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## FORUM SHOPPING AND THE INFRASTRUCTURE OF FEDERALISM

by JAMES E. PFANDER \*

### ABSTRACT

The recent effort of environmentalists and others to secure progressive social change at the state level enacts a familiar ritual in the history of American federalism. Political actors who have found their initiatives blunted at the national level have often turned to the states. With the ebb and flow of political power between two parties over time, arguments about the relative authority of federal and state governments display far more expediency than principle, far more mutability than predictability. States may be more or less progressive than the national government, depending in good measure on the temper of the times and the relative success of political movements in particular states and regions of the country.

If states do not invariably produce progressive social legislation, why then should progressives like Justice Brandeis defend state sovereignty? This Essay suggests that the answer may lie in what it calls the infrastructure of federalism, a series of doctrines that ensure the binding effect of state law in our federal system of interstate litigation. By ensuring the binding effect of state law, the infrastructure of federalism both ensures that state legislatures remain relevant as centers of policymaking and serves to encourage interstate forum shopping. Forum shopping, in turn, may tend to advance the interests of plaintiffs in litigation outcomes. While improving plaintiff win rates does not directly advance progressive social values, forum shopping does tend to ensure that firms operating throughout the nation must comply with relatively more pro-consumer policies at the state level.

### INTRODUCTION

With few exceptions in the nation's history, two parties have vied for control of the national government. Just as frequently, the party excluded from political control at the national level has sought refuge in the councils of state governments. Thomas Jefferson and James Madison exemplify this model of turning to state government; their opposition to Federalist policy carried far more weight as the Virginia and Kentucky resolutions than as a set of principles inscribed in a

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pamphlet or newspaper.<sup>1</sup> When Jefferson and Madison prevailed at the national level in the 1800 election,<sup>2</sup> the Federalists turned to the states. As Fisher Ames explained, “[T]he federalists must entrench themselves in the State governments, and endeavor to make State justice and State power a shelter of the wise, and good, and rich, from the wild destroying rage of the southern Jacobins.”<sup>3</sup>

As opposing parties have cycled through state and national governments on the unpredictable currents of public opinion, the idea of a principled approach to federalism has never much taken hold. Jefferson again provides the defining example. After opposing what he viewed as the loose constitutional construction that led to the creation of the Bank of the United States,<sup>4</sup> Jefferson himself took a breathtakingly broad view of federal power in approving the Louisiana Purchase (and in imposing an embargo on trade with England).<sup>5</sup> To be sure, Jefferson briefly flirted with principle and urged his administration to seek a constitutional amendment that would have authorized the territorial expansion of the United States.<sup>6</sup> But political reality prevailed and Jefferson was content to implement the treaty through legislation rather than through constitutional amendment.<sup>7</sup> Since Jefferson’s day, the rhetoric of strict construction and limited federal power has been less a matter of principle than a slogan to use against political opponents.

If arguments about the constitutional allocation of power between the federal and state governments have less to do with principle than with political expediency, we should not be surprised to find a political component to **the famous claim of Justice Louis Brandeis that federalism enables states to run experiments in social policy**.<sup>8</sup> Brandeis and the progressives had increasingly turned to state governments to pursue such initiatives as workplace regulation, women’s suffrage, and temperance. One of Brandeis’s goals in the case that gave us the memorable phrase was to protect these initiatives from federal displacement under the prevailing substantive due process conception of the Fourteenth Amendment.<sup>9</sup>

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1. See STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 719-26 (1993) (detailing the resolutions’ substantial influence).

2. For an engaging account, see EDWARD J. LARSON, *A MAGNIFICENT CATASTROPHE: THE TUMULTUOUS ELECTION OF 1800, AMERICA’S FIRST PRESIDENTIAL CAMPAIGN* (2007).

3. 3 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 97-98 (1919) (quoting letter from Fisher Ames).

4. Thomas Jefferson, *Opinion on the Constitutionality of a National Bank (1791)*, in 1 DOCUMENTS OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY 132, 132-36 (Melvin I. Urofsky ed., 1989); cf. Alexander Hamilton, *Opinion as to the Constitutionality of the Bank of the United States (1791)*, in 1 DOCUMENTS OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY 136, 136-40.

5. 2 HENRY ADAMS, *THE HISTORY OF THE UNITED STATES OF AMERICA: DURING THE FIRST ADMINISTRATION OF THOMAS JEFFERSON* 74-93 (Antiquarian Press Ltd. 1962) (1896).

6. *Id.* at 83-84.

7. *Id.* at 84-85.

8. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

9. See *id.* at 310-11 (asserting that states must have the power to experiment in social and economic areas which should not be restricted by limitations set by the courts).

Protection of state lawmaking competence also appears to explain that other famous Brandeis opinion, *Erie Railroad Co. v. Tompkins*.<sup>10</sup> But although the progressives worked to secure and protect reforms at the state level, they went on to impose their reforms at the national level as well. The temperance movement started at the state level, but eventually led to national prohibition, a complete, if relatively short-lived, barrier to state regulation in an area of previously acknowledged state competence.<sup>11</sup>

If progressives were the first to denominate their work as experiments in state laboratories, history teaches us to regard with some skepticism the notion that state governments will consistently serve as engines of progressive social change. Even today, as progressives celebrate the new environmental consciousness on display in some of the states, they will certainly acknowledge that opposing forces hold the upper hand in many states and perhaps at the national level as well. The prospect of same-sex marriage has produced its own reaction, both in the Defense of Marriage Act (DOMA)<sup>12</sup> and in legislation that would deprive the federal courts of power to consider the constitutional validity of DOMA's restriction on the recognition of same-sex marriage.<sup>13</sup> Opposition to same-sex marriage at the state level fueled voter turnout in the 2004 election,<sup>14</sup> and may have influenced the outcome of the national election. From this view, we can perhaps better explain the states' role in our federal system as an alternative political forum, rather than a consistently progressive one. State politics are not inherently more progressive or more conservative than national politics but simply reflect the fact that a different set of politicians has appealed to a different group of voters.

