether lawyers or courts do this depends, ultimately, on the procedures that regulate how lawyers and judges do their jobs. That's hardly a revelation: Much of the history of the common law is a history of procedure, in which substantive rights evolved in response to seemingly technical changes in pleading practice.[157]

Sadly, the class action procedure has created structural conditions that abet the pervasive under-enforcement of due process norms in the class context. Yet, it need not be so. While the Framers could not conceptualize the modern class action, their ingenious constitutional design provides reformers with tools sufficient to restore the proper level of constitutional enforcement in the most complex of judicial proceedings. The principal tool is jurisdictional competition, made possible by the Constitution's grant of federal question jurisdiction and the related device of federal question removal. The secondary tool is self-interest—including the self-interest of judges forced to manage complex, duplicative proceedings and of parties facing

156. *See, e.g.*, Hobbs v. Blue Cross & Blue Shield of Ala., 276 F.3d 1236, 1241–42 (11th Cir. 2001) (holding that removal of doctor claims against HMOs under an ERISA "complete preemption" theory requires an evidentiary inquiry into whether patients properly assigned covered-health care benefits under an ERISA plan to their doctor, and whether the assignment is valid under the terms of the ERISA plan).

157. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 63 (Butterworths 3d. ed., 1990) (1971) ("The learning about writs, forms of action and pleading was fundamental to the common law, not simply because lawyers were more punctilious about form than they now are, but because the procedural institutions preceded the substantive law as now understood. The principles of the common law ... grew around the forms through which justice was centralised and administered.").

massive liability. Together, procedural reform and individual self-interest combine to create a unique opportunity for promoting protection of individual rights under the Due Process Clause, under conditions in which defendants and judges have special incentive to take individual rights seriously. Is this framework a panacea? No. But it offers a chance for change and an answer to the creeping fatalism of contemporary tort reformers.