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# Overruling Erie: Nationwide Class Actions and National Common Law

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## COMMENTARIES

### OVERRULING *ERIE*: NATIONWIDE CLASS ACTIONS AND NATIONAL COMMON LAW

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The Class Action Fairness Act of 2005<sup>1</sup> (CAFA) reflects a sharp change of direction in contemporary thinking about federalism. It expands federal jurisdiction substantially, placing many more state law claims into federal court. In so doing, it highlights and attempts to resolve the tension that has always existed between state and national interests.

In this Commentary, I argue that the enactment of CAFA amounts to swimming halfway across a river. Professor Linda Silberman's thoughtful and well-argued proposal<sup>2</sup> is a valiant attempt to keep from drowning while treading water in the middle of the river. I suggest that instead of treading water, we should swim the rest of the way.

The river I am talking about is federal mistrust of state judges. And the far shore we are heading toward is *Swift v. Tyson*.<sup>3</sup> In other words, I want to make the proposal that Judith Resnik describes as "a more energetic claim" than those made so far,<sup>4</sup> that Richard Marcus and Stephen Burbank say is foreclosed by CAFA's legislative history,<sup>5</sup> and

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<sup>1</sup> Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

<sup>2</sup> Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001 (2008).

<sup>3</sup> 41 U.S. (16 Pet.) 1 (1842).

<sup>4</sup> Judith Resnik, *Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: "The Political Safeguards" of Aggregate Translocational Actions*, 156 U. PA. L. REV. 1929, 1935 (2008).

<sup>5</sup> See Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1943 & n.129 (2006) ("[T]here is evidence that in enacting CAFA, Congress did not intend to alter the ordering of federal and state lawmaking authority established by *Erie v. Tompkins* and its progeny."); Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: Preliminary View*, 156 U. PA. L. REV. 1439, 1529 (2008) (quoting S. REP. NO. 109-14 (2005) for the proposition that CAFA does not change the application of *Erie*); Richard L. Marcus, *Assessing*

that even Samuel Issacharoff and Catherine Sharkey offer only as a descriptive prediction of possible future developments:<sup>6</sup> CAFA should be read as overruling *Erie Railroad Co. v. Tompkins*,<sup>7</sup> at least for the national-market cases<sup>8</sup> that it places within federal court jurisdiction.

The skeleton of my argument is as follows: First, mistrust of state interference with national markets should be viewed as the norm, and *Erie* as the aberration. Second, despite its explicit intent to leave *Erie* in place, Congress squarely based CAFA on this norm. Finally, we cannot have it both ways: either we trust state judges or we do not. To the extent that Congress tried to adopt both positions, courts must find a single consistent interpretation of the statute—they must head for one shore or the other. I know which way I would swim.

Let me start with mistrust of state interference with the national-market economy. Justice Story's opinion in *Swift* eloquently presented the conventional nineteenth-century view. My favorite quotation, however, comes from a case two decades before *Swift*. In 1821, Chief Justice Marshall rejected one of Virginia's many attempts to place its own policy above that of Congress: "That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people."<sup>9</sup> Marshall thus put national economic policies on the same plane as foreign relations—a federalized subject that must be protected from individual state obstruction.

Diversity jurisdiction, properly understood, also fosters a national market and a federalized commercial liability regime. The origins of diversity are famously unclear.<sup>10</sup> Under any reading, however, protect-

*CAFA's Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765, 1812 (2008) (deeming the argument that CAFA displaces *Erie* both too broad and too narrow).

<sup>6</sup> See Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1419-20 (2006) (explaining that federal courts will need to develop "incremental decisional law").

<sup>7</sup> 304 U.S. 64 (1938).

<sup>8</sup> By "national-market cases" I mean to invoke Issacharoff's definition of national-market activity: "conduct that arises from mass produced goods entering the stream of commerce with no preset purchaser or destination." Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1842 (2006).

<sup>9</sup> *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 413 (1821).

<sup>10</sup> See 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, 1833 (2008) (explaining that the constitutional framers and ratifiers provided little rationale for adopting diversity jurisdiction).

ing national-market interests from state interference was a significant purpose behind diversity jurisdiction.<sup>11</sup> But that purpose is in direct tension with *Erie*: it does not make much sense, in terms of protection from aberrant or biased states, to place cases in federal courts but let state judges make the substantive rules. It is, in Professor Silberman's memorable characterization from an analogous context, paying more attention to where the defendant will be hanged than to whether he will be.<sup>12</sup> Indeed, it is probably not logical to let state *legislatures* determine the law in cases involving national commerce, and in that sense *Swift* did not go far enough (but that argument is beyond the scope of this Commentary).

