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An Illusion of Sacrifice: The Incompatibility of Binding Stipulations in CAFA Cases

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An Illusion of Sacrifice: The Incompatibility of Binding Stipulations in CAFA Cases

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I. INTRODUCTION

Two claims are removed to the same federal court on the same day.¹ Essentially, this common disposition is all they share. In the first action,² Westley, a citizen of Wyoming, alleges breach of contract against Vizzini Insurance Co., considered a citizen of Texas. There is one plaintiff and one defendant. At stake is a few thousand dollars, of interest only to the two of them. In the second action,³ Buttercup brings a putative class action against an Idaho corporation, Humperdinck, Inc. Based on the minimal discovery completed thus far, the damages are likely well into the millions of dollars, but no single claim is worth more than \$75,000. The class Buttercup would represent includes thousands of individuals from all over the country, including Idaho. Their relief hangs in the balance.⁴ She represents their interests as well as her own.⁵ Both plaintiffs have filed motions to remand.⁶

Oh, another thing they have in common. Before removal, both Westley and Buttercup filed stipulations that they will neither seek nor accept damages exceeding the minimum amount in controversy necessary to invoke federal diversity jurisdiction.⁷ That is to say, they will sacrifice a portion of

1. See 28 U.S.C. § 1332 (2006).

2. As the following facts should make clear, Westley's case is a typical case requiring complete diversity and an amount in controversy of more than \$75,000. See *id.* § 1332(a). It is removable under 28 U.S.C. § 1441 (2006).

3. Buttercup's case is a 28 U.S.C. § 1332(d) case removable under § 1453. See 28 U.S.C. § 1453 (2006).

4. If the class is certified, the res judicata effect of Buttercup's suit will prevent them from bringing another action on this claim or any claims arising out of the same transaction or series of transactions even if they are unhappy with the result and notwithstanding their lack of participation.

5. See FED. R. CIV. P. 23(a).

6. See 28 U.S.C. § 1447 (2006).

7. Westley will have stipulated to damages of less than \$75,000. See 28 U.S.C. § 1332(a).

their rightful recovery to stay in state court. In considering each motion to remand,⁸ the issue could be articulated in precisely the same way: Will such a binding stipulation defeat removal? Imagine you are the judge considering the question. Further, imagine there is no binding precedent on this question. What will the answer be? Will it be the same in both cases? Why or why not?

These are the questions this Comment seeks to answer—questions that the Supreme Court will answer later this term when it decides *Standard Fire Insurance Co. v. Knowles*.⁹ Westley's lawsuit is based on *St. Paul Mercury Indemnity Co. v. Red Cab Co.*,¹⁰ and the answer—that a plaintiff who “does not desire to try his case in the federal court . . . may resort to the expedient of suing for less than the jurisdictional amount”—is well-established law.¹¹ The answer in Buttercup's action is unsettled, but several courts have treated the hypothetical questions as identical and permitted binding stipulations to defeat removal.¹² Of the several problems this creates, the most important is also the most obvious. While, in Westley's case, the sacrifice made is borne by the party controlling the litigation, in Buttercup's case, absent class members with no say in the matter will make the sacrifice.

The distinction matters now in the wake of the Class Action Fairness Act of 2005 (CAFA), which allows defendants to remove class actions to federal court so long as minimal diversity exists, the amount in controversy is greater than \$5 million, and a few other conditions are met.¹³ Before CAFA, total diversity was required and removal jurisdiction could be defeated without any sacrifice at all.¹⁴ Including a named plaintiff from the same state as a named defendant foreclosed the possibility of removal.¹⁵ After CAFA, binding stipulations offer an alternate means of achieving the same end.¹⁶

Part II will discuss the historical context in which CAFA arose and early

Buttercup must stipulate to damages of less than \$5 million. *See id.* § 1332(d)(2).

8. *See* 28 U.S.C. § 1447(a).

9. *Knowles v. Standard Fire Ins. Co.*, No. 4:11-CV-04044, 2011 U.S. Dist. LEXIS 139077 (W.D. Ark. Dec. 2, 2011), *cert. granted*, 183 L. Ed. 2d 730 (U.S. Aug. 31, 2012) (No. 11-1450).

10. 303 U.S. 283 (1938).

11. *Id.* at 294.

12. *See infra* notes 138–83 and accompanying text.

13. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

14. *See* Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1450–51 (2008) [hereinafter Burbank, *A Preliminary View*].

15. *Id.* at 1451.

16. *See infra* notes 80–82 and accompanying text.

techniques designed to circumvent it.¹⁷ Part III.A traces the history of the class action in federal courts, starting from just after Rule 23 was entirely overhauled and the modern class action created in 1966 and concluding with *Wal-Mart Stores, Inc. v. Dukes*,¹⁸ which represents the latest example in a series of Supreme Court decisions that tend to make state fora more attractive than federal.¹⁹ Part III.B covers the state of the law with regard to this Comment's precise question.²⁰ Part IV describes the problems that binding stipulations create on three planes—their conflicts with Rule 23,²¹ considerations of federalism and the Dormant Commerce Clause,²² and their poor fit in the modern landscape of complex litigation.²³ Finally, Part V explicates the deficiencies of judicial approaches employed thus far²⁴ before addressing how the newly enacted Federal Courts Jurisdiction and Venue Clarification Act of 2011²⁵ marks a step in the right direction.²⁶ Part V closes with a proposal for a per se rule against binding stipulations in these cases.²⁷ Part VI concludes.²⁸

II. CLEANING UP THE CLASS ACTION

Hailed as a victory for big business, the Class Action Fairness Act of 2005 was signed into law by President George W. Bush after years of wrangling.²⁹ Aimed largely at diverting large class action lawsuits into

17. See *infra* notes 29–87 and accompanying text.

18. 131 S. Ct. 2541 (2011).

19. See *infra* notes 88–137 and accompanying text.

20. See *infra* notes 138–83 and accompanying text.

21. See *infra* notes 184–277 and accompanying text.

22. See *infra* notes 278–96 and accompanying text.

23. See *infra* notes 297–336 and accompanying text.

24. See *infra* notes 337–63 and accompanying text.

25. Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 758 (codified as amended in scattered sections of 28 U.S.C.).

26. See *infra* notes 364–83 and accompanying text.

27. See *infra* notes 384–429 and accompanying text.

28. See *infra* notes 430–42 and accompanying text.

29. See Bernadette Tansey, *Lawyers Size up New Law; Both Sides Ponder Effect of New Federal Class Action Act*, S.F. CHRON., Mar. 18, 2005, at C1, available at http://articles.sfgate.com/2005-03-18/business/17364770_1_class-action-suits-federal-court-state-court; see also Edward A. Purcell Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdiction Reform*, 156 U. PA. L. REV. 1823, 1823 (2008) [hereinafter Purcell, *CAFA in Perspective*] (“[CAFA] was the product of an extended and well-organized political campaign. In Congress, its passage required a grinding eight-year effort, several modifications to the original proposal, numerous committee hearings, multiple reports by both Houses, political compromises that drew some Democratic support, two unsuccessful attempts to terminate debate in the Senate by imposing cloture, and strenuous efforts to amend in both the House and Senate when the bill came to the floor for a final vote. Passage also required Republican control of both Houses of Congress and the presidency as well.”).

While the legislation had obvious political connotations, President George W. Bush disclaimed any antipathy toward the class action device:

federal courts,³⁰ the law turned out far different than originally conceived.³¹ The problems it had originally been meant to address—convoluted notices and the payment of bounties to class representatives, for example—were largely ameliorated by judicial innovation³² and by the 2003 amendments to Rule 23 of the Federal Rules of Civil Procedure.³³ Thus, CAFA’s role in preventing forum shopping overshadows its inclusion of a “Consumer Class Action Bill of Rights.”³⁴ CAFA accomplishes this primary purpose by allowing a defendant to remove any class action to federal court where, among other things, the aggregate sum in controversy exceeds \$5 million, minimal diversity exists, and the class consists of at least 100 persons.³⁵

Class actions can serve a valuable purpose in our legal system. They allow numerous victims of the same wrongdoing to merge their claims into a single lawsuit. When used properly, class actions make the legal system more efficient and help guarantee that injured people receive proper compensation. That is an important principle of justice. So the bill I sign today maintains every victim’s right to seek justice and ensures that wrongdoers are held to account.

Remarks on Signing the Class Action Fairness Act of 2005, 1 PUB. PAPERS 270, 271 (Feb. 18, 2005).

30. Edward F. Sherman, *Class Actions After the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1593, 1595 (2006) [hereinafter Sherman, *After CAFA*].

31. Compare Class Action Fairness Act of 1998, S. 2083, 105th Cong. (1998) (providing, *inter alia*, for limitations on attorney’s fees, allowing removal so long as the aggregate damages exceed \$75,000 and minimal diversity exists, and amending FRCP 11), with Class Action Fairness Act of 2005, S. 5, 109th Cong. (2005) (declining to amend FRCP 11 or impose any direct limitations on attorney’s fees while, among other things, permitting removal where the amount in controversy exceeds \$5 million and minimal diversity exists, regulating permissible attorneys’ fees in the event of coupon settlements, and demanding judicial review of such settlements).

32. See generally BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, *MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES* (3d ed. 2010) (describing ways judges have managed class action litigation in the face of various troubling techniques), available at [http://www.fjc.gov/public/pdf.nsf/lookup/classgd3.pdf/\\$file/classgd3.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/classgd3.pdf/$file/classgd3.pdf).

33. See FED. R. CIV. P. 23(c)–(h) advisory committee notes, 2003 amendments (amended to provide for judicial review of proposed settlements, establish guidelines and protocols for the selection of class counsel, and mandate that notice be sent to all class members informing them of the attorney’s fees to be paid and allowing for objections to be heard, among other things). Professor Sherman originally made this observation in 2006. See Sherman, *After CAFA*, *supra* note 30 at 1594–95.

34. See 151 CONG. REC. 2636 (2005) (statement of Rep. Sensenbrenner) (describing “aggressive forum shopping by trial lawyers to find courts and judges who will act as willing accomplices in a judicial power grab” as “[a] major element of the worsening crisis”); 148 CONG. REC. 3104 (2002) (statement of Rep. Cox) (decrying the effects of forum shopping); see also Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553, 1554 (2008) [hereinafter Clermont & Eisenberg, *CAFA Judicata*].

35. See 28 U.S.C. § 1332(d)(2), (5)–(6), (11) (2006). In pertinent part, § 1332 (which provides federal courts with diversity jurisdiction) reads as follows:

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any

According defendants this limited right to litigate in federal court gives CAFA its defendant-friendly reputation.

Plaintiffs often file class actions in state court.³⁶ In state courts, especially a few prime destinations,³⁷ plaintiffs seem to maintain a considerable advantage over defendants.³⁸ Class actions get certified with relative ease.³⁹ The settlements reached are not subject to the same scrutiny

defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

....

(5) Paragraphs (2) through (4) shall not apply to any class action in which—

....

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs.

....

(11)(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

Id.

36. See, e.g., E. Farish Percy, *The Tedford Equitable Exception Permitting Removal of Diversity Cases After One Year: A Welcome Development or the Opening of Pandora's Box?*, 63 BAYLOR L. REV. 146, 147 (2011) (noting the general preference of plaintiffs for state courts and defendants for a federal forum). In fact, the preference dates back to the late 1800s. See EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958, at 87 (1992) [hereinafter PURCELL, LITIGATION & INEQUALITY]. Indeed, plaintiffs' concerns may have been even greater then. Professor Purcell describes the "pivotal legal issue in the system of corporate diversity litigation" as being the question of jurisdiction, citing the inconvenience and impracticality of travel and the attendant delays of being in federal court as the original reasons. See *id.* Within a few years though, the defendant's advantage became more substantive, and removal was often sufficient to end the litigation altogether. *Id.*

37. "Forum shopping has resulted in a very small handful of local courts in such places as Madison County, Illinois; Jefferson County, Texas; and Palm Beach County, Florida, making law for an entire Nation." 148 CONG. REC. 3104 (2002) (statement of Rep. Cox). Madison County, where only a pair of class action suits were filed in 1998, hosted 106 such actions in 2003. S. REP. NO. 109-14, at 13 (2005). Accordingly, it has drawn the bulk of Congress's ire. See, e.g., 151 CONG. REC. 2645–46 (2005) (statement of Rep. Keller) ("Madison County, Illinois has been called the number one judicial hellhole in the United States. . . . The movie 'Bridges of Madison County' was a love story. The 'Judges of Madison County' would be a horror flick.").

38. See Paul Rosenthal, *Improper Joinder: Confronting Plaintiffs' Attempts to Destroy Federal Subject Matter Jurisdiction*, 59 AM. U. L. REV. 49, 57–58 (2009).

39. See Allan Kanner, *Interpreting the Class Action Fairness Act in a Truly Fair Manner*, 80 TUL. L. REV. 1645, 1654 (2006) ("The federal courts' reluctance to issue class certification is well documented."). Kanner's evidence includes the Senate Report prepared for the Class Action Fairness Act of 2000, which found:

[O]ne reason for the dramatic explosion of class actions in State courts is that some State court judges are less careful than their Federal court counterparts about applying the procedural requirements that govern class actions. Many State court judges are lax about following the strict requirements of rule 23 (or the State's governing rule), which are intended to protect the due process rights of both unnamed class members and

required under Rule 23.⁴⁰

These concerns took center stage in congressional debates over the proposed legislation. Congressman Jim Sensenbrenner (R-WI) painted the ominous picture of a few “magnet courts” deciding a disproportionate number of class actions and wielding equally disproportionate power.⁴¹ CAFA, he argued, would restore sanity to the system and put national cases where they should be—a federal forum.⁴² Moments before turning over the floor, Sensenbrenner predicted the anguish CAFA would cause plaintiffs’ firms:

I suspect you could hear a pin drop in the halls of infamous courthouses located in Madison County, Illinois and Jefferson County, Texas, where for so long the good times have rolled for forum-shopping plaintiffs’ attorneys and the judges who enable them. And when this legislation is signed by the President one day soon, those same halls may echo with sobs and curses because this time justice and fairness and the American people will have the last laugh.⁴³

These concerns just scrape the surface. Another problem often cited in the legislative history is that of multiple actions, arising out of a single

defendants. In contrast, Federal courts generally do scrutinize proposed settlements much more carefully and pay closer attention to the procedural requirements for certifying a matter for class treatment.

S. REP. NO. 106-420, at 16 (2000).

40. See Richard L. Marcus, *Assessing CAFA’s Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765, 1820 (2008) [hereinafter Marcus, *Assessing CAFA’s Policy*].

41. See 151 CONG. REC. 2636 (2005) (statement of Rep. Sensenbrenner) (“The infamous handful of magnet courts known for certifying even the most speculative class action suits The only explanation for this phenomenon is aggressive forum shopping by trial lawyers to find courts and judges who will act as willing accomplices in a judicial power grab, hearing nationwide cases and setting policy for the entire country.”).

42. See *id.*

43. *Id.* While class counsel has proven remarkably adaptable, the effects of CAFA and similar measures still provoke unrest and discontent. See generally Howard M. Erichson, *CAFA’s Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593 (2008) [hereinafter Erichson, *CAFA’s Impact*]. Whether or not measures like CAFA take money from the pockets of plaintiffs’ attorneys as a group, they are viewed with distaste among the plaintiffs’ bar because they often cast the plaintiffs’ attorneys as villains. See *id.* at 1596–1602; see also Nan S. Ellis, *The Class Action Fairness Act of 2005: The Story Behind the Statute*, 35 J. LEGIS. 76, 84 (2009) (“Tort tales provide a tale of morally blameworthy individuals (the plaintiffs) who beset blameless, responsible and hardworking individuals (the defendants) aided by the most blameworthy of all—the lawyer.”). Better criticisms of the plaintiffs’ bar seem rooted in agency theory. See *infra* notes 72, 403–10 and accompanying text.

alleged tort, filed in numerous jurisdictions.⁴⁴ Such actions not only force the defendant to fight essentially the same battle on multiple fronts but also burden the judiciary's resources.⁴⁵ Further, they pit the plaintiffs against each other in a race to the bottom that only class members cannot win—defendants win by getting a cheap settlement, class counsel by raking in attorney's fees.⁴⁶ This “reverse auction” gives defendants leverage by allowing them to haggle over the settlement with attorneys representing various putative classes.⁴⁷ In return for guaranteeing class certification, and the settlement and fees that come with it, class counsel need only make the lowest bid.⁴⁸ When the dust settles, if all goes well for the defendant,⁴⁹ all

44. See, e.g., S. REP. NO. 109-14, at 4 (2005) (“Multiple class action cases purporting to assert the same claims on behalf of the same people often proceed simultaneously in different state courts, causing judicial inefficiencies and promoting collusive activity.”). “*Duplicative litigation* is the simultaneous prosecution of two or more suits in which some of the parties or issues are so closely related that the judgment in one will necessarily have a res judicata effect on the other.” RICHARD L. MARCUS & EDWARD F. SHERMAN, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* 103 (4th ed. 2004).

45. See *id.* Under CAFA, the actions would presumably be funneled into federal courts, where an MDL transfer would allow for resource-saving consolidation. See 28 U.S.C. § 1407 (2006); see also STEPHEN C. YEAZELL, *CIVIL PROCEDURE*, 173 (7th ed. 2008) [hereinafter YEAZELL, *CIVIL PROCEDURE*] (“Section 1407 of 28 U.S.C. sets up a judicial panel on multidistrict litigation and authorizes it to transfer cases pending in different districts to a single district for coordinated or consolidated pretrial proceedings. . . . The theory underlying such consolidation is efficiency . . .”).

46. See John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 392 (2000) [hereinafter Coffee, *Class Action Accountability*].

47. See *id.* at 392 & n.53. Indeed, even in the absence of parallel class actions, the mere threat that one may be filed can lead to a hasty settlement. *Id.*

The late Professor Richard A. Nagareda proposed in 2003 to reverse the reverse auction “by linking the security of incumbent class counsel to the adequacy of the representation that they provide.” Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 371 (2003) [hereinafter Nagareda, *Administering Adequacy*]. Instead of vying for the defendant's business, the attorneys would compete for the court's. See *id.* Such a solution, he believed, would also ameliorate the problem of magnet jurisdictions because any attorney's decision to settle an action in such a jurisdiction “would serve as a heightened alert for would-be challengers to incumbent class counsel.” *Id.* at 372. An auction of this sort would also put the continued use of binding stipulations in doubt because the adequacy of any attorney willing to sacrifice a portion of his clients' recovery would similarly serve as an alert.

48. See James M. Underwood, *Rationality, Multiplicity, & Legitimacy: Federalization of the Interstate Class Action*, 46 S. TEX. L. REV. 391, 409 (2004). To effect this agreement, the creation of a “settlement class” is necessary. *Id.* “The term ‘settlement class action’ refers to a class action that is designed [sic] to be settled rather than litigated, with the defendant not objecting to certification of the class providing the settlement is approved.” Roger C. Cramton, *Individualized Justice, Mass Torts, and “Settlement Class Actions”: An Introduction*, 80 CORNELL L. REV. 811, 823 (1995).

49. Whether an absentee class member can collaterally attack the preclusive effects of a class action settlement by alleging inadequate representation after the fact is a question that divided the Supreme Court in *Dow Chemical Co. v. Stephenson*, 539 U.S. 111 (2003) and thus remains open. Different courts have reached different results. Compare *Epstein v. MCA Inc.*, 179 F.3d 641 (9th Cir. 1999) (holding that “due process does not require collateral second-guessing of” an original finding of adequacy), with *State v. Homeside Lending, Inc.* 826 A.2d 997 (Vt. 2003) (noting, but ultimately disregarding, considerations of comity in determining that a showing of inadequate

other putative classes will be estopped from bringing their actions.⁵⁰ While federal courts have the procedural and jurisdictional tools to handle this problem, state courts do not.⁵¹

Just as the “reverse auction” affects absentee class members directly and negatively, coupon settlements harm only them.⁵² While the oft vilified form of settlement⁵³—instead of paying out cash, class members receive coupons⁵⁴—may have some merit,⁵⁵ it generally does little to make plaintiffs

representation nullified any preclusive effect of a prior proceeding in Alabama). Vigorous defenses of both approaches have emerged in the academy. Compare Marcel Kahan & Linda Silberman, *The Inadequate Search for “Adequacy” in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L. REV. 765 (1998) (arguing that such collateral attacks should be deemed impermissible), with Susan P. Koniak, *How Like a Winter? The Plight of Absent Class Members Denied Adequate Representation*, 79 NOTRE DAME L. REV. 1787, 1794 (2004) (“Due process is, however, always in tension with efficiency, speed and finality. . . I say the simple and longstanding answer on the question of collateral attack is right and should be preserved.”), and Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX L. REV. 383 (2000) (arguing a similar position); see also Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2131 (2008) [hereinafter Wolff, *Federal Jurisdiction and Due Process*] (arguing that “collateral attack must remain a part of the class member’s potential repertoire of responses to collusion or malfeasance, albeit a disfavored response, in at least some cases”).

50. See Richard A. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 U. CHI. L. REV. 603, 605 (2008) (“Class settlement agreements today involve a kind of business transaction in which the commodity ‘bought and sold’ consists of the preclusive effect that the judgment in the class action stands to exert vis-à-vis class members’ claims.”) [hereinafter Nagareda, *The Administrative State*].

51. See JAY TIDMARSH & ROGER H. TRANGSRUD, *MODERN COMPLEX LITIGATION* 162 (2d ed. 2010). For further discussion of federal courts’ advantage in this regard, see *infra* Part IV.C.

52. See *In re Oracle Sec. Litig.*, 132 F.R.D. 538, 544–45 (N.D. Cal. 1990) (“The defendants . . . get off cheaply, the plaintiffs’ (and defendants’) lawyers get the only real money that changes hands and the court, which approves the settlement, clears its docket of troublesome litigation.”).

53. See Note, *In-Kind Class Action Settlements*, 109 HARV. L. REV. 810, 811 (1996) (describing various criticisms heaped on coupon settlements).

54. *Id.* at 810. “For example, class members in one case recovered coupons valid for a discount on the purchase of new food processors. Other class action plaintiffs have secured discounts on transatlantic air travel, groceries homesite purchases, bar review courses and legal texts, and brokerage fees.” *Id.* (citations omitted).

55. See Geoffrey P. Miller & Lori S. Singer, *Nonpecuniary Class Action Settlements*, 60 L. & CONTEMP. PROBS. 97, 98 (1997) (writing with the “goal . . . to replace some of the recent hysteria about coupon and other nonpecuniary settlements with a more balanced account that identifies the benefits, as well as the costs, of such agreements”). Coupon settlements are just one of five types of nonpecuniary settlements the article discusses; the other four being: “distributions of securities, monitoring for future harm, reverter funds in which unclaimed settlement funds return to the defendant, and fluid recovery funds where unclaimed settlement funds are distributed to persons other than injured class members.” *Id.* at 98–99. Miller and Singer define coupon settlements:

A coupon settlement is a settlement where the defendant creates a right for class members to obtain a discount on future purchases of the defendant’s products or services. The right to receive a discount is the consideration class members receive instead of an immediate cash payment. The defendant receives a release from legal claims and the

whole.⁵⁶ Their attorneys, on the other hand, can create substantial windfalls for themselves by securing such a settlement, and defendants get off light when the coupons go unused.⁵⁷ In some cases, they even turn a profit on the transaction.⁵⁸

The coupon settlement likely attracts so much attention because it is a vivid example of the incongruities created by the mass tort class action—who has not been awarded one only to find it worthless?—but its criticisms represent no mere stalking horse hiding a pro-business agenda.⁵⁹ Rather, it is a real problem that Congress addressed with the enactment of CAFA.⁶⁰

benefit of the consumers' increased incentives to purchase one of its products or services. *Id.* at 102.

As the definition accounts for, an ancillary and inevitable effect of the settlement is to incentivize a renewed customer–retailer relationship between the victim and the tortfeasor. This perverse consequence seems to have no analogue in the field of remedies, and one cannot help but feel a little uncomfortable at the transactional dynamic. This observation has not been lost on commentators. *See, e.g.*, Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 *UCLA L. REV.* 991, 1028–29 (2002).

56. Leslie, *supra* note 55, at 1037. Among the chief reasons is the simple fact that these coupons are rarely redeemed. *Id.* at 1035 (describing redemption rates ranging from a high of 26.3% to a low of 3%).

57. *See* Leslie, *supra* note 55, at 993.

58. Leslie, *supra* note 55, at 994.

Of course, CAFA is not a cure-all, and discretion is left to judges. *See* 28 U.S.C. § 1712(e) (2006). For a post-CAFA case tying together many of the concepts described *supra* notes 42–56 and accompanying text, see *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292 (S.D. Fla. 2007). In *Figueroa*, the action was one of several filed against Sharper Image in state and federal courts alleging that the Ionic Breeze® air purifier was defective. *Id.* at 1294. A “reverse auction” ensued, resulting in a coupon settlement—*Figueroa* had seemingly won the race to the bottom. *See id.* at 1297. Despite the unreserved support of Professor Leslie, the settlement was ultimately rejected by the district court in light of the objections of named class representatives from parallel class actions as well as the attorneys general of several states. *See id.* at 1313–15. While the case goes a long way in showing that federal courts have not perfected the class action—by adding a defendant not named in the parallel actions, *Figueroa* avoided section 1404 transfer and abstention under the Colorado River Doctrine—the coupon settlement itself, despite being a failure ultimately, was greatly improved by CAFA’s provisions. *See id.* at 1295–96, 1323. When objected to, the parties went back to the drawing board and incorporated suggested changes. *Id.* at 1323. Indeed, Professor Leslie was brought in to advise on the settlement terms by Sharper Image after his work was cited repeatedly by objectors. *See id.* at 1313. The final product, in Professor Leslie’s words, “more than satisfie[d] the CAFA standard and [w]ould provide an excellent model for post-CAFA coupon settlements.” *Id.* In the end, District Judge Cecilia M. Altonaga’s detailed, thorough opinion rejecting the settlement demonstrated that CAFA’s added protections have teeth. *See id.* at 1315.

59. *See generally* Leslie, *supra* note 55 (describing various problems with in-kind settlements). Opponents of CAFA tend to downplay the importance of coupon settlements, portraying them as atypical and *sui generis*. *See, e.g.*, Burbank, *A Preliminary View*, *supra* note 14, at 1448 (referring to CAFA’s treatment of coupon settlements as “legislation by anecdote”).

60. *See* Class Action Fairness Act of 2005 §3, 28 U.S.C. § 1712 (2006). CAFA’s approach to coupon settlements has been criticized heavily. *See, e.g.*, J. Brendan Day, Comment, *My Lawyer Went to Court and All I Got Was This Lousy Coupon! The Class Action Fairness Act’s Inadequate Provision for Judicial Scrutiny over Proposed Coupon Settlements*, 38 *SETON HALL L. REV.* 1085, 1088 (2008) (outlining various perceived shortcomings in the statute); Robert H. Klonoff & Mark Herrmann, *The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements*, 80 *TUL. L. REV.* 1695, 1697 (2006) (“Congress lacked any clear understanding of what it was trying to fix.

State courts, on the other hand, offer no uniform protections.⁶¹ And when individual states erect them, forum-shopping plaintiffs can take their business elsewhere.⁶² Or, they could before CAFA.

