

# THE CHOICE-OF-LAW PROBLEM(S) IN THE CLASS ACTION CONTEXT

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*Numerous scholars have noted that choice of law in the federal courts is a mess; this is particularly true in the damage class action context. Unfortunately, proposed solutions address only half of this “choice-of-law problem”: They focus either on removing the barriers choice of law creates for certification or on preserving choice of law’s traditional allocation of regulatory authority among the states, but no proposal has taken up both issues. The time has come to address this problem in full. Given the current climate of political and economic change, Congress should amend the Class Action Fairness Act of 2005 (CAFA) to revitalize the class action as a meaningful regulatory mechanism while still deterring the state court excesses that spurred CAFA’s enactment. My two-pronged proposal would do exactly that—facilitate certification of meritorious consumer cases while ensuring fair and effective allocation of regulatory authority between interested states.*

## INTRODUCTION

Over the past forty years, damage class actions<sup>1</sup> have come to play an increasingly significant regulatory role in the consumer context. Federal regulations provide mandatory product standards in some fields, but compensation and deterrence still depend upon private attorneys general enforcing state law rights through collective action. Recent legal developments, however, have greatly diminished the damage class’s practical utility in this respect: While damage class actions remain viable on the books, in practice unfavorable federal

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<sup>1</sup> The class action mechanism allows groups of plaintiffs to combine their claims and sue defendants collectively pursuant to Rule 23 of the Federal Rules of Civil Procedure. Certification is the process by which a court determines that a proposed class’s claims are suitable for collective treatment under Rule 23 or its state-law equivalent. If certified as a class, all class members and defendants are bound by the results of the collective action. “Damage” classes seek primarily money damages, rather than injunctive relief, under Rule 23(b)(3). See *infra* notes 20–26 and accompanying text (describing characteristics of and requirements for damage classes).

precedent<sup>2</sup> and nearly exclusive federal jurisdiction under the Class Action Fairness Act of 2005 (CAFA)<sup>3</sup> prevent certification of many damage classes, reducing the ability of consumers to hold defendant-wrongdoers accountable.

Choice of law has proven to be one of the most consistent obstacles to damage class certification in recent years. Federal precedent has developed such that when multiple state laws would apply to a class, federal judges usually deny certification. To the extent that states rely on class actions to enforce their regulatory regimes, CAFA's jurisdictional shift appears to be weakening enforcement, resulting in underdeterrence and perhaps greater corporate misbehavior.

Academics have suggested various solutions to this "choice-of-law problem": passing substantive federal legislation, reading into CAFA congressional permission to create federal common law, adopting a federal choice-of-law rule, and simply exhorting federal courts to certify and manage difficult classes.<sup>4</sup> Most scholars agree that federal coordination of a solution is desirable;<sup>5</sup> however, the specific form this should take is much disputed, and each proposal has failed to comprehend the full scope of the choice-of-law problem.

In fact, we must confront *two* choice-of-law problems, stemming from choice of law's two distinct roles in the class action context: choice of law as a procedural gatekeeper for certification and choice of law as the mechanism by which substantive regulatory authority is allocated between states. In the current federal judicial climate, these two roles are in frequent conflict. The choice-of-law rules that would facilitate the most fair and efficient consumer protection (those applying different states' laws to different class members) tend to cause denial of certification, while rules that facilitate certification (those applying a single state's law) produce suboptimal regulation of corporate conduct. At this seeming impasse, scholars have taken sides. Some would compromise choice of law's allocation function to facilitate certification; others insist on adherence to traditional choice-of-law principles even when the resulting denial of certification ren-

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<sup>2</sup> For a discussion of federal cases that have made certification more difficult to obtain, see *infra* notes 44–46.

<sup>3</sup> Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified as amended in scattered sections of 28 U.S.C.).

<sup>4</sup> See *infra* Part II (discussing proposed solutions to choice-of-law problem).

<sup>5</sup> Federal coordination would promote uniformity and predictability and help to correct the regulatory mismatch between national conduct and state law-based liability. See *infra* notes 42–53 and accompanying text (describing problem of regulatory mismatch) and notes 82–88 and accompanying text (explaining utility of federal coordination).

ders consumers' rights unenforceable.<sup>6</sup> In attempting to formulate solutions, scholars have taken seriously only one or the other of these two sets of concerns.

To achieve a real solution, one must account for both. To this end, I propose that Congress amend CAFA in two respects. First, Congress should adopt an amendment originally proposed by Senator Dianne Feinstein and rejected during the Senate floor debate on CAFA: “[T]he district court shall not deny class certification, in whole or in part, on the ground that the law of more than [one] State will be applied.”<sup>7</sup> Second, Congress should prescribe a federal choice-of-law rule directing courts to apply the law of the consumer’s home state to each claim in a consumer class action<sup>8</sup> under CAFA. Together these proposals would produce greater uniformity and predictability, as well as more fair and accurate claims pricing for settlement and recovery, restoring damage classes to their full potential as regulatory enforcement mechanisms.

Part I of this Note provides relevant background regarding choice of law and class actions. Part II explores proposed solutions, showing how each fails to address fully the dual nature of the choice-of-law problem. Finally, in Part III, I propose a two-part solution, arguing for amendments that would remove choice of law from the Rule 23(b)(3) analysis and create a federal choice-of-law rule directing courts to apply the law of the consumer’s home state to each claim.

## I

### BACKGROUND: CHOICE OF LAW AND DAMAGE CLASS ACTIONS

This Part lays the groundwork for a full understanding of the choice-of-law problem in the consumer class action context. Part I.A explains the theories and principles underlying choice of law and class actions; Part I.B examines the realities of modern class action practice.

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<sup>6</sup> See *infra* Part II.B–C (describing two main scholarly approaches and their limitations).

<sup>7</sup> S. 5, 109th Cong. amend. 4, 151 CONG. REC. S1215 (daily ed. Feb. 9, 2005). See *infra* note 128 for the full text.

<sup>8</sup> While many of the same issues animate the “choice-of-law problem” in other class action contexts, this Note addresses only consumer or products liability cases.

## A. *Underlying Theories and Principles*

### 1. *Choice of Law Allocates Regulatory Authority*

Choice of law has rarely enjoyed much respect or excited much enthusiasm within the academy,<sup>9</sup> yet it performs an essential function in our federal system, determining which sovereign authority will regulate conduct implicating several states' interests. These rules are more than mere practical workouts; they embody normative concepts of interstate relations, seeking to establish not just which of several regulatory regimes *will* govern but which *should* govern.<sup>10</sup>

Each state has developed its own choice-of-law rules over time.<sup>11</sup> When a controversy has contacts with multiple states, the court first determines whether the relevant state laws actually conflict.<sup>12</sup> If they do, then the court uses its choice-of-law rule to decide which substantive law will apply, and this determines which state's regulatory scheme will be given effect. A federal court sitting in diversity jurisdiction—as occurs in most nationwide consumer class actions—must apply the choice-of-law rule of the state in which it sits.<sup>13</sup>

Federalism and policy concerns, more than firm constitutional restrictions, have shaped the development of choice-of-law rules and decisions. The Supreme Court has offered little guidance regarding the formulation or application of choice-of-law rules. In *Phillips Petroleum Co. v. Shutts*, the Court identified only a minimal due process restraint on choice-of-law decisions in the class action context: The chosen law must have a “significant contact or significant aggregation of contacts . . . creating state interests” with respect to *each* claim.<sup>14</sup> This standard affords courts considerable latitude. They

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<sup>9</sup> William Prosser famously wrote, “The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors . . . . The ordinary court, or lawyer, is quite lost when engulfed and entangled in it.” William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

<sup>10</sup> Take, for example, a New York plaintiff who purchased in New Jersey a car manufactured by a Michigan corporation and who was subsequently injured in an accident in Massachusetts due to design-based engine failure. If she were to sue in tort for personal injury or in contract for breach of warranty, which state's laws should govern? Different choice-of-law rules yield different answers.

<sup>11</sup> Only Louisiana has a statutory scheme, and all others are common law. SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION* 4–5 & n.14 (2006).

<sup>12</sup> See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 816 (1985) (“We must first determine whether Kansas law conflicts in any material way with any other law which could apply. There can be no injury in applying Kansas law if it is not in conflict with that of any other jurisdiction connected to this suit.”).

<sup>13</sup> *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

<sup>14</sup> 472 U.S. 797, 821–22 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981)) (holding unconstitutional Kansas Supreme Court's application of Kansas law to all class claims when Kansas did not have sufficient contacts with or “interest” in some of those claims).

remain free to apply a single substantive law to an entire class so long as that law has sufficient contacts with each class member's claim and provided the court chooses that law in accordance with the choice-of-law rule of the state in which it sits. This lack of constitutional or Supreme Court direction has encouraged divergent choice-of-law methods and results across the country.

The earliest American choice-of-law rules looked to territoriality and nationality, strictly applying the law of the place in which some important event occurred or a particular party was domiciled. The First Restatement of Conflict of Laws exemplifies this type of rule.<sup>15</sup> While a few states continue to use the First Restatement (and traditional territorial principles inform newer choice-of-law rules), most states have moved to "modern methods."<sup>16</sup> These seek to discern which state has the greatest regulatory interest in the controversy, as judged by the nature and extent of the state's connections to the parties and the conduct.<sup>17</sup> The Second Restatement directs courts to consider a list of nonexclusive factors that go to the very heart of choice of law's role in a federalist system.<sup>18</sup>

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<sup>15</sup> Under the First Restatement, the *lex loci delicti* (the law of the place of wrong) generally governs tort claims, RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 378 (1934), while contract claims look to the place of contracting, *id.* § 311 cmt. d (identifying place of contracting as place where "the principal event necessary to make a contract occurs"). To return to our earlier example, *supra* note 10, if our New York plaintiff sued in a First Restatement jurisdiction, the place of the harm (Massachusetts) would govern her tort claim, whereas the place of the purchase agreement (New Jersey) would likely govern her contract claim.

<sup>16</sup> "Modern methods" include the Second Restatement, significant contacts, interest analysis, Leflar's "better law," and "combined modern" approaches. See Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719, 725–28 (2009) (describing modern approaches). As of 2006, only ten states still adhered to traditional rules in tort cases, and only twelve in contract. Symeon C. Symeonides, *Choice of Law in the American Courts in 2006: Twentieth Annual Survey*, 54 AM. J. COMP. L. 697, 713 tbl.1 (2006). Forty states and territories used a "modern method" for torts and contracts. *Id.*

<sup>17</sup> The Second Restatement's formulation is typical: "The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971) [hereinafter SECOND RESTATEMENT].

In our earlier example, *supra* note 10, a court would most likely find New York or Michigan to have the most significant relationship to the parties and occurrence. As the plaintiff's home state, New York may have a strong interest in ensuring her compensation; as the defendant's home state, Michigan may have a strong interest in regulating the conduct of its corporate citizens.

<sup>18</sup> Section 6 of the Second Restatement looks to:

(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the

For all their complicated obscurity, modern choice-of-law rules are fundamentally about doing the right thing—they seek to promote both fairness to the litigants and good federalism by respecting the regulatory interests of sister states such that the law of the state with the strongest relationship to the parties and occurrence governs the course of conduct. However, this effort entails significant judicial discretion and variation in outcomes; as a result, modern choice-of-law methods are notoriously indeterminate.<sup>19</sup> Choice-of-law determinations can be complicated and obscure even in the individual case. As we shall see, the class action context magnifies both the complexity and the practical import of these decisions.

## 2. *The Regulatory Function of Damage Class Actions*

The modern American class action emerged mid-twentieth century with the 1966 amendments to Federal Rule of Civil Procedure 23.<sup>20</sup> This Rule prescribes three categories of class actions, the third of which concerns classes primarily seeking monetary relief.<sup>21</sup> Certification is appropriate under this category when collective treatment promotes overall efficiency and fairness, even if certification is not strictly necessary.<sup>22</sup> This third category—the damage class—has caused a great deal of furor in recent years.

To be certified, a putative damage class must meet the requirements of both Rule 23(a) and 23(b)(3). Rule 23(a) mandates four qualities that are necessary but not sufficient for class treatment: numerosity, typicality, commonality, and adequacy of representation.<sup>23</sup> Since damage class claims could theoretically proceed sepa-

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particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

SECOND RESTATEMENT, *supra* note 17, § 6.

<sup>19</sup> See, e.g., Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459, 461 (1985) (“[Interest analysis] reflects nothing more than the unexplained value preferences of its proponents.”). Judges have expressed similar dissatisfaction with modern methods. See, e.g., *Kaczmarek v. Allied Chem. Corp.*, 836 F.2d 1055, 1057 (7th Cir. 1987) (describing modern approaches to choice of law as “caus[ing] pervasive uncertainty, higher cost of litigation, more forum shopping . . . and an uncritical drift in favor of plaintiffs”). *But see* Whytock, *supra* note 16, at 764–77 (presenting empirical results suggesting that modern methods are more predictable and less biased in application than scholars have assumed). For further discussion, see *infra* notes 143 and accompanying text.

