
THE CHECKS AND BALANCES OF FORUM SHOPPING

Mark Moller*

ABSTRACT

The law of forum shopping has splintered into dissonant doctrinal silos. Jurisdictional doctrines enable, even encourage, forum shopping. Erie condemns it. Scholars have failed to articulate constitutional principles that can unify both bodies of law. This article pares away this confusion by developing a new model that explains federal courts' divergent approaches to forum shopping in terms of a coherent set of principles. Missing from prior accounts is an appreciation of the role that competition for judicial business, within a market for adjudication, plays in the architecture of limited federal judicial power. The article traces how the logic of competition and markets shaped three key episodes in the development of the law of forum shopping: the early framing-era debate over jurisdictional concurrency, the formation of key modern jurisdictional doctrines in the late nineteenth century, and Erie. It shows that different doctrines relating to forum shopping, far from being inconsistent, have travelled along the same arc. Together, they form an architecture of judicial competition designed to check federal courts' share of the adjudication market, subject to Congress's control. Based on this history, the article develops a model for analyzing forum shopping as part of that architecture. The model can revitalize structural debates in important but stale fields of law regulating litigants' forum choices. More generally, it challenges the canonical view that federal-state forum shopping is constitutionally disfavored. And it questions past defenses of jurisdictional competition, which cast it as a mechanism for empowering the federal protection of individual rights. Forum shopping, this article shows, is an integral part of our framework of limited federal judicial power.

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* Associate Professor, DePaul University College of Law. Thanks to participants at a DePaul workshop for helpful comments on earlier drafts of this article. Special thanks to Marla Kanemitsu, Stephen Siegel, Deborah Tuerkheimer, Josh Sarnoff, Mark Weber, and an anonymous peer-reviewer, whose comments and suggestions on earlier drafts greatly helped me develop this piece, and to Andrew Gold, whose suggestions and conversation helped spark the idea for this article.

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INTRODUCTION

Constitutional law ought to hang together. But when it comes to forum shopping, it looks unprincipled, even schizoid. On one hand, federal jurisdiction doctrines, like the “deeply rooted presumption in favor of concurrent state court jurisdiction,” enable forum shopping.¹ But on the other hand, *Erie* condemns it.² Previous accounts of forum shopping have travelled along this divide. Federal jurisdiction specialists suggest the right to choose a forum might be a protected structural right.³ *Erie* specialists treat forum

1. See, e.g., *Tafflin v. Levitt*, 493 U.S. 455, 459 (1990) (noting the “deeply rooted presumption in favor of concurrent state court jurisdiction,” which may be “rebutted if Congress affirmatively ousts the state courts of jurisdiction over a particular federal claim”).

2. See, e.g., *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (noting “discouragement of forum shopping” is one of the twin aims of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

3. Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 235-36 (1988) (advocating a “litigant [forum] choice” principle derived from principles of federalism).

shopping as a violation of fairness norms.⁴

The result? Both case law and scholarship describe dissonant local doctrines concerning federal-state forum shopping that play out in different doctrinal silos. Worse, this disarray spawns confusion about the implications of constitutional structure in evolving fields of the law that affect litigants' forum choices. A prime example is the class action field, where cases have vacillated in an untheorized, ad hoc way about whether, and when, federal courts managing class actions ought to protect class members' ability to shop for a state forum.⁵ As a consequence, straightforward due process considerations have supplanted constitutional structure as a constraint on class actions, leading to extremism and polarization in class action law.

Scholars have reacted to this confusion by mostly ignoring it: It has been nearly twenty years since anyone has offered a new, systematic account of constitutional structure as it relates to federal-state forum shopping.⁶ When it comes to forum shopping, we've learned to live with dissonance and incoherence.

The aim of this article is to pare away confusion about the implications of constitutional structure, as it bears on forum choice, in a way that can inform evolving areas of law. Toward that end, I develop a new model that explains federal courts' divergent approaches to forum shopping as extensions of the

4. John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 712 (1974) (suggesting *Erie*'s concern with forum shopping was the "simple unfairness" of "affording a nonresident plaintiff suing a resident defendant a unilateral choice of the rules by which the lawsuit was to be determined").

5. On one hand, a body of doctrine interpreting the federal Anti-Injunction Act, 28 U.S.C. § 2283, dating from the 1980s suggests class members' freedom to choose a forum is an important structural value that ought to inform class action law. On the other, considerations of constitutional structure have played no role in the Supreme Court's interpretation of the proper scope of mandatory class actions in the 1990s or 2000s, despite the fact that federal mandatory class actions cram down a judgment from a forum class members never chose and may affirmatively reject. *Compare In re Fed. Skywalk Cases*, 680 F.2d 1175, 1180-82 (8th Cir. 1982) (vacating a mandatory class certification order enjoining parallel state proceedings after finding such an injunction would be prohibited by the Anti-Injunction Act), and *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1002 (3d Cir. 1986) ("[C]ertification of a mandatory class raises serious questions of personal jurisdiction and intrusion into the autonomous operation of state judicial systems."), with *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559 (2011) (referring exclusively to due process as a constitutional basis for construing Rule 23(b)(2) narrowly), and *Ortiz v. Fibreboard, Corp.*, 527 U.S. 815, 846-47 (1999) (referring exclusively to due process and Seventh Amendment concerns as constitutional bases for construing Rule 23(b)(1)(B) narrowly).

6. The last major attempt at synthesizing doctrines related to vertical forum shopping is Erwin Chemerinsky's empowerment model of litigation choice, proposed in the late 1980s. See Chemerinsky, *supra* note 3, at 300-21. I discuss his theory further below. See *infra* notes 14 to 24 and accompanying text. There has been recent movement to synthesize the Court's "horizontal" or state-state federalism cases, particularly by Allan Erbsen. See Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493 (2008); Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1 (2010).

principles of checks and balances and separated powers.

Inferior federal courts are “limited tribunals” subject, in our system of checks and balances, to Congress’s control.⁷ This article approaches the limited nature of federal courts’ power through the prism of markets. Competition from state courts, driven by litigants’ power to shop for a state forum, checks federal courts by limiting their share of cases and controversies—their share, that is, of the market for dispute resolution.⁸

Consistent with the first principle of our system of checks and balances, that no branch defines its own power,⁹ the Article proposes that regulating federal-state jurisdictional competition is the job of the political process. To reinforce Congress’s role as the regulator of that competition, the Article proposes two related principles: First, federal courts cannot erect barriers to state competition, absent the clear approval of Congress. Second, federal courts cannot bid to increase their share of the market in dispute resolution through what might be called judicial product differentiation—that is, by adopting special procedures that entice litigants to switch away from state court into federal court—absent the clear approval of Congress. Both principles reflect the idea that federal courts should respect competition from states as an important restraint on their share of the market for adjudication, subject to Congress’s control.

The model builds on the Framers’ understanding: they adopted concurrency to harness forum choice and jurisdictional competition as a hedge against a feared “consolidation” of federal judicial power.¹⁰ And it explains and unifies core features of current precedent: The presumption of concurrency creates a market for adjudication. Judicial constructions of federal question jurisdiction, diversity, and removal reduce barriers to state competition in that market by limiting corporate defendants’ gatekeeping power over plaintiffs’ access to state court. The *Erie* line of cases prevents federal courts from

7. *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (contrasting “common law courts” and limited “federal tribunals”); *Sprint Commc’ns Co. v. APCC Servs.*, 554 U.S. 269, 305 (2008) (Roberts, C.J., dissenting) (referring, in context of a standing challenge to claims brought by an “aggregator” who had obtained assignments of consumers’ rights to sue, to the “proper—and properly limited—role” of federal courts in our tripartite system of government).

8. The idea that jurisdictional competition can be characterized as a kind of “market” for public goods is not new. *See, e.g.*, ERIN A. O’HARA & LARRY RIBSTEIN, *THE LAW MARKET* (2009) (characterizing legal frameworks in which consumers of public goods can choose between competing providers of those goods as a kind of “market”).

9. *Kline v. Burke Constr. Co.*, 260 U.S. 226 (1922); *Snyder v. Harris*, 394 U.S. 332, 341-42 (1969) (noting the power to define and expand federal jurisdiction lies “in the Congress, not in the courts”); Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 *Nw. U. L. REV.* 1207, 1274 (2001) (“Th[e] first principle of limited federal power supports a corollary notion: the scope of an institution’s power - its jurisdiction - must be determined by a source outside that institution itself.”).

10. *See infra* notes 49-95 and accompanying text.

diluting the restraint of state competition by differentiating federal dispute resolution procedures in a way that attracts litigants into federal court absent approval of Congress.¹¹

The model also pares away confusion about the implications of constitutional structure, as it bears on forum choice, in evolving areas of law. I demonstrate this at the end of the Article by using the model to begin thinking through class members' right to choose their forum in class action proceedings. I show that the structural model advanced here opens up a new, richer understanding of constitutional restraints on class actions. The result, counterintuitively, is not to further restrain class actions but actually to open new doctrinal avenues that could lead to more experiment and pluralism in the way courts—federal and state—manage class litigation.

The Article proceeds in three Parts. After reviewing several previous attempts to defend federal-state forum shopping, including Erwin Chemerinsky's litigant empowerment model, Part I introduces the new model of forum choice, which I call the "limited tribunals" model, and explains how it differs from predecessors.

Part II of the Article then demonstrates the limited tribunals model's consistency with key features of modern doctrine, as well as its historical support, by tracing its development across three key episodes—the development, first, of the competitive theory of concurrency in the first Judiciary Act; then, of the well-pleaded complaint rule and related jurisdictional presumptions between the late nineteenth century and mid-twentieth centuries; and, finally, *Erie*. A long historical view reveals a pattern consistent with the limited tribunals model, making it an appealing candidate for unifying different doctrines relating to forum shopping under a consistent set of structural principles.

To make clear the breadth and reach of the limited tribunals model, as well as all of the different avenues for further research the model opens up, Part III turns to apply the model to make sense of constitutional structure, as it bears on litigants' forum choices, in the particularly muddled arena of class-action law.

I. A LIMITED TRIBUNALS MODEL OF FEDERAL-STATE FORUM CHOICES

Constitutional structure fulfills two functions simultaneously. It checks and restrains federal institutions, consistent with the first principle of our constitutional system: that the federal government is one of profoundly limited powers.¹² It also guides institutional design at the federal level.

11. See *infra* notes 129-171 and accompanying text.

12. Fitzgerald, *supra* note 9, at 1273 (at the heart of separation of powers values "is the principle that all federal power is profoundly limited: that the Constitution's three governing institutions may use power only if and when affirmatively authorized to do so by

To fulfill both functions, federal courts, at a minimum, should strive to extend structural principles in a way that is coherent and consistent across doctrines. Yet when it comes to the practice of forum shopping, constitutional law is in disarray. Our jurisdictional infrastructure enables forum shopping. *Erie* condemns it. And scholars have learned to live with the resulting dissonance and incoherence.

The aim of this Article is to explain divergent approaches to forum shopping as applications of a coherent set of structural principles. First, Section A reviews previous attempts to do so.¹³ Then, in Section B, I introduce the model advanced in this Article—the “limited tribunals” model—and distinguish it from its rivals.

In succeeding parts of the Article, I set out to show that it is a superior model, in that it makes better sense of the early history of concurrency and modern precedent than past accounts.

A. *Two Models of Forum Shopping*

The web of rules relating to forum shopping is muddled, yet so familiar we’ve ceased to care. The last systematic attempt to explain vertical forum shopping in terms of larger constitutional structural principles is over twenty years old.

The leading account remains Professor Erwin Chemerinsky’s. In the late 1980s and early 1990s, Chemerinsky wrote a series of articles proposing that federalism’s advantage lies in its “redundant” systems for solving pressing social problems.¹⁴ Multiple governments sharing the same territory, “each with the ability to act,” can step in to address problems if other coordinate

that power’s source”).

13. Because this Article focuses on integrating structural principles and forum-shopping doctrine, I do not consider the parallel literature treating forum shopping doctrine as an outgrowth of fairness and equality concerns. *See, e.g.*, Stephen Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1443 (2008) (discussing forum shopping from a historical vantage that emphasizes fairness concerns, including “differences in the ability of different types of litigants to benefit from forum shopping, the purposes for which a forum is being selected, the fairness of the forum selected to the parties and legal systems concerned, and the proportionality of forum choice”). Both the model proposed here and these fairness-based approaches to forum shopping do, however, have some synergies, since both advocate shifting more control over selection of the forum to plaintiffs and away from corporate defendants. *See infra* notes 115-123 and accompanying text. *Cf. Id.* at 1476 (noting that “corporate defendants . . . for decades had used the burdens of distance and expense as tactical weapons to wear down individual plaintiffs through removal”).

14. Erwin Chemerinsky, *Federalism Not as Limits, But as Empowerment*, 45 KAN. L. REV. 1219, 1234 (1997) (explaining that a “tremendous advantage of federalism is its redundancy”).

sovereigns drop the ball.¹⁵ In this way concurrency “empowers” individuals and government to respond to pressing social needs.¹⁶

Consistent with this conception of “federalism as empowerment,” Professor Chemerinsky argued that a “litigant choice” principle “should guide Congress in enacting jurisdictional statutes and the Supreme Court in fashioning common law jurisdictional rules.”¹⁷ According to this principle, litigants, especially ones with constitutional claims, “should have the ability to choose the forum in which to proceed.”¹⁸ Because claimants and their lawyers are best positioned to assess “which court in a particular geographic area offers a better chance of vindicating a particular claim,” the litigant choice principle empowers litigants in a way that is likely to “maximize the opportunity for the protection of individual liberty”¹⁹ by “creating a competition between forums.”²⁰

Chemerinsky’s empowerment model was interpretive as well as normative. Although he proposed that it ought to guide federal courts and Congress,²¹ he also suggested it is a pretty good description of principles that actually underlie modern jurisdictional doctrines. “To a large extent,” he wrote, “existing statutes already support[ed]” his empowerment model.²² And, he wrote, “there is compelling evidence that the litigant choice principle was intended by Congress when it defined federal jurisdiction.”²³

Professor Chemerinsky’s model has had a good deal of success; it was well-received by federal courts scholars of the period, and remains a leading way to conceptualize the normative value of judicial concurrency. But it has critics, who complain it slights the accepted view that constitutional structure should restrain, not empower, government.²⁴

And it has rivals. Writing around the same time, Professor George Brown offered another interpretive account of constitutional structure and federal-state

15. *Id.* (noting that in a system composed of multiple levels of government, “[i]f states fail to deal with an issue, federal or local action is possible”).

16. *Id.* (“[F]ederalism needs to be reconceptualized as being primarily about empowering varying levels of government and much less about limiting government.”).

17. Chemerinsky, *supra* note 3, at 237.

18. Chemerinsky, *supra* note 14, at 1237.

19. Chemerinsky, *supra* note 3, at 300.

20. *Id.* at 310.

21. *Id.* at 300 (arguing the litigant choice principle “should guide Congress in enacting jurisdictional statutes and the Supreme Court in fashioning the common law of jurisdictional rules”).

22. *Id.* at 311.

23. *Id.*

24. William H. Pryor, Jr., *Federalism and Freedom: A Critical Review of Enhancing Government: Federalism for the 21st Century*, 83 TUL. L. REV. 585, 594 (2008) (suggesting Chemerinsky fails “to appreciate the virtues of American federalism[] as a structural restraint” on Congress and the federal judiciary).

forum shopping. Unlike Professor Chemerinsky, Professor Brown's account had little to say about the architecture of federal jurisdiction.²⁵ His account had a different starting point: a schizophrenia that he perceived in the Rehnquist and Burger Courts' treatment of forum shoppers.²⁶ The conservative Court's *Erie* jurisprudence reflected a strident, "across-the-board" hostility to plaintiffs shopping for a federal forum.²⁷ Although that is what you might expect from a conservative, pro-defendant Court,²⁸ wrote Brown, at the state level, the conservative Court surprised. Its interpretation of personal jurisdiction and choice of law doctrines enabled, even encouraged, state-level forum shopping.²⁹

This different treatment of federal-state and state-state forum shopping, Professor Brown argued, flowed from the Court's understanding of *Erie*. Although *Erie* is "primarily about federal versus state lawmaking," he suggested the conservative Court saw, standing behind the case, a larger unstated policy favoring "the primacy of state [courts] in developing private law norms."³⁰ That explained the Rehnquist and Burger Courts' hostility to federal-state forum shoppers: deterring them funneled more cases to state court, reinforcing states' power and authority.³¹ But the same federalism policy, he argued, had led the Court to tolerate plaintiffs' shopping among states.³² The

25. Brown mentioned jurisdictional statutes only in passing. George D. Brown, *The Ideologies of Forum Shopping—Why Doesn't a Conservative Court Protect Defendants?*, 71 N.C. L. REV. 649, 690 (1993) (mentioning the Burger-Rehnquist Court's narrow interpretation of federal jurisdiction statutes as part of a larger discussion of the Court's pro-defendant ideology).

26. *Id.* at 650 (noting the divergent treatment of state-state and federal-state forum shopping and asking whether "the Court [is] hopelessly inconsistent?").

27. *Id.* at 692-94.

28. *Id.* at 650 (noting "[f]orum-shopping threatens such conservative values as the desire to avoid proliferation of lawsuits, a distrust of manipulation of the system to achieve substantive ends (at least by plaintiffs), and a general pro-defendant tilt"); *id.* at 651 ("Anything other than a broad condemnation seems strange from a Court generally viewed as conservative.").

29. *Id.* at 651 (noting that "[i]n the face of apparent state-state private law forum shopping . . . major decisions . . . seem to accept the practice, perhaps even to encourage it.>").

30. *Id.* at 682.

31. *Id.* at 651 (observing "the Court is opposed to forum-shopping in the federal-state public and private law contexts while seemingly supportive of the state-state private law variant" because "[i]n all three contexts the ultimate winners are the states and their courts"); *id.* at 653 ("The Court, I contend, adheres to an *Erie*-based vision of federalism in which the states retain the primary role in private law. They are encouraged to assert their regulatory authority aggressively."); *id.* at 651-52 (noting that it is "hardly surprising that with a conservative Court," the protection of "states and their courts" would be the "end result").

32. *Id.* at 673-75 (discussing the Court's "relaxed standards of personal jurisdiction, . . . [and] choice of law theories that encourage the use of forum law, [as well as] minimal Supreme Court scrutiny of state choice of law decisions").

conservative Court's two seemingly different approaches to forum shopping were, accordingly, linked together as part of a single coherent "vision of federalism."³³

As interpretations of the constitutional principles bearing on forum shopping, each of the preceding models was incomplete and unsatisfying. Chemerinsky's model did not address or explain *Erie*. And Brown's account was not a textually-grounded account of constitutional principle at all—it was a description of gestalt federalism policies or "values," untethered to text, which he argued infused both *Erie* and the Burger-Rehnquist Court.³⁴ Moreover, Professor Brown's account looks increasingly dated: It did not, for example, adequately account for the Court's willingness to uphold forum shopping-inducing Federal Rules of Civil Procedure against *Erie*-related challenges.³⁵

If anything, the two accounts, viewed together, pointed to incoherence in the law of the forum shopping. Each looked at different bodies of law and saw disparate approaches confined to different doctrines. Professor Chemerinsky, focusing on jurisdictional law, saw an orientation toward federal-state jurisdictional competition, leading to litigant empowerment. Professor Brown, focusing on Supreme Court choice of law cases in the late 1970s and 1980s, thought he discerned a federalism policy hostile to federal-state forum shopping. Viewed through Professor Chemerinsky's and Professor Brown's eyes at once, the constitutional law of forum shopping seemed a hopeless muddle—not one body of law, but two, and maybe more, that had grown up in

33. *Id.* at 653 ("The Court, I contend, adheres to an *Erie*-based vision of federalism in which the states retain the primary role in private law.").

