



**Digital Commons@**

Loyola Marymount University  
LMU Loyola Law School

## Loyola of Los Angeles Law Review

---

Volume 33  
Number 4 *Symposium on New Directions in  
Federalism*

Article 10

---

6-1-2000

### Judicial v. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort Cases and Other Complex Litigation

Georgene Vairo

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

---

#### Recommended Citation

Georgene Vairo, *Judicial v. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort Cases and Other Complex Litigation*, 33 Loy. L.A. L. Rev. 1559 (2000).

Available at: <https://digitalcommons.lmu.edu/llr/vol33/iss4/10>

This Symposium is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact [digitalcommons@lmu.edu](mailto:digitalcommons@lmu.edu).

# JUDICIAL V. CONGRESSIONAL FEDERALISM: THE IMPLICATIONS OF THE NEW FEDERALISM DECISIONS ON MASS TORT CASES AND OTHER COMPLEX LITIGATION

*Georgene Vairo\**

*Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of national power. The Amendment confirms the promise implicit in the original document: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."*<sup>1</sup>

*"These are the same people who say we need to return power to the local level, to the individual level, and here they are now arguing to bring this back to the Federal Government. This is absolutely contrary to the horse that my colleagues rode to the Congress on, the states' rights horse."*<sup>2</sup>

---

\* Professor of Law and William M. Rains Fellow, Loyola Law School. I gratefully acknowledge and thank Larry Solum. His insightful comments helped me tame, to some degree, the rather farfetched arguments I propound here. I also acknowledge the participants at Loyola's Federalism Symposium in February 2000 for their thoughtful questions and comments. Thanks finally to Catherine Fisk and the *Loyola of Los Angeles Law Review* for inviting me to participate in the Symposium.

1. *Alden v. Maine*, 119 S. Ct. 2240, 2247 (1999) (Kennedy, J.) (quoting U.S. CONST. amend. X).

2. Stephen Labaton, *House Passes Bill that Would Limit Class-Action Suits*, N.Y. TIMES, Sept. 24, 1999, at A1 (quoting Rep. Melvin Watt, Dem., N.C.) (discussing his "states' rights" Republican colleagues' attempts to enact

## I. INTRODUCTION

In a remarkable series of cases, the United States Supreme Court has redefined the relationship of the federal government to the states.<sup>3</sup> As a proceduralist,<sup>4</sup> I undertake participation in this Federalism Symposium quite humbly. Other participants will expound on the very basic constitutional implications of the Supreme Court's recent federalism cases. Instead, I will focus on a more mundane, but somewhat related and equally important, trend. As the Supreme Court continues its campaign to end federalism as we know it, Congress has taken a surprisingly antifederalist approach to federal court jurisdiction.<sup>5</sup>

---

legislation that would have the effect of ousting the state courts from hearing diversity-based class actions).

3. See, e.g., *Alden v. Maine*, 119 S. Ct. 2240 (1999) (holding that Congress may not abrogate state sovereign immunity in state courts); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999) (holding that Congress lacks Section 5 enforcement power under the Fourteenth Amendment to abrogate state sovereign immunity in patent cases); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (holding that Congress could not abrogate sovereign immunity in Trademark Remedy Clarification Act under its Section 5 of the Fourteenth Amendment enforcement powers); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (noting that Congress lacks the power under its Article I Commerce Clause powers to abrogate state sovereign immunity in federal courts); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997) (holding that *Ex Parte Young* did not apply in the case of submerged lands); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (noting that the Religious Freedom Restoration Act was not an appropriate exercise of Congress's Section 5 of the Fourteenth Amendment enforcement power); *Printz v. United States*, 521 U.S. 898 (1997) (striking down Brady Handgun Violence Prevention Act gun control legislation as exceeding Congress's Commerce Clause powers and in violation of the Tenth Amendment); *United States v. Lopez*, 514 U.S. 549 (1995) (striking down Gun-Free School Zones Act of 1990 as exceeding Congress's Commerce Clause powers and violating the Tenth Amendment).

4. Although I have taught Federal Courts and written some in the area, see, e.g., Georgene M. Vairo, *Making Younger Civil: The Consequences of Federal Court Deference to State Proceedings*, 58 *FORDHAM L. REV.* 173 (1989), most of my scholarship relates to Rule 11 sanctions, the procedural aspects of forum selection, and mass tort resolution. I do not purport to be a constitutional law scholar. Accordingly, my arguments come from the perspective of a proceduralist rather than a constitutional law scholar.

5. See *infra* Part IV.

Congressional Republicans, who consider themselves to be conservatives and states' rights advocates,<sup>6</sup> have adopted and continue to pursue legislation that seeks to reverse our long-standing tradition of preserving the availability of state courts to those who seek remedies for violations of traditional state law causes of action.<sup>7</sup> For example, the Securities Exchange Act of 1997<sup>8</sup> and the Y2K Act<sup>9</sup> permit the removal of state claims by granting federal courts original jurisdiction for cases that traditionally could only be brought in state court because of a lack of diversity jurisdiction. These acts also set some of the substantive federal standards for resolving many aspects of what otherwise would be pure state law claims. And, more dramatically, Congress is now considering a class action bill that could result in federalizing all mass tort cases and other class action litigation depending on state law for their resolution.<sup>10</sup> Congress's authority to regulate subject matter jurisdiction in litigation in which it also posits the rules of decisions may be unquestionable. However, in light of the recent Supreme Court cases, Congress's attempt to do so in cases involving purely state law claims raises significant federalism problems.<sup>11</sup>

Of course, we have always lived in a world of concurrent jurisdiction in which litigants often have the choice of state or federal courts. Diversity cases serve as the prime, and relevant, example.<sup>12</sup>

---

6. See Labaton, *supra* note 2.

7. I do not mean to suggest that all the proponents of the legislation that I will discuss are states' rights conservative Republicans. Indeed, I, perhaps better described as a "knee-jerk liberal," have been of the view for a long time that consolidation of complex litigation in the federal courts can be an efficient and fair means for resolving complex, multiparty, multijurisdiction litigation. See, e.g., Georgene M. Vairo, Georgine, *The Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims Resolution*, 31 LOY. L.A. L. REV. 79 (1997) [hereinafter *Georgine*]; Georgene M. Vairo, *The Dalkon Shield Claimants Trust, Paradigm Lost (or Found)?*, 61 FORDHAM L. REV. 617 (1992) [hereinafter *Paradigm*]; Georgene M. Vairo, *Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role for Federal Common Law?*, 54 FORDHAM L. REV. 167 (1985) [hereinafter *Multi-Tort*].

8. 15 U.S.C. §§ 77p, 78bb (2000).

9. 15 U.S.C. §§ 6601-6617 (1999).

10. See H.R. 1875, 106th Cong. § 2 (1999); S. 353, 106th Cong. § 3 (1999). See *infra* Part IV.C.

11. See *infra* Part IV.C.3.

12. See 28 U.S.C. § 1332 (1996) (providing for federal subject matter juris-

In that respect, the legislation I will focus upon here is simply another example of Congress providing federal courts as a proper alternative in diversity based cases. However, as we will see, what many members of Congress are actually seeking to do is to prevent certain types of state law cases from being litigated in the state courts in order to ensure a certain substantive outcome. To the extent that Congress's subject matter jurisdiction legislation is intended to succeed in that attempt, it is problematic.

This paper will explore these legislative developments, particularly the general class action removal provisions pending before Congress, in contrast to what the Supreme Court is doing in its revolutionary federalism cases.<sup>13</sup> Of course, the cases involving challenges to federal legislative power at the expense of the states that the Supreme Court has focused upon are very different from the private law cases effected by the legislation I will discuss. Purely private cases generally do not expressly implicate the Tenth or Eleventh Amendment,<sup>14</sup> and therefore, the subject matter jurisdiction legislation I will address is not obviously implicated directly by the Supreme Court's recent federalism cases. Nonetheless, it is appropriate to examine this apparent crosscurrent. Although the Court's decisions do not readily suggest that such legislation is unconstitutional, one may wonder how far the new federalism decisions may reach to curb legislative antifederalism subject matter jurisdiction trends.<sup>15</sup>

---

diction in cases between citizens of different states when the amount in controversy exceeds \$75,000).

13. See, e.g., *Alden v. Maine*, 119 S. Ct. 2240, 2269-95 (1999) (Souter, J., dissenting) (describing majority's revolutionary conception of state sovereign immunity).

14. Of course, even that assertion is now suspect. The successful constitutional challenge to the Violence Against Women Act (VAWA) in *Brzonkala v. Morrison*, 169 F.3d 820 (4th Cir. 1999), *aff'd*, *United States v. Morrison*, 120 S. Ct. 1740 (2000), was based on whether Congress's enforcement power under Section 5 of the Fourteenth Amendment can proscribe certain kinds of private conduct rather than state action. The Court held that it may not.

15. Moreover, as the states themselves become more involved in mass tort litigation, as they did in the tobacco litigation and as they are now doing in the gun and lead litigations, the Eleventh Amendment may be expressly implicated. For example, in the wake of the tobacco litigation, some injured smokers have sued the states for their share of the proceeds of the states' settlements with the tobacco companies. Suits have been filed in Georgia, North Carolina,

I will focus on state claim based complex litigation generally, and mass tort claims particularly, in exploring the divergent approaches taken by the Supreme Court on the one hand, and Congress on the other. Such litigation, especially mass tort litigation, is a good vehicle because, as we will see, it raises important federalism problems in and of itself. I will discuss how ironic it is, in light of the Supreme Court's new federalism decisions, that congressional Republicans are trying to channel these cases into federal court rather than leaving them in the state courts where they arguably should be from a federalism perspective. I will then sketch out an argument that legislation channeling more state claim based litigation—such as certain tort, consumer protection, fraud, or contract claims—into the federal courts violates, at the least, the spirit of the Court's new federalism decisions. I also will argue quixotically that the legislation may, indeed, also violate the letter of the Tenth and Eleventh Amendments as envisioned by the conservative majority of the Court.

I will begin by providing a brief history of the resolution of mass tort cases. Although mass tort cases are based on state tort claims, state courts were perceived as lacking in resources or procedures for resolving multiparty, multijurisdiction litigation. Thus, by the mid-1980s, the federal courts came to be seen as the most appropriate place to resolve mass tort cases. Later judicial developments, most particularly the Supreme Court's *Amchem Products, Inc. v. Windsor*<sup>16</sup> decision, questioned the propriety of federal court class resolution of mass tort litigation. These decisions resulted in a flight of mass tort and similar litigation to the state courts, many of which appear to be more hospitable to class resolution of such cases. This flight, in turn, led to the recent subject matter jurisdiction legislation designed to permit the return of the state class litigation to federal courts. Once returned, Congress envisions, based on restrictive

---

Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, and West Virginia. In another case brought in Wisconsin, the trial court dismissed the claims against the state in violation of the Eleventh Amendment. There is also a case pending in California. Plaintiffs hope to avoid the Eleventh Amendment problem by filing in California state court. See Stephen Labaton, *Medicaid Smokers Seek to Gain a Share of States' Settlement*, N.Y. TIMES, Jan. 26, 2000, at A1.

16. 521 U.S. 591 (1997).

readings of *Amchem*, that the federal courts generally will refuse to certify the proposed class actions, which, of course, greatly reduces their settlement value to plaintiffs and their attorneys.<sup>17</sup>

Against this backdrop, I will examine briefly some of the jurisdictional bills recently enacted and under consideration by Congress. Next, I will analyze Congress's legislation through the federalism prism articulated by the Supreme Court. I will argue that Congress's attempt to move more state claim based litigation to the federal courts violates federalism principles, not simply as redefined by the Supreme Court, but also as traditionally understood. I maintain, as I always have, that the federal courts should remain an important part, and perhaps the ultimate part, of the resolution of mass tort and other national scale civil litigation.<sup>18</sup> However, I will show that, while only arguably unconstitutional, legislation that has the effect of stripping state courts of their ability to hear class actions involving state law claims undermines the spirit of federalism and may impair the fair resolution of such cases.

## II. HOW THE FEDERAL COURTS CAME TO DOMINATE MASS TORT LITIGATION

While important in the 1970s, mass tort cases came to dominate the civil litigation scene in the last two decades of the last millennium.<sup>19</sup> Mass tort cases, and other complex cases based on state law liability theories, have no inherent claim to federal court resolution. Indeed, according to the *Erie* doctrine,<sup>20</sup> the law to be applied to such cases is state law.<sup>21</sup> And, state courts of general jurisdiction can and generally do resolve the vast majority of cases turning on state

---

17. See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (directing district court judge to decertify class action in hemophiliac/HIV contamination litigation out of concern that certification provided plaintiff class with undue leverage in seeking settlement).

18. See, e.g., *Georgine*, *supra* note 7; *Paradigm*, *supra* note 7; *Multi-Tort*, *supra* note 7.

19. Asbestos, Agent Orange, breast implants, Bendectin, the Dalkon Shield, Fen Phen, tobacco, and now gun litigation have overwhelmed state and federal courts for the last few decades.

20. See *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

21. See *id.* at 78.

law.<sup>22</sup> Of course, in appropriate cases, diversity jurisdiction permits such cases to be adjudicated in federal court. But, because mass tort litigation, or consumer protection litigation such as the General Motors side saddle fuel tank litigation,<sup>23</sup> is simply an aggregation of hundreds or thousands of individual state law cases, one would think that the preferred place for resolving such litigation would be state courts.<sup>24</sup>

State courts, however, generally lacked the means for resolving such cases on a national basis.<sup>25</sup> Instead, the federal courts increasingly were looked to as the preferred forum for the aggregated resolution of cases traditionally handled as individual product liability cases in state or federal court.<sup>26</sup> Because mass torts are

---

22. See Mark C. Weber, *Complex Litigation and the State Courts: Constitutional and Practical Advantages of the State Forum Over the Federal Forum in Mass Tort Cases*, 21 HASTINGS CONST. L.Q. 215 (1994).

23. See *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 819 (3d Cir. 1995).

24. See Robert L. Rabin, *Federalism and the Tort System*, 50 RUTGERS L. REV. 1, 6 (1997); Linda S. Mullenix, *The Federalization of State Law: Mass Tort Litigation and the Dilemma of Federalism*, 44 DEPAUL L. REV. 755, 757-60 (1995); Weber, *supra* note 22; William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENTARY 599 (1999).

25. Currently, there is no legislation authorizing transfer, consolidation, and coordination of related state and federal litigation. There have been various proposals for more effective handling of complex litigation pending in state and federal courts. For example, the American Law Institute has proposed a variety of procedural solutions for dealing with such litigation, including the following: expanded federal diversity subject matter jurisdiction to provide a federal forum alternative in a broader range of cases; reverse removal to permit federal cases to be handled in the state courts where appropriate; expanded powers for a new Complex Litigation Panel which would take the place of the Multidistrict Litigation Panel; federalizing choice of law rules; and new rules pertaining to personal jurisdiction and preclusion. See AMERICAN LAW INST., *COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS* (1994). Although these proposals raise interesting federalism issues, they, at the least, envision an important role for state courts. Moreover, in recent years, federal district and state court judges have worked closely and cooperatively on a voluntary basis in a number of complex cases to achieve a high degree of efficiency. See William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689 (1992). In addition, Congress has considered various forms of "Multiparty-Multijurisdiction" legislation over the last decade. For a discussion of the problems raised by this legislation, see Mullenix, *supra* note 24.

26. For amplification of many of the issues raised by the use of class ac-



national—and sometimes international—in scope, it made sense to try to use the federal court system to resolve such cases.<sup>27</sup> Most parties, particularly defendants beleaguered at the least by the huge transaction costs presented when defending thousands of suits, often ultimately desire some form of global, efficient, and fair resolution of a mass tort. The federal courts appear to have the best tools for achieving that goal.

First, Congress has provided the federal judicial system with the Multidistrict Litigation statute.<sup>28</sup> The statute allows the Multidistrict Litigation Panel to transfer related federal cases to one district court for pretrial purposes.<sup>29</sup> In addition, the bankruptcy laws provide several tools to assist a defendant corporation in consolidating the cases against it.<sup>30</sup> Filing under Chapter 11 provides the company with an automatic stay of all litigation against it, including all mass tort cases filed against it in state and federal court.<sup>31</sup> Moreover, 28 U.S.C. § 1334, which vests the federal district courts with subject matter jurisdiction over cases “related to” a bankruptcy case, may be used to support removal of state cases and, ultimately, their aggregated treatment in a federal court.<sup>32</sup> Indeed, codefendants in some cases may be able to channel cases against them away from the state courts to the federal court handling the bankruptcy case.<sup>33</sup>

---

tions in mass tort cases, see *Georgine*, *supra* note 7.

27. See, e.g., Geoffrey P. Miller, *Overlapping Class Actions*, 71 N.Y.U. L. REV. 514 (1996).

28. See 28 U.S.C. § 1407 (1994).

29. See *id.*; 17 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ch. 112 (3d ed. 1999).

30. See Barbara J. Houser, *Chapter 11 as a Mass Tort Solution*, 31 LOY. L.A. L. REV. 451 (1998).

31. See 22 U.S.C. § 362 (1994).

32. See 28 U.S.C. § 1334(b) (1994). Section 1334 provides for original and exclusive jurisdiction over all cases under title 11 (the Bankruptcy code) and further provides in relevant part: “[T]he district courts shall have original but not exclusive jurisdiction of all civil proceedings . . . arising in or related to cases under title 11.” *Id.*; see also 28 U.S.C. § 157(b)(5) (1993) (allowing consolidation); *In re Dow Corning Corp.*, 86 F.3d 482, 486-87 (6th Cir. 1996) (finding “related to” jurisdiction).

