

WIELDING THE SLEDGEHAMMER: LEGISLATIVE SOLUTIONS FOR CLASS ACTION JURISDICTIONAL REFORM

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In this Note, Thomas Woods examines recent congressional proposals that would allow virtually all class actions to be filed in or removed to federal court. Woods begins by analyzing the problems of forum shopping and overlapping classes in current practice. Woods then argues that, while the congressional proposals would alleviate these problems, the proposals would exacerbate federalism and docket congestion concerns. Woods concludes with a proposal for expanding the exceptions to federal jurisdiction proposed by Congress.

INTRODUCTION

Since the late 1970s, polybutylene (PB) pipes have been installed in over six million homes.¹ It was later discovered that PB did not tolerate the chlorine commonly added to drinking water.² Massive leaks and extensive property damage occurred.³

In 1993, a nonprofit organization filed a nationwide class action against several PB manufacturers in Texas state court.⁴ The parties reached a \$750 million settlement⁵ a year later, which the presiding judge, without comment, refused to approve.⁶ The publicity surrounding the proposed Texas settlement led competing counsel to file an identical class action in Alabama state court.⁷ Meanwhile, the Texas counsel left state court and filed an identical suit in Texas fed-

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¹ See Richard B. Schmitt, *Leaky System: Suits over Plastic Pipe Finally Bring Relief, Especially for Lawyers*, *Wall St. J.*, Nov. 20, 1995, at A1 (chronicling polybutylene (PB) class action litigation).

² See *id.*

³ See *id.*

⁴ See John C. Coffee, Jr. & Susan P. Koniak, *Rule of Law: The Latest Class Action Scam*, *Wall St. J.*, Dec. 27, 1995, at A11 (criticizing conduct of class counsel in PB class action litigation).

⁵ See Schmitt, *supra* note 1, at A1.

⁶ See *id.* Texas procedure, like the Federal Rules of Civil Procedure, requires judicial approval of any proposed class settlement. See *Tex. R. Civ. P.* 42(e).

⁷ See Schmitt, *supra* note 1, at A1.

eral court.⁸ When class counsel experienced difficulties in federal court, they abandoned Texas in favor of an identical suit in Tennessee.⁹

With competing suits now in Alabama and Tennessee state courts, "a war between the . . . state class actions erupted."¹⁰ The competing class counsel each tried to discredit publicly the competing action.¹¹ Both counsel hired public relations firms and ran disparaging advertisements on television and in local newspapers.¹² Eventually, a California state judge held a settlement conference for the competing counsel¹³ and convinced them to settle in Tennessee state court.¹⁴ The ensuing Tennessee settlement "did little to improve benefits for the class" relative to the original proposed Texas settlement.¹⁵ However, the new settlement not only assured that both sets of class counsel would be entitled to attorneys' fees,¹⁶ but also allowed for substantially more attorneys' fees relative to the rejected Texas state court settlement.¹⁷

The PB litigation exemplifies the rampant abuse that occurs in current class action practice. Class counsel have virtually unlimited discretion to choose a state or federal forum;¹⁸ the initial PB counsel

⁸ See Coffee & Koniak, *supra* note 4, at A11.

⁹ See Schmitt, *supra* note 1, at A1.

¹⁰ *Id.*

¹¹ See *id.*

¹² See *id.* The Tennessee counsel leaked to the press the claim that a former topless dancer had filed a legal malpractice suit against the lead Alabama counsel. The suit charged that the Alabama counsel had gotten the dancer pregnant and then threatened to drop the dancer as his client if she did not consent to an abortion. Most of the public advertisements boasted of the previous success of each counsel in individual PB suits. See *id.*

¹³ See Kathryn Ericson, *Cross-Country Tri-Court Conference Produces New Plumbing Pipe Settlement*, West's Legal News, Nov. 14, 1995, available in 1995 WL 911245. The California judge's intervention was motivated by an effort of California attorneys to have all California residents opt out of the two nationwide classes. See *id.*

¹⁴ See *Cox v. Shell Oil Co.*, Civ. A. No. 18844, 1995 WL 775363 (Tenn. Ch. Ct. Nov. 17, 1995).

¹⁵ See Coffee & Koniak, *supra* note 4, at A11.

¹⁶ See *id.*

¹⁷ See Schmitt, *supra* note 1, at A1. In a well-publicized incident, the lead Alabama counsel later settled individual suits not covered by the nationwide settlement and proposed an award of attorneys' fees that the trial judge described as "excessive and indeed almost scandalous." Alison Frankel, *Greedy, Greedy, Greedy*, Am. Law., Nov. 1996, at 70, 72. Dissatisfied clients sued the counsel over the fees claimed. See *Spera v. Fleming, Hovenkamp & Grayson, P.C.*, 4 S.W.3d 805, 812-13 (Tex. Ct. App. 1999) (affirming trial court's refusal to certify clients as class).

¹⁸ This Note addresses only those class actions in which federal jurisdiction is founded on diversity of citizenship. Federal question jurisdiction classes raise fewer concerns, since defendants can remove these cases to federal court. See 28 U.S.C. § 1441(a) (1994). The defendants could then consolidate the classes for pretrial purposes. See *id.* § 1407(a) (providing for consolidation of multidistrict litigation (MDL)). As will be discussed at length,

were able to move from Texas state court, to Texas federal court, and to Tennessee state court merely by amending the pleadings. As the PB experience shows, such discretion encourages forum shopping.¹⁹ Furthermore, under current practice defendants are unable to consolidate competing class actions. This result is unjustified.

In response to the problems of forum shopping and competing classes, Congress is currently considering proposals that would allow virtually all²⁰ classes to be filed in, or removed to, federal court.²¹ While class action jurisdictional²² reform is necessary, the current con-

the ability to consolidate classes undercuts the incentives for class action abuse. See *infra* notes 53-61 and accompanying text (discussing problems of competing classes).

¹⁹ The problems associated with forum shopping are discussed *infra* notes 42-52 and accompanying text. Three of the states involved in the PB litigation—Texas, Alabama, and Tennessee—are magnets for nationwide class actions. See John C. Coffee, Jr., *Class Actions: Interjurisdictional Warfare*, N.Y. L.J., Sept. 25, 1997, at 5 (identifying Texas, Alabama, and Louisiana as host to many nationwide classes); David A. Price, *Class-Action Relief on the Way?*, *Investor's Bus. Daily*, June 7, 1996, at A1, available in Lexis, News Library, INVDLY file (claiming Alabama and Tennessee have become “havens” for nationwide classes) (quoting Fred Souk, products liability defense attorney).

²⁰ This Note does not address those congressional proposals aimed at relaxing the diversity requirements for mass disasters and other single events. See Multidistrict, Multiparty, Multiforum Jurisdiction Act of 1999, H.R. 2112, 106th Cong. (providing for “Federal jurisdiction of certain multiparty, multiforum civil actions”).

²¹ See Interstate Class Action Jurisdiction Act of 1999, H.R. 1875, 106th Cong.; Class Action Fairness Act of 1999, S. 353, 106th Cong. For a brief discussion of the Senate bills, see Linda Silberman, *The Vicissitudes of the American Class Action—With a Comparative Eye*, 7 Tul. J. Int'l & Comp. L. 201, 216-17 (1999). At the time of publication, H.R. 1875 had passed the full House while S. 353 remained in the Senate Judiciary Committee.

In the 105th Congress, the House Judiciary Committee passed similar legislation, the Class Action Jurisdiction Act of 1998, H.R. 3789, 105th Cong., which the close of Congress prevented the full House from considering. See Hearing on H.R. 1875, the “Interstate Class Action Jurisdiction Act of 1999,” and H.R. 2005, the “Workplace Goods Job Growth and Competitiveness Act of 1999,” Before the House Comm. on the Judiciary, 106th Cong. (1999) (visited Mar. 8, 2000) <<http://www.house.gov/judiciary/1.htm>> [hereinafter July 1999 Hearings] (statement of Guy Miller Struve, Ass'n of the Bar of the City of N.Y.). Similar legislation was introduced in the Senate, see Class Action Fairness Act of 1998, S. 2083, 105th Cong., but stalled in committee, see 145 Cong. Rec. S1166 (daily ed. Feb. 3, 1999) (statement of Sen. Grassley). Any relevant differences among the bills are discussed in the text. For a review of past failed legislative class action jurisdictional proposals, see generally George F. Sanderson III, Note, *Congressional Involvement in Class Action Reform: A Survey of Legislative Proposals Past and Present*, 2 N.Y.U. J. Legis. & Pub. Pol'y 315 (1999).

In 1999, the President signed the Y2K Act, which provides for original and removal jurisdiction over virtually all Y2K class actions. See Y2K Act, Pub. L. No. 106-37, § 15(c), 106 Stat. 185, 201-02 (1999) (to be codified at 15 U.S.C. § 6614(c)). A Y2K action is defined as a civil action commenced in federal or state court in which plaintiff's injury “arises from or is related to an actual or potential” computer failure resulting from Year 2000 transition problems. See *id.* § 3(1), (2) (to be codified at 15 U.S.C. § 6602(1), (2)).

²² This Note does not address congressional class action reform proposals outside of the jurisdictional context. The Senate proposal discussed in this Note contains such reform proposals. See S. 353, 106th Cong. § 2 (1999) (limiting attorneys' fees and requiring state

gressional proposals are overbroad. Giving both class counsel and defendants virtually unlimited access to federal court would swamp an already heavily congested federal docket and stymie future attempts to enlarge federal question jurisdiction. Such proposals also raise serious federalism concerns.

A balance must be struck between current practice and the current congressional proposals. This Note argues that, rather than allowing virtually all class actions into federal court, Congress must enlarge the current exceptions to jurisdiction contained in the proposals. Enlarging the exceptions will allow states to retain control over more class actions, which will minimize the federalism and docket congestion concerns raised by federalizing all classes. Part I of this Note examines the current class action jurisdictional framework. Part II discusses how the congressional proposals attempt to alter this framework and also identifies the concerns raised by the proposals. Part III advocates modification of the congressional proposals.

I

CURRENT PRACTICE: CLASS COUNSEL'S VIRTUALLY UNFETTERED DISCRETION

A. Doctrinal Framework and Class Counsel Manipulation

Class counsel currently have enormous discretion to choose a state or federal forum.²³ Diversity of citizenship is satisfied if the jurisdictional amount in controversy is met²⁴ and there is complete di-

attorney general notification of proposed class action settlements); id. § 5 (strengthening availability of Rule 11 sanctions).

²³ See H.R. Rep. No. 106-320, at 7 (1999) ("[The] current rules can be used to game the system and keep interstate class actions out of Federal court."); Georgene M. Vairo, *Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role for Federal Common Law?*, 54 *Fordham L. Rev.* 167, 180 n.63 (1985) (discussing tactics class counsel may employ to "insure" federal forum); see also Geoffrey P. Miller, *Overlapping Class Actions*, 71 *N.Y.U. L. Rev.* 514, 519 (1996) ("The most important choices facing class counsel in determining where to bring suit are not legal but practical.").

²⁴ See 28 U.S.C. § 1332 (1994). It used to be clear that each individual plaintiff, whether named or unnamed, had to satisfy the jurisdictional requirement of \$75,000. See *Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973) (holding that each individual class member must meet jurisdictional amount); *Snyder v. Harris*, 394 U.S. 332, 341-42 (1968) (finding that separate and distinct claims by class members may not be aggregated to meet jurisdictional amount).

Circuit courts have split on whether the supplemental jurisdiction statute, 28 U.S.C. § 1367 (1994), has overruled *Zahn* and allows class members who have claims under \$75,000 to be included in the class as long as one named plaintiff meets the jurisdictional amount. Compare *Free v. Abbott Lab. (In re Abbott Lab.)*, 51 F.3d 524, 527-29 (5th Cir. 1995) (finding that § 1367 now allows parties who do not meet jurisdictional amount to be included in class actions), cert. granted, 120 S. Ct. 525 (1999), with *Leonhardt v. Western Sugar Co.*, 160 F.3d 631, 640-41 (10th Cir. 1998) (holding that § 1367 did not overrule *Zahn*

versity between all of the named plaintiffs and defendants.²⁵ Because only the named plaintiffs²⁶ are considered in determining diversity,

[u]nder current doctrine, if one member of a class is of diverse citizenship from the class' opponent, and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant and have nothing to fear from trying the lawsuit in the courts of their own State.²⁷

Conversely, jurisdiction may be defeated by naming a nondiverse plaintiff.²⁸ While the judicially created doctrine of "fraudulent joinder" circumscribes the ability of counsel to manipulate the pleadings,²⁹ the doctrine is limited.³⁰ Therefore, class counsel have

requirement in class actions). A similar split has divided the circuits in the context of plaintiffs joined under Fed. R. Civ. P. 20 rather than in a class action. Compare *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928, 931 (7th Cir. 1996) (holding that § 1367 overrules *Zahn* requirement for claims by Rule 20 plaintiffs), with *Meritcare Inc. v. Saint Paul Mercury Ins. Co.*, 166 F.3d 214, 222 (3d Cir. 1999) (holding that § 1367 did not overrule *Zahn* requirement for claims by Rule 20 plaintiffs). The Supreme Court has granted certiorari on the question of § 1367's effect on *Zahn*. See *Free*, 120 S. Ct. at 525.