<sup>20</sup> See 7A CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1753 (3d ed. 2008) (describing drastic changes wrought by 1966 revisions).

<sup>21</sup> FED. R. CIV. P. 23(b)(3).

<sup>22</sup> See *infra* notes 24–25 and accompanying text (explaining rationale behind Rule 23(b)(3) requirements).

<sup>23</sup> FED. R. CIV. P. 23(a). Numerosity ensures there are enough claims for class treatment to be efficient. Typicality and commonality require that potential class members’

rately without impeding one another, Rule 23(b)(3) imposes two additional requirements to test whether class treatment is truly the most fair and efficient means of resolution:<sup>24</sup> Courts must find both predominance and superiority in order to certify.<sup>25</sup> Numerous factors bear on these determinations, but choice of law has proven to be one of the most consistently important considerations. When the choice-of-law rule points to the laws of different states for different class members, federal courts usually find predominance and/or superiority lacking and deny certification.<sup>26</sup>

The certification decision has important implications for regulatory enforcement. Appropriately constituted damage classes promote efficiency by pooling plaintiff resources, avoiding duplicative discovery and litigation, and resolving large numbers of claims with minimal expenditure of judicial time and resources.<sup>27</sup> They also promote the adjudication of meritorious claims, particularly when claim values are so small that the transaction costs of litigation would otherwise preclude plaintiffs from enforcing their rights. The class action mechanism and the American contingency fee system of attorney compensation together make these “negative value” claims financially viable, producing collective cases worth attorneys’ time and resource investments.<sup>28</sup> In this way, the damage class empowers consumers—and

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claims be sufficiently similar to one another and to those of the class representative(s). Adequacy of representation ensures that class counsel and representative(s) have the capacity and incentives to represent fully the interests of all class members. See Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709, 715–16 (2003) (describing Rule 23(a) requirements and rationales).

<sup>24</sup> See FED. R. CIV. P. 23 advisory committee’s note, reprinted in 39 F.R.D. 69, 102–03 (1966) (“Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.”).

<sup>25</sup> Predominance asks if “questions of law or fact common to class members predominate over any questions affecting only individual members.” FED. R. CIV. P. 23(b)(3). Superiority asks whether “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” *Id.* In making these decisions, courts look to: (A) class members’ interests in controlling their own cases; (B) the extent and nature of any litigation already instituted by class members regarding the same controversy; (C) the desirability of pursuing all claims in the particular forum; and (D) difficulties the court is likely to encounter in managing the class. *Id.*

<sup>26</sup> See *infra* Part I.B.1 (describing trends in choice-of-law and certification decisions).

<sup>27</sup> See Myron S. Greenberg & Megan A. Blazina, *What Mediators Need To Know About Class Actions. A Basic Primer*, 27 HAMLINE L. REV. 191, 207 (2004) (describing efficiency benefits of class actions).

<sup>28</sup> See Samuel Issacharoff, *Preclusion, Due Process, and the Right To Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1059–60 (2002) (defining “negative value” as both when “the value of the claim . . . itself is too small to justify the cost of prosecution” and when “the multiple exposure of the defendant creates an incentive to expend resources in litigation that would overwhelm any individual litigant, even if the amount of the claim

incentivizes lawyers—to enforce rights that otherwise would go unenforced.<sup>29</sup> By facilitating suits by private attorneys general, the class action plays an important regulatory function in the consumer context.<sup>30</sup> An economic analysis suggests that without this collective mechanism, corporations would not fully internalize the costs of their conduct, causing inefficiencies, undercompensation, underdeterrence, and other social losses.<sup>31</sup>

More specifically, regulation in this context is primarily realized through settlement pricing. In the modern American system, the vast majority of civil cases, including class actions, settle before trial.<sup>32</sup> Economics explains the settlement process in terms of reaching a shared understanding of the suit's expected value: The parties must arrive at sufficiently similar assessments of the strength and value of the plaintiff's claim in order to identify a price that both consider pref-

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would conceivably justify one-on-one litigation" (citations omitted)); *see also infra* notes 76–81 and accompanying text (explaining lack of practical alternatives for negative value claims). For a discussion of how class action systems require contingency fees in order to be effective, see Thomas D. Rowe, Jr., *Shift Happens: Pressure on Foreign Attorney-Fee Paradigms from Class Actions*, DUKE J. COMP. & INT'L L., Summer 2003, at 125, 127–33.

<sup>29</sup> See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (explaining that class action mechanism helps “solve[ ] this problem [of negative value claims] by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor” (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997))); *cf.* *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980) (noting “increasing reliance on the ‘private attorney general’ for the vindication of legal rights”).

<sup>30</sup> Chief Justice Burger recognized this important regulatory function nearly thirty years ago:

The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.

*Deposit Guar.*, 445 U.S. at 339; *see also* Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 867 (1977) (describing modern class action as “solution to the discrepancies that result from the imposition of a mass-production economy on an individualized system of litigation”).

<sup>31</sup> See, e.g., Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 105 (2006) (asserting that real value of class actions lies not in compensation but in deterring defendant-wrongdoer by “caus[ing it] to internalize the social costs of its actions”); William B. Rubenstein, *Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKC L. REV. 709, 710–11, 726 (2006) (arguing class actions create broader social benefits, or “positive externalities,” such as changed industry standards and accelerated development of legal principles, beyond simple compensation and deterrence).

<sup>32</sup> For a survey of recent studies, see Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1285 n.129 (2002), which reports that “by most estimates, approximately seventy percent of all cases filed in federal court end in pretrial settlement.”

erable to continued litigation.<sup>33</sup> The judicial process facilitates this by providing information to both parties early in the litigation process and by supervising the exchange of information through discovery.<sup>34</sup>

A variety of legal and nonlegal factors determine settlement values; certification and choice of law are two of the most significant in the class action context. Since many consumer claims simply are not viable unless aggregated, the certification decision is tremendously important. Certified class actions overwhelmingly settle, while denial of certification generally leads to lower settlement values or to a complete lack of recovery.<sup>35</sup> In this way, choice of law affects settlement pricing through its role in certification, but the substance of the choice-of-law decision independently influences claim value as well. Plaintiffs usually sue under state consumer protection statutes and common law, both of which can vary significantly between states. A court's decision as to which state's laws will govern provides crucial shared information regarding the risk-discounted value<sup>36</sup> of a plaintiff's claim.<sup>37</sup>

Choice-of-law and certification decisions, therefore, significantly influence settlement prices, with important implications for regulatory enforcement.

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<sup>33</sup> For an accessible explanation of the conditions necessary for successful settlement, see generally Samuel Issacharoff, *The Content of Our Casebooks: Why Do Cases Get Litigated?*, 29 FLA. ST. U. L. REV. 1265 (2002). See also George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 14–17 (1984) (analyzing settlement negotiation process through economic modeling and concluding that parties are most likely to settle when they share similar assessments of claim value).

<sup>34</sup> Court decisions on motions to dismiss, the scope of discovery, choice of law, certification, evidentiary issues, and summary judgment all provide shared information.

<sup>35</sup> See *infra* Part I.B.2 (discussing effects of denial of certification).

<sup>36</sup> The “risk-discounted value” of a claim refers to a party's calculation of the likely judgment amount adjusted for that party's likelihood of success at trial and the expected litigation costs. See Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 111–13 (1994) (explaining standard economic account of settlement, incorporating concept of risk-discounted claim value).

<sup>37</sup> For example, under one state's law the plaintiff might enjoy a presumption of reliance, while under another she would have to prove it; contributory negligence might be a complete defense under one law and irrelevant under another. If a court concluded that a law presuming, rather than requiring the plaintiff to prove, reliance applied to the plaintiff's claim, the claim would likely have a higher risk-discounted value, and the defendant would be willing to pay more to settle the claim. Similarly, if a court concluded that contributory negligence was a complete defense, the claim would likely have a lower risk-discounted value, and the amount the defendant would be willing to pay to settle the claim would decrease.

## B. Choice of Law and Damage Classes in Practice

Having surveyed the theoretical framework for this subject, I now turn to the realities of class action practice. In this Part, I illustrate the practical import of choice-of-law and certification decisions by examining certification trends and the lack of effective alternatives to class adjudication.

### 1. Certification Trends Before and After CAFA

Congress enacted CAFA as a response to the perceived evils of damage class actions run amok.<sup>38</sup> Beginning in the 1970s and increasing through the early 1990s, federal and state courts were inundated with nationwide consumer and mass tort class actions based on state law claims.<sup>39</sup> Broad rules of personal jurisdiction<sup>40</sup> allowed plaintiffs to sue most national corporations in state or federal court anywhere in the country. In these early years, many judges—both state and federal—favored the damage class as a useful mechanism for resolving mass torts and consumer claims.<sup>41</sup>

Beginning in the mid-1990s, however, state and federal courts' attitudes began to diverge in this respect, due in part to their different approaches to choice of law. State and federal courts in the same state performed class action choice-of-law analysis under the same state rules,<sup>42</sup> which, in theory, should have produced similar results. In fact, many state courts were more hospitable to certification requests than their federal counterparts.<sup>43</sup> Federal courts increasingly refused to certify nationwide damage classes, finding predominance

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<sup>38</sup> See S. REP. NO. 109-14, at 4–5 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 5–6 (describing CAFA's purpose, in part, as remedying class action abuses in state courts).

<sup>39</sup> Parties sought to resolve numerous mass harms—*asbestos*, *Agent Orange*, *Dalkon Shield*, etc.—by means of the newly reformed class action mechanism. For a historical summary of this development and citations to specific cases, see Alec Johnson, *Vioxx and Consumer Product Pain Relief: The Policy Implications of Limiting Courts' Regulatory Influence Over Mass Consumer Product Claims*, 41 *LOY. L.A. L. REV.* 1039, 1047–48 & nn.55–60 (2008).

<sup>40</sup> See, e.g., *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319–20 (1945) (requiring only “systematic and continuous” contacts between defendant and forum to establish personal jurisdiction).

<sup>41</sup> See, e.g., *In re A.H. Robins Co.*, 880 F.2d 709, 740 (4th Cir. 1989) (“[T]he ‘trend’ is once again to give Rule 23 a liberal rather than a restrictive construction, adopting a standard of flexibility in application which will in the particular case ‘best serve the ends of justice for the affected parties and . . . promote judicial efficiency’ . . .”).

<sup>42</sup> See *supra* note 13 and accompanying text (explaining *Klaxon* rule).

<sup>43</sup> State courts frequently found reason (and sufficient constitutional contacts under *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821–22 (1985)) to apply the forum law to all class members' claims and therefore certify a class. See Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 *U. PA. L. REV.* 1439, 1504–09 (2008) (describing pre-CAFA state court certification practices).

lacking on choice-of-law grounds.<sup>44</sup> Since the mid-1990s, lower federal courts have adjudicated certification motions under binding and persuasive precedent that has become increasingly unfavorable to nationwide classes,<sup>45</sup> resulting in fewer certifications.<sup>46</sup> Not surprisingly, plaintiffs' attorneys responded to these developments by filing more nationwide classes in state courts and forum shopping for the most liberal certification practices and plaintiff friendly substantive laws.<sup>47</sup>

As part of a larger "tort reform" movement, certain business interests, politicians, and legal commentators began calling for a congressional fix that would save corporate defendants from these "anomalous" state court certifications.<sup>48</sup> CAFA supporters argued

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<sup>44</sup> In the mid-1990s, the Third, Fifth, and Seventh Circuits handed down a trio of influential decisions decertifying classes on choice-of-law grounds. *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 626–30 (3d Cir. 1996) (decertifying settlement class in part for lack of predominance based on choice-of-law concerns); *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (relying on Third and Fifth Circuit decisions to decertify nationwide class of smokers on choice-of-law predominance and manageability grounds); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300–02 (7th Cir. 1995) (decertifying class partly due to necessity of applying multiple states' laws). As binding and persuasive precedent, these three cases continue to make federal certification of nationwide classes difficult. See David Marcus, *Erie, the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1305–06 (2007) (discussing continuing influence of these cases).

To take one example, in *In re Rhone-Poulenc*, Chief Judge Posner rejected certification based on its potential *in terrorem* effect on defendants, Seventh Amendment issues, and choice-of-law concerns. 51 F.3d at 1299–304. He particularly objected to the trial court's plan to determine the defendant's liability under a generalized negligence standard that elided differences between state laws. *Id.* at 1300–02 ("The voices of the quasi-sovereigns that are the states of the United States sing negligence with a different pitch.").

