

# Federal Expansion and the Decay of State Courts

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*At the turn of the twenty-first century, the country entered its third era of judicial federalism. That era is defined by federal judicial expansion into areas of state-court power and federal monopolization of large and complex litigation. These changes, in turn, have coincided with the decay of state courts. Whether measured by funding, delays, or docket loads, state courts—the true workhorses of the American legal system—have declined relative to federal courts. Indeed, over the last decade, state chief justices have complained that state courts are “financially bankrupt,” “at the tipping point of dysfunction,” and “on the edge of an abyss.” This state-court decay could not come at a worse time—due to federal efforts to circumscribe access to court, there have been growing calls for a turn to state courts. But that turn cannot work without vibrant and well-funded state judiciaries. Thus, federal expansion and state-court decay represent the most fundamental developments in judicial federalism.*

*This Article explores the rise of federal courts and apparent fall of state courts and analyzes the relationship between these two developments. At its core, the Article makes the original claim that federal expansion may be contributing to the decay of state courts and has reinforced a plaintiff-defendant divergence between the two systems. In laying the groundwork for that argument, the Article offers three contributions. First, it provides the first historical periodization of judicial federalism, oriented around three broad eras with distinctive philosophies toward the federal-state allocation of cases. The Article presents significant evidence that in the 1980s and 1990s the country entered a new era of judicial federalism when, for the first time in the nation’s history, the federal government began to aggressively appropriate state-court litigation. Second, the bulk of the Article draws on a wealth of political economy literature and empirical data to step back and evaluate the potentially positive and negative effects of federal-court expansion. The third era has allowed institutional litigants to opt out of state courts, leading to negative distributional consequences for small-stakes litigants. For example, when federal courts siphon large litigants from state court, state legislatures lose existing political pressure to fund*

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*those courts, potentially leading to deteriorating judiciaries that ultimately affect family courts, employees, and consumers. This state-to-federal emigration of institutional litigants may also explain one of the most puzzling recent developments in civil procedure: while federal courts have embraced prodefendant procedural rules in the class action, personal jurisdiction, and pleading contexts, state courts remain relatively proplaintiff, leading to a clear divergence between the two systems and a host of normative concerns. Finally, after laying out these consequences, the Article briefly sketches a few potential remedies to improve state courts, including federal funding for state judiciaries and a push for more state complex litigation courts.*

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## INTRODUCTION

Judicial federalism is the set of doctrines and norms that govern the relationship between state and federal courts.<sup>1</sup> That relationship, in turn, is at the center of the American legal system. It determines litigants' access to federal court, the vertical distribution of judicial power, the coherence of federal and state substantive law, and the shape of procedural law.<sup>2</sup> Most importantly, judicial federalism regulates which judiciary, state or federal, has the power "to settle policy questions which affect the lives, liberty, or purses of men, corporations, and governments."<sup>3</sup>

Judicial power is not evenly distributed between the state and federal systems. Federal courts host less than three hundred thousand civil cases a year while state courts bear the brunt of nearly seventeen million civil cases.<sup>4</sup> Despite this state predominance over docket loads, state courts are mired in relative decay. While federal courts are well funded, politically independent, and host the largest claims,<sup>5</sup> state judicial systems have "struggled with layoffs, hiring freezes and cutbacks in services."<sup>6</sup> Indeed, some courts have become "financially bankrupt"<sup>7</sup> and others have faced "unprecedented budget crises."<sup>8</sup> Moreover, while federal courts have embraced prodefendant procedural rules in the class action, arbitration, and pleading contexts—circumscribing access

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<sup>1</sup> See Louise Weinberg, *The New Judicial Federalism*, 29 *Stan L Rev* 1191, 1196–97 (1977). See also generally Michael E. Solimine and James L. Walker, *Respecting State Courts: The Inevitability of Judicial Federalism* (Praeger 1999).

<sup>2</sup> See generally James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 *Nw U L Rev* 191 (2007); Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 *Harv L Rev* 869 (2011).

<sup>3</sup> William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863–1875*, 13 *Am J Legal Hist* 333, 333 (1969).

<sup>4</sup> Paula Hannaford-Agor, Scott Graves, and Shelley Spacek Miller, *The Landscape of Civil Litigation in State Courts* \*6 n 36 (National Center for State Courts, Civil Justice Initiative, 2015), archived at <http://perma.cc/H4G4-LBPS> (NCSC Report).

<sup>5</sup> See Part I.C.

<sup>6</sup> Don J. DeBenedictis, *Struggling toward Recovery: Courts Hope That Belt-Tightening Lessons from the Recession Will Help Them Make It through the '90s*, 80 *ABA J* 50, 50 (1994).

<sup>7</sup> *Id.* at 51.

<sup>8</sup> Lisa Lambert, *U.S. States Moved beyond Budget Crises in 2012—Census* (Reuters, Apr 11, 2013), archived at <http://perma.cc/VW48-3ESR>. For more on the current situation, see Editorial, *State Courts at the Tipping Point* (NY Times, Nov 24, 2009), archived at <http://perma.cc/7WZ7-DS4G>; Geoffrey McGovern and Michael D. Greenberg, *Who Pays for Justice? Perspectives on State Court System Financing and Governance* \*1 (RAND Corporation, 2014), archived at <http://perma.cc/ENH8-T6LE>.

to court in the process—state courts have remained relatively pro-plaintiff and have ensured broader access to court.<sup>9</sup> This growing divergence between the two systems raises problematic questions about judicial federalism.

This Article explores the rise of federal courts and apparent fall of state courts and analyzes the relationship between these two developments. At its core, the Article makes the original claim that federal expansion may be contributing to the decay of state courts and has reinforced a plaintiff-defendant divergence between the two systems. Although scholars have addressed judicial federalism from many angles, they have largely overlooked the emergence of a new era of federal expansion, its procedural underpinnings, and its relationship to broader trends in state-court funding.<sup>10</sup> Indeed, scholars have offered a litany of factors attempting to explain state-court “inferiority,” from judicial elections to the demise of legendary common-law judges.<sup>11</sup> These factors are part of a broad mix of causes for relative state-court decay, including balanced-budget requirements, structural federal advantages in a globalized economy, and generalized austerity at

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<sup>9</sup> See Diego A. Zambrano, *The States’ Interest in Federal Procedure*, 70 Stan L Rev 1805, 1879 (2018) (“While the federal judiciary continues to close its doors, the states have refused to mimic this retrenchment.”).

<sup>10</sup> The most closely related recent work comes from Professors Samuel Issacharoff and Catherine M. Sharkey, who began to map out federalization of state litigation over a decade ago. See generally Samuel Issacharoff and Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L Rev 1353 (2006). A related literature in the late 1980s and early 1990s also focused on federalization and the values of judicial federalism. See, for example, Richard A. Posner, *The Federal Courts: Crisis and Reform* 169–317 (Harvard 1985); Laurence H. Tribe, *The Relationship between the Federal and State Courts*, in Cynthia Harrison and Russell R. Wheeler, eds., *The Federal Appellate Judiciary in the 21st Century* 107, 115–16 (Federal Judicial Center, 1989), archived at <http://perma.cc/N4SM-PFTW>. See also generally Martin H. Redish, *Reassessing the Allocation of Judicial Business between the State and Federal Courts: Federal Jurisdiction and “The Martian Chronicles”*, 78 Va L Rev 1769 (1992); Erwin Chemerinsky and Larry Kramer, *Defining the Role of the Federal Courts*, 1990 BYU L Rev 67; Daniel J. Meador, *Transformation of the American Judiciary*, 46 Ala L Rev 763 (1995). Further afield, an unrelated strain of scholarship addresses the importance of state constitutional rights. See, for example, Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 Tex L Rev 1141, 1144–55 (1985) (describing three eras of state constitutional criminal law). Most of this literature has ignored federalization’s effect on state courts.

<sup>11</sup> See, for example, Burt Neuborne, *The Myth of Parity*, 90 Harv L Rev 1105, 1121–29 (1977) (arguing that federal courts are superior to state courts due to a variety of institutional features, including presidential appointment of federal judges); John C.P. Goldberg, *Benjamin Cardozo and the Death of the Common Law*, 34 Touro L Rev 147, 147, 154 (2018) (claiming that “there is no member of a state judiciary who rivals [Justice Benjamin] Cardozo in stature,” and that “judges today have little feel” for the common law).

the state level. This Article does not set forth a strong or exclusive causal argument but seeks only to identify a disregarded contributing factor: federalization of state claims in the past forty years seems to be an important driver in the relative decline of state courts' budgets, stature, and role as common-law innovators.

In order to lay the groundwork for my claims, I begin by briefly categorizing the history of judicial federalism. That inquiry requires a historical periodization that can identify the evolving relationship between state and federal courts and shed light on what, if anything, is truly new about the past few decades. The aim here is not to build a new legal history framework but instead to show that developments since 1980 represent a break from earlier eras. My focus is specifically on the doctrine that determines the allocation of cases: subject matter jurisdiction. In order to organize its ups and downs over the centuries, I propose three eras with distinctive philosophies toward the allocation of cases between the two judicial systems.

The first era began in 1789 when the Framers created a partially integrated federal-state judicial system through a web of overlapping jurisdiction, substantive laws, and a unified constitutional ethos.<sup>12</sup> The defining feature of that First Era of Partial Integration, for our purposes, is that under Article III and the Judiciary Act of 1789, state judiciaries were the primary trial courts for federal claims because federal courts did not have plenary federal question jurisdiction.<sup>13</sup>

By contrast, the Second Era of Dual Judicial Sovereignty began tentatively with the Jurisdiction and Removal Act of 1875—which granted federal courts the power to hear all federal statutory claims.<sup>14</sup> By then, the antebellum idea of limited federal courts had run its course, opening the way for federal control over federal law cases. But as federal judicial power grew in the early 1900s, something interesting then happened: progressives launched an all-out attack against diversity jurisdiction. Justice Louis Brandeis, Justice Felix Frankfurter, and even Judge Henry Friendly, later known as a conservative jurist, produced magisterial work taking diversity to task as a tool for corporate

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<sup>12</sup> See Max Farrand, ed, 1 *Records of the Federal Convention of 1787* 124–25 (Yale 1911); Judiciary Act of 1789, ch 20, §§ 9–12, 1 Stat 73, 76–80. See also Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv L Rev 49, 65–66 (1923); Henry M. Hart Jr, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv L Rev 1362, 1401–02 (1953).

<sup>13</sup> See Judiciary Act of 1789, ch 20, §§ 9–12, 1 Stat 73, 76–80.

<sup>14</sup> See Part I.B.

defendants to escape state courts.<sup>15</sup> Drawing on these critiques, the American Law Institute (ALI) proposed in 1969 a clean division of judicial labor under a principle I call “Dual Judicial Sovereignty,” the idea that federal claims should be heard *exclusively* in federal court and state claims in state court. The ALI’s plan provoked a decade-long legislative and judicial movement to create abstention doctrines,<sup>16</sup> shift federal claims to federal court, and abolish diversity jurisdiction<sup>17</sup>—a move supported by the National Association for the Advancement of Colored People (NAACP) and the American Civil Liberties Union (ACLU) and adopted by the House of Representatives in 1978.<sup>18</sup> Despite Senator Ted Kennedy’s support,<sup>19</sup> the ALI’s groundbreaking proposal failed in the Senate.

The Article then argues that in the 1980s and 1990s, the federal government launched a third era of judicial federalism in which, for the first time in the nation’s history, the government became committed to the expansion of *both* diversity and federal question jurisdiction.<sup>20</sup> Provoked partly by a Reagan-era backlash against “out-of-control”<sup>21</sup> state courts, starting in 1980, Congress initiated a series of changes I call “federal expansion” that (1) aggressively federalized areas previously governed by state law, including state class action claims; (2) promoted the concentration of monetarily significant claims in federal court; and (3) unintentionally contributed to the decay of state courts. As a result of the third era’s wide-ranging reforms, more than 50 percent of federal

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<sup>15</sup> See Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv L Rev 483, 498 (1928); Felix Frankfurter, *Distribution of Judicial Power between United States and State Courts*, 13 Cornell L Q 499, 523 (1928); *Erie Railroad Co v Tompkins*, 304 US 64, 78–80 (1938) (Brandeis).

<sup>16</sup> See, for example, *Colorado River Water Conservation District v United States*, 424 US 800, 817 (1976); *Younger v Harris*, 401 US 37, 43–44 (1971); *Huffman v Pursue, Ltd.*, 420 US 592, 603–05 (1975).

<sup>17</sup> See American Law Institute, *Study of the Division of Jurisdiction between State and Federal Courts* 3–4 (1969) (ALI Study); notes 120–29.

<sup>18</sup> See note 123.

<sup>19</sup> See note 124 and accompanying text.

<sup>20</sup> See Part I.C.

<sup>21</sup> Willy E. Rice, *Allegedly Biased, Intimidating, and Incompetent State Court Judges and the Questionable Removal of State Law Class Actions to Purportedly Impartial and Competent Federal Courts—A Historical Perspective and an Empirical Analysis of Class Action Disposition in Federal and State Courts, 1925–2011*, 3 Wm & Mary Bus L Rev 419, 425 (2012).

class action claims in some contexts assert state-law claims;<sup>22</sup> federal jurisdiction is routinely manufactured in what are essentially state law cases; and corporate litigants routinely find a jurisdictional hook to enter federal court.<sup>23</sup> Accordingly, the median damages award in federal cases has gone from \$8,000 in 1980 to \$60,000 in 2015; the mean from \$544,000 to \$1.4 million.<sup>24</sup> Unlike these massive claims that now dominate federal dockets, 75 percent of state-court cases involve damages awards of less than \$5,000.<sup>25</sup> Moreover, I present evidence that suggests state-court budgets have been growing at a much smaller pace since 1982 relative to federal-court budgets.<sup>26</sup> In short, federal courts control the largest cases and have increasingly consumed state-court dockets.

After laying out these three eras of judicial federalism, the heart of the Article draws on a wealth of political economy literature to evaluate the effects that federal expansion can have on state courts.<sup>27</sup> To be sure, federalization has the potential to bring a wealth of benefits, as it allows federal courts to manage cases with national repercussions, police negative externalities stemming from state law, and bring uniformity to federal law. Moreover, I argue that federal expansion can lead to federal-state competition for cases—spurring state governments to streamline their court systems.<sup>28</sup>

Despite these benefits, the Article argues that an expanding federal judiciary may actually contribute to the decay of state courts.<sup>29</sup> This novel claim runs counter to scholarship in the area which has failed to identify this connection and has instead worried that federalization may overburden and weaken federal—not

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<sup>22</sup> Consumer Financial Protection Bureau, *Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street and Consumer Protection Act § 1028(a) § 6*, \*20–21 (Mar 2015), archived at <http://perma.cc/GRD2-4PRG>.

<sup>23</sup> See Thomas E. Willging and Shannon R. Wheatman, *An Empirical Examination of Attorneys' Choice of Forum in Class Action Litigation* \*8 (Federal Judicial Center, 2005), archived at <http://perma.cc/JPR8-4TM4> (noting that defense-side attorneys in removed cases tended to report an expectation that federal courts would rule favorably toward them on pretrial matters).

<sup>24</sup> See Part I.C.3.

<sup>25</sup> See note 251 and accompanying text.

<sup>26</sup> See Part I.C.4.

<sup>27</sup> See Parts II–III.

<sup>28</sup> See Part III.B. See also Zambrano, 70 *Stan L Rev* at 1845–46 (cited in note 9).

<sup>29</sup> See Part II.

state—courts and could even relieve overtaxed state-court dockets.<sup>30</sup> But I argue that by expanding the breadth of arbitration and federal jurisdiction over state-court cases, federal courts have compounded existing problems in state judiciaries. A state-to-federal shift allows businesses and institutional litigants to effectively opt out of state court in favor of arbitration or federal courts. This alters the equilibrium of stakeholders in state courts, with dynamic and negative consequences.

First, state courts may grow increasingly proplaintiff and federal courts prodefendant because repeat players are no longer stuck at the state level; they can opt out.<sup>31</sup> As businesses emigrate from state to federal court, they leave behind a stakeholder pool that is less corporate heavy and, eventually, more plaintiff friendly. That is partly because as large businesses care less about state litigation, they cede their repeat-player influence to other stakeholders and focus mostly on lobbying federal courts (even though, as I explain below, they maintain a significant interest in state judicial elections). State judges eager to retain some litigation may then market their courts to plaintiffs' attorneys, who in turn prefer heterogeneous state judiciaries from which they have more opportunities to find friendly judges. In line with this theory, I draw on significant evidence that defendant firms generally prefer to litigate in federal court while plaintiffs' attorneys side with state courts; that plaintiffs' win rate in federal court has collapsed since 1985; and that while federal courts have adopted prodefendant procedural reforms, state courts have remained relatively proplaintiff.<sup>32</sup> One concern is that such a stark state-federal divergence can lead to a negative feedback loop: prompted by allegations of state bias against defendants, the federal government increases its jurisdiction, only to turn state courts even more proplaintiff and in need of further intervention. In other words, as the federal judiciary expands to absorb state cases, local courts end up inviting further federal action, leading to a negative spiral.

Second, federalization means that businesses that used to be repeat litigants in state court no longer have as much of a vested

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<sup>30</sup> See, for example, William W. Schwarzer and Russell R. Wheeler, *On the Federalization of the Administration of Civil and Criminal Justice*, 23 *Stetson L Rev* 651, 682 (1994).

<sup>31</sup> See Part II.A.1.

<sup>32</sup> See Part II.A.2. See also Alexandra D. Lahav and Peter Siegelman, *The Curious Incident of the Falling Win Rate: Individual vs System-Level Justification and the Rule of Law*, 52 *UC Davis L Rev* 1371, 1408–20 (2019).



interest in the quality of local judiciaries, reducing any incentive they had to lobby state legislatures for competent and well-funded courts.<sup>33</sup> Although normatively it may be a good thing for state courts to lose prodefendant lobbying, businesses nonetheless retain an incentive to lobby for procorporate judges (especially in judicial elections) and the state substantive law that follows them to federal court (for example, tort reform). Due to federal expansion, businesses only lose the incentive to lobby for better courts. This may partly explain one of the Article's findings: that federal-court budgets have grown much more than state-court budgets recently.<sup>34</sup> The main problem with this shift is that it carries distributional consequences and leads to a classic political economy problem: while businesses are better off in federal court, remaining state-court litigants (including consumers, employees, and those in family courts) are stuck with deteriorating state judiciaries. Society may lose the beneficial effect businesses had on state courts yet retain the normatively worrisome effects of prodefendant and procorporate substantive law.

Third, federal monopolization of large state claims weakens the ability of state courts to shape the common law. Because the largest cases are increasingly litigated in federal court—including state-law claims under diversity or supplemental jurisdiction—the common law is stuck in a double bind: state courts have less jurisdiction to change it and federal courts cannot engage in innovative interpretations because of *Erie Railroad Co v Tompkins*.<sup>35</sup> This can lead to common-law stagnation. The Fifth Circuit explicitly recognized this problem in December 2018 in the context of a products-liability case against Apple, writing that “where defendants operate nationwide in highly consolidated industries, like Apple in the smartphone industry, the rules governing federal courts in diversity cases may substantially close state courts to novel claims. . . . The result may be a legal system less generative than normal.”<sup>36</sup> To evaluate this dynamic, I review preliminary evidence that federal courts are doing more work interpreting novel areas of state law.<sup>37</sup>

In sum, federal expansion has a vast array of effects on state courts that are linked to economic and political dynamics. This

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<sup>33</sup> See Part II.B.1.

<sup>34</sup> See Part I.C.

<sup>35</sup> 304 US 64 (1938). See Part II.C.

<sup>36</sup> *Meador v Apple*, 911 F3d 260, 267 n 6 (5th Cir 2018).

<sup>37</sup> See Part II.C.

extended discussion of state courts is also timely—the federal judiciary’s efforts to reduce plaintiffs’ access to court (and the Supreme Court’s conservative tilt) means that legal struggles at the federal level may migrate to state courts. And indeed, we are already seeing this turn to state courts. While the Supreme Court recently decided that political gerrymandering is nonjusticiable, the Pennsylvania Supreme Court welcomed and adjudicated a similar claim under state law in 2018.<sup>38</sup> State courts thus have the opportunity to seize this moment by opening access to justice.<sup>39</sup> But this shift to state courts cannot blossom while state judiciaries are constrained by federal expansion, relatively low budgets, insufficient political support, and “legislative assault” in at least nineteen states.<sup>40</sup> This Article ultimately seeks to highlight the importance of state courts so that they can regain their vital role in shaping state and even federal law. After all, “For most Americans, Lady Justice lives in the halls of state courts.”<sup>41</sup>

Given this state of affairs, the Article sketches a few potential remedies for the relative decay of state courts. I suggest that the federal government should fund state judiciaries with attached conditions that focus on improvements. Such a proposal can be structured carefully to avoid constitutional concerns. I also argue, among other things, that state governments should continue to create complex litigation courts.

Finally, a word about methods and limitations is in order. The Article leverages data collected by the Administrative Office of the United States Courts, the US Bureau of Justice Statistics, and National Center for State Courts on cases in federal and state courts, and state-court financial information. Moreover, I focus on the law of civil procedure even though there is a universe of criminal cases that are hosted in the same courts. I leave criminal cases aside mostly because they are not subject to the same forum-shopping dynamics and involve different political economy

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<sup>38</sup> Compare *Gill v Whitford*, 138 S Ct 1916, 1934 (2018) (refusing to decide the issue of justiciability of political gerrymandering); *Rucho v Common Cause*, 139 S Ct 2484, 2506–07 (2019), with *League of Women Voters of Pennsylvania v Commonwealth*, 175 A3d 282, 286 (Pa 2018) (Baer concurring and dissenting) (noting that the court did not stay proceedings while *Gill* was pending or show restraint).

<sup>39</sup> See, for example, Mitch Smith, *North Carolina Judges Suspend Limit on Governor’s Powers* (NY Times, Feb 8, 2017), archived at <http://perma.cc/3MFD-Q89D>.

<sup>40</sup> See notes 274–76; *Legislative Assault on State Courts* (Brennan Center for Justice, Feb 11, 2019), archived at <http://perma.cc/HC9Z-X95V>.

<sup>41</sup> John Schwartz, *Critics Say Budget Cuts for Courts Risk Rights* (NY Times, Nov 26, 2011), archived at <http://perma.cc/BT5T-5R2R> (quoting former Colorado Supreme Court Justice Rebecca Love Kourlis).

considerations. That is another reason why I do not claim a strong causal relationship between federalization and relative state-court decay. I seek instead only to add a new consideration to an existing basket of contributing causes.

The Article proceeds as follows. Part I explores the three eras of judicial federalism: from the 1789 partial integration of state and federal courts all the way through the 1969 ALI plan and era of Dual Judicial Sovereignty. A major contribution of this Article is to then describe how after 1980, the country entered into a new era of judicial federalism defined by federal expansion. This sets the basis for an exploration of the effect of recent federal changes on state courts. Thereafter, Parts II and III—the heart of the Article—draw on the political economy literature to argue that federal expansion can provide benefits but can also impose significant costs on state courts. Finally, Part IV suggests a few potential remedies to improve the relationship between the federal government and state judiciaries.

#### I. THE HISTORY OF JUDICIAL FEDERALISM: PARTIAL INTEGRATION, DUAL JUDICIAL SOVEREIGNTY, AND FEDERAL EXPANSION

In this Part, I set the stage for the division of cases between federal and state courts by exploring three historic episodes that cover judicial federalism from 1789 to 2018. The boundaries between the three eras are fuzzy and arguably spanned decades. But the point of this history is neither to search for some defining line between true eras nor to develop a legal history framework—rather, I simply aim to describe how attitudes toward federal-state court relations (and subject matter jurisdiction) have evolved over time and how the post-1980 era is quite different than what came before. This history also shows two common themes.

First, there is a profound co-evolution and deep interconnectivity between federal question and diversity jurisdiction. In the first era, federal question jurisdiction was anathema, constrained by the 1789 Judiciary Act and vilified by states'-rights proponents and Anti-Federalists. By contrast, diversity jurisdiction gave,

according to Justice Joseph Story, “lasting satisfaction to the people.”<sup>42</sup> In the Second Era, however, the roles flipped. Access to federal court became a savior for post–Civil War freedmen, federal officials, and railroads—federal questions transformed into the cornerstone of federal judicial power. Conversely, diversity jurisdiction and its relationship to corporate defendants became, according to Justice Frankfurter, “the mounting mischief inflicted on the federal judicial system” and a target for progressives, the ALI, and even the NAACP.<sup>43</sup> One distinctive feature of the third era is that anxieties about both diversity and federal question jurisdiction vanished and, for the first time, the federal government aggressively appropriated state-court litigation and expanded both types of jurisdiction. Indeed, Republicans seem enamored of diversity jurisdiction as a way to fight plaintiffs’ attorneys.<sup>44</sup>

Second, political parties in the midst of political realignments have given new constituencies access to federal court as a way to consolidate emerging political coalitions.<sup>45</sup> In the first era, federalists shielded interstate creditors—a central constituency of their new political coalition—from state legislatures with diversity jurisdiction and access to federal courts staffed by federal judges and urban juries. In the second era, radical Republicans seeking to retain a political majority after the Civil War expanded federal question jurisdiction over newly empowered freedmen and interstate companies. Finally, in the third era, the Reagan administration embraced the corporate anti-litigation movement with broad expansions of federal jurisdiction and a retrenched federal procedural regime that made it more difficult for plaintiffs to file claims or certify class actions. Although this gloss is only part of a complex history of institutional change, drawing these links between broader political debates and procedural law shows that jurisdiction, and related doctrines, can be a tool used by different political groups to retain political power in uncertain times.

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<sup>42</sup> Joseph Story, 3 *Commentaries on the Constitution of the United States* § 1686 at 564 (Hilliard 1833).

<sup>43</sup> *Lumbermen’s Mutual Casualty Co v Elbert*, 348 US 48, 54 (1954) (Frankfurter concurring).

<sup>44</sup> See, for example, Linda S. Mullenix, *The American Class Action Fairness Act and Forum Shopping American-Style*, 31 *Geneva Papers* 357, 360 (2006).

<sup>45</sup> For a related institutional account of the development of judicial power, see generally Justin Crowe, *Building the Judiciary: Law, Courts, and the Politics of Institutional Development* (Princeton 2012).

## A. The First Era: A Partially Integrated Judiciary (1789–1875)

The story of judicial federalism starts at the beginning of the Republic. The Framers in 1789 envisioned a federal judiciary charged with a limited caseload brought under the Supreme Court's "original" jurisdiction—affecting ambassadors, public ministers, and cases in which a state is a party, a defined set of cases in the Supreme Court's appellate docket,<sup>46</sup> and a vague promise of future "inferior courts" that could hear any claims arising under federal law.<sup>47</sup> The Framers forcefully debated the constitutionality of these lower federal courts, ultimately settling for Madison's compromise to leave to Congress the choice whether to create them.<sup>48</sup> Unlike those heated debates, however, the Framers barely discussed federal courts' diversity jurisdiction.<sup>49</sup> And, most importantly for our purposes, the 1789 Judiciary Act did not even vest federal courts with federal question jurisdiction, severely cabining the number of cases in federal court.<sup>50</sup> The Framers instead placed the burden of judicial work in the new nation on state courts, expecting they would hear most state *and* federal claims.<sup>51</sup> This jurisdictional decision by itself defined the first era and made it quite distinctive from what came after the Civil War.

