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Routing

Controlling Unconstitutional Class Actions

A Blueprint for Future Lawsuit Reform

by Mark Moller

Executive Summary

Class actions, as currently constituted, are a procedural nightmare. Instituted to combine similar legal claims into a single court proceeding, the class device has evolved into a radical tool (1) for government redistribution of wealth and (2) for subversion of individual rights. Here's why: The modern class mechanism often forces innocent defendants to "settle" claims, that is, to redistribute wealth to lawyers and a class of consumers, without regard for plaintiffs' responsibility for their own injuries. Courts pave the way for such settlements by depriving defendants of legal defenses to which the law entitles them. By making it hard to fight the litigation, courts prod defendants to settle.

Coercion of defendants in this manner is a constitutional problem. The Due Process Clauses of the Fifth and Fourteenth Amendments require courts to apply the law predictably and impartially. Yet, when courts disregard the legal rights of class action defendants in the interest of coercing them to settle, they upset expectations about the law's content for plaintiffs' benefit.

Unfortunately, the Class Action Fairness Act does not address this problem. It merely draws more of these actions into federal court. Yet, studies such as one published by RAND in 2000 suggest that federal judges are not more likely to protect due process rights in class proceedings—suggesting, in turn, that the Class Action Fairness Act will disappoint its supporters. Without further reform—far more aggressive than Congress has considered—unconstitutional class action proceedings, and the settlements they coerce, will continue.

At a minimum, controlling unconstitutional class actions requires Congress to change federal class action rules. Necessary changes include (1) requirements that absent class members "opt in" before they are counted as part of the class and that courts assess the merits of legal claims before authorizing their litigation in the form of a class action and (2) a ban on class treatment of lawsuits in which key elements can be proven only on a case-by-case basis.

Changing federal class action rules is only a partial solution. Congress must also give federal courts more power to control constitutionally problematic class actions filed in state court. It can do so by authorizing defendants to remove class suits raising due process problems into federal court when state courts don't adequately protect litigants' due process rights. The latter reform not only is consistent with the Supreme Court's understanding of federalism and separation of powers but will give states greater incentives to reform their local class action procedures.

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Class action suits have spawned a legal regime that is lawless.

Introduction

In its first piece of serious business, the 109th Congress enacted the Class Action Fairness Act,[1] which President Bush signed on February 18, 2005. Not surprisingly, Republican Party leaders immediately claimed to have "reformed" class actions—a device for aggregating often thousands of similar lawsuits into one legal proceeding. But the act, at bottom, simply pulls a greater number of class action suits into federal court. It does nothing to address the fundamentals of the problem of class action abuse. Congress cannot rest on its laurels, therefore. It must do more to reform class actions—much more. This study analyzes the class action problem in some detail and then lays out a series of genuine reforms that can realize what the act only promises, an end to class action abuse.[2]

Put simply, the fundamental problem with class action suits is that they've spawned a legal regime that is lawless. That contention may surprise, but a second look at the class action procedure underscores that judges who manage those actions often change the law, arbitrarily, for the benefit of plaintiffs. Why? Because doing so makes it easier for a court to manage the aggregated lawsuits in one sitting. To understand this dynamic, consider a simple example involving an imaginary statute against lying. That law makes a "lying seller" pay damages to a plaintiff who "relied" on the lie—who, but for the lie, would not have purchased the product. Now imagine a class action suit that targets one such lying seller, who is alleged to have lied in 10,000 separate transactions with as many different purchasers. Clearly, if the court is to respect the seller's right to defend himself by invoking a plaintiff's lack of reliance, it will be impossible to try all 10,000 lawsuits together, because the court would have to determine in each of the 10,000 cases whether the purchaser relied on the lie. If the court jettisons that defense, however, it can try the cases in a single lawsuit—but only by ignoring the law, by discarding the limits the law places on the scope of the seller's liability.[3]

In practice, courts that handle class actions often behave just like that. They change the plaintiffs' burden of proof to make it easier for them to aggregate their claims and try them as a unit. Unfortunately, that reduces the rights of the defendant. And that, in turn, renders the law deeply uncertain: In the world of class actions, where the judge has discretion to arbitrarily discard a defendant's defenses whenever doing so might make it easier to aggregate claims, it is impossible for a defendant to predict the content of his rights in court. That is the "rule-of-law" problem at the heart of the class action debate. And it is not simply a legal problem; it is a moral problem as well. As legal philosopher Lon Fuller argued, a stable set of laws is the minimum moral requirement for a free society, because stable laws enable people to predict the future and act as responsible agents.[4]

The rule-of-law problem that surrounds class actions is also a constitutional problem. The Due Process Clauses[5] of the Fifth and Fourteenth Amendments ban deprivations of "life, liberty, and property" without "due process of law." That protection of "liberty," at its most basic level, prohibits courts from employing arbitrary judicial procedures—procedures, for example, that make it hard for a party to ascertain his rights or result in the law being applied unevenly at the whim of a court.[6] At a minimum, those protections prevent courts tasked with managing class action suits from discarding defendants' lawful defenses simply to make it easier to try all the claims as a unit.

In this study I argue that the rule of law should be the focus of class action reform. I begin by examining the due process components of the rule-of-law problem, focusing first on the relationship between burdens of proof and altered legal rights. Then I defend the proposition that courts violate the Due Process Clauses when they alter the elements needed to prove a set of claims in a class action context. Next, turning to reform, I critique the Class Action Fairness Act and examine a series of alternative procedural fixes, including the

Right-to-Choose-Your-Own-Lawyer Act, soon to be introduced by Rep. Chris Cox (R-CA). I argue that this act, and other commonly proposed changes to the class procedure, will promote the rule of law at the federal level in ways that even proponents of these reforms have not fully appreciated.

The Rule-of-Law Problem

When a large number of lawsuits are combined into a "class," plaintiffs obtain enormous leverage over a defendant, who must defend perhaps thousands of claims before one jury of 12. The risk of a bad judgment, one imposing stratospheric money damages on the defendant, is simply too high. Faced with that prospect, many defendants rush to settle even frivolous class action lawsuits out of court.

The coercive pressure created by class actions is not the only problem surrounding them. Another, subtler dilemma lurks in the background: when class actions aggregate claims, courts are often tempted to change the law in order to make it easier to litigate those claims in one sitting. After all, if proof of a claim requires that unique aspects of each class member's transaction with a defendant be investigated, a court that aggregates tens of thousands of such claims faces an impossible task—conducting tens of thousands of mini-trials. Many courts, therefore, discard important components of the law—legal defenses against individual claims, for example—in order to render collective management of the aggregated claims feasible.

An example helps to illustrate the problem. Recently, a handful of doctors brought suit on behalf of more than 600,000 physicians who participate in health maintenance organization (HMO) practices.[7] Those doctors alleged that major HMOs—including Aetna, Cigna, Humana, and United Health Care—induced doctors to join HMO networks by misrepresenting the amount of medical fees the HMOs pay under their patients' health plans, thereby "defrauding" the doctors.[8] The doctors sought relief under common law fraud statutes and the Racketeer Influenced and Corrupt Organizations Act,[9] both of which made plaintiffs' showing that they "reasonably relied" on the HMOs' supposed misrepresentations a condition of recovery.[10] The "reasonable reliance" requirement, as lawyers call it, is an important individualizing element of proof in a fraud case because it distinguishes real victims from plaintiffs who may have made poor judgments in a transaction and therefore should be responsible for their own losses.[11] Each doctor must show that he actually received a knowingly false representation from an HMO and made "reasonable" decisions based on it that he otherwise would not have made.