<sup>45</sup> See, e.g., *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996) (looking to *In re Rhone-Poulenc*, 51 F.3d, in denying damage class certification in part because jury instruction on multiple laws would be "impossible task"); *In re Gen. Motors Corp. Dex-Cool Prods. Liab. Litig.*, 241 F.R.D. 305, 324 (S.D. Ill. 2007) (denying certification partly due to Seventh Circuit precedent establishing that "the difficulties inherent in applying the laws of numerous states to the class claims defeat both predominance and manageability").

<sup>46</sup> Between 1990 and 1995, federal courts held at a rate of 2.5:1 that choice of law did not present a predominance barrier to certification. Marcus, *supra* note 44, at 1306 & n.318. Between 1995 and 2000 that trend reversed, with federal courts denying certification at a rate of 1.7:1 when confronted with choice-of-law concerns. *Id.* at 1307 & n.319.

<sup>47</sup> See Laura G. Dooley, *National Juries for National Cases: Preserving Citizen Participation in Large-Scale Litigation*, 83 N.Y.U. L. REV. 411, 423 (2008) (describing CAFA as response to plaintiff forum shopping for "magnet jurisdictions," such as Madison County, Illinois, in which juries tended to award large verdicts and most litigants came from outside jurisdiction); Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1664–65 (2008) (explaining problem of outlier state courts that granted certification to classes that other courts refused to certify).

<sup>48</sup> See Issacharoff & Nagareda, *supra* note 47, at 1660–65 (asserting CAFA was enacted to allow defendants to remove class actions from "anomalous" state courts); Jacob R. Karabell, Note, *The Implementation of "Balanced Diversity" Through the Class Action*

that magnet-state court certifications had *in terrorem* effects on defendants<sup>49</sup> and allowed a small number of pro-plaintiff states to dictate liability standards for the entire country.<sup>50</sup> CAFA purported to fix these problems by moving most nationwide class actions into federal courts.<sup>51</sup> Specifically, it grants federal courts original jurisdiction over nationwide class actions with minimal diversity and at least five million dollars in controversy, and it allows defendants (though not plaintiffs) to remove these cases to federal court at any time during state proceedings.<sup>52</sup> Notwithstanding this jurisdictional shift, CAFA failed to address a more significant regulatory mismatch: State rather than federal law continues to determine nationwide liability, regardless of forum. As a result, choice of law remains a significant obstacle to certification in federal courts, which now hear most large class action cases.<sup>53</sup>

It is too early to know how CAFA will affect certification trends, but its impact on plaintiff filings is already apparent. Many more nationwide classes are filed originally in favorable federal circuits

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*Fairness Act*, 84 N.Y.U. L. REV. 300, 304 (2009) (characterizing CAFA as primarily motivated by state court certification abuses).

<sup>49</sup> Presumably this would unfairly inflate settlement values for plaintiffs. See Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971) (“[An antitrust class action] is a form of legalized blackmail. If defendants who maintain their innocence have no practical alternative but to settle, they have been de facto deprived of their constitutional right to a trial on the merits.”).

<sup>50</sup> See S. REP. NO. 109-14, at 61 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 57 (“A principal purpose of [CAFA] is to correct . . . the problem . . . that ‘many state courts faced with interstate class actions have undertaken to dictate the substantive laws of other states by applying their own laws to . . . other states, resulting in a breach of federalism principles.’” (quoting Solicitor Gen. Walter Dellinger)).

<sup>51</sup> According to its preamble, CAFA aimed to correct a regulatory mismatch: Liability for nationwide conduct should be decided by national rather than state courts. Pub. L. 109-2, § 2(b)(2), 119 Stat. 4 (codified as note to 28 U.S.C. § 1711 (2006)); see also Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1844 (2006) (discussing mismatch that occurs in integrated national market when economic activity crosses state borders but remains subject to regulation by individual states).

<sup>52</sup> 28 U.S.C. § 1332(d) (2006).

<sup>53</sup> Many commentators assert that CAFA’s corporate backers hoped for exactly this result: Federal judges would use choice of law and other doctrinal tools to deny certification more often than did their state counterparts. See, e.g., Issacharoff, *supra* note 51, at 1861 (“[T]he motivation behind the legislation was to take multistate class actions out of the hands of state courts, presumably selected for their amenability to class certification, and place them in federal courts, perceived as being less welcoming to ‘adventuresome’ aggregated proceedings.”); Marcus, *supra* note 44, at 1288 (reporting that group of Fortune 100 corporate counsel came up with “[t]he idea for CAFA . . . about the time that . . . the Third, Fifth, and Seventh Circuits had staked out their hostile positions on multistate class actions” and that same group of counsel “spent between \$50 and \$200 million lobbying for its enactment”).

since removal now appears inevitable.<sup>54</sup> To the extent CAFA sought to eliminate the uncertainty associated with forum shopping its success is debatable, having apparently traded one type for another. In addition, relative to pre-CAFA numbers, contract claims have increased while tort claims have decreased.<sup>55</sup> Whereas tort choice-of-law rules usually look to the place of injury, which is often different for each consumer, contract rules generally point to either the consumer's or defendant's home state.<sup>56</sup> A nationwide class suing in tort will almost certainly require application of multiple states' laws; a class suing in contract, however, can plausibly argue for application of a single state's law (and, therefore, certification) by showing that the defendant's, rather than each consumer's, home state has the most significant relationship with each claim. This argument often fails, but it stands a better chance of success, under existing choice-of-law rules, than similar arguments regarding tort claims. The shift in pleadings may reflect an even greater plaintiff concern with choice-of-law decisions and their effects on certification now that CAFA has moved most nationwide class actions into federal court.

## 2. *Alternatives to Class Adjudication: What Happens When Certification Is Denied?*

In theory, a variety of effective alternatives to the nationwide class exist, including individual litigation and settlement, statewide class actions, and aggregate settlement of individual claims.<sup>57</sup> In fact, without nationwide certification, high value consumer claims usually

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<sup>54</sup> Plaintiffs now seem to be forum shopping between federal circuits rather than between state jurisdictions in their search for favorable certification doctrine. See Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1612–14 (2008) (noting filings have increased more than removals in circuits amenable to certification (D.C., Second, Third, Fourth, Fifth, Ninth, and Eleventh Circuits), and vice versa in circuits that are less receptive to class treatment (First, Seventh, Eighth, and Tenth Circuits)).

<sup>55</sup> *Id.* at 1621.

<sup>56</sup> See *supra* notes 15–17 and accompanying text (detailing choice-of-law rules for tort and contract claims). Traditional territorial concepts were rigidly applied under the First Restatement, but they also strongly inform the modern methods and their outcomes. *Id.* Consequently, traditional and modern rules frequently produce similar results despite differences in approach.

<sup>57</sup> Aggregate settlements frequently result from consolidation of cases by the Multidistrict Litigation (MDL) panel. Congress created the MDL panel in 1968 and charged it with “(1) determin[ing] whether civil actions pending in different federal districts involve one or more common questions of fact such that the actions should be transferred to one federal district for coordinated or consolidated pretrial proceedings; and (2) select[ing] the judge or judges and court assigned to conduct such proceedings.” U.S. JUDICIAL PANEL ON MULTIDIST. LITIG., AN INTRODUCTION TO THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION (2009), available at [http://www.jpml.uscourts.gov/General\\_Info/Overview/PanelBrochure-6-1-09.pdf](http://www.jpml.uscourts.gov/General_Info/Overview/PanelBrochure-6-1-09.pdf).

settle in aggregate settlements, and negative value claims generally go completely unredressed.<sup>58</sup> Both are undesirable outcomes.

Most high value class claims result from mass torts wherein each class member suffered significant personal harm and each therefore has a financially viable claim without the class mechanism. As a result, courts and commentators have generally assumed that these claims would proceed as individual actions absent certification,<sup>59</sup> and courts have analyzed the relative efficiency and desirability of certification in comparison with this assumed alternative.<sup>60</sup> For “immature”<sup>61</sup> torts in particular, courts often have denied certification on the

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<sup>58</sup> Empirical evidence is limited, but a 2001 study of all mass product cases (forty-three in number) that came before the MDL panel in the 1990s is informative. Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883 (2001). Professor Hensler distinguished “mass financial injury litigation”—presumably negative value claims in which the value of each claim is too small to litigate individually—from “mass personal injury and property damage claims”—presumably positive value claims in which the value of each claim is large enough to litigate individually. *Id.* at 888. She found that of the forty-three motions for MDL treatment, roughly seventy-two percent were granted. *Id.* at 904 tbl.6. Of those cases where the panel granted MDL motions but courts denied class certification, sixty-nine percent of personal injury/property damage cases reached a collective resolution, compared with only thirty-three percent of financial injury cases. *Id.* at 905 tbl.7. For cases denied both certification and MDL treatment, fourteen percent of personal injury/property damage cases were resolved collectively, while none of the financial injury cases reached a collective resolution. *Id.* The author concluded:

Although there are too few cases to reach strong conclusions, the available data suggest that class action certification and settlement is crucial to mass financial injury litigation . . . .

. . . . In catastrophic accidents and mass personal injury and property damage cases arising out of alleged product defects, the parties had a high likelihood of success in reaching collective resolution, even when class certification was not obtained, if MDL status was granted. For financial injury cases, MDL status alone was less likely to lead to collective resolution. Collective resolutions were rarely obtained when parties did not obtain class certification or MDL status. Moreover our investigations indicate that where collective resolution attempts failed, mass litigation collapsed.

*Id.* at 904–05.

<sup>59</sup> See, e.g., *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 748 (5th Cir. 1996) (finding superiority lacking largely because court assumed claims would be brought individually after denial of certification); *infra* note 62 (summarizing Chief Judge Posner’s argument for superiority of individual litigation over class action when series of individual cases would help future litigants better understand value of claims).

<sup>60</sup> See Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 525–26 (“Too many judges treat class action problems as though the alternative is autonomous individual litigation, when in fact the alternative is more likely to be some form of mass collective representation.”).

<sup>61</sup> “Immature” tort claims are difficult for litigants to price because they have been adjudicated in too few individual cases prior to class treatment. By contrast, “mature” tort claims have been litigated individually on numerous occasions so that their values are well established. See Sue-Yun Ahn, *CAFA, Choice-Of-Law, and the Problem of Legal Maturity*

theory that efficiency and fairness would be better served if the cases proceeded to trial individually.<sup>62</sup>

The problem is that most high value claims do *not* proceed to trial individually when denied certification; instead, they settle in the aggregate, without the process or judicial oversight mandated by the class form to protect claimants.<sup>63</sup> Modern large scale litigation is dominated by plaintiffs' firms that collect "inventories" of high value cases.<sup>64</sup> These high value claims are then typically disposed of in package deals that clear the firms' inventories.<sup>65</sup>

Aggregate settlements provide some degree of compensation and deterrence,<sup>66</sup> but they are generally less fair and efficient than class resolutions because they tend to elide differences between claims (both in pricing and in allocating compensation)<sup>67</sup> and are not subject

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*in Nationwide Class Actions*, 76 U. CIN. L. REV. 105, 108 (2007) (discussing courts' reluctance to certify classes involving immature tort claims).

<sup>62</sup> Chief Judge Posner made such an argument in *Rhone-Poulenc*, concluding that individual adjudication was superior because different juries applying different laws would produce a series of verdicts over time that would help litigants better understand the relative values of the claims. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299–302 (7th Cir. 1995). This would protect against the *in terrorem* effect of a single winner-takes-all class action, allow individuals to control their own high value litigation, ensure individually appropriate compensation, and let state courts address novel state law theories in the first instance. *See id.*

<sup>63</sup> *See, e.g.,* L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 LA. L. REV. 157, 158–63 (2004) (arguing for increased judicial oversight of MDL aggregate settlements because collective representation encourages collusion and unfair settlement allocations); Erichson, *supra* note 60, at 524–25 (noting that “[a]s a practical matter, . . . much litigation is handled through collective representation even if no class is certified,” and identifying non-class aggregate litigation’s functional similarities to class actions); Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1573 (2004) (“Mature torts . . . have persistently resolved themselves into what are essentially bureaucratized, aggregate settlement structures. ‘Informal aggregation’ . . . is not the deviation but the norm in these cases.” (quoting Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 386–409 (2000))).

<sup>64</sup> *See* Erichson, *supra* note 60, at 530–43 (describing organization of mass litigation firms and process by which they aggregate claims).

<sup>65</sup> *See* David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393, 395 (2000) (“[T]he real world of mass tort litigation is characterized by corporately structured organizations of plaintiffs’ attorneys that not only compete for market share of classable claims to aggregate large claim inventories and attract financial backing . . . but sometimes also share information and costs.”).