²⁵ See *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 366-67 (1921) (holding in context of class actions that only citizenship of named parties is considered for determining diversity).

²⁶ Of course class counsel must retain nondiverse named representatives in order to defeat diversity. However, the requirements for a named representative, once retained, are not onerous. See, e.g., Howard M. Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 Neb. L. Rev. 646, 657-60 (1994) (discussing limited requirements other than undivided loyalty required by representative and "nominal" role played by class representative in suit). If such representatives cannot be retained, class counsel may still avoid federal court by pleading under the jurisdictional amount. See *infra* notes 32-33 and accompanying text. If at least one class member meets the jurisdictional amount requirement, the defendant may, depending on the circuit, argue that § 1367 permits aggregation of claims. See *supra* note 24 (outlining circuit split and mentioning that Supreme Court has granted certiorari to resolve split).

²⁷ *Snyder*, 394 U.S. at 340; see also *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 161-62 (2d Cir. 1987) (rejecting argument that complete diversity is needed between all class members and defendant as settled by "66 years of Supreme Court precedent").

²⁸ See *Ben-Hur*, 255 U.S. at 366-67.

²⁹ Fraudulent joinder is the well-established doctrine that in certain limited instances, the court may ignore the citizenship of a party. Fraudulent joinder may be established if the defendant can show that there is no colorable claim against the defendant, if there is outright fraud in the plaintiff's pleading of jurisdictional facts, or if the plaintiff joins a defendant or another plaintiff who has no logical connection to the controversy as a whole. See, e.g., *Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1288 (11th Cir. 1998) (stating fraudulent joinder requirements for ignoring citizenship of defendant); *Koch v. PLM Int'l, Inc.*, No. Civ. A. 97-0177-BH-C, 1997 WL 907917, at *4 (S.D. Ala. Sept. 24, 1997) (extending fraudulent joinder doctrine for ignoring citizenship of named plaintiffs). But see *Dorsey v. Manufacturers Life Ins. Co.*, No. Civ. A. 97-2389, 1997 WL 703354, at *6 (E.D. La. Nov. 10, 1997) (refusing to compare named plaintiff's claims with that of unnamed class in fraudulent joinder inquiry).

³⁰ See 28 U.S.C.A. § 1446 (West 1994) (David D. Siegel, *Commentary on 1988 Revision of Section 1446*) ("The fraudulent joinder doctrine will work only rarely . . ."). Courts

enormous discretion to manipulate the pleadings either to create or to destroy diversity.³¹

If class counsel choose a state forum, counsel also have additional tactics available to make classes "removal proof." One tactic is for counsel to limit artificially the class's claims to below the jurisdictional amount.³² This puts defendants in the uncomfortable position of arguing that plaintiff's claim is worth more than the plaintiff says it is. Because the jurisdictional amount is not satisfied, the defendants cannot remove unless they can show that the claims are worth more than the jurisdictional amount.³³ Class counsel can also make cases "removal proof" by joining a sympathetic defendant who will agree not

have refused to extend fraudulent joinder to situations in which only a very small proportion of the plaintiff class has claims against a particular defendant. See, e.g., *Triggs*, 154 F.3d at 1290 (failing to apply doctrine even though 98% of class did not have claim against particular defendant). Therefore, fraudulent joinder is only effective when the transaction between certain plaintiffs and defendants at issue are "wholly distinct" from the transactions involving the other parties. See *Dorsey*, 1997 WL 703354, at *6. A few courts have stretched their characterization of "wholly distinct" transactions in an effort to ignore the citizenship of a particular party. See, e.g., *Koch*, 1997 WL 907917, at *3 (applying doctrine in nationwide class against issuer of securities because, even though entire class purchased same securities, class did not purchase from same brokerage houses). Courts have undoubtedly stretched their inquiry because of the ease with which counsel can destroy diversity.

³¹ See *Gray v. H.A.S.*, 18 F. Supp. 2d, 1320, 1322 (M.D. Ala. 1998) (recognizing such manipulation as "prevalent concern"); H.R. Rep. No. 106-320, at 7 (1999) (finding that counsel often names "irrelevant parties" or "recruit[s] a [nondiverse] plaintiff" to destroy diversity); July 1999 Hearings, *supra* note 21 (statement of Walter E. Dellinger, Former Acting Solicitor Gen.) ("[Counsel] can easily evade federal jurisdiction by adding to the class of plaintiffs or to the list of defendants in order to ensure that at least one plaintiff and defendant share a common state of citizenship."); *id.* (statement of John H. Beisner, Esq.) ("[L]awyers who want to keep a class action out of federal court often manipulate the parties in an attempt to destroy complete diversity."); *id.* (statement of Rep. Bob Goodlatte) (mentioning counsel's practice of destroying diversity by naming nondiverse parties).

³² See, e.g., July 1999 Hearings, *supra* note 21 (statement of John H. Beisner, Esq.) (discussing counsel's tactic of "shaving" claims). But see *supra* note 24 (discussing effect of § 1367 on jurisdictional amount for class actions).

³³ Circuits are split over the weight of the burden that the defendant must sustain in showing that the alleged damages do satisfy the jurisdictional amount. Compare *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996) (mere preponderance), *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1412 (5th Cir. 1995) (same), and *NLFC, Inc. v. Devcom Mid-America, Inc.*, 45 F.3d 231, 237 (7th Cir. 1995) (same), with *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994) (legal certainty), *Gafford v. General Elec. Co.*, 997 F.2d 150, 156 (6th Cir. 1993) (same), and *Watterson v. GMRI, Inc.*, 14 F. Supp. 2d 844, 850 (S.D. W. Va. 1997) (clear and convincing); see also Russell D. Jessee, Note, Pleading to Stay in State Court: Forum Control, Federal Removal Jurisdiction, and the Amount in Controversy Requirement, 56 Wash. & Lee L. Rev. 651 (1999) (exploring three removal standards by examining two opinions on removed cases with specified damages below jurisdictional amount).

to support a removal petition.³⁴ Because removal requires unanimity among defendants,³⁵ a removal petition will be defeated.

The problem of pleadings constructed to avoid diversity jurisdiction is exacerbated by the one-year bar of § 1446(b). If the original case is nonremovable,³⁶ but the complaint is later amended such that the case becomes removable, the defendant may remove the case within thirty days of receiving the amended complaint.³⁷ However, under no circumstances may a defendant remove an action one year after the filing of the complaint.³⁸ Therefore, class counsel can plead a nonremovable case³⁹ and then amend the complaint to plead a removable case at any time beginning one year after the filing of the original complaint.⁴⁰ The defendant will be barred by the one-year provision from removing the case.⁴¹ The cumulative effect of current doctrine is

³⁴ See Class Action Jurisdiction Act of 1998: Hearing on H.R. 3789 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 105th Cong. 19 (1998) [hereinafter June 1998 Hearings] (statement of John H. Beisner, Esq.) (discussing "quasi-defendants" who agree with class counsel to oppose removal); Mass Torts and Class Action Lawsuits: Hearings Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 105th Cong. (1998) (visited Feb. 26, 2000) <http://commdocs.house.gov/committees/judiciary/hju59921.000/hju59921_0.htm> [hereinafter March 1998 Hearings] (statement of John W. Martin, Jr., Vice President-General Counsel, Ford Motor Co.) (stating that class counsel "sometimes join a 'plaintiff-friendly'" defendant with understanding that defendant will veto any removal attempt).

³⁵ See, e.g., *Balazik v. County of Dauphin*, 44 F.3d 209, 213 (3d Cir. 1995) ("[I]t is well established that removal generally requires unanimity among the defendants."). The exception to this rule is for nominal, unknown, or fraudulently joined parties. See, e.g., *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1193 n.1 (9th Cir. 1988). Therefore, if the defendant can show that another defendant was fraudulently joined, the fraudulently joined defendant is not only ignored for citizenship purposes, but also has no right to veto a removal petition. See *supra* notes 29-30 and accompanying text (discussing fraudulent joinder doctrine).

³⁶ A case may be nonremovable if there is incomplete diversity or the claims do not satisfy the jurisdictional amount. See *supra* notes 24-28 and accompanying text.

³⁷ See 28 U.S.C. § 1446(b) (1994).

³⁸ See *id.*

³⁹ Note the particularly egregious nature of this practice if the counsel represent that they claim an amount under the jurisdictional amount only to claim damages in excess of the jurisdictional amount one year after the filing of the complaint. See July 1999 Hearings, *supra* note 21 (statement of John H. Beisner, Esq.) (arguing that previous claim of damages can amount to "waiver" of damages in excess of jurisdictional amount, which raises adequacy of representation concerns).

⁴⁰ See H.R. Rep. No. 106-320, at 7 (1999) (observing that counsel after one year "drop diverse parties, since at that point, current statutes bar removal of the case to Federal court" and also claim "only a very small amount of money," only later to "recant those statements"); June 1998 Hearings, *supra* note 34, at 19 (statement of John H. Beisner, Esq.) (claiming that counsel "frequently" abuse one-year provision).

⁴¹ Courts have applied the one-year provision rigidly. See, e.g., *Russaw v. Voyager Life Ins. Co.*, 921 F. Supp. 721, 724-25 (M.D. Ala. 1996) (holding that there is no exception to one-year bar even though plaintiff fraudulently joined defendant in lawsuit in order to defeat complete diversity); *Norman v. Sundance Spas, Inc.*, 844 F. Supp. 355, 360 (W.D.

that class counsel is given great discretion in choosing a state or federal forum and preventing defendants from removing state actions to federal court.

B. The Problems of Forum Shopping and Competing Classes

Giving class counsel enormous discretion in choosing a particular state or federal forum and preventing removal encourages forum shopping and competing class actions. Substantial anecdotal evidence⁴² and some empirical evidence⁴³ suggest that class counsel fre-

Ky. 1994) (applying one-year bar even though nondiverse defendant was dismissed from action one year after complaint was filed); *Cofer v. Horsehead Research & Dev. Co.*, 805 F. Supp. 541, 544 (E.D. Tenn. 1991) (applying one-year bar even though counsel, over one year after filing complaint, prayed for damages in excess of jurisdictional amount); see also *Royer v. Harris Well Serv., Inc.*, 741 F. Supp. 1247, 1249 (M.D. La. 1990) ("While the one year limitation could lend itself to abuses and inequities, it is for the Congress and not this Court to rewrite the provisions of section 1446(b)."). There is limited authority to the contrary. See *Cofer*, 805 F. Supp. at 543 (collecting cases but finding such support "scant" relative to strict interpretation of one-year bar).

⁴² See, e.g., H.R. Rep. No. 106-320, at 9 (1999) ("[O]ppportunistic lawyers have identified those States and particular judges where the class action device can be exploited." (quoting Rep. James Moran)); Robert H. Klonoff & Edward K.M. Bilich, *The Mass Tort Class Action Gamble*, Metropolitan Corp. Counsel, Aug. 1999, at 8, available in Lexis, Legal News Library, MCC file ("Centers for mass tort litigation have developed in small, rural areas in such states as Alabama, Mississippi, Louisiana, and Texas."); Bruce T. Rubenstein, *Class Actions: That Giant Sucking Sound Revisited*, Says GC, Corp. Legal Times, July 1997, at 7, available in Lexis, Legal News Library, CORPLT file ("That giant sucking sound Ross Perot heard was not made by jobs going to Mexico . . . [I]t was made by the migration of thousands of class actions out of federal courts and into state courts, particularly into a few southern states that have become havens for . . . abuses . . ."); see also sources cited *supra* note 19.

One striking example of forum shopping involves an Alabama state judge who sits alone over three counties. This judge certified a total of 35 classes during 1996 and 1997. See March 1998 Hearings, *supra* note 34 (statement of Dr. John B. Hendricks, President, Ala. Cryogenic Eng'g, Inc.). This number is extraordinarily large, as the entire federal system certified only 38 classes in 1997. See *id.*

Another example involves the litigation surrounding alleged defects in the fuel tanks of General Motors trucks. The Third Circuit decertified a settlement class on several grounds. See *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 779, 822-23 (3d Cir. 1995). The same class was subsequently settled on very similar terms in Louisiana state court. See *White v. General Motors Corp.*, 718 So. 2d 480, 485 (La. Ct. App. 1998). Even though the settlement was ultimately vacated by the state appellate court, see *id.* at 491, the Third Circuit found it was without authority to question the Louisiana state court settlement. See *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d 133, 137-38 (3d Cir. 1998).

⁴³ Empirical evidence of class action filings is limited. See Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. Rev. 74, 178 (1996) ("There is a basic need for research to determine the incidence or volume of class actions throughout the ninety-four districts of the federal system."). However, the limited empirical evidence available supports the conclusion that class counsel have targeted certain states. A survey of 32 Fortune 500 companies showed that in 1998, 69% of class actions filed against these companies were filed in five states, which included

quently forum shop by filing class actions in "plaintiff-friendly"⁴⁴ state courts even though those states have little or no connection with the underlying dispute. Soliciting plaintiff-friendly forums allows for potential abuse of defendants and class members.