That requirement made class certification difficult, since establishing reasonable reliance would have necessitated case-by-case scrutiny of each doctor's transactions—some 600,000 transactions 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 in fees as a result. Other doctors, employed by large physician groups, may have been required by their employers to service HMO patients. Obviously, scrutinizing 600,000 or more individual transactions was not in the cards; hence, argued the defendants, the claims were not susceptible to "class treatment."[12]

The doctors argued, in turn, that considerations of "fairness"[13] excused them from having to prove each of the claims in the way the law required. "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."[14] As a result, absent class certification, no HMO doctors would file suit, leaving them without a remedy.[15] Best, they counseled, to eliminate the reliance element of their burden of proof (as it made the class action infeasible).[16] That argument assumed, of course, what their lawsuit sought to prove—that the HMOs had done something wrong that deserved a remedy. Yet the court accepted the doctors' argument. And the doctors got what they wanted: Once the court reduced the plaintiffs' burden by eliminating the reliance element, thus green-lighting the class action, Aetna, the

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nation's largest HMO, agreed to settle. The case never went to trial.

The managed care litigation makes a perplexing feature of class litigation clear: it underscores that a decision to litigate claims as a class can change the parties' rights. When the court managing the HMO lawsuits eliminated the requirement that plaintiffs prove reliance, it transformed the RICO statute—at least for this litigation—into something it had not been before the class litigation commenced. Obviously, the rights of the defendants were changed in the process. As the rights of plaintiffs expand, those of defendants contract.

This rule-of-law problem isn't an isolated problem; it is endemic to class action lawsuits: It arises not only in the HMO suits but in a host of different actions—ranging from class disputes over franchise contracting practices, to product liability cases involving individualized tort defenses, to antitrust suits targeting anti-competitive practices in inefficient markets where economic injury can't be presumed across a class of consumers.[17]

The rule-of-law problem should worry anyone who cares about justice: If rule by "law" means anything, it means the law can't be changed to suit the convenience of one group at the expense of another. Laws are supposed to be announced in advance and applied equally to all parties. That is a hallmark of free legal systems—and a rule routinely flouted in systems that do not respect the individual as a responsible moral agent. The rule of law is supposed to be a hallmark of American justice.

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Due Process and the Rule of Law

The Due Process Clauses of the Fifth and Fourteenth Amendments bar courts from changing the elements of a claim simply to make it easier for plaintiffs to aggregate claims in a class action. That proscription is implicit in the clauses' ban on court use of arbitrary procedure—procedure that changes the rights of parties in a way that renders the law unpredictable or partial to one party.

The Due Process Rights of Class Action Defendants

The right to due process is a guarantee of the Fifth and Fourteenth Amendments of the U.S. Constitution, which provide that state officials may not deprive a person of his or her "liberty" without "due process of law." As William Van Alstyne, then professor of law at the Duke Law School, argued in an influential essay, "[T]he protected essences of personal freedom [under the Due Process Clause] include a freedom from fundamentally unfair modes of government action, an immunity . . . from procedural arbitrariness."[18] As he says:

> 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 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.[19]

To see the implications of the Due Process Clause in class litigation, consider *Hansberry v. Lee*,[20] an early civil rights lawsuit. *Hansberry* served as the backdrop for Lorraine Hansberry's play, *A Raisin in the Sun*. The facts of the case are as follows: White Chicago residents attempted to bar African Americans from buying property in their neighborhood. To accomplish their goal, those Chicagoans resorted to a special legal device called a restrictive covenant; in essence, that covenant was simply an agreement between owners of parcels of property that bound both the current owners and future owners. It purported to bar any signatory owners, and their successors in interest, from selling or leasing land so encumbered to African

Americans. But the covenant was not automatically enforceable. It included a condition precedent—namely, 95 percent of all current "frontage" owners must have signed the restrictive agreement before it could be enforced in court.[21] The covenant did not garner enough valid signatures, however, and so was not enforceable by any signatory party.[22]

To address this enforcement problem, the residents resorted to legal trickery, which involved a class action lawsuit. The gambit is complicated. To understand it, it is necessary to bear in mind that a court, in order to uncover the lack of necessary signatures, had to scrutinize the individual circumstances of each signature. Only in that manner could the parties determine whether an individual signature on the covenant was valid—for example, whether the notary had personal "knowledge" of the identity of the owner and his property rights, as state law required, or whether individual signatures had been obtained by fraud or forged.[23]

The need to evade individualized scrutiny prompted white owners to file a class action lawsuit designed to stop black residents from challenging the covenant. The suit proceeded as follows: One white owner filed a (likely collusive)[24] class suit on behalf of all covenant holders against another white property owner who, after acquiring a property interest in a parcel covered by the covenant, leased his property to an African American.[25] The suit sought to establish the rights of all covenant holders as a class. In the course of the "class" litigation, the plaintiffs and defendants entered a special agreement that the requisite number of valid signatures had been obtained, rendering the covenant enforceable.[26] An Illinois state court in turn treated the special agreement as proof that the covenant was enforceable, and upheld it.[27] Through this trick, the white residents hoped to preclude future African-American purchasers from relitigating the covenant's enforceability. Why? If African-American purchasers obtained title from a former "class member" whose property rights were "bound" by the class litigation, they would, under the plaintiff's theory, be unable to challenge the validity of the covenant.[28]

The *Hansberry* litigation ensued when an African-American family—the Hansberrys—bought property in the neighborhood. Neighborhood whites immediately brought suit to enjoin the sale,[29] invoking the supposedly binding class litigation. An epic court battle ensued. The Hansberrys argued that the prior class litigation couldn't be given legal effect, because it was impossible to tell whether the signatures had been obtained by fraud or coercion or in an otherwise improper manner, unless the court engaged in individual scrutiny of the circumstances surrounding each signature.[30] But the white homeowners had used the class action lawsuit to evade that form of proof. If that were permissible, then a legal procedure could be used to protect weak evidence from court challenge. That was contrary, they argued, to the Due Process Clause, which prevents use of court procedure to disadvantage one party by denying him the defenses to which the law entitles him.[31]

The Hansberrys' due process argument has intuitive appeal.[32] If due process means anything, it means that litigants and a court cannot twist procedure so that a losing claim becomes a winning one. And a number of modern courts, in a variety of class action suits, have upheld the due process principle advocated by the Hansberrys—namely, that due process rights of defendants are violated when their "class" liability is established by special proof that falls below the burden a plaintiff must satisfy in an ordinary lawsuit. The Texas Supreme Court, in a class action seeking damages for a defective consumer product, put the matter plainly:

> The class action is a procedural device intended to advance judicial economy by trying claims together that lend themselves to collective treatment. It is not meant to alter the parties' burdens of proof, right to jury trial, or the substantive prerequisites to recovery under a given tort. . . . Although a goal of our system is to resolve lawsuits with great

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> expedition and dispatch and at the least expense, the supreme objective of the courts is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. This means that convenience and economy must yield to a paramount concern for a fair and impartial trial. And basic 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.[33]

Due Process Protects the Public Interest

First and foremost, due process protects individual liberty by proscribing legal procedures that deprive defendants of their rights. But it also protects the public at large. There is risk in every class action that it will be used in a way that benefits plaintiffs and their lawyers at the expense not only of defendants but of the public interest as well. This is so because courts are usually unable to measure the effects of class settlements on the public, an incapacity that renders it difficult for a judge to determine whether plaintiffs are gaming the system for their own private ends. Faithful application of the Due Process Clause by courts may indirectly reduce that risk.

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Judges have difficulty identifying class actions that aren't in the public interest, thanks to a basic, unremarkable feature of our adversarial legal system, namely, the bipolar nature of a lawsuit, involving a plaintiff and a defendant. It is their interests—not the public interest—that are inevitably advocated in arguments advanced in court. This bipolar system works well when used to resolve individual disputes, as the classic common law was designed to do. But in huge class actions involving hundreds of thousands of claims, the outcome can have vast ripple effects. Yet the bipolar nature of the litigation hides information about such effects on the public at large.