<sup>66</sup> The plaintiff recovers something, and the defendant internalizes at least part of the cost of the harm.

<sup>67</sup> *See* Nancy J. Moore, *The American Law Institute’s Draft Proposal To Bypass the Aggregate Settlement Rule: Do Mass Tort Clients Need (or Want) Group Decision Making?*, 57 DEPAUL L. REV. 395, 408 (2008) (“[A] common attorney has little financial incentive to ensure horizontal equity among the various clients. . . . Even if neither the plaintiffs’ nor the defendant’s attorneys are biased in favor of certain claimants within the

to judicial oversight.<sup>68</sup> A court may approve a class action settlement only “on finding that it is fair, reasonable, and adequate.”<sup>69</sup> By contrast, aggregate settlements are ostensibly private contractual agreements, legitimated by the parties’ consent, over which courts enjoy no special authority.<sup>70</sup> In theory, judicial oversight is unnecessary because the plaintiff consents to the settlement: She is protected by her own power to reject unsatisfactory offers and by the American Bar Association’s aggregate settlement rule, which requires attorneys to secure each client’s informed consent based on disclosure of all material terms of the settlement.<sup>71</sup> In fact, disclosure and consent requirements provide little protection since plaintiffs rarely know the value of their claims and attorney-client incentives are misaligned.<sup>72</sup> An attorney generally profits more if he settles his full inventory of claims than if he maximizes any particular client’s recovery.<sup>73</sup> As a result, aggregate settlements involve many of the same dangers as class action settlements—including significant opportunities for collusion between plaintiffs’ attorneys and defendants—but offer none of

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group, they will not be motivated to expend the time and effort to individualize the settlements . . . .”); see also John C. Coffee, Jr., *Conflicts, Consent, and Allocation After Amchem Products—Or, Why Attorneys Still Need Consent To Give Away Their Clients’ Money*, 84 VA. L. REV. 1541, 1542 (1998) (“The problem of conflicts may well be worse at the allocation stage than at the earlier settlement negotiation stage because plaintiffs’ attorneys have little economic incentive to make a ‘fair’ allocation, whereas they generally have a strong economic incentive to maximize the size of the settlement fund.”).

<sup>68</sup> See Chamblee, *supra* note 63, at 163 (proposing that Congress “amend the multidistrict litigation statute to permit judicial oversight of post-aggregation settlements” in light of opportunities for collusion).

<sup>69</sup> FED. R. CIV. P. 23(e)(2). This includes potentially searching analysis of attorneys’ fees, with an eye to ensuring adequate representation for class members. See FED. R. CIV. P. 23(h); Suzette M. Malveaux, *Fighting To Keep Employment Discrimination Class Actions Alive: How Allison v. Citgo’s Predominance Requirement Threatens To Undermine Title VII Enforcement*, 26 BERKELEY J. EMP. & LAB. L. 405, 432 (2005) (“Rule 23(h) further monitors the selection of class counsel through its enhanced examination of attorneys’ fees. Thus, through [Rules 23(g) and 23(h)], adequacy of representation—the linchpin to class litigation—is further protected.”).

<sup>70</sup> See Erichson, *supra* note 60, at 527 (“Although some judges actively manage the settlement process . . . judicial approval of settlements in non-class litigation generally is not required as it is in class actions.”).

<sup>71</sup> MODEL RULES OF PROF’L CONDUCT R. 1.8(g) (2004).

<sup>72</sup> See Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1, 41–43 (2009) (arguing that although in theory “consent . . . alleviates intra-client conflicts and allocative disparities,” in fact incompatible goals of attorney and client “inhibit[] participation and group cohesion,” leading to conflicts “which deteriorate the settlement’s legitimacy and may promote inequitable allocation”).

<sup>73</sup> See Erichson, *supra* note 60, at 525 (“Lawyers representing the mass of plaintiffs often have little or no incentive to allocate [aggregate] settlements fairly among their clients, and may have incentives to allocate settlements unfairly.”).

Rule 23's judicial safeguards.<sup>74</sup> Compared with class treatment, aggregate settlement can save courts time and expense, but superiority analysis under Rule 23(b) should not turn primarily on conservation of judicial resources. The class mechanism therefore looks potentially superior even in high value cases in that it promotes resolutions at prices that account more closely for differences in individual claim values.<sup>75</sup>

Negative value claims<sup>76</sup> face even bleaker fates when denied certification. Most simply disappear. Individual representation is not an option, since by definition the claims are not sufficiently valuable for attorneys to pursue them individually.<sup>77</sup> Not surprisingly then, negative value claims rarely settle—aggregately or individually—without certification.<sup>78</sup> Of course, where certification is denied based on choice-of-law concerns, these same claims might instead be brought as statewide classes to avoid the choice-of-law problem.<sup>79</sup> The economic incentives in this regard, however, vary considerably state-to-state: Attorneys might have sufficient reason to pursue statewide class actions in the most populous states but not in smaller ones.<sup>80</sup> Even if

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<sup>74</sup> See Chamblee, *supra* note 63, at 160–61 (“The concerns and symptoms of settlement collusion in class actions are nearly identical to those in post-aggregation settlements . . . . [C]ollective representation, without the judicial supervision incorporated into the class action and bankruptcy schemes, permits collusion and inequitable settlement allocations that lead to second-class justice for mass tort claimants.”).

<sup>75</sup> See Erichson, *supra* note 54, at 1625 (concluding that “[i]f CAFA reduces class certifications as expected, then it is likely to increase the number of claims resolved on a mass nonclass basis” and noting irony that “a statute driven by mistrust of lawyers and aimed at enhancing judicial supervision may actually reduce the level of supervision over the litigation and resolution of mass disputes”).

<sup>76</sup> See *supra* note 28 (defining negative value claims in class action context).

<sup>77</sup> See Issacharoff, *supra* note 51, at 1861 (“It is well understood that aggregation is the key to the viability of many claims routinely brought as class actions, particularly what are termed the negative value claims, in which the transaction costs of prosecuting individual actions make enforcement impossible absent aggregation.”).

<sup>78</sup> See Hensler, *supra* note 58, at 905 tbl.7 (finding that “financial injury” cases achieved collective resolution only thirty-three percent of time when certification was denied but MDL treatment was granted, and never when both certification and MDL treatment were denied); see also Erichson, *supra* note 54, at 1625 (“[W]ith the notable exception of small-claims class actions, lawyers often find ways to litigate and settle mass disputes on a collective basis regardless of whether any court grants class certification.” (emphasis added)).

<sup>79</sup> Some speculate that CAFA will encourage more statewide classes, but empirical data is lacking. See Richard G. Stuhan & Sean P. Costello, *Robbing Peter To Pay Paul: The Conflict of Interest Problem in Sibling Class Actions*, 21 GEO. J. LEGAL ETHICS 1195, 1195 (2008) (asserting, without support, that single-state classes are more popular with plaintiffs’ lawyers than nationwide classes); see also Ahn, *supra* note 61, at 118–19 (“[S]tatewide class actions may [be viable] when the stakes are high enough and the claimants are geographically concentrated, [but] it is unlikely that statewide class actions could be an entirely satisfactory solution to the problems of certifying a nationwide class action in federal court.”).

<sup>80</sup> During the CAFA floor debate, Senator Leahy read a letter from fourteen state attorneys general opposing CAFA:

statewide classes do pick up some of the regulatory slack post-CAFA—a proposition far from certain—they are likely to do so selectively, such that only the largest states' regulatory regimes are enforced and their citizens compensated. Practically speaking, certification of nationwide classes is essential to fair and effective enforcement of most meritorious consumer claims,<sup>81</sup> both positive and negative in value.

## II

### THE CHOICE-OF-LAW PROBLEM(S) IN CONTEXT: WHY PROPOSED SOLUTIONS FAIL TO ADDRESS THE FULL SCOPE OF THE PROBLEM

The theoretical and practical discussions in Part I illuminate the dual nature of the choice-of-law problem. First, as a practical matter, choice of law makes certification difficult. CAFA has pulled most nationwide class actions into federal court, where judges routinely deny certification on choice-of-law grounds. This result is undesirable in terms of both private compensatory and public deterrence goals, since it generally causes negative value claims to go unredressed and high value claims to settle aggregately without judicial oversight.<sup>82</sup> Most meritorious class claims need to be certified in order to realize fully their regulatory functions, and choice of law has become a significant obstacle under current doctrine.

This is the “choice-of-law problem” most reform proposals address, but it is not the *only* choice-of-law problem. While this first problem relates to ensuring that private attorneys general can fulfill their regulatory function, the second concerns the proper allocation of regulatory authority.<sup>83</sup> Since state—not federal—law still determines defendants' liability post-CAFA, the choice-of-law rules applied to

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[I]n theory, injured plaintiffs in each state could bring a separate class action lawsuit in federal court, but . . . while the population of some states may be large enough to warrant a separate class action involving only residents of those states, it is very unlikely that similar lawsuits would be brought on behalf of residents of many smaller states.

151 CONG. REC. S1177 (daily ed. Feb. 9, 2005) (statement of Sen. Leahy); *see also* Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 678 (7th Cir. 2001) (“If any class treatment is appropriate, a class limited to a single state . . . would be more practical—though buyers in a single state . . . may be too few to justify class treatment.”).

<sup>81</sup> I focus on problems related to under-compensation for meritorious claims and the under-deterrence this effects. For a discussion showing that an epidemic of frivolous class claims is myth, see *infra* notes 132–133 and accompanying text.

<sup>82</sup> *See supra* Part I.B.2 (discussing consequences of denial of certification).

<sup>83</sup> *See supra* Part I.A.1 (explaining that choice-of-law rules and decisions are fundamentally concerned with properly allocating regulatory authority between interested states).

these classes should respect the regulatory interests of the different states. Instead, federal courts across the country apply a patchwork of choice-of-law rules under *Klaxon*,<sup>84</sup> fostering unpredictability and effecting suboptimal compensation and deterrence, as seen below.

Thus we are confronted with two distinct choice-of-law problems, stemming from choice of law's two conflicting roles in the class action context. In this Part, I examine several of the more prominent proposed solutions and show how each fails to address the full scope of the choice-of-law problem.

#### A. *The Need for Federal Coordination*

Most proposals favor some degree of federal involvement in order to rectify the unpredictability and lack of uniformity currently clouding class action practice. CAFA addressed the anomalous forum problem but did little to increase certainty for corporate defendants regarding which substantive law will govern their nationwide conduct.<sup>85</sup> According to law and economics scholars, such uncertainty causes inefficient ex ante corporate behavior because potential defendants cannot shape their activities according to known liability standards.<sup>86</sup> Manufacturers and retailers pass the costs of these inefficiencies on to consumers and society at large. Uncertainty also makes settlement more difficult, since parties' assessments of claim values are less likely to overlap.<sup>87</sup> By contrast, predictability fosters efficiency and minimizes the social costs of litigation.<sup>88</sup> As a result, most proposed solutions to the choice-of-law problem call for some

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<sup>84</sup> See *supra* note 13 and accompanying text (explaining *Klaxon* rule).

<sup>85</sup> Nearly any state's law might govern, depending on where a defendant is sued and which choice-of-law rule is applied. See *supra* Part I.A.1 (discussing choice-of-law rules and principles).

<sup>86</sup> See, e.g., Ralf Michaels, *Two Economists, Three Opinions? Economic Models for Private International Law—Cross-Border Torts as Example*, in AN ECONOMIC ANALYSIS OF PRIVATE INTERNATIONAL LAW 143, 156 (Jurgen Basedow & Toshiyuki Kono eds., 2006) (“*Ex-ante* predictability enables parties to optimize their conduct *vis-à-vis* the incentives set by the applicable tort rules.”). Under a uniform national choice-of-law rule, a company could more easily predict which law would govern its liability. Without the need to hedge its bets, the company can price its products more efficiently, passing on at least some of the savings to consumers.

<sup>87</sup> See *id.* (“*Ex-post* predictability enables parties to . . . settle rationally in the shadow of a defined substantive law . . . .”); see also *supra* note 33 and accompanying text (describing conditions necessary for settlement, including parties arriving at “sufficiently similar assessments of the strength and value” of claims).

<sup>88</sup> See, e.g., MICHAEL J. WHINCOP & MARY KEYES, POLICY AND PRAGMATISM IN THE CONFLICT OF LAWS 27 (2001) (“[C]hoice-of-law rules can increase the likelihood of settlement by operating in predictable fashion. Increased certainty about the likely choice of law permits parties to identify the settlement range, in which settlement terms are mutually beneficial.”).

form of federal coordination in CAFA cases, either through substantive legislation in the consumer field, development of federal common law, or a uniform federal choice-of-law rule that would overrule *Klaxon*, all of which I discuss below.

