

Some Realism about Mass Torts

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Mass Torts in a World of Settlement

Richard A. Nagareda. Chicago, 2007. Pp vii, 324.

INTRODUCTION

In 1995, Peter Schuck began an important article by recalling the summer of 1969, when physicians prescribed diethylstilbestrol (DES) to prevent miscarriages, soldiers sprayed Agent Orange freely in Vietnam, and crushing liability for asbestos companies remained in the future.¹ Mass torts had not yet become a phenomenon. Reflecting on the subsequent twenty-five years of tumult, Schuck made a “preliminary” effort to define a “mass tort system.”² Schuck expressed his optimism that this system, a set of dispute resolution processes, could adequately bring peace to complex mass harms.³ Since then, the mass tort system he outlined has endured a true trial by fire. Scores of mass injuries, the ugly underbelly of a global marketplace, have plagued American courts with thousands of complicated cases. Several of the most ambitious efforts to herd such litigation toward an efficient and just conclusion have

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¹ Peter Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L Rev 941, 945–46 (1995). By the mid-1980s, DES had become the subject of many class actions. See *Collins v Eli Lilly Co*, 342 NW2d 37, 45 (Wis 1984) (observing that approximately one thousand class action suits were pending at the time DES was banned). Agent Orange led to a class settlement of then-record-breaking proportions. See *In re “Agent Orange” Product Liability Litigation MDL No 381*, 818 F2d 145, 171–74 (2d Cir 1987) (approving a \$180 million settlement agreement that addressed an estimated 20,000 claims). The first major break in favor of asbestos plaintiffs came in 1973. See *Borel v Fibreboard Paper Products Corp*, 493 F2d 1076, 1103 (5th Cir 1973) (affirming a jury verdict holding defendants liable for failing to warn of dangers from asbestos exposure).

² Schuck, 80 Cornell L Rev at 944 (cited in note 1).

³ See *id* at 980 (explaining that the mass tort system is favorable to the available alternatives because it takes the valuable elements from a common law approach, is consistent with a contractual approach, and is likely to be more administrable than a bureaucratic approach).

failed, at times in spectacular fashion.⁴ A dozen years of mass tort litigation have put front and center the question of whether global peace—the final resolution of a defendant’s liability to thousands or even millions of possible plaintiffs—is possible in a legal system that begins with the premise that each individual has a right to her own day in court.⁵

An answer should begin with a thorough reevaluation of the mass tort system Schuck outlined, and Richard Nagareda has provided one in his *Mass Torts in a World of Settlement*. Nagareda addresses the central problem for the mass tort system: how can a small group of private lawyers craft a global settlement that binds even prospective claimants whose injuries have not yet developed and once and for all extinguish the defendant’s tort liability? He masterfully crafts an analytical framework from a variety of doctrinal materials to explain the mass tort system and assess its successes and failures. Nagareda explains why parties choose to settle mass torts, how peacemaking lawyers try to create global peace that binds even future claimants, and why these efforts have proven largely unsuccessful over the past dozen or so years.

Nagareda starts with a straightforward premise: peacemaking in mass torts is a form of governance. When a defendant engages in allegedly injurious conduct, prospective claimants acquire legal rights defined by the applicable substantive law. Settlements require these individuals to exchange these preexisting rights to sue for relief generated by a compensation regime. For mass torts, private lawyers who have no formal relationship with the vast majority of claimants they purport to represent must nonetheless bind these claimants to settlements. The power of these lawyers to engage in what amounts to privatized law reform begs a problem of legitimacy. Nagareda argues that litigation-based ideals of due process that stress individual autonomy and conflict-free representation as prerequisites for legitimate gover-

⁴ One example in this respect is the various attempts to bring class actions against tobacco companies for injuries caused by purchasing and smoking cigarettes. See *Schwab v Philip Morris USA, Inc*, 449 F Supp 2d 992, 1026–27 (EDNY 2006) (summarizing tobacco litigation cases). See also *In re Simon II Litigation*, 407 F3d 125, 127–28 (2d Cir 2005) (decertifying nationwide punitive damages class action against tobacco companies); *Castano v American Tobacco Co*, 84 F3d 734, 746 (5th Cir 1996) (decertifying nationwide class action against tobacco companies); Robert L. Rabin, *Tobacco Control Strategies: Past Efficacy and Future Promise*, 41 *Loyola LA L Rev* (forthcoming 2008) (discussing a series of class action suits alleging nicotine addiction, fraud, and second-hand smoke injuries). Another example is the failed efforts to resolve asbestos liability in large settlements on behalf of nationwide classes. See generally *Ortiz v Fibreboard Corp*, 527 US 815 (1999) (reversing the approval of class certification); *Amchem Products, Inc v Windsor*, 521 US 591 (1997) (affirming the denial of class certification).

⁵ See, for example, *Ortiz*, 527 US at 846. Compare Samuel Issacharoff, “Shocked”: *Mass Torts and Aggregate Asbestos Litigation after Amchem and Ortiz*, 80 *Tex L Rev* 1925, 1930 (2002) (criticizing this premise as “nostalgic” and a “halcyon” ideal out of sync with the reality of mass tort dispute resolution).

nance collide with the real-world dynamics that lead parties to settle mass torts in the first place.

A solution to the difficulties that mass torts pose starts with the recognition that they are not primarily problems of tort or procedural doctrine but of legitimate governance. This perspective frees Nagareda from the shackles of litigation to turn to administration for a source of legitimacy. He observes that mass tort settlements function as a form of administration. Parties create a compensation regime, akin to a workers' compensation system, that cuts off access to tort and binds claimants going forward to a certain range of payments. Accordingly, a concept of legitimacy rooted in administration, not litigation, should govern mass tort settlements. Agencies have legitimate law reform power—that is, lawful power to alter citizens' preexisting rights—because administrators are accountable over time to those they govern. Nagareda proposes the same for mass torts. A fee arrangement can align the incentives of peacemaking lawyers with all claimants, including those whose injuries will become manifest in the future, by extending their relationship over time. With a proper fee arrangement in place, a settlement will be legitimated by Nagareda's metric. Agencies could adopt such settlements as rules to ensure that the peace they provide is truly global.

Nagareda grounds his analytical framework in a comprehensive survey of virtually every significant attempt to resolve a mass tort over the past decade. In Part I, I summarize the four parts of Nagareda's book and offer some reactions along the way. It is nuanced and detailed, so my summary, albeit lengthy, can offer only a sketch of Nagareda's carefully forged argument. He shows repeatedly how the real world of mass torts, with unseemly but unavoidable conflicting incentives between lawyers and clients, clashes with litigation-centered ideals of governance. The great virtue in Nagareda's account lies in this realism and the lessons it inspires for mass tort governance.

In Part II, I challenge Nagareda's notion of preexisting legal rights, a discordantly formalist thread in an otherwise insistently realist fabric. Nagareda claims that individuals come to mass tort settlements with preexisting rights to sue defined by the applicable substantive law, and that settlements amount to law reform because they replace these preexisting rights. In my view, Nagareda has drawn too rigid a boundary between the substantive component of an individual's right to sue and the procedural options the individual has for its attempted vindication. A realist perspective treats available procedural avenues as constituent components of rights to sue. Construed accordingly, many rights to sue have real-world existence only as parts of class actions. This understand-

ing supports David Shapiro's "entity" theory of the class,⁶ which would give courts greater flexibility in the administration of aggregate litigation. A realist perspective makes class action litigation a more viable institutional setting for mass tort governance than Nagareda would admit.

I intend my disagreement with Nagareda not as criticism but rather as thoughts stimulated by his insightful account. Rigorously rooted in the messy details of attempted mass tort settlements, as well as the entire terrain of mass tort litigation and commentary of the past dozen years, Nagareda's book is a tour de force. *Mass Torts in a World of Settlement* is as thorough as it is elegant. A rarity among academic commentary, the book should become required reading for scholars, judges, and mass tort practitioners alike as they search for just and efficient paths to peace.

I. NAGAREDA'S REALISM—A SUMMARY OF HIS ARGUMENT

A. The Mass Tort Problem

A consistent undercurrent runs through Nagareda's book: in their prescriptions to solve some of the problems that bedevil peacemaking for mass torts, courts and commentators have ignored or misunderstood the real-world dynamics that produce the incentives to make peace in the first place. Nagareda's realism about mass tort settlements leads him to begin his argument not in the treetops of appellate court doctrine but in the roots of how and when parties try to resolve mass torts in an aggregate fashion. Nagareda argues that peacemaking does and should occur when a mass tort is mature but that courts cannot adequately police the maturity boundary.

1. The maturation process.

Nagareda uses the orthodox account of the mass tort maturation process to describe what propels the parties to try to craft a global peace.⁷ A mass tort is immature until plaintiffs' lawyers can establish a "credible threat" that their clients can prevail on each element of their claims (pp 13, 29). This effort, which requires investment in "generic assets," such as experts to establish general causation or research on novel legal theories, gives plaintiffs' lawyers an incentive to recruit new

⁶ See David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 *Notre Dame L Rev* 913, 931 (1998). See also Part II.B.

⁷ For the standard account, see Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 *Tex L Rev* 1821, 1842–43 (1995); Francis E. McGovern, *Resolving Mass Tort Litigation*, 69 *BU L Rev* 659, 659 (1989). See also Thomas E. Willging, *Beyond Maturity: Mass Tort Case Management in the Manual for Complex Litigation*, 148 *U Pa L Rev* 2225, 2251 (2000).

clients to spread these costs. Meanwhile, defendants look for ways to “knock out” the entire mass tort by, for example, finding scientific evidence that refutes allegations of general causation (p 15).

The proof of a mass tort’s maturity is in the pudding. Plaintiffs with high-value injuries begin to win at trial, showing that claimants can establish each element of the claims at issue and creating fears of ruinous verdicts for defendants. Their investments beginning to pay off, plaintiffs’ lawyers redouble client recruitment efforts. Once the pool of high-value claimants dries up, lawyers then add exposed-but-presently-unimpaired clients—future claimants—into their inventories.

At this point, the mass tort begins to exhibit “dysfunctions” (p 20). Most importantly, “the claims of exposed but unimpaired persons can start to exhibit settlement values out of line with current tort doctrine” (p 20). Whereas tort doctrine affords little merit to unimpaired claimants’ cases (pp 22–24), Nagareda argues, plaintiffs’ lawyers can leverage the threat of ruinous verdicts on behalf of presently impaired claimants into an aggregate settlement that includes future claimants as well (p 25).

Defendants now want a settlement that allows them to avoid both ruinous verdicts and the payment of present damages to claimants whose injuries, if any, will only become manifest in the future. This settlement should eliminate variance of outcomes and pay present claimants at an acceptable level, based on accurate information about claim values created by the maturation process. It should also lock future claimants into a compensation schedule that avoids dysfunctions (p 28). Plaintiffs’ lawyers will quite happily settle claims of future claimants, persons who might never end up as their clients, if they can get sizeable settlements for their present claimant clients. Their relationship with these clients, after all, generates their fees (pp 224–25).⁸ Incentives among the present parties thus align for a global peace.

Nagareda explains how courts try to police the boundary between immature and mature torts and argues that they are not institutionally well suited to guard against “imperfections” that might propel mass torts toward settlements unwarranted by fact or law. For example, judges can wield the *Daubert v Merrell Dow Pharmaceuticals, Inc*⁹ standard for the admission of expert testimony¹⁰ to ensure that inaccurate information about general causation does not push a mass tort into a settlement that bears little relationship to the defendant’s liability un-

⁸ See, for example, John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum L Rev 1343, 1373–75 (1995).

⁹ 509 US 579 (1993).

¹⁰ See *id* at 587, 597 (adopting a standard requiring federal judges to ensure that expert scientific testimony admitted at trial is relevant and reliable as required under Federal Rule of Evidence 702).

der the applicable substantive tort doctrine (pp 39–40). Nagareda’s second example is Judge Richard Posner’s opinion in *In the Matter of Rhone-Poulenc Rorer Inc.*,¹¹ litigation brought by persons with hemophilia against blood clotting factor manufacturers whose product allegedly infected them with HIV/AIDS.¹² When plaintiffs have yet to establish credible threats under the applicable doctrine—for example, when they have won only a few idiosyncratic early individual trials—courts can deny class certification. Courts thereby can shield risk-averse defendants against pressure that might otherwise force them into an unmerited settlement driven by fears of a catastrophic class judgment awarded by a biased jury.¹³

¹¹ 51 F3d 1293 (7th Cir 1995).

¹² See *id* at 1296.

¹³ As Nagareda acknowledges (pp 44, 48), whether class certification causes or should take account of settlement pressure is a point in substantial dispute. See, for example, *Klay v Humana, Inc.*, 382 F3d 1241, 1275–76 (11th Cir 2004) (stating that settlement pressure is not a sufficient reason to overturn class certification); Charles Silver, “*We’re Scared to Death*”: *Class Certification and Blackmail*, 78 NYU L Rev 1357, 1379–80 (2003) (questioning Posner’s class decertification in *In the Matter of Rhone-Poulenc* after considering the settlements already entered into by the defendant). See generally J.B. Heaton, *Settlement Pressure*, 25 Intl Rev L & Econ 264 (2005) (questioning the effectiveness of settlement pressure in litigation against corporate defendants). Nagareda addresses one response to the settlement pressure problem: pre-trial case management can protect a defendant, even in a certified class, from entering into unmerited settlements. He doubts that summary judgment can effectively sort out cases that deserve to settle from those that do not. Cases with a moderately low probability of success might meet the low threshold summary judgment sets but do not deserve to settle (p 51). See also Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-wide Arbitration, and CAFA*, 106 Colum L Rev 1872, 1891 (2006). But summary judgment is not the only shield the court can wield. In *Wadleigh v Rhone-Poulenc Rorer, Inc.*, the district court certified for class treatment only issues pertaining to the defendant’s negligence. 157 FRD 410, 423 (ND Ill 1994). The trial plan would have required individual plaintiffs to take the class verdict to their home jurisdictions; file suit; and litigate proximate cause, damages, and affirmative defenses one by one. In other words, plaintiffs had quite a long way to go before the specter of firm-shattering liability haunted the defendants. See *In the Matter of Rhone-Poulenc*, 51 F3d at 1307 (Rovner dissenting). Arguably, the trial plan could have protected against cognitive biases created by proof of defendant’s bad behavior and only allowed recovery if a plaintiff actually could prove causation. See, for example, Hal R. Arkes and Cindy A. Schipani, *Medical Malpractice v. the Business Judgment Rule: Differences in Hindsight Bias*, 73 Or L Rev 587, 633–35 (1994) (showing how bifurcated trial plans can protect defendants against hindsight bias).

Whether the bifurcated trial plan would have spared the *In the Matter of Rhone-Poulenc* defendant from undue settlement pressure depends on whether the heart of the case lay with the core liability issues certified for class treatment or with the issues left for individual trials. The plaintiffs pursued a novel theory of liability, which if accepted by the class jury in the certified part of the case, would have greatly tipped the scales in the plaintiffs’ favor. *In the Matter of Rhone-Poulenc*, 51 F3d at 1300–01 (describing the plaintiff’s “serendipity” theory, which argued that defendants’ failure to protect hemophiliacs from Hepatitis B made defendants liable for any consequences that such protection would have avoided). But, given the rejection by most jurisdictions of market share liability theories for blood factor defendants, and given the difficulty many blood factor plaintiffs had in showing which among the various blood factor companies manufactured the product that infected them, there is some reason to think that plaintiffs in individual trials would have had quite difficult times establishing individual causation. See, for

Nagareda sees in *Daubert* and *In the Matter of Rhone-Poulenc* “top-down, third-party” efforts to “reassert the primacy of tort doctrine over the distorting effects that litigation dynamics or aggregative procedure may have” (pp 30, 53). Such regulatory efforts work imperfectly. Judges have to immerse themselves in subjects well beyond their expertise to use *Daubert* effectively to police the maturity boundary. Courts tempted to deny class certification to guard against settlement pressure in anemic cases have to determine that the case is indeed anemic and not one that merits a settlement. They have to scrutinize verdicts in individual trials to determine whether the few juries that ruled for plaintiffs did so because plaintiffs met their evidentiary burden on the elements of their claims, or whether juries were swayed by some sort of cognitive bias in favor of plaintiffs that obscured otherwise fatal weaknesses in their cases. Judges, Nagareda notes, cannot look behind verdicts and thus lack the institutional capacity to undertake this exercise (p 52). A “bottom-up, first-party” mechanism, by which the parties themselves police the maturity boundary, is preferable (p 54). Nagareda ultimately argues that his fee arrangement fits this bill.