Preserving a vibrant role for the states in our federal system, on this view, depends on the ability of state-level politicians to translate policy initiatives into binding law. In a unitary national government, one can certainly imagine experimentation at the local level. But experiments chosen by a unitary national government would likely bear the imprint of the nationally dominant political party. In a federal system, by contrast, the experiments run at the state level do not depend on securing the consent of the dominant national party. This ability to pursue an independent set of political outcomes helps to explain why oppositional political candidates find it worthwhile to turn to the states with their policy initiatives. Opposition politicians can secure a legislative payoff at the state level

10. 304 U.S. 64 (1938).

11. See U.S. CONST. amend. XVIII (repealed 1933) (establishing prohibition).

12. 28 U.S.C. § 1738C (2006).

13. DOMA has produced an enormous amount of literature. On the full faith and credit issues, see Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143 (2005); Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255 (1998). For a summary of the jurisdiction-stripping proposals that seek to prevent a judicial invalidation of DOMA, see James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction Stripping*, 101 NW. U. L. REV. 191 (2007).

14. See Sheryl Gay Stolberg, *G.O.P. Moves Fast to Reignite Issue of Gay Marriage*, N.Y. TIMES, Oct. 27, 2006, at A6 (stating that the gay marriage issue played an important role in the 2004 election).

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that rewards their efforts in articulating a vision contrary to that of the party in control at the national level.

Several features of our federal system make the states an attractive forum in which to seek a legislative payoff in the form of binding law. To mention only the most obvious example, state legislatures have the power to tax and spend for the general welfare of the state and do not depend on the federal government to finance their operations. Even at a time when the states have accepted countless federal matching grants that impinge on their budgetary freedom, the states retain the power to collect and distribute substantial pools of state tax revenue (as well as the associated power to curtail tax collection). The ability of the state to set its own rate of taxation and to pursue policies with its own revenues provides politicians and other political entrepreneurs with enormous scope for the implementation of policy initiatives.

This Essay will explore a collection of the less well-known features of our federal system, features that make up what I will call the infrastructure of federalism. This infrastructure includes at least four elements. First, state laws take effect when signed by the governor and do not typically require leave of the national government.<sup>15</sup> Second, state laws presumptively control all disputes in state court, unless some contrary body of federal law displaces state authority.<sup>16</sup> Third, state courts can apply state law to disputes with which they have relatively modest ties, even though some other state might conceivably have a stronger regulatory interest.<sup>17</sup> Fourth, state courts can issue judgments binding on non-resident defendants on the basis of relatively modest affiliating connections to the state. These binding decisions, in turn, must be respected by both state and federal courts throughout the country.<sup>18</sup>

Together, these four somewhat invisible elements quietly ensure the binding quality of state law. With the power to bind, the state assembly is no mere debating society. State policy initiatives, even if experimental, concretely affect the interests of the people by changing their legal relations in meaningful ways. The infrastructure of federalism ensures such concrete effects, quite without regard to whether the initiative has a progressive or conservative face. This neutral quality provides an essential feature of the experimentation that occurs at the state level. For, in its neutrality and generality, the infrastructure of federalism provides policy makers and interest groups of all stripes with a reason to fight for control of state lawmaking authority. State politics remain relevant not because politicians display a principled respect for the local sphere and protect it from federal displacement but because the law of federalism carries its judgments into legal effect.

If federalism depends on securing binding effect for state law, then perhaps we can better understand why the Court has approved a system of interstate adjudication that seemingly permits widespread forum shopping. No one doubts

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15. See *infra* text accompanying notes 23-28.

16. On the nature of federal preemption under the Supremacy Clause, see *infra* note 27.

17. See *infra* text accompanying notes 41-54.

18. See *infra* text accompanying notes 55-66.

that forum shopping occurs or that it has a dramatic impact on the outcome of litigation.<sup>19</sup> Many scholars criticize aspects of the practice, perhaps in part due to the critique of forum shopping that Brandeis leveled in his *Erie* opinion; others disagree.<sup>20</sup> But so long as courts differ about substantive law and choice-of-law rules and so long as relaxed rules of territorial jurisdiction prevail, parties will gain strategic advantages from steering their disputes to particular tribunals. Forum shopping may be the price our system of interstate litigation pays to preserve a measure of state autonomy in the making and enforcement of state law. To the extent states open their courts to claimants from around the country (as indeed, they must<sup>21</sup>) forum shopping may produce outcomes that tend to favor plaintiffs, who essentially control the decision about where to litigate.<sup>22</sup>

### I. PRE-ENFORCEMENT REVIEW OF STATE LAW

State law takes effect in accordance with its terms, notwithstanding claims that it may exceed constitutional limits, or conflict with federal policy. It does so, moreover, despite the best efforts of men like James Madison and James Wilson to deny state law this quality of immediate effectiveness. Throughout the colonial period, the Privy Council in England exercised veto power over the laws of the colonial assemblies of British North America.<sup>23</sup> Madison and Wilson sought to restore this veto power at the Constitutional Convention by empowering Congress to negate or veto state laws deemed to be inconsistent with national interests.<sup>24</sup> Although Madison and Wilson presumably had in mind the invalidation of state stay and tender laws that were impeding the collection of debts in the state courts,

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19. See, e.g., Michelle J. White, *Asbestos Litigation: Procedural Innovations and Forum Shopping*, 35 J. LEG. STUD. 365 (2006) (recounting the difference in expected recovery that resulted from plaintiffs' ability to steer cases to forums with favorable procedural rules).

