"HOW DO YOU TAKE YOUR MULTI-STATE, CLASS-ACTION LITIGATION? ONE LUMP OR TWO?" INFUSING STATE CLASS-ACTION JURISPRUDENCE INTO FEDERAL, MULTI-STATE CLASS-CERTIFICATION ANALYSES IN A "CAFA-NATED" WORLD

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ABSTRACT

The Class Action Fairness Act of 2005, which essentially federalizes all multi-state class-action cases, has introduced the class-action bar, and necessarily the judiciary, to myriad substantive and procedural issues never before envisioned in class-action litigation's history. While some of these issues have already surfaced, many others haven't but will as newly federalized multi-state class-action lawsuits move through litigation to the class certification stage. A major and unavoidable issue involves whether federal judges, when deciding multi-state claims' class certification under Federal Rule 23, may consider well-developed, state class-action jurisprudence applying a single state's substantive law or whether doing so violates the U.S. Supreme Court's *Erie* Doctrine. My Article, after analyzing federal choice-of-law jurisprudence and *Erie* and its progeny, concludes that federal courts may consider state class-action jurisprudence applying a single state's substantive law when deciding class certification under Federal Rule 23 and that doing so actually honors *Erie's* mandate, albeit in an unanticipated manner. My Article provides guidance to the class-action bar and the judiciary, as they will undoubtedly recognize this issue and its significance when briefing, arguing, and deciding class certification of multi-state, class-action lawsuits.

I. INTRODUCTION

The Class Action Fairness Act of 2005[1] undoubtedly created more issues than it answered.[2] By federalizing essentially all interstate class-action lawsuits,[3] CAFA introduced multiple legal, jurisdictional, and other theoretical challenges that the bench and bar will have to work through together, hopefully to sensible resolutions. One of these challenges concerns whether federal judges may rely on well-developed, state class-action jurisprudence to decide

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[1] 28 U.S.C. §1332(d) (2005).

[2] For example, by way of unintended consequences, federal court antitrust filings have already begun to increase because price-fixed products' indirect purchasers can't bring lawsuits under the Clayton Act, 15 U.S.C. §4 (2005), for violating the Sherman Act, 15 U.S.C. §1 (2005), yet *can* make claims under certain states' antitrust or consumer-fraud statutes, s*ee* Daniel R. Karon, *"Your Honor, Tear Down That* Illinois Brick *Wall!" The National Movement Toward Indirect Purchaser Antitrust Standing and Consumer Justice,* 30 WM. MITCHELL L. REV. 1351, 1401 (2004) (Arguing that "thirty-nine (and arguably as many as forty-four) states grant indirect purchasers standing, either on their own or through their attorneys general as *parens patriae,* to pursue price fixing claims."), and common law. *See* Daniel R. Karon, *Undoing the Otherwise Perfect Crime – Applying Unjust Enrichment to Consumer Price-Fixing Claims,* __ W. VA. L. REV. ___, ___ (2006) (Arguing that, in all states, "unjust enrichment [is] an entirely viable, yet often underutilized, theory for pursuing consumer price-fixing claims."). Indirect purchasers typically filed claims in state court, where only complete diversity jurisdiction existed as defendants' basis for removal to federal court. But CAFA only requires minimal diversity and permits defendants to aggregate damages. *See infra* Part II. Therefore, antitrust litigation that would have remained in state court pre-CAFA must now be filed in federal court.

Also, where "two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed," 28 U.S.C. §1332(d)(4)(B) (2005), the federal court must decline jurisdiction. But to properly rebut this threshold, a defendant must prove that the majority of the class is outside the state, which requires an empirical class analysis, such as defendant producing its customer lists pre-class certification – not a welcome undertaking for any defendant.

Finally, "[i]f a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed." 28 U.S.C. §1712(a). Accordingly, plaintiffs' counsel have already become, naturally, less inclined to resolve class-action lawsuits for coupons and have instead begun insisting on money damages – a result that defendants, while believing favorable during the pre-CAFA debate, have, in some situations, begun to regret.

[3] According to CAFA:

> The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which –
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> (A) any member of a class of plaintiffs is a citizen of a State different from any defendant;
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> (B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or
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> (C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state. 28 U.S.C. §1332(d)(2)(A)-(C) (2005).

class certification under Federal Rule 23 when considering multi-state, class-action lawsuits alleging a single state law's substantive application.

Federal courts rarely conducted these difficult, multi-state, substantive-law analyses pre-CAFA, and denying federal courts the ability to invoke years of well-developed, state-court jurisprudence on this challenging subject post-CAFA arguably forces federal courts to decide multi-state class certification alleging a single state law's substantive application from a largely blank legal slate. But even though federal courts hearing diversity-jurisdiction cases regularly apply state substantive law,[4] this particular state-law issue is curious in that it involves a procedural overlay – Federal Rule 23 – that affects (or does it?) federal courts' otherwise traditional ability to invoke state substantive law and to conduct multi-state class-certification analyses pursuant to it. Despite the admittedly, if not predominantly, procedural nature of a Federal Rule 23 class-certification analysis, this Article will argue that, consistent with U.S. Supreme Court doctrine – albeit never intended to be so invoked – federal courts *may* draw upon state-law decisions when deciding multi-state class certification alleging a single state law's substantive application.

II. CAFA AND ITS EFFECT ON TRADITIONAL, INTERSTATE CLASS-ACTION, SUBJECT-MATTER JURISDICTION

CAFA fundamentally changed federal subject-matter jurisdictional doctrine as it relates to diversity-based (*i.e.,* interstate) class-action claims. Before CAFA, which amended 28 U.S.C. §1332 (the federal diversity-jurisdiction statute) to create federal jurisdiction for claims involving minimal diversity[5] and amounts in controversy that, individually, total less than

[4] *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.").
[5] 28 U.S.C. §1332(d)(2)(A) (2005).

$75,000,[6] federal courts weren't permitted to aggregate class members' claims to establish the jurisdictional minimum.

In *Snyder v. Harris*,[7] a class-action shareholder lawsuit,[8] the U.S. Supreme Court explained that "[w]hen two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount. . . ."[9] The *Snyder* Court based its ruling on two considerations. First, the Court sensed that a contrary holding would wreak havoc on the federal judiciary's workload.[10] Second, it believed that Congress had come to rely on the Court's interpretation in continually re-enacting §1332's amount-in-controversy threshold.[11]

Harkening back to *Snyder,* the Court, in *Zahn v. International Paper Co.,*[12] later elucidated that "class actions involving plaintiffs with separate and distinct claims were subject to the usual rule that a federal district court can assume jurisdiction over only those plaintiffs presenting claims exceeding the $10,000[13] minimum specified in §1332[, and that a]ggregation of claims was impermissible. . . .[14] Instead, "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the

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[6] *Id.* at §1332(d)(2)(C).
[7] 394 U.S. 332 (1969).
[8] *Id.* at 333 (Plaintiff "brought suit against members of the company's board of directors alleging that they had sold their shares of the company's stock for an amount far in excess of its fair market value, [and] that this excess represented [an illegal] payment to these particular directors. . . .").
[9] *Id.* at 336 (citing Troy Bank v. G.A. Whitehead & Co., 222 U.S. 39, 40 (1911)).
[10] *Id*. at 340 ("The expansion of the federal caseload could be most noticeable in class actions brought on the basis of diversity of citizenship. . . .").
[11] *Id*. at 339 ("To overrule the aggregation doctrine at this late date would run counter to the congressional purpose in steadily increasing through the years the jurisdictional amount requirement."). *See also Zahn v. Int'l Paper Co.,* 414 U.S. 291, 301 (1973) ("We have no good reason to disagree with . . . the historic construction of the jurisdictional statutes, left undisturbed by Congress over these many years.").
[12] 414 U.S. 291 (1973).
[13] On May 18, 1989, Congress amended §1332's jurisdictional-minimum requirement from $10,000 to $50,000, and on January 17 1997, amended it from $50,000 to $75,000.
[14] *Zahn, supra* note 12, at 299.

case. . . ."[15] And while the *Zahn* Court never expressly mentioned supplemental jurisdiction (or its antecedents, pendent and ancillary jurisdiction), the Court's language also effectively precluded district courts from exercising subject-matter jurisdiction over class members with (at least arguably) less than $75,000 in damages.[16] Accordingly, district courts couldn't automatically consider absent class members' claims even if the named plaintiff's claimed damages may have satisfied the minimum-jurisdictional requirement.[17]

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[15] *Id.* at 301. Interestingly, though, the Court excused unnamed plaintiffs from satisfying §1332's "diversity of citizenship" requirement. *See* Supreme Tribe of Ben-Hur v. Cauble, 225 U.S. 356, 366 (1921) ("The intervention of the Indiana citizens in the [class-action] suit [against defendants who were Indiana citizens] would not have defeated the [district court's diversity] jurisdiction. . . ."). The Court never explained why it treated §1332's diversity-of-citizenship and amount-in-controversy requirements differently, other than to suggest that allowing unnamed plaintiffs to evade both requirements would open the federal litigation floodgates – a result the federal courts surely wanted to avoid but must now face. *See* Snyder v. Harris, 394 U.S. 332, 340 (1969) ("To allow aggregation of claims where only one member of the entire class is of diverse citizenship could transfer into the federal courts numerous local controversies involving exclusively questions of state law.").