Consider the settlement discussed above between Aetna and some 600,000 doctors.[34] The aim of the litigation was suspect from the start: 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."[35] Indeed, in other contexts, both the Federal Trade Commission and the Department of Justice have prosecuted doctor groups for coercive collective bargaining designed to inflate medical fees—on the theory that such bargaining harms the ultimate health care consumer, *the patient*.[36] But the class action procedure provided a loophole, permitting doctors to band together and use the legal process to lobby for higher fees. And the gambit worked. The litigation, centralized in a single federal district court, produced a class certification order, and the class certification order convinced Aetna, the country's biggest HMO, to settle. The settlement, of course, preceded any judgment that Aetna had done anything wrong; it was the fruit of Aetna's exposure to potentially ruinous class-wide liability.[37]

Whether the public interest was served remains in doubt. Some provisions of the settlement agreement were potentially beneficial, such as new disclosure initiatives that may produce greater transparency about how doctors are paid.[38] But regardless of the merit of individual agreements, the big picture was startling. The settlement created a new "compliance dispute administrator," tasked with settling disputes between doctors and Aetna, including, potentially, disputes over the *quality* of the HMO's payment practices—creating, in effect, a shadow Department of Health and Human Services run by plaintiffs' lawyers and doctors for their benefit.[39] That oversight system, in turn, will affect the medical fees paid by millions of insureds who receive coverage from the HMO and by their employers.[40] Because those third parties depend on the managed care model for affordable health care, both groups stood to lose from a doctor-imposed settlement designed to increase doctors' fees. Yet neither group participated in a meaningful way in court—a function of the

inherently bipolar nature of litigation.[41] As a result, when the settlement was presented to the judge for approval—after Aetna effectively had been forced at gunpoint by that judge to accede to the doctors' demands—no one else was there to present patients' objections. No one was there to complain about the provisions that limited HMOs' ability to deviate from the claim-processing systems preferred by the American Medical Association.[42]

Accountability is needed but is difficult to achieve. Judicial scrutiny of class certification orders under the Due Process Clause is part of the answer. If we cannot ascertain whether a settlement is in the public interest, we can at least determine whether plaintiffs have received some special treatment. And when courts alter the preexisting burdens of proof shouldered by plaintiffs, they are by definition giving plaintiffs special treatment—a procedural "premium" that the law has not recognized.

That special treatment, in turn, may be evidence that procedure is manipulated for private ends, not for public ends. That's an inference that is especially proper when the court lets a plaintiff sidestep burdens of proof that have been assigned by the incremental accretion of common law precedent. As the product of incremental development of the law in thousands of cases, that proof is not assigned in response to the extraordinary and unusual pressures of one-shot class litigation and therefore has a much greater claim to operate in the public interest.

Reconciling the Constitution and Class Actions—Proposals for Reform

Checks and balances ensure that if one power center is compromised, other power centers can steer it back to the requirements of constitutional duty. It is in that spirit that I propose the following reforms, which aim to facilitate judicial attention to constitutional problems raised by class actions. I begin by briefly sketching three reform principles. I then examine the leading legislative reform, the Class Action Fairness Act,[43] which expands federal "diversity" jurisdiction over interstate class actions, and argue that the act is likely to be ineffectual, particularly with respect to encouraging constitutional challenges to certification. Finally, I lay out a series of more aggressive reforms.

Principles for Reform

Although the Supreme Court has recognized that Congress has broad power to regulate judicial procedure,[44] that power should be wielded in a way that respects the spirit of our system of separated powers. Accordingly, Congress should adhere to the following principles, drawn from the Court's recent federalism jurisprudence.

Promote Judicial Review. The federal government is divided into three branches in order to ensure, at a minimum, that persons have more than one possible "instrument of redress" for the invasion of rights.[45] While the judiciary is the first among equals in the protection of constitutional rights, courts that manage class actions frequently discount the constitutional rights of defendants and abdicate responsibility for their protection. Similar concerns were voiced in RAND's landmark 2000 study of class action reform, which suggested that the key to fixing class actions is to educate judges about the importance of protecting rights by "changing the discourse about the role of judges in collective litigation"[46]—a proposal that conjures visions of "sensitivity sessions" for judges prone to class action abuse. Below, I will suggest a different route to changing judicial norms: federal class action procedure needs to be altered in a way that gives parties and judges greater *incentives* to raise and take seriously constitutional challenges to class certification.

Decentralization. Under our constitutional design, power is dispersed among different branches of the federal government and between the federal government and the individual states. That "decentralization" of power is an important check on government officials:[47] At a minimum, decentralization reduces the cost of error by any one government decision-

The Class Action Fairness Act is likely to be ineffectual. Instead, real class action reforms must give parties and judges greater *incentives* to raise and take seriously constitutional challenges to class certification.

Combining as many claims as possible into one single mega-proceeding—as the Class Action Fairness Act contemplates—is a form of judicial "central planning" that is just as dangerous as centralizing power in one branch of government.

maker. If the federal government fails to look out for individuals' interests, a state government might. Better still, decentralization promotes competition among dispersed power centers: states, for example, compete for citizens and investment, making each government more responsive to its citizens.[48]

Unfortunately, modern class actions are a form of centralized judicial power. In the ordinary run of things, many different courts would consider the claims of many different plaintiffs alleging injury by one defendant. But a class action simply combines all of those claims into one single mega-proceeding. Judge Frank Easterbrook has rightly called this a form of judicial "central planning" and warns that it is just as dangerous as centralizing power in one branch of government:

> 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. . . . 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. Similarly, Gosplan or another central planner may hit on the price of wheat, but that would be serendipity. 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.[49]

Sensible legal reform must not treat judicial decentralization (i.e., the consideration of similar legal claims by a number of different courts) as "inefficient." Instead, reformers should follow the lead of our Founders and look for ways to harness decentralization of judicial power to promote judicial protection of due process rights. Below, I describe how we can do so.

Cooperative Federalism. In our system of "dual sovereignty," state courts are partners of federal courts—and joint administration of justice by local and national courts is favored.[50] Yet class action reformers frequently treat state litigation as a problem that should be "eliminated" and put in the hands of federal judges, who are assumed to be more competent.[51] But that is a superficial reform proposal: States are the incubators of experiment and the ultimate voice of background common law principles in their everyday application. Those background principles, in turn, inform how burdens of proof are allocated in a class action proceeding.[52] Accordingly, lasting reform that rationalizes the way burdens of proof are allocated must include the states rather than cut them out of the process.

The Class Action Fairness Act Considered

With those principles in mind, we turn to the Class Action Fairness Act. Before critiquing the act, let's outline the two main changes it brings about.

Expanding Federal Diversity Jurisdiction. Article III of the Constitution grants federal courts diversity jurisdiction—the power to hear cases or controversies arising between parties who are citizens of different states.[53] Under the law prior to the act's enactment, federal courts were authorized to hear state-law suits under narrow circumstances where *all* plaintiffs are citizens of states different from those in which any defendant resides.[54] "Complete" diversity, as that is called, is not a constitutional requirement but rather a judicial interpretation of Section 1332 of Title 28 of the U.S. Code, which governs the exercise of diversity jurisdiction.[55] That requirement can be changed, but it must be changed by Congress. That is what the Class Action Fairness Act, in essence, does. It eliminates the complete diversity rule in cases in which plaintiffs file so-called interstate class actions—that

is, class actions that aggregate claims by persons who are residents of different states—and replaces it with a rule that, in theory, allows federal courts to hear any class action so long as at least one plaintiff "class member" lives in a different state than does the defendant.[56]

Expanding Federal Removal Jurisdiction. The act not only expands federal courts' diversity jurisdiction; it also expands the power of defendants to transfer, or "remove," interstate class actions to federal court.[57] That power—the "removal power"—is governed by Section 1441 of Title 28 of the U.S. Code, which permits defendants to transfer lawsuits filed in state court to the nearest federal court if the lawsuit could have been filed in federal court in the first place.[58] The Class Action Fairness Act liberalizes the removal power in three ways: First, it permits removal of state-filed class actions so long as even some plaintiffs or class members live in a state different from that of the defendant.[59] Second, it liberalizes the calculation of "amount in controversy"—that is, the specified minimum amount of money that must be at issue to justify federal court jurisdiction.[60] And, third, it overturns a longstanding rule that bars federal appellate courts from reviewing district court orders that return, or "remand," cases to state court for lack of federal jurisdiction.[61] At the same time, the act also creates a safe harbor rule, by providing that, notwithstanding other provisions of the act, claims may not be removed to federal court if, for example, two-thirds of class members live in the same state as a "primary" defendant.[62]

Will the Class Action Fairness Act Succeed?

