

CHOICE OF LAW IN COMPLEX LITIGATION

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Nearly all proceduralists agree that all the claims in a complex case should be decided under a single substantive law or, at the very least, under a uniform choice-of-law rule. In this paper, Professor Kramer challenges the assumptions at the foundation of that consensus. In so doing, he confronts two myths of late-twentieth century procedure: that the sort of procedural maneuvers used to circumvent unambiguous Supreme Court precedents precluding federal courts from creating choice-of-law rules are legitimate; and that the unusual nature of complex litigation justifies such measures. Professor Kramer exposes the fallacies underlying the first premise, then presents historical and normative arguments against the second. He questions both the principle that the parties in complex litigation are similarly situated with respect to the applicable law and the notion that adjudicating such litigation under more than one law is unmanageable.

Consensus is increasingly rare in today's legal world. Our profession has grown so big and has such a wide assortment of groups representing diverse interests that advocates are found on more than one side of almost any issue. This is especially true if the stakes are high, as in complex litigation. Few questions about how to handle these gigantic lawsuits are matters of general agreement. Choice of law is even worse, though not necessarily because the stakes are high. Conflicts scholars just seem to like disagreement, and they have helped to confuse courts and make a mess of choice-of-law analysis.

All things considered, then, it's surprising to find even partial consensus on choice of law in complex litigation. Yet consensus there is—consensus, at least, that ordinary choice-of-law practices should yield in suits consolidating large numbers of claims and that courts should apply a single law in such cases.¹ True, the shared understand-

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¹ See, e.g., James A.R. Nafziger, Choice of Law in Air Disaster Cases: Complex Litigation Rules and the Common Law, 54 La. L. Rev. 1001, 1013 (1994) (explaining that because forum shopping poses serious problem, "a consensus has emerged in favor of applying the same body of rules to govern all issues in a single case"). Aaron Twerski and Robert Sedler appear to be the only dissenters from this view, and Sedler in particular has been a persistent objector. See Robert A. Sedler, The Complex Litigation Project's Propo-

ing does not go much beyond this. There is little agreement on how the one applicable law should be chosen, or even what it means exactly to choose a single law. Many commentators say that one law should govern all the issues in a case, though some would leave an escape hatch for extreme situations.² Others favor *dépeçage* and would apply different laws to different issues, so long as only one law is applied to each issue.³ But the experts all agree that our usual

sal for Federally-Mandated Choice of Law in Mass Tort Cases: Another Assault on State Sovereignty, 54 La. L. Rev. 1085, 1086 (1994) [hereinafter Sedler, Another Assault on State Sovereignty] (arguing that applying law of single jurisdiction in mass tort cases represents "assault on state sovereignty" because it sacrifices important state interests); Robert A. Sedler, Interest Analysis, State Sovereignty, and Federally-Mandated Choice of Law in "Mass Tort" Cases, 56 Alb. L. Rev. 855, 861 (1993) (proposing that in consolidated mass tort cases, federal courts should adhere to state choice-of-law rules and reach same result as courts of state from which case was transferred); Robert A. Sedler & Aaron D. Twerski, The Case Against All Encompassing Federal Mass Tort Legislation: Sacrifice Without Gain, 73 Marq. L. Rev. 76, 98 (1989) [hereinafter Sedler & Twerski, Sacrifice Without Gain] (arguing that legislation allowing federal courts to consolidate litigation of mass tort cases using law of single state violates principles of state sovereignty and choice of law); Robert A. Sedler & Aaron D. Twerski, State Choice of Law in Mass Tort Cases: A Response to "A View From the Legislature," 73 Marq. L. Rev. 625, 626 (1989) (proposing that "if consolidation [of mass tort cases in single federal court] ever does occur it should be accomplished without displacement of state choice of law"). I am indebted to Professors Sedler and Twerski for many of the ideas in this paper, a fact that I have probably failed adequately to indicate in subsequent citations and so wish to underscore at the outset.

² See, e.g., The Multiparty, Multiforum Jurisdiction Act of 1989: Hearings on H.R. 3406 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary, 101st Cong., 1st Sess. 17, 19 (1989) (statement of William W. Schwarzer, U.S. District Judge for the Northern District of California) ("Although in some cases it may be possible for the judge to apply the law of a single state to all issues, it would seem unwise, and perhaps unworkable and unjust, to require the transferee court to apply the law of only a single jurisdiction to all issues."); American Bar Ass'n Comm'n on Mass Torts, Report to the House of Delegates app. D § 106 (Aug. 1989) [hereinafter ABA, Mass Torts Report] (recommending choice-of-law decisions be left to discretion of federal court when multiple state rules apply); Jack B. Weinstein, Individual Justice in Mass Tort Litigation 21, 25, 146 (1995); Peter J. Kalis et al., The Choice-of-Law Dispute in Comprehensive Environmental Coverage Litigation, 54 La. L. Rev. 924, 949-51 (1994) (arguing that in environmental insurance coverage actions, forums with significant interests in outcome of litigation should have their laws applied); Thomas M. Reavley & Jerome W. Wesevich, An Old Rule for New Reasons: Place of Injury as a Federal Solution to Choice of Law in Single-Accident Mass-Tort Cases, 71 Tex. L. Rev. 1, 43 (1992) (suggesting that when it is not foreseeable that accidents will occur in given state, application of multiple laws is acceptable); Paul S. Bird, Note, Mass Tort Litigation: A Statutory Solution to the Choice of Law Impasse, 96 Yale L.J. 1077, 1094 (1987) (contending that courts should apply multiple laws when selection of one law does not comport with due process).

³ See, e.g., American Law Inst., Complex Litigation Project § 6.01 cmt. a, at 398-99 (Proposed Final Draft, Apr. 5, 1993) [hereinafter ALI, Complex Litigation Project] (explaining desirability of applying law of single state to particular issue that is common to all claims); Friedrich K. Juenger, Mass Disasters and the Conflict of Laws, 1989 U. Ill. L. Rev. 105, 126 (proposing that in choosing applicable rule for any issue in mass disaster case, it is preferable to frame an alternative reference provision that favors application of better sub-

choice-of-law practices should be modified in favor of some "single law" approach for complex litigation.

What's striking about this concordance is not just the unlikelihood of finding harmony at the intersection of two genuinely controversial topics. What's striking is that the accepted wisdom seems so obviously wrong. That may sound like a brash claim. Practically everyone's first instinct, I know, is to look for a single law in complex cases. But first instincts may mislead, and I believe that a closer look shows why we should not change our usual choice-of-law practices solely for mass litigation. The argument in a nutshell is this: Because choice of law is part of the process of defining the parties' rights, it should not change simply because, as a matter of administrative convenience and efficiency, we have combined many claims in one proceeding; whatever choice-of-law rules we use to define substantive rights should be the same for ordinary and complex cases. I put aside whether we should change those rules across the board (a question I have dealt with at length elsewhere⁴).

Before elaborating this position, I want also to put aside the idea of using federal substantive law—not because such law is a bad idea, but because the question we need to address is what to do without it. The predicaments that give rise to complex litigation—airplane crashes, securities frauds, pollution disasters, defective products, and the like—may all be interstate matters of a type properly subject to federal regulation with preemption of state law. I mean federal regulation of these areas, by the way, without regard for whether the lawsuits that arise are complex. No one argues that Congress ought to adopt special substantive rules that come into play only if lawyers and judges choose to structure lawsuits on a consolidated basis. There is, however, a decent argument that the national character of the problems that give rise to complex litigation justifies preempting state law with uniform federal tort or contract law. If so, the solution is to work for the adoption of such law, something advocated by almost

stantive rule and can be expected to produce decisionmaking rules similar to "national consensus law"). Professor Russell Weintraub urges only that we find a single approach to the choice-of-law inquiry, even if this means applying different laws to different claims, which may place him outside the general consensus along with Sedler and Twerski. See Russell J. Weintraub, *Methods for Resolving Conflict-of-Laws Problems in Mass Tort Litigation*, 1989 U. Ill. L. Rev. 129, 148.

⁴ See, e.g., Larry Kramer, *More Notes on Methods and Objectives in the Conflict of Laws*, 24 Cornell Int'l L.J. 245, 275 (1991); Larry Kramer, *On the Need for a Uniform Choice of Law Code*, 89 Mich. L. Rev. 2134, 2146-49 (1991) [hereinafter Kramer, *Uniform Choice of Law*]; Larry Kramer, *Rethinking Choice of Law*, 90 Colum. L. Rev. 277, 280 (1990) [hereinafter Kramer, *Rethinking*]; Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. Rev. 979, 1015-21 (1991).

every commentator who has discussed complex litigation.⁵ To date, such efforts have been unavailing, and Congress has declined to legislate—whether from lack of political will, the urge to toady to palm-greasing lobbyists, or wisdom in recognizing the benefits of leaving states a role.

Whatever the reason, there is no substantive federal legislation for these cases. And it is unquestionably beyond the competence of federal courts to create such law with their limited common-law-making powers.⁶ The world is full of imperfections, including the occasional (or maybe not so occasional) failure of Congress to legislate when federal legislation is appropriate. Our legal system requires judges to accept these imperfections. It does not permit them to just step in and make the law themselves. Such a “cure” would, in the long run, be worse than the disease—at least, that’s the premise of a system based on a preference for popular decisionmaking and separation of powers and federalism.⁷

So the question is not whether courts can find a clandestine way to create national law that Congress has declined to adopt. The question is, given the continuing applicability of state law, what should courts do when many claims, potentially subject to many states’ laws, are consolidated for disposition together? As noted above, most judges and commentators say we should choose one (and only one) of the potentially applicable laws to govern the case. Or, rather, that’s what most commentators say. Judges are bound by precedents, which

⁵ See *supra* notes 2-3.

⁶ After examining proposed choice-of-law solutions to the mass tort problem and finding them no better than the present system, Linda Mullenix suggests that we give federal common law “some more serious, if not more dignified, consideration.” Linda S. Mullenix, *Federalizing Choice of Law for Mass Tort Litigation*, 71 *Tex. L. Rev.* 1623, 1631 (1992). Harold Korn makes a similar suggestion, building on Judge Weinstein’s claim in *In re “Agent Orange” Prod. Liab. Litig.*, 580 F. Supp. 690 (E.D.N.Y. 1984), that states would recognize a “national consensus law”: “Congress, after all, reflects the national consensus in terms of elected representatives of what the whole country wants. If Congress will not act, let us trust a federal judge to try and figure out what the national consensus is.” Harold L. Korn, *Big Cases and Little Cases: Babcock in Perspective*, 56 *Alb. L. Rev.* 933, 939 (1993). I plead agnosticism on the sentiment because such action exceeds by a wide margin even the Supreme Court’s boldest post-*Erie* claim of common-law-making powers. See Erwin Chemerinsky, *Federal Jurisdiction* § 6.2.3 (2d ed. 1994) (predicting that federal common law will be developed in suits between private parties only if application of state law will frustrate federal interests); Barbara A. Atwood, *The Choice-of-Law Dilemma in Mass Tort Litigation: Kicking Around Erie, Klaxon, and Van Dusen*, 19 *Conn. L. Rev.* 9, 19-27, 40-41 (1986) (arguing that because recent decisions from Supreme Court “indicate that federal judicial authority to create nonconstitutional common law” is limited both by principles of federalism and separation of powers, courts may not make value choices absent clear guidance from Congress).

⁷ For more complete discussion of this point, see generally Larry Kramer, *The Law-making Power of the Federal Courts*, 12 *Pace L. Rev.* 263 (1992).

in this instance don't leave much room to formulate new choice-of-law procedures.⁸ So courts have had to find more covert ways to express their preference for a single law, which naturally discourages saying much by way of explanation. Part I of this paper describes some of the techniques judges have used to achieve this result. Part II then examines the arguments—made mostly by academics—used to rationalize the practice and explains why the mere fact of consolidation does not justify modifying choice-of-law analysis.

This conclusion seems to leave a still worse problem. For judges and commentators alike assume that administering complex litigation is impossible unless we simplify the choice-of-law issues. If so, some other solution may have to be found for these cases. But I believe the protests are overstated, and Part III briefly explores some of the tools and techniques available to handle choice-of-law issues in complex litigation.

I

A

The problem of choice of law in complex litigation did not receive much attention until the late 1980s.⁹ A variety of factors contributed to the delay. Tort and product liability law did not offer substantive theories on which to ground such litigation much before the 1970s, and the procedural tools for constructing complex, multi-jurisdictional lawsuits are also relatively recent innovations. Class action litigation, for example, was generally limited prior to the 1966 amendments to the Federal Rules of Civil Procedure and took several more years to gather momentum. Even then, the statement in the 1966 Advisory Note to Rule 23 that a “‘mass accident’ resulting in injuries to numerous persons is ordinarily not appropriate for a class action” served to discourage the creation of mass actions that were based on state law and posed significant choice-of-law problems.

The problem might have arisen earlier, in airplane or other single-accident disasters. But universal acceptance of the First Restatement's jurisdiction-selecting rules kept choice of law relatively simple. The conflicts “revolution” did not even begin until 1963 by most accounts,¹⁰ and it did not achieve widespread success until well

⁸ See *infra* notes 12-14 and accompanying text.

⁹ The first detailed analysis of the problem is Willis L.M. Reese's modest article, *The Law Governing Airplane Accidents*, 39 Wash. & Lee L. Rev. 1303 (1982). The decisions in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and *Agent Orange* drew increased attention to the problem, as did the growing awareness of mass torts generally.

¹⁰ Commentators typically date the transformation of American conflicts law to the decision of the New York Court of Appeals in *Babcock v. Jackson*, 191 N.E.2d 279, 283

into the 1970s. More important, the actions that were brought tended to be small and to involve parties from no more than a few states. Consolidation on a really large scale was unheard of before the 1980s—possibly because of limits on jurisdiction and joinder, more likely because lawyers had not yet thought to push the boundaries so far.