At the center of Article III stood two somewhat contradictory principles: a dual structure of separate federal and state courts and an integrative principle that wove the two systems together. Unlike countries with a unitary judiciary, the Constitution created a federal judiciary that would exist in parallel to state courts. But despite this dualism, Article III enmeshed the two court systems. On the federal side, the Supreme Court had the power to hear direct appeals from state courts on issues of federal law.<sup>52</sup> The inferior federal courts were also empowered to hear claims between residents of diverse states and original jurisdiction claims not exclusively reserved to the Supreme Court.<sup>53</sup> On the

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<sup>46</sup> US Const Art III, § 2.

<sup>47</sup> US Const Art III, § 1.

<sup>48</sup> Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 Wis L Rev 39, 42. See also *Records of the Federal Convention* at 125 (cited in note 12); Warren, 37 Harv L Rev at 65–66 (cited in note 12).

<sup>49</sup> Friendly, 41 Harv L Rev at 484–87 (cited in note 15).

<sup>50</sup> See, for example, Judiciary Act of 1789 §§ 9–12, 1 Stat 73, 76–80.

<sup>51</sup> Hart, 66 Harv L Rev at 1401 (cited in note 12).

<sup>52</sup> See Judiciary Act of 1789, § 25, 1 Stat 73, 85–87; *Martin v Hunter's Lessee*, 14 US 304, 352–53 (1816) (holding that state-court decisions on issues of federal law "may be re-examined and reversed or affirmed in the supreme court of the United States").

<sup>53</sup> Judiciary Act of 1789, ch 20, §§ 9–12, 1 Stat 73, 76–80.

state side, local judiciaries were bound by the Constitution under the Supremacy Clause to apply federal law<sup>54</sup> and were also trial courts for most federal claims.<sup>55</sup>

The Framers need not have pursued partial integration. They could have easily kept the systems apart, with no lower federal courts at all or, alternatively, lower federal courts with exclusive federal jurisdiction, no diversity provision, and no appellate review of state decisions on federal law.<sup>56</sup> Indeed, the drafters of the 1789 Judiciary Act considered, but ultimately rejected, an early proposal “that state courts should serve as federal inferior courts.”<sup>57</sup> But by enlisting state courts to enforce federal statutes, the Framers pacified Anti-Federalist objections to federal jurisdiction.<sup>58</sup> And, vice versa, by giving federal courts the power to decide diversity cases, Federalists gave access to federal court to one of their main constituencies: interstate creditors.<sup>59</sup>

Given the lack of any preexisting federal courts, most state and federal judges were at the time of the founding, “more often than not, the very same people.”<sup>60</sup> Both state and federal judges were originally appointed by the political branches for life tenure,<sup>61</sup> and, not surprisingly, a large majority of the federal judges confirmed in the early republic had “served as state court judges either before, after, or both before and after their federal position.”<sup>62</sup> Indeed, “State courts were the main source of Supreme Court justices throughout the nineteenth century.”<sup>63</sup> Although

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<sup>54</sup> US Const Art VI, cl 2.

<sup>55</sup> Henry M. Hart Jr, *The Relations between State and Federal Law*, 54 Colum L Rev 489, 498 (1954).

<sup>56</sup> See Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 BU L Rev 205, 212 (1985) (“Article III plainly imposes no obligation to create lower federal courts.”).

<sup>57</sup> Julius Goebel Jr, 1 *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801* 470 (MacMillan 1971).

<sup>58</sup> See Hart, 54 Colum L Rev at 498 (cited in note 55).

<sup>59</sup> See Story, 3 *Commentaries on the Constitution* § 1685 at 607 (cited in note 42).

<sup>60</sup> Brian T. Fitzpatrick, *The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure*, 98 Va L Rev 839, 891 (2012).

<sup>61</sup> *Id* at 841–42.

<sup>62</sup> *Id* at 891.

<sup>63</sup> Lawrence M. Friedman, *A History of American Law* 283 (Simon & Schuster 3d ed 1973).

the Compensation Act of 1789 set federal judicial salaries significantly higher than the average state judge,<sup>64</sup> few prominent observers noted disparities in competence or ability. Justice Story wrote in his *Commentaries* that “the judges of the state courts are, and always will be, of as much learning, integrity, and wisdom, as those of the courts of the United States.”<sup>65</sup> The most important modern difference between state and federal judges, judicial elections, came only in the 1830–1860 period when around twenty state governments adopted elections as the predominant method of judicial selection.<sup>66</sup> This development did, for the first time, place a systematic distinction between state and federal courts.

Whatever critiques against federal jurisdiction existed during Founding-era debates, they were overtaken by a movement of judges and lawyers intent on building a uniform commercial law in both state and federal courts.<sup>67</sup> To be sure, although this movement was only one side of the judicial federalism debate, it was led by some of the most recognized judges of the era, including Justice Story and New York’s Chancellor James Kent.<sup>68</sup> In the *Commentaries*, Justice Story felt confident enough to write about diversity jurisdiction that “[p]robably no part of the judicial power of the Union has been of more practical benefit, or has given more lasting satisfaction to the people,” and that it “has cherished a mutual respect and confidence between the state and national courts.”<sup>69</sup> Chancellor Kent similarly praised the 1789 Judiciary Act as responsible for a system “so successful and so beneficial in its operation, that the administration of justice in the federal courts has been constantly rising in influence and reputation.”<sup>70</sup>

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<sup>64</sup> James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 Mich L Rev 1, 20 (2008) (“Critics of generous salaries argued that the figures exceeded the sums paid to state judges and were more than sufficient to attract the best talent.”).

<sup>65</sup> Story, 3 *Commentaries on the Constitution* § 1736 at 606 (cited in note 42).

<sup>66</sup> See Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 Harv L Rev 1061, 1066 (2010).

<sup>67</sup> This movement is why the Supreme Court allowed federal courts to create their own general commercial law. See generally *Swift v Tyson*, 41 US (16 Pet) 1 (1842).

<sup>68</sup> See Amalia D. Kessler, *Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture, 1800–1877* 22–23, 45–48 (Yale 2017) (noting that while Justice Story and Chancellor Kent were partially motivated by commercial concerns, they were also motivated by moral and procedural aspects of equity and common law).

<sup>69</sup> Story, 3 *Commentaries on the Constitution* § 1686 at 564 (cited in note 42). In 1833, the Force Bill allowed the removal of claims against federal officials for acts connected with taxation. Act of Mar 2, 1833, § 3, 4 Stat 633–34.

<sup>70</sup> James Kent, 1 *Commentaries on American Law* 286 (O. Halsted 1826).

On the whole, the first era seems to have been fairly stable,<sup>71</sup> with a pro-state court bent, underpowered federal courts, and few systematic differences between state and federal judges prior to the wave of judicial elections.<sup>72</sup> To be sure, much of this peace in judicial relations was later upended by fugitive slave cases, Jacksonian hostility to an elite judiciary, and the Civil War.<sup>73</sup> For our purposes, however, the era was quite different than what came later because the lack of plenary federal jurisdiction meant that state courts had primary power over federal law. And even though state courts were dominant, when federal judges dealt with cases defining federal judicial power, they did not develop a language of “deference” to state judiciaries.<sup>74</sup>

#### B. The Second Era: Dual Judicial Sovereignty (1875–1980)

The long unfolding story of judicial federalism during the second era shows that federal courts clawed back power from state courts but, simultaneously, found themselves under constant attacks for their expansive diversity jurisdiction.<sup>75</sup> The second era began with a flurry after the Civil War, when a Republican Congress pursued a five-part effort to shift power from state to federal court through expansions to removal jurisdiction, habeas corpus appeals, and bankruptcy jurisdiction, as well as the creation of the US Court of Claims to host suits against the federal government.<sup>76</sup> The federal legislative *coup de grâce* came in 1875, when the Reconstruction Congress finally gave federal courts the plenary power to hear all cases presenting an issue of federal law—so-called federal question jurisdiction—and expanded diversity jurisdiction.<sup>77</sup> This decisive step toward the second era represented “Republican disenchantment with state courts,” because

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<sup>71</sup> Grove, 124 Harv L Rev at 889 (cited in note 2).

<sup>72</sup> But see Friedman, *A History of American Law* at 119 (cited in note 63) (recognizing that state courts had great leaders but “their spheres were less floodlit . . . than the great federal courts”).

<sup>73</sup> See generally Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (Yale 1975). Jacksonian hostility arguably led to the Field Codes. See Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 Law & Hist Rev 311, 318 (1998).

<sup>74</sup> Mary Brigid McManamon, *Felix Frankfurter: The Architect of “Our Federalism”*, 27 Ga L Rev 697, 700 (1993).

<sup>75</sup> See Wiecek, 13 Am J Legal Hist at 338–39 (cited in note 3).

<sup>76</sup> Id at 333–34. But see Conformity Act of 1872, ch 255, §§ 5–6, 17 Stat 196, 197 (instructing federal courts to follow state procedures in cases of law).

<sup>77</sup> See Jurisdiction and Removal Act of 1875, § 2, 18 Stat 470, 470–71; Richard H. Fallon Jr, et al, *Hart & Wechsler’s The Federal Courts and the Federal System* 745–46



federal legislators “came to believe that local judges were trying to thwart national policy,” especially protections for, at first, “federal officers and freedmen,” and later, interstate commerce and railroads.<sup>78</sup> In other words, the Act became “part and parcel of the Republicans’ economic agenda”<sup>79</sup> and political strategy. But even then, federal question jurisdiction—the new cornerstone of federal judicial power—was limited by an amount-in-controversy requirement and faced repeated challenges from a Democratic Party eager to weaken the new jurisdictional rules.<sup>80</sup>

With federal question jurisdiction flourishing in the late 1800s and early 1900s, diversity jurisdiction became embroiled in battles between progressives and *Lochner*-era conservative federal courts.<sup>81</sup> In the face of federal-court attacks on state regulation, progressive lawyers began to attack diversity jurisdiction as a corporate tool.<sup>82</sup> In turn, the Democratic Party’s long-term efforts against federal jurisdiction over corporate suits finally earned support from progressive Republicans as well as judges and legal scholars worried about docket control.<sup>83</sup> A 1914 report for the National Economic League prepared by, among others, Professor Roscoe Pound and Justice Louis D. Brandeis, complained that “diversity jurisdiction” and differing legal interpretations between state and federal courts was an obstacle that had “impaired the usefulness of the federal courts in some localities.”<sup>84</sup> Two events then followed in the early 1920s that set the stage for further technical complaints about judicial federalism. First, the onset of prohibition in 1920 led to an unexpectedly large expansion of federal dockets, prompting anguish about overloaded

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(Foundation 6th ed 2009). Though this was not an exclusive grant. *Clafin v Houseman*, 93 US 130, 136 (1876) (“[I]f exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction.”).

<sup>78</sup> Wiecek, 13 Am J Legal Hist at 338, 342 (cited in note 3).

<sup>79</sup> Grove, 124 Harv L Rev at 891–92 (cited in note 2).

<sup>80</sup> *Id* at 893–94.

<sup>81</sup> See Edward Purcell Jr, *Brandeis and the Progressive Constitution: Erie, the Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America* 77–84 (Yale 2000). See generally *Lochner v New York*, 198 US 45 (1905).

<sup>82</sup> See David Marcus, *Erie, the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 Wm & Mary L Rev 1247, 1269 (2007) (arguing that diversity jurisdiction enabled “procorporate tendencies” in the *Lochner* era). See also William M. Meigs, *Decisions of the Federal Courts on Questions of State Law*, 45 Am L Rev 47, 48 (1911) (criticizing the idea of “general commercial law”).

<sup>83</sup> Grove, 124 Harv L Rev at 898–99 (cited in note 2).

<sup>84</sup> Charles W. Eliot, et al, *Preliminary Report on Efficiency in the Administration of Justice* 28 (National Economic League 1914).

federal courts.<sup>85</sup> Second, the *Black and White Taxicab*<sup>86</sup> case—in which the Supreme Court allowed a corporation to nakedly manufacture diversity jurisdiction—prompted state defenders and progressives to lash out against federal courts.<sup>87</sup>

Both of these events unleashed a new set of federalism detractors and invited progressive scholars and judges wary of conservative federal judges to seize on the festering discontent. Grasping the moment, in 1928 Judge Friendly produced a seminal article questioning the historical foundations of diversity jurisdiction, arguing that it was meant not as a bulwark against state parochialism but only as protection for the creditor and business class from in-state debtors.<sup>88</sup> A year later, Justice Frankfurter released an influential piece pushing against corporate-friendly diversity jurisdiction,<sup>89</sup> which he later called “the mounting mischief inflicted on the federal judicial system.”<sup>90</sup> The progressive critique of diversity thus solidified—it was a mischievous constitutional loophole that allowed exploitation of the federal judiciary to benefit large businesses.<sup>91</sup> This critique later gained credence among a New Deal labor movement that was categorically in favor of administrative regulation and against privatized adjudication.<sup>92</sup>

The rising tide against diversity jurisdiction provoked both victories and flops. Between 1928 and 1932, the Senate Judiciary Committee produced three bills to, for the first time in the history

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<sup>85</sup> See William M. Wiecek, *The Reconstruction of Federal Judicial Power*, in Lawrence M. Friedman and Harry N. Schriber, eds., *American Law and the Constitutional Order* 237 (Harvard 1988); *Caseloads: Criminal Cases, 1870–2017* (Federal Judicial Center), archived at <http://perma.cc/CX3M-ZQKP>.

<sup>86</sup> *Black and White Taxicab and Transfer Company v Brown and Yellow Taxicab and Transfer Company*, 276 US 518 (1928).

<sup>87</sup> See *id.* at 523–25 (holding that federal courts are not required to follow state common-law precedents even if the defendant was forum shopping). Robert Post, *Federalism in the Taft Court Era: Can It Be “Revived”?*, 51 *Duke L J* 1513, 1598–99 & n 295 (2002).

<sup>88</sup> Friendly, 41 *Harv L Rev* at 498–99 (cited in note 15).

<sup>89</sup> See generally Frankfurter, 13 *Cornell L Q* 499 (cited in note 15).

<sup>90</sup> *Elbert*, 348 US at 54 (Frankfurter concurring). See Frankfurter, 13 *Cornell L Q* at 520–21 (cited in note 15). In many ways, Frankfurter was the ideological “architect” of the Second Era. McManamon, 27 *Ga L Rev* at 733 n 255 (cited in note 74) (“It was, after all, Frankfurter who taught generations of Harvard law students, published countless books and articles, and drafted virtually all the opinions that gave birth to ‘our federalism.’”).

<sup>91</sup> Purcell, *Brandeis and the Progressive Constitution* at 77–78 (cited in note 81).

<sup>92</sup> See David Freeman Engstrom, “Not Merely There to Help the Men”: *Equal Pay Laws, Collective Rights, and the Making of the Modern Class Action*, 70 *Stan L Rev* 1, 64 (2018).

of the republic, wholly abolish diversity jurisdiction.<sup>93</sup> Progressive Senator George W. Norris—a former state-court judge and later cosponsor of the Norris-LaGuardia Act—masterminded all three bills, doggedly pursuing diversity’s abolition for over a decade.<sup>94</sup> Although Norris ultimately succeeded in curbing federal labor injunctions,<sup>95</sup> his diversity bills never received a vote.<sup>96</sup>

But the antidiversity push found more success in the judiciary. In 1928, the Supreme Court introduced an early version of what later became *Younger v Harris*<sup>97</sup> abstention, holding that lower federal courts should relinquish jurisdiction in cases involving unsettled questions of state law.<sup>98</sup> Then, in 1938, the Court’s decision in *Erie* revolutionized the judicial system by forcing federal courts to decide diversity cases as if they were state courts.<sup>99</sup> This was a direct strike against the core of diversity jurisdiction and the founding era’s partial integration.<sup>100</sup> *Erie* represented the Supreme Court’s sweeping attempt to blunt forum shopping from state to federal court and eliminate a major incentive for diversity removal—the possibility of different substantive law.<sup>101</sup> After Justice Frankfurter’s appointment to the Court in 1939, a new language of judicial federalism emerged. Only three years after *Erie*, Justice Frankfurter weakened federal courts’ power over state courts, holding in *Toucey v New York Life Insurance Co*<sup>102</sup> that the Anti-Injunction Act of 1793<sup>103</sup> was a nearly absolute bar on federal stays of state proceedings.<sup>104</sup> Then in 1941, Justice Frankfurter

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<sup>93</sup> S 626, 70th Cong, 1st Sess 1 (Mar 27, 1928); S 691, 71st Cong, 2d Sess 1 (May 20, 1930); S 530, 72d Cong, 1st Sess 1 (Apr 7, 1932). See Jack H. Friedenthal, *New Limitations on Federal Jurisdiction*, 11 *Stan L Rev* 213, 214 n 4 (1959). See also Purcell, *Brandeis and the Progressive Constitution* at 83–84 (cited in note 81).

<sup>94</sup> See Purcell, *Brandeis and the Progressive Constitution* at 77–85 (cited in note 81).

<sup>95</sup> William E. Forbath, *Law and the Shaping of the American Labor Movement* 159–62 (Harvard 1991); Luke P. Norris, *Labor and the Origins of Civil Procedure*, 92 *NYU L Rev* 462, 506 (2017).

<sup>96</sup> Brett W. Curry, *The Courts, Congress, and the Politics of Federal Jurisdiction* \*103 (unpublished PhD dissertation, The Ohio State University, 2005), archived at <http://perma.cc/PE8L-ATL6>.

<sup>97</sup> 401 US 37 (1971).

<sup>98</sup> *Gilchrist v Interborough Rapid Transit Co*, 279 US 159, 207 (1929).

<sup>99</sup> *Erie*, 304 US at 78. See also Daniel J. Meador, *Concluding Remarks: National Conference on State-Federal Judicial Relationships*, 78 *Va L Rev* 1895, 1895 (1992).

<sup>100</sup> See Louis H. Pollak, *In Praise of Friendly*, 133 *U Pa L Rev* 39, 51 (1984).

<sup>101</sup> See *Erie*, 401 US at 76–77.

<sup>102</sup> 314 US 118 (1941).

<sup>103</sup> Act of Mar 2, 1793, ch 22, § 5, 1 Stat 334–35.

<sup>104</sup> *Toucey*, 314 US at 132.

created a new robust concept of federal abstention with regard to state-court cases.<sup>105</sup>

After *Toucey* and the abstention cases, a period of relative calm set in for a decade, until Chief Justice Earl Warren called for a reevaluation of judicial federalism in 1959. Fresh from *Brown v Board of Education*<sup>106</sup> and in the throes of southern “massive resistance,” the Chief was also concerned about an entirely different villain: growing docket pressures on federal district court judges. In an attempt to forestall the incoming flood, the Chief called on the ALI to rethink the distribution of cases between the federal and state systems.<sup>107</sup> Chief Justice Warren likely calculated that if federal courts focused on solving civil rights cases and broader social issues, then whatever ensuing docket concerns came to light could be alleviated by getting rid of state law cases.<sup>108</sup> In response to Chief Justice Warren’s call, the ALI went through a ten-year study led by Herbert Wechsler that culminated in a final 1969 report, titled “Study of the Division of Jurisdiction between State and Federal Courts” (ALI Study).<sup>109</sup>

The ALI Study’s first proposal sought to place limits on diversity jurisdiction by prohibiting plaintiffs from bringing diversity cases in their own home states.<sup>110</sup> The Study otherwise recommended a jurisdictional expansion over certain complex cases. The second proposal was more radical. The Study not only reaffirmed the importance of federal question jurisdiction, but also recommended enlarging it. The “basic principle is that federal question jurisdiction is necessary to preserve uniformity in federal law and to protect litigants relying on federal law from the danger that state courts will not properly apply that law, either through misunderstanding or lack of sympathy.”<sup>111</sup> The Study thus suggested the abolition of the federal claims

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<sup>105</sup> *Railroad Commission of Texas v Pullman Co.*, 312 US 496, 501 (1941). See also *Burford v Sun Oil Co.*, 319 US 315, 332–33 (1943); *Louisiana Power & Light Co v City of Thibodaux*, 360 US 25, 30 (1959) (reinstating a stay of a federal-court action pending a decision by the Supreme Court of Louisiana on a novel question of state law).

<sup>106</sup> 347 US 483 (1954).

<sup>107</sup> 36 ALI Proceedings 27, 33 (May 20, 1959).

<sup>108</sup> Notably, this civil rights impetus differed from Justice Frankfurter’s motivation, which focused on the progressive movement’s battle against corporations. Indeed, Justice Frankfurter was ambivalent about civil rights cases. This highlights an important dissonance in the second era that only grew wider after Chief Justice Warren Burger became chief justice.

<sup>109</sup> See generally ALI Study (cited in note 17).

<sup>110</sup> *Id.* at 109.

<sup>111</sup> *Id.* at 4.

amount-in-controversy requirement and an expansion of federal question jurisdiction. The overall plan was to achieve a massive shift of around 50 percent of all diversity cases from federal court to state courts, while simultaneously increasing cases relying upon federal law.<sup>112</sup>

The ALI's federal-state division of labor became the guiding light for reformers. Its ethos for allocating cases in the federal system posited, at its core, what I'd like to call a "Dual Judicial Sovereignty" principle, which is defined by three notions: (1) each court system, federal and state, has a comparative advantage over cases addressing its own substantive law; (2) although the First Era's 1789 partially integrated structure explicitly blurred the lines between the two systems, the demands of the twentieth-century economy, and especially ballooning docket loads, requires a relaxation of these statutory and constitutional doctrines; and (3) coherence and uniformity of interpretation of substantive law were more important than the mirage of beneficial cross-pollination between the two court systems. These three principles fueled congressional and judicial reforms.

Although the ALI's proposal did not provoke immediate legislation, it set the stage for the next ten years of debates around federal jurisdiction. Chief Justice Warren Burger took up the baton in 1973 when he declared in his "Report on the Federal Judicial Branch" that diversity jurisdiction had "no validity today."<sup>113</sup> Laying out an ambitious agenda to, again, restructure judicial federalism, the Chief Justice called on Congress and the Judicial Conference to take the lead. By the early 1970s, the long-feared flood of cases had partly materialized. The Civil Rights Act of 1964, Federal Rule of Civil Procedure 23 (1966) (addressing class actions), prisoner claims, employment cases, and environmental statutes, among many others, were increasingly burdening an overworked federal judiciary.<sup>114</sup>

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<sup>112</sup> Id at 6.

<sup>113</sup> Warren E. Burger, *Report on the Federal Judicial Branch*, 59 ABA J 1125, 1126 (1973). This came after a decade of Warren Court rulings that represented a countertrend against dual judicial sovereignty. Ronald J. Bacigal, *The Federalism Pendulum*, 98 W Va L Rev 771, 783 (1996) ("[T]he Warren Court pushed the federalism pendulum to extend federal constitutional protection of individual rights.").

<sup>114</sup> *Report of the Federal Courts Study Committee* \*5 (Apr 2, 1990), archived at <http://perma.cc/9Q6P-RFSX>.

Both the Burger Court and Congress reacted to increasing docket loads by reinventing judicial federalism.<sup>115</sup> In a series of cases aimed at empowering state courts, the Court created and reaffirmed federal abstention doctrines (*Colorado River*,<sup>116</sup> *Younger*,<sup>117</sup> *Rooker-Feldman*,<sup>118</sup> etc.), weakened supplemental jurisdiction, and expanded the scope of state law.<sup>119</sup> The House of Representatives then followed on the Court's heels, introducing several bills in the early 1970s attempting to weaken diversity jurisdiction and requiring state prisoners to exhaust state remedies before challenging their detention in federal court.<sup>120</sup> The movement reached its peak in 1978, when the House overwhelmingly adopted a bipartisan bill that endeavored to wholly eliminate federal diversity jurisdiction.<sup>121</sup> By then, an impressive array of institutions and interests had lined up behind the effort: President Jimmy Carter, Attorney General Griffin Bell, Chief Justice Burger, the Judicial Conference, and the National Conference of State Chief Justices (claiming to be "ready" for cases to return where they rightfully belonged).<sup>122</sup> The bill even had the backing of the NAACP and the ACLU.<sup>123</sup>

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<sup>115</sup> A series of legal articles in the 1970s recognized the revolutionary nature of the courts' abstention doctrines. See, for example, Weinberg, 29 Stan L Rev at 1203 (cited in note 1) (noting that the Burger Court relied on "principles of federalism" to address increasing caseloads).

<sup>116</sup> See generally *Colorado River Water Conservation District v United States*, 424 US 800 (1976).

<sup>117</sup> See generally *Younger v Harris*, 401 US 37 (1971).

<sup>118</sup> See generally *Rooker v Fidelity Trust Co*, 263 US 413 (1923); *District of Columbia Court of Appeals v Feldman*, 460 US 462 (1983).

<sup>119</sup> See *Colorado River*, 424 US at 817; *Younger*, 401 US at 43–44; *Huffman v Pursue, Ltd.*, 420 US 592, 611–12 (1975); *Feldman*, 460 US at 482–83; *Boehning v Indiana State Employees Association, Inc.*, 423 US 6, 8 (1975); *Rizzo v Goode*, 423 US 362, 378 (1976); *Askew v Hargrave*, 401 US 476, 478 (1971); *De Canas v Bica*, 424 US 351, 357 (1976) (deferring to state regulation); *Kewanee Oil Co v Bicron Corp.*, 416 US 470, 493 (1974) (same); *Askew v American Waterways Operators, Inc.*, 411 US 325, 344 (1973) (same). Many of these abstention doctrines prevented not only the rise of state law cases in federal court, but federal claims too.

<sup>120</sup> Robert J. Sheran and Barbara Isaacman, *State Cases Belong in State Courts*, 12 Creighton L Rev 1, 28 (1978).

<sup>121</sup> The House passed HR 9622 abolishing diversity jurisdiction on February 28, 1978. See HR 9622, 95th Cong, 2d Sess (Feb 28, 1978), in 122 Cong Rec 1569.

<sup>122</sup> *Jurisdictional Amendments Act of 1979, Hearings on S 679 before the Committee on the Judiciary*, 96th Cong, 1st Sess 37 (1979) (*1979 JAA Hearings*) (statement of Chief Justice Robert J. Sheran, Supreme Court of Minnesota); id at 5 (statement of Sen Metzenbaum).

<sup>123</sup> Curry, *The Courts* at \*150 (cited in note 96).

