

# AGGREGATION ON THE COUCH: THE STRATEGIC USES OF AMBIGUITY AND HYPOCRISY

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*In this Essay, Professor Burbank comments on the essays by Professors Nagareda and Issacharoff. Welcoming the opportunity to revisit the interplay between procedure and substantive law and the question of democratic accountability that Professor Nagareda's essay presents, Professor Burbank concludes that the parts of that essay are greater than the whole. He finds that Professor Nagareda's pursuit of unifying themes and a general normative theory leads to inconsistencies in classification between procedure and substance and to an impoverished vision of institutional legitimacy. Professor Burbank voices concern that this quest, which is also evident in the current draft of the American Law Institute's Principles of the Law of Aggregate Litigation, denies the complex interaction of procedure and substantive law and takes an essentialist view, shaped by current federal arrangements, on normative questions, including questions of institutional legitimacy. Noting that both Professor Nagareda and Professor Issacharoff discuss the implications of the Class Action Fairness Act of 2005 (CAFA) for choice of law in nationwide class actions, but that their essays reach radically different conclusions, Professor Burbank finds neither persuasive on the critical question of legal authority. He argues that Professor Issacharoff attempts to beat Congress at the hypocrisy game, cherry-picking congressional statements to justify a choice of law result precisely the opposite of that sought by the statute's promoters. He also disagrees with Professor Nagareda's claim that CAFA instantiates a broader principle of institutional legitimacy. Agreeing, however, with both authors that CAFA affords good reason to reconsider the Supreme Court's Erie jurisprudence, in particular Klaxon Co. v. Stentor Electric Manufacturing Co., Professor Burbank offers an analytical path to the conclusion that under CAFA a federal court may not be required to follow state choice of law doctrine that "bootstraps" for the purpose of enabling aggregation.*

## INTRODUCTION

In a review essay that was published almost twenty years ago, I devoted considerable attention to the theme of "procedure as an instrument of power."<sup>1</sup> I noted "the substantive implications of joinder and . . . the extent to which efficiency concerns cause courts to bend the requirements of procedural rules, to pursue dubious packaging strategies that are supposedly provisional but that in substantive terms may be irremediable, and, alternatively, to pursue dubious substantive strategies that en-

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1. See Stephen B. Burbank, *The Costs of Complexity*, 85 Mich. L. Rev. 1463, 1471-76 (1987) (book review) [hereinafter Burbank, *Complexity*].

able packaging.”<sup>2</sup> I observed that the recurrent question, “which—joiner or change in the substantive law—is the chicken and which the egg” is “perhaps most sharply put in [connection with] class actions,” and that it could also be “pursued with profit in the context of settlement.”<sup>3</sup> Identifying as a premise implicit in my discussion “that complex litigation may exact a cost when the procedural system designed to accommodate it effects changes in the substantive law,”<sup>4</sup> I sought to refine that premise, as follows:

According to this view, the perception that procedural rules are not neutral makes it important to try to identify the impact of procedural rules and to be candid in describing that impact. The perception also makes it important to be candid in describing the purposes of procedural rules. Because avowedly procedural rules may have either substantive purposes or substantive effects, consideration should be given to the political legitimacy of the process by which they are formulated or applied and of the actors who are formulating or applying them. Rather than giving up on the procedure/substance dichotomy, we should craft it with attention to its ultimately political ramifications.<sup>5</sup>

It is a particular pleasure to comment on these essays by Professors Nagareda<sup>6</sup> and Issacharoff,<sup>7</sup> because the occasion affords me an opportunity to revisit the interplay of procedure and substantive law, and the questions of political legitimacy it raises, in the context of aggregation. It is also a pleasure because these two colleagues have done so much to advance the study of aggregate litigation in both their scholarship and their work for the American Law Institute.<sup>8</sup> Their essays, based on papers presented to the 2006 Institute for Law and Economic Policy conference, are part of those larger bodies of work. Although very different, they have at least one thing in common. Their authors seek to locate in the Class Action Fairness Act of 2005 (CAFA)<sup>9</sup> support, if not authority, for their preferred solutions to the problem of nationwide classes in cases governed by state substantive law.<sup>10</sup> Professor Nagareda’s essay is, however, far more ambitious than that, and CAFA plays a relatively minor,

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2. *Id.* at 1471 (footnotes omitted).

3. *Id.* at 1471–72.

4. *Id.* at 1472.

5. *Id.* at 1473.

6. Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 *Colum. L. Rev.* 1872 (2006) [hereinafter Nagareda, *Discontents*].

7. Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 *Colum. L. Rev.* 1839 (2006).

8. See *Principles of the Law of Aggregate Litig.* (Discussion Draft 2006) [hereinafter *Principles*]. Professor Issacharoff is the Reporter, and Professor Nagareda is one of the Associate Reporters, of the *Principles*. *Id.* at v.

9. Pub. L. No. 109-2, 119 Stat. 4 (to be codified in scattered sections of 28 U.S.C.).

10. See Issacharoff, *supra* note 7, at 1861–71; Nagareda, *Discontents*, *supra* note 6, at 1876–79, 1920–22.

and in any event supporting, role in his analysis. For that reason, and because the two authors' contrasting treatments of CAFA are instructive, I will first comment on the non-CAFA sections of Professor Nagareda's essay, and then turn to the common landscape that he and Professor Issacharoff paint in such different colors.

#### I. THE SEARCH FOR BRIGHT LINES, UNIFYING PRINCIPLES, AND GENERAL THEORIES OF LEGITIMACY

Professor Nagareda's thoughtful and stimulating essay pursues his interest in the relationship between aggregate procedure and substantive law. It is filled with arresting insights and interesting moves in each of its constituent parts—discussing class settlement pressure, waivers of class-wide arbitration, and CAFA. Professor Nagareda takes as “the ideal” that “vehicles for the resolution of civil claims should not alter substantive law.”<sup>11</sup> Adopting a normative stance of institutional legitimacy, he advances a “legislative primacy” principle positing “that law reform should take place by way of legislation, not through the backdoor of aggregate procedure or an arbitration clause in a private contract—both of which are characterized by their supposed lack of law-reform power.”<sup>12</sup>

Far be it from me to object to insistence on institutional legitimacy in lawmaking. That was not only a concern of the review essay discussed above;<sup>13</sup> it has been one of the central concerns of my career as a scholar.<sup>14</sup> I am left with the feeling, however, that the sum of the three parts of Professor Nagareda's essay—which is very substantial—is greater than the whole. It appears to me that the determination to tie together the three topics he discusses, and to draw overarching lessons from them, leads him to be insufficiently general in probing the interplay of procedure and substantive law, as a result of which he sacrifices consistency in classification. The same quest leads him to be insufficiently particular in his thinking about institutional legitimacy, as a result of which he submerges the legitimate lawmaking powers of courts and in that and other ways projects federal arrangements onto the states.

At least since the days of Walter Wheeler Cook,<sup>15</sup> thoughtful legal observers have recognized that there is no bright line between procedure

11. Nagareda, *Discontents*, supra note 6, at 1877; see also *id.* at 1874 (“[T]he format for the resolution of civil disputes—class action versus individual lawsuit, or arbitration versus litigation—should not alter substantive law.”).

12. *Id.* at 1909–10. At one point in his essay, Professor Nagareda seems to acknowledge that other “vehicle[s]” in addition to legislation may be regarded “as carrying comparable law-reform authority,” see *id.* at 1878, but he does not pursue the thought.

13. See supra text accompanying notes 1–5.

14. See, e.g., Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 *Notre Dame L. Rev.* 1677 (2004) [hereinafter Burbank, *Role of Congress*]; Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 *U. Pa. L. Rev.* 1015 (1982) [hereinafter Burbank, *Rules Enabling Act*].

15. See Walter Wheeler Cook, “Substance” and “Procedure” in the Conflict of Laws, 42 *Yale L.J.* 333 (1933).

and substance in whatever legal context one encounters the dichotomy (and for whatever purpose it is deployed).<sup>16</sup> Indeed, it was a standard rhetorical ploy of judges and scholars involved in federal court rule-making to respond to claims of overreaching by reminding us of that fact.<sup>17</sup> They were encouraged in that regard by Supreme Court decisions gutting the Rules Enabling Act's<sup>18</sup> restrictions<sup>19</sup> and (appropriately) upholding constitutional power to fashion Federal Rules that could rationally be classified as procedure or substance.<sup>20</sup>

If the power of procedure had not been evident before the 1960s, it certainly should have been so after the 1966 amendments to the federal class action rule (Federal Rule of Civil Procedure 23), one of the avowed purposes of which was to enable the vindication through group litigation of claims under the substantive law that could or would not be brought on an individual basis.<sup>21</sup> Indeed, the main architect of the amendments predicted that by "enhanc[ing] the forensic opportunities of hitherto powerless groups, they will tend to probe the *terrae incognitae* of substantive law,"<sup>22</sup> and in 1984 the Supreme Court used those amendments as an example of the fact that "this Court's rulemaking under the enabling Acts has been substantive and political in the sense that the rules of procedure have important effects on the substantive rights of litigants."<sup>23</sup>

Once knowledge of the power of procedure was widely shared, the potential substantive impact of proposed changes in procedural rules guaranteed that the institutions responsible for effecting such changes would attract the attention of interest groups. That Congress again became one of those institutions, after decades of leaving procedure to the federal judiciary, tells us both that legislators too had learned procedure's

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16. See, e.g., Burbank, Rules Enabling Act, *supra* note 14, at 1187–88.

17. See Burbank, Role of Congress, *supra* note 14, at 1706; Burbank, Complexity, *supra* note 1, at 1473 ("The reminder that there is no bright line between procedure and substantive law has been a refuge of procedural reformers for fifty years.").

18. 28 U.S.C. §§ 2071–2077 (2000).

19. See, e.g., *Hanna v. Plumer*, 380 U.S. 460, 464–65, 469–74 (1965); *Sibbach v. Wilson*, 312 U.S. 1, 9–16 (1941); Burbank, Rules Enabling Act, *supra* note 14, at 1028–35 (discussing *Hanna* and *Sibbach*).

20. See *Hanna*, 380 U.S. at 471–74; Stephen B. Burbank, Proposals to Amend Rule 68—Time to Abandon Ship, 19 U. Mich. J.L. Reform 425, 430–33 (1986) [hereinafter Burbank, Proposals] (examining 1983 and 1984 proposed amendments to Federal Rule of Civil Procedure 68, and critiquing Advisory Committee's analysis of limitations on Supreme Court's rulemaking power).

21. See Benjamin Kaplan, A Prefatory Note, 10 B.C. Indus. & Com. L. Rev. 497, 497 (1969) ("The entire reconstruction of [Rule 23] bespoke an intention . . . even at the expense of increasing litigation, to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all."). Professor Kaplan, the Reporter for the 1966 amendments, went on to criticize the Court's decision in *Snyder v. Harris*, 394 U.S. 332 (1969), because its "net effect . . . is to disfavor the small fellow and thereby to defeat a main purpose of the Rule revision." Kaplan, *supra*, at 498.