Whatever the reasons, mass litigation posing multiple choice-of-law questions did not emerge as a serious problem for courts until recently. Such litigation is, moreover, invariably brought in federal courts, which tend to have greater powers and more liberal procedures favored by the parties in such cases.¹¹ But federal courts have limited choice-of-law options. Under *Klaxon Co. v. Stentor Electric Manufacturing Co.*,¹² a federal court has no power to innovate and must apply the choice-of-law rules of the state in which it sits. Where claims have been transferred from other districts—at least where the transfer is based on 28 U.S.C. § 1404 or § 1407,¹³ as is usually the case—*Van Dusen v. Barrack*¹⁴ further constrains the court by requiring it to apply the whole law of the transferor court, including its choice-of-law rules.

B

This being so, it is remarkable how often courts adjudicating mass actions nevertheless find that one law applies to all the claims or to each issue. The most revealing examples are in multidistrict litigation (MDL) under 28 U.S.C. § 1407. These are mostly single accident

(N.Y. 1963) (rejecting application of law of place of tort, and instead choosing law of jurisdiction with greatest concern for specific issue raised by litigation). A reasonable argument could be made that the change began earlier, in California, under the guidance of Justice Traynor. See, e.g., *Bernkrant v. Fowler*, 360 P.2d 906, 910 (Cal. 1961) (applying law of jurisdiction that has substantial interest in contract and in protecting rights of those of its residents who are parties thereto); *People v. One 1953 Ford Victoria*, 311 P.2d 480, 482 (Cal. 1957) (holding that forfeiture requirement of one jurisdiction was inapplicable to nonresident following proof that nonresident's mortgage originated in another state). But Traynor was less explicit about what his court was up to, and the early California decisions failed to have the same catalytic effect as *Babcock*.

¹¹ See 3 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 13.02 (3d ed. 1992).

¹² 313 U.S. 487 (1941).

¹³ 28 U.S.C. §§ 1404, 1407 (1994).

¹⁴ 376 U.S. 612 (1964). *Van Dusen* itself dealt only with transfer under § 1404(a), but lower courts have extended its holding to transfers under § 1407. See, e.g., *In re Air Crash Disaster at Boston, Mass.* on July 31, 1973, 399 F. Supp. 1106, 1119-21 (D. Mass. 1975); *Stirling v. Chemical Bank*, 382 F. Supp. 1146, 1150 n.5 (S.D.N.Y. 1974); see also Atwood, *supra* note 6, at 18 (noting that since *Van Dusen* was decided, Congress has significantly expanded transfer options for federal courts in complex cases by enacting multidistrict consolidation statute).

cases, especially airplane crashes. They are not class actions but rather involve the consolidation of claims filed around the country. Although consolidation is ostensibly for pretrial purposes only, the MDL court often uses § 1404 to hold cases over for trial, and in any event must grapple with choice-of-law problems in ruling on motions to dismiss or for summary judgment as well as in resolving discovery disputes. And because the underlying claims are based on state law and frequently originated elsewhere, the court must heed *Klaxon* and *Van Dusen*.

Given the multiplicity of choice-of-law methods used in different states, one naturally expects to find different laws applied depending on where a claim was first filed. Yet in practically every case, the court has found the same law applicable under all the relevant choice-of-law approaches. This is not invariably true; there are cases in which courts have found some parties entitled to a different law than others.¹⁵ But exceptions are rare, and courts find convergence in a large majority of the cases.¹⁶

Now I don't want to appear jaded. But to someone like myself, who spends much (probably too much) of his time thinking about choice of law, this is an astonishing coincidence. Conflicts scholars don't fight bitterly about the differences among approaches because

¹⁵ See, e.g., *In re Air Crash Disaster at Washington, D.C.* on January 13, 1982, 559 F. Supp. 333, 362 (D.D.C. 1983) (holding that actions from District of Columbia, Illinois, Maryland, Texas, Massachusetts, and Pennsylvania should be governed by D.C. law on issues of negligence of parties, products liability, and liability of defendants, while apportionment of liability among defendants should be governed by Florida law); *Air Crash Disaster at Boston*, 399 F. Supp. at 1108 (holding that cases from New York, New Hampshire, Vermont, Massachusetts, and Florida should be governed by laws of respective states where those laws are mostly similar in substance).

¹⁶ See, e.g., *In re Bendectin Litig.*, 857 F.2d 290, 306 (6th Cir. 1988) (concluding that Ohio law should govern because, as place where injury occurred, or alternatively, as domicile of plaintiff, Ohio presumptively had strongest interest and thus "any error on the conflicts question would be harmless"); *In re Air Crash Disaster Near Chicago, Ill.* on May 25, 1979, 644 F.2d 594, 616 (7th Cir. 1981) (using "most significant relationship" test to justify application of Illinois law on punitive damages); *In re Air Crash Disaster at Sioux City, Iowa*, on July 19, 1989, 734 F. Supp. 1425, 1425-26 (N.D. Ill. 1990) (applying law of California to punitive damage claims against airline manufacturer; applying Ohio law to those claims against aircraft engine manufacturer; applying Illinois law to claims against airline); *In re Disaster at Detroit Metro. Airport* on August 16, 1987, 750 F. Supp. 793, 795 (E.D. Mich. 1989) (applying law of California to product liability claims and law of Michigan to all damage claims except those filed in California); *In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo.*, on November 15, 1987, 720 F. Supp. 1445, 1447 (D. Colo. 1988) (finding that Texas had most significant relationship to punitive damage claims); *In re Paris Air Crash* of March 3, 1974, 399 F. Supp. 732, 749 (C.D. Cal. 1975) (applying California law where there was no showing of greater or equal interest of foreign state to apply its own law). A useful survey of cases that confirms the one-law thesis is found in Nafziger, *supra* note 1, at 1015-84 (describing analysis and result in 62 cases decided between 1975 and 1993).

we disagree about their aesthetic qualities. We fight because the differences matter in terms of outcomes.¹⁷ But judges in complex litigation have managed to suppress these differences. Some say that the various tests, while different, all share the same basic objective (usually described as something like finding the “most interested” or “most significant” state), making it less surprising when all point to the same law in a given case.¹⁸ Other judges collapse approaches together, asserting that they use different words to describe what are really identical inquiries.¹⁹ Still other judges purport faithfully to apply the assorted tests only to find (surprise, surprise) that all happen to mandate the same result in the particular case.²⁰

It is difficult fully to appreciate these cases without examining them closely—something that constraints of space and reader patience will not permit. So let me instead recount some favorite examples to give a flavor for the kind of manipulation that takes place.

Based on the frequency with which it is cited, the Seventh Circuit’s opinion in *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*²¹ is probably the leading decision on choice of law in multidistrict litigation.²² But the opinion is also worth close consider-

¹⁷ The most frequently made criticism of the modern approaches to choice of law is, ironically, that they favor the application of either forum law or the law of the plaintiff’s home state. See, e.g., Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 Wash. & Lee L. Rev. 357, 370-72 (1992) (studying propensity of new choice-of-law theories to apply forum law, prorecovery rules, and rules that favor local parties); Luther L. McDougal III, *The Real Legacy of Babcock v. Jackson: Lex Fori Instead of Lex Loci Delicti and Now It’s Time for a Real Choice-of-Law Revolution*, 56 Alb. L. Rev. 795, 797 (1993) (examining reported state-court decisions in tort choice-of-law cases in which courts have employed modern choice-of-law approach to determine number of cases in which forum law has been applied). If true, finding one law applicable to every claim in multidistrict litigation ought to be impossible. I think the criticism is exaggerated but have no doubt that the different approaches yield different results.

¹⁸ See, e.g., *Air Crash Disaster Near Chicago*, 644 F.2d at 610 (quoting Robert A. Leflar, *American Conflicts* § 109, at 218 (3d ed. 1977), who argues that modern decisions, regardless of exact language, are likely to produce similar results on given set of facts); *In re “Agent Orange” Prod. Liab. Litig.*, 580 F. Supp. 690, 699 (E.D.N.Y. 1984) (commenting that modern approaches, although differing in formulation, mandate analytical inquiries which are essentially identical).

¹⁹ See, e.g., *Air Crash Disaster at Stapleton Int’l Airport*, 720 F. Supp. at 1448 (conflating “government interest analysis” test with most significant relationship analysis); *Air Crash Disaster at Washington, D.C.*, 559 F. Supp. at 342 (same).

²⁰ See, e.g., *Air Crash Disaster at Sioux City*, 734 F. Supp. at 1429-37 (concluding that California’s governmental interest analysis and Restatement test produced same result for each defendant); *Disaster at Detroit Metro. Airport*, 750 F. Supp. at 797-812 (finding that reliance on Second Restatement, which differed from Michigan’s choice-of-law rules, did not alter results of case).

²¹ 644 F.2d 594 (7th Cir. 1981).

²² See, e.g., Andreas F. Lowenfeld, *Mass Torts and the Conflict of Laws: The Airline Disaster*, 1989 U. Ill. L. Rev. 157, 160-63 (noting that issues raised in *Air Crash Disaster Near Chicago* are raised in almost every airline disaster litigation).

ation as a virtual "how-to" manual of ways to manipulate choice-of-law analysis. An airplane designed and manufactured by McDonnell Douglas and operated by American Airlines crashed during takeoff, killing all 271 persons on board and two persons on the ground. Plaintiffs from ten states and three foreign countries filed 118 wrongful death actions in Illinois, California, New York, Michigan, Puerto Rico, and Hawaii. The Judicial Panel on Multidistrict Litigation consolidated these actions for pretrial purposes in the Northern District of Illinois, where the accident had occurred. McDonnell Douglas was a Maryland corporation with its principal place of business in Missouri; American Airlines was a Delaware corporation with its principal place of business in New York (or Texas—the company had moved around the time of the accident and this fact was in dispute, though it turned out not to matter since the substantive law was the same in both states). The plane was designed and manufactured by McDonnell Douglas in California and maintained by American in Oklahoma.²³

The defendants moved to strike the claims for punitive damages. Applying the choice-of-law rules of the states in which each action had been filed, the district court found that all pointed to the same conclusion: McDonnell Douglas could be sued for punitive damages and American could not.²⁴ The court of appeals reversed in part, holding that neither defendant was liable for punitive damages.²⁵

Like the trial court, the court of appeals began by recognizing that *Klaxon* and *Van Dusen* required it to apply the choice-of-law rules of the states where the actions had originally been filed. The appellate court emphasized that, while these approaches may appear dissimilar, they are all essentially the same, all designed ultimately to identify the state with "the most significant interest" in applying its substantive law.²⁶ And with that hint, the court turned to individual analyses of choice of law in Illinois, California, New York, Michigan, Puerto Rico, and Hawaii.

Illinois uses the Second Restatement's "most significant relationship" test,²⁷ which the Seventh Circuit seamlessly transformed into a most significant *interest* test by turning immediately (and without explanation) from a recitation of contacts and considerations to an ex-

²³ *Air Crash Disaster Near Chicago*, 644 F.2d at 604-05.

²⁴ *In re Air Crash Disaster Near Chicago, Ill.*, on May 25, 1979, 500 F. Supp. 1044, 1054 (N.D. Ill. 1980).

²⁵ *Air Crash Disaster Near Chicago*, 644 F.2d at 633.

²⁶ *Id.* at 610 (quoting Leflar, *supra* note 18, at 218).

²⁷ Restatement (Second) of Conflict of Laws § 6 (1971) (Choice of Law Principles); see *Ingersoll v. Klein*, 262 N.E.2d 593, 597 (Ill. 1970) (finding no objection to application of "most significant contacts" rule).

clusive focus on state interests.²⁸ The court found that the defendant's home state (understood as its principal place of business) and the state where the wrongful conduct took place had the greatest interest in applying their laws on punitive damages and, further, that these interests were evenly balanced. This move already required some fancy footwork, as the court dismissed the plaintiffs' home states on the ground that they could have no interest in either barring or awarding punitive damages²⁹ (thus ignoring both a potential interest in encouraging defendants to do business in a state that bars punitive damages and the deterrent aspect of punitive damages that might underlie a decision to award them). In any event, this left the court with a tie between the two most interested states, which it broke by choosing the law of an avowedly less interested third state, the state where the injury took place (so much the better, I suppose, that this happened also to be the forum):

Although either [the state where the conduct took place] or [defendant's home state], taken separately, would have a greater interest than Illinois, the fact that the laws of these states are in absolute conflict indicates that neither state has an interest greater than the other's. Thus, in terms of a principled basis upon which a choice can be made, neither state has a "more significant interest" than Illinois. Since neither [of these states] can be chosen on a principled basis, the application of the "most significant relationship" test leads to the use of Illinois law.³⁰

As almost an afterthought, the court added that "application of Illinois law comports with the general criteria of the Restatement (Second) which emphasize certainty, predictability, uniformity of result, and ease in the determination and application of the law to be applied."³¹ True, the court conceded, "[f]uture defendants cannot predict . . . where airplane disasters will occur," but the decision nonetheless creates certainty and predictability because

air transportation companies will now be on notice that, under the "most significant relationship" test, when there is a true conflict between laws of states having equal interests in the issue of punitive damages, and when the place of injury has a strong interest in air safety and in protection of air transportation corporations, the law of the place of injury will apply

²⁸ *Air Crash Disaster Near Chicago*, 644 F.2d at 611-12.

²⁹ *Id.* at 612-13.

³⁰ *Id.* at 616.