[16] *See Zahn, supra* note 12, at 301 ("Any plaintiff without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims.").

[17] According to some federal courts, 28 U.S.C. §1367 (2005), which Congress enacted in 1990 and which provides that "the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution," *id.* at §1367(a), "overruled the *Zahn* and required district courts to aggregate the claims of class members to calculate the amount in controversy for purposes of diversity jurisdiction. . . ." Dawalt v. Purdue Pharmaceuticals L.P., 397 F.3d 392, 396 (6th Cir. 2005). *See also* State Nat'l Ins. Co. v. Yates, 391 F.3d 577, 580 (5th Cir. 2004) ("[T]he force of the argument that §1367 overrules *Zahn* is untouched by the presence of multiple defendants unless we adopt the illogical (indeed, absurd) conclusion that §1367 overrules *Zahn* only in single defendant cases."); Rosmer v. Pfizer, Inc., 263 F.3d 110, 114-15 (4th Cir. 2001) ("[S]ince the pendent claims of the absent class members raise similar questions of law and fact to [Plaintiff's] claim, they are necessarily a 'part of the same case or controversy.' . . . Therefore, the district court has supplemental jurisdiction over the other claims [pursuant to 28 U.S.C. §1367(a)]."); Stromberg Metal Works v. Press Mechanical, Inc., 77 F.3d 928, 931 (7th Cir. 1996) ("If §1367(a) allows suit by a pendent plaintiff who meets the jurisdictional amount but not the diversity requirement, it also allows suit by a pendent plaintiff who satisfies the diversity requirement but not the jurisdictional amount."); *In re* Abbott Labs., 51 F.3d 524, 528 (5th Cir. 1995) ("The statute's first section vests federal courts with the power to hear supplemental claims generally, subject to limited exceptions set forth in the statute's second section. Class actions are not among the enumerated exceptions."). Other courts, as described, believed that §1367 didn't overrule *Zahn* and that §1332's requirement that all class members' claims meet the jurisdictional minimum remained the rule. *See* Trimble v. Asarco, Inc., 232 F.3d 946, 962 (8th Cir. 2000) ("Congress in §1367(a) expressly excepted claims brought under §1332 and its well-understood definition of 'matter in controversy.'"); Meritcare Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214, 218 (3rd Cir. 1998) ([T]he claims of those plaintiffs who fail to meet the amount in controversy must be remanded."); Leonhardt v. Western Sugar Co., 160 F.3d 631, 640 (10th Cir. 1998) (". . . Congress in §1367(a) expressly excepted claims brought under §1332 and its well-understood definition of 'matter in controversy.'"). The Supreme Court, albeit after CAFA's enactment, ultimately confirmed that §1367 overruled *Zahn* and that "interpreting §1367 to foreclose supplemental jurisdiction over plaintiffs in diversity cases who [did] not meet the minimum amount in controversy [was] inconsistent with the text, read in light of other statutory provisions and our established jurisprudence." Exxon Mobil Corp. v. Allapattah Servs., __ U.S. __, 125 S. Ct. 2611, 2625 (2005).

But believing that "[c]lass-actions [were long being] manipulated for personal gain,"[18] and that "[l]awyers who represent plaintiffs from multiple states [were] shop[ping] around for the state court where they expect[ed] to win the most money,"[19] on February 10, 2005, Congress passed CAFA, and on February 18, 2005, President Bush signed CAFA into law. CAFA amended §1332 and abrogated *Zahn,* thus creating original federal-court jurisdiction for class-action claims that exceed $5,000,000 in potential *aggregate* damages.[20] Accordingly, plaintiffs can no longer pursue multi-state, class-action cases in state courts – assuming their claims involve any meaningful classwide damages – but must instead file their lawsuits in federal court. In this manner, at least as contemplated by President Bush and Congress, class-action defendants will be treated more fairly; although, not surprisingly, debate raged, and still rages, concerning the soundness of this belief and of *CAFA's* fairness.[21] But regardless of this debate's eventual

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[18] The White House, *President Signs Class-Action Fairness Act of 2005* (visited Dec. 12, 2005) <http://www.whitehouse.gov/news/releases/2005/02/20050218-11.html>.

[19] *Id.*

[20] 28 U.S.C. §1332(d)(2)(A) (2005). *See also Exxon, supra* note 17, at 2627-28 ("[CAFA] abrogates the rule against aggregating claims, a rule this Court recognized in *Ben-Hur* and reaffirmed in *Zahn*.")**.** And while CAFA also makes clear that, to satisfy §1332's diversity requirement, only "minimal diversity is required," meaning that only one class member need be a citizen of a different state from any defendant, even pre-CAFA it was "well-settled that a class action may satisfy §1332 if there [was] diversity only between the representative plaintiffs and the defendants." United States *ex rel.* Sero v. Preiser, 506 F.2d 1115, 1129 (2d Cir. 1974) (citing *Ben Hur,* 225 U.S. at 366). In this manner, CAFA's new "minimum diversity" requirement doesn't greatly impact the federal-jurisdictional analysis since minimum diversity had effectively been the standard beforehand.

[21] Fierce public debate preceded CAFA's enactment, with numerous public officials and consumer groups voicing strident opposition. According to House Democratic Leader, Nancy Pelosi, "[CAFA], which discourages class action lawsuits, is far from fair. It is instead another way for Republicans to align themselves with special interests at the expense of American consumers and the justice system." The People Over Profits Action Network, *From House Democratic Leader Nancy Pelosi* (on file with author). Speaker Pelosi added her belief that "Republicans [were] bringing to the floor . . . a payback to big business at the expense of consumers[, and that t]he Republican agenda is to ensure that some Americans do not get their day in court." *Id.* Considering that "federal courts are already overwhelmed by the large number of criminal drug cases and immigration case [and] do not have the resources to handle complex issues of state law," ATLA Press Room, *Don't Let Class Action "Reform" Deny Justice to Consumers* (visited Feb. 4, 2005) <http://www.atla.org/ConsumerMediaResources/Tier3/press_room/FACTS/classactions/SameOldStory_2005>, in 2003 Chief Justice William Rehnquist and the Judicial Conference of the United States sent a letter to the Senate Judiciary Committee expressing their concerns about CAFA and reiterating their opposition to many of its jurisdictional provisions, ATLA Press Room, *Federal Judicial Conference Opposed Federalizing Class Actions* (visited Feb. 4, 2005) <http://www.atla.org/homepage/fjc.aspx>, explaining that CAFA "would add substantially to the work load of the federal courts and is inconsistent with principles of federalism." NACA, *What the Experts are*

outcome, if any, CAFA's enactment effectively ended the days of filing multi-state, class-action lawsuits in state courts.