20. Compare Kimberly Jade Norwood, *Double Forum Shopping and the Extension of Ferens to Federal Claims that Borrow State Limitations Periods*, 44 EMORY L.J. 501, 543-49 (1995) (criticizing the transfer regime under which forum-shopping plaintiffs can retain advantageous law), and Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum Shopping*, 80 CORNELL L. REV. 1507, 1518-30 (1995) (arguing for the preservation of venue transfer to negate the advantages that plaintiffs secure through forum shopping), with Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333 (2006) (defending forum shopping as a legitimate strategy to advance client interests), and Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79 (1999) (same). For the view that forum shopping can produce mixed results, see Todd J. Zywicki, *Is Forum-Shopping Corrupting America's Bankruptcy Courts?*, 94 GEO. L.J. 1141, 1143 (2006).

21. Under the Privileges and Immunities Clause, state courts may not close their doors to citizens of other states. U.S. CONST. art. IV, § 2, cl. 1. See generally James E. Pfander, *The Tidewater Problem: Article III and Constitutional Change*, 79 NOTRE DAME L. REV. 1925 (2004) (exploring the implications of the Privileges and Immunities Clause for an understanding of the origins of diversity jurisdiction).

22. See generally George D. Brown, *The Ideologies of Forum Shopping: Why Doesn't a Conservative Court Protect Defendants?*, 71 N.C. L. REV. 649, 650 (1994) (noting that state-to-state forum shopping tends to favor plaintiffs).

23. See JOSEPH HENRY SMITH, *APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS*, at v (1950).

24. For an account, see JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 171-77 (1996).

their proposal was framed broadly enough to encompass all state laws.<sup>25</sup> It was also framed broadly enough to empower Congress to veto state laws on the basis of policy differences, and not solely on the basis of unconstitutionality.<sup>26</sup>

In the end, the convention rejected the proposed national veto on state laws, erecting instead a system in which the Supreme Court was responsible for considering whether state laws conflicted with supreme federal law.<sup>27</sup> **The Framers' choice of a judicial, rather than a legislative, negative on state laws has had profound impact on our federal system.** First, it means that state law goes into effect right away, without being subjected to the delays that would inevitably accompany a process of national legislative oversight and control. Second, the substitution of judicial oversight eliminates (at least in theory) the possibility that the courts will invalidate state law on the basis of policy disagreements. State law must give way only where it conflicts with the Constitution, laws, and treaties of the United States.<sup>28</sup> Under the rejected national veto, by contrast, one suspects that political considerations would have played a central role. The result may have been two rounds of political deliberations, a preliminary round at the state level and a second round at the national level. The tentative nature of state lawmaking under such a regime could have deprived the state process of much of its political salience.

Modern federal litigation threatens to subject some state laws to the equivalent of a pre-clearance judicial veto, but the justiciability doctrines may help to moderate this tendency to some degree. When a state law takes effect, it normally becomes binding in accordance with its terms unless set aside in the course of litigation. **But some state laws, like those that regulate abortion rights, attract pre-enforcement challenges from individuals who contend that the new law invades their constitutional rights.**<sup>29</sup> If successful, such pre-enforcement challenges can prevent the law from taking effect by enjoining the state attorney general from enforcing the disputed provisions.<sup>30</sup> Such challenges also transfer the litigation from state court, where the federal constitutional right would typically arise as a defense to state enforcement, to federal court. It has become commonplace to

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25. *Id.* at 173-74.

26. *Id.*

27. On the displacement of state law in conflict with supreme federal law, see *Hines v. Davidowitz*, 312 U.S. 52, 72-74 (1941) (developing a controversial doctrine of field preemption to protect federal regulation of immigration). For engaging treatments of preemption issues, see Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 2-10 (2007) (arguing that an anti-preemption rule of statutory construction would promote a more visible and vigorous public debate in Congress); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232-60 (2000) (providing an understanding of the history and construction of the Supremacy Clause).

28. U.S. CONST. art. VI, cl. 2 (the Supremacy Clause).

29. See *Singleton v. Wulff*, 428 U.S. 106, 118 (1976) (authorizing abortion service providers to challenge restrictions on abortion rights); *but cf.* *Okpalobi v. Foster*, 244 F.3d 405, 429 (5th Cir. 2001) (physicians lacked standing to file pre-enforcement action to enjoin application of state tort liability for abortion services).

30. See *Lifchez v. Hartigan*, 735 F. Supp. 1361, 1376-77 (N.D. Ill. 1990) (finding an Illinois abortion law unconstitutional and permanently enjoining its enforcement), *aff'd*, 940 F.2d 260 (7th Cir. 1990).

observe that modern pre-enforcement litigation transforms the Constitution from a shield into a sword.<sup>31</sup>

Strict insistence on justiciability doctrines may blunt the sword's edge to some extent. Familiar law requires the plaintiff in pre-enforcement litigation to satisfy the requirements of standing and ripeness.<sup>32</sup> Mere bystanders, anxious to pursue an abstract claim of unconstitutionality, thus lack the power to attack state law in federal court.<sup>33</sup> Rather, individuals must show that the law threatens to invade their legal rights in a fairly immediate way to justify the federal courts' involvement; hypothetical or conjectural challenges to state law will be rejected on standing and ripeness grounds.<sup>34</sup> Well-informed and well-financed interest groups can certainly work around the standing and ripeness hurdles to some extent through the careful recruitment of litigants. But together, the doctrines tend to ensure that the resulting decision will focus on the law's impact on protected rights, rather than on the politics of its adoption.<sup>35</sup>

One might expect that other jurisdictional doctrines will also tend to ensure that litigation over issues of federal preemption will occur in state court in the first instance. The venerable well-pleaded complaint rule requires that, to support the exercise of federal jurisdiction, a federal question must appear on the face of the well-pleaded complaint.<sup>36</sup> Under this rule, plaintiffs cannot ordinarily secure access to federal court by anticipating the assertion of federal defenses.<sup>37</sup> Moreover, the Court has held that suits for declaratory relief must be analyzed not on their own terms but as if they were brought as coercive actions.<sup>38</sup> While this combination of jurisdictional rules keeps most federal defenses in state court, it does not invariably produce that result as to preemption matters. Defendants sued in state court cannot ordinarily remove an action to federal court on the ground that federal law

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31. See Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1532 (1972) (citing *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), as an example of the Court using "judicial power to force affirmative action").