As predicted by Representative Sensenbrenner,⁶³ plaintiffs' attorneys reacted swiftly. The flurry of class action lawsuits filed just before the legislation became effective demonstrated their distaste for CAFA.⁶⁴ Attorneys pledged to circumvent the law.⁶⁵ One attempted solution—filing a number of separate lawsuits based on the same alleged wrong—is wildly inefficient and costly.⁶⁶ Accordingly, courts have treated it with suspicion.⁶⁷ Crafting state-specific classes offers one means of keeping cases in state courts, but it is not always practical.⁶⁸ Consequently, many techniques

As a result, the so-called 'problem' of class action settlements is ill-defined, and Congress has passed a series of unrelated provisions that achieve little and raise more questions than they answer."); Purcell, *CAFA in Perspective*, *supra* note 29, at 1874 (noting that where a case has been filed in state court, a collusive plaintiff and defendant could keep the case there and avoid CAFA's coupon settlement provisions altogether).

It is the shortcoming that Purcell identifies, and another related to the local exception carve-out, that seems to have inspired the single harshest criticism of CAFA to emerge from the academy. See Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1942 (2006) ("[The provisions] meet the philosopher Harry Frankfurt's definition of 'bullshit,' because they are made with apparent indifference to their truth content.").

For all these criticisms, Judge Cecilia M. Altonaga had no trouble interpreting them to great effect in *Figueroa*, 517 F. Supp. 2d 1292. See *supra* note 58; see also *Sobel v. Hertz Corp.*, No. 3:06-CV-00545-LRH-RAM, 2011 WL 2559565 (D. Nev. June 27, 2011) (undertaking a rigorous analysis pursuant to CAFA and rejecting a proposed coupon settlement).

61. See Purcell, *CAFA in Perspective*, *supra* note 29, at 1847.

62. This is, of course, the essence of forum shopping, and the point is that state court protections against coupon settlements will often be only as good as the weakest state. See Suzanna Sherry, *Wrong, Out of Step, and Pernicious: Erie as the Worst Decision of All Time*, 39 PEPP. L. REV. 129, 138-39 (2011) ("Instead of choosing between state and federal courts in order to obtain the benefit of state or federal law, litigants now choose among courts . . . located in different states in order to obtain the benefit of a particular state's law."); Donald Earl Childress III, *Redeeming Erie: A Response to Suzanna Sherry*, 39 PEPP. L. REV. 155, 160 (2011) (describing "horizontal forum-shopping between the several states").

63. See *supra* text accompanying note 43.

64. See Tansey, *supra* note 29 (quoting class action attorney Brad Seligman's comment, "A lot of lawyers are already starting to think how to write lawsuits to get around it").

65. See, e.g., *id.*

66. Parties must spend the extra sums associated with pursuing or defending each different action. Courts must expend additional resources in handling them.

67. See, e.g., *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 406 (6th Cir. 2008) (holding that "[b]ecause no colorable basis for dividing the claims . . . other than to avoid the clear purpose of CAFA [existed], remand was not proper"); *Proffitt v. Abbott Labs.*, No. 2:08-CV-148, 2008 U.S. Dist. LEXIS 72467, at *11 (E.D. Tenn. Sep. 23, 2008) ("[T]he plaintiff herein with his eleven class action complaints cannot create duplicative class action litigation and arbitrarily 'gerrymander' time frames in order to evade the purview of the CAFA.").

68. See Sherman, *After CAFA*, *supra* note 30, at 1598 ("A determination whether two-thirds of

revolve around manipulating the amount in controversy, giving rise to the “indeterminate complaint,”⁶⁹ the “lowball complaint,”⁷⁰ and finally, stipulations purporting to limit damages sought.⁷¹ These creative and inspired strategies belie the trite canard of villainous, scheming plaintiffs’ attorneys out to make a quick buck; from a purely legal perspective, it is some adroit maneuvering on their part. However, they endeavor to avoid a system—federal courts—designed to minimize the structural problems inherent in the class action device that divide the interests of class members and their counsel, and, in a less sophisticated system, “abuses” of the type decried by Congress will inevitably flourish.⁷²

the class members are citizens of the forum state may sometimes involve a fact question that can not easily be answered since neither class counsel nor defendants would necessarily have information about the domicile of each class member.”)

One method that can work, at least in certain circumstances, is defining the class in terms of state citizenship. *See, e.g., Grimsdale v. Kash N’ Karry Food Stores, Inc. (In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.)*, 564 F.3d 75, 76 (1st Cir. 2009) (remanding an action back to state court where the “class[,] defined to consist entirely of Florida citizens[,] sued a single corporation, also a Florida citizen, in Florida state court”).

69. The indeterminate complaint is one that leaves vague the sum of damages requested. *See Alice M. Noble-Allgire, Removal of Diversity Actions When the Amount in Controversy Cannot be Determined from the Face of Plaintiff’s Complaint: The Need for Judicial and Statutory Reform to Preserve Defendant’s Equal Access to Federal Courts*, 62 MO. L. REV. 681, 686 (1997). Because many states do not require that damages be pleaded with specificity, and some states expressly prohibit such pleading, federal courts—who of course require that the pleading at least makes clear the minimum jurisdictional threshold has been reached, *see* FED. R. CIV. P. 8(a)(1)—have trouble determining whether remand is proper. *See Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 751 (11th Cir. 2010) (“Indeterminate complaints pose two independent analytical problems, which should not be, but sometimes are, confused.” (quoting *Robinson v. Quality Ins. Co.*, 633 F. Supp. 572, 575 (S.D. Ala. 1986))). With regard to § 1332(a) diversity jurisdiction, i.e. classic diversity jurisdiction, Congress recently passed legislation aimed at fixing this problem. *See infra* Part V.

70. A lowball complaint is one in which the pleading requests specific damages less than the jurisdictional amount. *See Noble-Allgire, supra* note 69, at 691. Such complaints are sometimes treated practically as stipulations, *see, e.g., Lowdermilk v. U.S. Bank Nat’l Ass’n*, 479 F.3d 994 (9th Cir. 2007), but there is no doubt that a mere “lowball complaint” would not often limit the plaintiff’s recovery while an effective stipulation always would. As with the indeterminate complaint, Congress has taken recent steps to fix the problem it creates. *See infra* Part V.

71. *See, e.g., McClendon v. Challenge Fin. Investors Corp.*, No. 1:11 CV 1597, 2011 U.S. Dist. LEXIS 128178, at *8–10 (N.D. Ohio Nov. 3, 2011); *see also* Don Zupanec, *Class Action Fairness Act—Removal—Amount in Controversy—Damages Stipulation*, 27 NO. 3 FED. LITIGATOR 10 (2012). Under the heading “Litigation Tips,” Zupanec writes, “There are ways of pleading around CAFA jurisdiction[, including to] . . . limit the request for relief to less than CAFA’s \$5 million aggregate jurisdictional minimum.” *Id.*

72. That is, the problem is not one of attorney greed so much as it is one of agency costs, as described in a series of influential works by professor John C. Coffee. *See, e.g.,* John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288 (2010); John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why “Exit” Works Better Than “Voice,”* 30 CARDOZO L. REV. 407 (2009); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987) [hereinafter Coffee Jr., *Entrepreneurial Litigation*]; John C. Coffee Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625 (1987) [hereinafter Coffee Jr., *Rethinking the Class Action*]; John C. Coffee, Jr., *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative*

While CAFA seems riddled with holes just waiting to be exploited by plaintiffs' attorneys,⁷³ Congress was hardly caught unaware. Pertinently, even the Supreme Court-sanctioned practice of pleading to avoid jurisdiction was censured by the 2005 Senate Report prepared in advance of the legislation.⁷⁴ Under the heading "How Diversity Jurisdiction and Removal Statutes Are Abused," the report condemned the practice of including in the complaint a declaration that no plaintiff will seek damages greater than \$75,000 because plaintiffs can subsequently "amend their complaints after the removal to seek more relief and even though the class action seeks millions of dollars in the aggregate."⁷⁵

Of course, legislative history is not law.⁷⁶ Nothing in CAFA's text prohibits those very same "abuses" from emerging anew in the post-CAFA

Actions, 86 COLUM. L. REV. 669 (1986) [hereinafter *Coffee Jr., Understanding the Plaintiff's Attorney*].

"[A]gency theory is directed at the ubiquitous agency relationship, in which one party (the principal) delegates work to another (the agent), who performs that work." Kathleen M. Eisenhardt, *Agency Theory: An Assessment and Review*, 14 ACAD. OF MGMT. REV. 57, 58 (1989). In the class action context, the agent is the plaintiffs' attorney, and the principal is the named representative. See *Coffee Jr., Entrepreneurial Litigation, supra*, at 883–84.

Agency theory is concerned with resolving two problems that can occur in agency relationships. The first is the *agency problem* that arises when (a) the desires or goals of the principal and agent conflict and (b) it is difficult or expensive for the principal to verify what the agent is actually doing. . . . The second is the *problem of risk sharing* that arises when the principal and agent have different attitudes toward risk. The problem here is that the principal and the agent may prefer different actions because of the different risk preferences.

Eisenhardt, *supra*, at 58.

73. See Burbank, *A Preliminary View, supra* note 14, at 1541 (noting that "the statute's studied ambiguity on critical questions has already generated a great deal of litigation"); see also Clermont & Eisenberg, *CAFA Judicata, supra* note 34, at 1560–61 (noting that, with 182 relevant district court opinions and 44 relevant circuit court opinions in the first two and a half years after CAFA took effect, it had "already generated an impressive hillock of case law").

74. See S. REP. NO. 109-14, at 10–11 (2005).

75. See *id.*

76. See *Train v. City of New York*, 420 U.S. 35, 45 (1975) ("[L]egislative intention, without more, is not legislation."); cf. *INS v. Chadha*, 462 U.S. 919, 957–59 (1983) (finding unconstitutional the "legislative veto" because it neither satisfied the requirement of bicameral passage nor the Presentment Clause).

The legislative history of CAFA is especially criticized. See TIDMARSH & TRANGSRUD, *supra* note 51, at 334 ("[T]he [Senate] Report presents unique problems. It is dated . . . eleven days after CAFA's passage and ten days after President Bush had signed CAFA into law."). Whether or not this makes a difference is a subject of debate among the circuit courts. Compare *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006) (describing the "probative value for divining legislative intent" as "minimal" due to the timing of the Report's publication), with *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1206 n.50 (11th Cir. 2007) ("While the report was issued ten days following CAFA's enactment, it was submitted to the Senate on February 3, 2006—while that body was considering the bill.").

landscape.⁷⁷ It took less than two years for the first mention of a binding stipulation to appear in a federal court opinion.⁷⁸ And the damages stipulation has since grown in stature.⁷⁹ Stipulations and their functional relatives come in a few varieties.⁸⁰ The true stipulation, which purports to bind the plaintiffs to damages less than \$5 million, is at least commendable for its honesty.⁸¹ It is a straightforward pledge that the amount in controversy will in no case exceed the minimum amount in controversy established by CAFA.⁸² Less defensible is what might be called the phantom stipulation.⁸³ It seems to be a mere tool of obfuscation, suggesting to the court and to the defendant that the amount in controversy will not exceed the minimum amount in controversy.⁸⁴ It functions to defeat removal

77. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.). Of course, the statute's silence on these very "abuses" is exemplified by the cases discussed and cited *infra* Part III.B.

78. See *Lowdermilk v. U.S. Bank Nat'l Ass'n*, No. 06-592-HA, 2006 U.S. Dist. LEXIS 95697, at *7 (D. Or. Aug. 16, 2006), *aff'd*, 479 F.3d 994 (9th Cir. 2007).

79. This is especially true in the Eighth Circuit where *Bell v. Hershey Co.*, 557 F.3d 953 (8th Cir. 2009), has created a "roadmap" for their effective use. See *infra* notes 154-69 and accompanying text. In other jurisdictions, the *binding* stipulation is hardly necessary because a nonbinding prayer for relief can be sufficient. See *infra* notes 145-52 and accompanying text. In these jurisdictions, binding stipulations have seemingly not gained traction only because they are not necessary—a "lowball complaint" will suffice. See *infra* notes 145-52 and accompanying text. In these circuits, where the acceptability of binding stipulations is assumed but not yet important, a solution to lowball complaints must be found before a solution to binding stipulations is of any particular import. See *infra* Part V.B-C.

80. While lowball and indeterminate complaints are categorically different from binding stipulations, in jurisdictions where the defendant must prove to a legal certainty that removal is proper, they can serve essentially the same function, with the added benefit of not limiting plaintiff recovery—except in those few jurisdictions in which the complaint's *ad damnum* clause is binding. In the absence of legislation analogous to the recently enacted Jurisdiction and Venue Clarification Act of 2011, prohibiting binding stipulations will be of limited effect. See *infra* Part V.C.1.

81. In a Memorandum Opinion and Order out of the Western District of Arkansas, Judge P.K. Holmes III described a quintessential example:

Attached to the Complaint is a "Sworn and Binding Stipulation," signed by Plaintiff, affirming that he will not at any time during the pendency of the case "seek damages for myself or any other individual class member in excess of \$75,000 (inclusive of costs and attorneys' fees) or seek damages for the class as alleged in the complaint to which this stipulation is attached in excess of \$5,000,000 in the aggregate (inclusive of costs and attorneys' fees)."

Smith v. Am. Bankers Ins. Co. of Fla., No. 2:11-cv-02113, 2011 WL 6090275, at *2 (W.D. Ark. Dec. 7, 2011). As has become standard practice in the Eighth Circuit, the stipulation was effective, and the case was remanded to state court. See *id.* at *8; see also *infra* notes 154-69 and accompanying text.

82. See, e.g., *Smith*, 2011 WL 6090275, at *2; *Tuberville v. New Balance Shoe Athletic Shoe, Inc.*, No. 1:11-cv-01016, 2011 WL 1527716, at *3 (W.D. Ark. Apr. 21, 2011).

83. This category includes nonbinding stipulations, which serve only to put courts and defendants in an awkward spot, as well as lowball complaints, which serve the same function but at least do not pretend to be binding. See *Noble-Allgire*, *supra* note 69, at 691-92.

84. See *id.*

The issue is controversial . . . in jurisdictions that do not limit the plaintiff to the amount of damages pled in the complaint. . . . As a result, the specific amount of damages requested in the plaintiff's complaint is not necessarily a true indication of the amount in

in various ways. In some jurisdictions, it raises the burden of proof on the defendant, making remand nearly inevitable even when jurisdiction was proper.⁸⁵ In other cases, the defendant operates initially under the impression that the amount in controversy *is* less than the statutory amount.⁸⁶ By the time it becomes clear that removal is warranted, the opportunity to do so has passed.⁸⁷

III. THE CURRENT STATE OF THE LAW

A. Federal Courts' Longstanding Prudential Approach to Class Certification and the Corresponding Attractiveness of State Fora to Plaintiffs

More than ever before, federal class action jurisprudence is littered with obstacles standing between putative plaintiff classes and class certification.⁸⁸ This is especially true in the wake of *Wal-Mart Stores, Inc. v. Dukes*,⁸⁹ a recent Supreme Court case further constricting Rule 23's class action certification requirements.⁹⁰ While the case has received much attention and

controversy. Although the plaintiff requests a specific sum that falls below the federal jurisdictional threshold, the plaintiff is not bound by that figure. Therefore, the defendant's exposure may in fact be much greater than the federal jurisdictional cut-off. The federal court's dilemma, then, is to determine whose interests should prevail.

Id. at 692 (citation omitted). The Sixth Circuit, which seems to uniformly give truly binding stipulations effect, *see infra* notes 170–72, has warily refused to treat a phantom stipulation in the same manner. *See Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401, 407 (6th Cir. 2007) (noting that a mere “*disclaimer*” in a complaint regarding the amount of recoverable damages does not preclude a defendant from removing the matter to federal court” (emphasis added)); *Reagan v. ArcelorMittal*, No. 2:11–CV–35, 2012 WL 1023107, at *1–*2, *4 (E.D. Tenn. Mar. 26, 2012) (citing *Smith* and holding that complaint's allegation that “Plaintiff and members of the proposed Class limit their aggregate class-wide claims for relief to less than [\$4,999,999.00] and specifically disclaim [all] damages or other relief greater than [\$4,999,999.00]” was ineffective, presumably because it did not even purport to be binding).

85. *See, e.g., Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 997–98 (9th Cir. 2007) (holding that because the “Plaintiff claimed only damages ‘in total, less than five million dollars,’” the complaint was one requesting a “specific amount of damages” and, accordingly, the burden was on the defendant to show to a “legal certainty” that damages would not exceed \$5 million).

86. *See H.R. REP. NO. 112-10*, at 16 (2011) (explaining that the Federal Courts Jurisdiction and Venue Clarification Act of 2011 will make such practices per se bad faith, removable after more than one year).

87. *See id.*

88. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2566–67 (2011) (Ginsburg, J., dissenting) (arguing that the Court's holding superimposes the strict requirements of Rule 23(b)(3) onto (b)(1) and (b)(2) classes).

89. 131 S. Ct. 2541 (majority opinion).

90. *See id.* at 2552 (holding that a common question is insufficient to satisfy Rule 23(a)—a “common answer” is required).

generated commensurate controversy,⁹¹ it was, in large part, a unanimous decision reflecting not an ideological struggle—the corporate world versus the common man or the continued fight for gender equality, pick your narrative—but a rather consistent prudential approach⁹² to class action law suits.

The pattern began in 1969, less than five years after the 1966 amendments to the Federal Rules of Civil Procedure ushered in the modern era of class action litigation.⁹³ That year, in *Snyder v. Harris*,⁹⁴ the Court held that “separate and distinct claims could not be aggregated” to reach the amount in controversy, thus defeating a plaintiff’s attempt to bring her class action in federal court.⁹⁵ Four years later, in *Zahn v. International Paper Co.*,⁹⁶ the Court held that each plaintiff in a class action brought under Rule 23 must independently meet the minimum jurisdictional requirement.⁹⁷ The next year, the Court held that “[i]ndividual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort” and that the plaintiff must bear the cost of sending the notices.⁹⁸ Finally, completing the triumvirate of class-constricting 1970s Supreme Court decisions, the court held interlocutory appeals following the denial of class certification to be impermissible under 28 U.S.C. § 1291.⁹⁹ Thus, as Professor Carol Rice Andrews points out in her thorough treatment of the topic,¹⁰⁰ commentators of the time were already looking at state courts as the inevitable destination of would-be class action litigants.¹⁰¹

91. Andrew J. Trask, *Wal-Mart v. Dukes: Class Actions and Legal Strategy*, 2010–2011 CATO SUP. CT. REV. 319, 321.

92. See Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About “Class Action Fairness,”* 58 SMU L. REV. 1313, 1326 (2005) (noting that Supreme Court rulings on the matter tended to be based on Rule 23 rather than the Constitution).

93. See 7A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* §§ 1753, 1756 (3d ed. 2005) (“The provisions for representative actions were completely rewritten and augmented in 1966.”).

94. 394 U.S. 332 (1969).

95. *Id.* at 337–39.

96. 414 U.S. 291 (1973), *abrogated by* *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005) (holding that 28 U.S.C. § 1367 overruled *Zahn* and authorized supplemental jurisdiction).

97. See *id.* at 301.

98. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). In *Eisen*, signaling the trouble the holding would mean for plaintiff classes, the Court acknowledged that the instant litigation, wherein 2.25 million notices required dispatch, would likely die there. See *id.* at 175–76. Considering the text of Rule 23, such concerns could not affect the analysis. See *id.* at 176 (“There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs.”).

99. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 464–65 (1978).

100. Professor Andrews provides a helpful history and analysis of the Supreme Court’s on-point decisions and their effects in cases beginning with *Zahn* and ending with the enactment of CAFA. See generally Andrews, *supra* note 92.

101. See, e.g., Barry Abrams, *Toward a Policy-Based Theory of State Court Jurisdiction Over Class Actions*, 56 TEX. L. REV. 1033, 1033 (1978) (“The foreclosure of the federal courts as a forum

for many consumer class actions has focused increasing attention on the state courts as the only available judicial forum.”). *But see* Marcus, *Assessing CAFA’s Policy*, *supra* note 40, at 1774 (“At that time, the prevailing academic view was that federal courts were more attractive to plaintiffs” (citing Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1106 (1977))). The easiest explanation for this difference of opinion may simply be that Professor Neuborne was considering only jurisdiction arising from constitutional questions while Professor Abrams was referring to diversity actions. *Cf.* Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 238–39 (1988) (noting that his article will be limited to constitutional questions because, “[i]n part, . . . the parity debate in the cases and scholarly literature has centered on constitutional cases”). It seems abundantly clear that the answer to each question likely hinged on whether the claim brought was constitutional or a simple class action, and the friendliness *vel non* of federal courts to class actions during that period is really the only question pertinent to this Comment.

Judge Guido Calabresi, on the United States Court of Appeals for the Second Circuit, and Kevin S. Schwartz, an associate at Wachtell, Lipton, Rosen & Katz and former law clerk to Judge Calabresi, offer a counter-narrative, not as to what the “prevailing academic views” at the time were (which is all Professors Andrews and Marcus differ on), but with regard to the way it really was. *See generally* Guido Calabresi & Kevin S. Schwartz, *The Costs of Class Actions: Allocation and Collective Redress in the U.S. Experience*, 32 EUR. J.L. & ECON. 169 (2011). Without citing *Snyder, Zahn*, or *Coopers*, the article argues that:

[I]n the decisions of the Supreme Court in the 1970s and 1980s, class actions were favoured because they allowed people to bring suits that otherwise would not be economically feasible, because they enabled individuals, who otherwise lacked effective strength or large enough economic damages, to bring such suits, and because they often would bring about settlements.

Id. at 174.

Their history begins a year after *Zahn*, in 1974, with *Eisen*, which, in their words, “allowed trial courts to take an active role in creating the class; they encouraged trial courts to bring classes together and to certify a class action whenever such courts thought a class action was worthwhile.” *Id.* at 173. While *Eisen* certainly has kind words for class actions—as did George W. Bush when he signed CAFA into law, *supra* note 29—Calabresi and Schwartz neglect that its central holding spelled defeat for the plaintiffs in that case and substantially burdened plaintiffs to follow. *See supra* note 98 and accompanying text.

The next year, the Court held in *Califano v. Yamasaki*, 442 U.S. 682 (1979) that, because Rule 23 included no geographical limitations, nationwide class actions were permissible. *Califano*, 442 U.S. at 702. Consistent with Professor Andrews’s account, the holding relied entirely on the Rule’s text, and the Court even noted that “a federal court when asked to certify a nationwide class should take care to ensure that nationwide relief is indeed appropriate in the case before it, and that certification of such a class would not improperly interfere with the litigation of similar issues in other judicial districts.” *Id.* This fact-bound holding, *see id.* at 703, did little to foster federal acceptance of class actions generally. Indeed, the idea that a nationwide class *can* theoretically be certified under Rule 23 is taken for granted modernly and not seen as a controversial idea cutting against the proposition that federal courts and putative classes often find themselves at loggerheads. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (ordering the decertification of a “nationwide class action” comprised of over a million current and former Wal-Mart employees without ever treating the geographical scope of the class as inherently problematic).

Finally, the Calabresi–Schwartz disco-era triumvirate concludes with *U.S. Parole Commission v. Geraghty*, 445 U.S. 388 (1980). In this case, the plaintiff-friendly holding *did* rely on constitutional grounds. The question was whether Article III standing remained when the class had been denied certification, the plaintiff appealed, and the case was then mooted as to the named plaintiff. *See id.* at 390. Because the question was constitutional in nature, prudential concerns had no place in the analysis, and the Court held only that “an action brought on behalf of a class does not

State courts did not present the same obstacles. State courts did not have jurisdictional amount limitations on their subject-matter jurisdiction. In addition, states could offer more flexible procedures. To be sure, many states adopted a class action rule based on the federal rule. In fact, state adoption of Rule 23 facilitated class action procedure in state courts, but state courts were free to apply their own interpretations of Rule 23. Some states adopted class action rules that were more liberal than Rule 23. Finally, states could allow their appellate courts to review class certification decisions. Thus, although federal courts were effectively closed to many small claims class actions, state courts were not¹⁰²

In the mid-eighties, procedural class action questions once again found their way to the Supreme Court. The intended ramifications of the Court's ruling in *Phillips Petroleum Co. v. Shutts*¹⁰³ were initially unclear—the

become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied" because the named "representative retains a 'personal stake' in obtaining class certification sufficient to assure that Art. III values are not undermined." *Id.* at 404.

In fact, the Court addressed a second relevant issue, and its holding, on firmly prudential grounds, was certainly not friendly to plaintiff classes. The Third Circuit panel below had established the rule that in cases where class certification is denied, the district court had an affirmative obligation to *sua sponte* determine whether subclasses might be appropriate. *Id.* at 407–08. Holding that "it is not the District Court that is to bear the burden of constructing subclasses," the Court reversed. *Id.* at 408–09. The Court ultimately remanded the case back to the district court. *See id.* at 407. In the end, the district court certified only a limited class and then found against the plaintiff on the merits—two rulings the Third Circuit upheld on appeal. *See Geraghty v. U.S. Parole Comm'n*, 719 F.2d 1199, 1201 (3d Cir. 1983), *rev'd*, 455 U.S. 388 (1980).

While it is important to acknowledge this counter-narrative—if nothing else, it is a good reminder that there are two sides even to histories—Professor Andrews's focus on holdings and consequences over platitudes and asides seems to have yielded a more instructive chronicle. *See generally* Andrews, *supra* note 92. *See also* Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 679 (1979) ("It was a very difficult time for the class action practitioner, and the viability of the device itself was in serious doubt. The picture was made all the bleaker by the Supreme Court's restrictive decisions in *Snyder v. Harris*, *Zahn v. International Paper Co.*, and *Eisen v. Carlisle & Jacquelin*." (citations omitted)). Further, Judge Calabresi and Schwartz's conclusion that "the Supreme Court and the federal courts by the year 2000 had turned around and had become unfavorable to class actions" frames the Court's recent decisions as representative of a sea change in the thinking of federal courts that state courts, by contrast, have avoided. *See* Calabresi & Schwartz, *supra*, at 176 (emphasis added). This characterization of events casts suspicion on the recent approach of federal courts and implicit approbation on an imagined consistent approach by state courts that is simply not supported by the cases cited and neglected. *See id.* ("Increasingly, the federal courts interpreted Rule 23 against certification, while the state courts were *still* interpreting Rule 23 in favour of certification." (emphasis added)).

102. Andrews, *supra* note 92, at 1319 (citations omitted).

103. 472 U.S. 797 (1985). The petitioner was a purchaser and producer of natural gas and held leases in eleven different states for the purpose. *Id.* at 799. The plaintiff class was made up of approximately 28,000 royalty owners with interests in those leases properties and hailed from all fifty states, plus Washington D.C. and a number of foreign countries. *Id.* What appears to be a nettlesome conflict of laws problem was initially handled quite simply: the plaintiffs filed their suit

Court reversed in part and affirmed in part, with the holdings cutting in opposite directions vis-à-vis accessibility to courts—but the effect, revitalization of nationwide class actions, quickly became clear.¹⁰⁴ First, the Court rejected the argument that jurisdiction could not be constitutionally exercised over plaintiffs without contacts in the forum state, a holding that cleared the way, *constitutionally*, for such actions.¹⁰⁵ Second, the Court held that the imposition of one state’s law on parties with no contact to that state cannot be “arbitrary and unfair” and that “an important element [of fairness] is the expectation of the parties.”¹⁰⁶ Thus, the state’s law can only be applied where that state has a “significant contact or aggregation of contacts” with the state.¹⁰⁷ While the second holding seemed to create yet another roadblock for putative classes, it has proven easily surmountable.¹⁰⁸ With *Sun Oil Co. v. Wortman*¹⁰⁹—holding that state procedural rules could govern class action certification without running afoul of the Constitution¹¹⁰—ensuring that certain states would be inherently more plaintiff-friendly than others, the benefits of forum shopping were more clear than ever.¹¹¹

Just two years later, Congress accidentally stumbled into the fray by enacting 28 U.S.C. § 1367.¹¹² The statute was designed to overrule the

in a Kansas state court and Kansas applied its law to each and every one of the claims. *Id.* However, the petitioner contended that the Constitution proscribed “the application of Kansas law to all of the transactions between petitioner and respondents,” and the Court agreed. *Id.*

While the named plaintiff, Irl Shutts, was a resident of Kansas, his gas leases were in Oklahoma and Texas. *Id.* at 800–01. Still, his ties to the state were considerably stronger than most of those in the class. *See id.* at 801. Less than four percent of the class members resided in Kansas, and only “approximately one quarter of one percent” of the actual leases in question were within the state. *Id.* Thus, Kansas’s relation to the litigation was tenuous at best.