III. THE CHOICE-OF-LAW PROBLEM CAFA CREATED

Having explained CAFA's contours and the way it fundamentally changed federal-diversity jurisdiction, an example will help elucidate the substantive-procedural/choice-of-law issue that CAFA inadvertently created. Let's return to the pre-CAFA (or "de-CAFA-nated") world, where multi-state, class-action cases were routinely filed in state courts.[22] Fully

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Saying About the So-Called 'Class Action Fairness Act'" (on file with author). The Conference of Chief Justices, which represents the interests of state supreme courts, also "came out against the class action 'reform' legislation," ATLA Press Room, *Conference of Chief Justices Weighs Against Class Action "Reform" Legislation* (visited Feb. 4, 2005) <http://www.atla.org/homepage/ccj.aspx>, explaining that they saw "no hard evidence of the inability of state judicial systems to hear and decide fairly class actions brought in state courts," and expressing their belief that "state courts and state legislatures should be responsible for correcting any problems (with class actions), and history has shown that will occur." NACA, *What the Experts are Saying About the So-Called 'Class Action Fairness Act'"* (on file with author). Multiple consumer groups also went on record in opposition to CAFA's enactment, such as the ACLU, AFL-CIO, Coalition to Stop Gun Violence, Consumer Federation of America, Consumers Union, NAACP Legal Defense and Educational Fund, National Association of Consumer Advocates, National Consumer Law Center, NOW Legal Defense Fund, Public Citizen, Sierra Club, and United Steelworkers of America. *See* ATLA Press Room, *Public Interest Organizations Support Access to Justice – With Federal Courts Clogged, Class Actions Will Die* (visited Feb. 4, 2005) <http://www.atla.org/ConsumerMediaResources/Tier3/pess_room/FACTS/classactions/Coalition for Justice>. Even the Los Angeles Times commented that "[w]hen corporate executives gush over any bill with the word 'fairness' in its title, consumers had best check their wallets," *A Failure of Fairness,* L.A. TIMES, July 3, 2005, and the New York Times observed that CAFA "would move almost all major class-action lawsuits to overburdened federal courts from state courts [and that s]uch a shift is likely to delay or deny justice in numerous instances, and, ultimately, to dilute the impact of the strong consumer protection laws in many states." *Class-Action Unfairness,* N.Y. TIMES, July 6, 2004.

[22] *See, e.g.,* Compaq Computer Corp. v. Lapray, 135 S.W.3d 657, 661 (Tex. 2004) (Nationwide class action "alleg[ing] that the affected computers, some thirty-seven models of Compaq Presario computers, contain defective FDCs, which control the transfer of data . . . between a computer's memory and a floppy disk."); Portwood v. Ford Motor Co., 183 Ill. 2d 459, 461 (1998) (Nationwide class action by "thousands of people who purchased Ford automobiles [who] sustained property damage as a result of collisions which occurred when the vehicles' transmissions shifted from 'park' to 'reverse' without warning."); Orman v. Charles Schwab & Co., 179 Ill. 2d 282, 284 (1997) (Nationwide class action alleging that "defendants violated Illinois agency and/or contract law when they failed to remit to plaintiffs order flow payments received in executing plaintiffs' securities transactions."); Connick v. Suzuki Motor Co., 174 Ill. 2d 482, 511 (1996) (Nationwide class action alleging "that a defect in the Samurai's design caused all of the vehicles to roll over during turns or evasive maneuvers."); Washington Mut. Bank v. Superior Court, 24 Cal. 4th 906, 911 (2001) (Nationwide class-action where defendant bank was alleged to have "victimized its borrowers by systematically overcharging for the replacement insurance coverage and secretly profiting through cash commissions or in-kind services from the vendors of the replacement insurance."); Discover Bank v. Superior Court, No. B161305, 2005 Cal. App. LEXIS 1875, at *2 (Dec. 7, 2005), *rev'd as to whether Federal Arbitration Act preempted California law concerning unconscionability of class-action waivers and*

understanding this practice requires first discussing the U.S. Supreme Court's *Phillips Petroleum v. Shutts*[23] decision, which plaintiffs' class-action counsel regularly cite for the proposition that a court (formerly a state court) can, under appropriate circumstances, certify a multi-state class action under a single state's substantive law.

Shutts involved gas royalty owners' claims against Philips Petroleum for delaying royalty payments.[24] The royalty owners resided in all 50 states,[25] but three of them, including Shutts, filed a class-action lawsuit in Kansas, where Shutts happened to live, alleging that Phillips had violated Kansas contract and equity law. Plaintiffs argued that Kansas substantive law governed the entire class' claims "notwithstanding that over 99% of the gas leases and some 97% of the plaintiffs . . . had no apparent connection to the State of Kansas except for th[e] lawsuit."[26] Although Phillips argued that "the trial court should have looked to the laws of each State where the leases were located to determine, on the basis of conflict of laws principles, whether interest on the suspended royalties was recoverable, and at what rate,"[27] the Kansas Supreme Court "stated that generally the law of the forum controlled all claims unless 'compelling reasons' existed to apply a different law."[28] Finding no compelling reasons, the court affirmed the trial court's decision applying Kansas substantive law to the entire class' claims.[29]

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classwide arbitration, 36 Cal. 4th 148 (2005) ("[N]ationwide class action against Discover Bank . . . alleging claims for breach of contract and violation of the Delaware Consumer Fraud Act."); Renaissance Cruises, Inc. v. Glassman, 738 So. 2d 436, 437 (Fla. 1999) (Nationwide class action "assert[ing] that [cruise line held] out [certain] charges as being wholly due to the ports, but then [kept] the money that [was] in excess of the actual port charges."); State Farm Mut. Auto. Ins. Co. v. Superior Court, 114 Cal. App. 4th 434, 438 (2003) (Nationwide class action by "[a] group of policyholders [who] contend[ed] that the insurance company's board of directors did not pay the dividends it promised."); Fink v. Ricoh Corp., 365 N.J. Super. 520, 531-33 (2003) (nationwide class action against camera manufacturer for allegedly misrepresenting certain camera's features).

[23] 472 U.S. 797 (1985).

[24] *Id.* at 799.

[25] *Id.*

[26] *Id.* at 814-15.

[27] *Id.* at 802-03.

[28] *Id.* at 803.

[29] *Id.* at 803, 816.

On appeal to the U.S. Supreme Court, Phillips argued that applying Kansas substantive law had "violated the constitutional limitations on choice of law mandated by the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause. . . ."[30] Drawing upon its earlier *Allstate Insurance Co. v. Hague*[31] decision, which also involved a choice-of-law determination,[32] the Court explained that "in many situations a state court may be free to apply one of several choices of law,"[33] and it ruled that doing so in a class-action setting is appropriate so long as the law sought to be applied "is not in conflict with that of any other jurisdiction connected to th[e] suit,"[34] or, if a conflict exists, the state whose law plaintiff seeks to apply has a "'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class . . . 'creating state interests,' in order to ensure that the choice of [one state's] law is not arbitrary or unfair."[35] Considering Kansas's "lack of 'interest' in claims unrelated to [Kansas, as well as] the substantive conflict with jurisdictions such as Texas,"[36] the Court concluded that the "application of Kansas law to every claim in this case [was] sufficiently

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[30] *Id.* at 816.
[31] 449 U.S. 302 (1981).
[32] In *Allstate,* decedent, a motorcycle passenger, was killed in an automobile accident in Wisconsin. Although decedent worked in Minnesota, he, the motorcycle operator, and the other driver lived in Wisconsin, as did decedent's wife. While neither the motorcycle operator nor the other driver held valid insurance, decedent held an Allstate policy covering his three automobiles. Decedent's policy contained an uninsured motorist clause insuring him against loss incurred from accidents with uninsured motorists that limited coverage to $15,000 for each automobile. Following the accident, decedent's wife relocated to Minnesota, married a Minnesota resident, and decedent's estate filed suit in Minnesota seeking to stack the policy's uninsured motorist coverage, which Minnesota law permitted but Wisconsin law did not. *Id.* at 305. Affirming the Minnesota Supreme Court's decision to apply Minnesota's stacking law to decedent's estate's claim, the Court ruled explained that "Minnesota had a significant aggregation of contacts with the parties and the occurrence, creating state interests, such that application of its law was neither arbitrary nor fundamentally unfair." *Id.* at 320. Accordingly, the Court believed "the choice of Minnesota law by the Minnesota Supreme Court did not violate the Due Process Clause or the Full Faith and Credit Clause." *Id.*
[33] *Shutts, supra* note 23, at 823.
[34] *Id.* at 816.
[35] *Id.* at 821 (citing *Allstate*, *supra* note 31, at 312-13).
[36] *Id.* at 822.

arbitrary and unfair as to exceed constitutional limits,"[37] and it refused to apply Kansas substantive law to the multi-state class members' claims.[38]

Given *Shutts'* teachings, if a plaintiff (located anywhere, really), pre-CAFA, filed a multi-state, class-action lawsuit against, say, an Ohio corporation in an Ohio state court for breach of contract, plaintiff's theory for countering defendant's "predominance" argument[39] during the class-certification stage and for obtaining nationwide class certification would be that, under *Shutts'* first prong, Ohio's contract law doesn't conflict with any other state's contract law; therefore, no problem exists applying Ohio law to class members located in multiple states.[40] On the other hand, if plaintiff's lawsuit alleged that defendant had violated Ohio's consumer-protection act,[41] plaintiff's response to defendant's predominance argument and theory for

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[37] *Id.*

[38] *Id.* at 823 ("We . . . reverse [the Kansas Supreme Court's] judgment insofar as it held that Kansas law was applicable to all of the transactions which it sought to adjudicate.").

