

AGGREGATION AND ITS DISCONTENTS: CLASS SETTLEMENT PRESSURE, CLASS-WIDE ARBITRATION, AND CAFA

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The law of aggregate litigation has witnessed the emergence of three significant debates in recent years. Scholars of class actions have debated the normative significance of the settlement pressure exerted upon defendants by judicial decisions to certify litigation to proceed on a class-wide basis. The courts have diverged over the validity of provisions in consumer and other contracts that not only subject disputes to mandatory arbitration, but also purport to forbid claimants from conducting the arbitration proceeding on a class-wide basis. Congress, too, has entered the fray over aggregate procedure, enacting the controversial Class Action Fairness Act of 2005 (CAFA) to facilitate the removal to the federal courts of proposed class actions involving state-law claims.

In this Essay, Professor Nagareda unites the discourse about these three seemingly separate questions of aggregate procedure. All three raise common questions about the proper relationship between aggregation and underlying substantive law—in particular, about the institutional authority that a decision to afford or to withhold aggregate treatment has to bring about reform in substantive rights. By regarding aggregation from the standpoint of institutional authority, the law may discern with greater precision when class settlement pressure is illegitimate and when it raises no normative concern. Likewise, an institutional perspective helps to pinpoint the questions that courts should ask when confronted with challenges to waivers of class-wide arbitration. The Essay closes by relating these topics to an emerging debate over the application of choice of law principles to proposed nationwide class actions in the federal courts pursuant to CAFA.

INTRODUCTION

In recent years, three different debates have emerged in the law of aggregate procedure. Each has proceeded on its own track, for the most part, both in case law and in scholarly commentary. The enterprise of this Essay is to show how each of the three debates implicates a common question at the core of what aggregation is all about and how it relates to the proper allocation of lawmaking power among institutions. The question centers upon the proper relationship between aggregation and the remedial scheme set forth by the legislature in the underlying substantive law.

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The longest running of the three debates concerns aggregation in its most salient form: certification of a lawsuit to proceed on a class-wide basis. The concern here centers on the contention that class certification might exert undue, illegitimate pressure upon the defendant to settle. The ferment over class settlement pressure predictably divides plaintiffs and defendants, and scholarly commentary has replicated that division. One segment of commentary, sympathetic to the plaintiffs' side, contends that fears of class settlement pressure are overblown and that class certification simply provides a procedural means to address civil wrongdoing on a mass scale.¹ Another segment of the literature lends credence to the defendants' side, contending that class certification operates most disturbingly when the underlying merits of class members' claims are most dubious.²

During the past decade, a second debate about aggregation has emerged—this time, not over class actions as such, but one step removed, over contractual provisions that purport to subject future disputes to mandatory arbitration out of court and, further, to waive the opportunity to conduct the arbitration on an aggregate basis. The legality of these waivers of class-wide arbitration has garnered attention from scholars of alternative dispute resolution³ and, recently, from commentators on aggregate procedure.⁴ One commentator goes so far as to say that these waivers portend “the forthcoming, near-total demise of the modern class

1. See, e.g., Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 Va. L. Rev. 1849, 1879–90 (2004) (concluding that class action mechanism does not “present a special, systemic problem of nuisance-value litigation”); Warren F. Schwartz, *Long-Shot Class Actions: Toward a Normative Theory of Legal Uncertainty*, 8 Legal Theory 297, 298 (2002) (“[T]he hostility to ‘long-shot’ class actions is shown to be unsupported on any basis currently articulated in judicial opinions or legal scholarship.”); Charles Silver, “We’re Scared to Death”: Does Class Certification Subject Defendants to Blackmail?, 78 N.Y.U. L. Rev. 1357 (2003) [hereinafter Silver, *Blackmail*] (criticizing theory that class certification “blackmails” defendants into settling).

2. See, e.g., Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1254–55 (2002) (criticizing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), and proposing that “district court judges . . . evaluate the strength of the case whenever the specific requirements of the federal class action rule, Rule 23, call for an inquiry into merits-related factors,” or, more broadly, that they conduct a “preliminary inquiry into the merits in every case”); Geoffrey C. Hazard, Jr., *Class Certification Based on Merits of the Claims*, 69 Tenn. L. Rev. 1, 3–6 (2001) (proposing precertification merits evaluation through examination of “verdict value”); George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. Legal Stud. 521, 545 (1997) (“[C]lass certification confers extraordinary power, in many instances irrespective of any substantive merit to the underlying claim.”).

3. E.g., Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1 (2000); Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, *Law & Contemp. Probs.*, Winter/Spring 2004, at 75.

4. E.g., Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373 (2005).

action” and its replacement with a world in which defendants can “opt[] out of liability” through arbitration clauses in their contracts with consumers, employees, and the like.⁵

Among the parties affected by mandatory arbitration clauses, the lineup is both predictable in some respects and surprising in others. Defendants predictably defend waivers of class-wide arbitration, and plaintiffs predictably decry them. The arguments advanced for these positions in the arbitration setting, however, involve a kind of role reversal by comparison to the debate over class settlement pressure. Defendants contend that waivers of class-wide arbitration are merely matters of procedural form that leave intact the plaintiffs’ underlying rights to challenge wrongful conduct on an individual basis—albeit in an arbitration proceeding rather than through a lawsuit.⁶ Plaintiffs, by contrast, are the ones who argue that waivers of class-wide arbitration are not merely matters of procedural form. Specifically, plaintiffs contend that such waivers effectively can insulate from challenge wrongdoing that gives rise to claims unmarketable on an individual basis.⁷

By training, lawyers are accustomed to making divergent arguments in different settings. There is more going on here, however, than the simple tailoring of reasoning to point toward desired results. The opportunistic side-switching exhibited by both sides in the debates over class settlement pressure and class-wide arbitration is made possible by a deep uncertainty about the nature of aggregation itself.

The law of both class actions and arbitration embraces a similar ideal: Simply stated, the format for the resolution of civil disputes—class action versus individual lawsuit, or arbitration versus litigation—should not alter substantive law. This ideal is most familiar in the class action context, governed in the federal system by Rule 23 of the Federal Rules of Civil Procedure. In the Rules Enabling Act, Congress delegates to the Supreme Court the power to fashion rules of civil procedure for the federal courts. But the Act famously withholds a power of substantive law reform.⁸ Because of its posited separation from matters of substantive law, the class certification determination is supposed to be a preliminary ruling that courts should make “at an early practicable time” in the litiga-

5. See *id.* at 373.

6. See, e.g., *Strand v. U.S. Bank Nat'l Ass'n*, 2005 ND 68, ¶ 21, 693 N.W.2d 918, 926 (upholding waiver of class-wide arbitration on such grounds, among others).

7. See, e.g., *Kristian v. Comcast Corp.*, 446 F.3d 25, 58–61 (1st Cir. 2006) (invalidating waiver of class-wide arbitration on such grounds).

8. By its terms, the Act delegates to the Supreme Court “the power to prescribe general rules of practice and procedure” for cases in the federal courts, but withholds the power to “abridge, enlarge or modify any substantive right.” 28 U.S.C. § 2072(a)–(b) (2000). For the leading historical study of the Act, suggesting that the prohibition against abridgements of any substantive right reiterates the limited nature of the delegation to the Supreme Court to prescribe procedural rules, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015, 1108 (1982).

tion.⁹ In keeping with this view, the Supreme Court's decision in *Eisen v. Carlisle & Jacquelin* further obliges courts to make the class certification determination without regard to plaintiffs' likelihood of success on the merits.¹⁰ The choice of procedural format, in short, is to be kept distinct from the remedial scheme of underlying substantive law. By "remedial scheme," I refer to the array of choices that the law might make about which institutions stand to enforce its substantive commands and under what parameters. The ferment over class certification arises precisely because a ruling on that subject—although cast as preliminary and merely procedural in nature—shapes dramatically the impact that the applicable remedial scheme will have in the real world. Whatever their partisan stakes in a given litigation, all sides recognize that the overwhelming majority of actions certified to proceed on a class-wide basis (and not otherwise resolved by dispositive motion) result in settlements.¹¹

The law of arbitration speaks along broadly similar lines, embracing the ideal that the shift from litigation to arbitration is merely a cosmetic one that leaves undisturbed the remedial scheme of substantive law. In a series of decisions in recent decades, the Supreme Court has afforded wide latitude for arbitration clauses under the Federal Arbitration Act (FAA),¹² even with regard to claims under federal statutes designed to advance objectives of public policy beyond the particular parties' dispute.¹³ In so doing, the Court has declared that, "[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."¹⁴

9. Fed. R. Civ. P. 23(c)(1)(A).

10. In *Eisen*, the Court held that the district court lacked authority to shift to the defendant the cost of providing notice to the members of the plaintiff class based upon a preliminary determination that the class was "more than likely" to prevail on the merits at trial. 417 U.S. 156, 168 (1974). In the course of so holding, the *Eisen* Court stated that "nothing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary hearing into the merits of a suit." *Id.* at 177.

11. See Thomas E. Willging et al., An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges, 71 N.Y.U. L. Rev. 74, 143 (1996) ("The percentage of certified class actions terminated by a class settlement ranged from 62% to 100%, while settlement rates (including stipulated dismissals) for cases not certified ranged from 20% to 30%.").

12. 9 U.S.C. §§ 1–16 (2000) (amended 2002).

13. See, e.g., *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000) (holding that claims under Truth in Lending Act, 15 U.S.C. §§ 1601–1667f (2000), may be arbitrated by agreement of parties); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (same with respect to Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2000)); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (same with respect to Securities Act of 1933, 15 U.S.C. §§ 77a–77aa); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (same with respect to Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78mm, and Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968 (2000)); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (same with respect to Sherman Act, 15 U.S.C. §§ 1–7).

14. *Mitsubishi Motors*, 473 U.S. at 628.

This Essay seeks to alter the debates over class settlement pressure and class-wide arbitration by grouping the two together and considering both in light of a third debate spawned by the Class Action Fairness Act of 2005 (CAFA).¹⁵ Important components of the debates over class settlement pressure and class-wide arbitration represent mirror images of each other, albeit in different settings. Both debates pose the same underlying question: When should the law become concerned, as a normative matter, that the affording or withholding of aggregation is not a matter of mere procedural format but amounts instead to an unauthorized, back-door method of reform for substantive rights?

On its face, CAFA initially might seem to have little to do with debates about the institutional implications of aggregation. The primary thrust of CAFA is simply to amend the federal diversity jurisdiction statute in order to make it easier for defendants to remove class actions involving state-law claims—particularly nationwide class actions—from state court to federal court.¹⁶ In passing CAFA, Congress swore off any objective to alter longstanding doctrine under *Erie Railroad Co. v. Tompkins*¹⁷ and its progeny that commands federal courts in diversity cases to apply federal procedural law but state substantive law.¹⁸ This stance should sound familiar. In determining whether to certify a proposed class action, the federal court purportedly does not alter state substantive law but merely ascertains the federal procedural vehicle through which it may be vindicated.

The actual operation of CAFA, however, threatens to impinge upon the ideal of procedural format operating harmoniously with substantive law. By moving nationwide class actions involving state-law claims into federal court, the defense-side backers of CAFA were not engaged in a mere shell game. The point of moving such classes into federal court is to subject them to a distinctively federal body of class certification principles, and in so doing, to alter the outcomes of class certification decisions from what they otherwise would have been—at least in some courts within some state judicial systems.

The pressure point in this endeavor will come at the intersection of CAFA and *Erie* principles—specifically, the Court’s holding in *Klaxon Co. v. Stentor Electric Manufacturing Co.* that a federal court in a diversity case

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

16. See *id.* sec. 4(a), § 1332, 119 Stat. at 9–11 (amending diversity jurisdiction statute, 28 U.S.C. § 1332 (2000)), to encompass class actions in which “any member of a class of plaintiffs is a citizen of a State different from any defendant” and amount in controversy, based upon aggregation of class members’ claims, exceeds five million dollars).

17. 304 U.S. 64 (1938).

18. See S. Rep. No. 109-14, at 49 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 46 (“[CAFA] does not change the application of the *Erie* Doctrine . . .”); H.R. Rep. No. 108-144, at 26 (2003) (“[CAFA] does not change substantive law—it is, in effect, a procedural provision only. As such, class 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.”).

must apply the same choice of law principles as would a state court sitting in the same location.¹⁹ In particular, the pressure point is likely to come in the form of a consumer class action brought in, or removed to, a federal court located in a state that would choose to apply a single body of law to a proposed nationwide class—that is, a state that embraces choice of law principles that considerably facilitate class certification.²⁰ This scenario pits CAFA's asserted respect for *Klaxon* (via *Erie*) against CAFA's objective to bring nationwide class actions involving state-law claims into federal court precisely so that they will not be certified.

The coming clash of CAFA and *Klaxon* presents more than just a doctrinal sidepoint. It threatens the notion that choices about the format for the resolution of civil claims should operate seamlessly with substantive law. Current doctrine, if anything, tends to sidestep the impact of aggregation on substantive law, casting the subject not in direct form but rather in terms of various surrogates: the *Eisen* rule in the debate over class settlement pressure; the doctrine of unconscionability in the debate over contractual waivers of class-wide arbitration; and the stricture of *Klaxon* in connection with CAFA.

The tendency to address important, deep-seated issues through indirection is by no means unique to the law of aggregate procedure. Sigmund Freud famously observed that modern civilization itself comes only at the price of psychological discontents²¹—repression of what one commentator describes as the “egoistic self-satisfaction” that characterizes the “instinctive life” of humankind.²² My suggestion is that aggregate procedure is under constant pressure—sometimes from plaintiffs and sometimes from defendants—to serve as the vehicle for reform of underlying substantive law through means other than actual reform legislation.

The solution here is not to junk the ideal that vehicles for the resolution of civil claims should not alter substantive law, any more than Freud thought modern humans should—or even could—cast off civilization simply because it produces discontents. A determination to acknowledge the discontents of aggregation and to grapple with them openly has the potential to produce in the law something like the illumination that Freud posited—however controversially—for psychoanalysis. By digging beneath the various doctrinal surrogates, this Essay seeks to confront forthrightly the intersection of aggregate procedure and underlying remedies. The affording or withholding of aggregate treatment is most problematic from an institutional standpoint when it operates as a backdoor

19. 313 U.S. 487, 496 (1941).

20. For an example of such a choice of law by a state supreme court in the context of a nationwide consumer class action, see *Ysbrand v. DaimlerChrysler Corp.*, 2003 OK 17, 81 P.3d 618, discussed *infra* text accompanying note 190.

21. See Sigmund Freud, *Civilization and Its Discontents* 33–45 (James Strachey trans., W.W. Norton & Co. 1961) (1930).

22. John Strachey, *A New Level of Consciousness*, *Spectator* (Lon.), July 26, 1930, at 136.

vehicle to restructure the remedial scheme in applicable substantive law. By the term “backdoor,” I refer to alteration of the applicable remedial scheme through neither legislation nor any alternative vehicle that one should regard as carrying comparable law-reform authority.

The problem of backdoor law reform is least pronounced in CAFA. This is not to say that CAFA is uncontroversial or that its implications are easy to parse. It is simply to note that any displacement of state substantive law (in the form of choice of law principles, as characterized in *Klaxon*) at least would take place at the behest of federal legislative choice. The authority question is more pressing in the debates over both class settlement pressure and class-wide arbitration precisely because both class certification decisions and private arbitration clauses occupy rungs of authority below legislation itself.