With this overwhelming support, the bill to abolish diversity jurisdiction reached the Senate floor in 1979. To welcome it, Senator Ted Kennedy opened debate by noting that “[t]oo many cases now clogging the Federal courts involve issues of State law that would be better heard and resolved by our State courts. Abolition of Federal diversity jurisdiction is a States’ rights issue; State courts should decide State cases while Federal courts should retain jurisdiction over Federal matters.”<sup>124</sup> Other senators welcomed this crisp statement of the Dual Judicial Sovereignty principle.<sup>125</sup> But despite this impressive backing, the floor vote never arrived. The bill did not gather sufficient support. And try as many reformers did over the next two decades, they could not revive the push against diversity.

The movement ran into opposition from three groups. First, defenders of the status quo argued that diversity cases accounted for only a small percentage of the federal docket and were thus not problematic.<sup>126</sup> Why fix this nonexistent issue? Second, the powerful Association of Trial Lawyers of America and its supporting congressmen claimed that diversity jurisdiction was part of the American tradition, promoted convenience, increased access to justice, and provided federal-state cross-pollination.<sup>127</sup> Many in this camp also appealed to diversity jurisdiction as a safety valve against the prejudice of local courts.<sup>128</sup> Finally, Senator Strom Thurmond and others voiced a concern that foisting thousands of diversity cases on overburdened state courts would actually strike a blow *against* access to justice by increasing delays.<sup>129</sup> With these arguments, supporters of diversity jurisdiction carried the day.

So ended the second era of judicial federalism, with a whimper. Critically, although arguments for shifting work to state courts advanced different values at different times—progressives

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<sup>124</sup> 1979 JAA Hearings, 96th Cong, 1st Sess at 1 (cited in note 122) (statement of Sen Kennedy).

<sup>125</sup> See, for example, *id* at 4–7 (statements of Sen Metzenbaum and Chief Justice Sheran).

<sup>126</sup> But see John P. Frank, *Federal Diversity Jurisdiction—An Opposing View*, 17 SC L Rev 677, 679–80 (1965).

<sup>127</sup> Sheran and Isaacman, 12 Creighton L Rev at 30 & n 148 (cited in note 120), citing *Federal Diversity of Citizenship Jurisdiction, Hearings on S 2094, S 2389, and HR 9622 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 95th Cong, 2d Sess 140 (statement of Association of Trial Lawyers of America).

<sup>128</sup> 1979 JAA Hearings, 96th Cong, 1st Sess at 3 (cited in note 122) (statement of Sen Thurmond).

<sup>129</sup> *Id.*

were wary of *Lochner*, New Dealers favored regulation instead of adjudication, the Warren Court wanted to focus on civil rights cases, and the Burger Court wanted to offload those cases—there was a consistent struggle against large and diversity-fueled federal-court dockets. That was a noticeable shift from the first era. After 1979, however, there were no other even remotely successful efforts to abolish diversity jurisdiction. Instead, diversity made a roaring comeback.

### C. The Third Era: Federal Expansion (1980–Present)

In this Section, I focus on the pre- and post-1980 federal reforms that expanded federal jurisdiction. The term “federal expansion” refers here specifically to federal appropriation of state-law claims and federal claims that used to be litigated in state courts.<sup>130</sup> There are several reasons why 1980 likely marks the beginning of the third era, but a single one suffices: that was the year that Congress finally eliminated the amount-in-controversy requirement for federal question jurisdiction.<sup>131</sup> This represented the culmination of two-hundred-year-old statutory restrictions on federal judicial control over federal law. After that change, other reforms followed, ranging from procedural minutiae all the way to substantive statutory reforms. The central feature of this new era is that unlike the first two, after 1980, federal officials, judges, and large businesses began to simultaneously champion both diversity and federal question jurisdiction as a way to federalize state-court cases.

To be clear, although 1980 marks the beginning of the era, it does not represent a decisive break. The recent state-to-federal shift has sometimes ebbed and hasn’t always been unidirectional; sometimes the states have reclaimed judicial power.<sup>132</sup> Federal courts and Congress have at times even surrendered jurisdiction in a variety of ways, including by constraining federal question jurisdiction and standing doctrine, and by enacting jurisdiction-stripping legislation.<sup>133</sup> All of these cases and statutes represent a significant countertrend in the midst of the third era.

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<sup>130</sup> This is only one kind of expansion. It does *not* refer to a generalized and comprehensive expansion of federal jurisdiction over all possible claims (state or federal).

<sup>131</sup> Federal Question Jurisdictional Amendments Act of 1980, Pub L No 96-486, 94 Stat 2369, codified at 28 USC § 1331.

<sup>132</sup> See note 289 and accompanying text.

<sup>133</sup> See generally, for example, *Merrell Dow Pharmaceuticals Inc v Thompson*, 478 US 804 (1986); *Gunn v Minton*, 568 US 251 (2013). See also *Spokeo, Inc v Robins*, 136 S Ct



Setting aside these few exceptions, however, the thrust of the third era has been expansion. The 1970s and 1980s procedural political economy defeated the second pillar of the ALI's plan—returning state-law cases to state court. Instead, the federal government launched a third era composed of three parts: federalization of areas previously governed by state law, including state class actions; the concentration of monetarily significant claims in federal court; and the decay of state courts. Below, I describe these changes thematically because the federal government has moved through these reforms in a nonprogrammatic fashion.

1. Expanding federal law and supplemental jurisdiction.

The federal government has employed a variety of mechanisms to concentrate federal claims in federal court and displace related state-law claims. Rather than constituting solely a change in which government controls the relevant primary conduct, many federal statutes have shifted the adjudicative forum.<sup>134</sup> The third era reforms discussed in this Section involve four coherent and self-reinforcing changes: (1) new federal causes of action that can (2) comfortably call on federal courts' federal jurisdiction or (3) be easily removed from state courts and can (4) be paired with state-law claims under the supplemental jurisdiction doctrine. These changes have mostly been motivated by the desire for uniform national regulation<sup>135</sup> and a political economy in which businesses favor the federal judiciary.<sup>136</sup> Of course, many of these changes have come in areas that have been federal for quite a long time. Nonetheless, recent federal expansion has been unusual and has gone through these four related steps:

First, Congress has enacted federal statutes with private rights of action in areas previously dominated by state law.<sup>137</sup> Just

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1540, 1545 (2016); Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub L No 104-132, 110 Stat 1214, codified as amended in various sections of Title 28. These changes are of a piece with broader efforts to close the federal courthouse doors to a wide variety of claims. See Parts I.C.2; I.C.5; *Alexander v Sandoval*, 532 US 275, 291 (2001).

<sup>134</sup> Issacharoff and Sharkey, 53 UCLA L Rev at 1359 (cited in note 10).

<sup>135</sup> *Id* at 1368.

<sup>136</sup> See Part II.A.

<sup>137</sup> Committee on Long Range Planning of the Judicial Conference of the United States, *Long Range Plan for the Federal Courts* \*37 (Dec 15, 1995), archived at <http://perma.cc/W2VR-WYKB> (Long Range Plan). Professors Samuel Issacharoff and Catherine Sharkey have discussed this area of the law extensively. See generally Issacharoff and Sharkey, 53 UCLA L Rev (cited in note 10).

in the last few decades, Congress has legislated in areas like products liability,<sup>138</sup> employee benefits,<sup>139</sup> copyright,<sup>140</sup> regulation and maintenance of ships,<sup>141</sup> airline-carrier liability,<sup>142</sup> labor-management relations,<sup>143</sup> worker safety,<sup>144</sup> and trade secret protection.<sup>145</sup> In the environmental law context alone, there has been a federal statutory revolution. The Clean Water Act<sup>146</sup> by itself preempted state common law claims of nuisance and property damage.<sup>147</sup>

Federalization of state law edged even closer to the core work of state courts: torts and contracts.<sup>148</sup> At the end of the second era, Congress created significant legislative slack that the judiciary later seized on, and Congress itself expanded, in the third era. In the realm of mass torts, federal statutes like the National Traffic and Motor Vehicle Safety Act,<sup>149</sup> the Public Health Cigarette Smoking Act of 1970,<sup>150</sup> the Medical Device Amendments,<sup>151</sup> and expansive interpretations of even older laws like the Federal Food, Drug, and Cosmetic Act<sup>152</sup> have either preempted traditional state claims or given plaintiffs an added federal claim to

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<sup>138</sup> See, for example, Cigarette Labeling and Advertising Act, Pub L No 89-92, 79 Stat 282 (1965), codified as amended at 15 USC § 1331 et seq.

<sup>139</sup> See, for example, Employee Retirement Income Security Act (ERISA), Pub L No 93-406, 88 Stat 829 (1974), codified in various sections of Title 26 and Title 29.

<sup>140</sup> See, for example, Copyright Act, Pub L No 94-553, 90 Stat 2541 (1976), codified as amended in 17 USC §§ 101–810. To be sure, this movement started in the New Deal.

<sup>141</sup> See, for example, Ports and Waterways Safety Act of 1972 (PWSA), Pub L No 92-340, 86 Stat 424, codified at 33 USC §§ 1221–1232a, partially repealed by Pub L No 115-282, 132 Stat 4264 (2018).

<sup>142</sup> See, for example, Convention for the Unification of Certain Rules Relating to International Transport by Air, 49 Stat 3000, Treaty Ser No 876 (1929).

<sup>143</sup> See, for example, Labor-Management Relations Act (LMRA), 61 Stat 136 (1947), codified as amended at 29 USC § 151 et seq.

<sup>144</sup> See, for example, Occupational Safety and Health Act (OSHA), Pub L No 91-596, 84 Stat 1590 (1970), codified as amended at 29 USC §§ 651–678.

<sup>145</sup> See, for example, Defend Trade Secrets Act of 2016 (DTSA), Pub L No 114-153, 130 Stat 376, codified at 18 USC § 1836 et seq.

<sup>146</sup> Pub L No 92-500, 86 Stat 816 (1972), codified as amended at 33 USC §§ 1251 et seq.

<sup>147</sup> See Issacharoff and Sharkey, 53 UCLA L Rev at 1380–81 (cited in note 10).

<sup>148</sup> See generally, for example, Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 Geo Wash L Rev 449 (2008); Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DePaul L Rev 227 (2007).

<sup>149</sup> Pub L No 89-563, 80 Stat 718 (1966), codified as amended at 15 USC § 1381 et seq.

<sup>150</sup> Pub L No 91-22, 84 Stat 87 (1970), codified at 15 USC § 1340.

<sup>151</sup> Pub L No 94-295, 90 Stat 539 (1976), codified at 21 USC §§ 360c–379a.

<sup>152</sup> 52 Stat 1040 (1938), codified as amended at 21 USC §§ 301 et seq.

flood federal courts with tort disputes.<sup>153</sup> In all of these, Congress sought to provide new regulatory regimes to either extinguish tort claims or allow federal courts and regulators to substitute for state courts.

Adding power to this statutory blunderbuss, Supreme Court decisions on the Commerce Clause, abstention, and preemption have sided with federal power over state common law.<sup>154</sup> As Professor Daniel Meltzer noted in the heyday of the Rehnquist Court, in statutory preemption cases “the Supreme Court has been willing to recognize in the federal courts a broad lawmaking power, based upon policy judgments about how best to further the purposes of federal enactments.”<sup>155</sup> The Rehnquist Court interpreted federal statutes expansively, covering areas like labor and employment, economic regulation, transportation, health, safety, environmental regulation, and arbitration.<sup>156</sup> These expansive anti-state law decisions extended even to areas without federal legislation. For example, in *Boyle v United Technologies Corp.*,<sup>157</sup> the Court held that federal courts could displace state tort claims in suits against federal contractors even in the absence of a controlling statute.<sup>158</sup> Although the Court at times constrained federal legislative power, it simultaneously promoted federal expansion through its field and implied preemption holdings, allowing federal regulation to displace state common law.<sup>159</sup> Professors Michael Greve and Jonathan Klick, for example, have found that

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<sup>153</sup> Issacharoff and Sharkey, 53 UCLA L Rev at 1412–13 (cited in note 10). See, for example, Longshore and Harbor Workers’ Compensation Act Amendment of 1984, Pub L No 98-426, 98 Stat 1639 (1988), codified as amended at 33 USC § 901 et seq; Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub L No 100-694, 102 Stat 4563, codified in various sections of Title 28. But see Robert Rabin, *Federalism and the Tort System*, 50 Rutgers L Rev 1, 4–5 (1997) (arguing that Congress had not yet enacted a national tort reform agenda).

<sup>154</sup> Michael S. Greve and Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 S Ct Econ Rev 43, 84–88 (2006) (empirically analyzing the Rehnquist Court’s preemption decisions); Daniel J. Meltzer, *The Supreme Court’s Judicial Passivity*, 2002 S Ct Rev 343, 369–70 (finding that since Justice Clarence Thomas joined the Court, the Court has held state laws preempted in two-thirds of preemption cases).

<sup>155</sup> Meltzer, 2002 S Ct Rev at 344 (cited in note 154). But see Greve and Klick, 14 S Ct Econ Rev at 47 (cited in note 154) (finding no “decisional trend”).

<sup>156</sup> Greve and Klick, 14 S Ct Econ Rev at 50–51 (cited in note 154).

<sup>157</sup> 487 US 500 (1988).

<sup>158</sup> *Id.* at 504.

<sup>159</sup> See Meltzer, 2002 S Ct Rev at 367 & n 104 (cited in note 154). But see *Cipollone v Liggett Group, Inc.*, 505 US 504, 517 (1991) (rejecting an implied preemption claim because “Congress’ enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted”).

tort cases comprised “nearly 40 percent of the [Rehnquist Court preemption] case universe” and the Court preempted state tort claims in 62.5 percent of those cases.<sup>160</sup> The Roberts Court has cheerfully continued this trend with expansive preemption rulings and even attempts to neuter abstention doctrines developed in the 1970s.<sup>161</sup>

Second, Congress and the Supreme Court invigorated these new federal statutes by construing federal question jurisdiction broadly.<sup>162</sup> The Court had long understood federal jurisdiction to exist when a well-pleaded complaint stated a federal issue. But there was also federal jurisdiction when some “disputed question of federal law [became] a necessary element of one of the well-pleaded state claims.”<sup>163</sup> Despite this expansive language, practical limitations like an amount-in-controversy requirement of \$10,000 and the lack of a statutory cause of action constrained the reach of federal jurisdiction.<sup>164</sup> In the past few decades, however, Congress and the Court have set these constraints aside. Congress in 1976 eliminated the federal amount-in-controversy requirement for claims against the United States,<sup>165</sup> and then in 1980 scrapped it entirely.<sup>166</sup> Decades later, the Court supported the idea that a state law case can nonetheless “arise under” federal question jurisdiction in *Grable & Sons Metal Products, Inc v Darue Engineering & Manufacturing*.<sup>167</sup> In that case, the Court allowed the removal of a state-law quiet-title claim because it was inextricably tied up with a federal tax title provision, a sufficient federal “ingredient” in the claim.<sup>168</sup> Some evidence suggests that this decision opened federal jurisdiction to state claims bound up with a federal statute.<sup>169</sup>

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<sup>160</sup> Greve and Klick, 14 S Ct Econ Rev at 52 (cited in note 154).

<sup>161</sup> See Catherine M. Sharkey, *The Administrative State and the Common Law: Regulatory Substitutes or Complements?*, 65 Emory L J 1705, 1733 (2016). See also, for example, *Exxon Mobil Corp v Saudi Basic Industries Corp*, 544 US 280, 292–93 (2005).

<sup>162</sup> Issacharoff and Sharkey, 53 UCLA L Rev at 1410–14 (cited in note 10).

<sup>163</sup> *Franchise Tax Board of California v Construction Laborers Vacation Trust for Southern California*, 463 US 1, 13 (1983).

<sup>164</sup> See note 80 and accompanying text.

<sup>165</sup> Act of Oct 21, 1976, Pub L No 94-574, 90 Stat 2721, codified as amended at 5 § USC 702, 703.

<sup>166</sup> See Federal Question Jurisdictional Amendments Act of 1980, Pub L No 96-486, 94 Stat 2369, codified as amended at 28 USC § 1331.

<sup>167</sup> 545 US 308 (2005).

<sup>168</sup> *Id* at 315.

<sup>169</sup> Compare Issacharoff and Sharkey, 53 UCLA L Rev at 1414 (cited in note 10) (“*Grable* has reinvigorated federal question jurisdiction.”), with *Empire Healthchoice Assurance*,

Third, to complete the expansion of federal jurisdiction, the Court and Congress strengthened the power of defendants to remove claims from state to federal court. Under the well-pleaded complaint rule, a claim was removable only if there was a federal cause of action in the plaintiffs' complaint.<sup>170</sup> A federal defense would not suffice. But in 1983 the Court expanded a little-known exception for federal defenses that "completely pre-empt[ ]" a state cause of action.<sup>171</sup> This allowed the removal of state claims necessarily tied up with a preempting federal claim. The Court then went out of its way to bless and expand the use of this new-fangled exception.<sup>172</sup> Even more, the Court has developed a series of doctrines related to waiver of the right to remand a case back to state court "that are strongly skewed against plaintiffs and in favor of federal-court adjudication, even in cases that raise only substantive state law issues."<sup>173</sup> Perhaps most importantly, in the 1988 Judicial Improvements and Access to Justice Act,<sup>174</sup> Congress significantly eased the mechanistic process of removal.<sup>175</sup> The Act eliminated hurdles that stood in the way of removal, including the submission of a notarized petition and the required posting of a bond.<sup>176</sup> As explained below, all of these complementary reforms may have contributed to an increase in removal rates.<sup>177</sup>

Finally, the expansion of federal law, federal question jurisdiction, and removal is even more relevant to the question of *forum* because of the concomitant growth of supplemental jurisdiction over state claims. In 1990, Congress adopted an expansive supplemental jurisdiction statute that, for the first time, covered

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*Inc v McVeigh*, 547 US 677, 699 (2006) (noting that *Grable* is in a "special and small category").

<sup>170</sup> *Construction Laborers Vacation Trust*, 463 US at 9–10.

<sup>171</sup> *Id.* at 23–24.

<sup>172</sup> See A. Benjamin Spencer, *Anti-Federalist Procedure*, 64 Wash & Lee L Rev 233, 252–54 (2007) (criticizing the Courts' expansion upon the exception established in *Construction Laborers Vacation Trust* in *Beneficial National Bank v Anderson*, 539 US 1 (2004)).

<sup>173</sup> Joan Steinman, *Waiving Removal, Waiving Remand—The Hidden and Unequal Dangers of Participating in Litigation*, 71 Fla L Rev 689, 692 (2019).

<sup>174</sup> Pub L No 100-702, 102 Stat 4642 (1988), codified as amended in various sections of Title 28.

<sup>175</sup> Judicial Improvements and Access to Justice Act § 1016, 102 Stat at 4669–70.

<sup>176</sup> See HR Rep No 100-889, 100th Cong, 2d Sess 71 (1988).

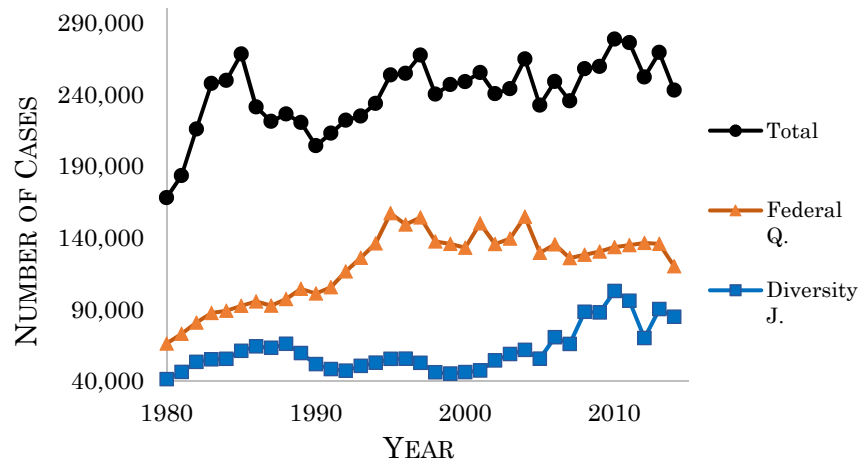
<sup>177</sup> See Christopher Terranova, *Erroneous Removal as a Tool for Silent Tort Reform: An Empirical Analysis of Fee Awards and Fraudulent Joinder*, 44 Willamette L Rev 799, 805–09 (2008).

both pendent parties and pendent claims.<sup>178</sup> Although Congress provided exceptions for “claim[s] rais[ing] a novel or complex issue of State law,”<sup>179</sup> the Supreme Court has interpreted the statute as a “broad grant of supplemental jurisdiction” over state claims, including over class action members who do not independently meet diversity requirements.<sup>180</sup>

All four of these steps involve self-reinforcing changes aimed at concentrating more cases in federal court, along with any supplemental state-law claims: congressional enactment of federal causes of action that can be filed jointly with state claims, an expansive reading of federal question jurisdiction over those new statutes, doctrinal and statutory amendments that eased removal, and a related enlargement of supplemental jurisdiction over state-law claims.

To evaluate whether the federal docket reflects a change in the number of federal cases, I collected figures from the Administrative Office about docket loads. As explored in Figure 1 below, federal dockets show that the overall number of civil cases in federal court has grown from 168,105 in 1980 to 242,972 in 2014:<sup>181</sup>

FIGURE 1: FEDERAL COURT CASES<sup>182</sup>



<sup>178</sup> Judicial Improvements Act of 1990, Pub L No 101-650, 104 Stat 5089, codified as amended in various sections of Title 28.

<sup>179</sup> Judicial Improvements Act of 1990 § 1367(c)(1), 104 Stat at 5113.

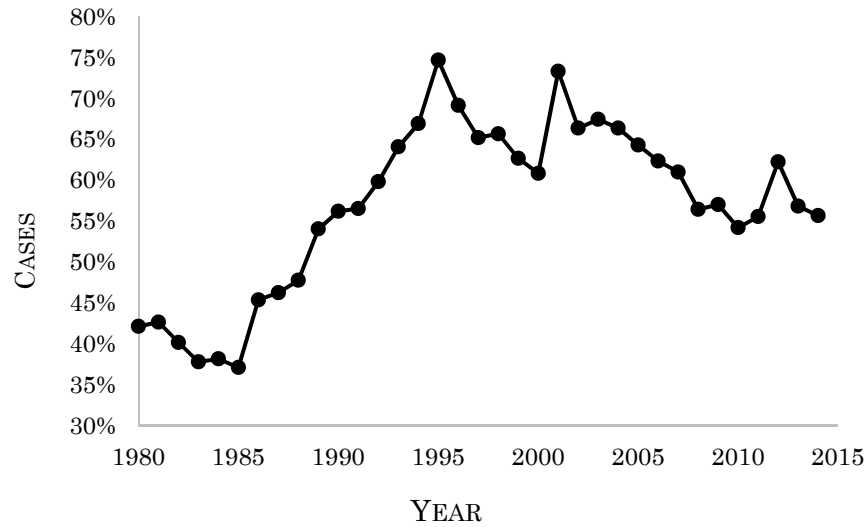
<sup>180</sup> *Exxon Mobil Corp v Allapattah Services, Inc*, 545 US 546, 547 (2005).

<sup>181</sup> Data from the Coase-Sandor Institute on file with author.

<sup>182</sup> The chart excludes a third group of cases against the federal government.

Accounting for population and economic growth, the expansion is moderate. It may have also flatlined since in the mid-1990s. Despite this apparently flat trend, federal expansion has been mostly about the composition of docket loads, not the sheer number of cases. The third era, therefore, should have produced an increase in the *percentage* of cases based on federal question jurisdiction (especially if many state claims now reach federal court through supplemental jurisdiction or diversity class actions). This change in composition is exactly what we observe in Figure 2 below:

FIGURE 2: FEDERAL QUESTION CASES AS A PERCENTAGE OF ALL FEDERAL CASES<sup>183</sup>



There are a few ways to interpret this growth. One possibility is that federal cases have expanded in both state and federal courts. But there is no evidence that this has happened.<sup>184</sup> The most straightforward reading seems to be that federal expansion has succeeded. The federal docket is increasingly composed of federal question cases, going from 42 percent in 1980 to 75 percent

<sup>183</sup> State cases were omitted from the total number of cases because it would be difficult to determine whether each case was removed based on diversity or federal question jurisdiction.

<sup>184</sup> But see Daniel J. Meador, *Federal Law in State Supreme Courts*, 3 Const Comment 347, 358–61 (1986).

in 1995 and 56 percent in 2014. To be sure, diversity jurisdiction is the most direct path for state-law claims to access federal courts. As I explore in the next Section, however, after the Class Action Fairness Act of 2005<sup>185</sup> (CAFA), there is reason to believe that the number of diversity cases (around sixty thousand a year) understates their significance; the diversity docket is now populated by increasingly large class actions and actually represents millions of state-law *claims*. This only reinforces the success of federal expansion.

Relatedly, at least four related empirical trends support the idea that state claims are increasingly flooding federal courts. First, removal rates as a percentage of all diversity cases have shot up since 1988–1990.<sup>186</sup> Those years overlap precisely with many of the changes discussed above.<sup>187</sup> An increase in removals offers evidence of a state to federal shift in forum; those cases might have otherwise remained in state court but for federal jurisdiction. Moreover, there is an increasing gap between removal rates and remands since at least 2001.<sup>188</sup> The numbers imply that defendants increasingly prefer to litigate in a federal forum and have a higher likelihood of remaining there. At the very least, the data line up with congressional goals.

Second, federal docket compositions reflect a rise in tort, contract, and labor cases since 1980 (as well as prisoner and civil rights claims).<sup>189</sup> To be sure, we should examine these data with caution because the coding methods used by the Administrative Office are not always reliable over time.<sup>190</sup> With that said, tort cases went from 17 percent of the federal civil docket in 1986 to an impressive 24 percent in 2013, becoming the largest type of

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<sup>185</sup> Pub L No 109-2, 119 Stat 4, codified in various sections of Title 28.

<sup>186</sup> Kevin M. Clermont, *Litigation Realities Redux*, 84 Notre Dame L Rev 1919, 1923–26, 1926 (2009) (see Figure 1).

<sup>187</sup> *Id.*; Terranova, 44 Willamette L Rev at 799, 805–09 (cited in note 177).

<sup>188</sup> See Clermont, 84 Notre Dame L Rev at 1925–26 (cited in note 186) (see Figure 1).

<sup>189</sup> See Patricia W. Hatamyar Moore, *The Civil Caseload of the Federal District Courts*, 2015 U Ill L Rev 1177, 1180.