[39] According to Federal Rule of Civil Procedure 23(b)(3), when alleging a class-action claim for money damages, one of the multiple requirements that a plaintiff must prove to a court's satisfaction to obtain class certification is that "the questions of law or fact common to the members of the class *predominate* over any questions affecting only individual members. . . ." (Emphasis added.) Generally referred to as Rule 23's "predominance requirement," "[t]he Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Prods. v. Windsor, 521 U.S. 591, 623 (1997). As a practical matter, "[i]n order to meet the predominance requirement of Rule 23(b)(3)**,** a plaintiff must establish that 'the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, . . . predominate over those issues that are subject only to individualized proof.'" *In re* Visa Check/Mastermoney Antitrust Litig., 280 F.3d 124, 136 (2d Cir. 2001) (citing Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1233 (11th Cir. 2000)). Importantly, "[t]he predominance requirement calls only for predominance, not exclusivity, of common questions." Shelter Realty Corp. v. Allied Maintenance Corp., 75 F.R.D. 34, 37 (S.D.N.Y. 1977).

[40] *See, e.g.,* Stetser v. TAP Pharmaceutical Prods. Inc., 165 N.C. App. 1, 17 (2004) (Explaining that "[t]he trial court's application of North Carolina law to a nationwide plaintiff class will pass constitutional muster only if the substantive laws of each of these states does not materially differ from North Carolina's law on plaintiffs' claims."); Microsoft Corp. v. Manning, 914 S.W.2d 602, 616 (Tex. Ct. App. 1995) (Affirming multi-state class certification under Texas law, explaining that "[n]o one will be injured in applying Texas law . . . if it is not in conflict with that of any other jurisdiction connected to this suit."); Delgozzo v. Kenny, 266 N.J. Super. 169, 192 (1993) (Reversing order denying certification of a multi-state fraud and fraudulent concealment class-action claim under New Jersey law, explaining that "[t]he additional problems with possible multi-state consumer fraud or other statutory claims raise manageable questions. The problems inherent in certifying a class presenting conflict of laws issues are not unsurmountable [sic]. . . .").

[41] Under some states' consumer-protection laws, the plaintiff must be a state resident for the statute to apply. *See e.g.,* Avery v. State Farm Ins. Co*.,* No. 91494, 2005 Ill. LEXIS 959, at *133 (Aug., 18 2005) ("We conclude, therefore, that the out-of-state plaintiffs in this case have no cognizable cause of action under the Consumer Fraud

obtaining nationwide class certification would be that, under *Shutts'* second prong, applying Ohio substantive law – here, Ohio's consumer-protection act – neither violates due process nor is fundamentally unfair because defendant is headquartered in Ohio, defendant's scheme was hatched and implemented in Ohio, defendant profited from its fraud in Ohio, and so on.[42] Importantly (and germane to this Article), when making either argument, plaintiff would invoke all Ohio state-court, class-action decisions applying Ohio substantive law to multi-state classes. For defendant's part, it would cite all Ohio state-court, class-action decisions refusing to apply Ohio substantive law to multi-state classes.

But in today's CAFA-nated world, plaintiff's multi-state, class-action complaint, if filed in Ohio state court, would be immediately removed to federal court,[43] unless plaintiff originally

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Act."); Goshen v. Mutual Life Ins. Co., 774 N.E.2d 1190, 1195 (N.Y. 2002) ("[T]o qualify as a prohibited act under the statute, the deception of a consumer must occur in New York.").

[42] *See, e.g.,* Renaissance Cruises, Inc. v. Glassman, 738 So. 2d 436, 439 (Fla. Ct. App. 1999) (Affirming class certification under Florida consumer-protection law where "[t]he trial court found that Florida had significant connections, [such as a]ppellant's principal place of business [was] in Florida, . . . appellant's U.S. business operations [were] controlled and carried out from [Florida,] any overages were kept by appellant in Fort Lauderdale[, thus] indicati[ng] the parties' mutual expectation that Florida law would apply. . . . ."); Gordon v. Boden, 224 Ill. App. 3d 195, 202 (1991) (Explaining that "if the trial court found that Illinois ha[d] significant contact to the claims asserted by each class member, the court could apply Illinois substantive law to this multi-state class action[, and that t]his finding would ensure that the application of Illinois law [was] neither arbitrary nor unfair.").

[43] According to 28 U.S.C. §1441, "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." Furthermore, according to CAFA, "[t]he amendments made by this Act shall apply to any civil action commenced on or after the date of enactment of this Act[, February 18, 2005]." 109 P.L. 109-2, §9, 119 Stat. 14 (2005). Consequently, since CAFA's enactment, defendants have routinely begun removing state-court, class-action cases to federal court where original jurisdiction, pursuant to CAFA, either does or is claimed to exist. *See, e.g.,* Natale v. Pfizer, Inc., 424 F.3d 43, 44 (1st Cir. 2005) (Affirming district court's remand order where defendant removed plaintiff's pre-CAFA lawsuit, explaining that a state lawsuit "commences" when it begins in state court, not when the defendant removes it to federal court.); Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 447 (7th Cir. 2005) (Reversing district court's order denying remand to state court following removal under CAFA where plaintiff's "suit was commenced after February 18, 2005, the Act's effective date."); Bush v. Cheaptickets, Inc., 425 F.3d 683, 684 (9th Cir. 2005) (Affirming district court's order remanding case to state court following removal under CAFA because "[b]y its own terms, the Act became effective for all actions that 'commenced on or after' February 18, 2005."); Dinkel v. GMC, No. 05-190-P-H, 2005 U.S. Dist. LEXIS 27237, at *7 (D. Maine Nov. 9, 2005) (Denying plaintiff's motion for remand since plaintiff's lawsuit, in which he failed to serve defendants all defendants within 90 days of his pre-CAFA complaint's filing, was not considered as having "commenced" pre-CAFA: "Under Kansas Rules of Civil Procedure, however, filing the complaint alone does not necessarily 'commence' the lawsuit. That filing

filed it in federal court.[44] Once in federal court, at class certification, a major question would be to what extent, if any, the federal judge could call upon or properly be influenced by Ohio state-court, class-action decisions considering class certification under Ohio Rule 23 and applying (or not) Ohio's substantive law to multi-state classes. After all, class certification is a procedural question under Federal Rule 23, and, as a procedural question, the U.S. Supreme Court's *Erie R.R. Co. v. Tompkins*[45] decision – generally directing that federal courts in diversity cases (which multi-state class actions are) must apply state substantive law but are directed to apply federal procedural law[46] – arguably requires the federal judge to consider only federal jurisprudence, since class certification is a procedural, not a substantive, inquiry.

But can't it be argued that determining what state's substantive law applies to classwide claims really is, in a way, a *substantive* question to be decided under the forum state's jurisprudence, thus permitting the federal judge to consider and apply state law, whether the forum state's or some other's, when deciding predominance under Federal Rule 23?[47] And if so,

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'commences' the lawsuit only if process is served within 90 days thereafter. Otherwise (*i.e.*, if more than 90 days passes), the lawsuit does not 'commence' until service of process occurs. . . ."); Eufaula Drugs, Inc. v. Scripsolutions, 2005 U.S. Dist. LEXIS 24821, at *12-13 (M.D. Ala. Oct. 6, 2005) (Remanding pre-CAFA case to state court even though plaintiff filed its amended complaint after CAFA's enactment, explaining that "the Amended and Restated Complaint would relate back [and that] this case was commenced for purposes of the CAFA before the effective date of the CAFA.").

[44] *See* 28 U.S.C. §1332(a) (2005) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . Citizens of different States. . . ."). *See also supra* Part II.

[45] 304 U.S. 64 (1938).

[46] *Id.* at 78 ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."). *See infra* Part V.