2. Reactions.

By fitting *Daubert* and *In the Matter of Rhone-Poulenc* into the maturity framework, Nagareda casts illuminating light on the functional roles pre-trial decisions play in linking settlement outcomes to a defendant’s expected liability according to applicable substantive law. He thereby makes an important contribution to the maturity account. With terms like “dysfunctions,” “imperfections,” and “distorting effects,” Nagareda adds two layers of normative gloss to this orthodox description of how mass torts evolve. First, as he argues explicitly, mass torts should not settle until mature. Payments to exposed but unimpaired claimants, a symptom of a mass tort dysfunction at the mature stage, can dry up funds to pay genuinely injured victims (pp 20–21). Second, as his analysis implies, a mass tort should mature only when a steady drumbeat of plaintiffs’ verdicts in individual trials establishes a credible threat that claimants can consistently satisfy all elements of the operative substantive tort law (pp 52–53).

example, *Doe v Baxter Healthcare Corp.*, 380 F3d 399, 408 (8th Cir 2004) (discussing the Iowa Supreme Court’s rejection of the market share liability theory). See also Andrew R. Klein, *A Legislative Alternative to “No Cause” Liability in Blood Products Litigation*, 12 Yale J Reg 107, 109 (1995) (observing that only one state supreme court and one federal district court applied market share theories to excuse plaintiffs from identifying which blood factor defendant infected them). If this was so, then perhaps the bifurcated trial plan could have at least lessened the intensity of any settlement pressure that class certification would have put on the defendants.

I will not rehash debates over Nagareda's first normative claim here.¹⁴ As for the second, I wonder why formal elements of tort doctrine necessarily provide the appropriate measure to determine when mass tort settlements result from "dysfunctions" or "imperfections," and when they are justified.¹⁵ Nagareda asserts that "[a]ny legal system that does not implement accurately the standards of applicable substantive law hardly would be a system worthy of applause" (p 20). Perhaps, but whether a legal system that assigns no liability to a defendant that has caused harm to one-third of a population—because individual plaintiffs cannot meet each element of a claim—merits such applause is hardly self-evident.¹⁶ In the blood factor litigation, for example, plaintiffs often lost because they could not prove which defendant had infected them.¹⁷ Yet general causation seemed indisputable. Between 55 and 78 percent of persons with hemophilia were HIV positive within three years of the discovery of AIDS,¹⁸ and the defendants likely did not adequately warn even when they knew that their products were killing people.¹⁹ The blood factor litigation in the end did settle, but downward

¹⁴ See, for example, Willging, 148 U Pa L Rev at 2246–53 (cited in note 7) (criticizing the maturity concept and its role in deciding, for example, when to make class action settlements). Compare Schuck, 80 Cornell L Rev at 950 (cited in note 1) (supporting the maturity concept), with David Rosenberg, Comment, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 BU L Rev 695, 707–11 (1989) (criticizing the maturity concept).

¹⁵ For related criticism of Nagareda on this point, see Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 Colum L Rev 1924, 1932–33 (2006).

¹⁶ Compare Shapiro, 73 Notre Dame L Rev at 931 (cited in note 6) (explaining why damages awarded to a class as a whole in such a case are justified from the perspective of deterrence and reasonable compensation).

¹⁷ This difficulty manifested itself in two ways. Most importantly, persons with hemophilia in the 1980s, when most of the infections occurred, ingested products manufactured by multiple defendants, most of whom failed to protect against transmission of HIV. Thus, someone who contracted HIV had a difficult time pinpointing the defendant that caused her illness. See, for example, *Ray v Cutter Laboratories, Division of Miles, Inc.*, 744 F Supp 1124, 1126 (MD Fla 1990). Also, although perhaps less frequently, persons with hemophilia may have ingested other blood products, in addition to clotting factors, that could have transmitted the virus and had difficulty pinning the blame on a defendant product. See, for example, *Spencer v Baxter International, Inc.*, 163 F Supp 2d 74, 79, 80 n 7 (D Mass 2001).

¹⁸ See M.M. Lederman, et al, *Acquisition of Antibody to Lymphadenopathy-associated Virus in Patients with Classic Hemophilia*, 102 Annals of Intern Med 753, 753–57 (1985); W.A. Andes, S.R. Rangan, and K.M. Wulff, *Exposure of Heterosexuals to Human Immunodeficiency Virus and Viremia: Evidence for Continuing Risks in Spouses of Hemophiliacs*, 16 Sexually Transmitted Diseases 68, 68–73 (1989).

¹⁹ See, for example, Elizabeth Amon, *In the 1980s, Thousands of Hemophiliacs around the World Became Infected with HIV after Using Tainted Blood Products. Could Their Illnesses and Deaths Have Been Prevented?*, The American Lawyer 77 (Dec 2004); Gina Kolata, *Hit Hard by the AIDS Virus, Hemophiliacs Angrily Speak Out*, NY Times 7 (Dec 25, 1991). See also George W. Conk, *Is There a Design Defect in the Restatement (Third) of Torts: Products Liability?*, 109 Yale L J 1087, 1107–11 (2000) (criticizing conduct of blood factor defendants); Michael J. Miller, Note, *Strict Liability, Negligence and the Standard of Care for Transfusion-transmitted Disease*, 36 Ariz

pressure generated by the Seventh Circuit's denial of class certification may have meant an unjustly depressed amount per claimant.²⁰ Perhaps plaintiffs could not strictly meet each element of their tort claims. But a settlement that made defendants pay adequately for the harm they caused, even if spurred by pressure created by class certification, would not have obviously besmirched the American civil justice system.

Nagareda obviously cannot exhaustively defend every point he makes. But the starting point of substantive law as an ideal that settlement must respect reappears as a theme throughout his book. The clear import of his argument is that courts should never certify litigation classes—that is, grant contested certification motions—in mass torts (see, for example, p 92). An elaboration on why substantive law necessarily places this limit on case management through class certification would have added helpful ballast to Nagareda's overall argument.

B. From Litigation to Administration

Nagareda turns from the “when” and “why” of peacemaking to its “how” in Part II. At this point, the mass tort has matured and settlement becomes the order of the day. Peacemakers want finally to terminate access to the tort system, including that of future claimants, and attempt to replace rights to sue with an administrative compensation regime. This turn from tort triggers two problems: (1) how do lawyers create the “grid” that generates compensation for future claimants within the terms of the peace; and (2) what gives lawyers the rulemaking power legitimately to craft a compensation regime that displaces future claimants' litigation rights (p 63). The latter—the source of legitimacy for what amounts to privatized law reform—proves the central challenge, both theoretically and practically, for peacemaking.

1. Generating the grid.

Peacemakers create compensation grids of the sort familiar to government entitlement programs (p 65). Claimants present their histories to the entity that administers the settlement,²¹ the claims administrator

L Rev 473, 480 n 55 (1994) (showing much greater incidence of HIV among people who used defendants' products).

²⁰ See Jay Tidmarsh, *Mass Tort Settlement Class Actions: Five Case Studies* 99 (Federal Judicial Center 1998) (noting that claimants in Japan recovered twice the amount the American class members won). For a discussion of how class certification denial may exert downward pressure on settlement thresholds, see Geoffrey P. Miller, *Review of the Merits in Class Action Certification*, 33 Hofstra L Rev 51, 79–80 (2004).

²¹ Peacemaking lawyers turn over the administration of class settlements to so-called “claims resolution facilities,” private firms that specialize in the disbursement of class action settlements. See generally Deborah R. Hensler, *Alternative Courts? Litigation-induced Claims Resolution Facilities*, 57 Stan L Rev 1429 (2005).

assigns claimants to cells in the grid, and these cells generate a specified payment. Provided that it proceeds without “dysfunctions,” the maturation process usually involves individual trials on various types of claims that then signal to peacemakers what values to put in each cell.²²

Gridmaking turns both on “pragmatic considerations” and “also on the compromises needed to bring about the adoption of the grid in the first place” (p 64). Nagareda’s analysis suggests several such compromises. Plaintiffs will demand compensation without having to prove a difficult element of the tort at issue, or they might require defendants to waive certain affirmative defenses. Defendants in exchange will insist upon a reduction of the variance in outcomes of plaintiffs’ claims (p 64), as well as an assurance that the payout future claimants receive fairly reflects the value that the underlying tort doctrine assigns their claims.²³ Most importantly, the deal must bind high-value claimants, the sort of plaintiffs who threaten defendants with unpredictable and ruinous liability in tort. Defendants are unlikely to agree to a settlement that does not include high-value claimants and only affects claimants with less valuable or more tenuous claims.

2. Legitimacy.

These “compromises” that alter parties’ rights make gridmaking a form of privatized law reform. As the Supreme Court has declared, the

²² For additional discussion of this point, see Issacharoff, 80 *Tex L Rev* at 1928 (cited in note 5). Recent litigation over Vioxx illustrates how judicial management of a mass tort can recreate the maturity process by which individual trials create values for a compensation grid. Both Judge Eldon Fallon, who supervised the federal multidistrict litigation (MDL), and Judge Carol Higbee, who supervised coordinated proceedings in cases filed in New Jersey state courts (Merck’s home state), used carefully selected bellwether trials to establish settlement values for various categories of claims against Merck, Vioxx’s manufacturer. See, for example, Susan Todd, *Behind the Scenes of the Vioxx Settlement*, Newark Star-Ledger 1 (Nov 18, 2007); Kristen Hays, *Judge Decries Effort to Have Vioxx Cases Tried in State Courts*, Philadelphia Inquirer C7 (Oct 28, 2005) (describing Judge Fallon’s goal to reach a global settlement of the Vioxx cases). See also Howard M. Erichson, *The Vioxx Settlement*, Mass Tort Litigation Blog (Nov 10, 2007) online at http://www.lawprofessors.typepad.com/mass_tort_litigation/2007/11/the-vioxx-settl.html (visited Aug 29, 2008) (discussing the strategic and procedural implications of the Vioxx settlement).

²³ Nagareda illustrates his point with *Cimino v Raymark Industries, Inc.*, 751 F Supp 649 (ED Tex 1990), reversed, 151 F3d 297 (5th Cir 1998) (involving class action asbestos litigation). There, Judge Robert Parker famously tried to use statistical sampling from data derived from representative trials to generate a grid that would pay compensation to the thousands of asbestos plaintiffs that had clogged his federal district in lieu of having them all go to trial. Judge Parker’s gridmaking, Nagareda maintains, “laid bare, in a published judicial opinion, the inner workings of practices that usually operate below the judicial radar screen in mass tort litigation” (p 69). The defendants refused to go along (and eventually stopped Judge Parker’s efforts on appeal) because the grid did not give them the necessary quid pro quo to secure their cooperation. It only bound existing claimants, leaving the defendants at the continued mercy of future claimants, and the representative trials generated values for certain types of claims inconsistent with what tort doctrine would have provided (p 69).

right to sue, which the grid replaces, is a form of property (pp 58–59).²⁴ In run-of-the-mill individual litigation, a plaintiff freely enters a voluntary contractual relationship with her lawyer. Just as a contract authorizes a real estate agent to sell her client's house, the professional services agreement gives an attorney legitimate power to settle and thereby sell her client's property to the defendant (p 60). When lawyers generate a grid for future claimants, who are not their clients, autonomy and contractual consent play no role. "[T]he administration of [such] mass tort claims stands to act upon an individual's right to sue not in the manner of a real estate agent retained by contract," Nagareda argues, "but, rather, like a local government condemning real property and providing 'just compensation' to the property owner" (p 60). As such, peacemaking is governance. This fact begs the question: what confers on private lawyers the institutional authority legitimately to engage in this form of law reform?

Nagareda finds the structure of this governing authority in *Amchem Products v Windsor*²⁵ and *Ortiz v Fibreboard*,²⁶ a pair of landmark Supreme Court decisions he ultimately criticizes. Both cases emerged from the asbestos onslaught that plagued the federal courts starting in the 1970s.²⁷ In *Amchem*, a consortium of twenty asbestos companies tried to strike a deal with plaintiffs' lawyers who represented large inventories of presently injured asbestos claimants. The defendants agreed to pay these claimants hundreds of millions of dollars.²⁸ The parties then jointly moved to certify a settlement class of future asbestos claimants, prospective parties with whom the peacemaking plaintiffs' lawyers had no actual relationship. The class settlement would have created a compensation grid for future claimants to generate predictable and acceptably large (from the defendants' perspective) awards.²⁹

The *Ortiz* defendant tried to settle its asbestos liability in one fell swoop by moving with the plaintiffs' lawyers for certification of a settlement class. The settlement would have bound future asbestos claimants to a compensation grid with total payouts capped basically at the extent of the defendant's insurance coverage.³⁰ The parties argued that this sum amounted to a "limited fund" and thus justified mandatory class treatment under Federal Rule of Civil Procedure 23(b)(1), with no

²⁴ *Phillips Petroleum Co v Shutts*, 472 US 797, 807 (1985).

²⁵ 521 US 591 (1997).

²⁶ 527 US 815 (1999).

²⁷ See *Amchem*, 521 US at 598.

²⁸ *Id* at 601.

²⁹ For the settlement terms, see *id* at 603–05.

³⁰ *Ortiz*, 527 US at 824–25.

opt-out rights for absent class members.³¹ As in *Amchem*, the defendant entered a separate settlement with the same plaintiffs' lawyers who negotiated the class settlement that resolved the pending claims. The defendant made the separate settlement, which would have provided \$500 million for the attorneys' inventory cases and thus \$167 million in fees,³² contingent upon judicial approval of the class settlement.³³

The Court rejected certification in both cases, stressing in each the conflict of interest created when present claimants and their lawyers negotiate a settlement for future claimants only.³⁴ In *Ortiz*, for example, present claimants secured notably high recoveries in the separate settlement, while the class settlement saddled future claimants with a cumbersome claims process and capped their awards to more modest amounts.³⁵ Present claimants in *Amchem* similarly did quite well vis-à-vis future claimants.³⁶ Both cases illustrate the central problem in peacemaking. Present claimants enjoy the leverage that produces settlement incentives and thus hold all the cards. The lawyers who represent them will willingly exchange future claimants' rights to sue for increased recoveries for their present claimant clients and thereby generate bigger fees for themselves. Because future claimants have nothing (yet) to threaten the defendants with, and because they lack a fee-generating relationship with plaintiffs' lawyers, future claimants get the short end of the stick.

Although perturbed by the proposed settlements in both cases, the Court left a foundational principle for class actions intact. Self-appointed peacemakers can legitimately sell absent class members' rights to sue as part of a settlement if at a minimum they adequately represent the interests of these absent members.³⁷ Valid interest representation creates legitimate governing authority. Nagareda mines *Am-*

³¹ See *id.* at 828. Rule 23(b)(1) allows courts to certify class actions with no opt-out rights for class members when "the prosecution of separate actions . . . would create a risk" of "adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." FRCP 23(b)(1)(B). These include cases involving "limited funds"—cases, for example, where "the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximums, demonstrate the inadequacy of the fund to pay all the claims." *Ortiz*, 527 US at 838. The parties in *Amchem* sought certification under Rule 23(b)(3), which would have entitled class members to the right to opt out. See *Amchem*, 521 US at 605.

³² Coffee, 95 Colum L Rev at 1401 (cited in note 8).

³³ *Ortiz*, 527 US at 852.

³⁴ See *Amchem*, 521 US at 625–27; *Ortiz*, 527 US at 856.

³⁵ See 527 US at 855.

³⁶ Coffee, 95 Colum L Rev at 1397 (cited in note 8) (observing that inventory clients in one separate settlement received payouts 54 percent higher than what they would have received pursuant to the class settlement).

³⁷ See *Hansberry v Lee*, 311 US 32, 42 (1940).

chem and *Ortiz* for three “components” that mark the bounds of this power (p 79). First, “class actions enjoy no general authority to alter the *preexisting rights* of class members” (p 79) (emphasis added). Agencies can promulgate rules that change bundles of rights individuals enjoy under existing law only if they have the delegated power to do so. The quality of the promulgated rules cannot justify the power to promulgate them in the first place (pp 81–82). Analogously, as the Court in *Amchem* put it, peacemakers must find a source of delegation in matters that “preexist any settlement.”³⁸ A settlement’s substantive fairness does not excuse an inquiry into Rule 23’s requirements for certification.³⁹ Matters like the adequacy of representation, the cohesion of the class, and the nature of class members’ claims, which exist prior to and independent of the settlement itself, decide the certification question.⁴⁰ Similarly, the parties in *Ortiz* could not craft a limited fund for the purposes of class settlement, then argue that this limited fund meets certification requirements and justifies their power to enter into a class settlement. “[S]omething antecedent to all the good that its exercise might do” must legitimate peacemaking power (p 82).

