CAFA AND ERIE: UNCONSTITUTIONAL CONSEQUENCES?

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INTRODUCTION

Imagine a statute that provides that every class action involving any one plaintiff and any one defendant from different states, where the aggregate amount in controversy exceeds $5,000,000, must be adjudicated in federal court and cannot be heard in state court.¹ This statute would force all class actions where any one class member is diverse from any defendant, and the aggregate class members’ claims exceed $5,000,000, into federal court. However, all of these class actions would be governed by state substantive law.² This hypothetical statute is very similar to the Class Action Fairness Act of 2005 (CAFA).³ The two statutes differ only in that CAFA does not explicitly create exclusive federal jurisdiction over such interstate class actions. However, as this Note will argue, CAFA’s practical effect will be to cause federal courts to exercise exclusive jurisdiction over some interstate class actions. Consequently, CAFA raises several questions: Does CAFA comport with Article III of the U.S. Constitution’s limited

¹. This would be an example of exclusive federal jurisdiction. As a threshold matter, Congress possesses the power to mandate exclusive federal court jurisdiction over those situations enumerated in Article III. 13 Charles Alan Wright et al., Federal Practice and Procedure § 3527 (2d ed. 2006).

². See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (noting that a federal court sitting in diversity can apply federal procedural law, but “Congress has no power to declare substantive rules of common law applicable in a [s]tate . . .”). Because jurisdiction over this type of class action is predicated upon diversity, state substantive law controls the decision. See id.; see also Rules of Decision Act, 28 U.S.C. § 1652 (2000) (“The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”).

grant of diversity jurisdiction? Does CAFA contravene the *Erie* doctrine? Does CAFA conflict with the Rules of Decision Act?

CAFA does not appear to directly violate Article III. Article III grants federal courts jurisdiction over “[c]ontroversies . . . between Citizens of different States.” CAFA is most likely consistent with Article III because it only extends federal jurisdiction over class actions in which any one defendant is a citizen of a different state than any one plaintiff. Courts have consistently held that the “complete diversity” doctrine espoused by Chief Justice John Marshall in *Strawbridge v. Curtiss,* which mandates that all plaintiffs must be diverse from all defendants, was a decision interpreting the First Judiciary Act of 1789 and not Article III’s Diversity Clause.

The U.S. Supreme Court has further held that it is constitutionally permissible for Congress to extend federal jurisdiction over minimally diverse parties in complex litigation. CAFA, therefore, is a constitutionally valid extension of Article III diversity jurisdiction over minimally diverse interstate class actions.

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4. *See generally Erie,* 304 U.S. 64.
7. *See* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 531 (1967) (“Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens.”).
8. 7 U.S. (3 Cranch) 267 (1806).
9. Diversity jurisdiction would be improper under the First Judiciary Act if a plaintiff and a defendant were citizens of the same state. *See id.*
10. *See id.* at 267 (interpreting “the words . . . of [C]ongress” in section 11 of the First Judiciary Act to require complete diversity). Note that the wording of the First Judiciary Act was different than the current diversity statute: “The circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law . . . where . . . the suit is between a citizen of the State where the suit is brought, and a citizen of another State.” Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73. This seems to imply that the original diversity statute was intended to cover just those situations where a defendant would be haled into a potentially biased state tribunal. Where there are two parties from the same state on either side of the suit, the risk of prejudice against the out-of-state citizen is counteracted by the presence of an identically situated state citizen, and federal jurisdiction is not warranted. *See* 13B Wright et al., *supra* note 1, § 3605 (“[The] justification for granting federal diversity jurisdiction does not apply to cases in which there are citizens from the same state on opposing sides of the litigation.”).
11. “Minimal diversity” occurs where any one defendant is the citizen of a different state than any one plaintiff. *See State Farm,* 386 U.S. at 531 (holding that the interpleader statute, which requires only minimal diversity between any two claimants, is a constitutional exercise of diversity jurisdiction under Article III; *see also* 13B Wright et al., *supra* note 1, § 3605 (“The *State Farm* decision holds only that complete diversity is not required by the Constitution in all cases.”). At least one commentator has suggested that there may be constitutional problems with minimal diversity. *See* C. Douglas Floyd, *The Limits of Minimal Diversity,* 55 Hastings L.J. 613 (2004). However, it is hard to see how the plain meaning of the language in the Constitution itself requires complete diversity.
12. This statute may, however, extend diversity jurisdiction beyond its narrow reach contemplated and intended by the framers, most notably Alexander Hamilton. *See* The Federalist No. 80 (Alexander Hamilton) (stressing that the main rationale for diversity
Even though CAFA does not clash with the text of Article III, CAFA is incompatible with the *Erie* doctrine. 13 It is probable that some areas of state substantive law are only adjudicated in the form of class actions, 14 because it is unlikely that individual plaintiffs will bring actions involving small individual claims, such as consumer protection or products liability actions, on their own behalf as individual suits. 15

CAFA, in effect, restricts jurisdiction over state law consumer protection and products liability class actions to federal court. 16 As a result, state courts will never have the opportunity to interpret and develop the substantive law in those areas. CAFA’s practical effect will be to usurp the state judiciary’s primary role of creating and developing the substantive law in those areas. Thus, the statute will force federal courts to create and develop substantive federal common law. 17

In *Erie Railroad Co. v. Tompkins*, the Court held that it is unconstitutional for federal courts sitting in diversity to create substantive common law, 18 stating that neither Congress nor the federal courts have the “power to declare substantive rules of common law applicable in a [s]tate.” 19 Consequently, federal courts sitting in diversity must apply state substantive law. 20

Because CAFA is based on diversity jurisdiction, state substantive law will govern all of the class actions under its purview. 21 However, because CAFA restricts jurisdiction over these class actions exclusively to federal court, the federal courts will lack applicable state law and be forced to

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14. See infra Part II.B.2 and accompanying text.
15. This Note is concerned with state laws that provide plaintiffs the right to recover for small individual damage claims. These claims are unlikely to be brought by individuals and will only be interpreted in the context of class actions, yet the state court system will lack jurisdiction over those class actions. Consider, for example, a Florida class action suit filed last December against The Home Depot, alleging that The Home Depot overcharged customers by adding a 10% damage waiver fee to equipment rentals. Julie Kay, *Home Depot Fights Challenge to Fee for Damage Waiver*, Miami Daily Bus. Rev., Dec. 29, 2005, available at http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1135850712531. The named plaintiff in that suit alleged damages of a 10% waiver fee on his $39 bill. *Id.* It is unlikely that any plaintiff would sue individually over $3.90.
16. Edward F. Sherman, *Class Actions After the Class Action Fairness Act of 2005*, 80 Tul. L. Rev. 1593, 1608 (2006) ("After CAFA, the federal courts are essentially ‘the only game in town’ for multistate and national class actions.").
19. *Id.*
20. *Id.*
develop a federal common law of class actions. Accordingly, CAFA will force federal courts to violate the core constitutional holding of \textit{Erie} because the federal courts do not have any constitutional authority to create substantive law.

\textit{Erie} also established the proposition that the Rules of Decision Act requires federal courts to apply state law, including state judicial decisions, as the rules of decision in all U.S. courts. Because CAFA, in practice, removes the state court system’s jurisdiction over some state law class actions, state courts will be unable to create state decisional case law. Consequently, CAFA may force federal judges to create and apply federal “rules of decision” in diversity class actions, which transgresses both the Rules of Decision Act and the Court’s holding in \textit{Erie}.

Part I of this Note provides a brief historical background of federal class actions. It introduces CAFA and describes how CAFA changes the federal diversity and removal statutes. Part II first describes Congress’s concerns over class action abuses, and then outlines how CAFA addresses those concerns. Part II then analyzes and describes the potential problems that CAFA creates. It first introduces the theory of “Procedural Swift,” and then describes how this theory applies to CAFA. Next, this section addresses whether CAFA conflicts with the \textit{Erie} doctrine, and whether CAFA forces federal courts to violate either the Rules of Decision Act (RDA) or the Rules Enabling Act (REA). Finally, this section also discusses whether principles of federalism adequately justify CAFA’s extension of diversity jurisdiction over class actions.

Part III argues that CAFA conflicts with the core constitutional holding of \textit{Erie} because it forces federal courts to create state substantive common law in certain areas. Part III also contends that CAFA extends diversity jurisdiction over class action suits beyond the scope intended by the framers. Part III further asserts that in passing CAFA, Congress breached several key principles of democratic legitimacy. Finally, the conclusion offers federal district courts practical solutions to minimize CAFA’s impact on the sovereignty of state courts.

I. THE CLASS ACTION FAIRNESS ACT OF 2005: A BREAK FROM THE PAST

A. \textit{Historical Background of Federal Class Actions}

The class action is a time-honored and venerable practice in U.S. legal history. It is “a uniquely Anglo-American invention” that is relatively

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25. See 28 U.S.C. \S\ 1652; \textit{Erie}, 304 U.S. at 78; \textit{infra} Part II.B.2 and accompanying text.
27. \textit{id.} \S\ 1453 (West 2005).
In America, the modern class action began to take shape in the mid-nineteenth century. Class actions were based on the concept that multiple parties could be joined together in one litigation if they shared common legal or factual issues. By the twentieth century, class actions were well entrenched in the American legal system.

In 1938, Congress adopted the Federal Rules of Civil Procedure. Rule 23 of the Federal Rules governs class action certification. In 1966, Congress amended Rule 23 to its current form. In order to certify a class and allow a suit to proceed in federal court, federal judges must find that all of Rule 23’s requirements are satisfied. To satisfy Rule 23’s requirements, plaintiffs must show that:

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

Rule 23(b) delineates the three types of class actions, which differ depending on the kind of relief sought. Rule 23(b)(1) governs situations where

the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class . . . or (B) adjudications . . . which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications . . . .

Rule 23(b)(2) controls in situations where multiple plaintiffs seek injunctive or other equitable relief, such as in civil rights class actions.

The major change to federal class actions came in 1966, when Congress amended Rule 23 to allow plaintiffs to use the class action device to obtain monetary damages. Rule 23(b)(3) authorizes the “damage” class action.
where a group of plaintiffs jointly seeks monetary relief. Rule 23(b)(3) requires that the trial judge find legal or factual questions common to all class members and that these common questions dominate the individual claims of class members.\(^{39}\) The trial judge must also find that the class device is a “fair and efficient” way to settle the class members’ claims.\(^{40}\)

Rule 23(b)(3) is the most controversial provision of Rule 23.\(^{41}\) Critics of the class action device argue that Rule 23(b)(3) was never intended to handle mass toxic torts and products liability cases.\(^{42}\) They maintain that Rule 23(b)(3) has opened the judicial floodgates to allow mass tort cases into the federal court system, cases that the system is simply not designed or equipped to handle.\(^{43}\) Congress shared the critics’ concerns with mass tort class actions and found that state judges were applying certification standards improperly.\(^{44}\) As a result, Congress attempted to narrow the state court system’s power to adjudicate interstate class actions by passing CAFA.\(^{45}\) CAFA reformed the current class action system by altering the diversity jurisdiction statute’s citizenship and amount-in-controversy requirements with respect to class actions. These changes, in effect, cause more class actions to be heard in federal court.