[47] *See, e.g.,* Simer v. Rios, 661 F.2d 655, 672 (7th Cir. 1981) ("Our inquiry into the predomination analysis must[, in part,] be on the substantive elements of plaintiffs' cause of action and inquire into the proof necessary for the various elements."); Murray v. America's Mortgage Banc, Inc., Nos. 03 C 5811, 03 C 6816, 2005 U.S. Dist. LEXIS 11751, at *9 (N.D. Ill. May 5, 2005) ("The predominance factor requires consideration of the substantive elements of the plaintiffs' cause of action."); *In re* Tri-State Crematory Litig., 215 F.R.D. 660, 691 (N.D. Ga. 2003) ("[T]he Court will begin its predominance analysis by setting forth the elements of the substantive law for each cause of action."); *In re.* Vitamins Antitrust Litig., 209 F.R.D. 251, 263 (D.D.C. 2002) ("[T]he predominance inquire also requires the identification of the elements of the substantive law at issue."); Ploog v. Homeside Lending, Inc., No. 00 C 6391, 2001 U.S. Dist. LEXIS 15697, at *22 (N.D. Ill. Sept. 28, 2001) ("In determining whether the predominance requirement has been met, the 'Court considers the substantive elements of the Plaintiff's cause of

does the fact that the federal court is considering what state's substantive law to use necessarily render this inquiry substantive even though the court is conducting a larger procedural analysis?

In this manner, might a court's procedural, federal, class-action analysis be allowed a "substantive twist," specifically where predominance under Federal Rule 23(b)(3) (*i.e.,* which state or states' substantive law should apply) is concerned? And if so, does considering state-court, class-action decisions run afoul of *Erie,* or is making a substantive inquiry when conducting a larger procedural one a necessary part of a new CAFA-nated, class-action analysis *under Erie*?[48] Let's find out.

IV. THE FALLACY OF RELYING EXCLUSIVELY ON STATE CHOICE-OF-LAW JURISPRUDENCE

When attempting to resolve this conundrum, the temptation might exist to rely principally, if not exclusively, on state choice-of-law jurisprudence and the U.S. Supreme

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action, the proof necessary for the various elements, and the manageability of the trial on these issues.'"); Ingram v. Coca-Cola Co., 200 F.R.D. 685, 700 (N.D. Ga. 2001) ("[The p]redominance requirement focuses on the substantive aspects of class members' legal claims. . . ."); Panache Broad. v. Richardson Elecs., No**.** 90 C 6400, 1995 U.S. Dist. LEXIS 14462, at *38 (N.D. Ill. Sept. 27, 1995) ("[A] court should begin the predominance inquiry by focusing on the substantive elements of the cause of action, and then examine the evidence necessary to prove those elements in order to determine whether common or individual questions are likely to predominate in the litigation.").

[48] Or perhaps state-court Rule 23 decisions considering what state's substantive law to apply are sufficiently procedural such that they can necessarily be used according to *Erie,* just like state courts frequently used Federal Rule 23 decisions when considering class certification under their state Rule 23 or equivalent procedural statute. *See, e.g.,* Southwestern Refining Co., Inc. v. Bernal, 22 S.W.3d 425, 433 (Tex. 2000) ("[Texas Rule 42] is patterned after Federal Rule of Civil Procedure 23; consequently, federal decisions and authorities interpreting current federal class action requirements are persuasive authority."); Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole, 896 So. 2d 773, 777 (Fla. Ct. App. 2004) ("The federal cases on the issue are persuasive, because Florida [R]ule 1.220, which governs certification of a class, is modeled on [F]ederal [R]ule 23, which is interpreted in the above federal cases."); *In re* Logan, No. 47301-8-I, 2002 Wash. App. LEXIS 475, at *11 (Mar. 11, 2002) ("Federal Rule 23 and Washington CR 23 are the same. '[T]hus, federal cases interpreting the analogous federal provision are highly persuasive.'"); CSX Transp. v. Clark, 646 N.E.2d 1003, 1007 (Ind. Ct. App. 1995) ("Federal class action cases decided under Federal Rule 23 are persuasive authority for Indiana Courts interpreting Ind. Trial Rule 23."); Sisters of St. Mary v. Aaer Sprayed Insulation, No. 85CV5952, 1987 Wisc. App. LEXIS 4440, at *11 n.8 (Dec. 17, 1987); ("[O]ur courts have relied on Federal Rule 23 and federal cases addressing it to approve of procedural determinations made by Wisconsin trial courts in class action cases."); Perry v. Meek, 618 P.2d 934, 940 (Okla. Ct. App. 1985) ("Insofar as the issues under consideration arise from provisions of 12 O.S. Supp. 1979 §§13-18, which are actually similar to the provisions of Federal Rule of Civil Procedure 23, the federal case law on those points is instructive persuasive authority in this forum."); Williams v. Motorists Ins. Corp., No. 76 CA 148, 1977 Ohio App. LEXIS 10012, at *11 (Aug. 12, 1977) ("As to the law that would apply in the instant case, it is helpful to resort to federal cases dealing with a similar rule, Federal Rule 23."). This query, though, is one for another article.

Court's *Klaxon Co. v. Stentor Electric Manufacturing Co., Inc.*[49] decision, where the Court considered whether, in a diversity case, "the federal courts must follow conflict of laws rules prevailing in the states in which they sit."[50] Explaining that *Erie's* scope extended "to the field of conflict of laws,"[51] the *Klaxon* Court ruled that "[t]he conflict of laws rules to be applied by the [sitting] federal court . . . must conform to those prevailing in [the forum state's] state courts."[52]

In the relatively infrequent occurrence where a federal court, pre-CAFA, was asked to consider multi-state class certification – because, for instance, diversity existed and the requested injunctive relief was considered as meeting or exceeding the jurisdictional amount in controversy[53] – federal courts, as first suggested by *Allstate* and later by *Shutts*, sometimes invoked *Klaxon* to conclude that the forum state's choice-of-law rules applied pursuant to which these courts could blithely rule that one state's substantive law applied to the controversy:

> If a conflict of law is found to exist in this [multi-state, class-action] litigation, this Court, sitting in diversity, is bound to apply the choice of law rules of the forum state, New York. [Citing *Klaxon*] In the event that a conflict of substantive law did exist . . . New York courts apply a "center of gravity" or

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[49] 313 U.S. 487 (1941).
[50] *Id.* at 494.
[51] *Id.* at 496.
[52] *Id.*
[53] *See, e.g.,* Kanter v. Warner-Lambert Co., 265 F.3d 853, 860 (9th Cir. 2001) (Explaining that federal jurisdiction exists in cases where "it is apparent that injunctive relief is the primary relief sought."); Steinberg v. Nationwide Mutual Ins. Co., 224 F.R.D. 67, 71 (E.D.N.Y. 2004) ("[T]he injunctive relief sought by the plaintiff furnishes the basis for federal jurisdiction."); Jackson v. Johnson & Johnson, Inc., 2001 U.S. Dist. LEXIS 22329, at *15 (W.D. Tenn. Apr. 3, 2001) (Denying plaintiffs' motion for remand because they "were seeking injunctive relief in the form of the medical monitoring program[, and t]he amount in controversy, therefore, was measured by the value of the object of litigation."); Hubbard v. Gen. Motors Corp., No. 95 Civ. 4362, 1996 U.S. Dist. LEXIS 6974, at *8 (S.D.N.Y. May 22, 1996) ("The Court finds that plaintiff and the alleged class members have a common and undivided interest in the injunctive and declaratory relief sought herein. Therefore, the jurisdictional amount requirement is satisfied if their interests collectively exceed $ 50,000."); Gibbs v. E.I. DuPont De Nemours & Co., 876 F. Supp. 475, 479 (W.D.N.Y. 1995) ("In a suit for injunctive or declaratory relief, the amount in controversy is measured by the value of the object of the litigation. [Citation omitted.] The value of the medical monitoring program sought by plaintiffs is well in excess of $50,000, even using defendants' figures.").