104. *See Andrews, supra* note 92, at 1323.

105. *See Shutts*, 472 U.S. at 808 (“The burdens placed by a State upon an absent class-action plaintiff are not of the same order or magnitude as those it places upon an absent defendant.”). The bases of the holdings are significant because they demonstrate that limitations on federal jurisdiction of these cases consistently tends to be prudential rather than constitutional. *See Andrews, supra* note 92, at 1313 (“In federal court, this issue principally is one of policy . . .”).

106. *Shutts*, 472 U.S. at 822.

107. *Id.* at 821.

108. *See, e.g., Sullivan v. Oracle Corp.*, 662 F.3d 1265, 1271 (9th Cir. 2011) (“A state court is rarely forbidden by the Constitution to apply its own state’s law.”).

109. 486 U.S. 717 (1988).

110. *Id.* at 722.

111. *See Andrews, supra* note 92, at 1324 (noting that the holding permits states to “provide forum shopping incentives to class counsel”).

112. Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended in scattered sections of 28 U.S.C.).

Court's holding in *Finley v. United States*¹¹³ and restore to the federal judiciary the long-utilized doctrine of pendent party jurisdiction.¹¹⁴ While Congress seemingly wanted the statute to have no effect on class actions,¹¹⁵ it did not take long for courts to start ruling that it abrogated *Zahn* and expanded federal court jurisdiction for class actions via its codification of supplemental jurisdiction.¹¹⁶ While it can be debated whether Congress's intentions should preclude any overruling of *Zahn*,¹¹⁷ a plain reading of the statute indicates that class actions are within its scope.¹¹⁸ So held the Supreme Court in *Exxon Mobil Corp. v. Allapattah Services, Inc.*¹¹⁹ Subject to statutory exceptions, jurisdiction was established so long as some of the claims were within the court's original jurisdiction; § 1367 supplemental jurisdiction would apply to the rest.¹²⁰ While the holding made federal court

113. 490 U.S. 545 (1989), *superseded by statute*, Judicial Improvements Act of 1990, Pub. L. No. 101-650, sec. 310(a), § 1367, 104 Stat. 5089, 5113-14, *as recognized in Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005).

Finley began with a plane crash. *See id.* at 546. Barbara Finley lost her husband and two of her children when a twin-engine plane carrying them hit power lines while on final approach into a San Diego airport. *Id.* Alleging insufficient lighting, Finley sued the United States in federal court, alleging that the Federal Aviation Administration (FAA) had been negligent. *Id.* The complaint was later amended to add as parties San Diego Gas and Electric Company and the city of San Diego. *Id.* The district court permitted the amendment, "assert[ing] 'pendent' jurisdiction" over the state law claims. *Id.* at 546-47. Due to the novel nature of the precise question, the district court certified an interlocutory appeal and was subsequently reversed by the Ninth Circuit. *Id.* at 547. Relying primarily on statutory interpretation, the Supreme Court affirmed. *See id.* at 554-56.

114. *See, e.g.,* Erwin Chemerinsky, *Rationalizing Jurisdiction*, 41 EMORY L.J. 3, 8-9 (1992).

115. *See* H.R. REP. NO. 101-734, at 29 (1990) ("The section is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions"); *see also Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 573 (2005) (Stevens, J., dissenting) (arguing that "[t]he legislative history of 28 U.S.C. § 1367 provides powerful confirmation" that the statute was not meant to overrule *Zahn*).

116. *See, e.g.,* *Patterson Enters. v. Bridgestone/Firestone, Inc.*, 812 F. Supp. 1152, 1154 (D. Kan. 1993); *Garza v. Nat'l Am. Ins. Co.*, 807 F. Supp. 1256, 1258 (M.D. La. 1992). *But see* *Griffin v. Dana Point Condo. Ass'n*, 768 F. Supp. 1299, 1302 (N.D. Ill. 1991). As these cases suggest, a circuit split quickly developed. Underwood, *supra* note 48, at 434. The Court granted certiorari to address the question first in the case of *Free v. Abbot Laboratories, Inc.*, 529 U.S. 333 (2000), but Justice O'Connor's recusal from the case led to a four-four split among the justices, leaving the question for another day. *See id.*

117. Compare Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 22 (1998) ("The text is the law, and it is the text that must be observed."), with STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW* 89-93 (2010) (criticizing textualism and advocating an inquiry into legislative intent).

118. *See* 28 U.S.C. § 1367 (2006) (excepting from the statute's grant of supplemental jurisdiction any "claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure," which specifically leaves out Rule 23); *see also Allapattah*, 545 U.S. at 567 ("The proponents of the alternative view of § 1367 insist that the statute is at least ambiguous and that we should look to other interpretive tools, including the legislative history of § 1367, which supposedly demonstrate Congress did not intend § 1367 to overrule *Zahn*. We can reject this argument at the very outset simply because § 1367 is not ambiguous.").

119. 545 U.S. 546 (2005).

120. *See id.* at 566-67.

more *open* to plaintiffs, it did not make the federal forum more *desirable*.¹²¹ Nothing in the opinion made class action certification more available.¹²² Rather, the holding was useful to defendants desiring to be in federal court.¹²³ So long as one member of the class met the requirements of diversity jurisdiction, the case could be removed to a federal court with the power to exercise supplemental jurisdiction over the entire action.¹²⁴ Thus, Congress increased the stature of removal as a tool in the corporate defendant's arsenal.¹²⁵

With *Bell Atlantic Corp. v. Twombly*,¹²⁶ the Court dealt with a purported class action but not with class action law.¹²⁷ Rather, the question involved a Rule 12(b)(6) motion to dismiss—what must a complaint allege to state a legally cognizable claim and survive the motion?¹²⁸ In a holding that has been widely criticized,¹²⁹ the Court held that a complaint must state on its face a plausible claim for relief, *i.e.*, “[f]actual allegations . . . [sufficient] to raise a right to relief above the speculative level.”¹³⁰ The rule, and its extension in *Ashcroft v. Iqbal*,¹³¹ has significantly increased defendants’

121. The holding of *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988), especially, which remains intact, and the perceived difficulties of getting a class certified in federal court make state courts more attractive.

122. See generally *Allapattah*, 545 U.S. at 546–72.

123. The usefulness of the holding is, however, limited to cases with aggregate damages under \$5 million because, of course, CAFA was passed the very next year and offers an easier means of removal for qualifying class actions. See 14AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3704.1 (4th ed. 2006).

124. See *Allapattah*, 545 U.S. at 558–59.

125. See Underwood, *supra* note 48, at 432.

126. 550 U.S. 544 (2007).

127. See *id.* at 548–49.

128. *Id.* The complaint alleged violations of antitrust law, specifically, section 1 of the Sherman Act. See *id.* at 548. William Twombly and Lawrence Marcus were subscribers of local telecommunications companies, and represented a putative class of all fellow subscribers. *Id.* at 550. The gist of the allegations was that competing companies in the area had agreed on inflated prices to the detriment of their customers. See *id.* at 551–52. The facts included in the pleading described “certain parallel conduct unfavorable to competition” but did not include facts suggesting an actual agreement between the telecommunication companies involved. *Id.* at 548–49. Without such an agreement, parallel action does not constitute a violation of the Sherman Act. *Id.* at 552. The Court ultimately held that “[b]ecause the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.” *Id.* at 570.

129. See, e.g., Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 2 (2010); Note, *Pleading Standards*, 121 HARV. L. REV. 305, 305–06 (2007); Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL’Y 61, 62 (2007).

130. *Twombly*, 550 U.S. at 555 (alteration in original).

131. 556 U.S. 662 (2009) (making clear that the *Twombly* rule applied outside the antitrust context, to “all civil actions”). The plaintiff, Javaid Iqbal, sued, among others, former Attorney General John Ashcroft, after being arrested in the tense days following the terrorist attacks on

probability of ending litigation at the pleading stage,¹³² thereby making the federal forum correspondingly less appealing to plaintiffs.¹³³

Most recently, the Supreme Court held in *Wal-Mart Stores, Inc. v. Dukes*: (1) that Rule 23(a)(2)'s commonality requirement mandated a showing that each of the plaintiffs in the class had suffered the "same injury" and that the common question was central to the resolution of the action,¹³⁴ and (2) that "claims for monetary relief may [not] be certified under [Rule 23(b)(2)]."¹³⁵ Again, the case was decided on Rule 23 grounds rather than constitutional grounds.¹³⁶ Consequently, state courts are a more attractive option than ever before.¹³⁷

September 11, 2011. *Id.* at 666. "As to [Ashcroft and Robert Mueller, the Director of the FBI], the complaint allege[d] that they adopted an unconstitutional policy that subjected respondent to harsh conditions of confinement on account of his race, religion, or national origin." *Id.* The Court did not doubt that Iqbal's account, if true, suggested constitutional violations by his handlers. *Id.* But did they allege a policy dictated by Ashcroft and Muller that resulted in unconstitutional treatment? *See id.* Applying *Twombly*, the Court held that Iqbal's "complaint fail[ed] to plead sufficient facts to state a claim for purposeful and unlawful discrimination against petitioners." *See id.* at 687.

132. Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 624 (2010) ("Especially after *Iqbal*, [courts] appear to be granting 12(b)(6) motions at a significantly higher rate than they did under *Conley* . . ."). In fact, in the six months following the *Twombly* decision, the case was cited in a staggering 2,400 opinions. YEAZELL, CIVIL PROCEDURE, *supra* note 45, at 364. While the case was an antitrust case and significant portions of the analysis discussed the cost of discovery in such cases, *see, e.g., Twombly*, 550 U.S. at 559, "most of the decisions citing the case have been applying its pleading guidelines broadly to Rule 8 and Rule 12(b)(6) motions, regardless of the legal context." 5 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1216 (3d ed. 2005). *Iqbal* put that question to rest, holding conclusively that it applied to the rule in general and not to any specific context. *See Iqbal*, 556 U.S. at 687.

133. *See* Saritha Komatireddy Tice, A "Plausible" Explanation of Pleading Standards: Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007), 31 HARV. J.L. & PUB. POL'Y 827, 835–37 (2008) (arguing that *Twombly* reflects hostility toward litigation).

134. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

135. *See id.* at 2556.

136. *See* Trask, *supra* note 91, at 327 ("[T]he *Dukes* certification debate was less a sweeping statement on due process than it was a high-profile housecleaning."). *But see Dukes*, 131 S. Ct. at 2559 (conducting an analysis under Rule 23 but then suggesting the Due Process Clause might well compel an identical conclusion).

137. *See* John R. Webster & Richard C. Worf, *Commonality in Class Actions After Wal-Mart v. Dukes*, 33 NO. 1 CLASS ACTION REPORTS ART 1, Jan.-Feb. 2012 (observing that "[i]n only a few months, we have seen several lower court decisions in which the *Dukes* commonality holding appears to have been determinative of the outcome—that is, in which the court probably would have certified the class pre-*Dukes*, but would not certify after *Dukes*—directly because of a failure to meet commonality"). *But see* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431 (2010). Under *Shady Grove*, Rule 23's requirements cannot be constricted by way of state procedural rules. *Id.* at 1444. If the class qualifies for certification under Rule 23, the inquiry ends there and the class is certified, regardless of any countervailing state rules of procedure. *See id.* The upshot is that some class actions that cannot be filed in state courts may be filed in federal courts instead. *See id.* at 1447 ("We must acknowledge the reality that keeping the federal-court door open to class actions that cannot proceed in state court will produce forum shopping."). Thus, there is a narrow set of circumstances in which federal courts will not be merely more attractive to plaintiffs but are their only option.

*B. The Use of Low Ball Complaints and Stipulations to Avoid Removal:
Three Distinct Approaches to the Problem Emerge*

In late August of 2012, the Supreme Court was asked to resolve the question of whether class action plaintiffs could avoid federal court and its body of procedural law by using binding stipulations to avoid removal under CAFA.¹³⁸ Scantly a week later, the Court accepted the invitation,¹³⁹ bringing CAFA to the nation's highest court for the first time.¹⁴⁰ The Court thus stands poised to solve a problem percolating among the lower courts. Of the five circuit courts to encounter the issue in the CAFA context,¹⁴¹ four have

138. See Petition for Writ of Certiorari, *Standard Fire Ins. Co. v. Knowles*, No. 11-1450 (May 30, 2012), 2012 WL 1979957; see also Ben Cheng, *Petition of the Day*, SCOTUSblog (Aug. 23, 2012, 11:35 PM), <http://www.scotusblog.com/2012/08/petition-of-the-day-322/>. The precise question the Court will answer is:

When a named plaintiff attempts to defeat a defendant's right of removal under the Class Action Fairness Act of 2005 by filing with a class action complaint a "stipulation" that attempts to limit the damages he "seeks" for the absent putative class members to less than the \$5 million threshold for federal jurisdiction, and the defendant establishes that the actual amount in controversy, absent the "stipulation," exceeds \$5 million, is the "stipulation" binding on absent class members so as to destroy federal jurisdiction?

Supreme Court, *11-1450 Standard Fire Insurance Company v. Knowles: Question Presented* (Aug. 31, 2012), www.supremecourt.gov/qp/11-01450qp.pdf.

139. *Standard Fire Ins. Co. v. Knowles*, 183 L. Ed. 2d 730 (2012) (granting certiorari). The case's disposition and the lack of a well-defined circuit split on the issue prompted one court observer to describe the Court's decision as "one of the most improbable grants of certiorari you will ever see." See Alison Frankel, *Are Class Action Lawyers in Arkansas Snubbing SCOTUS (and CAFA)?*, THOMSON REUTERS: NEWS & INSIGHT (Oct. 3, 2012), http://newsandinsight.thomsonreuter.com/Legal/News/2012/10_-_October/Are_class_action_lawyers_in_Arkansas_snubbing_SCOTUS_%28and_CAFA%29_/.

140. Petition for Writ of Certiorari at 19, *Standard Fire Ins. Co. v. Knowles*, No. 11-1450 (May 30, 2012), 2012 WL 1979957. Less than a year prior, the Court denied certiorari to another case that, like *Knowles*, originated in the Eighth Circuit, *Skechers U.S.A. Inc. v. Tomlinson*. See 132 S. Ct. 551 (2011) (mem.) (denying certiorari). In *Skechers*, Patty Tomlinson brought an action in Arkansas state court against Skechers alleging that its Shape-Ups shoes offered none of the health benefits claimed in advertising. See *Tomlinson v. Skechers U.S.A., Inc.*, No. 11-5042, 2011 U.S. Dist. LEXIS 142862, at *2 (W.D. Ark. May 25, 2011). To avoid removal under CAFA, the plaintiff included a binding stipulation that damages would not exceed \$5 million, a stipulation that expressly extended to absent class members. *Id.* at *5. While the district court determined that "defendant has likely established by a preponderance of the evidence that the amount in controversy in this case is greater than \$5,000,000," the stipulation was dispositive. *Id.* at *6-9.

141. The question of whether, in class action litigation generally, such tactics are acceptable also seems to split the circuits. Compare *Darden v. Ford Consumer Fin. Co.*, 200 F.3d 753, 755-56 (11th Cir. 2000) (allowing stipulations to govern the amount in controversy where "all Plaintiffs stipulate[d] that each individual class member [would] neither request nor accept damages in excess of \$75,000" (emphasis added)), with *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 724 (5th Cir. 2002) ("[I]t is improbable that Manguno can ethically unilaterally waive the rights of the putative class members to attorney's fees without their authorization."). While the legal issues are similar and likely should be decided in the same way, the case against dispositive stipulations is considerably stronger in CAFA cases because of the express purpose of the legislation to put

made it clear that a binding stipulation will defeat removal jurisdiction.¹⁴² The Seventh Circuit, however, indicated that such stipulations are insufficient.¹⁴³

A few different theories, none of which are entirely adequate, seem to govern the outcomes reached thus far. The Ninth Circuit approach seen in *Lowdermilk* comes directly from *St. Paul Mercury Indemnity Co. v. Red Cab Co.*,¹⁴⁴ and the precise question decided was what level of proof the defendant must satisfy to avoid remand to the state courts.¹⁴⁵ In reaching its

“interstate cases of national importance” in a federal forum. See S. 5, 109th Cong. § 2(b)(2) (2005) (enacted).

142. See *Rolwing v. Nestle Holdings, Inc.*, 666 F.3d 1069, 1072 (8th Cir. 2012) (“[A] binding stipulation limiting damages sought to an amount not exceeding \$5 million can be used to defeat CAFA jurisdiction.”); *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 409 (6th Cir. 2008) (dictum) (“We recognize that plaintiffs can avoid removal under CAFA by limiting the damages they seek to amounts less than the CAFA thresholds.”); *Lowdermilk v. U.S. Bank Nat’l Ass’n*, 479 F.3d 994, 999 (9th Cir. 2007); *Morgan v. Gay*, 471 F.3d 469, 476 n.7 (3d Cir. 2006). For a slightly different account of the state of the law and current circuit split, see Nick Landsman-Roos, Note, *Front-End Fiduciaries, Pre-Certification Duties and Class Conflict*, 65 STAN. L. REV. (forthcoming 2013) (manuscript at 17–20), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2155365.

143. *Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830–31 (7th Cir. 2011) (noting that such stipulations could undermine the named party’s obligation to adequately represent the entire class). The Fifth Circuit would likely reach the same conclusion, having dealt with a similar issue in the context of class actions generally. See *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1413 (5th Cir. 1995). While *De Aguilar* seems to rely on Texas state law and does not flatly bar the use of binding stipulations in class actions, it has since been regularly cited for just that proposition. See, e.g., *Ditcharo v. UPS*, 376 F. App’x 432, 437 (5th Cir. 2010) (“[The purported stipulation] do[es] not provide Appellants with the authority to deny other members of their putative class action the right to seek an award greater than \$ 75,000.”); *Manguno*, 276 F.3d at 724 (“[I]t is improbable that Manguno can ethically unilaterally waive the rights of the putative class members to attorney’s fees without their authorization.”); *Belin v. Int’l Paper Co.*, No. 11-0215, 2011 U.S. Dist. LEXIS 69449, at *7 (W.D. La. June 28, 2011) (“[A]lthough the class representatives appear willing to waive their own claims for damages in excess of the jurisdictional threshold, they do not have authority to waive damages on behalf of other unnamed class members.”); see also *Petition for Writ of Certiorari at 8, Skechers U.S.A., Inc. v. Tomlinson*, 132 S.Ct. 551 (2011) (No. 11–287), 2011 WL 3898017 (citing several previously identified cases in support of the proposition that the Seventh and Fifth Circuits had both reached the conclusion that binding stipulations are impermissible in CAFA litigation). But see *Coltrin v. Rain CII Carbon, L.L.C.*, No. 2:09-CV-837, 2012 U.S. Dist. LEXIS 7905, at *6 (W.D. La. Jan. 24, 2012) (“Plaintiffs can [defeat removal] by filing a pre-removal binding stipulation, or affidavit, affirmatively renouncing their right to accept a judgment in excess of \$75,000.00.” (citing *De Aguilar*, 47 F.3d at 1412)). *Coltrin* demonstrates that the Fifth Circuit’s position on binding stipulations remains unclear.

144. 303 U.S. 283 (1938).

145. *Lowdermilk*, 479 F.3d at 995–96. The very first sentence of the opinion illustrates that this case is, in actuality, a case about a lowball complaint: “[W]hen the plaintiff has pled damages less than the jurisdictional amount, what must the defendant prove in order to remove the case to federal court?” *Id.* at 996. While the differences between a lowball complaint and a stipulation are significant, in jurisdictions where pleadings are nearly dispositive, a lowball complaint gives the plaintiff the best of both worlds—the case stays in state court, and the plaintiff is free to seek whatever damages it can get. The case involved a class of U.S. Bank employees represented by Willene Lowdermilk. *Id.* They alleged that the bank had violated a pair of Oregon laws governing the payment of employees and brought the action in state court. *Id.* The relief requested was “in total, less than five million dollars,” and the complaint’s jurisdictional statement provided that “[t]he

conclusion, the court relied on two principles. First, being of limited jurisdiction, federal courts should “strictly construe [their] jurisdiction.”¹⁴⁶ Second, the plaintiff is entitled to avoid federal jurisdiction by way of pleading.¹⁴⁷ With these principles established, the result became nearly inevitable. The court cited *St. Paul* in support of the proposition that “a plaintiff may sue for less than the amount she may be entitled to if she wishes to avoid federal jurisdiction and remain in state court.”¹⁴⁸ With only the qualification that there could be no “bad faith” on the part of the plaintiff, the court held that merely pleading—not even necessarily stipulating—that damages would be less than the jurisdictional amount put the burden on the defendant to show to a “legal certainty” that the damages would exceed the jurisdictional minimum before blocking remand.¹⁴⁹

In the previous year, the Third Circuit panel in *Morgan v. Gay* seemed to use much the same approach in reaching much the same conclusion.¹⁵⁰ Among the differences, the most important was the court’s forward-looking observation that an ultimate award of damages in excess of \$5 million, while allowed under both the Federal Rules of Civil Procedure and New Jersey’s analogous body of rules,¹⁵¹ “could well be deemed prejudicial to the party that sought removal to federal court when the party seeking remand uses a damages-limitation provision to avoid federal court.”¹⁵²

aggregate total of the claims pled herein do not exceed five million dollars.” *Id.* (alteration in original). When the defendant removed, contending “that the actual amount in controversy far exceeded CAFA’s jurisdictional amount,” the district court promptly remanded the case back to the Oregon state court, holding “that it was bound by the complaint as to the amount in controversy ‘unless plaintiff’s prayer is determined to have been made in bad faith,’” and that the defendant had not proven bad faith on the part of the plaintiff. *Id.* The Ninth Circuit granted the defendant permission to appeal and transmuted the district court’s good faith requirement into the legal certainty test. *Id.* at 1005 (“[T]he ‘legal certainty,’ or ‘good faith,’ test from *St Paul Mercury* is applicable where the complaint at issue specifies an amount in controversy lower than the jurisdictional minimum, not where the complaint fails to specify what the amount in controversy is.”).

146. *Id.* at 998.

147. *Id.* at 998–99.

148. *See id.* at 999.

149. *See id.*

150. *Morgan v. Gay*, 471 F.3d 469, 473–76 (3d. Cir. 2006). Like *Lowdermilk*, this case involved a lowball complaint. *See id.* at 471 (quoting from the complaint: “the total amount of such monetary relief for the class as a whole shall not exceed \$5 million in sum or value” (citing *Morgan v. Gay*, No. 06-1371, 2006 WL 2265302 at *1 (D.N.J. Aug. 7, 2006)). Upon removal by the defendant, the district court determined that the minimum jurisdictional amount had not been met and remanded the case. *Id.* After applying the same “legal certainty” standard and ordering remand, the panel observed that “[t]he plaintiff has made her choice, and the plaintiffs in state court who choose not to opt out of the class must live with it.” *Id.* at 477–78.

151. *See* FED. R. CIV. P. 54(c); N.J. CT. R. 4:42-6.

152. *See Morgan*, 471 F.3d at 477. In its conclusion, the court elaborated:

In the Eighth Circuit, there are no varying standards of proof depending on the pleading; the defendant need show only by a preponderance of the evidence that the various jurisdictional requirements are met.¹⁵³ The court noted in *Bell v. Hershey Co.* that use of the “legal certainty” test in CAFA cases both conflicts with a primary purpose of CAFA—to open the federal courts to corporate defendants out of concern that the national economy risked damage from a proliferation of meritless class action suits—and represents an inversion of the test as applied by the Supreme Court in *St. Paul*.¹⁵⁴ Then, unnecessarily, the court made the offhand remark that trouble could have been avoided in the first place by stipulating to damages less than

We do caution, however, that the plaintiffs in state court should not be permitted to ostensibly limit their damages to avoid federal court only to receive an award in excess of the federal amount in controversy requirement. The plaintiff has made her choice, and the plaintiffs in state court who choose not to opt out of the class must live with it.

Id. at 477–78.

A later decision construing *Morgan* described its place in Third Circuit approaches to CAFA cases:

Morgan provided a more complete roadmap. First, it added a precept that may be applied to all diversity class actions that have been removed: “Because ‘the complaint may be silent or ambiguous on one or more of the ingredients needed to calculate the amount in controversy,’ ‘[a] defendant’s notice of removal serves the same functions as the complaint would in a suit filed in federal court.’” Second, *Morgan* erected guideposts in those cases where the plaintiff’s complaint specifically and precisely states that the amount sought in a class action diversity complaint “for the class as a whole shall not exceed \$5 million in sum or value.” In such cases “[t]he party wishing to establish subject matter jurisdiction has the burden to prove by a legal certainty that the amount in controversy exceeds the statutory threshold.”

Raspa v. Home Depot, 533 F. Supp. 2d 514, 521 (D.N.J. 2007) (alterations in original) (citations omitted).

153. *Bell v. Hershey Co.*, 557 F.3d 953, 957–58 (8th Cir. 2009) (requiring that the defendant show, by a preponderance of the evidence, that the jurisdictional requirements are met, noting that—under *St. Paul*—the plaintiff has the prerogative to limit the amount in controversy, and that only “good faith” in pleading is required).

154. *See id.* (noting that *St. Paul* held that where the plaintiff’s pleadings showed to a legal certainty that the jurisdictional minimum had not been reached, the pleadings would be dispositive). An antitrust case, James Bell brought suit against five chocolate manufacturers alleging, *inter alia*, price fixing. *Id.* at 954–55. As the district court noted, great pains were made when drafting the complaint to circumvent CAFA. *Id.* at 955. Bell’s attorneys were not the sort to beat around the bush, and the complaint read in part: “[T]he Class Action Fairness Act does not apply and no federal court jurisdiction is available as a basis for removal.” *Id.* While the class certainly qualified for removal under CAFA in all other respects, the petition purported to limit the amount in controversy to \$3.75 million in compensatory damages and “no more than \$1.24 million” in attorney’s fees—a grand total of \$4.99 million. *Id.* Rather than sheer luck or fancifulness, the class was composed with CAFA in mind and designed to avoid it. *See id.* (“Bell arrived at a figure below the jurisdictional minimum through permissible control of the class composition, the assumed price fixing overcharge, and the duration of the class period.”). Additionally, in pleading specific damages, Bell flaunted Iowa court rules, which prohibit the practice. *Id.*; *see also* IOWA R. CIV. P. 1.403(1) (“[A] pleading shall not state the specific amount of money damages sought. . . . The specific amount and elements of monetary damages sought may be obtained through discovery.”). The district court applied a legal certainty test and remanded, but after electing to allow the interlocutory appeal, the Eighth Circuit vacated and remanded. *Bell*, 557 F.3d at 959.

the jurisdictional minimum.¹⁵⁵ District courts have, understandably, attached great significance to this passage,¹⁵⁶ turning *Bell* into a “roadmap” for circumventing CAFA.¹⁵⁷

Knowles v. Standard Fire Insurance Co. represents a paradigm example.¹⁵⁸ The case tackled the very problem of this Comment: “whether a plaintiff may meet his burden of proof by stipulating at the time the complaint is filed that he will not seek more than the federal jurisdictional minimum for himself and the putative class.”¹⁵⁹ After determining that the defendant had met its burden of proving by a preponderance of the evidence that the amount in controversy was more than \$5 million, the burden then shifted to the plaintiff to prove to a legal certainty that it would not recover

155. *See id.* at 958 (“In order to ensure that any attempt to remove would have been unsuccessful, Bell could have included a binding stipulation with his petition stating that he would not seek damages greater than the jurisdictional minimum upon remand; it is too late to do so now.”).