Unfortunately, the act misses the heart of the problem with class litigation. It focuses on the supposed incompetence of state courts—which reformers treat as a root cause of class action abuse. According to the committee report that accompanied a prior version of the act, "[S]ome State court judges are less careful than their Federal court counterparts about applying the procedural requirements that govern class actions."[63] The impulse behind the act, put simply, is that class action abuse can be fixed by putting class actions into the hands of a more professional elite—federal judges.

The assumption that federal judges are more likely to protect the rights of parties has been rejected by many commentators. As Jonathan Macey, professor of law at Yale Law School, has emphasized, federal trial 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."[64] That means, in practice, that many federal judges are biased in favor of class actions—even those that violate defendants' due process rights—because class actions encourage settlements. No defendant wants to bet his financial well-being on a single court's or jury's determination of tens of thousands of legal claims. If the judge or jury rules for the plaintiffs, the defendant may well be destined for bankruptcy. Thus, a class certification order almost inevitably prods the defendant to cut a deal with the plaintiffs since the risk, if he loses, is so great. In short, because federal judges, no less than state judges, believe their job is to foster settlements, they are not significantly more likely to protect a class action defendant's rights when doing so gets in the way of a settlement deal.[65]

Yet, 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. The decision of the federal 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 court's class certification order—even though the order had been appealed by the HMOs to the Eleventh Circuit.[66] That appeal was decided more than a year and a half after the settlement and nearly two years after the district court's order came down.[67] Thus, the oppor-

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tunity for appellate review of the class action didn't save Aetna. Once Aetna's rights were violated by the federal trial court, in the name of making a class action possible, the game was up and Aetna threw in the towel.

The Class Action Fairness Act, in short, is premised on a misdiagnosis akin to the assumption criticized by James Madison in *Federalist* No. 10: that promoting good government is simply a function of selecting good governors.[68] The problem with class litigation is not that bad judges administer class actions. The problem, rather, is with the procedure itself. As discussed, it fails to protect the rights of the parties—particularly defendants. Changing the venue or jurisdiction in which class actions are litigated, therefore, is not a recipe for long-term reform—a point underscored by RAND's 2000 study of class action litigation. "For more than two decades," warned the study, "federal and state judges have been lectured that efficient use of public and private resources compels them to settle cases quickly and cheaply in whatever fashion 'works.'"[69] In the process, those judges have learned to "emphasize[] calendar-clearing above all other values," including protecting the rights of plaintiffs and defendants.[70] Replacing one set of judges with another will not get at that problem. Instead, we must change the class action procedure in order to create incentives for courts to protect parties' due process rights.

Alternatives to the Class Action Fairness Act

Congress should do more to directly address key problems with modern class actions at the state *and* federal levels by engaging in a top-to-bottom reform of the class action concept. With that goal in mind, I propose that Congress closely consider six reforms designed to facilitate judicial review of constitutionally questionable class actions. I describe each, and its rationale, briefly below.

Ban Class Actions That Alter Defendants' Rights. Currently, the federal procedural rule that governs class actions, Federal Rule of Civil Procedure 23, permits class actions even where a governing statute or common law rule requires that reliance, causation, or damages be proved individually. Nonetheless, in a series of cases, the U.S. Courts of Appeals for the Fourth, Fifth, and Seventh Circuits have held that classes may not be certified when plaintiffs, to satisfy their burdens of proof, must undertake a case-by-case analysis of each class member's claims.[71] Other circuits, however, continue to hold that the mere allegation of a "common scheme" is sufficient to warrant class treatment, even if core elements of liability—such as reliance, causation, or injury—cannot be proven except on the basis of an individualized examination of each plaintiff's claims.[72] Congress should begin by codifying the former rule and rejecting the latter—enacting a rule that class actions cannot be certified where plaintiffs, to satisfy their burden of proof under the governing law (be it statute or common law), must examine reliance, causation, or injury on a case-by-case basis. Doing so would create, at a minimum, a focus on due process concerns that is currently missing under modern Rule 23.

Require Courts to Consider the Merits before Certification. The current class action rule requires courts to consider certification before deciding whether the claims have any merit.[73] That means that worthless lawsuits can be turned into a class action. It also has an indirect constitutional dimension: Because courts are forced to undertake due process inquiries before the "representative" suit is actually litigated, they don't have enough information about the way the claim "plays out" in litigation, and therefore they may be reluctant to recognize due process problems.[74] If, however, courts are first required to address whether the lawsuit has any merit, they will be forced to confront the possibility that claims may be too factually complex, and too individualized, to try as a unit, as the class action procedure would require. Accordingly, Congress should require courts to certify classes later in proceedings—when plaintiffs can show, after preliminary fact-finding, that they have a probable chance of succeeding on the merits.

This rule should be coupled with heightened pleading requirements[75] and an automatic stay on all discovery while motions to

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dismiss are pending. Both requirements would deter the use of lawsuits as a vehicle for discovery—"fishing expeditions" in which plaintiffs file suit not to vindicate known wrongs but in the hope of using compulsory discovery to uncover wrongdoing.

Eliminate the Power of Named Plaintiffs to Monopolize the Market for Class Members. The current class action rule that governs class 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 (in legal terminology, "opt out") from the class before trial.[76] In effect, current law presumes that you "consent" to inclusion in a class action if you don't ask the court to exclude you. The result is larger class actions. Why? In a world in which they are presumed to be "represented" without lifting a finger, most "class members" have little incentive to take an active role in protecting their rights. They are typically passive and inattentive, and, as a result, most don't opt out—much less have any awareness that their rights are being litigated.

By encouraging the passivity of class members, the opt-out rule provides a subsidy to lawyers who want to aggregate a very large number of claims at minimum cost to themselves. That in turn has an unfortunate effect: It increases the risk that a certification order will effectively monopolize all related "class claims." It's a simple calculus: Absent persons are presumed to favor representation by any given representative, few opt out, and inclusion in the class is binding on these parties. As a result, it often takes just one certification order in a nationwide class lawsuit to effectively preempt every other class action. That has a string of even worse effects. First, it gives enormous power to lawsuit-friendly jurisdictions—just one class certification order by a plaintiff-friendly court, like the one in Madison County, Illinois,[77] can suck every related lawsuit into that court. Second, it destroys the possibility of decentralized proceedings—once a court certifies a class, it is very likely that that court will become the only game in town, amplifying the effect of any bad judgments it makes.

Third, and perhaps most important, the opt-out rule affects courts' management decisions: When several different courts manage duplicative class proceedings, each court faces a greater risk that its efforts will be for nothing when it expends a great deal of time on the underlying claims. There is always a chance that the court's orders—for example, limiting or streamlining discovery—will be preempted by a certification order issued by another court.

As a result, the pay-off a court can expect to derive from protecting defendants' due process rights decreases. At a minimum, protecting due process rights takes a court's time and energy—because it depends on the willingness of the judge to investigate the existence of individualized defenses and the nature of proof necessary to establish those defenses in court. But in a world in which another court can easily monopolize litigation of class claims with the stroke of a pen, those efforts can be mooted at any moment. Engineering a settlement, by contrast, becomes more attractive: A settlement brings an end to the litigation and cannot be mooted by another, later court decision. As a result, in an opt-out world, judges are less inclined to undertake the effort necessary to fulfill their constitutional duties—and more inclined to promote settlements by certifying class actions. Put simply, the current system tends to suppress, rather than promote, the searching judicial inquiry necessary to protect defendants' due process rights.