Class settlement pressure is least problematic when it simply makes marketable on an aggregate basis claims that substantive law recognizes as meritorious but that otherwise are unmarketable on an individual basis. This is not to say that class settlement pressure is absent from such cases, only that the law should not regard it as objectionable. Complaints over class settlement pressure in this first setting amount to complaints that some substantive principles simply are not worth vigorous enforcement. That might well be true in some settings, but 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. By contrast, class settlement pressure is most troubling when aggregation would not merely enable the enforcement of cost-prohibitive claims, but in addition, would distort the underlying remedial scheme. The most glaring of these situations arises when a class action would aggregate statutory damages that have been decoupled from claimants’ actual losses specifically in order to enable individual litigation. Aggregation of statutory damages in this setting would make for a kind of double counting discordant with the underlying remedial scheme.²³

The implication for class-wide arbitration is the mirror image of the analysis of class settlement pressure. Waivers of class-wide arbitration are most problematic when they effectively restructure the remedial scheme of the underlying statute—when they waive not merely class-wide arbitration but also the realistic opportunity for private persons to bring a claim at all. The law, nonetheless, need not embrace a wholesale rejection of mandatory arbitration by way of private contracts in order to resolve sensibly the debate over waivers of class-wide arbitration. In making mandatory arbitration clauses binding “so long as the prospective litigant effectively may vindicate [her] statutory cause of action in the arbitral forum,”²⁴ the law gives wide berth to private contracts, just not so wide as

23. This is the problem presented in *Parker v. Time Warner Entertainment Co.*, 331 F.3d 13 (2d Cir. 2003), discussed in greater depth *infra* Part I.B.2.

24. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

to place them entirely on a par with legislation itself in terms of their law-reform power. Seen in this light, waivers of class-wide arbitration are most vulnerable when they bring about a result most like reform legislation (effectively writing a private right of action out of the statutory scheme) through means (arbitration clauses in contracts) from which such power supposedly has been withheld.

The overarching point remains: By casting the relationship between aggregation and underlying substantive law as a question of institutional authority, the operation of CAFA can lend insight into other debates. Through its highlighting of the relationship between the format for civil claims and underlying substantive law, CAFA might well produce ripples likely to chagrin its defense-side backers elsewhere. By wielding federal legislation to restructure, in practical effect, matters thought to be the province of state substantive law, CAFA has the potential to draw added attention to the lack of such law-reform power in contractual waivers of class-wide arbitration.

This Essay proceeds in three parts, corresponding to the three debates that I seek to unify. Part I analyzes the controversy over class settlement pressure. Part II turns to what I have characterized as the mirror image of the class settlement pressure debate: waivers of class-wide arbitration that purport to turn off the pressure of aggregation upon the would-be defendant. Part III then discusses the tension between CAFA and *Klaxon* and how its resolution—in whatever direction courts might come to rest—underscores the primacy of legislation as the appropriate vehicle for reform of substantive law.

I. CLASS SETTLEMENT PRESSURE

The debate over class settlement pressure is not new to the law of aggregate procedure. In a 1973 book, Judge Henry Friendly expressed concern about the possibility of “blackmail settlements” induced by a low probability of class-wide liability.²⁵ This concern entered federal case law most prominently in Judge Richard Posner’s 1995 opinion for the Seventh Circuit in *In re Rhone-Poulenc Rorer Inc.*²⁶ Nestled within the opinion—albeit in somewhat jumbled form—is a useful roadmap that can help us frame the institutional significance of aggregation. As Part II shall show, the roadmap developed here will enable us later to pinpoint the nature of the normative objection to waivers of class-wide arbitration.

A. Mapping the Effects of Aggregation

Rhone-Poulenc concerned a proposed nationwide class of HIV-positive hemophiliacs suing the blood products industry in tort for negligence. The district court had declined to certify the proposed class for “adjudica-

25. Henry J. Friendly, *Federal Jurisdiction* 120 (1973). For criticism of the “blackmail” characterization, see Silver, *Blackmail*, *supra* note 1, at 1366–69.

26. 51 F.3d 1293 (7th Cir. 1995).

tion of the entire controversy between the plaintiffs and the defendants.”²⁷ Invoking the discretion granted in Rule 23(c)(4)(A) to certify a class action as to “‘particular issues’ only,” however, the district court had authorized a class-wide determination of whether the defendants had failed to exercise reasonable care in either their screening of blood donors or their treatment of blood products.²⁸ This issue of breach centered, in large part, upon what the defendant companies reasonably should have known about the risk of HIV transmission amid the rapidly changing nature of medical research at early stages of the HIV crisis.

On appeal, the Seventh Circuit concluded that the district court had abused its discretion to such a degree as to warrant class decertification through the extraordinary remedy of a writ of mandamus, one of the few avenues for interlocutory review of class certification decisions at the time.²⁹ Writing for the court, Judge Posner grounded the decertification of the *Rhone-Poulenc* class in several rationales, only one of which speaks of class settlement pressure.³⁰ The discussion of class settlement pressure nonetheless comprises the most controversial portion of the opinion. With seemingly no concern for the *Eisen* rule, Judge Posner pointed to what he saw as a “great likelihood that the plaintiffs’ claims, despite their human appeal, lack legal merit.”³¹ Plaintiffs had won only approximately eight percent of the individual cases—one of thirteen, to be exact—that previously had proceeded to judgment at trial.³² Given this purportedly low probability of success on the merits, Judge Posner saw class certification as wildly inappropriate by comparison to a different procedural route: what he described as “a decentralized process of multiple trials, involving different juries,” that held the promise of generating results that “will reflect a consensus, or at least a pooling of judgment, of many different tribunals” on the difficult question of breach.³³

The district court’s determination to certify class treatment of the breach issue rather than to remit plaintiffs to “a decentralized process of multiple trials” built inappropriate settlement pressure on the defend-

27. *Id.* at 1296.

28. *Id.* at 1297 (quoting Fed. R. Civ. P. 23(c)(4)(A)).

29. A subsequent amendment to Rule 23 added a new subsection (f), authorizing interlocutory review of “an order of a district court granting or denying class action certification” in the “discretion” of the relevant court of appeals. Fed. R. Civ. P. 23(f).

30. The court also pointed to choice of law problems posed by the certification of a nationwide class grounded in state tort law, and to problems posed by an issue class in light of the Reexamination Clause of the Seventh Amendment. See 51 F.3d at 1300–04.

31. *Id.* at 1299.

32. *Id.* at 1296. Here, I analyze Judge Posner’s class settlement pressure argument on its own terms. Other commentary has noted that reliance on the success rate for plaintiffs in previous trials ignores that 100–150 individual settlements had occurred prior to the class proceedings in *Rhone-Poulenc*. See Jay Tidmarsh, *Mass Tort Settlement Class Actions: Five Case Studies* 92 (1998). Inclusion of those data would have raised plaintiffs’ overall success rate to eighty-nine to ninety-two percent. See Silver, *Blackmail*, *supra* note 1, at 1379.

33. 51 F.3d at 1299–1300.

ants, said Judge Posner.³⁴ The mechanisms for that pressure bear delineation. One mechanism consists of an increase in the absolute number of claims that defendants would face as a result of class certification—what one might dub the “addition” effect of aggregation. In *Rhone-Poulenc*, this addition effect consisted of the contrast between the 300 or so claims that Judge Posner estimated defendants would face in a world of individual trials and the “thousands” of claims that they would face “[a]ll of a sudden” in the event of class certification.³⁵ The purportedly low probability of plaintiff success on the merits entered into this comparison indirectly. Judge Posner’s supposition appears to be that individual litigation rapidly would peter out—that, absent class certification, far fewer persons than the entire proposed class of HIV-positive hemophiliacs ultimately would sue individually.

Rhone-Poulenc also presents a second mechanism of settlement pressure that remains intertwined with the first in operation, but that nonetheless bears description as a distinct concept. This second mechanism stems from projection of the probability of plaintiff success in an individual case over the entire nationwide class—what one might call the “amplification” effect of aggregation.³⁶ A simplified example serves to isolate this effect.

Suppose that the absolute number of claims that defendants face would not change upon class certification. With the addition effect now put aside, suppose that, absent class certification, the defendants would face 1000 claims with an estimated eight percent chance of a finding that defendants failed to exercise reasonable care in any given case. And suppose that each such finding ultimately results in one million dollars in damages to the individual plaintiff, due to the severity of the injury suffered.³⁷ Given the large number of individual cases, one can be relatively confident that defendants’ loss rate over all 1000 cases would closely approximate the eight percent estimated probability that a breach will be found in any given case. The result is that defendants would expect to lose roughly eighty individual cases, with a total payout of eighty million dollars.

34. *Id.* at 1298.

35. *Id.*; see also *id.* at 1296 (estimating that class members numbered at least 10,000 persons).

36. I borrow here from the title of Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. Chi. Legal F. 475.

37. It is realistic to think that the breach issue comprised the only major firewall standing between defendants and liability for the overwhelming majority of class members—specifically, that further questions as to causation and comparative negligence would defeat few claims in follow-on trials. The hemophiliacs in the *Rhone-Poulenc* class, after all, used the defendants’ blood products out of medical necessity. There is no reason, moreover, to believe that the incidence of intravenous drug use or unsafe sex—other risk factors for HIV transmission—was unusually high within the class by comparison to the general population.

In the world of a class action, the situation for defendants is dramatically different. Defendants face an eight percent chance of having to pay one billion dollars (based on a class-wide finding of breach that then supports one million dollars in damage payouts to each of 1000 class members) and a ninety-two percent chance of having to pay nothing (due to a class-wide finding in defendants' favor on the breach issue). The expected value of the class-wide proceeding is the same as that for the no-class-action world (eighty million dollars), but the variance in outcomes is much greater. As a practical matter, there is no realistic possibility of an outcome in the class action world—aside from one generated by a class settlement—that would replicate the expected total payout of eighty million dollars in individual litigation of the 1000 claims.

A risk-neutral defendant would not care about the greater variance in the class action world and, accordingly, would settle the class action for no more than its expected value: eighty million dollars. A risk-averse defendant, by contrast, cares about variance, for that concern is the defining feature of risk aversion.³⁸ Such a defendant would be willing to pay more than the expected value of the litigation in order to settle the class action and thereby rid itself of the greater variance of outcomes associated with it.

All of this is not to say that the addition and amplification effects of aggregation remain completely unrelated to each other. On Judge Posner's account, the two effects dovetailed. Rather than "pay damages in only 25 cases, involving a potential liability of perhaps no more than \$125 million altogether," defendants in the class proceedings might "easily be facing \$25 billion in potential liability (conceivably more), and with it bankruptcy."³⁹ In what is perhaps the most famous passage of the opinion, Judge Posner then added: "[Defendants] may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle."⁴⁰

B. *When the Addition Effect Matters*

Considered on its own, the addition effect is an unlikely candidate for concern. Even while clamping down on adventuresome class certifications, the Supreme Court observed in its 1997 decision in *Amchem Products, Inc. v. Windsor* that "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."⁴¹ The Court explained that "[a] class action

38. See Steven Shavell, *Foundations of Economic Analysis of Law* 258, 406–07 (2004).

39. 51 F.3d at 1298.

40. *Id.*

41. 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.'"⁴²

All of this is not to suggest that *Rhone-Poulenc* itself involved the kinds of unmarketable claims thought to lie "at the very core of the class action mechanism." The point, instead, is that the law of class actions frequently celebrates the addition effect. I discuss, in turn, the reasons why this is so, and thereafter, one scenario where the addition effect properly rises to the level of normative concern.

1. *Addition in Aid of the Remedial Scheme.* — The addition effect is most pronounced and, at the same time, least controversial with regard to claims that are unmarketable on an individual basis. At its extreme, the addition effect alters the litigation landscape from one in which zero claims are brought to a world in which all similarly situated persons are presumptively claimants in the class proceeding.⁴³ The important point for present purposes is that addition, simply as addition, is not usually considered a matter for normative concern.⁴⁴

Insofar as the addition of claims against the defendant is troubling in a case like *Rhone-Poulenc*, the normative problem stems not from the addition effect itself, but instead from the manner in which addition of claims in large numbers contributes to the amplification of the underlying probability of success on the merits. Put differently, the idea that does the real work in the class settlement pressure argument in *Rhone-Poulenc* ultimately is one of amplification, not addition. If all of the claims in the proposed class were meritorious, then the addition effect generally would be evidence of the desirable consequences of aggregation, not of its dysfunctionality.

The notion that claims unmarketable on an individual basis comprise a "core" scenario for aggregation is no news to the law of class actions, but the reason why bears exposition. That reason highlights the connection between aggregate procedure and the remedial scheme of underlying substantive law. One can imagine a remedial scheme for the sorts of wrongs that comprise the "core" justification for aggregation that might not permit private lawsuits at all, or at least would make less use of them—that, instead, would rely predominantly on public administrative enforcement.⁴⁵ Even within the realm of private litigation, moreover, substantive law might draw upon an array of features to frame the param-

42. *Id.* (quoting *Mace*, 109 F.3d at 344).

43. Rule 23(b)(3) presumes class membership unless individual members affirmatively opt out. See Fed. R. Civ. P. 23(c)(3).

44. For a dissenting view, see Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal F. 71, 77–80 (criticizing as "faux" class actions those in which "most members of the class never make a conscious choice to seek judicial enforcement of their substantive right to pursue private damages").

45. Robert Kagan has argued that "adversarial legalism" is a distinctive feature of the United States by comparison to other Western democracies. See Robert A. Kagan, *Adversarial Legalism* 16 (2001) ("It is only a slight oversimplification to say that in the

eters for such lawsuits—most conspicuously, in the civil rights area, fee-shifting provisions to reduce the cost obstacles to private enforcement.⁴⁶

Claims unmarketable on an individual basis comprise a “core” scenario for aggregation because aggregation in that setting operates in support of the underlying remedial scheme in a particular way: Aggregation facilitates claims that are otherwise unmarketable by removing barriers that are not plausibly the products of substantive law design. It is not plausible, for example, to think that Congress, by outlawing price fixing irrespective of the amount by which consumers are overcharged and by permitting private antitrust lawsuits, thereby sought to design a remedial scheme that would lie fallow. Again, this is not to say that the law must outlaw price fixing when it harms consumers to a degree that does not give rise to claims marketable on an individual basis. Nor must the law necessarily permit private antitrust litigation as a supplement to public enforcement. 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. Aggregation operates harmoniously with remedial design by making feasible private litigation (when substantive law chooses to permit it) to enforce strictures against misconduct that otherwise would not give rise to marketable claims (when such strictures are part of substantive law).

If one believes that trivial harms should not be the subject of private litigation in a given area,⁴⁷ then one naturally would regard the addition effect of aggregation as making a bad situation worse. Not all substantive principles necessarily warrant enforcement to the *n*th degree. Enforcement of those principles might benefit from the kind of prioritization that characterizes public administrative schemes.⁴⁸ This criticism of the addition effect is real. It highlights what one might dub “the Javert problem”: the possibility that aggregation might amount to a rigid, literalistic insistence upon substantive law in all its details akin to that exhibited by the police inspector in Victor Hugo’s *Les Misérables*.⁴⁹ But the appropriate target of this criticism is not aggregation as such. The right targets for

United States lawyers, legal rights, judges, and lawsuits are the functional equivalent of the large central bureaucracies that dominate governance in high-tax, activist welfare states.”).

46. See, e.g., 42 U.S.C. § 1988(b) (2000) (Civil Rights Attorney’s Fees Awards Act of 1976); *id.* § 2000e-5(k) (Title VII of Civil Rights Act of 1964); *id.* § 12205 (Americans with Disabilities Act of 1990).

47. For an early suggestion to this effect, see *Developments in the Law—Class Actions*, 89 *Harv. L. Rev.* 1318, 1357 (1976) (“[A]llowing costs to fall on holders of small claims may be more efficient if the small claimants have access to a less expensive means of reducing social costs than do defendants.”).

48. See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (“An agency generally cannot act against each technical violation of the statute it is charged with enforcing.”).

49. See Victor Hugo, *Les Misérables* (Charles E. Wilbour trans., Modern Library 1992) (1862).

criticism are the underlying legislative choices about what kinds of conduct to proscribe and what institutions to deploy as enforcement vehicles. In particular, there 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.

2. *Addition at Odds with the Remedial Scheme.* — Case law identifies one scenario for class action litigation in which the addition effect, simply as addition, rises to the level of normative concern. The nature of that concern bears discussion, for the analysis here will prove useful in the later treatment of class-wide arbitration. The kinds of unmarketable individual claims thought to comprise the “core” justification for class actions consist of traditional damage claims, with damages determined by, say, the estimated amount of the overcharge to a given consumer from an anti-trust violation. All remedial schemes, however, do not follow the traditional damage model. Some laws in the consumer protection area set forth minimum “statutory damages” not tied to the harm suffered by the consumer. Efforts to obtain class certification for statutory damage claims form a useful counterpoint to the preceding analysis of the addition effect.