34. *Id.* at 677 (suggesting the Court's commitment to a "conservative legal doctrine . . . including [to] the general notion of a restrained or nonactivist judiciary, the importance of original intent in construing any constitutional provision, [and] the central roles which the structural values of federalism and separation of powers play in the constitutional scheme"); *id.* (noting these "principles are not applied by the Court with perfect consistency, but they recur enough to produce patterns of results both in terms of the availability of federal courts and the results public law litigants are likely to receive there," including "[t]ightening access to the federal courts"); *id.* at 708-13 (analyzing how commitment to federalism trumps conservative hostility to private law plaintiffs in the Burger-Rehnquist Court's horizontal federalism cases). At one point, Professor Brown suggested protecting plaintiffs' ability to shop for a state forum may be required by the Tenth Amendment, but at other junctures he referred to the federalism values as part of an abstract "vision of federalism" manifested in both conservatives' jurisprudence and in *Erie*. Compare *id.* at 663 ("Viewed as a federalism decision, *Erie*'s condemnation of federal-state forum-shopping is essential to furthering Tenth Amendment values and preserving the Hart and Wechsler concept of the 'interstitial' nature of federal law;"), with *id.* at 653 ("The Court, I contend, adheres to an *Erie*-based vision of federalism in which the states retain the primary role in private law."). See also EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION 402 n.68 (2000) (noting Professor Brown "construe[d] *Erie* abstractly").

35. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1448 (2010) (rejecting an *Erie*-based challenge to Rule 23).

different doctrinal silos and developed in different directions toward dissonant ends.

B. *A New Synthesis*

The rest of this Article develops a new account of constitutional structure as it bears on forum choice—the limited tribunals model. This model builds on, but also differs from, previous accounts. Unlike Professor Chemerinsky’s empowerment model, it advocates protecting federal-state competition in order to limit federal courts. And unlike Professor Brown’s account, it is rooted in a principled account of constitutional text and structure.³⁶ Finally, unlike either, it explains and unifies forum shopping doctrine.

The familiar proposition that federal courts are “limited tribunals” under Congress’s control refers, of course, to the fact that federal courts are subject to legal limits on the subject matter jurisdiction they exercise, by virtue of Article III’s limited grant of subject matter jurisdiction.³⁷ The constitutionally limited scope of their jurisdiction is a formal limit. But federal courts also face functional limits. They operate in a market for adjudication created by the system of jurisdictional concurrency. In that market, the relative share of actual disputes that federal courts control—the share of disputes in which they have an opportunity to exercise their jurisdiction by resolving claims and declaring rights—is limited by competition from states for judicial business. That share of disputes is the measure of federal courts’ power and influence in a functional sense. And, at the end of the day, that is the only sense worth caring about.

The limited tribunals model proposes that regulating federal-state judicial competition is a job for Congress, not federal courts. Although I argue later that assigning Congress control over federal-state competition is consistent with the way the principle of checks-and-balances has been worked out historically, the idea is intuitive. It is a natural implication of the Constitution’s textual commitment, in Articles I and III, of power over inferior federal courts to the Article I lawmaking process.³⁸ The vesting of control over federal courts in

36. This is not to say that the model is required by the text—only consistent with it and its natural implications. *See infra* notes 38-39 and accompanying text. The case for the model turns not just on text but on the interpretivist criteria of coherence, fit with current practices, and history. *See* Part II.A for further discussion.

37. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 101 (1998) (“The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects.”).

38. The textual case for congressional control of federal courts is familiar and well-canvassed both in numerous Supreme Court decisions and prior articles. *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807) (Marshall, C.J.) (“[C]ourts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. It is unnecessary to state the reasoning on which this opinion is founded,

Congress is the outgrowth of one of the first principles of our system: No branch defines its own power. Each is checked by the others.³⁹ And given that principle, it would make no sense to limit Congress to defining the formal scope of federal courts' power, but exclude from its control the functional determinants of that power. The political process simply cannot serve its intended checking function unless Congress regulates federal-state judicial competition.

The limited tribunals model also proposes that federal courts ought to interpret statutes in a way that protects state courts' power to compete against federal courts for cases unless Congress clearly provides otherwise. This is consistent with the way that federal courts enforce the congressional control principle in other contexts.⁴⁰ They do so through clear statement rules that specify federal courts derive only those powers that have been clearly conferred by Congress. That protects Congress's checking function by ensuring decisions empowering federal courts are made, deliberatively, by the political process.⁴¹ Because federal courts are limited by the effect of state competition, the model accordingly proposes that vague grants of authority ought to be construed to protect states' ability to compete for cases and controversies, until Congress

because it has been repeatedly given by this court; and with the decisions heretofore rendered on this point, no member of the bench has, even for an instant, been dissatisfied."); *Kline v. Burke Constr. Co.*, 260 U.S. 226 (1922) (noting the power to define jurisdiction lies "in the Congress, not in the courts"); *Snyder v. Harris*, 394 U.S. 332, 341-42 (1969) (same); see also Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1030 (1982) (noting that while the Constitution "contains many provisions that are not at all clear," Congress's power over inferior tribunals is "one of the clearest"); Lumen N. Mulligan, *A Unified Theory of 28 U.S.C. § 1331 Jurisdiction*, 61 VAND. L. REV. 1667, 1727 (2008) ("Congress is a preeminent actor in resolving federalism questions, at least with regard to the intersection between federalism and the control of the federal courts' jurisdiction.").

The normative and textual case for the congressional control principle is related to the larger textual and structural arguments for the political process as a federalism safeguard. Leading contemporary accounts of textual and historical basis for understanding the separation of powers as a federalism safeguard include: Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001); Larry D. Kramer, *Putting the Political Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549 (2000); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1 (2004).

39. Fitzgerald, *supra* note 9, at 1274 ("Th[e] first principle of limited federal power supports a corollary notion: the scope of an institution's power—its jurisdiction—must be determined by a source outside that institution itself.").

40. *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17 (1951) ("The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation."); *Stoneridge Inv. Partners LLC v. Scientific-Atlanta*, 552 U.S. 148, 164-65 (2008) (same).

41. Young, *supra* note 38, at 1608-09 (arguing that clear statement rules enhance the political safeguards of federalism by increasing the "salience" of constitutional issues at stake and by adding to the "hurdles that any legislation must pass").

clearly directs otherwise.

Congress might choose to empower federal courts by diluting or displacing state competition in two ways. First, it might erect barriers to states' competition for a share of the dispute resolution market. Second, it can try to counter states' competition by adopting dispute resolution rules that make federal courts attractive to a subset of parties, pulling them away from state courts into federal courts.

To reinforce Congress's authority over the adoption of either type of rule, the model proposes that federal courts construe rules affecting litigants' forum choices according to two clear statement principles. First, federal courts cannot erect barriers to competition from state courts by interfering with litigants' ability to choose a state forum, absent clear approval of Congress. Second, federal courts cannot bid to enhance their share of the litigation market by adopting modes of dispute resolution that stimulate demand for a federal forum, absent clear approval of Congress. These clear statement principles ensure that decisions to diminish competition from states as an important functional limit on federal courts are made by Congress alone.

In the next Part, I will show that those principles are consistent with the different doctrines dealing with forum shopping. Together, those doctrines create an infrastructure of competition that limits federal courts' share of the adjudication market, subject to Congress's control. As a result, one can see the model as an interpretation of structural principles implicit in current doctrine. But the model also attempts to rationalize and legitimize current doctrine by linking it to a set of coherent principles that are not only consistent with current practice, but have roots in constitutional text and history. As a result it, and the supporting historical evidence that follows, can be viewed as a constitutional construction of how the principle of checks and balances ought to operate. I explore these points further in the next Part.

II. THE CASE FOR THE LIMITED TRIBUNALS MODEL

A. *An Overview of the Argument*

This Part builds the case for the limited tribunals model. It may be helpful to, at the outset, discuss in more detail the criteria against which this article advances that case. Arguments about constitutional structure, as Jack Balkin notes, necessarily take the form of constitutional constructions that "even when they use history[] are designed to explain how the constitutional plan should work today."⁴²

42. See Jack Balkin, *Resolution VI as a Principle of Construction*, BALKINIZATION (Aug. 6, 2011), <http://balkin.blogspot.com/2011/08/resolution-vi-as-principle-of.html>. For a general discussion of the distinction between constitutional interpretation and constitutional

The model is offered as just such a construction. The case for the model operates on two levels: On one level, it is interpretivist, in that it aims for coherence across forum shopping doctrines by articulating a unified set of structural principles, consistent with the Constitution's text,⁴³ that can explain and legitimate core features of different doctrinal compartments dealing with federal-state forum choices.⁴⁴ The argument, however, also adopts the premise that, when picking among principles that can lend coherence to forum shopping doctrines, we also ought, where possible, to prefer principles that have been suggested by prior historical sources, rather than adopting principles that are totally foreign to our tradition of constitutional construction.⁴⁵

That does not mean the case should be limited to principles articulated during the framing era. As Balkin notes, "[I]n making structural arguments, it's perfectly permissible to look at the work of the first several Congresses, even though all of this material occurred after ratification. Indeed, there's no reason not to look at materials created many years after ratification, after new amendments and new constructions have been added."⁴⁶ That is the approach to justifying the limited tribunals model taken here: The model is an account of "how the Constitution should work today" that can make sense of key components of current practices relating to forum shopping in terms of a consistent set of structural principles and that has some roots in our tradition of

construction, see Lawrence B. Solum, *The Interpretation/Construction Distinction*, 27 CONST. COMMENTARY 95 (2010). See also Jack Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 577 (2009) (arguing that constitutional construction is a project of "[r]ationalization," meaning "providing reasons why the constructions are faithful to the Constitution; [and] subjecting these constructions to reasons—articulating rules and principles of judgment—that will presumably be binding on the political branches in the future").

43. See *supra* notes 38-39 and accompanying text for discussion of the relationship between the text of Article I and Article III and the limited tribunals model.

44. The interpretive values I am appealing to here are coherence and fit. See STEPHEN A. SMITH, *CONTRACT THEORY* 11 (2004) (observing that a "theory satisfies the coherence criterion to the extent it presents [the law] as consistent or non-contradictory," and noting that a good legal theory should show that "most of the core elements" of a body of law being interpreted can be explained, or relate to, a single principle); see also *id.* at 7-9 (noting that interpretive theories should aim to fit "core elements" of the bodies of law interpreted: "The most obvious criterion for assessing interpretive theories is whether they fit the data they are trying to explain."). For various influential treatments of coherence and fit as interpretive values, see RONALD DWORKIN, *LAW'S EMPIRE* 19-20 (1986); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 38-42 (1995); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1237-43 (1987); Ken Kress, *Why No Judge Should Be a Dworkinian Coherentist*, 77 TEX. L. REV. 1375 (1999) (critiquing Dworkin-influenced theories of coherence); Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 273, 290-300 (1992).

45. See Fallon, *supra* note 44, at 1246 (suggesting that arguments based on history should factor more strongly than normative arguments in constitutional constructions).

46. See Balkin, *Article VI*, *supra* note 42, available at <http://balkin.blogspot.com/2011/08/resolution-vi-as-principle-of.html>.

constitutional construction.

This Part makes this case for the limited tribunals model on these coherentist and historical terms. It does so narratively, in a way that weaves together historical discussion and analysis of current doctrine into a seamless whole. The narrative is anchored around the different components of the limited tribunals model, which, as the last Part discussed, is composed of three interlocking building blocks: the ideas that (1) competition from state courts is an important check on federal judicial power; (2) checks-and-balances principles accordingly require clear congressional approval of rules that erect barriers to state competition; and (3) the same check-and-balances principles require clear congressional approval of rules likely to dilute state competition by incentivizing litigants to prefer federal court.⁴⁷

Below, I trace how each building block has been added to our doctrinal framework over time, beginning in Section B with the framing era's contribution. Although different framers articulated different understandings of the function of jurisdictional concurrency, the model of concurrency that triumphed by the end of the framing period is the one at the heart of the limited tribunals model: concurrency as a mechanism enabling competition as a *check* on federal courts' power.

The limited tribunals model posits not only that concurrency was set up as a competitive check on federal courts, but that principles of checks and balances require clear congressional approval of barriers to state competition with federal courts within the field of concurrency. This idea is suggested most directly at the end the Reconstruction period in Justice Samuel Miller's *Railroad Co. v Mississippi* dissent, which influenced the later development of the well-pleaded complaint rule and related constructions of the federal diversity statutes. Section C highlights Miller's dissent and then shows how key features of modern jurisdictional doctrine today, including the well-pleaded complaint rule and related aspects of diversity jurisdiction, operate consistently with Miller's idea.

The limited tribunals model also posits that rules that dilute the restraining effect of state competition by incentivizing litigants to prefer federal court must secure clear congressional approval. Section D shows the ways the *Erie* framework dovetails with this idea. *Erie* doctrine is a rich, tangled area of law that can be explained in terms of several different theories of the division of power between federal courts, the states, and Congress. But in its broad outlines, it has developed in ways that are consistent with the limited tribunals model's direction that federal courts cannot draw cases to themselves by adopting modes of dispute resolution that stimulate demand for a federal forum, absent clear, contrary direction from Congress. Understood in these terms, *Erie*, in effect, extends the basic idea at the heart of the limited tribunals model:

47. See Part I.B *infra*.

states can compete against federal courts; federal courts cannot compete against states without Congress's approval.

Together, each section highlights episodes in the progressive building out of our system of jurisdiction and choice of law—a system that, in broad outlines, is consistent with the limited tribunals model of forum choice.⁴⁸ In the process, the narrative illustrates that major features of the different contemporary doctrines relating to federal-state forum shopping can be rationalized by the limited tribunals model, while at the same time showing that the model describes a set of principles previously suggested by prior interpreters of our constitutional structure. The bottom line: the limited tribunals model is a construction of checks and balances with roots in our tradition of constitutional construction that can unify key doctrines relating to forum shopping as different parts of a coherent, principled whole.

B. *The First Building Block: Concurrency as a Competitive Restraint on Federal Courts*

This section begins by looking at the early understanding of jurisdictional concurrency. The early case for concurrency, subsection 1 shows, was intertwined with a vision of institutional competition between states and federal courts. But, as subsection 2 shows, dueling conceptions of jurisdictional competition jostled for supremacy during ratification. Yet, in the end, the last subsection shows, when the first Congress turned to implementing Article III, it adopted a model of concurrency that harnessed jurisdictional competition to limit and restrain federal courts, thereby erecting the first, and most fundamental, building block of the limited tribunals model.

1. *Dual Sovereignty as Competitive Sovereignty*

The Framers famously abandoned the old chestnut of British political theory that two sovereigns could not co-exist in the same territory or “political space” without one being subordinated to the other, and embraced, in its place, a system of multiple, co-equal sovereigns.⁴⁹ Past confederated systems,

48. I borrow the “building out” metaphor from Jack Balkin’s writings on constitutional construction. See Balkin, *supra* note 42, at 557 (noting that in his model of originalism, “the Constitution is never finished, and politics and judicial construction are always building up and building out new features”).

49. Leading, if different, interpretations of the Framers’ innovative theory of sovereignty include ALISON LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2010), and GORDON S. WOOD, *CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969). See also Todd E. Pettys, *Competing for the People’s Affection: Federalism’s Forgotten Marketplace*, 56 VAND. L. REV. 329, 338 (2003) (noting that while “[a]ll students of the federal Constitution know that ‘the Framers split the atom of sovereignty,’ creating a system of government in which citizens possess ‘two political capacities, one state and one

Madison argued, had foundered because their national governments had no direct relationship with the people and therefore were unable to serve as a locus for national unity and loyalty.⁵⁰ As a result, centrifugal forces in these prior confederacies tore them apart.⁵¹ The new federal system wouldn't make that mistake.⁵² By competing directly with states for the people's affection, the national government would forge, on top of citizens' natural loyalties to their states, an overlapping national identity capable of holding the new confederated American system together.⁵³

Scholars who have discussed the competitive aspect of the Framers' federalism have focused on legislative and regulatory competition between states and the federal government, while giving short shrift to the role judicial competition played in the Federalists' account of dual sovereignty.⁵⁴ Their focus reflects modern interests: in the administrative state, the biggest stakes competition is generally thought to lie in the realm of legislation and regulation, not adjudication.

But the way that Hamilton and Madison characterized competitive federalism in *The Federalist*—as a system in which each branch of the federal government would compete with states for citizens' "affection"⁵⁵—suggests strong reasons to think that they viewed the federal judiciary as a central focus of the system of competitive federalism. Outside the realms of taxation and military service, the judiciary was the primary institution through which the authority of the government was made "manifest[]" in the early Republic.⁵⁶ It was the "medium,"⁵⁷ said Hamilton, through which states and the federal

federal," the role competition for the people's "affection" would play in their framework is "[f]ar less well known").

50. THE FEDERALIST NOS. 18-20 (Alexander Hamilton & James Madison).

51. THE FEDERALIST NO. 20, at 172. (Alexander Hamilton & James Madison) (Isaac Kramnick ed., 1987).

52. THE FEDERALIST NO. 16, at 154 (Alexander Hamilton) (Isaac Kramnick ed., 1987) ("The government of the Union, like that of each State, must be able to address itself immediately to the hopes and fears of individuals."); *see also* Pettys, *supra* note 49, at 339 (noting the Framers thought "it was vital that the newly created federal government be able to regulate individuals' activities directly, rather than through state intermediaries," in order to foster affection for the federal government and reduce the need for use of military force).

53. Pettys, *supra* note 49, at 339; *see also* LACROIX, *supra* note 49, at 208-11 (discussing the Federalists' conception of the federal judiciary as a glue that would bind the nation together).

54. *See* Pettys, *supra* note 49, at 333 ("recovering" the Framers' competitive conception of federalism, but with a focus on "regulatory" and "legislative" competition); Young, *Two Federalisms*, *supra* note 38, at 80 (noting that the Founders' model "depended on institutional competition, at least as much as representation," but in the context of discussing state and federal legislative and regulatory competition).

55. *See supra* notes 50 to 54 and accompanying text.

56. THE FEDERALIST NO. 16, *supra* note 52, at 154.

57. *Id.* ("The majesty" of government authority is "manifested through the medium of the courts of justice.").

government carried their “agency” to the people⁵⁸ and, he emphasized, it is therefore the “most powerful, most universal, and most attractive source of popular obedience and attachment.”⁵⁹ “It is [the judiciary] which, being the immediate and visible guardian of life and property,” he said, “contributes more than any other circumstance to impressing upon the minds of the people affection, esteem, and reverence towards the government.”⁶⁰

If, then, the federal government must build its power and authority by “acting . . . on citizens individually” and competing directly for their “affection,” the judiciary would be a central competitive actor in our system of competitive federalism—the front-line pitchman for each sovereign in its competition for people’s affection. And, indeed, in the ratification conventions and in the subsequent debates over the first judiciary acts in the 1790s, judicial concurrency was repeatedly portrayed, attacked, and defended along lines consistent with the competitive account of concurrency in *The Federalist*: It was, said defenders, a system that enabled choice of jurisdictions—a “valuable right” claimed the Federalist pamphleteer Aristides,⁶¹ which avoided, said the *Columbian Centinel*, the “oppression” that would result from forcing a forum on an unwilling litigant.⁶² This choice, opponents and proponents conceded, would transform state and federal courts into “rivals,” “contend[ers],” or “competitors.”⁶³

58. THE FEDERALIST NO. 15, at 149 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (contrasting the “agency of the courts and ministers of justice” with the “coercion of arms” as different mechanisms for binding members of a political community together).

59. THE FEDERALIST NO. 17, at 157 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

60. *Id.*

61. “Aristides” (Alexander Contee Hanson), Remarks on the Proposed Plan of a Federal Government Addressed to the Citizens of the United States, and Particularly the People of Maryland (Jan. 1., 1788), reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 214, 238 (Paul Leicester Ford ed., 1888) (“A choice of jurisdiction has ever been esteemed a valuable right, even where there [sic] are both of the same kind.”).

62. COLUMBIAN CENTINEL (Dec. 3, 1800), reprinted in 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT 1789-1800, 660, 660 (Maeva Marcus ed., 1992) [hereinafter DHSC] (“To compel a man to submit to the judiciary of a State, to whose decision he would not voluntarily trust the life of a cat—when the Constitution has made such ample provision for him, must be allowed to smack a little of oppression.”).