**B. Diversity Jurisdiction and Class Actions**

In order for federal courts to exercise jurisdiction over any action, Article III of the Constitution must grant the federal courts the power to hear it.\(^{46}\) Article III grants the federal courts diversity jurisdiction over “cases . . . or controversies . . . between Citizens of different States.”\(^{47}\) CAFA now bestows the federal courts jurisdiction over class actions where at least one plaintiff is from a different state than any one defendant.\(^{48}\) This section traces the development of federal diversity jurisdiction over interstate class actions through the twentieth century before and after CAFA.

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40. Id.
43. See id. at 6, reprinted in 2005 U.S.C.C.A.N. at 7 (asserting that the federal courts should apply the four requirements mandated by Rule 23 strictly, in order to dissuade opportunistic plaintiffs’ lawyers from utilizing the class action device to bring these kinds of claims).
46. The federal courts are courts of limited jurisdiction that can hear only those cases or controversies enumerated in Article III of the Constitution. See 13B Wright et al., supra note 1, § 3522.
47. U.S. Const. art. III, § 2.
48. This is often referred to as “minimal diversity.”
1. Section 1332 Diversity Jurisdiction Requirements and Strawbridge

Prior to CAFA’s enactment, jurisdiction over interstate class actions was based on the diversity statute, 28 U.S.C. § 1332. The prevailing rationale for diversity jurisdiction was that out-of-state litigants faced the risk of bias when either pursuing or defending a claim in the state court where the adverse party was a citizen.49 The solution to the risk of bias against out-of-state citizens was diversity jurisdiction. Federal courts could provide an impartial forum for out-of-state litigants to assert their grievances.50

In simple litigation, where there is one plaintiff and one defendant, the diversity statute is easy to apply. The plaintiff must be from a different state than the defendant. One question that arose early in the nation’s history was how federal courts should apply the diversity jurisdiction requirement to complex litigation.51 Would each defendant have to reside in a different state than each plaintiff, or would diversity of citizenship between any one plaintiff and any one defendant suffice to support federal jurisdiction? In Strawbridge v. Curtiss, Chief Justice Marshall answered this question and declared that in complex litigation, each plaintiff must be able to establish diversity jurisdiction over each defendant, a principle known as “complete diversity.”52

Some commentators argue that complete diversity is simply a policy decision that balances the limited resources of the federal court system against the likelihood of state courts’ prejudicial treatment against out-of-state citizens.53 In complex litigation, the traditional policy rationale for diversity jurisdiction is weakened when there are citizens of the same state on either side of the litigation; in that case the biases will “cancel out” and neither side will be prejudiced.54 Complete diversity simply limits the amount of cases that federal courts will hear.

49. See 13B Wright et al., supra note 1, § 3605.
50. See id. § 3601 (“[T]he traditional, and most often cited, explanation of the purpose of diversity jurisdiction [is] the fear that state courts would be prejudiced against out-of-state litigants.”).
51. By “complex litigation,” this Note refers to suits that involve more than two parties.
52. See Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806) (holding that each plaintiff must have a citizenship different from each defendant to support jurisdiction under the diversity statute).
53. See Martin H. Redish, Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and “The Martian Chronicles,” 78 Va. L. Rev. 1769, 1803-06 (1992) (noting that in Strawbridge, “[Chief Justice John] Marshall made absolutely no effort to discern complete diversity from either the text or policies of the diversity statute,” but the rule can be justified because “it effectively controls the number of diversity cases that can be brought in federal court”). For an argument that the complete diversity requirement does not efficiently implement the policies it is supposedly driven by and is therefore an arbitrary policy centered on reducing the federal caseload, see generally id. and David P. Currie, The Federal Courts and the American Law Institute, Part I, 36 U. Chi. L. Rev. 1 (1968).
54. See Redish, supra note 53, at 1803-06; see also Nat’l Ass’n of Realtors v. Nat’l Real Estate Ass’n, 894 F.2d 937, 941 (7th Cir. 1990) (“The rationale for requiring complete
After *Strawbridge*, the question remained whether complete diversity was compelled by Article III of the Constitution. One hundred and fifty years later, the Supreme Court acknowledged that the *Strawbridge* decision was an interpretation of the diversity statute and not an interpretation of Article III.55 The text of Article III simply states, “The judicial power shall extend . . . to controversies . . . between Citizens of different States.”56 The Court, applying a plain meaning analysis, reasoned that nothing in the clause itself requires complete diversity. Consequently, the Court held that the federal courts may assert diversity jurisdiction over minimally diverse parties.57

2. *Supreme Tribe of Ben-Hur* and Diversity over Class Actions

After *Strawbridge*, it was still unclear how the diversity jurisdiction statute applied to class actions. In *Supreme Tribe of Ben-Hur v. Cauble*58 the Court resolved this issue. In *Ben-Hur*, the Court interpreted the diversity statute to require that all named representative plaintiffs and all named defendants be completely diverse.59 Therefore, after *Ben-Hur*, in a diversity class action, all representative plaintiffs and all representative defendants had to be completely diverse.60

Because the Court chose not to inquire into the citizenship status of unnamed class members, *Ben-Hur* was a decidedly pro-federal class action decision. A plaintiffs’ class may have contained unnamed members who were citizens of the same state as a defendant. If the court considered those class members in determining whether complete diversity existed, it would have defeated federal jurisdiction. Thus, *Ben-Hur* expanded the federal courts’ purview over diversity class actions.61

diversity is that the presence of residents of the same state on both sides of the lawsuit neutralizes any bias in favor of residents . . . .”)

55. See State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967) (holding that the interpleader statute’s requirement of minimal diversity between any two adverse claimants satisfies the constitutional diversity requirement of Article III); Redish, *supra* note 53, at 1803.


57. State Farm, 386 U.S. at 531.

58. 255 U.S. 356 (1921).

59. Id. at 366 (holding that the intervention of Indiana plaintiffs, who were not among the named representatives of the class, would not defeat diversity jurisdiction because diversity jurisdiction is determined based on the representative parties).

60. That is to say, all named plaintiffs must be diverse from all named defendants. *Ben-Hur*, 255 U.S. at 366.

61. Whether the complete diversity rule actually makes sense with respect to class actions is another matter. After *Ben-Hur*, a federal court could have been faced with a scenario where in a major interstate class action, one out of one thousand plaintiffs was from the same state as one defendant, and the district court would be forced to remand the matter to state court. Even though that state’s substantive laws may have governed the case, it is far from clear that the state truly had a greater interest in adjudicating the class action than any other state affected by the alleged improper activity, or a state where a significant number of plaintiffs are citizens. This is precisely the reason why the Senate argued it was necessary to
3. Section 1332’s Amount-in-Controversy Requirement and Zahn v. International Paper

In addition to diversity of citizenship, § 1332 has a second requirement: the amount-in-controversy requirement. Under § 1332, a plaintiff must make a good-faith allegation that she suffered more than $75,000 in damages. Ben-Hur left one issue unresolved: Did each member of the class have to allege damages in excess of the amount-in-controversy requirement? Or did only the named representative plaintiffs have to allege the requisite amount in damages to satisfy the provisions of § 1332?

The Court answered these questions in Zahn v. International Paper. In Zahn, the Court held that in order to establish diversity jurisdiction in a class action, each plaintiff’s individual claim must satisfy the amount-in-controversy requirement. Thus, each class member had to allege more than $10,000 (the amount-in-controversy requirement at the time) in damages.

The Zahn decision restricted federal court jurisdiction over class actions by precluding federal courts from certifying classes where plaintiffs could not allege sufficient damages. After Zahn, class actions based on claims where the individual damage to each plaintiff was minimal were effectively restricted to state courts. Zahn therefore represents the lowest ebb of the federal court system’s power to adjudicate diversity class actions.


After Zahn both Congress and the Supreme Court began to augment federal jurisdiction over diversity class actions. In 1990, Congress passed the supplemental jurisdiction statute, 28 U.S.C. § 1367(a), which provides, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original

apply the less stringent minimal diversity standards to class actions. See infra Part II.A. This Note argues that the conflict between state and federal interests is a problem inherent to our federal system and its distribution of power between national and state governments, and further that, while perhaps not unconstitutional, Congress’s solution with CAFA may be an example of overreaching.

63. Id.
64. See id. (setting forth a $75,000 amount-in-controversy requirement). At the time of Zahn, the amount in controversy requirement was $10,000. Zahn v. Int’l Paper Co., 414 U.S. 291, 293-94 (1973).
65. 414 U.S. 291.
66. Id. at 301.
67. Id.
jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.68

The supplemental jurisdiction statute grants federal courts the power to exercise ancillary jurisdiction69 over claims arising out of the same “case or controversy” that a federal court has the constitutional authority to adjudicate under Article III.

The following hypothetical illustrates the types of claims that fall under the purview of the supplemental jurisdiction statute. Assume there is an auto accident in New York, where D hits both P1 and P2. P1, who is from New York, sues D, who is from California, for a state law claim that satisfies the amount-in-controversy requirement. P2, also from New York, seeks to join in the lawsuit, but P2 suffered damages less than the amount-in-controversy requirement. Under § 1367(a), P2’s claim arises out of the same case or controversy as P1’s does (the accident) and thus P2 will be able to join P1 in suing D in federal court.

However, § 1367(b) places a further obstacle in P2’s path. If P1 bases his or her claim on the diversity statute, federal courts cannot exercise supplemental jurisdiction over P2’s claim if P2 was “made [a] part[y] under Rule 14, 19, 20, or 24.”70 Consequently, in all diversity suits where parties seek to be joined under these rules, each individual plaintiff must allege damages in excess of the amount-in-controversy requirement.

Conspicuously absent from § 1367(b) is Rule 23, the class action rule. After Congress passed § 1367, the question remained whether it overruled the Court’s holding in Zahn that each member of a class had to individually satisfy the amount-in-controversy requirement of § 1332. In Exxon Mobil Corp. v. Allapattah Services, Inc.,71 the Supreme Court held that § 1367 overruled Zahn.72 Congress, by not including Rule 23 in § 1367, overruled Zahn’s holding that each class member must satisfy the amount-in-controversy requirement.73 The Exxon Mobil Court found that as long as at least one named class member satisfies the amount-in-controversy requirement and the other class members’ claims form part of the same Article III case or controversy, federal courts have supplemental jurisdiction over the ancillary claims that do not satisfy the requirement.74

Exxon Mobil significantly altered the scope of federal class actions based on § 1332. As a result of Exxon Mobil, the ancillary claims of class

69. For a discussion of ancillary jurisdiction, see generally 7C Wright et al., supra note 1, § 1917.
72. Id. at 2625.
73. Id. (“We hold that § 1367 by its plain text overruled . . . Zahn and authorized supplemental jurisdiction over all claims by diverse parties arising out of the same Article III case or controversy . . . .”).
74. Id. at 2615.
members no longer have to meet the amount-in-controversy requirement, as long as they form part of the same Article III case or controversy. *Exxon Mobil* expanded federal jurisdiction over class actions founded on § 1332. Now, small individual claims that form part of the same case or controversy can be joined together in one class action in federal court. As the next section explains, CAFA further expands federal jurisdiction over diversity class actions.\(^{75}\) As a result of both *Exxon Mobil* and CAFA, federal jurisdiction over diversity class actions is now at unprecedented levels.