Accordingly, Congress should enact a proposal like The Right-to-Choose-Your-Own-Lawyer Act,[78] which requires trial lawyers to convince people to affirmatively "opt in" to a class action by mailing a consent form into court, *before* they can be counted as part of the "class." In an opt-in regime, class actions will tend to result in smaller lawsuits—a natural result of removing the subsidy that the opt-out rules provide to lawyers who want to aggregate very large numbers of claims. And when class actions are smaller, a court will face less risk that a certification order in another court will moot its labors, because in a world of smaller class actions, it is possible

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for different courts to litigate subsets of the class claims. Because those courts will have less fear of preemption by another court, they will have both "space" and incentives to engage in the searching due process inquiry needed to protect defendants' rights.

Create Incentives for Litigants and Courts to Raise Constitutional Challenges to Class Certification. One of the intuitions behind the expansion of diversity jurisdiction is that class actions raise concerns under federal law—including the constitutional guarantees of due process. That intuition is right. Unfortunately, expanding diversity jurisdiction does nothing to create new incentives for litigants to raise constitutional defenses to class certification—or for courts to take those constitutional challenges seriously—since the existence of diversity jurisdiction does not depend on whether litigation of a claim is likely to result in violation of federal law.

Article III, Section 2, of the Constitution gives Congress the power to expand federal jurisdiction over state class actions that raise substantial due process problems.

There is another way: Article III, Section 2, of the Constitution gives Congress the power to expand federal jurisdiction over state claims in which defendants raise a substantial issue of federal law.[79] That includes state law class actions that raise substantial due process problems. Unfortunately, under the modern jurisdictional statutes, federal courts, with a few limited exceptions, currently cannot hear all legal claims that raise serious constitutional problems: Under the "well-pleaded complaint rule," courts can hear only those cases in which the *plaintiff* raises a federal question in the "four corners" of his complaint.[80]

That rule is not fixed in stone. Congress can authorize removal of plaintiff's legal pleadings, even if they do not raise federal issues, provided that the defendant asserts defenses to liability under federal law. Indeed, Congress has done just that in the case of federal defenses asserted by federal officials (the so-called federal officer removal statute).[81] 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 "arises under" federal law when a "correct decision" in the case depends (1) on the enforcement of a "right or privilege," "claim or protection," or "defense" belonging to either the plaintiff or defendant, which (2) depends, in turn, on the "construction" (i.e., interpretation) of "the Constitution or a law or treaty of the United States."[82]

Constitutional challenges to class certification plainly concern rights, protections, and defenses that "depend[] upon the construction" of the Constitution. To be sure, the Supreme Court has held that federal defenses offer a basis for removal only when the defenses relate to the merits of the case.[83] But the constitutional questions discussed in this study do go to the merits of the case in the sense that plaintiffs' and class members' ability to establish liability and recover may turn on the resolution of that question. For example, the essence of the due process violation in the class action context is that a defendant has been deprived of an opportunity to litigate defenses to liability.

Expanding federal question jurisdiction in the way described is an avenue worth exploring because it offers a striking opportunity to reinvigorate constitutional challenges to the class action procedure. It furthers the goal of "judicial education," recommended by RAND, 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."[84] It does so, moreover, in a concrete fashion, by giving defendants facing enormous liability new incentives to raise and press constitutional challenges in the class litigation and, more important, by giving efficiency-oriented federal courts additional incentives to take constitutional challenges more seriously.

Involve the States. Lasting reforms require (1) weaning federal courts from the push toward centralization and (2) giving states incentives to shoulder an equal share of the burden of taming out-of-control class litigation. Unfortunately, reforms such as the Class Action Fairness Act try to remove as many class actions from state control as possible and put them in one federal court. There's another way, one that is procedurally more complex but, given the stakes, worth close consideration.

Congress could provide states with a "safe harbor" that permits them to retain jurisdic-

tion over constitutionally problematic, and therefore removable, claims if they adopt federal class certification standards to govern problem cases. Those 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.[85]

In order to respect states' freedom to apply their own procedures to constitutionally unproblematic claims, the safe harbor should provide that federal courts must assess the possibility of constitutional violations *before* applying the safe harbor to reject removal.

The safe harbor is constitutional. It resembles a form of conditional preemption[86] upheld by the Supreme Court in *New York v. United States*.[87] In that case, the Court suggested that the federal government does not act unconstitutionally when it allows states a "choice" that permits them to preserve control over a regulation within a federally preempted field. To be sure, the choice here applies to state court procedures, not regulation, but the difference is immaterial: If anything, state court procedure is entitled to less protection from federal commandeering than is state legislation.[88] The safe harbor, it should be noted, is consistent with the purpose of checks and balances, that is, the promotion of individual liberty. The condition does not generate new burdens on individual conduct; it merely replaces a preexisting state class action burden on defendants with federally selected class action procedures (including textual certification standards, consideration of the merits before certification, and opt-in procedures).[89] As discussed above, those proceedings are designed to *restrain* due process violations, promote decentralization, and facilitate state courts' consideration of the federal constitutional rights threatened by mass lawsuits. The safe harbor, in short, is fully consistent with our federal system.

Authorize Limited Stay of Discovery in Duplicative State Class Actions. The Securities Litigation Uniform Standards Act,[90] enacted to curb frivolous securities fraud class actions, authorizes federal courts to issue orders halting discovery in duplicative state-level securities fraud suits that can't be removed to federal court, when those claims threaten to interfere with federal jurisdiction over related federal cases.[91] A similar provision could be added to the safe harbor, creating the following system: The safe harbor would be applied to all removable state law claims raising federal constitutional defenses to certification, with a reservation of power to federal courts to "enjoin" (that is, to halt) discovery and certification proceedings at the state level during the pendency of a motion for class certification in the federal court. The injunction would apply only where the state class action raises *factual questions and constitutional problems similar to* those raised in parallel federal proceedings that have been consolidated in one federal court.

To see how this might work, consider the following hypothetical. There are 100 class claims. Five class actions are filed, one in federal court and four in state court. The state court actions are removed to federal court and then remanded back to state courts—because the states in which they were filed have adopted class action reforms. If it uses the power to halt proceedings temporarily, the federal court gets the first bite at these claims. If the federal court determines that the class suit is without merit, it will not certify the class. The plaintiffs can continue to litigate at the state level, but the state courts will have the guidance of the federal court's analysis. Better still, the 100 class members will also have the benefit of the federal court's 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 that the claims have merit and orders certification. The federal suit attracts 20 opt-ins, and the defendant settles. The four remaining state suits will compete for the remaining 80 opt-ins. Each state suit attracts 20 opt-ins, and

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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 undervalues the claims; it approves a settlement that pays individual class members very little but gives the plaintiffs as a group 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 litigation abuse by plaintiffs and their attorneys.

The provision to enjoin discovery and certification outlined above is consistent with that upheld by federal courts under the Securities Litigation Uniform Standards Act. As one court has put it, an injunction under SLUSA is warranted when duplicative state proceedings create a risk that an "unreasonable burden on a defendant before disposition of a motion to dismiss" may hamper a federal court's ability to determine whether the suit has merit—thereby defeating the goal of federal securities litigation procedures, which are designed to promote consideration of the merits of underlying claims.[92] Similar concerns are at stake here. The proposed injunction is designed to prevent litigants from using duplicative state litigation to (1) place settlement pressure on federal defendants by subjecting them to the cost of multiple lawsuits and thereby (2) defeat procedural regulations designed to promote due process rights, including the requirement that courts assess the merits of the claim before class certification. The settlement pressure generated by duplicative litigation could defeat both goals if it renders the cost of litigation, and hence the cost of defendants' vigorous assertion of their rights under the federal procedural framework, too expensive. The risk is that if sued enough times all at once, the defendant might settle—and therefore won't raise the federal defenses that the procedures are supposed to encourage. By sequencing litigation (i.e., pausing state lawsuits, often for years, until federal certification procedures are completed) the injunction mitigates against this risk.