A recent decision from the Second Circuit, *Parker v. Time Warner Entertainment Co.*, illustrates the difficulties that potentially can arise in the aggregation of statutory damage claims.⁵⁰ *Parker* concerned claims under the Cable Communications Policy Act of 1984 (Cable Act).⁵¹ The proposed class of twelve million Time Warner cable television customers alleged that the defendant company had violated the Cable Act by disclosing customer information to third parties and by failing to inform customers of such disclosure.⁵² As a remedy for violations of this sort, the Cable Act provides for actual damages, but with a statutorily specified minimum of \$1000 per claimant.⁵³ Multiplied over the proposed twelve-million-member class, these statutory damages would have amounted to potential liability for Time Warner of twelve billion dollars—which the district judge regarded as firm-threatening liability based upon alleged violations of the Cable Act that were minor in nature.⁵⁴

On technical grounds, the Second Circuit ultimately vacated the district court’s refusal to certify the class and remanded for further proceedings, though not before expressing great sympathy for the “legitimate concern” raised by the district judge.⁵⁵ Writing for the court, Judge

50. 331 F.3d 13 (2d Cir. 2003).

51. 47 U.S.C. §§ 521–561 (2000).

52. See *Parker*, 331 F.3d at 15.

53. 47 U.S.C. § 551(f)(2)(A).

54. 331 F.3d at 21–22 (summarizing district court’s reasoning in *Parker v. Time Warner Entertainment Co.*, 198 F.R.D. 374, 383–84 (E.D.N.Y. 2001)).

55. *Id.* at 22. The Second Circuit faulted the district court not for its concern over the consequences of adding together twelve million statutory damage claims at \$1000 apiece, but rather for its willingness to deny class certification on that ground without discovery

Stefan Underhill linked the aggregation question directly with the underlying remedial scheme. The court observed that statutory damage provisions already seek “to encourage the filing of individual lawsuits as a means of private enforcement of consumer protection laws.”⁵⁶ As a result, “[i]t may be that the aggregation in a class action of large numbers of statutory damages claims potentially distorts the purposes of both statutory damages and class actions,” creating “a potentially enormous aggregate recovery for plaintiffs, and thus an *in terrorem* effect on defendants, which may induce unfair settlements.”⁵⁷

Parker presents an especially clean illustration of when the addition effect properly militates against aggregation. The distortion of the underlying remedial scheme comes from the aggregation of statutory damages seemingly set forth by Congress with the scenario of individual litigation in mind. The addition effect matters in *Parker*, in other words, without regard to the plaintiffs’ probability of success on the merits. The link drawn by Judge Underhill to concerns about class settlement pressure is telling. That pressure is not “unfair” in *Parker* because of some

and, indeed, before the filing of a formal motion whereby class counsel at least could have made their best case for class certification. See *id.* at 21.

56. *Id.* at 22. As Stephen Burbank further observes in his responsive essay, the Cable Act also facilitates individual litigation by providing for an award of attorneys’ fees and costs to the plaintiff. See Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 *Colum. L. Rev.* 1924, 1930 n.42 (2006) (discussing 47 U.S.C. § 551(f)(2)(C)).

57. 331 F.3d at 22. New York law guards against class certification in similar circumstances through specific language in its class action rule. See N.Y. C.P.L.R. 901(b) (McKinney 2006) (“Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.”). The legislature added this language out of “fear[] that class judgments awarding statutory penalty-type damages to each member of the class could result in ‘annihilating punishment’ of the defendant.” *Id.* 901 cmt. C901:11, at 104 (quoting *Ratner v. Chem. Bank of N.Y. Trust Co.*, 54 F.R.D. 412, 416 (S.D.N.Y. 1972)); cf. *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 285–86 (D. Mass. 2004) (deeming C.P.L.R. 901(b) binding on federal court sitting in diversity, per *Erie*, notwithstanding nominal designation of that provision as state procedural rule).

The difficulties posed by the aggregation of statutory damage claims, moreover, are not confined to class actions under the Cable Act. The Telephone Consumer Protection Act of 1991 (TCPA) similarly provides for a minimum of \$500 in statutory damages for each instance in which a person sends an “unsolicited advertisement to a telephone facsimile machine,” 47 U.S.C. § 227(b)(3)(B)—what is popularly known as a “junk fax.” Courts have split on the appropriateness of class certification for such claims. Compare *Travel 100 Group v. Empire Cooler Serv.*, No. 03-CH-14510, 2004 WL 3105679, at *6 (Ill. Cir. Ct. Cook County Oct. 19, 2004) (expressing concern over “enormous disparity” between actual damages suffered by class members and \$1.7 million in statutory damages sought in class complaint, but certifying proposed class nonetheless), with *Levine v. 9 Net Ave., Inc.*, No. A-1107-00T1, 2001 WL 34013297, at *4 (N.J. Super. Ct. App. Div. June 7, 2001) (affirming denial of class certification based in part on trial judge’s view that minimum statutory damages under TCPA already provide “sufficient incentive” for individual actions). For criticism of junk fax class actions, see Walter Olson, *Op-Ed.*, *Rumpelstiltskin, LLP*, *Wall St. J.*, July 29–30, 2006, at A11.

brooding skepticism about the policy choice of Congress in the Cable Act to proscribe violations of customer privacy. The unfairness stems from the recognition, grounded in the remedial scheme that Congress selected, that aggregation would distort rather than aid that scheme.

The path suggested by the Second Circuit panel—exercise of judicial discretion to deny class certification, albeit upon appropriate factual findings of the sort not present at the time of the appeal in *Parker*—stands in contrast to another course of action. Concurring in *Parker*, Judge Jon Newman readily agreed that the adding up of per-customer statutory damages by way of class certification would strain the bounds of credible congressional authorization in the Cable Act.⁵⁸ But the solution for Judge Newman lay not in the withholding of class certification, but rather in the application of the absurdity doctrine of statutory interpretation, whereby “statutes are not to be applied according to their literal terms when doing so achieves a result manifestly not intended by the legislature.”⁵⁹ In Judge Newman’s view, the district court on remand could properly exercise its discretion to certify the class while effectively reducing the statutory damages available on an aggregate basis below the \$1000-per-customer amount expressly stated in the statute.⁶⁰ In fact, Congress itself has addressed similarly an analogous problem under the Truth in Lending Act, amending that statute to cap the aggregate amount of statutory damages available in class actions as distinct from individual litigation.⁶¹

The absurdity doctrine remains the subject of considerable debate,⁶² and this Essay is not the place to settle the score. My point is a more modest one: Both the *Parker* majority and the Newman concurrence share the crucial recognition that class certification layered on top of the per-violation damages in the Cable Act would distort, rather than facilitate, the remedial scheme of that statute. The judges in *Parker* diverged only over the question of what should yield—the availability of aggregation (a discretionary decision on the court’s part) or per-violation damages (as specified in the statutory text)—in order to prevent that distortion.⁶³ For present purposes, the important point remains that the

58. See 331 F.3d at 26 (Newman, J., concurring).

59. *Id.* at 27.

60. *Id.* at 27–28.

61. See 15 U.S.C. § 1640(a)(2)(B) (2000) (capping statutory damages in class actions at “the lesser of \$500,000 or 1 per centum of the net worth of the [defendant] creditor”).

62. For a critique, see John F. Manning, *The Absurdity Doctrine*, 116 *Harv. L. Rev.* 2387 (2003).

63. The *Parker* majority is on plausible ground in suggesting that the class certification decision, not the statutory text, must yield. The class certification decision is discretionary in nature for judges, whereas adherence to the statutory text of the Cable Act is not—at least, apart from the application of controversial interpretive principles like the absurdity doctrine. One might understand the majority as saying that the predicate for application of the absurdity doctrine—a situation in which the purportedly absurd result cannot otherwise be avoided—was not present in *Parker*. The absurd result could be avoided easily through the exercise of judicial discretion to deny class certification.

addition effect is problematic from a normative standpoint precisely when it would bring about an amendment of the underlying remedial scheme through means other than reform legislation itself.

C. *When the Amplification Effect Matters*

Scholarly concern over class settlement pressure does not stem primarily from the addition effect. The centerpiece of that debate asks what the law should make of the amplification effect. The prescriptions set forth in existing commentary range widely. Building on *Rhone-Poulenc*, some commentators call for rejection of the *Eisen* rule in order to pave the way for judicial consideration of the plaintiff class's likelihood of success on the merits as part of the class certification inquiry.⁶⁴ By contrast, one commentator skeptical about *Rhone-Poulenc* finds the concern over class settlement pressure overblown, contending that the prospect of a risk-averse defendant settling a class action to avoid a wide variance in possible outcomes is a matter suitable for treatment by the market for corporate risk insurance, not the law of aggregate procedure.⁶⁵ Still others acknowledge the connection between class settlement pressure and the merits of class members' claims, but contend that the law easily can preserve the benefits of aggregation with a modest change in practice: a mandatory summary-judgment determination as a precondition to judicial approval of any class settlement.⁶⁶

The varying prescriptions aside, even those commentators most skeptical about the concern expressed over class settlement pressure recognize that its legitimacy turns upon normative considerations, not descriptive ones.⁶⁷ The normative debate over class settlement pressure, at bottom, is a debate over what to make of the eight percent probability of loss for the defendant, to continue the stylized example from earlier discussion. The hard question is: Why does that eight percent exist? To see the significance of this question, recall the way that Judge Posner framed the procedural alternatives in *Rhone-Poulenc*: a nationwide class action versus "a decentralized process of multiple trials" that generate "a pooling of judgment" on the breach question across "multiple juries constituting in the aggregate a much larger and more diverse sample of decision-makers."⁶⁸

To be sure, this description of procedural alternatives identifies two extremes and omits several options in the middle—say, bellwether trials of multiple, individual cases as part of the class proceeding.⁶⁹ Middle options aside, Judge Posner's notion of multiple individual trials—the

64. See Bone & Evans, *supra* note 2, at 1275–76; Hazard, *supra* note 2, at 9.

65. See Silver, *Blackmail*, *supra* note 1, at 1413–15.

66. See Kozel & Rosenberg, *supra* note 1, at 1861–62.

67. See Schwartz, *supra* note 1, at 308; Silver, *Blackmail*, *supra* note 1, at 1419.

68. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299–1300 (7th Cir. 1995).

69. See Laurens Walker, *A Model Plan to Resolve Federal Class Action Cases by Jury Trial*, 88 Va. L. Rev. 405, 409–11 (2002).

most obvious alternative to class certification—helps to pinpoint the normative questions lurking within the eight percent figure. Judge Posner's call for a decentralized series of trials before multiple decisionmakers speaks in terms that sound in the Condorcet Jury Theorem. Here, I must note emphatically that I do not advance a new theory of class settlement pressure based upon an application of the Condorcet Jury Theorem. I simply suggest that we may advance our understanding of the normative implications of class settlement pressure by reference to one strand of writing on the Theorem in the context of legal decisionmaking.

Named for the Marquis de Condorcet, the Condorcet Jury Theorem speaks to the optimal size of decisionmaking bodies and their use of majority rule to make decisions. Briefly summarized, the Theorem holds that where a group of decisionmakers must choose "between two alternatives, one of which is correct and the other incorrect," and where the probability of any given decisionmaker selecting the correct alternative is greater than one-half, "the probability that a majority vote will select the correct alternative approaches 1 as the number of [decisionmakers] gets large."⁷⁰

The implications of the Theorem rest on the explanation that lies behind one of its premises. As Paul Edelman has shown, a variety of possible explanations exist as to why the probability that a given decisionmaker will select the correct alternative is greater than one-half. The choice among those explanations, in turn, determines the normative implications that one may draw about multimember decisionmaking bodies and the decision rules that they should follow. The one-half probability could be the result of pure random variation, in the sense of decisionmakers reaching their decisions based simply on a coin flip. Or it could be the result of the selection of decisionmakers from some larger pool, within which just over one-half of the potential decisionmakers decide correctly all of the time. Or it could be that each individual decisionmaker is apt to be correct in slightly more than one-half of the instances for decision.⁷¹ Scholars, in short, must unpack the probability models behind proposed applications of the Condorcet Jury Theorem in order to draw sound normative conclusions. So too, by analogy, must the law unpack the probability models behind the class settlement pressure debate.

To anticipate the discussion to follow, an eight percent probability of plaintiff success might arise for at least three possible reasons. I do not purport to exhaust all possibilities here, nor do I mean to suggest that the various explanations remain completely distinct from one another in real-world litigation. The discussion that follows keeps the three explanations distinct simply as a way to underscore the differences in their nor-

70. Paul H. Edelman, *On Legal Interpretations of the Condorcet Jury Theorem*, 31 *J. Legal Stud.* 327, 328 (2002).

71. *Id.* at 329.

mative implications. Briefly put, the explanation for the eight percent probability might lie in differences among class members, differences in the way that ambiguous factual questions common to the class are resolved, or differences in the factfinders themselves apart from any disputed facts. After setting forth each explanation on its own terms, I then turn to their collective implications for the debate over class settlement pressure.

1. *Differences Among Class Members.* — The possibility that an eight percent probability of success stems from differences among the class members themselves is, in many ways, the easiest explanation to analyze. Aggregation conceivably might submerge differences among class members through a process of cherrypicking. As the term suggests, cherrypicking involves the focusing of the class proceeding upon an atypical situation among those presented by the various class members⁷²—at its extreme, a focus upon one among the eight percent of class members who have a meritorious claim as a stand-in for the other ninety-two percent who do not. If permitted as a byproduct of aggregation, cherrypicking threatens to distort the implementation of the underlying remedial scheme by mismatching payouts and claimants.

This is a genuine concern. But it is far from clear that this first explanation for the eight percent probability can support a normative argument against class settlement pressure. Rule 23(a)(3) already requires the court to find that “the claims or defenses” of the class representatives “are typical of the claims and defenses of the class” as a whole.⁷³ The class certification inquiry, more generally, trains upon the cohesiveness of the proposed class.⁷⁴ The objective—imperfectly pursued, to be sure—is to look for differences among class members that might result in cherrypicking, were the proposed class action to proceed. This first explanation, in short, is one that the procedural requirements for aggregation can handle.

In fact, one federal appellate court has criticized the class settlement pressure argument in *Rhone-Poulenc*, contending that it should carry no weight in class certification now that Rule 23 authorizes interlocutory appellate review of such rulings.⁷⁵ The availability of interlocutory review to police the application of class certification requirements offers a solution to class settlement pressure, however, only on this first explanation of what aggregation amplifies. Only if differences among the would-be class members are what underlie that pressure, in other words, does careful

72. Allan Erbsen, From “Predominance” to “Resolvability”: A New Approach to Regulating Class Actions, 58 Vand. L. Rev. 995, 1010–11 (2005).

73. Fed. R. Civ. P. 23(a)(3).

74. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997) (“The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.”).

75. See *Klay v. Humana, Inc.*, 382 F.3d 1241, 1275 (11th Cir. 2004).

enforcement of class certification requirements form a persuasive retort to *Rhone-Poulenc*.

2. *Differences in the Interpretation of Common Facts*. — A second explanation for the eight percent probability posits no difference among class members. On this second view, the eight percent probability instead stems from the resolution of ambiguous facts common across all class members. As an illustration, recall the issue certified by the district court for class treatment in *Rhone-Poulenc*: whether the defendants exercised reasonable care in their screening of blood donors or their handling of blood products in the early years of the HIV crisis. The rapidly changing nature of scientific knowledge about HIV transmission during this period likely would have made for difficult factual determinations on the question of reasonable care. To put the point bluntly, it might well be hard to assess what a reasonable blood product firm should have known and when the firm should have known it in such a setting. Even the most conscientious factfinders might disagree on the conclusions to be drawn from ambiguous common facts.