C. CAFA Makes Significant Changes

Prior to 2005, federal courts applied the amount-in-controversy and the diversity requirements to class actions in the same manner they applied these requirements to all other diversity actions. Courts required that each named plaintiff and each named defendant be diverse and that every individual plaintiff satisfy the amount-in-controversy requirement. Now, *Exxon Mobil* and CAFA have significantly changed the federal class action terrain. In 2005, Congress passed CAFA, which expanded federal court jurisdiction over class actions. Congress’s goal with CAFA was “[t]o amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants.”\(^{76}\) To accomplish this objective, CAFA amended the federal diversity jurisdiction statutes with respect to class actions.\(^{77}\) CAFA made two important alterations: one to the diversity jurisdiction statute, 28 U.S.C. § 1332, and the other to the removal statute, 28 U.S.C. § 1441. This section first enumerates the jurisdictional changes that CAFA makes, and then outlines the exceptions to CAFA’s jurisdiction.\(^{78}\)

1. Jurisdictional Amendments to Section 1332: Minimal Diversity

CAFA first amended the diversity jurisdiction statute.\(^{79}\) Section four of CAFA created a new subsection, (d)(2), of § 1332.\(^{80}\) Section 1332(d)(2)

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75. In *Exxon Mobil Corp. v. Allapattah Services, Inc.*, the Court states that CAFA has no bearing on its interpretation of § 1367. *Id.* at 2627-28. The Court suggested that CAFA does not render its expansive interpretation of § 1367 moot. *Id.* at 2628. The Court seemed to suggest that there are class actions that will fall outside the realm of CAFA and yet federal jurisdiction may be proper under § 1367. *Id.* But class actions where a named plaintiff is suing for more than $75,000, other plaintiffs for less than that amount, and the aggregate is less than $5,000,000 (the cumulative amount in controversy that CAFA requires) will rarely arise.


78. Although CAFA includes several other provisions, this Note is primarily concerned with CAFA’s effects on diversity jurisdiction and removal jurisdiction.


80. *Id.* § 4, 119 Stat. at 9 (to be codified at 28 U.S.C. § 1332(d)(2)).
gives the federal “district courts . . . original jurisdiction over 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 . . . (A) any member of a class of plaintiffs is a citizen of a State different from any defendant.” 81 Section 1332(d)(2) thus establishes minimal diversity as the jurisdictional basis for interstate class actions. Under the current version of § 1332, as long as any one plaintiff is diverse from any one defendant, federal courts will have the authority to adjudicate that class action.

This is a major change from the pre-CAFA period. Ben-Hur required complete diversity between all named plaintiffs and all named defendants. 82 CAFA now applies to all proposed members of the class of plaintiffs, 83 rather than solely the named members. 84 A defendant can now establish minimal diversity based on the entire potential plaintiffs’ class rather than the named, post-certification representative class members.

This change greatly expands federal diversity jurisdiction over class actions. Congress intended CAFA to “strongly favor the exercise of federal diversity jurisdiction over class actions with interstate ramifications” and stated that it should be liberally applied to any suit that “resemble[s] a purported class action.” 85 When coupled with the modifications that CAFA makes to the removal provisions of Title 28, CAFA dramatically changes the federal class action jurisdiction setting.

2. Section 1453: Removal of Class Actions

Before CAFA, § 1441 prohibited defendants from removing diversity actions to federal court if the plaintiff brought the action in the defendants’ home state. 86 CAFA adds a new section to Title 28, § 1453, which governs the removal of class actions. 87 Section 1453 now allows defendants to remove class actions to federal court “in accordance with section 1446 . . . without regard to whether any defendant is a citizen of the State in which the action is brought.” 88 Additionally, any defendant may remove the action, with or without the consent of the other defendants. 89 Thus, § 1453 empowers any defendant to remove a minimally diverse class action to
federal court, and, as a result, greatly expands federal diversity jurisdiction over class actions.\textsuperscript{90}


In addition to expanding federal jurisdiction over actual or potential class actions, CAFA further amended § 1332 by adding § 1332(d)(11). Section 1332(d)(11) grants federal courts jurisdiction over “mass action[s],”\textsuperscript{91} which are defined as “any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact.”\textsuperscript{92} In passing § 1332(d)(11), Congress intended to prevent plaintiffs from avoiding federal jurisdiction by choosing not to proceed as a class but rather as a group of plaintiffs joined under Rule 20.\textsuperscript{93}

Mass actions differ from class actions in one important respect. In mass actions, the plaintiffs’ individual claims must satisfy one of the amount-in-controversy requirements of § 1332(a).\textsuperscript{94} Congress intended that either each individual claim in a mass action satisfy the $75,000 amount-in-controversy requirement of § 1332(a) or that the aggregate of all individual claims exceed $5,000,000.\textsuperscript{95} The statute further directs federal courts to remand jurisdictionally insufficient claims to state court, but the federal court will still exercise jurisdiction over the remaining claims.

After CAFA, any case with over one hundred plaintiffs that either independently or cumulatively satisfy one of § 1332’s two amount-in-controversy requirements may now be heard in federal court.\textsuperscript{96} Section 1332(d)(11), therefore, is Congress’s way of getting at those controversies that have the potential to become class actions, but where the plaintiffs have chosen not to use the class action device. This is a significant change because § 1332(d)(11) essentially requires courts to treat the joinder of one hundred or more plaintiffs as a class action.

4. Possible State Jurisdiction Carve-Out: The “State Action” Exception Under 1332(d)(4)

Congress recognized that CAFA greatly expanded federal jurisdiction over interstate class actions. Consequently, Congress included several

\begin{footnotes}
\item[92] \textit{Id.} § 1332d(11)(B)(i).
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carve-outs that restrict federal jurisdiction over cases that have the greatest local impact. The first of these carve-outs is the “State Action” exception.

If the plaintiffs can satisfy the State Action exception’s three requirements, the federal court must remand the class action to state court.97 These requirements are intended to ensure that if a controversy is truly local in nature, state courts will still retain the authority to adjudicate it.

The State Action exception first requires federal courts to find that “greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed.”98 Next, the court must determine that the defendant who resides in that state is a “primary focus” and “real target” of the litigation.99 Finally, in an attempt to deter multiple duplicative lawsuits in different states, the exception requires courts to find that no identical or similar class actions based on the harm in question have been filed in other states. To determine whether other state court class actions are similar, the statute directs federal courts to inquire “whether similar factual allegations have been made against the defendant.”100 If a class action does satisfy the aforementioned requirements, the federal court “shall decline to exercise jurisdiction” over the case and must remand it to state court.101

Congress reasoned that if over two-thirds of the class members are from the same state as the primary defendant, state interests weigh heavily in favor of adjudicating that case. Congress intended that all or almost all of the damage that resulted from the alleged actions of the defendants be suffered in the forum state in order for the state court to adjudicate the interstate class action.102

97. Id.
98. 28 U.S.C.A. § 1332(d)(4)(A)(i)(I). The statute further requires that [(A)(i)](II) at least one defendant is a defendant—
   (aa) from whom significant relief is sought by members of the plaintiff class;
   (bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and
   (cc) who is a citizen of the State in which the action was originally filed; and
   (III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and
   (ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or
   (B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.
102. See id.
The scope of the State Action exception is unknown at this time. However, its impact is likely to be limited because § 1332(d)(4)’s requirements are stringent, and courts are likely to interpret this section narrowly. Congress intended to limit this exception to class actions brought by citizens of one state against an in-state actor who is the primary proponent of harm. In that case, however, the federal courts lack discretion to entertain jurisdiction over the class action and must remand it to state court.

5. The Catchall Exception: § 1332(d)(3)

In contrast to the State Action exception, which prohibits federal courts from exercising discretion in certain instances, the catchall exception grants federal courts the discretion to decide whether to adjudicate CAFA class actions. The catchall exception, 28 U.S.C. § 1332(d)(3), provides that

[a] district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction . . . over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes . . . and the primary defendants are citizens of the State in which the action was originally filed.

The next step in the catchall exception inquiry requires courts to apply a balancing test and weigh several factors in order to determine whether the forum state’s interests are sufficiently compelling for that state to assert jurisdiction over the class action. The factors are designed to ensure that

103. See S. Rep. No. 109-14, at 41-42, reprinted in 2005 U.S.C.C.A.N. at 39-40. The examples that Congress chose to include are indicative of the kinds of cases they intended the state action exception to reach. A hypothetical state product liability class action against an out-of-state automobile manufacturer and in-state automobile dealers brought solely on behalf of and by Florida citizens is precisely the kind of case that, before CAFA, would have been heard in state court because of the complete diversity rule. Id. at 41, reprinted in 2005 U.S.C.C.A.N. at 39. Thus, one can infer that this is the kind of case that Congress intended that CAFA reach and shift into federal court.


105. Id. The factors include the following:

(A) whether the claims asserted involve matters of national or interstate interest;
(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;
(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;
(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;
(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and
if a class action that is truly local in nature is brought against a defendant in her home state, it may be heard by that state’s court. Congress’s rationale for including this exception closely tracks its reasoning for including the State Action exception. If a controversy is truly local in nature and the forum state’s interests weigh heavily in favor of adjudicating the case, Congress felt that the state court should adjudicate it, and granted the federal court the discretion to cede jurisdiction over that class action to state court.

D. The Landscape of Federal Class Actions After CAFA: Some Examples

CAFA greatly expanded federal jurisdiction over interstate class actions. Under CAFA, three different interstate class action situations can arise that differ depending on the percentage of class members who are citizens of the same state as the primary defendants. The first scenario is a class action where more than two-thirds of the class members are citizens of the same state as the primary defendants. In this case, the federal district court cannot hear the case and “shall” remand it to state court.

The second scenario is where more than one-third but less than two-thirds of proposed class members are citizens of the same state as the primary defendants. In this situation, the courts may decline to hear the case and have the discretion to remand it to state court in the “interests of justice.”

The third scenario is where less than one-third of the class members are citizens of the same state as the primary defendant. In this event, the federal court lacks discretion and must adjudicate the class action. To be clear, CAFA does not explicitly require federal courts to exercise jurisdiction over any class action. It is possible that the plaintiffs will file suit in state court and the defendants will choose not to remove the case to federal court. In that instance, the state court may adjudicate the class action. However, this outcome is highly unlikely because defendants perceive federal court to be friendlier to them.

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

Id.

106. See S. Rep. No. 109-14, at 36-38, reprinted in 2005 U.S.C.C.A.N. at 35-37. Congress intended this to be a narrow exception, as well as one “that was carefully drafted to ensure that it does not become a jurisdictional loophole.” Id. at 39, reprinted in 2005 U.S.C.C.A.N. at 38.