Second, *Amchem* and *Ortiz* establish that the scope of power delegated to class counsel “must stop short of the [essentially unchecked] legislative power that Congress might wield to alter preexisting rights” (p 84). Class certification requirements in Rule 23 provide an “intelligible principle” that limits the scope of class counsel’s power to replace absent class members’ preexisting rights to sue with a compensation grid (p 87). If class counsel could get a class certified without meeting these requirements, their power would exceed the Rules Enabling Act’s⁴¹ admonition that the operation of procedural rules not “abridge, enlarge or modify any substantive right”⁴² (p 87).

Third, *Amchem* and *Ortiz* provide the substantive limits on this delegated power: class counsel can sell the rights of class members to sue if the class is sufficiently cohesive, and if class counsel has no conflicting interests with class members (p 87). The settlements in *Amchem* and *Ortiz* failed by this metric. As the Court observed in *Amchem*, present claimants had an interest in “generous immediate payments,” while the future claimants they purported to represent would want

³⁸ 521 US at 623.

³⁹ *Id.* For criticism of the supposed fairness of the *Amchem* settlement, see Coffee, 95 Colum L Rev at 1393–95 (cited in note 8); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Prods., Inc.*, 80 Cornell L Rev 1045, 1066–67 (1995) (suggesting that class counsel’s clients had an advantage over other class members).

⁴⁰ *Amchem*, 521 US at 623–28.

⁴¹ Rules Enabling Act, Pub L No 73-415, 48 Stat 1064 (1934), codified as amended at 28 USC § 2072 (2000).

⁴² 28 USC § 2072(b). See *Amchem*, 521 US at 613; *Ortiz*, 527 US at 845.

“an ample, inflation-protected fund for the future.”⁴³ Class counsel in *Ortiz* wanted their side settlement to succeed along with the fees it promised to generate. The class settlement, on whose approval the side settlement depended, would not generate any fees for them. Their only incentive, then, was to push the defendant for whatever minimal class settlement “might survive a Rule 23(e) fairness hearing,” not “the best possible arrangement” for the future claimant class.⁴⁴

This endpoint for *Amchem* and *Ortiz*—cohesive, conflict-free interest representation as a sine qua non for legitimate privatized law reform—comes as little surprise. Valid interest representation has long functioned as the due process substitute for contractual attorney-client relationships that enable lawyers to settle their clients’ claims consistent with individual autonomy.⁴⁵ *Amchem* and *Ortiz* fit in a familiar syllogism: (1) an individual’s right to sue is a property right protected by the Due Process Clause; (2) valid interest representation can substitute for individual client consent to a settlement;⁴⁶ (3) valid interest representation requires conflict-free cohesion among class members; and thus (4) due process requires conflict-free cohesion among class members in order to bind them to a class judgment.⁴⁷

Nagareda’s realism about when and why parties settle mass torts leads him to identify a profound and important flaw in the point of departure for this familiar formula. As he argues, “Settlement structure drives class certification, not vice versa” (p 91). Defendants’ interest in a class settlement for future claims comes from the leverage lawyers for present claimants enjoy based on the credible threat their clients pose to the defendants. This in turn leads present claimants to use future

⁴³ 521 US at 626.

⁴⁴ 527 US at 852.

⁴⁵ *Hansberry*, 311 US at 41, 44–45 (stating that a class judgment can preclude an absent class member who was not a party to the earlier suit if the class in the earlier suit shared a “sole and common interest”). See also *Shutts*, 472 US at 811–12 (stating that absent plaintiffs may be subject to the jurisdiction of a state court resolving their claims provided that minimal procedural due process protections are in place).

⁴⁶ As Professor Samuel Issacharoff explains, adequate representation means that the absent class member has virtually participated in a fundamentally fair way. See Samuel C. Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 S Ct Rev 337, 353.

⁴⁷ See, for example, *id.* at 385. Professor John Coffee argues that minimizing agency costs legitimates representative litigation. In a sense he adds his voice to this claim. But Coffee emphasizes enhanced rights of “exit,” that is, opt-out rights, as a key to lowered agency costs. For him, enhanced client autonomy becomes the linchpin for class action governance. See John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum L Rev 370, 437–38 (2000). For Nagareda’s disagreement with Professors Issacharoff and Coffee on this issue, see Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 Harv L Rev 747, 785–89 (2002) (arguing that Professors Issacharoff and Coffee do not account for the dynamics that produce settlement but involve conflicts of interest).

claimants better to enrich themselves. A conflict of interest between present and future claimants, capitalized on by defendants, fueled the incentives of the parties in *Amchem* and *Ortiz* to try for a global peace and determined the structure the settlement took. The Court's insistence that cohesion could lead to better results for future claimants is chimerical; it would mean no settlement at all. As Nagareda concludes, "The upshot of *Amchem* and *Ortiz*, in practical terms, is that class settlements involving a purely prospective replacement of the tort system simply are not viable . . . at the invitation of any law firm realistically positioned to serve as class counsel" (p 91).

The Court's litigation-centered ideal of due process is an unrealistic touchstone for peacemaking governance. This ideal demands respect for an individual's autonomy before someone acting on her behalf can abridge or modify her right to sue.⁴⁸ Sheer numbers make individual client consent a nonstarter for peacemaking on a mass scale. Conflict-free cohesion can act as a substitute, but as a precondition for peacemaking it conflicts with the dynamics that fuel peacemaking efforts in the first place.

Reinforcing a recurring theme in his book, Nagareda hints that an answer to this dilemma lies in administration, not litigation. He observes that elections, for example, enable representatives legitimately to govern constituents with far more conflicts and far less cohesion than what Rule 23 after *Amchem* and *Ortiz* requires (p 89). An agency can govern legitimately because this mechanism aligns over time the interests of administrators with the interests of the governed (pp 235–36). Just as administration replaces litigation as lawsuits give way to settlements, litigation-centered ideals of legitimacy should yield to those that authorize agencies to alter preexisting rights with binding rules.

As I discuss in Part II, I dispute Nagareda's point of departure, the notion of preexisting rights and the limits they place on peacemaking. My disagreement aside, his analysis of *Amchem* and *Ortiz* leads to a useful framework for the assessment of mass tort settlements and the legitimacy of peacemaking efforts.

C. The Search for Peace

In Part III, Nagareda dissects each of the most significant efforts to resolve mass torts over the past decade. These examples show how the dynamics of mass tort litigation can clash with strictures of governance to hamstring peacemaking. Space does not permit a summary that would do Nagareda's lucid commentary justice. I describe two of

⁴⁸ See Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 Tex L Rev 287, 295 (2003).

his examples: the failed effort to resolve litigation against the pharmaceutical company Wyeth over the diet drug combination fen-phen, and the unsuccessful attempt to settle cases against Sulzer Orthopedics for its manufacture of defective hip implants. Their juxtaposition highlights a central peacemaking dilemma. Peacemaking efforts that leave open avenues to tort, as happened in the fen-phen litigation, are legitimate, but they tend to unravel. As the Sulzer example shows, peacemaking efforts that totally replace rights to sue in tort with a compensation regime can stick but fail on legitimacy grounds. Chilled by an unrealistic ideal of governance from *Amchem* and *Ortiz*, litigation has proven an inhospitable clime for the final resolution of mass torts.

1. Fen-phen.

The fen-phen debacle began when thousands of plaintiffs sued Wyeth, alleging that the drug combination it manufactured contributed to a heart condition that could progress to severe heart disease.⁴⁹ Wyeth sought peace after early losses in individual cases foretold a grim future of huge plaintiffs' verdicts, replete with sizeable punitive damage awards to punish the company for suppressing information about fen-phen's dangers.⁵⁰ The settlement class included presently impaired and exposed-but-unimpaired claimants alike, and the settlement created a compensation grid that generated payouts without requiring individual claimants to prove causation (pp 137–38). It also provided for “back-end opt-out rights.” Class members could opt out of the settlement within the usual short time Rule 23(e) provides.⁵¹ Presently unimpaired claimants could additionally opt out either upon diagnosis of a mild heart abnormality or upon diagnosis of a severe heart condition.⁵² Future claimants could thereby hedge against the risk that the claims process would pay less than the expected value of a lawsuit once their tort claims ripened. Nagareda describes these back-end opt-out rights as “put options.” A future claimant could force Wyeth to buy her right to sue at a price set in the settlement (p 140). Alternatively, the claimant

⁴⁹ See *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liability Litigation*, 2000 WL 1222042, *2–3 (ED Pa) (discussing the history of fen-phen's adverse health effects, its withdrawal from the market, and the ensuing litigation). As Nagareda notes, at the time of initial proceedings in the case, fen-phen's manufacturer was known as American Home Products (p 136).

⁵⁰ See generally Alison Frankel, *Still Ticking: Mistaken Assumptions, Greedy Lawyers, and Suggestions of Fraud Have Made Fen-phen a Disaster of a Mass Tort*, *The American Lawyer* 92 (Mar 2005).

⁵¹ Although Rule 23(e) does not specify the length of an opt-out period for (b)(3) class, deadlines as short as one month have been approved. See *Carlough v Amchem Products, Inc*, 158 FRD 314, 329 (ED Pa 1983).

⁵² *In re Diet Drugs*, 2000 WL 1222042 at *26.

could eschew her option, opt out of the class, and test her luck in an individual tort action (p 142). There was only one catch. Those who opted out at the back end could not seek punitive damages—the quid pro quo, Nagareda suggests, for the put option (pp 140–43).

The back-end opt-out rights solved the legitimacy problem that derailed the class settlements in *Amchem* and *Ortiz* by preserving the tort system and thus each class member's autonomy over her right to sue (p 143). The foregone punitive damages give Nagareda little pause. Class counsel do not have unchecked power to alter absent class members' preexisting rights. But individual plaintiffs have no right to punitive damages; they are only an "incidental vehicle to advance broader goals," and plaintiffs receive them, if at all, as a windfall (p 142). Thus, Nagareda contends, the settlement did not entail the sort of law reform that raises problems of governance because it left preexisting rights intact.⁵³ On the other hand, the elimination of punitive damages going forward benefited Wyeth significantly, as it could nip a future of uncertain and potentially ruinous litigation in the bud (p 141). If not global peace simpliciter, the fen-phen settlement at least cabined Wyeth's exposure within acceptable limits while resting on a solidly legitimate foundation.

Nagareda's early enthusiasm for the fen-phen settlement as a model for peacemaking has, by his own admission, proven unfounded (p 143).⁵⁴ As time passed, a "Field of Dreams" problem swamped the settlement: if you build it (a compensation grid), they (claimants, many of whom either would never have pursued a claim or had a weak claim suddenly worth something) will come (pp 143, 147). Abetted by suspect diagnoses, a flood of claimants wildly in excess of what Wyeth projected overwhelmed the \$3.55 billion pledge to fund the settlement (pp 145–46).⁵⁵

⁵³ This discussion of punitive damages reflects some slippage in the way Nagareda uses the concept of preexisting rights. "Plaintiffs are entitled to compensatory damages when a tort has been committed upon them," he argues, "but they have no entitlement to an award of punitive damages" (p 142). True, but absent a class action settlement, fen-phen claimants would have a preexisting right to seek punitive damages, regardless of whether they are entitled to them. The implication of Nagareda's argument is that class counsel can bargain away absent class members' rights to seek punitive damages without engaging in the sort of law reform that triggers a legitimacy problem. Atmospherically, this conflicts with the central goal of a lot of tort reformers—to limit or do away with plaintiffs' rights to seek punitive damages. See, for example, the American Tort Reform Association's position on punitive damages, *Punitive Damages Reform*, online at <http://www.atra.org/show/7343> (visited Aug 29, 2008). As a theoretical matter, trades of punitive damages do affect preexisting rights, because the underlying substantive law, unaffected by the class action, would afford them the right to *seek* punitive damages, if not an entitlement to them.

⁵⁴ See Nagareda, 115 Harv L Rev at 797 (cited in note 47).

⁵⁵ Two problems helped contribute to the settlement's downfall. First, Wyeth, fearful of crushing jury awards, settled "pell-mell" an initial spate of opt-out claims without putting up much of a defense. See Frankel, *The American Lawyer* at 96 (cited in note 50). This behavior signaled to plaintiffs (and plaintiffs' lawyers) that there was easy money to be had. Many more claimants than had been anticipated sought compensation from the settlement. Second, and

The option price—the compensation regime’s payout to a particular claimant—had to fall, and administration of the claims process ground to a halt. The opportunity cost for opt-outs plummeted. Even as Wyeth desperately poured additional funds into the settlement to dissuade high-value claimants from opting out, tens of thousands of claimants chose their own tort suits rather than collect from the desiccated compensation regime (p 147). In the end, the parties reworked their deal to cut out back-end opt-out rights (p 146). The whole misadventure has cost Wyeth at least \$21 billion (p 147).

Nagareda draws from the fen-phen disaster a “larger lesson” about back-end opt-outs specifically and individual autonomy in mass torts more generally: “Any private administrative regime that does not foreclose resort to the tort system in relatively short order . . . carries a serious potential for instability” (p 147). The preservation of claimants’ autonomy legitimated the fen-phen settlement, but this legitimacy butted heads with practicalities that made the open-ended settlement too unstable to achieve global peace.

2. Sulzer.

The Sulzer hip replacement settlement is the Scylla to fen-phen’s Charybdis. Sulzer faced two types of possible claimants: those who only needed a medical exam to confirm that their defectively designed hip implants did not warrant corrective surgery, and those who did in fact need surgery (p 152). The parties designed their settlement to discourage opt-outs and thereby ensure that high-value claimants recovered from a predictable compensation grid, not a wildcat tort system. The settlement included a lien that the peacemakers placed on most of Sulzer’s net worth. The lien would stay in place until Sulzer had paid all claims under the settlement, or about six years. Sulzer could sell its assets for business purposes, but the lien prohibited Sulzer from funding any judgments or settlements that opt-outs might obtain (p 153). Opt-outs would thus have to wait at least six years for their money, with the chance that the settlement would exhaust Sulzer’s assets in the meanwhile (p 153).

The lien would have solved the opt-out problem that unraveled the fen-phen settlement. By increasing the costs of opting out, it would have kept claimants in the class and thus won peace for Sulzer by capping its liability to a known, acceptable level (p 157). Unlike the waived punitive damages in the fen-phen litigation, however, Nagareda believes that the second-class treatment the Sulzer lien offered opt-outs

relatedly, Wyeth allowed claimants to present diagnoses from their own doctors when they claimed against the settlement. Many claimants obtained spurious diagnoses that overstated or fabricated their injuries. *Id.* at 96–97, 99. For a general discussion of the debacle, see *id.*

amounted to law reform. Absent the class settlement, no claimant would have a prior claim to any Sulzer's assets; all would begin the race toward satisfaction of judgments or settlements from the same starting line (p 154). The lien affected preexisting rights because it changed the "rules of the race" by altering claimants' positions vis-à-vis each other (p 156). *Amchem* and *Ortiz* provide that a class settlement cannot generate its own law reform power and that the certification requirements in Rule 23 limit the exercise of this power.⁵⁶ The settlement produced the lien, which is not provided for by Rule 23 but which altered preexisting rights. The lien's "self-referential legitimacy"—that is, its origins in the settlement itself—suffered from the same "fatal circularity" and thus deficit of legitimacy that marred the settlements in *Ortiz* and *Amchem* (p 156).

Nagareda uses examples from bankruptcy, government litigation, and elsewhere to illuminate how present claimants hold all the cards in peacemaking and can best win some form of compensation for future claimants but likely do so in a way that favors their own interests.⁵⁷ His discussions of efforts to make peace through informal arrangements between powerful plaintiffs' lawyers and defendants and legislative solutions to mass torts convincingly expose the dilemma of peacemaking through litigation: the source of legitimacy for these efforts, as fixed by litigation-centered due process ideals, can pose an insuperable obstacle to achievement of the practical needs for global peace.

D. Peacemaking as Governance

1. The leveraging proposal.

A straightforward message lurks beneath the course Nagareda maps in his first three parts: traditional litigation has failed as an avenue for global peace in mass torts. Peacemaking is law reform because it is governance. Peacemakers replace claimants' preexisting rights to sue in tort with an administrative compensation regime of their own devise—a set of rules to bind future claimants. Peacemaking incentives require that this be so. Defendants need to reduce variance of outcomes and cap their liability within acceptable bounds in order to leave tort

⁵⁶ See *Amchem*, 527 US at 628–29 (observing that the adoption of a nationwide administrative claims processing regime is a decision for Congress); *Ortiz*, 521 US at 861 ("The nub of our position is that we are bound to follow Rule 23 as we understood it upon its adoption, and that we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act.").

⁵⁷ Nagareda's chapter on bankruptcy, too detailed to adequately summarize here, is particularly trenchant. This analysis fits § 524(g) of the Bankruptcy Code, a specific provision for asbestos companies into the framework established by *Amchem* and *Ortiz*. See 11 USC § 524(g) (2000). Nagareda shows how claims resolution in bankruptcy suffers from the same set of problems that beset mass tort litigation (p 228).

behind. Plaintiffs' lawyers with inventories of present claimants can leverage the credible threat of significant recoveries to obtain a settlement for future claimants as well. This intersection of incentives gives rise to efforts to resolve mass torts in a global fashion.