32. For an overview of standing and ripeness doctrine, see JAMES E. PFANDER, *PRINCIPLES OF FEDERAL JURISDICTION* 30-40, 46-49 (2006).

33. *Id.* at 31.

34. *Id.* at 31-34.

35. *Id.* at 32-34.

36. See *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908) ("[A] suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution.").

37. See *id.* at 152 (stating that, to confer subject matter jurisdiction in federal court, "[i]t is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States").

38. See *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673-74 (1950) (holding that there is no original federal jurisdiction in a federal declaratory judgment if the federal claim would only arise as a defense to a state-created action); *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 18-22 (1983) (extending *Skelly* to state declaratory judgment acts and finding that "federal courts do not have original jurisdiction, nor do they acquire jurisdiction on removal, when a federal question is presented by a complaint for a state declaratory judgment").

preempts the state claim at issue.<sup>39</sup> But an important exception to the usual jurisdictional rules permits a defendant to bring an action in federal court, seeking declaratory and injunctive relief from a preempted state law.<sup>40</sup> As a consequence, the Court's jurisdictional framework protects a measure of state court primacy but does not preclude pre-enforcement federal judicial invalidation.

## II. LIMITED STATE PREEMPTION OF APPLICABLE STATE LAW

Just as federal law may preempt conflicting state law, so too can one state's law displace the law of another state. The Full Faith and Credit Clause of Article IV of the Constitution requires state courts to respect not only the *judgments* but also the “[a]cts . . . and [p]roceedings” of other states; it thus requires that state courts accord a measure of respect to the controlling laws of other states.<sup>41</sup> At one time, the Full Faith and Credit Clause was read to impose relatively significant constraints on the state choice-of-law process, requiring one state to give effect to the laws of another state where, for example, the dispute focused on the enforceability of a contract made in the other state.<sup>42</sup> Today, the Court has adopted a less demanding standard for evaluating a state's decision to prefer its own law over that of another state. The current test asks if the litigation has contacts with the state, thereby creating state interests, such that the application of the forum state's law is neither arbitrary nor fundamentally unfair.<sup>43</sup>

Under this state-interests approach, states are free to apply their own law to disputes before their courts so long as the dispute has some relatively minor contacts with the forum state. While the Court has made clear that a state with no connection to the litigation cannot apply its law, the extent of the connection

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39. See *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003) (permitting removal only where federal law completely preempts the state law claim and narrowly defining complete preemption as applicable only where federal law provides an exclusive federal right of action and preempts state law).

40. The Court has never satisfactorily explained how this exception comports with the usual well-pleaded complaint rules, but it has confirmed the exception's existence. See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) (noting that a plaintiff may seek injunctive and declaratory relief through a preempted state law in federal court); *Verizon Md. Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 642 (2002) (quoting *Shaw* approvingly on the issue of jurisdiction).

41. See U.S. CONST. art. IV (“[F]ull faith and credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”) (emphasis added); cf. 28 U.S.C. § 1738 (2006) (codifying the full faith and credit obligation); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981) (noting that a state may apply its own law so long as it has contacts with the transaction, creating state interests, such that the application of its law is neither arbitrary nor fundamentally unfair). For an overview, see Robert H. Jackson, *Full Faith and Credit: The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1 (1945).

42. See, e.g., *N.Y. Life Ins. Co. v. Dodge*, 246 U.S. 357, 377 (1918) (refusing to permit Missouri state courts to apply Missouri insurance law to dispute over an insurance contract made in New York, despite the fact that the policyholder was a Missouri resident).

43. See, e.g., *Allstate*, 449 U.S. at 308 (examining the contacts of the State whose law was applied with the parties and with the occurrence or transaction giving rise to the litigation, in order to ensure that the choice of law is neither arbitrary nor fundamentally unfair).

required can be quite modest. In *Phillips Petroleum Co. v. Shutts*,<sup>44</sup> the Court concluded that the Kansas courts could not apply Kansas law to all members of a plaintiff class when certain of those members were asserting claims to royalties on oil and gas producing properties with no connection to the state.<sup>45</sup> But modest ties can suffice. In a subsequent case, the Court permitted Kansas to apply its own statute of limitations to all of the royalty claims in the plaintiff class, even those that its substantive law could not properly control.<sup>46</sup> Other cases permit the forum state to apply its own insurance rules to govern insurance contracts made in other states, so long as the insured later moved to the forum state and the insurance company had not limited the scope of coverage to exclude risks after such relocations.<sup>47</sup>

The willingness of many state courts to prefer their own law in any choice of law analysis and the reluctance of the Supreme Court to impose any substantial limits combines to encourage interstate forum shopping. In one well-known case, *Ferens v. John Deere*,<sup>48</sup> the plaintiff brought a personal injury suit in Mississippi, after having let the statute of limitations expire in the state of Pennsylvania where the injury occurred.<sup>49</sup> The Court ruled that a transfer of the litigation back to Pennsylvania did not affect the choice of applicable law, leaving in place the plaintiff's acquisition of Mississippi's longer limitation period through successful interstate forum shopping.<sup>50</sup> In another case, *Keeton v. Hustler Magazine*,<sup>51</sup> the plaintiff brought a defamation claim in New Hampshire federal court, the only state in the country in which the limitations period had not expired.<sup>52</sup> Even though the plaintiff and defendants were from New York and Ohio respectively and had little contact with New Hampshire (aside from the distribution there of magazines that included the defamatory statements), New Hampshire chose to apply its own

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44. 472 U.S. 797 (1985).