This second explanation would lend credence to suggestions that mandatory summary judgment represents a complete response to the class settlement pressure problem. On this account, summary judgment operates in its ordinary manner—to ascertain whether there exists a genuine issue of material fact or whether a reasonable factfinder could come out only in favor of the moving party.⁷⁶ Upon a denial of summary judgment, some probability of plaintiff success would remain. But that remaining probability is not—on this view, cannot be—a source for normative concern in the class action setting, for it would not be so in the context of an ordinary individual action. Amplification of that remaining percentage by way of class certification would increase the variance of potential outcomes. But that variance would not be a cause for concern on this view, for the underlying probability of success that is the source of the variance—what aggregation amplifies—is itself not a cause for concern.

The important point remains that the argument for summary judgment as a complete response to class settlement pressure turns upon an implicit explanation for the underlying probability of plaintiff success. How one explains that probability influences greatly both the normative significance that one attaches to class settlement pressure and the policy prescriptions one endorses. As I now suggest, however, the concern over class settlement pressure—cast in its strongest terms—appears to stem less from factual ambiguity and more from the factfinders themselves.

3. *Differences Among Factfinders Irrespective of the Facts*. — A third explanation for the eight percent probability centers neither on class members nor on ambiguities in the facts common to their claims. This third expla-

76. See Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

nation is the most difficult of the three to analyze, even though it appears to be doing considerable work in the class settlement pressure argument. Comparing the issue class initially certified in *Rhone-Poulenc* with the alternative of individual trials, Judge Posner endorsed the latter as a way “of submitting an issue to multiple juries constituting in the aggregate a much larger and more diverse sample of decision-makers.”⁷⁷ Class treatment, by contrast, would mean that one jury—six persons in a federal civil trial today—would “hold the fate of an industry in the palm of its hand. This jury, jury number fourteen [after the thirteen previous individual trials], may disagree with twelve of the previous . . . juries—and hurl the industry into bankruptcy.”⁷⁸

What could be the implicit explanation for the eight percent probability at work here? I do not purport to have definitive insight into Judge Posner’s thinking. There is, nonetheless, an explanation grounded in the literature on civil litigation that enables one to sketch an account different from the two canvassed already. The jury in the class-wide trial might side with the plaintiff class not because of a bona fide disagreement over ambiguous facts, but instead for other reasons. Judge Posner alludes to this prospect in his passing reference to the “human appeal” of the HIV-positive hemophiliac class in *Rhone-Poulenc*.⁷⁹

One might try to cast the point here simply in terms of emotional sympathy. An emerging branch of scholarship, however, enables one to speak in a way that avoids casting juries as wildly emotional, biased, or stupid. This literature addresses the relationship between civil litigation and cognitive psychological research on human decisionmaking under conditions of uncertainty.⁸⁰ Commentators in this genre observe that human decisionmaking under conditions of uncertainty exhibits identi-

77. See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995).

78. *Id.*

79. *Id.* at 1299.

80. See, e.g., Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. Chi. L. Rev. 163, 191 (2000) (“Because plaintiffs in frivolous suits have a greater tolerance for risk than the defendants they have sued, the plaintiffs have ‘psychological leverage’ in settlement negotiations, even though they face a very low probability of prevailing at trial.”); Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 Mich. L. Rev. 107 (1994) (contending that systematic cognitive biases can cause litigants to proceed to trial even when settlement would be value-maximizing); Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 Tex. L. Rev. 77, 82 (1997) (“[L]awyers are more likely than litigants to apply an expected financial value analysis to the settlement-versus-trial decision, whereas certain cognitive and social-psychological phenomena that can distract from expected value analysis are more likely to influence litigants.”); Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. Cal. L. Rev. 113 (1996) (relying on cognitive psychological research to articulate framing theory of litigation); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. Chi. L. Rev. 571, 572 (1998) [hereinafter Rachlinski, *Hindsight*] (arguing that hindsight bias “makes defendants seem more culpable than they really are” and “can cause judges and juries to find liable even those defendants who attempted to avoid negligence by undertaking all reasonable precautions in foresight”).

able cognitive biases—tendencies 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.⁸¹ Most notable for present purposes is what commentators describe as “hindsight bias,” the tendency after the fact to overestimate the ability of decisionmakers to foresee the outcome of events.⁸² The temporal orientation of a personal injury lawsuit plays strongly into hindsight bias. Personal injury actions inherently present a known, injurious outcome for plaintiffs who then invite the jury to attribute legal responsibility for that outcome to the defendant.

The potential for hindsight bias in *Rhone-Poulenc* was considerable. The known outcome was truly tragic: infection of the plaintiff class members with a disease that was simultaneously the subject of scorn in some quarters, incurable, and fatal (at least until the late 1990s).⁸³ The class certified by the district court, moreover, carved out for aggregate treatment the issue most prone to hindsight bias: what a reasonable blood product company should have known about HIV transmission amid rapidly changing science about the disease.

The crucial starting point remains that hindsight bias is not something that substantive law regards as legitimate, even in individual cases.⁸⁴ To be sure, research on civil litigation and cognitive psychology suggests that systematic cognitive biases—perhaps especially hindsight bias—may be difficult to purge from individual trials in practice.⁸⁵ Simply out of necessity, the law may have to maintain a grudging, hold-its-nose kind of tolerance toward systematic cognitive bias in individual litigation, lest the law foreclose private lawsuits entirely in a given area. It is quite another thing, however, to think that aggregation should countenance the amplification of the problem.

Cast in its best light, the class settlement pressure argument sounds a kind of Hippocratic Oath for aggregate procedure: First, do no harm.

81. See Amos Tversky & Daniel Kahneman, Judgment Under Uncertainty: Heuristics and Biases, 185 Science 1124 (1974). For further development, see Judgment Under Uncertainty: Heuristics and Biases (Daniel Kahneman et al. eds., 1982).

82. See B. Fischhoff, Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty, 1 J. Experimental Psychol. 288, 292–93 (1975) (“Reporting an outcome’s occurrence consistently increases its perceived likelihood and alters the judged relevance of data describing the situation preceding the event.”). For a leading exposition of hindsight bias in legal decisionmaking, see Rachlinski, Hindsight, supra note 80.

83. See Lawrence K. Altman, With AIDS Advance, More Disappointment, N.Y. Times, Jan. 19, 1997, at A1 (“In the last year, the widespread use of combinations of new and older drugs has changed the face of AIDS, promising to transform a fatal infection to a manageable chronic disease.”).

84. See Rachlinski, Hindsight, supra note 80, at 600–01 (discussing injustice that results when hindsight bias effectively alters legal standards after the fact and thereby creates “incongruence” between legal rules and their actual administration).

85. See id. at 619–20 (finding that various debiasing strategies appear to have minimal effect on hindsight bias).

Do not worsen a phenomenon that itself is not regarded as a legitimate feature of individual lawsuits by amplifying its potential consequences. In any event, what makes the amplification effect something of normative concern here is the commitment of substantive law to the ideal of unbiased decisionmaking, not some impressionistic inquiry into how much settlement pressure is enough for defendants to bear. The source of that pressure—and the degree to which it is in tension with substantive law—is what matters, not its magnitude per se.

4. *Reframing the Debate over the Amplification Effect.* — The foregoing treatment is admittedly stylized. In real-world situations, a given probability of plaintiff success is likely to represent an aggregation of its own—a rolling together of explanations that implicate the nature of the claimants, the disputed facts, and the factfinders. It may be exceedingly difficult for courts tasked with the aggregation decision to separate cleanly the competing explanations in play. Three overarching points nonetheless emerge.

First, the discussion in this section highlights the continuity in the debate over the amplification effect of aggregation and the earlier treatment of the addition effect. The addition of claims through aggregation is most troubling in a *Parker*-type situation, when aggregation would lead to a deviation from the underlying remedial scheme rather than to its effectuation. Similarly, the amplification effect is most troubling when it would accentuate a deviation from the ideals of underlying substantive law—albeit a deviation that the law might have to tolerate grudgingly in individual lawsuits. The key point about both effects is that the remedial scheme of substantive law supplies the appropriate touchstone with which to assess the normative implications of aggregation.

Second, the analysis of the amplification effect in this section lends perspective to existing work on class settlement pressure. That literature identifies important elements of the amplification effect, and commentators see clearly many of the trees. The problem is that they tend to mistake particular trees for the entire forest. 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.

Third, a nuanced treatment of the amplification effect recasts the policy prescriptions in the current literature more along the lines of blunt instruments than of surgical scalpels. In calling for overt consideration of the plaintiffs' likelihood of success on the merits as part of the class certification determination,⁸⁶ one camp of commentators miscasts as a "what" question (what the likelihood of success is) something that primarily poses a "why" question (why does that likelihood exist). The

86. See sources cited *supra* note 2.

competing notion of mandatory summary judgment proceedings⁸⁷ also speaks to the problem of class settlement pressure only in a broad and undifferentiated way. The literature applying cognitive psychological research to civil litigation offers no reason to think that systematic cognitive biases somehow operate only on the low end of probable plaintiff success. Yet, that is the end where summary judgment has bite.

In the end, the contribution of this Part lies in underscoring just how nuanced the effects of aggregation are. As I now discuss, the roadmap to aggregation set forth here can help us to see the kinship between the class settlement pressure debate and the recent controversy over waivers of class-wide arbitration by private contract.

II. WAIVERS OF CLASS-WIDE ARBITRATION

The debate over class settlement pressure calls for courts to ask when the affording of aggregation works a distortion of substantive law. The controversy over class-wide arbitration inverts this question and transfers it to a new setting. Here, the concern is not that the affording of aggregation will distort the remedial scheme, but rather that the withholding of aggregation will do so. At bottom, however, the affording and the withholding of aggregation are the inverse of one another. This Part contends that the law accordingly should analyze waivers of class-wide arbitration on terms similar to those used in the preceding Part to untangle the debate over class settlement pressure.

To see class settlement pressure and waivers of class-wide arbitration as the inverse of each other is not to ignore differences in context. Waivers of class-wide arbitration are categorical provisions in private contracts, not the products of discretionary choices by courts. Still, the shift to foreclosure of aggregation by contract from authorization of aggregation by court order makes for less of a change in terms of normative analysis than one might think. As Part II.A explains, the core argument invoked to legitimize the arbitration of statutory claims pursuant to private contracts replicates the ideal of court-ordered aggregation. Like the move from individual lawsuit to class action, the move from litigation to arbitration ideally does not disturb underlying substantive law.

Part II.B confronts directly the status of mandatory arbitration clauses that contain waivers of class-wide treatment, focusing closely on the significant recent decision by the California Supreme Court in *Discover Bank v. Superior Court*.⁸⁸ Just as the affording of aggregation can distort the remedial scheme in a proposed class action like the one in *Parker*, so too might the withholding of aggregation have a similar effect. That effect, nonetheless, remains more subtle than the distortion that the *Parker* court perceived in the totaling up of statutory damage claims. This section offers guidance to courts on the sorts of questions worth asking—

87. See Kozel & Rosenberg, *supra* note 1.

88. 113 P.3d 1100 (Cal. 2005).

and those that are not—to ascertain whether a waiver of class-wide arbitration effects a comparable distortion of substantive law in a given instance. The analysis here does not call for sweeping invalidation of mandatory arbitration clauses in their entirety. Nor does it imperil waivers of class-wide arbitration in all cases. The job of discerning when a waiver of class-wide arbitration works a distortion of underlying substantive law—like the proper analysis of class settlement pressure—calls for nuanced treatment sensitive to context. Part II.C goes on to discuss how waivers of class-wide arbitration interact with other contractual provisions that might specify the choice of substantive law to govern disputes.

A. *Legitimizing Mandatory Arbitration of Statutory Claims*

The existing literature on arbitration ably recounts the rise of arbitration as a method of alternative dispute resolution under the FAA,⁸⁹ permitting me to compress the narrative here. In enacting the provisions now known as the FAA in 1925, Congress sought “to reverse the long-standing judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.”⁹⁰ The FAA does so chiefly through its § 2, which declares that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”⁹¹ The Supreme Court has characterized the FAA as establishing a “federal policy favoring arbitration”⁹² that the judiciary must “rigorously enforce.”⁹³ This policy carries such strength that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”⁹⁴ It is clear today, moreover, that the FAA’s validation of arbitration clauses extends to statutory claims,⁹⁵ not merely to claims concerning the interpretation of the contracts that contain such clauses.

The rationale invoked to legitimize mandatory arbitration for statutory claims bears note, for it will enable us later to pinpoint the difficulties posed by waivers of class-wide arbitration. In its treatment of statutory claims in arbitration, the Court has remained attuned to the broader

89. See, e.g., Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 *Stan. L. Rev.* 1631, 1635–42 (2005) [hereinafter Sternlight, *Creeping*]. The FAA is codified at 9 U.S.C. §§ 1–16 (2000) (amended 2002).

90. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). In 1925, Congress originally enacted the provisions we know today as the FAA under the rubric of the United States Arbitration Act, ch. 213, 43 Stat. 883 (1925). See Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 *Notre Dame L. Rev.* 101, 102 n.2 (2002) (explaining evolution of FAA’s popular name).

91. 9 U.S.C. § 2.

92. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

93. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

94. *Cone*, 460 U.S. at 24–25.

95. See *supra* note 13.

objectives of public policy that statutes serve. Current law reconciles this public dimension of statutory claims with mandatory arbitration pursuant to private contracts. In the Court's words: "[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."⁹⁶

At its core, this stance posits an ideal for arbitration strikingly similar to that embraced for class actions as vehicles for aggregation that do not "abridge, enlarge or modify any substantive right."⁹⁷ In its FAA case law, the Court repeatedly has stated that

[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.⁹⁸

If anything, the repetition of this language in the Court's FAA case law has turned the foregoing passage into something of a mantra.⁹⁹ For the modern Court, arbitration clauses in private contracts are, "in effect, a specialized kind of forum selection clause."¹⁰⁰

In short, 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. Both contracts and class actions, in other words, occupy rungs below that of reform legislation in terms of the authority to effectuate law reform. Both can switch claims out of the conventional framework for civil litigation—a lawsuit in court on an individual basis—but both can do so only with the caveat that they may not thereby alter the nature of those claims themselves.

B. *Waivers of Aggregation as Waivers of Rights*

With the Court's imprimatur, mandatory arbitration clauses have achieved what Jean Sternlight describes as a "silent revolution,"¹⁰¹ excluding from litigation statutory claims arising from a wide array of consumer

96. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985). For subsequent invocations of this language by the Court, see, e.g., *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991).

97. 28 U.S.C. § 2072(b) (2000).

98. *Mitsubishi Motors*, 473 U.S. at 628.

99. See, e.g., *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295 n.10 (2002); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001); *Gilmer*, 500 U.S. at 26; *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 229–30 (1987).

100. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).

101. Sternlight, *Creeping*, supra note 89, at 1633 (quoting Patti Waldmeir, *How America Is Privatising Justice by the Back Door*, *Fin. Times* (London), June 30, 2003, at 12).

contracts—for instance, contracts with “financial institutions (as to personal accounts, house and car loans, payday loans, and credit cards), service providers (termite exterminators, gymnasiums, telephone companies, and tax preparers), and sellers of goods (mobile homes, computers, and eBay).”¹⁰² One study estimates that arbitration clauses govern roughly one-third of the consumer transactions of a hypothetical “average” consumer in a major metropolitan area.¹⁰³

The rise of mandatory arbitration coincided roughly with the emergence of class action litigation as a subject of concern to corporate America. It would be only a matter of time before businesses would put two and two together. “In the late 1990s, trade journal articles first appeared encouraging corporate counsel to consider redrafting contracts requiring consumers and others to waive the right to participate in class actions or even group arbitrations.”¹⁰⁴ Practice soon followed these practice pointers, such that waivers of class-wide arbitration are now common features of arbitration clauses in consumer contracts.