Perhaps the most intuitively appealing solution is substantive federal legislation.<sup>89</sup> Not only would this correct the remaining regulatory mismatch,<sup>90</sup> but it would also solve the choice-of-law problem by making choice of law irrelevant to nationwide consumer classes, as the new federal law would govern all claims. Yet efforts to effect such a solution have failed time and again as Democrats, Republicans, and special interest groups fundamentally disagreed on the proper liability standards for corporate conduct.<sup>91</sup> The fact that torts and contracts are traditionally state-regulated areas has also impeded legislative efforts.<sup>92</sup> Scholars generally agree both that Congress has the authority to regulate nationwide conduct in the consumer context<sup>93</sup> and that it is highly unlikely to do so for political and federalism reasons.<sup>94</sup>

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<sup>89</sup> See, e.g., Russell J. Weintraub, *Methods for Resolving Conflict-of-Laws Problems in Mass Tort Litigation*, 1989 U. ILL. L. REV. 129, 141 (arguing for adoption of uniform substantive federal law for mass torts, in part to eliminate choice-of-law problems); see also AM. LAW INST., COMPLEX LITIGATION PROJECT: PROPOSED FINAL DRAFT 375 (1993) [hereinafter COMPLEX LITIGATION PROJECT] (“[T]he most direct way to attempt to solve the issues posed [is] to adopt national standards to govern the conduct of individuals or entities who are engaging in activity having interstate effects and who now are controlled by multiple, sometimes conflicting, state laws.”).

<sup>90</sup> See *supra* notes 51–52 and accompanying text (explaining regulatory mismatch where state law governs nationwide conduct).

<sup>91</sup> See, e.g., Product Liability Reform Act of 1997, S. 5, 105th Cong. (1997); Product Liability Fairness Act of 1995, S. 565, 104th Cong. (1995); Common Sense Product Liability Reform Act, H.R. 917, 104th Cong. (1995); see also Bradley W. Joondeph, *Federalism, the Rehnquist Court, and the Modern Republican Party*, 87 OR. L. REV. 117, 161–64 (2008) (characterizing CAFA as one of Republicans’ few legislative successes in series of repeated, failed attempts to protect corporations from liability); P. John Kozyris, *Values and Methods in Choice of Law for Products Liability: A Comparative Comment on Statutory Solutions*, 38 AM. J. COMP. L. 475, 477–78 (1990) (describing how most legislative efforts “have borne no fruit, principally because of opposition by the well-organized groups of trial lawyers”).

<sup>92</sup> See COMPLEX LITIGATION PROJECT, *supra* note 89, at 375 (suggesting need for procedural solution to current complex litigation problems since “the 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”).

<sup>93</sup> See, e.g., Issacharoff, *supra* note 51, at 1867 (“[I]f Congress has the interstate commerce authority to prescribe distinct jurisdictional treatment for national market claims, it also has the corresponding authority to prescribe the liability standards that should accompany those now federalized claims.”).

<sup>94</sup> See, e.g., Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 550 (1996) (“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,

Another, disfavored theory asserts that CAFA implicitly overruled *Erie*<sup>95</sup> with respect to class actions falling within its jurisdictional prescription; proponents of this theory urge courts to develop federal common law to provide substantive law for these cases.<sup>96</sup> A federal common law approach would have certain advantages but would also replicate existing problems, particularly the inefficiencies resulting from uncertainty.<sup>97</sup> Ultimately, *Erie* carries the day with most scholars; few agree that CAFA implicitly authorized courts to abandon *Erie* with regard to nationwide class actions.<sup>98</sup>

Instead, most debate has centered on procedural reform; in particular, many scholars have called on Congress to prescribe a uniform federal choice-of-law rule for class actions under CAFA.<sup>99</sup> Different

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or wisdom in recognizing the benefits of leaving states a role.”); Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001, 2027 (2008) (“[P]recisely because there has been no agreement or consensus through the democratic process about what the ‘national’ law should look like, attempts to achieve national statutory solutions have failed.”).

<sup>95</sup> In *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), the Supreme Court overruled previous precedent, which had recognized a “federal general common law,” and the Court held that federal courts hearing diversity actions must instead apply the substantive law of the forum state. *Id.* at 78. However, the Court still recognizes a few narrowly defined situations in which creation of federal common law is appropriate, including when a federal statute “implicitly” directs courts to do so. See Joseph R. Oliveri, *Converse-Erie: The Key to Federalism in an Increasingly Administrative State*, 76 GEO. WASH. L. REV. 1372, 1376–77 (2008) (detailing four types of situations in which Court has approved development of federal common law).

<sup>96</sup> See, e.g., Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1419–20 (2006) (asserting CAFA will eventually require federal courts “to develop incremental decisional law”); Suzanna Sherry, *Overruling Erie: Nationwide Class Actions and National Common Law*, 156 U. PA. L. REV. 2135, 2139–42 (2008) (arguing that CAFA must be interpreted as having overruled *Erie*, 304 U.S., for cases within CAFA’s scope).

<sup>97</sup> It would address the regulatory mismatch, but it would also likely lead to forum shopping between circuits and continued uncertainty because different circuits might adopt different substantive common law. See COMPLEX LITIGATION PROJECT, *supra* note 89, at 386 (“Not only [would] uncertainty and a lack of uniformity continue, at least until the courts determine[d] what the standards should be, but also there is no assurance that a single federal standard ever [would] evolve. . . . [I]t is likely that variations [would] develop among the federal circuits.”).

<sup>98</sup> See, e.g., Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1943 (2006) (“[T]here is evidence that in enacting CAFA, Congress did not intend to alter the ordering of federal and state lawmaking authority established by *Erie* and its progeny.”); Richard L. Marcus, *Assessing CAFA’s Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765, 1812–13 (2008) (asserting CAFA has not implicitly displaced *Erie*).

<sup>99</sup> Scholars generally agree that Congress has the authority to do so. See, e.g., Silberman, *supra* note 94, at 2027 (“The *Klaxon* rule, which requires federal courts to follow state choice of law rules, is not an obstacle since it is not required either by the Constitution or by the Rules of Decision Act.”). For a list of federal choice-of-law rule proposals, see Linda S. Mullinex, *Federalizing Choice of Law for Mass-Tort Litigation*, 70 TEX. L. REV. 1623, 1627 n.11 (1992).

proposals advocate different specific choice-of-law rules: Some aim to ease certification, while others seek to protect the federalism values that animate choice of law's allocation of regulatory authority. Unfortunately, no proposal to date has adequately accounted for both concerns. As a result, each proposal detailed in Parts II.B and II.C fails to address the full scope of the choice-of-law problem.

### B. *Proposals To Remedy the Difficulty of Certification*

For many, the “problem” is the difficulty of certification—that is, the fact that courts frequently deny certification on choice-of-law grounds.<sup>100</sup> Accordingly, these commentators advocate for a federal rule that would mandate the application of a single state's law to the entire class, eliminating choice-of-law-based predominance and manageability concerns. While such a rule would facilitate certification and ease the administrative burden on courts, it risks under- or over-regulation, depending on which state's law would apply, and it allocates regulatory authority in a manner that ignores the respective states' varied and legitimate interests.

Long before CAFA, the American Law Institute's Complex Litigation Project<sup>101</sup> recommended adoption “of a coherent and uniform federal choice of law code” that would facilitate certification by encouraging application of a single state's law in complex litigation cases.<sup>102</sup> More recently, Professor Issacharoff proposed a federal choice-of-law rule for CAFA cases under which courts would apply the law of the defendant's state of incorporation to all class claims.<sup>103</sup>

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<sup>100</sup> Motivations undoubtedly vary: Some such scholars probably favor certification due to pro-plaintiff bias; others may simply see class actions as the legal mechanism best able to secure fair and final resolution of large scale problems.

<sup>101</sup> The Complex Litigation Project was the American Law Institute's effort to address the problems associated with a rapidly increasing federal docket of “complex” cases in the 1990s. Dooley, *supra* note 47, at 428–29. These cases attempted to resolve large numbers of complicated claims between numerous and geographically dispersed parties on an aggregate basis, raising a variety of new practical and constitutional concerns. The Project made a variety of recommendations aimed at consolidating and centralizing litigation of national scope. *Id.*

<sup>102</sup> COMPLEX LITIGATION PROJECT, *supra* note 89, at 375. Chapter six of the report describes the proposal, which provides different choice-of-law rules for “Mass Torts” and “Mass Contracts,” both modeled on the Second Restatement of Conflict of Laws. In each case, the court would consider a list of enumerated factors “with the objective of applying, to the extent feasible, a single state's law” to every claim asserted against the defendant. *Id.* § 6.01–.03, at 395–98, 443–44, 457–58 (emphasis added).

<sup>103</sup> Issacharoff, *supra* note 51, at 1869 (“[T]he default would be that large-scale economic actors who deliver products in undifferentiated fashion onto the national market must be held accountable to some standard of conduct, and if none other is available, it should be the law governing the defendant's home state behavior.”). Courts have occasionally taken this approach. *See, e.g.,* Ysbrand v. DaimlerChrysler Corp., 81 P.3d 618, 626 (Okla. 2003) (applying law of defendant's home state to all class members' claims because

This proposal offers definite benefits: Ex ante, it would promote uniformity and predictability, helping defendants plan their conduct according to more accurate estimates of potential liability; ex post, it would discourage forum shopping (since all federal fora would apply the same rule) and facilitate both certification and settlement (since a single, predictable law would apply).

However, this proposal carries a serious risk of “capture”: It creates strong incentives for a corporation to manipulate the political process in its home state to secure favorable laws that would shelter corporate wrongdoing.<sup>104</sup> This could generate the classic “race to the bottom”; states at the “bottom” (those with the laxest standards) would presumably attract the most corporate citizens, and under the proposed federal choice-of-law rule their laws would govern most nationwide classes. Such an arrangement would give defendants the best of both worlds—global resolution (through the class mechanism) at a discounted price (under favorable home state laws). It would also mirror the anomalous court problem CAFA sought to end: Rather than a handful of plaintiff-friendly state courts imposing liability standards on the country, a few defendant-friendly states would now dictate liability nationwide.

Thus a home-state-of-defendant rule would impede optimal compensation and deterrence. Issacharoff’s proposed rule would further the regulatory function of class actions by facilitating certification, yet it would also undermine this function by applying defendant-friendly laws to corporate conduct. This seems highly likely to produce underdeterrence and undercompensation. It would increase the likelihood of defendant victories in the rare cases that go to trial, which, in turn, would decrease the risk-discounted value of the plaintiffs’ claims, leading to inaccurately low settlement pricing.<sup>105</sup>

Any choice-of-law rule applying the law of a single state would also violate key principles of federalism by ensuring certification at

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it was “only state where conduct relevant to all class members occurred”). More often courts have rejected it. *See, e.g.,* *Thompson v. Jiffy Lube Int’l, Inc.*, 250 F.R.D. 607, 627–28 (D. Kan. 2008) (denying certification after rejecting plaintiffs’ argument that law of defendant’s home state should apply to all class claims); *Drooger v. Carlisle Tire & Wheel Co.*, No. 1:05-CV-73, 2006 WL 1008719, at \*9 (W.D. Mich. Apr. 18, 2006) (“Mere corporate citizenship alone is not a weighty enough interest to tip the scales in Michigan’s choice of law analysis.”).

<sup>104</sup> Issacharoff himself notes this potential but appears to find this the lesser of many evils: “[A home-state-of-defendant rule] could have the effect of inducing home corporations to lobby fiercely for laws that would shield them from liability in their home jurisdictions. . . . [This would result in] turning every state into a variant of Delaware or South Dakota in terms of sheltering favored industries.” Issacharoff, *supra* note 51, at 1868, 1871.

<sup>105</sup> *See supra* notes 32–34 and accompanying text (discussing settlement pricing’s role in regulation via class actions).

the expense of other states' potentially more pressing regulatory interests in the same parties and conduct.<sup>106</sup> The Senate Report recommending the passage of CAFA identified such "false federalism" as one of the chief evils CAFA aimed to correct.<sup>107</sup> Proponents of the single-state choice-of-law rule have drawn on Professor David Shapiro's "entity theory" to argue that states' interests in compensation and deterrence are significantly diminished in the class context.<sup>108</sup> If we conceptualize the class as a single entity, rather than a collection of individual claimants, application of a single law looks more reasonable and less like an abridgement of individual rights.<sup>109</sup>

This approach may lessen fairness concerns, but it does not ensure effective deterrence. States supply the applicable deterrence regimes—that is, each state prices the "cost of the wrong" differently, according to its own policy determinations regarding the value of deterring the conduct at issue. If deterrence is the class action's primary purpose, as Shapiro asserts,<sup>110</sup> then the relevant "entity" is better understood as the smaller group of claims, within the nationwide class, that enforces each state's regulatory regime. On this view,

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<sup>106</sup> Kramer, *supra* note 94, at 578–79 ("[T]he appropriate solution surely cannot 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.").