45. *Id.* at 821-23.

46. *Sun Oil v. Wortman*, 486 U.S. 717, 726 (1988).

47. *See Allstate*, 449 U.S. at 316-17 (holding that a post-occurrence relocation to a different state does not necessarily preclude the application of the laws of claimant's new state); *Clay v. Sun Ins. Ltd.*, 377 U.S. 179, 182-83 (1964) (noting that insurance policies must anticipate the application of the laws of foreign jurisdictions due to the inherently transient nature of insurance policies).

48. 494 U.S. 516 (1990).

49. *Id.* at 519-20.

50. *Id.* at 531.

51. 465 U.S. 770 (1983).

52. *Id.* at 781. The Supreme Court upheld the power of the courts of New Hampshire to exercise territorial or judicial jurisdiction over the defendants on the basis that a small percentage of the allegedly defamatory statements appeared in magazines distributed within the state. *Id.* at 780-81. On remand, the First Circuit certified to the New Hampshire Supreme Court the question whether New Hampshire would apply its own statute of limitations to the dispute (despite the fact that the parties had little connection to the state) and the question whether New Hampshire would follow the single publication rule, thereby permitting the plaintiff to recover damages on a nationwide basis in a single proceeding and obviating the need for multiple suits. *Keeton v. Hustler Magazine Inc.*, 828 F.2d 64, 65-66 (1st Cir. 1987).

limitation period in response to a certified question.<sup>53</sup> In the end, forum shopping enabled the plaintiff to secure a \$2 million jury verdict.<sup>54</sup>

### III. MINIMUM CONTACTS AND FULL FAITH AND CREDIT

The law governing judicial jurisdiction also encourages a broad view of the scope of state court adjudicative authority. Under the familiar minimum contacts test of *International Shoe Co. v. Washington*,<sup>55</sup> state courts may adjudicate claims against non-resident defendants so long as the claim arises from the defendants' contacts with the state and the contacts are such that the assertion of jurisdiction "does not offend traditional notions of fair play and substantial justice."<sup>56</sup> In addition, the Court has permitted the state courts to assert general jurisdiction over claims against non-resident defendants so long as those defendants have "continuous and systematic" contacts with the state.<sup>57</sup> Many corporations that "do business" in a state may have to defend all sorts of claims in the state's courts, even though the claims themselves arise from the corporation's activities elsewhere.<sup>58</sup>

These generous rules of judicial jurisdiction help to cement the forum shopping opportunities that choice of law rules create. In *Ferens*, for example, the John Deere Company was subject to general jurisdiction in Mississippi on the basis that it sold farm implements in that state.<sup>59</sup> Judicial jurisdiction was proper on a general jurisdiction theory, even though the personal injury claim arose in Pennsylvania.<sup>60</sup> Similarly, in the *Keeton* case, the Court upheld New Hampshire's authority to adjudicate on the ground that some 10,000 to 15,000 copies of the magazine in which the defamatory statement appeared (or less than one percent of its monthly circulation) had been distributed in that state.<sup>61</sup> Because the claim might be seen as arising in New Hampshire from the distribution of the magazines there, New Hampshire courts had the power to adjudicate and to apply New Hampshire law.<sup>62</sup> Thus, a New York citizen who may have never set foot in New Hampshire, except perhaps in connection with a fall colors tour, was given the benefit of that state's favorable law.<sup>63</sup>

The rules that govern enforcement of judgments in the interstate context interact with these rules of judicial jurisdiction. Under the Full Faith and Credit Clause, the Court has compelled the state courts to respect the prior judgments of courts in other states, so long as the first court properly asserted judicial jurisdiction

53. *Keeton v. Hustler Magazine Inc.*, 549 A.2d 1187, 1188 (N.H. 1988).

54. *See id.* at 1196-97.

55. 326 U.S. 310 (1945).

56. *Id.* at 316, 320.

57. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 (1984).

58. *See generally* Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171 (setting forth justifications for doing-business jurisdiction).

59. *Ferens*, 494 U.S. at 519-20.

60. *Id.*

61. *Keeton*, 465 U.S. at 780.

62. *See id.* (confirming that the application of New Hampshire state law was appropriate).

63. *Id.*

over the proceeding.<sup>64</sup> With its broad definition of jurisdiction, the Court has considerably broadened the power of the state courts to enter binding judgments against non-resident defendants. In addition, the Court has clarified that one court's disagreement with the law and policy underlying another state court's judgment on the merits provides no basis for refusing to give effect to a prior judgment.<sup>65</sup> So long as jurisdiction was properly asserted in the first proceeding, state courts must give effect to the judgment even where the prior disposition ignored the law of a more interested state.<sup>66</sup>

#### IV. FORUM SHOPPING AND THE INFRASTRUCTURE OF FEDERALISM

While one might criticize the framework of interstate litigation as laying the foundation for considerable interstate forum shopping, the framework also provides the essential infrastructure of federalism. Why do we tolerate forum shopping? One answer would emphasize the importance of jurisdictional variety in a federal system. State law may not adequately protect certain values we hold dear and citizens can seek protection by invoking overlapping (and possibly redundant) rights under federal law. Plaintiffs who suffer injuries as a result of the use of excessive force by the police may not trust their state law tort remedies; they might sue instead under 42 U.S.C. § 1983, the federal statute that offers tort-like remedies for individuals who suffer violations of their federal rights (here, the right to freedom from the use of excessive force in a seizure under the Fourth Amendment) at the hands of officials acting under color of state law.<sup>67</sup> Similarly, women may have a choice in seeking remedies for sexual harassment on the job; they may either invoke federal law (Title VII)<sup>68</sup> or state tort analogs.