<sup>190</sup> See Christina L. Boyd and David A. Hoffman, *The Use and Reliability of Federal Nature of Suit Codes*, 2017 Mich St L Rev 997, 1006–07.



case.<sup>191</sup> At the same time, according to at least one study, tort filings notably declined in state courts.<sup>192</sup> State-law cases predominate in the 96 percent of multidistrict-litigation claims that fall into the “mass-tort” category.<sup>193</sup> Contract cases, for their part, have also increased since 1980, though they peaked around 1990.<sup>194</sup> Most of this rise and then flattening seems to be explained by business-to-business litigation moving from state to federal court after the 1950s.<sup>195</sup> Moreover, Fair Labor Standards Act cases have increased significantly in federal dockets since the 1980s.<sup>196</sup>

Third, all of these new federal cases are even more important because they can be filed alongside supplemental state-law claims. And, as I explore in the next Section, there is significant evidence from several different studies that a large percentage of federal claims in federal court include supplemental state-law claims.<sup>197</sup>

Finally, the recent dramatic rise in state certification statutes is a telling sign that state-law claims have been flooding federal courts. While Florida adopted the first certification statute in 1945,<sup>198</sup> the Supreme Court only blessed the certification process in 1974—vacating and remanding a lower court judgment so that it could certify an unsettled question of state law to the Florida supreme court.<sup>199</sup> By 1976, however, only fifteen states had a certification statute.<sup>200</sup> Since then, a wave of twenty-eight states have adopted statutes explicitly embracing certification, especially around the late 1980s and mid-1990s.<sup>201</sup> The fact that

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<sup>191</sup> Moore, 2015 U Ill L Rev at 1212 (cited in note 189) (see Table 5). See also Marc Galanter, *Contract in Court; or Almost Everything You May or May Not Want to Know about Contract Litigation*, 2001 Wis L Rev 577, 598.

<sup>192</sup> See R. LaFountain, et al, *Examining the Work of State Courts: An Analysis of 2008 State Court Caseloads* \*27 (National Center for State Courts, 2010), archived at <http://perma.cc/H3SX-2GTF>.

<sup>193</sup> Andrew D. Bradt, “A Radical Proposal”: *The Multidistrict Litigation Act of 1968*, 165 U Pa L Rev 831, 844 n 58 (2017).

<sup>194</sup> Galanter, 2001 Wis L Rev at 584 (cited in note 191) (see Figure 2).

<sup>195</sup> *Id.* at 586.

<sup>196</sup> Moore, 2015 U Ill L Rev at 1233 (cited in note 189) (see Figure 13). See also FJC Study.

<sup>197</sup> See note 239.

<sup>198</sup> Michael Klotz, *Avoiding Inconsistent Interpretations: United States v. Kelly, the Fourth Circuit, and the Need for a Certification Procedure in North Carolina*, 49 Wake Forest L Rev 1173, 1174–75 (2014).

<sup>199</sup> See generally *Lehman Brothers v Schein*, 416 US 386 (1974).

<sup>200</sup> Klotz, 49 Wake Forest L Rev at 1174–75 (cited in note 198).

<sup>201</sup> Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism after Erie*, 145 U Pa L Rev 1459, 1548 n 472 (1997).

nearly all state legislatures suddenly felt a need to adopt certification statutes in the midst of the third era is suggestive of federal expansion over state claims.

In sum, the government successfully promoted the ALI's plan to concentrate federal cases in federal court and also engaged in systematic expansion over state claims. To be sure, not all the data point that way. For example, prisoner petitions and civil rights claims do account for a significant rise in the number of cases in federal court since 1986. Nonetheless, the thrust of the last few decades has been toward considerable federalization of state law.

## 2. Expanding federal control of state class actions.

Although the ALI apparently succeeded in its first goal of concentrating federal cases in federal court, it mostly failed in its second goal of reining in diversity jurisdiction. In this Section, I explore how this failure was mostly due to political pressures that led to the federalization of state class actions. Between 1998 and 2005, Congress pursued broad-reaching statutes—especially CAFA and the Securities Litigation Uniform Standards Act<sup>202</sup> (SLUSA)—with a single purpose in mind: the removal of large class action cases from state to federal court. As I discuss here, the motivation behind these statutes had been building for decades. Parallel to the ALI's goal of Dual Judicial Sovereignty, corporate defendants and conservative groups demanded federal intervention against “out of control” state courts, and the federal government mostly complied. These developments meant that the partisan valence of federalism flipped at some point in the 1980s, when conservative forces began to see federal courts as friendlier to their claims.<sup>203</sup> Although conservative forces led the anti-litigation movement, they at times received significant support from liberals who were anxious about docket loads in the mass-tort era,<sup>204</sup> representing a broad anti-litigation push in the federal courts.

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<sup>202</sup> Pub L No 105-353, 112 Stat 3227 (1998).

<sup>203</sup> See Karen O'Connor and Lee Epstein, *Rebalancing the Scales of Justice: Assessment of Public Interest Law*, 7 Harv J L & Pub Pol 483, 494 (1984).

<sup>204</sup> See Stephen B. Burbank and Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U Pa L Rev 1543, 1558–59 (2014).

Like in federal courts, litigation in state court flourished in the late 1960s and 1970s.<sup>205</sup> New progressive groups took full advantage of statutory private rights of action to create the field of public interest litigation, covering areas like products liability, environmental protection, women's rights, and civil rights.<sup>206</sup> This cottage industry of plaintiffs' lawyers and the statutes that empowered them built the so-called litigation state—a uniquely American reliance on publicly oriented litigation to effect social policy.<sup>207</sup> This litigation state boomed in both federal and state courts.<sup>208</sup>

A combination of increased regulatory activity from federal agencies and expansive litigation provoked a political backlash. Early critiques of blossoming state litigation surfaced in the 1970s, as newly regulated businesses and trade associations took aim at the courts.<sup>209</sup> These business groups attacked not only the kinds of statutory claims they were facing, but also the very legitimacy of public-law litigation in the first place. Figures like Justice Lewis F. Powell Jr and Professor Edwin Meese began to assemble a comprehensive critique of litigation as harmful to businesses, the economy, and the public.<sup>210</sup> Meese's Pacific Legal Foundation (PLF), for example, created novel litigation strategies to blunt the force of environmental claims and environmental protection groups.<sup>211</sup> Seeing the success of this legal resistance, large businesses and foundations emulated the PLF and increased financial donations to conservative legal groups. These groups, in turn, began to focus on class actions as responsible for blurring the distinction “between law and politics” and for fueling “political change in the courts.”<sup>212</sup>

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<sup>205</sup> See, for example, Department of Justice, *Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability* \*80 (Feb 1986), archived at <http://perma.cc/F74X-AXTN>.

<sup>206</sup> O'Connor and Epstein, 7 Harv J L & Pub Pol at 493–94 (cited in note 203).

<sup>207</sup> Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the United States* 60, 64–65 (Princeton 2010); Robert A. Kagan, *Adversarial Legalism: The American Way of Law* 6–7, 9 (Harvard 2001).

<sup>208</sup> See Zambrano, 70 Stan L Rev at 1847–50 (cited in note 9). See also Robert A. Kagan, et al, *The Evolution of State Supreme Courts*, 76 Mich L Rev 961, 973, 980–83 (1978).

<sup>209</sup> O'Connor and Epstein, 7 Harv J L & Pub Pol at 493–94 (cited in note 203).

<sup>210</sup> *Id* at 494–95.

<sup>211</sup> *Id* at 495–96.

<sup>212</sup> David Marcus, *The History of the Modern Class Action, Part II: Litigation and Legitimacy, 1981–1994*, 86 Fordham L Rev 1785, 1788 (2018).

This emerging battle between public-law liberal groups and conservative probusiness backlash fueled the Reagan administration's litigation reform efforts in the early 1980s.<sup>213</sup> Among other things, the administration embraced the anti-litigation movement and explicitly sought "fundamental change to the American product liability system through the federalization of [state] substantive law."<sup>214</sup> Three terms of Republican presidents intent on appointing conservative judges committed to litigation reform had a few predictable effects on federal courts. First, a significant slice of the federal judiciary fell into a "crisis mentality" with regard to mass-tort claims,<sup>215</sup> worried that increasing numbers of cases would cripple the courts.<sup>216</sup> Second, as a result, a mix of federal circuit judges and justices (from both parties) lashed out against class actions in the 1990s, rigorously policing choice-of-law problems<sup>216</sup> and repudiating the use of nationwide class actions.<sup>217</sup> Third, federal courts began a systematic effort at procedural retrenchment aimed at closing access to federal court by constricting discovery, personal jurisdiction, and class actions, among other procedures.<sup>218</sup> Finally, in the face of doctrinal reforms that made it more difficult to certify class claims in federal courts, plaintiffs' attorneys moved to state courts with friendlier judges and procedures.

It was this plaintiffs' attorneys' federal-to-state shift in the 1990s that provoked the anti-litigation movement to focus on state courts.<sup>219</sup> As the anti-class action effort continued apace, reformers began to argue that plaintiffs' attorneys were taking advantage of friendly state procedures to flood state courts with litigation.<sup>220</sup> Proponents of legislation to limit state class actions complained that many of these state cases involved federal interests, matters of interstate commerce not appropriately weighed by state judges, and that plaintiffs were unfairly exploiting state

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<sup>213</sup> Stephen G. Burbank and Sean Farhang, *Class Actions and the Counterrevolution against Federal Litigation*, 162 U Pa L Rev 1495, 1506 (2017).

<sup>214</sup> Marcus, 48 Wm & Mary L Rev at 1287 (cited in note 82).

<sup>215</sup> Linda S. Mullenix, *Ending Class Actions As We Know Them: Rethinking the American Class Action*, 64 Emory L J 399, 422 (2014).

<sup>216</sup> See Marcus, 48 Wm & Mary L Rev at 1300–01 (cited in note 82).

<sup>217</sup> See *id.* at 1282–83.

<sup>218</sup> See generally Burbank and Farhang, 165 U Pa L Rev (cited in note 213).

<sup>219</sup> Marcus, 48 Wm & Mary L Rev at 1292–93 (cited in note 82).

<sup>220</sup> See Mullenix, 64 Emory L J 399 at 403 (cited in note 215); Marcus, 48 Wm & Mary L Rev at 1293 (cited in note 82). RAND found that in a single year, almost 60 percent of reported decisions arose in state courts. Deborah R. Hensler, et al, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 56 (RAND Institute for Civil Justice, 2000).

courts and gaming the system.<sup>221</sup> Notably, the criticism was infused with a contemptuous take on state courts as institutionally inferior, underresourced, and unprepared to handle complex interstate cases.<sup>222</sup> Advocates of a federal solution further argued that local courts were “bias[ed]” and “prejudice[d]” against out-of-state defendants.<sup>223</sup> None of this went unchallenged—state governments themselves lobbied vigorously against CAFA.<sup>224</sup> Nonetheless, the debate was shaped and decided by the presumed harmful behavior of state courts.<sup>225</sup>

The increasing growth of securities litigation also fed the federal critique of state courts. Seeking to tamp down the filing of “strike suits” in federal court—meritless claims in pursuit of settlement based on the drop of a company’s share price—a Republican Congress, with some Democratic support, enacted the Private Securities Litigation Reform Act<sup>226</sup> (PSLRA) in 1995. The PSLRA sought to limit class action litigation by heightening pleading standards, allowing early appeals, and limiting discovery during a pending motion to dismiss.<sup>227</sup> But just like in the case of large class actions more generally, plaintiffs’ attorneys moved their claims to state court, leading to a significant increase in state securities fraud filings.<sup>228</sup>

After decades of insistence, the anti-litigation movement’s efforts paid off with two major federalization victories: SLUSA and CAFA. Both CAFA and SLUSA targeted state class action claims

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<sup>221</sup> John H. Beisner and Jessica Davidson Miller, *They’re Making a Federal Case out of It . . . in State Court*, 25 Harv J L & Pub Pol 143, 155 (2001); Marcus, 48 Wm & Mary L Rev at 1288 (cited in note 82).

<sup>222</sup> Beisner and Miller, 25 Harv J L & Pub Pol at 151–52 (cited in note 221).

<sup>223</sup> Edward A. Purcell Jr, *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U Pa L Rev 1823, 1850 (2008). See also Marcus, 48 Wm & Mary L Rev at 1292–95 (cited in note 82).

<sup>224</sup> Marcus, 48 Wm & Mary L Rev at 1301 (cited in note 82).

<sup>225</sup> See *Interstate Class Action Jurisdiction Act of 1999 and Workplace Goods Job Growth and Competitiveness Act of 1999, Hearings on HR 1875 and 2005 before the House Committee on the Judiciary*, 106th Cong, 1st Sess 14–15 (July 21, 1999) (letter from David A. Brock, President of the Conference of Chief Justices) (arguing that there are no “systemic problems in state class action procedures”).

<sup>226</sup> Pub L No 104-67, 109 Stat 737, codified as amended in various sections of Title 15.

<sup>227</sup> David Marcus, 86 Fordham L Rev at 1838–39 (cited in note 212).

<sup>228</sup> See Joseph A. Grundfest and Michael A. Perino, *Securities Litigation Reform: The First Year’s Experience (Private Securities Litigation Reform Act of 1995)* \*6–7 (Practising Law Institute 1997); Conference Report, HR Rep No 105-803, 105 Cong, 2d Sess 14 (1998) (“The evidence presented in this report suggests that the level of class action securities fraud litigation has declined by about a third in federal courts, but that there has been an almost equal increase in the level of state-court activity.”).

by making it easier for defendants to remove those cases to federal court. CAFA expanded federal-court jurisdiction to encompass any class actions involving more than one hundred members and citizens of different states (so-called minimal diversity) along with an amount in controversy of over \$5 million.<sup>229</sup> SLUSA, for its part, preempted state class action claims in the securities fraud context.<sup>230</sup> A few years after its passage, the Supreme Court interpreted the statute broadly to cover any state-law claims connected with the purchase or sale of securities.<sup>231</sup>

Among the most peculiar details of these statutes is that they do not strike at plaintiffs' attorneys directly. Rather, they just allow defendants to change fora—from state court to federal court. There is an assumption in both statutes that federal courts are more rigorous, less tolerant of plaintiffs' firms, and friendlier to defendants.<sup>232</sup> Part of this is based on procedural retrenchment. Given that federal courts are more likely to dismiss cases or reject class certification, defendants have an incentive to move state cases to those courts.

Taking all of these changes to their logical endpoint, four new initiatives seem to signal further federalization. First, two years ago Representative Steve King introduced a bill to expand diversity jurisdiction to its full constitutional limits, a change that would upset the complete diversity balance struck by the Supreme Court in 1806.<sup>233</sup> That bill promises to give federal jurisdiction to tens of thousands of state cases in which only one party is diverse from one defendant. Second, in 2016, Republicans crafted a bill to expand the fraudulent joinder doctrine so that plaintiffs cannot avoid diversity removals to federal court by simply joining a nondiverse party.<sup>234</sup> Proponents of the bill complained that plaintiffs' attorneys should not be able to circumvent federal courts. Third, a few district and circuit courts have allowed home-state defendants—who must remain in state court under the diversity statute—to remove their claims to federal court before

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<sup>229</sup> CAFA § 1332(c)(5)–(6), 119 Stat at 338.

<sup>230</sup> SLUSA § 16(b), 112 Stat at 3228.

<sup>231</sup> *Merrill Lynch, Pierce, Fenner & Smith Inc v Dabit*, 547 US 71, 85 (2006).

<sup>232</sup> See Judith Resnik, *Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: "The Political Safeguards" of Aggregate Translocal Actions*, 156 U Pa L Rev 1929, 1935 (2008); Marcus, 48 Wm & Mary L Rev at 1292–95 (cited in note 82).

<sup>233</sup> HR 3487, 115th Cong, 1st Sess (July 27, 2017).

<sup>234</sup> See Fraudulent Joinder Prevention Act of 2016, HR 3624, 114th Cong, 2d Sess (Feb 29, 2016).

they have been served with the complaint because the diversity statute technically covers only defendants who have already been served.<sup>235</sup> This is an absurd technical reading of the statute, with results that systematically favor federal jurisdiction. Finally, after the Supreme Court's recent decision to limit state courts' personal jurisdiction over interstate class actions,<sup>236</sup> scholars now predict a further shift of mass-torts cases from state courts to federal multidistrict litigation.<sup>237</sup> This expectation is partly based on evidence that MDLs have for years been "contributing toward a shift from state to federal courts."<sup>238</sup> These efforts encapsulate the third era's rapidly evolving notion of federal power over state claims and the further politicization of jurisdictional policy.

With regard to the empirical effects of these reforms, at least four studies have found a significant presence of state-law claims in federal class actions. In 2015, the Consumer Financial Protection Bureau published the first comprehensive study of arbitration and class actions in the consumer financial context. Among other things, the study found that 57 percent of federal complaints in its dataset involved state law, including contract and tort supplemental claims.<sup>239</sup> Unlike the significant presence of state law in federal court, only 12 percent of claims filed in state court involved federal statutory claims.<sup>240</sup> These numbers match a 2005 study by the Federal Judicial Center that found "59% of attorneys filing in federal court reported a majority of state claims."<sup>241</sup>

In 2006, the FJC also found that CAFA had shifted a substantial number of cases from state to federal court: "[T]he monthly average number of diversity of citizenship class actions

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<sup>235</sup> See, for example, *Gibbons v Bristol-Myers Squibb*, 919 F3d 699, 705 (2d Cir 2019).

<sup>236</sup> See generally *Bristol-Myers Squibb Co v Superior Court*, 137 S Ct 1773 (2017).

<sup>237</sup> See Andrew D. Bradt and D. Theodore Rave, *Aggregation on Defendants' Terms: Bristol-Myers Squibb and the Federalization of Mass-Tort Litigation*, 59 BC L Rev 1251, 1282 (2018) ("[I]f plaintiffs want to bring aggregate litigation outside of the defendant's home state after *Bristol-Myers*, their only practical option may be federal MDL.").

<sup>238</sup> Samuel Issacharoff and Florencia Marotta-Wurgler, *The Hollowed Out Common Law*, 67 UCLA L Rev at \*13 n 28 (forthcoming 2019).

<sup>239</sup> Consumer Financial Protection Bureau, *Arbitration Study* at § 6, \*20–21 (cited in note 22).

<sup>240</sup> *Id.* at 22.

<sup>241</sup> Willging and Wheatman, *An Empirical Examination* at \*16 (cited in note 23).

filed in or removed to the federal courts has approximately doubled in the post-CAFA period.”<sup>242</sup> This shift is particularly important because current federal case data only looks at the number of “cases” in federal court. Although there may be only around fifty thousand diversity “cases” a year, to the extent that they involve CAFA jurisdiction, they likely contain hundreds of thousands or even millions of state-law *claims* that are aggregated into a few cases now in federal court. This idea is supported by yet another study of a subset of consumer cases in state and federal courts that concluded that CAFA caused a “relocation of cases to federal courts,” that “contributed to the diminution of state-based common law.”<sup>243</sup> The study noted that since 2000, “[c]learly, the dominance of federal courts as forums for state-law claims, at least in this sample, has steadily increased over time.”<sup>244</sup> These four studies show that state-law claims are increasingly hosted in federal courts and support the tide of federal expansion.

In sum, in this Section, I focused on the second distinguishing feature of the third era of judicial federalism: increasing federal control over state class action claims. These reforms show that after 1980, conservative forces began to push for federalization. This story, of course, is the mirror image of the 1960s, when liberals cheered on federal courts friendlier to civil rights and criminal defendant claims. But the anti-litigation movement benefited from support from liberals too, partly due to a deep-seated federal struggle against growing docket loads and the mass-torts crises of the 1980s and 1990s. This docket load fear makes sense of our division of cases: conservative judges may not trust state courts, but they also fear an increase in federal docket loads. Thus, the compromise struck in the third era may have been to (a) steer large and complex cases to federal court but (b) keep small cases in state court. On the whole, the story is much more complicated than a simple conservatives-versus-liberals model, but partisanship has nonetheless been a leading force in these efforts.

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<sup>242</sup> Emery G. Lee III and Thomas E. Willging, *The Impact of the Class Action Fairness Act on Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U Pa L Rev 1723, 1723 (2008).

<sup>243</sup> Issacharoff and Marotta-Wurgler, 67 UCLA L Rev at \*4 (cited in note 238).

<sup>244</sup> *Id.* at \*9–10.



3. The growth of monetarily significant cases in federal court.

One of the consistent principles to emerge from recent federal expansion is that monetarily significant cases belong in a federal forum. As discussed above, the ALI's attempt to transform the 1789 partially integrated system into one guided by Dual Judicial Sovereignty failed.<sup>245</sup> The 1980s procedural political economy favored instead a larger role for the federal judiciary in large cases. The most significant reforms to diversity jurisdiction have involved enlarging the amount in controversy twice, from \$10,000 in 1987 to \$75,000 in 1997, and opening up federal courts to large state class actions (through CAFA).<sup>246</sup> Moreover, the 1960–1990s federalization described in Part I.C.1 involved a slew of new federal statutes and the expansion of federal question jurisdiction, removal, and supplemental jurisdiction. In enacting these statutes, Congress targeted cases that involve business or institutional litigants that operate on a national scale. The common thread across all of these reforms is that monetarily significant cases have gained a hook to access federal fora.

To evaluate whether the federal docket reflects a change in the size of cases, I collected figures from the Administrative Office about federal judicial damage awards in adjudicated cases (to the extent there were damages awarded in summary judgment, posttrial, etc. but not settlements) since 1980: the median, mean, and the 75th percentile of federal awards. Below are graphical depictions of these data points:

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<sup>245</sup> See notes 126–29.

<sup>246</sup> See note 127 and accompanying text.

TABLE 1: FEDERAL DAMAGE AWARDS<sup>247</sup>

<b>Year</b>	<b>Median</b>	<b>Mean</b>	<b>75th Percentile</b>
<b>1982</b>	\$8,000	\$523,000	\$67,000
<b>1985</b>	\$5,000	\$1,087,000	\$63,000
<b>1988</b>	\$30,000	\$962,000	\$165,000
<b>1991</b>	\$33,000	\$1,385,000	\$366,000
<b>1994</b>	\$52,000	\$1,361,000	\$250,000
<b>1997</b>	\$11,000	\$694,000	\$92,000
<b>2000</b>	\$10,000	\$582,000	\$51,000
<b>2003</b>	\$45,000	\$1,495,000	\$315,000
<b>2006</b>	\$58,000	\$1,763,000	\$673,000
<b>2009</b>	\$81,000	\$1,519,000	\$563,000
<b>2012</b>	\$51,000	\$1,248,000	\$359,000
<b>Change 1982–2012</b>	<b>538%</b>	<b>139%</b>	<b>436%</b>

The data show a considerable expansion of judicial awards. Indeed, the growth is colossal: the median has expanded by 538 percent, the mean by 139 percent, and the upper quartile of cases by 436 percent. The average federal case that results in a damages award involves more than \$1.2 million in 2012, up from \$523,000 in 1982. The difference between the mean and median also shows that the distribution of awards is heavily right skewed, meaning that there are a few awards worth billions of dollars. The trend, however, is quite volatile, indicating that the mass-torts explosion and other broader shifts unrelated to federalization have had a big impact. Moreover, the expansion of the amount in controversy has certainly had some effect on the size of cases in federal court. It is also unclear whether there has been an increase in cases with no awards at all.<sup>248</sup> These expansions, however, are likely not explained solely by population, economic

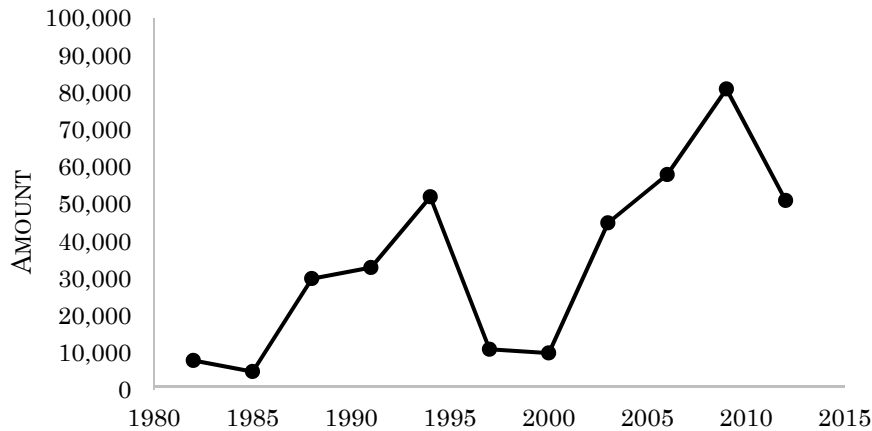
<sup>247</sup> Adjusted for inflation (in 2005 dollars). Rounded to the nearest thousand. The table ends in 2012 because of limitations in the available data.

<sup>248</sup> We might expect this to be the case if most of the cases with judicial awards went to trial, given that trials have largely vanished. See Nora Freeman Engstrom, *The Diminished Trial*, 86 *Fordham L Rev* 2131, 2131 (2018).

growth, or changes to the amount in controversy, and instead signal broader shifts in the kinds of cases that reach federal courts post-federal expansion.<sup>249</sup>

Another interesting pattern in the data is the fluctuating size of the awards, rising slowly at times and dramatically dropping at others. In order to visualize these changes over the past three decades, and to observe any possible correlations with the statutory changes described above, below is a graphical representation of the median awards in federal cases from 1980–2015:

FIGURE 3: MEDIAN AWARD IN FEDERAL CASES<sup>250</sup>



Again, this shows a steady and at times significant growth in awards, coupled with a considerable multi-year drop, but on the whole, showing an inexorable rise in the third era. These changes correlate with federal efforts to move the largest cases to federal courts.

In order to determine whether this massive expansion was mirrored in state courts, or occurred solely in federal courts, I also collected data from the National Center of State Courts on judicial damages awards. As an initial matter, 2015 data from a representative sample of all state cases show that 75 percent of state-court damages awards (to the extent damages were

<sup>249</sup> See also Theodore Eisenberg, et al, *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 Seattle U L Rev 433, 435–37 (1996) (comparing categories of cases in state and federal court).

<sup>250</sup> Adjusted for inflation (in 2005 dollars). Rounded to the nearest thousand.

awarded) were *below* \$5,200.<sup>251</sup> This is tiny compared to a federal 75th percentile that was closer to \$359,000 in 2012. This data point by itself shows that federal-court damage awards are orders of magnitude higher than state courts. But the relevant question for our purposes is about changes over time in the size of those awards. Unfortunately, the state data is not nearly as comprehensive as that from federal courts; the only numbers available start in 1992, end in 2005, sample only posttrial jury awards in the largest seventy-five counties (which likely involve larger awards on average), and are in the context of torts and contracts claims only. Table 2 shows the time trend for those sets of cases along with the same years in federal court and some similar data for (bench and jury) federal torts cases:<sup>252</sup>

TABLE 2: STATE-FEDERAL DAMAGE AWARDS<sup>253</sup>

	State (Jury)			Federal <sup>254</sup>	
	<i>Contract</i>	<i>Torts</i>	<i>Cont. &amp; Torts</i>	<i>Torts (Trial)</i>	<i>(All)</i>
<b>1992</b>	\$77,000	\$71,000	\$72,000	\$169,000*	\$15,000
<b>1996</b>	\$99,000	\$37,000	\$44,000	\$161,000	\$22,000
<b>2001</b>	\$90,000	\$31,000	\$41,000	\$201,000*	\$15,000
<b>2005</b>	\$92,000	\$33,000	\$43,000	---	\$60,000
<b>Change 1992– 2005</b>	<b>19.5%</b>	<b>-53.5%</b>	<b>-40.3%</b>	<b>19%</b>	<b>300%</b>

Although the comparison is not exactly apples to apples because of limitations in the data, at the very least we can observe that in the state courts of the seventy-five largest counties the median jury award in tort and contract claims (combined)

<sup>251</sup> NCSC Report at \*35 (cited in note 4).