22. Kaplan, *supra* note 21, at 500.

23. *Mistretta v. United States*, 488 U.S. 361, 392 (1989).

dirty little secret and that interest groups were pushing Congress either to restrain the judiciary or itself to exercise the power of procedure.<sup>24</sup> And from that perspective, the judiciary's invocation of "The Enabling Act Process"<sup>25</sup> as a reproach when Congress has contemplated changing a particular procedure found in the Federal Rules on a substance-specific basis, as in the Private Securities Litigation Reform Act of 1995,<sup>26</sup> is revealed as a complaint not just about having to share power, but also about losing a monopoly on the strategic use of procedure to mask substantive change.<sup>27</sup>

Against this background, it is not clear what we should make of the ideal and the principle that Professor Nagareda advances. It is difficult to conclude, other than through a wooden analysis of the sort made infamous in *Sibbach v. Wilson & Co.*,<sup>28</sup> that the advent of the small claims (negative value) class action did not "alter substantive law."<sup>29</sup> Both its purpose and effect were, after all, dramatically to alter the enforcement of substantive rights. It is even less obvious why the 1966 amendments did not in that respect constitute "law reform . . . through the backdoor of aggregate procedure."<sup>30</sup> And how is it exactly that this "procedural format . . . is to be kept distinct from the remedial scheme of underlying substantive law"?<sup>31</sup>

Perhaps anticipating these questions and concerns, Professor Nagareda acknowledges that "class certification . . . shapes dramatically the impact that the . . . remedial scheme will have in the real world."<sup>32</sup> He also seems to argue that, if a legislature has created a substantive right and a remedy (i.e., damages), it (and we) can hardly complain if the judiciary devises a new procedure, or alters an old one, in order to fructify

24. See Burbank, *Role of Congress*, supra note 14, at 1703–14 (describing historical development of congressional involvement in legislating procedural law).

25. *Id.* at 1729, 1731, 1733, 1737–39.

26. Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.).

27. As I have noted about "The Enabling Act Process" objection:

[F]or those many matters where the Federal Rules make no choices, leaving the procedure/substance accommodation to discretionary decisionmaking, the claim must be that Congress's substantive agenda is always better served by trusting to the discretion of federal judges and thus abjuring the potentially potent technique of using procedure to drive, or to mask, substance. From the latter perspective, indeed, the claim seeks to deny to Congress a politically valuable instrument of ambiguity.

Burbank, *Role of Congress*, supra note 14, at 1731–32 (footnote omitted).

28. 312 U.S. 1, 14 (1941) (concluding that test for validity of Federal Rule "must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them").

29. Nagareda, *Discontents*, supra note 6, at 1877.

30. *Id.* at 1909.

31. *Id.* at 1875.

32. *Id.*

that right and remedy.<sup>33</sup> In other words, the small claims class action is not itself a remedy, but merely a “vehicle” or “format” for the vindication of substantive rights.

Taking the last point first, it seems entirely possible that—prior to the introduction of the small claims class action—a legislature may have been aware, and (collectively) content, that in some circumstances the right and its attendant statutory remedy were worth only the paper on which they were written. Indeed, perhaps the legislature was counting on the complex of other laws and institutions that determine whether rights can be vindicated to serve as filters. That view appears particularly plausible with respect to a legislature that has sought only selectively to change one of the most important such filters—the market for legal services—by providing for an award of attorney’s fees to prevailing plaintiffs.<sup>34</sup> It is also a view that will be familiar to those who have studied foreign legal systems in which rights often go unenforced through private litigation and may not be enforced at all.<sup>35</sup>

If it is appropriate to hold a legislature to awareness of the background of procedural rules against which it legislates, as we are often told,<sup>36</sup> why is it not appropriate to impute to that legislature awareness of (and reliance on) all of the ancillary arrangements that effectively determine whether rights mean anything in the real world? In any event, if “there is no authority for courts, as distinct from legislatures or executives, to select which principles in substantive law warrant vigorous enforcement and which do not,”<sup>37</sup>—a proposition that neglects the common law powers of state courts<sup>38</sup>—where is the authority to promulgate a rule with the purpose (and predictable and direct effect) of enabling vigorous enforcement in a particular class of cases?

33. Professor Nagareda’s exact words are: “The point is that the procedural rule for class actions authorizes aggregation and thereby removes a barrier to the private enforcement of substantive commands—a barrier that is not the byproduct of anything that one credibly might characterize as a legislative choice in the design of a remedial scheme.” *Id.* at 1884.

34. Professor Nagareda correctly recognizes that legislatures may use “fee-shifting provisions to reduce the cost obstacles to private enforcement.” *Id.* Moreover, he assimilates such provisions to “substantive law,” *id.* at 1883, a classification that is supportable in the context of federal court rulemaking, see Burbank, *Proposals*, *supra* note 20, at 433–34, but not under the approach taken by the Court in *Sibbach*. See *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941).

35. See Stephen B. Burbank, *Jurisdictional Conflict and Jurisdictional Equilibration: Paths to a Via Media?*, 26 *Hous. J. Int’l L.* 385, 387, 397, 398–99 (2004) [hereinafter Burbank, *Jurisdictional Conflict*].

36. See, e.g., *Califano v. Yamasaki*, 442 U.S. 682, 698–701 (1979) (requiring “clear expression of congressional intent to exempt actions brought under” a statute “from the operation of the Federal Rules of Civil Procedure”).

37. Nagareda, *Discontents*, *supra* note 6, at 1878; see also *id.* at 1885 (“[T]here is no authority in the hands of courts charged with the administration of aggregate procedure somehow to select which features of substantive law to temper.”).

38. See *infra* note 44.

On this view, and passing the question whether the 1966 amendments to Rule 23 were valid under the Rules Enabling Act when promulgated, the effect of amended Rule 23(b)(3) in small claims class actions generally was *not* materially different from its effect in the recent Second Circuit case involving the Cable Communications Policy Act of 1984 (Cable Act)<sup>39</sup> that Professor Nagareda discusses.<sup>40</sup> Although the concept of inefficient overenforcement is a tool of economic analysis of law,<sup>41</sup> when applied to a particular statute, it surely must start with the level of enforcement sought by the legislature, which may be inferable from the legislature's attention or inattention to the background or ancillary rules and institutions that determine the real value of legal rights. Moreover, the Cable Act in fact looks in opposite directions on this question, since it appears to contain ample incentives for individual enforcement but lacks limitations on class action recoveries that, given experience in cognate areas, one would expect to find if Congress had been concerned about inefficient overenforcement.<sup>42</sup>

Finally, if the concern is either legislative hypocrisy or buried policy choices, it would be the height of hypocrisy for the judiciary to resort to the Federal Rules—a vast repository of buried policy choices<sup>43</sup>—to redress the problem. Withal, I doubt that a proponent of institutional legitimacy should advocate the use of court rulemaking to call the legislature's bluff. At least, the wisdom of that approach is unclear to me when the instrument of remonstrance is one that vastly enhances the powers of

39. 47 U.S.C. §§ 521–573 (2000).

40. See *Parker v. Time Warner Entm't Co.*, 331 F.3d 13 (2d Cir. 2003); Nagareda, *Discontents*, supra note 6, at 1885–88.

41. See Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. Legal Stud. 47, 61 (1975).

42. In that regard, note that the relevant section of the Cable Act contains a provision authorizing courts to award “reasonable attorneys’ fees and other litigation costs reasonably incurred,” 47 U.S.C. § 551(f)(2)(C), which is a more important incentive to individual enforcement than is the provision authorizing the award of “actual damages but not less than liquidated damages computed at the rate of \$100 a day for each day of violation or \$1,000, whichever is higher.” *Id.* § 551(f)(2)(A). In addition, there is an important difference between the perceived misfit of the federal class action and the civil liability provision of the Truth in Lending Act, 15 U.S.C. § 1640 (2000)—which Professor Nagareda notes, see Nagareda, *Discontents*, supra note 6, at 1887—and that which troubled the Second Circuit concerning the Cable Act. Congress enacted the Truth in Lending Act in 1968, before the impact of the 1966 amendments to Rule 23 was clear. In any event, once alerted to the misfit, Congress twice amended the statute. See Act of Oct. 28, 1974, Pub. L. No. 93-495, tit. IV, § 408(a), 88 Stat. 1500, 1518 (limiting total recovery to \$100,000 in class actions involving “any creditor who fails to comply with any requirement imposed” under pertinent statutory provisions); Consumer Leasing Act of 1976, Pub. L. No. 94-240, § 4, 90 Stat. 257, 260 (raising class action limit to \$500,000). Rule 23 was long on the books, and Congress had the benefit of the Truth in Lending Act experience, when it enacted the Cable Act. This perspective suggests that statutory surgery under the guise of statutory construction is not appropriate. But see *Parker*, 331 F.3d at 25–28 (Newman, J., concurring) (advocating such an approach). Compare *id.*, with *id.* at 28–29 (exploring discretionary power of the court under Rule 23).

43. See Burbank, *Complexity*, supra note 1, at 1474–76.

the judiciary and, as in the case of federal court rulemaking, when the legislature in question may be a state legislature. The people have effective means to call a legislature's bluff; they lack comparable means to insist on transparency from the federal judiciary. Because federal courts are significantly constrained in their lawmaking powers, particularly in state-law cases, "[t]heir buried substantive policy choices therefore are more likely to raise the issue of accountability in both the weak sense [publicly taking responsibility for decisions they are empowered to make] and in the strong sense of allocation of power."<sup>44</sup> To be clear, I favor the small claims class action in many contexts, because I regard it as critically important to the vindication of substantive law norms in a society that distrusts, and is therefore unwilling to commit adequate resources to, centralized government enforcement.<sup>45</sup> I acknowledge, however, that the small claims class action was a product of the times (1966), and that during those times it "became increasingly clear that the federal courts wielded enormous power under the banner of procedure and that many choices they made under (or under the authority of) Federal Rules had consequential substantive impact."<sup>46</sup>

I also applaud Professor Nagareda's careful parsing and insightful treatment, for the purpose of understanding the settlement pressure exerted by class certification, of the "addition effect" and the "amplification effect," as well as his analytically acute distinctions within each of those categories.<sup>47</sup> My difficulty accepting his claim that the addition effect should not be "controversial with regard to claims that are unmarketable on an individual basis"<sup>48</sup>—because (he would have it) there, unlike its operation under the Cable Act, it does not "bring about an amendment of the underlying remedial scheme through means other than reform

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44. *Id.* at 1475. In contrast to the accountability issues implicated when federal courts engage in lawmaking,

[c]onsideration of democratic values suggests that whatever one thinks of the goal of trans-substantive Federal Rules it may be folly to have as a goal their adoption by the states. State courts historically have had much greater freedom to fashion common law than have the federal courts. If state courts' substantive policy choices are buried in the application of "adjective law," the issue may only be one of accountability in the weak sense—of a court publicly taking responsibility for decisions that it is empowered to make (and thus risking legislative override).