Just as citizens may appear to benefit from competition between state and federal governments in the protection of individual rights, we may benefit from competition between the several states. As everyone knows who has studied the so-called "dormant" Commerce Clause, state governments tend to write laws to benefit insiders and burden outsiders.<sup>69</sup> State governments might tend to write laws

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64. *See, e.g., McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 224 (1945) (holding that the state of Texas must give effect to California judgment following the Court's determination that California had properly exercised judicial jurisdiction over the Texas-based life insurance company). The court has recognized a variety of other defenses, not pertinent here, to the recognition of judgments.

65. *See Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908) (declaring that Mississippi court was bound by full faith and credit to recognize a Missouri judgment that was based on the enforcement of a contract that Mississippi regarded as against public policy).

66. *See id.* (upholding Missouri judgment that enforced a contract despite the fact that the law of the state where the contract was made would have invalidated the contract on policy grounds).

67. *See* 42 U.S.C. § 1983 (2000) (providing a federal remedy for the violation of an individual's civil rights at the hands of a state actor).

68. 42 U.S.C. § 2000e-2 (2000) (prohibiting discrimination on the basis of sex in employment).

69. *See, e.g., S. Pac. Co. v. Ariz. ex rel. Sullivan*, 325 U.S. 761, 783-84 (1945) (invalidating, as disruptive of interstate commerce, a state law that required trains entering Arizona to be broken into shorter lengths; state law was apparently adopted to benefit in-state workers); *S.-Cent. Timber Develop., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984) (invalidating a state law that required in-state processing of Alaskan lumber).

governing the internal affairs of corporations in ways that extract benefits from shareholders and transfer them to locals (e.g., workers or consumers). The ability of the corporation to seek out the most advantageous forum in which to incorporate may dampen the ability of some states to capture corporate profits through regulation (although scholars continue to debate the extent to which states actually compete in a market for the issuance of corporate charters).<sup>70</sup>

Competition among states to attract litigation business may not be quite so healthy. The primary beneficiaries of such competition may be the lawyers who steer the business to state courts to earn litigation fees.<sup>71</sup> These lawyers, in turn, may attempt to influence the handling of their claims through judicious participation in the process of judicial elections. At least some of the anecdotes about state court overreaching that were marshaled in support of the transfer of class action litigation to federal court in the Class Action Fairness Act of 2005<sup>72</sup> may have had their roots in judicial electioneering.<sup>73</sup> The defense bar has fought back and has been relatively successful in using tort reform as a wedge issue in judicial election campaigns.<sup>74</sup> The U.S. Supreme Court recently abetted such competition by providing more constitutional protection for partisan speech by those running for judicial office.<sup>75</sup> Judicial candidates can now provide a more explicit description of their views on particular issues than would have been appropriate under the old canons of ethics.<sup>76</sup> One consequence has been an increase in the flow of partisan and special interest money into the campaign accounts of judicial candidates.<sup>77</sup>

To the extent that forum shopping enables lawyers to exploit advantageous relationships with specific judges or courts, the practice seems hard to justify.

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70. For an introduction to the substantial literature on state competition over corporate charters, see Lucian Ayre Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 122 YALE L.J. 553 (2002).

71. See, e.g., Bruce H. Kobayashi & Larry E. Ribstein, *Class Action Lawyers as Lawmakers*, 46 ARIZ. L. REV. 733, 742-47 (2004) (discussing the role of lawyers as private lawmakers); Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 470-71 (2003) (discussing the incentives that lawyers have in promoting laws that would encourage parties to establish contacts in the state).

72. 28 U.S.C. §§ 1332(d), 1453, 1711-15.

73. One Alabama trial court judge in particular was said to have cozy relations with the plaintiffs' class action bar, and was said to have been too quick to certify nationwide class actions.

74. In 2004, for example, Lloyd Karmeier won a position on the Illinois Supreme Court after the most expensive judicial campaign in state (and national) history. Karmeier, the Republican Party candidate, was identified as friendly to the interests of business groups and tort reformers, and received much of his financial support from such groups. Upon joining the court, Justice Karmeier promptly voted with other Justices to overturn a series of controversial lower court class action decisions. Mary Eileen Weicher, *The Expansion of the First Amendment in Judicial Elections: Another Cause for Reform*, 38 LOY. U. CHI. L.J. 833, 868 (2007).

75. See *Republican Party v. White*, 536 U.S. 765, 788 (2002) (holding that the Minnesota Supreme Court's canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violated the First Amendment).