Dictum is often and fairly criticized because it is essentially an advisory opinion operating outside the context of an Article III case or controversy. *See, e.g.*, *United States v. Rubin*, 609 F.2d 51, 69 n.2 (2d Cir. 1979) (Friendly, J., concurring) (“A judge’s power to bind is limited to the issue that is before him; he cannot transmute dictum into decision by waving a wand and uttering the word ‘hold.’”). While Judge Murphy’s pronouncement here was entirely avoidable—she had already issued the holding, *see Bell*, 557 F.3d at 958—dicta is often unavoidable and not intended to be followed. *See Pierre N. Leval, Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1250 (2006) (describing dicta as a “judge’s insignificant aside remark—something to be treated lightly, or frankly, ignored”). As Judge Leval points out, ultimately, “[w]hat is problematic is not the utterance of dicta, but the failure to distinguish between holding and dictum.” *Id.* at 1253.

156. *See Thompson v. Apple, Inc.*, No. 3:11-CV-03009-PKH, 2011 WL 2671312, at *2 (W.D. Ark. July 8, 2011) (“[N]umerous federal district courts . . . have set forth compelling reasoning in ruling that stipulations following the procedure outlined in *Bell* are sufficient to defeat diversity jurisdiction under CAFA.”); *see also Tomlinson v. Skechers U.S.A., Inc.*, No. 11-5042, 2011 U.S. Dist. LEXIS 142862, at *8 (W.D. Ark. May 25, 2011); *Murphy v. Reebok Int’l, Ltd.*, No. 4:11-CV-214-DPM, 2011 WL 1559234, at *2-3 (E.D. Ark. Apr. 22, 2011); *Tuberville v. New Balance Athletic Shoe, Inc.*, No. 1:11-CV-01016, 2011 WL 1527716, at *3 (W.D. Ark. Apr. 21, 2011).

157. *Tuberville*, 2011 WL 1527716, at *2. (“*Bell* provides a roadmap for a CAFA plaintiff to follow to avoid removal to federal court.”).

158. No. 4:11-CV-04044, 2011 WL 6013024 (W.D. Ark. Dec. 2, 2011), *cert. granted*, 183 L. Ed. 2d 730 (U.S. Aug. 31, 2012) (No. 11-1450). The case sounded in contract law. *Id.* at *1. The plaintiff, Greg Knowles, alleged that Standard Fire Insurance Company had systematically underpaid on insurance claims. *Id.* Counsel for Knowles employed two tactics in order to preemptively defeat removal—confining the class to a two-year period instead of the five allowed by the statute of limitations and signing a stipulation that damages greater than \$5 million would not be sought. *Id.* After removing, the defendant adduced evidence sufficient to show by a preponderance of the evidence that the \$5 million jurisdictional amount was met by a slim margin, less than \$25,000. *Id.* at *3. Indeed, because the amount in controversy established was \$5,024,150, *id.*, this case may well be one of the few in which the stipulation does not represent inadequate representation—the probability of winning is improved and recovery goes down only fractionally, *see infra* Part V.C.2.c. However, because *Knowles* follows *Bell* and does not tackle the issue independently in any meaningful way, it is a model example of the binding stipulation at work in the Eighth Circuit.

159. *Knowles*, 2011 WL 6013024, at *4.

such a sum.¹⁶⁰ The court began its analysis with a clear statement of the rule: “The law in this circuit is clear that a binding stipulation sworn by a plaintiff in a purported class action will bar removal from state court if the stipulation limits damages to the state jurisdictional minimum.”¹⁶¹ Because the plaintiffs had effectively stipulated that they would “seek to recover total aggregate damages of less than” \$5 million, the burden had been met and remand was proper.¹⁶²

After three years spent paving the *Bell* map’s road, the dictum became Eighth Circuit law in 2011, with nary a meaningful analysis.¹⁶³ Rather than the result of a discussion, the holding came as part of a rule statement in *Rolwing v. Nestle Holdings, Inc.*:

We have previously stated that a binding stipulation limiting damages sought to an amount not exceeding \$5 million can be used to defeat CAFA jurisdiction. Stipulations of this sort, when filed contemporaneously with a plaintiff’s complaint and not after removal, have long been recognized as a method of defeating federal jurisdiction in the non-CAFA context.¹⁶⁴

This both illustrates and misses the point. Dicta and inapposite case law should not have settled the question.¹⁶⁵ Thus, despite being fully briefed on the defendant’s fiduciary duty arguments,¹⁶⁶ the Eighth Circuit treated the question as closed and relied on the rule that the court is “bound to consider only jurisdictional facts present at the time of removal and not those occurring subsequently,” turning what should have been an open question of

160. *Id.* at *3–4.

161. *Id.* at *4. This disconcerting conflation of dicta with law is precisely what Judge Leval of the Second Circuit addressed in his 2006 article. *See* Leval, *supra* note 155.

162. *Id.* at *2, *4, *6.

163. *See* *Rolwing v. Nestle Holdings, Inc.*, 666 F.3d 1069, 1072 (8th Cir. 2012). *Rolwing* involved a merger between Nestle and Ralston Purina Company. *See id.* at 1070. Upon completion of the merger, a Ralston shareholder sued, alleging on behalf of a putative class of fellow shareholders that Nestle had paid them late, thus entitling them to six days of interest. *Id.* The prayer for relief included an ironclad binding stipulation, both requesting “judgment against defendant in an amount that is fair and reasonable in excess of \$25,000, but not to exceed \$4,999,999” and providing, “Plaintiff and the class do not seek—and will not accept—any recovery of damages (in the form of statutory interest) and any other relief, in total, in excess of \$4,999,999.” *Id.* at 1071. Additionally, the complaint included a pair of stipulations to the same effect, one signed by counsel and the other by the single lead plaintiff. *Id.* The defendant’s first contention, that Missouri law would not give effect to the stipulation, was rejected on state law grounds—Missouri’s judicial estoppel doctrine would preclude the plaintiff from accepting damages greater than \$5 million. *See id.* at 1072.

164. *Id.* (citation omitted).

165. *Cf., e.g.,* J. M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 773 (1987) (“[D]istinguishing a case is as much an interpretation as following it.”).

166. *See* Brief of Defendant-Appellant at 11–23, *Rolwing v. Nestle Holdings, Inc.*, 666 F.3d 1069 (8th Cir. 2012) (No. 11–3445), 2011 WL 6073918 at *11–23.

statutory interpretation into a fact-bound jurisdictional analysis.¹⁶⁷ *Rolwing* seemed to foreclose hope for any successful appeal in *Knowles*, and the Eighth Circuit indeed denied discretionary review¹⁶⁸ and a rehearing en banc,¹⁶⁹ thus making the case ripe for Supreme Court review.

In the Sixth Circuit the same pattern occurred. Unnecessary dicta in a circuit court decision¹⁷⁰ is now regarded as the law of the circuit.¹⁷¹ The question has not been analyzed in any depth, and the dicta has become another roadmap for defeating CAFA.¹⁷²

While each of these analytical approaches is compelling so far as they go, it is where they do not go that raises concern. Unlike its sister circuits, when faced with a similar question, the Seventh Circuit analysis looks at the question not simply as one of diversity jurisdiction but also in light of class action requirements generally.¹⁷³ Under Rule 23 of the Federal Rules of Civil Procedure, to serve as a representative member of a class, the named party must “fairly and adequately protect the interests of the class.”¹⁷⁴ In *Back Doctors Ltd. v. Metropolitan Property & Casualty Insurance Co.*,

167. See *Rolwing*, 666 F.3d at 1073.

168. *Knowles v. Standard Fire Ins. Co.*, No. 11-8030, 2012 WL 3828891 (8th Cir. Jan. 4, 2012) (denying permission to appeal).

169. *Knowles v. Standard Fire Ins. Co.*, No. 11-8030, 2012 WL 3828845 (8th Cir. Mar. 1, 2012) (denying petition for rehearing en banc and panel rehearing).

170. See *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 409 (6th Cir. 2008). In *Freeman*, the plaintiff had attempted to evade CAFA by bringing five different class actions, all based on the same alleged tort and maintaining that the amount in controversy for any given plaintiff was less than \$75,000 and that the class-wide claim was limited to \$4.9 million. *Id.* at 407. The Sixth Circuit panel made an inquiry into legislative intent and held that CAFA’s “purposes support reading CAFA not to permit the splintering of lawsuits solely to avoid federal jurisdiction in the fashion done in this case.” *Id.* at 408. Because “recovery [wa]s expanded, rather than limited, by virtue of splintering of lawsuits for no colorable reason,” the individual actions were not treated as containing stipulated damages. *Id.* at 409. This certainly makes sense. Otherwise, the plaintiffs would get all the benefits of a stipulation while the defendant would still be liable for a huge sum. However, the court’s decision to cite *St. Paul* and “recognize” the plaintiff’s right to use a binding stipulation to defeat removal was unfortunate dictum not necessary to the holding. See *id.*

171. See, e.g., *Franklin v. CitiMortgage, Inc.*, No. 1:11-cv-608, 2012 U.S. Dist. LEXIS 270, at *6 (S.D. Ohio Jan. 3, 2012) (“A plaintiff who wants to avoid federal jurisdiction may do so by attaching a binding stipulation to his complaint limiting damages to an amount below the applicable jurisdictional threshold.”); *McClendon v. Challenge Fin. Investors Corp.*, No. 1:11 CV 1597, 2011 U.S. Dist. LEXIS 128178, at *14 (N.D. Ohio Nov. 3, 2011) (noting “the recognition by the Sixth Circuit . . . that a class representative can avoid CAFA jurisdiction by expressly limiting the class members’ damages”).

172. See *McClendon*, 2011 U.S. Dist. LEXIS, at *15 (holding that, because the plaintiff “has done what the Sixth Circuit says she has the right to do: limit the total potential damage award to less than \$5,000,000 to litigate her case in state court,” remand was proper).

173. See *Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830–31 (7th Cir. 2011).

174. FED. R. CIV. P. 23(a)(4).

instead of a binding stipulation, there was only an in-court declaration that the plaintiff did not “‘now’ want punitive damages,” a declaration relied on by the district court in remanding the case.¹⁷⁵ This non-binding language readily suggests one problem with the remand. Regardless of which circuit the case appeared in, “events after the date of removal do not affect federal jurisdiction, and this means in particular that a declaration by the plaintiff following removal does not permit remand.”¹⁷⁶ Writing for a unanimous panel, Judge Frank H. Easterbrook went further.¹⁷⁷ Because of the representative party’s duty to its class, he wrote, any purported limitation on the damages sought would be subject to review.¹⁷⁸ It necessarily followed that:

A representative can’t throw away what could be a major component of the class’s recovery. Either a state or a federal judge might insist that some other person, more willing to seek punitive damages, take over as representative. What Back Doctors is willing to accept thus does not bind the class and therefore does not ensure that the stakes fall under \$5 million.¹⁷⁹

175. See *Back Doctors Ltd.*, 637 F.3d at 830. In *Back Doctors*, the plaintiff sued in an Illinois state court, alleging that the defendant, an insurance provider, was violating both contractual duties and an Illinois statute by utilizing software enabling them to pay medical providers less than required by the underlying policies. *Id.* at 829. The insurance provider timely removed to federal court under CAFA, and Back Doctors requested that the case be remanded to state court. *Id.* While damages in excess of \$2.9 million were apparent, the insurer argued that the looming specter of punitive damages meant the amount actually in controversy exceeded \$5 million. *Id.*

176. *Id.* at 830. Ironically, this rule also finds its origins in *St. Paul*. See *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 290–92 (1938).

177. In all fairness, this “holding” is probably itself dictum. As Judge Leval notes, the distinction between the two comes not from how the proposition is framed by the court but rather whether it is central to the holding. See Leval, *supra* note 155, at 1257–58. Judge Easterbrook provides two seemingly equally weighted reasons why remand is improper—the *St. Paul* issue of timing and the plaintiff’s “fiduciary duty” to her fellow class members. *Back Doctors Ltd.*, 637 F.3d at 830–31. The first reason seems to be the central holding while the second is not necessary even if true. This fits Judge Leval’s definition of dicta. See Leval, *supra* note 155, at 1257 (“If the insertion of the rejected proposition into the court’s reasoning, in place of the one adopted, would not require a change in either the court’s judgment or the reasoning that supports it, then the proposition is dictum. It is superfluous. It had no functional role in compelling the judgment.”). Whether it represents dictum could probably be persuasively argued both ways, and luckily the correct answer, pointed out only to give a fair accounting of the state of the law, is of no importance to this Comment.

178. *Back Doctors Ltd.*, 637 F.3d at 830–31.

179. *Id.* The same logic can be seen in a Fifth Circuit case predating the passage of CAFA. In *Manguno v. Prudential Property & Casualty Insurance Co.*, 276 F.3d 720 (5th Cir. 2002), the court considered whether remand was required in a class action case where the plaintiffs included in their petition a statement that “the amount in controversy does not exceed \$75,000” and that the plaintiffs were not seeking attorneys fees allowed by Louisiana law. See *Manguno*, 276 F.3d at 722. However, because under Louisiana law, the plaintiff receives whatever relief their case merits, regardless of whether it was included in the prayer or relief, and because the purported waiver of fees was in no way binding, a determination that the aggregated legal fees would be in excess of \$75,000 was sufficient to prevent remand. *Id.* at 724. Only in dicta did the court observe that it was

Judge Easterbrook's analysis hints at the fundamental flaw in relying primarily on *St. Paul*. While the seminal case undoubtedly remains good law, not only was it decided sixty-seven years before CAFA,¹⁸⁰ but it was also not a class action case.¹⁸¹ It involved a single plaintiff and, originally, two defendants.¹⁸² The specter of Rule 23 changes the analysis.¹⁸³

IV. CATALOGING THE MYRIAD PROBLEMS CREATED BY STIPULATIONS

As seen in Part III.B, federal judges have been loathe to undermine concepts of plaintiff autonomy and confine *St. Paul Mercury* to similar cases.¹⁸⁴ In doing so, courts consistently give short shrift to the problems identified by defendants' counsel.¹⁸⁵ In this Part, full treatment is given to those problems, which manifest themselves on three planes. Subsection A examines the tensions between binding stipulations and the law, first with specific regard to Rule 23,¹⁸⁶ then in relation to CAFA itself,¹⁸⁷ and, finally, developing case law on claim splitting, a common practice that has recently

"improbable that Manguno [could] ethically unilaterally waive the rights of the putative class members to attorney's fees without their authorization." *Id.*

180. Compare *St. Paul Mercury Indem. Co.*, 303 U.S. 283, with Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.). Additionally, it was decided 28 years before the 1966 amendments to the Federal Rules of Civil Procedure fundamentally altering Rule 23 and creating class actions as we know them today. See Note, *Certifying Classes and Subclasses in Title VII Suits*, 99 HARV. L. REV. 619, 619 n.1 (1986) ("The modern class action dates from 1966, when the Supreme Court promulgated an amended rule 23 of the Federal Rules of Civil Procedure.").

181. See *St. Paul Mercury Indem. Co.*, 303 U.S. at 284. *St. Paul* was, essentially, a run-of-the-mill insurance dispute. See *id.* at 284–85. When the case was removed to federal court, the complaint was amended twice, and the second amended complaint revealed the damages to be less than the minimum jurisdictional amount. *Id.* at 285. The district court then rendered a judgment for the plaintiffs on the merits, which on appeal, the circuit court declined to address, observing that, from the face of the second amended complaint, the court had no jurisdiction. *Id.* Thus, the precise issue was whether a complaint amended after removal could deprive the court of jurisdiction, a question the Court answered in the negative. See *id.* at 294–95. The disposition of the case creates another, smaller, problem with relying on *St. Paul* to answer this CAFA question: that the plaintiff could "resort to the expedient of suing for less than the jurisdictional amount" thereby stripping the defendant of his right to remove the action was mere dicta. *Id.* at 294; see *supra* note 155 (discussing dicta and the problems with its use); see also *infra* Part V.C.2 (discussing *St. Paul* in greater depth).

182. See *St. Paul Mercury Indem. Co.*, 303 U.S. at 284–86. Subsequently, the district court dismissed the second defendant, making the case one featuring a single plaintiff and a single defendant by the time it reached the Supreme Court. See *id.*

183. See *infra* Part V.C.2.a.

184. *Supra* notes 138–83 and accompanying text.

185. See *supra* notes 141–54 and accompanying text; *infra* notes 337–61 and accompanying text.

186. See *infra* notes 192–206 and accompanying text.

187. See *infra* notes 207–261 and accompanying text.

attracted the attention of the Supreme Court.¹⁸⁸ Subsection B discusses the constitutional justifications for CAFA and concludes that binding stipulations undermine the federalist structure enshrined in the Constitution. Finally, Subsection C draws on lessons learned from the study of complex litigation, which is concerned largely with consistency and efficiency.¹⁸⁹ By funneling large cases into the federal forum, CAFA operates as an important complex litigation tool, and its circumvention promotes inefficiency and inconsistency.¹⁹⁰ These considerations make binding stipulations unfit in the class action context, a conclusion highlighted by a close inquiry into *St. Paul Mercury Indemnity Co. v. Red Cab Co.*¹⁹¹

A. *A Question of Class Action Law: Understanding the Interplay Between Stipulations and Rule 23*

1. The Struggle Between Stipulated Damages and General Requirements for Class Actions

The general requirements for class action certification are known informally as numerosity, commonality, typicality, and adequacy of representation.¹⁹² Numerosity, commonality, and typicality are not threatened by permitting stipulated limitations of damages, but as Judge Easterbrook observed, the adequacy of the representation becomes suspect once the potential damages have been capped under \$5 million.¹⁹³

While the text of Rule 23 mandates only that “the representative *parties* will fairly and adequately protect the interests of the class,”¹⁹⁴ that same obligation necessarily falls on the shoulders of the plaintiffs’ attorneys.¹⁹⁵

188. See *infra* notes 262–77 and accompanying text.

189. See *infra* notes 297–304 and accompanying text.

190. See *infra* notes 305–17 and accompanying text.

191. See *infra* notes 318–36 and accompanying text.

192. YEAZELL, CIVIL PROCEDURE, *supra* note 45, at 799; see also FED. R. CIV. P. 23(a). In its entirety, Rule 23(a) reads:

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a).

193. See *Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830–31 (7th Cir. 2011).

194. FED. R. CIV. P. 23(a)(4) (emphasis added).

195. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 n.20 (1997) (noting that “competency and conflicts of class counsel” should be considered as part of the inquiry into whether the class will be adequately represented). Indeed, it has been argued persuasively that the importance of adequate class representatives pales in comparison to that of adequate class counsel.

While the rules recognize a right of absentee class members to adequate representation,¹⁹⁶ the possible lack of a remedy demonstrates that such class members must be protected on the front-end of the process—at certification—rather than at the back-end—on appeal—at which point it may be too late to collaterally attack any judgment binding them or cutting off their rights for future recovery.¹⁹⁷ Furthermore, the inquiry into each of the

See Jean Wegman Burns, *Decorative Figureheads: Eliminating Class Representatives in Class Actions*, 42 HASTINGS L.J. 165, 165 (1990) (arguing that the “class representative serves no useful purpose and that we would be better off without him”).

The adequacy requirement with regard to class counsel was codified with the 2003 amendments to Rule 23. See FED. R. CIV. P. 23(g)(4) (“Class counsel must fairly and adequately represent the interests of the class.”). Notwithstanding the particularized provision, courts tend to apply Rule 23(a)(4) to counsel just as they did before the amendments. See, e.g., *Creative Montessori Learning Ctrs. v. Ashford Gear L.L.C.*, 662 F.3d 913, 917 (7th Cir. 2011) (citing both (a)(4) and (g) as relevant where “class counsel ha[d] demonstrated a lack of integrity that cast[] serious doubt on their trustworthiness as representatives of the class”); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011) (analyzing the adequacy of “the named plaintiffs and their counsel” under only Rule 23(a)(4)). For this reason, and because the language in (a)(4) and (g)(4) substantially mirror each other, this Comment will cite to (a)(4), but it should be understood that (g)(4) is also implicated.

196. See FED. R. CIV. P. 23(a)(4). It is important to note that Rule 23 does not create such a right. Rather, the provision is written with an eye toward the Fifth Amendment’s due process guarantee. See U.S. CONST. amend. V; see also Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1192 (1982) (“Rule 23’s mandate of adequate representation is of constitutional dimension. In essence, this requirement embodies a fundamental tenet of due process: that judicial procedure fairly protect ‘the interest of absent parties who are to be bound by it.’” (quoting *Hansberry v. Lee*, 311 U.S. 32, 42 (1940))); 7A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 1765 (3d ed. 2005) (“The binding effect of all class-action decrees raises substantial due-process questions that are directly relevant to Rule 23(a)(4).”).

197. See Koniak, *supra*, note 49, at 1787–93. Professor Koniak’s article was inspired by the Supreme Court’s decision, or lack thereof, in *Dow Chemical Co. v. Stephenson*, 539 U.S. 111 (2003), in which an evenly divided court affirmed by default the Second Circuit’s position that absent class members can challenge the preclusive effects of an earlier judgment on the grounds of inadequate representation. See *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 261 (2d Cir. 2001) (“Because these plaintiffs were inadequately represented in the prior litigation, they were not proper parties and cannot be bound by the settlement.”). The Ninth Circuit, however, has held otherwise. See *Epstein v. MCA, Inc.*, 179 F.3d 641, 648 (9th Cir. 1999) (“[T]he absent class members’ due process right to adequate representation is protected not by collateral review, but by the certifying court initially, and thereafter by appeal within the state system and by direct review in the United States Supreme Court.”).

These considerations create another, more ironic, reason for defendants to contest binding stipulations—repose. In settling, the defendant “seeks to purchase” finality. Nagareda, *Administering Adequacy*, *supra* note 47, at 289. However, if the settlement is found constitutionally wanting due to inadequate representation, it could conceivably be attacked collaterally, at which point the defendant would again be exposed to liability. See *supra* note 49 (discussing the viability of such an attack). Therefore, for true finality, defendants have an interest in making sure that absent plaintiffs in actions against them are afforded due process. To pile irony on irony, plaintiffs’ attorneys have no such enduring concerns for absent class members; they merely need to pass a rarely failed test once. Cf. Linda S. Mullenix, *Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes*, 57 VAND. L. REV. 1687, 1692 (2004)

Rule 23(a) factors is to be “rigorous,” a description that makes probing, nuanced analysis not only proper but required.¹⁹⁸

Of course, Rule 23 and its various protections apply only to cases in federal court.¹⁹⁹ This creates a situation where Judge Easterbrook’s argument is arguably beside the point—if the case is to be remanded to state court, of what concern is it that it would fail to meet Rule 23’s requirements? However, the adequacy requirement’s constitutional underpinnings make the consideration of adequacy relevant in any forum.²⁰⁰ Further, CAFA’s provisions should be read *in pari materia*²⁰¹ with Rule 23, and a tactic

(“Instead, courts routinely wave their blessings over class counsel and proposed class representatives and presumptively make findings of adequacy on nonexistent or scant factual showings.”).

198. See *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982). Federal courts at all levels, including the Supreme Court itself, have latched onto the requirement that class actions be certified after only a “rigorous” application of Rule 23(a), with over 1500 such cases citing *General Telephone Co.* for that proposition. See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011); *Miles v. Merrill Lynch & Co. (In re Initial Pub. Offerings Sec. Litig.)*, 471 F.3d 24, 29 (2d Cir. 2006); *Faulk v. Home Oil Co.*, 184 F.R.D. 645, 649 (M.D. Ala. 1999).

199. See, e.g., *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2377–78 (2011) (acknowledging and giving deference to the fact that “the West Virginia Supreme Court has . . . declar[ed] its independence from federal courts’ interpretation of the Federal Rules—and particularly of Rule 23”).

200. See 7AA CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1789.1 (3d ed. 2005). The requirements of the due process clause apply identically in state and federal courts meaning that any state’s version of the adequacy of representation prong must, at a minimum, meet the constitutional requirement. See, e.g., *Sw. Bell Tel. Co. v. Mktg. on Hold Inc.*, 308 S.W.3d 909, 919 (Tex. 2010) (enumerating Texas’s class action requirements of numerosity, commonality, typicality, and adequacy of representation, and observing that the “protections are not only procedural safeguards but are based in the Due Process clauses of the United States . . .”); cf. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 806–12 (1985) (analyzing the class action rules of Kansas against the backdrop of the Constitution’s due process guarantee and finding them satisfactory).

201. Translated, the phrase means “[o]n the same subject; relating to the same matter.” BLACK’S LAW DICTIONARY 862 (9th ed. 2009). “It is a canon of construction that statutes that are *in pari materia* may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject.” *Id.* While reliance on canons of statutory construction is admittedly fraught, see Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950) (“[T]here are two opposing canons on almost every point.”), the canon discussed here has gained wide acceptance on the Supreme Court, being cited in over 300 opinions (including concurrences and dissents). See, e.g., *Powerex Corp. v. Reliant Energy Servs. Inc.*, 551 U.S. 224, 229 (2007) (reading provisions of 28 U.S.C. § 1447 “*in pari materia*”); *Branch v. Smith*, 538 U.S. 254, 281 (2003) (“And it is, of course, the most rudimentary rule of statutory construction . . . that courts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part, including later-enacted statutes.”) (citing *United States v. Freeman*, 44 U.S. (3 How) 556, 564–65 (1845) (“The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law, that all acts *in pari materia* are to be taken together, as if they were one law. If a thing contained in a subsequent statute, be within the reason of a former statute, it shall be taken to be within the meaning of that statute; and if it can be gathered from a subsequent statute *in pari materia*, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute.” (citations omitted))).

violative of the latter should not be permitted under the former.²⁰²

While the effect of Rule 23 has been to constrict class action certification, this is not its purpose.²⁰³ The relevant purpose of Rule 23 is to ensure that classes get certified only where proper.²⁰⁴ Rule 23, then, does not derive its value from its limiting effects but from the quality of classes it produces.²⁰⁵ A tactic rendering the class action constitutionally suspect

202. Cf., e.g., *Grimsdale v. Kash N' Karry Food Stores, Inc. (In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.)*, 564 F.3d 75, 79 (1st Cir. 2009) (“The most natural reading of the home state exception is that Congress meant § 1332(d)(4)(B) to be read in conjunction with . . . [Rule 23] or similar state statutes and rules of judicial procedure.”).