*Id.* (footnotes omitted); see also Burbank, *Role of Congress*, *supra* note 14, at 1713 (noting one strand of scholarly critique of Federal Rules system that rests on a "vision of political accountability in which, on some matters, prospective and transparent policy choices by democratically accountable actors are preferable to buried policy choices by federal judges").

45. See Robert A. Kagan, *Adversarial Legalism* 16 (2001); Burbank, *Jurisdictional Conflict*, *supra* note 35, at 387 (noting differences between United States's and other developed countries' approaches to vindicating substantive rights and regulatory interests).

46. Burbank, *Role of Congress*, *supra* note 14, at 1710.

47. See Nagareda, *Discontents*, *supra* note 6, at 1879–95.

48. *Id.* at 1883.

legislation itself"<sup>49</sup>—is specific to his normative analysis, which is framed in terms of a general theory of institutional legitimacy.

Professor Nagareda's deconstruction of the amplification effect is, if anything, even more impressive. Like his treatment of the addition effect, his discussion of the amplification effect augurs far greater precision in identifying possible sources of "discontent" concerning class action aggregation. Here too, however, I find that Professor Nagareda's quest to tie the various pieces of his article together leads him astray.

Professor Nagareda's discussion of different possible explanations for settlement pressure due to the amplification effect contains a careful and very useful analysis of causes that should trouble us and those that should not, using the Seventh Circuit's decision in the *Rhone-Poulenc* case<sup>50</sup> as food for a thought experiment. Professor Nagareda himself appears to be troubled only by that which involves "differences among factfinders irrespective of the facts."<sup>51</sup> Admirably eschewing the current fad to bash juries "as wildly emotional, biased, or stupid," he taps recent work that brings the findings of cognitive psychology to bear on the problems of litigation, deeming most notable for his purposes "what commentators describe as 'hindsight bias,' the tendency after the fact to overestimate the ability of decisionmakers to foresee the outcome of events."<sup>52</sup> Professor Nagareda correctly observes that "[t]he potential for hindsight bias in *Rhone-Poulenc* was considerable."<sup>53</sup> So far, so good. Yet, in relating this discussion to his normative project, Professor Nagareda first asserts as the "crucial starting point . . . that hindsight bias is not something that substantive law regards as legitimate, even in individual cases."<sup>54</sup> He then leaps to the conclusion that "what makes the amplification effect something of normative concern here is the commitment of substantive law to the ideal of unbiased decisionmaking . . . . The source of that [settlement] pressure—and the degree to which it is in tension with substantive law—is what matters, not its magnitude per se."<sup>55</sup> I question the starting point, and the conclusion seems, well, contrived.

Without knowing what body of substantive law Professor Nagareda is referring to, it is difficult to assess his blanket assertion "that hindsight bias is not something that substantive law regards as legitimate, even in individual cases."<sup>56</sup> We are talking, after all, about "decisionmaking

49. *Id.* at 1888.

50. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995).

51. Nagareda, *Discontents*, *supra* note 6, at 1891–94. He concludes: "What one should make of the amplification effect in normative terms depends crucially on what explanation one embraces for the underlying probability of plaintiff success that aggregation would amplify. Those explanations are varied, and so too are their normative implications." *Id.* at 1894.

52. *Id.* at 1892–93.

53. *Id.* at 1893.

54. *Id.*

55. *Id.* at 1894.

56. *Id.* at 1893.

under conditions of uncertainty,” the tendency of people in those circumstances “to rely upon analytical shortcuts or suppositions that facilitate the making of decisions, but only at the cost of predictable, systematic errors in terms of accuracy.”<sup>57</sup> If trials were only a search for truth, one would surely agree that a legal system should attempt to purge such a source of error. But trials are not, and probably should never be, only a search for truth.<sup>58</sup> Recognizing (1) human imperfections and the imperfections of any litigation system to establish historical fact, and (2) the important role private litigation in this country plays in allocating responsibility and risk, and in redistributing wealth, those responsible for “the substantive law” might accept—that is, regard as legitimate in the circumstances—the risk of hindsight bias. That, at least, is one possible explanation for a state’s refusal to permit the bifurcation of personal injury trials into separate liability and (if necessary) damages phases, a choice that has been found to have a significant effect on plaintiff victories.<sup>59</sup> That federal courts sitting in diversity<sup>60</sup> dispensed with Texas law to that effect,<sup>61</sup> which remained the same notwithstanding a Texas rule identical to Federal Rule of Civil Procedure 42(b) (on which the federal courts relied),<sup>62</sup> tells us again how chameleonic the procedure/substance dichotomy is

57. *Id.* at 1892–93.

58. See Stephen B. Burbank, *The Good, the Bad, and the Ugly*, 79 *Judicature* 318, 322 (1996) (book review) [hereinafter Burbank, *Good-Bad-Ugly*] (“Laws represent compromises of conflicting policies, and that is no less true of the laws of the courtroom—rules of procedure and evidence—in which truth is by no means always the paramount value.”).

59. See Hal R. Arkes & Cindy A. Schipani, *Medical Malpractice v. The Business Judgment Rule: Differences in Hindsight Bias*, 73 *Or. L. Rev.* 587, 633–36 (1994) (discussing studies “illustrat[ing] that the hindsight bias unfairly prejudices defendants in unitary trials”); Stephen B. Burbank, *The Courtroom as Classroom: Independence, Imagination and Ideology in the Work of Jack Weinstein*, 97 *Colum. L. Rev.* 1971, 1994 (1997) (“[Judge Jack B.] Weinstein was so far ahead of most of his contemporaries in recognizing, and seriously engaging, the substantive impact of procedure and its implications for court rulemaking.”); Jack B. Weinstein, *Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power*, 14 *Vand. L. Rev.* 831, 831–32 (1961) (arguing that “the bifurcation rule . . . has within it potentialities for a major change in the relative position of plaintiffs and defendants in negligence cases,” and that “[t]he effective legal rights of injured persons are based upon substantive rights . . . as attenuated, warped and reinforced by the hazards, the costs and the ameliorating influences of our procedures for obtaining remedies”).

60. See *Rosales v. Honda Motor Co.*, 726 F.2d 259 (5th Cir. 1984).

61. See, e.g., *Eubanks v. Winn*, 420 S.W.2d 698, 701 (Tex. 1967) (“The issues of liability and of damages in [personal injury cases] are elements of an indivisible cause of action and may not be tried piecemeal.”). The Texas courts continued to require unitary trials notwithstanding the adoption of “Rule 174(b)[, which] is in the exact language of Federal Rule of Civil Procedure Rule 42(b).” *Iley v. Hughes*, 311 S.W.2d 648, 651 (Tex. 1958).

62. Rule 42(b) authorizes the court to order separate trials “in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy.” Fed. R. Civ. P. 42(b).

and that it defies general statements about institutional legitimacy in a federal system.

The Texas experience also tells us that the federal judiciary, at least, would vigorously resist Professor Nagareda's attempt to kidnap the "ideal of unbiased decisionmaking" and treat it as a matter of substantive law.<sup>63</sup> They would not be alone. For, whatever one thinks about attempts to turn courts into laboratories, and to carve both facts and law in the pursuit of more rational and more efficient adjudication,<sup>64</sup> it has long been the unquestioned province of the law of the courtroom, including the rules of procedure and evidence, to provide for the accurate ascertainment of the facts and the accurate application of the substantive law.<sup>65</sup>

The mischief that a unifying theme and a general theory of institutional legitimacy cause in Professor Nagareda's essay becomes even clearer when one compares with his treatment of class settlement pressure his take on waivers of class-wide arbitration. Here again, there is much that is of value, including interesting perspectives on and insights about one of the most troubling developments in American dispute resolution. The Supreme Court's interpretations of the Federal Arbitration Act (FAA)<sup>66</sup> have not only remitted those with federal statutory claims to arbitral forums;<sup>67</sup> in controversies governed by state substantive law, they have deprived the states of the power to protect those vulnerable to contractual overreaching unless they are willing to do so on grounds that are applicable to any contract.<sup>68</sup> The result has been either a failure of regulation or a very small tail wagging a very large dog.

63. Nagareda, *Discontents*, supra note 6, at 1894.

64. See, e.g., Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. Empirical Legal Stud. 591, 624–26 (2004) (defining factual and legal carving, and discussing carving's threat to controversy-based decisionmaking); Burbank, *Good-Bad-Ugly*, supra note 58, at 322 ("Courtrooms are not laboratories, and it is misleading or at least incomplete to describe a trial as a search for truth.").

65. See, e.g., Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. Legal Stud. 399, 400–01 (1973) ("Judicial error is therefore a source of social costs and the reduction of error is a goal of the procedural system."); Roscoe Pound, *Some Principles of Procedural Reform*, 4 Ill. L. Rev. 388, 388 (1910) ("[T]he controlling reason for a systematic and scientific adjective law must be to insure precision, uniformity and certainty in the judicial application of substantive law.").

66. 9 U.S.C. §§ 1–16 (2000) (amended 2002).

67. See, e.g., *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (holding that federal courts' "duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (finding "no reason to depart from" FAA's presumption in favor of arbitration "where a party bound by an arbitration agreement raises claims founded on statutory rights").

68. See, e.g., *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (holding that under § 2 of FAA, state contract law only applies if it "govern[s] issues concerning the validity, revocability, and enforceability of contracts *generally*." A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2." (emphasis added)); *Southland Corp. v. Keating*, 465 U.S. 1,

An optimist might see here the silver lining that courts are beginning to rescue contract doctrines such as unconscionability from *laissez faire* notions that have made recent decades resemble the last decades of the nineteenth century.<sup>69</sup> A realist is more likely to note the incentive for state courts merely to pretend that their arbitration clause decisions are consistent with state law that would be applied to any contract.<sup>70</sup> It does appear, in any event, that courts are increasingly acknowledging the relevance to their decisions on arbitration clause enforcement of what I have called the “background or ancillary rules and institutions that determine the real value of legal rights.”<sup>71</sup> One can only hope that they will extend such breadth of vision to other contexts involving forum selection in which judicial hypocrisy has been standard fare, including choice of court clauses and the *forum non conveniens* doctrine.<sup>72</sup>

Professor Nagareda sees in this context “the inverse” of the question raised by class settlement pressure: not “that the affording of aggregation will distort the remedial scheme, but rather that the withholding of aggregation will do so.”<sup>73</sup> He argues that “neither an arbitration clause in a private contract nor a class action in a court is supposed to have the capacity, in itself, to alter substantive rights conferred by legislation”—that they “occupy rungs below that of reform legislation in terms of the authority to effectuate law reform.”<sup>74</sup>

Note what has happened here. That which, in the discussion of class settlement pressure, was a “procedural format . . . to be kept distinct from

16 n.11 (1984) (striking down California statute, insofar as it invalidated arbitration agreements for claims arising under the statute, because “the defense to arbitration found in the [statute] is not a ground that exists at law or in equity for the revocation of *any* contract but merely a ground that exists for the revocation of arbitration provisions in contracts subject to the [statute]” (internal quotation marks omitted)).