<sup>252</sup> See generally Lynn Langton and Thomas H. Cohen, *Civil Bench and Jury Trials in State Courts, 2005* (Bureau of Justice Statistics, Oct 2008), archived at <http://perma.cc/E5EN-5MAH>. These figures include “Final Awards” adjusted for inflation. The “Median Jury Awards” data covers only the seventy-five most populous counties for purposes of standardization.

<sup>253</sup> Adjusted for inflation, 2005 dollars.

<sup>254</sup> Data is adjusted for inflation at constant 2005 dollars; rounded to the nearest thousand.

plunged significantly (-40.3 percent). At the same time, the median award in federal tort cases—including both bench and jury trials—grew 19 percent in the 1994–2002 period. And the median award in all federal cases grew by 300 percent, even if the median was fairly stable until the 2001–2005 period. As explored above in Table 2 and Figure 1, awards in federal courts have only expanded since 2005. This trend is likely influenced by other developments that are unrelated to federal expansion, including the rise of tort reform efforts in state legislatures. Regardless, the available evidence seems to show that federal courts are increasingly hosting the largest claims in the third era (and state courts are not).

#### 4. The perceived decay of state courts since 1980.

Developments in the third era of judicial federalism have been influenced by scholarly and litigant perceptions that state courts are mired in decay. While there is no doubt that state courts have improved significantly on many measures and are likely better than ever,<sup>255</sup> the critique—which I call the *state decline thesis*—is that they have decayed *relative to* federal courts. Although it is difficult to capture with precision the concept of judicial decay, several strands of evidence support the idea that state courts are not as well funded as federal courts, lack vibrancy, and are no longer the leading developers of the common law. In an attempt to flesh out the state decline thesis, this Section focuses on scholarly discussions of states courts' role in legal developments, litigant views of state courts, and funding levels for state judiciaries.

The modern scholarly view of state-court decay began in the late 1960s and coalesced into a full-blown critique in the 1970s and 1980s. Fresh from federal judicial victories in the civil rights movement, legal scholars observed that southern state courts were on the wrong side of history as leading opponents of school desegregation, making lower federal courts the only “redeemers” of the American constitutional order.<sup>256</sup> Observing these developments, Professor Burt Neuborne argued in 1977 that federal

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<sup>255</sup> See note 450 and accompanying text.

<sup>256</sup> See David W. Romero and Francine Sanders Romero, *Precedent, Parity, and Racial Discrimination: A Federal/State Comparison of the Impact of Brown v. Board of Education*, 37 L & Soc Rev 809, 818–20 (2003) (finding that there was only a dramatic change after *Brown* in federal courts, but not state courts, particularly those in the South).

courts had superior “technical competence” than state courts because of higher caliber judges and a better institutional setting.<sup>257</sup> For that reason, Neuborne argued, state courts were likely less receptive to constitutional rights.<sup>258</sup> This piece unleashed a broad debate about federal-state parity that centered mostly on the question of state-court openness to constitutional rights rather than just a broader disparity in “quality.”<sup>259</sup> Nonetheless, many scholars agreed that state courts had lost their edge, arguing that “the ‘action’ in American law” had shifted from the states to “the national level” partly because state judges were no longer improving the common law.<sup>260</sup> Some argued that state courts had “faded in significance” as innovators.<sup>261</sup>

A set of empirically minded scholars carried on the state decline thesis in the 2000s, centering on the corrosive effect of judicial elections and political corruption. Professors Michael Kang and Joanna Shepherd, for example, have argued that there is a correlation between electoral donations in state supreme court races—which are higher than they have ever been—and certain state-court decisions.<sup>262</sup> These and other studies supported the idea that since at least the 1980s, state-court elections have become more competitive and decisions may be increasingly influenced by donors, worsening the quality of state courts relative to the appointed federal judiciary.<sup>263</sup>

Beyond scholarly perceptions, attorney surveys in the third era find that litigants consider federal courts to be more competent than state courts. Studies in the early 1980s exploring attorney court preferences between federal and state courts had mixed findings on the relevance of judicial competence to forum choice.<sup>264</sup>

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<sup>257</sup> Neuborn, 90 Harv L Rev at 1120–21 (cited in note 11).

<sup>258</sup> See id at 1123.

<sup>259</sup> See, for example, Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L Rev 233, 244 (1988).

<sup>260</sup> See, for example, Goldberg, 34 Touro L Rev at 153 (cited in note 11).

<sup>261</sup> See, for example, id at 153. See also, for example, Issacharoff and Marotta-Wurgler, 67 UCLA L Rev at \*13–15 (cited in note 238).

<sup>262</sup> Michael S. Kang and Joanna M. Shepherd, *Partisanship in State Supreme Courts: The Empirical Relationship between Party Campaign Contributions and Judicial Decision Making*, 44 J Legal Stud 161, 178–80 (2015).

<sup>263</sup> See id at 180–81. To be clear, federal courts have gone through their own crises over the past few decades. For example, Congress has not increased the number of federal judges since 1990 and immigration dockets have exploded, leading to significant delays.

<sup>264</sup> Compare Jolanta Juszkiewicz Perlstein, *Lawyers’ Strategies and Diversity Jurisdiction*, 3 L & Pol Q 321, 332 (1981) (finding that judicial competence did not significantly impact forum choice), with Kristin Bumiller, *Choice of Forum in Diversity Cases: Analysis of a Survey and Implications for Reform*, 15 L & Soc Rev 749, 768 (1980) (“Preference for

By contrast, beginning in the early 1990s, a series of studies polling attorney preferences between state and federal courts reported that “federal judges are perceived as superior to state-court judges. Virtually all of the defense attorneys and a large proportion of the plaintiff attorneys said that federal judges are more competent.”<sup>265</sup> Attorneys report that “the federal courts provide superior justice to that provided by state courts.”<sup>266</sup> Although subject to selection bias, the studies show a consistent belief that federal courts are more competent.

Scholarly and attorney perceptions of state-court decay have been bolstered by American Bar Association (ABA) and judicial reports that have continuously decried the dramatic underfunding of state courts. Since the early 1990s, the ABA, the National Center for State Courts, and other legal organizations have warned of impending “disaster” due to overburdened and underfunded state judiciaries.<sup>267</sup> After the 1992–1993 recession, state courts “struggled with layoffs, hiring freezes and cutbacks in services,” court staff faced “furloughs,” and some court systems were “financially bankrupt.”<sup>268</sup> In the early 2000s, the ABA complained that “States have variously been forced to halt civil trials, suspend jury trials, eliminate drug treatment courts, condense jurisdictions, force unpaid furloughs on court employees, leave judicial positions unfilled, suspend pay for counsel for the indigent, close courthouses and cut staff, in some cases dramatically.”<sup>269</sup> After the 2008 financial crisis, a RAND Corporation study found

mounting evidence that many state courts have been struggling with increased case-load demands, decreased staffing levels, and frozen to slashed annual operating budgets. Chief justices from across the nation have decried the funding cuts that state court systems have suffered, asserting that courts

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the perceived higher quality judges in the federal courts is a consistently important factor.”); Jerry Goldman and Kenneth S. Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry*, 9 J Legal Stud 93, 97–98 (1980) (finding that 92 percent of attorneys representing out-of-state clients cite the perception that federal judges are superior to state judges as relevant to choosing a federal forum).

<sup>265</sup> Neal Miller, *An Empirical Study of Forum Choices in Removal Cases under Diversity and Federal Question Jurisdiction*, 41 Am U L Rev 369, 433 (1992).

<sup>266</sup> *Id.* at 379.

<sup>267</sup> Don J. DeBenedictis, *Struggling toward Recovery: Courts Hope That Belt-Tightening Lessons from the Recession Will Help Them Make It through the '90s*, 80 ABA J 50, 50 (1994).

<sup>268</sup> *Id.* at 50–51.

<sup>269</sup> Frances Kahn Zemans, *Court Funding* \*11 (ABA, Aug 2003), archived at <http://perma.cc/249Y-R64R> (ABA Report 2003).

are “at the tipping point of dysfunction,” “on the edge of an abyss,” and “slowly failing.”<sup>270</sup>

All of these studies paint a bleak picture of state-court funding.<sup>271</sup> To make matters worse, federal courts continue to routinely poach state judges.<sup>272</sup> This judicial lateralizing has been dramatically asymmetrical: over nine hundred state judges have moved to federal courts while only fourteen have gone the other way.<sup>273</sup>

Out of all of these theories and statements about state-court decline, the best area to look for empirical evidence may indeed be in judicial funding data. State judicial funding can be a good proxy for judicial independence, vitality of the court system, access to court, and *relative* decline over time compared to federal courts. As the ABA has explained, “There is significant potential for court funding to affect judicial independence in a variety of ways.”<sup>274</sup> Differences in funding levels over time can be illuminating because they impact judicial delays, docket loads, and even whether courts keep their doors open. Because judicial funding comes mostly from general funds appropriated by state legislatures,<sup>275</sup> funding levels can also indicate state governments’ relative commitment to their judiciaries. The health of judicial budgets also emphasize that judges have to lobby state legislatures and governors on a routine basis, placing them at the center of their states’ judicial political economy.<sup>276</sup>

In order to compare state to federal judicial funding over the last four decades—and to evaluate the viability of the state decline thesis—I assembled data from the Bureau of Justice Statistics (the “Bureau”) on funding for judicial and legal services.<sup>277</sup> The Bureau relies on “annual surveys of government

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<sup>270</sup> McGovern and Greenberg, *Who Pays for Justice?* at \*1 (cited in note 8). But see Michael D. Greenberg and Geoffrey McGovern, *An Early Assessment of the Civil Justice System After the Financial Crisis: Something Wicked This Way Comes?* \*14 (RAND Corporation, 2012), archived at <http://perma.cc/2F2Q-DZKC> (noting that budget numbers did not match perceived panic, but “state courts may face growing challenges”).

<sup>271</sup> See also Judith Resnik, *Courts and Economic and Social Rights/Courts as Economic and Social Rights*, in Katharine G. Young, ed., *The Future of Economic and Social Rights* (Cambridge 2018).

<sup>272</sup> Jonathan Remy Nash, *Judicial Laterals*, 70 Vand L Rev 1911, 1927 (2017).

<sup>273</sup> *Id.*

<sup>274</sup> ABA Report 2003 at \*2 (cited in note 269).

<sup>275</sup> *Id.* at 13.

<sup>276</sup> *Id.* at 17.

<sup>277</sup> See generally *Data User’s Guide to the Justice Expenditure and Employment Data Series* (Bureau of Justice Statistics), archived at <http://perma.cc/KS2F-46F5>. Data available at <http://www.bjs.gov/index.cfm?ty=pbse&sid=33> (visited Sept 30, 2019) (Perma archive unavailable).



finances and employment,” compiled by the US Census Bureau.<sup>278</sup> In 2015, the latest year with complete data, state governments spent nearly \$23 billion in their judicial systems, local governments contributed about \$22.5 billion, and the federal government spent roughly \$15.7 billion. But on the question of *relative decay over time*, there does seem to be some support for the decline thesis. Below is a table summarizing federal and state expenditures increases on judicial and legal services from 1982–2015 (excluding the sizable local expenditures except on the per case category):

TABLE 3: STATE AND FEDERAL JUDICIAL LEGAL EXPENDITURES  
(REAL DOLLARS)

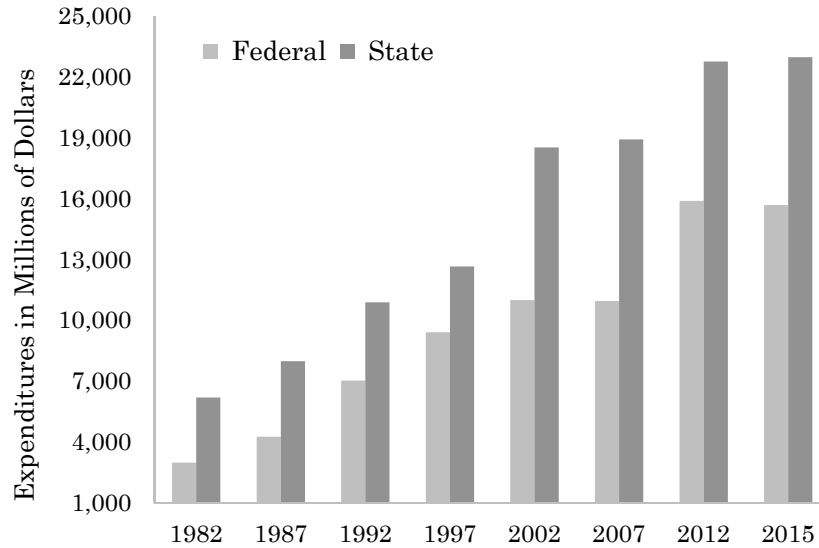
Year	Absolute (Millions)		Compound Growth		Per Case <sup>279</sup>	
	<i>Federal</i>	<i>State</i>	<i>Federal</i>	<i>State</i>	<i>Federal</i>	<i>State &amp; Local</i>
<b>1982</b>	\$2,978	\$6,189	---	---	\$4,908	\$624
<b>1992</b>	\$7,030	\$10,891	136%	75%	\$5,596	\$794
<b>2002</b>	\$10,997	\$18,526	269%	199%	\$5,822	\$1,040
<b>2015</b>	\$15,685	\$22,982	<b>427%</b>	<b>271%</b>	\$13,066	\$1144

As Table 3 displays, federal judicial expenditures have expanded significantly in the third era, showing a remarkable 427 percent growth in the 1982–2015 period. This is even more noteworthy once we adjust it on a per judge or case basis. Although the states’ spending on their courts and legal services has also grown considerably, state courts continuously lag behind federal courts, opening up a substantial funding gap. Indeed, as Figure 4 indicates, even in absolute terms, federal courts are catching up to state expenditures—though the gap is much larger when local expenditures are included—despite their substantially smaller caseloads:

<sup>278</sup> *Data User’s Guide* at \*2 (cited in note 277).

<sup>279</sup> Includes bankruptcy cases in federal courts and excludes traffic cases in state courts.

FIGURE 4: ABSOLUTE EXPENDITURES ON JUDICIAL SERVICES  
(IN MILLIONS)<sup>280</sup>



It is unclear whether this relative funding decay over time translates into the broader competence gap that Neuborne highlighted.<sup>281</sup> On the one hand, as the ABA and others have argued, court funding may be the key variable in predicting the functioning of a judicial system, correlating with access to court, court delays, and staff hiring. On the other hand, the states have improved in absolute terms and do not seem to lag the federal courts on salary growth or other variables.

Why is this happening? There are likely *many* contributing factors at play, including state balanced budget requirements, the weakening of public sector unions, generalized austerity, and, as I discuss in Part II.B.1, federal expansion's effect on the political economy of state courts. At the end of the day, it may be impossible to settle the question empirically—but scholarly, litigant, and ABA perceptions of relative state-court decay seem to find some support in important variables and suggest that state deterioration is at least politically at the center of the third era. Federal policymakers have used the alleged deterioration of state courts

<sup>280</sup> Note: This excludes local expenditures, which can be quite significant.

<sup>281</sup> See note 257 and accompanying text.

to justify further federal expansion. That seems to be a unique development of the third era.

##### 5. The rise of arbitration and alternative fora.

The last axe to fall on state courts comes not from federal courts directly, but from the rise of private arbitration, administrative adjudication, and New York and Delaware commercial courts. With regards to arbitration, an extensive literature has documented how in a series of cases beginning in the early 1980s, federal courts revived the Federal Arbitration Act of 1925<sup>282</sup> (FAA)—using it to compel arbitration wherever possible.<sup>283</sup> For example, Professor Maria Glover has noted that as a result of this three-decade long process, “cases that would otherwise proceed in the public realm—the courts—have been moved to a purely private realm, which is largely shielded from judicial and public scrutiny.”<sup>284</sup> Supreme Court pro-arbitration decisions coincided with the beginning of the third era, going from a relatively subdued decision calling the FAA “a liberal federal policy favoring arbitration agreements”<sup>285</sup> in 1983 to a set of aggressive decisions in the 1990s and 2000s on arbitration of securities law, consumer, antitrust, and employment claims.<sup>286</sup> The effect of these decisions on state law has been widely studied, including, as I discuss below, the potential danger that private arbitration precludes the development of state common law.<sup>287</sup> Similarly, there has been a concomitant growth in agency adjudication of millions of claims and a shift in commercial cases from other states to New York and Delaware.<sup>288</sup> It is hard to overstate the potentially disruptive

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<sup>282</sup> 43 Stat 883, codified as amended at 9 USC § 1 et seq.

<sup>283</sup> See J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 Yale L J 3052, 3062 (2015); Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U Pa L Rev 1793, 1812–14 (2014).

<sup>284</sup> Glover, 124 Yale L J at 3054 (cited in note 283). See also generally Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 Ill L Rev 371.

<sup>285</sup> *Moses H. Cone Memorial Hospital v Mercury Construction Corp*, 460 US 1, 24 (1983).

<sup>286</sup> See Glover, 124 Yale L J at 3061 (cited in note 283); *Mitsubishi Motors Corporation v Soler Chrysler-Plymouth, Inc*, 473 US 614, 625 (1985); *Shearson/American Express Inc v McMahon*, 482 US 220, 226 (1987).

<sup>287</sup> See notes 407–08.

<sup>288</sup> Michael Sant’Ambrogio and Adam S. Zimmerman, *Inside the Agency Class Action*, 126 Yale L J 1634, 1652–53 (2017); John F. Coyle, *Business Courts and Interstate Competition*, 53 Wm & Mary L Rev 1915, 1922–23, 1951–52 (2012).

effect of these trends on state courts. These changes allow litigants to opt out of state court into alternate tribunals.

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In this Section, I outlined the third era of judicial federalism, defined by three core changes: federal expansion over state-law claims, the massive growth of monetarily significant cases in federal court, and the relative decay of state courts. The changes involved both statutory enactments and doctrinal innovations at the Supreme Court. The combination of many federal changes seemed poised to shift a vast swath of cases from state to federal court. Although the data is limited, there are empirical trends that are consistent with the doctrinal changes (even if they do not demonstrate a causal relationship): (1) an increasing concentration of federal claims in federal court; (2) an increasing concentration of state claims in federal court; (3) the expansion of the damages means/medians in federal court; and (4) a growing budget gap between the two systems. All of this shows that there has been a veritable explosion in the size of federal cases.

As a concluding note to this historical periodization, it is important to recognize that all three eras of judicial federalism were defined by historical events and the efforts of political parties to retain a political majority. The first by founding era disputes between federalists and Anti-Federalists, state-court predominance, and antipathy toward federal judicial power; the second by the Civil War, progressivism, prohibition, and the mid-twentieth-century docket load crisis. And the third by the Reagan presidency, class actions, and corporate backlash against the litigation state. Beginning from a founding-era partial integration of the two court systems, the country moved away from integration after the Civil War and toward a more bifurcated understanding of the two judiciaries. Both diversity and federal question jurisdiction became entangled in larger questions about Reconstruction, the growth of railroads, and progressivism. And the trend was not necessarily toward more federal power; in opposing diversity, progressives wanted to empower state courts. It was only in the midst of the Second Era, between 1920 and 1980, that judges and reformers invented the idea of federal sensitivity to state judicial power.<sup>289</sup> And in the third era, the federal government reversed its views and began to monopolize state-court cases.

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<sup>289</sup> McManamon, 27 *Ga L Rev* 697 at 700 (cited at note 74).

## II. THE COSTS OF FEDERAL EXPANSION IN THE THIRD ERA

Scholars have for the most part welcomed federal expansion as beneficial for overburdened state courts and the requirements of a national economy.<sup>290</sup> Taking a contrary approach, this Part highlights several drawbacks to federal expansion and its possible connection to the decay of state courts, including: (1) a growing divergence between state and federal courts with regards to proplaintiff and prodefendant procedural rules; (2) the potential hollowing out of institutional litigant stakeholders at the state-court level; and (3) the states' diminishing ability to shape the common law.

Before proceeding, two clarifications on my terminology and analysis are appropriate. First, in this Part, I repeatedly refer to "large institutional defendants," "business litigants," "prodefendant" rules, or "corporate defendants." When I use those terms I am referring, roughly speaking, to the two thousand or so largest firms by market capitalization.<sup>291</sup> Studies have suggested that these firms are "mega litigants" responsible for most legal expenditures in federal and state court and that their preferences differ from smaller firms.<sup>292</sup> These firms, however, can be plaintiffs too, especially in business-to-business litigation. Nonetheless, they are mostly on the defense side, so I refer to them as defendants. Similarly, when I use the terms "plaintiffs" or "proplaintiff" rules, I am generally referring to plaintiffs' firms, who are systematically on the plaintiff side in most cases.

Second, although I address the states as a homogeneous group, there may be relevant state-by-state differences. I address some of these potential differences when relevant below. My focus, however, is on the *structural relationship* between state and federal courts, which should in theory be uniform. Nonetheless, I acknowledge that this carveout may affect some of the analysis below.

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<sup>290</sup> See Issacharoff and Sharkey, 53 UCLA L Rev at 1368 (cited in note 10). But see, for example, Schwarzer and Wheeler, 23 Stetson L Rev at 682 (cited in note 30) (arguing that increasing caseloads undermine federal courts).

<sup>291</sup> See Terence Dunworth and Joel Rogers, *Corporations in Court: Big Business Litigation in U.S. Federal Courts, 1971–1991*, 21 Law & Soc Inquiry 497, 518–20 (1996).

<sup>292</sup> See Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 Stan L Rev 1275, 1285 (2005); Joanna Schwartz, *The Cost of Suing Business*, 65 DePaul L Rev 655, 676–77 (2016). By "plaintiffs" I similarly mean the plaintiffs' attorneys bar.

A. Plaintiff-Defendant Divergence between State and Federal Courts and Distributional Consequences

In this Section, I analyze how the third era of judicial federalism has theoretically shaped the stakeholder pools in state courts. I argue that federal expansion has allowed business defendants to opt out of state courts into arbitration or federal court and, by consequence, turned state judiciaries more plaintiff friendly *relative to* federal courts. I then examine empirical evidence supporting that prediction in procedural law, including: (1) plaintiff win rates in federal court have collapsed from 70 percent to 35 percent between 1985 and 2000 but not in state courts; (2) attorneys report in surveys that state courts are friendlier to plaintiffs and federal courts less hostile to defendants; (3) civil procedure studies conclude that state courts have resisted a prodefendant trend of federal changes; and (4) state civil rules' advisory committees have greater representation of plaintiffs' interests than the federal advisory committee. Finally, I examine normative concerns with such an outcome, including the possibility of a negative downward spiral that leads to cyclical federalization.

1. Plaintiffs and defendants in state and federal courts.

One clear effect of federal expansion is that large institutional litigants can increasingly litigate in federal court or arbitration as opposed to state court. This development is fueled by evolving plaintiff and defendant strategies. On the one hand, federal expansion means that plaintiffs' attorneys have a newfound variety of federal claims that did not exist pre-1960. Whether it is statutes on products liability, civil rights, securities, airline-carrier liability, or labor-management relations, among others, plaintiffs' attorneys can increasingly include federal claims in their litigation toolbox. And to the extent that these attorneys pursue comprehensive remedies, they should prefer to file add-on federal claims in any court of their choice (state or federal).<sup>293</sup> On the other hand, these dynamics can influence defendants' choices, too. If plaintiffs file more federal claims, then defendants will increasingly litigate in federal court both as an initial matter and because they can easily remove those claims. And we know that business defendants do prefer federal courts to state courts (as I

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<sup>293</sup> See Part II.A.3.

discuss below).<sup>294</sup> In consequence, business litigants can more easily opt out of state courts.

The ability of business defendants to move to federal court and arbitration should not come as a surprise. As explored in Part I.C, businesses were largely responsible for the expansion of diversity jurisdiction, CAFA, and other federal statutes precisely because they preferred to litigate in the more conservative federal judiciary. And businesses were partly successful in doing this: some studies have found that business litigants are involved in a significant majority of federal civil cases. For example, Professor Gillian Hadfield has calculated (under several assumptions) that from 1970 to 2000, “[o]rganizational defendants have gone from being named in approximately 68% of cases . . . to 83%.”<sup>295</sup> Businesses are now seemingly reaping the benefits of federal expansion that they desperately sought.

The likely emigration of business defendants from state to federal courts can have noticeable effects on the stakeholder pool at the state level. Each court system is composed of a dynamic set of stakeholders: insurance companies, plaintiffs’ attorneys, small plaintiffs, business defendants, government defendants, and other run-of-the-mill litigants. In theory, it is easy to see how this pool can be thrown out of balance by federal intervention. For example, the typical environmental nonprofit organization in the early 1960s likely litigated mostly state tort or nuisance claims against industrial polluters in state court. But a flurry of federal environmental statutes in the early 1970s shifted the locus of litigation to federal law and federal court.<sup>296</sup> This should have, in theory, shifted the presence of environmental nonprofit stakeholders from state court to federal court. Similarly, if Congress abrogates the states’ sovereign immunity for a particular set of federal claims, then we should expect state governments to become greater stakeholders in federal court.<sup>297</sup> By the same logic, the increasing ease of removal in the third era should shift a slice of business litigants from the state stakeholder pool to the federal one.

There are several reasons, however, to believe that emigration from state to federal court should not be symmetrical between corporate defendants and plaintiffs’ attorneys—we should

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<sup>294</sup> See note 433 and accompanying text.

<sup>295</sup> Hadfield, 57 *Stan L Rev* at 1304 (cited in note 292).

<sup>296</sup> See Issacharoff and Sharkey, 53 *UCLA L Rev* at 1380–82 (cited in note 10).

<sup>297</sup> See, for example, *Fitzpatrick v Bitzer*, 427 US 445, 451–52 (1976).

expect corporate defendants to increasingly opt out of state court and move to federal court while plaintiffs' attorneys stay behind:

First, a significant percentage of corporate litigation is business to business.<sup>298</sup> And these may be precisely the kinds of cases most likely to move to federal court or arbitration—because of their size, claims, sophisticated attorneys, and interstate diversity—leaving behind a corporate-bereft state stakeholder pool. For example, one area of increased business-to-business litigation in federal court is trade secrets lawsuits, in which institutional players now have a federal statute at their disposal.<sup>299</sup> Similarly, available data from arbitration organizations show double-digit growth in commercial business-to-business cases.<sup>300</sup> As those cases leave state court, they remove businesses as stakeholders. But this business emigration does not affect the number of cases involving plaintiffs' side interests—plaintiffs' attorneys—in state court. That is because plaintiffs' attorneys almost never sue each other. This fundamental asymmetry, in which businesses do sue each other but plaintiffs' attorneys do not, by itself explains why state courts may be increasingly influenced by plaintiffs' attorneys, who may become a bigger part of their stakeholder pool relative to corporate defendants. Although those plaintiffs' firms are still suing someone—often corporations—those remaining defendants may both lack the political support they used to have from now-departed institutional litigants and may themselves face different kinds of claims.