<sup>107</sup> S. REP. NO. 109-14, at 61–63 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 57–59. The Report states:

A principal purpose of [CAFA] is to correct what former Acting Solicitor General Walter Dellinger has labeled a wave of "false federalism." . . . [T]he problem is that "many state courts faced with interstate class actions have undertaken to dictate the substantive laws of other states by applying their own laws to . . . other states, resulting in a breach of federalism principles."

. . . .

. . . [By contrast] federal courts have been extremely respectful of the interests of each state in having its laws applied (as appropriate) to its own residents, particularly in recognizing the substantial variations of those laws in the class action context.

*Id.*

<sup>108</sup> David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 917–18 (1998) ("[T]he notion of the class as entity should prevail over more individually oriented notions of aggregate litigation."). This theory particularly resonates with regards to negative value claims because those claims are not individually viable.

<sup>109</sup> See Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 29 (1996) ("If it were possible to imagine [an entity] class claim, it would be possible to choose a single law to govern . . ."); Issacharoff, *supra* note 51, at 1866 ("[I]f CAFA defines national market cases as an 'entity' meriting distinct rules for federal jurisdiction, does [that] not also permit a more rational approach to choice of law analysis, grounded in the need to provide intracontroversy consistency to similarly situated claimants?").

<sup>110</sup> Shapiro, *supra* note 108, at 924 ("[T]he small claim class action . . . serves the purpose not of compensating those harmed in any significant sense . . . [but] of allowing a private attorney general to contribute to social welfare by bringing an action whose effect is to internalize to the wrongdoer the cost of the wrong.").

application of a single state's law to a nationwide class may not violate the class entity's rights, yet it still compromises the entity's core regulatory function if that single law prices the claims lower (or higher) than would be the case under the laws that would govern the claims individually, thereby producing under- (or over-) deterrence.

Proponents of federal rules that would apply a single state's law to the class in order to facilitate certification equate the present difficulty of certification with the overall choice-of-law problem; in so doing they take only one aspect of choice of law seriously. Their proposals would ensure certification but impede choice of law's other fundamental function, the proper allocation of regulatory authority between states.

### C. *Proposals that Focus on Federalism Concerns*

Unfortunately, scholars who take choice of law's allocation-of-authority role seriously tend to go too far in the opposite direction. They prioritize choice of law's traditional concern for federalism and individual rights over any practical interest in achieving collective resolutions. These scholars would sacrifice certification in order to uphold fully the existing choice-of-law regime. Like those whose proposals would facilitate certification, these scholars address only half of the choice-of-law problem, discounting the fact that certification has become almost a prerequisite to effective enforcement.<sup>111</sup>

Professors Larry Kramer and Richard Nagareda have both argued strongly against changing choice-of-law rules to facilitate certification. Kramer was one of the first to insist on preserving existing choice-of-law rules for complex cases.<sup>112</sup> He argued that choice of law is substantive rather than procedural<sup>113</sup> and that applying a single state's law to all class claims impermissibly abridges class members' and defendants' rights when individual treatment would apply different laws.<sup>114</sup> Kramer's argument focused primarily on individual

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<sup>111</sup> See *supra* Part I.B.2 (explaining how certification is essential to realizing fair compensation and effective deterrence).

<sup>112</sup> Kramer, *supra* note 94, at 549 ("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 . . .").

<sup>113</sup> *Id.* at 569–72 (contending that choice of law is substantive because it determines who recovers and in what amounts).

<sup>114</sup> *Id.* at 589 (arguing that modification of choice-of-law rules is "covert way" of "rewriting state law").

rights, but it also underscored the importance of respecting states' distinct regulatory regimes.<sup>115</sup>

Along similar lines, Nagareda has identified a “preexistence principle” in Supreme Court precedent that he claims counsels against special choice-of-law rules for class actions.<sup>116</sup> Specifically, he argues that federal courts should not be “bootstrapping”—applying a single state’s law to facilitate certification.<sup>117</sup> In light of class actions’ significant regulatory effects, bootstrapping amounts to inappropriate law reform, supplanting existing state governance regimes and altering individuals’ rights to recovery.<sup>118</sup>

Professor Linda Silberman has focused on federalism concerns in arguing against the application of a single state’s law. While acknowledging that a federal choice-of-law rule is both possible and potentially desirable, she notes that most such proposals have shown “no real interest in . . . federalism values.”<sup>119</sup> Without advocating for a specific federal rule, Silberman concludes that “[i]n a regime where state law will govern the rights and liabilities of the parties, the federal choice rule should be one that continues to respect the different substantive judgments reflected in the laws of different states . . . .”<sup>120</sup>

Such arguments properly emphasize the important role choice of law plays in allocating regulatory authority; however, they pay insufficient attention to choice of law’s consequences for certification under current doctrine. Both Kramer and Silberman acknowledge that a refusal to apply a single state’s law may present certification problems.<sup>121</sup> Silberman appears largely unconcerned by this result<sup>122</sup>

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<sup>115</sup> *Id.* at 579 (describing different outcomes for different class members as “both expected and acceptable” because outcomes reflect legitimate policy differences among states).

<sup>116</sup> Richard A. Nagareda, *Bootstrapping in Choice of Law After the Class Action Fairness Act*, 74 UMKC L. REV. 661, 662 (2006) (“[T]he class action device enjoys no free-standing authority to alter preexisting rights as delineated by substantive law.”). In particular, Nagareda points to *Amchem* and *Ortiz* as establishing this principle. *Id.* (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999)).

<sup>117</sup> *Id.* at 661–62.

<sup>118</sup> *Id.* at 669 (acknowledging desirability of legislative reform but arguing that class action procedural device does not give courts license to effect such reform); see also Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1909 (2006) (“[L]aw reform should take place by way of legislation, not through the backdoor of aggregate procedure . . . .”).

<sup>119</sup> Silberman, *supra* note 94, at 2028.

<sup>120</sup> *Id.* at 2029. Silberman specifically rejects Issacharoff’s home-state-of-defendant rule because it would allow one state’s legislature to dictate liability standards for the whole nation. *Id.*

<sup>121</sup> See Kramer, *supra* note 94, at 580–81 (noting that many claims are not viable without consolidation); Silberman, *supra* note 94, at 2030–31 (same).

but notes that courts can create subclasses to enable certification.<sup>123</sup> Kramer makes the subclassing point more strongly, arguing that courts can and should certify classes even where multiple state laws apply: Subclassing, separation of issues, careful jury instructions, and special verdicts allow for certification without changing the existing choice-of-law rules.<sup>124</sup> As seen in Part I.B.1, however, district courts in several circuits operate under precedent that largely forecloses such an approach, while others have only sporadically taken up the challenge.<sup>125</sup> This denial of certification in otherwise meritorious cases poses serious regulatory concerns for both positive and negative value cases.<sup>126</sup> Exhorting courts to use the discretion inherent in modern choice-of-law methods and to be more proactive in managing multistate classes is an attractive solution in theory but has proven unrealistic. These scholars are right to highlight choice-of-law's important federalism function, but they do not sufficiently account for the practical significance of the certification decision and its regulatory implications.

### III

#### A TWO-PRONGED PROPOSAL FOR AMENDING CAFA

How then can reform address both the practical procedural problem of securing certification for meritorious cases and the substantive problem of properly allocating regulatory authority between states? Below I introduce a two-pronged proposal: Neither part alone is sufficient, but together they address the full scope of the choice-of-law problem(s).

##### A. Prong One: The Feinstein Amendment

First, Congress should remove choice of law from the predominance analysis under Rule 23(b)(3). Senator Diane Feinstein's proposed amendment to CAFA, rejected in the floor debates,<sup>127</sup> provides a useful model: "[T]he district court shall not deny class certification,

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<sup>122</sup> Silberman, *supra* note 94, at 2031 (asserting that "Congress has allowed the choice of law consequences to fall where they may" by moving more class actions into federal court without providing federal substantive law or choice-of-law rules, and concluding that "the applicable choice of law rule should not tilt in the direction of either enhancing or discouraging class certification").

<sup>123</sup> *Id.* at 2032–33.

<sup>124</sup> Kramer devotes much of Part III of his article to an extended discussion of the management tools available to courts. Kramer, *supra* note 94, at 584–88.

<sup>125</sup> See *infra* Part III.C for a discussion of courts that have adopted such strategies.

<sup>126</sup> See *supra* Part I.B.2 (describing lack of fair and effective alternatives).

<sup>127</sup> The Senate voted sixty-one to thirty-eight against the Feinstein amendment. 151 CONG. REC. S1184 (daily ed. Feb. 9, 2005).

in whole or in part, on the ground that the law of more than [one] State will be applied.”<sup>128</sup> The Senate rejected the Feinstein amendment largely along party lines:<sup>129</sup> Republicans condemned it as “perpetuating the very magnet court abuses that [CAFA] seeks to end” by forcing certification of illegitimate class suits,<sup>130</sup> while Democrats deemed it essential in order to protect meritorious consumer classes against denial of certification on manageability grounds.<sup>131</sup>

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<sup>128</sup> S. 5, 109th Cong. amend. 4, 151 CONG. REC. S1215 (daily ed. Feb. 9, 2005). In its entirety, the proposed Feinstein amendment reads:

Notwithstanding any other choice of law rule, in any class action, over which the district courts have jurisdiction, asserting claims arising under State law concerning products or services marketed, sold, or provided in more than 1 State on behalf of a proposed class, which includes citizens of more than 1 such State, as to each such claim and any defense to such claim—

(1) the district court shall not deny class certification, in whole or in part, on the ground that the law of more than 1 State will be applied;

(2) the district court shall require each party to submit their recommendations for subclassifications among the plaintiff class based on substantially similar State law; and

(3) the district court shall—

(A) issue subclassifications, as determined necessary, to permit the action to proceed; or

(B) if the district court determines such subclassifications are an impracticable method of managing the action, the district court shall attempt to ensure that plaintiffs’ State laws are applied to the extent practical.

*Id.*

<sup>129</sup> The record reflects that thirty-seven out of forty-four Democrats voted for the Feinstein amendment, and fifty-three out of fifty-five Republicans voted against it (one Republican did not vote). U.S. Senate, Roll Call Votes 109th Congress—1st Session (2005),

[http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=109&session=1&vote=00007](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=1&vote=00007) (last visited Aug. 24, 2009).

Numerous academics have noted CAFA’s highly political nature and corporate origins. *See, e.g.*, Issacharoff & Sharkey, *supra* note 96, at 1417 (“CAFA was designed to offer absolution to potential defendants in what are termed ‘negative value’ class actions . . . in which the only capacity to bring suit is premised on the ability of an entrepreneurial attorney to organize a class action of suitable dimensions.”); Nagareda, *supra* note 116, at 684 (“[T]he failure of the Feinstein amendment actually reinforces a shared recognition that CAFA would change class certification outcomes based upon application of a distinctively federal methodology. The amendment simply sought to temper the change achieved . . .”).

<sup>130</sup> 151 CONG. REC. S1180 (daily ed. Feb. 9, 2005) (statement of Sen. Hatch); *see also* Jim Drinkard, *Bush To Sign Bill on Class-Action Suits*, USA TODAY, Feb. 17, 2005, [http://www.usatoday.com/money/2005-02-17-lawsuits-usat\\_x.htm](http://www.usatoday.com/money/2005-02-17-lawsuits-usat_x.htm) (quoting President George W. Bush as promising that CAFA would “reduc[e] the frivolous lawsuits that clog our courts, hurt the economy, cost jobs and burden American businesses”).

<sup>131</sup> *See, e.g.*, 151 CONG. REC. S1247 (daily ed. Feb. 10, 2005) (statement of Sen. Reid) (“The rejection of the Feinstein-Bingaman amendment shows this bill’s true colors. . . . [W]ithout that change, the truth is plain to see: This bill is designed to bury class action lawsuits, to cut off the one means by which individual Americans . . . can band together to demand justice from corporate America.”).

It remains an open question which rhetoric has the more solid factual basis, but studies have generally supported the Democratic position. Frivolous lawsuits undoubtedly exist, but legal scholarship in the past two decades has consistently refuted tort reformers' assertions of systemic failure in this respect.<sup>132</sup> As one scholar characterized it, "Insurers and well-organized repeat-player defendants have waged a costly and deceptive campaign over several decades—with media complicity—to disseminate the myths that Americans file large numbers of frivolous cases and juries are excessively generous to victims."<sup>133</sup> If the class action epidemic of the 1990s was largely an invention of corporate think tanks, not a creature of reality, then perhaps it is time to reconsider CAFA and its goals in this light. Society appears ready to embrace a new culture of corporate responsibility,<sup>134</sup> yet the existing rules and doctrine make it nearly impossible for the class action mechanism to perform its intended regulatory function. In order to efficiently regulate corporate behavior, Congress must reinvigorate the class action practice that CAFA proponents sought to suppress.