33. See 28 U.S.C. § 1334(b). Section 1334 “related to” jurisdiction has been used in a number of mass tort cases to effect consolidation. Perhaps the broadest use of such jurisdiction occurred in the silicone breast implant litigation. There, after Dow Corning sought Chapter 11 protection, other manufacturers and suppliers of silicone breast implants, as well as Dow Corning’s cor-

There are judicial tools as well. The Supreme Court by way of Federal Rule of Civil Procedure 23 permits representative litigation in appropriate cases.<sup>34</sup> Finally, in some cases nearing federal court settlement, the federal courts will issue injunctions against state

---

porate parents, Dow Chemical Co. and Corning Inc., who were codefendants in the lawsuits against Dow Corning, sought to have the state cases filed against them removed to federal court. They consolidated with the Dow Corning Chapter 11 proceeding pursuant to 28 U.S.C. § 1334 (providing federal jurisdiction) and 28 U.S.C. § 157(b)(5) (allowing consolidation). *See In re Dow Corning Corp.*, 86 F.3d at 486-87. The district court rejected the attempt, but the Sixth Circuit reversed and remanded. *See id.* at 485. Citing the “primary goal [of] establish[ing] a mechanism for resolving the claims at issue in the most fair and equitable manner possible,” the Sixth Circuit adopted an expansive definition of “related to” jurisdiction. *Id.* at 487, 489. The Sixth Circuit found that the tort claims against the nondebtors were sufficiently related to the tort claims against Dow Corning, which were stayed pursuant to 11 U.S.C. § 362(a)(1) (1994), because the former could give rise to contribution or indemnification claims among the nondebtors which could have an impact on the debtor’s estate. *See In re Dow Corning*, 86 F.3d at 493-94. Thus, according to the court, the “unusual circumstances” necessary to invoke 28 U.S.C. § 1334 “related to” jurisdiction were present. *Id.* at 493 (quoting *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 999 (4th Cir. 1986)). The court also found that 28 U.S.C. § 157(b)(5) granted the district court handling the Dow Corning bankruptcy the power to transfer all the cases to itself. *See id.* at 496-97. The Sixth Circuit relied heavily on the decision of the Fourth Circuit in the *Dalkon Shield* litigation. *See id.*

On remand, the district court, invoking 28 U.S.C. § 1334(c)(2), held that the actions against the nondebtors were subject to mandatory abstention. *See In re Dow Corning Corp.*, No. 95-CV-72397-DT, 1996 U.S. Dist. LEXIS 16754, at \*20-21 (E.D. Mich. July 30, 1996). Section 1334(c)(2) provides for mandatory abstention “if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.” 28 U.S.C. § 1334(c)(2). The Sixth Circuit granted mandamus in favor of the nondebtors, holding that an individualized determination must be made in each case to determine the impact of the case on the debtor’s estate. *See In re Dow Corning Corp.*, 113 F.3d 565, 569, 572 (6th Cir. 1997). In addition, the Sixth Circuit found that discretionary abstention under 28 U.S.C. § 1334(c)(1) was also “wholly inappropriate” given the court’s prior acknowledgment of the “significant impact that our resolution of these issues will have on the future course of [bankruptcy] litigation.” *Id.* at 571. Thus, the filing of bankruptcy, together with the broad reach of the “related to” jurisdictional provision and the transfer power, provides a very potent tool for aggregation and global resolution. The Fourth Circuit had held that there was “related to” jurisdiction over claims against doctors and A.H. Robins’s insurance company. *See A.H. Robins Co.*, 788 F.2d at 1011.

34. *See* FED. R. CIV. P. 23.

court litigation which raise or may raise the same claims as those in federal court.<sup>35</sup>

### A. *Early Reluctance*

Despite the existence of these tools, federal court resolution of mass tort cases was unthinkable until the 1966 amendments to Rule 23.<sup>36</sup> It was then that the Federal Rules of Civil Procedure first expressly provided for compensatory damage classes under Rule 23(b)(3). Although the advisory committee had in mind cases where an individual's economic stake was so small that one-on-one

---

35. See Georgene M. Vairo, *Problems in Federal Subject Matter Jurisdiction: Supplemental Jurisdiction; Removal; Preemption, Abstention and Diversity*, reprinted in ALI-ABA NEW DIRECTIONS IN FEDERAL CIVIL PRACTICE AND PROCEDURE 47-58 (1996).

36. Prior to the 1966 amendments to Rule 23, the class action rule had an equity orientation and thus was not conceived as being available in a common law tort case. See FED. R. CIV. P. 23 advisory committee's note to 1937 Adoption; FED. R. CIV. P. 23 advisory committee's note to 1966 Amendment. However, practice with the rule showed that the rule was fraught with difficulties. As the 1966 advisory committee's note explains:

The categories of class actions in the original rule were defined in terms of the abstract nature of the rights involved: the so-called "true" category was defined as involving "joint, common, or secondary rights"; the "hybrid" category, as involving "several" rights related to "specific property"; the "spurious" category, as involving "several" rights affected by a common question and related to common relief. It was thought that the definitions accurately described the situations amenable to the class-suit device, and also would indicate the proper extent of the judgment in each category, which would in turn help to determine the res judicata effect of the judgment if questioned in a later action. Thus the judgments in "true" and "hybrid" class actions would extend to the class (although in somewhat different ways); the judgment in a "spurious" class action would extend only to the parties including intervenors.

In practice the terms "joint," "common," etc., which were used as the basis of the Rule 23 classification proved obscure and uncertain.

The courts had considerable difficulty with these terms.

FED. R. CIV. P. 23 advisory committee's note to 1966 Amendment (citations omitted).

litigation would be impracticable,<sup>37</sup> the idea that it might be appropriate to use class actions to resolve damages cases was born.

However, the advisory committee clearly did not envision the routine use of class actions in mass tort litigation. First, mass torts were "as rare as hen's teeth" in the 1960s.<sup>38</sup> Second, the advisory committee note stated that mass accident cases "ordinarily" would not be "appropriate" for class action treatment.<sup>39</sup> This part of the advisory committee's note was invoked time and again in the late 1970s and early 1980s as the federal courts denied class action treatment in a variety of mass tort cases. For example, in the *Dalkon Shield* litigation,<sup>40</sup> the MDL Panel transferred the federal *Dalkon Shield* cases to the district court of Kansas for pretrial proceedings under 28 U.S.C. § 1407.<sup>41</sup> By the end of 1979, with thousands of cases pending nationwide, the courts remanded many of the MDL

---

37. See FED. R. CIV. P. 23 advisory committee's note to 1966 Amendment; see also Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 391 (1967) ("the interest [in controlling a litigation] may be no more than theoretic where the individual stake is so small as to make a separate action impracticable"); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338-40 (1980) (finding that plaintiffs have an economic interest in appealing denial of class certification in order to shift the costs of the litigation onto the class; denying them standing to appeal would reduce the effectiveness of the class action as a device for obtaining relief for a multiplicity of small claims).

38. Mark Herrmann, *From Saccharin to Breast Implants: Mass Torts, Then and Now*, 26 LITIGATION 50, 52 (1999).

39. See FED. R. CIV. P. 23(b)(3) advisory committee's note to 1966 Amendment. The advisory committee's note to the 1966 revision of Rule 23(b)(3) states:

A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

*Id.*

40. *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982). See RICHARD B. SOBOL, *BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY* 1-22 (1991).

41. See *In re A.H. Robins Co.*, 406 F. Supp. 540, 541 (J.P.M.L. 1975).

cases to their respective transferee courts for trial.<sup>42</sup> The district court in California certified a nationwide class under Rule 23(b)(1) of the Federal Rules of Civil Procedure on the issue of punitive damages, and a California class under Rule 23(b)(3) on the issues of liability and compensatory damages.<sup>43</sup> The Ninth Circuit, however, reversed,<sup>44</sup> citing the 1966 advisory committee's note.<sup>45</sup>

Attempts to certify classes or to push the limits of the multidistrict litigation procedure fared no better in the early phase of the asbestos litigation. For example, in 1974 in *Yandle v. PPG Industries, Inc.*,<sup>46</sup> a district court in Texas refused to certify a Rule 23(b)(3) class on the issue of liability. More surprising than the courts' reluctance to certify mass tort class actions during this period was the MDL Panel's refusal to invoke the pretrial transfer provision of 28 U.S.C. § 1407 in the asbestos litigation.<sup>47</sup> In 1977, the MDL Panel declined to transfer the pending asbestos cases because it was not convinced that such cases raised sufficient common questions of fact.<sup>48</sup> At the time, 103 cases were pending in nineteen different district courts.<sup>49</sup> The Panel denied transfer again in 1980, 1985, 1986, and 1987.<sup>50</sup>

### *B. The Need for Federal Judicial Pragmatism in the Face of Congressional Inaction*

As the number of mass tort cases increased, the federal courts' philosophy changed dramatically. By 1991, the number of asbestos cases in the federal courts reached over 26,000.<sup>51</sup> At that time the

---

42. See *Paradigm*, *supra* note 7, at 625; see also *In re A.H. Robins Co.*, 610 F. Supp. 1099, 1100 (J.P.M.L. 1985) (discussing pending Dalkon Shield actions).

43. See *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. at 896.

44. See *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 693 F.2d 847, 857 (9th Cir. 1982).

45. See *id.* at 851-52.

46. 65 F.R.D. 566, 570-72 (E.D. Tex. 1974).

47. See *In re Asbestos Litig.*, 431 F. Supp. 906 (J.P.M.L. 1977).

48. See *id.* at 910.

49. See *id.* at 907.

50. See *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 417 (J.P.M.L. 1991) (discussing history of asbestos litigation).

51. See *id.* at 416.

MDL Panel, citing the changed circumstances, decided that transfer of the asbestos cases under 28 U.S.C. § 1407 was appropriate.<sup>52</sup> The MDL Panel was, no doubt, persuaded to change its mind because of the practical considerations of handling and resolving through settlement or trial thousands of pending cases. Later, paralleling the greater willingness to transfer cases under 28 U.S.C. § 1407,<sup>53</sup> district courts, often with approval from the courts of appeals, certified mass tort class actions of various kinds. Some of the most notorious of those cases involved asbestos,<sup>54</sup> Agent Orange,<sup>55</sup> the Dalkon Shield,<sup>56</sup> breast implants,<sup>57</sup> Fen Phen,<sup>58</sup> and tobacco.<sup>59</sup> Of course not all attempts at certification in the district courts were successful.<sup>60</sup>

---

52. See *id.* at 417-18.

53. See *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 749-50 (E.D.N.Y. 1984) ("Some 600 separate cases have been sent to this district from all over the country with an estimated fifteen thousand named plaintiffs."); *In re Temporomandibular Joint (TMJ) Implants Prod. Liab. Litig.*, 844 F. Supp. 1553 (J.P.M.L. 1994) (173 actions); *In re San Juan Dupont Plaza Hotel Fire Litig.*, MDL 721, 1988 U.S. Dist. LEXIS 17332 (D.P.R. Dec. 3, 1988) (275 actions).

54. See *In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996) (certifying mandatory class in Texas asbestos litigation), *cert. granted and judgment vacated*, 521 U.S. 1114, 1115 (1997) (judgment vacated and case remanded to Fifth Circuit Court of Appeals for further consideration in light of *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997)); *In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir. 1986); *Jenkins v. Raymark Indus.*, 109 F.R.D. 269 (E.D. Tex. 1985), *aff'd*, 782 F.2d 468 (5th Cir. 1986) (affirming district court order certifying class in Texas asbestos litigation).

55. See *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145 (2d Cir. 1987) (affirming district court order affirming Rule 23(b)(3) class in Agent Orange litigation).

56. See *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir. 1989) (affirming mandatory class action against Dalkon Shield product liability insurer in litigation related to A.H. Robins Chapter 11 proceeding).

57. See *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 887 F. Supp. 1469 (N.D. Ala. 1995) (certifying class against breast implant manufacturers).

58. See *In re Diet Drugs Prods. Liab. Litig.*, No. 98-20626, 1999 U.S. LEXIS 13228 (E.D. Pa. Aug. 26, 1999) (certifying Rule 23(b)(3) class in Fen Phen litigation).

59. See *Castano v. American Tobacco Co.*, 160 F.R.D. 544 (E.D. La. 1995) (certifying nationwide Rule 23(b)(3) class in tobacco litigation on addiction theory), *rev'd*, 84 F.3d 734 (5th Cir. 1996); *Broin v. Phillip Morris Cos.*, 641 So. 2d 888 (Fla. Dist. Ct. App. 1994).

60. See, e.g., *In re Joint E. and S. Dist. Asbestos Litig.*, 14 F.3d 726 (2d Cir. 1993) (reversing mandatory class certification in asbestos litigation insurance

There was no question, however, that during this time period district courts were willing to use class actions as vehicles for managing or settling mass torts cases, and that the courts of appeals would often affirm. For example, "despite misgivings," the Third Circuit affirmed a Rule 23(b)(3) class in the asbestos property damage case and commented that "the trend has been for courts to be more receptive to use of the class action in mass tort litigation."<sup>61</sup> Similarly, in the Texas asbestos litigation, the district court certified a class on the central issue of the "state of the art" defense.<sup>62</sup> The Court of Appeals for the Fifth Circuit affirmed.<sup>63</sup> Summarizing the new approach to thinking about mass torts, the Fifth Circuit stated:

The courts are now being forced to rethink the alternatives and priorities by the current volume of litigation and more frequent mass disasters. . . . If Congress leaves us to our own devices, we may be forced to abandon repetitive hearings and arguments for each claimant's attorney to the extent enjoyed by the profession in the past. Be that as time will tell, the decision at hand is driven in one direction by all the circumstances. Judge Parker's plan is clearly superior to the alternative of repeating, hundreds of times over, the litigation of the state of the art issues with, as that experienced judge says, "days of the same witnesses, exhibits

---

dispute); *In re Federal Skywalk Cases*, 93 F.R.D. 415 (W.D. Mo. 1982), *vacated*, 680 F.2d 1175 (8th Cir. 1982) (vacating mandatory class certification in accident case). Perhaps the result in these cases may be seen as demonstrating judicial reluctance to use mandatory, limited fund class action theories in mass tort cases, especially where the federal court class certification would have the practical effect of enjoining related state court proceedings. See *In re Federal Skywalk Cases*, 680 F.2d 1175, 1182 (8th Cir. 1982). The district court certified the class in part to prevent competing actions which might frustrate the federal court's attempts at settlement. The Eighth Circuit reversed because the mandatory class had the effect of an injunction and because the Anti-Injunction Act forbids the federal courts from enjoining state court proceedings unless one of three narrow exceptions, none of which the court found to be present in the litigation, were satisfied. See *id.* at 1181-82. However, by the mid-1990s, courts of appeals would also overturn class certifications in damages class actions under Rule 23(b)(3). See *Ortiz v. Fibreboard Corp.*, 119 S. Ct. 2295 (1999) (overturning mandatory class settlement in asbestos litigation).

61. *In re School Asbestos Litig.*, 789 F.2d at 1009 (citations omitted).

62. See *Jenkins v. Raymark Indus., Inc.*, 109 F.R.D. 269 (E.D. Tex. 1985).

63. See *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 471-75 (5th Cir. 1986).

and issues from trial to trial.”

....

Necessity moves us to change and invent.<sup>64</sup>

Similar efficiency considerations motivated the decision to certify a class action in the *Agent Orange* litigation. Plaintiffs, Vietnam War veterans and members of their families, claimed to have suffered damages as a result of the veterans' exposure to herbicides produced by the defendants.<sup>65</sup> Judge Weinstein decided to enter an order certifying a damages class for all issues under Rule 23(b)(3) and for the issue of punitive damages under Rule 23(b)(1)(B).<sup>66</sup> Judge Weinstein's analysis is important because, like the asbestos decisions just discussed, he invoked a policy argument favoring settlement as his guide in applying Rule 23.<sup>67</sup> He stated:

Finally, the court may not ignore the real world of dispute resolution. As already noted, a classwide finding of causation may serve to resolve the claims of individual members, in a way that determinations in individual cases would not, by enhancing the possibility of settlement among the parties and with the federal government.<sup>68</sup>

The court of appeals later affirmed Judge Weinstein's Rule 23(b)(3) settlement class.<sup>69</sup>

### C. Federal Court Sponsorship of Global Resolution

Explicit in Judge Weinstein's *Agent Orange* opinion was the notion that certifying the class would facilitate settlement and result in a fairer distribution of settlement funds.<sup>70</sup> Implicit was his view that the only place that such a resolution could be obtained was in a federal court class action after an MDL transfer. Given the magnitude of the case, a federal global settlement appeared to be the only

---

64. *Id.* at 473 (citations omitted).

65. *See In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 720 (E.D.N.Y. 1983).

66. *See id.*

67. *See id.* at 720-21.

68. *Id.* at 723.

69. *See In re "Agent Orange"*, 818 F.2d at 166-67. Because it affirmed the settlement class, the Second Circuit did not need to address the limited fund class.

70. *See In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. at 723.



way to achieve a number of salutary goals: (1) to avoid swamping the state and federal courts with years of repetitive litigation, (2) to avoid a depletion of the defendant's assets by the huge transaction costs presented by mass tort litigation, and (3) to insure that all plaintiffs, not just those at the head of the litigation line, would receive some compensation for their alleged injuries.

Later, in the *Dalkon Shield* litigation, the Court of Appeals for the Fourth Circuit similarly cited the need to achieve a global settlement and, accordingly, affirmed a mandatory settlement class in connection with the A.H. Robins Chapter 11 Plan of Reorganization under the bankruptcy laws.<sup>71</sup> By 1989, when the case was decided, the court cited academic commentary<sup>72</sup> along with the "[r]ecent court decisions [that] have also spoken approvingly of the class certification of mass-tort actions for purposes of settlement" to support its decision.<sup>73</sup> According to the court, affirming the settlement class was essential to the confirmation and consummation of the reorganization plan.