Defendants face potential abuse because an improper class certification⁴⁵ is often effectively unreviewable⁴⁶ and forces settlement.⁴⁷ Class actions can threaten defendants with bankruptcy; even if the class claims are unmeritorious, defendants will often settle the class rather than risk a large judgment against them.⁴⁸

Alabama, Texas, and Louisiana. See Class Action Litigation—A Federalist Society Survey, Part III, Class Action Watch, Fall 1999, at 1, 3. A Rand Institute class action study also found a "pattern[]" of filings in "Gulf region" states, in particular Alabama and Louisiana. See Rand Inst. for Civil Justice, Class Action Dilemmas: Pursuing Public Goods for Private Gain, Executive Summary 7 (1999).

⁴⁴ These plaintiff-friendly states often involve an elected judiciary. See, e.g., June 1998 Hearings, *supra* note 34, at 10-11 (statement of John H. Beisner, Esq.) (explaining connection between class action abuse and elected judiciary). But see Shirley S. Abrahamson, The Ballot and the Bench, 75 N.Y.U. L. Rev. (forthcoming 2000) (arguing that elected judges are as independent as appointed ones).

⁴⁵ Until recently, some Alabama state judges frequently certified classes *ex parte*. See, e.g., *Ex parte Citicorp Acceptance Co.*, 715 So. 2d 199, 205-06 (Ala. 1997) (Cook, J., concurring) (describing *ex parte* certification practice as "almost routine"); Stateside Assocs., Class Actions in State Courts: A Case Study of Alabama, Feb. 26, 1998, reprinted in March 1998 Hearings, *supra* note 34 (stating that 30 classes certified by one judge in 1997 were certified *ex parte*). However, the Alabama Supreme Court recently outlawed *ex parte* certifications. See *Ex parte Federal Express Corp.*, 718 So. 2d 13, 15 (Ala. 1998) ("This Court has recently rejected the practice of conditional certification of a class action based solely on the allegations of a complaint and without an evidentiary hearing.").

⁴⁶ Because class certification orders are interlocutory orders, in many states the defendant will not receive appellate review of the class certification. See Timothy E. Eble, Non-Federal Question Class Actions Prosecution and Defense Strategies, in *Emerging Issues in State Filings of Non-Federal Question Class Actions* 359, 363 (PLI Litig. & Admin. Practice Course Handbook Series No. H0-0068, 1999), available in Westlaw, 612 PLI/Lit 359. However, more states are likely to adopt interlocutory review in light of the fact that such review is now available in the federal system. See Fed. R. Civ. P. 23(f). Some states already provide for interlocutory appeals of class certification orders. See, e.g., Ark. R. App. P. 2(a)(9). Others also liberally allow defendants to seek a writ of mandamus compelling the trial judge to decertify the class. See, e.g., Brian W. Warwick, Note, Claim-Jumpers Beware: Alabama Takes Another Look at Class Action Certification, 22 Am. J. Trial Advoc. 211, 211 (1998) (describing recent Alabama Supreme Court decisions in which court decertified classes by granting writ of mandamus). Class counsel, therefore, will often not only target a particular district, but also a state with plaintiff-sympathetic appellate review.

⁴⁷ See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, C.J.) (arguing that defendants face enormous pressure to settle nationwide class actions once class is certified); Peter H. Schuck, Judicial Avoidance of Juries in Mass Tort Litigation, 48 DePaul L. Rev. 479, 480 n.6 (1998) (suggesting that Posner's theory explains recent settlements of weak class claims).

⁴⁸ See Sheila Birnbaum, Class Certification—The Exception, Not the Rule, 41 N.Y.L. Sch. L. Rev. 347, 350 (1997) ("Given the uncertainties of litigation, few defendants can withstand the pressure to settle after the class is certified rather than risk an adverse jury verdict in a single class action trial."); see also sources cited *supra* note 47.

Absent class members also face potential abuse from forum shopping. Plaintiff-friendly forums are unlikely to scrutinize settlement proposals. Class counsel's interests at the settlement stage are not aligned with the absent class. Class counsel is interested in maximizing attorneys' fees; the class is interested in maximizing class damage payments.⁴⁹ The defendant is indifferent⁵⁰ to paying \$10 million in attorneys' fees with \$90 million in damage payments versus paying \$30 million in fees and \$70 million in damages. Money is fungible; the defendant seeks finality, not justice. Because class actions inevitably involve minimal monitoring by class members, the judge is the only party in a position to ensure the fairness of the settlement to the class. Plaintiff-friendly judges who are willing to rubberstamp any settlement proposed by class counsel only exacerbate the problems already inherent in judicial review of settlements.⁵¹ Indeed, substantial anecdotal evidence demonstrates that particular state judges consistently

⁴⁹ See, e.g., Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 *Stan. L. Rev.* 497, 535 (1991) ("The lawyer has a direct economic interest in the litigation: the expected fee. That interest is not the same as the interest of the class, which is in the damage recovery, net of attorneys' fees.").

⁵⁰ Of course, the threat of collateral attack can help motivate defendants to seek an otherwise fairer settlement than what otherwise would have been proposed. The scope of collateral review of class action settlements is an emerging topic that is beyond the scope of this Note. However, the prospect of collateral review has not effectively motivated class counsel and defendants to propose fair settlements, as the current scope of collateral attack is limited and courts as a rule presume that settlements are valid. See, e.g., *Epstein v. MCA, Inc.*, 179 F.3d 641, 647-50 (9th Cir. 1999) (limiting dramatically scope of collateral review of class action settlements), withdrawing on reh'g 126 F.3d 1235 (9th Cir. 1997), cert. denied, 120 S. Ct. 497 (1999). For discussion of the effect of allowing collateral attack on class action settlements in the context of the now withdrawn Ninth Circuit opinion in *Epstein*, see Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions*, 73 *N.Y.U. L. Rev.* 765, 786 (1998) (asserting process-based approach to collateral attack); William T. Allen, *Finality of Judgment in Class Actions: A Comment on Epstein v. MCA, Inc.*, 73 *N.Y.U. L. Rev.* 1149, 1166 (1998) (arguing that federalism concerns should limit scope of collateral attack); Geoffrey P. Miller, *Full Faith and Credit to Settlements in Overlapping Class Actions: A Reply to Professors Kahan and Silberman*, 73 *N.Y.U. L. Rev.* 1167, 1177-78 (1998) (finding that collateral attack should be limited to cases in which benefits of overturning egregious settlements outweigh costs of reducing finality); Alan B. Morrison, *The Inadequate Search for "Adequacy" in Class Actions: A Brief Reply to Professors Kahan and Silberman*, 73 *N.Y.U. L. Rev.* 1179, 1180 (1998) (explaining that collateral attack should be available when state court settlement releases exclusive federal claims); Marcel Kahan & Linda Silberman, *The Proper Role for Collateral Attack in Class Actions: A Reply to Allen, Miller, and Morrison*, 73 *N.Y.U. L. Rev.* 1193, 1204 (1998) (noting general agreement by commentators of appropriateness of limiting collateral attack).

⁵¹ See, e.g., Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 *U. Chi. L. Rev.* 1, 46 (1991) (commenting that judges often have inadequate information to evaluate settlement's fairness). Docket congestion also creates incentives for judges to approve unfair settlements. See, e.g., John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 *Colum. L. Rev.* 1343, 1445 (1995) ("Eager for a

approve settlements that are patently unfair to the absent class, but generous in attorneys' fees.⁵²

In addition to the problem of forum shopping, giving plaintiffs enormous discretion to choose a state or federal forum also prevents the consolidation of competing class actions. "Competing classes" are two or more class actions filed by different class counsel in different forums involving the same underlying claims.⁵³ State courts lack the power to consolidate or enjoin competing class actions filed in state court in different states or in federal court.⁵⁴ Federal courts also lack the power to enjoin parallel state proceedings because of the limitations imposed by the Anti-Injunction Act.⁵⁵ By comparison, for cases completely within the federal system, federal courts, equipped with the authority of the Judicial Panel on Multidistrict Litigation (JPML), are better able to consolidate overlapping actions.⁵⁶ However, because class counsel may file identical suits in either state or federal court and also prevent removal, current practice inhibits consolidation of competing classes.⁵⁷

docket-clearing settlement, trial courts face a temptation to close their eyes to conflicts and improprieties that they would not tolerate in other contexts.").

⁵² See, e.g., *Hoffman v. BancBoston Mortgage Corp.*, No. 91-1880 (Ala. Cir. Ct. Jan. 24, 1994) (providing almost \$20 million in attorneys' fees and *negative* or minimal recovery for most class members), discussed in Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 Va. L. Rev. 1051, 1057-68 (1996); see also *id.* at 1062 n.29 (stating that through "confidential sources," authors learned of many Alabama settlements that provided *negative* recoveries to class but huge attorneys' fees to counsel).

⁵³ See generally Miller, *supra* note 23 (proposing methods judges may utilize to minimize harm from competing actions).

⁵⁴ See, e.g., *id.* at 520-39 (discussing problems state courts face with overlapping classes).

⁵⁵ 28 U.S.C. § 2283 (1994) (limiting ability of federal courts to enjoin proceedings in state courts); see Miller, *supra* note 23, at 531-32 (describing limitations of Anti-Injunction Act).

⁵⁶ The Judicial Panel on Multidistrict Litigation (JPML) may transfer civil actions pending in more than one federal district involving one or more common questions of fact to any district for coordinated or consolidated pretrial proceedings if the Panel determines that transfer will be for the "convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a) (1994). The Supreme Court recently held that the transferee court may not retain the actions for trial. See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998). While the *Lexecon* decision might stifle federal courts' ability to eliminate the problems with overlapping actions, the federal judiciary is clearly the superior forum relative to the states for minimizing the costs of overlapping actions. But see *infra* notes 171-75 and accompanying text (discussing need to overhaul MDL procedures).

⁵⁷ Many commentators have proposed judicial remedies for competing class actions. See, e.g., Miller, *supra* note 23, at 528-29, 532-33 (discussing abstention as possible judicial remedy). Not only have such remedies not been adopted, but the recent bills show that Congress is skeptical that such remedies will be adopted.

Limited empirical⁵⁸ and substantial anecdotal⁵⁹ evidence suggests that competing class actions are a growing problem. In addition to draining systemic resources, competing class actions can potentially harm absent class members because defendants may conduct a "reverse auction" by soliciting the lowest "bids" for settlement of the class.⁶⁰ The two (or more) class counsel each have an incentive to settle first, as the first party to settle is likely to receive a much larger share of attorneys' fees.⁶¹

The most troubling aspect of current practice is that, despite the problems of forum shopping and overlapping classes, class counsel's discretion has no offsetting policy justification.⁶² More discretion is

⁵⁸ See Rand Inst. for Civil Justice, *supra* note 43, at 5 (evaluating survey recipients' response to claims of increase in competing class actions).

⁵⁹ A prime anecdotal example is the *Epstein* litigation. In *Epstein*, two competing actions were filed, one in Delaware state court, the other in federal court. See, e.g., Kahan & Silberman, *supra* note 50, at 773-76 (critiquing Supreme Court and first subsequent Court of Appeals decision). Class counsel in the federal action asserted several state law claims together with a claim under the Securities Exchange Act, subject to the exclusive jurisdiction of the federal judiciary. See *Epstein v. MCA, Inc.*, 50 F.3d 644, 659-60 (9th Cir. 1995). Class counsel in the state action settled all claims first, including the Securities Exchange Act claim. See *In re MCA, Inc. Shareholders Litig.*, 598 A.2d 687, 690 (Del. Ch. 1991). The Supreme Court held that a state court settlement can include a release of exclusive federal claims. See *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 369 (1996). The Ninth Circuit, on remand, first held that collateral attack was permitted on the issue of adequacy of representation in the state court action. See *Epstein v. MCA, Inc.*, 126 F.3d 1235, 1242-48 (9th Cir. 1997). Then, on rehearing, the Ninth Circuit dramatically limited the previous opinion's scope of collateral review. See *Epstein v. MCA, Inc.*, 179 F.3d 641, 649-50 (9th Cir. 1999), cert. denied, 120 S. Ct. 497 (1999).

⁶⁰ See, e.g., Kahan & Silberman, *supra* note 50, at 775 (discussing defendant's ability to conduct reverse auction).

⁶¹ See *id.* If judges scrutinized class action settlements, the problems with reverse auctions would be minimized. However, as shown earlier, forum shopping allows class counsel to choose a forum that is not likely to scrutinize a settlement. See *supra* notes 50-52 and accompanying text.