69. See Paul D. Carrington, *Unconscionable Lawyers*, 19 Ga. St. U. L. Rev. 361, 373–79 (2002) (providing examples of courts invalidating arbitration clauses on unconscionability grounds).

70. In a very interesting paper, Stephen Broome uses empirical and doctrinal evidence to argue that the California courts, while purporting to apply general unconscionability doctrine to arbitration clauses, “routinely apply an entirely different test, requiring less of parties seeking to avoid arbitration.” Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Judiciary Is Circumventing the Federal Arbitration Act*, 3 *Hastings Bus. L.J.* (forthcoming 2006).

71. *Supra* text accompanying note 41; see *infra* text accompanying note 86 (providing recent example from First Circuit).

72. See Burbank, *Jurisdictional Conflict*, *supra* note 35, at 393, 397. I have argued that:

American courts have no coherent or consistent view of the role or weight, if any, that should be given in *forum non conveniens* analysis to the constellation of legal rules and arrangements that determines whether a putative plaintiff has real, as opposed to theoretical, access to court and to means of proof essential to gain a remedy.

*Id.* at 397.

73. Nagareda, *Discontents*, *supra* note 6, at 1895.

74. *Id.* at 1897.

the remedial scheme of underlying substantive law”<sup>75</sup> has become *part of the remedial scheme*, while that which the author’s general theory of political legitimacy would insulate from law reform in the lower rungs has switched from “substantive law” to “substantive rights.”<sup>76</sup> The switch allows Professor Nagareda to find in the California Supreme Court’s decision in the *Discover Bank* case<sup>77</sup> support for the proposition that “foreclosing of aggregation, no less than the providing of it, has the potential to work a distortion of the underlying remedial scheme,”<sup>78</sup> and to argue that “[t]he problem was not so much that the defendant might escape all liability for its late-fee policy, but rather that the waiver of class-wide arbitration effectively altered the remedial scheme from one of complementary public and private enforcement to one comprised exclusively of the former.”<sup>79</sup> Indeed, in the negative value claims context, he now attributes to “substantive law the notion of private enforcement,”<sup>80</sup> terming waiver of class-wide arbitration “tantamount to a statutory amendment to make consumer protection statutes unenforceable in low-claim-value situations by way of consumer claims.”<sup>81</sup>

I agree entirely with Professor Nagareda that “[b]y linking the problem here with the underlying remedial scheme, one may identify with greater clarity which questions courts should ask about waivers of class-wide arbitration and which questions are irrelevant.”<sup>82</sup> My regret is that in his earlier discussion of class settlement pressure, he did not acknowledge that there, as here, negative value class actions are a no less integral part of a remedial scheme than are statutory fee-shifting provisions, and that there, as here, the matters relevant to an analysis that takes seriously the enforcement of the substantive law include a wide variety of arrangements affecting the market for legal services. I also regret that Professor Nagareda’s sensitivity to the potentially different implications for waivers of class-wide arbitration of “fee-shifting statutes in state law”<sup>83</sup> did not extend to the question of institutional legitimacy in general.

The court that decided *Discover Bank* was interpreting a body of state law in which the authority to certify class actions is statutory,<sup>84</sup> and where, therefore, any dichotomy between procedure and substance for this purpose can have no bearing on questions of institutional legitimacy. The problem for the court was that the case was subject to the FAA, and it was

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75. *Id.* at 1875.

76. Compare *id.*, with *id.* at 1897.

77. *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

78. Nagareda, *Discontents*, *supra* note 6, at 1901.

79. *Id.* at 1902.

80. *Id.*

81. *Id.* at 1903.

82. *Id.*

83. *Id.* at 1906.

84. See Cal. Civ. Proc. Code § 382 (West 2004); *Linder v. Thrifty Oil Co.*, 2 P.3d 27, 31 (Cal. 2000). The fact that the statutory authority is skeletal does not change this conclusion.

therefore necessary at least to pretend to apply general contract doctrine.<sup>85</sup> No such dilemma confronted the First Circuit in its recent decision, noted by Professor Nagareda, invalidating arbitration clause provisions barring treble damages, the recovery of attorney's fees and costs, and class arbitration, for claims under the federal antitrust laws.<sup>86</sup>

Treble damages and attorney's fees and costs, being provided by statute, can without difficulty be regarded as integral parts of the remedial scheme that Congress intended to provide for the enforcement of the antitrust laws,<sup>87</sup> and that, under the Supreme Court's decisions, are protected from contractual waiver as a matter of public policy.<sup>88</sup> Moreover, if one takes seriously the question whether "the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum,"<sup>89</sup> it may make no difference that, as the First Circuit acknowledged, "the arbitration agreements' class mechanism prohibition is not in direct conflict with the relevant antitrust statutes . . . which do not mention class actions."<sup>90</sup> The court's holding tells us, however, that at least in some circumstances—predictable circumstances—the availability or not of the class mechanism determines whether there will be any remedy.<sup>91</sup> It therefore confirms the artificiality, when the question is institutional legitimacy, of an attempt to justify a court rule authorizing negative value class actions as a mere "procedural format." For that matter, the *Discover Bank* decision suggests the same thing, albeit about classification for a different purpose (determining whether an arbitration clause is unconscionable under state contract law).<sup>92</sup>

85. See *Discover Bank v. Superior Court*, 113 P.3d 1100, 1108–09 (Cal. 2005) (analyzing contract under state unconscionability doctrine); *supra* note 70.

86. See *Kristian v. Comcast Corp.*, 446 F.3d 25, 48, 52–53, 59 (1st Cir. 2006); Nagareda, *Discontents*, *supra* note 6, at 1901 n.125, 1904 n.136. *Kristian* also involved attempted waivers in connection with state law claims. *Kristian*, 446 F.3d at 49–50.

87. See 15 U.S.C. § 15(a) (2000).

88. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) (noting in dictum that Court "would have little hesitation in condemning . . . as against public policy" contractual provisions operating "as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations").

89. *Id.* at 637.

90. *Kristian*, 446 F.3d at 54 (emphasis omitted).

91. See *id.* at 61. "While Comcast is correct when it categorizes the class action (and class arbitration) as a procedure for redressing claims—and not a substantive or statutory right in and of itself—we cannot ignore the substantive implications of this procedural mechanism." *Id.* at 54.

92. The California Supreme Court observed:

Some courts have viewed class actions or arbitrations as a merely procedural right, the waiver of which is not unconscionable. But as . . . cases of this court have continually affirmed, class actions and arbitrations are, particularly in the consumer context, often inextricably linked to the vindication of substantive rights. Affixing the "procedural" label on such devices understates their importance and is not helpful in resolving the unconscionability issue.

*Discover Bank v. Superior Court*, 113 P.3d 1100, 1109 (Cal. 2005) (citations omitted).

## II. CAFA: AMBIGUITY AND HYPOCRISY ON STILTS

Professor Issacharoff seeks in CAFA authority for judge-made federal choice of law rules that would facilitate his normative goal of treating national market cases alike.<sup>93</sup> Professor Nagareda professes to be agnostic about which of two principles CAFA is interpreted to choose: “first, that the availability of aggregation should not change the applicable substantive law . . . and second, that the availability of the federal forum likewise should not change the applicable substantive law.”<sup>94</sup> It is not surprising, however, that he devotes some effort to an argument that would have CAFA privilege the first of these principles, which is, after all, a unifying principle of his essay, or that he sees the exercise of choosing one or the other as confirming the primacy of legislation as the means of law reform.<sup>95</sup>

Enriched as I have been by numerous valuable insights about CAFA in both essays, I am not persuaded by the analysis of either on the critical question of legal authority or by Professor Nagareda’s claim that CAFA somehow instantiates a broader principle of institutional legitimacy or authority. The essays do suggest to me, however, that further inquiry is warranted concerning the reach of *Klaxon Co. v. Stentor Electric Manufacturing Co.*<sup>96</sup> outside of the jurisdictional landscape for which it was intended.

There is usually no serious question about Congress’s constitutional power to prescribe uniform federal law for interstate activities. There should be no question at all that, in the absence of such uniform federal statutory law, Congress has constitutional power to prescribe choice of law rules specifying the states whose laws shall govern such activities.<sup>97</sup> The problem confronting Professor Issacharoff is that for most of the cases that concern him, “mass harm cases presented either as tort actions or consumer cases,”<sup>98</sup> Congress has done neither. This leads him to reconsider the history of federal judicial lawmaking in cases governed by state law, in particular the history of choice of law in diversity cases. Following a long line of scholars who have criticized *Klaxon* and the interpretation of the *Erie* decision<sup>99</sup> that it embodies, Professor Issacharoff hopes to persuade us that CAFA presents an opportunity to act on those criticisms by authorizing federal courts to fashion distinctively federal choice of law rules for class actions that come into federal court under its auspices.

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93. See Issacharoff, *supra* note 7, at 1861–71.

94. Nagareda, *Discontents*, *supra* note 6, at 1911.

95. See *id.* at 1920–22.

96. 313 U.S. 487 (1941).

97. See U.S. Const. art. IV, § 1; Am. Law Inst., *Complex Litigation: Statutory Recommendations and Analysis* § 6 intro. note cmt. b (1994).

98. Issacharoff, *supra* note 7, at 1859.

99. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

One can share all of Professor Issacharoff's normative premises and his ultimate goal without accepting the argument that current law furnishes authority for the federal courts to reach that goal. It appears to me that his solution is quite incompatible with the law existing before CAFA and that he does not offer an adequate basis to regard the 2005 legislation as a new source of authority.

It is no criticism to observe that, like his animadversions upon modern choice of law doctrine,<sup>100</sup> Professor Issacharoff's criticisms of *Klaxon*<sup>101</sup> are nothing new. Indeed, this would not be ground for comment if the criticisms he echoes were both apt when made and had withstood the test of time. Certainly, for a few years following *Erie*, the Court's decisions invoking that case as authority for requiring the application of state law in diversity cases, including *Klaxon*, were subject to the criticism that they could not plausibly be grounded in the Constitution, which is, after all, what the Court said required the decision in *Erie*.<sup>102</sup> Any misunderstanding on that question should, however, have been laid to rest by *Guaranty Trust v. York*'s invocation of the "policy of federal jurisdiction"<sup>103</sup> established in *Erie*. Moreover, it is a bit strange to read that Justice Frankfurter's quintessentially realist opinion in *Guaranty Trust*<sup>104</sup> shares with *Klaxon* "a peculiarly formalistic reading of . . . *Erie*."<sup>105</sup> The dissonance increases when Professor Issacharoff immediately thereafter commits the sin that Justice Frankfurter (following Walter Wheeler Cook)<sup>106</sup> was seeking to guard against by decrying the reach of *Guaranty Trust*'s rule to "*matters so presumably procedural as whether service of pro-*

100. See Issacharoff, *supra* note 7, at 1844–51.

101. See *id.* at 1851–57.

102. See *Erie*, 304 U.S. at 77–78 ("But the unconstitutionality of the course pursued has now been made clear and compels us [to abandon the doctrine of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)]."); *id.* at 80 ("We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States.").