109. Id. § 4, 119 Stat. at 9-10 (to be codified at 28 U.S.C. § 1332(d)(3)).

110. Allan Kanner, Interpreting the Class Action Fairness Act in a Truly Fair Manner, 80 Tul. L. Rev. 1645, 1666-67 (2006) (“The reason fewer class actions are tried in federal courts is due more to hostility of the class action mechanism by federal courts, which has
Additionally, an individual plaintiff can still bring an action on her own behalf. Assuming there is no other federal jurisdictional hook, a state court will be the only forum available to adjudicate the case. This is unlikely, however, because most plaintiffs will be unwilling to bring an individual action to recover a small amount of damages.\footnote{111}

Most likely, in the above situation, the plaintiffs will file as a class in state court, and the defendants will remove the class action to federal district court under § 1453 because they perceive the federal court to be friendlier to them. In this instance, the district court cannot decline to hear the case, and federal jurisdiction over these class actions is, in effect, exclusive.\footnote{112} This creates a situation similar to the exclusive jurisdiction provisions of the aforementioned hypothetical class action statute.\footnote{113} Consequently, CAFA causes federal courts to contravene the \textit{Erie} doctrine.

E. Diversity Class Actions and the \textit{Erie} Doctrine

Because CAFA class actions are based on diversity jurisdiction, every CAFA class action will be subject to the strictures of the \textit{Erie} doctrine. Prior to \textit{Erie}, under the holding of \textit{Swift v. Tyson},\footnote{114} federal courts applied their version of what they thought the proper substantive law should be when sitting in diversity and ignored state common law.\footnote{115} Federal courts created a “general commercial law” that oftentimes differed from the common law of the state in which the court sat.\footnote{116} This led to “vertical forum shopping.”\footnote{117} Plaintiffs attempted to get into federal court or stay out of federal court because the outcome of their case could be different under the federal or state common law.\footnote{118} As Justice

\footnote{\textquoteleft\textquoteleft\textit{resulted in . . . increasing denial[s] of class action certification.}\textquoteright\textquoteright} (quoting M. Jared Marsh, Comment, The Class Action Lack of Fairness Act of 2002: Congress Attempts to Federalize Class Action Lawsuits, 71 UMKC L. Rev. 151, 151 (2002)).

\footnote{111. For example, plaintiffs will be unwilling to bring individual claims on their own behalf to recover $3.90. See Kay, supra note 15.}

\footnote{112. See 28 U.S.C.A. § 1332(d)(2) (establishing the statutory baseline of federal jurisdiction over this type of class action).}

\footnote{113. See Sherman, supra note 16, at 1608 (“After CAFA, the federal courts are essentially ‘the only game in town’ for multistate and national class actions.”).}

\footnote{114. 41 U.S. (16 Pet.) 1 (1842) (finding that the federal courts had the power to discern a generally applicable federal common law).}

\footnote{115. \textit{Erie R.R. Co. v. Tompkins}, 304 U.S. 64, 71 (1938).}

\footnote{116. \textit{Id.} at 75.}

\footnote{117. \textit{See id.} at 76–77 (describing what is currently known as vertical forum shopping).}

\footnote{118. \textit{See id.} The Court stated, [T]he discrimination resulted from the wide range of persons held entitled to avail themselves of the federal rule by resort to the diversity of citizenship jurisdiction. Through this jurisdiction individual citizens willing to remove from their own State and become citizens of another might avail themselves of the federal rule by re-incorporating under the laws of another State . . . .}

\textit{Id.} For a much maligned example of vertical forum shopping, see \textit{Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab Transfer Co.}, 276 U.S. 518 (1928). In this case, a
Louis Brandeis explained, “[Swift] made rights enjoyed under the unwritten ‘general law’ vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen.”

Under Swift, the litigants’ vertical choice of forum between state and federal court affected the outcome of the litigation.

The Erie Court was concerned with the practice of vertical forum shopping. Consequently, in Erie, the Court overruled Swift. The Erie Court held that federal courts have no power to create or develop “substantive rules of common law applicable in a State whether they be local in their nature or ‘general,’ be they commercial law or a part of the law of torts.” Accordingly, the Erie doctrine requires federal courts sitting in diversity to apply state substantive law. Because the main purpose of diversity jurisdiction was to prevent state courts from mistreating out-of-state litigants, federal courts sitting in diversity had no authority to change any state substantive right or rule of decision. When sitting in diversity, the federal court system’s only function was to apply state laws fairly.

The Court further held that Congress also cannot establish substantive rules of decision with respect to these matters. Neither the courts nor Congress can create rules of law unless they are authorized by a section of the Constitution. When the federal courts, sitting in diversity, created general federal common law, they were acting unconstitutionally because they had no express constitutional authority to create substantive common law. Except for the federal Constitution and federal statutes, “the law to be applied in any case is the law of the State.”

Kentucky company reincorporated in Tennessee in order to create diversity of citizenship and get its case into federal court, where the substantive law was much more favorable to its position. Ironically, the same concern presents itself with CAFA: Plaintiffs will seek to construct their complaint so that they avoid federal court. See Andrée Sophia Blumstein, A New Road to Resolution: The Class Action Fairness Act of 2005, 41 Tenn. B.J. 16, 23 (2005) (“It is not difficult to imagine various ways in which resourceful class counsel may manage to keep their state law class actions in state court . . . .”).

119. Erie, 304 U.S. at 74-75.
120. Id. at 76–77.
121. Id. at 75–76.
122. Id. at 78.
123. Id. (“Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state . . . . There is no federal general common law.”).
124. Id. at 74.
125. Id.
126. 19 Wright et al., supra note 1, § 4506.
127. Erie, 304 U.S. at 78. (“Congress has no power to declare substantive rules of common law applicable in a state . . . .”)
128. See 19 Wright, et al., supra note 1, § 4505.
129. Erie, 304 U.S. at 78.
130. Id.
The *Erie* Court also held that state decisional common law and state statutory law are both included among the “laws of the several states” mentioned in the RDA.\textsuperscript{131} The RDA requires U.S. courts to apply “[t]he laws of the several states . . . as rules of decision in civil actions in the courts of the United States, in cases where they apply.”\textsuperscript{132} Federal courts were violating the RDA by creating and applying general federal common law in areas where the state was authorized to exercise its authority.\textsuperscript{133}

Thus, the *Erie* doctrine requires federal courts hearing interstate class actions founded on the diversity statute\textsuperscript{134} to apply the substantive law of the state in which the federal court sits. Because CAFA extends federal jurisdiction to minimally diverse interstate class actions, a large number of class actions will in effect be heard exclusively in federal court.\textsuperscript{135} Defendants will always want to remove class actions to federal court because it is perceived to be more defendant-friendly.\textsuperscript{136} The federal courts, in turn, are bound by *Erie* to apply the state substantive law that governs the action.\textsuperscript{137} Yet, state courts will not have an opportunity to create common law in those areas where federal courts will exercise exclusive jurisdiction.

Vertical forum shopping, the *Erie* doctrine, and principles of federalism and democracy all ignited the Congressional debate over CAFA. CAFA’s proponents were concerned about state judicial abuses that encouraged plaintiffs to choose state court over federal court.\textsuperscript{138} They also argued that state courts improperly applied their own laws outside of the geographical boundaries of their home state.\textsuperscript{139} CAFA’s opponents were concerned about the *Erie* doctrine implications of extending practically exclusive federal jurisdiction over state-law-based class actions. Other critics argued that with CAFA, Congress passed a procedural statute that, in practice, affects substantive tort reform.\textsuperscript{140} These critics assert that this conduct conflicts with core principles of democratic theory.\textsuperscript{141} The next section explores Congress’s rationale for CAFA and opponents’ critiques of CAFA in detail.

\begin{itemize}
\item \textsuperscript{131} See id. at 79. The Court went out of its way to note that it was not holding § 34 of the Judiciary Act (the diversity statute’s antecedent) unconstitutional. *Id.* at 79-80.
\item \textsuperscript{133} See *Erie*, 304 U.S. at 78.
\item \textsuperscript{135} See supra Part II.B.2 and accompanying text.
\item \textsuperscript{136} See id.
\item \textsuperscript{137} See *Erie*, 304 U.S. at 78.
\item \textsuperscript{139} See id., reprinted in 2005 U.S.C.C.A.N. at 56-57.
\item \textsuperscript{140} See *infra* Part II.B.1 and accompanying text.
\item \textsuperscript{141} See id.
\end{itemize}
II. THE CONTROVERSY OVER CAFA: STATE JUDICIARY ABUSES, FALSE FEDERALISM, AND ERIE

A. Congressional Concerns with the Pre-CAFA Class Action Landscape

1. Forum Shopping Concerns: Jurisdictional Manipulation

The Senate issued extensive findings outlining their reasons for passing CAFA.142 The theme supporting all of their arguments was the notion that the plaintiffs’ bar manipulated the complete diversity doctrine in order to avoid federal jurisdiction in diversity class actions.143 The Senate contended that the plaintiffs’ bar added named plaintiffs in order to destroy complete diversity and force class actions into state court, which the plaintiffs’ bar perceived to be more plaintiff-friendly.144 The Senate reasoned that this “vertical forum shopping” was undesirable because states were unable to adjudicate national class actions fairly.145 Consequently, the Senate argued that the only way to solve this problem was by expanding federal jurisdiction over class actions because federal courts could adjudicate them fairly, without a pro-plaintiff bias.146


Another related problem that prompted Congress to pass CAFA was the concern over “magnet” state courts. Magnet state courts were state courts that were applying more lenient standards for certifying classes than the federal system.147 The Senate dubbed those courts’ approach to certification the “I never met a class action I didn’t like” method of certification.148 Because those states had more lenient certification standards, plaintiffs were more likely to file class actions in state court in those states.149

143. See id. at 10, reprinted in 2005 U.S.C.C.A.N. at 11 (“In interstate class actions, plaintiffs’ counsel frequently and purposely evade federal jurisdiction by adding named plaintiffs or defendants simply based on their state of citizenship in order to defeat complete diversity.”).
149. See id. at 23, reprinted in 2005 U.S.C.C.A.N. at 23 (“Copy cat class actions clog the courts and permit forum shopping.”).
The Senate then tried to ascertain why there were differences between state and federal court certification standards in those magnet state courts. They found that the state rules that outlined class action certification standards were substantially similar to Federal Rule of Civil Procedure 23 in most jurisdictions. State judges were simply applying Rule 23 differently than federal judges. This resulted in state judges improperly certifying nationwide classes. One example that the Senate offered in its findings was Madison County, Illinois. In the state court located in Madison County, the number of class actions filed grew from two in 1998 to thirty-nine in 2000. Many of those class actions had no real relation to Madison County itself—they were nationwide in character. The plaintiffs filed in Madison County because they perceived it to be favorable to certification. This led some advocates to dub Madison a "judicial hellhole."