⁶² See Thomas D. Rowe, Jr., *Beyond the Class Action Rule: An Inventory of Statutory Possibilities to Improve the Federal Class Action*, 71 N.Y.U. L. Rev. 186, 190 (1996) (suggesting *Ben-Hur* decision was premised on antiquated view of absent class members as later joined parties); see also *supra* note 25 (explaining *Ben-Hur* decision). It is hard to justify considering only the named parties for diversity of citizenship but requiring each individual class member, whether named or unnamed, to meet the jurisdictional amount. See Rowe, *supra*, at 190-91. However, some commentators have suggested that even though the *Ben-Hur* rule is arbitrary, it is effective as a docket control mechanism by both allowing and limiting the number of class actions brought in federal court. See, e.g., *id.* at 191 (pointing out that rule effectively grants federal jurisdiction over mass tort and other large state-law class actions). This justification fails because the *Ben-Hur* rule is an extremely crude way of defining jurisdiction, since the named parties often bear no relationship to the composition of the class. Cf. Martin H. Redish, *Diversity Jurisdiction*, in 15 Moore's Federal Practice § 102.12, at 102-1, 102-23 (3d ed. 1999) ("Apart from its obvious historical pedigree, it is unclear that the complete diversity requirement is any more rational a means of curbing diversity jurisdiction than an approach premised on the basis of a litigant's astrological sign.").

given to class counsel than to an "ordinary" plaintiff, who must rely on chance to determine whether the party he or she wishes to sue is a citizen of a different state. The plaintiff's choice of forum in a class action should not (at the very least) be given any more deference than that accorded in an "ordinary" action.⁶³ Further, the practice of considering only the named parties for diversity of citizenship rests on an antiquated view of unnamed class members as later joined parties.⁶⁴

The current practice elevates form over substance. The face of the pleadings and not the composition of the class determines jurisdiction. Because current practice lacks a firm policy justification and exacerbates the problems of forum shopping and overlapping classes, there is growing support in Congress for a complete overhaul of federal class action jurisdiction.

II

FEDERALIZING CLASS ACTIONS

A. *Current Congressional Proposals*

Two bills have been introduced in the current Congress that would allow virtually all class actions to be filed in or removed to federal court.⁶⁵ Instead of requiring complete diversity between named plaintiffs and defendants for both original and removal jurisdiction, the current proposals require only minimal diversity between *any* class member (named or unnamed) and *any* defendant.⁶⁶ The effect

⁶³ Compare, e.g., *Warrick v. General Elec. Co.*, 70 F.3d 736, 741 n.7 (2d Cir. 1995) (noting that deference to initial choice of forum by class plaintiffs is entitled to less weight than choice by individual plaintiff), *Job Haines Home for the Aged v. Young*, 936 F. Supp. 223, 228 (D.N.J. 1996) (finding less deference for class counsel's choice of forum than ordinary plaintiffs), and *Schenet v. Anderson*, No. 86 C 6124, 1986 WL 13751, at *2 (N.D. Ill. Dec. 1, 1986) ("This court has held that little rests on the choice by a plaintiff representative of a nationwide class."), with *Hayes v. Fireman's Fund Mortgage Corp.*, 649 N.E.2d 582, 587 (Ill. App. Ct. 1995) (holding that class counsel is entitled to same deference in choice of forum as ordinary plaintiff), and *Girsh v. Jepsen*, 355 F. Supp. 1104, 1106 (E.D. Pa. 1973) (same).

⁶⁴ See Rowe, *supra* note 62, at 190.

⁶⁵ See Interstate Class Action Jurisdiction Act of 1999, H.R. 1875, 106th Cong.; Class Action Fairness Act of 1999, S. 353, 106th Cong.; see also *supra* note 21 (discussing current state of these two bills as well as past failed proposals).

In 1993, the American Law Institute proposed an overhaul of federal jurisdictional law. See American Law Inst., Complex Litigation Project: Proposed Final Draft (1993). The proposal provided for expansive removal jurisdiction, see *id.* § 4.01, at 220-21, and a federal Complex Litigation Panel, which would have enormous discretion to transfer cases within the federal judiciary, see *id.* Introductory Note, at 36-38, or to the states, see *id.* § 3.07, at 177-78. For a concise overview of the proposal, see Thomas E. Willging, *Mass Torts Problems and Proposals: A Report to the Mass Torts Working Group*, 187 F.R.D. 328, 406-08 (1999).

⁶⁶ See H.R. 1875 § 3(a), 4(a); S. 353 § 3, 4(a).

of these proposals is to make the distinction between named and unnamed plaintiffs meaningless for jurisdictional purposes. The House and Senate bills also allow class members to aggregate to meet the jurisdictional amount; the House proposal raises the amount to \$1,000,000,⁶⁷ while the Senate proposal retains the amount at \$75,000.⁶⁸ The proposals abolish the rule requiring unanimity for removal⁶⁹ by providing that any defendant may seek removal.⁷⁰ The much abused one-year bar⁷¹ of § 1446(b) is eliminated in both bills.⁷² The bills also allow absent class members to remove cases from state to federal court.⁷³

More controversially,⁷⁴ the two congressional proposals also provide that once an action has been removed to federal court and decertified, the action may be refiled in state court,⁷⁵ but the refiled action may be re-removed to federal court.⁷⁶ This circular procedure is necessary to curb forum shopping and competing classes. If this proce-

⁶⁷ See H.R. 1875 § 3(a), 4(a).

⁶⁸ See S. 353 § 3, 4(a).

⁶⁹ See supra note 35 and accompanying text.

⁷⁰ See H.R. 1875 § 4(a); S. 353 § 4(a). The House proposal also repeals the current prohibition on in-state defendant removal, see H.R. 1875 § 4(a), while the Senate bill is ambiguous, not mentioning any change in the current prohibition on in-state removal, but speaking of "any defendant" in the context of removal in general, see S. 353 § 4(a).

⁷¹ See supra notes 36-41 and accompanying text.

⁷² See H.R. 1875 § 4(b); S. 353 § 4(a).

⁷³ See H.R. 1875 § 4(a); S. 353 § 4(a). The theory underlying this provision is examined *infra* note 168.

⁷⁴ See *infra* Part II.B.1 (discussing controversial effect of this provision to regulate indirectly state class action procedure).

⁷⁵ State and federal statutes of limitations are tolled under the House proposal during the time the action is pending. See H.R. 1875 § 4(e). Tolling applies to both refiled class actions and refiled actions asserting only individual claims. See *id.* The Senate proposal provides less protection. The Senate proposal tolls only the federal (not state) statute of limitations and only tolls the refiling of individual claims, as opposed to another class action. See S. 353 § 3 (tolling to extent of "federal law"); see also *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 552-54 (1974) (holding that statute of limitations is tolled for individuals who intervene in class action when Rule 23 complaint is filed); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350 (1983) (holding that *American Pipe* rule is not limited to intervenors but extends to all class members); *Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987) (holding that *American Pipe* doctrine does not extend to repleading class complaint).

⁷⁶ See H.R. 1875 § 4(e). Unlike the House bill, the Senate bill contains no express permission to re-remove a filed case. However, there is nothing to suggest that re-removal would not be allowed, and it would seem that the presumption is that it would be allowed, since barring re-removal would mean that the bill's provisions would not ultimately be applicable.

For a federal court to decertify a class that a state court certified would be unsurprising. Not only do many states have a different class action procedure from Fed. R. Civ. P. 23, see *infra* note 102 and accompanying text, but even those states that have adopted Rule 23 verbatim often reject federal jurisprudence regarding the Rule. See *infra* note 103 and accompanying text.

dure were not available, class counsel could file an unmeritorious class in state court, the defendant could remove the class to federal court (which would decertify the class), and the plaintiff would return to state court. If the defendant were unable to remove again, the defendant would have gained nothing by the first removal other than temporary delay.⁷⁷ And if the defendant gains nothing from removal, forum shopping and competing classes are unlikely to be curbed.

The congressional proposals provide three very limited exceptions to federal jurisdiction when minimal diversity exists. First, federal courts are required to decline removal jurisdiction⁷⁸ if a "substantial majority" of the class and the "primary defendants"⁷⁹ are from the state in which the action is filed and if the law of that state would apply. While a "new textualist"⁸⁰ might read this exception as rather broad, legislative history suggests that this exception should be interpreted extremely narrowly. Committee reports accompanying the 1998 and 1999 proposals provide the following hypothetical: A class of one thousand persons sues a North Carolina corporation under North Carolina law; if 997 members are from North Carolina, a court should decline jurisdiction.⁸¹ The House report cautions that this exception must be read "narrowly."⁸² The legislative history, therefore, suggests that this exception will apply in very few cases.⁸³

The same concerns about re-removal are implicated when the case is originally filed in federal court, decertified by the federal court, and then refiled in state court. The congressional bills do not bar such removal from state court. Even though this paradigm is technically not re-removal (the case was only filed once in state court), this Note treats this paradigm under the rubric of re-removal because the underlying concerns are the same.

⁷⁷ See, e.g., H.R. Rep. No. 106-320, at 25 (1999) (stating that if there were no re-removal provision, "[t]hat approach would allow counsel effectively to ask a State court to review and overrule the class certification decision of a Federal court").

⁷⁸ See H.R. 1875 § 3(a); S. 353 § 3. While the Senate proposal explicitly applies this limitation to both original and removal jurisdiction, the House proposal arguably only applies to removal jurisdiction. This is because the House proposal limits the exception to the state where "the action was originally filed," which implies that a state action must exist for the exception to take effect. See H.R. 1875 § 3(a). However, this result is strange, as the exception is provided in the original jurisdiction section.

⁷⁹ The word "primary" was inserted to distinguish between primary and nominal defendants. See H.R. Rep. No. 106-320, at 21 (defining "primary defendants" as "real 'targets' of the suit"); see also *infra* note 145 and accompanying text (discussing limited effect of "substantial majority" exception because corporations are citizens of at most two states).

⁸⁰ New textualists focus on the plain meaning of a statute without reference to legislative history. See generally William N. Eskridge, Jr., *The New Textualism*, 37 *UCLA L. Rev.* 621 (1990).

⁸¹ See H.R. Rep. No. 106-320, at 21; H.R. Rep. No. 105-702, at 13 (1998).

⁸² H.R. Rep. No. 106-320, at 21.

⁸³ See July 1999 Hearings, *supra* note 21 (statement of Eleanor D. Acheson, Dep't of Justice) ("[T]his . . . exception is not likely to produce a significant reduction in the number of State class actions subject to removal."); *id.* (statement of Brian Wolfman, Public Citizen

The second exception provides that courts must decline jurisdiction when the primary defendants are state officials since the Eleventh Amendment may bar plaintiff's recovery.⁸⁴ Obviously, this exception is also very narrow. The third exception is for shareholder class actions asserting state law claims relating to a corporation's securities or duties owed by corporate management.⁸⁵ Because most state law securities class actions are subject to exclusive federal jurisdiction under the 1998 Securities Uniform Standards Act,⁸⁶ this exception is narrow as well. Therefore, the effect of the House and Senate proposals is that, subject to the jurisdictional amount requirement and three very limited exceptions, virtually all class actions would be eligible for federal court. Indeed, the only classes that consistently fall outside a federal court's jurisdiction are those limited to a particular state's citizens who sue defendants from that state.

The congressional proposals, therefore, seek to alleviate abuse in the current class action environment by allowing virtually all classes to be filed in or removed to federal court and by guaranteeing that any federally decertified classes may not return to state court without threat of re-removal. Some commentators have suggested that these proposals are unconstitutional.⁸⁷ As discussed below, such concerns are misguided; nevertheless, serious federalism and docket congestion concerns are implicated, and the congressional proposals should be substantially amended.

B. Unintended Consequences of the Congressional Proposals

1. Constitutional Concerns

While it is uncontroversial that Congress could provide for original and removal jurisdiction for all classes that contain minimal diver-

Litig. Group) (explaining that despite "substantial majority" exception, proposals "shift[] an enormous amount of power from state to federal courts").

Of course, many members of the current Supreme Court are hostile to legislative history and may, if given the chance, read "substantial majority" without reference to the legislative history. See, e.g., *Department of Commerce v. United States House of Representatives*, 119 S. Ct. 765, 779-80 (1999) (Scalia, J., concurring in part) (writing separately for Chief Justice Rehnquist and Justices Kennedy and Thomas to criticize majority's reliance on legislative history as general proposition).

The Y2K Act contains the same substantial majority exception. See Y2K Act, Pub. L. No. 106-37, § 15(c)(2)(A), 106 Stat. 185 (to be codified at 15 U.S.C. § 6614(c)(2)(A)). There was no legislative history explaining the exception.

⁸⁴ See *Interstate Class Action Jurisdiction Act of 1999*, H.R. 1875, 106th Cong. § 3(a); *Class Action Fairness Act of 1999*, S. 353, 106th Cong. § 3.

⁸⁵ See H.R. 1875 § 3(b)(4)(A); S. 353 § 3(7)(A); see also H.R. Rep. No. 106-320, at 22-23. The House Report also cautions that this exception be read "narrowly." See *id.* at 23.

⁸⁶ 15 U.S.C.A. § 77p(b) (West Supp. 1999).