Given the range of contracts in which arbitration clauses appear, it is no surprise that waivers of class-wide arbitration arise in a comparable range of settings. My enterprise here is not to provide an exhaustive catalogue. I focus instead on the setting that highlights most starkly the kinship between the issues posed by such waivers and the debate over class settlement pressure. Oddly enough, the debate over the *foreclosing* of aggregation through waivers of class-wide arbitration arises most strikingly in the setting that class action law regards as a “core” scenario for the *affording* of aggregation—namely, statutory claims unlikely to be marketable on an individual basis.¹⁰⁵ The 2005 decision of the California Supreme Court in *Discover Bank* speaks to this situation. Here, as in the earlier treatment of *Rhone-Poulenc*, I focus on one prominent decision among the many that one might select for attention because the dialogue between the majority and the dissent in *Discover Bank* provides a useful roadmap for the issues at stake.

1. *Arbitration and Unmarketable Claims.* — The controversy in *Discover Bank* stemmed from representations by the defendant bank that it would not assess late fees against its credit card holders if their payments were received by a particular date. Cardholders alleged that Discover Bank, in fact, assessed late fees on payments received after 1:00 PM on the specified date, resulting in “damages that were small as to individual consumers but large in the aggregate.”¹⁰⁶ This kind of allegation is far from unusual. Commentators have highlighted the potential for undisclosed

102. *Id.* at 1638.

103. See Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer’s Experience, *Law & Contemp. Probs.*, Winter/Spring 2004, at 55, 62.

104. Gilles, *supra* note 4, at 396.

105. See *supra* text accompanying notes 41–42.

106. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1103 (Cal. 2005).

charges of various sorts to affect individual consumers only modestly, but to amount in total to considerable gain for product and service providers.¹⁰⁷

In *Discover Bank*, the cardholders assessed with the disputed late fees sought to pursue their damage claims by way of class-wide arbitration, a procedure permitted by California precedent.¹⁰⁸ Discover Bank also sought arbitration, but only on an individual basis, pointing to a waiver of class treatment added to the arbitration clause in its credit card agreements.¹⁰⁹ The court observed that the agreements were contracts of adhesion, set forth on a take-it-or-leave-it basis.¹¹⁰ Building upon this observation, the plaintiffs contended that the waivers of class-wide arbitration were unconscionable and hence unenforceable.¹¹¹

The cardholders cast their challenge under the rubric of unconscionability due to § 2 of the FAA. Recall that § 2 declares arbitration clauses to be enforceable, “save upon such grounds as exist . . . for the revocation of any contract.”¹¹² Those grounds are matters not of federal law, like the FAA, but of state law. The law across the various states frequently is not uniform, even with regard to widely shared concepts in areas such as contract law.¹¹³ As a result, claimants who wish to challenge the binding effect of an arbitration clause have an incentive to cast their arguments so as to enhance the prospect that the body of state contract law applied under § 2 will be a sympathetic one.

107. Cf. Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. Chi. L. Rev. 157, 173–74 (2006) (describing arbitration clauses that contain waivers of class treatment as “nothing but a shield against legal accountability by the credit card companies”).

108. See 113 P.3d at 1106 (discussing *Keating v. Superior Court*, 645 P.2d 1192 (Cal. 1982)).

109. This description omits some details: The plaintiff cardholders initially brought a conventional class action in court. Discover Bank moved to compel arbitration (pursuant to the mandatory arbitration clause in its credit card agreements) and to dismiss the class action (pursuant to the class action waiver). The plaintiffs then argued that the waiver was unconscionable, such that the dispute should proceed in arbitration (in accordance with the mandatory arbitration clause) but on a class-wide basis. See *id.* at 1104.

110. See *id.* at 1103 (“[W]e conclude that, at least under some circumstances, the law in California is that class action waivers in *consumer contracts of adhesion* are unenforceable, whether the consumer is being asked to waive the right to class action litigation or the right to classwide arbitration.” (emphasis added)).

111. The U.S. Supreme Court subsequently confirmed the authority of courts to rule upon challenges to the validity of arbitration clauses. See *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204, 1208–09 (2006) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)). By contrast, “a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.” *Id.* at 1210.

112. 9 U.S.C. § 2 (2000).

113. See, e.g., *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1016 (D.C. Cir. 1986) (noting that Uniform Commercial Code “is not uniform” as applied by various states (quoting James J. White & Robert S. Summers, *Handbook of the Law Under the Uniform Commercial Code* § 3 intro. (2d ed. 1980))).

The credit card contracts at issue in *Discover Bank* contained not only a waiver of class-wide arbitration but also a further clause that added another layer of complication. The contracts contained a choice of law clause specifying that the law of Delaware—Discover Bank’s home state—shall govern disputes.¹¹⁴ The upshot for the plaintiff cardholders was a patchwork quilt of legal argumentation. The plaintiff class itself encompassed cardholders nationwide. They sought damages “under the Delaware Consumer Fraud Act and Delaware contract law.”¹¹⁵ But they sought “to enforce those Delaware laws in a California court with a California unconscionability rule against class action waivers that arguably is not found under Delaware law.”¹¹⁶

The incongruities in *Discover Bank* were not confined to the plaintiffs’ side. The credit card industry itself owes much of its structure to federal legislation that tolerates—indeed, encourages—the exportation throughout the nation of credit terms permitted by the small number of states in which the industry is based. As Samuel Issacharoff and Erin Delaney observe, the federal banking laws

have been interpreted to provide exclusive regulatory power to the handful of states that have emerged as friendly fora for [incorporation of] credit card companies. Thus, Delaware, South Dakota, Nevada, Arizona, Rhode Island, and New Hampshire—states that combined have only 4 percent of the population—are now home to credit card issuing banks that, as of 2003, were owed more than \$350 billion of the \$490 billion outstanding debt on American credit cards.¹¹⁷

The National Bank Act enables banks “to *choose* their interest rates [for their credit cards] by virtue of their location in one state, and then to export those rates to customers in other states.”¹¹⁸ The same goes for late fees.¹¹⁹ In seeking to have the waiver of class-wide arbitration evaluated under Delaware unconscionability principles, per the choice of law clause, Discover Bank sought to extend this exportation of its home state law. Not surprisingly, Delaware law affirmatively requires that credit cards issued by Delaware-chartered banks shall be governed by Delaware law.¹²⁰ In calling for nationwide application of California unconscionability principles, the plaintiff cardholders sought to fight fire with fire—to blunt Discover Bank’s exportation of Delaware law with an exportation nationwide of California unconscionability principles.

114. See *Discover Bank v. Superior Court*, 36 Cal. Rptr. 3d 456, 457 (Ct. App. 2005).

115. 113 P.3d at 1118.

116. *Id.*

117. Issacharoff & Delaney, *supra* note 107, at 158.

118. *Id.* at 160.

119. See *id.* at 161 (discussing *Smiley v. Citibank*, 517 U.S. 735 (1996), which upheld regulations allowing banks to charge cardholders late fees that were legal in banks’ home states and illegal in cardholders’ state of residence).

120. Del. Code Ann. tit. 5, § 956 (2001).

The court of appeal in *Discover Bank* thought it could uphold the waiver of class-wide arbitration without deciding whether Delaware or California unconscionability principles governed that clause. For the court of appeal, the presence of the waiver within an arbitration clause sufficed, in itself, to validate that waiver under § 2 of the FAA; and the federal pedigree of the FAA, in turn, operated to preempt any unconscionability principles to the contrary, whatever their source in state law.¹²¹ The California Supreme Court unanimously overturned this conclusion as to preemption, pointing out that § 2 itself preserves contract defenses in applicable state law.¹²² The court ultimately remanded for consideration of the choice of law question,¹²³ a matter on which I shall have more to say momentarily. But, in the course of remanding, the court discussed at length why the waiver of class-wide arbitration in the underlying contracts was unconscionable as a matter of California law.¹²⁴

The casting of the analysis in *Discover Bank* in terms of unconscionability stems from the language in § 2 of the FAA. The unconscionability rubric nonetheless diverts attention from the core idea at work in the court's analysis. Though nominally cast in terms of unconscionability, the court's analysis ultimately speaks to the distortion that a foreclosure of aggregation might work, in a given instance, upon underlying substantive law. Properly understood, the *Discover Bank* court's treatment of aggregation foreclosure by contract is the counterpart to the *Parker* court's treatment of aggregation provision for statutory damage claims. The foreclosing of aggregation, no less than the providing of it, has the potential to work a distortion of the underlying remedial scheme. These two kinds of distortions are equally problematic. The legitimacy of the arbitral forum, no less than the legitimacy of a class action lawsuit, stems from the premise that an arbitration clause lacks the power to alter preexisting rights in the manner of reform legislation. A given waiver of class-wide arbitration is unconscionable, in other words, when it exceeds the limits on the institutional authority of arbitration itself—boundaries that are not ultimately matters of state contract law, but rather federal law, as the U.S. Supreme Court has conceived of arbitration.¹²⁵

121. *Discover Bank v. Superior Court*, 129 Cal. Rptr. 2d 393, 395–96 (Ct. App. 2003), rev'd, 113 P.3d 1100.

122. See *Discover Bank*, 113 P.3d at 1110–12; id. at 1118 (Baxter, J., concurring in part and dissenting in part) (“I agree with the majority that *federal* law does not *compel* enforcement of contractual class action waivers simply because they are contained in arbitration agreements.”).

123. Id. at 1117–18 (majority opinion).

124. Id. at 1108–10.

125. For a similar suggestion in subsequent case law, see *Kristian v. Comcast Corp.*, 446 F.3d 25, 60 (1st Cir. 2006) (reading analysis of unconscionability in *Discover Bank* as ultimately resting upon insight that “a class mechanism bar can impermissibly frustrate the prosecution of claims in *any* forum, arbitral or judicial”); see also id. at 63 (“As a practical matter, there are striking similarities between the vindication of statutory rights analysis and the unconscionability analysis.”).

2. *Pinpointing the Problem.* — Writing for the majority in *Discover Bank*, Justice Carlos Moreno took care to note that adhesive contracts generally are enforceable and, further, that waivers of class-wide arbitration are not invalid *per se*.¹²⁶ The court concluded, however, that such waivers in adhesive contracts are not enforceable “to the extent that they operate to insulate a party from liability that otherwise would be imposed under California law.”¹²⁷ This statement comes close to pinpointing the fundamental concern about waivers of class-wide arbitration, but the court’s phrasing warrants refinement.¹²⁸ The 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. Where damage claims are unlikely to be marketable on an individual basis, the waivers in nominally private contracts take on a public, law-reform dimension, effectively writing out of substantive law the notion of private enforcement. Yet that is precisely the kind of law-reform power that the U.S. Supreme Court has repeatedly deemed arbitration clauses to lack.¹²⁹

Attention to the law-reform capacity of waiver clauses helps to explain why attacks on them cannot be swept aside on the ground that the availability or unavailability of aggregation is merely a question of procedure that cannot imperil substantive law.¹³⁰ Such reasoning mistakenly invokes the ideal posited for aggregation—that the format for claims res-

126. See 113 P.3d at 1108, 1110.

127. *Id.* at 1109.

128. The court’s focus on whether the waiver would insulate *Discover Bank* from liability for its late-fee policy—not on whether the waiver effectively would eliminate the plaintiffs’ private right of action—stems from California statutory law. The California Civil Code includes a provision stating that “[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.” Cal. Civ. Code § 1668 (West 1985). Thus, in a famous earlier case from outside the arbitration setting, the California Supreme Court invalidated a term in a private contract for admission to a charitable hospital that purported to release the hospital from liability for any future negligence. *Tunkl v. Regents of the Univ. of Cal.*, 383 P.2d 441, 441–42 (Cal. 1963). For a recent decision from the New Jersey Supreme Court along broadly similar lines, see *Hojnowski v. Vans Skate Park*, 901 A.2d 381, 383 (N.J. 2006) (striking down as contrary to public policy preinjury release clause signed by parent with respect to her son’s use of skateboarding facility, but upholding contract insofar as it subjects claims thereunder to arbitration). The same court subsequently noted that, in some circumstances, a waiver of class-wide arbitration “can act effectively as an exculpatory clause.” *Muhammad v. County Bank of Rehoboth Beach, Del.*, No. A-39-05, 2006 WL 2273448, at *8 (N.J. Aug. 9, 2006).

129. See *supra* notes 96–100 and accompanying text.

130. But see, e.g., *Strand v. U.S. Bank Nat’l Ass’n*, 2005 ND 68, ¶ 21, 693 N.W.2d 918, 926 (“The right to bring an action as a class action is purely a procedural right. . . . Thus, limitation of use of a class action or class arbitration does not prohibit any substantive remedy that would otherwise be available . . .”).

olution does not alter substantive law—as a basis to reject challenges that ask precisely whether that ideal holds true in a given instance.

In *Parker*, the concern was that class treatment would turn the per-customer statutory damages in the Cable Act into a hammer so heavy as to be beyond any plausible account of the underlying remedial scheme.¹³¹ With the Cable Act already having facilitated individual actions by providing for statutory damages, the further addition of class certification would have made for a proverbial double whammy. Because Congress already had set the remedial scheme to make claims worthwhile on a disaggregated basis, that scheme did not plausibly tolerate class certification. In *Discover Bank*, the concern was that the foreclosing of aggregation would make for a hammer not too big, but rather too small—so small that it would be tantamount to a statutory amendment to make consumer protection statutes unenforceable in low-claim-value situations by way of consumer claims.

Pinpointing the problem here in terms of the statutory rights of action granted to consumers helps to situate *Discover Bank* in line with other decisions. Some courts have found waiver clauses unconscionable when combined with the foreclosure of particular remedies otherwise available to consumers—for example, punitive damages or injunctive relief.¹³² *Discover Bank* extends the logic of these decisions by positing that waivers of class-wide arbitration, in themselves, might work a comparably troubling amendment of the remedial scheme. To recognize this possibility, nonetheless, is not to paint with a broad brush.

By 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. Dissenting on the unconscionability question, Justice Marvin Baxter observed that even without class-wide arbitration, “many other means” exist to hold Discover Bank accountable for its late-fee policy.¹³³ He noted, for example, that California’s unfair competition statutes might have allowed public officials to challenge Discover Bank’s late-fee policy on behalf of consumers.¹³⁴

The existence of complementary avenues for public enforcement is relevant if the problem with waivers of class-wide arbitration lies in the likelihood that the defendant might escape all liability.¹³⁵ It is beside the point, however, if the problem consists of the effective amendment of

131. See supra Part I.B.2.

132. See, e.g., *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 576–77 (Fla. Dist. Ct. App. 1999) (finding unconscionable waiver of punitive damages, injunctive or declaratory relief by statute, and class-wide arbitration); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 277–80 (W. Va. 2002) (finding unconscionable waiver of both punitive damages and class-wide arbitration).

133. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1121 (Cal. 2005) (Baxter, J., concurring in part and dissenting in relevant part).

134. See *id.* at 1122.

135. See supra note 127.

public law by way of arbitration clauses.¹³⁶ Invocation of avenues for public enforcement mistakes a consequence of private rights of action—their capacity to challenge wrongful conduct, just as public enforcement might do—for the distinctively private nature of those rights of action in the first place. It is the latter that waivers of class-wide arbitration imperil. Much the same analysis explains why the law also should regard the existence of avenues for consumer complaints apart from the bringing of damage claims—for instance, an informal process for consumers to raise billing questions¹³⁷—as beside the point. An actual amendment of the statutory scheme to eliminate a private right of action would be no less of an amendment if it left in place informal avenues for consumer complaints.

So much for things that do not matter. Now consider some that do. The real question about a given waiver of class-wide arbitration is whether, if enforced, it effectively would write private enforcement out of the underlying statute. This question calls for courts to examine carefully the framework for the bringing of claims on an individual basis—specifically, the financial arrangements to do so in the absence of aggregation. Here, too, there has been some understandable circling around the right question, without precise pinpointing.

In its 2000 decision in *Green Tree Financial Corp.-Alabama v. Randolph*, the U.S. Supreme Court left open the possibility that a claimant might, in a given instance, discharge her “burden of showing the likelihood” that the costs of arbitration would be “prohibitively expensive.”¹³⁸ The *Randolph* Court harkened back to the notion that the legitimacy of the arbitral forum rests upon the ability of claimants to vindicate their statutory rights.¹³⁹ The consequent focus by courts and scholars on the costs of arbitration,¹⁴⁰ however, gives little attention to the financing of damage claims in the ordinary civil justice system—namely, through contingency fee arrangements whereby a plaintiff’s lawyer bears the cost of bringing the claim in exchange for a share of any recovery obtained for

136. See *Kristian v. Comcast Corp.*, 446 F.3d 25, 59 (1st Cir. 2006) (“When Congress enacts a statute that provides for both private and administrative enforcement actions, Congress envisions a role for both types of enforcement. . . . Weakening one of those enforcement mechanisms seems inconsistent with the Congressional scheme.”).