3. Judicial Hellholes

The American Tort Reform Association (ATRA) conducted a study in 2004 where they determined the jurisdictions most favorable to class action certification. The "Hellhole Study" demonstrates Congress’s main concern with state adjudication of interstate class actions. The ATRA named Madison County, Illinois, the top judicial hellhole in 2004. It found that "travel agent" trial lawyers ... shop[ped] for the best forum to have their cases heard, regardless of whether the case ha[d] any logical connection to the local community." Because Madison County had overly broad venue rules, the ATRA argued that the county attracted these predatory plaintiffs' lawyers. This led the ATRA to dub Madison County a "Class Action Paradise" and the ATRA offered several

151. Id. at 13-14, reprinted in 2005 U.S.C.C.A.N. at 14 (noting that thirty-six states have adopted a class action certification rule modeled on Federal Rule 23); see also 735 Ill. Comp. Stat. 5/2-801 (1993). The Illinois state rule on class certification tracks Rule 23’s requirements nearly identically.
155. See generally id.
156. Id. at 14.
157. Id. at 14.
158. See id. ("[Madison’s venue rules] allow claims to proceed . . . where the plaintiff and defendant are located out-of-state, the plaintiff’s exposure occurred outside the state, medical treatment was provided outside the state, no witnesses live in Illinois, and no evidence relates to the state.").
159. Id. The study notes that the number of class actions filed in Madison County has grown substantially each year, ranging from two in 1998 to one hundred and six in 2003. Id. at 15.
examples where Madison County courts adjudicated interstate class actions with national effects.\(^{160}\)

The ATRA contended that “local judges . . . ‘frequently decided to hear cases that other [federal] courts have refused to hear,’”\(^{161}\) and also that judges in Madison and other judicial hellholes improperly “certif[ied] classes that do not have a sufficient commonality of facts or law.”\(^{162}\) Congress sided with the ATRA and considered state judicial laxity towards certifying interstate classes, typified by the Hellhole Study, a significant problem. It argued that this practice encouraged vertical forum shopping, one of the main concerns of the *Erie* Court.\(^{163}\)

There are two types of forum shopping, horizontal and vertical. Because the laws among the fifty states diverge, horizontal forum shopping occurs when litigants pick one state over another because the chosen state has more favorable laws.\(^{164}\) Vertical forum shopping was the main concern of the *Erie* Court. It occurs when federal courts sitting in diversity apply different substantive law than state courts.\(^{165}\) The difference in outcome between state and federal court causes litigants to attempt to establish or defeat federal jurisdiction, based on the favorability of the outcome in federal court.\(^{166}\)

The Senate was especially concerned about this problem and devoted an entire section in their findings to it.\(^{167}\) The ATRA echoed this sentiment by enumerating several interstate class actions brought in Madison County, all of which were brought by the same plaintiffs’ law firm.\(^{168}\)

The Senate was concerned about plaintiffs shopping between state court and federal court because, in states like Illinois, there was a greater probability that a Madison County state court would certify a nationwide class than an Illinois federal court.\(^{169}\) This encouraged litigants to avoid

\(^{160}\) See id. at 15-16. Examples given include a products liability case brought against Ford, a fraudulent advertising claim against Intel, a products liability case brought against Sears Roebuck, and a case against American Express for overcharging customers. See id. at 15. It should be noted that all of these cases involve national or multinational corporations and nationally known and sold products and therefore ostensibly are interstate in nature.

\(^{161}\) Id. at 15 (quoting Amity Shales, Commentary, Big Judgments, Bigger Mistakes: Legal Windfalls in Madison County Demonstrate the Need to Limit Forum Shopping of Class-Action Lawsuits, Chi. Trib., June 29, 2004, at 15).


\(^{163}\) See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 76-77 (1938).

\(^{164}\) See *Hanna v. Plumer*, 380 U.S. 460, 467-68 (1965) (noting that one of the “twin aims” of the *Erie* doctrine was to discourage forum shopping between federal and state court).

\(^{165}\) See *Erie*, 304 U.S. at 76-77.

\(^{166}\) See *Hanna*, 380 U.S. at 467-68.


\(^{168}\) See *Hellhole Study*, supra note 154, at 15; supra note 160 and accompanying text.

federal court by drafting their pleadings creatively in order to destroy federal jurisdiction. Consequently, plaintiffs’ lawyers attempted to select the forum that was most favorable to class action litigation.170

The ATRA argued that in order to dissuade opportunistic plaintiffs’ lawyers from vertical forum shopping, Congress should “[p]reserve[] the [a]uthority of [f]ederal [c]ourts to [h]ear [i]nterstate class actions.”171 In order to do this, they advocated that Congress shift all interstate class actions to federal court.172

But, the ATRA’s solution does not address horizontal forum shopping concerns. The differences in state substantive law will still encourage horizontal forum shopping, as plaintiffs have the incentive to file lawsuits in states with the most favorable substantive law.173 Furthermore, *Erie* did not abrogate the state courts’ right to apply a different class action certification standard than the federal standard. Neither did *Erie* restrain the state courts’ ability to adjudicate state law claims. *Erie*, in fact, preserved the sovereignty of state law.174 Federal courts sitting in diversity must still apply state substantive law. Congress must pass a statute in order to change the substantive rules of decision in federal court. CAFA, however, does not alter state substantive law, or attempt to acknowledge the horizontal forum shopping problem.175

4. False Federalism

a. *Congressional Concerns About Improper State Influence over Other States*

The Senate was also concerned that state courts, by adjudicating nationwide class actions, were exercising too much authority over out-of-state citizens.176 The Senate argued that it was improper for one state to apply its laws nationally.177 Consequently, the Senate contended that class actions with nationwide impact should be heard in federal court. As the Senate argued in its findings, “[w]hy should an Alabama state court tell 20 million people in all 50 states what kind of airbags they can have in their
The Senate reasoned that state courts do not have the power to influence behavior outside their own state. The Senate dubbed this practice "false federalism." Traditional principles of federalism, the Senate argued, require that state courts' power be restricted to within their own borders. Only the federal court system should make national decisions that affect citizens of other states.

The Senate further insisted that it is the province of the federal government to step in and enforce the boundaries between the states so that one state does not usurp the legal system of another. For example, consider a state law products liability case. Because manufacturers have no practical way of keeping their products out of any particular state, plaintiffs can choose among several states and select the jurisdiction in which the laws are most favorable to their claim. This is a concern because when states impose their laws on the country at large, state courts shift money and resources from out-of-state corporations to in-state plaintiffs. As a result, state courts undermine one of the core principles of federalism: States are independent entities that should exercise sovereignty only over their own territory.

b. Avery v. State Farm and Its Ilk

In support of their contention that state courts were improperly applying state laws to out-of-state citizens, Congress furnished the specific example

181. See id. at 23-24, reprinted in 2005 U.S.C.C.A.N. at 24. The Senate was concerned with enforcing the limits of state sovereignty. This is a situation where the Senate felt it was the federal government's responsibility to step in and restrict the influence that one state can exert over another via adjudication of nationwide class actions in state courts. See id. at 26, reprinted in 2005 U.S.C.C.A.N. at 26.
183. See id.
184. Id.
185. Id.
186. Id. at 99; see generally S. Rep. No. 109-14 reprinted in 2005 U.S.C.C.A.N. 3. However, if a corporation is purposefully availing itself of business within a jurisdiction, then it is foreseeable that it will be subject to that jurisdiction's regulation and possibly haled into court and subject to its laws. This seems more like a due process problem than a federalism problem. For an elaboration of this concept, see infra Part II.B.4.
of *Avery v. State Farm Mutual Automobile Insurance Co.*, a widely publicized case that illustrates some of the dangers of allowing state courts to adjudicate interstate class actions.

In *Avery*, a nationwide class of plaintiffs sued State Farm, a national insurance company, under Illinois consumer protection and contract law. However, several other states’ laws directly contradicted Illinois’ laws and expressly permitted State Farm to perform the activity that the plaintiffs alleged caused them harm.

Illinois’ substantive law created a cause of action for the nationwide class of plaintiffs, but the *Avery* class itself failed to meet several of Rule 23’s requirements for certification. Most importantly, the plaintiffs could not show that there were “questions of fact or law common to the class” because contradictory state laws would apply to the nationwide class. Nevertheless, the state trial court certified the nationwide class and allowed the class action to proceed.

Congress considered *Avery* symptomatic of the larger problem of state courts improperly certifying nationwide classes and applying state laws to out-of-state citizens. State courts, like the trial court in *Avery*, improperly certified classes in situations where many states’ laws could potentially apply to the class. In those cases, it is clear that the plaintiffs’ classes did not satisfy the commonality-of-law requirement of Federal Rule of Civil Procedure 23. However, state judges were applying Rule 23 differently than federal judges. The Senate found that these state judges were applying Rule 23’s certification requirements improperly, and as a result:

187. 746 N.E.2d 1242, 1254, 1257 (Ill. App. Ct. 2001) (affirming the certification of a nationwide plaintiff class with respect to an action against State Farm for breach of contract claims), aff’d in part, rev’d in part, 835 N.E.2d 801 (Ill. 2005) (holding that it was an abuse of discretion for the trial court to certify the class of nationwide plaintiffs seeking restitution for breach of contract claims because that group lacked commonality of claims).


190. See 735 Ill. Comp. Stat. 5/2-801(2) (1998); *Cf. Avery*, 835 N.E.2d at 819 (noting that the Illinois statute is modeled after Federal Rule of Civil Procedure 23, and therefore federal interpretations of Rule 23 are “persuasive authority”). Note that Illinois’ highest court did eventually overturn the certification decision, so the state did make the correct certification decision, albeit belatedly. *Id.*


192. See id. at 14, reprinted in 2005 U.S.C.C.A.N. at 14 (chiding state judges for their “lax” attitude towards applying class certification requirements).

consequence, they were incorrectly certifying nationwide classes.\textsuperscript{194} Congress argued that the only solution to this problem was to shift interstate class actions into federal court, where federal judges would correctly apply the class certification standards of Rule 23.\textsuperscript{195}

\textbf{B. Problems that CAFA Has Created}

CAFA’s critics claim that the Senate and ATRA overestimated the gravity of the problem of state courts adjudicating interstate class actions. This section explores these critics’ arguments. Part II.B.1 describes CAFA’s relationship with the theory of “Procedural Swift,” where the government enacts substantive legislation under a procedural guise. Part II.B.2 outlines CAFA’s effect on the constitutional holding of \textit{Erie}. Part II.B.3 discusses CAFA’s effects on the Rules of Decision Act and the Rules Enabling Act. Part II.B.4 illustrates the view that the Senate vastly overstated its concerns over “False Federalism.”