63. Characterizations of federal and state judiciaries as “rivals,” “contenders” or “competitors” pervaded discussion of the concurrent system of jurisdiction throughout the 1790s. See, e.g., 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 563 (Jonathan Elliot ed., 1859) [hereinafter ELLIOT’S DEBATES] (William Grayson) (predicting federal and state judiciaries will become “contending” jurisdictions); Edmund Randolph to George Washington (Aug. 5, 1792), reprinted in 4 DHSC at 584 (referring to the “rivalship” of federal and state judges, and noting that “the mere superiority of talents in the federal judges (if indeed it were admitted) cannot be presumed to counterbalance the real talents, and full popularity of their competitors”); “A Citizen” (Jan. 26, 1801), reprinted in 4 DHSC at 696 (lamenting that the “contrast between the state and federal administration appears strong, and the advantage manifest against the federal judiciary”).

2. *Two Faces of Competition: Empowering Litigants and Limiting Federal Courts*

Apart from emphasizing the role that competition for popular affection would play in building, consensually, new ties and loyalties between citizens and the national government, *The Federalist* left many of the more concrete benefits of competitive federalism undeveloped. As the ratification debates rolled forward, the case for federal-state judicial competition accreted new defenses.

Some of those defenses anticipated the “empowerment model” of litigant choice: Many thought litigants’ freedom to “take their remedy in which line of courts they pleased,” as Oliver Ellsworth put it,⁶⁴ would not only reduce conflict between state and federal courts but, at the same time, promote more secure protection of rights, speedier administration of justice, and impartiality across the federal and state systems.⁶⁵

The idea that interjurisdictional competition promoted better judicial administration was not new. The link between competition and improved judicial administration had been made two decades before the ratification debates, by Adam Smith, writing about the overlapping jurisdiction of the King’s Bench, the Court of Common Pleas, and the Exchequer: “The present admirable constitution of the [royal] courts of justice in England,” he wrote in *The Wealth of Nations*, “was, perhaps, originally in a great measure” a result of the parties’ freedom to choose “before what court they would . . . have their cause tried,” which led each court “by superior dispatch and impartiality[] to draw to itself as many causes as it could.”⁶⁶

While *The Wealth of Nations* was widely read in the colonies,⁶⁷ and while some Framers were probably familiar with Smith’s arguments about the virtues of judicial competition,⁶⁸ there is no smoking-gun evidence it influenced the

64. Oliver Ellsworth to Richard Law (Aug. 4, 1789), *reprinted in* 4 DHSC at 495 (suggesting that leaving it “optional with the parties entitled to federal Jurisdiction, where the causes are of considerable magnitude, to take their remedy in which line of courts they pleased” was less calculated to hurt state courts’ “feelings and their influence”).

65. *Id.*

66. 2 ADAM SMITH, AN ENQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 720 (R.H. Campbell & A.S. Skinner eds., Liberty Fund 1981).

67. For discussion of the influence of Smith on the colonies and the Framers in particular, see Samuel Fleischacker, *Adam Smith’s Reception among the American Founders, 1776-1790*, 70 WM. & MARY Q. 897, 897 (2002) (“[T]he American founders were among the earliest readers of Smith’s *Wealth of Nations*, and their readings constitute a significant episode in the history of the book’s reception.”); David Prindle, *The Invisible Hand of James Madison*, 15 CONST. POL. ECON. 223, 231 (2004) (tracing Madison’s exposure to Smith and arguing his writings in the *Federalist* reflect the influence of Smith’s idea that “competition between self-interested individuals, groups, and institutions, if intelligently structured, can produce the public good”).

68. See Fleischacker, *supra* note 67, at 897 (noting “there is good evidence that many

Framers' design of the federal judiciary. Even so, parallel invisible-hand-type arguments for judicial competition were part of the standard framing-era repertoire of arguments for judicial concurrency, particularly during ratification debates and debates over the first judiciary acts: "A choice of jurisdictions," argued the Federalist pamphleteer Aristides, is a "valuable right" because it allows litigants to opt for fora with superior reputations for "speedy administration of justice" and impartiality.⁶⁹ If, in turn, state courts lose business to federal courts due to their superior efficiency or impartiality, states have a remedy, suggested Edmund Randolph at the Virginia Convention: reform. "Remove the procrastination of justice, make debts speedily payable," said Randolph, "and the evil" threatened to state courts "goes away."⁷⁰ Together, choice and competition would spur both federal and state courts to burnish their reputations for justice and impartiality, by honing their administration of justice.

Yet, concurrency could also be defended in another, different way: not as a vehicle for promoting better administration of justice or strengthening the legitimacy of the federal government, but as a protection for states' share of the litigation market. Antifederalists feared, to the point of paranoia, that the new federal government would "absorb and annihilate" the states or "at best, turn them into . . . feeble Corporations."⁷¹ No institution of the new federal government provoked quite as much hostility among Antifederalists as the proposed new judiciary.⁷² And few features of the new federal judiciary

of the founders, including Jefferson, Madison, and Wilson" were reading Smith's work during the framing era); Prindle, *supra* note 67, at 231 (noting that "[t]here is no doubt that Madison was familiar with *The Wealth of Nations*," given that he studied Smith's works at Princeton and recommended *The Wealth of Nations* for inclusion in the founding collection of the national library); *id.* (noting "Madison never acknowledged a debt to Smith in the formation of his larger conceptions of political design," but suggesting "[t]his reticence is not surprising, for it was considered presumptuous during the era to list one's intellectual influences"). For one pamphlet published in Philadelphia during the Constitutional Convention that explicitly cited Book 2, chapter 5 of *The Wealth of Nations*, in which Smith discusses judicial design, see "A Foreign Spectator" (Nicholas Collin), *An Essay on the Means of Promoting Federal Sentiments in the United States*, PHILA. INQUIRER (Sept. 1787), reprinted in FRIENDS OF THE CONSTITUTION: WRITINGS OF THE "OTHER" FEDERALISTS, 1787-88 (Colleen A. Sheehan & Gary L. McDowell eds., 1999).

69. "Aristides," *supra* note 61, at 238 (a "choice of jurisdictions has been ever esteemed a valuable right" because it gives "every assurance to the general government, of a faithful execution of its laws, and [] give[s] citizens, states, and foreigners, an assurance of the impartial administration of justice"); *id.* at 240 (suggesting parties will opt for federal court if it provides "a more speedy administration of justice").

70. 3 ELLIOT'S DEBATES, *supra* note 63, at 575 (Edmund Randolph).

71. "Curtius" in AUGUSTA CHRON. (May 28, 1791), reprinted in 4 DHSC at 559.

72. Herbert J. Storing, *What the Anti-Federalists Were For*, in 1 THE COMPLETE ANTI-FEDERALIST 50 (Herbert J. Storing ed., 1981) ("In the Constitutional provisions for the judiciary . . . the Anti-Federalists thought they saw the tracks of a consolidating aristocracy."). State courts also resented the expansion of federal jurisdiction. See Edmund

provoked as much suspicion as federal courts' power to interpret the scope of their own jurisdiction. Statutory divisions between the jurisdiction of federal and state courts would necessarily be imprecise,⁷³ and Antifederalists feared that federal courts would use creative fictions and expansive interpretations of Congress's imprecise jurisdictional grants to pull away cases from state courts, "swallow[ing] by degrees all these State Judiciaries."⁷⁴

Rather than apportion state and federal power legislatively, through static and impermeable jurisdictional divisions that federal courts might manipulate to their advantage, concurrency could ensure that the balance of power between competing judiciaries would, as one critic put it, teeter back and forth dynamically as individual plaintiffs "shift for themselves" in a system of "contending" fora.⁷⁵ No matter, then, if federal courts expand their jurisdiction through fictions and expansive interpretations of federal jurisdictional statutes: litigants would retain a choice to opt for local over federal fora. In effect, if concurrency, competition, and choice offered Federalists an opportunity to break down citizens' exclusive loyalty to the states, it also offered Antifederalists an all-important hedge against the specter of federal judicial consolidation. Regardless of how expansively federal courts interpreted the scope of their jurisdiction, it locked federal and state courts in a perpetual, shifting, never finished contest for business.

Although much of *The Federalist* emphasized federal-state competition as a vehicle for empowering citizens and bolstering their ties with the national government, it also gestured to this limiting rationale for concurrency, too. "Concurrency," emphasized Hamilton, avoids "an entire subordination of the states to the Union."⁷⁶ And Hamilton took special care to emphasize that states

Randolph to George Washington, *supra* note 63, at 584 (noting a major source of resistance to the new federal judiciary was state judges' "jealousy" of infringements on their authority).

73. The most famous and sustained argument in this regard is that of "Brutus." *See, e.g.*, XI Essays of Brutus (January, 31 1788), in 2 THE COMPLETE ANTI-FEDERALIST 420 (Herbert J. Storing, ed. 1981) ("That the judicial power of the United States, will lean strongly in favour of the general government, and will give such an explanation to the constitution, as will favour an extension of its jurisdiction"); *id.* at 421 ("Every extension of the power of the general legislature, as well as of the judicial powers, will increase the powers of the courts; and the dignity and importance of the judges, will be in proportion to the extent and magnitude of the powers they exercise"); *id.* at 422 (citing English royal courts' extension of their own jurisdiction through legal fictions, and noting "[w]hen the courts will have before them the precedent of a court which extended its jurisdiction in opposition to an act of a legislature, is it not to be expected that they will extend theirs . . . ?").

74. William Maclay, Diary Entry (July 17, 1789), reprinted in 4 DHSC at 473 ("The Constitution is meant to swallow up all the State Constitutions by degrees and this [the judiciary act] to Swallow by degrees all the State Judiciaries.").

75. 3 ELLIOT'S DEBATES, *supra* note 63, at 563 (William Grayson) (characterizing, and criticizing, the system of concurrency).

76. *See* THE FEDERALIST NO. 34, at 230 (Alexander Hamilton) (Isaac Kramnick ed.,

would retain inherent advantages in the competition that concurrency fostered. Because people's "affections are commonly weak in proportion to the distance or diffusiveness of the object," he wrote, people prefer what is local and familiar to what is distant and new.⁷⁷ "The first and most natural attachment of the People will be to the government of their respective states," Madison added, since, "[w]ith the affairs of these, the people will be more minutely and familiarly conversant."⁷⁸ Indeed, said Hamilton in *The Federalist* No. 17, local familiarity with and partiality toward state courts was "the one transcendent advantage belonging to the province of the State governments."⁷⁹

In essence, strong local ties and familiar local procedures would yield heterogeneous forum preferences among vast numbers of individual plaintiffs who were free to choose where to "take their remedy."⁸⁰ As a result, federal courts' power might wax to a degree, and for a time, but that power would remain unstable, under constant competitive pressure. The federal judiciary might succeed in earning the federal government a share of the people's affection, but it would never swallow state courts' share of the concurrent field entirely.

3. *The Ascendancy of Concurrency as a Competitive Restraint on Federal Courts*

Viewing framing-era defenses of judicial concurrency in the abstract leaves the distinct impression that concurrency was an early example of incompletely theorized agreement in the law: concurrency survived because different Framers valued concurrency for different reasons—some because they saw

1987) (characterizing concurrency as a pragmatic compromise between a "sacrifice of the great interests of the Union to the power of the individual States," on the one hand, and "an entire subordination" of states to the Union, on the other). Hamilton made this point in the context of explaining concurrent state and federal taxation, but it obviously acknowledges an attractive selling point for all of the different types of concurrencies between states and the different branches of the federal government. *See also* LACROIX, *supra* note 49, at 192 (noting that while in the 1760s and 1770s, when the focus was on independence from the crown, concurrent jurisdiction between colonial legislatures and Parliament had been viewed by colonists as a threat, "in the world of 1787, where complete union or consolidation appeared to be a possibility, retaining concurrent jurisdiction might reasonably be construed as a victory for the states").

77. THE FEDERALIST NO. 17, *supra* note 59, at 157; Pettys, *supra* note 49, at 340 (In the Framers' view, "[t]he states would enjoy tremendous popular support, after all . . . because people tend to favor that which is local.").

78. THE FEDERALIST NO. 46, at 297-98 (James Madison) (Isaac Kramnick ed., 1987).

79. THE FEDERALIST NO. 17, *supra* note 59, at 157 ("There is one transcendent advantage belonging to the province of the State governments . . . the ordinary administration of criminal and civil justice. This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attractiveness.").

80. Ellsworth, *supra* note 64, at 4 DHSC at 495.

concurrency as a way to empower litigants, others because they anticipated litigants' ability to choose between state and federal fora would protect states. Yet, a closer look underscores that the limiting model of concurrency quickly dominated as the first Congresses turned to implement Article III. The empowerment model of concurrency, in effect, played an important role in the early intellectual history of concurrency, but it never mustered enough support to decisively shape the early infrastructure of judicial federalism.

The historical record is particularly misleading if examination is confined to the ratification debates. During those debates, proponents of a new inferior federal court system had the luxury of appealing to both models of concurrency in an attempt to win the support of nationalists while assuaging the fears of Antifederalists. By the time it came to actually erecting a system of federal courts, hard choices had to be made. An empowerment model of concurrency favored more expansive grants of federal jurisdiction; broader opportunities for defendants to remove cases from state to federal court; easy access to federal tribunals; and sufficient resources to ensure speedy resolution of federal lawsuits. A limited tribunals model favored structuring choice in a way that would help states retain cases—one that limited defendants' ability to veto plaintiffs' choice of a state forum, that reduced federal incentives to poach cases from state courts, and that made federal courts less, not more, accessible.

Even before the ratification debates had started, the empowerment model had suffered a setback of sorts. Early accounts of the competition between the English royal courts, like Adam Smith's, had emphasized the role that court *fees* had played in driving the royal courts to "compete" for litigants.⁸¹ Article III's compensation provisions adopted a salary rather than a fee-based compensation for Article III judges.⁸² In doing so, it reinforced a limiting rather than an empowering system of concurrent jurisdictional competition. States, some of which embraced fee-based compensation,⁸³ would compete *for* federal business. But federal courts, as James Pfander observes, would be "encourage[d] . . . to stay within the boundaries of Article III, rather than competing for business with one another or with the state courts."⁸⁴

After ratification, the Framers turned to implementing Article III. Once

81. See 2 SMITH, *supra* note 66, at 720 (identifying fee-based compensation as one of the important drivers of jurisdictional competition in the royal court system).

82. Article III provides that Article III judges shall receive "at stated Times . . . a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1. For a careful exegesis of the text of Article III's compensation system and the history behind it, see James Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 MICH. L. REV. 1 (2008).

83. *Id.* at 13 (noting that despite a founding era hostility to fee-based compensation, "[s]tates did not entirely foreclose the payment of fees to judges" and "some states continued to permit fee payments to superior court judges well into the nineteenth century").

84. *Id.* at 5.

hard choices had to be made about the actual design of the inferior federal court system, though, many Federalists, like Edmund Randolph, William Paterson, and Fisher Ames, balked at the concurrency the Federalists had advertised during the ratification debates. Fearing it would weaken federal courts, they would have enacted, were it feasible, a strict system of dual sovereignty with sharp divisions between areas of exclusive federal and state subject matter jurisdiction, particularly with respect to federal questions.⁸⁵ At the same time, as the creation of lower federal courts loomed as a likely possibility, concurrency, as Alison LaCroix notes, began to be viewed by Antifederalists “as a victory for states” and a hedge against a total “consolidation” of federal power over the cases and controversies enumerated in Article III.⁸⁶

The result was that, in 1789, if the concurrency model of federal judicial power succeeded, it would succeed less as an affirmative, positive vision of federalism embraced by the nationalizing Federalists, than as a compromise forced on Federalists out of solicitude for the Antifederalists’ concern for state sovereignty. And, indeed, the first Judiciary Act’s endorsement of concurrency came with a strong pro-state sovereignty stamp. With a few narrow exceptions, the act explicitly conferred concurrent, not exclusive, jurisdiction on the new federal courts. But, along the lines of the limited tribunals model of litigant choice, it provided limited mechanisms for removal of state-filed claims, ensuring that a plaintiff’s decision to seek relief in state court would be final.⁸⁷

Rather than structure the lower federal courts in a way that ensured easy access to a federal forum, the act reinforced protection for states by making litigation in federal courts inconvenient for litigants, reinforcing litigants’ natural preference for familiar local courts. It did so by situating federal district courts in metropolitan centers (at a distance from many litigants), limiting local plaintiffs’ access to federal courts geographically (no doubt, with Hamilton’s observation that popular affection is weaker “in proportion to the distance and

85. Letter from Fisher Ames to John Lowell (July 28, 1789), *reprinted in* 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS (Charlene Bangs Bickford & Kenneth R. Bowling eds., 2004) (suggesting that entrusting federal questions to state courts “is delivering the Govt. bound hand and foot to its enemies to be buffeted”). Even Madison, privately, seemed to have qualms about the system erected. Letter from James Madison to Samuel Johnston (July 31, 1789), *reprinted in* 4 DHSC 491 (noting the act is “pregnant with difficulties . . . being in its own nature peculiarly complicated & embarrassing . . . , [T]he most that can be said in its favor is that it is the first essay, and in practice will be surely an experiment”).

86. *Cf.* LACROIX, *supra* note 49, at 192 (noting that “perhaps in the world of 1787, where complete union or consolidation appeared to be a possibility, retaining concurrent jurisdiction might reasonably be construed as a victory for states”); *see also id.* at 210 (noting that, for opponents of Federalists in the 1790s, “concurrence was not a bone to be thrown—or not—to the cowering states at the pleasure of the mighty federal government, but quite the opposite: a measure of goodwill on the part of the states as they shared a measure of their plenary power, their sovereignty, with the general government”).

87. Judiciary Act of 1789 §§ 9, 11-12.

diffusiveness of the object” firmly in mind).⁸⁸ It did authorize circuit courts sharing concurrent jurisdiction in civil cases over a threshold amount in controversy; and these courts alternated between fixed locations in each circuit in an attempt to bring federal justice closer to local communities.⁸⁹ But the Act authorized a limited number of circuit judges, leading to clogged circuit dockets and delay throughout the 1790s.⁹⁰ The result was a federal judiciary that could compete with local courts for business—but, thanks to geographic limits on litigants’ access to federal district courts and understaffing of the federal circuit courts, those courts competed with local courts with one hand tied behind their backs.

As the decade wore on, proponents of a strong national judiciary were increasingly on the defensive. In 1793, as a belt-and-suspenders protection for concurrency as a check against federal consolidation, Congress passed the Anti-Injunction Act, which, in its original version, flatly barred any federal injunctions against parallel proceedings in state court.⁹¹ Head on attacks on concurrency—like Edmund Randolph’s 1790 proposal to vest federal courts with exclusive jurisdiction over claims arising under federal law and to expand federal removal jurisdiction⁹²—died a quick and silent death.⁹³ And more indirect attacks on the state-protective aspects of the system of concurrency, like the Federalists’ controversial expansion of federal jurisdiction in the

88. Judiciary Act of 1789 § 3; *see also supra* note 77 and accompanying text.

89. Judiciary Act of 1789 § 5. *See* Maeva Marcus, 4 DHSC at 28 (noting the circuit-riding system, “under which Supreme Court justices were required to roam the country holding circuit courts,” “promote[d] the popularity of the Judiciary Act in the states”).

90. Complaints about the delay and inconvenience of suing in federal court, and the resulting loss in judicial business to states, pervaded discussion of the Federalists’ judicial reform proposals. *See* Robert Goodloe Harper to his Constituents (May 15, 1800), *reprinted in* 4 DHSC 651 (noting the delay and inconvenience associated with suing in federal court had deterred people from “prosecuting offenders against them” in federal court); Robert Goodloe Harper to his Constituents (Feb. 26, 1801), *reprinted in* 4 DHSC 715 (noting circuit-riding led to “long and frequent journies” and “accidents” that would prevent the judges’ attendance, leading to “a great delay of business, and much loss and inconvenience to the suitors jurors and witnesses”); *id.* at 717 (arguing that judicial reform has “received a most preserving and violent opposition from those whose main object . . . is[] to keep the federal government as feeble, and dependent on the state governments, as possible”); Archibald Henderson to his Constituents (Feb. 28, 1801), *reprinted in* 4 DHSC 719 (under the 1789 system, “some of the districts were so large as to render it very inconvenient and expensive for suitors, jurors, &c. to attend the courts”).

91. Act of March 2, 1793, ch. 22 § 55, 1 Stat. 334.

92. Edmund Randolph, Report of the Attorney General (Dec. 31, 1790), *reprinted in* 4 DHSC 127. *See also* Maeva Marcus, *reprinted in* 4 DHSC 122-23 (noting that Randolph’s “central premise” was that federal and state jurisdiction should be “completely separate”), *quoted in* LACROIX, *supra* note 49, at 194.