³¹ *Id.*

—a result the court tells us is also “relatively simple and easy to apply.”³²

Turning from Illinois to California, the court addressed the “comparative impairment” test,³³ a variant of interest analysis that directs a judge to apply the law of the state whose policy would be most impaired if not applied.³⁴ Not surprisingly, the court again found that the states with the greatest stake in having their law applied were the defendant’s home state and the state where the conduct took place³⁵—which might have led one to think that these were the states whose law would be most impaired if not applied. But “most impaired” is really just the flip side of “most interested.” So the court followed its earlier logic and concluded that, because it was “unable to say that either state’s interest would be impaired less by the failure to apply its policy,” it would impair both by applying the law of the state where the injury occurred.³⁶

The next state whose law the court analyzed, New York, turned out to be easy—after some not too gentle massaging of the case law. According to the Seventh Circuit, in *Babcock v. Jackson*³⁷ the New York Court of Appeals formulated a rule that “it [the New York court] viewed as equivalent to the Restatement (Second)’s ‘most significant relationship’ test.”³⁸ Choice of law in New York is thus “the functional equivalent” of choice of law in Illinois and the same result follows.³⁹ The problem, of course, is the premise that New York is a Second Restatement state. For while *Babcock* may have been unclear and the cases that followed it confusing, one thing New York most definitely has *not* done is to adopt or endorse the Second Restatement.⁴⁰

³² *Id.*

³³ *Id.* at 621-28.

³⁴ See, e.g., *Offshore Rental Co. v. Continental Oil Co.*, 583 P.2d 721, 726-28 (Cal. 1978) (discussing and applying comparative impairment test); *Bernhard v. Harrah’s Club*, 546 P.2d 719, 723-25 (Cal. 1976) (same). This test is based on an article by William F. Baxter, *Choice of Law and the Federal System*, 16 *Stan. L. Rev.* 1 (1963).

³⁵ *Air Crash Disaster Near Chicago*, 644 F.2d at 625.

³⁶ *Id.* at 625, 626-28.

³⁷ 191 N.E.2d 279 (N.Y. 1963).

³⁸ *Air Crash Disaster Near Chicago*, 644 F.2d at 628.

³⁹ *Id.* at 629.

⁴⁰ In *Babcock*, Judge Fuld may have been uncertain about the differences among approaches, or he may have been trying to garner votes by embracing more than one approach. But at different places in the opinion the court appears to endorse not just the most significant relationship test, but also interest analysis and the “center-of-gravity” approach—leading Brainerd Currie to observe that *Babcock* “contains items of comfort for almost every critic of the traditional system.” Brainerd Currie, *Comments on Babcock v. Jackson*, *A Recent Development in Conflict of Laws*, 63 *Colum. L. Rev.* 1233, 1234 (1963). In subsequent cases, New York veered toward a conventional version of interest analysis,

Michigan turned out to be more difficult, and the Seventh Circuit's handling of Michigan law is revealing. Most choice-of-law scholars identify Michigan as either a "lex fori" or an interest analysis state, because the Michigan court has expanded its traditional public policy exception to require the application of forum law pretty much whenever Michigan has even an arguable interest in the case.⁴¹ Under this approach, it seems certain that Michigan would have applied its own law permitting the possible recovery of "exemplary" damages in a case like *Air Crash Disaster Near Chicago*.⁴²

The Seventh Circuit reached a different conclusion. Asserting that Michigan's choice-of-law approach is unclear,⁴³ the court observed that, in *Sweeney v. Sweeney*,⁴⁴ the Michigan Supreme Court "cited approvingly" an opinion from Michigan's intermediate court of appeals, *Branyan v. Alpena Flying Service, Inc.*,⁴⁵ in which a multistate tort was resolved using the most significant relationship test.⁴⁶ "Thus," the Seventh Circuit concluded, "it appears that under Michigan law, a court would attempt to determine which state had the most significant relationship to the parties or to the occurrence."⁴⁷ Furthermore, if this test failed to resolve the question, "because of Michigan's strong history of following the lex loci delicti rule . . . and because the *Sweeney* court declined to completely abandon that rule, we conclude that the Michigan court would then consider the law of the place of

see *Tooker v. Lopez*, 249 N.E.2d 394, 398-99 (N.Y. 1969), and then back toward rules, see *Neumeier v. Kuehner*, 286 N.E.2d 454, 457-58 (N.Y. 1972), with several detours along the way. In none of its opinions, however, does the New York court adopt anything that resembles the Second Restatement approach. For an analysis of New York cases decided at the time of *Air Crash Disaster Near Chicago*, see Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 Colum. L. Rev. 772 (1983). The Seventh Circuit attempted, unsuccessfully in my view, to distinguish these cases in several long footnotes. See *Air Crash Disaster Near Chicago*, 644 F.2d at 628 nn.43-45.

⁴¹ Compare Herma Hill Kay, *Theory Into Practice: Choice of Law in the Courts*, 34 Mercer L. Rev. 521, 580-81 (1983) (describing Michigan as "lex fori" state) and Gregory E. Smith, *Choice of Law in the United States*, 38 Hastings L.J. 1041, 1085-87 (1987) (describing Michigan as adopting lex fori rule for tort cases in which at least one party is resident) with Robert A. Sedler, *Choice of Law in Michigan: Judicial Method and the Policy-Centered Conflict of Laws*, 29 Wayne L. Rev. 1193, 1210-11 (1983) (characterizing Michigan choice-of-law rules as based on interest analysis).

⁴² Michigan awards "exemplary" damages in part to assure that plaintiffs are adequately compensated for forms of injury that are difficult to quantify. See, e.g., *Kewin v. Massachusetts Mut. Life Ins. Co.*, 295 N.W.2d 50, 55 (Mich. 1980) (noting that exemplary damages compensate for harm done to victims' feelings); *Jackovich v. General Adjustment Bureau, Inc.*, 326 N.W.2d 458, 464 (Mich. Ct. App. 1982) (same).

⁴³ *Air Crash Disaster Near Chicago*, 644 F.2d at 630.

⁴⁴ 262 N.W.2d 625 (Mich. 1978).

⁴⁵ 236 N.W.2d 739 (Mich. Ct. App. 1975).

⁴⁶ *Air Crash Disaster Near Chicago*, 644 F.2d at 630.

⁴⁷ *Id.*

injury to be determinative.”⁴⁸ It followed (for the same reasons as in Illinois, California, and New York) that Michigan would apply Illinois law.

The Seventh Circuit’s rendition of Michigan law is a grotesque distortion. *Sweeney* is in the line of cases expanding Michigan’s public policy doctrine to require the application of Michigan law in most cases.⁴⁹ *Sweeney* itself applied Michigan law and allowed a daughter to sue her father for injuries even though the claim was barred in Ohio, where the accident occurred.⁵⁰ In the course of its analysis, the court discussed several cases in which Michigan had allowed Michigan plaintiffs who were injured in other states to sue despite Michigan law barring the actions. And in the course of this discussion, the court dropped a footnote stating “Compare *Branyan*,” with a barebones description of its facts and holding.⁵¹ There is no reference to the most significant relationship test and nothing that remotely endorses it. Moreover, *Branyan* itself uses interest analysis and neither adopts nor endorses the Second Restatement test, though it does use the phrase “most significant relationship” once in the middle of the opinion to describe what a California court did.⁵² To infer from this that Michigan would adopt a most significant relationship test is, at best, pure fantasy.

Puerto Rico and Hawaii proved to be easier, though the court finished its analysis with an unexpected twist. Puerto Rico still uses the place-of-injury rule, which led directly to the application of Illinois law.⁵³ As for Hawaii, the Seventh Circuit explained that “[n]either the parties nor the district court have been able to identify” its approach to choice of law.⁵⁴ This should have made things easy, since the most reasonable assumption would then be that Hawaii, too, still followed the traditional place-of-injury test. Instead, the court reasoned that “where the choice-of-law law cannot be determined . . . the court should presume that the forum would apply its own law.”⁵⁵ This meant that claims filed in Hawaii were governed by the law of Hawaii

⁴⁸ Id.

⁴⁹ See supra note 41 and accompanying text.

⁵⁰ *Sweeney v. Sweeney*, 262 N.W.2d 625, 628 (Mich. 1978).

⁵¹ Id. at 627 n.3.

⁵² *Branyan v. Alpena Flying Serv., Inc.*, 236 N.W.2d 739, 742 (Mich. Ct. App. 1975) (describing *Reich v. Purcell*, 432 P.2d 727 (Cal. 1967)). The holding in *Branyan*, pure interest analysis, is that the case presented a false conflict because “all governmental interest in this case is in Michigan, and . . . no Virginia concern is involved or disturbed herein.” Id. at 744.

⁵³ *Air Crash Disaster Near Chicago*, 644 F.2d at 630.

⁵⁴ Id.

⁵⁵ Id. at 631.

rather than Illinois—an unexpected finding that turned out not to matter because, like Illinois, Hawaii barred punitive damages.⁵⁶

Another case that illustrates the lengths to which courts will go to apply a single law in complex cases is the Sixth Circuit's decision in *In re Bendectin Litigation*.⁵⁷ Approximately 1200 cases from around the nation were consolidated for trial in the Southern District of Ohio.⁵⁸ The plaintiffs alleged that their birth defects were caused by their mothers' ingestion during pregnancy of the defendant's anti-nausea drug Bendectin. The trial judge trifurcated the case, holding a first trial solely on the issue of causation.⁵⁹ The jury found for the defendant,⁶⁰ and the plaintiffs appealed, arguing that the trial judge had erroneously based his instructions to the jury on Ohio law.⁶¹ According to the plaintiffs, the defendant had fraudulently concealed evidence of birth defects from the Food and Drug Administration, and under their home state laws such evidence would shift the burden of proof on causation to the defendant.⁶² The Sixth Circuit found that the plaintiffs had waived this argument by failing to object to the instructions, but "out of caution" addressed the issue anyway.⁶³ Applying Ohio choice-of-law rules under *Klaxon*, the court of appeals upheld the trial judge's decision to apply Ohio law.⁶⁴ The problem

⁵⁶ *Id.* at 631-32.

⁵⁷ 857 F.2d 290 (6th Cir. 1988).

⁵⁸ *Id.* at 293.

⁵⁹ *Id.* at 295-96.

⁶⁰ *Id.* at 296.

⁶¹ *Id.* at 302.

⁶² *Id.* at 303.

⁶³ *Id.*

⁶⁴ *Id.* at 303-04. The determination that Ohio law applied was itself questionable under Ohio's interpretation of the Second Restatement. In an earlier product liability action, *Morgan v. Biro Mfg. Co.*, 474 N.E.2d 286 (Ohio 1984), the Ohio Supreme Court held that the state where the plaintiff resided and was injured (in that case Kentucky) had a more significant relationship than the state where the defendant was located and where the product was manufactured (Ohio). *Id.* at 289. The Sixth Circuit reached a different result:

We . . . see the law of the state of manufacture of the product as being more significant in this type of case than that of the state where an individual plaintiff happens to live. Merrell Dow manufactured and distributed a uniform drug internationally. The company issued a uniform set of warnings and instructions for use. The regulations governing the labeling, research, and distribution of the drug were governed either by Ohio law or by [federal law].

In re Bendectin Litig., 857 F.2d 290, 305 (6th Cir. 1988). The court rejected the plaintiffs' argument that the law of their domicile should govern:

[The assumption that domiciliary law should apply because this is where the injury occurred] is not at all clear, for the state of domicile at the time of suit may bear little or no relation to where a mother may have taken a morning sickness drug years before. A plaintiff presently residing in Arizona, for example, might nonetheless be found to have taken Bendectin while traveling in many different states. In short, it is difficult if not impossible to perceive any

was that many of the claims had been transferred to Ohio from other states whose choice-of-law rules should have been controlling under *Van Dusen*. Dismayed by the prospect of "attempting to analyze the conflict of laws rules of every state in the union," the court said it was the plaintiffs' job to show that other states would not do what the trial judge had done.⁶⁵ And, the court continued, "[b]ased on the cases cited by plaintiffs and a thorough search of the literature on causation . . . we are not persuaded that the law in any American jurisdiction would preclude separation of the issues of causation and culpability in such complex cases as the present one."⁶⁶ Maybe so—if the issue were trifurcation. But the question in dispute was the burden of proving causation once it had been severed for separate treatment. On that question, the plaintiffs cited cases showing that the substantive and choice-of-law rules of other states were different from Ohio's and made some evidence of culpability relevant in determining causation,⁶⁷ which should have been enough to require a reversal. The Sixth Circuit was simply unwilling to consider the possibility.

C

Bending choice-of-law analysis is not limited to multidistrict litigation. The obvious example here is Chief Judge Weinstein's much discussed opinion in *In re "Agent Orange" Product Liability Litigation*.⁶⁸ This was a class action comprising some two million claimants from more than 600 separate lawsuits filed throughout the United States and transferred to New York for pretrial proceedings before class certification. (The claimants in approximately 400 more cases opted out of the class, and their individual actions were consolidated with it.) In an earlier phase of the litigation, when the case was before Judge Pratt, the court ruled that the plaintiffs' claims were governed by federal common law.⁶⁹ But the Second Circuit reversed, holding that "there is [no] identifiable federal policy at stake in this litigation

meaningful relationship to the subject matter of the lawsuit for the law of the state of domicile at the time of the suit, or the state in which the drug may have been prescribed, dispensed, ingested, or the state in which the child may have been conceived or born.

Id. The court simply disagreed with *Morgan*, which should have been controlling under *Klaxon*: "[T]he relationship between the parties is essentially centered in Ohio, where the tortious conduct and the safety of the product are regulated." Id.

⁶⁵ *Bendectin Litig.*, 857 F.2d at 306.

⁶⁶ Id. at 320.

⁶⁷ Id. at 309-13.

⁶⁸ 580 F. Supp. 690, 713 (E.D.N.Y. 1984) (holding that national consensus law should be applied in product liability class action against "Agent Orange" manufacturer).

⁶⁹ In re "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 737, 744 (E.D.N.Y. 1979).

that warrants the creation of federal common law rules.”⁷⁰ Chief Judge Weinstein was thus required to adjudicate the case using state law. Moreover, because class certification does not affect the law applicable to any individual claim,⁷¹ the court had to follow *Klaxon* and *Van Dusen* and apply the choice-of-law rules of the transferor courts.