203. See Nagareda, *The Administrative State*, *supra* note 50, at 625 (“Class certification . . . is all about the legitimacy of the assertion that the proposed aggregate unit is an appropriate unit for inquiry.”).

204. See *id.*

205. Critics of CAFA do not seem to address this argument. While the legislation is derided as being pro-defendant (and therefore pro-big business), the only virtue of state courts seems to be that plaintiffs have a better win-rate in state court. See, e.g., Ellis, *supra* note 43, at 93–95 (recounting various criticism of state courts and recasting them as myths but providing, at best, only a probative lack of evidence to support the conclusion); Kanner, *supra* note 39 (citing “federal courts’ reluctance to issue class certification” as illustrative of the point that CAFA denies plaintiffs their day in court without acknowledging that class action certification is tantamount to victory). The other primary argument, plaintiff autonomy, seems unmoored from reality for two reasons. First, absentee class members make up the vast majority of any given class and have no autonomy at all. See Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1149–50 (2009); see also *supra* note 196–97 and accompanying text. Second, the autonomy at stake belongs not to the named representatives but rather to their counsel in these lawyer-dominated proceedings. See Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 524 [hereinafter Erichson, *Beyond the Class Action*] (“In a class action, numerous plaintiffs depend upon the work of counsel with whom they have no meaningful individual lawyer-client relationship, [and] over whom they have no meaningful control . . .”). Increased discussion on what makes state courts qualitatively better in how they deal with class actions would be valuable but seems lacking. But see 13E CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3601 (3d ed. 2009) (observing that, at least “in some parts of the country” the argument that “federal courts qualitatively are so superior to the state courts that it is desirable to channel as many cases as possible to those tribunals, or at least that out-of-state litigants who have no opportunity to work for the improvement of the state courts, should be spared exposure to them” has merit). From these observations it follows that opponents of CAFA could more readily be described as pro-plaintiff or anti-big business. That plaintiffs win more often in state court is no justification for the normative proposition that they should have an easier time staying there. The argument that defendants are more likely to be held accountable in state court is beside the point, or worse, if not grounded in sound arguments that the states have developed better models of producing justice. Observations that CAFA is, in any event, not *inherently* pro-defendant leads to an obvious conclusion:

Objections that CAFA is pro-defendant may also be overtaken by future events. . . . [C]urrent preferences may change. Indeed, one could even make an argument that in the long run CAFA will inure to the benefit of consumer plaintiffs. Certainly the legislation includes a stated endorsement for class actions on behalf of consumers; by making federal court jurisdiction more readily available for such suits, it may enable litigation of exactly the sort that defense interests would not welcome. Moreover, should it also produce a shift away from either *Erie* or *Klaxon*, CAFA would become a more potent

under Rule 23 should not be endorsed by federal courts.²⁰⁶

2. How Permitting Stipulated Damages Undermines the Very Foundations of CAFA, Both as a Provider of “Fairness” and as a Congressional Tool Ensuring National Issues Are Dealt with at the Federal Level

Depending on who is doing the talking, one referring to CAFA by its full name, the Class Action Fairness Act of 2005, will always say *fairness* with an entirely straight face or a hint of irony. The question *fairness to whom* has been bandied about *ad nauseum* by commentators, practitioners, and politicians alike.²⁰⁷

While CAFA doubtless seems unfair to plaintiffs’ attorneys, it only endeavored to be fair to the actual plaintiffs on one hand and defendants on the other.²⁰⁸ Its success in achieving these competing goals can be debated,

instrument for such suits. Thus, although some supporters of the legislation regard it as a step toward curtailing private enforcement of public law, the statute could boomerang against them.

Marcus, *Assessing CAFA’s Policy*, *supra* note 40, at 1789 (citations omitted); *see also* PURCELL, LITIGATION & INEQUALITY, *supra* note 36, at viii (noting that “the social impact of procedural and jurisdictional rules changes over time”).

206. Indeed, federal rules governing class actions have led the way for states, which have in large part enacted analogous provisions. *See* Marcus, *Assessing CAFA’s Policy*, *supra* note 40, at 1797; TIDMARSH & TRANGSRUD, *supra* note 51, at 342; *see, e.g.*, TEX. R. CIV. P. 42. The difference between state procedural law and federal procedural law is often mere accident, and states, while they might always trail the federal law because they are tracking it, generally make course corrections as suggested by their counterparts on the federal bench. *See* David Marcus, *Erie, The Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1294–95 (2007) [hereinafter Marcus, *Federalism Implications*] (describing various abuses to prove the need for CAFA and the remedial steps taken by the individual states in the intervening time since). In fact, several of the state court practices condemned when CAFA was enacted have been largely curtailed by the states themselves. *Id.*; Marcus, *Assessing CAFA’s Policy*, *supra* note 40, at 1798 (describing California’s new proactive stance on coupon settlements). If state courts are only better for plaintiffs because they are less experienced and sophisticated with regard to complex litigation, the idea that this alternative forum should be protected is substantially weakened. *See id.*

207. *See, e.g.*, Editorial, *Class-Action Unfairness*, COLUMBUS DISPATCH (Ohio), June 21, 2004, at 06A, available at 2004 WLNR 21215023; Michael Isaac Miller, Comment, *The Class Action (Un)Fairness Act of 2005: Could It Spell the End of the Multi-State Consumer Class Action?*, 36 PEPP. L. REV. 879 (2009). Additionally, in 2008, the University of Pennsylvania Law Review devoted an entire symposium—*Fairness to Whom? Perspectives on the Class Action Fairness Act of 2005*—to this precise topic, which spawned several of the most important scholarly pieces written on CAFA to date. *See* Symposium, *Fairness to Whom? Perspectives on the Class Action Fairness Act of 2005*, 156 U. PA. L. REV. 1439 (2008); *see, e.g.*, Burbank, *A Preliminary View*, *supra* note 14; Clermont & Eisenberg, *CAFA Judicata*, *supra* note 34; Marcus, *Assessing CAFA’s Policy*, *supra* note 40; Erichson, *CAFA’s Impact*, *supra* note 43; Purcell, *CAFA in Perspective*, *supra* note 29; Wolff, *Federal Jurisdiction and Due Process*, *supra* note 49.

208. *See* S. REP. NO. 109-14, at 52 (2005) (discussing duplicative actions in particular and the “unfairness” that manifests itself when “[d]efendants are forced to defend the same case in many different courts[, a]nd class members are harmed because the various class counsel compete with each other to achieve the best settlement for the lawyers”).

but the only question in this Comment is whether permitting binding stipulations to defeat removal furthers either or both ends. Not only are stipulations unfair to absent plaintiffs,²⁰⁹ they also do violence to the government interests at stake, interests that played just as vital a role in the passing of the legislation as did concerns of *fairness*.²¹⁰

When looking at a class action lawsuit in terms of its parties, it is easy to forget that the vast majority of them are not identified in the case caption.²¹¹ While absentee class members represent a tiny fraction of members in the average class action lawsuit, their interest in the case is assumed to be just as important as that of the named parties.²¹² CAFA takes absentee plaintiffs into consideration, most vividly by providing that coupon settlements be subjected to enhanced scrutiny.²¹³ Indeed, it seems possible that reports of CAFA's anti-consumer bent have been greatly exaggerated.²¹⁴ Such claims seem to rely on the fact that modern class actions are won and lost at the certification stage.²¹⁵ Because the federal rules for class certification are stringent, any device that pushes class actions into federal court reduces the probability that plaintiffs will prevail.²¹⁶ Of course, such arguments

209. See *infra* Part V.C.2.a.

210. See S. REP. NO. 109-14, at 30 (“The purposes of the Act are therefore . . . to restore the intent of the Framers by expanding federal jurisdiction over interstate class actions . . .”).

211. See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2560–61 (2011) (reversing the certification of a class made up of approximately 1.5 million plaintiffs). While this may be an extreme example, and “[c]ourts occasionally certify classes as small as a few score, . . . typically classes consist of at least hundreds of persons.” YEAZELL, *CIVIL PROCEDURE*, *supra* note 45, at 799.

212. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846–48 (1999) (describing the due process and Seventh Amendment rights of absentee class members); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) (discussing “proper representation of the absent plaintiffs’ interest” and various protections of that interest).

213. See 28 U.S.C. § 1712 (2006). The provisions related to coupon settlement are comprehensive. In addition to a required hearing, which culminates in a finding that the settlement is “fair, reasonable, and adequate for class members,” *see id.* at § 1712(e), the statute provides limitations on contingency fees and other attorney’s fees, and the use of expert witnesses “to provide information on the actual value to the class members of the coupons that are redeemed.” *See id.* at § 1712(a)–(d).

214. See Marcus, *Assessing CAFA’s Policy*, *supra* note 40, at 1798–99.

215. TIDMARSH & TRANGSRUD, *supra* note 51, at 341–42 (“In many cases the certification decision is the decisive ruling in the case. . . . [I]f a litigation class action is certified, the enormous risks that a loss poses for the defendant makes settlement the likeliest outcome—a reality that often drives defendants’ opposition to class certification.”). On the flip side, when a class is not certified, the action often ends in victory for the defendant because individual claims are not worth bringing. Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Req[ui]rement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 606 (2006).

216. See Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 593 (1998) (recording “that in diversity cases, the win rate drops from 71% in original cases to 34% in removed cases”).

implicitly assume that these lawsuits have merit and are worthy of class certification.²¹⁷ But win rates are of little importance to a typical absentee class member who stands to gain worthless coupons as part of a settlement.²¹⁸ That is to say, in such settlements, often it is not the plaintiffs that win; it is their lawyers.²¹⁹ Federal rules, both those codified as part of Rule 23 and those enacted with the passage of CAFA, endeavor to make sure that settlements are fair to absentee plaintiffs.²²⁰ Myopic focus on the win rate makes sense if you value the class action only as a regulatory tool—making the plaintiff whole is beside the point; you want to make the defendant pay.²²¹ However, any solution that lines attorneys’ pockets and leaves the injured parties without just compensation cannot be described as fair.²²² If it were true that binding stipulations were used only at the margins, to make borderline cases removal-proof, they might be more easily defended on fairness grounds. But plaintiffs’ attorneys have shown no such restraint, employing stipulations even where the recovery will be cut in half,²²³ or by an order of magnitude.²²⁴

217. Marcus, *Assessing CAFA’s Policy*, *supra* note 40, at 1798.

218. See Leslie, *supra* note 55, at 995 (“Although coupon-based settlements may at first appear to be a reasonable mechanism to compensate class members, coupons are in fact often worthless despite their deceptively high face value.”).

219. *Id.* (“In many cases, the class counsel appear to sell out the interests of the class in exchange for relatively generous attorneys’ fees. While this represents a win-win scenario for the class counsel and the defendant, many class members are left uncompensated.”).

220. See, e.g., FED. R. CIV. P. 23(a)(4), (c)(2)(B), (e), (g); see also S. REP. NO. 109-14, at 4 (2005) (setting out the purposes of the act, including to combat state court methods of handling class actions that “contravene[] basic fairness and due process considerations”).

221. There is much validity to this premise, which has been described as a “basic deterrence principle.” John J. Donohue III, *The Law and Economics of Tort Law: The Profound Revolution*, 102 HARV. L. REV. 1047, 1065 (1989) (reviewing WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987) and STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987)). But it misses the point when the question is one of due process. See *infra* Part V.C.2.a. Additionally, if the defendant can negotiate a coupon settlement that turns a profit, the deterrent effect of the litigation is nil. See *supra* note 52 and accompanying text.

222. Congress’s envisioned role for federal courts in multi-state class actions may be overly ambitious though. As long as courts refuse to certify a class on the theory that “variations in state law may swamp any common issues and defeat predominance,” *Klay v. Humana, Inc.*, 382 F.3d 1241, 1261 (11th Cir. 2004) (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996)), it is hard to imagine them providing the stabilizing presence sought. Nonetheless, it does not appear that any circuit has rejected this view of commonality. See Rory Ryan, *Uncertifiable?: The Current Status of Nationwide State-Law Class Actions*, 54 BAYLOR L. REV. 467, 470 (2002) (“Based primarily on the burden of applying multiple states’ laws, an overwhelming number of federal courts have denied certification of nationwide state-law class actions.”). Of course, state courts tend to apply the same analysis. *Id.* at 471. The problem, then, is likely simply a reminder that “the class action is no panacea.” WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 268 (1987).

223. See, e.g., *Rolwing v. Nestle Holdings, Inc.*, 666 F.3d 1069, 1070–71 (8th Cir. 2012) (describing evidence showing that, if plaintiff’s allegations were true, damages would have accrued at a rate of \$2 million a day for six days, totaling \$12 million).

224. See, e.g., *Reagan v. ArcelorMittal*, No. 2:11–CV–35, 2012 WL 1023107, at *2–3 (E.D. Tenn. Mar. 26, 2012) (documenting a phantom stipulation despite evidence showing damages of \$56

Further, CAFA was more than a bit of procedural refereeing in the name of fairness.²²⁵ While forum shopping might create headaches for litigants, judicial hellholes create law.²²⁶ And that law can effectively regulate an entire area of national importance when the threat of being hauled into court and subjected to it looms.²²⁷ CAFA was designed in part to force national issues to the national stage and, conversely, to prevent single states from dictating national policy.²²⁸ While it seems fair to allow courts leeway when deciding procedural questions on prudential grounds, thereby letting them decide for themselves what is best, legitimate goals of Congress should not be trampled by sanctimonious judicial bodies, and defendants' statutory right to remove should be protected.²²⁹ That is to say, blind reliance on principles for the simple reason that they have always been relied on ceases to be admirable when countervailing considerations demand that they be set aside.²³⁰

In *Lowdermilk*, the court short-circuited its own analysis, first by observing at the outset that federal courts should strictly construe their own jurisdiction.²³¹ While the pleasing idea of judicial restraint hangs heavy

million).

225. See Marcus, *Assessing CAFA's Policy*, *supra* note 40, at 1788–89.

226. *Id.* at 1804–05.

227. See S. REP. No. 109–14, at 24 (2005) (bemoaning the current state of affairs, which allowed “one state court to dictate to 49 others what their laws should be on a particular issue, thereby undermining basic federalism principles”).

228. *Id.* at 4 (identifying problems the legislation is designed to address including that “many state courts freely issue rulings in class action cases that have nationwide ramifications, sometimes overturning well-established laws and policies of other jurisdictions”).

229. See *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907) (“Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction.”). This is especially true where, as here, evidence suggests that judges have made a political battlefield out of CAFA. See Clermont & Eisenberg, *CAFA Judicata*, *supra* note 34, at 1585–86 (documenting a plaintiff win-rate of 71% percent in front of Democrat-appointed judges versus 55% before Republican-appointed judges and noting that male Republican-appointed judges were “deciding CAFA cases in a way that expands federal jurisdiction” to a statistically significant extent). Seeing as how CAFA was inarguably designed to expand federal jurisdiction, it is (Clermont and Eisenberg suggest, and with approval) “value laden” motivations on the part of other members of the judiciary that have constricted CAFA's application. See *id.* at 1586.

230. See *Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830 (2011) (“There is no presumption against federal jurisdiction in general, or removal in particular. The Class Action Fairness Act must be implemented according to its terms, rather than in a manner that disfavors removal of large-stakes, multi-state class actions.”).

231. See *Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 998 (9th Cir. 2007). It is worth noting that such “preferential rules and presumptions” have the effect of “load[ing] the dice for or against a particular result” and, accordingly, have been subjected to criticism. See Scalia, *supra* note 117, at 27–28 (1998). In Justice Scalia's words:

here, the cynic would do well to remember that the most breathtaking claim of judicial power in our nation's history came cloaked in identical raiment.²³² A closer inspection suggests that the *Lowdermilk* rationale should be viewed less as an exercise in restraint and more as an abdication of a duty placed upon it by Congress.

In its latest term, the Supreme Court reaffirmed the notion that federal courts, “in the main ‘have no more right to decline the exercise of jurisdiction which is given, then [sic] to usurp that which is not given.’”²³³ This general proposition seems to apply equally to cases involving “arising under” jurisdiction and diversity jurisdiction, a conclusion supported by the fact that the Constitution treats the categories equally.²³⁴ Indeed, the deference played to the principle suggests that it is to be applied irrespective of underlying policy concerns.²³⁵ However, the Supreme Court has already “been willing to allow generous removal” in the name of efficiency and fairness.²³⁶ In *Federated Department Stores, Inc. v. Moitie*,²³⁷ the Court held that removal was warranted simply because it would permit the application

It is hard enough to provide a uniform, objective answer to the question whether a statute, on balance, more reasonably means one thing than another. But it is virtually impossible to expect uniformity and objectivity when there is added, on one or the other side of the balance, a thumb of indeterminate weight. How “narrow” is the narrow construction that certain types of statute are to be accorded; how clear does a broader intent have to be in order to escape it? . . . There are no answers to these questions, which is why these artificial rules increase the unpredictability, if not the arbitrariness, of judicial decisions.

Id. at 28.

232. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (claiming the power of judicial review—the authority to find an act of Congress unconstitutional—in order to find wanting jurisdiction to issue a writ of mandamus). This is not to suggest that Chief Justice John Marshall got the case wrong or pulled a fast one on anybody. It is simply a reminder that all is not as it seems.

233. See *Mims v. Arrow Fin. Servs., L.L.C.*, 132 S. Ct. 740, 747 (2012) (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)).

234. See U.S. CONST. art III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . [and] to Controversies . . . between Citizens of different States . . .”). The counterargument would be that the very next clause, which makes the Constitution’s grant of federal jurisdiction subject to congressional “Exceptions” and “Regulations,” represents a sort of reverse Supremacy Clause—in this rare instance, because the Constitution provides for only the outer bounds of jurisdiction and Congress has the authority to constrict it, § 1331 and § 1332 become “the supreme Law of the Land.” Cf. U.S. CONST. art VI, cl. 2. Because *Mims* and *Cohens* both involved “arising under” jurisdiction, § 1332 is not implicated and it would be wrong to rely on either of them for questions of diversity jurisdiction. This is correct, but the general assertion, that federal courts have no option to decline jurisdiction when it is proper, is based on an entire reading of Article III and, indeed, the Constitution as a whole, which provides for separation of powers and describes the respective roles of the executive, legislative, and judicial branches. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (noting that to decline jurisdiction where proper or to exercise it where improper “would be treason to the [C]onstitution” (emphasis added)).

235. Cf. *Cohens*, 19 U.S. (6 Wheat.) at 404 (“Questions may occur which we would gladly avoid, but we cannot avoid them.”).

236. Geoffrey P. Miller, *Overlapping Class Actions*, 71 N.Y.U. L. REV. 514, 537 (1996).

237. 452 U.S. 394 (1981).

of res judicata to the case, which in an earlier incarnation had been already tried in federal court.²³⁸

Additionally, the vitality of the maxim cited is, to a certain extent, questionable.²³⁹ The principle finds its roots in a pair of New Deal-era Supreme Court cases.²⁴⁰ Both expound the rule that federal jurisdiction is to be construed narrowly, and both explain why. The reasons for the rule, it turns out, do not apply.

In *Healy v. Ratta*, the question was whether diversity jurisdiction was proper: was the amount in controversy met?²⁴¹ The argument that jurisdiction was proper relied on a novel calculation of the amount in controversy.²⁴² The court rejected the argument, instead applying a simple analysis and reaching a simple conclusion.²⁴³ The amount in controversy had not been met.²⁴⁴ Then, the Court went on to explain the policy

238. Originally, seven actions alleging an antitrust violation had been consolidated in federal district court. *Moitie*, 452 U.S. at 395. The suits did not survive a 12(b)(6) motion to dismiss, whereupon one of the plaintiff's attorneys filed a substantively identical action in state court, alleging violation of state antitrust laws. *Id.* at 396. At that point, the defendants removed the case back to federal court and again motioned for dismissal, this time arguing that the case had been previously dismissed on the merits and could not be relitigated. *Id.* The district court denied the plaintiff's motion for remand and granted the defendant's motion to dismiss, decisions reversed by the Ninth Circuit. *Id.* at 396–97. In reversing the Ninth Circuit's decision, the Court paid remarkably little attention to the removal statute itself, § 1441(b)—it is cited only as part of Justice Brennan's dissent. *See id.* at 406 (Brennan, J., dissenting). Instead, the analysis turned on principles of equity and the meaning of "simple justice." *See id.* at 401 (majority opinion). Thus, the Supreme Court made it clear that the principle that federal courts should strictly construe their jurisdiction must subordinate itself to articulable policy considerations.

239. Of course, it is elementary that federal courts cannot proceed without subject matter jurisdiction and that the jurisdiction of federal courts is narrow, constrained both by the Constitution and by Congress. *See* U.S. CONST. art. III, § 2. To the extent that these observations inform the maxim, it remains as good a rule as any. However, other support for the principle relies on rockier footing. *See infra* notes 241–61 and accompanying text.

240. *See* *City of Indianapolis v. Chase Nat'l Bank of N.Y.C.*, 314 U.S. 63 (1941); *Healy v. Ratta*, 292 U.S. 263 (1934).

241. *See Healy*, 292 U.S. at 265. Factually, the case was clear. The plaintiff argued that a tax to be imposed upon him violated the Fourteenth Amendment and sought to enjoin its application. *Id.* at 264. Of course, modernly this would be a claim "arising under the Constitution," and federal subject matter jurisdiction would attach. *See* 28 U.S.C. § 1331. However, even questions of federal law and the Constitution had to satisfy a minimum jurisdictional amount until 1980. ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 304 (4th ed. 2003). While the tax to be paid represented less than the jurisdictional amount, the plaintiff contended that the amount in controversy requirement was met because the indirect consequences of paying the tax or the penalties for refusing to pay it would exceed the statutory minimum. *See Healy*, 292 U.S. at 267. The Court held otherwise, reasoning simply that "[t]he tax, payment of which is demanded or resisted, is the matter in controversy, since payment of it would avoid the penalty and end the dispute." *See id.* at 268.

242. *See Healy*, 292 U.S. at 266–67.

243. *See id.* at 265, 269.

244. *Id.* at 269.

supporting the rationale:

Not only does the language of the statute point to this conclusion, but the policy clearly indicated by the successive acts of Congress regulating the jurisdiction of federal courts supports it. . . . From the beginning suits between citizens of different states, or involving federal questions, could neither be brought in the federal courts nor removed to them, unless the value of the matter in controversy was more than a specified amount. Cases involving lesser amounts have been left to be dealt with exclusively by state courts, except that judgment of the highest court of a state adjudicating a federal right may be reviewed by this Court. *Pursuant to this policy the jurisdiction of federal courts of first instance has been narrowed by successive acts of Congress, which have progressively increased the jurisdictional amount. The policy of the statute calls for its strict construction.* The power reserved to the states, under the Constitution [Amendment 10], to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution [Article 3]. Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.²⁴⁵

Less than ten years later, the Court granted certiorari in *City of Indianapolis v. Chase National Bank of New York*.²⁴⁶ There, the problem with jurisdiction was not that the amount in controversy had not been met; rather, the parties lacked the complete diversity typically required of diversity actions.²⁴⁷ Again the Court found it proper to explain the policy behind the rule.²⁴⁸ In addition to quoting extensively from *Healy*, Justice Frankfurter made other key observations:

The dominant note in the successive enactments of Congress relating to diversity jurisdiction, is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of “business that intrinsically belongs to the state courts,” in order to keep them free for their distinctive federal business. . . . In defining the boundaries of diversity jurisdiction, this Court must be mindful of this *guiding*

245. *Id.* at 269–70 (emphasis added) (citations omitted).

246. *See City of Indianapolis v. Chase Nat’l Bank of N.Y.C.*, 314 U.S. 63 (1941).

247. *Id.* at 74–75.

248. *See id.* at 76–77.

*Congressional policy.*²⁴⁹

What can be drawn from the decisions are four key observations. First, the “strict construction” called for is a result of policy considerations—the policy animating congressional action, not abstract policy concerns.²⁵⁰ Second, much weight was given to the fact that Congress had acted to consistently narrow diversity jurisdiction.²⁵¹ CAFA, of course, represents the opposite, an expansion of diversity jurisdiction.²⁵² Third, CAFA accounts for the need to “avoid[] offense to state sensitivities” by offering a specific means of letting states handle cases in which their interests in the litigation are heightened.²⁵³ In fact, the Senate Report indicates

249. *Id.* (quoting Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 510 (1928)) (emphasis added).

250. *See id.*; *Healy*, 292 U.S. at 269–70.

251. *See City of Indianapolis*, 314 U.S. at 76; *Healy*, 292 U.S. at 270 (“Pursuant to this policy the jurisdiction of federal courts of first instance has been narrowed by successive acts of Congress, which have progressively increased the jurisdictional amount. The policy of the statute calls for its strict construction.” (citation omitted)).

252. *See* 28 U.S.C. § 1332(d)(2) (2006) (expanding federal jurisdiction to cases where only minimal diversity exists so long as certain requirements are met). Indeed, the only present *trend* of any sort is to expand federal jurisdiction. *See, e.g.*, 28 U.S.C. § 1369 (2006) (establishing federal jurisdiction over cases with only minimal diversity where “at least 75 natural persons have died in the accident at a discrete location” so long as certain conditions are met); 28 U.S.C. § 1367 (expanding federal jurisdiction to include state law claims that bear a certain relationship to claims properly brought in federal court); *cf.* Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, sec. 103, 125 Stat. 758, 760–61 (amending 28 U.S.C. §§ 1441, 1446 to make removal easier in general but not, technically, expanding jurisdiction). *But see id.* at § 101, 125 Stat. at 758 (constricting federal jurisdiction in cases where resident aliens could, previously, conceivably have served as the basis for diversity jurisdiction); *id.* at § 102, 125 Stat. at 758–59 (resolving a circuit split in the favor of narrowing federal jurisdiction as to corporations).

While section 101 “achieve[s] the goal of modestly restricting jurisdiction,” H.R. REP. NO. 112-10, at 7 (2011), and section 102 accomplishes the same thing “in a small range of cases for which a Federal forum might be available today,” *id.* at 9, the effects of the Act cut in the opposite direction with regard to removal jurisdiction. *See* Laura M. Fontaine, *The Federal Courts Jurisdiction and Venue Clarification Act of 2011: New Legislation Expands Removal Jurisdiction in Federal Court*, VINSON & ELKINS (Jan. 19, 2012), <http://www.velaw.com/resources/FederalCourtsJurisdictionVenueClarificationAct2011.aspx> (stating that the Act “will significantly increase the number of cases that a defendant may remove from state court to federal court by eliminating procedural roadblocks to federal jurisdiction”).

253. *See* 28 U.S.C. § 1332(d)(3)–(4). The provisions read as follows:

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of—

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

unambiguously that close questions should be resolved in favor of CAFA removal.²⁵⁴ Finally, whereas the Supreme Court viewed the successive contractions of diversity jurisdiction as a means of alleviating the “overwhelming burden” of cases better left to the states,²⁵⁵ Congress

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- (C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;
 - (D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;
 - (E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and
 - (F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2)—

(A)(i) over a class action in which—

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant—

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

Id.

Subsection (3) has often been referred to as the “local controversy exception,” while subsection (4) has been dubbed the “home state exception.” 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3724, at 908 (4th ed. 2009). Together, the provisions function to keep cases that belong in state court in state court. *See* S. REP. NO. 109-14, at 23 (2005) (“The bill . . . includes several provisions ensuring that where appropriate, state courts can adjudicate certain class actions that have a truly local focus.”). *But see* Michael D. Y. Sukenik & Adam J. Levitt, *CAFA and Federalized Ambiguity: The Case for Discretion in the Unpredictable Class Action*, 120 YALE L.J. ONLINE 233, 240, 242 (2011), <http://www.yalelawjournal.org/images/pdfs/945.pdf> (arguing that the “practical effect [of the provisions] is far removed from their stated intent” and that district court judges should have expanded discretion in determining “whether a particular multistate class action should be adjudicated in state or federal court”).