Second, in the face of caseload migration to federal court, state judges increasingly interested in retaining certain cases may compete for plaintiffs' firms' attention because those firms make the initial decision of where to file a case.<sup>301</sup> While state judges may be happy to offload large segments of their dockets and ease their workload, any realistic conception of judges as individuals predicts that they are also interested in retaining cases that increase their own reputation and prestige.<sup>302</sup> Of course, in a two-sided litigation market in which defendants decide whether

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<sup>298</sup> Donald J. Farole Jr, *Contract Bench and Jury Trials in State Courts, 2005* \*3 (Bureau of Justice Statistics, Sept 2009), archived at <http://perma.cc/QY75-T737>. See also Schwartz, 65 DePaul L Rev at 666–67 (cited in note 292); Hadfield, 57 Stan L Rev at 1288–89 (cited in note 292).

<sup>299</sup> Rachel Bailey, *Trade Secret Litigation Report 2018* \*2–4 (Lex Machina, July 2018).

<sup>300</sup> *Arbitration Remains a Trusted Venue for Resolving B2B Disputes* (American Arbitration Association, Feb 27, 2018), archived at <http://perma.cc/L7CV-JGQC>.

<sup>301</sup> Zambrano, 70 Stan L Rev 1805 at 1844–45 (cited in note 9).

<sup>302</sup> See notes 314–15.



to remove a case or to remain in state court, judges also have some incentive to compete for corporate defendants' attention. But plaintiffs have the unique power to structure a case to avoid removal. And besides, state judges cannot truly compete with prodefendant federal rules given that state courts have, in a sense, already lost the defense side of the market. If judges are competing for plaintiffs' attention, as I discuss below, then we should expect plaintiffs' firms to prefer state court.

Third, plaintiffs have more opportunities to find friendly judges among the heterogeneous state courts. With fifty separate court systems and no centralized appellate authority over state law, state courts are more numerous and ideologically diverse. Some state judiciaries are more conservative, others more liberal. By contrast, federal courts are fewer, are appointed by the same government, and are controlled by the Supreme Court. This likely makes federal courts less ideologically diverse, and perhaps more stable and centrist. Because plaintiffs choose their forum, subject to personal jurisdiction limits, they can select the state judges that are on the proplaintiff tail of the distribution. So even if the median state court is similar to the median federal court with respect to plaintiff friendliness, the state courts in which plaintiffs file will be significantly more plaintiff friendly than corresponding federal courts.

Finally, on the defense side, it is the largest and most influential firms with multistate operations that are increasingly able to remove claims to federal court. Small businesses may instead remain in state court as influential repeat players in small routine cases, like debt collection or landlord-tenant claims.<sup>303</sup> By contrast, on the plaintiffs' side, emigration to federal court should be a mixed affair. On the one hand, many of the largest plaintiffs' firms may happily federalize their claims. This is especially true for firms that specialize in federal class actions or MDL litigation. On the other hand, sophisticated plaintiffs' firms may also strategically keep their litigation in state courts for the reasons discussed above.<sup>304</sup> So there is no clear-cut reason to predict that the largest plaintiffs' firms will, on average, federalize their claims.

These dynamics mean that, even assuming a modest decline of business-to-business litigation, we should expect a state stakeholder pool that is bereft of the largest business defendants and

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<sup>303</sup> Judith Resnik, *Revising Our "Common Intellectual Heritage": Federal and State Courts in Our Federal System*, 91 *Notre Dame L Rev* 1831, 1929 (2016).

<sup>304</sup> See Miller, 41 *Am U L Rev* at 381 (cited in note 265).

may become dominated by other groups, including plaintiffs' firms. Once business litigants begin to opt out of state court and, thereafter, plaintiff-side interests make up a larger share of the litigant pool, we may expect state judiciaries to resist federal courts' prodefendant reforms. This prediction depends on two premises:

The first one is that as business litigants opt out, they are no longer repeat players interested in shaping state law. As Professor Marc Galanter has argued, litigation repeat players play for the long haul and seek to shape the structure of substantive and procedural law.<sup>305</sup> These players strategically settle or litigate claims to mold the law in their favor in the long run. The larger the player, the more resources they have to engage in long-term legal system design through strategic litigation. But the removal of repeat defendant businesses from state courts—especially the largest litigants—means that they should no longer be as interested in playing the litigation game (at least with the same vigor) in state court. Without a strong long-term interest, there is less of an incentive for business defendants to invest in state-court legal strategies and may instead shift their litigation game to federal courts.

Plaintiff-side firms may then begin to control state litigation in unexpected ways. For example, large defendant law firms may de-emphasize their state-court practices, contribute less to local bar associations, or simply ignore local state politics. Business lobbyists may change their interaction patterns, too. The extent to which plaintiff-side interests would pick up the slack or departing business defendants may drag plaintiffs' firms along to federal courts is unclear. But as public choice theory predicts, a small but deeply committed and increasingly unopposed group of plaintiffs' lawyers—who prefer state court, do not place as much emphasis on competence, and who have a mix of state and federal cases—could become dominant at the state level.<sup>306</sup>

Either way, even if plaintiffs' firms do not come to exercise more influence over state courts, at the very least the remaining stakeholder pool would be *less* corporate heavy than before. By sheer default, the entire pool may be more plaintiff friendly. The point is that as large businesses care less about state litigation, they may cede some of their influence to other stakeholders who

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<sup>305</sup> Galanter, 2001 Wis L Rev at 619 n 127 (cited in note 191).

<sup>306</sup> See Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* 23–36 (Harvard 1971) (outlining small group effects).

are invested in local litigation. We should at minimum expect businesses to be more interested in shaping federal, and not state, law and procedure.

There is suggestive evidence in amicus brief filings that supports this theory.<sup>307</sup> The Chamber of Commerce, and other defense-side lawyers associations, have significantly increased their amicus filings in federal class actions cases “by a factor of thirty-five” in the third era (between the 1980s and 2000s).<sup>308</sup> This thirty-five-fold growth significantly outstrips the general growth of amicus filings in that time (which went up by a factor of “3.3”),<sup>309</sup> and the Chamber of Commerce specifically is now the largest single filer by far.<sup>310</sup> Studies of state-court amicus filings have also found an increase in business filings, but, in contrast to federal courts, business’s share of state amicus filings declined from a dominant 42.9 percent in 1965 to 23.3 percent in 1990.<sup>311</sup> At the same time, and in line with the rising state court influence of plaintiffs-side interests, “organizations representing lawyers . . . and other ‘legal’ interests” began to file amicus briefs “in increasing numbers” in that period.<sup>312</sup>

A second important premise here is that courts as institutions, and judges as employees, are influenced by their stakeholders because they are participants in a litigation market. As Professor William Landes and Judge Richard Posner have previously outlined, courts can be analyzed as suppliers in a litigation market shaped by the demands of litigants.<sup>313</sup> Within this market for litigation, judges can be seen as laborers who seek to maximize their popularity, prestige, and reputation, among other values in

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<sup>307</sup> See Memorandum from Lewis F. Powell Jr to Eugene Sydnor Jr, Chairman of the Education Committee, US Chamber of Commerce, *Attack on American Free Enterprise System* \*27 (Aug 23, 1971), archived at <http://perma.cc/DP42-TSP5> (encouraging the Chamber of Commerce to aggressively use amicus briefs to promote a probusiness agenda).

<sup>308</sup> Burbank and Farhang, 165 U Pa L Rev at 1525 (cited in note 213).

<sup>309</sup> *Id* at 1526–28.

<sup>310</sup> See Adam Chandler, *Cert.-Stage Amicus “All Stars”: Where Are They Now?* (SCOTUSblog, Apr 4, 2013), archived at <http://perma.cc/5L42-GBV9>. See also David L. Franklin, *What Kind of Business-Friendly Court—Explaining the Chamber of Commerce’s Success at the Roberts Court*, 49 Santa Clara L Rev 1019, 1023–24 (2009).

<sup>311</sup> Lee Epstein, *Exploring the Participation of Organized Interests in State Court Litigation*, 47 Pol Rsrch Q 335, 347 (1994).

<sup>312</sup> *Id* at 346.

<sup>313</sup> See, for example, William M. Landes and Richard A. Posner, *Adjudication as a Private Good*, 8 J Legal Stud 235, 236–40, 238–39 (1979). See also Zambrano, 70 Stan L Rev at 1844 n 191 (cited in note 9) (collecting sources).

their utility function.<sup>314</sup> This is especially true for state judges who are subject to elections in a majority of states.<sup>315</sup> Not only does economic theory and political science predict this, social psychology theory also compellingly predicts that state judges should care deeply about the preferences of legal and social elites.<sup>316</sup>

Beyond their role as supply-side employees, judges are also embedded in a network of lawyers.<sup>317</sup> They are not only lawyers themselves, but are also prominent members of their legal communities, speakers at bar association gatherings, and deeply enmeshed in the legal field. So too for state legislators who are equally influenced by the local bar.<sup>318</sup> As such, courts, legislators, and judges are likely to respond to the interests of their local legal elites through a set of dynamics that may be thought of as “cultural capture.”<sup>319</sup> This kind of influence can manifest in conferences where judges and practitioners interact, amicus briefs, and law school events. As Judge Diane Wood once noted, “[D]ispute resolution is, at its base, a service, and it should not be surprising that states will take steps to provide needed services to their important political constituents.”<sup>320</sup>

To the extent that the local legal community or litigation stakeholder pool is gradually bereft of business litigants, we may expect state judiciaries to drift toward the preferences of the remaining stakeholders, which may tend to be dominated by plaintiffs’ firms still interested in local litigation.<sup>321</sup> By contrast, we

<sup>314</sup> See Landes and Posner, 8 *J Legal Stud* at 238–39 (cited in note 313).

<sup>315</sup> See Eric Helland and Jonathan Klick, *Why Aren’t Regulation and Litigation Substitutes? An Examination of the Capture Hypothesis*, in Cary Coglianese, ed., *Regulatory Breakdown: The Crisis of Confidence in U.S. Regulation* 231–34 (Pennsylvania 2012).

<sup>316</sup> See Neal Devins and Nicole Mansker, *Public Opinion and State Supreme Courts*, 13 *U Pa J Const L* 455, 473 (2010) (“For justices on politically insulated courts, like the U.S. Supreme Court and a handful of state courts, social psychology suggests that these justices will be especially interested in winning favor with elites, including bar groups, legal academics, and journalists.”).

<sup>317</sup> See Gerhard Wagner, *The Dispute Resolution Market*, 62 *Buff L Rev* 1085, 1129 (2014).

<sup>318</sup> See *id.* at 1130–32.

<sup>319</sup> For a discussion of “cultural capture” theory, see generally James Kwak, *Cultural Capture and the Financial Crisis*, in Daniel Carpenter and David A. Moss, eds., *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* 71 (Cambridge 2014); Richard Neely, *The Product Liability Mess: How Business Can Be Rescued from the Politics of State Courts* (Free Press 1988).

<sup>320</sup> Diane P. Wood, *Generalist Judges in a Specialized World*, 50 *SMU L Rev* 1755, 1763 (1997).

<sup>321</sup> See notes 220–21 and accompanying text. See also, for example, J. Jonas Anderson, *Court Capture*, 59 *BC L Rev* 1543, 1551 (2018); Brett McDonnell and Daniel Schwarcz, *Regulatory Contrarians*, 89 *NC L Rev* 1629 (2011).

may expect federal courts to be increasingly influenced by institutional defendants.

A state-court proplaintiff drift does not have to be conscious. I already outlined one mechanical route for change: large businesses would no longer bring cases or settle claims with the goal of shaping the long-term development of state law. Moreover, when defendants do end up in state court it may occur because plaintiffs' attorneys designed the case to keep it there. So there would be a selection effect—remaining state cases would be plaintiff friendly. Another avenue of change may be based on subconscious psychological effects. Flattered state judges may side with the lawyers who favor their own state courts and come to dislike the large litigants who constantly remove claims to federal court.<sup>322</sup> They may then rule differently in a litigation field no longer dominated by large institutional defendants.

Of course, a plaintiff or defendant divergence probably does not apply to every state court equally. State courts that enjoy robust business support and lobbying—like the New York commercial division and Delaware's Chancery Court—are likely incentivized by their business constituency to avoid proplaintiff reforms. Larger states may enjoy a more diverse business and litigant community while smaller states may be influenced by either small businesses or a single large business.<sup>323</sup> Moreover, plaintiffs' attorneys do not have to forum shop in every state—they are more likely to find outlier state courts that can be much more proplaintiff compared to the average federal court. All of this would affect the dynamics discussed above.

## 2. Evidence of divergence in procedural law.

All of these effects—on stakeholder pools, state and federal law, and courts—should be most evident not in substantive law but in state and federal *procedural law*. Even if large institutional defendants opt out of state court, they will continue to have an incentive to shape state substantive law because under *Erie* that

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<sup>322</sup> After all, this was part of the motivating concern for why Congress passed CAFA and SLUSA in the first place. See notes 229–32 and accompanying text.

<sup>323</sup> See John B. Oakley and Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 Wash L Rev 1367, 1426 (1986) (noting that “less populous states” have more “systematically modeled their civil procedures on the Federal Rules” than “[s]tates with larger populations”).

law is applied in federal court.<sup>324</sup> In other words, large institutional defendants may be able to opt out of state courts, but they cannot fully opt out of state substantive law. Therefore, the right legal locus to observe the effects of the third era is in procedural law because that law can and does differ in state and federal courts. It is in state civil procedure that businesses may no longer have as much at stake in the repeat player game.

Setting aside theory, some empirical evidence does support these expected trends; state and federal courts are veering away from each other in predictable ways. A recent study shows that between 1985 and the late 1990s, plaintiff win rates in adjudicated federal-court cases dropped from 70 percent to 30 percent before stabilizing.<sup>325</sup> There is no evidence of a similar decline in state courts nor a clear explanation for this dramatic drop.<sup>326</sup> This is an astonishing fall that matches other developments in the third era. Early studies of attorney preferences in diversity jurisdiction cases—written in the late 1970s and 1980s—described mixed findings on the question of different court preferences between plaintiffs’ and defendants’ counsel.<sup>327</sup> One research survey supported by the National Center for State Courts in 1988 found that “[t]he predilection to favor state courts or federal courts did not differ by type of counsel.”<sup>328</sup> Indeed, the defense bar even opposed an effort to federalize class actions in the 1980s.<sup>329</sup> Since the early 1990s, however, a series of studies exploring attorney preferences has consistently found that plaintiffs’ attorneys prefer to litigate in state court and institutional defendants in federal court.<sup>330</sup> Already in 1992, Neal Miller of the Institute for Law and Justice found that in a large sample of removal cases (which suffer from selection problems)<sup>331</sup>: “Plaintiff attorneys reported that

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<sup>324</sup> *Erie*, 304 US at 64.

<sup>325</sup> Lahav and Siegelman, 52 UC Davis L Rev at 1371, 1373 n 1 (cited in note 32) (defining adjudicated cases as “any decision rendered by a court that ends a case”).

<sup>326</sup> NCSC Report at \*23 (cited in note 4).

<sup>327</sup> See, for example, Bumiller, 15 L & Soc Rev at 772–73 (cited in note 264).

<sup>328</sup> Victor E. Flango, *Attorneys’ Perspectives on Choice of Forum in Diversity Cases*, 25 Akron L Rev 41, 94 (1991). But see Note, *The Choice between State and Federal Court in Diversity Cases in Virginia*, 51 Va L Rev 178, 196 n 57 (1965) (“It is evident that counsel for insurance companies prefer federal courts when defending a personal injury claim, and that plaintiffs’ counsel prefer state courts.”).

<sup>329</sup> Marcus, 48 Wm & Mary L Rev at 1282 (cited in note 82).

<sup>330</sup> Miller, 41 Am U L Rev at 381 n 48 (cited in note 265).

<sup>331</sup> See Kevin M. Clermont and Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything about the Legal System? Win Rates and Removal Jurisdiction*, 83 Cornell L Rev 581, 602 (1998).

favorable bias . . . with respect to their clients in state court is relatively common” and “[d]efense attorneys’ forum preference for federal court is based on expectations of lesser hostility there toward business litigants.”<sup>332</sup>

Several other studies have reached similar conclusions about this state proplaintiff and federal prodefendant divergence. In 1995, one study found that “[a]ttorneys who regard corporate status as an important consideration in forum selection favor federal courts if their client is a corporation and state courts if their opponent is a corporation.”<sup>333</sup> Most importantly, a 2005 research project shepherded by the Federal Judicial Center found that class-action plaintiffs’ attorneys preferred to litigate in state court because they perceived them—and state substantive and procedural law—as friendlier to their interests.<sup>334</sup> Defendants, by contrast, preferred federal court for similar reasons.<sup>335</sup> These findings, of course, support the beliefs of congressional supporters of CAFA.<sup>336</sup> To be sure, not all of the data point in the same direction. Some researchers have found that a surprising number of in-state plaintiffs bring cases in federal court.<sup>337</sup> But the general thrust of existing empirical studies supports the idea that plaintiffs’ attorneys prefer state court and businesses federal court.

Not only do attorneys’ preferences differ, the development of procedural law shows a state proplaintiff inclination *relative to* federal courts. As discussed above, in the past thirty years, the federal courts have engaged in procedural retrenchment—a systematic effort to close access to federal court through reform to pleading, personal jurisdiction, class actions, arbitration, and discovery, among other procedures.<sup>338</sup> These efforts have been part of a broader anti-litigation movement sponsored by large institutional defendants. Surprisingly, however, state courts have not

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<sup>332</sup> Miller, 41 Am U L Rev at 408, 424 (cited in note 265).

<sup>333</sup> Flango, 25 Akron L Rev at 67 (cited in note 328). See also Clermont and Eisenberg, 83 Cornell L Rev at 603–04 (cited in note 331).

<sup>334</sup> Willging and Wheatman, *An Empirical Examination* at \*53–54, 58 (cited in note 23).

<sup>335</sup> *Id.* at \*22.

<sup>336</sup> HR 1115, 108th Cong, 1st Sess, § 2(a)(4) (2003) (finding that plaintiffs use “artful pleading . . . to avoid litigating class actions in Federal court”).

<sup>337</sup> See, for example, Victor Eugene Flango and Craig Boersema, *Changes in Federal Diversity Jurisdiction: Effects on State Court Caseloads*, 15 U Dayton L Rev 405, 446–48 (1990).

<sup>338</sup> See generally Burbank and Farhang, 162 U Pa L Rev (cited in note 204); Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 Cal L Rev 411 (2018).

followed this pattern.<sup>339</sup> The states emulated and indeed cribbed federal procedural law for decades until the 1980s.<sup>340</sup> Since then, they have aggressively rejected prodefendant federal changes in their local rules and criticized federal efforts to close access to court.<sup>341</sup> For example, in 1986 Professors John Oakley and Arthur Coon found that twenty-three states were “federal replica jurisdictions” in that they adopted the federal rules almost wholesale.<sup>342</sup> By 2003, Professor Oakley found the opposite, noting that “it is arguable that there are no longer any true replicas of the [Federal Rules of Civil Procedure] to be found among the local procedural systems of the fifty states.”<sup>343</sup> The states have not emulated the prodefendant changes to pleading standards, class actions, and jurisdictional rules.<sup>344</sup> The third era has brought state courts that refuse to enact prodefendant procedural reforms and remain relatively proplaintiff.<sup>345</sup>

The growing procedural gulf between state and federal courts—evidence of a proplaintiff vs. prodefendant drift—is even more apparent in the composition and actions of the committees that manage the rules of procedure. Professors Stephen Burbank and Sean Farhang have shown that the Federal Rules Advisory Committee—responsible for proposing new amendments to the Federal Rules—has become dominated by defendant-side interests since the 1980s.<sup>346</sup> Even though the committee tended to adopt proplaintiff rules in the 1960s and 1970s, almost all of the proposals put forth since 1985 have been prodefendant.<sup>347</sup> The shift correlates exactly with the reforms of the third era. Burbank notes that “[a]fter increasing in the early 1960s, the predicted probability that a proposed amendment would favor plaintiffs declined from 87% in the mid-1960s to 19% by [2014].”<sup>348</sup> To be sure, much of this has been influenced by the fact that the last three chief justices—who appoint members to the committees—have

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<sup>339</sup> See, for example, Zambrano, 70 Stan L Rev at 1830 (cited in note 9).

<sup>340</sup> Oakley and Coon, 61 Wash L Rev at 1425 (cited in note 323).

<sup>341</sup> Zambrano, 70 Stan L Rev at 1830 (cited in note 9).

<sup>342</sup> Oakley and Coon, 61 Wash L Rev at 1376–77 (cited in note 323).

<sup>343</sup> John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 Nev L J 354, 355 (2002).

<sup>344</sup> See Clopton, 106 Cal L Rev at 423–45 (cited in note 338).

<sup>345</sup> Consider Brooke D. Coleman, *One Percent Procedure*, 91 Wash L Rev 1005, 1022–23 (2016).

<sup>346</sup> See Burbank and Farhang, 162 U Pa L Rev at 1598 (cited in note 204).

<sup>347</sup> Stephen B. Burbank and Sean Farhang, *Rights and Retrenchment: The Counterrevolution against Federal Litigation* 93–95 (Cambridge 2017).

<sup>348</sup> *Id.* at 94.



been appointed by Republican presidents (Chief Justices Warren Burger, William Rehnquist, and John Roberts). Nonetheless, the composition of the federal advisory committee is clearly friendlier to defendant interests—most of the practitioner members in the committee are now identified as corporate defense lawyers rather than plaintiffs’ attorneys by a 2:1 ratio, a serious departure from the prior balance in 1960.<sup>349</sup> By contrast, and as predicted, the state-level advisory committees include sizable representations of the plaintiffs’ bar and a more balanced ratio (42 percent plaintiff vs. 58 percent defendant).<sup>350</sup> Practitioners also seem to have more power in state advisory committees.<sup>351</sup>

To be sure, all of these changes are in the aggregate only and elide significant heterogeneity among the states. For example, while nineteen state courts have rejected federal courts’ plausibility pleading, Colorado, Massachusetts, Nebraska, South Dakota, and Wisconsin, among others, have adopted that higher standard; while state courts in Florida, New York, Oregon, Connecticut, California, and Iowa have criticized some Supreme Court changes to class certification, courts in twelve states have emulated them; and while courts in around sixteen states have expanded some theories of personal jurisdiction, others have remained attached to the federal approach.<sup>352</sup> This heterogeneity is relevant but does not change the aggregate conclusions I draw here.

The states’ failure to drift toward defendant reforms may also be unique to procedure. In other areas, businesses (and related interests) continue to invest heavily and more than ever to tilt state law in their favor, including the following contexts:

- state judicial elections;<sup>353</sup>
- tort reform;<sup>354</sup>
- medical malpractice rules;<sup>355</sup>

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<sup>349</sup> Id at 79–81.

<sup>350</sup> Zachary D. Clopton, *Making State Civil Procedure*, 104 Cornell L Rev 1, 29 (2018).

<sup>351</sup> Id.

<sup>352</sup> Scott Dodson, *The Gravitational Force of Federal Law*, 164 U Pa L Rev 703, 711–17 (2016); Clopton, 106 Cal L Rev at 433–34, 441–42 (cited in note 338).

<sup>353</sup> See, for example, Clive S. Thomas, Michael L. Boyer, and Ronald J. Hrebenar, *Interest Groups and State Court Elections: A New Era and Its Challenges*, 87 *Judicature* 135, 137 (2003).

<sup>354</sup> See, for example, id at 140.

<sup>355</sup> See, for example, Jean Macchiaroli Eggen, *Medical Malpractice Screening Panels: An Update and Assessment*, 6 *J Health & Life Sci* 1, 26–28 (2013).

- handgun manufacturer liability;<sup>356</sup>
- punitive damages;<sup>357</sup>
- statutes of repose;<sup>358</sup> and
- contingency fees.<sup>359</sup>

But that interest in electing a procorporate judge or shaping state law in a variety of contexts is quite different than an interest in the quality and funding of state courts. It is the uncoupling of these things—competence vs. substantive law—that is worrisome.

In sum, there is considerable evidence that state and federal courts are diverging as expected. State courts and state civil procedure have resisted the pro-institutional defendant trend of federal-court changes and indeed seem to have embraced pro-plaintiff concerns. As business defendants opt out of state court in the third era, the stakeholder pools of both court systems have changed; we can observe this directly in plaintiff win rates and in the membership numbers of civil rules' advisory committees at both levels. At the very least, federal courts are both *perceived* to be and are *likely* to be more prodefendant than the most proplaintiff state court that a litigant can find.<sup>360</sup>

### 3. Normative concerns: the one-way ratchet, the negative feedback loop, and inefficient forum shopping.

There are at least three reasons to be normatively concerned with plaintiff-friendly state courts and business-friendly federal courts. First, a proplaintiff or prodefendant bias can become a one-way ratchet. The more the two systems diverge, the more each stakeholder group is incentivized to maintain cases in their own court system or invest in further lobbying, making each system even more biased. The plaintiffs' bar would continue to favor the state judiciaries, courting state judges, and shaping state law and procedure as a repeat player. Defendants, by contrast, would do the same to federal courts. If optimal legal policy is the result of a system that takes plaintiff and defendant concerns into account, we should worry about this.

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<sup>356</sup> See Thomas A. Eaton and Susette M. Talarico, *Testing Two Assumptions about Federalism and Tort Reform*, 14 Yale L & Pol Rev 371, 384–85 (1996); David A. Logan, *Juries, Judges, and the Politics of Tort Reform*, 83 U Cin L Rev 903, 911 (2015).

<sup>357</sup> See Logan, 83 U Cin L Rev at 904–05 & n 8 (cited in note 356).

<sup>358</sup> See id at 910.

<sup>359</sup> See id at 910 & n 32.

<sup>360</sup> I am grateful to Sam Issacharoff for his specific language here.

Second, a divergence in counsel bias may continue to provoke federal intervention into state judiciaries. As I discussed above, both CAFA and SLUSA—centerpieces of the third era—were targeted at “out of control” state judiciaries.<sup>361</sup> They constituted a rescue package for large institutional defendants who complained about the proplaintiff tendencies of state courts. But CAFA and similar statutes have a potentially destructive core. As federal intervention accelerates the one-way ratchet, the system can collapse into a negative feedback loop. The federal government may intervene in state courts only to make those courts even more proplaintiff and federal courts more prodefendant; in time, this can provoke further interventions with the same goals in mind. In other words, the federal “cure” to proplaintiff state courts is worsening the alleged disease. We may find a pattern in which the federal government designs interventions into state courts every ten years or so with no apparent equilibrium in sight.