Chief Judge Weinstein acknowledged this at the beginning of his opinion.⁷² He just wasn’t going to let it get in his way. Undaunted by practice, by precedent, by the ruling of a superior court, or, for that matter, by law, he proceeded to hold that every transferor court would, regardless of its choice-of-law methodology, “look to a federal or a national consensus law of manufacturer’s liability, government contract defense and punitive damages.”⁷³ In other words, no state would choose its own law or the law of any other state to govern the case. Rather, faced with “the plethora of states and nations with contacts and the impossibility without a full trial of even knowing where the allegedly offending dioxin was produced,”⁷⁴ each state would make up a *new* law solely for “this most unusual case.” Even more remarkable, each state would make up the *same* law—a law reflecting the “national consensus” on how to handle tort issues in complex product liability litigation.⁷⁵

One problem with Chief Judge Weinstein’s argument that every state would choose “national consensus law”—whether it used the traditional rules, the Second Restatement, interest analysis, *lex fori*, better law, or any other approach to choice of law—is that not a single court had ever suggested such a thing under *any* of these approaches, a fact Weinstein failed to note. Of course, he assumed that what courts had said in the past wouldn’t help, because no one had ever

⁷⁰ In re “Agent Orange” Prod. Liab. Litig., 635 F.2d 987, 993 (2d Cir. 1980). The Supreme Court subsequently recognized a federal common law “military contractor” defense in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 512 (1988). This defense would not have obviated the choice-of-law problems in *Agent Orange*, however, because it is not clear that the defendants could establish the necessary elements, and in the meantime the court would still have needed to choose an applicable law for the plaintiffs’ claims. These laws differed on issues like market-share liability, punitive damages, and limitations.

⁷¹ This is clear on the face of Rule 23, which makes common issues of law a potential ground for certifying a class and the absence of such issues a ground for denying certification—thus presupposing that the applicable law is derived from some other source and may be different for different claimants. Fed. R. Civ. P. 23(a). It also makes sense as a matter of policy, since class certification is merely a joinder device to coordinate the adjudication of large numbers of claims in a manner that is administratively convenient. See also *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821 (1985) (requiring courts to examine applicable law for each claim in class action to ensure protection of constitutional limits).

⁷² *Agent Orange*, 580 F. Supp. at 692-93.

⁷³ *Id.* at 713.

⁷⁴ *Id.* at 710-11.

⁷⁵ *Id.*

faced a case with the unique attributes of *Agent Orange*. But while *Agent Orange* was noteworthy in some respects,⁷⁶ there was nothing all that extraordinary about the legal issues it presented—nothing to distinguish it from toxic torts like asbestos or DES, which had already been around for years and posed similar problems respecting causation and proof of responsibility for particular injuries. Such cases may not have been common in 1984, but neither were they new or unheard of. So if state courts were going to start creating “national consensus law,” one would have expected some court, somewhere, sometime, under some choice-of-law methodology, to have said something about it. But there was nothing, not even a hint. Because Chief Judge Weinstein made it up, finding a new label for the federal common law he had been told he could not make.⁷⁷

There is an even more fundamental flaw in the *Agent Orange* analysis. Weinstein’s argument hinges on the claim that state courts would choose “national consensus law” because of the impossibility of choosing any particular state’s law to govern every claim in the class action. But who said that a single law had to be chosen? More important, where did Chief Judge Weinstein get the idea that the question was what a state court would do if faced with the class action? The appropriate question was, what would the various courts of origin have done if the actions had remained dispersed? And there is absolutely no reason to think they would have made up some novel “national consensus law” in that circumstance.

Because the court’s ruling was interlocutory, no appeal could be taken under the final judgment rule. The defendants tried to obtain relief by way of mandamus, but the Second Circuit declined to grant the writ. “While we will not disclaim considerable skepticism as to the existence of a ‘national substantive rule,’” the court explained:

[W]e note Chief Judge Weinstein’s declared intention to create subclasses as dictated by variations in state law. Given the unique aspects of this case arguably creating a need for a single dispositive trial on the common issues [of fact], we cannot say that the use of

⁷⁶ Among the unusual features of *Agent Orange* was its connection to the Vietnam War and the fact that the most responsible defendant, the United States government, was immune. See Peter H. Schuck, *Agent Orange on Trial 59-62* (enlarged ed. 1987). But these issues were not involved in the choice-of-law decision, which dealt with the standard of liability to be used in a product action against private manufacturers.

⁷⁷ Much of the praise garnered by Chief Judge Weinstein for his handling of *Agent Orange* may come from the belief that the Second Circuit was wrong to prohibit the use of federal common law in the first place. See, e.g., Schuck, *supra* note 76, at 129 (“[T]he Second Circuit’s surprising rejection of federal common law was utterly perverse.”). But even if the Second Circuit was wrong, *this* cannot be the solution. There is nothing admirable about ignoring the law in circumstances like these, and it is hardly ingenious for a judge to offer such a transparently untenable rationale while doing so.

subclasses corresponding to variations in state law is a palpable error remediable by mandamus.⁷⁸

In fact, Chief Judge Weinstein had declared no such intention, which would have been contrary to the whole tenor of his opinion. And Judge Winter (who wrote for the Second Circuit) had to know this; he must have been hinting at what would be needed to survive appellate review after trial and a final judgment.

As it turned out, the court never had to deal with the problem. Faced with uncertainty over the applicable law, and under considerable pressure from the judge, the lawyers settled *Agent Orange* on the eve of the trial.⁷⁹ In a subsequent appeal on other issues, the Second Circuit reiterated its skepticism respecting the choice-of-law solution. Calling Weinstein's approach "bold and imaginative," the court nonetheless observed:

[I]n light of our prior holding that federal common law does not govern plaintiffs' claims, every jurisdiction would be free to render its own choice of law decision, and common experience suggests that the intellectual power of Chief Judge Weinstein's analysis alone would not be enough to prevent widespread disagreement.⁸⁰

Because the parties had settled, however, any error in this regard was treated as harmless.

There are still other ways to avoid the choice-of-law issues in a multistate class action. One popular technique is to certify a class subject to decertification if a conflicts problem surfaces later.⁸¹ This method is especially common in securities litigation, which is based on federal law but often includes pendent claims for fraud or negligent misrepresentation. Some courts have concluded that the necessity of applying many laws makes class treatment infeasible for anything other than the federal claim.⁸² Other courts have found, using a variety of rationales, that one law applies to all the pendent claims.⁸³ The

⁷⁸ In re Diamond Shamrock Chems. Co., 725 F.2d 858, 861 (2d Cir. 1984).

⁷⁹ See Schuck, *supra* note 76, at 143-67.

⁸⁰ In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 165 (2d Cir. 1987).

⁸¹ See, e.g., ALL Complex Litigation Project, *supra* note 3, § 6.01 Reporter's Note 21 to cmt. c, at 429-30 (citing examples of provisional certification).

⁸² See, e.g., Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 725 (11th Cir. 1987) (affirming district court's denial of class certification because differing standards of liability among states would "render class action treatment unmanageable"); In re Laser Arms Corp. Sec. Litig., 794 F. Supp. 475, 495 (S.D.N.Y. 1989) (finding plaintiff's state law claims for negligent misrepresentation, conversion, and fraud incompatible with class treatment); Sanders v. Robinson Humphrey/American Express, Inc., 634 F. Supp. 1048, 1057 (N.D. Ga. 1986) (same).

⁸³ See, e.g., In re Atlantic Fin. Fed. Sec. Litig., Civ. A. No. 89-0645, 1990 WL 188927, at *6 (E.D. Pa. Nov. 28, 1990) (holding that Pennsylvania law applies because all states share interest in expeditious disposition of claim, which requires application of one law); Bresson

most common tactic, however, is for the court, after acknowledging that choice-of-law problems might make the class unmanageable, to certify provisionally on the grounds that it may be possible to apply one law or, if not, to create manageable subclasses.⁸⁴

The stated premise of provisional certification is that the court can always decertify later if the choice-of-law issues complicate matters too much. But later never comes, and never will, because the cases always settle first—as judges know better than anyone. The provisional certification ploy thus enables the court to create a class without letting any pesky choice-of-law problems get in the way. The applicable law is left undecided—though the fact that a class has thus been certified, together with the threat that one law may be applied and uncertainty as to what that law will be, undoubtedly plays an important role in settlement.⁸⁵

v. Thomson McKinnon Sec., Inc., 118 F.R.D. 339, 343 (S.D.N.Y. 1988) (finding that state laws governing liability “do not vary significantly”); see also ALI, Complex Litigation Project, supra note 3, § 6.01 Reporter’s Note 21 to cmt. c, at 429-30 (citing securities cases in which classes were certified on ground that “there was no demonstrated conflict among the laws of the various states”).

⁸⁴ See, e.g., *Maywalt v. Parker & Parsley Petroleum Co.*, 147 F.R.D. 51, 58 (S.D.N.Y. 1993) (discounting defendants’ “speculative forecast of difficulties” with making choice-of-law determination and certifying provisionally on ground that subclasses can be created); *In re Kirschner Medical Corp. Sec. Litig.*, 139 F.R.D. 74, 85 (D. Md. 1991) (postponing actual choice-of-law determination while noting that there did not appear to be “substantial variation among the states”); *In re Crazy Eddie Sec. Litig.*, 135 F.R.D. 39, 41 (E.D.N.Y. 1991) (holding that potential application of laws of different states did not preclude certification because of presence of issues common to class and because individual issues could be adjudicated through use of subclasses); *Alexander v. Centrafarm Group, N.V.*, 124 F.R.D. 178, 186 (N.D. Ill. 1988) (predicting that lack of variation among state fraud laws would produce few individual questions and providing for individualized hearings or alteration of class certification); *In re Seagate Technologies Sec. Litig.*, 115 F.R.D. 264, 271 & n.13 (N.D. Cal. 1987) (noting that prospect of numerous state laws controlling state claims was “illusory” and providing for decertification or “other necessary modifications”); *In re Computer Memories Sec. Litig.*, 111 F.R.D. 675, 686 & n.7 (N.D. Cal. 1986) (noting that either California law would apply “across the board” or subclasses would be employed; otherwise, class could be decertified or modifications could be made in structure of litigation); *In re Lilco Sec. Litig.*, 111 F.R.D. 663, 670 (E.D.N.Y. 1986) (doubting that differences in state laws were “so great as to preclude class treatment” and providing for the use of subclasses if necessary).

⁸⁵ See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297-1302 (7th Cir. 1995) (Posner, J.) (issuing mandamus to decertify class out of concern that pressure on defendants to settle would be great because of district court judge’s proposal to have defendants’ negligence determined under nonexistent uniform standard); *In re Air Crash Disaster at Sioux City, Iowa*, on July 19, 1989, 734 F. Supp. 1425, 1429 (N.D. Ill. 1990) (noting that early resolution of choice-of-law question “may facilitate settlement negotiations”). This tactic, too, made an appearance in *Agent Orange*. For while Chief Judge Weinstein held that the court would apply a national consensus law, he left the content of that law to “another memorandum.” *In re “Agent Orange” Prod. Liab. Litig.*, 580 F. Supp. 690, 713 (E.D.N.Y. 1984). This other memorandum never needed to be written because the parties

II

A

These are just a few of the techniques courts use to find a single law applicable in class and complex litigation. But why do they do it? It's hard to know from the opinions, because judges will not admit that they are going to distort choice-of-law analysis and ignore *Klaxon* and *Van Dusen*, much less say why. An explanation can be found, however, in academic commentary recommending that these precedents be overturned so that a single law can more easily be chosen. The literature offers at least three reasons:

First, we are told that it is unfair to apply different laws to different parties in a complex case. To treat parties in the same consolidated mass action differently violates "the principle that persons similarly situated ought to receive similar treatment."⁸⁶ As one commentator explains:

It is one thing to contemplate the disparate ways different state laws may resolve a given dispute; it is quite another to accept such disparities in the context of a mass tort suit consolidated in a single forum adjudicating, for example, the identical claims of passengers sitting side by side aboard an airplane.⁸⁷

This argument has less force in the context of dispersed torts, mass actions in which injuries occurred at different times and in different places. But even here, it is thought preferable if all claimants have their rights determined under the same law.⁸⁸

Second, some commentators make the closely related argument that mass actions should be adjudicated under a single law because applying different laws yields inconsistent results.⁸⁹ Some plaintiffs recover while others do not, with differences attributable solely to the

settled on the eve of trial—and uncertainty about what it would say plainly contributed to the decision to settle.

⁸⁶ Juenger, *supra* note 3, at 122; see also Reese, *supra* note 9, at 1307.

⁸⁷ Bird, *supra* note 2, at 1087. Other commentators making the same point include, e.g., Robert W. Kastenmeier & Charles Gardner Geyh, *The Case in Support of Legislation Facilitating the Consolidation of Mass-Accident Litigation: A View From the Legislature*, 73 Marq. L. Rev. 535, 565-66 (1990); Reavley & Wesevich, *supra* note 2, at 24; Reese, *supra* note 9, at 1306-07.

⁸⁸ See, e.g., ALI, *Complex Litigation Project*, *supra* note 3, § 6.01 cmt. c, at 419 (noting that application of ALI's proposed standard would foster consolidated handling of litigation even for suits "in which the plaintiffs and injuries are dispersed across many states").