Litigation-centered requirements for legitimate governance, however, prove ill-fitting. Respect for individual autonomy as manifested in a consensual attorney-client relationship—what legitimates settlements of individual actions—makes little sense when global peace requires that a compensation grid bind masses of future claimants, individuals with no reason yet to have counsel. Conflict-free cohesion, the class action substitute for a consensual attorney-client relationship, clashes with the fact that defendants only settle future claims because of the threat posed by plaintiffs' lawyers' stockpiled present claims. Within the limits of *Amchem* and *Ortiz*, settlements have foundered on the shoals of a practical inability to bind future claimants (fen-phen) or a deficit of rulemaking legitimacy (Sulzer).

A paradigm shift is in order. As Nagareda observes, in mass torts, "litigation operates as the prelude to administration" (p 220). Accordingly, principles of governance should stop "pound[ing] the square peg of mass torts into the round hole of litigation concepts" and "instead . . . reshape the hole itself" (p 221). Agencies can promulgate rules with future power, even though they affect preexisting rights, because agencies fit into an "an institutional structure that links the self-interest of the rule makers with the well-being of the rule subjects" (p 235). Governance by public rulemaking passes a due process test of legitimacy because an institutional arrangement "extends over time the relationship between rule makers and rule subjects" (p 235) (emphasis omitted). Administrators will pay the price, presumably in terms of bad election outcomes for their administration, if they do a bad job on behalf of those they represent.

Nagareda proposes an institutional arrangement—his "leveraging proposal"—to inject this alternative due process ideal into mass tort settlements. Rather than scrupulously avoid conflicts, his proposal enables plaintiffs' counsel to leverage high-value present claimants to win a peace on behalf of all present and future claimants.⁵⁸ To protect against the sort of unequal allocations that marred the settlements in

⁵⁸ The originality of Nagareda's proposal is striking in light of the received wisdom that peacemaking attorneys should not represent both present and future claimants. See, for example, Dennis E. Curtis and Judith Resnik, *Contingency Fees in Mass Torts: Access, Risk, and the Provision of Legal Services When Layers of Lawyers Work for Individuals and Collectives of Clients*, 47 *DePaul L Rev* 425, 443–44 (1998). For a comprehensive review of fee arrangements in mass torts and other aggregate litigation, see generally Judith Resnik, et al, *Individuals within the Aggregate: Relationships, Representation, and Fees*, 71 *NYU L Rev* 296 (1996).

Amchem and *Ortiz*, a fee arrangement would ensure that these lawyers internalize the risk that the settlement does not treat present and future claimants equivalently. Plaintiffs' lawyers would earn a contingency fee equal to a fixed percentage of the lesser of what a present claimant receives or what a similarly situated future claimant receives when she eventually files her claim (p 237). The funds reserved under the settlement for fees would go into something like an escrow account for a specified period of years, long enough for a court to evaluate how equally the settlement treats present and future claimants. This arrangement would govern both peacemaking lawyers, that is, those who design the settlement, and lawyers who represent individual claimants to the settlement (p 240).

Nagareda's leveraging proposal can solve many of the peacemaking problems he identifies in the book. First, unlike *Amchem* and *Ortiz*, his arrangement credits the dynamics that drive peacemaking, which include conflicts of interest, but harnesses them to ensure that they operate legitimately. Nagareda rejects a blind reliance on a litigation-centered ideal of legitimacy that does not work in practice. Second, whereas plaintiffs' lawyers already have an incentive to do well by present claimants—their clients and thus their source of fees—the leveraging proposal ensures that they have an equal incentive to do well by future claimants. Third, the arrangement protects against the “Field of Dreams” problem—a deluge of specious claims that swamps a settlement fund—by penalizing lawyers if they exhaust a fund for present claimants and leave only scraps on the table for the future. Fourth, the leveraging proposal will lead to a maximally large settlement. It precludes a “take the money and run” problem, by which defendants can buy off plaintiffs' counsel cheaply with a settlement that makes large upfront payouts but provides little for the future. Also, plaintiffs' lawyers will demand a larger overall pie to compensate them for the risk of future settlement shortfalls. The proposal thereby maximizes total recovery. Finally, the proposal provides a “first-party, bottom-up” mechanism to police the maturity boundary. Plaintiffs' lawyers will not want to settle until they can accurately predict the number and value of future claimants. This waiting period will equal the time necessary for a mass tort to mature, which will happen organically and without the need for judicial shepherding.

One problem remains. Plaintiffs' lawyers will come to the settlement with existing fee agreements entered into with clients. Nagareda maintains that courts generally lack the power to set aside these contracts, especially since doing so may well result in lower payouts to present claimants, the lawyer's clients (p 252). Hence he proposes a turn to rulemaking, not just as a model for legitimate governance but actually to implement the leveraging proposal. Parties would work out a set-

tlement in conjunction with the requisite government agency, which would be empowered by legislation to be involved, as part of a negotiated rulemaking proceeding.⁵⁹ The final rule would include the fee arrangement Nagareda proposes. As a quid pro quo for participation in the rulemaking enterprise, the parties would benefit from a settlement adopted as a public rule and thus binding on all claimants going forward (pp 254, 261). In other words, once the rule became final, no one could opt out.

2. Reactions.

I will leave to others an administrative law critique of the rule-making aspect of Nagareda's leveraging proposal. His solution to the legitimacy problem in mass torts has an appealingly simple elegance to it, all the more so given how complicated and problematic global peace in mass torts can be. I nonetheless offer one theoretical and one practical critique.

a) Administration and autonomy. At the theoretical level, the paradigm shift from the litigation-centered ideal of legitimacy to an administrative one may not be necessary. Nagareda elsewhere has derided the "Maginot Line" mentality that hinges the legitimacy of a mass tort settlement on satisfaction of a litigation-centered due process ideal.⁶⁰ This mindset ignores "the new world of warfare" in mass torts that has "blitzed past" old models of dispute resolution.⁶¹ Conflict-free cohesion as a substitute for individual autonomy ignores mass tort realities. Legitimate governance better suited to the challenges mass torts pose draws inspiration from administration, not litigation, as the appropriate institutional framework.

However, the source of legitimacy Nagareda invokes—an alignment of incentives between those who make rules and those affected by them—arguably fits within a litigation framework. As discussed, the class action's due process bona fides rest on a foundation of valid interest representation. A number of scholars have argued that a class action

⁵⁹ In a negotiated rulemaking proceeding, an agency determines that there exists a limited number of interests that will be affected by a proposed rule. It then creates a committee, which includes representatives from these interests as well as agency representatives, to craft a rule by consensus. The rule then goes through standard rulemaking procedures before it becomes final (pp 255–57). For negotiated rulemaking in the mass tort setting, Nagareda proposes that the agency that usually attends to the subject matter of the mass tort at issue appoint the peacemaking lawyers to the rulemaking committee and promulgate the settlement they strike as the rule (pp 257–65).

⁶⁰ See Richard A. Nagareda, Panel Discussion, *The Vioxx Settlement* (American Enterprise Institute Jan 7, 2008), online at http://www.aei.org/events/filter.all,eventID.1626/event_detail.asp (visited Aug 29, 2008). See also Adam Liptak, *In Vioxx Settlement, Testing a Legal Ideal: A Lawyer's Loyalty*, NY Times A12 (Jan 22, 2008) (quoting Nagareda).

⁶¹ Nagareda, Panel Discussion, *The Vioxx Settlement* (cited in note 60).

can bind absent class members without their consent to a judgment or settlement consistent with constitutional prerequisites if the class representative and the class counsel adequately represent their interests.⁶² The flaw with the extant standard for interest representation, conflict-free cohesion, is that it ignores the dynamics of settlement and thus demands the impossible. Nagareda proposes a tool that may achieve valid interest representation in a manner consistent with settlement realities. Described as such, Nagareda's proposal fits rather than rejects the existing due process paradigm for aggregate litigation.

Nagareda invokes standard requirements of professional responsibility, which preclude the representation of conflicting interests absent client consent, to justify a turn away from litigation (pp 228–29). But these requirements regulate litigation involving relationships based on autonomy and consent, that is, individual attorney-client relationships. They do not apply, or at least not neatly, in class actions.⁶³ An ill fit between rules of professional responsibility and Nagareda's leveraging proposal does not make litigation the wrong paradigm for mass torts, because class actions offer a version of this institutional framework where these rules apply imperfectly, if at all.

Current class action law (as opposed to law of professional responsibility) may well place "off limits," as Nagareda contends, an arrangement "in which the dealmakers on the plaintiffs' side simulta-

⁶² See, for example, Issacharoff, 1999 S Ct Rev at 341, 352 (cited in note 46); John Bronsteen and Owen Fiss, *The Class Action Rule*, 78 Notre Dame L Rev 1419, 1420 (2003); Marjorie A. Silver, *Fairness and Finality: Third-party Challenges to Employment Discrimination Consent Decrees after the 1991 Civil Rights Act*, 62 Fordham L Rev 321, 367 (1993); Owen Fiss, *The Allure of Individualism*, 78 Iowa L Rev 965, 970–71 (1993). See also Douglas Laycock, *Due Process of Law in Trilateral Disputes*, 78 Iowa L Rev 1011, 1020 (1993) (referring to interest representation as a "second best" due process alternative); Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 NYU L Rev 193, 214 (1992) (referring to this as the "conventional wisdom"). Professor Coffee effectively posits good interest representation as the due process prerequisite for aggregate litigation. He does so, however, by emphasizing client autonomy. Strengthening client autonomy with rigorous opt out rights, he argues, will minimize the sort of agency costs that make interest representation problematic. See Coffee, 100 Colum L Rev at 417–28 (cited in note 47).

⁶³ See, for example, *Bash v Firstmark Standard Life Insurance Co*, 861 F2d 159, 161 (7th Cir 1988) (recognizing that strictly mandating rules of conduct on attorneys may make class actions unworkable); FRCP 23(g)(1)(B), Advisory Committee Notes to the 2003 Amendments (recognizing a possible conflict between class representatives and the class and requiring class counsel to put "the best interests of the class as a whole" first); ABA Model Rules of Professional Conduct Rule 1.7 comment 25 (2003) (noting that unnamed members in a class action are not considered clients of the lawyer with regard to whether "the representation of one client will be directly adverse to another client" under Rule 1.7). By implication, Nagareda might suggest that the standard conflict of interest rules do not apply in class litigation because "substantial conflicts are not allowed to emerge in the first place" under current class certification law (p 229). "Substantial conflicts" among class members, and between clients and their lawyers, do in fact emerge in class actions without requiring decertification of classes. See generally, for example, *Lazy Oil Co v Witco Corp*, 166 F3d 581 (3d Cir 1999).

neously represent both persons with present-day disease and persons at risk of disease in the future” (p 227). Thus, even if the class action framework and its foundation in interest representation could mesh in theory with Nagareda’s prescription, its current contours make it ill-suited for a mechanism that leverages rather than avoids conflicts of interest. One could simply criticize the Court in *Amchem* and *Ortiz* for misunderstanding how conflicts of interest in mass tort work and for failing to appreciate that management of the conflicts, not their repudiation, could lead to the best form of interest representation. Keeping mass torts in the litigation paradigm would thus require a revision to class action law. But a revision to one paradigm may come more easily than its wholesale replacement with another.

If a paradigm shift is necessary, it may be because valid interest representation alone cannot function as a complete due process substitute for the consensual attorney-client relationship and the respect it affords individual autonomy. For damages class actions, the extent to which due process requires some residue of participatory rights for class members remains uncertain.⁶⁴ Nagareda treats *Amchem* as consistent with the notion that valid interest representation is a sufficient due process substitute (p 229). But the opinion is ambiguous on this point. After it pronounced the class dead on conflict-of-interest grounds, the Court mentioned in dicta an additional concern, that the settlement did not afford absent class members meaningful opt-out rights.⁶⁵ Similarly, in *Ortiz*, the Court rejected the parties’ expansive use of Rule 23(b)(1)(B) in part because it would have bound class members without affording them opt-out rights and thus “regardless . . . of their consent.”⁶⁶

If individual autonomy is an irreducible due process minimum and if, as Nagareda suggests, opt-out rights imperil global peace, then perhaps peacemaking does in fact require a paradigm shift to administration, where some form of participatory rights is not a prerequisite for legitimate governance. Nagareda could have justified his turn to agency rulemaking, for example, not because it is necessary to override individual professional services agreements but because a promulgated rule could displace claimants’ autonomy to control their rights to sue without affording opt-out rights. But Nagareda seems to agree that valid

⁶⁴ See, for example, Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 BU L Rev 213, 225–26 (1990) (describing the Advisory Committee’s shifting positions on whether absent class members must consent to representation); Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action* 252 (Yale 1987) (arguing that Rule 23(b) vacillates between entrusting class representatives with the interests of those represented and requiring the consent of those represented).

⁶⁵ *Amchem*, 521 US at 628.

⁶⁶ See *Ortiz*, 527 US at 847.

interest representation is all that is needed.⁶⁷ Importantly, he notes that a final rule adopting a settlement would bind all claimants to its terms, whether they liked it or not, but he does not identify this outcome as a linchpin for the legitimacy of the process. If this is so, the paradigm shift to administration does not seem necessary as the theoretical prerequisite for the leveraging proposal.

b) *Practical problems with the leveraging proposal.* As a practical matter, Nagareda's leveraging proposal—the fee arrangement that defers payment to plaintiffs' lawyers until future claimants make their claims—would lead to significant delay, both for the final approval of mass tort settlements and the distribution of attorneys' fees. My argument should be kept in perspective, as fee awards in class actions can take a notoriously long time to vest in plaintiffs' lawyers. Fen-phen is illustrative. The district court approved the settlement in 2000, but the plaintiffs' lawyers did not get their fee award in whole until 2008.⁶⁸

Nonetheless, the agency overlay, added to the leveraging proposal, would lengthen an already protracted enterprise. With judicial review in the offing, rulemaking, including the supposedly more streamlined negotiated variety, hardly enjoys a sterling reputation as an efficient enterprise.⁶⁹ Nagareda would add to the lengthy mass tort maturation process a potentially thick layer of administrative delay. After a mass tort labored through a long immaturity stretch, and after peace-

⁶⁷ Nagareda suggests that opt-out rights are best understood not as a testament to the continued importance of individual autonomy in representative litigation but as a means better to ensure good interest representation (p 136). Past writing expands on this idea. Nagareda has argued that “[t]he proposition that class counsel have no general mandate to alter preexisting rights . . . means that the holders of those rights generally must have the opportunity to exclude themselves from the transaction” by enjoying the right to opt out. Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum L Rev 149, 195 (2003). Respect for autonomy is not an end unto itself, however. Rather, the threat of opt-outs by high value claimants will ensure that class counsel and defendants, interested in a final peace, will craft a settlement that will maximize the interests of all class members and thereby make opting out an unattractive option. See *id.* at 196. See also Nagareda, 115 Harv L Rev at 829 (cited in note 47) (praising opt-out rights as a means to “respect individual autonomy by preserving the tort system as an ongoing check on the settlement terms”).

⁶⁸ *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liability Litigation*, 2008 WL 942592, *2, *43–46 (ED Pa). The court made several preliminary fee awards during these eight years. See *id.* at *6.

⁶⁹ See, for example, Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L Rev 1, 9 n 19 (1997) (noting a consensus that rulemaking is costly, rigid, and has spurred perverse incentives). For empirical evidence suggesting that negotiated rulemaking has not proven markedly more efficient than standard rulemaking, see Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter*, 9 NYU Envir L J 386 (2001); Charles C. Caldart and Nicholas A. Ashford, *Negotiation as a Means of Developing and Implementing Environmental and Occupational Health and Safety Policy*, 23 Harv Envir L Rev 141, 145 (1999); Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 Duke L J 1255, 1260–61, 1271–1309 (1997).

makers concluded complex and difficult settlement negotiations, the agency would then have to open a notice and comment period before it could promulgate a final rule to adopt a settlement. One study of comment periods discovered that on average they lasted 2.2 years.⁷⁰ Objectors to the settlement could lodge their disagreement before the rule's final publication; but even more ominously, they could then sue to challenge the promulgated settlement as arbitrary and capricious under the Administrative Procedure Act⁷¹ (APA). Given the likelihood of objectors in high-stakes class actions,⁷² such challenges are sure bets. A whole new round of litigation would have to end before claimants could start receiving compensation.

