

PANEL FOUR: CLASS ACTION FAIRNESS ACT

SETTLED EXPECTATIONS IN A WORLD OF UNSETTLED LAW: CHOICE OF LAW AFTER THE CLASS ACTION FAIRNESS ACT

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This Essay examines the pressure placed upon choice of law doctrine by the Class Action Fairness Act of 2005 (CAFA). The core argument is that current choice of law doctrine, which assumes fidelity to the forum state choice of law rules as its basic premise, corresponds poorly to the national scope of economic activity in cases brought into federal court under CAFA. The Essay argues that there needs to be some conformity between the national scale of contemporary economic activity and the state-by-state presumption of inherited conflict of laws doctrine, in order to provide sensible legal oversight of national market conduct. Because of the multiplicity of potential forums for litigation over national market activity, the inherited doctrines of Klaxon Co. v. Stentor Electric Manufacturing Co. and Erie Railroad Co. v. Tompkins do little to provide settled expectations about the substantive laws governing broad-scale economic conduct.

The Essay offers an approach that should guide choice of law rules based on the need to facilitate common legal oversight of undifferentiated national market activity. The claim is that conduct that arises from mass-produced goods entering the stream of commerce with no preset purchaser or destination should be treated as just that: goods in the national market. In the absence of national choice of law rules, this Essay suggests that courts should, as a default rule, apply the laws of the home state of the defendant to all standardized claims, regardless of the situs of the final injury. The upshot of this approach is to suggest a path for future development of national market cases that have been brought into the federal courts as a result of CAFA.

INTRODUCTION

The received wisdom about the application of choice of law rules in class actions runs pretty much as follows: Choice of law rules are important because they help ensure that the right substantive law governs actionable conduct. Getting the choice of law rule right also allows expectations to settle and permits individuals and businesses to fashion their

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affairs with a proper understanding of their rights and duties should things turn out not as desired. These interests make it important to have clear choice of law rules that are known ahead of time, regardless of the happenstance of being sued in state or federal court. These rights are protected under *Klaxon Co. v. Stentor Electric Manufacturing Co.*, which held that choice of law rules are substantive,¹ and thus under *Erie Railroad Co. v. Tompkins*, federal courts must follow the choice of law regime of the forum state.² *Klaxon*, either standing alone or in combination with *Allstate Insurance Co. v. Hague*³ and *Phillips Petroleum Co. v. Shutts*,⁴ establishes a near-constitutional rule that the imposition of a choice of law regime that does not favor the law of the situs of a claimed harm is arbitrary, contrary to settled law, and likely unconstitutional.⁵

This Essay makes a simple point about this conventional account: It does not bear scrutiny. The law governing conflicts in substantive law is neither sufficiently settled nor sufficiently robust to provide the kind of certainty that the conventional story would maintain. But more significantly, the emergence of market conduct of national (not to mention international) sweep has significantly eroded the ability of state-specific law to provide a coherent basis for regulation. Indeed, the geographic breadth of modern economic activity creates an increasing mismatch between providing stable and rational legal oversight and the presumption of order that would attach to the proper application of each state's laws.

This Essay argues that there needs to be some conformity between the national scale of contemporary economic activity and the state-by-state presumption of inherited conflict of laws doctrine in order to provide some sensible legal oversight of national market conduct. Part I looks at the elusive goal of settled expectations under the current doctrines governing conflict of laws outside the class action setting. Under the current doctrinal muddle, the exact same transaction giving rise to the exact same injury may result in the application of different substantive laws *between the exact same parties*, based on the fortuity of where the plaintiff chooses to file suit and what the prevailing choice of law rule is in that state. As a result, it is difficult to invoke any concept of settled expectations as to what the choice of decisional law might be for any particular claimed conduct.

1. 313 U.S. 487, 495–96 (1941).

2. 304 U.S. 64, 78 (1938).

3. 449 U.S. 302, 312–13 (1981) (finding that for law of state to be selected, that state “must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair”).

4. 472 U.S. 797, 822 (1985) (holding that Kansas law should not be used in class action brought within state because state lacked sufficient contacts to case).

5. See, e.g., *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1016 (7th Cir. 2002) (applying principle of *lex loci delicti* to require classwide injuries to be litigated on basis of law of site of harm rather than location of defendant's primary place of business).