CAFA is a jurisdictional statute that Congress passed in order to change the substantive outcomes of interstate class actions.\textsuperscript{196} Professor JoEllen Lind has dubbed this phenomenon “Procedural Swift.”\textsuperscript{197} Procedural Swift occurs when “the national government intentionally uses its power to displace substantive law historically reserved to the states, but indirectly.”\textsuperscript{198} Lind argues that the federal government sometimes attempts to reform state tort laws by creating federal procedural rules that present greater hurdles for plaintiffs to recover under state law. If federal procedural rules displace state substantive law in federal courts, it encourages vertical forum shopping.\textsuperscript{199} Litigants will attempt to draft their complaint in order to gain entry into whichever court they perceive to be more favorable to their case.\textsuperscript{200}

Lind contends that Procedural Swift is harmful because it erodes many core democratic principles, such as transparency in the lawmaking process, political participation, and accountability.\textsuperscript{201} Because “procedural principles are technical and arcane, by their nature they limit the

\begin{footnotesize}
\begin{enumerate}
\item Id. at 22, reprinted in 2005 U.S.C.C.A.N. at 22-23 (illustrating examples of national classes that state court judges certified while federal judges did not).
\item Id. at 718-19.
\item See id. at 717 (“[P]rocedural differences in the federal courts typically disadvantage plaintiffs, not defendants, and so provide an increasing incentive for defendant forum shopping.”).
\item See id.
\item See id. at 720.
\end{enumerate}
\end{footnotesize}
information to people to make good decisions about the policy issues that are at stake.”202 Procedural changes are difficult for citizens to understand, and therefore it is difficult for citizens to predict their likely effects.203 As a result, procedural legislation is opaque lawmaking that has anti-democratic consequences.204 The people cannot hold their representatives accountable for passing a statute if the electorate is not cognizant of that statute’s effects.205

Procedural Swift also conflicts with traditional notions of federalism. In our federalist system, the states are the primary venues where citizens can participate in the governmental process.206 The states are also the guardians of individual rights and liberties.207 Lind maintains that because average citizens are far removed from the operation of the federal government, Procedural Swift removes the people’s ability to participate in the state governmental process.208 Consequently, Procedural Swift usurps citizens’ power to self-regulate their everyday relations because “procedural maneuvering at the national level takes place one step removed from the political process of state lawmaking.”209

Lind argues that with CAFA, Congress engaged in Procedural Swift by enlarging the scope of diversity jurisdiction over interstate class actions.210 She asserts that “[i]t is not hard to see that the purpose of the legislation is to employ another procedural tool—manipulation of diversity jurisdiction—to produce a different substantive outcome.”211 Accordingly, with CAFA, Congress stealthily utilized Federal Rule of Civil Procedure 23 to enact national substantive tort reform.

Rule 23 by itself most likely “really regulates procedure”212 and does “not abridge, enlarge or modify any substantive right.”213 It thus would pass the Rules Enabling Act test that the Court outlined in *Hanna v. Plumer*.214 However, as Rule 23 is applied to interstate class actions, it limits plaintiffs’ right to have their cases adjudicated. Congress did not choose to directly enact a substantive tort reform statute based on the authority granted by the Commerce Clause.215 Instead, as Lind asserts,

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202. *Id.*
203. *Id.*
204. *Id.*
205. *See id.*
206. *Id.* at 721-22.
207. *Id.*
208. *Id.* at 717.
209. *See id.* at 722.
211. *Id.* at 756.
214. 380 U.S. 460, 464-65 (1965); *see also infra* Part II.B.3.d.
215. For an argument that Congress could adopt substantive tort legislation governing interstate class actions based on the Commerce Clause, see *Jonathan R. Macey & Geoffrey*
Congress chose to change the substantive outcome of class actions by using a federal procedural device.

Lind posits that by legislating substantively with a procedural device, Congress sidestepped democratic responsibility in passing CAFA. This, Lind contends, is backdoor tort reform.

2. CAFA Causes Federal Courts to Create Substantive Common Law

Other critics argue that CAFA contravenes the *Erie* doctrine. Those critics are concerned with the federal court system’s lack of constitutional authority to create law. In practice, CAFA enacts exclusive federal jurisdiction over some interstate class actions. If any potential class members are citizens of the same state as any defendant, the federal court has original jurisdiction over that class action. Because those class actions are based on diversity jurisdiction, *Erie* requires the federal court to apply the state substantive law that governs the plaintiffs’ underlying claim.

However, under CAFA, state courts will most likely never hear these cases. Although the plain language of CAFA does not technically extend exclusive jurisdiction over interstate class actions to federal courts, the effect of CAFA will be to force interstate class actions into federal court. Defendants will always remove class actions to federal court because they perceive the federal courts to be more defendant-friendly than state courts. Furthermore, because minimal diversity is such a lenient jurisdictional standard, it is likely that the federal courts will have original jurisdiction over many class actions. Additionally, because the economy is now nationally integrated, the activities of one company regularly reach consumers in more than one state.

Because “many [CAFA] class actions . . . like consumer class actions . . . are not financially viable as individual cases,” plaintiffs will be unlikely to bring individual claims based on the underlying state law in state court.
Hence, CAFA’s practical effect will be to create a situation in which federal courts exert exclusive jurisdiction over some state-law based class actions.\textsuperscript{226}\textsuperscript{227}

As a result of CAFA, the federal courts “will inappropriately usurp the primary role of state courts in developing their own state tort and contract laws, and will impair their ability to establish consistent interpretations of those laws.”\textsuperscript{228} Because state courts will be restricted from hearing most or all interstate class actions, they will never have a chance to create law in those areas. “The likely effect of CAFA will then be to allow [federal courts to create] a body of national law . . . that corresponds to the demands of an undifferentiated [national] market.”\textsuperscript{229} Federal courts will lack any “relevant source of authority for how to handle similar problems” that arise in the context of class actions.\textsuperscript{230} Consequently, federal courts will, out of necessity, develop a generalized federal commercial common law of class actions.\textsuperscript{231}

This is an unacceptable and unconstitutional practice in light of the Court’s holding in \textit{Erie}. Under \textit{Erie}, federal courts do not have the constitutional authority to develop substantive federal common law.\textsuperscript{232} CAFA therefore directs federal judges to act unconstitutionally by creating a substantive federal common law of interstate class actions, which is outside the scope of their constitutional power under Article III.\textsuperscript{233}

3. The Practical Result of CAFA in Light of the Aims of \textit{Erie}

a. \textit{CAFA May Be Outcome Determinative}

Another major concern of the \textit{Erie} Court was the risk of forum shopping. The differences between the general federal commercial law that developed after \textit{Swift v. Tyson}\textsuperscript{234} and state commercial law led litigants to select either federal or state court based on the favorability of the chosen forum’s laws.\textsuperscript{235} Consequently, the \textit{Erie} Court held that federal courts sitting in

\begin{itemize}
  \item \textsuperscript{226} For a general explanation of exclusive federal jurisdiction, see 13 Wright et al., \textit{supra} note 1, § 3527.
  \item \textsuperscript{227} \textit{See supra} note 16 and accompanying text.
  \item \textsuperscript{229} \textit{Isacharoff & Sharkey, supra} note 17, at 1419.
  \item \textsuperscript{230} \textit{Id}.
  \item \textsuperscript{231} \textit{Id.} at 1420.
  \item \textsuperscript{232} \textit{See Erie R.R. Co. v. Tompkins}, 304 U.S. 64, 78 (1938).
  \item \textsuperscript{233} \textit{Cf. Patrick Woolley, Erie and Choice of Law After the Class Action Fairness Act}, 80 Tul. L. Rev. 1723, 1767 (2006) (arguing that if federal courts were to develop independent choice-of-law rules for diversity cases, it “would undermine the basic constitutional holding of \textit{Erie}”).
  \item \textsuperscript{234} 41 U.S. (16 Pet.) 1 (1842).
  \item \textsuperscript{235} \textit{Erie}, 304 U.S. at 78.
\end{itemize}
diversity should “apply state law fairly” so that the outcome between the two forums was as similar as possible to discourage shopping between the two court systems.\textsuperscript{236}

With CAFA, Congress intended to shift interstate class actions based on state law into the federal court system because of the lesser probability that federal courts would certify an interstate class action under the standards outlined by Federal Rule of Civil Procedure 23.\textsuperscript{237} CAFA, therefore, working in conjunction with Rule 23, may be outcome determinative and may encourage vertical forum shopping in the same way the Court disaffirmed in \textit{Erie}.

Rule 23 defines class action certification standards in federal court.\textsuperscript{238} It requires federal judges to “find[] that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members.”\textsuperscript{239} However, Rule 23 is a procedural rule that applies to only certification. \textit{Erie} requires federal courts sitting in diversity to apply state substantive law.\textsuperscript{240} In a national class action, a federal court may be obligated by \textit{Erie} to apply fifty different states’ laws to one class of plaintiffs. One consequence of the lack of uniformity among state laws is that the \textit{Erie} doctrine makes it more difficult for a potential interstate plaintiffs’ class to satisfy Rule 23’s commonality of law requirement in interstate class actions.\textsuperscript{241} If fifty different state laws apply to one national class of plaintiffs, it is unlikely that the applicable law will be “common” enough to merit certification under Rule 23.\textsuperscript{242}

Thus, CAFA and Rule 23 encourage plaintiffs to avoid federal jurisdiction. CAFA creates a great incentive for plaintiffs to tailor their complaints in order to avoid the federal court system. Defendants, in turn,

\textsuperscript{236} Id.
\textsuperscript{237} See James Pfander, \textit{The Substance and Procedure of Class Action Reform}, 93 Ill. B.J. 144, 144 (2005). For a discussion of federal certification standards, see \textit{supra} Part I.A.
\textsuperscript{238} Fed. R. Civ. P. 23.
\textsuperscript{239} Fed. R. Civ. P. 23(b)(3).
\textsuperscript{240} See \textit{Erie}, 304 U.S. at 78.
\textsuperscript{242} See \textit{In re} Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1302 (7th Cir. 1995). In \textit{Rhone-Poulenc}, the plaintiffs contracted HIV from infected blood. They sued the drug companies who manufactured the blood solids from which they contracted the virus. \textit{Id.} at 1294. The U.S. Court of Appeals for the Seventh Circuit ordered decertification of the nationwide class of plaintiffs. \textit{Id.} at 1297. The court concluded that the thousands of members of the plaintiff class . . . will have their duties determined, under a law that is merely an amalgam, an averaging, of the nonidentical negligence laws of 51 jurisdictions. No one doubts that Congress could constitutionally prescribe a uniform standard of liability for manufacturers . . . . [But] \{the point of \textit{Erie}\} is that Article III of the Constitution does not empower the federal courts to create such a regime for diversity cases. \textit{Id.} at 1302.
CAFA and ERIE

will attempt to remove class actions from state court to get into the much more defendant-friendly federal court system.

This seems like a return to the days of *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.* In that case, a Tennessee corporation dissolved itself and reincorporated in Kentucky in order to create diversity of citizenship and establish federal jurisdiction. The corporation undertook these actions because the federal court would apply federal common commercial law, which was much more favorable to the defendants than Tennessee state law. CAFA encourages similar behavior on both sides; plaintiffs will want to get into state court, and defendants will want to stay out of state court. But, because minimal diversity is such a lenient standard, and because CAFA class actions will most likely involve corporations where at least some of the alleged misconduct was of an interstate nature, defense attorneys will have an easier time crafting their complaints in order to establish minimal diversity and gain access to the federal court system.