As for plaintiffs' lawyers waiting to be paid, Nagareda would add to this time a three- to five-year period while their fees sit in escrow. Even assuming a settlement took one year to proceed from proposed to final rule, objectors to the final product would then have whatever the number of years the applicable statute of limitations provided within which to sue. The APA prescribes a six-year period.⁷³ Nagareda notes that agency participation in his leveraging proposal would require legislation; any workable legislative scheme would have to include a much shorter limitations period. Unless Congress provided exclusive jurisdiction for such challenges, as Nagareda proposes (p 265), a case could begin in any federal district, go to the appellate level, and only end when the Supreme Court denied certiorari or decided the case on the merits. A best-case estimate for the length of this litigation is approximately two years. At the outer extreme (assuming the APA's limitations period remains in place), plaintiffs' attorneys could have to wait up to fourteen years before they got their fees: nine years for rulemaking and related litigation to conclude, then another five while the leveraging proposal kicked in. This scenario is the worst case, and Nagareda has built into his proposal a number of ways to shorten the process. But even a significantly more expedited process would likely mean quite a long waiting period.

Delay would create several problems. First, for mass torts, where claimants may suffer from serious physical infirmities, justice delayed

⁷⁰ See William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 *Pub Admin Rev* 66, 69 (2004).

⁷¹ 5 USC § 706(2)(A) (2000).

⁷² Theodore Eisenberg and Geoffrey Miller, *The Role of Opt-outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 *Vand L Rev* 1529, 1555 (2004) (observing that the number of objectors rises as the value of the case rises).

⁷³ See 28 USC § 2401(a); *Wind River Mining Corp v United States*, 946 F2d 710, 712-13 (9th Cir 1991) (holding that 28 USC § 2401(a) applies to actions brought under the APA to challenge agency action).

may well be justice denied.⁷⁴ Second, nothing in the fee arrangement Nagareda describes addresses the problem of high-value opt-outs. Some plaintiffs' lawyers might encourage their high-value, presently impaired clients to opt out of the aggregate settlement before its adoption as a rule, so the clients' recoveries are not lessened by a need to fund future claimants adequately and so the lawyer can get fees more quickly.⁷⁵ A sufficiently large number of high-value opt-outs could doom the negotiated settlement, as defendants would not have much incentive to fund a compensation grid that does not bind the sort of ruinous and risky claimants that drove it to settlement in the first place. Once the agency adopts the settlement as a final rule, it can of course extinguish opt-out rights. But the delay engendered by the rulemaking process might afford opt-outs sufficient time to threaten the settlement's viability.

Third, only highly capitalized plaintiffs' firms, with ample resources at their disposal to enable them to sit out this period, could play in the mass tort game. Nagareda quite correctly observes that mass torts are already very much the province of the Lief Cabrasers and Cohen Milsteins of the plaintiffs' bar (p 257). Mass torts require huge upfront investments by plaintiffs' firms. Moreover, one or several of the few large-scale plaintiffs' firms typically wins appointment to the plaintiffs' steering committee in multidistrict litigation. This result is appropriate. Given the financial resources corporate defendants have at the ready, a system that levels the playing field by allowing only the plaintiffs' A-team and their resources into the contest makes sense.

Still, Nagareda may overestimate the capacity even of elite plaintiffs' firms to weather a lengthy delay before they get their fees. These firms diversify their portfolios of cases and perhaps can tide themselves over with fees earned from antitrust, securities, and other complex litigation that pays in the present. But likely winnings for plaintiffs' lawyers are notoriously illiquid assets. The leveraging proposal makes a hardly implausible doomsday scenario more likely: a firm has millions invested in pending cases, cannot access its mass tort fees, and

⁷⁴ See, for example, *Ortiz*, 527 US at 866 (Breyer dissenting) (observing that "in one 3,000-member asbestos class action . . . 448 of the original class members had died while the litigation was pending").

⁷⁵ If an existing multidistrict litigation order is in place, any opt-out suit initiated in a federal court would be sent to the court that presides over the settlement, empowering the court designated for multidistrict litigation to make sure that these opt-out cases do not unravel the settlement itself. See Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 199 FRD 425, 435 (2001) (authorizing, pursuant to Rule 7.4, the Judicial Panel on Multidistrict Litigation to transfer "tag-along" actions to the MDL transferee court). But opt-outs could file suit in state courts, and it is doubtful that the MDL judge in the federal litigation could enjoin them from doing so. See, for example, *Drelles v Metropolitan Life Insurance Co*, 357 F3d 344, 347 (3d Cir 2003) (refusing to use the Anti-Injunction Act to enjoin opt-outs from a class settlement from suing elsewhere, and distinguishing cases where courts granted such an injunction).

does not have sufficient capital to pay its operating costs in the present.⁷⁶ Moreover, Nagareda's proposal increases the opportunity cost of litigating mass torts significantly. To do so means that plaintiffs' firms would give up potentially lucrative litigation whose payday arrives sooner than a mass tort payday would. Top firms might turn away from mass torts as a result. New firms could fill the void, but the startup capital necessary to litigate a mass tort, compounded by the prospect of attorney compensation delayed for years after a settlement, could make market entry quite difficult and perilous.

II. NAGAREDA'S FORMALISM—PREEXISTING RIGHTS TO SUE

Mass tort settlements pose problems of governance because they involve a sort of privatized law reform. As Nagareda sees it, claimants enjoy rights to sue in tort that preexist litigation commenced by would-be peacemakers. These rights to sue are property rights. When they settle mass torts, plaintiffs' lawyers sell these preexisting property rights to the defendant and thereby replace the tort system with an alternative compensation regime. Most claimants—either absent class members or future claimants—do not consent to representation by the peacemaking plaintiffs' counsel. Accordingly, the legitimacy of the power that peacemaking lawyers assume to dispose of others' property rights is uncertain. A source of legitimacy that does not undermine the pragmatics of peacemaking leads Nagareda to his leveraging proposal. It makes the sale legitimate because it aligns the interests of the peacemakers with the interests of all claimants, present and future. This proposal, Nagareda maintains, requires agency rulemaking to override existing attorney-client contracts. Nagareda's turn to agency rulemaking thus starts with the notion of preexisting rights to sue in tort.

In this Part, I question Nagareda's point of departure, which I believe strikes a formalist note in an otherwise consistently realist account. In my view, individuals do not enjoy rights to sue as property rights in any real sense unless these rights come with a viable procedural avenue for their attempted vindication. I distinguish rights to sue that have no procedural avenue for their attempted vindication from those that do,

⁷⁶ Nagareda suggests that plaintiffs' lawyers could securitize expected future fees and thereby earn shortly after settlement at least some of what they would otherwise have to wait three to five years to earn (p 239). Two features of mass tort litigation that Nagareda himself describes lead me to question this proposal's efficacy. First, how mass tort settlements play out, in terms of the numbers of future claimants who end up filing claims and whether the settlement amount is sufficient to pay these claims, is notoriously difficult to predict. Nagareda's description of the fepfen debacle is an example (pp 145–47). See also generally Frankel, *The American Lawyer* 92 (cited in note 50). Second, the specter of bankruptcy haunts mass tort defendants. The market for these settlement securities might require a huge discount rate to compensate investors for uncertainty and the possibility of bankruptcy.

and I contend that a number of litigation realities mean that the class action device can often offer the only, or at least the superior, such procedural avenue. If correct, this observation adds normative support to the entity theory of the class action, advanced primarily by David Shapiro, which conceives of the class as more than the sum of its individual parts.

Although I depart from Nagareda's premise, I do so in the service of his leveraging proposal. If the entity theory is correct, it justifies a perspective on the class action that treats the class's interests as primary and strengthens judicial power to put the leveraging proposal in place without agency action.

A. Some Realism about Preexisting Rights to Sue

1. Formalism, realism, and rights to sue.

Nagareda does not explicitly define what he means by "preexisting rights to sue" (p 83), but his argument makes the phrase's meaning clear. He refers to the bundle of rights claimants allegedly possess by whatever underlying substantive law a particular case puts at issue.⁷⁷ This definition does not imply that a claimant has a right to compensation but rather a right that, if a claimant meets her evidentiary burden for each element the substantive law prescribes, entitles the claimant to some form of relief. Because preexisting rights are property rights, class counsel cannot unilaterally usurp the power from individual holders to sell their causes of action by way of a class action settlement. As Nagareda has written elsewhere, "[T]he class action must take *as given* class members' preexisting bundle of rights."⁷⁸ Rule 23's provenance in the Rules Enabling Act, and the Act's mandate that pro-

⁷⁷ This definition fits Nagareda's discussion of judicial attempts to police the boundary between immature and mature torts, which are efforts to match settlement value with claimants' rights afforded by underlying substantive law. It also fits Nagareda's discussion of *Amchem*, *Ortiz*, and the Rules Enabling Act (pp 84, 87). See also Richard A. Nagareda, *Bootstrapping in Choice of Law after the Class Action Fairness Act*, 74 UMKC L Rev 661, 662 (2006) (referring to "preexisting rights" as those "delineated by substantive law"); Nagareda, 103 Colum L Rev at 196 & n 205 (cited in note 67) (referring to a "preexisting bundle of rights settled upon by public policymakers" and referring to those "public policymakers" as legislators, administrators, and common law courts).

⁷⁸ Nagareda, 103 Colum L Rev at 174 (cited in note 67) (emphasis added). For other similar arguments, see Martin H. Redish and Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U Chi L Rev 545, 551 (2006); Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 Vand L Rev 995, 1034-46 (2005); Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U Chi Legal F 475, 490 (2003).

cedural rules not “abridge, enlarge, or modify any substantive right,”⁷⁹ establish this limit as a matter of statutory and constitutional law.⁸⁰

The notion of preexisting rights to sue fixed by substantive law and vested as such in individuals as property implies a formalist separation between substance and procedure.⁸¹ This premise—rights preexist in substantive law—makes a jurisprudential assumption that at the least is open to question. Expressing a sentiment shared by a number of legal realists, Karl Llewellyn argued that “a right . . . exists *to the extent that* a likelihood exists that *A* can induce a court to squeeze, out of *B*, *A*’s damages In this aspect *substantive* rights . . . , as distinct from adjective, simply disappear.”⁸² If conceived of only as a product of substantive law, a right to sue “means nothing,” as it has no real-world implications for a plaintiff, a defendant, or a court.⁸³ To quote Llewellyn’s folk wisdom, “If wishes were horses, then beggars would ride.”⁸⁴

⁷⁹ 28 USC § 2072(b) (2000).

⁸⁰ *Id.* Language in *Amchem* and *Ortiz* supports this reading of the statute. See *Amchem*, 521 US at 613 (recognizing that the interpretation of Rule 23 requirements must accord with Article III and the Rules Enabling Act); *Ortiz*, 527 US at 845 (same). Nagareda elaborates on the import of the Rules Enabling Act for preexisting rights elsewhere. See Nagareda, 103 Colum L Rev at 189–91 (cited in note 67). This Review does not tackle the thorny issues posed by the intersection of Rule 23 with the Rules Enabling Act. For additional discussion, see, for example, Note, *The Rules Enabling Act and the Limits of Rule 23*, 111 Harv L Rev 2294, 2307 (1998) (suggesting that the interpretation of Rule 23 in *Amchem* may have violated the Rules Enabling Act); Paul D. Carrington, “Substance” and “Procedure” in the Rules Enabling Act, 1989 Duke L J 281, 317–19 (discussing Rule 23’s impact on doctrine understood as substantive law); Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington’s “Substance” and “Procedure” in the Rules Enabling Act*, 1989 Duke L J 1012, 1027–28 (same).

⁸¹ There are two reasons for the term “formalist.” First, the distinction between substance and procedure arose during an era of legal thought when formal distinctions among legal conceptions took firm root. See Thomas C. Grey, *Accidental Torts*, 54 Vand L Rev 1225, 1231 (2001) (describing the late nineteenth century roots of the distinction between “substance” and “procedure”); Stephen M. Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 Vand L Rev 1387, 1411 (1997) (describing the antebellum relationship between substance and procedure). Second, as discussed in this Review, legal realists reacted to the distinction between substance and procedure as a formalist idea. *Id.* at 1433–38.

⁸² Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 Colum L Rev 431, 448 (1930). For other prominent legal realists making a similar point, see Walter Wheeler Cook, “Substance” and “Procedure” in the Conflict of Laws, 42 Yale L J 333, 336 (1933); Thurman W. Arnold, *Institute Priests and Yale Observers—A Reply to Dean Goodrich*, 84 U Pa L Rev 811, 819 (1936) (“The difference between substantive law and procedure is nothing but a difference in attitude.”). Compare Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 Yale L J 718, 719–20 (1975) (reporting that Oliver Wendell Holmes, writing a generation before legal realism, shared a similar idea of the distinction between substance and procedure). For criticism of the Realists in this respect, see Perry Dane, *Vested Rights, ‘Vestedness,’ and Choice of Law*, 96 Yale L J 1191, 1236–42 (1987).

⁸³ Karl N. Llewellyn, *The Bramble Bush* 18 (Oceana 1960).

⁸⁴ *Id.* (emphasis omitted).

A realist perspective treats a procedural avenue for the attempted vindication of a right to sue as an essential component of the right itself.⁸⁵

This perspective does not deny all utility to the labels “substance” and “procedure” but makes them useful heuristics if not conceptually distinct phenomena.⁸⁶ The perspective insists that any line-drawing must depend on the purpose for and context in which the line is being drawn.⁸⁷ Hardly jurisprudential ravings from a defunct era in legal theory, this understanding of the substance/procedure dichotomy is arguably a main stream one.⁸⁸ Guided by Llewellyn’s insight, I maintain that a rigid boundary between substance and procedure for the purpose of identifying the components of a right to sue does not exist *if* a right to sue is that which entitles its holder to attempt to require her adversary to conform to a particular duty. Defined accordingly, a right to sue is abstract and meaningless in any real-world sense if no procedural avenue exists for its attempted vindication. Although I recognize that this understanding of a right to sue is hardly self-evident,⁸⁹ my premise is that a right to sue has real content that matters to the law only if such a procedural avenue exists.

By asserting the preexistence of a right to sue, Nagareda has side-stepped “the logical morass”⁹⁰ that obscures the boundary between substance and procedure. With a realist-inspired understanding of a right to sue in mind, I propose an analytical distinction to peg with some precision the ways in which substance and procedure interact to form such a right. I label as “unrealized” those rights to sue that appear to have substantive content but lack a procedural avenue for their attempted vindication, and as “realized” those that have both.

A couple of examples expose the epistemic limits of a right to sue defined exclusively in substantive terms and the difference between unrealized and realized rights. A hypothetical paint company lands a

⁸⁵ This perspective could also explain why fee-shifting provisions, treble damages, and other mechanisms that enable realization should be thought of as part of the right to sue as well. See Burbank, 106 Colum L Rev at 1937 (cited in note 15).

⁸⁶ Compare Charles E. Clark, Book Review, 36 Cornell L Q 181, 183 (1950) (“There is not a sharp enough dichotomy between substance and procedure so that these terms can be rigorously self-applying in any event.”), reviewing Charles T. McCormick and James H. Chadbourn, *Cases and Materials on Federal Courts* (2d ed, Foundation Press 1950).

⁸⁷ See Carrington, 1989 Duke L J at 284 (cited in note 80).

⁸⁸ See, for example, *Sun Oil Co v Wortman*, 486 US 717, 726–27 (1988) (“Except at the extremes, the terms ‘substance’ and ‘procedure’ precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn.”).

⁸⁹ Compare Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 Yale L J 1277, 1285–91 (1989) (criticizing the realists’ consequentialist concepts of rights). See also Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 Colum L Rev 857, 870–72 (1999) (describing theories that reject the notion that rights depend in an existential sense on remedies).

⁹⁰ *Mistretta v United States*, 488 US 361, 392 (1989).

government contract to provide paint for all on-base housing for military families in the United States. The paint turns out to contain a harmful chemical that injures thousands of children. Parents file scores of lawsuits in federal courts around the country. After deciding to consolidate the cases pursuant to 28 USC § 1407, the Judicial Panel on Multidistrict Litigation (JPML) has to decide where to send them for pre-trial proceedings.⁹¹ This decision will determine whether plaintiffs have rights to sue. If the JPML sends the cases to a district court within the Ninth Circuit, where the government contractor defense would not apply, the cases could survive a motion to dismiss.⁹² If cases go instead to a court within the Eleventh Circuit, where the defense applies to make defendants immune from suit, the plaintiffs' claims vanish.⁹³ The plaintiffs thus have an unrealized right to sue pending the JPML's decision under § 1407 as to where to send the multidistrict litigation.

Arbitration agreements with class action waivers illustrate the same idea.⁹⁴ A contract between a seller and a consumer will set the substantive terms of the agreement between them and thus the scope of the consumer's right to recover in contract against the seller. Often the contract will also include an arbitration agreement, and increasingly these agreements include waivers that preclude consumers from bringing or joining class actions.⁹⁵ Courts almost assuredly would enforce the clause to bar a consumer from filing an individual action.⁹⁶ Whether she has any right to sue at all thus depends on whether she can start or join a class action. If her case proceeds in the First Circuit, where such waivers are generally unenforceable,⁹⁷ she has a right to sue. If it goes for-

⁹¹ 28 USC § 1407(b) (2000).