To be sure, these proposals—particularly the safe harbor and opt-in rules—don't eliminate multiple litigation entirely. But that's not a good argument against reform. First, the risk of multiple litigation is not something unique to the reforms suggested. That risk also exists under the regime instituted by the Class Action Fairness Act, since the act doesn't preclude plaintiffs from filing duplicative *intrastate* lawsuits that place settlement pressure on a defendant. A plaintiff who files multiple intrastate lawsuits in strategically chosen states with huge populations can impose the same pressure on a defendant that a single nationwide class lawsuit imposes. Accordingly, the proper benchmark for assessing the reforms isn't whether they make multiple litigation possible—it's the conditions under which multiple litigation occurs, and whether those conditions retard or facilitate class action abuse.

The conditions in which multiple lawsuits are litigated under current law are far from perfect. There are few procedural limits on class actions that violate defendants' constitutional rights—at either the state or federal levels. Moreover, there is some reason to think the Class Action Fairness Act will shift power to large plaintiffs' firms, which will be able to afford an intrastate litigation strategy, and shift power away from smaller plaintiffs' law firms, which can't afford that strategy. If so, the result of the act, perversely, may be to augment the market power of the country's richest plaintiffs' lawyers without reducing defendants' litigation costs. This baseline sets the standard against which the proposed reforms must be measured—and it is a baseline that's easy to improve upon.

Second, I am not proposing abandoning the Class Action Fairness Act—only tightening the regime it creates in order to promote due process scrutiny of class litigation at the federal and state levels. Put simply, my proposals preserve the current distribution of jurisdiction between state and federal courts. The opt-in rule, for example, merely gives states space to assume meaningful control over the narrow spheres of class action litigation left to them by the act, while the other

reforms collectively restrain the worst abuses of the state system. As discussed, these are benefits, not costs, of reform because, under the right conditions, decentralized proceedings reduce the chance of judicial error and allow courts to "learn" from successive proceedings—something that's not possible under current law.

Third, I am proposing placing on class litigation a number of filters that do not currently exist. The combined effect of all of the proposed reforms (from limits on certification of individualized claims, to a preliminary assessment of the merits, to opt in, to federal question removal) may reduce, in some cases drastically, the total incidence of large class action suits, state or federal. For example, under the proposed reforms, state class claims that attempt to cobble together large numbers of individualized claims face removal and, in some cases, remand under restrictive federal certification standards. That risk gives plaintiffs a disincentive to file large consumer fraud claims—the kind of claims that typically involve individualized defenses and are among the most common and troublesome forms of large class action lawsuits. Moreover, under the opt-in rule, fewer persons may join a given class suit when the suit is of little or speculative merit. As a result, the pay-off of the "class" settlement may be very low relative to the cost of litigation, making such class actions less frequent. Similarly, if plaintiffs must show that their claim has merit, they may be less likely to file speculative lawsuits—since the pay-off of bringing those suits, discounted by the chance of dismissal, will drop substantially. And, finally, the ban on certification of claims that require case-by-case scrutiny will independently cull out a substantial number of class suits—by forcing plaintiffs to invest resources in cases that are far more factually simple (e.g., isolated "mass accidents") than most of the largest class actions today. Together, all of these reforms would depress the frequency of class actions, in aggregate, at the state and federal level. This benefit is likely to outweigh the cost of any remaining multiple litigation that defendants, as a group, face.

One other objection to the proposals sketched above might be that they are complicated. That's true. But the basic inquiry that courts would face—is there a constitutional problem with the claims and, if so, does the state provide enough protections—is no more complicated than many modern removal inquiries.[93] The best rejoinder is that our Madisonian system of federalism, with its framework for decentralized government power, is itself complicated—far more complicated than command-and-control systems of centralized regulation. Centralized systems, however, are apt to miscarry. It was the wisdom of the Founders to recognize that the more complex Madisonian system (1) better protects core constitutional values, including individual rights, and (2) promotes better government, by replacing one central government decisionmaker with multiple decisionmakers, thereby enhancing liberty, reducing the error costs of government decisions, and promoting experimentation.

Put simply, class action reform will not be easy. It will not be accomplished by simple fixes. But it might be accomplished by thoughtful application of Congress's power to define and condition the exercise of federal question jurisdiction, when undertaken in a way that promotes careful, cooperative, and constitutional consideration of class action litigation by state and federal courts.

Conclusion: Procedure and the Constitution

Important constitutional principles depend on the choices of fallible individuals for their continued vitality. They depend on work-a-day lawyers to raise them in court. They depend on trial court judges to take those lawyers' arguments seriously. And, as our nearly four-decades-long experience with modern class actions suggests, they also depend on the *procedures* that regulate how lawyers and trial judges do their jobs. That's hardly a revelation: J. H. Baker, a scholar of the English common law, has observed that the history of the common law was in large part a history of procedure, in which

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The bottom line: Properly structured, class action litigation need not be a black hole for constitutionalism; it could provoke renewed attention to due process rights.

"substantive" common law rights evolved in response to seemingly technical changes in ordinary pleading practice.[94]

The class action is a modern procedure with a baleful effect on substantive rights and constitutional principle. Put simply, the explosion of class action litigation exacerbates judicial inertia in the face of constitutional violations. There is, however, hope: Properly structured, class action litigation need not be a black hole for constitutionalism; it could provoke renewed attention to due process rights. That provocation, however, needs a procedural stimulus.

The foresight of the Framers is revealed in the most unexpected of places: They could not conceptualize the modern class action and its marked departures from traditional common law procedure. But they knew full well that lawyers and judges (state and federal), like all human beings, are often tempted to put narrow self-interest above principle. It was their genius to devise a constitutional structure that is adaptable, offering means for pointing participants in the legal system back toward the requirements of constitutional duty. Here, the means is jurisdictional competition, abetted by adapting the Constitution's grant of federal question jurisdiction and the related device of federal question removal. The fuel is self-interest—including the self-interest of judges forced to manage complex, duplicative proceedings and the self-interest of parties facing massive liability. The outcome is a unique opportunity to promote first principles of individual rights and limited government by creating a setting where parties have reason to take those claims seriously. It's not a panacea, to be sure, but it offers hope for meaningful change that puts constitutional rights back at the center of the class action debate.

Notes

1. S. 5, 109th Cong., 1st Sess.

2. This study is adapted from a longer article. See Mark Moller, "The Rule of Law Problem: Unconstitutional Class Actions and Options for Reform," *Harvard Journal of Law and Public Policy* 28 (May–June, 2005) (forthcoming), http://ssrn.com/abstract=713661.

3. This example is based on recent class actions against health maintenance organizations (HMOs), brought by doctors who alleged that the HMOs had disseminated lies to doctors about how much they pay for medical services. The case is discussed in greater detail in the first part of this study.

4. See, e.g., Lon L. Fuller, *The Morality of Law*, 2d ed. (New Haven, CT: Yale University Press, 1969), pp. 38–39, 162.

5. U.S. Const. amend. V, amend. XIV.

6. See William Van Alstyne, "Cracks in the 'New Property': Adjudicative Due Process in the Administrative State," *Cornell Law Review* 62 (1977): 487 (suggesting that "[t]he protected essences of personal freedom include a freedom from fundamentally unfair modes of government action, an immunity (if you will) from procedural arbitrariness").

7. The author, as an attorney at Gibson, Dunn & Crutcher LLP, served as counsel to Aetna from 2000 to 2004, representing the company and its subsidiaries in a variety of public-policy-oriented class action lawsuits, including the lawsuits discussed at length in this study. Below, I use these cases as a case study in the rule-of-law problems spawned by large class action suits; in this, I join other commentators, who have argued these cases are a classic example of the problems generated by modern class action suits. See, e.g., Victor Schwartz, Mark A. Behrens, and Leah Lorber, "Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform," *Harvard Journal on Legislation* 37 (2000): 505–7 (discussing managed care litigation as a "case study" of the "new style class action").

8. See, e.g., Plffs' Consol. Reply Br. in Support of Mt. 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.").

9. 18 U.S.C. § 1961 et seq.

10. See, e.g., *Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) (holding that a showing of proximate causation is a prerequisite for establishment of RICO liability).

11. See, e.g., *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1360–61 (11th Cir. 2002).

12. Brief of Petitioners at 21, *Aetna Inc. v. Klay*, No. 02-16333-C (11th Cir. filed Dec. 30, 2002) ("Evalu-

ated 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.").