93. Letter from Caleb Strong to David Sewall (Jan. 17, 1791), *reprinted in* 4 DHSC 550 (noting “there is no probability that it will be acted upon this Session”).

Judiciary Act of 1801, had only brief-lived success.⁹⁴ These failures underscored that, by the beginning of the nineteenth century, the value of concurrency, competition, and choice *as a hedge against federal consolidation* had become an entrenched underpinning of federal judicial design.⁹⁵

C. *The Second Building Block: Connecting Concurrency, Competition and Separated Powers in the Law of Federal Jurisdiction*

The last section showed that the first Congresses converged on one of the basic tenets of the limited tribunals model: jurisdictional competition, enabled by concurrency, as a check against federal judicial consolidation. The limited tribunals model, however, also has a separation of powers component. It specifies that fidelity to the logic of checks and balances puts Congress in charge of decisions to dilute or displace that competition. As a corollary, federal courts ought not adopt rules that erect barriers to state competition absent clear approval from Congress.

Since Reconstruction, federal courts have braked the expansion of federal jurisdiction by interpreting their authority in ways that protect states' ability to compete for cases, until Congress clearly decides otherwise.⁹⁶ The connection between these interpretive moves and separation-of-powers logic of checks and balances is suggested most directly at the beginning of this line of cases, in an 1880 dissenting opinion by Justice Samuel Miller. Below, I start by reviewing that dissent and then show how jurisdictional doctrine, in its broad outlines, has developed consistently with it in a way that coheres around the limited tribunals model.

94. Alison LaCroix provides the leading discussion of the debate over federalism surrounding the passage of the Judiciary Act of 1801, which granted general federal question jurisdiction and eased removal to state courts along the lines of the empowerment model of concurrency. *See* LACROIX, *supra* note 49, at 201-13. As LaCroix notes, some of the subtext of the Act was the Federalists' hostility to concurrency. The Act itself did not specify that its grant of federal jurisdiction was concurrent. *Id.* at 209 (noting the only mention of concurrence in the 1801 Act is with respect to concurrent jurisdiction of district and circuit courts over bankruptcy proceedings). And while during debate over the Act and earlier versions, such as the "Harper bill," Robert Goodloe Harper contended the grant of federal question jurisdiction would be interpreted against a presumption in favor of concurrency, *see* Federal Gazette (Jan. 5, 1801), *reprinted in* 4 DHSC at 666 (Rep. Harper) (noting that federal question jurisdiction was "coextensive with the states, all of any of the courts having cognizance"), many of its supporters likely intended to leave the issue of concurrency strategically ambiguous in the hope the federal judiciary would interpret its grant of federal question jurisdiction in favor of exclusivity.

95. LACROIX, *supra* note 49, at 212 ("the election of 1800 and the ensuing repeal of the 1801 act" reaffirmed "the type of concurrence and overlap that had characterized the system set up by the 1789 act").

96. *See supra* Part II.B.2.

1. *Justice Miller's Theory*

After the Civil War, the empowerment model of litigant choice seemed to get a second lease on life. In a series of jurisdictional enactments culminating in the Jurisdiction and Removal Act of 1875,⁹⁷ the Reconstruction Congress authorized broad original and removal jurisdiction over federal questions for the first time since 1801. Federal courts, at first, interpreted these new jurisdictional grants expansively. The result was a regime that is hard to distinguish from Chemerinsky's empowerment model: Federal courts exercised jurisdiction over cases in which federal rights were raised either as a basis for relief or as a defense.⁹⁸ Removal jurisdiction obtained as soon as it became clear from the pleadings (including the answer, as well as the complaint) that a federal question would figure in the case.⁹⁹ When this was so, either plaintiffs or defendants could remove to federal court.¹⁰⁰

The decade that followed was the incubation period of the *Lochner* era: armed with aggressive new interpretations of the due process and equal protection clauses of the Fourteenth Amendment, litigants advanced a host of new substantive-due-process-based defenses to federal and state economic regulations.¹⁰¹ The result: "an enormous flood of constitutional litigation" in cases involving corporations, who systematically relied on these constitutional defenses to remove state-filed claims into federal court.¹⁰² The exodus threatened to massively augment federal power at the expense of state courts.

The flood troubled a faction of the Supreme Court that included Justice Samuel Miller. Miller is most famous for his opinion in *The Slaughter-House Cases* adopting a narrow interpretation of the Fourteenth Amendment's Privileges and Immunities Clause.¹⁰³ But in *Railroad Co. v. Mississippi*, an early federal question removal case, Justice Miller also articulated a basis for

97. See Act of Mar. 3, 1875, ch. 137, § 2, 18 Stat. 470, 470.

98. *Franchise Tax Bd. v. Laborers Vacation Trust*, 463 U.S. 1, 10 n.9 (1983).

99. Michael Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 728 n.59 (1986) (noting that under the 1875 Act, "[a] plaintiff merely anticipating a federal defense could not seek federal jurisdiction as an original matter, but either the plaintiff or defendant could remove from state court after the answer showed that the defense raised some issue of federal law").

100. See 18 Stat. 470-71 (authorizing removal by "either party").

101. See, e.g., Collins, *supra* note 99, at 728 n.59 ("although the due process clause of the fourteenth amendment had only recently been given short shrift by a five-four Court in the *Slaughter-House Cases*, lawyers were . . . undeterred from pressing their due process arguments against state regulatory action," and by the turn of the twentieth century, the Due Process Clause overtook the Contract Clause as a basis for challenging state regulatory action).

102. *Id.* at 728.

103. *Butchers' Benevolent Ass'n of New Orleans v. Crescent City Live-Stock Landing & Slaughter-House Co.* (The *Slaughter-House Cases*), 83 U.S. (16 Wall.) 36 (1873).

restraining interpretations of the new grants of federal jurisdiction, in a way that laid the seeds for later jurisdictional developments, including the well-pleaded complaint rule.¹⁰⁴ His dissent is of special interest because he implicitly recast the Framers' conception of concurrency as a default setting, from which only Congress can depart, in an opinion that appealed to principles of checks and balances.

Railroad Co. v. Mississippi involved an action by the State of Mississippi against the New Orleans, Mobile & Chattanooga Railroad Co. seeking to have a bridge that the railroad had erected declared a nuisance and torn down.¹⁰⁵ After filing its answer, the railroad removed the case to federal court.¹⁰⁶ The Court held that its federal defense was sufficient to confer federal removal jurisdiction under the 1875 version of the federal removal statute, but Justice Miller dissented. He wrote:

“It is always a matter of delicacy,” he wrote, “when a cause of which a court has undoubted jurisdiction is transferred, at the instance of one party, to another court of concurrent jurisdiction. It is especially so when the transfer is to be made to a federal from a state court, without regard to the consent of the latter, and against the objection of the other party. In such a case the right of removal should be made very clear on the application for that purpose.”¹⁰⁷

The key points in Justice Miller's dissent—that displacement of states' jurisdiction is a “matter of delicacy,” and that the “right” to displace another litigant's choice of a state forum over her “objection” ought to be “very clear”—can be viewed as an appeal to principles of comity. Yet, viewed in context, his emphasis on protecting plaintiffs' *choice* of a state forum pointed to a larger idea. The Judiciary Act of 1875's removal provisions had installed corporate defendants as gate-keepers over plaintiffs' access to state court. Because corporate defendants had turned out to have a strong preference for a federal forum, the 1875 Act had reshaped competition between federal and state courts in federal courts' favor. The inevitable result—a massive expansion of federal courts' share of the litigation market. Against that backdrop, protecting plaintiffs' choice of forum was essential to preserving concurrency's competitive check on federal courts' share of the business of dispute resolution.

By suggesting that the decision to displace plaintiffs' choice of a state forum must be the “very clear” result of the political process, Miller anticipated the role clear statement rules play in protecting Congress's role as the regulator of federal judicial power. Combining this and his implicit concern for preserving state competition as a check on federal courts suggests a bold idea: the framing era model of concurrency (as a mechanism harnessing

104. *R.R. Co. v. Mississippi*, 102 U.S. 135, 142 (1880) (Miller, J., dissenting).

105. *Id.* at 136-37.

106. *Id.* at 138.

107. *Id.* at 142 (Miller, J., dissenting).

jurisdictional competition to restrain federal courts' share of judicial business) is a default against which jurisdictional grants ought to be interpreted. That idea is consistent with the logic of checks and balances that underpins the Constitution's grant of authority over inferior federal courts to Congress. Once concurrency and state competition are appreciated in the Framers' terms—as a check against federal judicial consolidation—it follows from Congress's role in our system of checks and balances that federal courts should be cautious about diluting or displacing the restraining force of state competition without clear direction from Congress.

Of course, it not clear that Miller had anything like it firmly in mind when he wrote his dissent in *Railroad Co. v. Mississippi*.¹⁰⁸ But the idea is certainly consistent with what we know about Justice Miller's judicial philosophy. As “[t]he beau ideal of advocates of judicial restraint,”¹⁰⁹ he was keenly concerned with the idea that federal courts were a branch entrusted with strictly limited powers subject to congressional control.¹¹⁰ “Perhaps above all else,” Miller was concerned with preserving the federal-state balance in the wake of the Civil War Amendments;¹¹¹ he wrote that the Court must “keep in view the principles of our complex form of State and Federal government, and . . . disturb the distribution of powers among them as little as [is] consistent with the wisdom acquired by a sorrowful experience.”¹¹² And he was particularly concerned that the “dramatic increase in federal-court litigation” deluging the federal judicial system in the wake of the Civil War Amendments had upset the federal-state balance.¹¹³ Even if he did not fully articulate the theory of the limited tribunals model of forum choice, he seemed to intuit it, and there is every reason to think he would have approved it.

108. *Id.*

109. HOWARD JAY GRAHAM, *EVERYMAN'S CONSTITUTION* 134 (1968).

110. *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 639 (1869) (Miller, J.) (insisting on the importance of respect for the “line which circumscribes the judicial department”) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819)); Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 *YALE L.J.* 643, 693-94 (2000) (discussing Miller's philosophy of judicial restraint).

111. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 82 (declaring it is the Court's duty to “hold with an even and steady hand, the balance between State and Federal power”); Newsom, *supra* note 110, at 688.

112. GRAHAM, *supra* note 109, at 296.

113. Newsom, *supra* note 110, at 703 (“As biographer Charles Fairman has noted, ‘always uppermost in [Justice Miller's] mind’ was the dramatic increase in federal-court litigation spawned by the Civil War”) (quoting CHARLES FAIRMAN, *RECONSTRUCTION AND REUNION: 1864-88*, at 410).

2. *Miller's Legacy*

Because Justice Miller's dissent influenced later developments in federal jurisdictional doctrine,¹¹⁴ it is not surprising that the idea suggested in his dissent goes a long way toward describing major features of jurisdictional doctrine today. The presumption in favor concurrency, the well-pleaded complaint rule, the presumption against removal, and a cluster of diversity jurisdiction rules that reflect the "master of the complaint" doctrine all implicitly recognize Congress's primacy as the regulator of states' competitive check on federal courts.

The presumption in favor of concurrency makes federal and state courts competitors in a market for dispute resolution. Other key doctrines—such as the presumption against removal and the well pleaded complaint rule—affect the degree to which state competition limits federal courts' share of that market. These do so by regulating how the power to select a forum is allocated between plaintiffs and defendants.

In a world in which plaintiffs and defendants are equally likely to prefer state over federal court, allocating the final say over forum choices to either would not affect federal and state courts' relative share of the dispute resolution market. However, if plaintiffs and defendants tend to have different forum preferences, things are different. If the group that tends to prefer federal court controls the forum, then state competition functions as a lesser limit on federal courts' market share. If the group that tends to prefer a state forum is given that control, then competition operates as a greater limit on federal courts' market share. When plaintiffs and defendants tend to exhibit different forum preferences, then, reinforcing Congress's control over the limits on federal courts requires interpreting unclear rules in favor of allocating a greater share of forum selection power to the group with the greater preference for state-level litigation.

Given historical patterns, that means allocating more forum selection power to plaintiffs. It's a commonplace observation that institutional parties are more likely to be civil defendants and are more likely to prefer litigating in federal court, while plaintiffs tend to have a stronger preference for litigating at the state level, which empirical studies tend to confirm.¹¹⁵ This preference is

114. Collins, *supra* note 99, at 726 & n.53 (noting Miller's arguments "foreshadowed" later cases adopting the well-pleaded complaint rule, which he characterizes as a "revival" of Miller's views).

115. See Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 604 (1998) (noting corporate defendants heavily populate removed cases); Victor E. Flango, *Litigant Choice Between State and Federal Courts*, 46 S.C. L. REV. 961 (1995) (reviewing empirical evidence suggesting out of state corporate parties have stronger preferences for federal court, although also noting that for many corporate litigants, federal forum selection is driven more by fear of local bias than fear of bias based on the party's

not a modern phenomenon: It may have been even more pronounced in the pre-*Erie* era, when the choice between federal and state court had substantive consequences.¹¹⁶ Even after *Erie*, though, the preference has persisted, reflecting a defense-side folk wisdom that federal courts are more likely to be business-friendly in their interpretation of state and federal law and in their procedural rulings.¹¹⁷

Against that pattern, the limited tribunals model, accordingly, requires allocating more power over forum selection to plaintiffs. This is what federal courts have done. First, federal courts have read various additional restrictions into the removal statutes based on the general principle that removal rights should be “construed narrowly.”¹¹⁸ These bar diversity-based removal as a result of the judicial dismissal of nondiverse parties or other involuntary changes to the suit. But they permit diversity-based removal if plaintiffs voluntarily change the party structure or amend the demand for relief in a way that satisfies the section 1332 jurisdictional requirements.¹¹⁹ Federal courts also require defendants’ unanimous consent to removal (a requirement that, until recently, was not clearly dictated by the text of section 1441), making removal

corporate status); Neal Miller, *An Empirical Study of Forum Choices in Removal Cases under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 414, 424 (1992) (collecting data showing corporate counsel perceive bias against their clients and noting “defense attorneys’ forum preference for federal court is based on expectations of lesser hostility there toward business litigants (80% to 85% of defendants are businesses),” “fear of anti-client bias in some local state courts, and federal judges’ greater judicial capabilities and willingness to act as a check upon jury bias and sympathies”); *id.* at 414 (“[A]mong plaintiff attorneys, familiarity with state court was the single most frequently cited reason for filing decisions, closely followed by the cost of litigation. Among outcome determinative reasons, more sympathetic or favorable juries were the most important factor. Thus, plaintiff attorneys pointed to the expectation of a higher verdict or settlement in state court. Almost as important to plaintiff attorneys was the combination of (1) local bias against defendants’ out-of-state or business status, and (2) favorable bias toward local, individual plaintiffs.”).

116. See *infra* note 143 and accompanying text.

117. See Flango, *supra* note 115, at 968 (noting that while data suggests not all attorneys take the corporate status of a party into account when picking a forum, “[a]ttorneys who do regard corporate status as an important consideration in forum selection tend to favor federal court if their client is a corporation and state court if their opponent is a corporation. One Texas attorney noted that ‘federal judges are mainly Reagan appointees very conservative and willing to violate the law to help establishment-type defendants.’”).

118. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941). See also *Barbour v. Int’l Union*, 640 F.3d 599, 629 (4th Cir. 2011) (en banc) (noting federal courts’ “obligation to construe removal jurisdiction strictly because of the ‘significant federalism concerns’ implicated by it”).

119. See, e.g., *Great N. Ry. Co. v. Alexander*, 246 U.S. 276 (1918) (“conversion [of a non-removable into a removable case] can only be accomplished by the voluntary amendment of his pleadings by the plaintiff or, where the case is not removable because of joinder of defendants, by the voluntary dismissal or nonsuit by him of a party or of parties defendant.”).

more difficult in cases against multiple defendants.¹²⁰ In addition, by imposing a particularly high burden on removing defendants seeking to show that a demand for relief below the amount in controversy is in bad faith or erroneous, courts have allowed plaintiffs to defeat removal by limiting their demand for relief.¹²¹ Together, these rules reinforce plaintiffs' ability to keep their claims in state court through their control over the suit's party structure and the relief demanded.

These constructions give plaintiffs power to defeat *diversity*-based removal. Plaintiffs' power to avoid federal question-based removal is, by contrast, conferred through the well-pleaded complaint rule.¹²² By limiting federal question jurisdiction to questions injected into the case through the elements of plaintiff's cause of action, but excluding jurisdiction over federal questions injected into the case through affirmative defenses or counterclaims, the well-pleaded complaint rule again shifts control over forum selection away

120. 28 U.S.C. § 1441(a) authorizes removal by "defendant or defendants." Although the text might be read to authorize removal by one or more defendants, the Court has narrowly construed it to require all defendants to join in the removal petition. *See, e.g., Chi., Rock Island & Pac. Ry. v. Martin*, 178 U.S. 245, 248 (1900). Congress recently codified this longstanding construction in the Jurisdiction and Venue Clarification Act of 2011. Pub. L. No. 112-63, § 103(b)(3)(B) (codified at 28 U.S.C. § 1446(b)(2)(A)).

121. Thus, it is often said that the defendant has a particularly high burden to show that a demand below the amount in controversy is made in bad faith or erroneous, reflecting the "qualitative difference between a device designed to invoke federal jurisdiction and one designed to avoid it." AM. LAW INS., *STUDY ON THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* (1969); *see also* 16 JAMES WM. MOORE, ET AL., *MOORE'S FEDERAL PRACTICE* § 107.14 (3d ed. 2007) ("A defendant seeking removal has a heavy burden to show that the plaintiff's express claim to an amount less than the jurisdictional minimum amount in controversy is erroneous."). Edward Purcell calls this "one of the great, if largely unspoken, social and legal compromises of the late nineteenth and early twentieth centuries. The operative rule was simple and well understood. If plaintiffs agreed to keep their claims reasonably small, they could guarantee themselves a state forum." EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958*, at 251 (1992).

122. *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908). The Court ostensibly rooted its reinterpretation of original and removal jurisdiction over federal questions in the language of Congress's 1887 jurisdictional act, which made some technical changes to the 1875 jurisdictional statute. *See Tennessee v. Union & Planters' Bank*, 152 U.S. 454, 459-64 (1894). Yet, as Michael Collins notes, the effect of the changes in the 1887 Act on federal question jurisdiction were "at best ambiguous," and, in fact, the statute's text and legislative history suggests Congress actually intended no change to the scope of jurisdiction over federal questions. *See Collins, supra* note 101, at 718-19 (noting the Court's "now-settled construction of the 1887 Act, which tied removal to the well-pleaded complaint rule, was incorrect"). For this reason, the rule in *Mottley* is better understood not as a legislative choice, but as an opportunistic judicial exploitation of congressional tinkering with its jurisdictional statutes to justify adopting a belated, narrowing construction of Congress's jurisdictional grants. *Id.* (noting the Court's opinion in *Union & Planters' Bank* "is better explained by an examination of a number of unspoken concerns that reflect its jurisdictional agenda in the post-Reconstruction era").

from the defendant to the plaintiff—this time, through her control over the theory of the case. As the Court put it in *Healy v. Sea Gull Specialty Co.*, it makes the plaintiff “the absolute master of what *jurisdiction* [s]he will appeal to” through her mastery of her complaint.¹²³

The Court’s narrow constructions of removal rights and the well-pleaded complaint rule are often explained as conceptually distinct jurisdictional doctrines: Limits on diversity-based removal are said to reflect the disfavored status of federal courts’ diversity docket.¹²⁴ The well-pleaded complaint rule is said to promote judicial economy by demarcating jurisdiction at the outset of the case;¹²⁵ or to parcel cases between federal and state courts based on their relative competencies, by focusing federal question jurisdiction on cases where federal questions are likely to predominate.¹²⁶ These explanations are not implausible. But they are unattractive, because they treat jurisdictional doctrine as a collection of ad hoc judicial policies, rather than an outgrowth of coherent principles.