All parties accepted the A.H. Robins plan of reorganization, together with the mandatory settlement class, because it achieved global peace. Representatives of the claimant group signed on because of the prospect of receiving full compensation for their clients' injuries. All defendants in the *Dalkon Shield* cases, including A.H. Robins, the Chapter 11 debtor and manufacturer of the product; its product liability insurer Aetna; doctors and other health care providers who were responsible for the insertion or removal of the product; and others supported the plan because it immunized them all from further litigation over the *Dalkon Shield*.<sup>74</sup>

---

71. See *In re A.H. Robins Co.*, 880 F.2d 709, 752 (4th Cir. 1989).

72. See *id.* at 738.

73. *Id.*

74. A creditor has no right to choose which of two funds will pay his claim.

The bankruptcy court has the power to order a creditor who has two funds to satisfy his debt to resort to the fund that will not defeat other creditors. Here, the carefully designed reorganization of Robins, in conjunction with the settlement in *Breland*, provided for satisfaction of the class B claimants. However, some chose to opt-out of the settlement in order to pursue recovery for their injuries from Aetna or from medical providers for malpractice. It is essential to the reorganization that these opt-out plaintiffs either resort to the source of funds provided for them in the Plan and *Breland* settlement or not be per-

A quote from the Third Circuit's asbestos property damage class action similarly demonstrates why the federal courts came to be seen as the best place to resolve mass tort cases:

Concentration of individual damage suits in one forum can lead to formidable problems, but the realities of litigation should not be overlooked in theoretical musings. Most tort cases settle, and the preliminary maneuverings in litigation today are designed as much, if not more, for settlement purposes than for trial. Settlements of class actions often result in savings for all concerned.<sup>75</sup>

All this authority was obviously of great importance to the federal district court judges who continued to be confronted with new and old mass torts. A slew of class actions were certified without the angst that accompanied earlier cases. For example, Judge Sam Pointer approved a settlement class in the *Breast Implant* litigation after the MDL Panel transferred all the federal breast implant cases to him.<sup>76</sup> A very controversial<sup>77</sup> settlement class was approved by

---

mitted to interfere with the reorganization and thus with all the other creditors.

*In re A.H. Robins Co.*, 880 F.2d 694, 701-02 (4th Cir. 1989) (citing *Columbia Bank For Coops. v. Lee*, 368 F.2d 934, 939 (4th Cir. 1966); *IV Minor's Institutes* 1248 (1883)).

75. *A.H. Robins*, 880 F.2d at 739 (quoting *In re School Asbestos Litig.*, 789 F.2d 996, 1009 (3d Cir. 1986)).

76. See *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, No. CV 92-P-10000-S, 1994 U.S. Dist. LEXIS 12521, at \*1 (N.D. Ala. Sept. 1, 1994) (approving settlement in breast implant class action litigation); see also discussion *infra* notes 71-75 and accompanying text. The class in the *Breast Implant* case technically fell apart, due in part to the extraordinarily large number of claimants who indicated their desire to be part of the settlement. See *In re Dow Corning Corp.*, 86 F.3d 482, 486 (6th Cir. 1996). This led the major defendant, Dow Corning, to file for bankruptcy protection under Chapter 11. See *id.* Nonetheless, in October 1995, Judge Pointer approved a substitute settlement plan proposed by the remaining defendants that would pay \$5000 to \$500,000 per claim, depending upon a woman's medical condition. See Henry Weinstein, *New Terms Offered in Breast Implant Cases*, L.A. TIMES, Oct. 3, 1995, at D1. The original settlement agreement offered payments of \$100,000 to \$1.4 million per claim. See *id.* That settlement collapsed after too many women applied for the \$4.25 billion in projected benefits. See *id.* More than a third of the over 100,000 women who filed claims against silicone breast implant manufacturers have accepted these reduced settlements. However, thousands of other claimants rejected the plan. Many plaintiffs say they are receiving more in individually negotiated settlements. See *id.* Nonetheless, claims are

the district court in the asbestos multidistrict litigation.<sup>78</sup> In addition, a class action in which tobacco plaintiffs asserted the then novel addiction theory was approved by the district court in Louisiana.<sup>79</sup> Until some of these classes, notably the tobacco and asbestos classes, were vacated, the federal courts continued to be viewed as the primary forum for the resolution of mass tort cases.<sup>80</sup>

#### *D. Insuring the Primacy of Federal Court Resolution*

Before looking at the reversal of these cases, however, we must consider another tool that resulted in the primacy of the federal courts over state courts for the resolution of mass tort cases: the All-Writs Act.<sup>81</sup> As a preliminary matter, the federal Anti-Injunction Act,<sup>82</sup> ironically for our purposes, embodies Congress's intent that federal courts not interfere with ongoing state litigation. The Act provides "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."<sup>83</sup>

---

being paid pursuant to a successor plan of compensation offered by several manufacturers of silicone, and a bankruptcy court has approved a \$3 billion settlement of the Dow Corning cases. See *In re Dow Corning Corp.*, No. 95-20512, 1999 WL 1398601 (E.D. Mich. Dec. 21, 1999).

77. An amazing number of law review articles and law review symposia have been devoted to the analysis of the settlement class in *Georgine v. Amchem Products, Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994), *vacated*, 83 F.3d 610 (3d Cir. 1996). For example, a 425 page symposium in the *Cornell Law Review* was devoted largely to ethical and other issues the *Georgine* class action generated. See Symposium, *Mass Torts: Serving up Just Desserts*, 80 CORNELL L. REV. 811 (1995). A Westlaw search of the Law Journal library reveals that over 150 law review articles discuss, to some degree, the *Georgine* settlement class.

78. See *Georgine*, 157 F.R.D. at 336.

79. See *Castano v. American Tobacco Co.*, 160 F.R.D. 544, 560-61 (E.D. La. 1995), *rev'd*, 84 F.3d 734 (5th Cir. 1996).

80. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628-29 (1997); *Castano*, 84 F.3d at 752 (reversing and remanding with instructions that the district court dismiss the complaint); *Georgine*, 83 F.3d at 635 (vacating asbestos settlement class).

81. 28 U.S.C. § 1651(a) (1994).

82. 28 U.S.C. § 2283.

83. *Id.*

The Anti-Injunction Act's exceptions have been narrowly construed to effectuate its purpose: non-interference with state court proceedings.<sup>84</sup> Often, federal courts seeking to terminate a dispute evaded the strictures or at least spirit of the Anti-Injunction Act by invoking the All-Writs Act.<sup>85</sup> The All-Writs Act provides "[t]he Supreme Court and all courts established by Act of Congress may issue All-Writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."<sup>86</sup>

The Supreme Court, in *United States v. New York Telephone Co.*, set forth a broad construction of the All-Writs Act.<sup>87</sup> There, the Court upheld the use of the Act to compel a nonparty to comply with an order.<sup>88</sup> The Court noted:

This Court has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained: "This statute has served since its inclusion, in substance, in the original Judiciary Act as a 'legislatively approved source of procedural instruments designed to achieve "the rational ends of law."'"

Indeed, "[u]nless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it."<sup>89</sup>

An important aspect of the All-Writs Act is that it permits federal courts to enter orders affecting nonparties. The *New York*

---

84. See, e.g., *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281 (1970).

85. 28 U.S.C. § 1651(a).

86. *Id.* Cases exploring the meaning of "necessary or appropriate in aid of their respective jurisdictions" are collected in *FTC v. Dean Foods Co.*, 384 U.S. 597, 603-04 (1966).

87. 434 U.S. 159, 172 (1977).

88. See *id.* at 174.

89. *Id.* at 172-73 (respectively quoting *Harris v. Nelson*, 394 U.S. 286, 299 (1969) (quoting *Price v. Johnson*, 344 U.S. 266, 282 (1948)) and *Adams v. United States ex rel McCann*, 317 U.S. 269, 273 (1942)).

Telephone Court explains:

The power conferred by the Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice.<sup>90</sup>

Several recent cases show how the All-Writs Act was used by federal courts to facilitate global settlements. Perhaps the "grand-daddy" of such use is *In re Baldwin*.<sup>91</sup> While not solely a state claim-based case, the principles it established have been invoked in complex state claim-based litigation including mass tort and consumer protection cases. *In re Baldwin* involved consolidated multi-district class actions against broker-dealers who sold securities in bankrupt corporations.<sup>92</sup> The Multidistrict Litigation Panel consolidated proceedings of more than 100 federal securities lawsuits in class actions in the Southern District of New York.<sup>93</sup> Plaintiffs asserted claims under the Securities Act of 1933 and the Securities Exchange Act of 1934 against twenty-six broker-dealers and related individuals.<sup>94</sup> Many of the plaintiffs also raised pendent state law claims, such as consumer protection actions under statutes providing private rights of recovery.<sup>95</sup>

For two years, the district court coordinated settlement talks among the parties.<sup>96</sup> Negotiations proved successful as to eighteen of the twenty-six broker-dealer defendants, providing for payment of approximately \$140 million to the plaintiffs in exchange for a release of all the plaintiffs' federal claims against the settling defendants, as well as any claims available to each plaintiff under relevant state

---

90. *Id.* at 174 (citing *Mississippi Valley Barge Line Co. v. United States*, 773 F. Supp. 1, 6 (E.D. Mo. 1967); *Board of Educ. v. York*, 429 F.2d 66 (1970); *United States v. Mottie*, 196 F. 586 (N.D. Ill. 1912); *Field v. United States*, 193 F.2d 92, 95-96 (1950)).

91. 770 F.2d 328 (2d Cir. 1985).

92. *See id.*

93. *See id.* at 331.

94. *See id.*

95. *See id.*

96. *See id.*

laws.<sup>97</sup> Only about fifty individual plaintiffs objected to this settlement. For the purpose of ruling on these settlements, the district court provisionally approved class status.<sup>98</sup>

The representatives of forty states in the National Association of Attorneys General (NAAG), on hearing of the proposed settlements, concluded that the proposal did not adequately compensate plaintiffs for their federal and state law claims, and that the defendants' actions may have violated state regulatory and criminal laws.<sup>99</sup> Nonetheless, the district court preliminarily approved the settlement and scheduled a hearing on its fairness.<sup>100</sup> Meanwhile, between the time when some parties signed the stipulations of settlement and the year's end, ten states issued subpoenas or other requests for information from various defendants.<sup>101</sup> The states sought to enforce state laws authorizing them in their representative capacities to seek restitution and monetary damages from the defendants.<sup>102</sup> The recovery was to be paid over to the states' citizens who were plaintiffs in the consolidated class actions before Judge Brieant.<sup>103</sup> In addition, some states sought to pursue other state remedies, "including prospective injunctive relief and enforcement of state criminal and regulatory laws designed to guard against repetition of the conduct forming the basis of the consolidated federal actions."<sup>104</sup>

In late January of 1985, an unsuccessful meeting occurred between certain state representatives and the defendants.<sup>105</sup> The states requested a higher settlement figure, and in return offered to terminate all proposed state administrative proceedings and civil litigation against the defendants.<sup>106</sup> In opposition to the allegedly inadequate settlements, twenty-two states, including about half of the appellant states, submitted an amicus brief.<sup>107</sup>

---

97. *See id.*

98. *See In re Baldwin-United Corp.*, 105 F.R.D. 475 (S.D.N.Y. 1984).

99. *See In re Baldwin-United Corp.*, 770 F.2d 328, 332 (2d Cir. 1985).

100. *See id.*; *In re Baldwin*, 105 F.R.D. at 485.

101. *See In re Baldwin*, 770 F.2d at 332.

102. *See id.* at 332-33.

103. *See id.* at 333.

104. *Id.*

105. *See id.*

106. *See id.*

107. *See id.*

In mid-February, the State of New York gave several defendants notice of its intent to bring a suit seeking restitution for New York citizens.<sup>108</sup> These defendants sought to enjoin the imminent actions in New York.<sup>109</sup> Judge Brieant granted the injunction, stating that the injunction was necessary "in aid of preserving [the court's] jurisdiction" pursuant to the All-Writs Act and Rule 23(d) of the Federal Rules of Civil Procedure.<sup>110</sup> The court found that state court suits were likely to impair the court's jurisdiction because the federal court settlement negotiations would be frustrated by the existence of competitive litigation.<sup>111</sup> The court was also concerned that

the existence of actions in state court would jeopardize its ability to rule on the settlements, would substantially increase the cost of litigation, would create a risk of conflicting results, and would prevent the plaintiffs from benefiting from any settlement already negotiated or from reaching a new and improved settlement in the federal court.<sup>112</sup>

The Second Circuit affirmed the injunction order.<sup>113</sup> The Anti-Injunction Act was technically inapplicable because the injunction issued before any suits were commenced in state court.<sup>114</sup> The circuit court explained:

When a federal court has jurisdiction over its case in chief, as did the district court here, the All-Writs Act grants it ancillary jurisdiction to issue writs "necessary or appro-

---

108. *See id.*

109. *See id.*

110. *Id.* (citing 28 U.S.C. § 1651; FED. R. CIV. P. 23(d)).

111. *See id.*

112. *Id.* However, recognizing that the states had an interest in enforcing their laws, the court stated that it was to be

"absolutely clear that the injunction will not extend to the enforcement of the criminal law against anybody who may be deemed to have violated it, and it will not extend to a request of a state court for prospective injunctive relief as to any business practice on the part of any defendant."

*Id.* The court stated that if it decided to deny class action status, it would modify the injunction and allow the plaintiffs to bring actions on behalf of nonparty class members. *See id.*

113. *See id.* at 342.

114. *See id.* at 335 (relying on *Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1965)).

priate in aid of' that jurisdiction.<sup>115</sup> This provision permits a district court to enjoin actions in state court where necessary to prevent relitigation of an existing federal judgment, notwithstanding the fact that the parties to the original action could invoke *res judicata* in state courts against any subsequent suit brought on the same matters.<sup>116</sup> Even before a federal judgment is reached, however, the preservation of the federal court's jurisdiction or authority over an ongoing matter may justify an injunction against actions in state court. Such "federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case."<sup>117</sup>

The circuit court noted, however, that the "mere existence of a parallel lawsuit in state court that seeks to adjudicate the same *in personam* cause of action does not in itself provide sufficient grounds for an injunction against a state action in favor of a pending federal action."<sup>118</sup> Nonetheless, in *Baldwin*, the court found the district court's findings that the injunction was necessary to preserve its jurisdiction and protect its judgments sufficient to justify the issuance of the injunction under the All-Writs Act.<sup>119</sup> At the time the district court issued the injunction, eighteen of the twenty-six defendants had reached stipulated settlements that the court provisionally approved and were awaiting final court approval, and the remaining eight defendants were continuing settlement negotiations.<sup>120</sup> The Second

---

115. *Id.* (quoting All-Writs Act, 28 U.S.C. § 1651 (1982)).

116. *Id.* (citations omitted).

117. *Id.* at 335 (quoting *Atlantic Coast*, 398 U.S. at 295 (Anti-Injunction Act)). See *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1332, 1334-35 (5th Cir. 1981) (upholding an injunction, issued by a federal judge presiding over multidistrict litigation, against actions by the same plaintiffs in state court); cf. *James v. Bellotti*, 733 F.2d 989, 994 (1st Cir. 1984) (indicating that the existence of a provisionally-approved settlement would justify a protective injunction against state court suits brought by the same parties).

118. *In re Baldwin*, 770 F.2d at 336 (citing *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 642 (1977) ("We have never viewed parallel *in personam* actions as interfering with the jurisdiction of either court.")).

119. See *id.* at 336, 338.

120. See *id.* at 336.



Circuit concluded that the injunction was "necessary or appropriate in aid of" the court's jurisdiction because "the potential for an onslaught of state actions posed more than a risk of inconvenience or duplicative litigation; rather, such a development threatened to 'seriously impair the federal court's flexibility and authority' to approve settlements in the multidistrict litigation."<sup>121</sup>

The court continued:

The success of any federal settlement was dependent on the parties' ability to agree to the release of any and all related civil claims the plaintiffs had against the settling defendants based on the same facts. If states or others could derivatively assert the same claims on behalf of the same class or members of it, there could be no certainty about the finality of any federal settlement. Any substantial risk of this prospect would threaten all of the settlement efforts by the district court and destroy the utility of the multidistrict forum otherwise ideally suited to resolving such broad claims. To the extent that the impending state court suits were vexatious and harassing, our interest in preserving federalism and comity with the state courts is not significantly disturbed by the issuance of injunctive relief. . . .

. . . In effect, unlike the situation in the *Kline v. Burke Construction Co.* line of cases, the district court had before it a class action proceeding so far advanced that it was the virtual equivalent of a res over which the district judge required full control. . . .

. . . Although the question is closer as to the application of the injunction to the eight defendants who have not yet settled, we cannot find that the injunction was erroneous as to them. Given the extensive involvement of the district court in settlement negotiations to date and in the management of this substantial class action, we perceive a major threat to the federal court's ability to manage and resolve the actions against the remaining defendants should the states be free to harass the defendants through state court actions designed to influence the defendants' choices in the

---

121. *Id.* (quoting *Atlantic Coast*, 398 U.S. at 295).

federal litigation. So long as there is a substantially significant prospect that these eight defendants will settle in the reasonably near future, we conclude that the injunction entered by the district court is not improper. If, however, at some point in the continued progress of the actions against the remaining eight defendants it should appear that prompt settlement was no longer likely, we anticipate that upon application the injunction against parallel actions by the states might be lifted; in that event the situation would fall within the *Burke v. Kline Construction Co.* rule that *in personam* proceedings in state court cannot be enjoined merely because they are duplicative of actions being heard in federal court. That situation, however, does not presently exist.<sup>122</sup>

A more glowing endorsement of the power of the federal courts to resolve complex litigation would be hard to find.

Indeed, borrowing from the *Baldwin* analysis, in the pre-*Amchem* days, federal courts used the All-Writs Act to enjoin state litigation that would thwart the global class resolution of mass tort and other state claim-based complex litigation. For example, in the asbestos litigation, the Third Circuit affirmed a district court order preliminarily enjoining absent members of the plaintiff class, including future class claimants, from prosecuting separate state court actions.<sup>123</sup> The court held that the injunction was appropriate as necessary in aid of jurisdiction under the Anti-Injunction Act and the All-Writs Act.<sup>124</sup> Settlement of the federal class action was imminent, and the plaintiffs later would have the opportunity to opt out pursuant to the class action.<sup>125</sup> A key reason for upholding the injunction was the fact that the state actions sought to challenge the propriety of the federal class action, thereby implicating the "in aid of jurisdiction" exception to the Anti-Injunction Act and the All-Writs Act.<sup>126</sup>

---

122. *Id.* at 337-38.

123. *See* Carlough v. Amchem Prods., Inc., 10 F.3d 189 (3d Cir. 1993).

124. *See id.* at 204.

125. *See id.* at 203-04.