76. See *id.* at 786-87 (discussing the Court's holding in the light of various codes of legal ethics).

77. For an account of recent judicial elections to the Illinois Supreme Court, see Weicher, *supra* note 74, at 867-70.

Even where forum shopping simply exploits differences in applicable law, one might question the practice. Indeed, among its enduring justifications, the *Erie* decision sought to suppress the forum shopping that had emerged under the previous regime of *Swift v. Tyson*.<sup>78</sup> But widespread systemic hostility toward forum shopping that seeks to exploit distinctions in state and federal general common law has not carried over into our attitude toward interstate forum shopping. When the Court has confronted the practice in the interstate context, it has usually responded with only token expressions of concern. For example, in *Ferens*, the Court treated forum shopping as a natural outgrowth of a federal system in which state courts enjoy overlapping jurisdiction and parties have incentives to steer litigation into particular courts to gain strategic advantage.<sup>79</sup> Accordingly, the Court instructed lower federal courts not to fight forum shopping (at least as to matters governed by state law) but simply to duplicate the results that would obtain in state court.<sup>80</sup>

Although puzzles remain, I believe that the acceptance of forum shopping reflects a desire to preserve an element of state autonomy in the making of law and in the adjudication of disputes in our federal system. Each state has legislative power over matters with which it has some relatively modest contacts; each state has adjudicative power over disputes with which it has similarly modest contacts; states with such contacts may apply their own law to the dispute before them—they have no constitutional obligation to apply the law of a “more interested” jurisdiction (although they may choose to impose limits on themselves as a matter of their own choice of law rules). In a national economy, many disputes implicate the interests of more than a single state and create a forum-shopping opportunity. The Supreme Court and Congress have refused so far to place significant constitutional or statutory limits on the power of the states to hear and determine multi-state disputes. States with the freedom to choose often agree to hear disputes with which they have little connection and often seek to apply their own law. Established rules require federal courts sitting in diversity to replicate the results that would be achieved in state tribunals. Our whole system rests on the presumed availability of forum choice.

Forum choice, in turn, provides the states’ politicians with a policy-making arena that extends well beyond their own borders. New Hampshire’s decision

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78. See *Erie R.R. Co.*, 304 U.S. at 74-75 (citing the mischievous consequences of permitting parties to exploit differences in applicable state and federal law as one justification for overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)).

79. See *Ferens*, 494 U.S. at 530-31 (holding that the law of the transferor district applies to state law actions transferred for convenience, even where the motion to transfer was made by the plaintiff who sought to gain strategic advantage from filing suit in a distant forum).

80. The Court has taken a somewhat more negative view of forum shopping in the international, forum non conveniens context. In *Piper Aircraft Co. v. Reyno*, the lower court had treated the loss of favorable state law as a strong argument against the forum non-dismissal of products liability claims brought against manufacturers in the United States. 454 U.S. 235, 244-46 (1981). The Court reversed, emphasizing the fact that the plane crash from which the claims arose had occurred in Great Britain and the plaintiffs had apparently chosen to file suit in the United States to take advantage of advantageous tort law and favorable jury awards. *Id.* at 259-61.

about the length of its limitations period and the content of its defamation law may govern the relations of parties with little connection to the state.<sup>81</sup> State laws frequently apply to events that occur outside the state's borders, and occasionally to events outside the United States.<sup>82</sup> The expansive application of state law depends, in turn, on the willingness of the parties to invoke state law in the course of pursuing claims in state court. And, so long as the state courts can issue binding judgments that other states must respect, parties can gain litigation advantages by invoking state law.

#### V. FEDERALISM AND THE OUTCOME OF LITIGATION

The infrastructure of federalism, by encouraging or at least facilitating forum shopping, may have a tendency to produce legal outcomes that favor plaintiffs.

The pro-plaintiff tendency of the federal system certainly seems consistent with our intuitive understanding of the way lawyers seek strategic advantage in the selection of the forum. It also finds support in a collection of empirical studies that examine the impact of the tactics that defendants use to counter forum shopping.<sup>83</sup> In brief, these empirical studies reveal that such tactics as removal and transfer of litigation—tactics often designed to counter plaintiff forum selection—lower the plaintiff's likelihood of success in the litigation.<sup>84</sup> The studies clearly indicate that, in cases where the plaintiff's forum selection stands, plaintiffs are more likely to win.

The intuitive case for thinking that forum shopping tends to improve the plaintiff's prospects for success seems quite straightforward. When plaintiffs have a choice of forums available to them, their lawyers will tend to select the forum that, other things being equal, will offer the best chance of recovery. Perhaps the forum chosen will have favorable law; perhaps it will have favorable jury panels; perhaps it will employ judges who lean in the plaintiff's direction. Whatever the reason, so long as the plaintiff's lawyer acts in the best interests of the client in choosing the forum (and we have some reason to suppose that contingency-fee financing of litigation tends to align these interests pretty well), forum selection will predictably enhance the plaintiff's prospects for success.

Empirical studies confirm this intuition. Kevin M. Clermont and Theodore Eisenberg have shown that the removal of cases from state to federal court tends<sup>85</sup>

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81. Thus, in *Keeton*, 549 A.2d at 1195-96, the New Hampshire Supreme Court applied the state's own five-year limitation period and the single publication rule to allow an action by a New York resident, Kathy Keeton, to proceed to judgment against an Ohio-based magazine and its owner, Larry Flynt, even though the action would have been time-barred under the limitations laws of the other forty-nine states.

82. See, e.g., *Ferens*, 494 U.S. at 519, 531-32 (applying Mississippi's statute of limitations to an event that took place in Pennsylvania).

83. See, e.g., 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, 592-607 (1998) (analyzing the effect of removal jurisdiction on plaintiffs' win rates).

84. *Id.* at 606-07.

85. 28 U.S.C. § 1441 (2000) authorizes the removal from state to federal courts of actions to which

to reduce win rates for plaintiffs.<sup>86</sup> Equally important, they have shown that this reduction in win rates is not likely to have been influenced by case selection effects that often obscure the implications of win rate data.<sup>87</sup> Similarly, Clermont and Eisenberg have shown that plaintiff win rates decline when cases are transferred<sup>88</sup> “in the interests of justice” from one venue to another in the federal system.<sup>89</sup> They conclude that forum shopping affects the outcome of litigation.<sup>90</sup> Finally, Clermont studied the impact of forum non conveniens dismissals, concluding that plaintiffs were almost never successful in litigation that was initiated in the wake of such a dismissal.<sup>91</sup> If defendants’ efforts to counter forum shopping reduce win rates in ways that case selection does not explain, then one can fairly conclude that unchecked forum shopping improves plaintiffs’ prospects for success.