So why did the same generation—and even many of the same individuals—that adopted Article III also enact the Rules of Decision Act?<sup>13</sup> Why, in fact, did the same Congress enact both the predecessor of § 1332<sup>14</sup> and the Rules of Decision Act? This question is difficult only if we assume *Erie's* reading of the Rules of Decision Act—but *Erie* was probably wrong.

As other scholars have shown, the more historically accurate interpretation of the Act is that it was either limited to state legislative enactments (as *Swift* held), or that it was meant as a directive to apply *American* rather than English law, not as a directive to apply state rather than federal law.<sup>15</sup> The best textual evidence for the latter interpretation is the use of the term “the laws of the several states” rather than “the laws of the respective states.”<sup>16</sup> In eighteenth-century parlance, that distinction signaled the difference between law common to the states and the laws of each individual state.<sup>17</sup> The historical evidence is too voluminous to canvass here, but the very fact that *Erie's* reading of the Act is in tension with the acknowledged purposes of

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<sup>11</sup> See, e.g., David Marcus, *Erie, the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1265-70 (2007) (citing several sources to explain that federal courts were thought to better appreciate the needs of an interstate economy).

<sup>12</sup> Linda J. Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 88 (1978).

<sup>13</sup> Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (current version at 28 U.S.C. § 1652).

<sup>14</sup> 28 U.S.C. § 1332 (2000).

<sup>15</sup> See WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789*, 126-48 (Wythe Holt & L.H. LaRue eds., 1990); Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 105-06 (1993).

<sup>16</sup> Ritz, *supra* note 15, at 148.

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

diversity jurisdiction should suggest that *Swift* might be closer to the original meaning of the Act.

From the founding to the early twentieth century, then, American jurists believed that state judges could not be trusted either to develop or to apply a body of law that would foster a growing national economy. Diversity jurisdiction worked with the *Swift* doctrine to put that body of law into the capable hands of federal judges. Without *both* a federal forum and federal substantive law, there would still be opportunities for state judges to implement policies that served the needs of their own constituency but not those of the nation.

As several of the articles in this Symposium point out, Congress recognized the problem of state courts acting to increase in-state benefits and export costs. With CAFA, Congress intentionally and explicitly sought to solve this problem by returning to the previous regime. One of the three listed purposes is to “restore the intent of the framers of the United States Constitution.”<sup>18</sup> That intent, as Congress saw it, was to prevent state interference with national markets, and CAFA therefore places cases involving the national economy into the federal courts.

As I have argued, however, the only way to make sense of the framers’ intention regarding diversity jurisdiction is to see it as yoked to the *Swift* doctrine. By moving national cases into federal court, CAFA thus achieves only half of its goal. Congress focused on state court judges recklessly certifying nationwide class actions, but ignored the possibility that those same judges might recklessly develop state substantive tort liability in ways that similarly hamper nationwide markets. Blinded by almost seventy years of unquestioned adherence to *Erie*, Congress apparently could not see that cases in federal court could still be hijacked by aberrant state law.

In a nutshell, then, CAFA fails to remedy the negative consequences of *Erie*. Individual states can still impose their laws on the nation, and the vertical forum shopping that occurred under *Swift* has been replaced by horizontal forum shopping. As Howard Erichson’s article demonstrates, CAFA has simply changed the shape of that horizontal forum shopping but has not eliminated it.<sup>19</sup>

So what is the solution? Silberman suggests that we adopt an anti-*Klaxon*<sup>20</sup> rule. Instead of applying the choice of law rules of the state

<sup>18</sup> CAFA § 2(b)(2), 28 U.S.C. § 1711 note (Supp. V 2005).

<sup>19</sup> Howard M. Erichson, *CAFA’s Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1606 (2008).