⁸⁹ See, e.g., ABA, *Mass Torts Report*, *supra* note 2, at 12-13 (concluding that federal courts must be empowered to choose among competing rules of decision, based on finding that "separate adjudication of individual tort claims arising from a single accident . . . poses unacceptably high risks of inconsistent results"); ALI, *Complex Litigation Project*, *supra* note 3, at 389 (noting that application of single state's law to common issues would encourage consistent results).

fact that different substantive rules were used. Apart from unfairness, such inconsistencies look bad, contributing to "public dissatisfaction with the tort law system and the legal profession."⁹⁰

Third, the argument most frequently made is that applying different laws unduly complicates consolidated treatment. Applying many laws is described as "daunting,"⁹¹ a task that imposes "a heavy burden . . . upon the courts,"⁹² a task that may, in fact, be impossible "because of the sheer burden of organizing and following fifty or more different bodies of complex substantive principles."⁹³ As a result,

choice of law problems derail the equity and efficiency advantages that collective adjudication otherwise promises. The transferee court's obligation to discover what law some state *other* than the one in which it sits would find applicable requires considerable expenditure of judicial resources. Because varying state laws fragment claimants' initially common interests, such pre-trial choice of law rulings quickly dissipate the efficiency gains collective adjudication is intended to achieve.⁹⁴

B

There is no denying that to apply different laws means treating some claimants differently from others and makes consolidated litigation more expensive. But are the differences in treatment *unfair*? Is the increase in cost and complexity *undue*? Claimants whose injuries differ in severity receive different awards, but no one regards the difference as unfair because everyone agrees that severity is an appropriate ground for making distinctions. Forcing parties to go through pretrial discovery increases the expense and complexity of litigation, but everyone accepts these costs as desirable for a proper adjudication. So the question is not whether applying more than one law will produce differences in outcomes or increase the cost and complexity of litigation. It will. The question is whether it will do so in a manner that is inappropriate.

This point is seldom recognized or addressed in the literature, which treats the claims of unfairness and inefficiency as self-evident. A careful reading of the commentary, moreover, suggests that these

⁹⁰ ABA, Mass Torts Report, *supra* note 2, at 12.

⁹¹ Nafziger, *supra* note 1, at 1009.

⁹² Reese, *supra* note 9, at 1307.

⁹³ Arthur R. Miller & David Crump, Jurisdiction and Choice of Law in Multistate Class Actions After *Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 64 (1986).

⁹⁴ Bird, *supra* note 2, at 1085-86 (footnote omitted). For other commentators making the same point, see, e.g., ALI, Complex Litigation Project, *supra* note 3, at 378-79; Juenger, *supra* note 3, at 109-10; Korn, *supra* note 6, at 938-39; Reavley & Wesevich, *supra* note 2, at 30-31.

claims rest on a further assumption: that choice of law is a matter of procedure. This point is not usually made directly in support of the argument for applying one law. Rather, it typically follows the observation that Congress is unlikely to enact substantive federal law. At that point, many commentators go on to explain that modifying choice-of-law rules is a second-best, procedural alternative. The following statement from the American Law Institute's Complex Litigation Project is illustrative:

[T]he possibilities of reaching a political consensus on what the appropriate federal standard should be, as well as expecting Congress to intrude so directly into areas historically governed by state law, appear so slim that it becomes important to look for an alternative that could improve the current processing of complex litigation in the courts—in other words, a procedural solution. This Chapter proposes the enactment of a coherent and uniform federal choice of law code for these cases as an essential ingredient of that procedural approach.⁹⁵

Precisely because it is a background assumption, no one bothers to explain why choice of law is a procedural matter. But the premise is neither new to choice-of-law analysis nor limited to discussions of choice of law in complex cases.⁹⁶ The idea seems to be that “choosing” an applicable law is a threshold inquiry, distinct from “applying” the chosen law. Like other threshold concerns—personal and subject matter jurisdiction, venue, service of process, and so forth—choice of law is part of a bundle of procedural matters that ought to be settled as early as possible. Once this is done, the court can turn to finding the facts and applying the chosen law, matters more properly characterized as substantive in nature.

⁹⁵ ALI, Complex Litigation Project, *supra* note 3, at 375; see also, e.g., P. John Kozyris, *The Conflicts Provisions of the ALI's Complex Litigation Project: A Glass Half Full?*, 54 *La. L. Rev.* 953, 954 (1994) (describing ALI as having avoided substantive lawmaking in favor of “procedural and choice of law efficiency”); Mullenix, *supra* note 6, at 1629 (criticizing ALI for addressing only “procedural aspects” of mass tort litigation); Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be (Part II: Non-Jurisdictional Matters)*, 42 *UCLA L. Rev.* 967, 993 (1995) (describing choice of law as “an arguably procedural matter”).

⁹⁶ See, e.g., Brainerd Currie, *The Law of the Forum, Selected Essays on the Conflict of Laws* 3, 64 (William S. Hein & Co. 1990) (1963) (suggesting that if court cannot determine applicable law, it should apply forum law because some law must be chosen in order to render decision “on the merits”); Henry M. Hart, Jr. & Herbert Wechsler, *The Federal Courts and the Federal System* 634-35 (1st ed. 1953) (arguing that *Klaxon* was wrongly decided because choice of law is “quasi-procedural or procedural” matter). The authors of the third edition of Hart and Wechsler's text apparently take a different view. See Paul M. Bator et al., *Hart & Wechsler's The Federal Courts and the Federal System* 797 (3d ed. 1988) (suggesting that “under a state's ‘procedural’ label there may lurk a significant substantive policy”).

It is easier, with this assumption as part of the background, to understand why judges and commentators might conclude that applying many laws in a complex case would be unfair and inefficient. Because the parties are all suing for the same mass injury, one expects them all to be judged by the same legal standard, and a procedure that frustrates this expectation is unfair to the parties who are substantively disadvantaged. By the same token, other things being equal, we prefer procedural rules that are less complicated and less expensive to administer. Hence, a choice-of-law procedure that increases the cost and complexity of litigation is obviously undesirable and inefficient.

The problem is that choice of law is not a matter of procedure. It is, in fact, as substantive as it gets. And once this is understood, the fallacy in the arguments for applying a single law in complex cases becomes apparent. This is true, by the way, even if those arguments are based on some premise other than the procedural nature of choice of law; because choice of law is substantive, the fact of consolidation alone is not enough to justify changing the otherwise applicable laws.

(1)

Before explaining why this is so, I want to say a bit more about what I mean in saying that choice of law is "substantive." I hope this is like the point about the emperor's clothes and that, once stated, it seems obvious. But I cannot take chances, since the contention is critical to my argument.

To begin, I am using the terms "substantive" and "procedural" in the conventional sense of matters that define the parties' rights versus matters that implement those rights. It is, of course, every procedure teacher's favorite truism that there is no bright line distinguishing substance from procedure, that the meanings of these terms shade into one another by degrees and vary from context to context. And like everything in litigation, making a choice of law entails a process of decisionmaking by the judge and can, to that extent, be described as an aspect of implementing the parties' rights. But the *form* of the decision does not make it "procedural" in the relevant sense. For choice of law is, literally, the assignation of rights to the parties—the decision defining what the plaintiff and defendant are entitled to on the particular facts. It is in this strong and fundamental sense, in terms of both its purpose and effect, that choice of law is substantive.

Here's another way to see the point: Suppose that a court reinterpreted its tort law to impose strict liability rather than requiring proof of negligence. No one would doubt that this is a substantive decision. So why is it less substantive if the means by which this

change is made is the decision to apply New York law rather than Ohio law, especially if the decision is made because the facts and legal policies make New York law the more appropriate standard?

Or again: Parties make their claims and defenses by invoking particular legal rules, not general systems of law. The plaintiff in a tort action does not seek damages under New York law in some abstract sense, but under a particular New York rule or rules.⁹⁷ Now suppose that either of two New York rules may apply to a particular dispute—one allowing damages upon proof of negligence, another allowing treble damages if certain additional conditions are satisfied.⁹⁸ The court's decision to apply one of these rules rather than the other is obviously substantive: The court is deciding what the parties' rights are in the litigation. Well, this is no less true if the choice is between a New York rule of law and an Ohio rule of law. In both cases, the court is defining the parties' substantive rights in the dispute.

Or yet again: Choice of law is part of the familiar process of defining the elements of a claim or defense. A lawsuit is a claim by one party that he or she is entitled to relief from another party because of something that happened or failed to happen. To recover, a claimant must establish some set of facts and show that, because these facts are true, some rule of law entitles the claimant to a remedy. The first determination (what happened?) is made through one of the legal system's factfinding mechanisms: trial, summary judgment, stipulation, judicial notice. The second determination (do these facts entitle the plaintiff to relief?) is made through one of the mechanisms established to test the legal sufficiency of a claim: demurrer, summary judgment, argument over jury instructions, directed verdict. The judge makes this second determination by interpreting the law proffered by the plaintiff in support of his or her claim and deciding what facts must be proved to recover under it.

Most of the time, making this determination is easy. But sometimes a law is unclear or omits essential terms, in which case the court clarifies the necessary elements through a process of interpretation. Choice of law is one aspect of this process—a problem of interpreta-

⁹⁷ Hence, if the plaintiff overlooks an available claim, it is waived. Parties get the benefit only of rules they call to the court's attention. See, e.g., *Neely v. Club Med Management Servs., Inc.*, 63 F.3d 166, 180-81, 180 n.10 (3d Cir. 1995).

⁹⁸ Problems involving overlapping or inconsistent rules within a single legal system arise routinely in wholly domestic cases. See, e.g., *Marek v. Chesney*, 473 U.S. 1, 7-11 (1985) (reconciling clash between 42 U.S.C. § 1988 and Fed. R. Civ. P. 68); *Gordon v. New York Stock Exch.*, 422 U.S. 659, 682-91 (1975) (reconciling clash between §§ 1-2 of Sherman Act (15 U.S.C. §§ 1-2) and § 19(b) of Securities Exchange Act of 1934 (15 U.S.C. § 78s(b)). Although seldom labeled "choice-of-law" problems, these are functionally indistinguishable from such problems. See *Kramer*, *Rethinking*, supra note 4, at 284-89.

tion necessitated (and made difficult) by the fact that few laws specify what connections with the state trigger their applicability. Suppose, for example, that a plaintiff from New York suffers terrible side effects from ingesting a drug manufactured by the defendant in Ohio. Suppose further that New York law requires proof of negligence, while Ohio imposes strict liability. Unable to prove negligence, the plaintiff does not plead it. The defendant moves to dismiss for failure to state a claim, and the plaintiff responds that she need not allege negligence because her right to recover is based on Ohio law. This case would be relatively easy if Ohio law specified the connection necessary to state a claim under Ohio law. The defendant's motion would be granted, for example, if Ohio provided that a plaintiff may recover "only if injured in the state." There are, in fact, laws that include terms like this.⁹⁹ But most laws are silent with respect to their territorial reach, leaving judges to define the contact or contacts necessary to state a claim or defense. Choice of law is the tool courts use to fill these gaps.

As even a passing familiarity with American conflicts law makes clear, states employ a variety of techniques to make these decisions. Some approaches focus on substantive policies; others emphasize considerations like simplicity, uniformity, and predictability. Some approaches are "unilateral" and take account of only the state's own interests; others are "multilateral" and shape the choice of an applicable law in light of other states' interests as well. But disagreement about how best to make a choice of law does not change the essential nature of the task as one of interpretation to fill gaps in coverage. Whatever approach a state uses, it is, by definition, determining the parties' rights under the laws at issue.

The point from all these different angles is thus essentially the same: The court in a multistate lawsuit must determine whether some rule of positive law confers a right to recover. Making this determination is a problem of interpreting laws offered by the parties to support their contentions. The only difference when it comes to choice of law is that, instead of asking whether the plaintiff must prove that the defendant acted negligently or was within the scope of his or her employment, we ask whether the plaintiff must prove that he or she is from the state or that the accident occurred within the state. But the extraterritorial reach of a law is still an element of a claim or defense

⁹⁹ See, e.g., Ala. Code § 43-8-135 (1991) (making validity of wills dependent upon, *inter alia*, compliance with law of place where will was executed); Ariz. Rev. Stat. Ann. § 14-2506 (1994) (same); Unif. Prob. Code § 2-506 (1993) (same); Colo. Rev. Stat. Ann. § 4-9-103 (West 1985) (perfection of security interests governed by law of jurisdiction where collateral is located when last event affecting perfection occurs); Ind. Code Ann. § 26-1-9-103 (Burns 1985) (same); U.C.C. § 9-103(1)(b) (1994) (same).

based on that law, determined by a process of interpretation that is, because it directly defines the parties' rights, the very paradigm of what we mean by "substantive."

(2)

Which brings me to the proposition at the heart of this paper: If choice of law is substantive (in the sense that it defines the parties' rights), then courts should not alter choice-of-law rules for complex cases. The reasoning is straightforward. We start with claims that everyone concedes would otherwise be adjudicated under different laws. We combine these claims, whether through transfer and consolidation or by certifying a class, on the ground that we can adjudicate the parties' rights more effectively and efficiently in one big proceeding. So far, so good. Then, having constructed this proceeding, we are told we must change the parties' rights to facilitate the consolidated adjudication. And that makes no sense. If the reason for consolidating is to make adjudication of the parties' rights more efficient and effective, then the fact of consolidation itself cannot justify changing those rights. To let it do so is truly to let the tail wag the dog.

Stated this way, the point seems both obvious and irrefutable. One rejoinder might be that a person injured individually is situated differently than a person injured in a mass tort, not merely as a procedural matter but in terms of substantive interests. No one has made or developed this argument, however, and while it is conceptually possible, I do not see the ground for it as a matter of policy. To the extent that such a ground exists,¹⁰⁰ moreover, it would presumably support formulating special substantive rules for mass actions, not manipulating choice-of-law rules to select a particular state's law that was written for "ordinary" cases.

A second rejoinder, and the one that probably underlies most proposals for applying a single law in mass actions, is that claims in complex litigation should be decided under the same law whether they are consolidated or not. That is, most commentators do not contend that a party's substantive rights should change just because his or her claim is adjudicated together with other claims rather than separately.