126. *See id.* For similar reasons, the Fifth Circuit affirmed the use of injunctions in an antitrust case in *In re Corrugated Container Antitrust Litigation*, 659 F.2d 1332 (5th Cir. 1981). Key to the court's affirmance was the fact that state court actions were initiated for the purpose of challenging and derailing a

Similarly, the Ninth Circuit used the All-Writs Act in a consumer protection case. In *Hanlon v. Chrysler Corp.*,<sup>127</sup> the defective latch litigation, the court found that it is proper to use the All-Writs Act to temporarily enjoin state court litigation pending the final approval of a class action settlement.<sup>128</sup> And the Seventh Circuit has affirmed the use of an injunction under the All-Writs Act in the HIV hemophilia case to prevent attorneys from suing in state courts to enforce contingency fee agreements that were inconsistent with the federal settlement decree.<sup>129</sup>

Courts have also used the All-Writs Act to effect removal of state cases to federal court. For example, the *Agent Orange* court used the All-Writs Act to remove parallel state court proceedings to prevent them from frustrating the federal settlement of the litigation.<sup>130</sup> In that case, two groups of veterans and their families brought actions in state court asserting tort claims against chemical companies which manufactured the defoliant Agent Orange.<sup>131</sup> Plaintiffs alleged that injuries they sustained did not manifest themselves or were not discovered until after the settlement date in prior federal class action suit involving Agent Orange.<sup>132</sup> The cases were removed to federal court, which remanded claims of two civilian plaintiffs, but denied a motion to remand brought by veteran plaintiffs and their family members.<sup>133</sup> The district court then dismissed their claims as barred by a prior settlement of federal class action and an order enjoining future suits by class members.<sup>134</sup>

The Second Circuit affirmed the denial of the motion to remand, relying on the All-Writs Act as the basis for permitting removal.<sup>135</sup>

---

federal class action settlement. *See id.* at 1335; *see also* *White v. National Football League*, 41 F.3d 402, 409 (8th Cir. 1994) (approving settlement agreement in complex antitrust class action lawsuit and enjoining related actions in state or federal court).

127. 150 F.3d 1011 (9th Cir. 1998).

128. *See id.* at 1025.

129. *See In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 159 F.3d 1016 (7th Cir. 1998).

130. *See In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425 (2d Cir. 1993).

131. *See id.* at 1428, 1430.

132. *See id.* at 1430.

133. *See id.*

134. *See id.*

135. *See id.* at 1428.

The Second Circuit found that a district court, in exceptional circumstances, may use its All-Writs authority to remove an otherwise unremovable state court case in order to “effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained.”<sup>136</sup> The court noted that “[i]f Agent Orange victims were allowed to maintain separate actions in state court, the deleterious effect on the *Agent Orange I* settlement mechanism would be substantial.”<sup>137</sup> “The parties to that settlement implicitly recognized this when they agreed that all future suits by class members would be permanently barred.”<sup>138</sup>

The circuit court explained that a state court properly addressing a victim’s tort claim would first need to decide the scope of the Agent Orange class action and settlement.<sup>139</sup> The federal district court which approved the settlement, and entered the judgment enforcing it, was best situated to make such a determination.<sup>140</sup> Accordingly, removal was “an appropriate use of federal judicial power” under the All-Writs Act.<sup>141</sup>

The court warned, however:

[W]e are not unmindful of the fact that the All-Writs Act is not a jurisdictional blank check which district courts may use whenever they deem it advisable. “Although that Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate.” Given the “exceptional circumstances” surrounding the instant case, issuance was a proper exercise of judicial discretion. The district court was not determining simply the preclusive effect of a prior final judgment on claims or issues expected to be raised in subsequent collateral proceedings; it was enforcing an explicit, ongoing order against relitigation of matters

---

136. *Id.* at 1431 (quoting *United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977)).

137. *Id.*

138. *Id.*

139. *See id.*

140. *See id.*

141. *Id.*

it already had decided, and guarding the integrity of its rulings in complex multidistrict litigation over which it had retained jurisdiction.<sup>142</sup>

The Second Circuit rejected plaintiff's argument that removal violated the Anti-Injunction Act. Rather, the court found removal necessary to protect or effectuate the district court's *Agent Orange I* judgment.<sup>143</sup> In *Chick Kam Choo v. Exxon Corp.*, the court held that "the relitigation exception [in the statute] was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court."<sup>144</sup> The district court clearly determined the central issue of class membership raised in the state court actions, whether persons who had yet to manifest injury were class members.<sup>145</sup>

There is, however, some debate over whether it is appropriate to use the All-Writs Act to remove state court cases. The Eleventh Circuit has noted that the All-Writs Act may permit removal, but only in extraordinary cases.<sup>146</sup> The court, following the analysis of the Supreme Court in *Rivet v. Regions Bank* that an otherwise non-removable case may not be removed on the theory that it is precluded by a prior federal judgment, held that the case before it was not removable.<sup>147</sup> The Tenth Circuit rejected the Second Circuit's approach as well.<sup>148</sup> Moreover, it appears that the federal courts may not have the power to use the All-Writs Act to effect removal unless they have retained jurisdiction over a case in which it has secured a judgment. Indeed, the Supreme Court recently vacated an Eighth

---

142. *Id.* at 1431 (citations omitted) (quoting *Pennsylvania Bureau of Correction v. United States Marshals Serv.*, 474 U.S. 34, 43 (1985)).

143. *See id.*

144. 486 U.S. 140, 147 (1988).

145. *See Agent Orange*, 996 F.2d at 1433.

146. *See Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368, 1379 (11th Cir. 1998).

147. *Rivet v. Regions Bank*, 522 U.S. 470, 478 (1998).

148. *See Hillman v. Webley*, 115 F.3d 1461, 1469 (10th Cir. 1997) (holding that the All-Writs Act does not provide an independent basis for a district court to acquire jurisdiction over a separate case pending in state court). On the other hand, the Seventh Circuit, citing *Agent Orange*, endorsed the use of the All-Writs Act to remove and enjoin state court litigation in order to enforce its ongoing orders. *See In re VMS Sec. Litig.*, 103 F.3d 1317, 1323-26 (7th Cir. 1996).

Circuit judgment that the All-Writs Act can be used as a basis for removing an action to federal court.<sup>149</sup> The Court limited the use of the All-Writs Act in light of *Rivet*. In *Rivet*, the case turned on whether the district court retained jurisdiction in the settlement order, ultimately holding it improper to remove under 28 U.S.C. 1441(b).<sup>150</sup>

More importantly for the purposes of this Article, the federal courts have recently moved away from permitting themselves to be the primary forum for resolving mass tort and other state claim based complex litigation. The Supreme Court in *Amchem*, as we will see, circumscribed the use of Rule 23 as a settlement tool. In addition, a recent Third Circuit decision in a consumer protection case, the GM side saddle fuel tank litigation, provides an example of how the federal courts are showing state courts increasing deference in such cases.<sup>151</sup>

### III. THE FEDERAL JUDICIARY REJECTS ITS PARAMOUNT ROLE

The courts of appeals decisions on class actions and the All-Writs Act of the mid-1980s to the mid-1990s signaled the receptivity of federal courts as the primary forum for the resolution of mass torts and other state claim based complex litigation. Although the use of this device, particularly the settlement class, became more frequent, its use remained highly controversial. Thus, in a series of cases, courts of appeals and the Supreme Court vacated class certifications in a variety of mass tort contexts.<sup>152</sup> In addition, the federal

---

149. See *NAACP v. Metropolitan Council*, 522 U.S. 1145 (1998), *vacated*, 125 F.3d 1171 (8th Cir. 1997).

150. See *Rivet*, 522 U.S. at 472.

151. See *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133 (3d Cir. 1998).

152. See, e.g., *Castano v. American Tobacco*, 84 F.3d 734 (5th Cir. 1996) (reversing and remanding district court order certifying nationwide cigarette litigation class action); *Georgine v. Amchem Prods.*, 83 F.3d 610 (3d Cir. 1996) (remanding to the district court with directions to decertify the asbestos settlement class); *In re American Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996) (granting petitions for writ of mandamus and directing district court judge to decertify the plaintiff class in penile implant litigation); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995), *cert. denied sub nom. Grady v. Rhone-Poulenc Rorer, Inc.*, 516 U.S. 867 (1995) (directing district court judge to decertify class action in hemophiliac/HIV contamination litigation).

courts began to shy away from using the All-Writs Act to protect the primacy of federal jurisdiction in resolving such cases.

*A. The Shibboleth of Legalized Blackmail Returns*

Judge Weinstein was motivated to certify the Agent Orange class action discussed above to help achieve a settlement of a mass tort litigation.<sup>153</sup> However, one reason courts and commentators historically thought it appropriate to reject class actions in which the class seeks money damages was the idea that once a class is certified, plaintiffs have an unfair bargaining advantage.<sup>154</sup> A recent mass tort example of this argument is Judge Posner's opinion in *In re Rhone-Poulenc Rorer Inc.*,<sup>155</sup> the HIV hemophiliac litigation. Over 300 lawsuits, involving some 400 plaintiffs, were filed in state and federal courts seeking to impose tort liability on the defendants for the transmission of HIV to hemophiliacs in blood solids manufactured by the defendants.<sup>156</sup> The federal cases were transferred by the MDL Panel to the Northern District of Illinois.<sup>157</sup> One of these cases became the subject of the class action.

Plaintiffs advanced a novel theory of tort liability. They claimed:

before anyone had heard of AIDS or HIV, it was known that Hepatitis B, [often] a lethal disease . . . could be transmitted either through blood transfusions or through injection of blood solids. The plaintiffs argue[d] that due care with respect to the risk of infection with Hepatitis B required the defendants to take measures to purge that virus

---

153. See *supra* Part II.B.

154. See *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 572 (2d Cir. 1968) (Lumbard, J., dissenting) ("The appropriate action for this Court is to affirm the district court and put an end to this Frankenstein monster posing as a class action."), *rev'd*, 417 U.S. 156 (1974). Judge Friendly called settlements induced by a small probability of an immense judgment in a class action "blackmail settlements." HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 120 (1973). But see Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"*, 92 HARV. L. REV. 664, 679-82 (1978-79) (arguing that serious abuses died out by the mid-1970s).

155. 51 F.3d 1293 (7th Cir. 1995).

156. See *id.* at 1296.

157. See *id.*

from their blood solids . . . .<sup>158</sup>

Such measures would have protected hemophiliacs “not only against Hepatitis B but also . . . as the plaintiffs put it ‘serendipitously,’ against HIV.”<sup>159</sup>

It was not feasible to certify a class action for all aspects of the case, largely because the differences in the dates of infection alone raised predominance problems.<sup>160</sup> Nevertheless, the district court found that particular issues, such as the novel “serendipity” theory, could be adjudicated through special verdicts on a classwide basis under Rule 23(c)(4)(A).<sup>161</sup> Defendants sought review of the district court’s interlocutory order by writ of mandamus.<sup>162</sup> Although the Seventh Circuit commended the district judge for his experiment with an innovative procedure for streamlining the adjudication, Judge Posner, writing for the majority, found that the “plan so far exceeds the permissible bounds of discretion in the management of federal litigation as to compel us to intervene and order decertification.”<sup>163</sup>

According to Judge Posner, the sheer magnitude of the risk to which the class action, in contrast to the individual pending or likely actions, exposes defendants justified immediate review. Rather than face plaintiffs in the 300 or so cases filed, the defendants would face a universe of over 5000 class members. The defendants had already prevailed in twelve of the first thirteen cases tried. Even if the defendants were to lose or settle, they would be faced with limited liability of probably no more than \$125 million. With class certification, potential liability of \$25 billion loomed, and with it bankruptcy. Judge Posner was concerned that with this potential liability, the defendants “may not wish to roll these dice,” and they would be under intense pressure to settle.<sup>164</sup>

---

158. *Id.*

159. *Id.*

160. *See id.* at 1296-97.

161. *See id.* at 1297.

162. *See id.* at 1294-95. The amendment to FED. R. CIV. PROC. 23(f), permitting interlocutory review of class certifications decisions, was not effective at the time. Accordingly, the only vehicle for seeking immediate review was a writ of mandamus.

163. *Rhone-Poulenc Rorer*, 51 F.3d at 1297.

164. *Id.* at 1298 (citations omitted). Ironically, the defendants settled the



Of course, Judge Weinstein would say: "Exactly!" Class certification might result in a global settlement, thereby promoting the twin goals of compensating the claimants and preventing the further waste of defendant, plaintiff, or judicial resources on the litigation. While the legalized blackmail aspect of Judge Posner's opinion is, no doubt, a practical motivation for Congress in trying to catapult more class actions into the federal court where they are less likely to be certified, there is a more important, *Erie* federalism-based aspect to Judge Posner's opinion.<sup>165</sup>

The Seventh Circuit also justified vacating the district court order on the ground that the *Erie* doctrine requires the federal courts to apply the law that each of the transferor states would have applied.<sup>166</sup> Accordingly, class treatment would be unmanageable even on the novel tort theory issue proposed to be treated as a classwide issue by the district court.<sup>167</sup> Similarly, the Fifth Circuit cited state law differences as a justification for vacating the national class certification in the *Castano* cigarette litigation. The Supreme Court, in *Amchem*, also cited this concern, as we will see below. This concern, together with the new reading of the Tenth and Eleventh Amendments by the Supreme Court reinvigorates the federalism prong of the *Erie* doctrine, as I will demonstrate in Part IV.C, below.<sup>168</sup>

### B. The Supreme Court Rejects the Primacy of Federal Class Action Resolution

While Judge Posner worried about improper leverage of plaintiffs vis-à-vis defendants, many commentators and courts began to question whether abuses and ethical lapses had permeated the use of the class action procedure to the detriment of class members.<sup>169</sup> For

---

hemophiliac HIV litigation for \$640 million, a rather staggering sum if Judge Posner is correct about the merits of the litigation. See Thomas M. Burton, *Makers of Blood Products Agree to Offer \$640 Million to Settle Cases Tied to AIDS*, WALL ST. J., Apr. 19, 1996, at B6; *In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 159 F.3d 1016 (7th Cir. 1998).

165. For a discussion of the federalism aspects of the *Erie* doctrine, see notes 293-301 and accompanying text.

166. See *Rhone-Poulenc Rorer*, 51 F.3d at 1300 (citing *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938)).

167. See *id.* at 1302.

168. See *infra* Part IV.C.3.

169. See, e.g., John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass*

example, the Third Circuit reversed a so-called "coupon settlement" in the General Motors side saddle fuel tank litigation.<sup>170</sup> Judge Becker, writing for the unanimous panel, found that the settlement did not meet the test of fairness under Rule 23 because the plaintiff class members' individual recoveries were intolerably low in the face of huge attorneys' fees for the class lawyers.<sup>171</sup> Indeed, the Third Circuit questioned whether settlement classes were appropriate at all.<sup>172</sup> Judge Becker returned to this theme a year later in the MDL asbestos litigation, again vacating a settlement class.<sup>173</sup> The Supreme Court, by a six to two vote, affirmed.<sup>174</sup>

The Supreme Court quite clearly signaled its distaste for the possibly collusive conduct of counsel for the opposing parties that may lead to the use of settlement classes in mass tort cases.<sup>175</sup> In that respect, the majority opinion is of the same cloth as Judge Posner's and Judge Becker's. At the same time, however, the Court rejected the Third Circuit's opinion that settlement classes must meet the same criteria for certification as if the case were to be tried.<sup>176</sup> The Court's opinion is a technical parsing of Rule 23 that elevates the importance of state law when resolving cases in federal court and rejects the primacy of federal courts in resolving mass tort cases.

---

*Tort Class Action*, 95 COLUM. L. REV. 1343 (1995) [hereinafter Coffee, *Class Wars*]; Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045 (1995); John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 CORNELL L. REV. 990 (1995).

170. *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 819 (3d Cir. 1995).

171. *See id.* at 803, 822.

172. *See id.* at 818.

173. *See Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996).

174. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). Justice Ginsburg delivered the opinion of the Court. *See id.* at 597. Justice Breyer wrote a dissenting opinion in which Justice Stevens joined. *See id.* at 628. Justice O'Connor took no part in the case. *See id.* Justice Breyer's dissent was based on his view that the extensive fairness hearing conducted by the district court warranted a more deferential degree of judicial review. *See id.* at 633-34. This observation then led to his policy-based rationale that if ever there was a case that warranted, indeed compelled, class settlement, the protracted asbestos litigation which has swamped state and federal courts for decades was it. *See id.* at 630-32.

175. *See id.* at 600, 618, 623.

176. *See id.* at 597, 618.

As discussed above, most of the thousands of asbestos cases pending throughout the federal district courts were transferred by the MDL Panel to the Eastern District of Pennsylvania.<sup>177</sup> Attorneys for plaintiffs and defendants formed separate steering committees<sup>178</sup> and began settlement negotiations.<sup>179</sup> Negotiations focused not only on the pending claims that had been transferred, but also on settling all future asbestos claims that might be filed.<sup>180</sup> Indeed, the Center for Claims Resolution (CCR)—the defendants' negotiating arm—made clear that it would not settle the individual pending claims which had been transferred by the MDL order—the so-called "inventory claims" of the plaintiffs' attorneys who were co-chairing the Steering Committee—unless the settlement also provided protection from the filing of future asbestos claims.<sup>181</sup> Eventually, CCR and the plaintiffs' attorneys reached an agreement whereby the inventory claims and the future claims would be settled. The Supreme Court made clear that the recoveries negotiated for the inventory claimants were more generous than those that the future claimants would receive.<sup>182</sup> CCR, together with the plaintiffs' lawyers, marched to the district court with a class action complaint, an answer, a proposed settlement order, and a joint motion for the conditional certification of a

---

177. See *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 422-24 (J.P.M.L. 1991).

178. Complex litigation, such as mass tort cases, involve numerous parties on the plaintiffs' side and often on the defendants' side as well. "Traditional procedures in which all papers and documents are served on all attorneys, and each attorney files motions, presents arguments, and conducts witness examinations, may result in waste of time and money, in confusion and indirection, and in unnecessary burden on the court." FEDERAL JUDICIAL CTR, MANUAL FOR COMPLEX LITIGATION, THIRD 26 (1995). A solution to the problem is the judicial appointment of lead or liaison counsel or steering committees composed of representative counsel for the parties. The court appointing such counsel generally will apprise them of their duties, and they are charged with insuring that all attorneys involved are apprised of the proceedings. See *id.* at 26-28.