Moreover, the same problem that prompted Congress to enact CAFA—horizontal forum shopping—could arise in the federal court system. Plaintiffs will continue to seek out “magnet” courts in districts and circuits that are certification-friendly. This will result in an increase in class action filings in those magnet courts. Consequently, CAFA, in conjunction with Rule 23, will encourage both vertical and horizontal forum shopping.

b. CAFA and the Rules Enabling Act

The Rules Enabling Act authorizes the Supreme Court to create rules of procedure for cases in the federal district courts. Such rules cannot “abridge, enlarge or modify any substantive right.” The Supreme Court issued Rule 23 pursuant to its authority under the REA. As Rule 23 now interacts with CAFA, however, it is questionable whether Rule 23’s certification requirements abridge the substantive rights of a national class of plaintiffs, because CAFA makes it more difficult for plaintiffs to get a

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243. 276 U.S. 518 (1928).
244. See id. at 523-24.
245. See generally id.
246. See Blumstein, supra note 118, at 23; Kay, supra note 15 (describing the kinds of class action cases that will generally be heard in federal court after CAFA). One example of these kinds of class actions involves The Home Depot, a national chain that has 1061 retail locations nationwide. See Kay, supra note 15 and accompanying text.
248. Id.
250. Id. § 2072(b).
Accordingly, CAFA makes it more difficult for plaintiffs to assert their substantive rights under state law. Congress clearly intended to change the outcome of class actions by placing them in a forum where they are less likely to be certified. Congress used a procedural device—diversity jurisdiction—to affect the substantive outcome of class actions. Congress recognized that federal judges will be less likely to certify interstate classes than some state judges.252

Fourteen states have chosen not to base their class action certification standards on Rule 23.253 In those states, CAFA makes a drastic change to state certification requirements that may abridge some substantive rights.254 Plaintiffs who would have been able to seek relief under state law prior to CAFA now will be subject to different, more stringent class certification requirements.255

c. CAFA Does Not Alter Rule 23 to Violate the Rules Enabling Act

Even though CAFA alters the outcome of interstate class actions and encourages forum shopping, it most likely does not violate the Rules Enabling Act. Under the Rules Enabling Act test outlined by the Supreme Court in Hanna v. Plumer,256 Rule 23 will most likely still be acceptable after CAFA. Class action certification standards affect the process for enforcing individual rights but not the substantive rights themselves because plaintiffs can still bring individual actions based on the underlying state substantive law.257 Although CAFA does place a substantial obstacle

251. See Daniel R. Karon, “How Do You Take Your Multi-State, Class Action Litigation? One Lump or Two?”—Infusing State Class-Action Jurisprudence into Federal, Multi-State Class Certification Analyses in a “CAFA-Nated” World, SL081 ALI-ABA 1503, 1513-14 (2006); see also 19 Wright et al., supra note 1, § 4509 (“It is also conceivable that unusual cases occasionally might arise in which . . . application of a Civil Rule (even to a matter it clearly comprehends) would intrude upon state substantive rights or policies to a degree that probably was not foreseen when the Rule was promulgated. In these rare cases, a federal court might not be able to rely on the presumptive validity of the Civil Rule and instead might have to determine independently whether, given the circumstances, the “substantive rights” proviso bars application of the Rule in that particular case.”).


254. See, e.g., Ragan v. Merch. Transfer & Warehouse Co., 337 U.S. 530, 533 (1949). Ragan concerned a diversity action in Kansas. Id. at 531. A Kansas state statute conflicted with Federal Rule of Civil Procedure 3, concerning when the statute of limitations was tolled. Id. The Court applied the state statute because the “cause of action is created by local law[; thus] the measure of it is to be found only in local law . . . . Otherwise there is a different measure of the cause of action in one court than in the other, and the principle of Erie[] is transgressed.” Id. at 533.


257. Id. at 464.
in the path of prospective state plaintiffs, Rule 23 still "really regulates procedure," because it does not technically abridge their substantive rights under state law.\textsuperscript{258}

However, the \textit{Hanna} test also has a practical prong that analyzes whether the questioned rule will be relevant to the litigants’ choice of forum.\textsuperscript{259} CAFA, in conjunction with Rule 23, will probably induce forum shopping in instances where the state and federal certification standards for class actions differ. Plaintiffs will try to remain in state court and defendants will try to get into federal court in those cases because the federal certification standard is likely to be stricter than the state standard. In those states, it is more questionable whether Rule 23 "really regulates procedure" because CAFA is intended to use Rule 23 to affect the substantive outcome of class actions.\textsuperscript{260}

d. \textit{CAFA and the Rules of Decision Act}

CAFA may also conflict with the Rules of Decision Act.\textsuperscript{261} The RDA requires federal courts sitting in diversity to apply state common law as the “rules of decision in civil actions in the courts of the United States.”\textsuperscript{262} The RDA problem is marked with respect to issues of first impression under state law.\textsuperscript{263}

For example, assume that defendants remove a class action to federal court under CAFA’s removal provisions. The class action’s jurisdiction is founded on diversity, so both \textit{Erie} and the RDA require the federal court to apply state substantive law. If the issue is one of first impression, no state court will have addressed this precise issue. Consequently, the federal court will decide the question, acting as if it were that state’s highest state court. The federal court’s decision will be subject to correction by a state court in subsequent cases. Yet, because CAFA in practice restricts jurisdiction over class actions based on this legal issue to federal court, no case concerning this issue will be ever brought in state court.\textsuperscript{264} As a result, there will be

\textsuperscript{258} Id. (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).
\textsuperscript{259} Id. at 468 (“The ‘outcome-determination’ test therefore cannot be read without reference to the twin aims of the \textit{Erie} rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.”).
\textsuperscript{260} Id. at 464 (quoting Sibbach, 312 U.S. at 14); see also Karon, supra note 251, at 1513-14 (arguing that the choice-of-law inquiry in national class actions may be a substantive question that requires federal judges to consider state class action certification jurisprudence).
\textsuperscript{262} Id.; see also Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78-80 (1938).
\textsuperscript{263} Kanner, supra note 110, at 1654 (“[CAFA] is particularly problematic when a case involves a novel state law claim, such as those concerning consumer fraud. Federal courts sitting in diversity cases are constantly admonished not to innovate and not to recognize novel claims that have not previously been recognized by state courts.”).
\textsuperscript{264} See Issacharoff & Sharkey, supra note 17, at 1419 (“Although CAFA declared its intent to leave \textit{Erie} untouched, once national-market cases are jurisdictionally isolated in
no state decisional law relating to the underlying substantive law claims for federal courts to apply in these cases. 265

Federal judges will, out of necessity, develop federal decisional law with respect to these state law issues. 266 This both usurps the state court’s role as the primary creator and interpreter of state law and prevents federal courts from applying state law as they are required to by the Act. If federal judges apply their own federal decisional law in diversity cases, it may violate the RDA. 267

4. CAFA and “False Federalism”: The Application of One State’s Laws to Other States is a Consequence Inherent to the Federal System

Some critics assert that the Senate overestimated the harmful consequences of False Federalism. It is true that in interstate class actions, one state can apply its laws to out-of-state citizens. However, False Federalism is a consequence of the Constitution’s division of power between the states and the federal government. 268 The application of one state’s laws to out-of-state citizens is not a federalism problem; it is a due process problem.

Federal courts sitting in diversity are bound by Erie to apply the state substantive law of the state in which they sit. 269 Thus, under Erie, where a state court is constitutionally authorized to apply its own law or choice-of-law rules to parties in an interstate class action, the federal court sitting in that state is bound to apply that state’s laws. 270

The due process limits of personal jurisdiction safeguard out-of-state citizens from being unfairly subjected to another state’s laws. 271 The Due

federal courts, the need to develop incremental decisional law to address the particular concerns of these cases will be inescapable.”).

265. See id. at 1419-20.
266. See id.
267. See Erie R.R. Co. v. Tompkins, 304 U.S. at 78. However, an argument can be made that the Rules of Decision Act does not actively prohibit federal courts from applying federal decisional law in the absence of state decisional law.

268. See Woolley, supra note 233, at 1735 (“[T]here was no basis for congressional confidence that application of the law of a single state in multistate . . . class suits invariably violates the Constitution.”).

269. Erie, 304 U.S. at 78.
270. See Floyd, supra note 11, at 657; Woolley, supra note 233, at 1769-70 (“Unless and until Congress enacts a choice-of-law policy that governs class suits, federal courts will remain rigidly bound by state choice-of-law rules.”); cf. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (holding that a federal court sitting in diversity must apply the conflict of laws rule of the state in which it sits).
271. See Floyd, supra note 11, at 657; see also Int’l Shoe Co. v. Washington, 326 U.S. 310, 316-17 (1945) (due process requires that when a person or corporation is subject to the jurisdiction of another state, that entity must have such “minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’” (quoting Milliken v. Meyer, 326 U.S. 310, 316 (1940))).
Process Clause\(^{272}\) limits one state’s jurisdiction over out-of-state citizens. As long as the state court determines that an out-of-state citizen should be subject to the laws of the state because she had a sufficient level of contact with the state to reasonably expect to be brought into court there, that state court may permissibly exercise jurisdiction over her.\(^{273}\) The Supreme Court has dealt with this issue in its line of personal jurisdiction cases.\(^{274}\) The structural division of power between the states and the national government permits states to apply their laws beyond their physical borders.\(^{275}\)

The Senate’s argument, that states were improperly applying their own laws over corporations in other states’ jurisdictions, is misguided. False federalism is not “judicial usurpation,”\(^{276}\) but is a necessary repercussion of the federal system and its division of power between state and national governments. States have the power to regulate activities occurring within their state, within the boundaries of constitutional due process.\(^{277}\)

### III. CONGRESS IMPROPERLY PASSED CAFA CONTRARY TO PRINCIPLES OF DEMOCRACY, FEDERALISM, AND THE ERIE DOCTRINE

This section adopts the views of CAFA’s critics. Part III.A first argues that Congress acted inappropriately in passing a procedural statute intended to affect substantive reform. Next, Part III.B contends that CAFA’s broad expansion of federal jurisdiction over minimally diverse interstate class actions exceeds the traditional policy basis for diversity jurisdiction. Part III.C then asserts that CAFA will compel federal courts to create federal common law, which violates the Court’s holding in \textit{Erie}. Finally, Part III.D closes with an example of a hypothetical class action that illustrates how CAFA will, in practice, cause the aforementioned problems to arise.

\(^{272}\) U.S. Const. amend. V (“[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . . .”); U.S. Const. amend. XIV, § 1 (“[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .”).

\(^{273}\) \textit{See} World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (describing the foreseeability requirement of personal jurisdiction: “[The] defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there”).

\(^{274}\) \textit{See}, \textit{e.g.}, \textit{Int’l Shoe}, 326 U.S. at 310.

\(^{275}\) \textit{See}, \textit{e.g.}, id.


\(^{277}\) \textit{See} Floyd, \textit{supra} note 11, at 657 (“Of course, states are constrained by due process limits that prevent them from applying their own law to transactions with which they have no significant contact or relation. But where such a connection does exist, they are free to apply their ordinary choice of law rules to transactions having interstate ramifications without violating the Commerce Clause or any other provision of the Constitution.” (footnote omitted)).
A. Congress May Have Acted Contrary to Well-Accepted Democratic Principles in Passing CAFA

Congress may have acted anti-democratically in enacting CAFA. If Congress wanted to directly enact substantive legislation governing interstate class actions, it almost certainly could. The Commerce Clause grants Congress broad authority to regulate interstate commerce. Interstate class actions most likely “substantially affect” interstate commerce, and thus it would be proper for Congress to develop substantive rules of decision for interstate class actions.