254. *See* S. REP. NO. 109-14, at 43 (“Overall, new section 1332(d) is intended to expand substantially federal court jurisdiction over class actions. Its provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant.”). In fact, the Senate Report goes so far as to specifically state that a provision granting an exemption from CAFA’s removal mechanism should “be narrowly construed.” *See id.* at 45.

255. *See* *City of Indianapolis v. Chase Nat’l Bank of N.Y.C.*, 314 U.S. 63, 76 (1941).

determined that no concerns about the federal court's "overwhelming workload" were implicated with the passage of the Act²⁵⁶ and, just as importantly, that these actions were not "business intrinsically belong[ing] to the state courts."²⁵⁷ Instead, the precise opposite was true.²⁵⁸

The second threshold observation by the *Lowdermilk* court was that the plaintiff is the master of his complaint and entitled, more or less, to choose his forum.²⁵⁹ Axiomatic as this may seem, it is surely a funny place to start the analysis considering that the primary purpose of CAFA is to give defendants the opportunity to remove to federal court.²⁶⁰ Indeed, in other

256. See S. REP. NO. 109-14, at 51–53 (citing a number of statistics and facts to show that state courts were just as burdened as federal courts); see also John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . In State Court*, 25 HARV. J.L. & PUB. POL'Y 143, 151 (2001) ("The civil caseload in state courts has grown much more rapidly than the federal court civil caseload[, and f]ederal courts have more resources to meet this challenge.").

257. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4, 5 (indicating that the legislation is targeted at getting "cases of national importance" into federal court).

258. *Id.*; see also 28 U.S.C. 1332(d)(3)–(4) (excluding cases from removal where a showing could be made that the case belonged in state court).

259. See *Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 998–99 (9th Cir. 2007). The string cite that follows this uncontroversial proposition includes a pair of Supreme Court cases. See *id.* Neither are class action cases. Instead, they represent the classic bipolar model of litigation, with a single plaintiff and a single defendant. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282 (1976) (describing bipolar lawsuits, in which "[l]itigation is organized as a contest between two individuals or at least two unitary interests, diametrically opposed, to be decided on a winner-takes-all basis," as part of the traditional model). In both cases, the Court simply confirmed plaintiffs' prerogative to bring only state law claims, despite the presence of a federal claim, and thereby avoid federal jurisdiction. The older case, *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987), a staple of first-year federal civil procedure classes, established that:

The presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.

Id. at 392 (1987) (citation omitted).

The latter case relied on the same rationale in holding that a counterclaim based on federal law would not make a case removable to federal court. See *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831–32 (2002) ("Allowing a counterclaim to establish 'arising under' jurisdiction would also contravene the longstanding policies underlying our precedents. First, since the plaintiff is 'the master of the complaint,' the well-pleaded-complaint rule enables him, 'by eschewing claims based on federal law, . . . to have the cause heard in state court.'" (quoting *Caterpillar Inc.*, 482 U.S. at 398–99)). Note the high cost of avoiding removal; entire causes of action must be abandoned. In CAFA cases, the cost of avoiding removal is possibly comparable—the damages sought must be limited to less than \$5 million—but this pecuniary sacrifice cuts to the very heart of the Rule 23 adequacy of representation argument. See *infra* Part V.C.2.a–b.

260. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(b), 119 Stat. 4, 5 ("The purposes of this Act are to . . . restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction . . .").

contexts, other courts have recognized the shortcomings of the cliché as applied to CAFA cases.²⁶¹

3. Analogizing Stipulated Damages with Claim-Splitting

Sometimes, to increase the probability of class certification or to avoid removal to federal court or for other reasons, plaintiffs in a class action will choose to forego certain available claims, despite the fact that claim preclusion will attach and prevent those claims from ever being heard in court.²⁶² This practice, known as “claim splitting,”²⁶³ is often attacked by defendants on the grounds of adequacy²⁶⁴— “[t]he challengers view failure to raise all possible claims as splitting the cause of action, thereby leaving the class members at risk that a later court will find the omitted claims to be precluded.”²⁶⁵ Citing a “serious conflict of interest,” the Fifth Circuit has taken the position that the tactic is impermissible.²⁶⁶ More recently, with *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court expressed its own concerns.²⁶⁷

261. See, e.g., *Grimsdale v. Kash N’ Karry Food Stores, Inc. (In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.)*, 564 F.3d 75, 79 (1st Cir. 2009) (“[W]e do not mean to say that the four corners of the plaintiff’s complaint necessarily control the question of whether CAFA’s home state exception applies. We do not rely on the maxim that the plaintiff is the master of his own complaint—the answer to that question is that it depends.”).

262. Edward F. Sherman, “Abandoned Claims” in *Class Actions: Implications for Preclusion and Adequacy of Counsel*, 79 GEO. WASH. L. REV. 483, 483–84 (2011) [hereinafter Sherman, *Abandoned Claims*]. Though it varies somewhat between jurisdictions, “a final judgment on the merits of an action [generally] precludes the parties or their privies from relitigating issues that were or could have been raised in that action.” *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (emphasis added).

263. Trask, *supra* note 91, at 325.

264. See, e.g., *Coleman v. GM Acceptance Corp.*, 220 F.R.D. 64, 80 (M.D. Tenn. 2004); *Clark v. Experian Info. Solutions, Inc.*, No. 8:00-1217-24, No. 8:00-1218-24, No. 8:00-1219-24, 2001 U.S. Dist. LEXIS 20024, at *11–12 (D.S.C. Mar. 19, 2001); *Zachery v. Texaco Exploration & Prod., Inc.*, 185 F.R.D. 230, 243 (W.D. Tex. 1999).

265. Sherman, *Abandoned Claims*, *supra* note 262, at 484.

266. See *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 283 (5th Cir. 2008).

267. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559 (2011). While the class was certified pursuant to Rule 23(b)(2), which covers cases where “final injunctive relief or corresponding declaratory relief is appropriate, see FED. R. CIV. P. 23(b)(2), the plaintiffs also sought backpay, *Dukes*, 131 S. Ct. at 2548. Under their theory, which the Ninth Circuit adopted, an award of backpay would be appropriate even as part of a (b)(2) class because the claims for backpay “did not ‘predominat[e]’ over the requests for declaratory and injunctive relief.” *Id.* at 2550 (alteration in original) (quoting *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 616 (9th Cir. 2010)). The chief difference between a class certified under (b)(2) and a class certified under (b)(3) is that the latter requires “individual notice to all members who can be identified through reasonable effort” and includes an option for would-be class members to opt out of the litigation and preserve the right to bring their own claims separately. See FED. R. CIV. P. 23(c)(2).

A unanimous Court held “that, at a minimum, claims for *individualized* relief (like the backpay at issue here) do not satisfy the Rule.” *Dukes*, 131 S. Ct. at 2557. The primary bases of the holding were that “the relief sought [in (b)(2) class actions] must perforce affect the entire class at once” and that in no case predating the codification of Rule 23 did analogous actions include “any

Claim-splitting conflicts both with Rule 23(a)(4) and the Fourteenth Amendment of the Constitution in a manner analogous to the problems created by stipulations—both create conflicts of interest between absent class members and their attorneys, which by extension undermine their right to due process.²⁶⁸ Both techniques increase the probability of class certification,²⁶⁹ meaning plaintiffs have a better chance of winning if they are allowed.²⁷⁰ But both also potentially strip absentee class members of recovery, and neither gives them a say in the matter.²⁷¹ To illustrate the similarities in analysis, consider the approach the Texas Supreme Court took

claim for individualized relief.” *Id.* at 2558. Such actions, the Court determined, were better left for (b)(3) because it included additional protections that were unnecessary for (b)(2) actions, where any relief would necessarily affect all members of the class and make opt-out provisions moot. *Id.* The Court went on to reject the “predominance” test proposed by the plaintiffs:

[The] predominance test, moreover, creates perverse incentives for class representatives to place at risk potentially valid claims for monetary relief. In this case, for example, the named plaintiffs declined to include employees’ claims for compensatory damages in their complaint. That strategy of including only backpay claims made it more likely that monetary relief would not “predominate.” But it also created the possibility (if the predominance test were correct) that individual class members’ compensatory-damages claims would be *precluded* by litigation they had no power to hold themselves apart from. If it were determined, for example, that a particular class member is not entitled to backpay because her denial of increased pay or a promotion was *not* the product of discrimination, that employee might be collaterally estopped from independently seeking compensatory damages based on that same denial. That possibility underscores the need for plaintiffs with individual monetary claims to decide *for themselves* whether to tie their fates to the class representatives’ or go it alone—a choice Rule 23(b)(2) does not ensure that they have.

Id. at 2559. Thus the Court identified the plaintiff’s claim-splitting, acknowledged that it increased the likelihood of certification, and found the whole thing “perverse” because it created a conflict of interest between the class representatives and the absentee class members. *See id.* And, of course, conflict of interests cut to the heart of Rule 23(a)’s adequacy requirement. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

268. *See infra* Part V.C.2.a.

269. Claim-splitting increases the chances of class certification by making common questions predominate. Sherman, *Abandoned Claims*, *supra* note 262, at 483 (“For example, class members may have a claim under both the state consumer protection act and common law fraud, but the fraud claim is not asserted because individual reliance would be required and the class action would fail to satisfy the predominance requirement.”). Stipulations make class certification more likely simply because they function to keep cases in state court, where class certification is more likely than it would be in federal court. *See supra* note 36 and accompanying text.

270. *See* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1262–63 (2002); *see also* 7AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1785 (3d ed. 2005) (“The determination whether or not to certify an action as a class action has enormous implications for all the participants—the named parties, the absent class members, and the court itself.”).

271. *See* Sherman, *Abandoned Claims*, *supra* note 262, at 488 (acknowledging that valuable and lucrative claims of absentee class members can be lost as a result of claim-splitting); *see also infra* Part V.C.2.a (discussing the negative impact of stipulations on absentee class members).

in finding claim-splitting to potentially conflict with its state rules of civil procedure and due process protections of the United States Constitution:

Due process requires that the named plaintiff at all times adequately represent the interests of the absent class members, as well as notice plus an opportunity to be heard and participate in the litigation. . . . [A] certifying court . . . must protect the due process rights of absent class members by ensuring that the class representative adequately represents their interests. . . .

. . . .

A class representative's decision to abandon certain claims may be detrimental to absent class members for whom those claims could be more lucrative or valuable, assuming those class members do not opt out of the class. Abandoning such claims, or claims "reasonably expected" to be raised by class members, could undermine the adequacy of the named plaintiff's representation of the class. We hold, therefore, that Texas Rule of Civil Procedure 42 requires the trial court, as part of its rigorous analysis, to consider the risk that a judgment in the class action may preclude subsequent litigation of claims not alleged, abandoned, or split from the class action. The trial court abuses its discretion if it fails to consider the preclusive effect of a judgment on abandoned claims, as *res judicata* could undermine the adequacy of representation requirement.²⁷²

272. *Citizens Ins. Co. of Am. v. Daccach*, 217 S.W.3d 430, 456–57 (Tex. 2007) (citations omitted) (internal quotation marks omitted). In *Daccach*, a "worldwide class" had been certified in the wake of alleged securities fraud. *Id.* at 435. Despite the presence of several claims, the plaintiffs brought only one—that the defendant failed to register with the Texas Securities Board before offering or selling securities in the state. *See id.* at 440. At the intermediate appellate level, Citizens had argued, *inter alia*, "that because Daccach abandoned all claims but the Texas Securities Act claim, he was not an adequate representative of the class . . . and Daccach improperly seeks to resolve a single issue instead of the entire controversy." *Id.* at 448. The argument had been rejected by way of holding: "[c]lients who have claims not raised in this class action because the claims are unsuitable for class treatment can bring those claims on an individual basis, and *res judicata* will not bar those claims because absent class members had no opportunity to litigate those issues in this lawsuit." *Id.* (quoting *Citizens Ins. Co. of Am. v. Hakim Daccach*, 105 S.W.3d 712, 725 (Tex. App. 2003)). Daccach did not even try to argue that the *res judicata* effect had no bearing on the question of adequacy. *See id.* Rather, he argued that preclusion would not attach; Rule 42 of Texas Rules of Civil Procedure meant that the action only could have been certified in the absence of the other claims, meaning that could not have been brought for the purposes of a classic preclusion analysis. *Id.*

In rejecting Daccach's argument, the court undertook a traditional preclusion analysis and noted that "there is no right to litigate a claim as a class action." *Id.* at 450 (quoting *Ford Motor Co. v. Sheldon*, 22 S.W.3d 444, 452–53 (Tex. 2000)). Importantly, the same is true in federal courts, and just as importantly, Texas law generally "rel[ies] on . . . persuasive federal decisions and authorities interpreting current federal class action requirements," making *Daccach* an apposite case study. *See Daccach*, 217 S.W.2d at 449. Because there was no right to bring a class action, the claim could

It seems that much the same analysis would apply where a named plaintiff stipulates that damages will be less than \$5 million despite evidence showing the actual amount in controversy to be far higher. In such a case, the Texas Supreme Court's analysis need only be slightly reworded:

Due process requires that the named plaintiff at all times adequately represent the interests of the absent class members, as well as notice plus an opportunity to be heard and participate in the litigation. . . . [A] certifying court . . . must protect the due process rights of absent class members by ensuring that the class representative adequately represents their interests. . . .

. . . .

A class representative's decision to [forego a substantial portion of the possible recovery] may be detrimental to absent class members [because the alternative is, by definition,] more lucrative or valuable, assuming those class members do not opt out of the class. [Disclaiming any right to relief] "reasonably expected" to be [sought] by class members could undermine the adequacy of the named plaintiff's representation of the class. . . . We hold, therefore, that . . . [t]he trial court abuses its discretion if it fails to consider [that the decision of plaintiffs attorneys to forego a substantial portion of potential relief] could undermine the adequacy of representation requirement.²⁷³

While the Supreme Court in *Dukes* did not so tidily describe its analysis, the concern was that absentee class members with no opportunity to opt out of the litigation would potentially be precluded from bringing backpay claims in the event that the class was certified under Rule 23(b)(2) and the plaintiffs lost at trial.²⁷⁴ These precise concerns also animate the discussion in other claim-splitting cases, with the notable, and perhaps dispositive, caveat that the *Dukes* discussion was limited to (b)(2) cases.²⁷⁵ Further, it is

have been brought in another form and, therefore, any claims not presently brought would likely be precluded thereafter. *Id.* at 451–55.

273. *Cf. id.* at 456–57 (alteration to original).

274. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2559 (2011) (reasoning that the danger of a res judicata effect being applied to absent class members who had no opportunity to opt out of the first action weighed against a finding that a case could be certified under Rule 23(b)(2)).

275. *See id.* (noting that (b)(2) classes lack "Rule 23(b)(3)'s procedural protections"). Indeed, under *Daccach*, so long as adequate notice was provided to the absentee class members such that they understood that a failure to opt out meant that some claims could become barred, classes

notable that the Court expressed its discomfort with claim-splitting in a case where substantial recovery on behalf of the class members—injunctive relief and backpay—was sought.²⁷⁶ This can be contrasted with stipulations cases where the attorneys pledge to seek only a fraction of the actual amount in controversy and where individual plaintiffs may only receive worthless coupons in the event of a settlement.²⁷⁷

B. CAFA and the Dormant Commerce Clause

Perhaps the most befuddling of the Constitution’s enumerated powers,²⁷⁸ the Commerce Clause gives Congress the authority “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”²⁷⁹ As a corollary, the power of states to regulate such commerce is limited and can neither discriminate against interstate commerce²⁸⁰ nor place unreasonable burdens upon it.²⁸¹ This principle is known as the Dormant Commerce Clause,²⁸² and while the appellation may be relatively modern, the seminal case of *Gibbons v. Ogden*²⁸³ relied on the theory.²⁸⁴ This limitation applies only to legislative enactments however. Judge-made common law is outside the reach of the commerce clause.²⁸⁵ As a result, especially in torts cases, the law of one jurisdiction can de facto dictate

featuring abandoned claims could be certified. See *Daccach*, 217 S.W.3d at 458. This enhanced notice approach suggests a possible solution for the problem of binding stipulations—one ultimately rejected for practical reasons. See *infra* Part V.C.2.d.

276. See *Dukes*, 131 S. Ct. 2541.

277. See *supra* notes 50–59 and accompanying text.

278. See Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress’s Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL’Y 849, 851 (2002) (“[C]ourts, executives, and legislatures, at the federal and state level alike, are often at a loss about how to approach the problem.”).

279. U.S. CONST. art.I, § 8, cl. 3.

280. See, e.g., *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951).

281. See, e.g., *So. Pac. Co. v. Ariz.*, 325 U.S. 761, 767 (1945) (“[T]he states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.”).

282. E.g., WILLIAM D. ARAIZA & M. ISABEL MEDINA, *CONSTITUTIONAL LAW: CASES, HISTORY, & PRACTICE* 250 (4th ed. 2011).

283. 22 U.S. (9 Wheat.) 1 (1824).

284. See *id.* at 197–212 (reasoning that Congress’s power, while expressly limited by the Constitution, is “plenary as to those [enumerated powers, including the commerce power, and therefore] is vested in Congress as absolutely as it would be in a single government,” meaning that states have no power to enact legislation interfering with this Congress’s plenary grant of power).

285. See *W. Union Tel. Co. v. Call Publ’g Co.*, 181 U.S. 92, 102 (1901) (“[T]he principles of the common law are operative upon all interstate commercial transactions except so far as they are modified by congressional enactment.”); see also Frederick H. Cooke, *The Supreme Court, the Commerce Clause and Common Law Rules*, 19 YALE L.J. 32, 32–35 (1909) (explaining the difference between statutory law and the common law and how Dormant Commerce Clause questions can hinge upon the distinction).

national policy.²⁸⁶ It was with an eye toward this loophole that Congress passed CAFA.²⁸⁷ Thus, CAFA is about more than providing for fairness between litigating parties. It is also designed to prevent the courts of single states from unduly burdening interstate commerce.²⁸⁸

In Commerce Clause cases, there seems to be little doubt of the impropriety of allowing a single state to wield power burdening its sister states.²⁸⁹ As a result, the commerce power has been construed more broadly over time.²⁹⁰ Whether or not this is as it should be, it makes little sense that

286. See S. REP. NO. 109-14, at 60 (2005) (“When state courts preside over class actions involving claims of residents of more than one state, they frequently dictate the substantive laws of other states, sometimes over the protests of those other jurisdictions When that happens, there is little those other jurisdictions can do, since the judgment of a court in one state is not reviewable by the state court of another jurisdiction.”). The authors of the Report concluded that it was “far more appropriate” that a federal judge be tasked with such questions than a given state judge, asking: “Why should a state court judge be able to overrule other state laws and policies? Why should state courts be setting national policy?” See *id.* at 60–61; see also *supra* notes 38–39 and accompanying text.

287. See S. REP. NO. 109-14, at 30 (describing one of the primary aims of CAFA as the restoration of “the intent of the Framers by expanding federal jurisdiction over interstate class actions”); see also *supra* notes 38–39 and accompanying text. To this end, the Report describes the question of “[w]hether the claims asserted are of ‘significant national or interstate interest’” as one to be determined by a balancing test:

[T]he federal court should inquire whether the case does present issues of national or interstate significance of this sort. If such issues are identified, that point favors the exercise of federal jurisdiction. If such issues are not identified and the matter appears to be more of a local (or intrastate) controversy, that point would tip in favor of allowing a state court to handle the matter.

S. REP. NO. 109-14, at 36–37. In the Act itself, these concerns are reflected in the Findings and Purposes section. See Class Action Fairness Act of 2005, § 2(a)(2), 28 U.S.C. § 1711 (2006) (“Over the past decade, there have been abuses of the class action device that have . . . adversely affected interstate commerce . . .”).

288. See Marcus, *Assessing CAFA’s Policy*, *supra* note 40, at 1804–05.

289. See, e.g., *So. Pac. Co. v. Ariz.*, 325 U.S. 761, 767 (1945) (“[T]he states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.”); see also THE FEDERALIST NO. 42 (James Madison) (arguing that without the grant of authority provided in the Commerce Clause states would have both power and incentive to shape the law in a manner discriminating against their counterparts).

290. See Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1 (1999) (identifying 1936 as the year in which the scope of the Commerce Clause began to grow and *Wickard v. Filburn*, 317 U.S. 111 (1942), as the case that “transformed the Commerce Clause by declaring that it not only included ‘commerce’ . . . but also ‘economics’”). This trend slowed considerably with *United States v. Morrison*, 529 U.S. 598 (2000) (holding that the Commerce Clause could not be read so expansively as to give Congress the authority to enact certain provisions of the Violence Against Women Act) and *United States v. Lopez*, 514 U.S. 549 (1995) (holding the same with regard to the Gun-Free School Act). While any thinking that these cases represent an approaching constriction of the commerce power’s scope has proven somewhat

policy concerns underlying a classic Commerce Clause question should be given so much weight in that context but receive little or no consideration at all when the battlefield shifts from the statehouse to the court room. This is doubly so when one considers the fact that in Commerce Clause cases the political process propels the change in the law whereas state judges—some elected, some appointed²⁹¹—change the law by decree and order.²⁹² While some commentators view CAFA as an encroachment on important principles of federalism,²⁹³ the principle underlying federalism is that states should be able to govern themselves and handle local issues without excessive interference from the federal government, which should limit its action to matters concerning the nation as a whole.²⁹⁴ The only federalism at stake in the case of nationwide class actions is a perversion of its original form.²⁹⁵ Allowing “locally-elected state court judges to adjudicate the claims of absent nonresident class members against nonresident businesses involving causes of action that are not uniquely related to that jurisdiction” undermines the Commerce Clause and furthers no legitimate interest of federalism.²⁹⁶

off the mark, *see* *Gonzales v. Raich*, 545 U.S. 1 (2005), change is clearly afoot. *See* *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

291. *See* Sandra Day O'Connor, *The Debate Over Judicial Elections and State Court Judicial Selection*, 21 *GEO. J. LEGAL ETHICS* 1347, 1420 (2008) (describing the present situation in which some states elect judges and others appoint them, and urging states to consider turning to the appointment model). This aspect of the problem should not be understated. In cases where elected judges preside, the combination of an out-of-state corporate defendant and plaintiffs among the electorate undoubtedly create at least the appearance of unfairness. *See* Nagareda, *The Administrative State*, *supra* note 50, at 612–13.

292. *See* Marcus, *Assessing CAFA's Policy*, *supra* note 40, at 1804–05.

293. *See, e.g.*, Marcus, *Federalism Implications*, *supra* note 206, at 1251 (“Particularly when federal judges systematically favor defendants in categories of disputes for which state law provides the rule of decision, the federal exercise of jurisdiction may mean that state law will receive less enforcement than if cases stay in state court. Diversity jurisdiction then affects the power of states to regulate the types of conduct that become the subject of these disputes. The assertion of federal jurisdiction thereby alters the federalism balance, and does so without a positive law enacted through the democratic process.”); Heather Scribner, *Protecting Federalism Interests After the Class Action Fairness Act of 2005: A Response to Professor Vairo*, 51 *WAYNE L. REV.* 1417, 1420 (2005) (“If federal courts were to exercise jurisdiction to the full extent of CAFA’s grant, the states’ sovereign interests in developing their own laws and regulating on behalf of their own citizens would suffer.”); 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, 1560 (2000) (analyzing an early version of CAFA and positing that “Congress has taken a surprisingly antifederalist approach to federal court jurisdiction”); *see also* S. REP. NO. 109-14, at 87 (2005) (Minority Views) (proposing amendments to CAFA in consideration of “Federalism concerns”).

294. *See* AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 105–06 (2005).

295. *See* Underwood, *supra* note 48, at 405–06.

296. *Id.* at 405; *see also* *Interstate Class Action Jurisdiction Act of 1999 and Workplace Goods Job Growth and Competitiveness Act of 1999: Hearing on H.R. 1875 and H.R. 2005 Before the H. Comm. On the Judiciary*, 106th Cong. 119 (1999) (statement of Walter E. Dellinger, III) (“Many state courts faced with interstate class actions . . . have undertaken to dictate the substantive laws of other states by applying their own laws to all other states, which results essentially in a breach of federalism principles by fellow *states* (not by the federal government). And because the state court decision has binding effect everywhere by virtue of the Full Faith and Credit Clause, the other states

C. *A Simple Answer to a Complex Problem: How Lessons from the Field of Complex Litigation Inform the Problem*

Defining the term *complex litigation* has proven immensely difficult.²⁹⁷ Luckily, CAFA cases tend to be paradigmatic complex litigation cases, and only a brief discussion of what makes them so is necessary.²⁹⁸ While Professor Tidmarsh's conception of complex litigation—"Litigation in an adversarial system in which the judicial power necessary to overcome the dysfunction of the lawyers, the jury, or the parties results in procedural disparities that cause substantively disparate outcomes among similarly situated parties, claims, or transactions"²⁹⁹—seems to be as good as any and better than most, a striking analogy made by Professor Lon L. Fuller in his early work on the subject is an instructive place to start.³⁰⁰

will have no way of revisiting the interpretation of their own laws."). Professor Underwood provides an example:

[I]f a state court judge rules that a defendant's business practice is unlawful, that defendant will almost certainly have to change its behavior in response to the determination or face the risk of not only additional, similar lawsuits (perhaps by the same class counsel), but also punitive or treble damages available under many states' deceptive trade practice statutes or similar legislation, as well as ramifications on the continued economic viability of the defendants and their ability to stay in business in those remote locations.

Underwood, *supra* note 48, at 406.

This hypothetical is not far removed from an actual case, often cited to illustrate the reverse-federalism problem. See *Avery v. State Farm Mut. Auto. Ins. Co.*, 746 N.E.2d 1242 (Ill. App. Ct. 2001) *aff'd in part, rev'd in part*, 835 N.E.2d 801 (Ill. 2005); see also S. REP. No. 109-14, at 24–25 (citing *Avery* as among those "most egregious of such cases . . . in which one state court issues nationwide rulings that actually contradict the laws of other states"). By providing customers with non-original equipment manufacturer (non-OEM) parts as replacements, State Farm violated Illinois law, notwithstanding the fact that the policy made clear that such parts would be provided. See *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 810–13 (Ill. 2005). Judgment was entered against State Farm in excess of \$1 billion. *Id.* at 810. While the Illinois Supreme Court eventually reversed, it took four years after the intermediate appeal, six years after the trial, and eight years after the originally complaint was filed, to get it right. See *id.* at 812. But see Marcus, *Federalism Implications*, *supra* note 206, at 1294 (arguing that, because the Illinois Supreme Court got it right eventually, "*Avery* is not a great example of a single county court exercising unchecked power over nationwide conduct").

297. See TIDMARSH & TRANGSRUD, *supra* note 51, at 35–47.

298. For its understanding of complex litigation, this Comment relies heavily on the work of Professors Jay Tidmarsh and Roger H. Trangsrud. See generally JAY TIDMARSH & ROGER H. TRANGSRUD, *MODERN COMPLEX LITIGATION* (2d ed. 2010).

299. Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1801 (1992). This conception of complex litigation can be contrasted with one of simple litigation, where courts are "passive arbiters of bipolar private controversies," and following a trial, "the judge applies preexisting legal norms to determine liability and define appropriate relief." Rhode, *supra* note 196, at 1187. As discussed later, *St. Paul Mercury* represents a classic example. See *infra* Part IV.C.2.

300. Indeed, Professor Tidmarsh and Professor Trangsrud's book begins a section entitled "The

We may visualize this kind of situation by thinking of a spider web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap. This is a “polycentric” situation because it is “many centered”—each crossing of strands is a distinct center for distributing tensions.³⁰¹

Even proceeding with Tidmarsh’s definition, the idea of polycentrism vividly conceptualizes the problem.³⁰² By definition, a lawsuit removable under CAFA is a non-local class action with at least \$5 million at controversy and at least 100 class members.³⁰³ This is a model example of complex litigation.³⁰⁴

1. Complex Litigation: Its Inherent Difficulties and the Devices Designed to Address Them

Typical problems seen in complex litigation include the danger of a multiplicity of lawsuits and the threat of inconsistent recovery.³⁰⁵ Of course, both of these problems arise where multiple actions are filed based on either one alleged wrong or a series of related wrongs.³⁰⁶ When CAFA is analyzed

Meaning of Complex Litigation” with excerpts from the Fuller article and includes this passage. *See* TIDMARSH & TRANGSRUD, *supra* note 51, at 2.

301. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 395 (1978).

302. The use of binding stipulations can be seen as pulling on the strand of Professor’s Fuller’s spider web. While such manipulation is harmless in simple litigation, *see infra* Part IV.C.2., things are far less simple in the web of complex litigation where the same pull can create due process problems, agency cost problems, and federalism problems. *See supra* notes 175–80 and accompanying text; *infra* notes 403–10 and accompanying text.

303. *See* 28 U.S.C. § 1332(d) (2006).

304. *Cf.* TIDMARSH & TRANGSRUD, *supra* note 51, at 2 (“The *Microsoft* antitrust litigation, *Brown v. Board of Education*, and the thousands of asbestos cases clogging court dockets are paradigms of complex civil litigation.”).

305. *See* Julia Christine Bunting, *Ashley v. Abbott Laboratories: Reconfiguring the Personal Jurisdiction Analysis in Mass Tort Litigation*, 47 VAND. L. REV. 189, 232 (1994) (noting that in complex litigation “the dangers of multiple actions and inconsistent judgments are especially potent”).

306. Look no further than the Skechers Shape-ups litigation for an example. *See supra* note 140 and accompanying text. The allegation leveled against Skechers by Patty Tomlinson, that Shape-ups don’t actually function as the “toning shoes” advertising made them out to be, has been made by other plaintiffs in other courts—from federal court in California to separate actions filed in the state of Arkansas. *See* Tomlinson v. Skechers U.S.A., Inc., 2011 U.S. Dist. LEXIS 142862, at *2 (W.D. Ark. May 25, 2011). Whether Skechers should be held liable seems to be a question with one answer—either the shoes function as advertised or they do not. Nonetheless, they must potentially litigate that one question on several fronts, *see In re: Skechers Toning Shoe Prods. Liab. Litig.*, 831 F. Supp. 2d 1367, 1368 (J.P.M.L. 2011) (“Plaintiffs’ motion includes twelve actions pending in nine districts, as listed on Schedule A. The Panel also has been notified of eight additional related

as a mere procedural mechanism—"[CAFA] is court reform[,] not tort reform," in the words of the Senate Report prepared in advance of the legislation³⁰⁷—its value becomes apparent. Granted, the law is not value-neutral,³⁰⁸ but procedurally it fits right in to a modern legal landscape in which complex litigation is more common and tools that provide aggregation and encourage consistent outcomes are increasingly necessary.³⁰⁹

Not only do federal courts have the resources and tools to address problems presented by complex litigation,³¹⁰ they use them effectively.³¹¹ Great emphasis is put on class actions in particular,³¹² and "the presence of dueling class actions makes the case a near shoo-in for MDL treatment."³¹³ For example, in the *Skechers U.S.A. Inc.* litigation described *supra*,³¹⁴ Skechers has been named a defendant in several class actions alleging either personal injury or misleading advertising, and, accordingly, the actions have been consolidated for pretrial proceedings pursuant to 28 U.S.C. § 1407.³¹⁵

actions."), and in the event of a trial, the answer may not always be the same, *see* Edward F. Sherman, *Class Actions and Duplicative Litigation*, 62 IND. L.J. 507, 511 (1987).

307. S. REP. NO. 109-14, at 56 (2005).

308. *See* Burbank, *A Preliminary View*, *supra* note 14, at 1442.

309. JoEllen Lind, "Procedural Swift": *Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717, 745-50 (2004) (examining then-pending CAFA's fit in the modern complex litigation landscape).

310. *See* 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3861 (3d ed. 2005) (describing the evolution of federal courts' approach to complex litigation and some of the more important procedural developments).

311. *See, e.g., In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415 (J.P.M.L. 1991) (utilizing a 28 U.S.C. § 1407 MDL transfer to consolidate 26,639 asbestos actions for pretrial proceedings); *Hoffman v. Merrell Dow Pharm., Inc. (In re Bendectin Litig.)*, 857 F.2d 290 (6th Cir. 1988) (affirming a trial court's decision to trifurcate proceedings with regard to proximate cause pursuant to Rule 42 of the Federal Rules of Civil Procedure).

312. *See* TIDMARSH & TRANGSRUD, *supra* note 51, at 159.

313. *Id.* The text cites a number of cases in support, including *In re Toys "R" Us-Delaware, Inc., Fair & Accurate Credit Transactions Act Litig.*, 581 F. Supp. 2d 1377 (J.P.M.L. 2008). The Judicial Panel on Multidistrict Litigation's decision in that case represents the fewest number of actions ever consolidated under § 1407. TIDMARSH & TRANGSRUD, *supra* note 51, at 159. There were only two. *In re Toys "R" Us*, 581 F. Supp. 2d at 1377. While that factor and others represented "sound arguments" in opposition to consolidation, it seems likely that a desire to "prevent inconsistent pretrial rulings, especially with respect to class certification" was dispositive. *See id.*; *see also* TIDMARSH & TRANGSRUD, *supra* note 51, at 156 (explaining that other factors cited in the case are typically cited as mere "boilerplate").

314. *See supra* note 140.

315. *See In re: Skechers Toning Shoe Prods. Liab. Litig.*, 831 F. Supp. 2d 1367 (J.P.M.L. 2011). Under the Multidistrict Litigation statute, actions can be consolidated in one district for pretrial proceedings so long as the "actions involv[e] one or more common questions of fact," the transfer is "for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a) (2006). Like other tools, its application is limited to cases already in

This tool does not exist in state courts,³¹⁶ and its utilization was opposed by Skechers U.S.A., illustrating that there is no inherent advantage to defendants when class actions are funneled into federal court.³¹⁷

2. Putting *St. Paul Mercury Indemnity Co. v. Red Cab Co.* in Its Place

If complex litigation represents a relatively modern and rapidly growing form of litigation, what is simple litigation? Simple litigation pits the defendant and the plaintiff against each other in a bipolar proceeding umpired by the judge and dominated by attorneys.³¹⁸ Simple Litigation is *St. Paul Mercury Indemnity Co. v. Red Cab Co.*³¹⁹ In *St. Paul*, the Red Cab Company sued St. Paul Mercury and its agent, a man referred to only as Harlan, alleging that it had failed to provide insurance under the terms of a 30-day binder.³²⁰ Though the parties were diverse—the Red Cab Company was an Indiana corporation while St. Paul Mercury and its agent hailed from Minnesota—the claim was brought in state court.³²¹ At that time, the minimum amount for federal jurisdiction was \$3000, and the pleading alleged \$4000 in damages.³²² The case was removed to federal court, and the trial resulted in a \$1,162.98 judgment against the defendant.³²³ On

the federal forum. *See id.* Unsurprisingly, the presence of similar actions filed in state court and thus outside the consolidation's reach tend to frustrate its purpose. *See, e.g.,* Ret. Sys. of Ala. v. J.P. Morgan Chase & Co., 386 F.3d 419 (2d Cir. 2004). In *Retirement Systems*, litigation from the WorldCom collapse had been consolidated in the Southern District of New York, and trial had been scheduled. *Id.* at 421. In Alabama, despite a request from the federal court that it delay trial until after federal proceedings had concluded, a state court handling similar litigation scheduled its trial prior to that of the consolidated action. *Id.* at 422. The district court's attempt to enjoin the state proceedings was held to be outside its authority, and any inconvenience caused by the Alabama trial was insufficient to compel a different holding. *Id.* at 430–31.

316. State court “analogues” to the MDL do exist and function in a similar fashion, but their scope is so constricted jurisdictionally that they can hardly be considered the same device. *See* MARK HERRMANN ET AL., STATEWIDE COORDINATED PROCEEDINGS: STATE COURT ANALOGUES TO THE FEDERAL MDL PROCESS 41 (2d ed. 2004) (noting the lack of “formalize[d] federal-state coordination mechanisms”). While the mechanism cannot be found in state courts, it is true that state and federal courts are learning to coordinate overlapping litigation. *See* William W. Schwarzer et al., *Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689, 1689–90 (1992). Coordination between state proceedings is even rarer. *See* HERRMANN *supra*, at 93.

317. *See In re: Skechers*, 831 F. Supp. 2d at 1369 (“Skechers opposes centralization primarily on the grounds that the respective plaintiffs’ injuries vary and its liability in each action will hinge on highly individualized facts, such as those surrounding the causation of each plaintiff’s injuries and each plaintiff’s reliance on (and the materiality of) representations made about the toning shoe product.”).

318. *See* Rhode, *supra* note 196, at 1187.

319. 303 U.S. 283 (1938). For a discussion of the important role *St. Paul* has played in cases related to the question at hand, see *supra* notes 144–57 and accompanying text.

320. *St. Paul*, 303 U.S. at 284.

321. *Id.*

322. *See id.* at 286.

323. *Id.* at 285.

appeal, the panel refused to address the merits, holding that there was no subject matter jurisdiction and remanding to the state court.³²⁴ In reversing, the Supreme Court established the rule that the amount claimed by the plaintiff controls, so long as it is claimed in good faith, and that “[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.”³²⁵ The real holding of the case was that developments subsequent to proper removal cannot deprive the court of subject matter jurisdiction.³²⁶ As an aside, and to illustrate that a plaintiff wishing to avoid removal has options, the court noted the ability to plead below the jurisdictional amount and avoid removal.³²⁷ In the case of simple litigation, there is no reason why this should not be so.

With only one plaintiff, the sacrifice of forgoing a portion of the recovery is borne only by the party deciding to make that sacrifice. This is in obvious contrast to the class action cases discussed in Part III, and this point alone seems like sufficient grounds to distinguish the cases.³²⁸ Further, *St. Paul* did not arise out of a mass tort.³²⁹ Thus, there were no concerns that procedural gymnastics could cause a different outcome that would then have preclusive effects on other parties.³³⁰ The interests of other parties were not even indirectly at stake.³³¹ Finally, the “legal certainty” standard it established has provoked such unrest in Congress as to be abrogated at least in part.³³²

This Comment need not argue that prudential rules should be different for complex cases than they are for simple cases like *St. Paul*. Prudential rules *are* different between complex and simple cases.³³³ This is especially

324. See *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 90 F.2d 229, 229–30 (7th Cir. 1937), *rev'd*, 303 U.S. 283 (1938) (“The court cannot close its eyes to the obvious, nor go ahead with the trial of a cause of which it has no jurisdiction—even though, as here, both parties are desirous of having it try the cause.”).

325. See *St. Paul*, 303 U.S. at 289.

326. See *id.* at 293 (“[E]vents occurring subsequent to removal which reduce the amount recoverable, whether beyond the plaintiff’s control or the result of his volition, do not oust the district court’s jurisdiction once it has attached.”).

327. See *id.* at 294.

328. See *supra* Part III.B.

329. See *St. Paul*, 303 U.S. at 284.

330. See *id.* at 294.

331. See *id.* at 284–85.

332. See Federal Courts Jurisdiction and Venue Clarification Act of 2011, § 103, 28 U.S.C. § 1446(c)(2)(B) (2006 & Supp. 2011) (creating a “preponderance of the evidence” standard for removal cases”); see also H.R. REP. NO. 112-10, at 15 (2011) (“The . . . ‘legal certainty’ standard[] that govern[s] the amount in controversy requirement when a plaintiff originally files in Federal court ha[s] not translated well to removal . . .”).

333. Cf. Erichson, *Beyond the Class Action*, *supra* note 205, at 522 (“[C]lass actions differ

true in terms of plaintiff autonomy, and the rule referenced in *St. Paul* has no place in complex litigation, neither as a matter of fact³³⁴ nor as a matter of sound policy.³³⁵ Reliance on *St. Paul* is misplaced, and the case likely should be cited only for the proposition that jurisdiction is properly determined as of the time of removal.³³⁶ The case's central holding remains vital; its dicta merits no particular exaltation.

V. BALANCING PLAINTIFF AUTONOMY WITH THE PURPOSES OF CAFA, CONCEPTS OF FUNDAMENTAL FAIRNESS, AND CONCERNS FOR EFFICIENCY

If binding stipulations and their relatives pose problems, they must be either prohibited entirely,³³⁷ greatly limited,³³⁸ or (and this seems to be the favored approach) admonished.³³⁹ The latter tack is even more feckless than it sounds. Subsection A recounts the ways in which federal judges have dealt with binding stipulations at the district court level and illustrates why various rationales offered fall short.³⁴⁰ Subsection B explicates the Federal Courts Jurisdiction and Venue Clarification Act of 2011,³⁴¹ while subsection C begins by arguing that the Act should be extended to CAFA cases. The balance of this penultimate Part concerns itself with solving the problems created by binding stipulations. Application of legal³⁴² and theoretical³⁴³ principles militates toward the conclusion that binding stipulations should rarely be allowed. For practical reasons, they should be entirely prohibited.³⁴⁴ And, finally, a more flexible approach, judicial review, is found wanting.³⁴⁵

A. Ineffective Judicial Techniques

Because binding stipulations go hand-in-hand with remand, federal courts lose jurisdiction over the case and can offer no effective guidance to

fundamentally from other litigation and therefore raise special problems.”). This divergence is evidenced most clearly by the existence and widespread use of a rulebook just for complex litigation. See FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION (4th ed. 2004), available at <http://public.resource.org/scribd/8763868.pdf>.

334. See *supra* notes 305–17 and accompanying text.

335. See *supra* Part IV.C.

336. See *St. Paul*, 303 U.S. at 293–94; see also *supra* Part IV.C.2.

337. See *infra* notes 388–422 and accompanying text.

338. See *infra* notes 423–29 and accompanying text.

339. See *supra* notes 207–48 and accompanying text.

340. See *infra* notes 346–63 and accompanying text.

341. Pub. L. No. 112-63, 125 Stat. 758 (2011) (codified in scattered sections of 28 U.S.C.); see *infra* notes 362–72 and accompanying text.

342. See *infra* notes 388–402 and accompanying text.

343. See *infra* notes 403–10 and accompanying text.

344. See *infra* notes 411–22 and accompanying text.

345. See *infra* notes 423–29 and accompanying text.

the litigation.³⁴⁶ Still, courts often address the legitimate concerns raised by counsel for the defense by professing their confidence that the mechanism will not be abused and their assurances that subsequent removal may be possible.³⁴⁷

A pronouncement that removal will be permitted if at any time the amount in controversy inarguably exceeds \$5 million ignores the reality of class action litigation. The case is won or lost at the certification stage and almost assuredly will never go to trial.³⁴⁸ Therefore, plaintiffs' counsel can ensure that the amount in controversy never exceeds \$5 million by seeking only a settlement for less than that.³⁴⁹ At this point, their pay day is realized, and the absentee class members' potential right to greater recovery is forfeit.³⁵⁰

In other cases, the right of absent class members to opt out is cited as evidence that absentee class members will be protected. In *Tuberville v. New Balance Athletic Shoe, Inc.*, the defendants argued that it was "inappropriate for [the] Plaintiff to bind the as-yet-unknown class members with her stipulation limiting the total recovery."³⁵¹ The court had no problem finding otherwise, first by referencing the maxim that "the plaintiff is . . . 'master of the complaint'" and citing *St. Paul*, and then by continuing:

As it is Plaintiff's prerogative to define the class as she chooses . . . she may . . . define the method and means through which relief is to be obtained for the class. It is of no moment that Plaintiff currently qualifies for inclusion in other nationwide class actions concerning the same product. The Plaintiff may assert her own claims, and she

346. Because the decision to remand is based on a lack of subject matter jurisdiction, the court can bind or direct the parties in any way. *See, e.g., Ortiz v. Menu Foods, Inc.*, 525 F. Supp. 2d 1220, 1221 (D. Haw. 2007) (treating a motion to stay proceedings as mooted by a determination that remand was proper).

347. *See, e.g., Lowdermilk v. U.S. Bank Nat'l Ass'n*, No. 06-592-HA, 2006 U.S. Dist. LEXIS 95697, at *9-10 (D. Or. Aug. 16, 2006), *aff'd*, 479 F.3d 994 (9th Cir. 2007) ("Here, if plaintiff prevails on her claims in state court, she cannot recover more than her prayer of five million dollars, and, as discussed above, if she increases that prayer her claims will then be subject to removal.").

348. *See supra* note 205 and accompanying text.

349. Of course, as Judge Easterbrook pointed out, if the court refuses to approve such a settlement, additional problems are created and either removal would then be allowed, an inefficient proposition, or recovery would exceed \$5 million and the plaintiff will not have been bound at all. *See supra* notes 177-79 and accompanying text.

350. *See, e.g., McNally v. Esmark, Inc. (In re Transocean Tender Offer Sec. Litig.)*, 427 F. Supp. 1211, 1218 (N.D. Ill. 1977) (preclusive effect attaching to all class members who failed to opt out of previous related litigation).

351. *Tuberville v. New Balance Athletic Shoe, Inc.*, No. 1:11-cv-01016, 2011 WL 1527716, at *3-4 (W.D. Ark. Apr. 21, 2011).

may set the terms for her class.³⁵²

Due process concerns are brushed aside with the observation that “putative class members could simply opt out of the class and pursue their own remedies or join a different ongoing class action if they feel that the limitations placed on the class by the Plaintiff are too restrictive.”³⁵³ But, to be adequate, notice need not include a statement of legal tactics to be employed.³⁵⁴ Further, notice and opt-out requirements will not be established by Rule 23 of the Federal Rules of Civil Procedure but will vary from state to state, even if the text of the class action statute is identical or nearly so.³⁵⁵ Implicitly, then, the court is relying on state procedural

352. *Id.* at *4.

353. *Id.*

354. *See* FED. R. CIV. P. 23(c)(2)(B). The provision requires that notice in the case of all (b)(3) classes include:

- (i) the nature of the action;
- (ii) the definition of the class certified;
- (iii) the class claims, issues, or defenses;
- (iv) that a class member may enter an appearance through an attorney if the member so desires;
- (v) that the court will exclude from the class any member who requests exclusion;
- (vi) the time and manner for requesting exclusion; and
- (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Id.

The purposes of the first three provisions are to provide “in an understandable format, sufficient information about the specific lawsuit to allow a class member to” decide if opting out or exercising the right to make an appearance is in her best interests. 7AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1787 (3d ed. 2005). While the existence of a stipulation of damages seems pertinent information to that decision, nothing in the text of the rule demands that it be included. Also of note is the fact that notice is only sent *after* the class has been certified. *See* FED. R. CIV. P. 23(c)(2)(B); *see also* 7AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1788 (3d ed. 2005) (“[Notice] should be sent as soon as practicable after the court determines that the class action is proper [and not before].”). Of course, at this point the question of adequate representation has already been answered as part of the certification process. *See* FED. R. CIV. P. 23(a)(4), (g). And there is great weight to the argument that class counsel willing to stipulate to damages (thereby foregoing a large portion of damages) merely to circumvent CAFA is serving her own interests and not the interest of the class. *See supra* note 46 and accompanying text; *infra* notes 403–10 and accompanying text; *cf.* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2559 (2011) (observing the “perverse incentives” created when some claims of the class are sacrificed to make class certification more likely).

355. *See, e.g.,* Smith v. Bayer Corp., 131 S. Ct. 2368, 2377 (2011) (“If a State’s procedural provision tracks the language of a Federal Rule, but a state court interprets that provision in a manner federal courts have not, then the state court is using a different standard and thus deciding a different issue.”); *see also* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811–12 (1985) (analyzing the notice provided by a Kansas state court under state rules, observing that it need only satisfy a constitutional due process requirement—as distinct from the strictures of Rule 23—and finding it constitutional). Professor Underwood vividly describes the reality of class action notice:

The large font screams at the reader “IMPORTANT NOTICE: IF YOU WERE THE PURCHASER OF A CELLULAR TELEPHONE MANUFACTURED BY A.B.C. CORPORATION FROM JANUARY 1, 2000, THROUGH DECEMBER 31, 2003, PLEASE NOTE THE FOLLOWING INFORMATION” What follows this attention-getting language is typically much smaller-sized print with case information

safeguards. Because CAFA was designed in part to get additional cases in federal courts where absentee plaintiffs could be better protected from unfair settlements,³⁵⁶ it seems odd to rely on a presumption that states will protect absentee class members in justifying remand.

Least persuasive of all is the argument that due process concerns are inapplicable because a class action has not yet been certified.³⁵⁷ Therefore, there are no absent class members.³⁵⁸ This is a real head-scratcher. One need not make a deep, controversial³⁵⁹ inquiry into legislative intent to understand that CAFA was designed to prevent class action abuses.³⁶⁰ It would be ironic indeed if abuse of the class action device were permissible in order to circumvent a system designed to prohibit class action abuses. Due process concerns should inform every stage of the litigation.³⁶¹

The worst approach recorded occurred in the Sixth Circuit, where the use of binding stipulations seems to be picking up. Instead of addressing the adequate representation argument, the district court blithely observed that the state court could itself answer that question on remand and that, if the representation were inadequate, the class would not be certified and the

often indecipherable to most lay persons. The receipt of such a document, or the chance-spotting of this language in a newspaper, is frequently the first and perhaps the only "notice" class members may receive, informing them that they have been injured economically, that they are litigants in a lawsuit they knew nothing about, pending in a forum they have never visited, and that they are being represented by a lawyer they have never met. The litigants have just entered the mysterious and controversial realm of a consumer class action lawsuit in America.

Underwood, *supra* note 48, at 392.

356. *See supra* notes 42–58 and accompanying text.

357. *See, e.g.,* Tuberville v. New Balance Athletic Shoe, Inc., No. 1:11-cv-01016, 2011 WL 1527716, at *4 (W.D. Ark. Apr. 21, 2011) (dismissing due process and adequacy concerns with the "important" observation that "the Plaintiff in the case at bar has not yet been named class representative, nor has the class been certified by any court").

358. *See id.*

359. *See* Kanner, *supra* note 39, at 1660. Kanner's argument is both predictable and off the mark. While, for purposes of this Comment, regular citations to the legislative record are only appropriate, they are not necessary in finding that binding stipulations conflict with Rule 23. *See infra* Part V.C.2.a. Further, Kanner's "Argument for a Narrow Application," which implicitly purports to rely on textualism, turns out to be based on a non-textual presumption against federal jurisdiction, a proposition that has no support in CAFA's clear purpose to expand federal jurisdiction. *See* Kanner, *supra* note 39, at 1662 ("CAFA did not change well-settled and core jurisdictional principles and rules." (footnotes omitted)); *see also* Class Action Fairness Act of 2005 § 2(b)(2), 28 U.S.C. § 1711 note (2006) (Findings and Purposes).

360. *See* Class Action Fairness Act of 2005, § 2(a)(2), 28 U.S.C. § 1711 note (2006) (describing "abuses of the class action device" in the Findings and Purposes section).

361. *Cf.* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) ("[T]he Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members." (emphasis added)).

claim would proceed as a single individual's action.³⁶² This is no answer. The analysis is no different from conceding inadequate representation but wishing the parties better luck in state court where the judge might see things differently. The fact that the state judge might see things differently is why CAFA exists in the first place.³⁶³ The proper approach is not to shunt the problem off to state courts.

B. The Federal Courts Jurisdiction and Venue Clarification Act of 2011: An Inconsequential Step in the Right Direction

Aimed in part at lowball and indeterminate complaints,³⁶⁴ the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (“the Act”)³⁶⁵ serves as an imperfect model for how the problem should be viewed. While nothing in the Act deals with binding stipulations, its tone and tenor indicate that tactics designed to defeat removal jurisdiction are to be discouraged.³⁶⁶ Under the Act, the “sum demanded” in the pleading represents the amount in controversy, except where the plaintiff seeks nonmonetary relief or files the complaint in a state that either prohibits prayers for “specific sums” or allows “recovery of damages in excess of the amount demanded.”³⁶⁷ In such cases, if the trial court finds by a mere preponderance of the evidence that section 1332(a)'s minimum jurisdictional amount is satisfied, removal is proper.³⁶⁸

By its terms, the relevant provisions of the Act affect only diversity actions brought under section 1332(a).³⁶⁹ CAFA cases, of course, are granted jurisdiction by section 1332(d).³⁷⁰ One exception of possible significance is the statute's broad rule that a case may be removed to federal court “on the basis of jurisdiction conferred by section 1332 more than one

362. See *McClendon v. Challenge Fin. Investors Corp.*, No. 1:11 CV 1597, 2011 WL 5361069, at *5 (N.D. Ohio Nov. 3, 2011).

363. See Class Action Fairness Act of 2005 § 2(a)(4), 28 U.S.C. § 1711 note (Findings and Purposes). Relying on legislative intent is in no way problematic where, as here, the conclusion can be plainly inferred from reading the law's findings and purpose clause, which was subject to bicameral passage and presentment. See U.S. CONST. art. I, § 7.

364. See William Baude, *Clarification Needed: Fixing the Jurisdiction and Venue Clarification Act*, 110 MICH. L. REV. FIRST IMPRESSIONS 33, 34–35 (2012), <http://www.michiganlawreview.org/asets/fi/110/Baude.pdf>.

365. Pub. L. No. 112-63, 125 Stat. 758 (2011) (codified in scattered sections of 28 U.S.C.).

366. See Federal Courts Jurisdiction and Venue Clarification Act of 2011 § 103(b)(3)(C), 28 U.S.C. § 1446(c) (2006 & Supp. 2011) (providing protections against “bad faith” pleading by plaintiffs and easing the burden's standard of proof in showing that removal is proper); see also H.R. REP. NO. 112-10, at 15 (2011) (citing “removal-defeating strategies designed to keep the case in state court” as a basis for the amendments).

367. 28 U.S.C. § 1446(c)(2).

368. 28 U.S.C. § 1446(c)(2)(B).

369. See 28 U.S.C. §§ 1441(b), 1446(c).

370. See 28 U.S.C. § 1332(d).

year” after its filing if “the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.”³⁷¹ If “bad faith” were construed to include stipulations, the Act might make a difference in CAFA cases. However, such an argument relies on a finding that a stipulation does, in fact, indicate bad faith, and the passage of the Act does nothing to change the answer to a question most courts have already answered in the negative.³⁷²

The Act’s approach to 1332(a) diversity cases with regard to lowball and indeterminate complaints should be extended to 1332(d) cases, i.e., CAFA cases, but this change cannot and should not be initiated by the courts. Such interpretation would contradict a plain reading of the statute, which unambiguously limits the statute’s scope to traditional diversity cases.³⁷³ Not only would a wider reading be problematic at the theoretical level of statutory interpretation, such a reading would contradict the approach utilized by the Supreme Court in analogous cases.³⁷⁴ Therefore, the improvements described here should be made by Congress rather than judges. While the Act is a step in the right direction, for purposes of solving the problems created by binding stipulations it is an inconsequential one.