⁸⁷ See *infra* Part II.B.1.

sity between any class member and any defendant,⁸⁸ some commentators⁸⁹ have suggested that the re-removal provisions of the congressional proposals run afoul of the Tenth Amendment.⁹⁰ These commentators have pointed out that re-removal has the effect of federalizing state class action procedure, and cite dicta in cases involving federal preemption of state procedure in *federal question* cases for the proposition that Congress may not regulate state procedure.⁹¹

The cases themselves are unremarkable. The fact that federal substantive law can preempt state procedure can be seen as an extension of the Supremacy Clause.⁹² If state substantive law can be preempted because it frustrates a federal statute, then surely a state cannot accomplish that same goal by recharacterizing the state substantive law as a procedural one.⁹³

However, the dicta in these cases suggest that while federal substantive statutes may not directly preempt state procedural rules, such

⁸⁸ Requiring minimal as opposed to complete diversity is consistent with Article III. See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 531 (1967) (holding that while 28 U.S.C. § 1332 requires complete diversity, Article III requires only minimal diversity). It is difficult to see how expanding jurisdiction to provide minimal diversity for all classes would run afoul of Article III. It is irrelevant that minimal diversity will allow many classes into federal court that do not implicate the policy concern of local bias that underlies diversity jurisdiction because current jurisprudence requires no inquiry into whether a particular action implicates the concern of local bias. See *supra* note 27 and accompanying text.

⁸⁹ See, e.g., June 1998 Hearings, *supra* note 34, at 44 (statement of Brian Wolfman, Public Citizen Litig. Group) (questioning constitutionality of re-removal provision); H.R. Rep. No. 106-320, at 34-35 (dissenting views) (same); H.R. Rep. No. 105-702, at 25 (1998) (dissenting views) (same).

⁹⁰ The Amendment provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. X.

⁹¹ See, e.g., *Johnson v. Fankell*, 520 U.S. 911, 919 (1997) (“The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.” (quoting *Howlett v. Rose*, 496 U.S. 356, 372 (1990) (internal quotation marks omitted))); *Felder v. Casey*, 487 U.S. 131, 138 (1988) (“No one disputes the general and unassailable proposition relied upon by the Wisconsin Supreme Court below that States may establish the rules of procedure governing litigation in their own courts.”); cf. *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs.*, 398 U.S. 281, 285 (1970) (“One of the reserved powers was the maintenance of state judicial systems for the decision of legal controversies.”); *The Federalist* No. 83 (Alexander Hamilton) (stressing importance of independent state judiciary in federal system).

⁹² See, e.g., *American Ry. Express v. Levee*, 263 U.S. 19, 21 (1923) (“The law of the United States cannot be evaded by the forms of local practice.”).

⁹³ For examples of federal preemption of state procedure, see *Felder*, 487 U.S. at 134 (holding that state notice provision was preempted by federal civil rights statute); *Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330, 335-36 (1988) (rejecting state procedure allowing prejudgment interest for Federal Employee's Liability Act claim); *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (holding that Federal Arbitration Act's procedures were valid in state court because of substantive right created by Act).

preemption is allowed if the purpose of the federal statute itself is to regulate state procedure.⁹⁴ This question is part of a much larger debate than that addressed by the congressional proposals; this issue has arisen in the failed 1997 proposed nationwide tobacco settlement,⁹⁵ federal tort reform proposals,⁹⁶ and the recently enacted Y2K Act.⁹⁷ This debate centers around the Tenth Amendment's prohibition on commandeering state officials.⁹⁸ The argument is that in directly pre-

⁹⁴ For a thorough examination of this issue, see generally Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures*, 44 Vill. L. Rev. 1 (1999).

⁹⁵ Among other things, the proposal would have prohibited state tobacco-related class actions. See Proposed Resolution, Title VIII B(2), June 20, 1997 (visited Mar. 6, 2000) <<http://stic.neu.edu/settlement/6-20-settle.htm>> (providing for bar on "class actions, joinder, aggregations, consolidations, extrapolations or other devices to resolve cases [arising from conduct prior to settlement] other than on the basis of individual trials"); see also *A Review of the Global Tobacco Settlement: Hearing Before the Senate Comm. on the Judiciary*, 105th Cong. 160 (1997) (statement of Professor Laurence H. Tribe) ("For Congress directly to regulate the procedures used by state courts in adjudicating state-law tort claims—to forbid them, for example, from applying their generally applicable class action procedures in cases involving tobacco suits—would raise serious questions under the Tenth Amendment and principles of federalism.").

⁹⁶ In 1996, President Clinton vetoed the Common Sense Product Liability Reform Act of 1995, which provided for specific judicial procedures in awarding punitive damages. See William J. Clinton, *Message to the House of Representatives Returning Without Approval Product Liability Legislation*, 1 Pub. Papers 681 (May 2, 1996). For constitutional criticism of the proposal, see generally Cynthia C. Lebow, *Federalism and Federal Product Liability Reform: A Warning Not Heeded*, 64 Tenn. L. Rev. 665, 677-88 (1997) (outlining objections to regulating state procedure).

⁹⁷ Y2K Act, Pub. L. No. 106-37, 106 Stat. 185 (1999) (to be codified at 15 U.S.C. §§ 6601-6617). The Act imposes several procedural prerequisites to maintaining a Y2K action in state court. See generally Steven G. Burton & Charles G. Geitner, *Recent Legislative Developments Impacting Year 2000 Litigation*, Fla. B.J., Nov. 1999, at 10 (outlining Act's provisions).

⁹⁸ See *Alden v. Maine*, 119 S. Ct. 2240, 2264 (1999) ("A power to press a State's own courts into federal service to coerce the other branches of the State . . . is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals."); see also *Printz v. United States*, 521 U.S. 898, 933-34 (1997) (invalidating federal statute requiring state officials to perform background checks on handgun purchasers); *New York v. United States*, 505 U.S. 144, 188 (1992) (holding that Congress could not require states to implement regulatory procedures for dealing with nuclear waste). But cf. *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 771 (1982) (requiring states to follow federally mandated procedures if they choose to continue regulating public utilities); *Testa v. Katt*, 330 U.S. 386, 392, 394 (1947) (holding that state courts must entertain federal questions absent "valid excuse").

One issue raised in the greater debate over regulating state procedure is, notwithstanding the Tenth Amendment, what source of power, if any, permits Congress to regulate state procedure. See generally Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 Ind. L. Rev. 71 (1998). This issue is inapplicable in the class action jurisdictional context, as the regulation of state procedure is an indirect effect of a valid jurisdictional grant under Article III. See *supra* note 88 (explaining that minimal diversity proposals do not run afoul of Article III).

scribing state procedure, Congress is commandeering state officials to administer a federal mandate, violating the autonomy of state processes.⁹⁹

Despite the controversial issue of direct congressional regulation of state procedure, the congressional proposals do not run afoul of the Tenth Amendment since they only indirectly regulate state procedure. The congressional proposals do not mandate that state judges implement a federal procedure. Indeed, they do not even prohibit state judges from doing anything. The effect of federalizing Rule 23 comes from federal action, as federal courts exercise removal jurisdiction. Because there is no commandeering of state officials, and hence no accountability problem, the Tenth Amendment is not violated by the congressional proposals.¹⁰⁰ The only argument, therefore, is that Congress may not encroach on state procedure at all. However, a substantive approach to the Tenth Amendment has long been abandoned.¹⁰¹ But, as will be discussed at length in the following subsections, even though there are no constitutional problems with the congressional proposals, they raise serious federalism and docket congestion concerns that warrant modification of the proposals.

2. *Federalism Concerns*

Federalizing all class actions would unduly inhibit state experimentation with class action procedures. Fourteen states have adopted criteria for class action requirements that are different from those set forth in Federal Rule 23.¹⁰² Those states that have adopted Federal Rule 23 verbatim still have the opportunity to reject the federal judiciary's jurisprudence and fashion their own.¹⁰³ Nationalizing Rule 23 will limit state experimentation with different ways to resolve class

⁹⁹ See Parmet, *supra* note 94, at 41.

¹⁰⁰ See, e.g., *Reno v. Condon*, 120 S. Ct. 666, 672 (1999) (rejecting Tenth Amendment challenge to Driver's Protection Privacy Act in part because Act did not require state officials to regulate private conduct).

¹⁰¹ See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985) (overruling previous Tenth Amendment test of whether congressional act encroached on "traditional government function").

¹⁰² See H.R. Rep. No. 106-320, at 37 & n.35 (1999) (dissenting views) (describing differences among states regarding class action rules).

¹⁰³ See, e.g., *Arkansas La. Gas Co. v. Morris*, 744 S.W.2d 709, 711 (Ark. 1988) (noting that, despite similarity between Arkansas class action procedure and Federal Rule 23, "there is a considerable difference in application"); *Cartt v. Superior Court*, 124 Cal. Rptr. 376, 383 n.16 (Ct. App. 1975) ("While our Supreme Court has repeatedly referred to Rule 23 as a useful tool it has never adopted it as a procedural straight jacket." (citations omitted)); cf. Philip Stephen Fuoco & Robert F. Williams, *Class Actions in New Jersey State Courts*, 24 Rutgers L.J. 737, 740 (1993) (finding that New Jersey state courts often look to federal jurisprudence for interpreting state class action statute but recognizing independent state jurisprudence).

disputes consistently with due process. With the growing importance of class actions in our society,¹⁰⁴ *more*—not less—experimentation is needed.

Federalizing class actions would also prevent states from deciding regional disputes. Most localized disputes would be eligible for federal court, because in diversity jurisdiction, citizenship is determined by domicile and not residence.¹⁰⁵ For example, consider a class action against a franchisee for food poisoning at a particular store location.¹⁰⁶ Almost all of the class are citizens of the same state as the franchisee. However, if the class includes enough members who are residents of the state, but are not domiciled in the state—for instance, college students—the class would defeat the narrow “substantial majority” exception and be eligible for federal court. The broad sweep of the congressional proposals, therefore, captures not only nationwide classes but also those classes that arise from truly local disputes. Denying state courts the opportunity to deal with a substantial portion of these cases raises serious federalism and comity concerns.

Federalizing all class actions would also stunt the development of important state substantive law. With the growing importance of class actions, some consumer protection statutes typically are invoked only

California has consistently challenged federal class action jurisprudence. For example, California has rejected the Supreme Court’s decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974), in holding that the California class action rule allows a trial court to direct the defendant to bear part or all of the initial cost of notice. See *Civil Serv. Employees Ins. Co. v. Superior Court*, 584 P.2d 497 (Cal. 1978).

Some states have also challenged the federal judiciary’s perceived hostility to using the class action device in consumer litigation. See Kenneth S. Gould, *New Wine in an Old Bottle—Arkansas’s Liberalized Class Action Procedure—A Boon to the Consumer Class Action?*, 17 U. Ark. Little Rock L.J. 1, 21-24 (1994) (recognizing federal judiciary’s hostility to consumer class actions and commenting that recent Arkansas decisions have opened door for consumer class actions); see also 7B Charles Alan Wright et al., *Federal Practice and Procedure* § 1782, at 57-58 (2d ed. 1986) (noting federal judiciary’s hostility toward consumer class actions).

¹⁰⁴ Recent class actions have included millions of class members and claimed astronomical damages. See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997) (decertifying settlement class involving all persons who had been exposed to asbestos or related to family member who had been exposed); *Castano v. American Tobacco Co.*, 84 F.3d 734, 737 (5th Cir. 1996) (decertifying class of all smokers and their families against tobacco companies); *Lindsey v. Dow Corning Corp.* (In re Silicone Gel Breast Implant Prods. Liab. Litig.), No. CV 92-P-10000-S, 1994 WL 578353, at *1 (N.D. Ala. Sept. 1, 1994) (approving over four billion dollar settlement involving breast implants).

¹⁰⁵ See, e.g., *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 828 (1989) (noting that for purposes of diversity, citizenship is determined by domicile).

¹⁰⁶ This example is adapted and modified from an actual case. See H.R. Rep. No. 106-320, at 39 & n.48 (1999) (dissenting views) (describing litigation against Foodmaker, Inc., parent company of Jack-in-the-Box restaurants).

in the class action context.¹⁰⁷ By not allowing state courts to entertain class actions, the federal judiciary will be the exclusive institution that regulates many traditional state and local practices.¹⁰⁸ Further, while under *Erie Railroad Co. v. Tompkins*¹⁰⁹ federal judges sitting in diversity must apply the common law of the state in which they sit, in practice they are likely to interpret state precedents more narrowly than would a state court judge.¹¹⁰

If the state supreme court has not spoken on the issue, federal judges are forced into the uncomfortable position of "predicting" how the state court would rule.¹¹¹ Of course, the federal judge's prediction stands as the controlling law in the federal system until the decision is contradicted by an ensuing state court holding. Thus, federal judges

¹⁰⁷ See Joseph Thomas Moldovan, Note, *New York Creates a Private Right of Action to Combat Consumer Fraud: Caveat Venditor*, 48 Brook. L. Rev. 509, 530-31 (1982) (arguing that low stakes involved in consumer fraud actions lead to class actions being only economically viable action under consumer fraud statutes); see also Steven E. Fineman, *Consumer Protection Class Actions Have Important Position: Applying New York's Statutory Scheme*, N.Y. L.J., Nov. 23, 1998, at S6 (discussing importance of class actions in enforcing New York consumer laws).