The limited tribunals model of forum choice suggested in Justice Miller’s dissent, by contrast, fuses both diversity and federal question doctrines together into a coherent whole. By shifting control over the forum to plaintiffs, who have a stronger demand for state adjudication, both sets of doctrines ensure state competition against federal courts will translate into a larger check on federal courts’ share of the litigation market. In the face of unclear political commitment to dilute or displace that check, that’s the right approach: It respects Congress’s authority role in our system of checks and balances by pushing decisions that dilute states’ competitive check on federal courts back to the political process.

Of course, it is possible to imagine Congress having designed a system in which state competition was an even greater check on federal courts’ share of the adjudication market—say, by giving defendants with a preference for a state forum the power to remove federal cases to state court or by adopting rules defining corporate citizenship for diversity purposes more broadly, further narrowing corporate defendants’ access to federal court. That does not,

123. 237 U.S. 479, 480 (1915). *See also* *Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) (“Of course the party who brings a suit is master to decide what law he will rely upon and therefore does determine whether he will bring a ‘suit arising under’ the patent or other law of the United States.”).

124. Debra Lynn Bassett, *The Roots of Removal*, 77 BROOK. L. REV. 1, 34-35 (2011) (discussing policies typically associated with limits on removal, including an “apparent disfavor of diversity jurisdiction”).

125. *See* Robert Ragazzo, *Reconsidering the Artful Pleading Doctrine*, 44 HASTINGS L.J. 273, 322 (1993) (suggesting that the well-pleaded complaint rule reflects a raw “preference for state courts” in our system of limited federal jurisdiction).

126. *Id.* at 320 (suggesting the well-pleaded complaint rule allocates jurisdiction according to a proper “division of judicial business,” by focusing federal jurisdiction on cases in which federal issues “predominate”).

however, undermine the limited tribunals model. Again, that model is intended to provide a principled explanation of the core modern judicial *constructions* of Congress's jurisdictional statutes. These constructions protect states' competitiveness as much as possible within the boundaries of the choices already made by Congress.

It also bears emphasizing that the limited tribunals model is not offered as a master key that explains every one of the Court's historical constructions of the jurisdictional statutes. Federal jurisdiction doctrine is, like many old, rich bodies of law, not consistent across time.¹²⁷ The limited tribunals model does the most that reasonably can be expected of any interpretive theory in that context: It does a better job than rival theories of rationalizing essential, durable judicial doctrines—the presumption of concurrency, the well pleaded complaint rule, and the disfavored status of removal—that matter most today.¹²⁸

127. See, e.g., Burbank, *supra* note 13, at 1473 (noting that “the Supreme Court responded differently, indeed inconsistently, to the interpretive questions posed” by federal jurisdictional statutes in the late nineteenth and first half of the twentieth centuries).

128. The Court's late nineteenth century construction of the rules governing corporate citizenship for diversity purposes is undoubtedly the episode in the history of jurisdictional law most glaringly inconsistent with the limited tribunals model. As Edward Purcell points out, on balance, those early constructions expanded corporations' ability to access federal courts through removal, by limiting the number of states in which they would be deemed “citizens.” See PURCELL, LITIGATION AND INEQUALITY, *supra* note 121, at 121-26, 193, 262-91 (discussed in Burbank, *supra* note 13, at 1468-83). They are part of a larger turbulent period of push-pull between access-limiting and access-expanding constructions of federal jurisdiction in the late nineteenth and early twentieth centuries. Congress, however, ratified the basic outlines of the Court's constructions of corporate citizenship after the fact. Act of July 25, 1958, Pub. L. No. 85-554, § 2, 72 Stat. 415 (codified as amended at 28 U.S.C. § 1332(c)(1) (2011)). Thus, although this early episode is not consistent with the limited tribunals model, it also does not undermine the model, which is, again, not offered as a synthesis of every aspect of the Court's historical practice, but, rather, as an interpretation and rationalization of the way federal courts' jurisdictional constructions operate today, within the boundaries of choices already made by Congress. One can readily come up with other doctrines, historical and modern, that don't neatly fit the model. The complete preemption doctrine, for example, began its life as an ad hoc judicial relaxation of the well-pleaded complaint rule, enabling defendants to remove various state-law actions that federal courts thought implicated unusually important federal interests. However, in *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003), the Court affirmed that state causes of action are “completely preempted,” triggering removal, only when Congress has replaced plaintiffs' state remedy with an exclusive cause of action. *Id.* at 9. This holding, in conjunction with the longstanding presumption against complete preemption, puts Congress squarely in control of its future scope.

Federal courts' interpretation of the *scope* of the well-pleaded complaint rule also doesn't neatly fit the model. Justice Holmes' early formulation of the test in *American Well Works* asked whether plaintiff's complaint relied on a cause of action created by federal law. *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916). The test articulated in *Smith v. Kan. City Title & Trust Co.*, 255 U.S. 180 (1921) is broader. It asks whether the components of the plaintiff's case necessary to sustain a viable cause of action raise significant, disputed contentions of federal law. Relative to *American Well Works*, *Smith* expands the availability of a federal forum and therefore is situated further along the

D. *The Third Building Block: Erie's Anti-Forum Shopping Principle*

The limited tribunals model not only identifies Congress as the institution in control of erecting barriers to state competition. It also identifies Congress as the institution authorized to dilute states' competitive check on federal courts through what might be called judicial product differentiation—that is, the development of dispute resolution mechanisms designed to attract litigation away from state court and into federal court. In broad outlines, the doctrinal framework spawned by *Erie Railroad v. Tompkins*¹²⁹—the last building block in the progression toward the limited tribunals model—is consistent with this idea, as I explore below.

A caveat is appropriate at the outset: *Erie* is among the richest and most conceptually contested areas of federal courts law out there. A complete analysis of *Erie* through the prism of the limited tribunals model is well beyond the scope of this article. The goal here is not to suggest all of the cases in the *Erie* canon are consistent with the model, or that the *Erie* framework can be explained exclusively by the limited tribunals model. It is rather to suggest that, in its broad outlines, major features of the *Erie* framework are compatible with the model, making it an attractive candidate for unifying different bodies of law dealing with vertical forum shopping under a single set of structural principles.¹³⁰ Adopting the model, however, would in turn require some

continuum toward the empowerment model of litigant choice. Chemerinsky, *supra* note 3, at 134 (noting that the empowerment model supports federal jurisdiction whenever a disputed federal issue would decide the case). Nonetheless, *Smith*, like the complete preemption cases, makes a difference in a minuscule fraction of cases. And it is rooted in old precedents that are difficult to reconcile with the Court's repeated insistence in modern cases like *Finley* that separation of powers requires construing the scope of federal jurisdiction narrowly. *Finley v. United States*, 490 U.S. 545, 547 (1989) (reaffirming that "courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction") (citing *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93 (1807)). Finally, *Smith* does nothing to disturb the most important of feature of the well-pleaded complaint rule: its allocation of the power over the choice of a forum from defendants to plaintiffs. Under *Smith* or *American Well Works*, the defendant's removal rights depend on the issues injected into the suit by *plaintiff's* theory of the case, not those injected into the case by affirmative defenses or counterclaims; both formulations put control over forum choice in the hands of the class of litigants with the strongest demand for a state forum. In the end, like the complete preemption cases, *Smith* tinkers at the margins of a system that reflects the limited tribunals model of forum choice.

129. 304 U.S. 64 (1938).

130. Many interpretivists contend that a good interpretive account must satisfy a high threshold of minimum fit with considered practices. See Kress, *supra* note 44, at 1402-03 ("Those employing constructive interpretive methods and coherence theorists of law generally agree that the coherent reconstructed set of legal principles and norms must meet a high threshold of fit with legal doctrine and institutional practice."). No one, however, demands that an interpretive account must universally fit every feature of the areas of law, and such a goal is particularly difficult to meet if the aim is to develop principles that can conciliate different complex fields of law. See, e.g., SMITH, *supra* note 44, at 13 (noting

adjustments in each of these bodies of law, including, perhaps especially, in the *Erie* framework.¹³¹ The extent to which this is true is the subject of a future article.

1. *A Brief Overview of Erie*

Erie doctrine, as it has been elaborated over nearly eighty years, has several strands, whose ins and outs are comprehensively described elsewhere. Here, space constraints necessitate a very brief summary: *Erie* itself, of course, overturned *Swift v. Tyson*, ending a century of federal common law, in a decision that emphasized, in part, the federal government's lack of "power to declare substantive rules of common law applicable in a State."¹³² But *Erie* also justified the result in passages laced with language condemning the forum-shopping that *Swift* had precipitated.¹³³ In *Hanna v. Plumer*, the Court subsequently reified those passages into the "twin aims" test, under which federal rules of decision that do not conform to those of the forum state must be tested by "reference to the twin aims of the *Erie* rule: discouragement of forum shopping and avoidance of inequitable administration of the laws."¹³⁴ Federal rules that violate *Erie*'s twin aims must give way to contrary state practice.

Hanna, though, also qualified the applicability of *Erie*'s twin aims test. Federal procedural common-lawmaking, it affirmed, is governed by it. Thus, where judge-made federal dispute resolution rules conflict with state rules, and the conflict would promote federal-state forum shopping or result in the inequitable administration of the law, *Hanna* held that federal courts must conform to the state rules.¹³⁵ But, the Court emphasized that Federal Rules of Civil Procedure are not subject to *Erie* at all; they instead must be assessed

coherence requires only that most of the core elements of the body of law being interpreted fit, or are related to, a single principle). For an argument that coherence theorists tend, in practice, to demand only a weak or soft fit with existing legal practices, see Kress, *supra* note 44, at 1376 (arguing, with a focus on Dworkin, that coherence theorists demand a much weaker level of fit with existing practices than is often assumed, in order to give more play to normative judgments about the content of the law).

131. *See infra* note 150.

132. *Erie*, 360 U.S. at 78.

133. *Id.* at 74-75 (noting "the mischievous results of the [*Swift*] doctrine," which "made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court; and [conferred] the privilege of selecting the court in which the right should be determined . . . upon the non-citizen," making "equal protection of the law" impossible); *id.* at 76-77 (noting diversity allowed "individual citizens willing to remove from their own State and become citizens of another might avail themselves of the federal rule" resulting in "injustice and confusion").

134. 380 U.S. 460, 468 (1965).

135. *Id.* at 471 (noting that the "typical, relatively unguided *Erie* choice" is reserved for situations which are not "covered by one of the Federal Rules").

under different standards derived from the Rules Enabling Act.¹³⁶ Federal Rules enacted through the Enabling Act's rulemaking process supersede conflicting state rules, even if they induce litigants to shop for a federal forum, so long as they are within Congress's broad constitutional power to adopt, do not violate due process, the Seventh Amendment, or other constitutional norms, and are consistent with the terms of the delegation of rulemaking authority in the Enabling Act itself.¹³⁷

Since *Hanna*, the modern Court has also pushed the *Erie* framework into new areas that do not involve vertical choice of law questions. It has invoked *Erie* and *Hanna* (albeit inconsistently) as a basis against developing federal common law in federal question cases, unless federal courts' authority to do so is clearly contemplated by a federal statutory scheme.¹³⁸ And in a line of cases extending from Justice Powell's dissent in *Cannon v. University of Chicago*,¹³⁹ it has also invoked *Erie* as authority against judicial implication of new federal private rights of action—a business, Justice Scalia said in *Alexander v. Sandoval*, for “common-law courts,” not limited “federal tribunals.”¹⁴⁰

2. *Erie through the Lens of the Limited Tribunals Model*

Key features of *Erie*—its anti-forum shopping principle, *Hanna*'s qualification of that principle, and the Court's extension of *Erie*'s domain beyond the narrow domain of vertical choice of law problems in the diversity context are all compatible with the limited tribunals model. Indeed, these components of the *Erie* framework are a necessary implication of the core idea at the heart of the model: that federal courts cannot dilute or displace states' competitive check without Congress's approval.

The jurisdictional doctrines reviewed in the last part—the presumption in

136. *Id.* at 469-70 (noting that the “rule of *Erie R. Co. v. Tompkins*” does not “constitute[] the appropriate test of the validity and therefore the applicability of a Federal Rule of Civil Procedure”).

137. *Id.* at 471 (in situations covered by a Federal Rule, “the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions”).

138. *See* *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 98 (1991) (“Our cases indicate that a court should endeavor to fill the interstices of federal remedial schemes with uniform federal rules only when the scheme in question evidences a distinct need for nationwide legal standards, or when express provisions in analogous statutory schemes embody congressional policy choices readily applicable to the matter at hand. Otherwise, we have indicated that federal courts should ‘incorporate [state law] as the federal rule of decision,’ unless ‘application of [the particular] state law [in question] would frustrate specific objectives of the federal programs.’”).

139. 441 U.S. 677, 730 (1979) (Powell, J., dissenting).

140. 532 U.S. 275, 287 (2001) (contrasting “common law courts” and limited “federal tribunals”).

favor of concurrency, the well-pleaded complaint rule and related diversity doctrines—expose federal courts to competition from states and funnel decisions limiting that competition back to Congress. There are, though, ways federal courts might offset the effect of that competition in spite of these doctrines. In ordinary markets, businesses can fend off price competition, insulating or expanding their market share, through product differentiation. The same basic idea plays out in the federal-state market for adjudication. Offering modes of dispute resolution that deviate from state procedures makes federal courts attractive to classes of litigants who benefit from those deviations, which in turn can offset states' competition and entrench or expand federal courts' own share cases of controversies.

Of course, any particular change to federal rules of dispute resolution may not have any effect on federal and state courts' relative share of the market of dispute resolution. Nonconforming federal modes of dispute resolution may attract some subset of litigants but drive away others; and the demand-side effects of changes in federal modes of dispute resolution may be offset by changes at the state level.

Yet the experience with *Swift* underscored that the effects of federal-state nonconformity can be both unpredictable and dramatic. Then as now, plaintiffs preferred litigating in state court.¹⁴¹ But although jurisdictional rules reviewed in the last Part shifted control over the forum to plaintiffs, it proved easy for corporate defendants to manufacture diversity by changing their state of incorporation. The result was that *Swift*, by the early twentieth century, encouraged a dramatic flight of “tramp corporations” into federal court, precipitating a shift of business away from states reminiscent of that encountered by Justice Miller sixty years earlier.¹⁴² By the 1930s, the historian Edward Purcell notes, “foreign corporations dominated the diversity docket, and were the removing parties in the overwhelming majority of all removed diversity actions.”¹⁴³

The experience with *Swift* showed that federal-state nonconformity in their modes of federal dispute resolution can create profound turbulence in the market for adjudication, dramatically reshaping federal and state courts' share of the business of dispute resolution. And it underscored that, to fulfill its checking function, Congress accordingly must control the adoption of modes of dispute resolution with the potential to stimulate demand for a federal forum in this way. By construing bare grants of jurisdiction against the power to adopt different rules of decision from those available in the forum state (and reading the Rules of Decision Act to require broad conformity to state substantive law

141. PURCELL, *supra* note 34, at 160 (noting “[f]ew ordinary individuals sought to bring suits in federal court, and fewer still sought to do so in out-of-state federal courts”).

142. *Id.* at 64-67.

143. *Id.* at 160.

for good measure), *Erie* in turn protected Congress's ability to do so. It pushed the decision to confer the competitive advantage that flows from differentiating federal proceedings back through the checks of the political process.

Of course, the *Erie* decision was concerned with federal adoption of rules of substantive common law. Hence, standard descriptions of the domain of the *Erie* framework describe it in limited fashion: as a framework concerned about forum-shopping for substantive law, but not procedure.¹⁴⁴ Yet, the distinction between substance and procedure has proved elusive in practice. Most dispute resolution rules have features that render them rationally capable of classification as either "substantive" or "procedural."¹⁴⁵ After a fruitless, brief attempt to build a conceptual distinction between "substantive" and "procedural" rules into *Erie* framework, the Court has taken a functional turn that treats "substance" and "procedure" as labels denoting federal rules' relationship to *Erie*'s twin aims. Federal common law rules are "substantive" if they are likely to induce forum shopping and result the inequitable administration of the law (problems that, in the Court's cases, tend to blend together); procedural if these results do not follow from the federal rule's adoption.¹⁴⁶ In effect, since *Hanna*, *Erie* cases have treated the term "substantive" as little more than a label signifying a conclusion that federal dispute resolution rules are so qualitatively different from state rules that they are likely to induce forum shopping into federal court.¹⁴⁷ It is accordingly no

144. See, e.g., *Gasperti v. Ctr. for Humanities*, 518 U.S. 415, 427 (1996) ("Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law."); Kermit Roosevelt III, *Choice of Law in Federal Courts: From Erie and Klaxon to CAFA and Shady Grove*, 106 NW. U. L. REV. 1, 11 (2012) (noting that "the conventional statement of the basic rule—that federal courts exercising diversity jurisdiction apply state substantive law but federal procedure—suggests that the task is essentially one of characterization; courts must decide whether a particular issue is substantive or procedural.").

145. See, e.g., Donald L. Doernberg, *The Rules Enabling Act Decision that Added to the Confusion, but Should Not Have*, 44 AKRON L. REV. 1147, 1202 (2011) (noting "the functional inutility of the labels 'substantive' and 'procedural'"); Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 802 (2010) ("Procedure is inherently substantive . . . [and] the converse is also true"); Roosevelt, *supra* note 144, at 12 (noting that the categories "substantive" and "procedural" are "not stable and mutually exclusive categories").

146. *Hanna v. Plumer*, 380 U.S. 460, 465-67 (1965) (noting that *Guaranty Trust* "made it clear that *Erie*-type problems were not to be solved by reference to any traditional or common-sense substance-procedure distinction" but rather with reference to the policy concerns motivating the Court in *Erie*); see also Roosevelt, *supra* note 144, at 11 (noting that after *Guaranty Trust v. York*, the Court moved away from attempts to distinguish between "substance" and "procedure" in an "abstract sense," and has turned toward using the term "substance" as a label for federal rules that offend "[p]olicy *Erie*," including *Erie*'s policy against forum shopping).

147. See, e.g., *Hanna*, 380 U.S. at 467 (the "message of *York* itself is that choices between state and federal law are to be made not by application of any automatic, 'litmus paper' criterion, but rather by reference to the policies underlying the *Erie* rule").

stretch to characterize mature *Erie* doctrine as a body of law that in operation generally forbids federal courts from departing from conformity with state dispute resolution rules—whether or not those rules can be classified as substantive or procedural—when that would have the effect of making federal courts more attractive to a class of litigants, thereby inducing shopping for a federal forum.¹⁴⁸

This point is subject to the important qualification articulated in *Hanna*: federal rules approved by Congress are treated differently from those promulgated by federal courts in common law fashion.¹⁴⁹ While federal courts cannot fashion rules that induce forum shopping into federal court on their own, rules authorized by Congress are not susceptible to objections based on their propensity to induce forum shopping. As a result, in broad outlines, the *Erie* framework forbids federal courts from adopting dispute resolution rules that could make federal courts more attractive to a class of litigants *without congressional authorization*.

The limited tribunals model is consistent with the *Erie* framework, so described.¹⁵⁰ By proscribing development of common law dispute resolution

148. Put another way, understanding *Erie* through the prism of the limited tribunals model requires emphasizing what *Erie* does rather than what it says. *Erie* says it is safeguarding state substantive lawmaking authority; in practice, what *Erie* does, though, is police against adopting federal rules that vary from state rules in a way that incentivizes federal forum shopping. Thus, *Erie* mostly (although not entirely, *see infra* note 150) fits the principles of the limited tribunals model if we focus on its operation. In other words, in the terminology of interpretivist literature, the claim in support of that model requires prioritizing the interpretive criterion of fit over the criterion of transparency. *See, e.g.*, Andrew S. Gold, *A Moral Rights Theory of Private Law*, 52 WM. & MARY L. REV. 1873, 1882-84 (2011) (reviewing the role of the criteria of fit, coherence, and transparency in interpretivist theories). Again, in an effort to rationalize different complex doctrines in terms of a coherent set of principles, some interpretive values may have to give way, and that is the case here. Harmonizing *Erie*'s anti-forum shopping principle and jurisdictional doctrine requires ignoring some of *Erie*'s stated rationales and emphasizing a latent rationale that has been sporadically articulated in the jurisdictional context, *see* Parts II.B.2-3 & II.C.1 *infra*, and that fits some major features of *Erie* doctrine—a rationale embodied in the limited tribunals model.

149. *Hanna*, 380 U.S. at 471.