> "grouping of contracts" test . . . and apply "the law of the jurisdiction having the greatest interest in the litigation."[54]

But conducting merely a traditional choice-of-law analysis and deciding whether or not predominance is satisfied under the forum state's substantive law fails to consider the larger procedural overlay that federal courts must appreciate when analyzing what is undeniably a procedural question under Federal Rule 23. A shorthand analytical approach under *Klaxon* ignores *Erie* and its progeny and their generally understood directive to consider federal law with respect to procedural matters and state law with respect to substantive ones; although, a Federal Rule 23 predominance analysis may well be a substantive matter, just not entirely.[55]

Moreover, conducting solely an *Allstate/Shutts* analysis, and determining "that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair,"[56] also undermines, and indeed entirely neglects, any meaningful procedural analysis. To merely contemplate the substantive choice-of-law issues raised by *Allstate* and *Shutts*, while ignoring the procedural realities that a Rule 23 predominance analysis necessarily engenders, likewise ignores the Supreme Court's

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[54] *Steinberg*, *supra* note 53, at 78 (suggesting that applying New York substantive law to multi-state claims when conducting Federal Rule 23's predominance inquiry was appropriate). *See also* Simon v. Philip Morris, Inc., 124 F. Supp. 2d 46, 70 (E.D.N.Y. 2000) ("The significant contacts with New York state in this [multi-state, class-action] case satisfy Due Process and Full Faith and Credit under *Shutts*."); Gruber v. Price Waterhouse, 117 F.R.D. 75, 82 (E.D. Pa. 1987) (Finding selection of forum law constitutional in securities litigation where defendant "Pennsylvania ha[d] the most significant relationship . . . since the financial statements alleged to contain the misstatements emanated from Pennsylvania."); *In re* ORFA Sec. Litig., 654 F. Supp. 1449, 1455 (D.N.J. 1987) ("[I]t is clear that New Jersey law applie[d] to the questions raised by Count V of the Complaint" because defendant's principle place of business was New Jersey and its alleged misrepresentations originated there.); *In re* Lilco Sec. Litig., 111 F.R.D. 663, 670 (E.D.N.Y. 1986) ("After *Shutts* it is not at all certain that application in this case of one state's law is unconstitutional and in the event New York is applied, it may be that New York choice of law rules direct the application of New York law."); *In re* Activision Sec. Litig., 621 F. Supp. 415, 430-31 (N.D. Cal. 1985) ("Court . . . entertain[ed] a presumption that California law . . . control[ed the] case" because defendant maintained its principle place of business there, issued securities there, and the purchasers' acceptances were directed there.).

[55] *See generally* note 54.

[56] *Allstate, supra* note 31, at 312-13.

long-standing *Erie* doctrine in favor of another analytically short-shrift choice-of-law approach when considering multi-state, class-action litigation and a single state law's substantive application.

V. *ERIE* AND ITS PROGENY

Examining *Erie R.R. Co. v. Tompkins*[57] and its progeny provides some better and more complete guidance concerning federal courts' ability to invoke state-law jurisprudence when considering multi-state, class-action claims and applying a single state's substantive law.

A. The Erie *Doctrine*

In *Erie,* an object protruding from an Erie freight train injured Tompkins, a Pennsylvania resident, while he was walking in Pennsylvania along a commonly used beaten footpath that ran alongside the railroad tracks.[58] When Tompkins brought his claim in New York federal court, because Erie was incorporated there,[59] Erie contended that under Pennsylvania law, "its duty to Tompkins was no greater than that owed to a trespasser."[60] For Tompkins' part, he "denied that any such rule had been established by the decisions of the Pennsylvania courts; and contended that, since there was no statute of the State on the subject, the railroad's duty and liability [was] to be determined in federal courts as a matter of general law," which favored Tompkins.[61] "The question for decision," explained the Court, was "whether the oft-challenged doctrine of *Swift* v. *Tyson* shall now be disapproved."[62]

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[57] 304 U.S. 64 (1938).
[58] *Erie, supra* note 45, at 69.
[59] *Id.*
[60] *Id.* at 70.
[61] *Id.*
[62] *Id.* at 69.

In *Swift v. Tyson,*[63] the Court had earlier held that federal courts exercising diversity jurisdiction, in general jurisprudential matters, weren't required to apply the states' unwritten laws. Rather, federal courts were free to exercise independent judgment as to what the states' common law was or should have been:

> [T]he true interpretation of the thirty-fourth section [of the 1789 Judiciary Act] limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding, that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this Court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed.[64]

But the *Erie* Court explained that applying *Swift's* doctrine had exposed serious political and social defects; *Swift's* expected benefits had never accrued; and persistent state courts' questions concerning common law had prevented uniformity:

> [T]he mischievous results of the doctrine had become apparent. Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State. *Swift* v. *Tyson* introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten "general law" vary according to whether

[63] 41 U.S. 1 (1842).
[64] *Id.* at 18-19.

> enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the State.[65]

Accordingly, the *Erie* Court held that, "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no federal general common law."[66] The Court added that Mr. Justice Holmes, in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*,[67] had articulated the "fallacy"[68] underlying *Swift's* rule:

> The doctrine rests upon the assumption that there is "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute," that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts "the parties are entitled to an independent judgment on matters of general law":
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> > "but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. . . .
> >
> > "the authority and only authority is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word."[69]

Accordingly, the Court held that, under Pennsylvania law, "the only duty owed to the plaintiff was to refrain from wilful or wanton injury,"[70] and it "reversed and the case remanded

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[65] *Id.* at 74-75 (footnote omitted).
[66] *Id.* at 78.
[67] 276 U.S. 518 (1928).
[68] *Erie, supra* note 45, at 79.
[69] *Id.* (quoting *Black & White Taxicab Co*., *supra* note 67, at 532-36).
[70] *Id.* at 80.

to it for further proceedings in conformity with [its] opinion."[71] More generally, of course, the *Erie* Court's discussion and mandate have become understood to mean that "federal courts sitting in diversity cases, when deciding questions of 'substantive' law, are bound by state court decisions as well as state statutes."[72]

B. Erie's *Transformation* – Guaranty Trust Co. v. York

Supreme Court cases considering other various and assorted federal/state-law quandaries transformed and reshaped *Erie's* original mandate. Of *Erie's* progeny, *Guaranty Trust Co. v. York*[73] offers perhaps the most valuable analytical succor, at least for this Article's purpose. In *York,* plaintiff-noteholder sued a class-action case in federal court, based on diversity of citizenship, alleging breach of trust by defendant for defendant's alleged failure to protect her and other noteholders' interests.[74] The appellate court ruled that the district court was "not required to apply the State statute of limitations that . . . govern[ed] like suits in the courts of a State where the federal court [was] sitting even though the exclusive basis of federal jurisdiction [was] diversity of citizenship."[75]

The Supreme Court's "concern [was] with the [appellate court's] holding that the federal court in a suit like [that] one [was] not bound by local law."[76] As this concern specifically affected the state statute of limitations, the case, the Court believed, "reduce[d] itself to the narrow question whether, when no recovery could be had in a State court because the action

[71] *Id.*
[72] Hanna v. Plumer, 380 U.S. 460, 465 (1965).
[73] 326 U.S. 99 (1945).
[74] *Id.* at 100.
[75] *Id.* at 101.
[76] *Id.*

[was] barred by the statute of limitations, a federal court in equity [could] take cognizance of the suit because there [was] diversity of citizenship between the parties."[77]

The Court's analysis underscored *Erie's* objective to ensure that where a federal court is exercising diversity jurisdiction, the litigation's outcome in federal court should be substantially the same as if tried in state court:

> Is the outlawry [or endorsement], according to State law, of a claim created by the States a matter of "substantive rights" to be respected by a federal court of equity when that court's jurisdiction is dependent on the fact that there is a State-created right, or is such statute of "a mere remedial character," . . . which a federal court may disregard?[78]

Withdrawing from *Erie's* substantive versus procedural construct, the Court explained that "[m]atters of 'substance' and matters of 'procedure' are much talked about in the books as though they define[] a great divide cutting across the whole domain of law. But, of course, 'substance' and 'procedure' are the same keywords to very different problems."[79] The Court restated the question it had considered in *Erie,* focusing no longer on the substantive-procedural distinction but rather marking the emergence of its "outcome determinative test":

> And so the question is not whether a statute of limitations is deemed a matter of "procedure" in some sense. The question is whether such a statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, *does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court*?[80]

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[77] *Id.* at 107.
[78] *Id.* at 107-08.
[79] *Id.* at 108. *See also Hanna, supra* note 72, at 472 ("[A] federal court system . . . carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.").
[80] *York, supra* note 73 at 109 (emphasis added).

The Court considered it "immaterial whether a statute of limitations [was] characterized either as 'substantive' or 'procedural,'"[81] as *Erie* never endeavored to formulate scientific terminology. Rather, *Erie* expressed a *policy* touching vitally on the judicial power's proper distribution between state and federal courts.[82] And despite lower courts' sometimes slavish adherence to nomenclature, *Erie's* intent was to ensure the same result in state and federal courts exercising diversity jurisdiction, not to entangle courts with analytical or terminological niceties:

> [T]he intent of [*Erie*] was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies *Erie R. Co*. v. *Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result.[83]

A federal tribunal, explained the Court, did not afford out-of-state litigants another body of law.[84] Rather, *state law* is the source of substantive rights enforced by a federal court exercising diversity jurisdiction:

> Here we are dealing with a right to recover derived not from the United States but from one of the States. When, because the plaintiff happens to be a non-resident, such a right is enforceable in a federal as well as in a State court, the forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic. But since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, *it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State*.[85]

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[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.* at 112.
[85] *Id.* at 108-09 (emphasis added).