137. See *Discover Bank*, 113 P.3d at 1120–21 (Baxter, J., concurring in part and dissenting in relevant part) (rejecting “facile premise that lack of a class remedy is equivalent to exculpation of an alleged wrongdoer” because, in part, “[t]he cardholder may contact the bank and attempt to resolve the matter informally. Discover Bank’s cardholder agreement specifically provides a 60-day period in which to contact the company with billing questions and disputes”).

138. 531 U.S. 79, 92 (2000).

139. See *id.* at 90.

140. For an analysis of published federal decisions addressing cost-based attacks on mandatory arbitration, see Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts*, 59 *Vand. L. Rev.* 729, 752–57, app. (2006).

the client.¹⁴¹ Aggregation bears crucially on contingency fee financing, but it does so chiefly by dampening the potential upside for plaintiffs' counsel, not by way of the costs associated with claiming. One central question thus is whether the unavailability of aggregation would reduce the potential upside to such a degree as to demonstrate a "likelihood" that lawyers will not represent claimants.¹⁴²

Private, contingency fee lawyers are not the only people who might represent a given claimant, of course. The public interest segment of the bar includes prominent organizations devoted to the cause of consumer protection.¹⁴³ Even these organizations, however, operate on budgets, such that the acceptance of any representation necessarily involves consideration of its potential upside, even if not conceived strictly in financial terms.

Also relevant are any fee-shifting provisions in the underlying remedial scheme. But here, too, analysis must be nuanced. It is not enough simply to point to the presence of fee-shifting provisions.¹⁴⁴ One important question goes to the method of fee calculation thereunder. The Supreme Court has held that judges must calculate awards under fee-shifting provisions in federal statutes according to the lodestar method¹⁴⁵—that is, by multiplying the number of hours reasonably spent on the case by the prevailing plaintiff's lawyer times a reasonable hourly rate. The merits of the lodestar method remain the subject of debate in the scholarly literature.¹⁴⁶ The point here is simply that the lodestar

141. See *id.* at 760 ("[R]ather than arbitration costs interfering with the workings of the contingent fee system, as some arbitration critics have asserted, the contingent fee system provides a means for overcoming possible liquidity and risk aversion barriers to arbitration.").

142. Cf. *Muhammad v. County Bank of Rehoboth Beach, Del.*, No. A-39-05, 2006 WL 2273448, at *9 (N.J. Aug. 9, 2006) ("[C]lass action waivers can functionally exculpate wrongful conduct by reducing the possibility of attracting competent counsel to advance the cause of action.").

143. Public Citizen has criticized the costs of arbitration. See Pub. Citizen, *The Costs of Arbitration* (2002), available at <http://www.citizen.org/documents/ACF110A.pdf> (on file with the *Columbia Law Review*). In addition, Trial Lawyers for Public Justice recently announced a project to combat waivers of class-wide arbitration. See Press Release, Trial Lawyers for Pub. Justice, *TLPJ Launches Special Project to Preserve Class Actions* (May 16, 2006), at http://www.tlpj.org/pr/capp_launch_051606.htm (on file with the *Columbia Law Review*).

144. But see, e.g., *Strand v. U.S. Bank Nat'l Ass'n*, 2005 ND 68, ¶ 23, 693 N.W.2d 918, 926 (holding that plaintiff failed to "establish[] that he will be left without an effective remedy if the 'no class action' provision is enforced" because, in part, state law would award attorney's fees to prevailing party). The majority in *Discover Bank* was too cursory in the opposite direction, dismissing the suggestion that fee-shifting provisions would constitute "an adequate substitute" for class-wide arbitration without inquiring into the applicable fee calculation method. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005).

145. See, e.g., *Hensley v. Eckerhart*, 461 U.S. 424, 433–34 (1983) (interpreting Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (2000)).

146. For criticism of the lodestar method, see, e.g., Charles Silver, *Due Process and the Lodestar Method: You Can't Get There from Here*, 74 Tul. L. Rev. 1809 *passim* (2000).

method does not link the fee award for plaintiff's counsel to the dollar recovery of her client.

The same approach does not necessarily hold, however, for fee-shifting statutes in state law. "Many states allow judges or juries to base fees paid as damages [pursuant to state fee-shifting statutes] on contingent fee arrangements. States may also give judges more flexibility when using the lodestar method than cases decided by the U.S. Supreme Court allow"—for instance, discretion "to regulate lodestar-based fee awards in ways that reward attorneys for superior performance, such as by awarding larger fee multipliers in cases that generate sizeable recoveries."¹⁴⁷ Different fee-shifting regimes, in short, can have different implications for the representation of claimants in the absence of class-wide arbitration.

Even under the lodestar method, moreover, the expected dollar recovery still might not be sufficient to make a market for legal representation if the lawyer must devote considerable time to the development of the case. To put the point more formally, the opportunity costs associated with the lawyer's time may be sufficiently great to dampen the market for representation of individual clients, even if the applicable fee-shifting statute would entitle the lawyer to a lodestar-based award.

Details aside, it is worthwhile to highlight the conceptual move being made here. In shifting from the existing focus on the costs of arbitration to an inquiry into the market for representation of individual claims, the law would move away from an arbitration-centric view of waivers and toward a more realistic perspective: one that situates waivers of class-wide arbitration, like the debate over class settlement pressure in *Parker*, within the array of measures by which the law might structure the private enforcement of public law.¹⁴⁸ As in the debate over class settlement pressure, the remedial scheme of substantive law is what properly informs the analysis of when waivers of class-wide arbitration cross the line from legitimate matters of private contract to unauthorized methods of public law reform. Scrutiny of waiver clauses calls for attention to context. Courts, in effect, must unpack the market for representation of individual claims in the arbitral forum just as courts must unpack the probability models behind the class settlement pressure argument.

Framing the debate over waiver clauses in terms of the institutional position of private contracts vis-à-vis public legislation is helpful in a further respect. It exposes the intuition behind a further feature of *Discover Bank* that initially might seem jarring: the court's concern over the presence of waivers as part of adhesive contracts.¹⁴⁹ At first glance, this con-

147. Principles of the Law of Aggregate Litig. § 1.06 reporter's notes at 41 (Discussion Draft 2006).

148. For a discussion of how private enforcement of public law by way of small claims class actions generates positive externalities for society, see William B. Rubenstein, Why Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action, 74 UMKC L. Rev. 709 (2006).

149. See 113 P.3d at 1109–10.

cern seems at odds with the binding effect that the law generally accords to adhesive contracts. The overarching point here is that waivers of class-wide arbitration are most vulnerable when they bring about a result most like legislation (effectively eliminating a private right of action) through means from which a power of substantive law reform has supposedly been withheld. The adhesive nature of the contracts used in many consumer contexts accentuates the disconnection between means and ends. If any types of contracts should be the subject of concern here, surely it should be those that are not the products of actual bargaining and compromise that one might even attempt to analogize broadly to the legislative process itself.

It is not unusual for private contracts to alter preexisting rights. Settlement agreements in civil litigation do so routinely. But the bargaining there takes place in the context of an assertion of preexisting rights in the first place, not as part of an anticipatory relinquishment of them. And when that bargaining takes place on a mass basis, as in a class settlement, procedural law regulates what one might call the bargaining unit by “blocking unwarranted or overbroad class definitions.”¹⁵⁰

The ferment over waivers of class-wide arbitration has not been lost upon providers of consumer goods and services. Some companies have taken to revising the arbitration clauses in their consumer contracts yet again to make the waiver clause nonseverable.¹⁵¹ If the waiver of class-wide arbitration is invalidated, in other words, then the whole arbitration clause falls with it. This move is unintentionally revealing, as it suggests that the purpose behind the insistence upon arbitration in the first place is precisely to use a change of forum to foreclose aggregation.¹⁵² If that foreclosure is not possible, then some companies apparently do not want arbitration at all. They apparently would prefer conventional litigation instead.

As I shall discuss in Part III, the idea of using a change of forum to alter the availability of aggregation is not something confined to arbitration. It is the overt goal of CAFA. Before turning to CAFA, however, the next subsection considers the interaction between waivers of class-wide arbitration and choice of law clauses in consumer contracts—a matter that serves to introduce additional themes that influence the CAFA discussion.

3. *The Intersection of Waivers and Choice of Law Clauses.* — The analysis of unconscionability in *Discover Bank* rightly has garnered attention. De-

150. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

151. See Jack Wilson, “No-Class-Action Arbitration Clauses,” *State-Law Unconscionability, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 *Quinnipiac L. Rev.* 737, 779–80 (2004).

152. For a similar interpretation of this development, see Issacharoff & Delaney, *supra* note 107, at 179 (“[T]he prospect of classwide arbitration . . . makes transparent that the concern of the credit card companies is about collective enforcement, not about the purported jointly beneficial savings from arbitration.”).

velopments in its aftermath have received less attention, even though they temper significantly the impact of the decision. Recall that the California Supreme Court left open the effect that the choice of law clause in the underlying contracts would have upon challenges to the waiver clause on grounds of unconscionability. On remand, the court of appeal held that Delaware law governs, rejecting the contention that California courts should disregard the choice of law clause insofar as it would lead to the validation of waivers that the California Supreme Court deemed unconscionable as a matter of California law.¹⁵³

Within days of the remand decision in *Discover Bank*, however, another California Court of Appeal took a different view in *Klussman v. Cross Country Bank*.¹⁵⁴ The *Klussman* court held that the unconscionability principles of California—not Delaware, as specified in a choice of law clause—governed the validity of a waiver of class-wide arbitration in credit card contracts similar, in relevant respects, to the ones in *Discover Bank*.¹⁵⁵ The contrast in result between *Klussman* and *Discover Bank* turns upon the incongruity in the latter that I mentioned earlier.¹⁵⁶

On remand, the court of appeal in *Discover Bank* reasoned that California did not have a greater interest in governing either the validity of the class action waiver or the merits of the dispute over the defendant bank's late-fee policy by comparison with any other state, including Delaware.¹⁵⁷ While acknowledging the interest of California in applying its unconscionability principles to protect its own consumers, the court observed that the plaintiffs in *Discover Bank* had brought two claims on the merits under Delaware law but “none under California law.”¹⁵⁸ The plaintiffs, moreover, asserted claims “on behalf of every state's consumers, not just California's.”¹⁵⁹

By contrast, the match between the class composition in *Klussman* and their claims on the merits was much closer. The plaintiff class in *Klussman* consisted “solely of California residents with California statutory claims” on the merits.¹⁶⁰ Taken together, *Klussman* and the *Discover Bank* remand decision effectively endorse state-specific classes that apply the

153. See *Discover Bank v. Superior Court*, 36 Cal. Rptr. 3d 456, 462 (Ct. App. 2005).

154. 36 Cal. Rptr. 3d 728 (Ct. App. 2005).

155. See *id.* at 740–41.

156. See *supra* text accompanying notes 114–116.

157. *Discover Bank*, 36 Cal. Rptr. 3d at 461. Applying widely accepted conflicts principles, California courts respect choice of law clauses in adhesive consumer contracts, even when the law chosen is in “fundamental conflict” with California law. *Id.* at 458 (citing Restatement (Second) of Conflict of Laws § 187(2) (1971), which California has adopted); *Klussman*, 36 Cal. Rptr. 3d at 734 n.8 (same). The one pertinent exception to this principle arises when California has a “materially greater interest than the chosen state” in governing the dispute. *Discover Bank*, 36 Cal. Rptr. 3d at 458 (quoting Restatement (Second) of Conflict of Laws § 187(2)); *Klussman*, 36 Cal. Rptr. 3d at 734 n.8 (same).

158. 36 Cal. Rptr. 3d at 461.

159. *Id.* at 462.

160. *Klussman*, 36 Cal. Rptr. 3d at 741.

law of the state in which all the plaintiff consumers reside, rather than nationwide classes that seek to project the unconscionability principles of any given state across the entire country. It is far from clear that the two decisions together amount to desirable public policy. I daresay, however, that their upshot is correct under current law.

In the clash between the credit card industry's effort to project nationwide the contract law of Delaware and the *Discover Bank* plaintiffs' attempt to project nationwide the contract law of California (if only as to unconscionability), the credit card industry largely prevailed. There is a good reason for this result—not necessarily good in terms of policy design, but at least good along the dimension of institutional authority. The projection sought by the credit card industry takes place as an outgrowth of federal banking law that, for better or worse, authorizes the projection of credit card terms from a minority of states to the rest of the nation.¹⁶¹ It is hardly a stretch for credit card contracts also to project the contract law of the issuing bank's home state. In fact, choice of law scholars observe that a given state might "bundle" the various features of its law that apply to a given subject, such as to make it preferable to apply the entirety of state law—here, for interest rates, late fees, and general contractual defenses—rather than just selective pieces.¹⁶²

On this account, any effort to limit the nationwide projection of the bank's home state law governing class-wide arbitration must appropriately take place through comparable institutional means: additional national legislation in the arbitration area. Absent national legislation directly on the issue, the holding in *Klussman*—allowing state-specific classes to invoke their home state's contract law—comports with the state-law caveat in § 2 of the FAA. This approach affords latitude for a diversity of views on state-law-based contract defenses—a stance consistent with the caveat in § 2—while confining the reach of any given state's view to its own consumers.

III. THE CLASS ACTION FAIRNESS ACT

In the debates over class settlement pressure and waivers of class-wide arbitration, either the affording or the foreclosing of aggregation stands to upset substantive law. The two preceding Parts cast that effect as problematic in institutional terms. The operative principle in both Parts posits 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.

161. See *supra* notes 117–119 and accompanying text.

162. See William H. Allen & Erin A. O'Hara, Second Generation Law and Economics of Conflict of Laws: Baxter's Comparative Impairment and Beyond, 51 *Stan. L. Rev.* 1011, 1046 (1999) (discussing bundling of state law with regard to property-related matters).

A sense of legislative primacy reinforces the view that waivers of class-wide arbitration are most problematic when they do more than just shift the forum for dispute resolution—when they effectively restructure the underlying statutory scheme from one of complementary private and public enforcement into one comprised exclusively of the latter. The same sense of legislative primacy counsels the rejection of broad, undifferentiated complaints about class settlement pressure while leaving room for the endorsement of those concerns in particular circumstances. Class settlement pressure is troubling when aggregation effects a modification of the underlying remedial scheme (the whopping total statutory damages sought in *Parker*) or an amplification of cognitive biases to which substantive law accords no legitimacy in the context of individual lawsuits (the hindsight bias arguably in play in *Rhone-Poulenc*). By the same token, class settlement pressure is not normatively troubling when it stems merely from the aggregation of similar claims in large numbers—the setting in which waivers of class-wide arbitration are most troubling. Here, complaints about class settlement pressure ultimately are complaints that some principles of substantive law really ought not to be enforced in full. Complaints along those lines are appropriately addressed to the legislature, not to courts administering the law of aggregate procedure.

The enactment of CAFA poses yet another permutation on the relationship between aggregation and substantive law. CAFA itself is reform legislation, but of a peculiar sort. By expanding federal diversity jurisdiction for class actions involving state-law claims, CAFA opens the federal forum precisely in order to drive different results on questions of class certification. In this regard, CAFA reflects an impulse similar to the one behind waivers of class-wide arbitration. CAFA deploys a change of forum—here, from state to federal court, and hence from state class-action principles to Federal Rule 23 principles—as a vehicle to alter the availability of aggregation. At the same time, at least on its face, CAFA does not change applicable substantive law: CAFA does not preempt state law, nor does CAFA purport to alter the choice of law principles that currently govern the federal court's selection of substantive law from among competing state sources as part of the class certification determination. As law-reform legislation, CAFA thus aspires to perform a delicate balancing act, purporting to reach only the choice of forum, not state substantive law.