<sup>20</sup> *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

in which they sit, she proposes, federal courts in CAFA cases should apply a unified federal choice of law rule.<sup>21</sup> She is in good company, as quite a number of scholars have urged the adoption of federal choice of law rules—either by congressional enactment or by judicial action—both before and after the enactment of CAFA.<sup>22</sup>

But to jettison *Klaxon* is to mistake the tip of the iceberg for the behemoth below. As long as the fifty states remain free to shape their laws as they wish, and federal courts must apply *some* state's law, litigants will attempt to game the system. Silberman almost concedes as much when she writes that “any choice of law rule that is adopted should be one that continues to respect the different substantive judgments reflected in the laws of different states.”<sup>23</sup> *Erie*'s error was exactly its protection of those different substantive judgments, despite their ability to wreak havoc on a national economy.

All of this leads to the conclusion that if we share the concerns that prompted Congress to adopt CAFA, we must reject *Erie*. But Congress said that it meant to retain *Erie*. What should we make of this inconsistency? I propose three arguments in support of interpreting CAFA to have overruled *Erie* for cases within CAFA's scope, despite an apparent congressional intent to the contrary.

First, the practical effect of combining CAFA and *Erie*—with or without *Klaxon*—is to choke off almost all nationwide class actions, which conflicts with the stated purpose of “assur[ing] fair and prompt recoveries for class members with legitimate claims.”<sup>24</sup> If the real purpose of the statute is, as some have suggested, primarily to protect corporate defendants from class-wide liability,<sup>25</sup> keeping *Erie* achieves

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<sup>21</sup> Silberman, *supra* note 2, at 2002.

<sup>22</sup> See, e.g., William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 32-42 (1963); Borchers, *supra* note 15, at 124-31; Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 23 (1991); Geoffrey C. Hazard, Jr., *Has the Erie Doctrine Been Repealed By Congress?*, 156 U. PA. L. REV. 1629 (2008); Issacharoff, *supra* note 8, at 1865-66; Friedrich K. Juenger, *Mass Disasters and the Conflict of Laws*, 1989 U. ILL. L. REV. 105, 121-22; Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1918-22 (2006); Richard A. Nagareda, *Bootstrapping in Choice of Law After the Class Action Fairness Act*, 74 UMKC L. REV. 661, 678-83 (2006).

<sup>23</sup> Silberman, *supra* note 2, at 2033.

<sup>24</sup> CAFA § 2(b)(1), 28 U.S.C. § 1711 note.

<sup>25</sup> See, e.g., Burbank, *Aggregation on the Couch*, *supra* note 5, at 1941-43 (calling the expressed purposes of CAFA “window dressing” to the true goal of preventing the certification of some classes that state courts might certify); Alan B. Morrison, *Removing Class Actions to Federal Court: A Better Way To Handle the Problem of Overlapping Class Actions*, 57 STAN. L. REV. 1521, 1528-31 (2005) (acknowledging efforts of potential class

that goal. We should, however, balk at any statutory interpretation that allows Congress to achieve its goals by stealth. If Congress wants to cut down on the number of nationwide class actions, it should do so directly rather than surreptitiously through the retention of *Erie*.

Second, Congress put its intent to return to the framers' vision into the statute itself, while the retention of *Erie* appears only in the legislative history. If I am right that these two goals are inconsistent, the one in the statute should prevail.

Finally, there is precedent for interpreting a statute contrary to Congress's wishes in similar circumstances. We should look to the relationship between Congress's two inconsistent intentions. The protection of national markets is the underlying, broader purpose of CAFA; the retention of *Erie* is merely a prohibition on a particular means of achieving that broader goal. The problem is that Congress was mistaken: the broader goal cannot be accomplished without the use of the prohibited means.

The Supreme Court faced exactly the same situation almost thirty years ago, and it interpreted the statute at issue to favor the broader goal and to allow the prohibited means. The case was *United Steelworkers of America v. Weber*,<sup>26</sup> which upheld private affirmative action despite Title VII's absolute ban on racial discrimination.<sup>27</sup> The clear text of the statute, as well as numerous statements in the legislative history, unequivocally pointed to the conclusion that Congress had meant to ban *all* racial discrimination by employers. But the Court rejected what it called a "literal" approach, because interpreting Title VII to ban affirmative action would be "at variance with the purpose of the statute."<sup>28</sup> In other words, Congress thought that it could accomplish its broader goal of social and economic integration while still prohibiting employers from using race as a criterion. The Court recognized the impossibility of doing both—and it interpreted the statute in accordance with its broader goal. Courts should do the same with CAFA.