As explained in Part I, the regulatory function of most class actions cannot be realized without certification. This is not to say that all putative classes should be certified: Sometimes differences between plaintiffs' claims reveal inadequacies in representation, or factual dissimilarities indicate that class adjudication will over- or undercompensate or over- or underdeter. But when class treatment is otherwise warranted, the necessity of applying multiple states' laws

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<sup>132</sup> See, e.g., Joshua D. Kelner, *The Anatomy of an Image: Unpacking the Case for Tort Reform*, 31 U. DAYTON L. REV. 243, 246 (2006) ("[T]he supposed litigation explosion . . . has been persuasively debunked."); Robert L. Nelson, *Ideology, Scholarship, and Sociological Change: Lessons from Galanter and the "Litigation Crisis"*, 21 LAW & SOC'Y REV. 677, 689 (1988) (describing "political debate over the litigation explosion" as "sobering example of how ideological currents and political organization can overwhelm sociolegal scholarship"); Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 5 (2002) (describing tort reform movement as "a 'conscious goal-oriented practical activity' designed to produce a dominant discourse that will predispose legislators, judges, legal academics, and the general public to support liability-limiting tort doctrines" (citing DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* 6 (1997))).

<sup>133</sup> Richard L. Abel, *Judges Write the Darndest Things: Judicial Mystification of Limitations on Tort Liability*, 80 TEX. L. REV. 1547, 1548 (2002).

<sup>134</sup> Consider the recent response to financial institutions paying large bonuses to employees after taking government "bailout" money during the financial crisis in late 2008 and early 2009. One contemporary news article reported that a majority of Americans claimed to be following the story closely, and a majority of both Republicans and Democrats felt the government should try to recover the bonus money paid by banks that had received bailout awards. *Poll: Americans Want the Bonuses Back*, CBS NEWS, Mar. 23, 2009, <http://www.cbsnews.com/stories/2009/03/23/opinion/polls/main4883554.shtml>.

should not in and of itself trigger a denial of certification. Despite the significant judicial discretion inherent in both Rule 23(b)(3) predominance analysis and the widely adopted modern choice-of-law methods, federal judges rarely certify classes when multiple laws apply,<sup>135</sup> and merely exhorting courts to exercise their discretion and manage meritorious classes seems to have had little effect.<sup>136</sup> To make nationwide damage classes viable post-CAFA, Congress needs to enact a rule similar to that proposed in the Feinstein amendment, requiring courts to manage these classes.

The greater fairness and efficiency of such an approach is most obvious in comparison with the realistic alternatives. Denial of certification generally does *not* lead to individual adjudication or any other “superior” means of resolution. Absent certification, meritorious negative value claims tend to disappear entirely, along with the deterrent and compensatory effects they were intended to achieve, while positive value claims settle aggregately in lump sums that advantage plaintiffs’ counsel without the procedural safeguards and judicial oversight afforded by Rule 23.<sup>137</sup> Collective treatment has become a near inevitability,<sup>138</sup> and for all its shortcomings the class action mechanism effectuates more fair and efficient deterrence and compensation than the alternatives. Adopting the Feinstein amendment would facilitate class treatment of the meritorious claims that CAFA and federal certification precedent have rendered unenforceable.

*B. Prong Two: A Federal Choice-of-Law Rule that Looks to the Home State of the Consumer*

The Feinstein amendment alone would improve upon the status quo, but it attends to only half of the choice-of-law problem.<sup>139</sup> To

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<sup>135</sup> See *supra* notes 44–46 and accompanying text (describing certification trends in federal courts).

<sup>136</sup> See *supra* notes 124–126 and accompanying text (describing how courts have ignored Kramer’s challenge to certify nationwide classes despite choice-of-law issues).

<sup>137</sup> See *supra* Part I.B.2 (discussing what happens when certification is denied).

<sup>138</sup> Over thirty years ago, Professor Arthur Miller noted that “[t]he ‘big case’ is an inevitable byproduct of the mass character of contemporary American society and the complexity of today’s substantive regulations. It is a problem that would confront us whether or not rule 23 existed.” Arthur R. Miller, Comment, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem,”* 92 HARV. L. REV. 664, 668 (1979).

<sup>139</sup> My proposal differs from the Feinstein amendment in that it advocates not only removing choice of law from the predominance analysis but also adopting a uniform federal choice-of-law rule looking to the consumer’s home state. While the Feinstein amendment would effect the former change, it would not address the second equally important set of concerns. Section 3 of the Feinstein amendment instructs district courts to apply the law of the plaintiff’s home state only if it is impractical for the court to subclass pursuant to the choice-of-law rule of the state in which it sits. See *supra* note 128 (providing text of

remedy the situation fully, I further propose a federal choice-of-law rule for consumer cases that would apply the law of each plaintiff's residence to his or her claim.

As seen in Part II.A, a federal rule is desirable because it would promote predictability and uniformity while discouraging forum shopping. Not only would this allow defendants to plan their conduct around known liability standards, it would also facilitate more efficient settlement since parties' claim valuations are more likely to converge when the applicable law is known.<sup>140</sup> The more difficult question is *which* federal rule Congress should adopt.

Each option has downsides. A "modern method"—considering a set of factors to determine the state with the strongest interest in the claim—would mirror the majority approach among states,<sup>141</sup> but modern methods are famously indeterminate.<sup>142</sup> In order to provide the predictability and uniformity justifying its adoption, the chosen federal rule must clearly indicate which law will govern in a given situation. While a federal choice-of-law rule based on competing state interests would uniformly and predictably apply in all federal courts, its outcomes—the chosen substantive laws—would vary significantly and unpredictably.<sup>143</sup> The other likely contender, Professor Issacharoff's home-state-of-defendant rule, is similarly unsatisfying. This rule would be highly predictable but would likely lead to underregulation: It is too open to capture by corporate interests and could easily create a race to the bottom, hindering effective deterrence and compensation.<sup>144</sup>

My proposal—applying the law of the consumer's home state—strikes a better balance between predictability and uniformity of

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Feinstein amendment). Thus, while the Feinstein amendment might occasionally produce the same result as my proposal, it would not provide the same uniformity or predictability.

<sup>140</sup> See *supra* notes 85–88 and accompanying text (explaining that uncertainty in applicable law blocks parties from agreeing on appropriate settlement value).

<sup>141</sup> See *supra* note 16 (listing types of "modern methods").

<sup>142</sup> See *supra* note 19 and accompanying text.

<sup>143</sup> Instead of clear rules, the modern methods provide standards according to which judges exercise considerable discretion in determining the most interested state. See *supra* notes 16–19 (providing examples of "modern methods" and detailing objections to substantial judicial discretion they afford).

A recent empirical study by Professor Christopher Whytock concluded that choice-of-law decisions in international tort cases were not significantly biased in favor of domestic law, domestic litigants, or plaintiffs, and that the modern methods were more predictable in this respect than most scholars have assumed. See Whytock, *supra* note 16, at 787. These are significant findings, but they are firmly rooted in analysis of *individual international* tort suits and do not necessarily indicate much regarding the nationwide class actions with which we are concerned.

<sup>144</sup> See *supra* notes 103–106 and accompanying text (critiquing home-state-of-defendant rule).

results on the one hand and fair and appropriate allocation of authority on the other.<sup>145</sup> Admittedly, a residence-based rule runs counter to the contemporary movement toward “modern methods.” Some recent commentators, however, have advocated a return to traditional territorial and citizenship-based approaches like the one I propose.<sup>146</sup> Strict traditional rules offer greater uniformity and predictability than modern methods, while also allocating governing authority more appropriately than rules that apply a single state’s law to the whole class.<sup>147</sup> A home-state-of-consumer rule would provide clear guidance to courts; parties could reasonably expect federal courts across the country to apply the rule with similar results. Defendants’ conduct would still be subject to varied state standards, but defendants would know *ex ante* that they faced each particular standard of liability in fairly direct proportion to the amount of business they did in that state, allowing them to plan accordingly. Currently, a federal court sitting in diversity uses the choice-of-law rule of the state in which it sits;<sup>148</sup> most often this is a “modern method,”<sup>149</sup> and results seldom favor nationwide classes. Most federal courts applying modern methods conclude that the law of the consumer’s home state properly governs each claim and deny certification for lack of predominance.<sup>150</sup> Under my proposal, the court would similarly apply the law of the consumer’s home state, but it would do so pursuant to a

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<sup>145</sup> For a response to potential manageability concerns, see *infra* Part III.C.

<sup>146</sup> See, e.g., Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 41–46 (1991) (supporting territorial or domicile-based federal rule generally and “state of the victim’s domicile” rule in products liability cases); Erin A. O’Hara & Larry E. Rubinstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1184 (2000) (concluding that First Restatement method “is most likely to lead to efficient results because its clear rules promote predictability and enable individual choice”); Joel P. Trachtman, *Conflict of Laws and Accuracy in the Allocation of Government Responsibility*, 26 VAND. J. TRANSNAT’L L. 975, 987 (1994) (“[D]ecisionmakers faced with conflict of laws issues should allocate prescriptive jurisdiction . . . to the government(s) whose constituents are affected by the subject matter, pro rata in proportion to the relative magnitude of such effects.”).

<sup>147</sup> Traditional rules generally apply the law of the place of harm or the plaintiff’s residence in consumer cases. As individuals are likely to consume goods in their home states, this permits each state to regulate conduct with respect to its own consumers. See *supra* note 15 and accompanying text.

<sup>148</sup> See *supra* text accompanying note 13 (describing *Klaxon* rule).

<sup>149</sup> See *supra* note 16 and accompanying text (noting that majority of states now use some form of modern method).

<sup>150</sup> See, e.g., *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018 (7th Cir. 2002) (denying certification because Indiana’s choice-of-law rule required application of laws of fifty states and multiple territories, rather than state of seller’s headquarters); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 742 n.15 (5th Cir. 1996) (“We find it difficult to fathom how common issues could predominate in this case when variations in state law are thoroughly considered.”).

predictable and uniform federal choice-of-law rule, and it would grant rather than deny certification (assuming the class met the other certification requirements). Such predictability offers significant fairness and efficiency advantages over the current system.<sup>151</sup> In particular, it would help defendants predict their liability and plan their conduct more easily and accurately.

My proposal would also allocate regulatory authority more fairly and efficiently than the alternatives. Professor Michael Solimine argues that “[e]conomic theory tends to support the notion that a state, through its conduct-regulating common law or statutes, should be able to govern a lawsuit based on a dispute arising within its borders, no matter where the suit is brought.”<sup>152</sup> Similarly, Professor Silberman notes that “justice” assumes definite meaning only in light of a particular political community’s values and principles.<sup>153</sup> The fifty states remain the relevant politically accountable communities with respect to consumer class actions, defining consumer rights and “justice” through state law. Principles of federalism and political accountability<sup>154</sup> counsel that any federal choice-of-law rule should honor the respective states’ interests in enforcing their regulatory regimes in a manner that defines and protects the rights of their own citizens.<sup>155</sup> Specifically, the rule should compensate state citizens and deter corporate wrongdoing in a manner and to a degree determined by each state’s democratic process. My proposal offers a predictable, neutral rule that would foster greater political accountability in this respect:<sup>156</sup> It would realize more effective regulation through settlement pricing

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<sup>151</sup> See O’Hara & Rubinstein, *supra* note 146, at 1184 (concluding that First Restatement method “is most likely to lead to efficient results because its clear rules promote predictability and enable individual choice”).

<sup>152</sup> Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 *GA. L. REV.* 49, 92 (1989); see also *id.* at 59–74 (summarizing and critiquing various economic theories of choice of law and highlighting Chief Judge Posner’s argument that territorial approach increases efficiency by reducing judicial error and transaction costs).

<sup>153</sup> Silberman, *supra* note 94, at 2023.

<sup>154</sup> See James R. Pielemeier, *Why We Should Worry About Full Faith and Credit to Laws*, 60 *S. CAL. L. REV.* 1299, 1330–32 (1987) (“The American principle of democratic government entails political accountability for state action. . . . [C]hoice of law decisions inherently pose the potential of applying a law that disadvantages a litigant who had absolutely no actual, potential, or even theoretical role in the law’s creation or application.”).

<sup>155</sup> See Silberman, *supra* note 94, at 2032 (arguing that choice-of-law rule should respect substantive judgments reflected in different states’ laws).