The real-world operation of CAFA largely remains to be seen. At this early juncture, nonetheless, this Part anticipates one difficult scenario in which the balancing act attempted by CAFA could turn from delicate to precarious. Specifically, Part III.A discusses the potential for a clash between CAFA and the Supreme Court's familiar holding in *Klaxon Co. v. Stentor Electric Manufacturing Co.*, requiring federal courts in diversity cases to apply the choice of law principles of the state in which they sit.¹⁶³ This

163. 313 U.S. 487, 496 (1941).

clash occurs when the forum state's choice of law principles call for the application of a single state's substantive law *because the plaintiff proposes to bring the lawsuit on a class-wide basis* on behalf of similarly situated persons nationwide. Because the choice of a single body of state law—say, the law of the defendant's principal place of business—greatly facilitates a finding of predominant common issues necessary for class certification, our hypothesized state choice of law rule dramatically facilitates the federal court's certification of the proposed nationwide class.¹⁶⁴ This approach is problematic, however, because it would involve a kind of bootstrapping: It would use the proposed aggregate nature of the lawsuit literally to reform applicable substantive law from what it otherwise would be in an individual lawsuit by the class representative.

Part III.B explains that the coming clash of CAFA and *Klaxon* would force the federal courts to choose between two principles: first, that the availability of aggregation should not change the applicable substantive law (the operative principle of Parts I and II), and second, that the availability of the federal forum likewise should not change the applicable substantive law (the *Erie* principle, of which *Klaxon* is a byproduct). In the bootstrapping situation outlined in Part III.A, it is not possible to adhere simultaneously to both of these principles. Either the substantive law governing the class action must differ from what would govern an individual lawsuit by the class representative in the same federal forum, or the substantive law for a class action in federal court must differ from what would apply in a class action brought in the state court down the street. Aggregation or forum, in short, must make a difference to substantive law.

The relationship of CAFA and *Klaxon* poses tricky questions of statutory interpretation beyond the scope of this Essay. The point of this Part is a more modest one: not to posit a definitive resolution for the question, but rather to highlight the nature of the question itself and its implications for the debates previously discussed. The choice—whether aggregation or forum should alter substantive law—presents a question about the proper meaning of CAFA *as a manifestation of legislative authority*. The implications of this observation should not be lost upon either plaintiff-side or defense-side forces. In arguing for federal courts either to embrace bootstrapping in choice of law (per *Klaxon*) or to reject state choice of law principles for purposes of federal class certification in light of CAFA, both sides would need to embrace the primacy of legislation as the appropriate vehicle for law reform. True enough, contending forces in

164. See, e.g., Fed. R. Civ. P. 23(b)(3) (calling for judicial determination that “the questions of law or fact common to the members of the class predominate over any questions affecting only individual members”). If the laws of multiple states apply to the claims of class members, then the court either would have to find that the various bodies of state law are not materially different from one another—in short, that no conflict exists—or that the various state laws can be grouped into a manageable number of patterns, with subclasses crafted accordingly. See Principles of the Law of Aggregate Litig. § 2.06 cmt. b at 82–83 (Discussion Draft 2006).

the law tend to invoke legislative primacy when it suits their immediate political purposes and to abandon the idea when it does not. I suggest that notions of legislative primacy actually would enable the law to set the debate over aggregate litigation on a more principled footing—albeit one with implications that might well chagrin both sides. For plaintiffs, such a view would imply the need to concede that class settlement pressure can be problematic when it amounts to law reform without legislation, as in *Parker*. And for defendants, such a stance would imply the need to recognize that waivers of class-wide arbitration sometimes may exceed the authority of private contracts to effectuate law reform.

A. *When CAFA Meets Klaxon*

The expansion in CAFA of federal diversity jurisdiction for class actions runs contrary to the usual trend of amendments to reduce access to the federal courts in diversity cases.¹⁶⁵ The legislative history of CAFA expresses unmistakably the sense that class actions call for a different approach. The stated goal is to bring nationwide class actions involving state-law claims into federal court precisely so that federal judges applying Federal Rule 23 principles now will be the ones to rule upon motions for class certification.¹⁶⁶

The backers of CAFA expected—indeed, affirmatively desired—that the change of forum would make for a change in the availability of aggregation. The congressional committee reports on CAFA cite a litany of nationwide class actions involving state-law claims that garnered certification in some state courts, in contrast to similar cases elsewhere that resulted in decertification.¹⁶⁷ To frame the contrast simply in state-versus-federal terms, however, would be to misstate the central problem animating CAFA. The problem is not that state courts as a whole diverged dramatically from federal courts as to class certification, but rather that a small minority of state courts within some state judicial systems did so with frequency.¹⁶⁸

At its extreme, the class certification game prior to CAFA involved a search for the anomalous state court that would certify a nationwide class action even though federal courts and, for that matter, most other state courts would not. One federal judge starkly described the result for class

165. Statutory amendments steadily have increased the minimum amount in controversy for diversity jurisdiction. See 14B Charles Alan Wright et al., *Federal Practice and Procedure* § 3701, at 2–3 (3d ed. 1998).

166. See S. Rep. No. 109-14, at 5 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 6; H.R. Rep. No. 108-144, at 26 (2003).

167. See S. Rep. No. 109-14, at 22–23; H.R. Rep. No. 108-144, at 12–14.

168. See S. Rep. No. 109-14, at 13, 24; H.R. Rep. No. 108-144, at 8. This focus on the anomalous minority of state courts helps to explain recent research indicating that “there is little empirical evidence supporting the belief that state and federal courts differ *generally* in their treatment of class actions.” Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 *Notre Dame L. Rev.* 591, 593 (2006) (emphasis added).

certification: “A single positive trumps all the negatives.”¹⁶⁹ Seen in this light, CAFA is national legislation that deals with a small number of outlier state courts—the ones seemingly located in “any county named after a president that’s by a body of water,” to borrow one tongue-in-cheek description.¹⁷⁰

The wisdom of CAFA as a matter of public policy will remain a subject of debate for the foreseeable future. I seek not to rehash the policy debate, but instead to assess the implications that flow from the overt use of forum selection to drive the availability of aggregation. CAFA operates easily enough where the difference in outcome as to class certification flows from a difference in the way that federal courts exercise their discretion to make that determination by comparison to anomalous state courts. As the backers of CAFA observed, differences in outcome on the class certification question do not stem from systematic differences in the stated content of federal and state class action rules.¹⁷¹ Quite the opposite: For the most part, state class action rules track the federal model.¹⁷² Even when those rules are textually identical for class actions, however, the courts of a given system retain discretion to interpret and apply their own rules differently,¹⁷³ within the outer boundaries of constitutional due process.

The effect of CAFA becomes more complicated where the difference in class certification stems not from judicial discretion in the application of the pertinent class action rule, but instead from principles governing choice of law. In the kinds of cases to which CAFA speaks—class actions involving state-law claims—choice of law bears critically upon class certification. Absent the application of a single body of state law, any court—whatever the judicial system in which it operates—is likely to have consid-

169. *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 333 F.3d 763, 766–67 (7th Cir. 2003) (Easterbrook, J.).

170. *Class Action Fairness Act*, Nat’l L.J., May 16, 2005, at 20 (remarks of Samuel Issacharoff). The reference here is to state courts in such places as Madison County, Illinois, and Jefferson County, Mississippi, among other localities criticized by CAFA supporters as magnets for nationwide class actions. See John H. Beisner & Jessica Davidson Miller, *They’re Making a Federal Case Out of It . . . in State Court*, 25 *Harv. J.L. & Pub. Pol’y* 143, 159–61 (2001), cited in S. Rep. No. 109-14, at 13.

171. See S. Rep. No. 109-14, at 13–14 (“The reason for this dramatic increase in state court class actions cannot be found in variations in class action rules . . . [T]here are no wide variations between federal and state court class action policies.”); see also H.R. Rep. No. 108-144, at 12 (“The Committee believes that the main reason for the explosion in State court class action filings is a growing recognition among plaintiffs’ lawyers that certain State courts are particularly friendly to class actions . . .”).

172. On the various state class action rules, see generally Linda S. Mullenix, *State Class Actions: Practice and Procedure* (2002).

173. See *J.R. Clearwater, Inc. v. Ashland Chem. Co.*, 93 F.3d 176, 180 (5th Cir. 1996) (“While Texas Rule of Civil Procedure 42 is modeled on Rule 23 of the Federal Rules, and federal decisions are viewed as persuasive authority regarding the construction of the Texas class action rule, a Texas court might well exercise this discretion in a different manner.” (citations omitted)).

erable difficulty finding the predominance of common issues necessary to support class certification.¹⁷⁴

1. *Shutts and the Problem of Bootstrapping*. — States are not free to operate wholly outside national constraints with regard to their choice of law for class actions. Here, the touchstone consists of the Supreme Court's 1985 decision in *Phillips Petroleum Co. v. Shutts*.¹⁷⁵ Much like the nationwide class of credit card holders in *Discover Bank*, the plaintiff class in *Shutts* effectively sought to project across the country the favorable—for them, at least—substantive law of Kansas with regard to a dispute concerning their natural gas leases with the defendant company, a Delaware corporation with its principal place of business located in Oklahoma.¹⁷⁶ The Supreme Court held that the Kansas court's application of forum law to class members spread across multiple states was “sufficiently arbitrary and unfair” as to violate the Due Process Clause.¹⁷⁷ The Court emphasized that “over 99% of the [underlying natural] gas leases and some 97% of the plaintiffs in the [*Shutts* class] had no apparent connection to the State of Kansas except for th[e] lawsuit.”¹⁷⁸ The parties to those leases accordingly would not have “had any idea that Kansas law would control” in the event of a dispute.¹⁷⁹

In the course of reversing, the Supreme Court went out of its way to criticize a further feature of the Kansas court's analysis—one that does not raise concerns of arbitrariness and unfair surprise, but instead speaks to the role of aggregation itself in the class certification analysis. The Kansas court had acted pursuant to “general” Kansas choice of law principles that call for the application of Kansas law to litigation brought in that forum “unless it is expressly shown that a different law governs.”¹⁸⁰ To this general presumption in favor of forum law, however, the Kansas courts had added special weight. In the context of “a nationwide class action,” the presumption in favor of forum law could be overcome only by “compelling reasons” that would “require” the choice of some other body of law.¹⁸¹ The Supreme Court criticized this further step as “something of a ‘bootstrap’ argument.”¹⁸² The mere presence of the proposed nationwide class action in the Kansas court had heightened the general

174. See *supra* note 164.

175. 472 U.S. 797 (1985).

176. *Id.* at 799.

177. *Id.* at 822.

178. *Id.* at 815. The Supreme Court noted several advantageous features of forum law concerning the calculation of damages in connection with royalties from natural gas leases by comparison to the competing laws of Texas or Oklahoma. See *id.* at 816–18.

179. *Id.* at 822.

180. *Shutts v. Phillips Petroleum Co.*, 679 P.2d 1159, 1181 (Kan. 1984). State choice of law principles often embrace such a presumption and place the burden of overcoming it upon the party urging application of some other state's law. See Patrick Woolley, *Choice of Law and the Protection of Class Members in Class Suits Certified Under Federal Rule of Civil Procedure 23(b)(3)*, 2004 Mich. St. L. Rev. 799, 816.

181. *Shutts*, 679 P.2d at 1181.

182. 472 U.S. at 821.

presumption in favor of forum law, effectively forming “an added weight in the scale when considering the permissible constitutional limits on choice of substantive law.”¹⁸³

The criticism of bootstrapping in *Shutts* ties into a broader suspicion about the law-reform power of aggregation. If the proposed aggregate nature of the lawsuit could alter choice of law principles—in *Shutts*, by turning a general presumption in favor of forum law into what one might describe as a super-presumption—then aggregation itself potentially could change the law chosen from what it otherwise would have been in the context of an individual lawsuit by the class representative against the defendant. Aggregation literally could reform the applicable substantive law. Indeed, it could do so in a way that would smooth the court’s path to find the predominant common issues necessary for aggregation in the first place. Aggregation, in other words, could operate as its own justification.

As I have argued elsewhere,¹⁸⁴ the discussion of bootstrapping in *Shutts* is of a piece with the Supreme Court’s decisions in the late 1990s—*Amchem Products, Inc. v. Windsor*¹⁸⁵ and *Ortiz v. Fibreboard Corp.*¹⁸⁶—striking down ambitious class settlements that effectively would have created privatized compensation systems for asbestos-exposed workers. In *Shutts*, 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. Similarly, the byproduct of class-wide settlement negotiations—a proposed class settlement agreement reached prior to actual class certification by any court—can neither give rise, in itself, to the predominant common issue needed for certification of an opt-out class (*Amchem*),¹⁸⁷ nor bring into being the limited fund needed for certification of a mandatory class (*Ortiz*).¹⁸⁸ The byproducts of negotiations conducted on an aggregate basis, in short, cannot form the grounds to legitimize aggregation in the first place. It is doubtful, nonetheless, that the *Shutts* Court’s concern over bootstrapping rises, of its own force, to the level of a due process violation. What 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.

2. *The New Bootstrapping.* — In the period between *Shutts* and CAFA, efforts to precipitate the certification of nationwide classes based upon application of a single body of state law did not cease. They did shift, however, in their focus. Rather than seek the application of forum law,

183. *Id.*

184. See Richard A. Nagareda, *Bootstrapping in Choice of Law After the Class Action Fairness Act*, 74 UMKC L. Rev. 661, 664–70 (2006).

185. 521 U.S. 591 (1997).

186. 527 U.S. 815 (1999).

187. See 521 U.S. at 622–23.

188. See 527 U.S. at 849.

plaintiffs' lawyers called for application of the law of the defendant's principal place of business to smooth the path for certification of nationwide classes. These efforts have proven unsuccessful in most courts.¹⁸⁹ But in one prominent counterexample, *Ysbrand v. DaimlerChrysler Corp.*, the Oklahoma Supreme Court chose Michigan law to govern the breach-of-warranty claims of a nationwide class comprised of persons who owned DaimlerChrysler minivans with allegedly defective airbag systems.¹⁹⁰ The choice to apply Michigan law to the entire nationwide class, in turn, greatly facilitated the certification of the class itself, precisely by subjecting the legal issues presented in the litigation to the common metric of Michigan breach-of-warranty law rather than the differing laws of the various states in which the minivan owners resided.

One easily might imagine a body of choice of law principles that presumptively would apply the law of the place where the business decisions concerning product design and warranties were made.¹⁹¹ Such a regime would be suited to the modern economy of the United States, in which undifferentiated products and services are routinely marketed nationwide.¹⁹² If widely embraced, choice of law principles along these lines effectively would export across the country the law of the defendant's home state, much like Discover Bank sought to export Delaware law through a choice of law clause in its credit card contracts. Exportation by way of choice of law principles would make it even more attractive for would-be defendants to base their business operations in states with atypi-

189. See, e.g., *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1016–18 (7th Cir. 2002); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186–88 (9th Cir. 2001); *Compaq Computer Corp. v. LaPray*, 135 S.W.3d 657, 680–81 (Tex. 2004).

190. 2003 OK 17, ¶¶ 12–21, 81 P.3d 618, 625–26. For background on choice of law analysis in Oklahoma class actions, see generally Steven S. Gensler, *Civil Procedure: Class Certification and the Predominance Requirement Under Oklahoma Section 2023(B)(3)*, 56 Okla. L. Rev. 289 (2003).

191. For an exposition of a federal choice of law rule in national market cases that would apply the substantive law of the defendant company's home state, see Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 Colum. L. Rev. 1839, 1866–71 (2006). A second commentator doubts that federal courts have authority, after CAFA, to develop such a federal choice of law rule. See Patrick Woolley, *Erie and Choice of Law After the Class Action Fairness Act*, 80 Tul. L. Rev. 1723, 1757 (2006). But this same source contends that “[s]tates have authority to adopt choice-of-law rules that facilitate the application of the law of a single state in multistate and nationwide class suits” and that a federal court, in turn, would be obliged by *Klaxon* to follow in class actions governed by CAFA. *Id.* at 1735.