C. Fixing the Problem

1. Of Complaints Lowballed and Indeterminate

Correcting the problem of binding stipulations will mean little if lowball and indeterminate complaints accomplish the same ends without even pretending to bind the plaintiffs.³⁷⁵ Inconsequential as it may be in its present form, the Act provides the mechanism for fixing the problems of

371. See 28 U.S.C. § 1446(c).

372. See, e.g., *Lowdermilk v. U.S. Bank Nat’l Ass’n*, 479 F.3d 994, 1002–03 (9th Cir. 2007) (embracing a plaintiff’s option to plead damages beneath the jurisdictional minimum as a method of avoiding federal jurisdiction and refusing to find bad faith on that basis).

373. See Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 103, 125 Stat. 758 (codified at 28 U.S.C. § 1446(c) (2006 & Supp. 2011)).

374. See, e.g., *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1440 (2010) (“[E]vidence of the New York Legislature’s purpose is pretty sparse. But even accepting the dissent’s account of the Legislature’s objective at face value, it cannot override the statute’s clear text.”); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 566–67 (2005) (holding that § 1367 “by its plain text overruled” a pair of Supreme Court cases and refusing to inquire into legislative history). In any event, the legislative history seemingly militates toward the conclusion that removal under CAFA was intentionally ignored. See H.R. REP. NO. 112-10, at 16 (2011) (repeatedly citing the minimum amount in controversy specifically as \$75,000).

375. See *supra* notes 144–46 and accompanying notes.

lowball and indeterminate complaints in CAFA cases. Analogous provisions should be drafted and enacted that treat such complaints identically, as they will now be treated in Section 1332(a) actions. This proposal is nothing new.³⁷⁶ However, the Act's enactment now allows us to see what such an act would look like.³⁷⁷

The provisions were designed: “[T]o address issues relating to uncertainty of the amount in controversy when removal is sought, *e.g.*, when state practice either does not require or permit the plaintiff to assert a sum claimed or allows the plaintiff to recover more than an amount asserted.”³⁷⁸

This is exactly our problem. As the House Report states, judicial approaches to the issue have not always fared well, especially in cases of lowball complaints where the amount pleaded is in no way binding.³⁷⁹ Legislation should be passed that functions in a manner identical to 28 U.S.C. § 1446(c)(2): Where the state does not to permit a “specific sum” to be pleaded—the indeterminate complaint—or where the sum pleaded will not be binding—the lowball complaint—the defendant can assert the amount in controversy in his notice of removal.³⁸⁰ The defendant in that case would

376. See Kristen L. Wenger, Note, *The Class Action Fairness Act of 2005: The Limits of Its Text and the Need for Legislative Clarification, Not Judicial Interpretation*, 38 FLA. ST. U. L. REV. 678 (2011).

377. In pertinent part, the Act amends 28 U.S.C. 1446(c) by adding the following two paragraphs:

(2) If removal of a civil action is sought on the basis of the jurisdiction conferred by section 1332(a), the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy, except that—

(A) the notice of removal may assert the amount in controversy if the initial pleading seeks—

(i) nonmonetary relief; or

(ii) a money judgment, but the State practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded; and

(B) removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A) if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a).

(3)(A) If the case stated by the initial pleading is not removable solely because the amount in controversy does not exceed the amount specified in section 1332(a), information relating to the amount in controversy in the record of the State proceeding, or in responses to discovery, shall be treated as an ‘other paper’ under subsection (b)(3).

(B) If the notice of removal is filed more than 1 year after commencement of the action and the district court finds that the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal, that finding shall be deemed bad faith under paragraph (1).

Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 103, 125 Stat. 758, 760–61 (codified at 28 U.S.C. § 1446(c) (2006 & Supp. 2011)).

378. H.R. REP. NO. 112-10, at 15.

379. *Id.*

380. *Cf.* 28 U.S.C. § 1446(c)(2)(A)(ii) (2006). Note that the rare binding *ad damnum* clause is left unaffected by this provision. This makes sense outside the class action context because it serves as a binding stipulation. See Noble-Allgire, *supra* note 69, at 720–21. The plaintiff, in effect, is waiving any claim to a greater amount of damages. See *id.* “The defendant, therefore, has no right

then need only to prove by a preponderance of the evidence that the amount in controversy exceeds \$5 million for the court to maintain jurisdiction.³⁸¹

In the case of an indeterminate complaint that left the defendant unable to ascertain the amount in controversy, section 1446(c)(3)'s analogue would be implicated. Under its provisions, if discovery led to evidence that the amount in controversy was, in fact, satisfied, the defendant would have thirty days to remove pursuant to section 1446(b)(3).³⁸² Finally, the protections of subparagraph 1446(c)(3)(B) make intentional obfuscation of the amount in controversy bad faith per se, thus extending the removal timetable pursuant to section 1446(c)(1).³⁸³ An analogous provision should be enacted that applies to CAFA cases.

2. Binding Stipulations

Of course, the problem addressed leaves the specific question of this Comment unanswered: What is to be done with binding stipulations? For reasons theoretical, legal, and practical, the right answer is the most extreme. Judges should impose a per se rule against giving effect to any purported binding stipulations. The theoretical reasons for such a rule have their basis primarily in agency theory.³⁸⁴ The legal reasons flow naturally from considerations of due process and the obligatory rigorous inquiry into Rule 23(a)(4)'s adequacy requirement.³⁸⁵ The practical reasons stem from considerations of complex litigation and efficiency.³⁸⁶ While, as previously acknowledged, the power of the judiciary to impose such rules is not plenary, it certainly extends far enough to ban this practice.³⁸⁷

a. The Legal Basis for a (Near) Outright Prohibition of Binding

to have the case tried in federal court because his or her exposure is clearly limited to an amount that falls below the federal jurisdictional threshold." *Id.* at 692. Because it is effective as a binding stipulation, the problems it raises are problems of adequate representation, and the practice should be banned on Rule 23(a)(4) and due process grounds. *See* discussion *infra* Part V.C.2.a.

381. *Cf.* 28 U.S.C. § 1446(c)(2)(B).

382. *Cf.* 28 U.S.C. § 1446(c)(3)(A). The operative portion of section 1446(b)(3) provides that "if the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant . . . of . . . other paper from which it may first be ascertained that the case is one which is or has become removable."

383. *See* 28 U.S.C. § 1446(c)(1), (3)(B).

384. *See infra* note 403 and accompanying text.

385. *See infra* note 398 and accompanying text.

386. *See infra* notes 411–22 and accompanying text.

387. The authority to impose the rule comes directly from Rule 23's adequacy requirement, *see* FED R. CIV. P. 23(a)(4), and the Due Process Clauses of the Constitution, *see* U.S. CONST. amend. V, XIV.

Stipulations

The problems with binding stipulations are fundamental. They are constitutional in scope.³⁸⁸ They strike to the heart of any conceptions of fairness.³⁸⁹

The class action has its roots in equity.³⁹⁰ In addition to being concerned with efficiency,³⁹¹ it must be, and always has been, limited by considerations of justice.³⁹² Some of its inherent limitations raise profound questions in this regard, many of which have been the subject of intense scholarly debate.³⁹³ The binding stipulation, however, is not an integral component of the class action device. Its relatively modern origins are in bipolar litigation,³⁹⁴ and its use need not be extended beyond, to the realm of class action.

That a class action will have wide-ranging preclusive effects is not a contested proposition.³⁹⁵ Rather, the preclusive effects make the class action a worthwhile device.³⁹⁶ It is also a source of danger to absentee class

388. See U.S. CONST. amend. V, XIV; see also *Hansberry v. Lee*, 311 U.S. 32, 45 (1940) (explicitly equating adequate representation with due process).

389. See *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 24 (1981). As the Supreme Court, speaking through Justice Potter Stewart in one of his last opinions, put it:

For all its consequence, “due process” has never been, and perhaps can never be, precisely defined. . . . “[U]nlike some legal rules,” . . . due process “is not a technical conception with a fixed content unrelated to time, place and circumstances.” Rather, the phrase expresses the requirement of “fundamental fairness,” a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what “fundamental fairness” consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Id. at 24–25 (citation omitted).

390. 7A CHARLES ALAN WRIGHT, FEDERAL PRACTICE & PROCEDURE § 1751 (3d ed. 2005). It is worth remembering that *equity* is defined as “[f]airness; impartiality; evenhanded dealing” and “[t]he body of principles constituting what is fair and right; natural law.” BLACK’S LAW DICTIONARY 619 (9th ed. 2009).

391. See *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974).

392. See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846–47 (1999) (refusing to allow a settlement that would bind future claimants to its terms notwithstanding the conceded efficiency of the plan).

393. See Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 866 (1977) (“Depending on their persuasions, judges, lawyers, and laymen either praise or curse [the class action]”); see also TIDMARSH & TRANGSRUD, *supra* note 51, at 341 (“No other federal rule of civil procedure has generated as much debate, or as much division, as the modern class action rule—Rule 23.”).

394. See *supra* Part IV.C.2.

395. See Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 718–20 (2005) (assuming preclusive effects and exploring how far they should range). Indeed, the crux of the “fierce debate” over preclusion that Professor Wolff describes is simply whether ostensibly precluded parties should be able to attack binding judgments collaterally by alleging inadequate representation. See *supra* notes 49, 196–97.

396. See 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1751 (3d ed. 2005).

members, making necessary Rule 23(a)(4)'s adequacy requirement and Rule 23(e)'s settlement review procedure.³⁹⁷ While this problem is essentially a Rule 23(a)(4) problem, the fact that Rule 23(e) can be avoided by way of stipulation, which would entirely denude the provision, vividly illustrates a key problem with binding stipulations.³⁹⁸

The legal analysis should hinge on Rule 23(a)(4), which requires class representatives and, by extension, class counsel, to “fairly and adequately protect the interests of the class.”³⁹⁹ As is the case with each of Rule 23(a)'s four requirements, it is already well established that the inquiry is to be “rigorous.”⁴⁰⁰ While Rule 23 concededly only applies in the certification context, it is clear that Rule 23(a)(4) should be considered “at all times” because of the specter of the Due Process clause.⁴⁰¹ “[C]ounsel’s greater concern for receiving a fee than for pursuing the class claims” can constitute inadequate representation.⁴⁰²

397. See 7A, 7B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 1765, 1797 (3d ed. 2005).

398. As discussed *infra*, notes 423–29, parties in a class action cannot settle unless the court reviews the agreement and finds it fair and adequate. FED. R. CIV. P. 23(e). Binding stipulations, if allowed, both wrest from federal courts the ability to make such an assessment and simultaneously place an upper limit on the plaintiffs’ recovery.

399. See FED. R. CIV. P. 23(a)(4); see also FED. R. CIV. P. 23(g) (expressly imposing an identical fiduciary duty upon class counsel).

400. See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). It is worth pointing out that the application of a less-than-rigorous analysis of Rule 23(a)(2) was recently rejected soundly by the Supreme Court. See *id.* at 2550–57 (conducting an intensive analysis into commonality). The district court, which was ultimately reversed by the Supreme Court in *Dukes*, cited the requirement that it undertake a “rigorous” analysis but then qualified the rule by staking a claim to “broad discretion.” *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 143 (N.D. Cal. 2004), *aff’d*, 603 F.3d 571 (9th Cir. 2010), *rev’d*, 131 S. Ct. 2541 (2011). The requirement of commonality then became transmuted into a “permissive and minimal burden.” See *id.* at 166. Just as the rigor of 23(a)(2) has been vindicated, so too should the rigor necessary in a proper (a)(4) analysis. At least one district court, perhaps recognizing the rule’s constitutional basis, seems to have applied heightened scrutiny to the adequacy requirement. See *Hettinger v. Glass Specialty Co.*, 59 F.R.D. 286, 296 (N.D. Ill. 1983) (“[Rule 23(a)(4)] must be strictly construed and stringently applied, since many absent class members will be bound by the judgment.”); see also 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1769 (3d ed. 2005) (“[B]ecause of the broad binding effect of class-action judgments, serious attention is given to the adequacy of representation of those absent class members who will be bound by the judgment.”).

401. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (citing *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940)); see also Debra Lyn Bassett, *When Reform is Not Enough: Assuring More Than Merely “Adequate” Representation in Class Action Cases*, 38 GA. L. REV. 927, 932 (2004) (“Adequacy of representation may be challenged at any stage of a class action, and it is a prerequisite both for class certification and for a binding judgment.”).

402. *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1078 (2d Cir. 1995) (citing 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1769.1 (1st ed. 1986)); see also 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1769.1 (3d ed. 2005) (“[T]he substantial attorney fees that may be awarded also may mean that at some point—in

*b. Aligning the Interests: How Prohibiting Binding Stipulations
Minimizes Agency Costs*

On the more theoretical end of the spectrum, prohibiting stipulations is a clean and clear way of reducing the agency cost problems that plague class actions.⁴⁰³ While the recent rise of big plaintiffs' firms has arguably antiquated Professor Coffee's model⁴⁰⁴—"class counsel as a solo practitioner or small law firm, cohesive in its desire to maximize law firm profit and capable of pursuing that one overriding interest by pegging case investment to expected fees"⁴⁰⁵—even his critics seem to concede its retained vitality in "comparatively smaller cases" of, say, \$5 million.⁴⁰⁶ The more divergent the interests between the agent and the principal, the higher the agency costs.⁴⁰⁷ Prohibiting binding stipulations unfortunately deprives the plaintiffs' attorney of a weapon in his arsenal, but it also aligns his interests more cleanly with his client's.⁴⁰⁸ Professor Coffee argues that "class members, as

particular when settlement discussions take place—the attorneys' interests and those of the class will conflict.").

403. See *supra* note 72.

404. See Morris Ratner, *A New Model of Plaintiffs' Class Action Attorneys*, 31 REV. LITIG. (forthcoming 2012) (manuscript at 4–5), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1924278.

405. *Id.* at 4.

406. See *id.* at 55 ("It would not make sense to litigate a case involving only, say, \$5 million in actual damages the way plaintiffs prosecuted [previously cited cases] each of which involved an investment of lodestar and hard costs by class counsel, collectively, well in excess of \$5 million."). The cases Professor Ratner cited involved damages conceivably in the billions of dollars, and his argument is that agency theory analysis might be outdated in view of the modern plaintiffs' firm, which pursues cases with a vigor not easily tied to bottom line considerations. See *id.* at 47–55. "[R]elatively lower value, smaller cases more clearly require counsel to at least attempt to calibrate case-investment decisions," observes Professor Ratner, a concession that the agency cost problems and causes Professor Coffee identified remain pertinent at least as to those cases. See *id.* at 55.

It is interesting to note that Professor Ratner, in arguing that there has been a paradigm shift for plaintiffs' class action attorneys, develops a typology of such attorneys. See *id.* at 23–24. There are big firms, which get no special treatment but are the focus of his article. See *id.* at 23. Then there is a subset of small firms types: "small firms with big aspirations"—these firms earn his endorsement and seem to be youngling big firms; "small firms with small aspirations"—firms of this sort "tend to file 'copycat' complaints [and] are more likely to be driven at any given moment and to the extent practicable by hoped-for attorneys' fees;" and finally, "outsider firms," which include "professional objectors, often solo practitioners, who intervene in class litigation at specific points, often just to hold up larger firms for a share of the fee, by threatening to delay finality, and thus payment." *Id.* at 23–24. According to Professor Ratner, "[t]hese last two categories of small firms are commonly described within the plaintiffs' class action bar, colloquially, as 'bottom feeders.'" *Id.* at 24. The very act of filing a binding stipulation seems to demonstrate an emphasis on outcome and profit that, if it does not belie Professor Ratner's model, at least suggests that the firms employing the tactic belong in one of the last two categories of small firms. And the recognition, *supra*, that cases of less than \$5 million also demand closer inspection of ultimate profitability militates toward that same conclusion.

407. See Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189, 189–90 (1987) (describing agency problems as the result of divergent interests between the plaintiff and the attorney).

408. By taking the case, the plaintiffs' lawyer has "effectively purchase[d] an equity interest in

the principals, should be deemed to have consented to the representation only if the agency costs associated with the relationship have been minimized.”⁴⁰⁹ Abolishing the practice of binding stipulations accomplishes just that.⁴¹⁰

c. Practical Reasons for Rejecting Binding Stipulations

Under perfect circumstances, there is no principled reason that binding stipulations should be completely prohibited. If each of the class members not only got an opt-out notice but understood it—grasped the tactical decision being made to forego a portion of the possible recovery—and individually approved of such a technique, that would be a start. That creates a situation analogous to *St. Paul*.⁴¹¹

Still, questions of national importance and reverse federalism would remain.⁴¹² If a class action were of the sort that gave state judges the final word on issues affecting the nation at large—the very cases that CAFA was designed to usher into federal court, that is⁴¹³—the presence of a binding stipulation should not outweigh Congress’s unambiguous preference that the case be heard in a federal forum.⁴¹⁴ So, clearly another carve-out would need to be designed to account for this consideration. An exception to the exception, if you will.

If this all sounds too complicated and ripe for inefficient motion practice between litigants, that is only because it is.⁴¹⁵ CAFA is already too

the litigation from the plaintiff, offering his or her future services in exchange for a percentage of the recovery.” *Id.* at 189. The investment comes primarily in the form of time and resources spent in pursuing the litigation. See David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. Rev. 72, 76 (1983). As a rational and risk-averse actor, the incentive to settle quickly, thus ensuring a profit while minimizing opportunity costs, is great. See Leslie, *supra* note 55, at 1042. Keeping the case in state court increases the probability of class certification, which in turn, makes a lucrative settlement practically a foregone conclusion. See *supra* note 193. However, none of the rational calculus considers the plaintiff, who is typically more interested in a vigorous pursuit of her claim than the lawyer who wants to minimize risk. See Coffee Jr., *Understanding the Plaintiff’s Attorney*, *supra* note 72, at 685–86. Thus, binding stipulations represent a paradigmatic example of the agency cost problems that plague class actions, and the only thing that makes them remarkable is how easily they can be eliminated.

409. Coffee, *Class Action Accountability*, *supra* note 46, at 376.

410. Concededly, this modest proposal does not solve the agency cost problem, not by a long shot. But it certainly does its part to minimize agency costs. See *id.*

411. See *supra* Part IV.C.2.

412. See discussion *supra* Part IV.B.

413. See *supra* notes 272–74 and accompanying text.

414. See Class Action Fairness Act of 2005 § 2(b)(2), 28 U.S.C. § 1711 note (2006) (Findings and Purposes).

415. Consider the current federalism-based exceptions and the litigation they have spawned.

complicated.⁴¹⁶ Those few cases in which binding stipulations would be theoretically permissible do not outweigh considerations of judicial economy. The creativity and tenacity of lawyers on both sides proves this point.⁴¹⁷ Instead of remedying the problem identified, any compromise would only worsen it. The likely result would be a slew of new circuit splits, new theories, and new arguments.⁴¹⁸ CAFA is supposed to promote efficiency and yet it has already led to inefficiencies of its own.⁴¹⁹ This approach would only compound the problem. If plaintiff autonomy were a concept grounded in the Constitution, perhaps this outcome would be unavoidable.⁴²⁰ However, the rule announced in *St. Paul* is not one of constitutional dimensions.⁴²¹ For the purposes of class actions, the idea that the plaintiff is the master of his own complaint has too little to commend it and too much to condemn it.⁴²² It should be discarded.

d. Judicial Scrutiny: An Alternative Approach Considered and Rejected

If a per se rule against binding stipulations is unsatisfactory, courts could always subject each proffered stipulation to scrutiny. Such an exercise would be analogous to the scrutiny already applied for actual settlements.⁴²³

416. See TIDMARSH & TRANGSRUD, *supra* note 51, at 317 (describing CAFA's provisions as "the most complicated, fact-intensive jurisdictional provisions that Congress has ever created").

417. See *supra* notes 63–84 and accompanying text. Defendant's attorneys show their tenacity by the sheer number of cases removed to federal court pursuant to CAFA, and by the novel arguments advanced when a case seems to clearly fall outside the statute. See, e.g., *Anwar v. Fairfield Greenwich Ltd.*, 676 F. Supp. 2d 285 (S.D.N.Y. 2009) (rejecting an "astoundingly expansive" reading of CAFA by the defendants and remanding to state court where there were less than 100 plaintiffs); *Walker v. Motricity*, 627 F. Supp. 2d 1137 (N.D. Cal. 2009) (remanding and, *sua sponte*, imposing sanctions on the defendant for frivolous removal), *rev'd in part sub nom.* *Walker v. Morgan*, 386 F.App'x 601 (9th Cir. 2010).

418. The factual inquiry alone—into whether (1) the entire class consented to the stipulation or, in the alternative, whether (2) the class, as defined, could have a preclusive effect on unforeseen individuals—could conceivably be relitigated each time the exception was invoked. And the exceptions currently in place to keep local matters in local courts already show a marked amenability to litigation, see Stephen J. Shapiro, *Applying the Jurisdictional Provisions of the Class Action Fairness Act of 2005: In Search of a Sensible Judicial Approach*, 59 BAYLOR L. REV. 77, 85–88 (2007) (describing the various legal issues created by the home state and local exceptions and the circuit split that has developed), which a "national importance" exception would surely be subject to.

419. See Clermont & Eisenberg, *supra* note 34, at 1567 ("The result [of vague and ambiguous provisions] has been much more social waste due to CAFA than to comparable statutes. And that waste will—ironically—offset any of the benefits that CAFA's supporters were attempting to create by corraling 'wasteful' class action litigation.").

420. That is to say, an outright prohibition on binding stipulations would possibly run afoul of the Constitution and any attempt to reign them in would, of necessity, be nuanced, even if that led to inefficiency. See *INS v. Chadha*, 462 U.S. 919, 944, 958–59 (1983) (explaining, in a different context, that when the Constitution and considerations of efficiency conflict, efficiency must be swept aside).

421. See *supra* Part IV.C.2.

422. See *supra* Part IV.C.

423. See FED. R. CIV. P. 23(e)(2). Under the rule, a binding settlement may be approved "only

The inquiry would again revolve primarily around adequacy.⁴²⁴ Essentially, if a settlement for less than \$5 million could be approved by the court, the stipulation would be permitted.

The primary problem with this approach is that at the removal stage the facts are not often developed enough to allow for a meaningful inquiry.⁴²⁵ This creates obvious problems vis-à-vis efficiency. Hearings are required under Rule 23(e), and the inquiry is fact-intensive.⁴²⁶ Such an inquiry presupposes a developed record.⁴²⁷ But perhaps the larger problem is that courts would be asked to undertake, with limited information, an analysis they could ill afford to get wrong. For example, what happens if factual developments make the value of a case suddenly grow exponentially?⁴²⁸

The fundamental point is that the adequacy of a stipulation cannot be accurately determined until the record is developed enough that the adequacy of a proposed settlement could be determined, and these points will not often coincide because, by rule, cases must be removed in their very early stages and, to be effective, any purported stipulation would necessarily be made even prior to that point, likely at the very onset of the litigation.⁴²⁹ Thus, pursuit of this compromise approach is inherently problematic. It should be rejected.

[if] after a hearing and on finding that it is fair, reasonable, and adequate.” *Id.*

424. See 7B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1797 (3d ed. 2005).

425. See *infra* notes 426–28.

426. See 7B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1797.1 (3d ed. 2005).

427. See Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 515 (2011).

428. See Ratner, *supra* note 404, at 43 (noting that estimates and expectations are “mostly guesswork” that rely on events, some of which may be unforeseeable). Professor Ratner uses two examples to illustrate his point:

[A] race discrimination class action lawsuit against Texaco settled in 1996 for what was then a record amount—\$176 million—after the plaintiffs obtained an audio-recording in which top company executives admitted to destroying documents responsive to discovery requests and used racial slurs to refer to the class action plaintiffs. Similarly, in Holocaust-era class action litigation against several Swiss banks, . . . the value of the litigation was dramatically enhanced after a night-watchman rescued documents from the shredder that were arguably related to plaintiffs’ claims. It is impossible to quantify and, at the same time, difficult to overstate how the evidence of the defendant’s document destruction added to the value of the litigation.

Id.

429. In class actions, it takes three years on average for cases to settle. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 820 (2010). Questions of removal, by contrast, should typically be addressed within 60 days; the case must be removed within 30 days of the action’s filing, see 28 U.S.C. §§ 1446(b), 1453 (2006), and the remand must then be requested within a new 30-day time period, see 28 U.S.C. §§ 1446(c), 1447(c).

VI. CONCLUSION

A quick look back at Westley and Buttercup's litigation.⁴³⁰ Westley, you recall, wanted to limit his lawsuit to less than \$75,000, thereby avoiding federal court at the expense of potentially recovering less than he might otherwise have. His case falls squarely within *St. Paul's* facts,⁴³¹ and the judge's response should be simple: As you wish. Buttercup, on the other hand, wants so badly to avoid federal court that she offers to make that same sacrifice, not only for herself but for the thousands of others she is under a duty to adequately represent. Not only that, but we can be confident that she is not the one making the decision at all; her lawyers are.⁴³² Her case can and should be distinguished from *St. Paul* because the sacrifice is borne by the class while the lawyers reap only benefits.⁴³³

Allowing binding stipulations contradicts Rule 23(a)(4)'s command that absent class members be adequately represented and also violates their co-extensive right to due process under the Constitution.⁴³⁴ Utilization of the tool creates perverse incentives for class action attorneys who can make a quick buck by filing a copycat lawsuit in a state court⁴³⁵ and submitting a binding stipulation that damages sought or recovered will not exceed \$5 million;⁴³⁶ conducting a reverse-auction with the defendants, thereby taking cases out from under the plaintiffs' attorneys who expended considerable resources in investigating and pursuing the original claims;⁴³⁷ and finally pocketing huge fees while the class members get worthless coupons⁴³⁸ and are precluded from pursuing real justice.⁴³⁹

This is not a parade of horrors. This is *Figueroa v. Sharper Image Corp.*⁴⁴⁰ with only the introduction of a binding stipulation into the mix.⁴⁴¹ Prohibiting binding stipulations is not anti-consumer, pro-big business, pro-defendant, or even anti-plaintiffs' attorney.⁴⁴² It is a rational reaction to a budding problem.

430. See *supra* notes 1–7 and accompanying text.

431. See *supra* notes 318–20 and accompanying text.

432. See Coffee Jr., *Rethinking the Class Action*, *supra* note 72, at 656 (noting that “lawyers today so totally dominate the process and pursue their own independent interests (which usually favor an early settlement)”).

433. See *supra* notes 318–36 and accompanying text.

434. See *supra* notes 371–83 and accompanying text.

435. See *supra* note 389.

436. See *supra* note 76–79 and accompanying text.

437. See *supra* notes 43–47 and accompanying text.

438. See *supra* notes 49–58 and accompanying text.

439. See *supra* note 87 and accompanying text.

440. 517 F. Supp. 2d 1292 (S.D. Fla. 2007).

441. See *supra* note 58.

442. To borrow from Professor Ratner's typology, the proposal would be only anti-bottomfeeder. See Ratner, *supra* note 404.

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