179. See *Amchem*, 521 U.S. at 598.

180. See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 266 (E.D. Pa. 1994) ("The primary purpose of the settlement talks in the consolidated MDL litigation was to craft a national settlement that would provide an alternative resolution mechanism for asbestos claims," including claims that might be filed in the future.).

181. See *Amchem*, 521 U.S. at 600.

182. See *id.* at 604, 636 (Breyer, J., dissenting).

settlement class which would settle all future claims.<sup>183</sup> No class certification was sought for the settlement of the inventory claims. The district court, after extensive fairness hearings under Rule 23(e), approved the settlement as fair and not collusive.<sup>184</sup> The Third Circuit vacated the class certification and the Supreme Court affirmed.<sup>185</sup>

The Supreme Court began its analysis by reviewing the 1966 amendments to Rule 23, noting that Rule 23(b)(3) damages classes

---

183. *See id.* (Breyer, J., dissenting).

184. *See Georgine*, 157 F.R.D. at 319-25, 337. The district court held an 18 day fairness hearing under Rule 23(e), at which dozens of witnesses testified to the ethical dilemmas of the settlement and its fairness to the class:

Counsel for the Settling Parties, several lawyers representing various Objectors, and counsel for various *Amici* participated at the fairness hearing. Under the direction of the Court, the Objectors closely coordinated their activities throughout the fairness proceedings.

Because of the complexity of the issues involved, and to give all interested parties a full and fair opportunity to present their views, the fairness hearing was extensive and protracted, involving the testimony of some twenty-nine witnesses (live or by deposition) during 18 hearing days over a period of over five weeks. The Court heard testimony from participants in the settlement negotiations, several representative plaintiffs, two high-ranking officers of the CCR, medical experts, financial experts, legal ethics experts, and representative asbestos plaintiffs' attorneys. Numerous exhibits were also submitted. The substance of the testimony covered, among other things: the decades-long history of asbestos litigation in the United States; the details of the handling of asbestos litigation in the current tort system; the negotiation and operation of the proposed settlement and various objections to certain of its provisions; the competence and adequacy of Class Counsel; the medical conditions caused by exposure to asbestos and the reasonableness of the medical criteria set forth in the settlement; the ability of the CCR defendants to meet their financial obligations under the Stipulation through insurance proceeds or otherwise; and the negotiation and operation of settlements reached between Class Counsel and the CCR defendants to settle in the present tort system the inventory of pending claims of clients represented by Class Counsel and their affiliated law firms.

In May, 1994, this Court received voluminous post-hearing submissions from the Settling Parties, Objectors and *Amici*. On May 23, 1994, the Court heard day-long final oral arguments on the fairness of and objections to the proposed settlement.

*Id.* at 260-61.

185. *See Amchem*, 521 U.S. at 628.

were thought to be the "most adventuresome" of the innovations adopted that year.<sup>186</sup> Furthermore, the Court quotes from the famous 1966 advisory committee's note which warned that "ordinarily [class actions are] not appropriate" in such cases.<sup>187</sup> Nonetheless, the Court reviewed with apparent approval the more recent trend in favor of class certification generally, and settlement classes in particular.<sup>188</sup> Unlike the Third Circuit, the Court found that settlement classes are appropriate in some cases.<sup>189</sup> According to the Supreme Court, instead of looking at whether all the requirements under Rule 23(a)<sup>190</sup> and the special requirements of predominance of common questions and superiority under Rule 23(b)(3) are met as if the case would be tried, the district court is required to consider the settlement in determining whether the class can be certified.<sup>191</sup>

The Court, however, warns that district courts must scrutinize such classes carefully. In rejecting the proposed class action settlement, the Court seemed troubled by the lower federal courts' growing role as the primary forum for boldly resolving mass tort and other complex, state law based cases. For example, to meet the commonality requirement of Rule 23(a)(2), the Court said that it is not sufficient to rely solely on the class members' claimed shared interest in

---

186. *Id.* at 614 (quoting Benjamin Kaplan, *The Class Action, A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969)).

187. *Id.* at 625 ("[M]ass accident' cases are likely to present 'significant questions, not only of damages but of liability and defenses of liability, . . . affecting the individuals in different ways.' And the Committee advised that such cases are 'ordinarily not appropriate' for class treatment.") (citations omitted).

188. *See id.* at 617.

In the decades since the 1966 revision of Rule 23, class action practice has become ever more "adventuresome" as a means of coping with claims too numerous to secure their "just, speedy, and inexpensive determination" one by one. The development reflects concerns about the efficient use of court resources and the conservation of funds to compensate claimants who do not line up early in a litigation queue.

Among current applications of Rule 23(b)(3), the "settlement only" class has become a stock device.

*Id.* at 617-18 (citations omitted).

189. *See id.*

190. These requirements include numerosity, commonality, typicality, and adequacy of representation. *See* FED. R. CIV. P. 23(a), 23(b)(3).

191. *See id.*; *Amchem*, 521 U.S. at 616-19, 625 n.20.

the fairness of the settlement or their desire for prompt and efficient compensation.<sup>192</sup> Second, the Court's reference to the "sprawling" nature of the class suggests its uneasiness with a nationwide class of hundreds of thousands, if not millions of claimants.<sup>193</sup> Specifically, the Court agreed with the Third Circuit that because the class members were exposed to asbestos at different times, for different lengths of time, and under different circumstances, the predominance of the common questions requirement of Rule 23(b)(3) was not satisfied.<sup>194</sup> Moreover, differences in state law exacerbated these disparities.<sup>195</sup>

Third, the Supreme Court, like the Third Circuit, expressed grave concern about the fairness of the settlement itself because of what it viewed as the serious conflicts of interest of the attorneys representing the class.<sup>196</sup> Allocation decisions were made by the class lawyers and defendants, as between inventory plaintiffs and future plaintiffs, and as between earlier future plaintiffs and later ones, without specific regard to the needs of each group. Thus, the adequacy of the representation element of Rule 23(a)(4) went unsatisfied.

Finally, the Court rejected the idea that federal courts ought to be the primary forum for resolving mass tort litigation, even when an unarguably efficient and fair means for compensating the victims of mass torts is proposed:

The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution. And Rule 23, which must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view, cannot carry the large load CCR, class counsel, and the District Court heaped upon it. As this case exemplifies, the rule-

---

192. See *Amchem*, 521 U.S. at 623.

193. See *id.* at 624.

194. See *id.* at 623-24.

195. See *id.* at 624; see also *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 823 (1985) (noting that constitutional limitations on choice of law apply in nationwide class actions).

196. See *Amchem*, 521 U.S. at 625.

makers' prescriptions for class actions may be endangered by "those who embrace [Rule 23] too enthusiastically just as [they are by] those who approach [the Rule] with distaste."<sup>197</sup>

And so, although federal court settlement classes are permitted, the Supreme Court has posed serious obstacles to the use of nationwide federal class actions to resolve state claim based litigation. The Court seems to suggest that the use of Rule 23(c)(4)(B) subclasses, but with independent counsel for all named representatives, could have ameliorated its concerns about adequacy of representation.<sup>198</sup> One can only imagine, however, how the Supreme Court would view a proposed nationwide settlement with the multiple numbers of subclasses needed to account for all measures of plaintiffs and state law. It is an easy bet that the Court would still use words such as "sprawling" and the concept of the federal courts overstepping their judicial bounds in rejecting any such proposed settlement.

### C. The Aftermath

There is no question that the economic realities of mass tort cases both in terms of the size of compensation funds and attorneys' fees, are huge.<sup>199</sup> After *Amchem*, attorneys seeking to settle mass tort cases on an aggregated basis through a class action took two basic approaches. Some worked harder at trying to craft classes and subclasses that respond to the concerns about the predominance of common questions and adequacy of representation addressed by the Supreme Court.<sup>200</sup> Many used statewide, rather than nationwide,

---

197. *Id.* at 628-29 (citing CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 508 (5th ed. 1994) (footnote omitted)).

198. *See id.* at 625.

199. *See* Coffee, *Class Wars*, *supra* note 169, at 1347-49; Bruce L. Hay, *Asymmetric Rewards: Why Class Actions (May) Settle for Too Little*, 48 HASTINGS L.J. 479, 479-80 (1996-97); Myron Levin, *Battling Big Tobacco Earns Lawyers Big Fees*, L.A. TIMES, Aug. 18, 1997, at A10. *See generally* Christopher P. Lu, *Procedural Solutions to the Attorney's Fee Problem in Complex Litigation*, 26 U. RICH. L. REV. 41 (1992) (discussing attorneys' fees problem and potential remedial solutions in, among other cases, class action suits with resulting common funds).

200. *See, e.g., In re Teletronics Pacing Sys., Inc. Accufix Atrial "J" Leads Prods. Liab. Action*, 172 F.R.D. 271 (S.D. Ohio 1997) (recertifying, after making detailed *Amchem* findings, nationwide class, with subclasses, on plain-

class actions to help alleviate concerns over the application of state law. Other attorneys abandoned the federal courts entirely and sought to certify settlement classes in state courts where the rules on certification are perceived to be more liberal.<sup>201</sup> The flight to state courts approach appeared to be the more successful.

In the wake of *Amchem*, some federal courts decertified classes that they previously had certified,<sup>202</sup> or refused to certify classes altogether.<sup>203</sup> Attorneys had already begun to abandon federal courts before *Amchem*, as the courts of appeals began to reject class actions. *Amchem* simply accelerated this trend.<sup>204</sup> While some state courts

---

tiffs' medical monitoring, negligence, and strict products liability claims in pacemaker litigation); *Fanning v. Acromed Corp.*, 176 F.R.D. 158 (E.D. Pa. 1997) (certifying a settlement class and enjoining competing state court actions pursuant to the All-Writs Act, 28 U.S.C. § 1651).

201. See *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 137 (2d Cir. 1998).

202. See, e.g., *Walker v. Liggett Group, Inc.*, 175 F.R.D. 226, 230-33 (S.D. W. Va. 1997) (citing what it believed to be the Supreme Court's "less than enthusiastic" endorsement of settlement classes, the court rejected a settlement class in a smoking case in which settlement had previously been approved).

203. See *In re Cincinnati Radiation Litig.*, No. C-1-94-126, 1997 U.S. Dist. LEXIS 12960 (S.D. Ohio Aug. 4, 1997) (citing *Amchem*, the court rejected proposed settlement class in context of radiation exposure claims); *Barnes v. American Tobacco Co.*, 176 F.R.D. 479 (E.D. Pa. 1997) (decertifying statewide class in tobacco litigation for trial purposes); *Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90 (W.D. Mo. 1997) (denying statewide litigation class for medical monitoring purposes); see also *Reed v. Phillip Morris, Inc.*, No. 96-5070, 1997 WL 538921 (D.C. Super. Aug. 18, 1997) (denying class certification in tobacco litigation).

204. Various federal appeals courts vacated classes certified by federal district courts. See *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (reversing district court order certifying nationwide cigarette litigation class action); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996) (reversing district court order certifying asbestos settlement class action); *In re American Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996) (vacating the district court's order certifying penile prostheses class action); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (reversing district court order certifying class action in hemophiliac/HIV contamination litigation); 3B JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶¶ 23.01-.87 (2d ed. 1996). In the wake of these opinions, plaintiffs' attorneys began increasingly to file class actions in state courts. See Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 602 (1997) ("The current phase in this saga recognizes the recent chilly reception of mass tort class actions in federal courts, and has changed the focus to state courts, either for national or statewide classes."); Elizabeth J. Cabraser, *Class Action*



are taking the relatively strict view outlined in *Amchem* and by the federal courts of appeals,<sup>205</sup> some state courts appear to be more receptive to class certification in mass tort or similar cases.<sup>206</sup> Other state courts appear to be feeling their way. For example, New York courts have certified and decertified classes in connection with the tobacco litigation.<sup>207</sup>

State courts are free to interpret their class actions rules as they see fit, so long as those interpretations do not run afoul of constitutional precepts. The Maryland state trial court opinion involving tobacco and health class claims is an example of the more receptive state court approach. The court certified a litigation class without

---

*Trends and Developments after Amchem and Ortiz*, E28 ALI-ABA 617, 647 (1999); John C. Coffee, Jr., *After the High Court Decision in Amchem Products, Inc. v. Windsor, Can A Class Action Ever be Certified Only for the Purpose of Settlement?*, NAT'L L.J., July 21, 1997, at B4 [hereinafter Coffee, *High Court*]; Brian Anderson, *Will Supreme Court Ruling Ebb the Class Action Tide?*, 12 WASH. LEGAL FOUND. LEGAL BACKGROUNDER (Sept. 12, 1997).

205. See, e.g., *Ford v. Murphy Oil U.S.A., Inc.*, 703 So. 2d 542 (La. 1997) (denying certification of class in pollution emission case). More recently, in *Spitzfaden v. Dow Corning Corp.*, No. 95-2578, 1995 U.S. Dist. LEXIS 16787 (E.D. La. Nov. 8, 1995), a Louisiana state court trial judge in a case involving breast implants decertified a class that had been tried as a class for liability purposes. Class members will be required to prove specific causation and damages in individual lawsuits. See *Judge Refuses to Reconsider Order on Breast Implants*, ASSOCIATED PRESS, Jan. 5, 1998; *Court Bars 1,800 From Breast Implant Suit*, N.Y. TIMES, Feb. 3, 1998, at A12 (reporting that Louisiana appeals court affirmed trial judge).

206. See also *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995) (discussing certification of settlement class in GM side saddle fuel tank litigation in Louisiana state court); *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 56 Cal. Rptr. 2d 483 (1996) (certifying settlement class in defective car/coupon case); *McFadden v. Staley*, 687 So. 2d 357 (Fla. Dist. Ct. App. 1997) (certifying litigation class in food poisoning case); *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39 (Fla. Dist. Ct. App. 1996); *Cox v. Shell Oil Co.*, No. Civ-A 18844, 1995 WL 775363 (Tenn. Ch. Nov. 17, 1995) (certifying national settlement class in polybutylene plumbing system case). See, e.g., *Cornerwood Healthcare, Inc. v. Estate of Herron*, 683 N.E.2d 1322 (Ind. Ct. App. 1997) (affirming damages class action); *Broin v. Phillip Morris Cos.*, 641 So. 2d 888 (Fla. Dist. Ct. App. 1994) (settling during trial a secondhand smoke case brought by flight attendants for \$300 million payable to medical research fund).

207. See *Small v. Lorillard Tobacco Co.*, 668 N.Y.S.2d 307 (Sup. Ct. 1997), *rev'd*, 677 N.Y.S.2d 515 (App. Div. 1998); *Geiger v. American Tobacco Co.*, 696 N.Y.S.2d 345 (Sup. Ct. 1999) (characterizing the class action issue as "rather simple").

raising any of the concerns discussed by the Supreme Court in *Amchem*.<sup>208</sup> Under Federal Rule of Civil Procedure 23(b)(3), in order for a mass tort damages class to be certified, the federal district court must find that common questions predominate and that the class action is the superior means for resolving the dispute.<sup>209</sup> Many federal cases are not certified because the courts find that in a mass tort case, *a la Amchem*, questions of liability specific to class members swamp any common questions. Factual considerations such as timing of exposure to the allegedly defective product, place and duration of exposure, alternative causation, and extent of injury are important in every mass tort case. These individual questions may, in the view of many federal courts, dwarf any common question, such as whether a particular product can be proved to cause the alleged injuries in the first place. It would follow that resolution of the common question may not, unless it is resolved in favor of the defendant, materially advance the overall resolution of the mass tort and that individual trials on the specific causation issues will be required in any event. Accordingly, a federal court may decide class certification is not the superior means for resolving the mass tort. The Maryland trial court, on the other hand, looked to the alleged "pattern of fraudulent activities" by the defendants to justify class certification, even though federal courts have rejected similar class certifications.<sup>210</sup>

Similarly, a corporate defendant's worst nightmare, showing just why Congress is attempting to oust state courts of jurisdiction over class actions,<sup>211</sup> is taking place in Florida. In the *Engle* case,<sup>212</sup> a

---

208. *Richardson v. Phillip Morris, Inc.*, No. 9614505/CE212596 (Md. Cir. Ct. Jan. 28, 1998), *vacated, sub. nom.*, *Philip Morris, Inc. v. Angeletti*, 2000 Md. LEXIS 249 (Ct. App. Md. May 16, 2000).

209. *See* FED. R. CIV. P. 23(b)(3).

210. *See, e.g., Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (reversing district court order certifying nationwide cigarette litigation class action). Although the intermediate court of appeals in Maryland vacated the trial court's certification order, it left open the possibility of an affirmable certification. Moreover, the appellate court noted that mass tort class actions may be appropriate.

211. Of course, I should not use the word "oust" because Congress is not providing for exclusive jurisdiction. However, there is no question that most defendants will take advantage of the opportunity to escape state courts by removing cases when possible. *See Philip Morris, Inc. v. Angeletti*, 2000 Md.

Florida appellate court permitted a class of Florida cigarette smokers to proceed to a class action trial.<sup>213</sup> In the first phase of the trial, the jury found that the cigarettes do, in fact, cause most of the cancers and heart diseases claimed by the plaintiffs. It also found that the defendants' conduct was so egregious that punitive damages should be awarded.<sup>214</sup> The trial judge then ordered that in the second phase of the trial the same jury should fix a lump sum punitive damage award before trying the hundreds of thousands of compensatory damages cases.<sup>215</sup> Experts predict an award of over \$300 billion.

State courts certainly have the power to certify mass tort class actions and indeed have certified nationwide mass tort class actions.<sup>216</sup> The United States Supreme Court ruled, in *Phillips Petroleum Co. v. Shutts*, that so long as state class action rules provide notice and opt out rights in damage cases, the state court class action judgment can bind class members from all states.<sup>217</sup> In *Phillips*, a nationwide class seeking damages for back royalties was certified by Kansas state courts and approved by the Supreme Court over a due process challenge.<sup>218</sup>

There is another serious potential due process problem, however. Although Justice Ginsburg's opinion for the Supreme Court in *Amchem* is a construction of Rule 23, her concerns over the attorneys' conflicts of interest and the class member conflicts of interest implicate constitutional protections. A class action judgment is

---

LEXIS 249 (Ct. App. Md. May 10, 2000).