150. *Erie*'s inapplicability where there is no state rule on point, as well as the Court's occasional efforts to preserve a conflicting federal rule by interpreting it narrowly, however, present some important ways in which the *Erie* framework does not neatly conform to the limited tribunals model in all particulars. *See, e.g.*, Joseph P. Bauer, *Shedding Light on Shady Grove: Further Reflections on Erie Doctrine from a Conflicts Perspective*, 86 NOTRE DAME L. REV. 939, 941-42 (2011) (noting that in the first stage of *Erie* analysis, the court "must identify the nature and scope of the state and federal 'rules' that would deal with that question," and ask: "Do both of those rules in fact address and cover that question? Do they truly 'conflict,' or might they coexist, in part perhaps because the federal rule should be given a less expansive reading? If they can be harmonized—if they do not in fact clash—then the *Erie* problem largely disappears."). The logic of the model would demand strict conformity with state law, including the state's failure to adopt a rule to cover the situation, if the difference between state and federal law would make federal courts more attractive

rules that are likely to induce forum shopping, *Erie*, as interpreted in *Hanna*, conforms to the model's direction that authority to formulate dispute resolution rules stimulating litigants' demand for a federal forum must come from Congress. And *Hanna*'s holding that dispute resolution rules embodied in the Federal Rules (or federal statutes) are not subject to challenge under the twin aims test is to the same effect. In the Enabling Act, Congress self-consciously launched a uniform system of federal procedural rules that differed from those applicable in state court, with the aim of making it easier to proceed federally¹⁵¹ "[D]ivergence from state law, with the attendant consequence of forum shopping, is the inevitable (indeed, one might say the intended) result of a uniform system of federal procedure" contemplated by the Enabling Act.¹⁵² From the standpoint of the principles embodied in the limited tribunals model, then, forum shopping ought to be no objection to the Federal Rules, because Congress has deliberately made a decision to authorize a set of rules that encourage litigants to gravitate into federal court.

The limited tribunals model is also compatible with the modern Court's *Erie*-influenced implied right of action cases, which extend *Erie*'s domain beyond vertical choice of law questions in diversity cases. Consider Justice Powell's dissent in *Cannon v. University of Chicago*, which laid the groundwork for later cases adopting the presumption against implied rights of action.¹⁵³ In it, he accused the Court of expanding its "own jurisdiction" contrary to the congressional control principle by implying a private right of action in a federal statute. And, at the same time, he compared implying rights

(again, subject to Congress's power to decide otherwise, as it has in the Rules Enabling Act). Thus, taking the limited tribunals model seriously would require extending *Erie*'s domain beyond its traditional domain of conflicts between state and federal rules, to federal-state conflicts over whether to adopt a rule covering the question in the first place.

That would be a significant departure from the conventional understanding of the *Erie* framework. Again, though, this shouldn't discredit the model. When articulating principles that can move different complex bodies of law that have developed independently in the direction of global coherence, it frequently proves difficult to come up with principles that fit every feature of each doctrinal category covered by the principles. *See supra* note 130 and accompanying text (noting that interpretivists do not demand perfect fit between principles and practices). The best that can be done here is a set of principles that fit some major contours of each doctrinal compartment covered by the limited tribunals model. Once recognized, this set of principles, in turn, guides further movement within each doctrinal compartment in the direction of deeper consistency and coherence. And such movement, in the *Erie* arena, would require rethinking the notion that *Erie*'s domain is limited to cases in which a state rule positively conflicts with a competing federal rule. Exploring this point is, however, left to another article.

151. *Hanna*, 380 U.S. at 472 ("One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by getting away from local rules.").

152. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1448 (2010).

153. 441 U.S. 677, 730 (1979) (Powell, J., dissenting).

of action to the “regime of *Swift v. Tyson*,”¹⁵⁴ implicitly invoking *Erie*.

Scholars have puzzled over his objections. In a thoughtful article, Lumen Mulligan, for example, objects to Justice Powell’s equation between implying rights of action and expanding federal jurisdiction. Even under the narrow Holmes formulation of the well-pleaded complaint rule in *American Well Works*, he notes, “the actual existence of a cause of action is not a necessary jurisdictional element”—federal question jurisdiction depends only on the “assertion of a [federal] cause of action.”¹⁵⁵ And, in any event, even the assertion of a federal cause of action is not a necessary condition for vesting jurisdiction under § 1331—it is, as *Grable & Sons v. Darue Engineering* affirmed, the plaintiff’s assertion of significant, disputed federal rights that matters.¹⁵⁶ As a result, he says, the idea that implication of a right of action expands federal “jurisdiction” reflects a “faulty view of how jurisdiction vests under §1331.”¹⁵⁷

Other critics puzzle at Justice Powell’s attempt to draw a connection between implied rights of action and *Erie*. *Erie* prohibited displacing state law with federal common law in diversity. Why, they ask, would *Erie* have any relevance to developing rights of action enforcing federal remedies conferred by statute in federal question cases?¹⁵⁸

But these criticisms miss the forest for the trees. One interpretation of Justice Powell’s structural objections is that they point to a larger principle standing behind *Erie* and the Court’s jurisdictional cases but suggested by them. Like expansive interpretations of federal jurisdictional grants or judicial development of attractive rules of decision, implying private federal enforcement rights affects federal courts’ competitiveness and market share in the class of disputes in which a federal private right of action is implied. It does so by attracting more of those disputes into federal court. This was, indeed, one of the earliest objections to implied rights of actions, by Chief Justice Stone in

154. *Id.* at 747 (“This runs contrary to the established principle that ‘[the] jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation . . . , and conflicts with the authority of Congress under Art. III to set the limits of federal jurisdiction.’”) (citation omitted); *id.* at 732 (comparing the Court’s decision to the “regime of *Swift v. Tyson*”). For a good discussion of Justices Powell’s and Rehnquist’s reliance on *Erie* in implied right of action cases in the 1970s and early 1980s, see George D. Brown, *Of Activism and Erie—the Implication Doctrine’s Implications for the Nature and Role of Federal Courts*, 69 IOWA L. REV. 617 (1984).

155. Lumen N. Mulligan, *Federal Courts Not Federal Tribunals*, 104 NW. U. L. REV. 175, 193 (2010).

156. *Grable & Sons Metal Prod., Inc. v. Darue Eng’r, & Mfg.*, 545 U.S. 308 (2005); Mulligan, *supra* note 155, at 199.

157. Mulligan, *supra* note 155, at 192.

158. PURCELL, *supra* note 34, at 292 (noting that *Erie* had “at most an uncertain relevance to causes of action directly based on, and intended to implement, federal statutory and constitutional provisions”).

his dissent in *Bell v. Hood*: the creation of new federal private rights of action, he objected, leads to a predictable migration of privately initiated disputes from state to federal court, as nondiverse plaintiffs employ their new federal cause of action to seek a remedy there.¹⁵⁹

Justice Powell, in effect, seemed to intuit the checks and balances logic of the limited tribunals model. By authorizing private enforcement of federal rights, federal courts shift demand for adjudication in their favor, expanding their own power—a decision that the logic of separated powers and checks and balances requires Congress alone to make.

3. *Erie and Separation of Powers: An Enlarged View*

Neither *Erie*, nor any of its progeny articulate the set of principles that I am calling the limited tribunals model of forum choice.¹⁶⁰ But that shouldn't discredit the model. *Erie's* explanation of its constitutional underpinning was sparse, and federal courts and commentators have had to build it out over time.¹⁶¹ All constitutional justifications for *Erie* and *Hanna* have been after-the-fact rationalizations. Nor is the claim here that the limited tribunals model of forum choice exclusively explains *Erie's* constitutional underpinnings. *Erie*, like many seminal but theoretically minimalist decisions, has attracted a dense net of constitutional justifications. One can accept the limited tribunals model of forum choice as one explanation for *Erie's* constitutional underpinnings, without rejecting other complementary accounts.

However, it bears emphasizing that the limited tribunals model complements what is probably the leading account of *Erie*, Professor Paul Mishkin's. He started with the basic point that federal law displaces state law

159. *Bell v. Hood*, 327 U.S. 678, 686 (1946) (Stone, C.J., dissenting) (“The only effect of holding, as the Court does, that jurisdiction is conferred by the pleader’s unfounded assertion that he is one who can have a remedy for damages arising under the Fourth and Fifth Amendments is to transfer to the federal court the trial of the allegations of trespass to person and property, which is a cause of action arising wholly under state law.”).

160. *Hanna*, for example, explains the twin aims test as a test compelled by concerns for fairness. 380 U.S. at 467 (“The *Erie* rule is rooted in part in a realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court.”). Edward Purcell also notes that concerns for unfairness and inefficiency at least in part shaped Brandeis’ concern with *Swift's* forum shopping regime. PURCELL, *supra* note 34, at 149-53.

161. Aaron Nielsen, *Erie as Nondelegation*, 72 OHIO ST. L.J. 239, 242-43 (2011) (noting “[t]here is deep confusion concerning *Erie's* constitutional basis, including whether there even is one at all”). *Erie* did suggest a constitutional basis for its decision. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 77-78 (1938) (noting the Court would be compelled to respect *Swift* as precedent but for the “unconstitutionality of the course pursued”). And theories have ranged from separation of powers, to the Commerce Clause and enumerated powers, to due process and equal protection, to the nondelegation doctrine. See Nielsen, *supra* (listing previous theories).

under the Supremacy Clause.¹⁶² Yet, Mishkin pointed out, there is an important difference “between Congress effectuating this displacement and such an action on the part of the federal courts.”¹⁶³ Our constitutional structure makes Congress, not federal courts, the source of federal substantive lawmaking because the procedural safeguards of the political process protect state lawmakers from federal encroachment.¹⁶⁴

The limited tribunals model emphasizes that constitutional structure not only puts Congress in charge of displacing state substantive lawmaking. It also puts Congress in charge of the inputs likely to affect litigants’ demand for federal court, in order to check against the expansion of federal courts’ competitiveness and share of the adjudication market at state *courts’* expense. Both state lawmaking institutions *and* state adjudicative institutions are protected by Congress’s role in our system of checks and balances; and Congress’s role in protecting state lawmaking and adjudicative institutions are, in turn, each protected by *Erie*.¹⁶⁵

The model, it also bears emphasizing, is plausibly consistent with Justice Brandeis’ own constitutional views, as evidenced by his opposition to the “Judges’ Bill,” the colloquial name for the Judiciary Act of 1925. The Judges’ Bill gave the Supreme Court discretionary jurisdiction over most of its docket, including much of its appellate jurisdiction over appeals from state courts.¹⁶⁶ The leading opponent of the Bill, Sen. Thomas Walsh, a staunch Progressive famously protective of state courts, appears to have been motivated by a commitment to the checks and balances logic of congressional control of federal jurisdiction. The federal judiciary, he warned, has an “appetite for power” and, if given free rein to define that power, will do so in a way that extends its “jurisdiction” at the expense of state courts.¹⁶⁷ Healthy respect for

162. Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682 (1974).

163. See Brown, *supra* note 154, at 621 (paraphrasing Mishkin).

164. Mishkin, *supra* note 162, at 1683 (“Principles related to separation of powers impose an additional limit on the authority of federal courts to engage in lawmaking on their own.”); *id.* at 1685 (noting the “structure established by the Constitution whereby the states, and their interests as such, are represented in the Congress but not in the federal courts”).

165. *Erie*, 304 U.S. at 78-79 (noting “the Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States—independence in their legislative *and independence in their judicial departments.*”) (emphasis added).

166. Judiciary Act of 1925, 43 Stat. 936. See also John Paul Stevens, “*Cheers!*” *A Tribute to Justice Byron R. White*, 1994 BYU L. REV. 209, 216-17 (discussing the effect of the Judges’ Bill).

167. 62 CONG. REC. 8547 (1922) (speech of Sen. Walsh); see also Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years after the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1645 (2000) (noting Walsh’s statement of “that truism, half legal and half political, that a good court always seeks to extend its jurisdiction, and that other maxim, wholly political, so often asserted by Jefferson, that the appetite for power grows as it is gratified.”).

checks and balances therefore, argued Walsh, cut against delegating discretion to federal courts over their own appellate jurisdiction.¹⁶⁸

Brandeis also privately opposed the bill. And although he did not give his reasons publicly, Chief Justice Taft reported privately that “[h]e evidently sympathized with Walsh.”¹⁶⁹ At a minimum, Brandeis’ position underscores that alongside a narrow concern for Congress’s control over substantive federal lawmaking, Justice Brandeis was concerned with vindicating Congress’s control over federal courts’ jurisdiction more generally, apparently out of the same concern Walsh had for protecting state courts’ authority. That’s consistent with Brandeis’ general solicitude for state courts throughout his career. His famous theory of states as “laboratories of experiment,” after all, trades on the idea that state institutions (the “laboratories”) must control the development of policy (the “experiments”).¹⁷⁰ The Judges’ Bill episode underscores that he saw congressional control of federal courts’ jurisdiction as an important safeguard for state courts’ authority to do so.

Like Justice Miller’s dissent in *Railroad Co. v. Mississippi*, Justice Brandeis’ opinion in *Erie* is laden with a good deal of under-theorized intuition. But in light of his strong attachment to the checks and balances principles underlying congressional control over federal jurisdiction, it is hardly implausible to think he would have accepted the complementary claim here: Federal courts are limited not only on paper, by the statutory terms of their jurisdiction; they are limited in their real-world operation by competition from state courts. And Congress, to fulfill its checking function, accordingly, must control the terms of that competition, including adoption of modes of dispute resolution that stimulate demand for a federal forum. It’s not a principle Justice Brandeis articulated. But it is one he might have accepted.¹⁷¹

III. NEW HORIZONS FOR THE LIMITED TRIBUNALS MODEL

The last Part traced the development of several core features of federal courts law, including concurrency, the well-pleaded complaint rule, the presumption against removal, and *Erie*’s anti-forum shopping cases. Each were developed in response to changes in the competitive equilibrium between

168. Hartnett, *supra* note 167, at 1645 (noting Sen. Walsh’s lonely opposition to the bill, which he later withdrew because he did not wish to “stand alone” in the matter).

169. *Id.* at 1691.

170. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

171. This is not to suggest that constructions of *Erie* doctrine derive their legitimacy from Brandeis’ original intent. The written text of a majority opinion, not the “intent” of the particular justice that drafted the opinion, has precedential status. Moreover, *Erie* is one case in a line of decisions that have progressively elaborated its obscure constitutional underpinnings. Good interpretations should aim to explain the *Erie* doctrine, not just the theory accepted by the author of the case that kicked off that line of doctrine.

federal and state courts, and they can be linked together as applications of a principled understanding of constitutional structure, embodied in the limited tribunals model of forum choice, which puts Congress in charge of decisions that dilute or displace state competition as a check on federal judicial power.

The model advanced here has two payoffs. First it provides a globally coherent account of several distinct doctrines relating to forum shopping which have, until now, been perceived as dissonant and hard to reconcile.

Second, it provides a platform for further research, along two fronts. On one front, it provides a model for thinking more deeply and critically about the implications of a coherent approach to constitutional structure within different doctrinal departments covered by the principle defended here. While the model can unify core features of jurisdictional doctrine and *Erie* doctrine, some aspects of each of these different doctrinal compartments may not fit the model. The model provides a platform and guide for re-thinking these compartments at a more granular level with the goal of deepening and extending cross-doctrinal coherence.

On the second front, the model can spur more careful thinking about the constitutional backdrop of newer, evolving areas of law that intersect with litigants' forum choices in a way that can shake us out of conceptual dead ends. In this Part, I demonstrate this latter virtue of the model through a thought-experiment that takes that model and applies it to start to think through a conceptual stalemate in the law of mandatory class actions. Confusion about the implications of constitutional structure in the class action field has led to polarization and extremism in the debate over class actions. The limited tribunals model, I argue, points the way toward new ways of thinking about the constitutional restraints on class actions that creates room for experiment and compromise.

The latter point is worth exploring in order to underscore the breadth and reach of the limited tribunals model, and make clear all of the different avenues for further research the model opens up. Section A begins with an overview of the current parameters of mandatory class action case law. As Section B discusses, that case law has become heavily reliant on due process arguments, with pernicious effects. Section C suggests, finally, how the limited tribunals model might open the way for more experiment, compromise, and pluralism in the class action field.

A. *Constitutional Structure and Class Members' Autonomy: The Current Synthesis*

Concerns for constitutional structure play no role in the Court's interpretation of Rule 23's mandatory class action provisions. But conceptually, mandatory class actions raise the same structural concerns as many of the restraints on federal-state judicial competition reviewed in the last part. We saw that one way federal courts obtain power at states' expense is by giving a class

of litigants with an asymmetric preference for a federal forum, like corporate defendants, broad gatekeeping power over plaintiffs' access to state court. Federal courts construe their authority against this type of competitive restraint.

A *second* way to erect barriers to state competition is by giving preferred federal plaintiffs' gatekeeping power over other plaintiffs' access to state court. That's just what a mandatory class action does. A named plaintiff gets the power to pull a large bundle of claims into federal court and resolve them through a binding federal judgment, even though no member of the class has affirmatively chosen to sue in federal court. In each case, a federal court preempts the power of states to resolve a class of claims by disrupting the role that *uncoordinated* litigant choice among competing forums was originally intended to play as a hedge against federal consolidation.¹⁷² Mandatory class actions thus can operate as another kind of barrier to state level competition for judicial business.

Yet constitutional structure has had only limited purchase as a limit on federal mandatory class actions. To see why requires rewinding thirty years to the late 1970s and early 1980s, a Wild-West period in development of the class action device. *Ortiz v. Fibreboard Corp.* and *Wal-Mart Stores* hadn't been decided.¹⁷³ Neither had *Phillips Petroleum v. Shutts*, which would not kick start the development of due process as a check on the expansion of mandatory federal class actions until 1985.¹⁷⁴ The possibilities latent in Rule 23's mandatory class provisions were accordingly wide-open, and plaintiffs pushed the envelope, arguing for certification of mandatory class actions in a host of tort cases arising out of mass accidents. In those cases, it was common for class members—many of who had substantial dollar-value claims—to file separately in state court during the pendency of the federal class proceedings, raising in a salient way the structural problems with mandatory class litigation.¹⁷⁵ The lower federal courts, in turn, struggled over the effect of mandatory class actions on class members' access to state court.

172. See Erbsen, *supra* note 6, at 82 (noting removal preempts state judicial power, rather than state lawmaking).

173. *Ortiz* was decided in 1999; *Wal-Mart Stores* in 2011. See *infra* note 183 and accompanying text.

174. *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 807, 812 (1985) (characterizing the cause of action as "constitutionally protected property," and concluding that "procedural due process" requires giving plaintiffs the power to "litigate" their claims "on [their] own").

175. Early decisions grappling with mandatory class litigation and duplicative litigation include *In re Sch. Asbestos Litig.*, 104 F.R.D. 422, 426-27 (E.D. Pa. 1984) (discussing history of orders dealing with injunctive of duplicative claims in a class partially certified under Rule 23(b)(1)(B)); *In re Fed. Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982) (confronting duplicative federal-state class litigation in an early attempt to certify a mass action under Rule 23(b)(1)(B)); *Robertson v. Nat'l Basketball Ass'n*, 413 F. Supp. 88 (S.D.N.Y. 1976) (enjoining Wilt Chamberlain from asserting his claims in state court because they were represented in a federal Rule 23(b)(1) class).

A few early mandatory class action cases took the view that Rule 23's mandatory class action provisions implicitly authorized federal courts to enjoin state-level litigation by class members.¹⁷⁶ This in turn triggered a series of cases that wrestled with the interaction between Rule 23 and the Anti-Injunction Act.¹⁷⁷ The AIA, recall, was enacted by the second Congress as a prop supporting the first Congress's competitive model of concurrency.¹⁷⁸ The AIA has since been amended several times and now includes some exceptions to its general ban against federal anti-suit injunctions, but those exceptions have been read very narrowly.¹⁷⁹

Some commentators in the 1980s advocated reading Rule 23 to implicitly authorize such injunctions and also reasoned that Rule 23 therefore fell within the Anti-Injunction Act's exceptions.¹⁸⁰ Over time, federal courts have gravitated toward a very different view: While judgments resolving mandatory class actions authorized by Rule 23 have a preclusive effect on all class members, Rule 23 certification orders do not enjoin class members from filing duplicative *in personam* state claims during the pendency of class proceedings. Nor can federal courts enjoin these suits. The AIA forbids it and its exceptions are not applicable.¹⁸¹

176. *See, e.g., In re Fed. Skywalk Cases*, 680 F.2d. at 1180-82 (vacating a mandatory class action after finding an injunction against duplicative state proceedings would be prohibited by the Anti-Injunction Act).