13. Plffs' Consol. Reply in Support of Mt. for Class Cert. at 5, *Shane v. Humana Inc.*, No. 00-1334-MD-MORENO (S.D. Fla. filed Jan. 3, 2001).

14. Ibid. (quoting *In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677, 693–94 (N.D. Ga. 1991)).

15. Ibid. ("[T]he only way that the injuries to the provider class will ever be remedied is via the class action device.") (quoting *In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. at 693–94).

16. Ibid. at 34–36.

17. See, e.g., *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 340–42, 344 (4th Cir. 1998) (Wilkinson, J.) (overturning federal trial court's decision to authorize class action of individualized contractual disputes, because aggregation deprived defendants of ability to raise unique defenses); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1301–02 (7th Cir. 1995) (Posner, J.) (overturning federal trial court's decision to authorize class action of tort claims by HIV-infected hemophiliacs against blood banks, because aggregation deprived defendants of ability to raise defenses under state negligence law); *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1020 (7th Cir. 2002) (Easterbrook, J.) (ordering class decertified in part because aggregating lawsuits would deprive defendants of defenses under state products liability law); *State of Alabama v. Blue Bird Body, Inc.*, 573 F.2d 309, 327 (5th Cir. 1978) (the "fact that a case is proceeding as a class action does not in any way alter the substantive proof required to prove up a claim for relief [under federal antitrust laws]. The holding is also a recognition that 'impact' is a question unique to each particular plaintiff and one that must be proved with certainty. That does not mean of course that cases do not exist wherein this requirement of certainty cannot be established by some sort of classwide proof. But it does mean that cases do exist wherein generalized proof of impact would be improper.").

18. Van Alstyne, p. 487.

19. Ibid., p. 488.

20. 311 U.S. 32 (1940).

21. See *Burke v. Kleiman*, 277 Ill. App. 519, 526–29 (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).

22. 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).

23. For example, the Hansberrys 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 Brief of Petitioners at 37, *Hansberry v. Lee*, No. 40-29 (U.S. filed Oct. 1, 1940) ("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") (emphasis in original). The Hansberrys also offered proof that some signatures were obtained by fraud or had not been properly notarized. Ibid. at 36–37 (adducing evidence that one signatory party (and a co-petitioner), 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).

24. See, e.g., *Lee,* 24 N.E.2d at 41 (Shaw, J., dissenting) ("by means of fraud and collusion between total strangers an agreement which is void on its face has been imposed upon some ten million dollars worth of the property of five hundred other parties who were never in court, who never had notice of any law suit, who were never by name or as unknown owners made parties to any law suit, and who have never been accorded any process whatever, either due or otherwise"). See also Brief for Petitioners at 14, *Hansberry*, No. 40-29 (quoting trial court's determination that the stipulation was likely collusive).

25. Brief for Petitioners at 15, *Hansberry*, No. 40-29.

26. Ibid.

27. *Burke*, 277 Ill. App. at 532.

28. *Hansberry*, 311 U.S. at 39-40.

29. *Lee*, 24 N.E.2d at 38 (describing genesis of the lawsuit).

30. See, e.g., Brief of Petitioners at 35–38, *Hansberry*, No. 40-29 (arguing that defenses required by their very nature a case-specific inquiry into the facts surrounding each signature; and that, as a matter of Illinois law, these defenses were "inherently personal" and therefore couldn't be asserted in collective, representative litigation).

31. Ibid. at 38 (by "conclud[ing] the petitioners against proof" in violation of the burden allocated by state law, the lower court had violated their due process rights).

32. The Court upheld the Hansberrys' challenge under the Due Process Clause but didn't adopt the theory outlined above. Instead, the Court ruled that the class litigation was not binding on the Hansberrys, based on the theory that the Hansberrys had not been adequately represented in the class suit, because their interests conflicted with those of the plaintiffs (their purported representatives) in that case. *Hansberry*, 311 U.S. at 44, 45–46.

33. *Southwestern Ref. Co. v. Bernal*, 22 S.W.3d 425, 437 (Tex. 2000). This and a variety of other due process precedents are usefully compiled in Evan M. Tager, "The Constitutional Limitations on Class Actions," *Mealey's Litigation Report*, January 2001.

34. "Aetna Settles with 700,000 Doctors," CBS News, May 22, 2003, http://www.cbsnews.com/stories/2003/05/22/health/main555147.shtml.

35. Defs.' Jt. Mt. to Dismiss Provider Plffs' Second Consol. Compl. at 17–18, *Shane v. Humana Inc.*, No. 00-1334-MD-MORENO (S.D. Fla. filed Oct. 18, 2002) (emphasis in original). 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).

36. See Federal Trade Commission, Notice of Proposed Consent Order in *Matter of System Health Providers*, File No. 0110196, 67 *Fed. Reg.* 55258 (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); Federal Trade Commission, Notice of Proposed Consent Order in *Matter of Physician Integrated Services of Denver, Inc., et al.*, File No. 0110173, 67 *Fed. Reg.* 36190 (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).

37. The total liability exposure faced by HMOs was simply 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 *10 years*, the total judgment sought by the doctor-plaintiffs could have totaled over a *billion dollars*.

38. See Settlement Agreement by Aetna Inc., the Representative Plaintiffs, the Signatory Medical Societies, and Class Counsel §§ 7, 7.1, 7.2, 7.3, 7.4, 7.5, 7.6, 7.7, 7.8, 7.9 (dated May 21, 2003).

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

40. See, e.g., Linda J. Blumberg, "Who Pays for Employer-Sponsored Health Insurance?" *Health Affairs* 18 (November–December 1999): 58 (noting that the vast majority of health care patients receive coverage through employer-sponsored health care plans).

41. Nineteen objectors submitted objections to the Aetna settlement, and all but two were doctors or their representatives. Although one health care insured filed an objection, the court summarily dismissed his arguments as irrelevant—solely because the insured was not a party to the Settlement Agreement, which governed only the claims between the parties to the lawsuit (i.e., the insurers and the doctors). See Final Approval Order and Judgment ¶ 12, *In re Managed Care Litigation*, No. 00-1334-MD-MORENO (S.D. Fla. Oct. 30, 2003).

42. See Settlement Agreement by Aetna Inc., the Representative Plaintiffs, the Signatory Medical Societies, and Class Counsel §§ 7.19, 7.20 (prohibiting Aetna from altering coding protocols ("CPT Codes") established by American Medical Association when processing claims).

43. S. 5, 109th Cong., 1st Sess.

44. 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.").

45. Cf. Alexander Hamilton, *Federalist* No. 28, at 181, in *The Federalist Papers*, ed. C. Rossiter, 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."). See also *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. Admin'r of Gen. Serv.*, 433 U.S. 425, 443 (1977)).

46. Deborah Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Santa Monica, CA: RAND Corporation, 2000), pp. 497–98 ("Judges need to be told that damage class actions are *not* just about problem solving, that the rights of plaintiffs *and* defendants are at stake.") (emphasis in original).

47. 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 James Madison, *Federalist* No. 51, in *The Federalist Papers*, p. 323).

48. 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 921–22). See also Adam C. Pritchard, "Constitutional Federalism, Individual Liberty, and the Securities Litigation Uniform Standards Act of 1998," *Washington University Law Quarterly* 78 (2000): 452–54 (discussing the theme that "division of power preserves freedom" in the Court's constitutional federalism cases).

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

50. Cf. *Gregory*, 501 U.S. at 460–61 (ambiguous federal statutes must be interpreted against alteration in the pre-existing balance of power between federal and state government). See also *Tarble's Case*, 80 U.S. (13 Wall.) 397, 407 (1872) ("[N]either [federal nor state governments] can intrude with [their] judicial processes 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 that "state governments remain responsive to the local electorate[]." See, e.g., *New York v. United States*, 505 U.S. 144, 167–68 (1992). For extensive discussion, and a critique of the "accountability" theme in the modern Court's federalism decisions, see Pritchard, pp. 450–55.