¹⁰⁰ I refer here to a ground other than the procedural arguments that are usually made. As suggested above, I do not believe that these are strong enough to justify modifying the parties' substantive rights. One might argue that the procedural exigencies created by choice-of-law problems could be so extreme that failure to modify choice-of-law rules will leave some parties remediless or uncompensated. My colleague Rochelle Dreyfuss offers the example of bankruptcy as an instance in which such concerns have led lawmakers to change substantive rights for consolidated litigation only. As explained in *infra* Parts II.C and III, the claim that choice-of-law problems are this severe is implausible.

Rather, one law should apply in consolidated litigation because this same law should apply even if claims are dispersed. This position, in turn, could be simply another expression of the desire for federal law, or it could reflect the belief that current choice-of-law rules are badly designed and that a "proper" system would choose the same law for all victims of a tort.

I explained above why the fact that national legislation may be appropriate or desirable cannot justify manipulating choice-of-law practices.¹⁰¹ Even if federal law should be created to handle the problems that give rise to complex litigation, Congress has not acted, and courts must apply the appropriate state laws until it does. Judges have no business distorting and misusing choice of law to produce some pseudo-federal law or federal law equivalent.

But what is the "appropriate" state law? Maybe the problem is that existing choice-of-law rules are poorly designed and would, if better formulated, choose one law for all of the claims in a mass action. Of course, states aren't about to rewrite their choice-of-law rules to accommodate this belief. But maybe federal judges (who hear most mass actions, after all) could and should devise their own, better rules for complex cases? This argument looks appealing at first, because most commentators assume that federal courts are more justified in making common law with respect to choice of law.¹⁰² Note, by the way, that even if this is true, judges on lower federal courts have no business doing it while *Klaxon* and *Van Dusen* remain on the books. The present practice of, in effect, ignoring these decisions cannot be condoned until the Supreme Court or Congress overrules them.

In any event, the assumption that it is easier to make federal common law respecting choice of law rests on the same fallacy that choice of law is procedural rather than substantive. Once we recognize that, in making a choice of law, the court is deciding who is entitled to recover what, we can no longer pretend that this is less substantive than defining any other element of a claim or defense. Take, for example, a state rule that awards punitive damages if a plaintiff (1) is injured; (2) in the state; (3) through grossly negligent acts of the defendant. (It doesn't matter for these purposes whether the rule is statutory or common law.) These three elements define the set of circumstances that must be established to recover, each designed to satisfy some policy judgment made by the state's lawmakers. Obviously, a federal court could not rewrite the third element and permit

¹⁰¹ See *supra* notes 6-7 and accompanying text.

¹⁰² See, e.g., Atwood, *supra* note 6, at 40-43 (noting that multidistrict consolidation under 28 U.S.C. § 1407 allows federal judges to alleviate some pressure on system); see also *supra* notes 95-96 and accompanying text.

punitive damages to be recovered only if the defendant acted intentionally. Why, then, should it be able to rewrite the second one, which is the element implied if the state uses the traditional place-of-injury rule? Either way, the federal court is using its jurisdiction as an excuse to alter the rights of the parties by permitting or precluding recovery in circumstances different from those selected by state law. Both changes may be desirable; both are equally improper.¹⁰³

Let me emphasize: I am not arguing that federal choice-of-law rules are unconstitutional or even necessarily undesirable. Some very substantial people have maintained that federal courts can and should serve as umpires to resolve conflicts between the states.¹⁰⁴ But this shows only that there may be room for federal action, i.e., that there is federal power to make choice-of-law rules. My point is that, given the substantive nature of choice-of-law rules in defining the parties' rights, the decision whether to exercise that power is for Congress to make (exercising authority expressly granted in the Full Faith and Credit Clause¹⁰⁵). The argument for federal choice-of-law rules, in other words, ultimately is no different than the argument for federal tort or contract law: It may be a good idea, and clearly there is federal power to act if necessary, but the decision is a legislative one. In the meantime, and until Congress acts, federal courts should apply state law, including choice of law.

¹⁰³ The American Law Institute's Complex Litigation Project suggests that a choice-of-law solution intrudes less on state law. See ALI, Complex Litigation Project, *supra* note 3, at 375-80. Why? Because *some* state's law is chosen? The intrusion comes from federal action that ignores a state's decision about who should recover and substitutes a different judgment in its place. Choice of law is as much a part of state law as anything else, and the use of federal jurisdiction to alter it is no less problematic.

¹⁰⁴ See, e.g., Letter from James Madison to George Washington (Apr. 16, 1787), excerpted in James Madison, *The Forging of American Federalism* 184, 186 (Saul K. Padover ed., 1965) (arguing that since those who apply laws may be affected by interests of their particular state, "it seems at least necessary . . . that an appeal should lie to some National tribunals in all cases to which foreigners or inhabitants of other States may be parties"); see also American Law Inst., *Study of the Division of Jurisdiction Between State and Federal Courts* 183-90 (Tentative Draft No. 1, 1963); Hart & Wechsler, *supra* note 96, at 634-35; Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 *Colum. L. Rev.* 489, 515 (1954); Andreas F. Lowenfeld & Linda J. Silberman, *Choice of Law and the Supreme Court: A Dialogue Inspired by Allstate Insurance Co. v. Hague*, 14 *U.C. Davis L. Rev.* 841, 855 (1981).

¹⁰⁵ U.S. Const. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.").

(3)

To make my argument clear, I need to spell out some of its implications. One point, not yet addressed, concerns practice in the states. As noted above, state courts seldom face problems of complex litigation. This is mostly because plaintiffs' attorneys prefer to litigate in federal court. In addition, however, states are unable to offer anything comparable to 28 U.S.C. § 1407 for the transfer and consolidation of cases filed in many jurisdictions. And while it is possible to bring a multistate class action in state court, these are restricted by the Constitution, which limits the power of state courts to exercise nationwide jurisdiction, and by state law, which often further confines the scope of the class action device.¹⁰⁶ As a result, most state-court class actions involve parties from a few states at most.¹⁰⁷

Despite these limitations, there have been nationwide class actions in state courts.¹⁰⁸ According to one recent report, the number of such actions has been increasing in recent years.¹⁰⁹ The general practice in these cases is for the court to use its own choice-of-law rules to determine the applicable law.¹¹⁰ Because certifying a class does not change the law applicable to any individual claim,¹¹¹ this should usually lead to the application of many laws, though there may be cases in which the court applies one law (as in a single-accident case brought in a state that still follows the First Restatement). Either way, so long as a state uses the same choice-of-law rules in complex and ordinary cases, the problem that concerns me—making consolidation a reason to change the applicable law—will not arise.

If a state does alter its choice-of-law practice because of the size of the litigation, as Kansas apparently did in *Shutts v. Phillips Petroleum Co.*,¹¹² my criticism applies and I would say the court is wrong to

¹⁰⁶ These restrictions, including the wide variation in state laws regarding class actions, are usefully discussed in 3 Newberg & Conte, *supra* note 11, § 13.

¹⁰⁷ See *id.* §§ 13.25-27.

¹⁰⁸ See, e.g., *Anthony v. General Motors Corp.*, 109 Cal. Rptr. 254 (Ct. App. 1973); *Geller v. Tabas*, 462 A.2d 1078 (Del. 1983); *Miner v. Gillette Co.*, 428 N.E.2d 478 (Ill. 1981); *Shutts v. Phillips Petroleum Co.*, 567 P.2d 1292 (Kan. 1977); *Paley v. Coca Cola Co.*, 209 N.W.2d 232 (Mich. 1973).

¹⁰⁹ See Commentary, 18 Class Action Rep. 1, 1 (1995).

¹¹⁰ See 3 Newberg & Conte, *supra* note 11, § 13.29. As in any case, application of the state's choice-of-law rules is subject to constitutional constraints imposed by the Due Process and Full Faith and Credit Clauses. See *id.*; *Shutts v. Phillips Petroleum Co.*, 472 U.S. 797, 816-19 (1985).

¹¹¹ See *supra* note 71. States that have class action rules broad enough to permit nationwide class actions generally model these on Federal Rule 23. See 3 Newberg & Conte, *supra* note 11, § 13.04.

¹¹² See *Shutts v. Phillips Petroleum Co.*, 679 P.2d 1159, 1181 (Kan. 1984) (holding that where state court takes jurisdiction over nationwide class action, "the law of the forum

do so. The principle I am advancing is that consolidation alone does not warrant changing the applicable law. A state may or may not have a sensible approach to choice-of-law problems, and it may or may not want to change its approach. But whatever approach a state uses, it should use the same approach across the board; an individual's rights should not change just because his or her claim is adjudicated together with the claims of others.

Practice in the federal courts is more complicated, though the same principle applies. The guiding policy, drawn from *Erie* and reflected in the Rules of Decision Act,¹¹³ is that the mere existence of federal jurisdiction does not justify modifying the parties' substantive rights under state law. As every first-year law student knows, this policy may yield when state law conflicts with valid federal procedural rules,¹¹⁴ and the Supreme Court today tends to give state substantive policies short shrift in such conflicts.¹¹⁵ But the policy of preserving

should be applied unless compelling reasons exist for applying a different law"), aff'd in part, rev'd in part & remanded, 472 U.S. 797 (1985).

¹¹³ See 28 U.S.C. § 1652 (1994) ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (holding that unless matter is "governed by the Federal Constitution or Acts of Congress" state law should be applied because Congress does not have "power to declare substantive rules of common law applicable to a State").

¹¹⁴ See, e.g., *Hanna v. Plumer*, 380 U.S. 460, 470-74 (1965) (holding that Federal Rules of Civil Procedure should be applied in diversity cases when there is direct collision with state rule); *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537-40 (1958) (holding that Seventh Amendment right to jury trial outweighs state interest in applying its own rule).

¹¹⁵ See, e.g., *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 31-32 (1988) (holding that federal forum-selection law displaces state forum-selection law in diversity because it controls issue and is valid exercise of Congressional power); *Burlington N.R.R. v. Woods*, 480 U.S. 1, 6-7 (1987) (determining that state policy embodied in rule regarding penalties for losing appellants must yield to federal rule, which regulates "procedural" matters). It was not always thus. See, e.g., *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751-53 (1980) (narrowly interpreting federal rule to avoid displacing state substantive law); see also *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 556 (1949) (deferring to state rule on plaintiff's liability for defendant's counsel fees in derivative suits because it is not "a mere procedural device"); *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537-38 (1949) (refusing to maintain action in federal court under diversity when state law precludes such action in state court); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 533-34 (1949) (deferring to state rule for tolling statute of limitations in diversity action in order to maintain consistency between state and federal courts).

the parties' substantive rights under state law was the driving force behind the decisions in both *Klaxon*¹¹⁶ and *Van Dusen*.¹¹⁷

Klaxon and *Van Dusen* are not very popular among the commentators, many of whom favor overruling both decisions. Some critics urge preempting state choice-of-law rules entirely with "true" federal law applicable in both state and federal courts.¹¹⁸ Others seek federal choice-of-law rules applicable only in federal courts in diversity actions.¹¹⁹ I argued above that the decision to take either of these routes is a legislative one—that because choice of law is substantive, the decision to displace it must be made by Congress. It follows that until Congress acts, *Klaxon* and *Van Dusen* should be obeyed rather than ignored in complex cases.

But my argument has stronger implications. It suggests, I think, that Congress should not overrule *Klaxon* and *Van Dusen*—or rather that Congress should not overrule them for complex cases alone, which is what reformers in this area keep urging (some because they may think it futile to ask for more, others because they are content with *Klaxon* and *Van Dusen* in ordinary cases).¹²⁰ It probably would be a good idea for Congress to enact national choice-of-law rules applicable in all cases in both state and federal courts; done properly, this could solve a messy problem and enhance the law's predictabil-

¹¹⁶ *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) ("The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. . . . Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state . . . the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws." (footnote omitted)).

¹¹⁷ *Van Dusen v. Barrack*, 376 U.S. 612, 637-38 (1964) (permitting transferee court to apply its own law "directly contradicts the fundamental *Erie* doctrine," which is to "ensure that the 'accident' of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed").

¹¹⁸ See, e.g., Elliott E. Cheatham, *A Federal Nation and Conflict of Laws*, 22 *Rocky Mtn. L. Rev.* 109, 114-15 (1950); Walter W. Cook, *The Powers of Congress Under the Full Faith and Credit Clause*, 28 *Yale L.J.* 421, 432-34 (1919); Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 *Geo. L.J.* 1, 1-2, 16-50 (1991); Harold W. Horowitz, *Toward a Federal Common Law of Choice of Law*, 14 *UCLA L. Rev.* 1191, 1193, 1200-03 (1967); Linda J. Silberman, *Can the State of Minnesota Bind the Nation?: Federal Choice-of-Law Constraints After *Allstate Insurance Co. v. Hague**, 10 *Hofstra L. Rev.* 103, 129-32 (1981).

¹¹⁹ See, e.g., Hart & Wechsler, *supra* note 96, at 634-35. As noted above, the authors of the third edition of Hart and Wechsler's text do not necessarily share this view. See *supra* note 96; see also Robert H. Abrams, *Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 *Ind. L.J.* 1, 54 (1982); Baxter, *supra* note 34, at 40-42; Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 *U. Pa. L. Rev.* 7, 38-39 (1986).

¹²⁰ See *supra* notes 1-3 and accompanying text.

ity.¹²¹ But Congress should not create different choice-of-law rules for ordinary and complex cases. As I have argued throughout, it is unfair to change a party's rights because lawyers and judges find it expedient to structure a lawsuit one way rather than another. Whatever rights I have if I litigate individually should be the same if, for reasons of convenience and efficiency, I am asked to litigate with others. So if Congress does decide that choice-of-law reform is necessary, the reform should apply whether the litigation is ordinary or complex.¹²²

There is another reason why Congress should not replace *Klaxon* and *Van Dusen* with a federal choice-of-law rule limited to mass actions. Most commentators say that the immense scope of mass actions makes them peculiarly "national" cases, another explanation for why federal intervention is now justified in an area that has traditionally been governed by state law.¹²³ No one seems to notice the irony of advocating a choice-of-law rule that selects the law of a single state on the ground that complex litigation is national in character. I would have thought that the more "national" the case, the *less* appropriate it is for any single state's standard to govern. A federal standard is one thing; at least the conditions it sets for recovery are chosen by the national legislature. Absent a federal standard, the next best solution may be a "pooling" of standards reflected in the different laws of many states.¹²⁴ But even if not, the appropriate solution surely cannot

¹²¹ See Kramer, *Uniform Choice of Law*, supra note 4, at 2149 (noting that "the conventional argument for rules—that they facilitate uniform, predictable results—remains persuasive and powerful in this context").