The problem is not what Congress did, but how Congress did it. Congress chose to enact CAFA, a procedural statute, rather than directly alter the substantive tort laws governing interstate class actions. Congress probably believed that it would be more difficult to enact direct tort reform legislation. CAFA, a jurisdictional statute, was likely less politically divisive than a direct tort reform statute would have been. Yet, in practice, CAFA will have the same effect as substantive tort reform. By shifting interstate class actions to federal court, Congress made it more difficult for plaintiffs’ lawyers to get nationwide classes certified. The Senate acknowledged that it intended to change the outcome of class actions that were being improperly certified by state courts. Hence, the Senate used CAFA to alter procedural rules that affect the substantive outcome of class action litigation.

By using a procedural apparatus to change substantive law, Congress infringed upon principles of democratic legitimacy. Jurisdictional statutes are necessarily arcane and complex. It is difficult for many to understand the significance of a change in a jurisdictional statute. By altering state substantive rules with a federal procedural device, Congress has made the lawmaking process more opaque and consequently more

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278. See Macey & Miller, supra note 215, at 910; see, e.g., United States v. Morrison, 529 U.S. 598, 609 (2000) (outlining the limits of Commerce Clause regulation). Congress could most likely regulate an interstate class action as business activity that “substantially affects” interstate commerce. Id.

279. See U.S. Const. art. I, § 8, cl. 3. See generally Morrison, 529 U.S. 598.

280. See Morrison, 529 U.S. at 609.

281. See generally Macey & Miller, supra note 215, at 910 (arguing that Congress can adopt substantive rules of decision governing interstate class actions based on its Commerce Clause power).


284. See Lind, supra note 197, at 720 (“I assume three hallmarks of a genuinely democratic system that should be noncontroversial: access to political participation, transparency in the process of lawmaking (whether by legislators or judges), and lawmakers’ accountability to the people for the consequences of their policy choices. Using procedure to affect substantive law undermines all three.”).

285. See id.

286. See id.
difficult for the people to hold their representatives accountable for their actions.287

Accountability is a key feature of democratic legitimacy.288 In order for the voters to hold their representatives accountable, they must be informed. The citizenry needs to be as informed as possible about the major changes that Congress makes that alter substantive rights. If the people do not understand the consequences of CAFA, they will be unable to make an informed decision as to whether they agree or disagree with their representative’s position.

For accountability to operate correctly, lawmaking must be transparent.289 When judge-made procedural law supplants state substantive law, “accountability is a faint hope, for federal judges enjoy lifetime tenure.”290 If unelected federal judges apply procedural rules that supplant state substantive law, it is undemocratic. Congress should legislate directly and clearly. Had Congress enacted a substantive statute rather than a jurisdictional statute, more citizens might have been aware of CAFA’s ramifications. This awareness might have spurred citizens to participate in the democratic process by phoning their representatives to express their disapproval of CAFA, or by voting their representatives out of office in the next election.

B. The Primary Policy Concern Behind the Diversity Clause Is Not Implicated by Most Interstate Class Actions

CAFA also contradicts the framers’ intent that the federal government consists of only limited and enumerated powers. The federal judiciary should only usurp state judicial power when there are serious national interests at stake.

The main reason the framers chose to include federal diversity jurisdiction in Article III was to prevent state courts from exercising prejudice against out-of-state litigants.291 None of the rationales that Congress chose to justify the need for CAFA implicate this policy concern.292

287. See id.
288. See id.
289. Id.
290. Id.
291. See supra Part I.B.1 and accompanying text (discussing the policy rationale for the Diversity Clause).
Had Congress argued that minimal diversity over class actions was necessary to prevent out-of-state defendants from experiencing prejudice in state courts, CAFA would have been more closely related to the original understanding of the need for diversity jurisdiction. But with CAFA, Congress was more concerned with the prejudice that one state’s class certification decision could have on citizens of other states. Thus, Congress’s rationale for extending diversity jurisdiction over interstate class actions was strained and unconnected to the purposes of the diversity clause.

There are situations in which a defendant in an interstate class action in state court will likely be subjected to prejudice. For instance, consider a products liability case based on state law on behalf of a class of Florida plaintiffs against an out-of-state car manufacturer and its in-state distributors for defective design. It is likely that none of the tortious activity took place in Florida and that the real defendant in interest is the mother corporation, yet the addition of the in-state subsidiaries destroys complete diversity and would, under the old class action regime, not be allowed into federal court.

In this scenario, a Florida court would adjudicate a class action on behalf of Florida residents against an out-of-state corporation. The risk of prejudice against the out-of-state corporation seems readily apparent; the Florida court has a greater obligation to the Florida citizens than a foreign corporation. It is precisely this kind of prejudice that the framers intended to alleviate by granting federal courts jurisdiction over “[c]ontroversies . . . between Citizens of different States.”

But there is no reason why a nationwide class action against an out-of-state defendant based on state laws cannot be fairly adjudicated by a state trial judge. Prejudice against out-of-state litigants should not be a significant issue, considering the fact that nationwide classes by definition must fairly represent the nationwide class’s interests. Furthermore, judicial economy favors the resolution of nationwide class claims in one court proceeding, rather than fifty different proceedings in fifty different states.

293. See Floyd, supra note 11, at 622 (noting that the traditional rationale for diversity jurisdiction is protecting out-of-state litigants from prejudice in state courts); see also supra Part I.B.1.


295. See supra note 98 for a description of the “defendant in interest” principle.

296. See Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 366 (1921) (applying the complete diversity requirement of Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806), to only the named parties in class actions).


298. For examples of the kinds of class actions that the Senate considered unfit for state court, see S. Rep. No. 109-14, at 38-39, reprinted in 2005 U.S.C.C.A.N. at 36-38, which outlines the difference between “national” and “local” actions, the former of which belongs in federal court.
C. CAFA May, in Practice, Cause Federal Courts to Violate the Constitutional Holding of Erie and Create Substantive Law

Congress, guided by the Erie Court’s concern over vertical forum shopping, enacted CAFA in order to create uniform application of interstate class action laws.\(^{299}\) Ironically, in effectively shifting all interstate class actions to federal court, Congress may have gone too far in attempting to prevent vertical forum shopping and may have forced federal courts to violate the second constitutional holding of Erie.\(^{300}\)

CAFA’s effect is to create exclusive federal jurisdiction over some state-law based interstate class actions.\(^{301}\) Consequently, CAFA effectively strips the state judiciary of its authority to create and interpret state laws governing some kinds of class actions.\(^{302}\) CAFA thus operates in contravention of the constitutional holding of Erie.\(^{303}\)

The Erie doctrine requires federal courts sitting in diversity to apply the substantive law of the state in which the court sits.\(^{304}\) Certain areas of state law, such as consumer protection law, however, will never be interpreted and developed by state courts.\(^{305}\) Federal courts will be forced, out of necessity, to develop their own substantive decisional law of interstate class actions.\(^{306}\) As a result, CAFA will force the federal courts to act outside the scope of their constitutionally granted authority under Article III.\(^{307}\) The federal courts have no constitutional authority to develop rules of substantive common law.\(^{308}\) Thus, CAFA in practice will cause the federal courts to act unconstitutionally, in violation of the Erie doctrine.

D. A Practical Example

An example can best illustrate how CAFA will, in practice, encourage forum shopping, cause lawyers on both sides to engage in gamesmanship, and force federal courts to create federal common law. Consider a recently filed class action against The Home Depot stores in Florida for overcharging 10% on tool rentals.\(^{309}\) The Home Depot is an Atlanta-based corporation, and the proposed plaintiff class is comprised of Florida

\(^{299}\) See S. Rep. No. 109-14, at 11, reprinted in 2005 U.S.C.C.A.N. at 12 (“This is not a recipe for uniformity or consistency, it is fair neither to claimants nor defendants and it is long past time for national policy makers to address class action procedures.”).
\(^{300}\) Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).
\(^{301}\) See supra Part II.B.2.
\(^{302}\) See supra Part II.B.2.
\(^{303}\) See Erie, 304 U.S. at 78.
\(^{304}\) See id.
\(^{305}\) See id.; Issacharoff & Sharkey, supra note 17, at 1419-20; supra Part I.B.2.
\(^{306}\) See Issacharoff & Sharkey, supra note 17, at 1419-20.
\(^{307}\) See U.S. Const. art. III.
\(^{308}\) See Issacharoff & Sharkey, supra note 17, at 1419-20; see also Erie, 304 U.S. at 78. See generally Woolley, supra note 233 (noting that CAFA may force federal courts to create a federal choice-of-law common law, in violation of the Court’s holding in Klaxon).
\(^{309}\) See Kay, supra note 15.
Before CAFA, the plaintiffs could have added the individual Florida stores as defendants to destroy diversity and have the case remanded to state court. After CAFA, the addition of same-state defendants does not matter—the corporation and the plaintiffs’ class are diverse. Thus, minimal diversity exists, and defendants can remove this class action to federal court.

The plaintiffs will then try to take advantage of CAFA’s two jurisdictional exceptions. The plaintiffs will first argue that the State Action exception should apply, because greater than two-thirds of class members are citizens of Florida. The Home Depot, however, is a citizen of Georgia for diversity purposes. The court is likely to determine that The Home Depot is the primary “defendant in interest” and therefore that the State Action exception does not apply.

Second, the plaintiffs will argue that the catchall exception should apply and the federal court should therefore decline jurisdiction. This exception requires that the judge find that between one-third and two-thirds of the plaintiffs are citizens of the same state as the primary defendants. The plaintiffs will argue that the local franchises are the primary defendants; defendants will argue that the mother corporation is the primary defendant. The defendants will further argue that the proposed class of plaintiffs should be expanded to include more non-Florida residents in order to reduce the number of same-state plaintiffs to less than one-third of the class and force the suit into federal court.

Because CAFA class actions generally involve interstate corporate activities, defendants will generally be able to successfully argue that the number of non-state citizens who should be in the plaintiff class is greater than the plaintiffs assert. It becomes readily apparent how CAFA provokes gamesmanship on both sides of class action litigation.

Assuming that the plaintiffs are able to tailor their complaints to avoid federal court, fifty different state courts may have to adjudicate fifty different class actions, which are all based on the same underlying occurrence. This will lead to a “greater expenditure of legal resources and [will] impose demands on a much larger number of courts.” It will further risk “inconsistent judgments” and “strategic settlements” throughout the nation.

310. Id.
311. See supra Part I.B.2 for an explanation of pre-CAFA diversity requirements.
312. See supra Part I.C.2 (describing the alterations CAFA made to the removal statute).
313. 28 U.S.C.A. § 1332(d)(4) (West 2005); see also supra Part I.C.
314. 28 U.S.C.A. § 1332(d)(4) (stating that the defendant must be “a citizen of the State in which the action was originally filed”).
315. Id. § 1332(d)(3).
316. See supra Part I.D.
318. Id.
319. Id.
CONCLUSION

Courts can take advantage of the § 1332(d)(3) jurisdictional carve-out and construe CAFA narrowly when it comes to state actions or areas where there is a substantial state interest involved in the litigation. Courts also have the discretion to define the scope of the proposed class members. Out of respect for the *Erie* doctrine, federal courts should interpret all of CAFA’s provisions with the goal of limiting federal jurisdiction over diversity class actions wherever possible. Only those class actions that are truly interstate in character should be adjudicated in federal court. The states should remain the primary creators and developers of substantive law.