103. 326 U.S. 99, 101 (1945); see *infra* text accompanying notes 156–157.

104. His opinion for the Court stated:

Matters of "substance" and matters of "procedure" are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, "substance" and "procedure" are the same keywords to very different problems. Neither "substance" nor "procedure" represents the same invariants. Each implies different variables depending upon the particular problem for which it is used.

*Guaranty Trust*, 326 U.S. at 108.

105. Issacharoff, *supra* note 7, at 1854.

106. Professor Cook admonished:

The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.

Cook, *supra* note 15, at 337.

cess or filing of suit had to be accomplished by the running of the statute of limitations."<sup>107</sup>

Professor Issacharoff's real complaint about *Klaxon* and *Erie*'s other progeny is a complaint, most prominently associated with Henry Hart,<sup>108</sup> that has been repeated by generations of scholars who have been in Hart's thrall.<sup>109</sup> These scholars have argued that the Court became sidetracked from *Erie*'s lofty constitutional path to the relatively trivial problem of forum shopping. Like Professor Issacharoff,<sup>110</sup> they would have us forget that Justice Harlan was writing only for himself in his plea for a Hartian vision of *Erie* in *Hanna v. Plumer*.<sup>111</sup> And like Professor Issacharoff, they have lost sight of, if they ever knew about, the serious practical and social problems that flowed from business corporations' manipulation of federal jurisdiction under the regime of *Swift v. Tyson*.<sup>112</sup>

As the legal historian Edward Purcell so brilliantly describes, Hart neglected the fact that Justice Brandeis's opinion for the Court in *Erie*, strategic as it was, reflected its author's deep concern about the waste and unfairness that corporate defendants created by jurisdictional manipulation designed to wear out their opponents and to take advantage of different substantive law.<sup>113</sup>

Perhaps, too, the most general conclusion to be drawn from Hart's vision of *Erie* and the federal judicial system is that legal

107. Issacharoff, *supra* note 7, at 1854–55 (emphasis added). As to how such matters should be classified under the Rules Enabling Act, I have observed:

But we know that some legal rules, whatever policies supposedly animate them, have quite dramatic effects. Thus, I also believe that prospective federal lawmaking that necessarily and obviously involves policy choices with a predictable and identifiable impact on rights claimed under substantive law is properly the province of Congress. Both the prospective formulation of a limitations period—two years or four years?—and the prospective formulation of a rule to determine when that period ceases to run in response to litigation activity—filing or service?—involve policy choices of this type. They are not, contrary to Professor Carrington's view, suitable subjects for court rules.

Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 Duke L.J. 1012, 1019–20 [hereinafter Burbank, *Corks*] (footnote omitted).

108. See Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 512–13 (1954); Issacharoff, *supra* note 7, at 1865.

109. See, e.g., Stephen B. Burbank, *Semtek*, Forum Shopping, and Federal Common Law, 77 Notre Dame L. Rev. 1027, 1032–33 (2002) [hereinafter Burbank, *Semtek*].

110. See Issacharoff, *supra* note 7, at 1855–56 (asserting that "the point of *Erie*" was "most clearly expressed by Justice Harlan in *Hanna v. Plumer*").

111. See 380 U.S. 460, 474–78 (1965) (Harlan, J., concurring). Professor Ely's account of "a general vision of . . . federalism that is widely shared by courts and commentators," John Hart Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 694 (1974), concluded: "But the Supreme Court is the Supreme Court, and seven is a majority of nine even when Justice Harlan is one of the two. *Hanna* therefore may not be *Erie*, but it seems to be the law." *Id.* at 697 (footnote omitted).

112. 41 U.S. (16 Pet.) 1 (1842); see Burbank, *Semtek*, *supra* note 109, at 1032–33.

113. See Edward A. Purcell, Jr., *Brandeis and the Progressive Constitution* 141–45, 149–55, 246–55 (2000).

abstraction, while never socially neutral, always remains socially volatile. Without constant reference to changing social dynamics and consequences, students of procedure can scarcely know what they are talking about.<sup>114</sup>

Viewed in that light, doctrine (1) reflecting the reality that the effects of legal rules are more important to clients' goals and their lawyers' strategies than are the purposes of legal rules, and (2) hewing to the limited purposes of the grant of diversity jurisdiction in the context of judge-made law, looks very different than it does in Hart's account. It may even look normatively appealing.

Although I do not regard this part of Professor Issacharoff's argument as persuasive, he is on firm ground in suggesting that, given CAFA, the premises of the nonconstitutional aspect of *Erie* that drove the decisions in *Klaxon* and *Guaranty Trust* are ripe for reexamination.<sup>115</sup> In doing so, however, perhaps mindful that hypocrisy is the coin of the realm within the beltway, he tries to beat Congress at its own game.

CAFA does *not* deprive state courts of jurisdiction,<sup>116</sup> and neither, as Professor Issacharoff seems to suggest, does it leave "single state class actions . . . unaffected."<sup>117</sup> As to the former, lawyers were quick to recognize the possibility that some defendants (such as those seeking a coupon settlement) might prefer to remain in state court, and hence might not remove a case over which CAFA confers jurisdiction.<sup>118</sup> As to the latter, CAFA's mandatory carve-out for local actions does not affect jurisdiction over a class action seeking relief only for citizens of one state and only for damages sustained in that state as a result of a product sent into the state by a defendant, unless that defendant, if a corporation, is incorporated or has its principal place of business in that state.<sup>119</sup> The example prompts me to wonder whether, in winning the battle, CAFA's proponents may not lose the war, because the statute shines a spotlight on the manifest

114. *Id.* at 257.

115. See Issacharoff, *supra* note 7, at 1865.

116. See *id.* at 1864 ("There are simply no other courts [besides federal courts] in the game any more."); *id.* at 1865 (asserting that CAFA "takes away precisely the power of state courts to adjudicate nationwide class actions"); *id.* at 1864 (characterizing "nationwide class action[s]" as "a class of cases that [can], by virtue of CAFA, only proceed in federal court"). But see *id.* (observing that "Congress decree[d] that, in the great bulk of these cases, there will be no more state court proceedings").

117. See *id.* at 1870. Professor Issacharoff is here talking about his proposed choice of law rule, but he links its application to "the jurisdictional predicate for cases brought into federal court under CAFA." *Id.*

118. See Kenneth B. Forrest et al., Wachtell, Lipton, Rosen & Katz, The Class Action Fairness Act of 2005 Becomes Law, Feb. 24, 2005, at <http://www.venulex.com/viewdoc.asp?documentID=4690> (on file with the *Columbia Law Review*) (noting that as a result of "potential settlement burdens in federal class actions generally" some defendants may "decide to forego removal and choose to remain in state court").

119. See Pub. L. No. 109-2, § 4(a)(2), 119 Stat. 4, 10 (2005) (to be codified in relevant part at 28 U.S.C. § 1332(d)(4)). The same is true of the statute's discretionary carve-out. See *id.*, § 4(a)(2), 119 Stat. at 9-10 (to be codified in relevant part at 28 U.S.C. § 1332(d)(3)).

absurdity of continuing to treat a corporation engaged in national commerce (and likely to have a national or international shareholder base) as if it were an outsider in forty-eight out of fifty states.<sup>120</sup> For the present, however, the example confirms what is apparent to any sentient reader of the statute's statement of findings and purposes. They are, at best, window dressing.<sup>121</sup> Less charitably, they meet the philosopher Harry Frankfurt's definition of "bullshit," because they are made with apparent indifference to their truth content.<sup>122</sup>

Professor Issacharoff refers to the high-minded statements of purpose in CAFA when it is convenient for him to do so, namely in aid of an argument that, in the absence of uniform federal substantive law, we need choice of law rules that reflect the existence of a national market.<sup>123</sup> Elsewhere in his essay, however, he acknowledges that the goal of CAFA's proponents was to ensure that nationwide classes of the sort that some

120. See 28 U.S.C. § 1332(c)(1) (2000) ("[A] corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . .").

121. See Pub. L. No. 109-2, § 2, 119 Stat. at 4–5. The findings and purposes are replete with assertions about supposed abuses of the class action device that bear no obvious relationship to the purposes of the grants of judicial power on which the legislation rests. See C. Douglas Floyd, *The Limits of Minimal Diversity*, 55 *Hastings L.J.* 613, 652–57 (2004) [hereinafter *Floyd, Limits*] (discussing same phenomenon in *Class Action Fairness Act of 2003*, H.R. 1115, 108th Cong. (2003)). The one notable exception is the finding that state and local courts are "sometimes acting in ways that demonstrate bias against out-of-State defendants." Pub. L. No. 109-2, § 2(a)(4)(B), 119 Stat. at 5. Even that finding gives pause when considered together with the statement of purpose to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." *Id.* § 2(b)(2), 119 Stat. at 5. I am not aware of research that supports the existence of such an intent divorced from the existence of or potential for bias against out-of-state litigants. See *Floyd, Limits*, *supra*, at 652 n.171, 655–56. It is true that CAFA's findings and purposes make a number of references to interstate commerce, see Pub. L. No. 109-2, § 2(a)(2), (4), 119 Stat. at 4–5, and Professor Issacharoff assumes an exercise of power under the Commerce Clause in arguing for a federal choice of law solution in national market cases. See Issacharoff, *supra* note 7, at 1843, 1866–67. It is not clear that Congress does in fact have "the interstate commerce authority to prescribe distinct jurisdictional treatment for national market claims," *id.* at 1866, if in exercising that purported power it prescribes no substantive law and leaves state courts free to exercise concurrent jurisdiction and to apply state law. See C. Douglas Floyd, *The Inadequacy of the Interstate Commerce Justification for the Class Action Fairness Act of 2005*, 55 *Emory L.J.* 487, 507–20 (2006) [hereinafter *Floyd, Inadequacy*]; *Floyd, Limits*, *supra*, at 656. Which is to say that I regard Congress's references to interstate commerce in CAFA's findings and purposes as an element of the window dressing, if not of the "bullshit," to which I refer. See *Floyd, Inadequacy*, *supra*, at 532 ("[T]he repeated invocation of the language of the Commerce Clause in the statement of findings and purposes and the legislative history . . . is a red herring.").

122. See Harry G. Frankfurt, *On Bullshit* (2005).

123. See Issacharoff, *supra* note 7, at 1861–62, 1865–66.

state courts had certified would not be certified at all.<sup>124</sup> From that perspective, of course, CAFA enables the kind of strategic manipulation of federal jurisdiction that concerned Justice Brandeis. This time, however, defendants are seeking different “procedural” law or, at least, different judges with different attitudes toward aggregate litigation. It would be poetic justice if the statute could be read to authorize the federal courts to formulate and apply federal choice of law rules and if, in doing so, the federal courts privileged Congress’s statement of purposes over the effects that everyone knows the statute’s proponents sought to bring about. I do not believe, however, that Professor Issacharoff makes a persuasive argument to that end.