¹⁰⁸ For example, many recent class actions have been filed against sweepstakes promoters. See Linda Goldstein, *Advertising Law: In Recent Months Several Class Actions Have Been Filed Against Sweepstakes Promoters Alleging Fraud, But the Suits May Encounter Certification Problems*, Nat'l L.J., Mar. 16, 1998, at B5 (stating that Louisiana consumer protection statute does not allow for private class actions, and speculating that lack of class action device is likely reason why no class actions have been filed against sweepstakes promoters, despite national trend). If state courts are not allowed to entertain class actions, state courts will not be allowed to play a role in regulating this industry.

¹⁰⁹ 304 U.S. 64, 78 (1938).

¹¹⁰ Federal judges sitting in diversity routinely ignore lower state court decisions in favor of federal decisions until the state's supreme court has spoken authoritatively, and not in dicta, on the issue. See William M. Landes & Richard A. Posner, *Legal Change, Judicial Behavior, and the Diversity Jurisdiction*, 9 J. Legal Stud. 367, 374-75 (1980) (finding that federal judges applying state law are two-and-a-half times more likely to cite federal precedent than state precedent); see also Robert A. Schapiro, *Balancing, Justice, and the Eleventh Amendment: Justice Stevens' Theory of State Sovereign Immunity*, 27 Rutgers L.J. 563, 595-96 & n.116 (1996) (finding federal judges sitting in diversity often decide cases differently than state courts eventually decide issue). For an exhaustive review of many of the problems created by *Erie* for federal judges regarding state precedent (or lack thereof), see generally Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. Rev. 651 (1995).

This narrow approach can be justified by a reading of *Erie* itself. If federal judges are given discretion to overturn or seriously alter existing law, federal judges arguably usurp the lawmaking power of the states. See Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. Pa. L. Rev. 1459, 1461 (1997) (arguing that *Erie* puts federal judiciary in "precarious position" of either usurping state power or unfairly disadvantaging litigants).

¹¹¹ See, e.g., *City of Philadelphia v. Lead Indus. Ass'n*, 994 F.2d 112, 123 (3d Cir. 1993) ("Federalism concerns require that we permit state courts to decide whether and to what extent they will expand state common law. Our role is to apply the current law of the appropriate jurisdiction, and leave it undisturbed." (citations omitted)).

would play a significant role in shaping state law while state courts would lose the opportunity to interpret their own laws due to the federalization of class actions.¹¹² While certification to the state supreme court is an option in most states,¹¹³ it is doubtful that federal judges and the state supreme courts will exercise the option frequently.¹¹⁴ Such constraints pose the concern that state law will be stunted, or at the very least, that only the federal judiciary will develop it.

Another concern with federalizing all class actions is that state courts' voices in shaping judicial methodology will be limited. State court judges challenge the federal judiciary and lead it to question its decisions and methods. State courts often apply different methodologies¹¹⁵ and are often more willing to gather input from all interested constituencies.¹¹⁶ Class actions provide a significant opportunity for state courts to gain a voice in national jurisprudence. By silencing this voice, our federalist system will be denied one of its greatest benefits: experimentation.¹¹⁷

¹¹² See, e.g., Clark, *supra* note 110, at 1461 (discussing "predictive approach" relative to *Erie* command not to create state law). Within the evolving field of products liability litigation, federal courts have faced the problem of dated state supreme court decisions that stand in contrast to a national trend of change in the law. Some federal courts have declined to predict how the state supreme court would rule on the claim and simply have applied the dated state supreme court precedent. See, e.g., *Dayton v. Peck, Stow & Wilcox Co.*, 739 F.2d. 690, 694 (1st Cir. 1984) ("We must apply the law of the forum as we infer it presently to be, not as it might come to be."). Indeed, in these situations federal courts are left with the undesirable choice of either creating law through prediction or abstaining from expanding the law and inflicting a potential injustice on the plaintiff. See Clark, *supra* note 110, at 1461.

¹¹³ All but six states have some form of certification procedure. See David G. Knibb, *Federal Court of Appeals Manual* § 23.3, at 422-23 (4th ed. 2000).

¹¹⁴ Certification is costly, and it forces the state supreme court to adjudicate an issue it is not deciding. See Hon. Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .*, 29 *Suffolk U. L. Rev.* 677, 678 (1995) (criticizing certification process in theory and in practice from standpoint of federal judge); Mark R. Kramer, *Comment, The Role of Federal Courts in Changing State Law: The Employment at Will Doctrine in Pennsylvania*, 133 *U. Pa. L. Rev.* 227, 233 (1984) (discussing problems with certification).

Federal courts could choose to abstain, but abstention is an extremely narrow exception to the federal court's duty to decide diversity cases. See generally Lewis Yelin, *Note, Burford Abstention in Actions for Damages*, 99 *Colum. L. Rev.* 1871 (1999).

¹¹⁵ See Ellen A. Peters, *Capacity and Respect: A Perspective on the Historic Role of the State Courts in the Federal System*, 73 *N.Y.U. L. Rev.* 1065, 1070 (1998) (arguing that state courts rely more on common law than do federal counterparts); see also *Hakimoglu v. Trump Taj Mahal Assocs.*, 70 F.3d 291, 299 (3d Cir. 1995) (Becker, J., dissenting) (commenting that state court judges may apply different "interpretative assumptions" than does federal judiciary).

¹¹⁶ See Peters, *supra* note 115, at 1071.

¹¹⁷ See *supra* text accompanying notes 102-04 (arguing that experimentation with class action procedures is needed).

3. Docket Congestion Concerns

Federalizing all class actions would strain an already congested federal docket.¹¹⁸ Federal dockets remain backlogged and overcrowded relative to some of their state counterparts.¹¹⁹ The federal appellate docket increased by 21% and the district court docket by 24% from 1990 to 1997.¹²⁰ This phenomenon can be attributed to two factors: the extraordinary backlog of judicial confirmations and the flood of criminal and mass tort filings in federal court.

The Senate currently faces a backlog of judicial confirmations.¹²¹ As of January 10, 2000, there were seventy-eight vacancies (out of a total of approximately 850 judgeships) in the federal court system.¹²² Long-term political wrangling between Senate Republicans and President Clinton has dramatically hampered the pace of judicial confirmations.¹²³ Understaffing of the federal judiciary has increased the caseload¹²⁴ and has forced judges to handle cases in undesirable

¹¹⁸ See, e.g., June 1998 Hearings, *supra* note 34, at 97 (statement of Richard H. Middleton, Jr., Ass'n of Trial Lawyers of Am.) (stating that federalizing all class actions will have deleterious effects on federal docket); H.R. Rep. No. 106-320, at 32 (1999) (dissenting views) (same).

¹¹⁹ See Jeffrey E. Shuren, Legal Accountability for Utilization Review in ERISA Health Plans, 77 N.C. L. Rev. 731, 777 (1999) (commenting on congested federal docket).

¹²⁰ See William H. Rehnquist, The 1997 Year-End Report of the Federal Judiciary, Third Branch, Jan. 1998, at 1, 2.

¹²¹ See generally Lee Renzin, Note, Advice, Consent, and Senate Inaction—Is Judicial Resolution Possible?, 73 N.Y.U. L. Rev. 1739, 1741-45 (1998) (describing crisis in federal judiciary).

¹²² See Mark Preston, Inhofe Will Block All Clinton Judicial Nominations, Roll Call, Jan. 10, 2000, at 18. In 1997, the crisis reached its worst point: During 1996, Congress confirmed only 17 judges, and no appellate court judges. See Sam Fulwood III, Clinton Calls on Senate to Confirm Judicial Nominees, L.A. Times, Aug. 10, 1999, at A16. In 1998, the Senate alleviated a backlog of judicial nominations by filling 65 judgeships. See William J. Clinton, Remarks at American Bar Association in Atlanta, Georgia, 35 Weekly Comp. Pres. Doc. 1600, 1603 (Aug. 9, 1999). However, during 1999, Congress again stalled during the confirmation process such that the level of vacancies today is nearly the same as it was during its worst point in 1997. See Rehnquist, *supra* note 120, at 2 (stating that there were 82 vacancies at end of 1997).

¹²³ See, e.g., Preston, *supra* note 122, at 18 (describing Republican frustration with presidential recess appointments, which resulted in Republican hold-up of confirmation process). The backlog during the Clinton administration has been far worse than during the administration of his Democratic predecessor, President Carter. During the Clinton administration, the Senate has taken an average of 201 days to confirm or reject a judge, while during the Carter administration the Senate took only 90 days. See Timothy J. Connolly, Federal Judiciary Posts Go Begging: Pols Hamper Nomination Process, Sunday Telegram (Worcester, Mass.), Oct. 17, 1999, at A1, available in 1999 WL 5028547.

¹²⁴ See Steve Lash, Federal Criminal Code Shouldn't Be Widened, Justices Tell Congress, Hous. Chron., Mar. 12, 1998, at 15A (citing statements by Justices Kennedy and Souter).

ways.¹²⁵ Indeed, Chief Justice Rehnquist remarked that "vacancies cannot remain at such high levels indefinitely without eroding the quality of justice."¹²⁶

In addition to the problem of judicial vacancies, the recent increase in mass tort cases and criminal filings has plagued the federal judiciary. The rampant increase in the number of federal criminal statutes¹²⁷ and the restrictions imposed by the Speedy Trial Act,¹²⁸ have further delayed civil litigation.¹²⁹ The number of federal crimes has surged in recent years.¹³⁰ The federal criminal docket is at its

¹²⁵ The Ninth Circuit had 10 vacancies on a 28 member court for most of 1997, prompting Chief Judge Procter Hug to cancel 600 hearings. Stephan O. Kline, *The Topsy-Turvy World of Judicial Confirmations in the Era of Hatch and Lott*, 103 *Dick. L. Rev.* 247, 266 (1999). In 1998, Second Circuit Chief Judge Ralph K. Winter, Jr., began to use only one active Second Circuit judge on some panels because of the five vacancies that existed on the 13 member court at that time. See *id.*

¹²⁶ Rehnquist, *supra* note 120, at 2. Sixth Circuit Chief Judge Boyce F. Martin, Jr. has argued that a recent increase in circuit splits can be attributed to the fact that less time is available for "sitting and reading" by judges because of the backlog. See Kline, *supra* note 125, at 267; see also Nina Totenberg & Bob Edwards, *Federal Judge Shortage* (NPR radio broadcast, Sept. 23, 1997), available in Lexis, News Library, NPR file ("You cannot give [cases] the attention that they deserve. And you know that you're making a lot of mistakes . . . because of the speed." (quoting Southern District of California Chief Judge Judith N. Keep)).

¹²⁷ See generally Charles D. Bonner, Comment, *The Federalization of Crime: Too Much of a Good Thing?*, 32 *U. Rich. L. Rev.* 905 (1998).

¹²⁸ 18 U.S.C. § 3161(h) (1994) (mandating dismissal of criminal matters if not tried within a specified time period). The Act has caused the federal judiciary to focus a greater amount of resources on criminal matters at the expense of civil matters. See Sara Sun Beale, Reporter's Draft for the Working Group on Principles to Use When Considering the Federalization of Criminal Law, 46 *Hastings L.J.* 1277, 1288-89 (1995) (remarking on increase of federal judiciary's attention to criminal matters).

¹²⁹ See, e.g., John A. Martin & Michelle Travis, *Defending the Indigent During a War on Crime*, 1 *Cornell J.L. & Pub. Pol'y* 69, 95 (1992) (describing federal docket's increase of criminal matters at expense of civil matters); see also Committee on Long Range Planning of the Judicial Conference of the U.S., *Proposed Long Range Plan for the Federal Courts* 10 (1995) ("[C]riminal cases have produced significant delays for civil suits in some judicial districts.").

From 1980 to 1992, the number of civil trials declined by 25% while the number of criminal trials increased by 43%. See Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States* 1993, at 206 tbl.332. Even though the number of civil trials has decreased, civil filings have continued to grow far more rapidly than criminal cases. See Beale, *supra* note 128, at 1289 (commenting on effect of federalizing crimes on federal judiciary). Chief Judge Judith N. Keep of the Southern District of California estimates that she spends more than 70% of her time on routine criminal matters. See Michael deCourcy Hinds, *Bush Aides Push State Gun Cases into U.S. Courts*, *N.Y. Times*, May 17, 1991, at A1.