177. *Id.* at 1180-82; *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1002 (3d Cir. 1986) (“[C]ertification of a mandatory class raises serious questions of personal jurisdiction and intrusion into the autonomous operation of state judicial systems”).

178. *See supra* note 91 and accompanying text.

179. *See* 28 U.S.C. § 2283 (recognizing exceptions for injunctions in aid of jurisdiction, injunctions expressly authorized by Congress, and injunctions to protect or effectuate federal judgments); *see also* Donald L. Doernberg, *What's Wrong with this Picture?: Rule Interpleader, the Anti-Injunction Act, In Personam Jurisdiction, and M.C. Escher*, 67 U. COLO. L. REV. 551, 569-72 (1996) (discussing the Court's restrictive interpretations of the AIA's exceptions); Joan Steinman, *The Newest Frontier of Judicial Activism: Removal under the All Writs Act*, 80 B.U. L. REV. 773, 786 & n.37 (2000) (reviewing the AIA case law and literature).

180. *See* Steven M. Larimore, *Exploring the Interface between Rule 23 Class Actions and the Anti-Injunction Act*, 18 GA. L. REV. 239 (1984) (arguing that injunctions of state actions in support of class actions should usually be viewed as necessary in aid of jurisdiction); Edward F. Sherman, *Class Actions and Duplicative Litigation*, 62 IND. L.J. 507 (1987) (analyzing AIA exceptions and suggesting a “functional analysis that weighs the degree of invasion of state interest against the efficiency and purpose of unitary federal resolution should adequately preserve the federalism concerns protected by the Act”).

181. Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1148 (2009) (noting the “orientation toward individual autonomy” in modern federal class action case law is reflected by the fact that “filing a class action does not prevent class members from also filing individual cases, or even prevent ‘dueling’ class actions; as long as they beat the class action in the race to judgment or settlement, individual class members can enjoy the benefits of their individual resolution”); Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 514-15 (2000) (noting that “[a]lthough scholars have argued

This gives class members in a certified mandatory class a half-way escape hatch—class members can file in state court in the panicked hope the state will rush to beat the federal court to a judgment. But a first-in-time federal judgment in the federal class proceeding closes that escape hatch shut, cramming down a federal judgment on all class members, and leaving even those class members who have sued in state court with a judgment from a forum they never chose and affirmatively indicated their preference to avoid.

Use of the AIA to restrain the effect of mandatory class actions was just a first step in reining in the device: it targeted the use of anti-suit injunctions in support of class certification orders under Rule 23, but did not bear on the scope of mandatory class actions under Rule 23 itself. Rule 23's mandatory class action provisions (contained in Rule 23(b)(1) and (b)(2)) are vaguely worded, not self-defining, leaving their scope, in practice, to common-law like elaboration. Arguments against expansive interpretations of Rule 23's mandatory class action provisions had to cast beyond the text of Rule 23 itself.

Defense counsel, next, shifted to the Constitution as a lever for restraining the mandatory class device. Yet, arguments based on constitutional structure faced serious difficulties. The AIA specified a relatively clear set of limits on federal courts. But once counsel stepped beyond the text of the statute, to the Constitution itself, the implications of constitutional structure for federal courts' ability to disrupt plaintiffs' control over their claims were profoundly unclear. Case law relating to constitutional structure and forum choice were, as we have discussed, in disarray.

Moreover, federal courts had been given broad rulemaking authority under the Rules Enabling Act. To argue constitutional structure restrained federal courts' ability to certify mandatory class actions, counsel would have to argue that structural concerns for checks and balances and separated powers required interpreting the scope of that delegation, as it pertained to mandatory class actions, narrowly. Yet, since *Hanna*, the Court had routinely rejected

that this exception deserves a broader interpretation, under current case law, the mere pendency of dueling class actions does not justify an injunction under the second exception" of the AIA for injunctions necessary in aid of jurisdiction"); Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2051-52 (2008) (noting lower courts have confined their injunctions to suits that duplicate federal proceedings in which settlement is imminent, using "inapt analogies and anachronisms"). *But see* Carlough v. Amchem Prods. Inc., 10 F.3d 189 (3d Cir. 1993) (district court could preliminarily enjoin class members from prosecuting duplicative state actions in light of imminent settlement); Hanlon v. Chrysler Corp., 150 F.3d 1011 (9th Cir. 1998) (holding that provisional approval of a federal class settlement stayed duplicative state actions). Note that the Anti-Injunction Act only bars injunctions against the prosecution of suits previously instituted by class members in state court; it does not bar injunctions against the commencement of actions contemplated, but not yet filed, by class members. *See* Dombrowski v. Phister, 380 U.S. 479, 484 n.2 (1979); *In re* Diet Drugs Prod. Liab. Litig., 282 F.3d 220, 233 n.10 (3d Cir. 2002).

arguments that applications of the Federal Rules exceed what the Enabling Act permits.¹⁸²

Naturally, then, defense counsel cast in another direction: due process. Over the 1990s and 2000s, the due process rights of class members became the principal hook for arguments in favor of limiting the expansion of the mandatory class device, culminating in *Ortiz v. Fibreboard* and *Wal-Mart Stores Inc. v. Dukes*. Together, both lean heavily on due process concerns as a basis for construing the scope of Rule 23(b)(1) and (b)(2) very narrowly.¹⁸³

The result is the modern synthesis. Due process concerns justify interpreting the scope of Rule 23(b)(1) and (b)(2) so narrowly that it is nearly impossible to certify mandatory class actions seeking monetary relief arising out of a mass tort.¹⁸⁴ In the rare case in which a mandatory class action is certified in the mass tort context, the consensus seems to be that the Anti-Injunction Act protects class members' right to initiate a race-to-judgment in a state forum. But a first-in-time judgment in the federal class action (or a federally approved class settlement) cashes out all of the class members' claims, cramming down a federal judgment (or settlement) even on those who affirmatively would have preferred to proceed in state court.

B. *Problems with the Current Synthesis*

The Court has never claimed that due process is an absolute limit on the use of mandatory class actions. Instead, it has relied on due process as the backbone of a constitutional avoidance strategy for shunting further development of mandatory class actions to the political process. It invokes due process as a potential problem that justifies confining mandatory class actions to a narrow circumference, leaving further development to the political process.

But this use of due process has questionable effects. Mandatory class

182. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442 (2010) (“[W]e have rejected every statutory challenge to a Federal Rule that has come before us.”).

183. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (“mandatory class actions aggregating damages claims implicate the due process ‘principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process,’ it being ‘our deep-rooted historic tradition that everyone should have his own day in court.’”) (citation omitted) (internal quotation marks omitted); *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541, 2559 (2011) (noting the “serious possibility” that depriving people of their “right to sue” for money damages under Rule 23(b)(2) violates due process).

184. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02 reporters' notes, cmt. (b)(1)(B) (2010) (noting “the class action has fallen into disfavor as a means of resolving mass-tort claims”); *see also Sergio Campos, Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1063 (2012) (noting courts and commentators treat mass tort class actions with disfavor).

actions may be a useful device for resolving mass tort litigation. Yet, the Court's increasingly rigid insistence on using due process as the legal lever for pushing further movement back to the political process squelches experimentation with mandatory classes at the state level. Below, I explore these problems further.

1. *Too Much Due Process?*

As we have come to better understand the dynamics of complex litigation, there are plausible reasons to think that the Court's due process rationale for constraining mandatory class actions is flawed. To see this requires appreciating the collective action dilemma at the heart of mass torts. Mass torts involve large numbers of recurring claims for relatively high dollar amounts arising out of harms caused by a single course of conduct (claims by victims of asbestos manufacturers being the paradigmatic example). In an important series of articles, David Rosenberg identifies an asymmetry between the stakes for each plaintiff and for the defendant in this setting. Plaintiffs in mass torts price their claims based on their individual injuries, and invest in their suits accordingly. The defendant, by contrast, makes investments in light of the aggregate liability risks created by the entire mass tort.¹⁸⁵ Moreover, the defendant's investment in developing defenses to one claim can be amortized across each other claim with respect to duplicative questions of law and fact on which its liability turns. For both reasons, defendants have incentives to invest much more in defending against any individual claim in a mass tort than any individual litigant does in enforcing it.¹⁸⁶ The result of this asymmetry, critics argue, include sub-par recoveries for individual class members, less deterrence, and, therefore, "more mass torts."¹⁸⁷

The Supreme Court, in cases like *Wal-Mart Stores, Inc. v. Dukes*, *Ortiz v. Fibreboard*, and *Amchem v. Windsor*, has construed the availability of the class device so narrowly in the mass tort context that it is very hard to certify classes

185. The leading discussion of asymmetric stakes in class litigation is that of David Rosenberg. See, e.g., David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831 (2002). Sergio Campos provides a very nice overview of the argument in his article *Mass Torts and Due Process*, *supra* note 184, at 1076 (discussing the problem of "asymmetric stakes" in a mass tort, and explaining that it stems from the fact that "a defendant owns all of the potential liability associated with any common issue, but each plaintiff only owns a portion of the recovery (the flipside of liability) The defendant simply has more at stake.").

186. See Campos, *supra* note 184, at 1076 (given these asymmetries, "[t]he defendant can exploit economies of scale in investing in common issues that the plaintiffs cannot," including in "legal research, discovery and factual investigation, and the hiring of expert witnesses and other consultants").

187. *Id.* at 1064 (as a result of asymmetric stakes, "individual control of the claim results in the plaintiffs 'shooting itself in the collective foot' by causing more mass torts").

composed of large numbers of mass tort claims.¹⁸⁸ Professors Rosenberg and Sergio Campos, in turn, contend that this is exactly the wrong tack to take. Given the asymmetry of stakes between plaintiffs and defendants in mass torts, class members—and the public—would be better off if they pooled their claims together and authorized a single lawyer, acting on a contingency basis, to enforce those claims as a bundle. Doing so ensures that lawyer will, like the defendant, invest in enforcing the claims based on the claims' aggregate value. But, of course, it is impossible for widely dispersed class members to agree to transfer control of their claims as a unit to a single representative. This collective action problem requires a public solution: namely, allowing courts to vest control over recurring mass tort claims in private attorneys general drawn from the class of aggrieved persons.¹⁸⁹

Indeed, Professor Campos notes that expanding the availability of opt out class procedures in the mass tort setting isn't enough to solve the enforcement problem in mass torts. Existing class members can inaugurate duplicative class actions at the state level, leading to a reverse auction in which defendants force competing class counsel into a war to underbid each other for a settlement and a share of fees.¹⁹⁰ To reduce the asymmetries in stakes between plaintiffs and defendants, while safeguarding against the agency costs of class litigation, federal courts must accordingly expand the scope of the *mandatory* class device in the mass tort setting.¹⁹¹ In practice, this would bring back early, adventurous uses of the mandatory class device from the 1980s and early 1990s. Mandatory class actions would enable mass one-shot settlements at the federal level, along the lines pioneered in the recent *Vioxx* litigation (a non-class consolidated proceeding that creatively shepherded the mass tort toward a comprehensive federal settlement), with the help of bifurcated proceedings, bellwether trials, and other econometric tools for approximating the value of the underlying claims.¹⁹²

188. AM. LAW INST., *supra* note 184, § 1.02 reporters' notes cmt. (b)(1)(B) (noting "the class action has fallen into disfavor as a means of resolving mass-tort claims"); *see also* Campos, *supra* note 184, at 1063 (noting courts and commentators treat mass tort class actions with disfavor).

189. Campos, *supra* note 184, at 1085 ("As noted by David Rosenberg, the mandatory class action can be seen as a 'mast-tying' device that prevents the plaintiffs from destroying the collective procedure they each would have agreed to before the tort.").

190. John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851, 853 (1995) (discussing the reverse auction problem); Wasserman, *Dueling Class Actions*, *supra* note 181, at 473-74 (noting the reverse auction problem created by dueling federal-state class actions).

191. Campos, *supra* note 184, at 1116-17 ("[T]he solution to the reverse auction is the same as the solution to sweetheart settlements. Rather than allow greater opt-out rights, which may lead to competing class actions, courts instead should have the power to enjoin other class actions from competing and driving the settlement value down.").

192. *In re Vioxx Prods. Liab. Litig.*, 760 F. Supp. 2d 640 (E.D. La. 2010).

The due process right to a “day in court” is the orthodox objection to this idea, relied on heavily in decisions like *Wal-Mart Stores* and *Ortiz* as a basis for construing the scope of mandatory class actions authorized by Federal Rule 23(b)(1) and (b)(2) exceedingly narrowly.¹⁹³ Yet, the due process argument for protecting class members’ autonomy is open to some compelling objections.

Consider, first, the oft-cited value of litigants’ participation in proceedings that affect them, which is rooted in a concern for litigants’ dignity and the “deeply rooted right to a day in court.” That value is often offered to explain why due process requires protecting class members’ control over their claims.¹⁹⁴ Yet, it is not clear why giving class members’ control over their claims is required by participation norms, given those norms are already safeguarded by pre-certification scrutiny of the alignment between the representative’s interests and those of the class, and by the generous opportunities federal procedure gives class members to intervene in class proceedings instituted on their behalf and present their own legal arguments or evidence.¹⁹⁵ Because safeguards for adequate representation and broad intervention rights already protect class members’ dignitary interest in participation, critics argue that “participation” norms don’t cut particularly strongly in favor of giving plaintiffs the additional right to exit the class and take control of those claims.¹⁹⁶

Or take an even more diffuse due process interest: liberty. Certainly, allowing class members to assume control over their own claims protects a form of liberty. But to the extent mandatory class actions enhance deterrence of mass torts, as Professor Rosenberg and Campos argue, then eliminating class members’ control over their claims enhances other types of liberty or dignity interests, by enhancing personal security and integrity.¹⁹⁷ In effect, questions

193. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (mandatory class actions aggregating damages claims implicate the due process “‘principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process,’ it being “‘our deep-rooted historic tradition that everyone should have his own day in court.’”) (citation omitted) (internal quotation marks omitted); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559 (2011) (noting the “serious possibility” that depriving people of their “right to sue” for money damages under Rule 23(b)(2) violates due process).

194. *See Ortiz*, 527 U.S. at 846.

195. *See, e.g.*, FED. R. CIV. P. 23(c)(2)(B) (notice to Rule 23(b)(3) class members must include notice of intervention rights); *Wal-Mart*, 131 S. Ct. at 2552 (class certification requests require “rigorous analysis”).

196. Campos, *supra* note 184, at 1111-12 (arguing norms of participation do not support the claim control entitlement because participation “can be fairly well accommodated in most cases without giving plaintiffs control over their claims, and thus satisfy dignitary and legitimacy values”).

197. Sergio Campos advances a particularly compelling argument along these lines. *See id.* at 1112 (noting that the “control entitlement” is incompatible with “other important

about who controls claims involve trade-offs between different liberties, making this value an indeterminate baseline against which to resolve questions about class members' claim-control entitlements.

The last, orthodox way of defending due process protection for class members' right to exit a class is as a procedure that safeguards their property interests in redress, by giving class members the ability to avoid the agency costs of litigation and assume control over their own claims. Yet, procedural due process does not require absolute protection for property interests.¹⁹⁸ And given the advantage defendants gain from dividing and conquering litigants in a mass tort, rigid insistence on protecting class members' autonomy leads, critics claim, to compromised enforcement of tort law, underdeterrence, and "more mass torts"—a seemingly compelling reason to loosen protection for class members' control of their claims, especially given all of the other, redundant protections (rigorous scrutiny of the representatives' adequacy, liberal intervention rights, and so forth).¹⁹⁹

The upshot, argue critics: the Supreme Court has been wrong to construe federal courts' authority to certify mandatory classes in mass torts so narrowly. Due process ought to be no bar to expanding the powerful deterrent engine of mandatory class actions. Those actions ought to encompass mass torts, whenever doing so would remedy asymmetries in incentives to invest in claims and defenses that work to powerful defendants' advantage.²⁰⁰

2. *Too Few Experiments?*

The attack on the Court' due process jurisprudence makes some compelling points. Even so, the Court is likely to continue to insist on due process restraints on mandatory class litigation, even if due process is a conceptually weak hook for narrowing interpretations of the class action rule. This is not because the Court is strongly wedded to the merits of due process objections to mandatory class actions. It is because the Court seems to be

interests"—in deterrence, for example—that he argues can also be characterized as liberty interests); *see also id.* at 1096-98, 1102-04 (arguing the deterrent effect of private enforcement as, in itself, a liberty interest, and arguing that individualized litigation can harm that interest, because of asymmetries in plaintiffs' and defendants' incentives to invest in litigation in a mass tort).

198. *Id.* at 1113-14 (noting logic of decisions like *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), is that litigants' entitlement to control a claim, even if it independently qualifies as a due-process protected interest, is not protected absolutely).

199. *Id.* (arguing logic of due process should justify sacrificing litigants' control entitlements to protect compelling interests, including the "higher order" entitlement to relief itself).

200. *Id.* at 1120 (the Enabling Act should be construed to ensure federal courts can "adjust procedure to make substance a practical reality," including by "modif[ying] the claim" through mandatory class actions).

wedded to pushing further development of the mandatory class action out of the judicial branch and back to Congress, and due process is the backbone of its constitutional avoidance strategy for doing so.

It has used due process in this way for at least thirty years, beginning in the 1980s decision, *Martin v. Wilks*.²⁰¹ In *Wilks*, the Court considered whether a consent decree in a Title VII case was binding on non-parties who had notice of the suit but did not take advantage of an opportunity to intervene.²⁰² The Court held it was not binding in a decision invoking the “deep-rooted historic tradition that everyone should have his own day in court” in support of this conclusion.²⁰³ But *Wilks* was careful to avoid holding that due process categorically forbid binding non-parties in that fashion. Instead, it decided that the decree could not be held binding because doing so was inconsistent with policies reflected in the Federal Rules. It used due process concerns as an additional thumb on the scale favoring that interpretation. Yet, the decision, explicitly, invited further legislative input.²⁰⁴

This strategy, in which due process serves as the formal basis for justifying constitutionally avoidant interpretations has persisted again and again, like clockwork. In *Ortiz v. Fibreboard* and *Amchem v. Windsor* and in *Wal-Mart Stores v. Dukes*, its class action trilogy, it again cited the same “day in court” due process boilerplate—not as a definitive reason for its interpretation of the class action provisions at issue, but as a concern favoring interpreting Rule 23 narrowly in order to avoid *potential* constitutional problems with more expansive applications of the class device.²⁰⁵ And it did this again in *Taylor v. Sturgell*, where it rejected a “virtual representation” theory of preclusion.²⁰⁶ At minimum, wrote Justice Ginsburg, “[i]t hardly follows . . . that *this Court* should proscribe or confine successive . . . suits” based on that controversial theory.²⁰⁷

201. 490 U.S. 755 (1989).

202. *Id.* at 762.

203. *Id.*

204. *Id.* at 761-66.

205. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (“mandatory class actions aggregating damages claims implicate the due process ‘principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process,’ it being ‘our deep-rooted historic tradition that everyone should have his own day in court.’”) (citation omitted) (internal quotation marks omitted); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559 (2011) (noting the “serious possibility” that depriving people of their “right to sue” for money damages under Rule 23(b)(2) violates due process).

206. 553 U.S. 880, 893 (2008) (invoking due process limits on preclusion); *id.* at 895-96, 903 (discussing exception to the day in court principle for “public rights” cases and leaving open the possibility that Congress might reverse its holding).

207. *Id.* at 903.