In keeping with its purpose to avoid federal courts reaching different results than would otherwise occur in state courts, the Court ruled that the state statute of limitations applied to plaintiff's claim, and it remanded the case for further proceedings.[86]

C. York's *"Outcome-Determinative" Test Modified* – Byrd v. Blue Ridge Rural Electric Cooperative, Inc.

The Court modified its outcome-determinative test thirteen years later in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*[87] The question presented in *Byrd* was whether "on remand the factual issue [of whether plaintiff was an employee or independent contractor was] to be decided by the judge or by the jury."[88] Under state law, the judge decided this question, while under federal law the jury did. In deciding this issue, the Court reiterated *Erie's* directive that "the federal courts in diversity cases must respect the definition of state-created rights and obligations by the state courts."[89] It therefore examined state law "to determine whether [the particular judge versus jury issue was] bound up with these rights and obligations in such a way that its application in the federal court [was] required."[90]

The Court first reiterated *York's* outcome-determinative test and acknowledged that it broadened *Erie*:

> [C]ases following *Erie* have evinced a broader policy to the effect that the federal courts should conform as near as may be – in the absence of other considerations – to state rules even of form and mode where the state rules may bear substantially on the question whether the litigation would come out one way in the federal court and another way in the state court if the federal court failed to apply a particular local rule.[91]

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[86] *Id.* at 112.
[87] 356 U.S. 525 (1958).
[88] *Id.* at 533.
[89] *Id.* at 535.
[90] *Id.*
[91] *Id.* at 536-37.

But the Court then withdrew slightly from *York's* test, explaining that, under certain conditions, federal law trumped state law:

> [T]here are affirmative countervailing considerations at work here. The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence – if not the command – of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury. [Citation omitted] The policy of uniform enforcement of state-created rights and obligations . . . *cannot in every case exact compliance with a state rule – not bound up with rights and obligations* – which disrupts the federal system of allocating functions between judge and jury. [Citation omitted] Thus the inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court.[92]

The Court believed that "in the circumstances of [that] case the federal court should not [have] follow[ed] the state rule," because it "[could not] be [disputed] that there is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts."[93] As an additional basis for its decision, the Court added that, with respect to the litigation's potentially different outcome based on "whether the issue of immunity [was] decided by a judge or jury,"[94] it didn't "think the likelihood of a different result [was] so strong as to require the federal practice of jury determination of disputed factual issues to yield to the state rule in the interest of uniformity of outcome."[95]

By this wrinkle to *York's* outcome-determinative test, the Court required lower federal courts to weigh the policies behind the relevant federal and state rules to determine whether a substantial possibility exists that different results will occur under federal law. If the state

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[92] *Id.* at 537-38 (emphasis added).
[93] *Id.* at 538.
[94] *Id.* at 539 (If plaintiff was considered an employee, he was barred from suing defendant because the workers compensation laws provided him an exclusive remedy.).
[95] *Id.* at 540.

practice reflects a weak state policy – one "not bound up" with the underlying state statute – yet the federal practice reflects a strong policy – such as the Seventh Amendment's jury trial guarantee – and if no substantial possibility exists that different results will occur by using federal law, then the federal practice is preferred. Finding this test satisfied, the Court reversed and remanded the case for a new trial.[96]

D. A Return to York – Hanna v. Plumer

But seven years later, in *Hanna v. Plumer,*[97] the Court swung back *Erie and York's* way when considering whether to require "service of process . . . in the manner prescribed by state law or that set forth in Rule 4(d)(1) of the Federal Rules of Civil Procedure."[98] Synthesizing the preceding cases, the Court again acknowledged *Erie's* rule that "federal courts sitting in diversity cases, when deciding questions of 'substantive' law, are bound by state court decisions as well as state statutes."[99] It described that *York* "made it clear that *Erie*-type problems were not to be solved by reference to any traditional or common-sense substance-procedure distinction. . . ."[100] As the Court had explained earlier in *Byrd*, *York's* outcome-determinative test "was never intended to serve as a talisman."[101] Instead, *York's* message was that "choices between state and federal law are to be made not by application of any automatic, 'litmus paper' criterion, but rather by reference to the policies underlying the *Erie* rule."[102]

Applying Federal Rule 4(d)(1), the Court reiterated that the natural difference between federal and state courts ought not substantively affect a claim just because the claim is pending

[96] *Id.*
[97] 380 U.S. 460 (1965).
[98] *Id.* at 461.
[99] *Id.* at 465.
[100] *Id.* at 465-66.
[101] *Id.* at 466-67.
[102] *Id.* at 467.

in federal court. "*Erie* and its offspring," explained the Court, "cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules."[103] Rather, federal courts' natural "housekeeping rules" shouldn't affect the essence of claims brought in federal court, and federal courts should avoid inequitably administering state substantive laws merely because diversity exists and the claims reside in federal court.

VI. FEDERAL COURTS' FREEDOM TO CONSIDER STATE-COURT, CLASS-ACTION JURISPRUDENCE

So how does all this concern our current issue, which is whether federal courts, when considering multi-state class certification under Federal Rule 23 pursuant to a single state's substantive law, may rely on state-court, class-action decisions either supporting or denying single-state-law application. After all, myriad state-law decisions exist upon which federal judges can potentially draw when considering the multi-state class-certification issues that state-court judges had previously decided for years.[104]

Given that Federal Rule 23 is, of course, a procedural rule, analyzing this question exclusively under *Erie* encourages solely applying federal decisions when deciding class certification. But as we know, class certification, particularly when considering a single state law's substantive application under Federal Rule 23's predominance requirement, *isn't* entirely a procedural undertaking – various courts' *Klaxon* analyses, which analyze and apply states' substantive laws, confirm this.[105]

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[103] *Id.* at 473.
[104] *See supra* note 22.
[105] *See, e.g.,* Coghlan v. Wellcraft Marine Corp., 240 F.3d 449, 452 n.2 (5th Cir. 2001) (analyzing substantive, state choice-of-law question under *Klaxon*); Zinser v. Accufix Research Institute, Inc., 253 F.3d 1180, 1187 (9th Cir.

Rather, state laws undeniably create the claims upon which most multi-state, class-action lawsuits are based, whether involving consumer fraud,[106] deceptive trade practices,[107] breach of contract,[108] unjust enrichment,[109] or some other state-law statutory or common-law claim. In this manner, state laws and their application can't help but to "significantly affect the result of a litigation,"[110] since federal lawsuits based on diversity jurisdiction necessarily involve state-law claims. Accordingly, neglecting state law, either substantive or sometimes procedural, would preclude federal courts from fully and properly deciding multi-state, class-action claims under a single state's substantive law.

2001) (same); Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 725 n.6 (11th Cir. 1987) (same); Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 676 F.2d 56, 60 n.10 (3rd Cir. 1982) (same).

[106] *See, e.g.,* Spector v. Toys "R" Us, Inc., 12 A.D.3d 358, 359 (N.Y. App. Div. 2004) (Class-action, consumer-fraud claim against Toys "R" Us involving claim "where gift receipts were presented upon an item being returned, the person presenting it would receive an amount less than that paid for the item."); Small v. Lorillard Tobacco Co., 252 A.D.2d 1, 5 (N.Y. App. Div. 1998) (Class-action, consumer-fraud case for allegedly "deceiv[ing consumers] into becoming smokers because defendants lied about nicotine's addictive properties while secretly manipulating the nicotine content of their products in order to addict consumers."); Clothesrigger, Inc. v. GTE Corp., 191 Cal. App. 3d 605, 619-20 (1987) (Class-action, consumer-fraud claim for Sprint allegedly "charg[ing] for incompleted calls.").

[107] *See, e.g.,* Bally Total Fitness Corp. v. Jackson, 53 S.W.3d 352 (Tex. 2001) (Class-action, deceptive trade practices claim alleging that Bally's "was liable under the Texas Deceptive Trade Practices Act for unconscionable conduct and for representing that [its member] agreement[s] conferred rights and obligations prohibited by law."); Chase Manhattan Mortgage Corp. v. Porcher, 898 So. 2d 153, 156 (Fla. Ct. App. 2005) (Class-action, deceptive trade practices claim "alleg[ing] that Chase ha[d] a deliberate policy of failing to post mortgage payments on the same date they were received so that it can charge unwarranted late fees."); J.M. Smucker Co. v. Rudge, 877 So. 2d 820, 821 (Fla. Ct. App. 2004) (Class-action, deceptive trade practices claim "alleging that Smucker's Simply 100% Fruit products [didn't] contain 100% fruit.").