One might suppose that states will tend to compete for the business that forum shopping brings about, and that such competition might tend to further enhance the prospects of success for plaintiffs. Consider, for example, the criticism of state court class action litigation that led to the enactment of the Class Action Fairness Act of 2005.<sup>92</sup> Critics argued that some state courts were too quick to allow the certification of nationwide class actions.<sup>93</sup> Because nationwide class actions can be brought in any state in the country, plaintiffs’ lawyers had incentives to steer the litigation to the most plaintiff-friendly forums.<sup>94</sup> The judges of Madison County, Illinois earned a reputation for welcoming class litigation and filings in that county grew dramatically in the decade preceding the adoption of CAFA.<sup>95</sup> Perhaps other states lowered their certification standards in an effort to compete for business.

Perhaps. But I suspect that most state justice systems develop rules of law not with a view toward attracting the outside litigant but with a view toward achieving just outcomes in wholly domestic litigation. Thus, the lengthy five-year limitation period that drew Kathy Keeton to New Hampshire probably reflected the state’s own sense of a just window of litigation opportunity rather than a limitations period

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the original jurisdiction of the federal courts extends.

86. Clermont & Eisenberg, *supra* note 83, at 605-06.

87. *Id.* at 606.

88. 28 U.S.C. § 1404 (2000) authorizes a federal district court to transfer a case to another appropriate forum when doing so would serve the convenience of the witnesses and parties and the interests of justice.

89. Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum Shopping*, 80 CORNELL L. REV. 1507, 1512 (1995) (comparing plaintiffs win rate of 59.97 percent when the case is not transferred to a win rate of 29.26 percent when transfer is granted).

90. *Id.* at 1507, 1530.

91. Kevin M. Clermont, *The Story of Piper: Fracturing the Foundation of Forum Non Conveniens*, in CIVIL PROCEDURE STORIES 193-216 (Kevin M. Clermont ed., 2004) (noting that plaintiffs do not generally succeed following a dismissal for forum non conveniens). On dismissal for forum non conveniens, see *Piper Aircraft Co.*, 454 U.S. at 235, 250-52.

92. See James E. Pfander, *Protective Jurisdiction, Aggregate Litigation, and the Limits of Article III*, 95 CAL. L. REV. 1423 (2007).

93. *Id.*

94. For a summary of the factors that were said to have supported the transfer of class litigation to federal court under CAFA, see *id.*

95. *Id.*

fashioned with the interests of non-resident plaintiffs in mind. State legislatures are more likely to consider the interests of their own citizens, rather than those of the nation as a whole, when they adopt new laws. With a few notable exceptions, such as long-arm statutes, it seems unlikely that the states would tailor particular bodies of law with the interests of non-residents chiefly in mind. The pro-plaintiff bias that forum shopping introduces into the law probably reflects less a race to the bottom on the part of state courts and legislatures than successful strategic behavior by plaintiffs' lawyers operating within a framework that facilitates broad forum choice.

Yet, in the end, the prospect of nationwide litigation in a system that encourages or at least tolerates forum shopping may compel firms selling products and services in the national market to conform their practices to those of the state with the most protective laws. Consider, for example, the behavior of BMW in developing a disclosure policy for minor repairs performed on cars marketed as new. The record in *BMW of North America, Inc. v. Gore*,<sup>96</sup> indicated that the firm had attempted to comply with the most demanding legislative disclosure standard of the many that had been adopted by the several states.<sup>97</sup> The Court, as a consequence, was reluctant to permit the state of Alabama to apply its more demanding judge-made standard as the predicate for the imposition of punitive damages on a nationwide basis.<sup>98</sup> But while the Court rejected the imposition of nationwide punitive damages, it did not question the power of Alabama courts to award compensatory damages to the plaintiff for BMW's failure to that state's own more demanding standard.<sup>99</sup>

#### CONCLUSION

Justice Brandeis analogized state legislatures to laboratories and celebrated their ability to experiment with social policy.<sup>100</sup> He thus argued for a narrow conception of Substantive Due Process with a view toward preserving more room for state experimentation. Brandeis was no doubt motivated, in part, by a desire to protect specifically progressive legislation at the state level, since it was that sort of legislation that the *Lochner*<sup>101</sup> Court tended to invalidate. The historian, Edward Purcell, has shown that Justice Brandeis acted from similarly progressive motives in his celebrated opinion for the Court in *Erie Railroad Co. v. Tompkins*.<sup>102</sup> In *Erie*, a cornerstone of what I have called the infrastructure of federalism, Brandeis acted to secure the role of state courts in the development of binding rules of common

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96. 517 U.S. 559 (1996).

97. *Id.* at 578.

98. *Id.* at 584-85.

99. *Id.* at 585.

100. *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting).

101. *Lochner v. New York*, 198 U.S. 45 (1905).

102. EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* (2000).

law. One consequence was to protect state judge-made rules of decision from federal displacement and the state-federal forum shopping that resulted; another was to break the common law into fifty potentially separate bodies of state law. By securing the role of each state supreme court as a final arbiter of the common law, *Erie* sets the stage for the interstate forum shopping that we witness today.

Whether he did so knowingly or not, the infrastructure of federalism that Brandeis helped to create in *Erie* has tended to advance the interests of plaintiffs. Forum shopping improves win rates for plaintiffs. Moreover, national markets have combined with the Court's relatively relaxed standards for the choice of applicable law and for the exercise of territorial jurisdiction to enhance forum shopping opportunities. Interestingly, then, the body of law that comprises the infrastructure of federalism, though nominally neutral, may tend to have a modestly progressive or at least pro-plaintiff bias after all.