⁹² See *In re Hawaii Federal Asbestos Cases*, 960 F2d 806, 810–12 (9th Cir 1992) (refusing to extend the government contractor defense to providers of nonmilitary products).

⁹³ See *Burgess v Colorado Serum Co, Inc*, 772 F2d 844, 846 (11th Cir 1985) (extending the government contractor defense to providers of nonmilitary products). The Ninth and Eleventh Circuits apply the law of the circuit in which the MDL transferee judge sits to dispositive motions. See *Newton v Thomason*, 22 F3d 1455, 1460 (9th Cir 1994); *Murphy v FDIC*, 208 F3d 959, 966 (11th Cir 2000).

⁹⁴ It should be noted that Nagareda has criticized class action waivers elsewhere as efforts by private contract essentially to engage in law reform. See Nagareda, 106 Colum L Rev at 1902–04 (cited in note 13).

⁹⁵ See Jean R. Sternlight and Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 L & Contemp Probs 75, 75 (2004).

⁹⁶ See Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-total Demise of the Modern Class Action*, 104 Mich L Rev 373, 393–96 (2005) (describing the Supreme Court's jurisprudence on arbitration as "incredibly expansive").

⁹⁷ See, for example, *Kristian v Comcast Corp*, 446 F3d 25, 53–60 (1st Cir 2006) (refusing to compel plaintiffs to arbitrate their claims because the arbitration agreement barred class and consolidated actions).

ward in the Seventh, where they are generally enforceable,⁹⁸ she has none. Her right to sue cannot preexist in substantive law. Pending a determination as to whether she can establish venue and personal jurisdiction in the First Circuit, her right to sue remains unrealized.

2. Class actions and realized rights to sue.

For the government contractor and arbitration agreement examples, an unrealized right to sue means that a procedural problem may take away the plaintiff's *power* to attempt to vindicate any protection the applicable substantive law might otherwise afford. The government contractor defense, for example, poses such an irreducible legal infirmity. I go a step further and suggest that the gap between realized and unrealized rights to sue may prove just as irreducible in real terms when the holder has no *ability* to attempt to vindicate her claim. This is so even if there exists no hard-and-fast legal infirmity in her way. In many instances, one or a number of practical barriers, such as a deficit of resources, may prevent or make difficult an attempted vindication through the procedural avenue of an individual action. In some such cases, the class action mechanism may provide the only, or perhaps the superior, procedural avenue for the realization of a right to sue.

The class action mechanism often provides the only procedural avenue for the attempted vindication of small or "negative value" claims.⁹⁹ Substantive law may vest holders with robust and unambiguous rights and impose corresponding duties on prospective defendants. Unless the substantive law also provides something like a fee-shifting provision, however, these rights to sue lack real-world meaning absent the class device. In Judge Posner's words, "only a lunatic or a fanatic"¹⁰⁰ would file an individual action based on them. Hence realization depends on the class action: "The *realistic* alternative to a class action is not [] million[s] [of] individual suits, but zero individual suits."¹⁰¹

Putting aside for argument's sake discomfort with my distinction between realized and unrealized rights, the contention that class actions provide the only means to pursue many small value causes of

⁹⁸ *Metro East Center for Conditioning and Health v Qwest Communications International, Inc.*, 294 F3d 924, 927 (7th Cir 2002) (recognizing that an arbitration agreement is enforced to the same extent as a contract).

⁹⁹ By small value claims, I include both those claims that are small in economic terms as well as those claims that lack sufficient noneconomic value to justify an individual action. A claim for some type of injunctive relief that, although it has little economic value, nonetheless has sufficient significance for the plaintiff to motivate her to bring a lawsuit does not qualify.

¹⁰⁰ *Carnegie v Household International, Inc.*, 376 F3d 656, 661 (7th Cir 2004).

¹⁰¹ *Id.* See also *Blair v Equifax Check Services, Inc.*, 181 F3d 832, 834 (7th Cir 1999).

action should provoke little disagreement.¹⁰² Can one draw a bright-line boundary between small value claims and high-value ones, and say with confidence that rights to sue that fall on the high-value side do not need the class action for realization? In past writing, Nagareda has suggested a “marketability” boundary.¹⁰³ Perhaps mass torts generally involve high-value or “marketable” rights to sue, rendering academic (for the purposes of this Review) any quibbling about realization.

For at least two reasons, procedural avenues and the way they do or do not enable realization remain relevant for mass torts. First, a claim’s value may depend on its relationship to other claims. As Nagareda describes, what can make a mass tort truly mass is not a slew of high-value claims but are rather some high-value claims that might be realized on their own, plus a lot of less valuable claims (pp 21–23). The latter can include exposure-only claims or claims marred by individual causation problems. A seventy-five-year-old, overweight smoker who believes that Vioxx caused his stroke might have a hard time finding a lawyer, as litigation costs may exceed the client’s expected recovery. If a lawyer can add the smoker’s claim to an inventory that includes a thirty-year-old athlete’s claim, the lawyer can spread costs across cases and thus assume the smoker’s representation. The smoker’s claim increases in net value because of its relationship to the aggregate, which might coalesce as a class. This is not necessarily to suggest that this increase in value is desirable, just that it happens as a result of aggregation.

Second, the realist perspective gives reason to doubt the efficacy of a bright-line marketability boundary. The line between rights to sue realizable through individual actions and those needing class treatment cannot be pinpointed without consideration of context, that is, the details of a particular case and perhaps even of particular claimants. In some instances, case-specific characteristics, including litigation costs and psychological dispositions of claimants and judges, can render even claims with an abstractly high value unrealizable through individual actions. Although not legal infirmities per se, these informal barriers blur the marketability boundary. The following are just several of the many informal ways in which even high-value claims can require a class action (or some other form of aggregative proceeding) for realization.

As litigation costs increase, the likelihood that even a nominally high-value right to sue is realizable through an individual action de-

¹⁰² See *Amchem*, 521 US at 617 (“The 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.”), quoting *Mace v Van Ru Credit Corp*, 109 F3d 338, 344 (7th Cir 1997).

¹⁰³ See Nagareda, 115 Harv L Rev at 751–52 (cited in note 47).

creases.¹⁰⁴ The need for sophisticated and thus costly experts in mass torts can exacerbate this problem.¹⁰⁵ The nationwide class action brought against tobacco companies in the early 1990s included upwards of forty million putative class members. At the same time it wound its way through the courts, the companies faced approximately one hundred pending individual cases.¹⁰⁶ Assuredly, many of the putative class members had no viable right to sue. Nonetheless, even if only 1 percent of them did, the class would have exceeded by a factor of four thousand, the number of plaintiffs who pursued individual actions. Assuredly, the tobacco companies' well-known, exhaustive, and cutthroat litigation strategy¹⁰⁷ dissuaded plenty of plaintiffs' lawyers from filing otherwise potentially valuable cases on behalf of individual clients.¹⁰⁸ Plaintiffs' lawyers may devise ways to spread litigation costs across individual clients without recourse to class actions;¹⁰⁹ the point remains, though, that transaction costs may thwart solo efforts to vindicate even abstractly valuable rights to sue.¹¹⁰

¹⁰⁴ See Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 *Notre Dame L Rev* 1057, 1059–60 (2002).

¹⁰⁵ See Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 *Stan L Rev* 1475, 1519 (2005).

¹⁰⁶ See Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 *DePaul L Rev* 331, 335 (2001). The numerous individual actions that have been filed since the termination of the nationwide tobacco class action owe their realizability, at least in part, to the failed class action. As Robert Rabin observes, these cases became attractive to lawyers in part because of the discovery produced in the class case. See *id.* at 345.

¹⁰⁷ See Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 *Stan L Rev* 853, 857–58 (1992).

¹⁰⁸ See, for example, Hubert H. “Skip” Humphrey, III, *The Decision to Reject the June, 1997 National Settlement and Proceed to Trial*, 25 *Wm Mitchell L Rev* 397, 418 (1999), reprinting *State of Minnesota, Office of the Attorney General, Hubert H. Humphrey III, Attorney General, Tobacco Proposal—Preliminary Analysis* (July 18, 1997).

¹⁰⁹ As discussed above, Nagareda describes this process, by which plaintiffs' lawyers compile inventories of claimants, as part of the mass tort maturity cycle (p 16). Plaintiffs' lawyers' ability to spread costs of generic litigation assets across individual cases means that the class action mechanism is hardly the sole device that enables lawyers to realize these rights to sue. See generally Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination among Counsel in Related Lawsuits*, 50 *Duke L J* 381 (2000) (discussing the implications of “informal aggregation” by lawyers who coordinate their efforts on cases that remain formally independent). Whatever implications this observation has for class actions, it shows that one plaintiff's right to sue may not be realizable without other plaintiffs pursuing their rights to sue as well.

¹¹⁰ See, for example, *Ortiz*, 527 *US* at 867–68 (Breyer dissenting):

[T]he alternative to class-action settlement is not a fair opportunity for each potential plaintiff to have his or her own day in court. Unusually high litigation costs, unusually long delays, and limitations upon the total amount of resources available for payment together mean that most potential plaintiffs may not have a realistic alternative.

A tidal wave of individual lawsuits might also make a right to sue unrealizable absent some form of aggregate proceeding.¹¹¹ Early individual lawsuits against a defendant may exhaust its coffers, extinguishing rights to sue both in formal terms—the defendant might declare bankruptcy¹¹²—and in real ones—the right to sue can become worthless and hence pointless to attempt to vindicate.¹¹³ Relatedly, when a tort is truly massive, only those individuals who can sprint to the courthouse door can prosecute their claim, leaving to those slower off the mark a long queue to wait in and an individual right to sue that exists in the abstract and has no meaning in reality.¹¹⁴ Judge Robert Parker famously observed in the Texas asbestos litigation that the defendants’ strategy—to “assert a right to individual trials in each case and assert the right to repeatedly contest in each case every contestable issue”—meant in practical terms that, absent aggregation, “these cases will never be tried.”¹¹⁵

Rights to sue, even nominally valuable ones, might prove unrealizable without the class action device because psychological barriers might preclude individual actions.¹¹⁶ A plaintiff might never know she has a right to sue absent a class action.¹¹⁷ A plaintiff may need the anonymity of absent class member status in order to feel comfortable prosecuting her claim.¹¹⁸ Whether the reason be conflict avoidance, indifference, or some-

¹¹¹ See, for example, Samuel Issacharoff, *Administering Damage Awards in Mass-tort Litigation*, 10 Rev Litig 463, 464–65 (1991) (arguing that delay and an absence of a credible threat of litigation can render even meritorious claims valueless).

¹¹² For example, repeated litigation against Johns-Manville drove the company into bankruptcy. Once this happened, future claimants lost their rights to sue the company. See *Kane v Johns-Manville Corp*, 843 F2d 636, 640 (2d Cir 1988) (detailing a bankruptcy reorganization plan that only allowed claimants to sue a trust rather than Johns-Manville, its operating entities, or its insurers).

¹¹³ See, for example, *In re Electronics Pacing Systems, Inc*, 137 F Supp 2d 985, 1015 (SD Ohio 2001) (describing the class action as having reached a point of diminishing returns where, given the defendants’ limited assets, going forward would decrease the likelihood of recovering damages).

¹¹⁴ Glen O. Robinson and Kenneth S. Abraham, *Collective Justice in Tort Law*, 78 Va L Rev 1481, 1503 (1992) (noting that in mass torts, some individual claims will be adjudicated but others will not given the limits of the judicial system).

¹¹⁵ *Cimino*, 751 F Supp at 651–52.

¹¹⁶ See, for example, *Castano v American Tobacco Co*, 84 F3d 734, 748 n 26 (5th Cir 1996).

¹¹⁷ See, for example, *Schwarm v Craighead*, 233 FRD 655, 664 (ED Cal 2006); *Clark v Bonded Adjustment Co*, 204 FRD 662, 666 (ED Wash 2002). Thomas E. Willging suggests that the provision of notice in the breast implant class action, a mass tort with nominally valuable claims, attracted a significant number of claimants who might not otherwise have filed suit. See Willging, 148 U Pa L Rev at 2256 (cited in note 7). Deborah R. Hensler reports that the significant increases in asbestos claims in the late 1990s may well have happened as a result of class action notice campaigns as part of the *Amchem* and *Ortiz* litigation. See Deborah R. Hensler, *As Time Goes By: Asbestos Litigation after Amchem and Ortiz*, 80 Tex L Rev 1899, 1908 (2002).

¹¹⁸ See, for example, *Scott v Aetna Services, Inc*, 210 FRD 261, 268 (D Conn 2002) (concluding that class action was more appropriate because, among other things, “class members may fear reprisal and would not be inclined to pursue individual claims”); *O’Brien v Encotech Construction Services, Inc*, 203 FRD 346, 350–51 (ND Ill 2001) (same); *Ansoumana v Gristede’s Operating*

thing else, most people eschew litigation even when they have potentially valuable claims.¹¹⁹ In contrast, cases that proceed on some sort of mass basis, either as class actions or pursuant to some other mechanism of aggregation, can lead to significantly higher rates of claims.¹²⁰

Psychological reactions to large-scale class actions among judges might also transform otherwise unrealizable rights to sue into realizable ones. These might include the temptation to right a historic wrong or to craft some form of rough justice on behalf of a large and sympathetic class. Judge Jack Weinstein famously pushed through a \$180 million settlement for members of the Agent Orange class, then afterward dismissed cases brought by opt-outs in part because the government contractor defense barred their claims.¹²¹ A single individual, suing alone and thus lacking the same world-historical appeal, might not tempt the judge to assume the same active management of litigation. Moreover, while the practice has earned its share of criticism,¹²² courts on occasion alter requirements of underlying substantive law to enable a class to meet certification standards, markedly altering the contours of a plaintiff's right to sue.¹²³

Corp., 201 FRD 81, 85–86 (SDNY 2001) (same); *Slanina v William Penn Parking Corp, Inc.*, 106 FRD 419, 423–24 (WD Pa 1984) (same).

¹¹⁹ This phenomenon is true for tort. See, for example, Thomas A. Eaton, et al, *Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1990s*, 34 Ga L Rev 1049, 1096 (2000) (finding a trend of underclaiming rather than overclaiming by Americans who have been injured by negligence); Deborah R. Hensler and Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-legal Analysis*, 59 Brooklyn L Rev 961, 1019 (1993) (suggesting possible explanations for why such a low rate of injured Americans file liability lawsuits). A twenty-year-old study discovered that this is true for employment discrimination as well. Michele Hoyman and Lamont Stallworth, *Suit Filing by Women: An Empirical Analysis*, 62 Notre Dame L Rev 61, 61 (1986).

¹²⁰ See McGovern, 73 Tex L Rev at 1823 (cited in note 7); Francis E. McGovern, *Looking to the Future of Mass Torts: A Comment on Schuck and Siciliano*, 80 Cornell L Rev 1022, 1024 (1995).

¹²¹ See *In re "Agent Orange" Product Liability Litigation MDL No 381*, 818 F2d 145, 159 (2d Cir 1987) (observing that Judge Weinstein granted summary judgment on government contractor grounds and because individual opt-outs could not establish individual causation). Judge Weinstein stated with respect to the Agent Orange litigation that "[i]ndividual justice is not something that this court can provide the Viet Nam veteran The best we can do with the tools at our disposal . . . is to try and do some type of relative rough justice." *CPR Legal Program Annual Meeting*, 9 Alt to the High Cost of Litig 147, 150 (1991). Given many weaknesses in their cases, the enormous settlement Holocaust victims secured from Swiss banks might also illustrate how a district judge, bent on vindicating claims no matter how legally implausible, forces through some class action settlement. See *In re Holocaust Victim Assets Litigation*, 2000 WL 34417291, *8–9 (EDNY). See also Stuart E. Eizenstat, *Imperfect Justice* 165–75 (Public Affairs 2003) (describing how the district judge coordinated both formal and informal meetings with the parties to manage the litigation toward settlement).

¹²² See *Phillips Petroleum Co v Shutts*, 472 US 797, 821 (1985) (describing as "something of a 'bootstrap' argument" the notion that underlying substantive doctrine should change to enable class certification).

¹²³ See, for example, *Blackie v Barrack*, 524 F2d 891, 907–08 (9th Cir 1975) (dispensing with the requirement of proof of reliance in a security fraud class action).