192. A post-*Ysbrand* decision of the Oklahoma Supreme Court suggests that the nature of the product or service affects the choice of law analysis in that forum. The court distinguished between contractual claims arising from “the sale of goods under the Uniform Commercial Code” (to which the law of the defendant's principal place of business applies, per *Ysbrand*) and other sorts of contractual claims (governed by the law of the place “where the contract was made”). *Harvell v. Goodyear Tire & Rubber Co.*, No. 102,128, 2006 WL 1073067, at *3 (Okla. Apr. 25, 2006). One way to read this ostensible distinction is as an effort to cabin, at least somewhat, the consequences of *Ysbrand* for the certification of nationwide classes.

cally favorable substantive law. Delaware, South Dakota, and the like soon might find themselves the manufacturing capitals of the nation. The countervailing effect, however, would be to constrain the ability of defendants to resist the certification of nationwide classes based upon variations in state law across the country—a fitting consequence, some might say, where the defendant already has treated the entire country as a single, undifferentiated marketplace.

The *Ysbrand* court, however, did not choose Michigan law for reasons that would apply equally had the court been faced with a breach-of-warranty action against DaimlerChrysler by an individual minivan owner. In keeping with widely embraced choice of law principles today, the court undertook the multifactor analysis prescribed for breach-of-warranty cases by the Restatement (Second) of Conflict of Laws.¹⁹³ But the court then proceeded to discount the Restatement factors that point to the various states in which the members of the proposed nationwide class of minivan owners were located and to focus, instead, on Michigan as “the only state where conduct relevant to all class members occurred.”¹⁹⁴ But Michigan stands out as a common feature only because of the proposed nationwide scope of the class. In one-on-one litigation, Michigan would not have stood out as a common thread any more than the home state of the individual minivan owner.

The choice of law analysis in *Ysbrand* operates at the interstices of *Shutts*. The choice of Michigan law is not arbitrary, for Michigan has a substantial connection to the breach-of-warranty dispute. Nor would the choice of Michigan law come as an unfair surprise for minivan owners transacting business with a Michigan-based manufacturer. The Oklahoma court nonetheless chose Michigan law based upon bootstrapping—for reasons that would not hold true absent the proposed class-wide nature of the lawsuit.

Prior to CAFA, a federal court would have been highly unlikely to find itself in the position of ruling upon the certification of a proposed nationwide class with a precedent like *Ysbrand* on the books of the state in which that federal court sits. With *Ysbrand* in place, a nationwide breach-of-warranty class action along similar lines would be highly unlikely to be filed in a federal court in Oklahoma or removable thereto prior to CAFA—at least, if class counsel were at all savvy.¹⁹⁵ By contrast, such a nationwide class action today plainly would be removable pursuant to the

193. See 2003 OK 17, ¶¶ 12–16, 81 P.3d at 625–26 (applying Restatement (Second) of Conflict of Laws §§ 6, 188(2) (1971)).

194. *Id.* ¶ 15, 81 P.3d at 626.

195. Prior to CAFA, the Supreme Court held that only the citizenship of the class representatives—not absent class members—counted for purposes of satisfying the usual requirement for complete diversity of citizenship vis-à-vis the named defendants. See *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 364 (1921). The holding in *Ben-Hur* enabled class counsel to guard against the removal of nationwide class actions filed in state court by selecting as the class representative a person from the same state as one of the defendants. See S. Rep. No. 109-14, at 10 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 11.

expanded diversity jurisdiction in CAFA; indeed, such a case might be initiated in a federal court sitting in Oklahoma. The upshot is that the federal court now would be the one to rule on class certification.

B. *CAFA and Klaxon as a Question of Legislative Authority*

Klaxon directs the federal court to apply the choice of law principles of the state in which it sits. And in Oklahoma, the highest court of the state has explicitly chosen to apply the law of the defendant's principal place of business to nationwide breach-of-warranty classes by way of bootstrapping. When "[a] single positive" ruling on class certification trumps "all the negatives,"¹⁹⁶ however, the embrace of bootstrapping by a federal court sitting in Oklahoma would trump the views of other federal courts sitting elsewhere. Application of *Klaxon* would replicate the phenomenon seen prior to CAFA, whereby an anomalous state view on class certification effectively governed the nation. Citing *Ysbrand* among its examples of aberrant state court class certification decisions, the legislative history of CAFA conveys the distinct expectation that federal courts should not now pursue the same course in like circumstances.¹⁹⁷

A motion in federal court to certify a proposed nationwide class in the face of a state precedent like *Ysbrand* would call for a choice between two principles that guard against two different sorts of divergence. The principle of aggregation reflected in Parts I and II posits that the availability of aggregation should not alter the applicable substantive law—precisely what bootstrapping in choice of law would do. Respect for this first principle accordingly would counsel rejection of a bootstrapping approach to choice of law for federal class actions.

With regard to class settlement pressure and waivers of class-wide arbitration, this first principle can operate unabated by any potential competing principle. The same is not true here. *Erie*—extended by *Klaxon* to state choice of law principles—posits that the availability of the federal forum should not alter applicable state substantive law. In a diversity case, the federal court should apply the same law as would a court of the state in which it sits. Use of the federal forum rather than its state counterpart, in other words, should not change the substantive law.

Something has to give here. The important point, for my purposes, is that the determination of what must give actually confirms the primacy of legislation as a vehicle for law reform by comparison to aggregate pro-

For class actions, CAFA switches from the usual standard of complete diversity to one of minimal diversity. See *supra* note 16 and accompanying text.

196. In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., 333 F.3d 763, 766–67 (7th Cir. 2003).

197. See S. Rep. No. 109-14, at 25 (citing *Ysbrand* as support for claim that "state court interference with the laws of other jurisdictions is becoming disturbingly common"); H.R. Rep. No. 108-144, at 14 (2003) (citing *Ysbrand* to support claim that "State courts have trampled on federalism principles . . . all in an effort to certify classes that should not be certified").

cedure. Whether one sees aggregation or forum as defining the axis on which divergence in substantive law is not to be countenanced, one's choice depends on how one reads CAFA as a matter of statutory interpretation.

One approach to this interpretive question would adhere to *Klaxon*, require the federal court in a bootstrapping state to apply the law of the defendant's principal place of business, and, in so doing, effectively have the proposed aggregate nature of the lawsuit drive its own certification. As suggested earlier, CAFA attempts to strike a delicate balance, at once deploying the federal forum to alter results as to class certification, but not purporting to override state substantive law—whether in the form of, say, state contract principles, or in the guise of state choice of law principles, which *Klaxon* characterizes as a dimension of substantive law. Simply as a textual matter, the provisions of CAFA in play here speak exclusively of a change of forum. They neither turn off *Erie* nor prescribe their own choice of law principles for nationwide class actions under CAFA.

In fact, in its floor debate on CAFA, the Senate voted down an amendment proposed by Senator Dianne Feinstein that would have spoken, albeit quite minimally, to choice of law by the federal court. The Feinstein amendment would have stopped well short of authorizing the creation of federal choice of law principles, much less of requiring application of the defendant's home state law. The amendment 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.”¹⁹⁸ In that event, a federal court would need to ascertain—as it does today—whether it would be possible to use “subclassifications among the plaintiff class based on substantially similar State law.”¹⁹⁹

To say that CAFA turns off *Klaxon* when the statutory text says no such thing, when the legislative history actually speaks of preserving *Erie*,²⁰⁰ and when the Senate rejected a much more modest amendment on choice of law, is to press hard at the boundaries of statutory inference. In other regards, federal appellate courts already have proven unreceptive to the argument that CAFA somehow changes the allocation of the burden to prove the propriety of a removal to federal court when the statutory text states no such change.²⁰¹ Absent statutory language shift-

198. S. Amendment 4 to S. 5, 109th Cong., 151 Cong. Rec. S1215 (daily ed. Feb. 9, 2005).

199. *Id.* This inquiry is already a part of class certification analysis. See Principles of the Law of Aggregate Litig. § 2.06 reporter's notes at 87 (Discussion Draft 2006) (citing illustrative cases and secondary sources).

200. See sources cited *supra* note 18 and accompanying text.

201. The Senate Report on CAFA states that upon removal of a class action to federal court, “the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident (i.e., that the applicable jurisdictional requirements are not satisfied).” S. Rep. No. 109-14, at 42. This allocation of the burden for class actions removed under CAFA would deviate from the usual approach, whereby the removing party—the one

ing the burden, even unambiguous specification in legislative history will fail to achieve that end.

This first approach effectively would stick the defense-side backers of CAFA with the byproducts of their own political cleverness. CAFA supporters chose to use a mere change of forum to drive different outcomes on class certification and shrank from an overt, frontal assault on state substantive law. Having embraced such a combination as a political matter, CAFA supporters conceivably might be stuck with a world in which *Klaxon* survives in situations of state court bootstrapping and proceeds to replicate—now, in federal courts sitting in anomalous states—the phenomenon of a single positive ruling trumping all the negatives on class certification. The stricture against divergence by forum would triumph over the stricture against divergence by aggregation, because CAFA chooses to speak only to the former.

There remains, however, a substantial argument the other way. The Supreme Court itself has recognized that the *Erie* principle is not absolute, but rather may be overcome upon a showing of “affirmative countervailing considerations” that stop short of outright commands in federal law.²⁰² In *Byrd v. Blue Ridge Rural Electric Cooperative*, state judicial decisions had allocated to the judge the determination whether a given person was a “statutory employee”—a determination that would have made the state workers’ compensation system that person’s exclusive avenue of recourse for work-related injury. Notwithstanding these state precedents, the Supreme Court held that in a federal diversity action, the jury, not the judge, must decide the categorization question.²⁰³ The *Byrd* Court observed that “a[n] essential characteristic of [the federal] system is the manner in which . . . it distributes trial functions between judge and jury and, *under the influence—if not the command*—of the Seventh Amendment

urging federal jurisdiction, not the one resisting it—bears the burden of demonstrating the validity of removal. See 14B Wright et al., *supra* note 165, § 3721, at 324.

Writing for the Seventh Circuit, Judge Frank Easterbrook noted the propriety of resort to legislative history “[w]hen a law sensibly could be read in multiple ways.” *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005). That, however, is not the situation in CAFA with regard to burden allocation. The passage in the Senate Report “does not concern any text in the bill that eventually became law.” *Id.* The passage instead “stands by itself, as a naked expression of ‘intent’ unconnected to any enacted text.” *Id.* Pointing to Supreme Court precedent denying legal effect to statements in committee reports that “d[o] not correspond to any new statutory language” to change preexisting doctrine, the *Brill* court deemed the passage in the Senate Report on CAFA to be similarly ineffectual with regard to burden allocation. *Id.* (citing *Pierce v. Underwood*, 487 U.S. 552, 566–68 (1988)). The Ninth Circuit has since embraced the same view. See *Abrego v. Dow Chem. Co.*, 443 F.3d 676, 685–86 (9th Cir. 2006) (per curiam) (“We join [the *Brill* court] and hold that CAFA’s silence, coupled with a sentence in a legislative committee report untethered to any statutory language, does not alter the longstanding rule that the party seeking federal jurisdiction on removal bears the burden of establishing that jurisdiction.”).

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

203. See *id.* at 538.

[right to jury trial], assigns the decisions of disputed questions of fact to the jury.”²⁰⁴ In more recent decisions in the *Erie* line, the Court has continued to cite *Byrd*.²⁰⁵

To be sure, CAFA is a statute, not a constitutional provision. Its text, moreover, does not “command” deviation from *Klaxon*. CAFA nonetheless might exercise “influence” here in such a way as to make divergence on grounds of aggregation, rather than of forum, the thing to be avoided. It would be odd, to say the least, to adhere to the principle that a change of forum from state to federal court cannot work a change in choice of law principles, even where the relevant state principles accord a power to aggregation literally to reform applicable substantive law in a manner out of line with Supreme Court class action decisions from *Shutts* through *Ortiz*.²⁰⁶ The oddity lies in the very thing with which the previous line of argument sought to saddle CAFA supporters: their use of forum as the engine to drive different results on class certification. That engine works only on the premise that federal courts can *and should* generate divergent outcomes on the class certification question from what might transpire in the courts of the states in which they sit. Far from being an axis on which divergence is disallowed, forum in CAFA is precisely the axis on which divergence is desired.

One might rephrase the argument even more strongly. Rather than preserving the possibility of divergent approaches as between the federal court and the state court down the street, CAFA effectively shuts down the state court with regard to class certification—at least when the defendant chooses to remove.²⁰⁷ On this second view, the stricture against divergence by aggregation must prevail over the stricture against divergence by forum under a statute predicated on the notion that the latter is a problem in the class action context, so much so as to warrant federal legislation to displace the state forum. If CAFA is to be faulted on this account, then the fault lies in a lack of transparency—in using a change of forum to work something more than just a change of forum.

The key point here does not center on how the law ultimately should resolve the clash between CAFA and *Klaxon*, but rather on the nature of that clash itself. The debate over the proper meaning to attribute to CAFA *as legislation* highlights what is missing from aggregation alone and from arbitration clauses in private contracts: law-reform power wielded by an actual law-reform institution. By casting the clash between CAFA

204. *Id.* at 537 (emphasis added).

205. See, e.g., *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 431–32 (1996). For further discussion of the current status of *Byrd* as a matter of precedent, see Nagareda, *supra* note 184, at 681–82.

206. See *supra* Part III.A.1.

207. See Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 *UCLA L. Rev.* 1353, 1416–17 (2006) (describing CAFA as responding to the “risk that any one state’s ability to enforce judgments of its courts threatens to disable any second state’s ability to have corresponding authority over claims affecting the second state’s citizens”).

and *Klaxon* as a question of statutory interpretation, this Part reinforces the centrality of legislation as the appropriate vehicle for law reform in contrast to aggregation or arbitration clauses, both of which lack law-reform power.

There is plenty of irony to go around here. In the debate over CAFA, defendants would be glad to suggest that a change in the forum for the resolution of disputes (here, the move to federal court) might drive a change in something deemed an aspect of substantive law (the choice of law principles of the state in which the federal court sits). On this account, CAFA does by way of federal legislation what defendants aspire for waivers of class-wide arbitration to do as a matter of contract—to use a change of forum (there, the move to arbitration from the courtroom) to drive a change in substantive rights. Having taken such a stance as to CAFA and class-wide arbitration, however, defendants would lose a principled basis on which to object when class settlement pressure is most problematic: precisely when it works a modification of substantive law without the trappings of legislation itself.

Plaintiffs would be glad to clothe themselves in the mantle of *Klaxon* to argue that a change of forum under CAFA cannot change state choice of law principles. That stance would stand as the CAFA analogue to plaintiffs' criticism of the law-reform power that waivers of class-wide arbitration might exert in a given instance. But, having taken that view as to CAFA and arbitration, plaintiffs would lose a principled basis on which to dismiss concerns about class settlement pressure, especially where aggregation not only aggregates claims but also works a kind of unauthorized law reform like that seen in *Parker*.

CONCLUSION

In its treatment of aggregation and its discontents, this Essay has counseled an aggregation of its own. The debates over class settlement pressure, waivers of class-wide arbitration, and CAFA each pose questions about the relationship between aggregate procedure and substantive law. In these high-stakes disputes, one side or the other seeks to characterize the availability of aggregation as merely a cosmetic matter, whereas the opposing side seeks to probe its practical effects. Interestingly enough, plaintiffs and defendants make different arguments along these lines in different settings.

The law should cut through the advocacy on both sides by situating all three debates along a common metric of *institutional authority*. Each is ultimately a debate over when the affording or the withholding of aggregation is not merely a matter of procedural format, but also a way to alter substantive law. It is one thing for that kind of law-reform power to be wielded by law-reform institutions, as Congress arguably has done by way of CAFA. It is quite another for law reform to take place by other means—whether aggregation alone or private contracts—from which law-reform power has been withheld. Like modern civilization itself, the

rise of aggregation in the civil justice system properly calls for a kind of repression—here, of the understandable impulse on the part of both plaintiffs and defendants to use the availability of aggregation as a back-door means for desired law reform.