We may agree that *Klaxon* was not constitutionally compelled and that Congress could prescribe choice of law rules selecting state law.<sup>125</sup> We may even agree that either the constitutional and statutory diversity grants<sup>126</sup> or the Rules of Decision Act (viewed, as it originally was, as a choice of law statute)<sup>127</sup> could at one time have been interpreted to authorize federal judge-made choice of law rules. *Klaxon* has been on the books for sixty-five years, however, and, as Professor Issacharoff acknowledges,<sup>128</sup> there is evidence that in enacting CAFA, Congress did not intend to alter the ordering of federal and state lawmaking authority established by *Erie* and its progeny.<sup>129</sup> Finally, although it is always a treacherous business to interpret Congress’s refusal to legislate, the fail-

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124. See *id.* at 1862 (“CAFA clearly sought to keep in place the inherited choice of law regime, under the assumption that the spiral of choice of law dictates of the multiple states where the claims accrue would effectively bar nationwide class actions.”).

125. See *supra* text accompanying note 97.

126. See Study of the Division of Jurisdiction Between State and Federal Courts 446–47 (Official Draft 1969).

127. The Rules of Decision Act is codified at 28 U.S.C. § 1652 (2000). For a description of the early view that the Act was a choice of law statute, see William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 *Harv. L. Rev.* 1513, 1513–38 (1984) (arguing that Rules of Decision Act originally meant that federal courts were required to follow “local” (state) law in cases where such law applied, but could follow other law—not, in modern terms, exclusively federal or exclusively state—in cases where “local” (state) law did not apply).

128. See Issacharoff, *supra* note 7, at 1866.

129. See, e.g., S. Rep. No. 109-14, at 49 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 46 (“[T]he Act does not change the application of the Erie Doctrine, which requires federal courts to apply the substantive law dictated by applicable choice-of-law principles in actions arising under diversity jurisdiction.”); *id.* at 61 (“[C]lass action decisions rendered in federal court should be the same as if they were decided in state court—under the *Erie* doctrine, federal courts must apply state substantive law in diversity cases.”); *id.* at 66 (“[U]nder the *Erie* doctrine, federal courts apply state substantive law in diversity cases. Consequently, a removed class action should have the same substantive law applied to it, regardless of whether it is in federal or state court.”). The recognition that some litigants entitled to access to federal court under CAFA might nonetheless choose to file (or remain) in state court, see *supra* note 118 and accompanying text, might make this legislative history look more like a principled choice than a strategic response to opposition wrapped in the flag of federalism. Moreover, it highlights the fact that, because Professor Issacharoff’s goal is to facilitate national solutions and not to provide a neutral

ure of a proposed amendment that was quite clearly intended to leave space for results of the sort that Professor Issacharoff champions is hardly favorable to his suggested interpretation.<sup>130</sup>

Turning now to that portion of Professor Nagareda's essay that considers the impact of CAFA on the class action landscape, recall that the problem confronting him is very different from that confronting his colleague. Professor Issacharoff seeks authority for federal choice of law rules that would facilitate the certification of nationwide classes. Having advanced the ideal that aggregation should not alter the substantive law (or substantive rights) elsewhere in his essay, Professor Nagareda would like to find authority enabling the federal courts not to follow state choice of law doctrine that "bootstraps" in order to certify nationwide classes. Without forthrightly advocating that result in the "choice . . . whether aggregation or forum should alter substantive law,"<sup>131</sup> he pursues an argument for the latter, also advanced in an earlier article<sup>132</sup>—namely that CAFA might be deemed an "affirmative countervailing consideration[ ]" sufficient to warrant a departure from *Klaxon* under the authority, such as it is, of the *Byrd* decision.<sup>133</sup>

Although the result Professor Nagareda would prefer is obvious, a posture of agnosticism is evidently comfortable for him, because he believes that recognizing the choice of principles that CAFA presents should force litigants who have a stake in the other aggregation debates he chronicles to acknowledge the primacy of legislation as a law-reform vehicle and hence the inconsistency with that principle of their positions in some of those other debates. I do not see it that way.

The facts that CAFA is a statute and that a decision to depart from *Klaxon* when state choice of law doctrine was perceived to "bootstrap" presumably would have to be attributed to its authority do not speak at all to broader questions of institutional authority or legitimacy. It would hardly be necessary for defendants making that argument "to embrace the primacy of legislation as the appropriate vehicle for law reform";<sup>134</sup> they would simply embrace the proposition that this statute changed the

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and unbiased forum, the imperfections of his proposed solution include the fact that the choice of law rules he advocates would be applicable only in federal court.

130. See Nagareda, *Discontents*, supra note 6, at 1919 (discussing Senate action rejecting proposed amendment that "merely would have reminded the federal courts that they 'shall not deny class certification' simply because 'the law of more than 1 State will be applied'" (quoting S. Amendment 4 to S. 5, 109th Cong., 151 Cong. Rec. S1215 (daily ed. Feb. 9, 2005))).

131. *Id.* at 1911.

132. See Richard A. Nagareda, *Bootstrapping in Choice of Law After the Class Action Fairness Act*, 74 *UMKC L. Rev.* 661, 681–85 (2006) [hereinafter Nagareda, *Bootstrapping*].

133. See *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 536–39 (1958) (holding that departure from *Erie*'s "policy of uniform enforcement of state-created rights and obligations" is warranted in some circumstances where "affirmative countervailing considerations" are present).

134. Nagareda, *Discontents*, supra note 6, at 1911.

law. It is even less clear why plaintiffs arguing for *Klaxon's* application could be thought to embrace Professor Nagareda's proposition. Apart from the fact that the Court in *Klaxon* failed explicitly to ground the decision in statutory authority,<sup>135</sup> those hypothetical plaintiffs would simply be arguing that the statute *did not* change the law.

More fundamentally, even if litigants and lawyers cared about principles as opposed to results in particular cases, they might find in Professor Nagareda's discussion of CAFA reasons, in addition to those canvassed above,<sup>136</sup> not to accept his general theory of institutional legitimacy.

The supposed antibootstrapping principle that Professor Nagareda developed in his earlier article<sup>137</sup> and that he brings on the scene here is an academic construct. However valuable it may be in stimulating thought, it should not be permitted to take on a life of its own. The history of *Erie*<sup>138</sup> teaches us the capacity of an idea that is not anchored in positive law to become a "brooding omnipresence."<sup>139</sup> The notion, for instance, that the Court in *Shutts*<sup>140</sup> was doing anything other than commenting on the reasoning of the Kansas court—that what the Kansas court did there would have violated due process if the law selected to facilitate class treatment had been that of Oklahoma (Phillips's principal place of business)—seems to me far-fetched.<sup>141</sup> The fact that Professor Nagareda made that suggestion in his earlier article treating these problems,<sup>142</sup> together with his assertion on this occasion that "[i]n *Shutts*,

135. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) ("Any other ruling would do violence to the principle of uniformity within a state, upon which the *Tompkins* decision is based."); Ely, *supra* note 111, at 697–98 (decrying "indiscriminate admixture of all questions respecting choices between federal and state law in diversity cases, under the single rubric of 'the *Erie* doctrine' or 'the *Erie* problem'"); *id.* at 699 (describing evolution of erroneous view that "if *Erie* is controlling outside of the context of the Rules of Decision Act, that must mean it is a constitutional doctrine"). Professor Ely's admirable insistence on rooting doctrine in this area in positive law might lead a reader unfamiliar with the cases to overlook the fact that, following *Erie*, the Court very rarely has mentioned the Rules of Decision Act. For a refreshing exception, see *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 426–27 (1996) (noting that "*Erie* doctrine" is based on Court's reading of Rules of Decision Act).

136. See discussion *supra* Part I.

137. See Nagareda, *Bootstrapping*, *supra* note 132. Professor Nagareda defines the antibootstrapping principle as "resistance to . . . the invocation of the class-wide nature of the litigation as a consideration in the choice-of-law analysis." *Id.* at 661.

138. See *supra* note 135.

139. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

140. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821 (1985).

141. Professor Issacharoff apparently shares this view. See Issacharoff, *supra* note 7, at 1869 ("[T]here is nothing apparently arbitrary or unfair in holding a party accountable to the laws of the state in which the party chooses to organize its primary economic activity."). That makes his assertion about the likely unconstitutionality of "a choice of law regime that does not favor the law of the situs of a claimed harm," *id.* at 1840, doubly puzzling. The case cited in support was merely applying the Indiana choice of law rule thought to be pertinent under *Klaxon*. See *id.* at 1840 n.5 (citing *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1016 (7th Cir. 2002)).

142. Professor Nagareda writes:

the proposed aggregate nature of the litigation cannot itself alter choice of law principles in such a way as to facilitate the affording of aggregate treatment,"<sup>143</sup> helps to explain why he refuses unequivocally to repudiate the notion that "bootstrapping rises, of its own force, to the level of a due process violation."<sup>144</sup> It also helps to identify a fundamental weakness in his analysis.

A central premise of the *Erie* decision is that federal courts have no authority to second-guess state lawmaking institutions, picking and choosing which state institution's legal products will apply as rules of decision under the Rules of Decision Act.<sup>145</sup> Similarly, states remain free to view class actions differently than they do individual actions—for instance, by altering state substantive law in class actions to facilitate negative value claims—so long as the law selected for such actions may constitutionally be applied under the Due Process Clause (and as against any other constitutional objection). It is not the proper function of a federal court, when exercising diversity jurisdiction and bound by *Klaxon*, to refuse to follow state choice of law rules because the federal court espies bootstrapping at work.

Professor Nagareda has wisely abandoned the suggestion, adumbrated in his earlier article,<sup>146</sup> that the Rules Enabling Act's prohibition against abridging, enlarging, or modifying substantive rights<sup>147</sup> might furnish the necessary authority to refuse to apply state choice of law doctrine that violates his antibootstrapping principle. The reasons why the Rules Enabling Act simply cannot do the work he would like it to do help us to understand, however, the problems with the abiding tendency of his work to project federal arrangements onto the states, and otherwise to ignore

The ambiguity concerns the status of the anti-bootstrapping stricture. Is that stricture merely derivative of the federal constitutional concern over arbitrariness in the choice of law ultimately made for a nationwide class? . . . Or does the anti-bootstrapping stricture have some manner of independent status, such that it warrants the invalidation of the choice made, even when the law selected is that of [a] state with the requisite contacts?

Nagareda, *Bootstrapping*, supra note 132, at 675.

143. Nagareda, *Discontents*, supra note 6, at 1915.

144. *Id.* Yet, having now merely called that proposition "doubtful," he correctly observes that "[w]hat made for arbitrariness and unfair surprise in *Shutts* was not bootstrapping in the choice of law analysis, but instead the lack of connection between the law ultimately chosen and the underlying claims of the vast majority of class members." *Id.*

145. The Court stated:

Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.

*Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

146. See Nagareda, *Bootstrapping*, supra note 132, at 676–78 ("Defendants are well positioned to argue in federal court for the independence of the anti-bootstrapping stricture as a straightforward implication from the Rules Enabling Act . . ."). In truth, the analytical path pursued there is hardly clear.

147. See 28 U.S.C. § 2072(b) (2000).

the respects in which courts rather than legislatures are responsible for the substantive law. In short, they cast additional doubt on the ideal and the principle by which he seeks to tie together the various strands of his essay.

The proposition that following *Klaxon* in a diversity case involving bootstrapping state choice of law doctrine would violate the principle that “the availability of aggregation should not alter the applicable substantive law”<sup>148</sup> reflects a failure to distinguish among different ways of ordering lawmaking power in a federal system. If imputed to the Rules Enabling Act, it would also confuse but for causation with proximate causation. State law authorizing class actions may or may not have been modeled on Rule 23, but federal courts have no business transposing either federal class action jurisprudence or the Rules Enabling Act’s limitations to state choice of law doctrine, even if thought to have transgressed similar limitations in state law.

Here as elsewhere it is essential to distinguish sources of authority from sources of rules. Judge-made federal common law tolling a statute of limitations need not observe the Rules Enabling Act’s restrictions simply because the Court fashioned that law, which it was otherwise empowered to do, with reference to (nonlimitations) policies underlying Rule 23.<sup>149</sup> The Rules Enabling Act’s restrictions are irrelevant to state law applied by a federal court sitting in diversity under *Klaxon*. Rule 23 is not the source of the obligation to apply state law, and the content of state law in no way reflects policy choices that are attributable to Rule 23.

Reading the Rules Enabling Act to prevent the application of bootstrapping state choice of law doctrine in putative class litigation would also prevent a federal court sitting in diversity from applying state law implementing a theory of alternative liability,<sup>150</sup> because the joinder authority necessary to enable the application of law different from that which would be applied in an individual action was contained in a Federal Rule.<sup>151</sup> More generally, Professor Nagareda’s antibootstrapping principle, if not carefully cabined, could return us to a world that sought to maintain a bright line between procedure and substantive law by denying (1) the impact of procedure on substantive law, and (2) the legiti-

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148. Nagareda, *Discontents*, supra note 6, at 1918.

149. See *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 556–59 (1974) (“[T]he mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose.”); see also *Burbank, Corks*, supra note 107, at 1027–28 (discussing *American Pipe*); cf. *id.* at 1021 (“[W]hen the Supreme Court makes law through supervisory court rules, it is engaged in an enterprise that, both practically and normatively, is different in important respects from the enterprise in which the Court, or any federal court, is engaged when it makes federal common law.”).

150. See, e.g., *Summers v. Tice*, 199 P.2d 1, 3–5 (Cal. 1948) (explicating theory of alternative liability).

151. See Fed. R. Civ. P. 20 (“Permissive Joinder of Parties”).

macy of a lawmaking body that has power in both realms—not necessarily a legislature—using them both to effect its chosen policies.

It is ironic that the course Professor Nagareda suggests as a means to vindicate a principle that privileges legislative authority relies on doctrine that arguably violates that principle. For, although it is possible to reconcile the nonconstitutionally-required aspects of the Court's *Erie* jurisprudence—which is almost all of it—with statutory authority, the Court itself has hardly attempted to do so.<sup>152</sup> Here, as in its federal common law jurisprudence more generally, the Court has preferred to maximize its own power by neglecting statutes that might be thought to constrain or channel exercises of that power,<sup>153</sup> including the Rules of Decision Act,<sup>154</sup> the very statute it construed in *Erie*,<sup>155</sup> and the diversity statute,<sup>156</sup> which figured so prominently in the nonconstitutional parts of that decision.<sup>157</sup> As a result, however, in cases where there is no pertinent federal statute or Federal Rule, the Court has left very little room for a refusal to apply state law in a diversity case.

Professor Nagareda observes that the “Court has continued to cite *Byrd*,”<sup>158</sup> the 1958 decision in which it sought to quell fears about the implications of its *Erie* jurisprudence,<sup>159</sup> by adducing the power of “af-

152. See *supra* text accompanying note 135. Addressing this point in greater detail, I have written:

The debate about the wisdom of the course taken in diversity cases after *Erie* has included the question whether, in effecting a policy against different outcomes on the basis of citizenship, the Court was interpreting the Rules of Decision Act or something else. The dichotomy is false. The policy against different outcomes on the basis of citizenship is a “policy of federal jurisdiction”; it evidently derives from the act of Congress conferring diversity jurisdiction on the federal courts. In considering whether the Constitution or acts of Congress (including the Rules Enabling Act) require the application of federal law, the federal courts must consider both policies grounded in those sources pointing towards a federal rule and policies pointing to the application of state law.

Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 *Cornell L. Rev.* 733, 788 (1986) [hereinafter Burbank, *Preclusion*] (footnotes omitted).

153. See Burbank, *Preclusion*, *supra* note 152, at 753–62 (“[*Erie*] could be read as speaking to the constitutional power of the federal government. It was thus natural for the Court to neglect other possible constraints on federal common law, including the Rules of Decision Act.” (footnote omitted)).

154. 28 U.S.C. § 1652 (2000).

155. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 71, 79–80 (1938).

156. 28 U.S.C. § 1332 (amended 2005).

157. See *Erie*, 304 U.S. at 74 (“Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State. *Swift v. Tyson* introduced grave discrimination by non-citizens against citizens.”); *supra* note 152.

158. Nagareda, *Discontents*, *supra* note 6, at 1921.

159. See Ely, *supra* note 111, at 709 (terming *Byrd* a “backlash” arising from “the ‘realization’ that [the outcome determination test] controlled not simply judge-made rules, but Federal Rules of Civil Procedure and even other federal statutes as well”).

firmative countervailing considerations”<sup>160</sup> to warrant the displacement of state law in a diversity case. Well, yes, but the Court has not cited it very often, and the thrust of its *Erie* jurisprudence since *Byrd* has been a repudiation of the balancing process *Byrd* seemed to authorize,<sup>161</sup> which in any event balanced one federal policy against another, *not* “federal and state interests.”<sup>162</sup> Indeed, in virtually the Court’s only subsequent decision that can plausibly be deemed to have applied *Byrd*, it ignored that case in dealing with the problem on which it might have made a difference<sup>163</sup> and invoked it on the problem for which it was redundant.<sup>164</sup>

There is, however, a more promising argument in favor of the result Professor Nagareda favors, one that vindicates legislative primacy by taking both the Rules of Decision Act and CAFA seriously.<sup>165</sup> It proceeds from the proposition that CAFA’s jurisdictional provisions altered more

160. *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537 (1958).

161. See Burbank, Preclusion, *supra* note 152, at 789 n.279; Ely, *supra* note 111, at 717 n.130.

162. Ely, *supra* note 111, at 717 n.130. For the correct view of the source of the policies to be considered, see *Byrd*, 356 U.S. at 538 (“Thus the inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the [federal] objective that the litigation should not come out one way in the federal court and another way in the state court.”); Burbank, Preclusion, *supra* note 152, at 788–89.

163. Compare *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 426–31 (1996) (requiring federal court in diversity case to apply state standard for determining whether new trial should be granted because jury verdict is excessive, without reference to *Byrd*), with *id.* at 463 (Scalia, J., dissenting) (relying on *Byrd*, and observing that the “Court’s opinion does not even acknowledge, let alone address, this dislocation”).

164. See *id.* at 431–39 (majority opinion) (holding that abuse of discretion standard of appellate review governs with respect to trial court decision denying new trial motion on ground of excessiveness, relying on *Byrd*). *Byrd* was redundant because the Court evidently believed that the Reexamination Clause of the Seventh Amendment required the standard of appellate review it prescribed. See *id.* at 434–36, 438–39 (noting doubts about consistency of appellate review with Seventh Amendment and stressing deferential standard of review in holding for first time that such review is constitutional). *Byrd*, on the other hand, referred to “the influence—if not the command—of the Seventh Amendment,” 356 U.S. at 537 (footnote omitted), and the opinion is written in such a way as to defy a conclusion that the result was constitutionally compelled. See Burbank, Preclusion, *supra* note 152, at 788–89 (inferring grounds for *Byrd* decision).

165. In previous work arguing that the Rules of Decision Act constrains federal common law, I observed:

The approach advocated here regards the Rules of Decision Act as speaking directly to the circumstances in which it is permissible to fashion or apply federal common law. It has the obvious effect of imposing discipline on [the process of identifying policies competing with that against different outcomes on the basis of citizenship]. Federal courts are not free to conjure up “interests”; rather, they must tie them to policies already articulated in, or at least articulable from, valid legal prescriptions. . . .

The approach also has the less obvious effect of disciplining the process by which federal policies finding expression in the permissible legal sources are considered, as against competing policies, in determining whether federal common law applies.

Burbank, Preclusion, *supra* note 152, at 789–90.

than the jurisdictional landscape, and in particular that they provide a peg in positive law for federal choice of law rules in some circumstances.

Once one recognizes that few, if any, of *Erie's* progeny can be grounded in the Constitution, and if one takes seriously the Court's invocation of a "policy of federal jurisdiction"<sup>166</sup> to describe the default landscape of which *Klaxon* is a part, my correction of Professor Issacharoff's suggestions that CAFA deprived the state courts of jurisdiction<sup>167</sup> appears as a small point at which to stick. CAFA certainly works a radical change in jurisdictional policy for the cases within its reach. On this view, CAFA represents a *different* policy of federal jurisdiction pursuant to which Congress has authorized the sort of jurisdictional manipulation that *Erie* jurisprudence sought to foreclose,<sup>168</sup> enabling litigants in cases of a certain aggregate size and in which there is minimal diversity to have access, even at the behest of an in-state defendant,<sup>169</sup> either to a different law (of "procedure"), or at least to courts that have a different attitude toward aggregate litigation, *and in any event access to a potentially different outcome on the certification question*. This new policy of federal jurisdiction for multistate class actions is also designed to provide protection against biased decisionmaking, but the relevant bias targets aggregation, not citizenship.<sup>170</sup>

This view leaves state law in state court untouched, and it does not warrant replacing state choice of law rules with uniform federal choice of law rules on a wholesale basis for class actions in federal court pursuant to CAFA. But, where state choice of law doctrine is materially influenced by state policy reflecting a bias in favor of aggregate litigation, CAFA's jurisdictional provisions—reflecting (most charitably) a policy to enable aggregation decisions unaffected by that bias—may plausibly be thought, in

166. *Guaranty Trust Co. v. York*, 326 U.S. 99, 101 (1945); see also *id.* at 112 ("Certainly, the fortuitous circumstance of residence out of a State of one of the parties to a litigation ought not to give rise to . . . discrimination against others equally concerned but locally resident."). Similar language also appears in *Byrd*, 356 U.S. at 536–38 (attributing some of Court's post-*Erie* decisions to "a broader policy" furthering the "objective that . . . litigation should not come out one way in the federal court and another way in the state court").