212. See *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39 (Fla. Dist. Ct. App. 1996).

213. See *id.* at 41.

214. See *id.* at 40.

215. See *R.J. Reynolds Tobacco Co. v. Engle*, No. 94-02797, 1999 Fla. App. LEXIS 11937 (Fla. Dist. Ct. App. Sept. 3, 1999) (vacating trial court order requiring second phase of trial would be lump sum determination of punitive damages), *vacated*, No. 94-02797, 1999 Fla. App. LEXIS 13055 (Fla. Dist. Ct. App. Sept. 17, 1999) (permitting second phase to proceed as ordered by trial court).

216. See *In re General Motors Corp.*, 134 F.3d at 139-40 (discussing Louisiana state court certification in GM side saddle fuel tank litigation).

217. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 823 (1985) (holding that so long as out-of-state putative class members receive notice and an opportunity to opt out of the class, they may be bound by a state damages class action).

218. See *id.* at 797.

binding on class members, but, under *Hansberry v. Lee*,<sup>219</sup> only when the class has been adequately represented. States are not free to permit attorney conflicts that raise adequacy of representation problems that rise to the level of due process violations. While the Supreme Court's opinion in *Amchem* provides little guidance in terms of the constitutional minimum, it is clear that state courts are not free to bless class action settlements that fail to provide the constitutional minimum.<sup>220</sup> To the extent that some members of Congress are concerned with collusive class action settlements that fail to protect absent class members, it is appropriate for Congress to be concerned with the flight of class actions to state courts. As a practical matter, it will be difficult for many state class action settlements to be reviewed for due process violations by the Supreme Court in light of the few cases the Court handles each year.

On the other hand, powerful federalism arguments can be made that a state court is at least an appropriate forum for resolving mass tort cases, including through class actions. After all, because mass tort cases are essentially aggregated state products liability cases, state courts arguably should be the primary jurisdictions to develop the applicable standards in resolving mass tort cases. Moreover, it is questionable whether federal courts are superior at protecting any litigant's constitutional rights.<sup>221</sup> This argument certainly has renewed force given the recent Supreme Court federalism cases.

#### IV. WHERE SHOULD MASS TORT CASES AND OTHER STATE CLAIM BASED LITIGATION BE RESOLVED?

Thus, the question is whether the trend to file class actions in state court is good or bad. Proponents of federalism should think it is a good thing because the claims asserted in these cases arise under state law. Many members of Congress, on the other hand, think it is a bad thing. They have responded to the flight of class actions to

---

219. 311 U.S. 32 (1940).

220. See Coffee, *High Court*, *supra* note 204, at B4; Anderson, *supra* note 204; Victor Schwartz, *High Court: Class Actions and Toxic Torts Do Not Mix*, 16 PRODUCT LIABILITY L. & STRATEGY No. 2, at 1 (1997).

221. See generally Rubenstein, *supra* note 24 (arguing that gay rights litigation experience debunks the myth that federal courts are superior to state courts in protecting constitutional rights).

state courts by enacting and considering legislation to permit the removal of such cases to federal court, where they will be met by a federal judiciary that Congress knows is now inhospitable to class actions. Generally, this inhospitality will ultimately weaken plaintiffs' bargaining power. The history of the General Motors cases provides an interesting example of the interrelationship of state and federal courts, and the dynamics Congress undoubtedly is seeking to address.<sup>222</sup>

### A. *Dueling Class Actions*

Federal courts have concurrent subject matter jurisdiction with state courts over mass tort cases in which diversity of citizenship exists. Thus, litigants have the choice of filing in either system, or both. In the mass tort arena, before *Amchem* and the other restrictive federal court of appeals decisions were decided, the federal court handling the mass tort, usually pursuant to a transfer order by the MDL Panel under 28 U.S.C. § 1407, was accepted as the forum for global resolution of the mass tort. So, for example, in the GM side saddle fuel tank litigation, the claims of GM truck owners who sought compensation for the allegedly defective fuel tank design responsible for a high risk of fire, were transferred to the Eastern District of Pennsylvania by the MDL Panel for pretrial purposes.<sup>223</sup> The district court certified a settlement class pursuant to which the class members were to receive \$1000 coupons which could be used to buy a new GM truck within a fifteen month period, and the attorneys for the class were to receive approximately \$9.5 million in attorneys' fees.<sup>224</sup> The Third Circuit vacated the class certification order and set aside the settlement but left open the possibility that the defects might be cured and a revised settlement approved on remand.<sup>225</sup>

---

222. See *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133 (3d Cir. 1998).

223. See *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 846 F. Supp. 30 (E.D. Pa. 1993).

224. See *In re General Motors Corp.*, MDL No. 961, 1993 U.S. Dist. LEXIS 18052 (E.D. Pa. Dec. 20, 1993).

225. See *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 819 (3d Cir. 1995), *cert. denied sub nom. General Motors Corp. v. French*, 516 U.S. 824 (1995).

Instead of proceeding further in the Eastern District of Pennsylvania, however, the parties to the settlement returned to the 18<sup>th</sup> Judicial District for the Parish of Iberville, Louisiana,<sup>226</sup> where a similar suit had been pending in which the defendants were then opposing class certification, restructured their deal, and submitted it to the Louisiana court that ultimately approved it. Before the Louisiana court finally approved the revised settlement, which provided slightly better terms for the class and over \$26 million in attorneys' fees, counsel for members of the class who had objected in the federal proceeding sought to derail the state proceeding by simultaneously removing the state court action and seeking an injunction by the federal court under the All-Writs Act against the parties proceeding in the state court.<sup>227</sup> The Third Circuit realized that the state court settlement was effectively an "end run" around the jurisdiction of the Eastern District of Pennsylvania MDL court to which the Third Circuit had remanded the case for further proceedings. It stated that although the procedure followed by the parties to the settlement "gives us pause, the precedent of this Court and the Supreme Court compels us to disagree" that relief is available under the All-Writs Act.<sup>228</sup>

The Third Circuit found that no injunction could issue because the federal district court in Pennsylvania lacked personal jurisdiction over all non-Pennsylvania class members.<sup>229</sup> The Third Circuit also found that because the Louisiana court had entered a final judgment on the settlement, its review was barred by both the Full Faith and Credit Act,<sup>230</sup> as interpreted in *Matsushita Electric Industrial Company, Ltd. v. Epstein*,<sup>231</sup> and the *Rooker-Feldman* doctrine, which prevents intermediate federal appellate review of state court decisions.<sup>232</sup> Finally, the court found that the requested injunction

---

226. See *White v. General Motors Corp.*, No. 42,865 Division "D" (18th Judicial District, La.) (appeal pending).

227. 28 U.S.C. § 1651 (1994).

228. *In re General Motors Corp.*, 134 F.3d at 137.

229. See *id.*

230. 28 U.S.C. § 1738 (2000).

231. 516 U.S. 367 (1996).

232. See *In re General Motors Corp.*, 134 F.3d at 138.

did not fall under any of the three exceptions to the Anti-Injunction Act.<sup>233</sup>

Indeed, in the wake of *Amchem*, and the movement of many mass tort class actions to state court, *Matsushita* takes on new importance. Thus, it is instructive to focus on the Full Faith and Credit aspect of Judge Becker's opinion in the *GM* case, where he stated:

The current phase in this saga recognizes the chilly reception of mass tort actions in federal courts, and has changed the focus to state courts, either for national or statewide classes. The class action investment engine and the defendants' drive for global peace are still moving apace, but on different tracks. Class actions rejected for trial in federal courts are now being filed in state courts—and proposed class action settlements rejected by federal courts are being refiled in state courts. The United States Supreme Court has given some momentum to this trend in *Matsushita Electric Industrial Company v. Epstein*.<sup>234</sup>

In *Matsushita*, the Supreme Court decided that a class action settlement agreement releasing claims within the exclusive jurisdiction of the federal courts was subject to § 1738, the federal Full Faith and Credit statute.<sup>235</sup> Judge Becker noted that Justice Ginsburg's dissent identified serious potential due process problems in the procedures followed in the Delaware state court where the court approved the settlement. Indeed, on remand, a panel of the Ninth Circuit considered the issues raised in Justice Ginsburg's dissent and by a two to one decision, decided, reminiscent of *Amchem*, that conflicts among class counsel and the plaintiff class rendered the representation in the Delaware action inadequate.<sup>236</sup> In an en banc opinion,

---

233. 28 U.S.C. § 2283; see *In re General Motors Corp.*, 134 F.3d at 138 (laying out the three exceptions).

234. McGovern, *supra* note 204, at 602 (footnotes omitted).

235. According to the Court:

The judgment of a state court in a class action is plainly the product of a "judicial proceeding" within the meaning of § 1738. Therefore, a judgment entered in a class action, like any other judgment entered in a state judicial proceeding, is presumptively entitled to full faith and credit under the express terms of the Act.

*Matsushita*, 516 U.S. at 374 (citation omitted).

236. See *Epstein v. MCA, Inc.*, 126 F.3d 1235 (9th Cir. 1997), *withdrawn*,

however, the Ninth Circuit found that the due process issue could not be reviewed and vacated the two to one opinion decided in the summer of 1999.<sup>237</sup>

Judge Becker would leave it to the Louisiana appellate courts, with ultimate appeal of due process issues to the United States Supreme Court, to provide the basis for analyzing the viability of the Louisiana class settlement in the *GM* case.<sup>238</sup> As Judge Becker put it: "If appellants are correct, the Court will be disturbed by what *Matsushita* has wrought here insofar as it is said to have facilitated an end run around the Eastern District of Pennsylvania proceedings."<sup>239</sup>

After *Matsushita*, seizing control of the resolution forum becomes increasingly important to counsel who seek a global resolution of mass tort cases. To the extent that the perception now is that federal courts are relatively hostile, and state courts relatively more amenable to class resolution, there will continue to be a rush to state courts. Other issues are accelerating this trend such as the desire to escape *Daubert v. Merrill Dow Pharmaceuticals, Inc.*,<sup>240</sup> the Supreme Court's decision making the federal district court the gatekeeper for the admission of expert testimony. Many federal courts have invoked *Daubert* to exclude plaintiff's scientific evidence,<sup>241</sup> and the decision is viewed as a serious obstacle to plaintiffs seeking to prove causation in many new mass tort cases.

### B. What Congress is Doing

In response to the flight of state claim based class actions to state court, because many state courts are viewed as more hospitable to class actions than the federal courts, Congress has enacted two statutes and is considering another. One way to prevent state courts

---

179 F.3d 641 (9th Cir. 1999), and cert. denied sub nom.. *Epstein v. Matsushita Elec. Indus. Co.*, 120 S. Ct. 497 (1999).

237. See *id.*

238. Indeed, the appellate court in Louisiana vacated the settlement and remanded for findings in light of *Amchem*. The case is still under consideration by the Louisiana judiciary.

239. *In re General Motors Corp.*, 134 F.3d at 142.

240. 509 U.S. 579 (1993).

241. See, e.g., *Baker v. Dalkon Shield Claimants Trust*, 156 F.3d 248 (1st Cir. 1998) (using *Daubert* to exclude plaintiff's gynecological expert's testimony and test results).



from resolving class actions is to allow for their removal to federal court.

First, Congress passed, and President Clinton signed into law, the Securities Litigation Uniform Standards Act of 1998<sup>242</sup> which bars most securities class actions based on state law fraud theories.<sup>243</sup> In the Senate, the Act was sponsored by Senator Phil Gramm, Republican of Texas. The bill passed, with only two Republicans voting against it.<sup>244</sup> While a majority of Democrats voted in favor of the Act, they were split twenty-six to nineteen.<sup>245</sup> Democratic members of Congress ironically objected to the legislation on federalism grounds.

The 1998 Act supplements the Private Securities Litigation Reform Act of 1995<sup>246</sup> that was designed to heighten the standards for prosecuting such actions in federal court. The 1998 Act is designed to close a perceived loophole in the 1995 Act. Supporters of the 1998 Act believed that the 1995 Act was being undermined by the increased filing of class actions filed in state courts based on state law fraud theories of liability. The 1998 Act amends section 16 of the Securities Act of 1933 and section 28 of the Securities Exchange Act of 1934 to prohibit class actions brought by private parties based on such theories.<sup>247</sup> It further provides that state court class actions brought on such theories are removable to the federal court in the district in which the state action was filed. Moreover, it permits federal courts to stay discovery in state court actions.<sup>248</sup>

It is no secret what Congress seeks to achieve. There is no question that Congress was well within its powers to cut back on the federal remedies for securities violations. There also is no question that Congress has the power to preempt state remedies, though such power is normally exercised relatively rarely. The use of a device like removal of cases to federal court to prevent state courts from providing relief for state law claims rather than exercise its

---

242. P.L. No. 105-353, 112 Stat. 3227 (codified at 15 U.S.C. § 78a (1998)).

243. *See id.*

244. *See id.*

245. *See id.*

246. 15 U.S.C. § 78u-4 (1995).

247. *See* 15 U.S.C. §§ 77p, 78bb (1998).

248. *See id.*

preemption powers is quite unusual and novel, and raises serious federalism problems as discussed below.<sup>249</sup>

Congress also recently enacted a bill governing so-called Y2K litigation. Already faced with numerous lawsuits—many of them class actions brought in state court—members of the information technology industry persuaded Congress, again led generally by conservative Republicans, to enact a bill to provide some relief from Y2K related litigation.<sup>250</sup> The legislation provides certain substantive and procedural standards for the resolution of these suits. Many of these standards appear to be designed to protect the information technology industry and those dependent upon it from claims Congress perceived as essentially nuisance claims or claims with little merit but which, if aggregated, would threaten some members of the industry with at least the possibility of ruinous liability. Accordingly, the statute limits punitive damages, imposes strict pleading requirements, and provides special rules governing class actions and jurisdiction.<sup>251</sup>

Y2K actions may be brought in state or federal court. However, they may be brought as class actions only if the court finds that the defects alleged are material for a majority of the members of the class.<sup>252</sup> The statute provides the standards for determining if a defect is material.<sup>253</sup> The statute also provides that the lawsuit in question must satisfy any other prerequisites of state and federal law.<sup>254</sup> Given the perception that some state courts may be overly friendly to class actions alleging Y2K related claims, the statute provides protective federal court solace for class actions. Section 6614(c) provides for original federal subject matter jurisdiction over many Y2K actions brought as a class action.<sup>255</sup> Of course, therefore, because Congress has provided original jurisdiction over Y2K class actions, they are removable under 28 U.S.C. § 1441(a).<sup>256</sup> The importance

---

249. *See infra* Part IV.C.

250. *See* 15 U.S.C. §§ 6601-6617 (1999).

251. *See id.* § 6614.

252. *See id.* § 6614(a)(2).

253. *See id.* § 6602(4).

254. *See id.* § 6614(a)(1).

255. *See id.* § 6614(c)(1).

256. *See id.* §§ 6614(c)(3)(A), (B).

of this statute is that it provides federal jurisdiction in class actions that otherwise would be beyond its jurisdictional reach.<sup>257</sup>

Currently under consideration by Congress is even more drastic, general legislation. Most recently, the House of Representatives introduced the Interstate Class Action Jurisdiction Act of 1999,<sup>258</sup> and the Senate introduced the Class Action Fairness Act of 1999.<sup>259</sup> These bills would provide for expanded federal jurisdiction over class actions in which there is minimal diversity. They would amend

---

257. *See id.* § 6614(c)(3)(A). For example, Y2K actions generally allege violations of state law. Section 6614(c) provides federal subject matter jurisdiction for class actions of this type notwithstanding a lack of complete diversity or failure to meet the jurisdictional amount rules. However, Congress did not intend to sweep into federal court all Y2K class actions. Rather, it excepted class actions that involve relatively localized claims, or relatively few class members, or state governments. Thus, the statute precludes original jurisdiction under § 6614(c)(2) if: (1) a substantial majority of the members of the proposed plaintiff class are citizens of a single state, the primary defendants are citizens of that same state, and the asserted claims will be governed primarily by the laws of that state; (2) the primary defendants are states, state officials, or other governmental entities against whom the district courts may be foreclosed from ordering relief; (3) the plaintiff class does not seek an award of punitive damages, and the amount in controversy is less than the sum of \$10 million (exclusive of interest and costs), computed on the basis of all claims to be determined in the action; or (4) the proposed plaintiff class has fewer than 100 members. *See id.* §§ 6614(c)(2)(A)-(D). If a class action is brought in federal court that fits within any of these exceptions, and if the sole basis for federal jurisdiction is the Y2K jurisdictional provision and the district court finds that the requirements for class certification under Rule 23 of the Federal Rules of Civil Procedure are not met, the district court must dismiss the action or, if removed, strike the class allegations and remand the Y2K action to state court. *See id.* § 6614(c)(3)(A)(i)-(ii).

258. H.R. 1875, 106th Cong. (1999). The bill was sponsored by thirty-eight members of Congress. Only three of the sponsors are Democrats. They all represent districts in states—Alabama, Louisiana, and Texas—that are known as particularly pro-plaintiff or pro-class action, or both, the exact targets of the legislation. One of the sponsors, Rep. Virgil H. Goode, was a Democrat at the time he sponsored the bill. He represents a district in Virginia. *See id.* Philip Morris, a corporation particularly interested in escaping state courts, has its headquarters in Virginia. Rep. Goode, known as one of the most conservative Democratic members of Congress, subsequently withdrew from the Democratic Party to become an independent. *See* Eric Schmitt, *Democrats Hit by a Defection in the House*, N.Y. TIMES, Jan. 25, 2000, at A14 (noting that on major bills, Goode voted more often with Republicans than Democrats).