Three final objections to my proposal are worthy of brief mention. First, does Congress have the power to overrule *Erie*, or is *Erie* based on constitutional principles? Although Justice Brandeis's opinion rested in part on constitutional limitations on federal power,<sup>29</sup> there

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action defendants—often corporations—to push CAFA through in order to stay out of unfair state courts).

<sup>26</sup> 443 U.S. 193 (1979).

<sup>27</sup> *Id.* at 209.

<sup>28</sup> *Id.* at 201-02 (internal citations omitted).

<sup>29</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78-80 (1938).

has always been great controversy about the validity of that part of the holding.<sup>30</sup> In any case, there should be no constitutional obstacles to concluding that *Erie* does not apply to CAFA cases. To the extent that *Erie* rests on federalism concerns, post-1938 developments in Commerce Clause jurisprudence vitiate those concerns: Congress certainly has power to regulate the substantive law governing nationally distributed goods. To the extent that *Erie* instead rests on separation-of-powers concerns, my argument reads CAFA as a legislative authorization for judicial development of substantive common law in the context of nationwide class actions. Thus, even if the application of federal common law in an ordinary tort case such as *Erie* itself would be unconstitutional, the national-market cases within CAFA's scope are distinguishable.

A second and related objection is that even if courts are not constitutionally precluded from developing the substantive law that should govern national products liability cases, Congress is still the more appropriate venue for such federal lawmaking. My response to this objection is practical: Congress is gridlocked and hopelessly partisan, and is unlikely ever to enact national tort legislation. CAFA is as good as it gets on that front. Moreover, state tort doctrines were originally common law (although many have since been codified by state legislatures), and there is no reason why federal courts should not take the lead in developing a federal common law for mass torts. Indeed, allowing incremental judicial lawmaking may ultimately produce a body of law worthy of congressional codification.<sup>31</sup>

Finally, there is the problem of CAFA's overly broad scope. As both Professors Marcus and Burbank have noted, CAFA's minimum diversity provisions combine with the fiction of corporate citizenship to place within federal jurisdiction cases that are *not* truly national.<sup>32</sup> The best response to this problem would be for Congress to recognize it and amend CAFA, but that seems unlikely. Under my proposal, then, would federal courts have the power to apply federal common

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<sup>30</sup> See, e.g., John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 704-05 (1974); Paul J. Mishkin, *Some Further Last Words on Erie—the Thread*, 87 HARV. L. REV. 1682, 1688 (1974); see also Resnik, *supra* note 4, at 1943.

<sup>31</sup> For a prior example of such judicial innovation followed by successful congressional adoption, see Suzanna Sherry, *Haste Makes Waste: Congress and the Common Law in Cyberspace*, 55 VAND. L. REV. 309, 312-13 (2002), describing the path from judicial receiverships to federal bankruptcy law.

<sup>32</sup> Burbank, *Class Action Fairness Act*, *supra* note 5, at 1525-28; Marcus, *supra* note 5, at 1806.



law to such cases? I am tempted to take the uncompromising position that they would: despite the absence of a national class, there is still a national *interest* as long as the goods are part of an undifferentiated national market. It is neither absurd nor unconstitutional to interpret CAFA as functionally equating such cases to nationwide class actions.

In the end, though, nationwide class actions and class actions involving citizens of a single state suing an out-of-state corporation are distinguishable for purposes of my proposal. The latter cases are much closer to *Erie* itself, in that they involve great state interests and only marginal federal interests. One can therefore argue either that Congress did not mean to—and did not need to—overrule *Erie* for those cases, or that congressional power over the substantive law in such cases would skate so close to the edge of the Commerce Clause power that we should read CAFA as *not* authorizing judicial lawmaking in this instance.

I close with a passage from Professor Silberman's article, which I think highlights Congress's futile attempt to stand in the middle of the river:

[J]ustice is not an abstract principle: it is in the mind of the beholder. The communities in which the parties reside and act—the relevant state or nation—define the applicable principles of justice for that community. Conflicts arise because the lawmaking bodies of different states and different nations see the world quite differently.<sup>33</sup>

What CAFA has done is redefine the relevant community. When it comes to national-market activity, the relevant community is now the nation rather than the individual states. Accordingly, the substantive principles of justice ought to be federal as well.

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<sup>33</sup> Silberman, *supra* note 2, at 2023 (internal quotation marks and footnote omitted).