167. See *supra* text accompanying note 116.

168. See *supra* text accompanying note 113.

169. See Pub. L. No. 109-2, § 4(a), 119 Stat. 4, 9 (2005) (to be codified in relevant part at 28 U.S.C. § 1332(d)(2)) (providing jurisdiction if amount in controversy is greater than \$5,000,000 and "any member of a class of plaintiffs is a citizen of a State different from any defendant"); *id.* § 5(a), 119 Stat. at 12 (to be codified in relevant part at 28 U.S.C. § 1453(b)) (providing for removal "without regard to whether any defendant is a citizen of the State in which the action is brought").

170. Of course, candor in that regard exposes CAFA's vulnerability to a constitutional analysis that insists on a demonstrable link between the statute's provisions and the purposes of the Diversity Clause. See Floyd, *Limits*, *supra* note 121, at 652–71 (concluding that some provisions of Class Action Fairness Act of 2003, H.R. 1115, 108th Cong. (2003), "are in some respects arguably tied to the purposes of the Diversity Clause, but in other, significant respects . . . sweep considerably beyond what those purposes logically might require").

the words of the Rules of Decision Act, to require otherwise than that such state law applies.<sup>171</sup>

For those who do not care about institutional legitimacy in the allocation of lawmaking competence between the federal government and the states, and who believe that *Byrd* retains (if it ever had) any vitality outside of the territory occupied or shadowed by the Seventh Amendment, the best approach to the desired result is not just through that part of the opinion which considers “affirmative countervailing considerations.” For the (federal) policy against which such considerations are balanced in the default regime is a policy of federal jurisdiction—“the objective that the litigation should not come out one way in the federal court and another way in the state court”<sup>172</sup>—that does not obtain under CAFA with respect to the class certification decision.

Although I regard this view of the landscape as more faithful both to existing boundary markers and to the state of the terrain after CAFA than those offered by my colleagues, it is by no means without problems of its own. Legal roadblocks include the legislative history to which I have referred that proclaims fidelity to *Erie*’s progeny.<sup>173</sup> There may be ways of avoiding those barriers, some of which are suggested by both Professors Issacharoff and Nagareda.<sup>174</sup> Even if the legislative history can be dispensed with, however, and although some of the statute’s findings are difficult to take seriously,<sup>175</sup> one of them appears to signal the continuing relevance of the policy against different outcomes on the basis of citizenship that animates the default regime.<sup>176</sup> Yet, the immediately succeeding finding—“State and local courts are . . . making judgments that impose their view of the law on other States and bind the rights of the residents of those States”<sup>177</sup>—speaks more directly to the issue in question: bias in favor of aggregation through choice of law. Indeed, it may have been intended to specify how Congress perceived that state courts were “sometimes acting in ways that demonstrate bias against out-of-State

171. See 28 U.S.C. § 1652 (2000) (“The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”).

172. *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 538 (1958); see also *supra* note 166.

173. See *supra* text accompanying note 129. Professor Nagareda also notes, however, legislative history that disapproves of state decisions in which “bootstrapping” choice of law enabled certification. See Nagareda, *Discontents*, *supra* note 6, at 1918 & n.197.

174. See Issacharoff, *supra* note 7, at 1862 & n.88 (noting refusal of courts to follow CAFA legislative history not rooted in text, and problems with postenactment legislative history); Nagareda, *Discontents*, *supra* note 6, at 1919–20 & n.201 (noting courts’ resistance to disembodied legislative history).

175. See *supra* notes 121–122 and accompanying text.

176. See *infra* text accompanying note 178.

177. Pub. L. No. 109-2, § 2(a)(4)(C), 119 Stat. 4, 5 (2005). As noted by Professor Floyd, “[t]his rationale is . . . unconnected to the purposes of the Diversity Clause.” Floyd, *Limits*, *supra* note 121, at 657.

defendants,”<sup>178</sup> and it is not in any event consistent with a policy of diversity jurisdiction that seeks to eliminate differences in outcome. Perhaps, therefore, these provisions of the statute itself support the conclusion (under the Rules of Decision Act) that CAFA requires the displacement of state choice of law doctrine that reflects bias in favor of aggregation.

The fact that, on this view, federal courts under CAFA would in some cases apply different choice of law rules than the courts of the state in which they sit is not, I believe, grounds for criticism or concern. For, unlike the default regime, CAFA’s policy is to enable jurisdictional manipulation in search of different (“procedural”) law, or at least of courts that have different attitudes toward aggregation.<sup>179</sup> Moreover, unlike the situation that would obtain under Professor Issacharoff’s proposed solution, the existence of such differences would be rationally related to the goals of the enterprise, goals that do not, at least for the present, include using diversity jurisdiction to advance the solution of problems created by a national market.

The prospects for success of this approach to the statute may turn on the Court’s willingness to acknowledge in deed if not in word the strategic uses of both ambiguity and hypocrisy. Although there is no reasonable hope that, were the Court to do so, the results of applying federal choice of law rules would, in the near future, be the ones that Professor Issacharoff favors, judicial preferences may change faster than sources of judicial authority.

#### CONCLUSION

At the end of the day, we should probably accept the strategic uses of both ambiguity and hypocrisy about aggregation at face value and not

178. Pub. L. No. 109-2, § 2(a)(4)(B), 119 Stat. at 5. More realistically, it is “an apparent attempt to establish a tie to the purposes of the diversity jurisdiction.” Floyd, *Limits*, supra note 121, at 630; see also *id.* at 661 n.210 (arguing that Class Action Fairness Act of 2003, H.R. 1115, 108th Cong. (2003), “is not aimed at preventing prejudice to out-of-state class members at all,” but “[r]ather . . . at protecting large corporate and other business defendants from allegedly unjustified verdicts in state courts, regardless of their state citizenship”).

179. The opportunities for manipulation that CAFA presents have not gone unnoticed.

Studying the decisions that have come down after CAFA’s enactment offers an opportunity to vividly witness the kind of strategic decision-making and gamesmanship that routinely takes place after a change in the law by those most centrally involved in dealing with it; that is, lawyers representing clients in cases to which the law may or may not be applicable. Observing and exposing these strategic maneuverings in the immediate aftermath of a new law’s enactment—particularly one as significant as CAFA’s—offers an important reminder that forum shopping in civil litigation is, and probably always will be, a two-way street.

Lonny Sheinkopf Hoffman, In Retrospect: A First Year Review of the Class Action Fairness Act of 2005, at 15 (Univ. of Houston Pub. Law & Legal Theory Series, Paper No. 2006-W-08, 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=901639](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=901639) (on file with the *Columbia Law Review*).

read into them “deep uncertainty about the nature of aggregation itself.”<sup>180</sup> Aggregation often presents a chicken and egg problem,<sup>181</sup> and once it became common knowledge that “the twilight zone around the dividing line between substance and procedure is a very broad one,”<sup>182</sup> both those responsible for the rules of the litigation game and players in that game were bound to use that knowledge for their own individual or institutional purposes. Neither lawyers, nor judges, nor Congress itself required CAFA to reveal to them “that choices about the format for the resolution of civil claims” do not necessarily “operate seamlessly with substantive law.”<sup>183</sup> They have known that for decades.

Professor Nagareda’s article manifests the desire to carve the world of aggregate litigation into procedural and substantive realms and to enforce a principle of fidelity whereby aggregate proceedings do in fact operate “seamlessly with substantive law,” but only in the sense of not altering substantive law. It is no surprise, therefore, that the same goals are evident in the current draft of the American Law Institute’s *Principles of the Law of Aggregate Litigation*, for which he is an Associate Reporter.<sup>184</sup> I have argued here, as I have on the floor of the ALI, that such a quest denies the complex interaction of procedure and substantive law throughout our federal system. I have also argued that it takes an essentialist view, shaped by current federal arrangements, on normative questions, including questions of institutional legitimacy.

As the Advisory Committee on Civil Rules considers whether to propose amendments to Rule 8 (“General Rules of Pleading”),<sup>185</sup> we can expect heavy doses of both ambiguity and hypocrisy from those who would stand to gain or lose if the system of notice pleading were changed. We

180. Nagareda, *Discontents*, supra note 6, at 1874.

181. See supra text accompanying note 3.

182. Letter from William D. Mitchell, Chairman, Comm. on Fed. Rules of Civil Procedure, to George Wharton Pepper (Dec. 19, 1937), quoted in Burbank, *Rules Enabling Act*, supra note 14, at 1134 n.530.

183. Nagareda, *Discontents*, supra note 6, at 1877.

184. See *Principles*, supra note 8, § 1.01(a), at 1 (“Procedures for aggregating claims should . . . respect the rights and remedies delineated by applicable substantive law.”); id. § 1.01 cmt. a, at 1 (“Fidelity concerns the relationship of aggregate procedure to underlying substantive law.”); id. § 1.05 reporter’s notes, at 31 (“Because compensation standards are creatures of substantive law, the awards claimants stand to win at trial should be the same in conventional lawsuits and aggregate lawsuits.”); id. § 2.03 cmt. c, at 50 (“Aggregation must respect these substantive choices, for procedural rules generally exist to describe the available modes for adjudication of civil claims without themselves altering the content of substantive rights.”); id. § 2.03 reporter’s notes, at 56 (“Aggregation generally should not serve as a backdoor method to alter the content of substantive law.”); id. § 2.06 cmt. a, at 81 (“As for this Chapter generally, the objective is for aggregate treatment to operate seamlessly with substantive law.”).

185. See Advisory Comm. on Civil Rules, *Advisory Rules Committees Actions: Fall 2005 Meetings (2005)*, at <http://www.uscourts.gov/rules/index.html#advisoryfall2005> (on file with the *Columbia Law Review*) (reporting that Advisory Committee on Civil Rules “agreed to consider other proposals further, including proposals to amend Civil Rule[ ] 8 (general rules of pleading)”).

all know, however, that this rule, nested in the “heartland of Civil Procedure,”<sup>186</sup> has profound implications for access to court. If, therefore, a proposal for major change were forthcoming, no argument based on the Enabling Act’s procedure/substance dichotomy would prevent controversy in Congress, where both the strategic value of ambiguity and the value of pleading rules to mask substantive change are well known.<sup>187</sup>

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186. Richard H. Field et al., *Civil Procedure: Materials for a Basic Course in Civil Procedure* 5 (8th ed. 2003).

187. See Burbank, *Role of Congress*, supra note 14, at 1680–81, 1689, 1731–32 & n.248 (discussing both general institutional preference for ambiguity and questions of institutional legitimacy in response to Fairman, *infra*); Christopher M. Fairman, *Heightened Pleading*, 81 *Tex. L. Rev.* 551, 614, 617–19 (2002) (opposing heightened pleading under Y2K Act, 15 U.S.C. § 6607 (2000), and Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b)(1)); Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 *Stan. L. Rev.* 627 (2002) (developing general theory of strategic uses of ambiguity by legislatures and courts, and illustrating theory with empirical evidence concerning Private Securities Litigation Reform Act of 1995); supra text accompanying note 27.