¹³⁰ Forty percent of federal criminal provisions enacted since the Civil War have been enacted since 1970. See John J. Mountjoy, *The Federalization of Criminal Laws*, *Spectrum*, Summer 1999, at 1, 1. The trend shows no signs of abating: Over one thousand criminal bills were proposed in the 105th Congress. See *id.* at 2.

highest level in sixty years.¹³¹ In 1998, the number of criminal case filings in federal court increased by fifteen percent.¹³² There were only twenty-four districts in 1972 in which criminal cases represented more than fifty percent of the trial dockets; in 1994, thirty-one districts devoted more than fifty percent of their trial dockets to criminal cases.¹³³ The effect of the increase in the number of federal crimes and the time restrictions of the Speedy Trial Act is that judges have less time to spend on the civil docket.

Regarding mass torts, there are 200,000 backlogged asbestos cases on the federal civil docket, with an expected increase of 50,000 more per year.¹³⁴ The Supreme Court's decisions in *Amchem Products, Inc. v. Windsor*¹³⁵ and *Ortiz v. Fibreboard Corp.*¹³⁶ viewed skeptically the use of single nationwide classes to settle mass tort litigation; the result, therefore, is that in the absence of any congressional action, the federal judicial system seems likely to endure individual complex mass tort cases for years to come.

The high judicial vacancy rate and the flood of criminal and mass tort cases in the federal judiciary make allowing virtually all class actions into federal court an unattractive option. While there is no comprehensive data on the exact number of class actions in state court,¹³⁷ evidence indicates that the number of state class actions is not only large but increasing.¹³⁸ Indeed, a recent study found that nearly sixty percent of appellate opinions on class actions come from state courts.¹³⁹ This percentage is daunting, considering that in 1997 the

¹³¹ See Rehnquist, *supra* note 120, at 4.

¹³² See William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary*, Third Branch, Jan. 1999, at 1, 2.

¹³³ See David L. Cook et al., *Criminal Caseload in U.S. District Courts: More than Meets the Eye*, 44 Am. U. L. Rev. 1579, 1592-93 (1995) (describing increase in resources that federal judiciary devotes to criminal matters).

¹³⁴ See *Finding Solutions to the Asbestos Litigation Problem: Hearing on S. 758, the Fairness in Asbestos Compensation Act of 1999 Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 106th Cong. (1999) (statement of Conrad L. Mallett, Jr., Coalition for Asbestos Resolution) (visited Mar. 8, 2000) <<http://www.senate.gov/~judiciary/10599cmj.htm>>. Indeed, federal district court Judge Spencer Williams has questioned whether state and federal systems will go bankrupt from the explosion in mass tort filings. See, e.g., *Complex Litigation Project*, *supra* note 65, at 17.

¹³⁵ 521 U.S. 591, 597 (1997) (holding that Rule 23 requirements must be met for settlement class action).

¹³⁶ 119 S. Ct. 2295, 2302 (1999) (limiting use of mandatory class actions when defendant faces potential bankruptcy because of class claims).

¹³⁷ There is no database on the number of class actions filed in state court. See *Rand Inst. for Civil Justice*, *supra* note 43, at 4.

¹³⁸ See *id.* at 5 (surveying plaintiffs' and defendants' attorneys and concluding that state class action filings have "surged" in the "past several years").

¹³⁹ See *id.* at 6 (reflecting 1995-1996).

federal system had 2641 classes pending in the district courts.¹⁴⁰ Therefore, assuming that a comparable number of class actions are pending in state court (most likely a conservative assumption), federalizing all class actions would lead to a tremendous increase in the workload of federal courts.

Not only would such an increase further delay civil litigation and reduce the amount of time federal judges may spend on individual cases, but it would also limit Congress's future ability to increase the federal docket.¹⁴¹ Because of federalism and docket congestion concerns, Congress cannot simply federalize all class actions. However, Congress also cannot ignore the unwarranted discretion given to class counsel under current practice. A middle ground between these two extremes must be implemented.

III

MODIFYING THE CONGRESSIONAL PROPOSAL

The congressional proposals provide that federal courts should decline jurisdiction if a "substantial majority" of the class and the "primary defendants" are from the state in which the action is filed and if the law of that state would apply.¹⁴² This exception reflects some congressional recognition of the federalism and docket congestion concerns raised by federalizing class actions.¹⁴³ However, this exception fails to alleviate these concerns for two reasons. First, the legislative history construes the term "substantial majority" extremely narrowly.¹⁴⁴ Second, because corporations are citizens of at most two states, it will be rare that the "primary defendants" will be from the same state as a "substantial majority" of the class.¹⁴⁵

¹⁴⁰ See Leonidas Ralph Mecham, *Judicial Business of the United States Courts* 383 tbl.x-4 (Statistics Div., Admin. Office of the U.S. Courts 1997).

¹⁴¹ Indeed, concerns regarding increased workload have been raised recently in response to congressional consideration of new federal causes of action. See 142 Cong. Rec. S10,396 (daily ed. Sept. 12, 1996) (statement of Sen. Thompson) (criticizing revived Gun Free School Zones Act as straining already congested federal docket); Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 Geo. L.J. 2589, 2618-19 (1998) (documenting opposition to Violence Against Women Act on ground that federal judiciary could not handle new causes of action); Mary C. Michenfelder, Note, *The Federal Carjacking Statute: To Be or Not to Be? An Analysis of the Propriety of 18 U.S.C. § 2119*, 39 St. Louis U. L.J. 1009, 1048 (1995) (criticizing federal carjacking statute for straining federal docket).

¹⁴² See *supra* notes 79-83 and accompanying text.

¹⁴³ Indeed, the exception in the House bill is titled "an intrastate case." See H.R. 1875, 106th Cong. § 3(a) (1999).

¹⁴⁴ See *supra* notes 81-83 and accompanying text.

¹⁴⁵ See Class Action Fairness Act of 1999: Hearings on S. 353 Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary, 106th Cong. (1999) (statement of Eleanor D. Acheson, Dep't of Justice) (visited Mar. 8, 2000) <<http://>

Therefore, Congress should expand this exception. Part III.A will discuss the specific amendments that should be made to the proposal and how these amendments will alleviate the problems of competing classes and forum shopping, while minimizing federalism and docket congestion costs. Part III.B will discuss objections to these proposed amendments. Part III.C will conclude with a brief discussion of why both this Note's proposal and the congressional proposals will not fully solve the problems of forum shopping and competing classes.

A. The Proposal and Its Merits

The "substantial majority" exception should be amended such that federal courts should decline original jurisdiction if it is reasonably certain that a sufficient proportion of the class is from one particular state; for the sake of argument, this Note will propose one-third.¹⁴⁶ For removal jurisdiction, judges should decline jurisdiction if it is reasonably certain that one-third of the class is from one particular state and the class action was filed in that state.¹⁴⁷ For both original and removal jurisdiction, the third of the residents need not be from the same state as the "primary defendants." The exception would be available irrespective of the law to be applied. The re-removal provisions of the congressional proposals would be retained. Under this reformulated exception, forum shopping and competing classes would be reduced relative to current practice. Further, this exception better minimizes the federalism and docket congestion concerns raised by federalizing virtually all classes.

Forum shopping would be reduced under this proposal because class counsel would have limited discretion in choosing plaintiff-

www.senate.gov/~judiciary/5499wl.htm> ("Defendants in class actions are likely to be corporate entities whose citizenship has no necessary relationship to where claims against them arise, so the exception for cases in which plaintiffs and defendants are predominately citizens of the same State is likely to apply to few cases.").

¹⁴⁶ One-third is initially advanced in this Note because, as will be discussed later, limiting jurisdiction in this way would limit forum shopping and competing classes and minimize federalism and docket congestion concerns. However, it is ultimately an empirical question as to whether a one-third standard or some other measure will best further these aims. Raising the proportion would further limit forum shopping and competing classes but exacerbate federalism and docket congestion concerns, while lowering the number would have the opposite effect.

¹⁴⁷ Therefore, if one-third of the class were from New York, the other two-thirds from various other states, and the class were filed in Alabama, the federal district court should exercise jurisdiction. If the class were filed in New York state court, the class could not be removed.

This Note's proposal would also retain the House's proposal that unnamed class members be allowed to remove. See *infra* note 168.

friendly states. Not only would all nationwide classes be eligible for federal court, but class counsel could only guarantee a plaintiff-friendly forum if a third of the class were from that forum. The removal provision would prevent class counsel from pursuing a suit in state court after the case had been filed first in state court, then removed to federal court and decertified.

It is possible, under this proposal, that counsel could decide to file a class action in a plaintiff-friendly state, defining the class in a gerrymandered style so that just barely one-third of class are state residents, thereby preventing removal. However, even in plaintiff-friendly states, such an option might not be available under state class action procedural rules.¹⁴⁸ Further, because of the gerrymandered shape of the class, the unusual definition of such classes will be highly visible to both the forum's judges and collateral reviewing judges, which could put any settlement or judgment at risk of vacatur for unfairness.

In addition to limiting forum shopping, competing classes would be reduced. All nationwide classes could be consolidated in federal court for pretrial purposes under the multidistrict litigation (MDL) statute.¹⁴⁹ Only two types of competing classes will continue to exist under this Note's proposal. First, a nationwide class and a limited state class could exist under this proposal. Consider a nationwide asbestos class and a second asbestos class filed in Alabama state court limited to Alabama citizens. Under the congressional proposals, these classes could be consolidated in federal court as long as one of the "primary defendants" was not from Alabama. Under this Note's proposal, this class could not be consolidated because all of the plaintiffs were from Alabama. While systemic resources will be wasted, this type of competing class does not raise the same concerns as do those competing classes that completely overlap, such as two nationwide classes. The same concerns are not raised because defendants will not be able effectively to conduct a reverse auction with the nationwide counsel. Defendants will only be able to exert minimal pressure on the nationwide counsel to settle more cheaply as settlement of the Alabama class would not terminate the nationwide suit. Therefore, the absent class in the nationwide suit is unlikely to be harmed in the same manner as absent class members are in two completely overlapping suits.

¹⁴⁸ Cf. Nancy Morawetz, *Underinclusive Class Actions*, 71 N.Y.U. L. Rev. 402, 434-38 (1996) (advocating increased judicial role under current rules in scrutinizing class definitions that are drawn too narrowly and exclude otherwise proper class members).

¹⁴⁹ See *supra* note 56 and accompanying text.

The second type of competing classes that could exist under this proposal are classes involving one-third residents from more than one state. Consider a regional dispute involving roughly one-third Illinois, Wisconsin, and Minnesota residents. Separate class counsel could file suit in Illinois, Wisconsin, and Minnesota state court, and the cases could not be removed to federal court. While not ideal, such competing classes are not overly troubling because it is doubtful that many classes will involve one-third residents from more than one state¹⁵⁰ and those classes that do will typically involve adjacent states. In addition, it is empirically uncertain whether class counsel will find competing classes economically viable if they cannot avail themselves of a plaintiff-friendly forum.

While this proposal more effectively minimizes federal docket concerns than do the congressional proposals, the impact of this proposal on federalism concerns is more controversial. Although all nationwide classes would be eligible for federal court, state courts would entertain more class actions involving interstate activity (even if a substantial part of the class is from a particular state) relative to the congressional proposals. However, the federal docket cannot handle all class actions involving interstate activity. In light of this limitation, this Note's proposal achieves a significant improvement over current practice as state courts will only entertain classes that involve a significant portion (relative to the rest of the class) of that state's residents. This effect is a significant improvement because under current practice virtually all class action controversies (whether they involve a significant portion of that state's residents or not) may be heard in state court. Therefore, this Note's proposal better allocates those class actions that should be heard in state court.

B. The Objections

There are three potential objections to this Note's proposal. First, how is a judge to determine if one-third of the class is from a particular state? Second, why not use a jurisdictional amount provision as opposed to the number of citizens from a particular state to limit jurisdiction? Third, why should diversity be defeated even though the defendants are not from the same state as the third of the class?

The first objection recognizes that the one-third standard, if strictly applied, could needlessly entangle courts. Because citizenship for diversity is determined by domicile (a fact-intensive question) and

¹⁵⁰ See *supra* note 146.

not by residence,¹⁵¹ limited resources would make it impossible for a judge to determine mathematically whether a third of the residents of a putative class were from a particular state.¹⁵² Therefore, the standard should be that it is "reasonably certain" that one-third of the class is from a particular state. This standard could be proven by circumstantial evidence without referencing any particular plaintiffs within the class. For example, consider the previously discussed hypothetical of a class action against a franchisee for food poisoning.¹⁵³ If defendants wished to remove, they could use statistical evidence of current customer patterns to show that fewer than one-third of the customers visiting the store in any given month are state residents.¹⁵⁴ Because federal courts are courts of limited jurisdiction, the burden should be on the party seeking a federal forum¹⁵⁵ to show by a preponderance of the evidence that the standard is met.

A second objection to the proposal might be that classes should be limited by the jurisdictional amount rather than class composition. The House proposal seems to take this course by providing for minimal diversity but raising the jurisdictional amount to an aggregate of one million dollars.¹⁵⁶ Raising this amount to a very high level, such as fifty million dollars, would certainly have the effect of reducing the cases eligible for federal court, thereby limiting docket congestion and federalism concerns.

There are several problems with using a high jurisdictional amount to limit cases. First, it is often extraordinarily difficult for the judge to assess whether the jurisdictional amount has been met. The judge is forced to examine the merits of the claim at a very early stage

¹⁵¹ See *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 828 (1989).