¹²² Note that my argument also suggests that any federal choice-of-law rules should apply not only to ordinary as well as complex cases, but also in both state and federal courts. It may be, in other words, that state law in the area of choice of law should be displaced because federal rules will do a better job umpiring conflicts among the states. But if Congress enacts choice-of-law rules, it should make those rules applicable in both state and federal courts. To do otherwise is unfair for the reasons explained in text—particularly to home-state defendants who do not even have the option to remove under 28 U.S.C. § 1441(b) (1994). Moreover, utilizing different choice-of-law rules in state and federal courts encourages forum shopping and creates needless uncertainty in the law. Indeed, it was precisely these consequences that made the limited federal law authorized by *Swift v. Tyson*, 41 U.S. 1 (1842), such a failure on the policy level. Federal choice-of-law rules limited to diversity actions will simply exacerbate the existing disarray in choice of law: on top of differences among the states, we will be adding disorder in the form of an additional federal alternative.

¹²³ See, e.g., ALI, *Complex Litigation Project*, supra note 3, at 378 (discussing predictability, efficiency, and fairness of using federal choice-of-law rule for complex litigation); Kozyris, supra note 95, at 953 (noting that "in some fields, especially mass torts and certain standardized contracts, the assumption of localism is no longer true" and calling ALI proposal good start in federalizing choice of law); Bird, supra note 2, at 1093 (arguing that choice-of-law decisions in mass tort cases constitute an inherently federal problem).

¹²⁴ Cf. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299-1300 (7th Cir. 1995) (Posner, J.) (suggesting that where liability is unclear many trials may be superior to single consoli-

be to apply the law of one state—a law that may be quirky or obsolete and that, in any event, reflects the political judgment of only a fraction of the nation.

C

Now recall the specific arguments advanced as reasons to choose one law in a mass action: that applying many laws is unfair to the parties, that it produces inconsistent results, and that it unduly complicates consolidated treatment. With a clearer picture of the nature and meaning of choice of law, we are in a better position to understand why these arguments fail. Once again, the reasoning is straightforward: Choice of law defines the parties' rights. States differ about what those rights should be. Such differences are what a federal system is all about. They are not a "cost" of the system; they are not a flaw in its operation. They are its object, something to be embraced and affirmatively valued.¹²⁵

It follows that there is nothing "unfair" if victims of the same mass tort are compensated differently—at least, not if they are from or were injured in different states. Such differences in outcome reflect the fact that different states with legitimate interests have made different judgments about how to handle tort problems. Different outcomes are thus both expected and acceptable.¹²⁶ They appear unfair only if measured from a national baseline, a baseline that is inappro-

dated action "because the pattern that results will reflect a consensus, or at least a pooling of judgment, of many different tribunals").

¹²⁵ The arguments about the benefits of federalism—regulatory diversity, the goad of competition, better prospects for innovation, and the like—are well known. For excellent summaries, see David L. Shapiro, *Federalism: A Dialogue* 75-106 (1995) (arguing that preservation of states' autonomy is constitutionally mandated and also an economic, political, and social virtue); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1491-1511 (1987) (book review) (examining intellectual case for federalism through close look at "founders' design").

¹²⁶ Professors Sedler and Twerski make the point in strong terms:

It is irrelevant that the parties were victims in the same "mass tort." The "mass" nature of the tort has nothing to do with the consequences of that tort for the individual victims and with the interest of the victims' home states in applying their law to determine the rights of the victims. The consequences of this "mass tort" will be felt by the victims in their home states, and it is the law of their respective home states that should determine the amount of damages they will each recover for this "mass tort."

Sedler & Twerski, *Sacrifice Without Gain*, *supra* note 1, at 89-90. Sedler and Twerski push the point too far in arguing that the proper solution is to apply the law of the plaintiffs' home states. *Id.* at 90. Certainly plaintiff's home state is a contender—particularly in dispersed torts, where the plaintiff's residence is usually also the place where the defendant sold the defective product and where the injury occurred. But states may differ about choice of law just like they differ about other elements of tort recovery. We need not decide what the ideal choice-of-law regime should look like to recognize that such dis-

appropriate unless Congress has enacted federal legislation. Until then, the appropriate baseline for measuring fairness is the multiplicity of state laws, with its potential for different outcomes. Put another way, applying different legal standards to different parties in complex litigation is not treating similarly situated parties differently: the parties are not “similarly” situated because, in a federal system, differences in where they are from or where they were injured are relevant grounds for distinguishing on matters still governed by state law.¹²⁷

The argument about inconsistent results is flawed for the same reasons. Professors Sedler and Twerski make the point:

The “inconsistent results” are due to the fact that the parties’ home states have different rules as to the amount of damages recoverable. These are also the states where the consequences of the accident and of imposing or denying liability will be felt by the parties. Once the reason for the “inconsistent results” is understood, it cannot be said to be “unacceptable” to limit each victim to the measure of recovery afforded by the law of the victim’s home state.¹²⁸

The argument is overdrawn insofar as it assumes that the proper solution is to apply the law of the plaintiff’s home state. States may, and do, legitimately disagree about what law to apply. But the more general point—that, in a federal system, the different results produced by the application of different states’ laws are not “inconsistent”—remains undeniable.

This leaves only the argument that, if courts cannot apply a single law in complex cases, they will find it difficult or impossible to adjudicate them. My initial reaction to this argument was: “so be it.” If courts cannot consolidate without changing the applicable law, they should forgo consolidation and find a different answer. After all, if it is unfairness that we’re concerned about, what could be more unfair than saying to a party: “It’s more efficient and convenient for us to litigate your claim together with the claims of others, but we can’t do that unless we apply the same law to everybody’s claim. So we’re changing your rights. Sorry.” The plaintiff whose recovery is thereby barred or (more likely) the defendant whose liability is thereby enlarged has a powerful argument that this is unfair.

agreements may produce different outcomes and that these differences are not “unfair” in a system that assumes the legitimacy of multiple legal standards.

¹²⁷ See Sedler, *Another Assault on State Sovereignty*, *supra* note 1, at 1090 (noting that because plaintiffs come from different states and consequences of their injuries will be felt in their respective states, various state policies embodied in each set of laws are implicated).

¹²⁸ Sedler & Twerski, *Sacrifice Without Gain*, *supra* note 1, at 92.

After further reflection, I can see that this response may be too hasty. It could be, for example, that without consolidation many claimants will be unable to test their claims at all. The stakes could be too small to justify independent litigation, or—more likely in the mass tort context—the cost of litigating each claim separately could exhaust the defendants' assets before a judgment is obtained. If so, consolidation may be necessary to prevent an even greater unfairness from refusing to consolidate.

The fact nonetheless remains that, if we do consolidate, we should not lightly alter the parties' substantive rights in the name of convenience and economy. It is one thing to say that we have to modify choice of law because we have to consolidate and we cannot consolidate without making this change. It is quite another to say that we have to consolidate and we want to modify choice of law to make things cheaper and more convenient when we do. We need to keep our priorities straight, which means not allowing consolidation to justify revamping the parties' substantive rights more than is necessary. And no one has come even remotely close to showing that we can't consolidate without changing choice-of-law rules. Nor do I think, given the discussion in Part III, that such a showing could be made.

III

I do not mean to minimize the seriousness of the problem posed by complex litigation. Mass torts are unavoidable given developing technology, national markets, and our evolving sense of substantive justice. New products mean new risks of injury. Mass marketing means injury on an immense scale. And we no longer dismiss injured claimants on flimsy grounds like absence of privity or caveat emptor. The mass tort is a product of the modern world, one not likely simply to disappear. So am I being old-fashioned and impractical to insist that consolidation does not justify changing the applicable law? Not if, as I believe, there are ways to consolidate and adjudicate without rewriting the parties' rights.¹²⁹

¹²⁹ For purposes of this paper, I will assume the conventional wisdom that the transaction costs of litigating the claims in a mass tort individually are too great to bear. I have some doubts even about this, but there is no need to explore them here given my argument that consolidation does not require modifying choice of law anyway. The topic of consolidation does, however, require further exploration. Most commentators, for example, appear to calculate the costs of dispersed litigation as if each separate action were the first and only one. Yet there are mechanisms for achieving economies of scale even without formal consolidation. First, because the defendants are mostly the same from action to action, they need not duplicate much of their work and can be expected to share costs. Second, plaintiff and defendant bar organizations can coordinate efforts and arrange for the sharing of information and costs. Third, with some modification to prevent unfairness

A

Two questions need to be separated to decide whether it is possible to adjudicate a mass action in one consolidated proceeding without changing choice-of-law practices. First, can judges feasibly make all the choice-of-law determinations called for in a mass action? Second, if these suggest the applicability of different laws (as will typically be the case if the court is honest in its choice-of-law analysis), can judges feasibly administer the consolidated action?

(1)

With respect to the first question, commentators frequently assert that it is impossibly difficult to resolve so many choice-of-law questions.¹³⁰ But while the task may not be fun, it is also far from impossible. In the first place, the judge will never have to analyze every issue in a case. Because choice of law pertains to the elements of a claim or defense, it is waivable.¹³¹ The court need deal only with issues raised

to defendants, offensive collateral estoppel can help limit duplicative litigation. Fourth, once a pattern of results begins to emerge, settlements take place with increasing ease and dispatch. By no means are these points sufficient to refute the argument for consolidation. But they suggest that, while dispersed litigation may be less cost effective than consolidation, it may also be nowhere near as bad as generally assumed. This is important, because allowing individualized adjudication has advantages—not the least of which is that it enables plaintiffs to control their own fate.

¹³⁰ See, e.g., Miller & Crump, *supra* note 93, at 63-67 (discussing difficulty of managing choice of law in fifty-state action); Nafziger, *supra* note 1, at 1009 (arguing that applying choice-of-law rules of several jurisdictions is daunting in air disaster cases); Reavley & Wesevich, *supra* note 2, at 31-32 (arguing in favor of federal choice-of-law rule in single-accident mass tort cases). This seems also to be the view among judges, though I suspect they may be influenced by another factor: Doing multiple choice-of-law analyses in the same case is boring and tedious, and a desire to avoid this work (conscious or not) undoubtedly makes the arguments for applying a single law look more attractive. In theory, analyzing 100 choice-of-law questions in a single case should be no more unpleasant than analyzing a single choice-of-law question in 100 cases. But it definitely seems worse (as cognitive psychologists can surely attest). In any event, while experience grading exams gives me a certain sympathy for the feeling, it is obviously inappropriate.

¹³¹ See *supra* note 97 and accompanying text. For some inexplicable reason, in international cases choice-of-law disputes are sometimes described as arguments about subject matter jurisdiction. Although the Supreme Court has tried to discourage this erroneous usage on a number of occasions, see *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 359 (1959); *Lauritzen v. Larsen*, 345 U.S. 571, 575 (1953), the Court made exactly the same mistake in its most recent effort. See *Hartford Fire Ins. v. California*, 113 S. Ct. 2891, 2909 n.22 (1993) (arguing that Sherman Act grants subject matter jurisdiction); *id.* at 2917 (Scalia, J., dissenting) (criticizing majority for confusing subject matter and legislative jurisdiction). Fortunately, the mistake in labeling has seldom caused significant problems. Recently, however, a panel of the United States Court of Appeals for the Third Circuit treated the choice-of-law issue as nonwaivable and voted to vacate a judgment on the ground that the court lacked subject matter jurisdiction because United States law did not apply. See *Neely v. Club Med Management Servs., Inc.*, Nos. 93-2069, 93-2102, 1994 WL 636467 (3d Cir. July 26, 1995) (*en banc*) (applying *Lauritzen* eight factor test to determine

by the parties in a timely fashion. In the ordinary course of litigation, this will typically boil down to one or two issues at most, with the others decided either by stipulation or concession.

Second, with respect to these one or two issues, there will never be fifty different substantive rules, or even fifteen or ten. States tend to copy their laws from each other, and many use identical or virtually identical rules. In practice, the court will seldom have to deal with more than three or four formulations, and the choice will often be between two alternatives. Hence, the number of actual conflicts may not be great.¹³² Nor are there all that many approaches to choice of law: nearly three-fourths of the states use either the First or Second Restatement, and only a few states each use such exotic approaches as *lex fori* or the better law approach.¹³³ Hence, the court should be able first to reduce the number of conflicts to a relatively manageable number and then to group states for purposes of conflicts analysis.¹³⁴

Professors Miller and Crump say it is "illusory" to think that grouping states with similar substantive laws will reduce the task to manageable proportions:

In order to group the states, the court initially must make decisions about the meanings of the laws of each. This approach, in effect, may amount to shifting those decisions to a time before the states are grouped. If the state classifications merely are tentative, the result may be two sets of decisions, one before and one after. Either approach may mean that the same quantum of decisionmaking ultimately will be necessary.¹³⁵

The Reporters for the American Law Institute's Complex Litigation Project, Arthur Miller and Mary Kay Kane, second the point, adding that "[a]s a practical matter, variations between state laws may range

subject matter jurisdiction). The court immediately reheard the case en banc and reversed, holding that questions regarding the applicable law go to whether the plaintiff states a claim, not whether the court has power to decide that question. See *Neely v. Club Med Management Servs., Inc.*, 63 F.3d 166, 174 (3d Cir. 1995) (en banc).