[108] *See, e.g.,* Avery v. State Farm Mut. Auto. Ins. Co., 216 Ill. 2d 100, 110 (2005) (Class-action, breach-of-contract claim against State Farm disputing "the propriety of State Farm's uniform practice of specifying the use of non-OEM crash parts to repair its policyholders' cars in every instance in which such cheaper parts are available."); Discover Bank v. Superior Court of Los Angeles, 36 Cal. 4th 148, 154 (2005) (Class-action, breach-of-contract claim against Discover Bank for allegedly "breach[ing] its cardholder agreement by imposing a late fee of approximately $29 on payments that were received on the payment due date, but after Discover Bank's undisclosed 1:00 p.m. 'cut-off time.'"); Carolla v. Am. Family Mut. Ins. Co., No. A03-0021, 2003 Minn. App. LEXIS 1109, at *2 (Sept. 9, 2003) (Class-action, breach-of-contract claim "asserting that the value of [plaintiff's] car was diminished as a result of being in an accident and that American Family's Minnesota Family Car Policy covered that diminished-value loss.").

[109] *See, e.g.,* Ortiz v. Ford Motor Co., 909 So. 2d 479, 480 (Fla. Ct. App. 2005) (Class-action, unjust-enrichment claim "alleging [that plaintiff] overpaid for his 1998 Ford Explorer beyond its true value due to the Defendant's concealment of a design defect."); Baltimore Football Club, Inc. v. Superior Court, 171 Cal. App. 3d 352, 356 (1985) (Class-action, unjust-enrichment action where class asserted "claims of unjust enrichment from the use of season ticket purchase money during a year in which games were cancelled due to the strike."); Boldt v. Correspondence Mgmt., 320 N.J. Super. 74, 77 (1999) (Class-action, unjust-enrichment claim for "alleged photocopying overcharges by health care providers. . . .").

[110] York, *supra* note 73, at 109.

Erie made clear that state substantive law had a significant place in federal courts' legal analyses. Indeed, *York* confirmed that federal courts may not disregard state law as explicated in state-court decisions. After all, if *Erie's* intent was to ensure the same substantive result in federal courts exercising diversity jurisdiction as in state courts, and state law is the source from which all substantive rights enforced by federal courts exercising diversity jurisdiction derive, no more authoritative source for state law exists than state-court decisions, including state-court decisions considering a single state law's substantive application under state class-action rules.

Moreover, considering state-court, class-action decisions advances *Erie* and its progeny's directive that a lawsuit's outcome remains substantially the same despite the court in which the lawsuit is pending. And although *Byrd* scaled back *York's* outcome-determinative test, explaining that uniformly applying state-created rights and obligations (here, state-law, class-action decisions interpreting and applying state substantive law) needn't apply where these state laws are "not bound up with the [state] rights and obligations" sought to be invoked, state-court, class-action decisions *can* fairly be considered as bound up with – or essential to – state class-action rules' fundamental purposes since, in light of these rules' purposes, state-court, class-action decisions considered, interpreted, and applied these state class-action rules from the time these rules were enacted. Moreover, acceding to state-court decisions doesn't risk disrupting or otherwise offending the federal system, as occurred in *Byrd* since almost all state class-action statutes mirror Federal Rule 23.[111]

[111] *See, e.g.,* ARIZ. ST. R. CIV. P. 23 (2005); ARK. R. CIV. P. 23 (2005); FLA. R. CIV. P. 1.220 (2005); IND. R. CIV. P. 23 (2005); KY. CIV. R. 23.01, 23.02 (2005); ME. R. CIV. P. 23 (2005); MASS. R. CIV. P. 23 (2005); MI. CT. R. 3.501 (2005); MINN. R. CIV. P. 23.01, 23.02 (2005); N.Y. CIV. PRAC. L. & R. 901 (McKinney 2005); OHIO R. CIV. P. 23 (2005); PA. R. CIV. P. 1702 (2005); TENN. R. CIV. P. 23.01, 23.02 (2005); TEX. R. CIV. P. 42; VT. R. CIV. P. 23 (2005) (all mirroring Federal Rule 23 and its prerequisites).

Viewed from the opposite end, using federal class-action decisions alone isn't so bound up in Federal Rule 23's predominance analysis – like, for example, the right to a jury trial is in the Constitution[112] – that state-court jurisprudence considering predominance should be abandoned, especially considering the near, if not complete, identity between most states' class-action rules and Federal Rule 23.[113] To be sure, no "strong federal policy"[114] exists *against* federal courts using state-court, class-action decisions when analyzing the identical predominance inquiry and single state law's classwide application that had been, until recently, all but exclusively considered in state courts. And a predominance inquiry's outcome may differ based on the influence of the state-court decisions invoked versus the relatively scant federal authority on this newly developing subject, which is yet another basis *Byrd* suggested for invoking state substantive law and, accordingly, state-court decisions.

As suggested by *Hanna,* the fact that interstate, class-action claims are now federalized shouldn't substantively affect these claims' determination. Even though state and federal courts aren't identical, federal courts should avoid ignoring or inequitably administering state laws merely because CAFA now confers original federal-court, subject-matter jurisdiction on interstate, class-action claims. Rather, federal courts' adherence to state-court, class-certification jurisprudence advances *Erie* and its progeny's age-old pronouncements and helps ensure that now federalized state-court claims will be decided substantially the same in federal court – their new forum – as they had traditionally been decided in state court.

And finally, as a practical matter, absent state-law consideration, federal courts sitting in diversity – many of which will imminently be considering this issue for the first time – will lack

[112] *Byrd, supra* note 87, at 540.
[113] *See supra* note 111.
[114] *Byrd, supra* note 87, at 538.

significant guidance concerning application of a single state's substantive law to multi-state claims. To abandon years of well-developed, state-court jurisprudence forces busy and newly challenged federal judges to analyze this issue from a largely blank federal slate, surely an undesirable consequence[115] and one that hardly comports with the judiciary's obvious and fundamental interest to adjudicate claims – especially class-action claims – judiciously, efficiently, and economically.[116]

VII. CONCLUSION

Whether to apply a single state's substantive law when considering predominance under Federal Rule 23 necessarily traverses the substantive and procedural divide, and this query's unique nature evokes *Erie's* fundamental essence. But examining *Erie* and its progeny (perhaps even alongside *Klaxon, Allstate,* and *Shutts*) demonstrates that federal courts may, in fact, consider state-court decisions when deciding multi-state class certification alleging a single state law's substantive application. Indeed, considering state-court jurisprudence respects *Erie's* original mandate while embracing its progeny's amplifications and nuances.

And although this issue is merely of the many still to come from CAFA's recent enactment, as federal, multi-state, class-action lawsuits move toward class certification, it is an issue sure to receive significant attention. *Erie* and its progeny, although never contemplating their invocation in this new world order, nonetheless demonstrate the appropriateness of invoking state-law, class-action jurisprudence in federal class-certification proceedings

[115] *See, e.g.,* Local Union No. 12004, USW v. Massachusetts, 377 F.3d 64, 77 (1st Cir. 2004) (expressing discomfort with "decid[ing an] issue on a blank slate"); Visser v. Magnarelli, 542 F. Supp. 1331, 1338 (N.D.N.Y. 1982) (emphasizing the importance of precedent so as to avoid "dedid[ing issues] on a tabula rasa").

[116] *See, e.g.,* Carson v. Polley, 689 F.2d 562, 585 (5th Cir. 1982) ("District courts are entitled to manage their cases with the aim of conducting litigation efficiently."); Lowth v. Town of Cheektowaga, No. 94-CV-0486E(F), 1997 U.S. Dist. LEXIS 5589, at *7 (W.D.N.Y. Mar. 7, 1997) (acknowledging plaintiffs "logical – indeed laudable – desire to litigate their claims as efficiently as possible"); Gabelli v. Sikes Corp., No. 90 Civ. 4904 (JMC), 1990 U.S. Dist. LEXIS 17015, at *16 (S.D.N.Y. Dec. 14, 1990) (acknowledging "the desire to avoid piecemeal litigation and promote judicial economy").

considering a single state law's substantive application. Federal courts deciding multi-state class certification under Federal Rule 23, therefore, are invited to sit back and drink in state-court, class-action jurisprudence involving, analyzing, and determining single state laws' substantive application in today's CAFA-nated world.