By using due process concerns for individual rights as the legal hook to push further innovations in the development of mandatory class actions back to the political process, the Court achieves pragmatic and democracy-reinforcing goals: at a minimum, the controversy surrounding mandatory class actions makes Congress an institutionally more appropriate body for deciding to employ the device more broadly at the national level. Yet, in the process, the Court's strategy stifles innovation or experiments at the state level. With a few exceptions, state courts have not, since *Ortiz*, interpreted their parallel mandatory class action provisions more broadly than the federal version.²⁰⁸ State supreme courts are less willing to venture into the constitutional twilight zone, because they anticipate they will receive less deference from the Supreme Court when they do. Congress, by contrast, is occasionally willing to test the Court's commitment to due process protections. It did so after *Wilks*, by passing legislation that reversed *Wilks* with respect to Title VII consent decrees.²⁰⁹ Congress is willing to do so because the Supreme Court is likely to give its considered policy judgments deference, even when those judgments are made in the shadow of "possible" due process restraints.

As a practical matter, then, the Court's due process cases in the class arena keep the door open for further innovation in the field of mandatory classing, but only by Congress. It is not clear this is the right result, especially if we were to credit the arguments that mandatory classes are an essential remedial device in the mass tort context. This Article does not take sides on the argument. There's certainly enough uncertainty about the merits of mandatory class actions to justify treading cautiously. But the more one credits arguments in favor of mandatory class actions, the more reasonable it is to think there ought to be more room for experimenting with mandatory classing at the local level. And, indeed, but for the due process shadow hanging over mandatory classing, state-by-state uses of mandatory class procedures in mass torts remains possible even after the Class Action Fairness Act, which preserves ample state authority over single-state class actions.

To be sure, state-level mandatory class actions present their own complications and thinking through them is beyond the scope of this article. At a minimum, they can raise serious federalism concerns of their own. The most obvious examples are cases where relief for claims arising out of a course of wrongdoing spanning several states will come from a limited fund insufficient to satisfy all of the claims. In that context, state-by-state proceedings risk extinguishing the fund before all claimants obtain relief. As a result, states that

208. See Linda Mullenix, *Abandoning the Federal Class Action Ship: Is there Smoother Sailing on Gulf Waters?*, 74 TUL. L. REV. 1709 (2000) (noting in the wake of *Amchem* and *Ortiz* that Texas, Alabama, and Louisiana class action jurisprudence, once deemed to be exceedingly plaintiff-friendly, veered in a conservative direction).

209. Civil Rights Act of 1991, Pub. L. No. 102-166, § 108, 105 Stat. 1071, 1076-77 (1991) (codified at 42 U.S.C. § 2000e-2).

proceed with their own intra-state mandatory class action put other states' remedial interests at risk. In this kind of setting, a national solution is appropriate.

But the case for state-by-state mandatory class actions is at its height where the class dispute is truly local: where, for example, the effect of a mass accident is discretely confined to a single state. For our purposes, the point is that Professor Rosenberg and Campos suggest that a more expansive use of mandatory classing may, on balance, serve class members' interests in that context. Yet, the Court's reliance on due process to push further development of the law to the political process may chill local experiments with mandatory classing in precisely those areas where their theories suggest experiments ought to be encouraged.

Perhaps one rationale for the Court's democracy-reinforcing use of due process is that the Court thinks class litigation is a national issue that needs national solutions, and wants to leave the door ajar for national experimentation, while deterring movement at the state level. Given the Court has generally taken a hands-off approach to state courts' management of class litigation, though, this seems unlikely.²¹⁰ Another possibility, however, is that there doesn't seem to be any plausible constitutional rationale, other than due process, that can serve as a formal, generalizable basis for pushing decisions about the proper scope of federal mandatory class litigation back to the national political process.

If so, one culprit in this state of affairs is surely the disarray in the way we understand constitutional structure's implications for forum shopping. Perhaps the Court has been shunted into using due process because there seems no other constitutional lever that can be used to justify the punt.

C. *Mandatory Class Actions and the Limited Tribunals Model*

Recapturing a sensible understanding of structural restraints on mandatory classes puts in reach another constitutional hook for democracy-reinforcing interpretations of Rule 23—one that, however, opens more space for experimentation at the state level. But developing it requires taking the road that defense counsel refused to take in the 1980s. It requires pushing beyond the AIA case law, and thinking more deeply about constitutional structure as a separate check on mandatory class actions. This is the virtue of the model developed in the previous sections—it helps draw out a set of constitutional principles embedded in our understanding of checks and balances and so can help shake ourselves loose from class action law's conceptual dead-end,

210. *See, e.g.,* Smith v. Bayer Corp., 131 S. Ct. 2368 (2011) (holding the Anti-Injunction Act bars injunctions against attempts by putative class members in a rejected federal class action to relitigate failed class certification theories at the state level).

opening up new possibilities.

The limited tribunals model proposes that federal courts ought to interpret their authority in favor of protecting state courts' power to compete against federal courts for cases. Procedural rulemaking can affect state competition in one of two ways. First, it might make original or removal federal jurisdiction more valuable to litigants, and therefore shape their incentives to prefer federal court over state court. All agree the Enabling Act reflects a clear, deliberative decision by the political process to delegate the power to enact these kinds of choice-*incentivizing* rules. (Justice Scalia, as noted earlier, makes exactly this point in *Shady Grove*.)²¹¹ And, as a result, federal courts' adoption of choice-*incentivizing* procedural rules are fully consistent with the limited tribunals model: they have been clearly authorized by Congress.

Opt out class actions can plausibly be characterized as a choice-*incentivizing* rule: They stimulate demand for a federal forum by lowering the relative price of initiating an action there. Members of a class who could proceed individually in state court must go through the trouble of hiring an attorney (and sending in an opt out request to federal court); by contrast, acceding to the federal class action saves class member the trouble of doing both—drawing more claims into federal court as a result.

Procedural rulemaking can also limit or preempt plaintiffs' ability to choose to "take their relief" in a state forum entirely through what might be called "choice-limiting" rules. Mandatory class actions are choice-limiting. Unlike opt out class actions, which give class members a choice to exit the federal class and seek relief in state court, they cram down a federal judgment even on class members who would have preferred to be in state court.

Yet, nothing in the Enabling Act's spare text or legislative history suggests its delegation of general rulemaking authority extends to such rules. At most the express prohibition on procedural rules that would "abridge" litigants' substantive rights²¹² allows an inference that rulemakers can enact choice-*limiting* rules when they are essential to protecting litigants' substantive rights. To protect forum choice on which state competition depends, the limited tribunals model, in turn, requires interpreting rulemakers' Enabling Act authority over mandatory class actions no farther.

Two uses of mandatory class actions clearly fit this narrow understanding of the authority conferred by the Enabling Act. Both are, as Stephen Burbank notes, at or near "the [historical] core of traditional class action practice."²¹³ The first is litigation against a limited fund. When multiple claims are asserted against a fund that is insufficient to satisfy all of the claims, then separately

211. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1448 (2010).

212. 28 U.S.C. § 2072(b) (1988).

213. Burbank, *supra* note 13, at 1486 n.184.

entertaining class members' claims guarantees that some will be left without a remedy because the fund will be exhausted before they can recover. Avoiding that outcome—the inevitable “abridgement” of some class members' right to relief—requires resolving all of the claims against the fund in one proceeding. The same is true where class members seek injunctive relief altering conduct that affects the class as an indivisible unit (de jure racial segregation within a school system is a classic example). In that case separate proceedings by each member of the class would lead to an all-too-certain outcome: the imposition of conflicting, incompatible orders on the defendant with respect to its duties towards the class. In both cases, withholding a mandatory collective enforcement mechanism would create insuperable practical barriers to meaningful relief because class members' claims are practically interdependent.²¹⁴

The limited fund and indivisible rights cases, in other words, mark out the core cases where mandatory classing is indispensable to avoid the practical abridgement of class members' rights, given the interdependence of class members' claims for relief. Proponents of mandatory class actions would push the device from the core to the periphery—to cases where mandatory classing *may* be necessary to ensure class members' optimal relief in light of the risks stemming from asymmetric stakes, discussed earlier, that are hard to measure empirically.²¹⁵

Federal courts have to decide whether their Enabling Act authority extends only to the core, or also to the periphery. Constitutional structure ought to inform where to draw the line. Mandatory classing allows federal courts to preempt the dispute resolution market—to pull mass tort claims out of that market and ensconce their resolution exclusively within a unique national forum. The limited tribunals model identifies Congress as the institution that must make that decision. And protecting its institutional authority accordingly favors drawing the line at the core—the classic limited fund and indivisible relief settings where withholding mandatory classing would abridge class

214. Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1118 (2010) (“The crucial point of indivisibility lies in the recognition that such remedies, if afforded, stand as a practical matter to redound to the benefit of all those adversely affected by the disputed practice on the defendant’s part, not merely to the particular plaintiff who happens to have sued. The scope of the allegedly wrongful practice defines the scope of the indivisible remedy. And the scope of the remedy, in turn, gives rise to demands for some vehicle to determine conclusively the legality of the practice in question.”); *id.* at 1132 (noting “indivisibility and interdependence among the claims of the class members” also favors aggregation of claims “against a limited fund”).

215. Campos, *supra* note 184, at 1104 (noting that even in cases where the defendants' assets are sufficient to satisfy class members' claims, “separate action[s] [in mass torts] would ‘as a practical matter’ impair the other class members, not because it would potentially deplete the fund, but because it would destroy the economies of scale necessary to put the class on equal footing with the defendant”).

members' right to relief given the interdependence of their claims. The propriety of broader, adventurous uses of mandatory class device beyond the core to the periphery, where the value of the device to class members turns on unsettled empirical questions, ought to be left to further deliberation by the national political process.²¹⁶

This idea is an extension of the way structural concerns have shaped interpretation of the Enabling Act's import for federal courts' authority over their own subject matter jurisdiction. Jurisdictional rules are a species of "procedural" rule in the broadest sense of term (that is, they regulate judicial power, rather than defining the obligations litigants owe each other outside of court). Under the modern understanding of nondelegation principles, there is no per se bar on Congress delegating to federal courts the authority to define their own jurisdiction.²¹⁷ Congress has expressly done so with respect to federal courts' appellate jurisdiction.²¹⁸ Nonetheless, rulemakers refused to treat the Enabling Act's broad grant of authority to embrace the definition of district courts' jurisdiction, an understanding they wrote into Federal Rule of Civil

216. The Class Action Fairness Act (CAFA), finally, is not to the contrary. Some might read into the Act, which expands federal diversity jurisdiction over multi-state class actions, a nationalist policy favoring a more expansive, creative role for federal courts in the resolution of complex litigation. But, as Lee Rosenthal notes, CAFA is silent about the key question—how to resolve class actions. As she notes, prior to CAFA, circuit decisions split about the virtues of a "centralized approach" to resolving recurring claims that "nationwide class actions provide." CAFA, she notes, doesn't resolve that question. Lee H. Rosenthal, *Back in the Court's Court*, 74 UMKC L. REV. 687, 704-06 (2006). At least some supporters saw it less as a general affirmation of federal courts' role in centralizing and resolving complex litigation than as a rejection of large class actions: it enabled removal of large class actions in federal court out of a hope that federal district courts would be more likely to reject certification of large class actions, paving the way for the underlying claims to be prosecuted either individually or in smaller local intra-state bundles in different courts, including at the state level. *See, e.g.*, Burbank, *supra* note 13, at 1530 ("We know that some of CAFA's supporters were not seeking different class action law so much as they were seeking different attitudes towards class certification. They hoped that many of the putative class actions removed under CAFA would be denied certification and go away."). Given uncertainty and disagreement about whether CAFA embraces a "centralized" or "decentralized" approach to resolving mass claims, the implications of the congressional control principle once again kick in, compelling the most restrained, state-friendly interpretation of CAFA—as a statute that is consistent, not inconsistent, with continued, cautious interpretation of the scope of federal courts' power over mandatory class actions.

217. *See* Thomas Rowe, *Beyond the Class Action Rule: An Inventory of Statutory Possibilities to Improve the Federal Class Action*, 71 N.Y.U. L. REV. 186, 188 n.16 (1996) (noting that "Congress might, to be sure, explicitly include jurisdiction-defining authority in its delegation of rulemaking power").

218. 28 U.S.C. § 1292(e) (1994) (granting the Supreme Court the power to add by rule categories of interlocutory appeal); 28 U.S.C. § 2072(c) (1988) (granting the Supreme Court the power to define by rule when district court rulings are final for purposes of appeal under 28 U.S.C. § 1291). The Court, though, has not delegated its power over federal subject matter jurisdiction to federal district courts. *See* Rowe, *supra* note 217, at 188 n.16 (discussing legislative delegation of authority to define federal jurisdiction).

Procedure 82.²¹⁹ The reason is rooted in a policy of self-restraint that reflects checks and balances: because subject matter limitations are a core constraint on federal courts, the choice to alter those limits should be made deliberately by Congress.²²⁰

The same argument for self-restraint carries over to federal courts' authority to adopt procedural rules affecting litigants' ability to opt for a state forum. Congressional control over litigants' forum choices, and the competitive check they enable, is, as the last Part showed, at the historical core of the principle of checks and balances. And that cuts especially strongly in favor of construing their Enabling Act authority very narrowly: Federal courts should not rely on the Act to promulgate mandatory class actions and other choice-limiting rules, beyond the classic settings where the duty to avoid abridging class members' substantive rights makes these procedures indispensable.

No doubt this construction of the Enabling Act is susceptible to objections that it draws an arbitrary line not suggested by the Act's "abridge, enlarge, modify" language. This, though, is inherent in the use of narrowing constructions and clear statement rules, and the same objection can be leveled at, for example, the well-pleaded complaint rule and other narrowing constructions of the jurisdictional statutes. Moreover, due process also faces its own line-drawing problems; indeed, the due process literature is almost entirely concerned with identifying when mandatory classing is so important to protecting class members' rights that fairness concerns justify sacrificing participation values, autonomy, and the like. This is not, as the last section should suggest, an easy question. The key point is not that the limited tribunals model solves line drawing problems but that it suggests an alternative constitutional hook for drawing the lines narrowly.

The point is not insignificant. In *Ortiz v. Fibreboard* and *Wal-Mart Stores, Inc. v. Dukes* the Court confined mandatory class actions to the core: to the limited fund context and indivisible remedies contexts. Both, of course, invoked due process concerns to justify construing Rule 23's mandatory class provisions narrowly.²²¹ The argument sketched above underscores the same result might have been justified just as neatly using arguments from

219. FED. R. CIV. P. 82 ("These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts.").

220. Carole E. Goldberg, *The Influence of Procedural Rules on Federal Jurisdiction*, 28 STAN. L. REV. 395, 431-43 (1976) (arguing Rule 82 reflects an act of judicial restraint).

221. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 841-42, 846 (1999) (invoking "our 'deep-rooted historic tradition that everyone should have his own day in court'" to confine Rule 23(b)(1)(B) classes to parameters marked out by the "historical model" of limited fund actions); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559 (2011) (noting the "serious possibility" that depriving people of their "right to sue" for money damages under Rule 23(b)(2) violates due process requires confining Rule 23(b)(2) to cases seeking an "indivisible" remedy for the class).

constitutional structure. Rather than invoke due process, it might have said that the effect of mandatory classing—it imposes a federal judgment on class members even over their “objection”²²² and therefore also impinges on the “autonomous operation of state judicial systems”²²³—favors reading the Enabling Act narrowly, to extend no farther than “the [historical] core of traditional class action practice,” where mandatory classing is indispensable to avoid “abridging” class members’ right to relief:²²⁴ the limited fund and indivisible relief settings.²²⁵

The Court’s case law in the class action arena thus inverts a pattern identified by Professor Roderick Hills in a different set of cases. He notes that the Court has relied on constitutional structure as a substitute for due process in cases protecting individual rights. As an example, he points to the Rehnquist Court’s Commerce Clause jurisprudence, which tended to strike down federal regulation as “noneconomic” when it fell within the due process-protected zone of privacy identified in earlier substantive due process cases like *Griswold v. Connecticut*.²²⁶ As he says, the strategy is a compromise—rather than striking down regulation as a matter of due process under *Griswold*, it invokes the Commerce Clause to protect the privacy interest from interference at the national level, leaving its protection at the local level to decentralized state political processes.²²⁷

222. *R.R. Co. v. Mississippi*, 102 U.S. 135, 142 (1880) (Miller, J., dissenting) (displacement of states’ jurisdiction is a “matter of delicacy,” and the statutory source of a litigant’s right to displace another litigant’s choice of a state forum over her “objection” ought to be “very clear”).

223. *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1002 (3d Cir. 1986) (“[C]ertification of a mandatory class raises serious questions of personal jurisdiction and intrusion into the autonomous operation of state judicial systems.”).

224. Burbank, *supra* note 13, at 1486 n.184 (noting Rule 23(b)(1) and (b)(2) reflect applications of class actions at the “historical core” of traditional class action practice or within the core’s “conceptual reach”).

225. *See also* Nagareda, *supra* note 214, at 1132 n.116 (noting Rule 23(b)(2) captures the “classic forms of indivisible relief”); *id.* (“A commonplace observation today holds that judicial practice under Rule 23(b)(2) has effectively converged with that under Rule 23(b)(1)(A) such that the classes authorized under either subsection are largely indistinguishable.”); *id.* at 1132 (“The language of the other major subsection to authorize mandatory class treatment—Rule 23(b)(1)(B)—likewise invokes notions of indivisibility and interdependence among the claims of the class members against a limited fund.”).

226. Roderick M. Hills, Jr., *The Individual Right to Federalism in the Rehnquist Court*, 74 GEO. WASH. L. REV. 888, 890 (2006) (“The parallel between Commerce Clause jurisprudence and substantive due process is even more striking when one realizes that the paradigm cases of ‘noneconomic’ regulation under the Commerce Clause—marriage, the education and custody of children, and sexuality—are also the paradigm cases of activities within the ‘zone of privacy.’ *Griswold*’s ‘zone of privacy,’ in short, overlaps to a striking degree with *Lopez*’s zone of federalism.”).

227. *Id.* at 888 (“the Rehnquist Court’s jurisprudence of enumerated powers tends to decentralize the definition of fundamental rights by limiting Congress’s power to define rights, thereby protecting the states’ power to do so free from congressional preemption.”).

The Court's class action due process cases invert this pattern. The Court substitutes due process-based constitutional avoidance arguments for constitutional structure as a basis for punting further development of the mandatory class device to the political process. The result is the opposite of the Commerce Clause cases identified by Professor Hills: the door is left ajar for expansion of the class device at the national level, by Congress, which is more adventuresome about pushing into the constitutional twilight zone, while state level experiments with the mandatory class device, in local disputes confined to the boundaries of a state's territory, are chilled.

Advocates of more aggressive uses of mandatory class actions in the mass tort context will be inclined to view this as a wrong turn. Again, one reason for this wrong turn may be simple doctrinal drift and disarray. Due process-rooted constitutional avoidance arguments have become the legal hook for punting decisions interfering with litigants' autonomy to the political process because parallel structural arguments to the same end have been obscured from view by doctrinal drift and confusion. Clarifying how structural principles bear on litigants' forum choices, the project of this article, opens up a new horizon—a different reason for pushing further expansions of the mandatory class device at the federal level to the national political process, as the Court is wont to do, but one that is not inconsistent with encouraging state experiments in discrete, local disputes where those experiments might be appropriate.

* * * * *

The argument here illustrates, but does not cash out, the range of inquiries that the limited tribunals model opens up. It may, for example, have interesting implications for non-party preclusion outside, as well as in, the class context.²²⁸ It may also have implications for litigants' right to contract for alternative dispute resolution mechanisms.²²⁹ More broadly, it frees litigants' right to control their claims from its exclusive association with due process, opening it as a separate object for study from new structural perspectives. Future scholarship can use the model to pursue these inquiries, and others.

CONCLUSION

Forum shopping is a practice in search of organizing constitutional principles. The article supplies those principles. Federal courts are limited by competition from states. That competition is sustained by plaintiffs' freedom to shop for a forum. And in our system of checks, balances, and separated powers,

228. See Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057 (2002) (arguing jurisprudence related to class members' autonomy needs to focus less on law dealing with the ex ante procedural question of certification and on more the ex post question of class preclusion).

229. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

regulating that competition is, exclusively, the job of just one federal institution—Congress.

From those principles flow a framework that integrates jurisdictional and *Erie* case law, restoring unity to an area riven with confusion. That framework, in turn, opens new doctrinal possibilities—holding out the promise of shaking up and revitalizing important but stale fields that have reached conceptual dead ends. These are the pay-offs of situating forum shopping in our competitive system of checks and balances.