51. S. Rep. No. 106-420, at 16 (2000).

52. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991) ("we have indicated that federal courts should 'incorporate [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'").

53. U.S. Const. art. III, § 2, cl. 1, 8 ("The judicial power shall extend to all Cases, in Law and Equity . . . between Citizens of Different State . . . .").

54. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530–31 (1967). For example, imagine two persons, A and B, sue the Acme Company. A lives in Illinois. B lives in Pennsylvania. The Acme Company is incorporated and headquartered in Pennsylvania, and thus treated by law as a Pennsylvania "resident." In this case there is no "complete diversity," because plaintiff B and the Acme Company live in the same state. If, however, Acme were incorporated and headquartered in Idaho, there would be complete diversity, because no plaintiff shares a residence with the defendant.

55. See *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 124 S. Ct. 1920, 1925 (2004) (noting complete diversity is a statutory requirement).

56. See S. 5, 109th Cong., 1st Sess., § 4(a)(2) (creating subsection d(2)(A) of Section 1332 of Title 28 of the U.S. Code, which provides 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"); ibid. (creating subsection d(1)(D) of Section 1332 of Title 28 of the U.S. Code, which provides that the term "class members" "means the persons (named and unnamed) who fall within the definition of the proposed or certified class"). In this case, if a plaintiff, A, lives in Pennsylvania and sues Acme Company, a Pennsylvania resident, the suit may be within federal diversity jurisdiction if A represents a class of plaintiffs that includes one or more Illinois residents, subject to certain safe harbors created by the act.

57. By authorizing federal courts to exercise original jurisdiction over class actions exhibiting "minimal diversity," the statute brings class actions within the removal provisions of 28 U.S.C. § 1441, which authorize removal of any claims over which federal courts have original jurisdiction. The bill also permits defendants to remove class actions even when they are sued in their own

home state's courts, something not permitted under current law. See S. 5, 109th Cong., 1st Sess., § 5(a) (adding new Section 1453(b) of Title 28 of the U.S. Code, which provides 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").

58. 28 U.S.C. § 1441(a). For example, let's imagine that A and B, who live in Pennsylvania and Illinois, sue Acme Company, an Idaho resident, in Illinois state court. Acme Company could remove the case to the Illinois federal court, since A and B could have sued there in the first place.

59. S. 5, 109th Cong., 1st Sess., § 5(a).

60. See, e.g., S. 5, 109th Cong., 1st Sess., § 4(a) (providing 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).

61. Ibid., § 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 State court . . . if application is made to the court of appeals not less than 7 days after entry of the order").

62. Ibid., § 4(a) (adding new Sections 1332(d)(3) and 1332(d)(4)).

63. S. Rep. No. 106-420, at 16 (2000).

64. Jonathan R. Macey and Geoffrey P. Miller, "The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform," *University of Chicago Law Review* 58 (1991): 46.

65. Hensler et al., pp. 497–98.

66. "Aetna Settles with 700,000 Doctors."

67. *Klay v. Humana, Inc.*, 382 F.3d 1241, 1276 (11th Cir. 2004) (upholding certification order).

68. James Madison, *Federalist* No. 10, in *The Federalist Papers*, p. 80 ("It is vain to think that enlightened statesmen will be able to adjust these clashing interests and render them all subservient to the public good. . . . The inference to which we are brought is that the causes of faction cannot be removed and that relief is only to be sought in controlling its effects.").

69. Hensler et al., p. 497.

70. Ibid., pp. 497–98.

71. See, e.g., *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998) (Wilkinson, J.); *Sandwich Chef of Texas, Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205 (5th Cir. 2003); *In re Bridgestone/Firestone, Inc., Tires Prod. Liab. Litig.*, 288 F.3d 1012 (7th Cir. 2002).

72. See, e.g., *In re Prudential Ins. Co. of Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 310, 311 (3d Cir. 1998) (class action permissible where plaintiff alleges class members are victims of a "common course of conduct").

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

74. 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 Enters., Inc. v. Subaru of New England, Inc.*, Civ. A. No. 99-109-B, 2001 WL 920060, *19 (D.N.H. Aug. 3, 2001) (holding that allegations 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).

75. Current pleading rules only require a plaintiff to plead enough information to give defendants "notice" of the basis for their lawsuit. In some circumstances, the Federal Rules require "heightened" pleading: For example, when a plaintiff alleges a defendant is guilty of fraud, he must plead with "particularity" facts in support of the elements of his fraud claim. See Federal Rule of Civil Procedure 9. Because Federal Rule of Civil Procedure 11 subjects plaintiffs to sanctions when they allege facts without a reasonable likelihood of evidentiary support, heightened pleading requirements prevent plaintiffs from filing "fishing expeditions" in the hope they will discover wrongdoing later, once they avail themselves of court-enforced discovery procedures.

76. See, e.g., Federal Rule of Civil Procedure 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).

77. W. Kip Viscusi, "The Blockbuster Punitive Damages Award," *Emory Law Journal* 53 (2004): 1411 and n.20 (noting that nicknames for Madison County include "The Lawsuit Capital of the World" and "Class-Action Paradise," thanks to its reputation for being particularly plaintiff friendly).

78. The act has not been formally introduced. A

copy of a provisional draft is on file with the author.

79. See, e.g., *Franchise Tax Board v. Construction 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, 262–63, 264 (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 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," *Catholic University Law Review* 53 (2004): 609, 620 and n.89.

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

81. 28 U.S.C. § 1442(a)(1).

82. *Davis*, 100 U.S. at 264. Moreover, for roughly a decade prior to 1887, Congress granted all state court defendants, not simply federal officials, the right to remove claims raising legitimate constitutional concerns: a right subsequently used by emerging national corporations to gain a federal forum for constitutional challenges to oppressive state-level regulation. See, e.g., *Southern Pac. R. Co. 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, 140–42 (1880) (upholding removal jurisdiction over state action filed by Mississippi seeking to force removal of railroad bridge, based on federal defense arising under the federal statute admitting Mississippi into the Union). See also Michael G. Collins, "The Unhappy History of Federal Question Removal," *Iowa Law Review* 71 (1986): 727 and n.55, 728 n.59 (discussing history of federal question jurisdiction over constitutional challenge to state regulation asserted by interstate corporations; noting that the Contract Clause, Commerce Clause, Privileges or Immunities Clause, and Due Process Clause were the "claus[es] of choice in challenging state or local action arguably destructive of vested rights").

83. 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).

84. See, e.g., Hensler et al., p. 497.

85. The removal provision should also specify that the case remain in federal court if there is a separate basis for jurisdiction (i.e., diversity jurisdiction). And, finally, appellate review of remand decisions should be available.

86. See Pritchard, p. 487 (analyzing preemption of state judicial procedure under the Securities Litigation Uniform Standards Act as a form of conditional preemption).

87. 505 U.S. 144 (1992).

88. See Pritchard, pp. 470–79 (discussing the scope of the "judicial exception" to the anti-commandeering rule recognized in *Printz* and *New York*).

89. 505 U.S. at 181 ("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, p. 487 (making a similar argument in support of the Securities Litigation Uniform Standards Act; and suggesting that conditional federal preemption of state judicial procedure is permissible to the extent it reduces the net reach of government).

90. Pub. L. No. 105-353, 112 Stat. 3227 (1998) (codified as amended at 15 U.S.C. §§ 77p, 78bb(f)).

91. 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.").

92. See *In re DPL, Inc., Secs. Litig.*, 247 F. Supp. 2d 946, 950–51 (S.D. Ohio 2003). See also *In re Adelphia Communications Corp.*, 293 B.R. 337, 354

(Bankr. 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").

93. See, e.g., *Hobbs v. Blue Cross Blue Shield*, 276 F.3d 1236, 1241–42 (11th Cir. 2001) (holding that removal of doctor claims against HMOs under an Employee Retirement Income Security Act "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).

94. J. H. Baker, *An Introduction to English Legal History* (Butterworths Services, 1990), p. 63 ("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.").

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