259. S. 353, 106th Cong. (1999). The bill was sponsored by two Republicans and one Democrat.

§ 1332 to allow original jurisdiction over class actions so long as any member of the class is diverse from any defendant.<sup>260</sup> They further would enact a removal provision that allows for any such case filed as a class action in state court to be removed to federal court.<sup>261</sup> The purpose of these amendments is to prevent plaintiffs filing state court class actions from preventing such cases from being removed by naming local defendants. The bills also would allow the federal district court to decline to exercise jurisdiction and remand when the amount in controversy is relatively small—less than \$1 million—when class members number fewer than one hundred, when a substantial number of the purported class members are citizens of the same state as the primary defendants, or when the claims asserted would be governed primarily by the law of the state.<sup>262</sup> The House approved its bill in September 1999.<sup>263</sup>

Although its passage is far from certain, it is interesting to look at this legislation through the prism of the Supreme Court's federalism decisions. Recall first that the Supreme Court in *Amchem* decried Congress's lack of action in the mass tort arena.<sup>264</sup> It found, nevertheless, that federal courts were without the power to use the procedural tool, Rule 23, to effect substantive results where Congress has failed to act.<sup>265</sup> The Court clearly envisioned a reduced federal court role in the resolution of these big cases. Moreover, the Third Circuit's analysis in the General Motors litigation, denying All-Writs Act relief,<sup>266</sup> opened the door for the states to resume their role in adjudicating matters of state law in complex cases, even in the form of class actions. So, it is ironic, if not perverse, especially in light of the Supreme Court's federalism cases that Congress seeks to channel these cases back to federal court where class certification now will generally be denied. These opinions demonstrate that the federal courts are seeking to limit themselves to a proper judicial role. At

---

260. See, e.g., H.R. 1875, 106th Cong. § 3(a) (1999).

261. See *id.* § 4(a).

262. See *id.* § 3(a).

263. See Stephen Labaton, *House Passes Bill that Would Limit Class-Action Suits*, N.Y. TIMES, Sept. 24, 1999, at A1.

264. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628-29 (1997).

265. See *id.* at 629.

266. See *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133 (3d Cir. 1998).

the same time, Congress appears to be seeking to dump its dirty work, disempowering plaintiffs' attorneys and protecting its corporate constituents, on the federal courts.

Without the ability to obtain class certification—in state courts because defendants will remove them and in federal courts because of the restrictive *Amchem* decision—the powerful plaintiffs' bar will lose its ability to leverage the claims of thousands of claimants to extract large settlements from deep pocket corporate defendants. Of course, this is the "White Knight" view of mass tort litigation. There is no question that the mass tort settlement class action raised serious questions about whether absent class members were receiving their due. But, we must put aside for the moment the question whether one thinks it is a good thing or a bad thing to swing back to a world in which the defendant, rather than the plaintiff class, has the upper hand in negotiations.

Indeed, there is no question that there is a role for Congress and the courts to play in ensuring fair play to all parties. Moreover, at first glance, there appears to be a sound constitutional basis for the legislation under Article III, Section 2 of the U.S. Constitution.<sup>267</sup> It has long been understood that Congress may provide subject matter jurisdiction based on minimal diversity.<sup>268</sup> The question to ask now, however, is whether legislation that essentially ousts the state courts from resolving mass tort and other complex state claim based class action litigation violates the spirit or letter of the Supreme Court's federalism decisions.

### *C. What Will this Supreme Court Say About the Legislation?*

I will not analyze the Court's recent federalism decisions in detail because they do not speak directly to the problem whether Congress's class action subject matter jurisdiction statute<sup>269</sup> is

---

267. U.S. CONST. art. III, § 2.

268. See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-31 (1967) (holding that complete diversity is not constitutionally required).

269. I will focus on the pending bill because it is more problematic from this perspective. The enacted legislation involving securities cases and Y2K cases is less problematic because Congress has not simply provided a federal forum, but also has enacted substantive standards. As I will show below, that may make a difference. See *infra* Part IV.C.

constitutional.<sup>270</sup> However, the Court's Tenth and Eleventh Amendment cases, taken together with existing Supreme Court precedents in the areas of protective jurisdiction, abstention, and choice of law, provide room for arguing that this Supreme Court may find the proposed class action legislation to be unconstitutional, notwithstanding its apparent Article III, Section 2 basis. The holdings of the Supreme Court cases, of course, provide no direct authority for these arguments. But the Court's approach to the Tenth and Eleventh Amendments, together with language from the opinions, certainly provide the basis for substantial, though potentially scary,<sup>271</sup> arguments that the legislation is problematic.

Indeed, this would not be the first time that the Court has struck down a subject matter jurisdiction statute that on its face appears to be proper under Article III. In *Hans v. Louisiana*,<sup>272</sup> the Supreme Court found that a case that fell within the literal text of Article III may not be heard. In *Hans*, the Court held that a citizen of Louisiana could not sue the state of Louisiana on a federal constitutional Contract Clause claim.<sup>273</sup> The case clearly arose under federal law, and thus within the federal question "arising under" jurisdiction.<sup>274</sup> Even though the Eleventh Amendment did not expressly prohibit such a suit, the Court found that it was "inherent in the nature of sovereignty" that the state cannot be sued without its consent.<sup>275</sup> In the class action cases affected by the legislation, the state is not the defendant, but is the target of the legislation.<sup>276</sup> Moreover, an aspect

---

270. Except, of course, in the tobacco cases brought against the state discussed *supra* at note 15.

271. Professor Evan Caminker opined at the Symposium that the argument I presented was "scary." I agree wholeheartedly because the import of the argument is that the power of judicial review has increased logarithmically. See Evan H. Caminker, *Private Remedies For Public Wrongs Under Section Five*, 33 LOY. L.A. L. REV. (forthcoming Sept. 2000).

272. 134 U.S. 1 (1890).

273. See *id.* at 21.

274. See *id.* at 14; 28 U.S.C. § 1331 (1994).

275. See *Hans*, 134 U.S. at 13; see also *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) ("[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms . . .").

276. See *supra* note 39 and accompanying text.

of the sovereignty of the state, its dignity interest, is quite clearly implicated.

### 1. The dignity of the state courts

There is no question that the Supreme Court's recent federalism decisions represent a paradigm shift of the highest order. The decisions are motivated in no small part by the desire to protect the dignity of the states as sovereigns. As Justice Kennedy wrote in *Alden v. Maine*:

The federal system established by our Constitution preserves the sovereign status of the States in two ways. First, it reserves to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status. . . .

Second, even as to matters within the competence of the National Government, the constitutional design secures the founding generation's rejection of the "concept of a central government that would act upon and through the States" in favor of "a system in which the State and Federal Governments would exercise concurrent authority over the people—who were, in Hamilton's words, 'the only proper objects of government.'"<sup>277</sup>

"States," argued Justice Kennedy, "are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not full authority, of sovereignty."<sup>278</sup>

The Supreme Court's Eleventh Amendment cases thus stand for the proposition that state immunity from private suits is central to sovereign dignity. Similarly, the Tenth Amendment cases suggest that Congress may not commandeer state officials and impose on the states duties to perform ministerial tasks, such as doing background checks on purchasers of handguns.<sup>279</sup> Such commandeering is an insult to the state as sovereign. At first glance, the Tenth and Eleventh Amendment cases appear to be inapposite to the problem of class

---

277. 119 S. Ct. 2240, 2247 (1999) (citing and quoting *Printz v. United States*, 521 U.S. 898 (1997)).

278. *Id.*

279. See *Printz*, 521 U.S. at 898-99 (striking down Brady Handgun Violence Prevention Act as in violation of the Tenth Amendment).

action litigation between private parties. The state, of course, is not a defendant in cases involving only private parties.<sup>280</sup> The state courts, of course, are not required to do anything but relinquish jurisdiction.

The crux of the legislation, however, is that state courts cannot be trusted to fairly resolve cases brought under state law.<sup>281</sup> In section two, the findings section of the Interstate Class Action Jurisdiction Act of 1999—the House version of the Bill—Congress finds that “interstate class actions are the ‘paradigm for Federal diversity jurisdiction because, in a constitutional sense, they implicate interstate commerce, invite discrimination by a local State, and tend to attract bias against business enterprises.’”<sup>282</sup> A more explicit statement that the state courts cannot be trusted would be difficult to envision. Is that not a serious insult to the dignity of the state courts? Before the recent decisions, it would be ludicrous to argue that Congress cannot enact broadened diversity jurisdiction under Article III. Now, however, with the renewed emphasis on state sovereignty, the dignity of the states and their role as co-partners in governing the people, it is not far fetched to argue that legislation based on the findings articulated in House Bill 1875 is constitutionally problematic.

Indeed, although members of Congress might say that the purpose of the legislation is to provide defendants with a safer haven from the assaults of plaintiff class action lawyers, the real target of the legislation is the state as personified by its judiciary. In *Seminole Tribe v. Florida*,<sup>283</sup> the Supreme Court struck down federal legislation requiring the state of Florida to negotiate with Indian tribes on gaming issues. The Indian tribes named the governor of the state as the defendant in an attempt to evade the Eleventh Amendment.<sup>284</sup> Nonetheless, the Court held that because the duty to negotiate ran to the state itself, it was irrelevant who was named as defendant.<sup>285</sup> Similarly, although the class action legislation does not directly impose a duty on state courts and does not subject them to the

---

280. *But see supra* note 15 and accompanying text.

281. *See* Labaton, *supra* note 263, at A1.

282. H.R. 1875, 106th Cong. § 2(1) (1999).

283. 517 U.S. 44, 47 (1996).

284. *See id.* at 52.

285. *See id.* at 74.



possibility of being named as defendants (unless perhaps if a state court refused to relinquish jurisdiction), there is no direct assault on the state. But the state's dignity interest is impaired just as surely as if it were made a defendant. Moreover, in one sense the class action legislation does impose a duty on the state courts: to relinquish jurisdiction over cases brought as class actions. For that reason, it is suspect under the Tenth Amendment.

Two examples show the potential for a Tenth or Eleventh Amendment violation. First, suppose the state court refuses to relinquish jurisdiction by continuing to issue discovery orders and the like. The federal court to which the action was removed will undoubtedly enjoin the state court from proceeding.<sup>286</sup> Even if only the parties to the litigation are named in the federal court injunction order, the order effectively runs to the state court itself because it bars it from proceeding, and thus violates federalism principles.<sup>287</sup> The state, as manifested by the state court judge, is now the clear target of the federal order. A clear Eleventh Amendment problem is presented by such a scenario.

Second, suppose that plaintiffs' lawyers are adamant about filing and keeping their class action cases in state courts. They would appear to have only one alternative. They would have to file thousands of individual actions instead of one class action in order to obtain the settlement leverage. This scenario presents a possible commandeering problem to the extent that these multiple filings increase the burden on the state judiciary. Absent the federal class action legislation, the parties, rather than the federal government, would determine where the litigation would be pursued. While it is true that under the proposed legislation the defendants must elect to remove the case to federal court, it is obvious that this is the course most defendants will take.

---

286. See 16 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 107.31(1), (2) (3d ed. 1999).

287. See *Younger v. Harris*, 401 U.S. 37, 44 (1971) ("Our Federalism" represents "a system in which there is a sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the State.").

I wrote at the outset of this paper that my arguments concerning the constitutionality of the class action legislation would be quixotic. Now, the reader sees why. It is hard to believe that the “dignity” argument outlined above would be taken seriously, especially given the Article III basis for the proposed legislation. Given how far the majority members of the Court have gone in the recent federalism cases, however, one wonders whether it might build on its recent decisions and entertain arguments that Congress is overreaching. Indeed, the Court’s view on the Tenth and Eleventh Amendments may revive old federalism arguments suggested in earlier cases that had been rejected as having little if any validity as a constitutional matter. It may be scary, but not too farfetched, to think that the Court, if intellectually honest, would look to these cases to extend further its new vision of federalism.

## 2. Class action legislation arguably is unconstitutional protective jurisdiction

There is no question that our federal system allows “the State and Federal Governments [to] exercise concurrent authority over the people.”<sup>288</sup> One way in which the state and federal governments exercise concurrent authority is through their courts. In most cases where Congress has provided for federal subject matter jurisdiction, the states have concurrent jurisdiction.<sup>289</sup> It is hornbook law that Congress has plenary control of the federal courts.<sup>290</sup> This dictates which cases the federal courts may hear so long as the case is within the scope of jurisdiction set forth in Article III of the Constitution.<sup>291</sup> The problem is whether the class action legislation is a proper grant of subject matter jurisdiction within the scope of Article III. A federalism argument can be made that it is not.

As mentioned above, it appears that the class action legislation is patently constitutional under Article III. Article III provides for

---

288. *Printz*, 521 U.S. at 899.

289. There would be no concurrent jurisdiction if Congress provided for exclusive federal subject matter jurisdiction. *See, e.g.*, 15 U.S.C. § 77p(d)(1)(A) (2000) (“A covered class action described in subparagraph (B) of this paragraph that is based upon the statutory common law of the State . . . may be maintained in a State or Federal Court by a private party.”).

290. *See Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850).

291. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

diversity jurisdiction over cases between citizens of different states.<sup>292</sup> The class action legislation provides for original jurisdiction and allows for removal of class actions when any proposed class member is a citizen of a state different from any defendant. The legislation thus requires minimal diversity. According to the Supreme Court, the complete diversity rule of *Strawbridge v. Curtis*<sup>293</sup> was merely a statutory requirement, not a constitutional one.<sup>294</sup> Thus, legislation that permits federal jurisdiction on the basis of minimal diversity would seem to be constitutionally sufficient.

However, if one views the class action legislation as "substantive" rather than purely procedural, one may question whether it is unconstitutional protective jurisdiction. There currently is a raging debate about the relationship between Congress and the federal courts in terms of the federal courts' rulemaking power under the Rules Enabling Act.<sup>295</sup> Borrowing from that debate, one can cobble together an argument that the class action legislation may be unconstitutional.

First, the Rules Enabling Act permits the Supreme Court to promulgate rules of procedure subject to the caveat that such rules "shall not abridge, enlarge or modify any substantive right."<sup>296</sup> This caveat's purpose is to prevent the courts from legislating, which, of course, is the province of the legislative branches that are accountable to the political process.<sup>297</sup> Although the rule-making process has become politicized over the last ten years, it has been thought that the politically insulated federal judiciary would be better at crafting "neutral" rules of procedure. Congress, certainly, always would be free to enact whatever substantive laws it desires within its Article I powers.

---

292. U.S. CONST. art. III.

293. 7 U.S. (3 Cranch) 267 (1806).

294. See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523 (1967).

295. See generally Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47 (1998) (collecting cases and summarizing debate).

296. 28 U.S.C. § 2072(b) (1994).

297. See Kelleher, *supra* note 295, at 94. ("With both the original 1934 Rules Enabling Act and its [1988 Amendment] Congress retained for itself exclusive authority to make federal law that 'modifies, abridges or enlarges substantive rights.'").

Congress, of course, also has promulgated procedural rules.<sup>298</sup> Title 28 of the United States Code contains a panoply of procedural provisions. For example, among other things, it contains venue statutes<sup>299</sup> as well as, more importantly for our purposes, subject matter jurisdiction statutes.<sup>300</sup> Most of the federal subject matter jurisdiction statutes parrot the language of Article III, and thus, like the class action legislation, appear to be constitutional on their face.

Occasionally, however, Congress enacts a subject matter jurisdiction statute that does not parrot the language of Article III, Section 2. In some cases, the Supreme Court has held such statutes to be constitutional in any event because they invariably present a federal question.<sup>301</sup> In others, the statute passes constitutional muster because the case will be decided under federal common law.<sup>302</sup> Some of these cases, however, have been quite a stretch. For example, in the *Osborn* case, Chief Justice John Marshall held a statute providing for federal subject matter jurisdiction in any case involving the United States Bank constitutional because threshold questions under the federal statute creating the Bank would be an ingredient of any case involving the Bank.<sup>303</sup> The ingredient was the issue whether the Bank had capacity to be sued, an issue that should arise only in the first litigations involving the Bank.<sup>304</sup> Rule 11 eventually would prevent the opposing litigant from raising the issue.<sup>305</sup> Nonetheless, Justice Marshall found that because the capacity question was a threshold ingredient of any case involving the Bank, and because federal law would provide the answer as to whether it has that capacity, any case involving the Bank was a case arising under federal law.<sup>306</sup>

Although the Supreme Court has never embraced the doctrine, scholars explain jurisdictional statutes like *Osborn* as “protective

---

298. See, e.g., 28 U.S.C. §§ 1330-1413 (2000).

299. See 28 U.S.C. §§ 1391-1413.

300. See *id.* §§ 1330-1368.

301. See, e.g., *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983).

302. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

303. See *Osborn*, 22 U.S. at 738.

304. *Id.* at 819.

305. See FED. R. CIV. P. 11.

306. See *Osborn*, 22 U.S. at 825-26.

jurisdiction statutes.”<sup>307</sup> The theory is that because Congress properly could have enacted substantive legislation to effect whatever substantive legislative purpose it has under Article I, it constitutionally may enact a subject matter jurisdiction statute that will promote its substantive purpose without the need for substantive legislation.

To be fair, in the protective jurisdiction cases to date, the question has been whether the statute can be saved by somehow bootstrapping the case as a federal question case. One could argue that there is no need for such bootstrapping in the case of the class action legislation because it fits within the Article III diversity jurisdiction. However, it is not farfetched to argue that a procedural statute may not be used to effect a substantive effect, for example effecting the relative bargaining power of the parties on the merits of a litigation. This is exactly what the class action legislation is designed to do. It deprives plaintiffs of their right to pursue class relief based on state law theories in state courts without preempting that state law or providing a federal law alternative for relief.

Moreover, the Supreme Court has cast doubt on whether such power exists.<sup>308</sup> The Court in *Mesa v. California* opined that protective jurisdiction cannot be used to avoid Article III problems.<sup>309</sup> The Court was concerned that the removal statute resulted in interference with state prosecutions without any finding of state hostility.<sup>310</sup> *Mesa* involved an attempt to save a jurisdictional statute, the federal officer removal statute,<sup>311</sup> as a federal question statute. But, it may be that just as the *Mesa* Court found that Congress’s generalized interest in providing federal officers a federal forum to be an inadequate justification for a jurisdictional statute, this Court would find

---

307. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) (Frankfurter, J., dissenting) (discussing protective jurisdiction theory); Louise Weinberg, *The Power of Congress Over Courts in Nonfederal Cases*, 1995 BYU L. REV. 731; Linda Mullenix, *Complex Litigation Reform and Article III Jurisdiction*, 59 FORDHAM L. REV. 169 (1990); George D. Brown, *Beyond Pennhurst—Protective Jurisdiction, the Eleventh Amendment, and the Power of Congress to Enlarge Federal Jurisdiction in Response to the Burger Court*, 71 VA. L. REV. 343 (1985); Carole E. Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. REV. 542 (1983).