Class actions in certain instances can perfect substantive rights to sue that cannot go forward as individual suits. Absent class members who have not exhausted required administrative remedies, for example, cannot file their own lawsuits but can join class actions.¹²⁴ For at least one type of claim, some circuits have held that an individual can only pursue a substantive right as part of a class action and not on her own.¹²⁵

3. Realization and opt-out rights.

Especially since many claims in mass torts attract counsel only because they can be added to inventories that include stronger claims, quite often rights to sue are not realizable through individual actions. Still, I do not intend to argue that most or even many high-value claims are realizable solely through the avenue opened by the class action. Rather, the informal barriers to realization described above show that realization is not reducible to a bright-line marketability boundary but depends on context. Informal barriers have just as much real-world bite as legal infirmities that formally extinguish rights to sue. A bright-line, one-size-fits-all rule to identify rights to sue as realizable through individual actions may overlook some of the ways in which individuals forego their own suits and thus may not work particularly well.

This is not to say that it is impossible to know when rights to sue may be realized through individual actions. Opt-out rights offer one generic tool to make this assessment. An individual's decision not to opt out of a certified damages class signals one of two things. For whatever reason, the individual's right to sue, at least at the time the class action proceeds to settlement or judgment, may not be realizable on its own.¹²⁶ Alternatively, the individual could believe that her right to sue, while realizable on its own, is better realized by her remaining in the class. Realization, in other words, is not an all-or-nothing affair. A class action could be the better, if not the exclusive, procedural avenue for realization. For individuals who do not opt out, it does not matter if they in theory could bring individual actions, as they gain something by remaining in the class. Interestingly, even for high-value claims, class members rarely exercise opt-out rights. One study found that less than 5 percent

¹²⁴ See *Abermarle Paper Co v Moody*, 422 US 405, 414 n 8 (1975) (noting that class action awards of back-pay under Title VII do not require the exhaustion of administrative remedies by unnamed class members).

¹²⁵ See, for example, *Davis v Coca-Cola Bottling Co Consolidated*, 516 F3d 955, 958 (11th Cir 2008) (holding that a Title VII plaintiff cannot pursue a pattern-or-practice claim unless he does so as part of a class action); *Bacon v Honda of America Manufacturing, Inc.*, 370 F3d 565, 575 (6th Cir 2004) (same).

¹²⁶ This scenario could include instances when the individual simply does not care about her right to sue or is unaware that she has one. Either circumstance amounts to a psychological barrier to suit that in real terms precludes realization absent the class action.

of class members in mass tort cases, which generally have higher-value claims than most other class actions, opted out.¹²⁷ An individual might not receive notice and thus miss the opt-out window, but such missed opportunities are less likely as the value of the claim increases.¹²⁸

B. Realized Rights, Class Actions, and the Entity Theory

The distinction between realized and unrealized rights to sue, and the recognition that the class action mechanism may provide the only or superior procedural avenue for realization, can add normative support to Shapiro's "entity theory" of the class action.¹²⁹ Professor Shapiro's entity theory conceives of a class as more than the sum of its individual parts and supports the notion that the law can consider the interests of the class as a whole apart from and even prior to interests of individual class members.¹³⁰ If individuals owe their realized rights to sue to the class, the class should have entity status.

1. The entity theory and its critics.

The class action fits into one of what Shapiro calls "two models of 'group litigation.'"¹³¹ The first treats the class action as nothing more than a technique for joinder of individual claimants. "Under this view," Shapiro observes, "the individual who is part of the aggregate surrenders as little autonomy as possible."¹³² Because each plaintiff controls her own right to sue, the first model requires that class-wide proceedings pay scrupulous heed to due process-based individual autonomy concerns of class members. I suspect that, given his claim that the class action mechanism must take members' preexisting property rights as givens, Nagareda shares this view. The second model construes the class as something more than the sum of its parts, an "entity" like a corporation or a union that enjoys its own jural identity distinct from its consti-

¹²⁷ See Eisenberg and Miller, 57 Vand L Rev at 1532, 1541–42 (cited in note 72).

¹²⁸ See, for example, Issacharoff, 77 Notre Dame L Rev at 1061 (cited in note 104) (describing high-value claims as more likely to promote vigilance by class members).

¹²⁹ Shapiro, 73 Notre Dame L Rev at 918–19 (cited in note 6). As he notes, Professor Shapiro "borrowed" the term "entity" from Edward Cooper. See *id.* See also Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 NYU L Rev 13, 28 (1996) (discussing the benefits of treating a class as an "entity"). For an earlier treatment of similar issues, see generally Diane Wood Hutchinson, *Class Actions: Joinder or Representational Device?*, 1983 S Ct Rev 459 (discussing the joinder model and the representational model in class action). See also Charles Alan Wright, et al, 18A *Federal Practice & Procedure* § 4455 at 486 (2002) (contrasting the traditional, narrow view of class action with the newer view that highlights the efficiency, finality, and consistency advantages of a class claim).

¹³⁰ Shapiro, 73 Notre Dame L Rev at 940–41 (cited in note 6). But see Coffee, 100 Colum L Rev at 379 (cited in note 47) (criticizing the entity theory).

¹³¹ Shapiro, 73 Notre Dame L Rev at 918 (cited in note 6).

¹³² *Id.*

tuent members.¹³³ This model can “severely limit[]” an individual’s right to control class proceedings if the interests of the class warrant doing so.¹³⁴ Thus, notice and opt-out rights are less important,¹³⁵ class counsel may justifiably owe her chief allegiance to the class and not individual members,¹³⁶ and judges can approve settlements that may be unfair to individual class members if they maximize overall class interests.¹³⁷

Shapiro supports his preference for the entity theory with three pragmatic arguments.¹³⁸ The first balances an individual’s interest to control her right to sue against the reality that punctilious respect for this interest often proves unduly expensive and may preclude “a fair and effective outcome.”¹³⁹ A focus on individual interests should yield to the class’s interest, not only for small value claims¹⁴⁰ but also for higher value claims where economies of scale that come with group litigation would lead to savings and distributional equities for class members.¹⁴¹ Second, Shapiro stresses the deterrence and compensatory goals of tort law and how a treatment of the class as an entity best serves those goals.¹⁴² A finding that a defendant in a mass tort has caused any particular individual’s harm sufficient to meet a burden of proof may be impossible, even as epidemiological data or the like establish that the defendant has injured one-third of the relevant population. While individual suits might consistently run aground, an entity theory makes the class—the population itself—the litigant and leads to an award to the class in direct proportion to the harm the defendant causes.¹⁴³ Third, Shapiro argues that a social interest in the efficient use of litigation resources can outweigh autonomy interests and justify subordinating the individual to the group as a whole.¹⁴⁴

Shapiro’s critics, most prominently John Coffee and Martin Redish, find these pragmatic rationales unsatisfying. Professor Coffee argues that, while the law gives certain groups like unions and groups of share-

¹³³ *Id.* at 919.

¹³⁴ *Id.* For support among other prominent commentators on class actions, see Issacharoff, 77 *Notre Dame L Rev* at 1060 (cited in note 104) (observing “increasing skepticism over the view that a class action is simply an unaltered aggregation of individual claims”); Nancy J. Moore, *Who Should Regulate Class Action Lawyers?*, 2003 *U Ill L Rev* 1477, 1483–86 (espousing the entity model as most appropriate for class actions and as a workable solution to ethics concerns).

¹³⁵ Shapiro, 73 *Notre Dame L Rev* at 936–38 (cited in note 6).

¹³⁶ *Id.* at 940.

¹³⁷ *Id.* at 941.

¹³⁸ See *id.* at 923, 931, 933.

¹³⁹ Shapiro, 73 *Notre Dame L Rev* at 923 (cited in note 6).

¹⁴⁰ *Id.* at 924.

¹⁴¹ *Id.* at 928.

¹⁴² See *id.* at 931.

¹⁴³ See Shapiro, 73 *Notre Dame L Rev* at 931 (cited in note 6).

¹⁴⁴ See *id.* at 933.

holders identities distinct from their individual members, no normative justification supports doing so for the damages class action.¹⁴⁵ Many members do not consent to inclusion in the class in any real sense, for example,¹⁴⁶ and the class action does not come with a majoritarian mechanism like shareholder voting rights by which members can exert control.¹⁴⁷ Efficiency arguments like Shapiro's can justify class treatment of particular claims, but even in these instances they do not justify a treatment that ranks the class as an entity above individual class members and their autonomy interests.¹⁴⁸

Professor Redish attacks the entity theory as confusing "the reality of externally imposed practical limitations on the individual's ability to control his chose [that is, property] with the abstract, pristine nature of the chose itself."¹⁴⁹ Each individual comes to the class action with "pristine pre-procedural substantive rights" protected by the Due Process Clause.¹⁵⁰ If the class were an entity, distinct from its constituent parts, then class certification would amount to a "mystical transformation of these claims" into entity-held rights to sue.¹⁵¹ But the underlying substantive law rarely, if ever, creates a substantive right to sue in classes as entities.¹⁵² The entity theory would strip individually held and individually controlled property rights from their owners and vest them in a class. The class action rule is a mere procedural mechanism limited by the Rules Enabling Act and cannot have this effect.¹⁵³ Standard due process balancing can allow cases proceeding as class actions to depart from the full panoply of protections individuals enjoy for their rights to sue. The entity theory, however, is a fig leaf that disguises an attempt to make class actions easier to bring by defining away the individual autonomy interests that have erected hurdles in the path of their prosecution.¹⁵⁴

¹⁴⁵ See Coffee, 100 Colum L Rev at 380–85 (cited in note 47) (identifying factors not typically present in class actions such as consent, majoritarian control, prior association, and homogenous preferences that justify entity treatment for corporations and unions).

¹⁴⁶ Id at 381.

¹⁴⁷ Id at 382.

¹⁴⁸ Id at 385.

¹⁴⁹ Martin H. Redish and Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 Cal L Rev 1573, 1592 (2007).

¹⁵⁰ Id at 1597.

¹⁵¹ Id.

¹⁵² 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, 97.

¹⁵³ Redish and Larsen, 95 Cal L Rev at 1596 (cited in note 149).

¹⁵⁴ Id at 1597.

2. Realized rights and the entity theory.

Both Coffee and Redish begin their criticism of the entity theory from the same point of departure. Coffee asks why “an individual possessing *legally recognized claims* should be compelled to accept the determination of an entity.”¹⁵⁵ Redish argues that individuals come to class actions with “pristine pre-procedural substantive rights” that they, not the entity, own.¹⁵⁶ In other words, both basically share Nagareda’s concept of preexisting rights to sue as provided for in substantive law.¹⁵⁷ The entity theory collides with due process, because the class action mechanism, a mere procedural device, lacks the lawmaking power to strip individuals of their property rights and vest them in a class.¹⁵⁸

This point of departure, I believe, makes horses of wishes. It draws an unduly formalist distinction between the substantive components of a right to sue, defined abstractly in terms of elements of a cause of action, and the procedural avenue that makes its attempted vindication possible. If the class action offers the only viable procedural avenue for an individual to realize her right to sue, then the individual owes some component of this right to the class. Even if the class action offers the superior, if not exclusive, avenue for realization, the individual’s right to sue when joined to the class nonetheless has a different and enhanced quality. If the class amounted to nothing more than the mere joinder of individuals, it would group together unrealized rights. Because the formation of the class makes realization possible, the class is more than the sum of its constituent parts. In other words, the class action has a transformative effect, one that is hardly mystical but instead a product of realities that make rights to sue unrealizable in individual suits.

Moreover, “pristine pre-procedural substantive rights,” if unrealizable on their own, may not deserve or even enjoy the sort of due process protection that places a premium on individual autonomy in the first place. Due process enters into the equation because rights to sue are property rights. This observation alone does little analytical work, and it remains open what qualities of a right to sue trigger due process protection. The due process status of unrealized rights to sue is arguably quite

¹⁵⁵ Coffee, 100 Colum L Rev at 381 (cited in note 47) (emphasis added).

¹⁵⁶ Redish and Larsen, 95 Cal L Rev at 1597 (cited in note 149).

¹⁵⁷ It bears mention that Redish goes much further than Nagareda and suggests that the requirement that class actions respect “preexisting substantive legal rights” renders significant parts of class action practice, including settlement classes, unconstitutional. See, for example, Redish and Kastanek, 73 U Chi L Rev at 551–52 (cited in note 78) (arguing that class action undermines the protections of Article III’s adverseness requirement).

¹⁵⁸ Redish, 2003 U Chi Legal F at 97 (cited in note 152) (explaining how class action procedure under an entity model transforms substantive rights).

tenuous. Several components of what makes property property for the sake of due process suggest why this is so. Settlements and judgments are sales of rights to sue. An unrealized right to sue lacks any procedural avenue for its attempted vindication, that is, a means to reach settlement or judgment, and is thus inalienable. It thereby lacks a characteristic often recognized as an essential component of a property right.¹⁵⁹ Walter Wheeler Cook suggested that the legal power to bring about a judgment is a constituent element of a right to sue as a property right.¹⁶⁰ An unrealized right to sue affords its holder no such power. Most germanely, the Supreme Court's recent procedural due process jurisprudence, as Thomas Merrill describes it, suggests that something is property for the purposes of due process if it has "some ascertainable monetary value."¹⁶¹ An unrealized right to sue has no value because it cannot be sold. Outside the due process context, property that merits constitutional protection does not do so because it exists in some abstract sense but because its holder can do something in the real world with that property.¹⁶² An individual does not enjoy status for the purposes of due process as an individual with an unrealized right to sue but as a class member—part of an entity—with a realized right.

Although one could object on formalist grounds,¹⁶³ my guess is that few would worry about sacrificed individual autonomy if courts treated classes of low-value claimants as entities. This shift would obviate the

¹⁵⁹ See, for example, Jeremy Waldron, *The Right to Private Property* 53–55 (Clarendon 1988); Richard A. Epstein, *Why Restrain Alienation?*, 85 Colum L Rev 970, 970 (1985). See also Margaret Jane Radin, *Time, Possession, and Alienation*, 64 Wash U L Q 739, 750 (1986) (describing alienation as "one of the most important liberal indicia of property").

¹⁶⁰ See Walter Wheeler Cook, *The Alienability of Choses in Action*, 29 Harv L Rev 816, 819–20 (1916) (analyzing the implications of owning a chose in action). For a more recent discussion of rights to sue as property rights, see Timothy P. Terrell, *Causes of Action as Property: Logan v. Zimmerman Brush Co. and the "Government-as-Monopolist" Theory of the Due Process Clause*, 31 Emory L J 491, 491–92 (1982).

¹⁶¹ Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va L Rev 885, 964 (2000). See also *Castle Rock v. Gonzales*, 545 US 748, 766 (2005) (endorsing Merrill's description). This description of the Court's definition of property for due process purposes fits the consensus among lower courts that a right to sue only "vests" as a property right and thus merits robust due process protection when it is reduced to a final, unreviewable judgment. See, for example, *Fields v. Legacy Health System*, 413 F3d 943, 956 (9th Cir 2005); *In re TMI*, 89 F3d 1106, 1113 (3d Cir 1996); *Salmon v. Schwarz*, 948 F2d 1131, 1143 (10th Cir 1991); *Arbour v. Jenkins*, 903 F2d 416, 420 (6th Cir 1990); *Sowell v. American Cynamid Co.*, 888 F2d 802, 805 (11th Cir 1989); *Hammond v. United States*, 786 F2d 8, 12 (1st Cir 1986).

¹⁶² See, for example, *Keystone Bituminous Coal Association v. DeBenedictis*, 480 US 470, 498–99 (1987) (refusing to declare a state statute that required landowners to leave a small percentage of coal in the ground a taking because as a practical matter landowners could only mine a certain percentage of coal regardless).

¹⁶³ Redish and Larsen, 95 Cal L Rev at 1597 (cited in note 149) (arguing that the class treatment of negative value claimants creates a foundational flaw by erroneously extending rights that confer individual causes of action onto the class).

need for a questionable set of procedures, like individualized notice, designed to affirm virtually nonexistent individual autonomy interests.¹⁶⁴ However, whereas Shapiro argues for a much greater restriction of opt-out rights, my distinction between realized and unrealized rights cannot support his argument for their limitation, appealing as it is.¹⁶⁵ My argument strengthens his entity theory because, when rights to sue are otherwise unrealizable, I deny that individuals come to the class with fully coalesced individual rights to sue that warrant primary and scrupulous deference. As argued, in any particular class action, barriers to realization are such that it is difficult to tell with confidence *ex ante* whether individual members could realize their rights to sue on their own. They can in some high-value instances and not in others.

Because context, that is, particular circumstances for each class member, matters, opt-out rights are crucial. They operate as a safety valve to guard against the erroneous assignment to the class as an entity of rights to sue that are realizable as individual actions.¹⁶⁶ They also buttress the case for subordinating the interests of members who do not opt out to the class as a whole. Again, the decision not to exercise the right signals that the individual right to sue is either only realizable or better realized through the class action mechanism. If this is so, the class member enjoys something by virtue of her class membership that does not exist for her otherwise, justifying a theory that privileges the class as an entity.