¹³² See, e.g., Restatement (Third) of Torts: Products Liability § 2 Reporters' Note, at 37-67 (Tentative Draft No. 1, 1994) (explaining consistency among jurisdictions regarding products liability rules governing manufacturing defects, duty to warn, and design defects); Restatement (Third) of Torts: Products Liability § 2 Reporters' Note, at 48-115 (Tentative Draft No. 2, 1995) (same).

¹³³ See Kay, *supra* note 41 (identifying and evaluating choice-of-law theories used by states since mid-1950s); Smith, *supra* note 41 (surveying state-by-state use of choice-of-law rules).

¹³⁴ See Larry Kramer, *Choice of Law in the American Courts in 1990: Trends and Developments*, 39 Am. J. Comp. L. 465, 475 (1991); Sedler, *Another Assault on State Sovereignty*, *supra* note 1, at 1096-97.

¹³⁵ Miller & Crump, *supra* note 93, at 64-65.

from nuances to fairly important differences," making the task still more problematic.¹³⁶

But surveying state laws is not the problem that could make mass consolidation unmanageable. Determining the law in many states is not easy, to be sure. But every practicing lawyer has done a fifty-state search at some time in his or her career, and this is certainly manageable. Moreover, the time and expense required to ascertain the content of the laws, even in a fifty-state search, are a drop in the bucket compared to the other costs of litigating a mass tort or contract action—especially given easy access to computers and to research services like LEXIS and Westlaw. The cost of doing such a search does not compare, for example, to the cost of preparing experts or compiling scientific evidence to establish or refute a claim.

If there is a problem here, it is the possibility that each claim will require its own unique choice-of-law analysis. That is, complex litigation really could become unmanageable if, once the various substantive laws were compiled and organized, the judge still had to perform hundreds or thousands of individualized choice-of-law analyses. But because variation in the legal rules is not great, once the state-by-state survey is completed, judges will find a relatively small number of conflicts and an equally small number of approaches to choice of law. At that point, claims can be grouped and the task of resolving the conflicts completed in a fairly efficient manner. It may not be fun, but it is far from impossible.

(2)

The end result of this process will almost surely be to find different laws applicable to different claimants, particularly since some choice-of-law approaches will point to the law of the plaintiffs' home state or the forum of origin. This raises the second question identified above: can the court successfully administer an action under different laws? Even assuming that there are only a few variations in substantive rules and that claims can be grouped accordingly, won't this still cause confusion and undue complexity, especially in jury trials?

Once again, I think the answer is no—at least not if the judge makes sensible use of the tools available to manage litigation. In a class action, the court can create subclasses, with separate representatives to protect the potentially divergent interests of the parties; where claims are consolidated, different claimants may still be divided by category, with appropriate adjustments made in the lawyer's commit-

¹³⁶ ALI, *Complex Litigation Project*, *supra* note 3, § 6.01 Reporter's Note 31 to cmt. e, at 439.

tee responsible for actually managing the litigation. Once the claims have been properly categorized, the court may analyze them sequentially, adjusting the order of proof as needed to keep the factual presentation orderly and sensible. At the end of trial, written findings may be used to distinguish among categories of claimants. Is this process more difficult and complicated than the ordinary case? Of course it is. But these are extraordinary cases, and adjudicating them is bound to be more difficult than adjudicating a run-of-the-mill tort or contract action.¹³⁷

Managing the litigation may be more complicated in jury cases, which pose the additional risk of confusing jurors by asking them to make separate determinations for different groups of plaintiffs. But careful instructions and the availability of special verdicts should go far toward eliminating this problem. The biggest risk may be resistance by jurors to making different awards to different groups of plaintiffs who have suffered similar or identical injuries. But the reasons for distinguishing among claimants, while perhaps not intuitively obvious, are also not that difficult to understand—they simply need to be explained. The judge should take a few minutes to instruct the jury why such differences exist, which ought to alleviate the problem.

Anyone who doubts the efficacy of these measures may want to study the asbestos litigation in the Eastern District of Pennsylvania, where a court did what the commentators insist is impossible: administer a nationwide action without distorting choice-of-law rules, even when this meant applying different laws. The action was filed in 1983 on behalf of 30,000 public and private schools and school districts from every state in the nation against virtually the entire asbestos industry. The complaints were based on state tort law and sought compensatory and punitive damages as well as equitable relief in the form of restitution and an injunction requiring removal of the asbestos.

In 1984, the district court certified a nationwide class for punitive and compensatory damages. The court had this to say about choice of law:

At first blush, this aspect of the litigation would seemingly prevent nationwide class certification. However, on further reflection, the problem is not nearly so complex. First, there is substantial duplication among the various jurisdictions as to the applicable law. For example, as to negligence, 51 [of 54] jurisdictions are in virtual agreement in that they apply the Restatement (Second) of Torts

¹³⁷ As Judge Edward Becker (himself no stranger to complex litigation) has pointed out, "a judge gets a case like that once or maybe twice in a lifetime." *Reforming the Civil Justice System* 176 (Larry Kramer ed., 1996) (discussing difficulty of evaluating scientific evidence in large class actions).

§ 388. As to strict liability, the basic test is Restatement (Second) of Torts § 402(A) that one who sells a product in a defective condition unreasonably dangerous to the user is liable. Forty-seven jurisdictions have adopted strict liability theories and all of them start with the concept of a defective product. In addition, plaintiffs have represented that they will direct discovery and trial briefs to meet the most stringent tests of liability. Finally, as the need arises, subclasses can be created to account for variances pursuant to Rule 23(c)(4).¹³⁸

The Third Circuit reversed the trial court insofar as it certified a mandatory class on punitive damages, finding inadequate evidence that failure to certify would impair the rights of some claimants as required by Rule 23(b)(1).¹³⁹ The court affirmed the decision to certify a (b)(3) class on compensatory damages, however. While noting "some doubt" about manageability, Judge Weis observed:

To meet the problem of diversity in applicable state law, class plaintiffs have undertaken an extensive analysis of the variances in products liability among the jurisdictions. That review separates the law into four categories. Even assuming additional permutations and combinations, plaintiffs have made a creditable showing, which apparently satisfied the district court, that class certification does not present insuperable obstacles.¹⁴⁰

The trial court was as good as its word in subsequent proceedings, handling the choice-of-law issues fairly and honestly even when this meant applying different laws to different claimants.¹⁴¹ There were, of

¹³⁸ In re School Asbestos Litig., 104 F.R.D. 422, 434 (E.D. Pa. 1984) (citations omitted). Unlike courts in securities litigation, see *supra* notes 82-85 and accompanying text, the court in this case did not use the possibility of subclasses as a ploy to avoid acknowledging the need to apply different laws; instead, it addressed the choice-of-law problems while holding this option in reserve as a legitimate management tool.

¹³⁹ In re School Asbestos Litig., 789 F.2d 996, 1002-08 (3d Cir. 1986). Rule 23(b)(1)(B) provides that a class may be certified if individual actions "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." Fed. R. Civ. P. 23(b)(1)(B).

¹⁴⁰ *School Asbestos Litig.*, 789 F.2d at 1010.

¹⁴¹ Under the *School Asbestos Litigation* name, see, e.g., No. 83-0268, 1993 WL 209719, at *3 (E.D. Pa. June 15, 1993) (memorandum and pretrial order granting single defendant's motion for summary judgment) (applying law of state of incorporation to determine liability of shareholders of defendant companies); No. 83-0268, 1991 WL 175848, at *2 (E.D. Pa. Sept. 4, 1991) (memorandum and pretrial order denying two defendants' motions for summary judgment) (applying Pennsylvania statute of limitations); No. 83-0268, 1990 WL 172591, at *1 (E.D. Pa. Oct. 31, 1990) (memorandum and order denying single defendant's motions for summary judgment) (applying law of state in which each plaintiff is domiciled); No. 83-0268, 1990 WL 2194, at *1-*2 (E.D. Pa. Jan. 11, 1990) (memorandum and order) (denying motion to decertify because plaintiffs agree to meet strictest evidentiary standard on liability).

course, problems in the litigation, including its Dickensian length.¹⁴² But massive proceedings of this sort are bound to be difficult, and the blame here cannot be attributed to choice-of-law issues. On the contrary, these appear to have been resolved as they arose with relative ease and without adding much undue complication.¹⁴³ Whether we should handle mass tort problems in a single consolidated proceeding may be a difficult and controversial question. But the *School Asbestos Litigation* decisions suggest that, if we want to go this route, we can do so without distorting choice-of-law analysis.

B

Nor are our choices in handling complex litigation limited to a single mass action, on the one hand, and thousands of individual suits, on the other. We can also break the one mass action into a few smaller actions, each dealing with a large but manageable chunk of the overall litigation.¹⁴⁴ Even if we allow the rather implausible supposition that only one law can be applied in any proceeding, we could have fifty statewide actions. This is less cost effective than a single action, of course, but it would still produce substantial economies of scale—without the need to rewrite anyone's substantive rights.¹⁴⁵ Be-

¹⁴² The most serious problem was the removal of the original trial judge because of the appearance of a conflict of interest after the judge appeared at a conference sponsored by the plaintiffs. In *re School Asbestos Litig.*, 977 F.2d 764, 770-71 (3d Cir. 1992). But the judge to whom the case was reassigned followed the same practice with respect to choice-of-law issues. See, e.g., In *re School Asbestos Litig.*, No. 83-0268, 1993 WL 209719, at *3 (E.D. Pa. June 15, 1993) (memorandum and pretrial order granting single defendant's motion for summary judgment) (applying different laws to different defendants on question of piercing corporate veil).

¹⁴³ But see *School Asbestos Litig.*, 977 F.2d at 796-98 (reserving question whether it will be possible to maintain class action while applying laws of plaintiffs' home states). As of the time this paper was written, settlement negotiations had produced an agreement that was awaiting judicial approval.

¹⁴⁴ See Stephen B. Burbank, *The Costs of Complexity*, 85 Mich. L. Rev. 1463, 1481 (1987) (arguing that before denying trial by jury for reason of costs of complexity in cases of joinder, the court should explore "breaking the lawsuit into smaller, less complex packages").

¹⁴⁵ Merely reducing the number of suits produces some savings. Others follow from coordination and sharing of information among the lawyers responsible for litigating the cases. Miller and Crump explain:

If plaintiffs' attorneys are denied certification of the nationwide class they propose, they may contract with counsel in other states to bring actions there. The result will not be a complete duplication of effort; instead, local counsel presumably will concentrate on local law while relying on national counsel for common issues. Pretrial proceedings, such as discovery, probably could be carried out on a national scale. The filing and pendency of a suit in a local court does entail some cost, but if the suit is part of a national effort, that cost should be reduced considerably. If settlement negotiations are conducted between the defendant and national counsel, they will reflect federalism concerns, be-

sides, given the techniques discussed above, it will never actually be necessary to conduct fifty actions in order to streamline the handling of choice-of-law issues. As explained earlier, it may still be possible to adjudicate the claims in a single action. If not, no more than three or four actions should ever be necessary as a practical matter.

Assuming we had to go this route—assuming, in other words, that consolidation is unavoidable and that the only way to consolidate without changing the applicable law is to have several actions—what might the problems be? Most objections to this alternative disappear once we recognize that it is not “unfair” to apply different laws to different claimants and that the disparate results thus produced are not “inconsistent” in a troublesome manner. That several actions cost more than one is unfortunate, but also unavoidable, since (as explained in Part II) this amount of extra cost alone cannot justify further consolidation if it requires the court to change the parties’ rights to do so.

The most substantial objection may be that we increase the risk of inconsistent results due to different *factual* determinations by various factfinders (if, for example, juries in different trials make different findings on the same factual issue). But it’s not clear that this should even be treated as a problem. As Judge Posner recently observed in *In re Rhone-Poulenc Rorer, Inc.*,¹⁴⁶ rather than trust the fate of an entire industry and class of plaintiffs to a single jury in a single trial, it may be preferable to submit the case “to multiple juries constituting in the aggregate a much larger and more diverse sample of decision-makers”; given uncertainty about the outcome, the pattern of results thus produced may achieve more overall social justice than a single verdict either way.¹⁴⁷ But if different factual determinations are thought to be a problem, the problem still seems smaller and more bearable than the false, unfair sameness produced by modifying the rights of plaintiffs and defendants.

cause they will anticipate results in different statewide forums; however, they will be conducted efficiently.

Miller & Crump, *supra* note 93, at 71-72 (footnotes omitted). It is the likelihood of this sort of cooperation that raises questions about the need for mass consolidation at all. See *supra* note 129.

¹⁴⁶ 51 F.3d 1293 (7th Cir. 1995).

¹⁴⁷ *Id.* at 1300, 1298-1300. Judge Posner concedes that this may be unrealistic where the individual stakes for each plaintiff are too small to make separate litigation feasible, but he notes that this is seldom a problem in mass tort actions. *Id.* at 1300. In any event, it will never be a problem under an intermediate solution that calls for several large actions in lieu of a single nationwide or worldwide lawsuit.

IV

Lawyers, judges, academics all recognize the practical significance of choice of law: It matters because differences in the applicable law may mean the difference between winning and losing, between unlimited damages and a cap, between recovering punitive damages and being limited to compensation. Yet these same observers show less respect when it comes to the legal significance of choice of law: Are existing rules inconvenient in complex cases? Then change them. Would it be easier to apply one law to everyone? Then make that the applicable choice-of-law rule. As if the parties have no right to expect any particular law to be chosen. As if this were a mere procedural inconvenience that should not be permitted to interfere with the smooth disposition of the case.

Choice of law deserves better treatment. It is, in fact, an integral part of parties' substantive rights, an aspect of determining which claimants are entitled to recover and on what terms. Courts have no more business modifying choice-of-law rules to make consolidated treatment easier than they do rewriting state law respecting negligence or strict liability for this purpose. Indeed, the one is just a covert way of doing the other.