This pattern may be even worsened by polarization. Plaintiffs’ attorneys overwhelmingly support Democrats while large institutional defendants are associated with Republicans.<sup>362</sup> To the extent that state courts are increasingly allied with plaintiffs and federal courts with defendants, this may further politicize both institutions, corroding bipartisan support for the judiciary. Indeed, as most important legal claims are concentrated in an increasingly polarized federal judiciary, courts may become estranged from half of the population. While it is unclear whether elected state judiciaries might either magnify or counter polarization, they are more likely than federal courts to welcome legal innovations that benefit consumers.<sup>363</sup>

Third, a systematic divergence between state and federal courts can lead to significant amounts of forum shopping and can distort legal claims. Litigation is by its very nature a strategic game; forum shopping is as old as the republic. But the one-way ratchet and negative feedback loop may cause increasing amounts of strategic behavior that can exacerbate current inefficiencies. For example, in a world in which the proplaintiff bias in

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<sup>361</sup> See notes 229–32 and accompanying text.

<sup>362</sup> See Adam Bonica, Adam S. Chilton, and Maya Sen, *The Political Ideologies of American Lawyers*, 8 J Legal Analysis 277, 281–82 (2016).

<sup>363</sup> See Amanda Frost and Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 Va L Rev 719, 732–40 (2010) (finding that state judicial decisions are closer to popular preferences); Shugerman, 123 Harv L Rev at 1064 (cited in note 66) (arguing that “elected judges face more political pressure and reach legal results more in keeping with local public opinion than appointed judges do”).

state court is outcome determinative, plaintiffs' attorneys may forgo federal claims to stay in state court. We may also see a symmetrical effort by defendants to design claims or structure their primary behavior to end up in federal court. A system in which litigants make decisions based on the happenstance of forum may be optimal for procedural rules—because of competition—but suboptimal for the substantive law. In other words, as I discuss further below, substantive state or federal law may eventually drift in accordance to the repeat players that choose to litigate therein even if their choices are based on procedural rules or judicial bias.

To conclude, the third era of judicial federalism has likely brought us systematic biases between state and federal courts in favor of plaintiffs vs. defendants. The stakeholder pools for each court system may now look very different. And these differences may, in turn, cause inefficient legal strategies.

## B. The Perils of Litigant Flight and Underfunded Judiciaries

When large institutional litigants have the power to opt out of state court, there is a second potentially harmful effect that I address here: institutional litigants lose interest in maintaining well-funded state judiciaries and, by consequence, state-court finances decay. Although lobbying for efficient procedures and skilled judges is in the interest of large litigants, their lobbying efforts may generate positive externalities insofar as they improve the quality of the courts for everyone. Once these litigants depart, they may take their beneficial lobbying with them, leading to a classic political economy problem in which states are left with dispersed litigants who often do not know in advance that they will need competent state courts.

### 1. Businesses as court stakeholders.

Let's begin with a basic premise—businesses care significantly about the legal system and the judiciary. As an initial matter, businesses are by far the largest consumers of the US legal industry.<sup>364</sup> Indeed, “Whereas in 1975 legal effort devoted to corporate and organizational clients comprised 53% of all legal effort, by 1995 this figure had risen to 64%.”<sup>365</sup> Businesses run the gamut

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<sup>364</sup> Dunworth and Rogers, 21 *L & Soc Inquiry* at 497, 517 (cited in note 291).

<sup>365</sup> Hadfield, 123 *Harv L Rev* at 1284 (cited in note 292).

of legal claims, from torts and products liability lawsuits, to intellectual property, contracts, and tax claims.<sup>366</sup> In one survey, around 85 percent of companies reported that a states' litigation setting influences significant business decisions.<sup>367</sup>

Beyond just taking a general interest, businesses and their law firms claim to care about judicial competence and speedy case resolutions. This concern comes through in a variety of initiatives. For example, as explained below, the Chamber of Commerce rates states on the "quality" of their judiciaries, including the "competence" of judges and political influence on judicial decisions, among other factors.<sup>368</sup> Perhaps most surprisingly, the Chamber of Commerce has been a strong supporter of higher pay for federal and state judges, claiming that "highly desirable and qualified potential judicial nominees" are important because judges handle "more and more complex commercial cases."<sup>369</sup> Stories abound of large businesses that have lobbied state legislatures for higher court funding, including BMW's and Boeing's efforts to increase South Carolina's judicial budget.<sup>370</sup> And, as discussed above, studies surveying defense attorney forum choices consistently find a preference for federal courts because they perceive them to be more "competent."<sup>371</sup>

There is little doubt that businesses prefer judges that decide cases in a way that helps businesses (and harms consumers), but given that a sizable slice of judicial dockets involve business vs. business claims,<sup>372</sup> businesses also want skilled judges who can handle complex cases in a speedy manner. In business-to-business litigation, parties prefer sophisticated courts that can engage in high quality, efficient, and streamlined dispute resolution. These business cases generate an incentive for corporate defendants to maximize efficiency and not necessarily to bias the

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<sup>366</sup> See *id.* at 1287–90.

<sup>367</sup> *2017 Lawsuit Climate Survey: Ranking the States* \*14 (Harris Poll, Sept 12, 2017), archived at <http://perma.cc/3CUH-QXBW> (*Ranking the States*).

<sup>368</sup> The study is based on a survey of general counsel at the largest companies (over \$100 million in revenues). *Id.* at \*7.

<sup>369</sup> *Letter on Federal Judiciary Compensation* (US Chamber of Commerce, June 7, 2007), archived at <http://perma.cc/UGW4-SGVN> (Letter from R. Bruce Josten to Minority Leader Rep John Boehner).

<sup>370</sup> See *Funding Justice: Strategies and Messages for Restoring Court Funding* \*17 (National Center for State Courts, 2012), archived at <http://perma.cc/58EW-S32K>.

<sup>371</sup> Miller, 41 *Am U L Rev* at 433 (cited in note 265).

<sup>372</sup> Schwartz, 65 *DePaul L Rev* at 657 (cited in note 292).

process.<sup>373</sup> That is why multiple studies have found that “[i]n examining the questions comprising the judicial qualities factor . . . judicial competency was by far the most important reason cited for defense attorneys’ forum selection.”<sup>374</sup>

There are several prominent examples of this preference for competence. Delaware, for one, has built a brand as a corporate litigation haven because, among other things, its courts and judges are perceived as highly competent in solving complex business disputes.<sup>375</sup> Similarly, when two dozen states sought to bring back business litigants to state court—because they were fleeing to federal courts and arbitration—their primary strategy was to create business courts with devoted judges, speedier dockets, and streamlined procedural rules.<sup>376</sup> The New York Court of Appeals judges have acknowledged a complaint commonly voiced by the American Corporate Counsel Association,<sup>377</sup> that businesses preferred to litigate in federal court to “escape the delays too often encountered in our overburdened State courts.”<sup>378</sup> This business desire for speedier tribunals pushed state courts to streamline complex litigation.<sup>379</sup> Even more, businesses that prefer arbitration to litigation routinely claim that an arbitrator’s expertise and the speed of the process are among the most important benefits of arbitration.<sup>380</sup> All in all, there is significant direct and indirect evidence that business-to-business litigation creates incentives for efficient dispute resolution.

There are also other theoretical reasons to believe that businesses should lobby for efficient procedures rather than just prodefendant law. Business lobbying for prodefendant state law has an inherent limit; once state law becomes too defendant friendly, plaintiffs may forum shop away from those courts. This means that lobbying to make the law prodefendant is partly self-defeating. Instead, it may be better for businesses to lobby for

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<sup>373</sup> I thank William Hubbard for helping me think through this.

<sup>374</sup> Miller, 41 Am U L Rev at 414 (cited in note 265).

<sup>375</sup> Omari Scott Simmons, *Delaware’s Global Threat*, 41 J Corp L 217, 228 (2015).

<sup>376</sup> See Zambrano, 70 Stan L Rev at 1811–12 (cited in note 9).

<sup>377</sup> See *Board of Directors’ Recommendation* (American Corporate Counsel Association, adopted June 13, 1996) (Wayback Machine 2019), archived at <http://perma.cc/2ZVQ-Q68S>.

<sup>378</sup> Judith S. Kaye, *The State of the Judiciary, 1993* 12–13 (New York State Unified Court System, Jan 1994).

<sup>379</sup> See *id.*

<sup>380</sup> See Thomas J. Stipanowich and J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 Harv Negot L Rev 1, 39 (2014).

more efficient courts since that generates benefits for defendants without discouraging plaintiffs.

To the extent that businesses do in fact lobby for better judicial services, speedier dockets, and better-prepared judges, they improve social welfare for everybody else who uses the courts. One of the crucial elements in this logic is that the judiciary is a nonexcludable public good. Outside of specialized courts, most state-court judges are generalists. When a state court hires a faster, more competent state judge, that can benefit any member of the public who uses that court, including criminal defendants, consumers, and employees. That is why empirical measures of judicial quality often focus on a judge's "productivity" and efficient caseload management without differentiating among different substantive areas.<sup>381</sup> And that is also why a long line of distinguished judges, from Justice Oliver Wendell Holmes Jr to Judge Richard Posner and Judge Diane Wood, have defended the value of generalist judges who can "enrich one field with insights from another."<sup>382</sup> Judge Wood has argued that "judges [ ] are specialists in 'judging,'"<sup>383</sup> and Justice Holmes claimed that all legal cases required the same skill, from "railroad business" to "an admiralty case [ ] mining law and so on."<sup>384</sup> Indeed, the public choice literature has cast doubt on the idea of "court capture" precisely because it would be highly inefficient to invest resources in an attempt to capture a generalist judge (who may or may not rule over a particular party's legal wrangle).<sup>385</sup>

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<sup>381</sup> See William G. Young and Jordan M. Singer, *Bench Presence: Toward a More Complete Model of Federal District Court Productivity*, 118 Penn St L Rev 55, 63–67 (2013); Stephen J. Choi and G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S Cal L Rev 23, 32 (2004); Stephen J. Choi, G. Mitu Gulati, and Eric A. Posner, *Are Judges Overpaid? A Skeptical Response to the Judicial Salary Debate*, 1 J Legal Analysis 47, 49 (2009). But see generally Marin K. Levy, Kate Stith, and José A. Cabranes, *The Costs of Judging Judges by the Numbers*, 28 Yale L & Pol Rev 313 (2010) (arguing that judicial rankings are misguided).

<sup>382</sup> Richard A. Posner, *Will the Federal Courts of Appeals Survive until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S Cal L Rev 761, 789 (1983). See also Guido Calabresi, *The Current, Subtle—and Not So Subtle—Rejection of an Independent Judiciary*, 4 U Pa J Const L 637, 639–40 (2002) (arguing that generalist judges are valuable because they interrogate the assumptions of "experts," who might have "reasons for pleasing the then-majority or the then-power structure"); Wood, 50 SMU L Rev at 1767–68 (cited in note 320) (noting that generalist judges apply due process as a consistent principle).

<sup>383</sup> Wood, 50 SMU L Rev at 1768 (cited in note 320).

<sup>384</sup> Oliver Wendell Holmes Jr, *Justice Oliver Wendell Holmes: His Book Notices and Uncollected Letters and Papers* 163 (Gaunt 2003) (H. Shriver, ed).

<sup>385</sup> See Anderson, 59 BC L Rev at 1571–72 (cited in note 321) (noting that some argue generalist courts are less susceptible to capture).

The next step in the logic here is that once businesses gain the power to opt out of state courts, they may lose any incentive to lobby for a more efficient state judiciary but retain an incentive to lobby for bias. Instead of devoting resources to lobby or improve state courts, businesses should reallocate those expenditures toward federal courts. Lobbying funds are zero sum—as more go to the federal government or federal judicial events, fewer dollars can be devoted to state politicians. Of course, businesses cannot fully opt out of state court—they must still deal with thousands of state cases. But if the *nature* of those cases has shifted from a mix of individual lawsuits against businesses and business-to-business litigation to mostly consumer and personal injury-type cases or even just smaller stakes cases, then even if businesses are investing in the state courts, their incentives have changed. This is especially so if the largest cases are now in federal court, like the trades secret litigation discussed above.<sup>386</sup> The larger the stakes, the greater the incentive to invest in shaping federal law and procedure.<sup>387</sup> Moreover, efficiency may no longer be a goal if a party is overwhelmingly a defendant and almost never a plaintiff; in fact, it might be the reverse. It may become less important to invest in support personnel and facilities for the courts, and, instead, businesses would have an increased incentive to lobby for probusiness judges.

The third era of judicial federalism allows businesses to opt out of state court and rededicate their lobbying toward federal courts. Thus, we should expect the Chamber of Commerce to decrease their lobbying for better funded state courts or to plan fewer events that criticize overburdened judicial dockets. By consequence, we may expect diminished positive externalities from business lobbying and, perhaps, the finding above, that state courts are in relative financial decay compared to federal courts. They simply lack sufficient political support. Of course, state-court decay has been influenced by:

- constitutional balanced budget requirements;
- the diverse obligations of state governments to fund other public services like police and schools;
- broader political dynamics at the state level, including the weakening of public sector unions and political polarization;

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<sup>386</sup> See note 299.

<sup>387</sup> Richard A. Posner, *The Federal Courts: Challenge and Reform* 94 (Harvard 1996).



- generalized austerity; and
- a long-term shift toward federal government regulation.<sup>388</sup>

Even if other areas of state governments have suffered worse budget cuts, the judiciary should in theory be more resilient and resistant to budget cuts. Regardless, as Justice Frankfurter noted a hundred years ago:

[I]s it wise to withdraw from the impulses to reform of state tribunals influential litigants who, in diversity litigation, now avoid state courts? Such litigants and their counsel ought to have every incentive to make state tribunals worthy, and their administration fair and impartial.<sup>389</sup>

More recently, the former President of the New York Bar Association—who noticed this dynamic in the early 1990s—put it even more bluntly:

[W]e believed it was important for the state court system to have the business community as one of its many constituents. To put it another way, we believed it was unhealthy for commercial litigants, in increasing numbers, to bypass the New York state courts, and therefore to have little interest in the strength and vitality of those courts.<sup>390</sup>

One possible response to this loss of businesses as beneficial stakeholders is that as state courts become relatively proplaintiff, state law may drift toward more normatively desirable outcomes—for example, more proconsumer doctrines—swamping any loss of judicial competence. Corporate lobbyists may have too much power anyways. Even if one agrees with this view, the normative concern is that, as discussed above, businesses cannot opt out of state law; they can only opt out of state court. This means that they should continue to have significant incentives to lobby for prodefendant and anti-consumer state law;<sup>391</sup> and they should only lose the incentive to lobby for prodefendant state procedures, speedier dockets, better funding, and expert judges.

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<sup>388</sup> ABA Report 2003 at \*6–15 (cited in note 269).

<sup>389</sup> Frankfurter, 13 Cornell L Q at 522 (cited in note 15).

<sup>390</sup> Mark H. Alcott, *The Formation of New York's Commercial Division: A History & Memoir*, 11 Jud Notice 51, 52 (2016).

<sup>391</sup> Eaton and Talarico, 14 Yale L & Pol Rev at 391, 395–97 (cited in note 356) (noting the impact of business lobbying on state law tort reform).

Indeed, the ability of businesses to opt out only from state courts may perversely throw the baby out with the bathwater. Society may lose the beneficial effects that businesses had on state courts and procedure yet retain the normatively worrisome effects of prodefendant and procorporate law. And there is evidence that, despite businesses' increased focus on federal courts,<sup>392</sup> they have also boosted their efforts to shape state substantive law.<sup>393</sup>

Another potential response is that, in theory, we cannot know with certainty if the *net* effect of business lobbying is positive for the entire legal system (rather than just for state courts). Insofar as departing businesses now lobby for better federal courts, it may be desirable to encourage further emigration. Maybe decaying state courts are not a social bad at the end of the day. This is an important rejoinder. Below, however, I argue that distributional consequences and a concern for consumers may weigh against federal expansion.

## 2. Normative and distributional consequences.

An important concern with the loss of businesses as beneficial stakeholders of state procedure is the consequences for the vast majority of groups that are stuck in state court. There may be clear winners and losers. As previously discussed, federal expansion allows large institutional litigants to move to federal courts or arbitration. With this third-era shift, businesses are potentially better off in federal court or arbitral tribunals than they used to be in state courts. But here's the rub—other state-court stakeholders cannot take advantage of the third era's changes in the same manner. At the end of the day, there are approximately seventeen million civil cases every year in state courts and only three hundred thousand in federal courts.<sup>394</sup> Most groups cannot easily remove their cases out of state courts.

Assuming that state courts are in fact in relative decay, the small stakeholders that avoid the exodus toward privatized arbitration are essentially stuck with judiciaries that are worsening relative to federal courts. They may not mind less competent judges because their legal matters are simpler, but they will likely mind a lack of predictability, slow legal process, and courts that

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<sup>392</sup> See notes 209–12 and accompanying text.

<sup>393</sup> See Myriam Gilles and Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v Concepcion*, 79 U Chi L Rev 623, 673 n 229 (2012) (discussing how business groups also invest in state attorneys general races).

<sup>394</sup> NCSC Report at \*6 (cited in note 4).

are so crowded or underfunded that they cannot even keep their doors open. Moreover, to the extent courts lose funding, they may increasingly rely on higher court fees or surcharges, again placing the cost on all court users. The *net* effect of business emigration may be to concentrate competence and efficient procedures in federal court where only large institutional litigants benefit and others are worse off. This may be socially harmful.

Even more fundamentally, worsening funding for state courts can shape the content of state-court dockets and close access to court for low stakes litigants. In an empirical study of state supreme court cases, Professors Paul Brace and Melinda Gann Hall found a significant positive relationship between state-court professionalism—determined by, among other things, budgets and legal resources—and docket space devoted to disadvantaged litigants. In other words, the more state courts lack professionalism, funding, and legal resources (among other things), the less likely they are to devote attention to cases involving small stakes litigants.<sup>395</sup> And there is even evidence that this may harm case outcomes for disadvantaged litigants.<sup>396</sup>

Even if these smaller stakeholders prefer more competent state judiciaries, they are likely out of luck: they face free-rider problems, their interests are too diffuse, and they do not have the focused motivation necessary for sustained lobbying.<sup>397</sup> Indeed, as the Brennan Center has recognized, “courts have no natural public constituency. Many voters believe government should spend more on schools, roads, and public safety. Few believe the courts need more money.”<sup>398</sup> It is “very clear that most Americans are simply not supportive of appeals for court funding at present.”<sup>399</sup> Unlike some other policy areas, “courts are not ‘sexy’ in the eyes of the public. They have few allies and fewer advocates in budgeting. Elected officials do not get much credit for funding

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<sup>395</sup> Paul Brace and Melinda Gann Hall, *Haves versus Have Nots in the State Supreme Courts: Allocating Docket Space and Wins in Power Asymmetric Cases*, 35 *Law & Soc Rev* 393, 407 (2001) (“An increase of supreme court professionalization by one standard deviation is estimated to increase the amount of docket space devoted to these have-not cases by 6%.”).

<sup>396</sup> *Id.* at 409.

<sup>397</sup> See Olson, *The Logic of Collective Action* at 35–36 (cited in note 306).

<sup>398</sup> *Funding Justice* at \*2 (cited in note 370).

<sup>399</sup> Daniel J. Hall and Lee Suskin, *Responding to the Crisis—Reengineering Court Governance and Structure*, 47 *New Eng L Rev* 505, 537 (2013).

courts.”<sup>400</sup> By contrast to the diffused interests of the general public, large businesses form a highly motivated group that can successfully shape the judiciary. And the key point is that either way businesses will lobby for prodefendant law. We might as well have them lobby for better courts, too.

To be sure, plaintiffs’ attorneys also can and do shape state judiciaries. But surveys of plaintiffs’ attorneys demonstrate that they place less emphasis on competence than defense-side firms.<sup>401</sup> Moreover, as designers of the New York Commercial Division found, plaintiffs’ attorneys and the state bar often have, like businesses, targeted concerns that do not extend to the entire judiciary.<sup>402</sup> Much of this may be due to the asymmetry discussed above: there is no business-to-business litigation equivalent on the plaintiffs’ side that can create incentives for “grow the pie” investments in state courts. Thus, it is unclear that increasing the power of plaintiffs’ attorneys over state courts can make up for the loss of competency-obsessed business defendants. Public choice logic predicts that as businesses opt out of state courts, everyone else may subsequently be worse off.

### C. State Courts May Lose the Ability to Shape State Law

Federal monopolization of state claims also removes the ability of state courts to shape the common law. As Professors Sam Issacharoff and Catherine Sharkey worried a decade ago, because the largest cases are often litigated in federal court—including state-law claims under diversity or supplemental jurisdiction—state courts may no longer have the docket mix that allows them to innovate on cutting-edge areas.<sup>403</sup> This corrodes the common law-making power of elected state judges, prosecutors, and attorneys general, with harmful consequences.

One of the most important tasks of a common law court is to generate precedent. The resolution of active cases allows stakeholders to predict the behavior of future courts, and allows market actors to structure their primary behavior in accordance with

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<sup>400</sup> Gordon M. Griller, *Future Trends in State Courts: The Quiet Battle for Problem-Solving Courts* \*62 (National Center for State Courts, 2011), archived at <http://perma.cc/7VFK-SKX6>.

<sup>401</sup> Miller, 41 Am U L Rev at 414 (cited in note 265).

<sup>402</sup> Alcott, 11 Jud Notice at 52 (cited in note 390).

<sup>403</sup> See Issacharoff and Sharkey, 53 UCLA L Rev at 1419–20 (cited in note 10); Issacharoff and Marotta-Wurgler, 67 UCLA L Rev at \*18 (cited in note 238).

judicial rulings.<sup>404</sup> Almost every model of how courts operate views the generation of precedent as a fundamental output that can increase social welfare.<sup>405</sup> In a properly working common law system, the generation of precedent must be continuous because societal changes require new legal rules and regimes that can guide market actors. New technologies, tax regulations or corporate organizational methods, for example, have to be integrated into old common law frameworks, regulatory regimes, or statutory claims. A properly working common law system requires legislators and common law courts that together successfully shape the law.

Given the inherent value of precedent, scholars have long argued that any process that weakens the power of courts to continuously generate precedent might be harmful to the common law and social welfare. Professor Owen Fiss warned in 1984 that the systematic growth of settlements—in lieu of adjudication—could deprive courts of the power to “explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them.”<sup>406</sup> More recently, Professor Myriam Gilles has argued that arbitration precludes common law development because it is confidential and nonprecedential—“Put simply: law cannot grow in the darkness with which arbitration shrouds its activities, and when law ceases to grow, it stagnates and eventually ceases to be (or be relevant).”<sup>407</sup> The logic is simple: a process like settlements or arbitration can deprive courts of the necessary raw material to develop, explicate, update, and improve the common law. When that happens, we may worry that “the common law . . . cease[s] to be a living organism.”<sup>408</sup>

It is entirely possible that the emigration of large cases from state to federal court may stunt state common law.<sup>409</sup> Like settlements and arbitration, the removal of state cases to federal court

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<sup>404</sup> This vision straddles the famous disagreement between Justice Oliver Wendell Holmes Jr and Professor H.L.A. Hart. Contrast Oliver Wendell Holmes Jr, *The Path of the Law*, 10 Harv L Rev 457, 458–59 (1897) (arguing that the law should be defined as a prediction of court behavior), with H.L.A Hart, *The Concept of Law* 39 (Oxford 1961) (critiquing Holmes’s prediction theory of law).

<sup>405</sup> See, for example, Landes and Posner, 8 J Legal Stud at 236–40 (cited in note 313).

<sup>406</sup> Owen M. Fiss, *Against Settlement*, 93 Yale L J 1073, 1085 (1984).

<sup>407</sup> Gilles, 2016 Ill L Rev at 413 (cited in note 284). See also Glover, 124 Yale L at 3058 n 23 (cited in note 283).

<sup>408</sup> See Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 Fordham L Rev 761, 786 (2002).

<sup>409</sup> Zambrano, 70 Stan L Rev at 1878–79 (cited in note 9).

“deprives” state judiciaries of the power to “explicate and give force to the values embodied” in their statutes and law. Under *Erie*, federal courts must apply state law in diversity cases.<sup>410</sup> But their rulings are not precedential for state courts; they are inert. This was not an important concern before 1980, when federal courts had a relatively small diversity and supplemental jurisdiction docket. But in the third era of judicial federalism, this may become a problem. Federal courts are now monopolizing the largest and most complex cases. And it is specifically those cases—large class actions, complex litigation, and monetarily significant claims—that are most likely to involve sophisticated litigants with innovative arguments, appeals, and creative legal strategies. These are the cases that shape the common law.

Because state courts still retain seventeen million civil cases, a stunted common law may not be a systemic issue—we may only observe it in areas that produce few cases that tend to end up in federal court.<sup>411</sup> According to a study of state-court dockets, 61 percent of cases involve contract law questions (mostly debt collection, landlord/tenant, and foreclosures) while only 6 percent involve torts (mostly automobile accidents) and 2 percent real property.<sup>412</sup> Most of the seventeen million cases, however, are dismissed (35 percent) or end in settlement (10 percent) while only 4 percent are adjudicated on the merits and 1 percent in summary judgment.<sup>413</sup> If federal courts are taking over cases in this narrow band of adjudicated cases, they could have a significant effect on the common law.

Moreover, federal expansion’s effect may be particularly observable in certain narrow yet cutting-edge areas of the common law. For example, the Fifth Circuit recently noted in the context of a smartphone products liability case against Apple that “where defendants operate nationwide in highly consolidated industries, like Apple in the smartphone industry, the rules governing federal courts in diversity cases may substantially close state courts to novel claims. . . . The result may be a legal system less generative than normal.”<sup>414</sup> Similarly, a study by Professors Sam Issacharoff and Florencia Marotta-Wugler—that emerged as part

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<sup>410</sup> *Erie*, 304 US at 78–80.

<sup>411</sup> NCSC Report at \*6 n 36 (cited in note 4).

<sup>412</sup> *Id.* at 8.

<sup>413</sup> *Id.* at 20. Although 26 percent ended in a judgment. *Id.*

<sup>414</sup> *Meador v Apple*, 911 F3d 260, 267 n 6 (5th Cir 2018).

of broader work for the American Law Institute's draft restatement of consumer contracts—recently found that in a sector of electronic consumer contracts post-CAFA, “there is virtually no contract case law at the state level, and [ ] the driving doctrinal work is being done at the federal appellate level.”<sup>415</sup> The authors conclude: “[T]he consequence of the dominance of the federal forum is that the common law is being elaborated in federal court in suits arising under diversity jurisdiction. In turn, those federal courts are largely bereft of any state law moorings,” leading to a hollowing out of the common law.<sup>416</sup> These smartphone products-liability and electronic consumer-contract cases are precisely the kind of cases in which we may observe a stagnating common law. And this does not even account for the millions of cases that have been privatized through arbitration.