<sup>156</sup> This is particularly true not only in comparison with the home-state-of-defendant rule but also as compared with “modern methods,” the obscurity and indeterminacy of which may preclude the public from identifying or remedying shortcomings in their state’s consumer laws.

and damage recoveries that more closely track the differentiated values of class members' claims.<sup>157</sup>

### C. *Confronting Objections to My Proposal*

The most significant potential objection to my proposal concerns efficiency and manageability: Certification could create classes that are simply too difficult for judges to manage, causing unfairness to litigants and draining judicial resources. Despite its prevalence among federal judges, this misgiving is not universally shared. Scholars have suggested, and judges have occasionally employed, a variety of management techniques to alleviate the more onerous aspects of handling multistate classes.<sup>158</sup> Many commentators insist that tort and contract laws simply are not *that* different between states and that courts can almost always group claimants into a small number of logical subclasses.<sup>159</sup> Moreover, partial or “issue” certification—to decide only liability, for example—can make class treatment more manageable and still realize class efficiency and fairness benefits even when subclassing is not viable.<sup>160</sup> In addition, careful use of supplemental briefs, special verdicts, and interrogatories can help courts successfully manage multistate cases.<sup>161</sup>

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<sup>157</sup> A home-state-of-plaintiff rule would facilitate pricing that reflects differences in the respective states' valuations of their class members' claims, mirroring the different substantive regulatory tradeoffs made by democratically accountable lawmakers in each state.

<sup>158</sup> *Newberg on Class Actions* observes that “[t]he application of the laws of multiple states to a common set of claims certainly has potential complexities, but, on analysis, procedures and litigation devices are available, in common usage, to render these tasks manifestly manageable for the court, the jury, and all the parties.” ALBA CONTE & HERBERT B. NEWBERG, 3 *NEWBERG ON CLASS ACTIONS* § 9.68, at 463 (4th ed. 2002); see also *id.* at 464 (“[C]areful trial planning with the use of jury interrogatories and special verdicts will avoid most jury-instruction complexities in multistate class actions . . .”).

<sup>159</sup> See, e.g., Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 *MICH. L. REV.* 373, 388–89 (2005) (asserting that “‘individual’ issues” are not overwhelming in mass tort cases involving multiple states’ laws because “the relevant state tort laws are generally not terribly divergent”); Kramer, *supra* note 94, at 583–84 (arguing that states tend to copy one another’s laws and that subclassing is relatively simple in most cases); Silberman, *supra* note 94, at 2033 (“Applicable state laws may be grouped into manageable patterns such that complications from choice of law differences can be obviated.”).

<sup>160</sup> See *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1008–09 (3d Cir. 1986) (“Determination of the liability issues in one suit may represent a substantial savings in time and resources. . . . If economies can be achieved by use of the class device, then its application must be given serious and sympathetic consideration.”); Ryan Patrick Phair, Comment, *Resolving the “Choice-of-Law Problem” in Rule 23(b)(3) Nationwide Class Actions*, 67 *U. CHI. L. REV.* 835, 853–54 (2000) (explaining benefits of issue certification); see also *infra* notes 166–168 and accompanying text (discussing issue classes).

<sup>161</sup> See *MANUAL FOR COMPLEX LITIGATION (FOURTH)* §§ 11.633, 12.451, 22.317 (2004) (suggesting these approaches for handling application of different laws to different claimants); see also Phair, *supra* note 160, at 846–48, 853–62 (explaining how issue certification,

Most federal courts have not embraced the challenge of managing nationwide classes when multiple states' laws would apply, but a few judges have used the above mentioned tools to certify and adjudicate or settle these complicated cases. Most often this involves plaintiffs and/or judges creating logical "subclasses"; this usually means smaller groups of class members who are subject to laws sufficiently similar to one another that their claims can be valued or adjudicated pursuant to a single formulation of the relevant law.<sup>162</sup> For example, the district court in *In re Asbestos School Litigation* certified a nationwide class after concluding that it could simplify management with effective subclassing:

[The applicability of 54 jurisdictions' laws] would seemingly prevent nationwide class certification. . . . [However] there is substantial duplication among the various jurisdictions as to the applicable law. For example, as to negligence, 51 jurisdictions are in virtual agreement in that they apply the Restatement (Second) of Torts § 388. . . . Forty-seven jurisdictions have adopted strict liability theories and all of them start with the concept of a defective product.<sup>163</sup>

Other federal courts have similarly used subclassing to mitigate the difficulty of managing nationwide consumer classes.<sup>164</sup> An Ohio district court recently concluded that certification was appropriate despite application of eight different states' laws because "a court could manage the differences . . . by holding separate trials for each statewide subclass, or perhaps a combined trial for a few statewide subclasses, where the law in those states is similar enough to allow creation of jury instructions and a verdict form that is not too complex."<sup>165</sup>

Subclassing is the most obvious and frequently employed means of simplifying judicial management, but it is not the only effective

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grouping, subclassing, and special verdicts help courts effectively manage multistate classes).

<sup>162</sup> See, e.g., *Steinberg v. Nationwide Mut. Ins. Co.*, 224 F.R.D. 67, 76–79 (E.D.N.Y. 2004) (conducting searching analysis of variations in state contract law and certifying nationwide consumer class pursuant to successful grouping of state laws into four types).

<sup>163</sup> 104 F.R.D. 422, 434 (E.D. Pa. 1984), *aff'd in part, vacated in part*, 789 F.2d 996 (3d Cir. 1986) (citations omitted).

<sup>164</sup> See, e.g., *Muehlbauer v. Gen. Motors Corp.*, 431 F. Supp. 2d 847, 872 (N.D. Ill. 2006) (denying motion to dismiss partly because plaintiffs had separated nationwide class into smaller subclasses within which applicable state laws were sufficiently similar); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 468 (D.N.J. 1997) ("Class Counsel have grouped potentially applicable state laws systematically into manageable patterns, completely obviating potential complications from choice of law differences.").

<sup>165</sup> *In re Welding Fume Prods. Liab. Litig.*, 245 F.R.D. 279, 294 (N.D. Ohio 2007).

method. Some courts have certified “issue classes” pursuant to Rule 23(c)(4);<sup>166</sup> this allows courts to certify a class for purposes of deciding an important issue in the case without requiring class treatment for the entire cause of action.<sup>167</sup> For example, the district court in *Central Wesleyan College v. W.R. Grace & Co.* certified a nationwide issue class to decide eight key factual questions common to all class members, despite the fact that application of multiple states’ laws might later require subclassing and/or separate trials.<sup>168</sup> Most suits settle, in which case manageability is a lesser concern and my proposal would simply ensure fairness by allowing for judicial oversight while helping parties achieve faster and more accurate claims pricing. Even when multistate class actions go to trial, however, careful jury instructions and specialized verdicts can address relevant differences between state law subgroups without impossibly burdening the court or the jury.<sup>169</sup>

Occasionally, jurists have voiced constitutional concerns related to class certification and choice of law. Chief Judge Posner in *Rhone-Poulenc* suggested that when differences between state laws were too numerous and substantial for effective subclassing, the use of issue certification and bifurcated trials would often lead to unconstitutional reexamination of jury verdicts.<sup>170</sup> This might be the case on occasion, but courts and commentators have rejected Posner’s assertion that it would be the norm.<sup>171</sup> As long as the first jury’s role is carefully

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<sup>166</sup> Rule 23(c)(4), in full, reads: “*Particular Issues*. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.” FED. R. CIV. P. 23(c)(4). Rule 42(b) similarly allows the court to “bifurcate” the liability and damage phases of a trial: “SEPARATE TRIALS. For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims.” FED. R. CIV. P. 42(b).

<sup>167</sup> See Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1499–507 (2005) (explaining issue class certification pursuant to Rule 23).

<sup>168</sup> 143 F.R.D. 628, 641–43 (D.S.C. 1992); see also *id.* at 643 n.20 (allowing for possibility of future subclassing to address differences between laws). The Fourth Circuit subsequently affirmed this issue certification. *Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 6 F.3d 177, 184–86, 188–90 (4th Cir. 1993).

<sup>169</sup> See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.5 (2004) (discussing management methods, including special verdicts, for complicated class action trials).

<sup>170</sup> Because so many different laws applied in that case, the jury in the class proceeding was only going to determine the defendants’ negligence. Subsequent juries would have decided liability with regard to individual claims. Chief Judge Posner, speaking for the court, rejected this approach: “How the resulting inconsistency between juries could be prevented escapes us.” *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1302–04 (7th Cir. 1995) (Posner, C.J.).

<sup>171</sup> See, e.g., Patrick Woolley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause*, 83 IOWA L. REV. 499, 502 (1998) (rejecting view that Reexamination Clause always forbids separate trial of overlapping issues); see also *Simon v. Phillip Morris Inc.*, 200 F.R.D. 21, 48–49 (E.D.N.Y. 2001) (permitting severance and certifying issues in

defined and its special verdict detailed, subsequent juries need not decide the same issues and the trial plan should not run afoul of the Seventh Amendment.<sup>172</sup> Even in those particularly complicated nationwide cases requiring bifurcation, creative use of special verdicts and other tools would frequently allow courts to manage multistate classes effectively, facilitating more fair and efficient claim resolutions without implicating constitutional concerns.

Recent cases have also raised legitimate concern that divisions within a class may be so significant as to make adequate representation of the class impossible, in which case certification would violate class members' due process rights.<sup>173</sup> My proposal is not a cure-all, and it neither advocates for nor facilitates certification in every case of mass consumer harm. If a court determines that, even with active case management, it cannot ensure that class representatives and attorneys will sufficiently represent the rights and interests of all class members, then the court should not certify the class. That is the current rule, and it would remain the rule under my proposal. Rule 23(a) adequately protects these interests, and my proposal would not alter its requirements.<sup>174</sup>

Instead, my proposal would change the way courts decide certification under Rule 23(b)(3). It is worth remembering that in this context, superiority and predominance are primarily matters of efficiency and do not usually implicate constitutional rights or the merits of class claims. Even acknowledging that applying multiple states' laws can tax judicial resources—though this concern is significantly mitigated by the fact that most cases settle—fairness and efficiency ultimately

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way that “establishes a clearer dividing line between the first jury’s focus, which will be the defendant’s conduct, and the second jury’s focus, which will be the plaintiff’s conduct, thereby minimizing the risk of reexamination”).

<sup>172</sup> Steven Gensler suggests two case management techniques to prevent reexamination:

First, the court needs to carefully define the roles of the two juries so that the first jury does not decide issues within the prerogative of the second jury. Second, the court must carefully craft the verdict form for the first jury so that the second jury knows what has been decided already. If the first jury makes sufficiently detailed findings, those findings are then akin to instructions for the second jury to follow.

Steven S. Gensler, *Bifurcation Unbound*, 75 WASH. L. REV. 705, 736–37 (2000) (citations omitted).

<sup>173</sup> See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 855–58 (1999) (finding lack of adequate representation because fund distribution plan failed to account for significant differences between claims); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625–28 (1997) (finding Rule 23(a)(4)'s adequacy of representation requirement not met because litigants “achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected”).

<sup>174</sup> The potential problem of courts abusing the requirements of Rule 23(a) to avoid certifying classes in which multiple states' laws apply is beyond the scope of this Note.

fare worse under alternate means of resolution.<sup>175</sup> In this respect, denying certification on choice-of-law grounds prioritizes theoretical conservation of judicial resources at the expense of more accurate pricing and fair compensation, which judicial oversight pursuant to class treatment can effectuate. Defining “efficiency” so narrowly is shortsighted and overlooks the real personal and societal losses such a tradeoff entails.<sup>176</sup>

#### CONCLUSION

Merely encouraging federal courts to use the tools at their disposal to certify and manage the many multistate classes now in federal court has not proven effective. It is time for Congress to address the full scope of the “choice-of-law” problem by telling courts to make meritorious nationwide class actions work and to do so in a manner that respects the regulatory interests of the different states. My two-pronged proposal would provide a uniform federal choice-of-law rule for CAFA cases, looking to the consumer’s home state, and it would instruct courts that the applicability of multiple states’ laws is not in itself a sufficient reason to deny certification. In so doing, my proposal would facilitate certification of meritorious consumer cases while ensuring a more fair and appropriate allocation of regulatory authority between interested states. Only by attending to both aspects of the choice-of-law problem in this manner can Congress effectively revitalize the class action as a meaningful regulatory mechanism and ensure effective consumer protection.

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<sup>175</sup> See *supra* Part I.B.2 (explaining how alternatives produce less fair and effective regulation regarding both high and low value claims).

<sup>176</sup> See *supra* notes 66–78 and accompanying text (discussing regulatory losses associated with nonclass resolutions of meritorious class claims).