308. See *Mesa v. California*, 489 U.S. 121 (1989).

309. See *id.* at 137.

310. See *id.* at 137-38.

311. See 28 U.S.C. § 1442(a)(1) (1994).

Congress's generalized interest in providing corporate defendants with a federal forum to be inadequate on the similar policy grounds of avoiding interference with state proceedings unless actual hostility is shown, especially because the effect of the legislation is to deprive states of their dignity interest.

### 3. Federalism and *Erie*

My "protective jurisdiction" argument is a difficult argument to make because the statute clearly falls within the Article III, Section Two, diversity power. Nonetheless, it can be argued that federalism and separation of powers concerns prohibit the legislature from legislating procedure when it dares not, or cannot, enact substantive legislation, especially when the basis for subject matter jurisdiction is diversity.<sup>312</sup> A new federalism reading of the venerable *Erie* opinion supports this claim.<sup>313</sup>

*Erie* stands for the basic proposition that Article III itself gives Congress no power to provide the rule of decision in diversity cases.<sup>314</sup> If Congress seeks to do so, it must look to its Article I power. In its class action legislation, the Senate points vaguely to interstate commerce, but does not clearly invoke the Commerce Clause.<sup>315</sup> Moreover, it purports to be offering a purely jurisdictional statute and not any rules of decision.<sup>316</sup> So, what is wrong with this? First, as was made clear in *United States v. Lopez*,<sup>317</sup> there are constitutional limits on Congress's ability to displace substantive state law. Indeed, it is questionable whether Congress could enact generalized substantive legislation to govern tort cases involving corporations engaged in interstate commerce.<sup>318</sup> Second, Congress may not

---

312. See Linda S. Mullenix, *Judicial Power and the Rules Enabling Act*, 46 MERCER L. REV. 733 (1995); Linda Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283 (1993); see also John H. Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276 (1928) (stating that legislatures exceed their constitutional power when they attempt to impose judiciary duty rules upon the judiciary).

313. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

314. See *id.*

315. See H.R. 1875, 106th Cong. § 2 (1999) (findings).

316. See *id.* § 2(5).

317. See 514 U.S. 549 (1995).

318. See *Griffin v. Breckenridge*, 403 U.S. 88 (1971) (forbidding the enact-

use its Article III powers to set substantive standards in diversity cases.<sup>319</sup> Third, federal courts lack the power, except in "few and restricted areas,"<sup>320</sup> to create the law to be applied in diversity cases. Of course, it is one thing to argue that federal courts may not legislate. For them to do so generally violates separation of powers. Where, however, Congress lacks the power to legislate in a particular area, the federalism concern raised is just as fundamental a constitutional problem. It follows then, that Congress may not have the power to affect substantive state law by way of its power to regulate procedure in federal courts in diversity cases. *Ex parte McCordle*<sup>321</sup> teaches that Congress is allowed to withdraw federal jurisdiction to prevent the federal courts from resolving a substantive issue. However, the Supreme Court has also ruled that Congress cannot force the federal courts to resolve cases in an unconstitutional manner.<sup>322</sup>

Quite obviously and intentionally Congress's class action legislation is an attempt, arguably unconstitutional, to interfere with state regulation of mass tort and other class actions. As the bill provides in its findings: The legislation is needed to prevent "discrimination by a local State," and to "ensure that interstate class actions are adjudicated in a fair, consistent, and efficient manner."<sup>323</sup> Congress is concerned with the flight of mass tort cases to state courts, and the increased bargaining power obtained by plaintiffs' attorneys when a greater likelihood of class certification exists.<sup>324</sup> Although the legislation does not direct the federal courts to refuse to certify mass tort cases—as it quite clearly could not,<sup>325</sup> Congress is well aware that

---

ment of general federal tort laws).

319. See *Erie*, 304 U.S. at 78 ("There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State . . ."); see also *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 202 (1956) ("*Erie Railroad Company v. Tompkins* indicated that Congress does not have the constitutional authority to make the law that is applicable to controversies in diversity of citizenship cases.").

320. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 518 (1988).

321. 74 U.S. (7 Wall.) 506 (1868) (holding that Congress may withdraw federal jurisdiction even when its motive is to deprive the federal courts of the opportunity to resolve a substantive matter).

322. See *United States v. Klein*, 80 U.S. (8 Wall.) 128 (1871).

323. H.R. 1875, 106th Cong. § 2(1), (5) (findings).

324. See *id.*

325. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 240 (1995) (holding that the Act requiring federal courts to vacate final judgments contravenes

there is a diminished possibility of class certification in federal courts after *Amchem*.<sup>326</sup> It need not enact substantive tort legislation because it can achieve its goal indirectly by ensuring that defendants be able to remove cases when they so desire.

Congress cannot plead that the class action legislation is purely procedural for another reason. No matter how it is characterized, it is well understood that rules or legislation can be considered substantive depending on their effect.<sup>327</sup> For example, when a matter becomes the subject of controversy or is politically controversial, then it should be treated as implicating a substantive right.<sup>328</sup>

Additionally, the bill may not pass muster under *Amchem* either. Recall that the *Amchem* Court was sympathetic to the goal of achieving an efficient and fair distribution of funds to asbestos victims.<sup>329</sup> However, the Court said the federal courts lacked the power to grant such relief absent congressional authorization to do so as a matter of substantive law.<sup>330</sup> What the Supreme Court had in mind was substantive legislation. Allowing for more mass tort class actions to be presented to the federal courts changes not a whit the standards for determining when class actions should be certified, nor does it supply the basis for any substantive relief.

It appears that Congress may be aware of a potential *Lopez* problem. Substantive laws enacted pursuant to the Commerce Clause regulating all mass torts might not pass muster under the new

---

separation of powers).

326. 521 U.S. 591 (1997).

327. For a discussion on the overlapping effects of procedural and substantive matters, see generally Kelleher, *supra* note 297, at 68.

328. See Jonathan M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842, 857 (1974) (discussing that the test for determining a substantive right is whether it is "the subject of widespread public controversy, as differentiated from controversy among lawyers"); Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 ARIZ. L. REV. 461, 482-83 (1997) ("proof of substantivity" is when a matter is "politically controversial, supported by some factions and opposed by others").

329. See *Amchem*, 521 U.S. at 597-98.

330. The district court in *Amchem* sought to consolidate individual asbestos cases into a class action to be certified under Federal Rule of Civil Procedure 23, but the Supreme Court ruled that Rule 23 cannot carry the large load heaped upon it. See *id.* at 628-29.



federalism. On the other hand, the Senate's findings suggest the classic justification for diversity jurisdiction.<sup>331</sup> However, the class action legislation virtually ensures that the result that a plaintiff is likely to obtain in the federal court may be different substantively from the one the plaintiff would have received in the state court across the street, a result that flies in the face of the *Erie* doctrine.<sup>332</sup>

Indeed, the new federalism readings of the Tenth and Eleventh Amendments may revive the equal protection argument Justice Brandeis articulated in *Erie*.<sup>333</sup> He suggested that it would be a violation of equal protection if a litigant were to receive a different substantive result in the federal court than that which would be obtained in the state court.<sup>334</sup> Although he appeared to be speaking in terms of fairness to the litigants, he believed that it was unconstitutional to deprive the litigants of the result that they would have obtained in the state court. States clearly have the right to articulate the tort rules governing its citizens and other persons within the state.<sup>335</sup> While the constitutional aspects of *Erie* have been attacked by scholars for decades,<sup>336</sup> a new federalism reading of *Erie* suggests that it is unconstitutional for the federal courts to oust the state courts of jurisdiction when the effect would be to invade the state's sovereign right to protect or regulate its citizens.

In sum then, at least some members of Congress are trying to protect corporate defendants engaged in interstate commerce from the vagaries of state law by providing them with the protective jurisdiction of the federal courts. The federal courts can be trusted, while the state courts cannot, to refuse to certify classes and thus remove the threat of draconian, "bet your company," leverage in settlement discussions, or worse yet, ruinous jury verdicts, like the one that may be forthcoming in the Florida *Engle* tobacco class action.<sup>337</sup> Rather

---

331. See H.R. 1875, 106th Cong. § 2 (1999) (findings) (including the "implicat[ion] of interstate commerce . . . discrimination by local State . . . [and] bias against business enterprise").

332. See *Hanna v. Plumer*, 380 U.S. 460, 461-62 (1965).

333. See *Erie*, 304 U.S. at 74-75.

334. See *id.*

335. See *infra* Part IV.C.1.

336. See, e.g., PETER W. LOW & JOHN C. JEFFRIES, JR., *FEDERAL COURTS AND THE LAW OF FEDERAL STATE RELATIONS* 11-14 (4th ed. 1998).

337. See *R.J. Reynolds Tobacco Co. v. Engle*, No. 94-8273, 1999 Fla. App.

than surgically curing a problem with a laser, as the Supreme Court requires, with significant findings justifying the operation,<sup>338</sup> Congress, with only inadequate, conclusory statements, is depriving state courts of their ability to provide class action resolution of state claims.

Again, Article III appears on its face to support the grant of jurisdiction. It seems far fetched to argue that the Supreme Court will require the same kind of findings as it did in cases involving the abrogation of the states' sovereign immunity, such as in *Kimel*. However, before the recent cases, who would have thought that the Supreme Court would position itself as the final arbiter of whether Congress had sufficiently supported its decision to enact legislation under its Fourteenth Amendment, Section 5 enforcement power? The Court now requires Congress to make detailed findings as to whether there is a constitutional problem that needs to be addressed.<sup>339</sup> There is no language in Section 5 that sets out a standard for when such legislation is appropriate. It merely says that Congress may adopt "appropriate" legislation.<sup>340</sup> Similarly, there is nothing in Article III that suggests that the Court has the power to review whether Congress's grants of subject matter jurisdiction are appropriate. But we have known since *Marbury v. Madison*<sup>341</sup> that the Supreme Court will review grants of subject matter jurisdiction to determine whether the grants comport with the Constitution. Additionally, we also know that in *Marbury*, the Supreme Court looked outside of Article III to find a principle, judicial review, to

---

LEXIS 11937, at \*1 (Fla. Dist. Ct. App. Sept. 3, 1999) (vacating trial court order that second phase of trial would be lump sum determination of punitive damages), *vacated*, No. 94-02797, 1999 Fla. App. LEXIS 13055 (Fla. Dist. Ct. App. Sept. 17, 1999) (permitting second phase to proceed as ordered by trial court).

338. See *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 645, 649-50 (2000) (holding that ADEA legislation making states amenable to suit fails "congruence and proportionality" test, and Congress made insufficient findings with respect to state age discrimination law to justify abrogation of sovereign immunity).

339. See *id.*

340. U.S. CONST. amend. XIV, § 5.

341. 5 U.S. (1 Cranch) 137 (1803).

determine whether the facially constitutional jurisdictional grant at issue was unconstitutional.<sup>342</sup>

In this context, especially because of its new aggressive approach to protecting all aspects of state sovereignty, how far fetched is it to think that this Court might now require findings to support subject matter legislation that it views to be infringing on the dignity and sovereignty of the states? Might not Congress be required to justify its legislation, to the extent that it seeks to protect interstate commerce? Under *United States v. Lopez*,<sup>343</sup> Congress must show that the harm to interstate commerce is direct, and that the legislation does not force the federal courts to "embrace centralized government" and "obliterate state-federal distinctions."<sup>344</sup> Such a showing would be a difficult task for Congress because the Supreme Court could view the legislation as "highly intrusive regulation in areas of traditional state concern."<sup>345</sup>

I do not mean to suggest that there is no merit to the legislation. Perhaps Congress will better justify the need for the legislation. There are many commentators who decry the abuse of class actions by some defendants and plaintiff class action lawyers who appear to be cutting deals to the detriment of absent class members.<sup>346</sup> I empathize with that concern, and am accordingly sympathetic to the proposed legislation for that reason. Possible Supreme Court review of state class action judgments may not be enough, as Judge Becker argued it would be in the General Motors litigation,<sup>347</sup> to protect the rights of absent class members. Federal judges can be provided tools to insure that class settlements are fair. My purpose here is not to debate the merits of the legislation, but rather to suggest that the analysis recently developed by the Supreme Court in its federalism

---

342. *See id.*

343. 514 U.S. 549 (1995).

344. *Id.* at 557.

345. *Id.* at 583.

346. *See generally* Rand Inst. for Civil Justice, *Class Action Dilemmas: Pursuing Public Goals for Private Gains, Executive Summary* (1999) (visited Apr. 1, 2000) <<http://www.rand.org/publications/MR/MR969.1.pdf>>. *See* Coffee, *Class Wars*, *supra* note 169, at 1045; Koniak, *supra* note 169, at 1045; Siliciano, *supra* note 169, at 990.

347. *See In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995).

cases raises serious questions whether such legislation is constitutional. Moreover, in my view, both state and federal courts have a proper role to play.

*D. Confessions of a Nationalist, Knee Jerk Democrat-Lover of Federal Courts*

Federal court consolidation can lead to an efficient and fair resolution of mass tort claims.<sup>348</sup> I even argued that federal common law should be applied<sup>349</sup> and that All-Writs Act injunctions ought to be ordered to prevent competing state lawsuits on the slightest provocation of interference, especially in light of *Matsushita*.<sup>350</sup> Thus, my natural inclination is to support the proposed class action legislation as a way to achieve fairness and efficiency.

However, all these writings were based on the assumption that a mass tort actually existed. I never suggested that federal consolidation was a good thing if done prematurely, meaning before we really knew there was a mass tort. For example, I suggested in one article that the breast implant litigation was consolidated too soon.<sup>351</sup> The history of that litigation shows that I was probably correct.

I maintain that we should consolidate meritorious claims, not necessarily marginal ones. The following is an example of how mass tort cases could proceed without doing violence to either the New or Old Federalism. First, we seem to have lost sight of one of the justifications for concurrent jurisdiction over diversity cases. State courts ought to be the laboratories for determining whether the evidence presented in a burgeoning mass tort is sufficient to present to juries. Cases should proceed as individual cases, typically in state courts which ought to have the opportunity to set standards for the various liability, defense, and damages issues that arise in order to provide a sense of the merit of the cases, and if there is merit, a sense of claims values for individuals injured in different state jurisdictions.<sup>352</sup> The

---

348. See *Georgine*, *supra* note 7.

349. See *Multi-tort*, *supra* note 7.

350. 516 U.S. 367 (1996).

351. See *Georgine*, *supra* note 7.

352. This is the strategy being employed by some plaintiffs' lawyers in the current Fen Phen and Redux cases. For example, Paul D. Rheingold of New York predicted that most of the Fen Phen cases will be litigated in state courts, and that plaintiffs will join diversity jurisdiction defeating doctors and clinics

class action plaintiffs' bar certainly has the resources to cooperate in developing the evidence needed, if it exists, to determine whether the burgeoning mass tort should be aggregated or not. Delaying aggregation until a credible record is developed on the question of liability should allay concerns that proposed settlements are not fair because the merits of the litigation are uncertain.

Indeed, it would be premature to certify a federal or nationwide class, and attorneys for the parties ought not be settling cases in the aggregate in either state or federal courts until there is some sense of their value as a matter of state law. Whether a class settlement is fair can be decided only with some negotiation and litigation of individual claims values after the substantive law with respect to a particular mass tort has evolved and the evidence has been developed.<sup>353</sup> While it may be proper for the MDL Panel to transfer federal actions for pretrial purposes, as it did in February 1998 in the Fen Phen/Redux litigation, the federal courts ought to refrain at this point from certifying class actions for litigation or settlement purposes until the general liability picture is clarified.

Once state court experience and discovery in the federal cases show that the claims have merit, and the number of filings increase dramatically such that individual litigation is no longer feasible, statewide class actions filed in state court could be used to establish the settlement value of the claims filed in that state. There ought to be due regard for the important differences in exposure, injury, and causation through the use of appropriate subclasses. From a federalism point of view, it is just as problematic for the state courts to certify nationwide classes as it would be for federal courts, especially given the concerns of the Supreme Court in *Amchem* with respect to both the predominance of common questions and the possibility of conflicts.

---

to insure that the case cannot be removed to federal court. See Bob Van Voris, *Diet Drug Suits Promise to Make Lawyers Fat*, NAT'L L.J., Sept. 22, 1997, at A7. His prediction appears to be accurate. While there is a federal \$3.75 billion settlement, see Bob Van Voris, *Fen-Phen Legal Battle Opens*, NAT'L L.J., Jan. 31, 2000, at A14, one of the first post-settlement cases will be tried in a Massachusetts state court. Moreover, seven thousand plaintiffs have, and many other plaintiffs may, opt out of the settlement. See Joseph P. Fried, *More Litigation Ahead on Diet Drug Despite Proposed Class Action*, N.Y. TIMES, Mar. 28, 2000, at A23.

353. See *Georgine*, *supra* note 7.

Finally, after several state class action settlements have been approved, and the various plaintiffs' lawyers and defense lawyers involved think it appropriate to achieve a global resolution, the federal court would be the appropriate forum for facilitating a settlement. Differences in state law would matter less at this point because the prior state court adjudications and class action settlements have established a meaningful sense of the value of the claims alleged. Accordingly, the Supreme Court's concerns about adequacy of representation can be tested against the historical settlement values already obtained in the state courts. In sum, it is best to leave it to the courts, state and federal, to decide the appropriate approach to resolving mass torts and other complex state claim based litigation.<sup>354</sup>

#### V. CONCLUSION

State courts and federal courts must remain partners in seeking the fair and efficient resolution of mass tort cases. Each jurisdiction has an important role to play in insuring that proper standards are applied and a global resolution is achieved with a minimum of cost and delay. Congress should not enact the class action litigation. It violates both the New and Old federalism and will not promote the fair and just adjudication of state claim based class resolution.

---

354. See Coffee, *Class Wars*, *supra* note 169.