This role for opt-out rights collides with Nagareda's claim that global peacemaking needs a complete termination of claimants' access to the tort system. Nagareda's ideal type in this respect is the fen-phen debacle, when back-end opt-out rights doomed the class settlement

¹⁶⁴ See, for example, Debra Lyn Bassett, *Constructing Class Action Reality*, 2006 BYU L Rev 1415, 1466–67 (2006) (noting the restraints of judicial economy and efficiency on rigorously representing absent class members); Richard L. Marcus, *They Can't Do That, Can They? Tort Reform via Rule 23*, 80 Cornell L Rev 858, 889 (1995) (commenting on “the indifference the courts have exhibited toward providing notice and the right to opt out in” some small-value consumer class actions); Roger C. Cramton, *Individualized Justice, Mass Torts, and “Settlement Class Actions”: An Introduction*, 80 Cornell L Rev 811, 824 (1995) (arguing that notice to class members can be less in small-value class actions). For example, in *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 319 (1950), the court disposed with personal service of process on parties whose addresses were unknown in part because they had “small interests” at stake. For criticism of individualized notice in small-value class actions, see Jonathan R. Macey and Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U Chi L Rev 1, 27–33 (1991).

¹⁶⁵ See Shapiro, 73 Notre Dame L Rev at 954–55 (cited in note 6) (suggesting that opt-out rights hurt the substantive interests and integrity of the class as a whole).

¹⁶⁶ For an approach to opt-out rights that treats them as a sort of due process safety valve, see *Robinson v Metro-North Commuter Railroad Co*, 267 F3d 147, 165–66 (2d Cir 2001) (deeming notice and opt-out rights to absent class members as adequately eliminating any due process risk in Rule 23(b)(2) class certification).

(p 147). Before opt-out rights—a fundamental due process plank for most aggregate litigation—have to yield, a broader empirical basis for Nagareda’s disenchantment would be helpful. One could make the case that Wyeth made poor litigation choices as it tried to settle its way out of fen-phen liability,¹⁶⁷ and that other mass tort defendants have already learned to avoid the sorts of mistakes Wyeth made that encouraged a stampede of opt-outs.¹⁶⁸ These mistakes, not something intrinsic to opt-out rights, perhaps should shoulder some blame for the fen-phen settlement’s instability. Indeed, Nagareda himself, prior to the fen-phen meltdown, argued that opt-out rights can encourage peacemaking lawyers to craft settlements that will deter high-value claimants from opting out and thereby strengthen a settlement’s viability.¹⁶⁹ At any rate, in practical terms there may not be a great deal of difference between my preference that opt-out rights be maintained and the implementation of Nagareda’s leveraging proposal; as argued above, the delay the proposal would engender might allow opt-outs to prosecute their own actions before the agency adopted the settlement as a final rule.

C. Implications for Nagareda’s Leveraging Proposal

Although I disagree with his point of departure, my argument for the realist perspective on rights to sue can help implement the fee arrangement at the heart of Nagareda’s leveraging proposal. Despite my concerns with its practical implementation, the fee arrangement is definitely worth a shot, especially since peacemaking in mass torts has proven a barren enterprise in recent years. The claim that a class includes members whose rights to sue are either only or better realized through class actions gives normative support to a theory of the class as an entity. This entity theory in turn justifies judicial power to impose the leveraging proposal and obviates the need for agency involvement.

As explained in Part I.D, Nagareda’s leveraging proposal would better serve the interests of the class as a whole, including future claimants, because it would align the interests of plaintiffs’ counsel negotiating a settlement with future claimants. It would both maximize the size of the pie for all claimants and best allocate the settlement fairly for present and future claimants alike (pp 238, 242). The problem with implementation, as Nagareda sees it, is that peacemaking attorneys have contrac-

¹⁶⁷ See note 55.

¹⁶⁸ See Daniel Fisher, *Will the Vioxx Settlement Work?*, *Forbes* (Nov 13, 2007), online at http://www.forbes.com/2007/11/12/merck-vioxx-lawsuits-biz-health-cz_df_1112vioxx.html (visited Aug 29, 2008) (describing how Merck in the Vioxx settlement put in measures to ensure that physicians-for-hire could not diagnose nonexistent injuries, a problem that helped sink the fen-phen settlement).

¹⁶⁹ See Nagareda, 103 *Colum L Rev* at 173 (cited in note 67).

tual relationships with present claimants only, and that these contracts generally provide for fees pegged to what these clients recover (pp 251–52). He argues that courts scrutinizing class settlements lack the authority to override these contracts, except that they enjoy the equitable power to increase the client’s share when the contract would otherwise yield excessive fees for the lawyer (p 252). Because it ensures equitable compensation for all claimants, Nagareda’s leveraging proposal may end up reducing the take-home for present claimants, the peacemakers’ clients. Nagareda finds “ironic” the notion that courts would use their equitable powers, usually employed to make clients better off, to void fee contracts and put in their stead a fee regime that would make clients worse off (p 252). Hence the need for agency rulemaking, with its unquestioned power to set aside private contracts (p 254).

The entity theory aside, I question whether existing doctrine precludes a court at the settlement approval stage from overriding attorney-client contracts in the interest of fairness to the class as a whole, even if the override takes money away from the settling attorney’s nominal clients.¹⁷⁰ The Third Circuit, for example, has described “[p]rivate arrangements individual class members may have with counsel” as “simply irrelevant” when it comes to structuring a fee award.¹⁷¹ Moreover, courts not only have the power to override whatever fee arrangements class counsel might have crafted, they also can override private contracts entered into between lawyers and inventory clients as these clients file claims with the settlement.¹⁷² This power may include the power to defer collection of fees by class counsel to the future to ensure that the fees match benefits paid to future claimants.¹⁷³

¹⁷⁰ After certification, the attorney has an attorney-client relationship with the class as a whole and arguably owes primary fiduciary duties to the class and not particular class members. See *Van Gemert v Boeing Co*, 590 F2d 433, 440 n 15 (2d Cir 1978) (describing how class counsel must advocate vigorously on behalf of absentee class members who are bound by judgment).

¹⁷¹ See *Lindy Brothers Builders, Inc v American Radiator & Standard Sanitary Corp*, 540 F2d 102, 120 (3d Cir 1976). See also Alan Hirsch and Diane Sheehey, *Awarding Attorneys’ Fees and Managing Fee Litigation* 71 (Federal Judicial Center 1994) (citing *Lindy Brothers* approvingly). The *Manual for Complex Litigation (Fourth)* provides that “the court may not rewrite the parties’ agreement,” but this statement is not inconsistent with the claim that the court can set aside a private agreement. *Manual for Complex Litigation (Fourth)* § 21.7, 335 (Federal Judicial Center 2004). It is hard to evaluate what the *Manual* means by this statement, as it cites no authority in support. See *id.* The American Bar Association reported in 2006 that the power of a court to set aside fee contracts is uncertain. See Task Force on Contingent Fees of the American Bar Association’s Tort Trial and Insurance Practice Section, *Contingent Fees in Mass Tort Litigation*, 42 *Tort Trial & Ins Prac L J* 105, 124–25 (2006) (stating that in principle authority exists for judges to regulate contingent fee contracts).

¹⁷² See *In re Joint Eastern and Southern Districts Asbestos Litigation*, 878 F Supp 473, 558 (EDNY 1995).

¹⁷³ See FRCP 23(h), Advisory Committee’s Notes to the 2003 Amendments (“In some cases [involving future payments from a settlement regime], it may be appropriate to defer some

Courts also have ample power to ensure an equitable allocation among the class as a whole, regardless of what sorts of private arrangements class counsel have with particular members,¹⁷⁴ and to use fairness of allocation as a factor to decide what sort of fee to award.¹⁷⁵

Assuming that Nagareda is correct, however, the entity theory provides a normative basis for implementation of his leveraging proposal without requiring agency action. The entity theory makes the class the client and puts the interests of the class before the interests of particular class members.¹⁷⁶ Class counsel thus owe their primary allegiance to the class and not to the individual class members.¹⁷⁷ If Nagareda is right that his leveraging proposal would maximize the size of the pie, a court could set aside private arrangements between class counsel and individual class members in the interest of ensuring that class counsel does not shortchange the class for her own benefit. Moreover, if counsel owes an obligation to the class, she owes an indivisible obligation to all class members, including future claimants. A court could override a private agreement that would result in future claimants being shortchanged, on grounds that it unduly enriches their counsel.

Nagareda supports his turn to rulemaking with the argument that his proposal would not require the creation of any new bureaucracy (p 251). He acknowledges, however, that his proposal would require “an initial delegation of rulemaking authority,” that is, federal legislation (p 258). The entity theory that makes a class the client would require no such significant legal change. In a number of ways, existing law that regulates the relationship between class counsel, individuals with whom they have contractual relationships, and classes as wholes treats classes as entities to whom attorneys owe primary allegiance. Nancy Moore points out, for example, that class counsel can recommend a settlement even if her nominal client, the class representative,

portion of the fee award until actual payouts to class members are known.”); *Manual for Complex Litigation (Fourth)* § 21.71 at 336–37 (cited in note 171) (describing appropriate circumstances that may require attorneys to take as fees some portion of in-kind benefits or defer all or some of their collection of fees pending distribution of benefits); id § 22.927 at 461 (observing that deferred payment of attorney fees may be appropriate for settlements with nonmonetary or deferred payments to claimants).

¹⁷⁴ See, for example, *Staton v Boeing Co.*, 327 F3d 938, 975–78 (9th Cir 2003) (holding that the district court abused its discretion in approving a settlement that had a large damage award differential between named and unnamed plaintiffs).

¹⁷⁵ See R. Eric Kennedy, *Class Action Attorney Fees: The Key Role of the Federal District Judge in Fashioning & Monitoring Mass-tort Common Fund Distributions to Assure a Settlement Deemed Equitable by Both Represented & Unrepresented Class Members, & Both Private & Class Counsel*, 6 Sedona Conf J 173, 175 (2005).

¹⁷⁶ Shapiro, 73 Notre Dame L Rev at 941 (cited in note 6).

¹⁷⁷ Consider ABA Model Code of Professional Responsibility EC 5-18 (“A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity.”).

disagrees.¹⁷⁸ Indeed, class counsel can continue to represent the class even if the class representatives with whom they have a professional services contract object to a settlement.¹⁷⁹

Once a class is certified, an attorney arguably represents all class members as individuals joined to an aggregate proceeding. In a number of ways, however, attorneys also owe obligations to putative classes,¹⁸⁰ and these obligations can supersede obligations to individual class representatives. For example, when a defendant makes a Rule 68 offer of judgment to a class representative in a putative class action, the plaintiff's attorney does not need to accept it on her client's behalf, even if the defendant offers the maximum amount the class representative requests as damages.¹⁸¹ The defendant must make the offer of judgment to 'the indivisible class' as a whole, even precertification, and its failure to do so means that it has not made an offer to a recognized 'offeree' for the purposes of Rule 68.¹⁸² Analogously, class counsel may have to turn down a settlement offer to the class representative if it runs counter to the interests of the putative class members, even if it serves the interest of the counsel's nominal client.¹⁸³ A class representative owes something to the class and thus should not use the leverage a putative class offers to procure an advantageous settlement for herself alone.¹⁸⁴ In other ways as well class counsel and putative classes enjoy a form of an attorney-client relationship.¹⁸⁵ The fact that these rules apply before a class is certified is significant; putative classes are not the aggregation of indi-

¹⁷⁸ See Moore, 2003 U Ill L Rev at 1484–85 (cited in note 134).

¹⁷⁹ *Lazy Oil Co v Witco Corp*, 166 F3d 581, 590 (3d Cir 1999).

¹⁸⁰ See *In re General Motors Corp Pick-up Truck Fuel Tank Products Liability Litigation*, 55 F3d 768, 801 (3d Cir 1995) (observing in the context of deciding a fee award that class counsel "owe the entire class a fiduciary duty once the class complaint is filed"). See also generally *Gates v Rohm and Haas Co*, 2006 WL 3420591, *2 (ED Pa) (acknowledging uncertainty over whether class members are clients protected under attorney-client privilege); *Schick v Berg*, 2004 WL 856298, *4–6 (SDNY) (discussing the nuances of the scope of the fiduciary duty owed to class members).

¹⁸¹ But see *Abraham v Volkswagen of America, Inc*, 1991 WL 89917 (WDNY).

¹⁸² See *McDowall v Cogan*, 216 FRD 46, 50 (EDNY 2003). See also *Weiss v Regal Collections*, 385 F3d 337, 347 (3d Cir 2004).

¹⁸³ See *Caston v Mr. T's Apparel, Inc*, 157 FRD 31, 33 (SD Miss 1994). See also *Shelton v Pargo, Inc*, 582 F2d 1298, 1315 (4th Cir 1978) (stating that a court should make sure that "under the guise of compromising the plaintiff's individual claim, the parties have not compromised the class claim to the pecuniary advantage of the plaintiff and/or his attorney").

¹⁸⁴ *Caston*, 157 FRD at 33.

¹⁸⁵ For example, the mere filing of a class action empowers a court to regulate the defendant's communications with putative class members. See *Gulf Oil Co v Bernard*, 452 US 89, 101–02 (1981); *Bublitz v E.I. DuPont de Nemours & Co*, 196 FRD 545, 549 (SD Iowa 2000). See also generally Debra Lynn Bassett, *Pre-certification Communication Ethics in Class Actions*, 36 Ga L Rev 353 (2002) (discussing the need to address communications between attorney and potential class members before class certification).

viduals, because prior to certification no court has determined formally to join them to the action.¹⁸⁶

A treatment of the class as an entity, already the implicitly operative theory in areas of class action law, strengthens a judge's power to implement Nagareda's leveraging proposal without rulemaking. An agency nonetheless would have one advantage over a court in this respect. Plaintiffs' lawyers representing high-value present claimants who do not want to risk a diminution of fees might advise their clients to opt out of the settlement and pursue individual litigation. As discussed, a sufficient number of these high-value opt-outs could imperil the global peace. By adopting the settlement as a rule, the agency can preclude all claimants' access to tort and thus prevent opt-outs. Lawyers with high-value claimants can no longer threaten the settlement's viability. A court in contrast almost assuredly cannot set aside private contracts and impose the leveraging proposal on lawyers representing opt-outs. Certainly the entity theory gives the court no such power, as an opt-out is no longer part of the class-as-entity. Without a compulsory rule in place, the leveraging proposal might give lawyers representing high-value claimants an incentive to steer their clients away from the global settlement and toward potentially more lucrative individual litigation.

Whether peacemaking without rulemaking would run aground for this reason and whether rulemaking as Nagareda proposes would solve the opt-out problem are questions open to dispute. Again, a broader empirical basis would help establish whether opt-outs necessarily threaten the viability of global peace, or whether the fen-phen settlement is exceptional in this regard. Also, while a rule, once final, would solve the opt-out problem, delay in the rulemaking process would give opt-outs time to pursue their own settlements and judgments. Finally, peacemakers could use other techniques to deter opt-outs, techniques that would not require either agency rulemaking or a court order for implementation.¹⁸⁷

¹⁸⁶ See *Rolo v City Investing Co Liquidating Trust*, 155 F3d 644, 659 (3d Cir 1998) ("The class must, however, be certified before it may become a class action. Until the putative class is certified, the action is one between [the named class representatives] and the defendants.").

¹⁸⁷ The Vioxx settlement agreement, for example, includes provisions that require any plaintiffs' lawyer who represents clients collecting from the settlement to recommend to 100 percent of that lawyer's clients to collect from the settlement. If any one client refuses and wants to pursue an individual settlement or judgment, the attorney either has to withdraw from representing the client or withdraw from representing all other clients. See *Settlement Agreement between Merck & Co, Inc, and the Counsel Listed on the Signature Pages Hereto* § 1.2.8, online at http://www.merck.com/newsroom/vioxx/pdf/Settlement_Agreement.pdf (visited Aug 29, 2008). In other words, the lawyer has a choice between losing all fees she might reap from collection through the settlement or losing fees she might reap if her individual client succeeds as an opt-out.

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CONCLUSION

Mass Torts in a World of Settlement succeeds for three reasons. First, Nagareda assembles a vast array of data on mass torts into a framework that illuminates with precision the quandaries that privatized peacemaking creates. Second, he offers a compelling public law vision of mass torts. This nominally private litigation actually works as a form of governance. As such, a public law solution—if not Nagareda’s leveraging proposal, than perhaps something similar—may indeed chart a way out of the dilemmas he convincingly describes. Finally, the book is nothing if not stimulating, a virtue I hope my challenge to the notion of preexisting rights to sue highlights. Future efforts to wrestle with peacemaking challenges in mass torts will have to account for, and may well be inspired by, Nagareda’s argument.