We should care about these narrow, cutting-edge areas of law because they are the ones that benefit the most from cross-pollination by both state and federal courts and a competition between legal innovations. State courts and judges have thrived in the past exactly at times of technological transformation. It was an unprecedented automobile liability case in 1916, for example, that put Justice Benjamin Cardozo, then Judge on the New York Court of Appeals, “on the map.”<sup>417</sup> Similar changes in the context of mass-torts cases and products liability have required multiple state and federal approaches—often benefitting from diverse treatment and an exchange of legal innovations by different courts. A federalized common law, by contrast, shifts common-law development from fifty separate state courts to a few federal district and circuit courts.<sup>418</sup> While this may promote uniformity, it diminishes cross-pollination and innovation, potentially harming the quality of the common law.

Losing innovative common-law cases even in narrow areas also has the potential to harm the stature of state courts in front of their own legislatures and legal communities. Traditionally, commentators have worried that federal “*Erie* guesses” of state

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<sup>415</sup> Issacharoff and Marotta-Wurgler, 67 UCLA L Rev at \*22 (cited in note 238).

<sup>416</sup> *Id.* at \*1.

<sup>417</sup> Goldberg, 34 Touro L Rev at 149 (cited in note 11). See generally *Macpherson v Buick Motor Co*, 111 NE 1050 (NY 1916).

<sup>418</sup> Issacharoff and Marotta-Wurgler, 67 UCLA L Rev at \*12 (cited in note 238).

law can be inaccurate and place state law in the hands of nonexpert federal judges.<sup>419</sup> But those concerns are antiquated and overly formalistic—there’s no reason to think federal judges decide state law issues in an unfair way, nor that they are so inaccurate as to verge on arbitrariness. A more serious concern is that federal expansion over state law may weaken incentives for the government and private actors to invest in state judiciaries.<sup>420</sup> The issue, in other words, is one of state-court stature, credibility, funding, and legitimacy. If state judges lose the ability to innovate on cutting edge areas of state law, that can affect their ability to attract high caliber judges and budgets.<sup>421</sup> Historically, state courts have burnished their reputation by creating or updating the common law to address unforeseen disasters. From railroad and automobile liability, to mass torts and consumer rights, state courts have justified their role as an integral part of a state’s democratic polity through common law-making. Federal expansion places this role at risk. State legislators may not invest in state courts that do not enjoy the admiration of the local bar and cannot even successfully address current issues. Unlike the vibrancy that exists in Delaware—where courts are seen as an integral part of a larger and highly profitable “brand”—the typical state judiciary may not be able to maintain the requisite stature within their own government, leading to a loss of financial support.

All of these things together are especially worrisome insofar as isolated federal courts are unlikely to respond or welcome legal innovations that benefit plaintiff or consumer side interests. As a whole, we may worry about stunted development of the common law.

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In this Part, I highlighted several potential drawbacks to federal expansion and its connection to the decay of state courts, including: (1) a growing divergence between state and federal courts with regards to proplaintiff or prodefendant procedural rules; (2) the potential hollowing out of institutional litigant stakeholders at the state-court level; and (3) the states’ diminishing ability to shape the common law. These do not represent the

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<sup>419</sup> Clark, 145 U Pa L Rev at 1499 (cited in note 201) (“[A] federal court’s ‘prediction’ of state law frequently devolves into little more than a choice among competing policy considerations.”).

<sup>420</sup> Consider Resnik, 162 U Pa L Rev at 1824 (cited in note 283).

<sup>421</sup> Consider Posner, 56 S Cal L Rev at 777 (cited in note 382) (arguing that abolishing diversity jurisdiction would undermine the generalist nature of the federal judiciary).



universe of potential concerns. But they highlight important perverse consequences of federal expansion for judicial federalism.

### III. THE BENEFITS OF FEDERAL EXPANSION IN THE THIRD ERA

No analysis of the third era of judicial federalism would be complete without grappling with its benefits for the judicial system. Unlike the benefits that most scholars have highlighted, however, I focus here on three underappreciated positive changes. First, federal expansion better aligns each court system with its own comparative advantages and institutional competence: federal courts for large and complex cases and state courts for small and local cases. Second, expansion pits state and federal courts in direct competition with each other for business cases, potentially fostering innovation and reforms. And finally, federal expansion allows federal courts to more effectively police state courts' externalization of costs. Below, I address these three benefits in turn.

#### A. Comparative Institutional Competence and Judicial Federalism

In this Section, I argue that federal courts can resolve larger cases more efficiently because of their national procedural powers. For example, in the context of multidistrict litigation (MDLs), class actions, and transnational litigation, federal courts have developed procedures to resolve large scale litigation with maximal efficiency, low coordination costs, and economies of scale. Moreover, federal courts are significantly better equipped to solve large and complex cases because—as Professor Gil Seinfeld has argued—they provide franchise-like benefits: procedural homogeneity, high professionalism, and predictable competence.<sup>422</sup> Thus, the third era has efficiently placed large cases in the judiciary best equipped to host them.

The traditional justifications for federal jurisdiction are overly simplistic. The conventional account is that federal courts ought to decide federal question cases because they can avoid the potential biases of state courts and can provide uniform interpretations of federal law with greater expertise.<sup>423</sup> This “‘bias-uniformity-expertise’ mantra”<sup>424</sup> has recently come under

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<sup>422</sup> Gil Seinfeld, *The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction*, 97 Cal L Rev 95, 133–48 (2009).

<sup>423</sup> Id at 103.

<sup>424</sup> Id at 158.

withering criticism as one-dimensional, based on misguided premises, and simply inaccurate.<sup>425</sup> There is little if any evidence that state courts are systematically biased against federal rights, that they provide a level of disuniformity that the Supreme Court cannot remedy or that federal courts can somehow avoid, or that they lack sufficient expertise. If anything, some have argued that since at least the 1980s, state courts have paradoxically been more open than federal courts to certain constitutional claims, including gay rights, religious liberty, and criminal procedure.<sup>426</sup>

Despite the recent failings of the conventional account, federal courts do indeed enjoy significant comparative advantages in certain areas, including national procedural efficiency.<sup>427</sup> Over the last five decades, federal courts have developed a series of procedures to resolve large-scale litigation with maximal efficiency. There are at least three examples: MDLs, class actions, and transnational litigation. In MDL cases, the Judicial Panel on Multidistrict Litigation can aggregate thousands of claims—based around similar facts and against the same defendants—from around the country and assign them to a single judge for all pre-trial matters. Most cases assigned to MDL are settled, obviating any need for thousands of trials around the country. Nothing like this could exist at the state level. Due to limits on personal jurisdiction, a state court cannot aggregate claims from different states that are not directly linked to in-state conduct, making a state equivalent of MDLs nearly impossible.<sup>428</sup> Moreover, because of the Federal Rules of Civil Procedure, there is no obvious procedural unfairness in coalescing thousands of cases from around the country in a single forum. By contrast, moving cases across state

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<sup>425</sup> Id at 109–10. But see Redish, 78 Va L Rev at 1787 & n 104 (cited in note 10) (“There is no real inconsistency between desiring state court input into the shaping of federal law, yet simultaneously believing that federal courts are, on the whole, the superior forum for the adjudication of federal law.”).

<sup>426</sup> See, for example, William B. Rubenstein, *The Myth of Superiority*, 16 Const Comment 599, 621–23 (1999) (“Pro-gay litigants have met with surprising success in state courts in the past decades.”). However, in the past two decades, the Supreme Court has been more open to these types of constitutional claims. See generally, for example, *Santa Fe Independent School District v Doe*, 530 US 290 (2000); *Lawrence v Texas*, 539 US 558 (2003); *Obergefell v Hodges*, 135 S Ct 2584 (2015); *Carpenter v United States*, 138 S Ct 2206 (2016).

<sup>427</sup> David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 Harv L Rev 317, 328 (1977).

<sup>428</sup> See generally *Bristol-Myers Squibb Co v Superior Court*, 137 S Ct 1773 (2017).

lines runs the risks of procedural disuniformity and outcome-determinative differences.<sup>429</sup>

There is a similar sort of national procedural efficiency at play in large class-action cases and transnational litigation. In these cases, federal courts benefit from the ability to coordinate litigation with other federal courts for discovery or pretrial matters. District courts can easily enforce subpoenas issued by other courts; they can transfer venue to other district courts; and judges can even sit in different districts by designation. Additionally, complex cases routinely involve foreign parties, foreign laws, and documents stored abroad. To address these matters, federal courts have developed a lengthy jurisprudence on international comity that is unmatched at the state-court level.<sup>430</sup> And federal courts have shown high competency in considering issues of foreign affairs and the application of federal law in other countries. Federal courts sometimes even invite amicus briefs from the State Department on questions of diplomacy and foreign affairs, a relationship with the executive that seems nonexistent at the state level.

Another important benefit of large litigation in the federal judiciary is that federal courts operate what Seinfeld calls a “national franchise” that provides a triumvirate of benefits: procedural homogeneity, professionalism, and predictable competence.<sup>431</sup> First, the homogeneous federal rules of civil procedure provide familiarity, predictability, and the opportunity for litigants to build and develop expertise.<sup>432</sup> This is especially useful for large corporate defendants with offices across the country or internationally. The transaction costs of employing local law firms with expertise in state procedural systems is high. It is much more efficient for large organizations to work with one or a few national law firms that have national expertise in federal court. This is why the literature on attorney preferences usually finds that corporate defense attorneys place a lot of importance on this benefit and almost always prefer federal courts.<sup>433</sup>

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<sup>429</sup> Seinfeld, 97 Cal L Rev at 137 (cited in note 422).

<sup>430</sup> See Diego Zambrano, *A Comity of Errors: The Rise, Fall, and Return of International Comity in Transnational Discovery*, 34 Berkeley J Intl L 157, 161–62 (2016).

<sup>431</sup> Seinfeld, 97 Cal L Rev at 137–39 (cited in note 422).

<sup>432</sup> See id at 100.

<sup>433</sup> See id at 142–43.

Second, large institutional defendants may prefer federal courts because they provide a predictable degree of professionalism and level the playing field between insiders and outsiders. All federal judges are selected through the same mechanism; are life tenured; sit as officers of the United States; and receive generous salaries.<sup>434</sup> This gives federal legal proceedings a remarkable degree of uniformity throughout the country. For large organizations and law firms that operate in multiple states, this is a professional, cultural, psychological, and financial boon. Moreover, federal courts have developed a culture that is geared toward professional treatment of complex cases.<sup>435</sup> As Professor Seinfeld notes, “In contemporary legal culture, federal court is the place where important matters are decided *by* important people *for* important people.”<sup>436</sup> This culture has managed to generate a self-sustaining degree of professionalism, high judicial talent, and devotion to the fair resolution of complex cases.

Within this high prestige and professional atmosphere, federal judges are incentivized to maintain a good reputation among national lawyers, encouraging them to further invest significant resources in resolving complex cases. By contrast, “standards of professionalism among state courts, particularly at the trial level, are lower than they are among federal courts, and the likelihood of local, personal relationships coming into play in the far smaller trial-level units of the state judiciaries is higher.”<sup>437</sup> This ensures a continuing perception that federal courts are better prepared to deal with complex cases.

All of this means that federal courts may be better placed to resolve exactly the kinds of cases that the third era of judicial federalism has foisted on them: large, complex, national cases with high monetary stakes. The third era’s federal expansion means that legally skilled federal judges are channeled toward the kinds of cases that require sophisticated understanding of procedural complexities. At the end of the day, the system efficiently price discriminates for entry—larger claims in federal court and smaller claims in state court. This may be the optimal distribution of cases in accordance with skill, size, and degree of sophistication.

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<sup>434</sup> See Neuborn, 90 Harv L Rev at 1121 & n 61, 1127–28 (cited in note 11).

<sup>435</sup> Seinfeld, 97 Cal L Rev at 140–42 (cited in note 422).

<sup>436</sup> Id at 141 (emphasis in original).

<sup>437</sup> Id at 144.

## B. State-Federal Competition May Fuel Judicial Improvements

Federal expansion has also produced unintended consequences that may be beneficial for state courts. Chief among these, and perhaps most surprisingly, is that many state courts have not only competed for plaintiffs' firms' attention—they have also taken up the challenge of competing with the federal courts for business cases. In doing so, there is tentative evidence that those court systems have reformed and streamlined their procedural rules.

Under a regulatory view of federalism, the vertical division of power between the states and federal government allows businesses to choose whether to be regulated by one government or the other.<sup>438</sup> When businesses lose a battle to avoid regulation—or fail to convince state governments to raise barriers against competitors—they can lobby for federal preemption or can move to other states.<sup>439</sup> This effectively gives businesses multiple bites at the regulatory apple. On the one hand, this brings duplicative costs when both the states and federal governments regulate the same activity or unnecessarily trample on each other's work. On the other hand, this fosters healthy competition among the states and between the states and the federal government. Each government unit has an incentive to compete because they want to maintain citizens, businesses, regulatory power, and large budgets. And this kind of competition can foster beneficial innovation.

As I have argued elsewhere, judicial federalism may follow the same economic logic as regulatory federalism.<sup>440</sup> State governments (and courts) are incentivized to compete with other state and federal courts for business litigation by engaging in “forum selling.”<sup>441</sup> Business cases can produce direct and indirect benefits, including revenues from court fees, business investment, fees for the local bar, and positive spillover effects for banks and related businesses.<sup>442</sup> This is precisely why Delaware's business courts are an integral part of the Delaware brand. Maintaining complex cases can also provide increased prestige for local judges and energy for the legal system. Many judges from around the

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<sup>438</sup> See Keith N. Hylton, *An Economic Perspective on Preemption*, 53 BC L Rev 203, 206–07 (2012) (characterizing preemption as a regulatory regime choice).

<sup>439</sup> See id at 213 n 39.

<sup>440</sup> Zambrano, 70 Stan L Rev at 1846–47 (cited in note 9).

<sup>441</sup> See, for example, Daniel Klerman and Greg Reilly, *Forum Selling*, 89 S Cal L Rev 241, 288 (2016) (discussing efforts by state courts to attract patent litigation).

<sup>442</sup> Zambrano, 70 Stan L Rev at 1844–45 (cited in note 9).

country have explicitly recognized that a loss of business litigation can sap vibrancy from state courts.<sup>443</sup>

Once we accept that the states and federal government may compete for certain cases, we may also expect these competitive pressures to sometimes push states to reform their judicial systems in order to attract more litigation customers. To be clear, as I noted earlier, these reforms cannot be done on a judge-by-judge basis or through procedural rules, unlike the proplaintiff changes previously discussed. These reforms must instead be system-wide and led by the legislature. For instance, New York Court of Appeals judges pushed the state legislature to create specialized business courts in the 1990s because they felt the system was decaying and businesses were increasingly litigating in federal court.<sup>444</sup> As one state judge mentioned, “[W]hen we’re competing with other states for business clients, we want to one-up every other state to get them to our state, so we try to streamline the [dispute resolution] system.”<sup>445</sup> Indeed, beneficial competition between the two government systems in the third era may be responsible for the creation of business courts in twenty-three states. These courts specifically focus on reducing delays, improving docket loads, increasing the expertise of local judges, and streamlining procedural rules. This may be a boon for corporate litigants.

This strategy also shows how the states have segmented the litigation market. Most states seem to have both become more proplaintiff through their general procedural rules but at the same time created business courts that are separate from the rest of the litigation system to attract corporate business-to-business litigation.<sup>446</sup>

As expected, there is some evidence that state courts have recently improved in several respects, all seemingly related to their treatment of business cases. The most relevant study comes from the US Chamber of Commerce, which produces one of the most influential rankings of state courts, based on aggregate responses by senior lawyers at large corporations (with revenues of at least \$100 million).<sup>447</sup> The rankings have been routinely cited

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<sup>443</sup> Id at 1844.

<sup>444</sup> Alcott, 11 *Jud Notice* at 52–53 (cited in note 390).

<sup>445</sup> See *Forced Arbitration and the Fate of the 7th Amendment: The Core of America’s Legal System at Stake?* \*100 (Pound Civil Justice Institute, 2015), archived at <http://perma.cc/C2HY-R3DM>.

<sup>446</sup> See note 376 and accompanying text.

<sup>447</sup> *Ranking the States* at \*5 (cited in note 367).

by state legislators, judicial commissions, governors, and academics.<sup>448</sup> Surprisingly, the rankings show a dramatic improvement in business views of the “reasonableness of state-court liability systems in America.”<sup>449</sup> In 2002, nearly 60 percent of corporate lawyers ranked their state courts as having an “Only Fair/Poor” environment and only 40 percent as “Excellent/Pretty Good.” By 2015, the numbers had flipped; 50 percent ranked state courts as having an “Excellent/Pretty Good” environment and in 2017 more than 60 percent did.<sup>450</sup> When asked specifically to grade the performance of state courts on issues like “judges’ competence,” “[o]verall treatment of tort and contract litigation,” and “[i]mpartiality,” businesses have given courts an improving overall score.<sup>451</sup> To be sure, there are reasons to doubt the ranking’s accuracy, especially because it solicits input only from large businesses with profoundly biased opinions of the judicial system.<sup>452</sup> But I use it here only to provide some evidence that state courts have improved in *one* measure—their handling of business cases and complex litigation.

### C. Avoiding State-Court Externalities and Political Pathologies

The most widely recognized benefit of federal expansion is that it allows disfavored state minorities to access federal court. Politically disempowered minorities in a state are by definition powerless to shape policy through the ballot box. In a liberal democracy, it is the countermajoritarian judiciary that is supposed to protect minorities’ legal rights. But this does not always work in practice. Minorities may also be shunned out of the legal system, especially in polities with elected judiciaries. This double whammy virtually ensures a denial of basic rights. It is no surprise then that biased state courts in the South had defended Jim Crow and would not budge at the beginning of the Civil Rights

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<sup>448</sup> Stephen J. Choi, G. Mitu Gulati, and Eric A. Posner, *Which States Have the Best (and Worst) High Courts?* \*2 (Public Law and Legal Theory Working Paper No 217, May 2008), archived at <http://perma.cc/94UV-XTF8>.

<sup>449</sup> *Ranking the States* at \*8 (cited in note 367).

<sup>450</sup> *Id.* at \*13 (cited in note 367). One qualification of comparing these numbers over time is that the Chamber of Commerce changed the polls slightly around 2015. See *id.* at \*86.

<sup>451</sup> *Id.* at \*94, 96.

<sup>452</sup> See Elizabeth G. Thornburg, *Judicial Hellholes, Lawsuit Climates and Bad Social Science: Lessons from West Virginia*, 110 W Va L Rev 1097, 1099 (2008) (arguing that the rankings are not meant to reflect reality, but instead to pressure susceptible state legislatures into adopting probusiness reforms).

movement. Federal expansion completely restructured minorities' legal rights. With a federal cause of action under the Civil Rights and Voting Rights Acts, minorities could gain access to a federal forum led by an appointed judge and governed by a different procedural regime. This combination allowed minorities to dodge local judiciaries and gain access to civil rights. Moreover, a federal forum enlarged the relevant polity from a potentially parochial state government to the more diverse federal body. By doing this, the second and third eras provided direct benefits to minorities in most states.<sup>453</sup>

A related benefit of federal expansion is the positive effect on commerce from increased access to federal judges. Commentators have long noted that federal courts tend to be friendlier to interstate commerce.<sup>454</sup> Judge Posner has theorized that even if state governments are not biased against out-of-state interests, local courts may nonetheless rule against out-of-staters in an attempt to externalize the costs of intrastate conduct.<sup>455</sup> In such a world, diversity jurisdiction can be highly efficient because it deters state judiciaries from assigning costs to out-of-state litigants (who can remove their claims to federal courts at any point) and promotes more predictable interstate commerce. As two scholars recently summarized, "Congress frequently regulates activities because state regulation, or lack of regulation, of those activities imposes external costs on neighboring states."<sup>456</sup> Moreover, the federal system's unitary nature—under a single Supreme Court—eases control of wayward courts that become too plaintiff or defendant friendly, ensuring greater uniformity and fairness. Federal expansion, in short, gives federal courts more power to check state courts, smoothing interstate commerce and blunting state efforts to overregulate.

#### IV. IMPROVING THE DISTRIBUTION OF JUDICIAL POWER

This Article has argued that judicial federalism may be just settling into its third era, one that brings wide-ranging implications for both federal and state courts. Given the plural array of benefits and costs of the third era, it may be difficult to discern

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<sup>453</sup> But see Rubenstein, at 621–23 (cited in note 426).

<sup>454</sup> See for example, Friendly, 41 Harv L Rev at 498 (cited in note 15); Posner, *The Federal Courts* at 142 (cited in note 10).

<sup>455</sup> Posner, *The Federal Courts* at 175–76 (cited in note 10).

<sup>456</sup> Issacharoff and Sharkey, 53 UCLA L Rev at 1370 (cited in note 10).



an optimal distribution of judicial power. At the very least, however, we should achieve agreement on more subsidiary concerns like state-court funding, a more coherent distribution of cases between the two systems, and the distributional consequences outlined above. If so, then the foregoing discussion suggests three lessons:

First, reformers should focus on state-court funding. State judiciaries are weighed down by growing docket loads and a complete lack of political support. An investment in financial resources might improve the system for the small stakes litigants who are using it the most. Reform efforts could focus on targeted investment in complex litigation courts, higher judicial salaries, and reforms that address judicial delays. To be sure, the process that launched the third era was political in nature; businesses lobbied the federal government for increased access to federal fora and federal law because the federal judiciary was more conservative and friendlier to business interests. But the third era is partly maintained by a persistent belief that state courts are “inferior” and “incompetent.” If this is merely false rhetoric coming from self-interested businesses, then improving the system would nonetheless help most litigants. And even if it is true, the remedy cannot be to reflexively open federal courts to more and more litigants, especially because of the potential for a negative spiral. Instead, the right approach might be to continue to concentrate large cases in federal court but at the same time improve state courts.

Increased federal funding for state courts may help remedy the overburdened and underfunded nature of state judiciaries.<sup>457</sup> As discussed above, state legislatures are unlikely to support financial investment in state courts given the existing electoral incentives. Instead, investment may have to come from the only entity with the funds to do so, the federal government itself. In support of this idea, the 1995 Long Range Plan for Federal Courts recognized that “improvement in state justice systems . . . may require significant federal financial assistance to state courts.”<sup>458</sup> Indeed, as early as 1979, Senator Ted Kennedy debated potential action to aid state courts, noting that “[i]f, indeed, State courts do

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<sup>457</sup> Professor Judith Resnik has also called for increased funding for state courts. Resnik, 91 *Notre Dame L Rev* at 1866–67 (cited in note 303).

<sup>458</sup> Long Range Plan at \*23 (cited in note 137).

not adjudicate as satisfactorily as Federal courts, then the appropriate remedy is to improve the quality of our State courts.”<sup>459</sup> Such an effort could take many forms, including increased funding for the State Justice Institute, which allows federal grants to improve state-court quality.<sup>460</sup>

Second, states should focus on creating complex litigation courts rather than simply business courts. One of the apparent bright spots of recent reforms is the creation of specialized business tribunals. Corporate lawyers seem to agree that these courts have improved state litigation. The problem, however, is that these courts have segmented state judicial systems by providing well-funded and expert judges only for business-to-business cases. That narrow focus ignores consumers, small stakeholders, and routine litigants. Noticing the inequality in this model, states like California have instead created complex litigation courts that can benefit all litigants, regardless of their specific claims.<sup>461</sup> These courts are fairer and extend the benefits of a better-funded judiciary to a broader set of stakeholders.

Third, the government should consider reversing recent reforms that have contributed to the incoherence of our jurisdictional rules. Because it is difficult to gauge how all of the changes described above cash out, reformers should focus on at least improving the coherence of the system. One of the most remarkable failures of the first two eras of judicial federalism is that they lacked a guiding ethos or sense of logical consistency. The first era, for example, empowered federal courts with diversity jurisdiction purportedly to allow out-of-state litigants to avoid biased local courts. But if bias were truly a concern, why could in-state plaintiffs file a diversity claim in federal court against an out-of-state defendant? There was no potential bias justification in that kind of case.<sup>462</sup> The second era was equally riddled with contradictions and paradoxes that the third era has extended. For example,

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<sup>459</sup> 1979 JAA Hearings, 96th Cong, 1st Sess at 2 (cited in note 122) (statement of Sen Kennedy).

<sup>460</sup> See 42 USC § 10702(b) (enumerating the goals of the Institute); *Thirtieth Anniversary Report* \*37 (State Justice Institute, 1984) archived at <http://perma.cc/2XXX-PHG7>.

<sup>461</sup> See generally Paula L. Hannaford-Agor, Nicole L. Mott, and Timothy F. Fautsko, *Evaluation of the Centers for Complex Civil Litigation Pilot Program* (National Center for State Courts, June 30, 2003), archived at <http://perma.cc/TW3H-JXQ9>.

<sup>462</sup> Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 Wash U L Q 119, 131 (2003). See also *Report of the Federal Courts Study Committee* at \*14 (cited in note 114).

the ALI's Dual Judicial Sovereignty principle assumed that federal cases belong in federal court. But there is no sound theoretical or practical reason that justifies that belief.

In order to remedy the mistakes of the previous two eras, Congress should consider embracing the principle of monetary significance and complexity as the touchstone of jurisdictional allocation. Such an organization has been part of judicial federalism since the first amount-in-controversy requirement (in the 1789 Judiciary Act). This principle would clarify that judicial federalism is not about avoiding local biases, providing uniformity, or allowing expert federal judges to resolve federal cases. Rather, it is about concentrating the kinds of cases that can best take advantage of each forum: large and complex cases in need of a national solution in federal court, and small and local cases in state court, regardless of the substantive law at issue. Such a change would also be in line with CAFA, which unabashedly moves large class-action cases to federal court even if those cases involve only state law questions. As previously discussed, the federal government can exploit economies of scale, procedural efficiencies, and its "federal franchise" to provide high quality judicial services across the nation. This is better than localized state litigation that is limited by the state's own territory.

#### CONCLUSION

This Article began with an observation: over the last thirty years, the federal government has upended traditional conceptions of judicial federalism. The federal government has relentlessly expanded federal jurisdiction, removal jurisdiction, and federal law to areas previously controlled by state law and, most importantly, to cases previously located in state court. These series of changes mark a new era of judicial federalism, one that has an array of effects on state and federal courts and may be contributing to weak state-court budgets.

Once we examine the political economy of judicial federalism, it becomes clear that large institutional defendants fueled this third era. But hidden in the crevices of this new era is a series of benefits and costs to the system. On the negative side of the ledger, state procedures are increasingly drifting toward plaintiff preferences and federal courts toward defendants; this may cause further federalization and forum shopping. Large business defendants are also now seemingly divorced from the well-being of their local judiciaries, perhaps weakening the financial base of

those systems. Finally, state courts have a diminished ability to shape certain areas of the common law. On the positive side of the ledger, however, federal courts have efficiently exploited economies of scale and the “federal franchise,” and have better-aligned court competency with outcomes.

Those interested in promoting a better balance between state and federal court should look to the third era of judicial federalism and ask: Is this the optimal allocation of cases between state and federal courts? I suggest that even if that is true, we may worry about distributional consequences for state litigants. In light of institutional constraints, the health of our judicial federalism may be best protected by increasing the financial resources and vibrancy of state courts.