¹⁵² This problem is not limited to this Note's proposal. The current congressional proposals exclude jurisdiction if a "substantial majority" of the class is from a particular state, the defendants are from that state, and the governing law will be of that state. See *supra* notes 78-83 and accompanying text. Therefore, the congressional proposals would require judges to determine the composition of the class as well.

¹⁵³ See *supra* note 106 and accompanying text.

¹⁵⁴ Defining one-third of a class that includes unknown or future plaintiffs can be handled in the same way. The party seeking to litigate in federal court will have the burden of convincing the judge with reasonable certainty that fewer than one-third of the future claimants are from the forum state. The problem of proof may be more difficult in the case of unknown class members, but the problem may be circumvented by the use of circumstantial evidence. For example, a class of "every United States person who has not been exposed to asbestos but is in fact exposed after class certification" certainly would not include one-third of residents from a particular state. Further, these same concerns arise under the congressional proposals, as a trial judge must determine whether a "substantial majority" of the class is from a particular state.

¹⁵⁵ For original jurisdiction, class counsel would have the burden; for removal jurisdiction, defendants would have the burden.

¹⁵⁶ See *supra* notes 67-68 and accompanying text.

in the proceedings, when few facts are likely to be available.¹⁵⁷ For this reason, the plaintiff's assertion of the amount of damages claimed is accorded great weight and may only be overcome by a very strong showing.¹⁵⁸ Further, in the case of removal, the parties are put in the awkward situation of arguing the reverse of what they will argue at trial—the defendants argue that the claims are worth more than what is stated and the plaintiffs argue that the claims are worth less.

Another problem with using a jurisdictional amount is that it is a crude indicator of which classes belong in federal court. Why, under the House proposal, does a class of 1000 members, each alleging \$1000 in damages, gain entry into federal court but not a class of 500 people, each alleging \$1750? The one-third composition proposal better captures those classes that belong in federal court than does the jurisdictional amount requirement.

The third possible objection to the proposal is that it does not require defendants to be from the same state as the one-third of the class. In other words, under this objection, the proposal would read that even if there were minimal diversity, courts should decline jurisdiction if it is reasonably certain that a third of the class is from one state and defendants are from that state.¹⁵⁹ This objection is motivated by two concerns: that state courts will decide interstate disputes and that defendants will face local bias. With respect to the former, the concern is that if a defendant is not from the state in which the case is brought, the class action is likely an interstate dispute that should be heard by a federal court. As discussed before, however, while the federalism issues are controversial, depriving state courts of all interstate disputes raises enormous docket congestion concerns. If defendants were required to be from the same state as the one-third of the plaintiffs, many more classes would be eligible for federal court.¹⁶⁰

¹⁵⁷ One justification for requiring great deference to the plaintiff's claim for the jurisdictional amount is that in evaluating the monetary amount of the plaintiff's claim, the judge arguably is infringing on the role of the jury. See, e.g., *Jaconski v. Avisun Corp.*, 359 F.2d 931, 935 (3d Cir. 1966) (finding that "legal certainty" test is grounded in "fear of depriving a plaintiff of his right to a jury trial").

¹⁵⁸ For original jurisdiction, the standard is that it must appear to a legal certainty that the plaintiff in good faith cannot claim the jurisdictional amount. See *Saint Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938). Courts are divided on the standard for removal jurisdiction. See *supra* note 33 and accompanying text.

¹⁵⁹ The "substantial majority" exception in the congressional proposal provides that not only must a substantial majority of the class be from one state, but the primary defendants must also be from that state. See *supra* notes 78-83 and accompanying text.

¹⁶⁰ For these reasons, the proposal should not require that the law applied be of the same state as the third of the residents.

The second concern underlying this objection is that of local bias. There is enormous disagreement over the level of bias that out-of-state defendants face, particularly national corporations that conduct substantial business within the state.¹⁶¹ Because corporations are citizens of only two states—their state of incorporation and their principal place of business¹⁶²—being an out-of-state defendant often does not correspond with any plausible claim of bias.¹⁶³ For example, it is difficult to imagine that the Disney Corporation (a citizen of California and Delaware) faces any local bias in Florida.¹⁶⁴ Further, the concern over local bias is undercut by the fact that the House proposal removes the barrier on in-state removal.¹⁶⁵

Ultimately, the proposal should not include a requirement that one-third of the residents be from the same state as the defendants. Even though local bias may still exist in some cases, such a modification would make too many classes eligible for federal court, raising serious federalism and docket congestion concerns. Further, this proposal already gives defendants a boon, as many more classes will be eligible for federal court than under current practice.¹⁶⁶

¹⁶¹ Compare, e.g., *Krell v. Prudential Ins. Co. of Am. (In re The Prudential Ins. Co. of Am. Sales Practice Litig.)*, 148 F.3d 283, 305 (3d Cir. 1998) (“[N]ational (interstate) class actions are the paradigm for federal diversity jurisdiction because . . . they . . . tend to guard against any bias against interstate enterprises.”), July 1999 Hearings, *supra* note 21 (statement of Hon. Griffin B. Bell) (arguing that out-of-state corporations face local bias in class actions), *id.* (statement of Professor E. Donald Elliott) (same), and *id.* (statement of John H. Beisner, Esq.) (same), with *id.* (statement of Guy Miller Struve, Comm. on Fed. Courts of the Ass’n of the Bar of the City of N.Y.) (arguing that out-of-state corporations do not face such local bias), *id.* (statement of Brian Wolfman, Public Citizen Litig. Group) (same), and H.R. Rep. No. 106-320, at 36 (1999) (dissenting views) (same).

Of course, the debate over out-of-state bias extends beyond the mere class action context to the existence of diversity jurisdiction altogether. The bias justification underlying diversity jurisdiction may not actually exist in today’s interstate economy. See American Law Inst., Study of the Division of Jurisdiction Between State and Federal Courts 106 (1969) (“[A]s to the matter of prejudice, the conventional justification for diversity jurisdiction, none of the significant prejudices that beset our society today begins or ends when a state line is traversed.”). Indeed, the House in 1978 passed legislation that would have completely abolished diversity jurisdiction. See 124 Cong. Rec. 5008 (1978).

¹⁶² See 28 U.S.C. § 1332(c) (1994).

¹⁶³ See, e.g., July 1999 Hearings, *supra* note 21 (statement of Brian Wolfman, Public Citizen Litig. Group) (arguing that out-of-state defendants no longer face local bias).

¹⁶⁴ This example comes from H.R. Rep. No. 106-320, at 36 & n.34 (dissenting views).

¹⁶⁵ See H.R. 1875 § 4(a), 106th Cong. (1999). Under current law, an action may not be removed if a defendant is a citizen of the state in which the suit is brought. See 28 U.S.C. 1441(b) (1994).

¹⁶⁶ In addition, this Note’s proposal would also eliminate the defendant in-state bar on removal in class actions. See *supra* note 70.

C. Problems in Common

There are two major problems that exist under both the congressional proposals and this Note's proposal that need to be briefly addressed: the defendant's incentive to remove and the inadequacy of the current MDL system.

As was discussed more fully earlier, despite higher litigation costs, defendants possess an advantage when there are competing classes;¹⁶⁷ defendants are able to conduct a reverse auction among class counsel to reach the lowest price of settlement. The proposals may give the defendants the power to remove, but there is no requirement that they exercise it. Therefore, while it is probable that defendants will wish to remove actions filed in a plaintiff-friendly forum, it is less certain that they would wish to do so with competing actions in neutral forums. The only parties in this situation with an incentive to remove are the absent class members. While both this Note's proposal and the congressional proposals allow for absent class removal, high monitoring costs make it doubtful that in practice such an option will be exercised frequently.¹⁶⁸

Therefore, measures other than jurisdictional reform are needed to combat this problem. One option is expanding the ability of absent class members to launch collateral attacks on settlements.¹⁶⁹ Perhaps giving more discretion to collateral judges to invalidate settlements will provide adequate incentives for defendants to arrive at a fair settlement, thereby negating the effect of a reverse auction. Another option is strengthening the penalties or sanctions for those attorneys who bargain in bad faith.¹⁷⁰

A second problem common to this Note's proposal and to the pending congressional bills is the inadequacy of the MDL procedures. Competing classes are reduced under the proposals because once cases are in federal court, they may be consolidated under the MDL statute.¹⁷¹ However, the transferee court may only keep the case for

¹⁶⁷ See *supra* notes 60-61 and accompanying text.

¹⁶⁸ See June 1998 Hearings, *supra* note 34, at 20 (statement of John H. Beisner, Esq.) ("I am doubtful that a plaintiff removal provision would be used very frequently . . ."). Although perhaps in some cases, the competing federal counsel would seek to intervene and remove the class.

¹⁶⁹ See *supra* note 50.

¹⁷⁰ See Fed. R. Civ. P. 11. Rule 11 sanctions can have an effect beyond the current dispute. A court may order the sanctioned attorney to inform other judges in front of which the attorney has cases pending of her violation. See, e.g., *Webster v. Omnitrition (In re Omnitrition Int'l, Inc. Sec. Litig.)*, No. C-92-4133 SBA, 965, 1995 WL 626529, at *1 (N.D. Cal. Feb. 21, 1995) (ordering such disclosure). Disclosure allows judges to scrutinize carefully the counsel's behavior in subsequent cases.

¹⁷¹ See *supra* note 56 and accompanying text.

pretrial purposes.¹⁷² The proposals do eliminate competing actions at the pretrial stage, which will reduce the risk of reverse auctions. However, if the classes do not settle, either the incentives for reverse auctions will reappear once the cases leave the transferee court, or wasteful multiple trials will result. Congress is currently considering House Bill 2112, which provides that the transferee court may keep consolidated cases for trial.¹⁷³ At the time of this Note's publication, the bill rested in conference committee.¹⁷⁴

However, the bill fails to address choice of law problems. Even at the pretrial stage, the choice of law problems facing the transferee court are enormous, as it must apply choice of law principles from each court in which the case was filed.¹⁷⁵

Therefore, Congress should consider overhauling the MDL system in considering class action jurisdictional reform.

¹⁷² See *supra* note 56.

¹⁷³ See Multidistrict Jurisdiction Act of 1999, H.R. 2112, 106th Cong. § 2.

¹⁷⁴ See Bill Summary & Status for the 106th Congress (H.R. 2112) (visited Mar. 2, 2000) <<http://thomas.loc.gov/cgi-bin/bdquery/z?d106:HR02112:@@L&summ2=M&>>.

¹⁷⁵ See, e.g., *In re Air Crash Disaster*, 734 F. Supp. 1425, 1429 (N.D. Ill. 1990) ("When a case is transferred, the transferee court must apply choice of law rules of the state where the transferor court sits."). Choice of law issues arise in the JPML for summary judgment and discovery disputes. See Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. Rev. 547, 553 (1996). Once the choice of law rules are determined, the transferee court must apply the rules to each precise legal claim involved. See, e.g., *id.* In a case decided before *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) (holding that transferee court may not retain case for trial), a court in declining to consolidate cases for trial commented:

For a single trial to be held on the issue of product defect, a fairly complicated scenario would have to transpire. First, an independent application of the choice of law rules of Colorado, Ohio, Pennsylvania, Tennessee, and Missouri would have to be implemented in order to identify what state's law should apply to each MDL composite case. Once identified, the applicable laws would have to be compared. If one or more sets of laws were conflicting, would the extent of conflict render a trial so cumbersome that the initial purpose of promoting judicial economy would be subverted? Even if the trial could be held as a logistical matter, would the risk of jury confusion on the merits be so great as to obviate the prospective advantages to be gained from a single trial?

In re The Dow Co. "Sarabond Prods." Liab. Litig., 664 F. Supp. 1403, 1405 (D. Colo. 1987). These same concerns arise in consolidating class actions in the JPML for pretrial purposes.

Of course, one wonders if judges under the guise of efficiency will faithfully apply the choice of law analysis so that more than one law applies. See John L. Strauch & Robert C. Weber, *Multidistrict Litigation*, in 1 *Business and Commercial Litigation in Federal Courts* § 11.3, at 621-36 (Robert L. Haig ed., 1998) (questioning whether judges indeed apply choice of law analysis to yield multiple laws applying in single suit); Kramer, *supra*, at 552 ("[I]t is remarkable how often courts adjudicating mass actions nevertheless find that one law applies to all the claims or to each issue.").

CONCLUSION

The current class action practice is in serious need of reform. Current practice elevates form over substance, encourages forum shopping, and prevents consolidation of competing classes. However, federalizing all classes is not the answer to these problems. While federalizing all classes would be effective in limiting forum shopping and overlapping classes, it raises serious federalism and docket congestion concerns.

A balance must be struck between the current practice and federalizing all classes. Congress should expand the current proposals' exceptions to federal jurisdiction to allow state courts greater control over class actions. Expanding the exceptions will minimize federalism and docket congestion concerns while limiting forum shopping and competing classes.