There may be a rule of exclusion in class actions emerging from the combination of *Klaxon* and *Shutts*, one that rejects the mechanical application of forum law simply because it is substantively more favorable to a plaintiff's recovery. But this rule of exclusion does little to settle expectations about what the actual law to be applied should be. For example, most jurisdictions follow the broad-gauge seven-factor test of the Restatement (Second) of Conflict of Laws to determine what substantive law should be applied to any particular claim.⁶ Unfortunately, the Restatement approach to resolving the substantive obligations of the parties is long on flexibility and short on predictability in its application. The Restatement is characterized by its direction that courts should weigh "the needs of the interstate and international systems" and the "relevant policies" of the forum state and other interested states.⁷ As if these conceptions were not sufficiently open-ended, they are then combined with a desire to protect the "justified expectations" of all the parties, together with the protection of "the basic policies underlying the particular field of law."⁸ This is simply a catalogue without an organizing principle.⁹ Choice of law is an area that yields few settled expectations except for the predictable frustration felt by practitioners and judges seeking to apply it.¹⁰

Part II turns to the problem of *Klaxon* itself. Often invoked but rarely probed, *Klaxon* talismanically stands for the inviolability of the choice of law regime of the forum state. But what is the source of the

6. Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 Md. L. Rev. 1248, 1250 (1997) (surveying state of law and concluding that despite doctrinal confusion, "the Restatement (Second) seems to dominate the American conflicts scene").

7. Restatement (Second) of Conflict of Laws § 6 (1971).

8. *Id.*

9. The Restatement's litany epitomizes what Justice Scalia chastises as law without principle: "Today we decide that these nine facts sustain recovery. Whether only eight of them will do so—or whether the addition of a tenth will change the outcome—are questions for another day." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1177 (1989).

10. I am by no means the first to express some bewilderment at the Restatement's lack of an organizing core. Even Michael Traynor, the President of the American Law Institute (ALI), has indicated in his individual capacity that there is institutional concern over the inability of this particular Restatement to fulfill the purposes of the Restatement enterprise. See Michael Traynor, *Conflict of Laws, Comparative Law, and the American Law Institute*, 49 Am. J. Comp. L. 391, 397 (2001) ("Restatement Second of Conflict of Laws has been much criticized, particularly the amorphous multi-factor test that prompts an inquiry for the 'most significant relationship' bearing on a case or issue involving choice of law."). Traynor also acknowledges that the ALI's failure is reproduced across the field of conflicts: "Although the Restatement Second of Conflict of Laws has been deservedly criticized, there is no reasonable prospect that the ALI will soon undertake a Restatement Third. . . . The law unfortunately is still too unsettled; and the international dimensions of the subject are becoming increasingly important." Michael Traynor, *A Heavenly Inquiry from Professor Juenger*, in Friedrich K. Juenger, *Choice of Law and Multistate Justice*, at xi, xiii (spec. ed. 2005).

rule? Neither *Klaxon* nor subsequent cases from the Supreme Court have located the obligation to use forum choice of law rules in the Constitution itself. Rather, *Klaxon* piggybacks on *Erie*, and proclaims that its choice of law regime will dampen forum shopping and provide a measure of stabilizing predictability. But the case reflects the Court's early infatuation with an "outcome determinative" demarcation between the exalted worlds of procedure and substance, hailing from the same generation of early efforts to draw formalistic distinctions between substance and procedure epitomized by the discredited approach taken in *Guaranty Trust Co. v. York*.¹¹ This section argues that, just as *Erie*¹² itself criticized the earlier regime of *Swift v. Tyson*¹³ for failing to achieve the goal of uniformity, the subsequent history of the *Klaxon* rule, particularly when run through the quickly metastasizing doctrines of the Restatement approach to conflict of laws, has yielded anything but uniformity and stability.

Finally, Part III offers an approach that should guide choice of law rules in the context of national market cases. Here I continue the efforts that I began in collaboration with Catherine Sharkey to show how legal doctrines have evolved to facilitate common legal oversight of undifferentiated national market activity.¹⁴ The claim here is that conduct that arises from mass produced goods entering the stream of commerce with no preset purchaser or destination should be treated as just that: goods in the national market. Congress has already decreed through the Class Action Fairness Act of 2005 (CAFA)¹⁵ that where controversies arise from such mass distribution of undifferentiated goods, the same pressures that push toward an expansion of federal regulation at the substantive level,¹⁶ and the same ones that push toward an expansion of the federal forum at

11. 326 U.S. 99, 109 (1945) ("The question is whether . . . a statute [of limitations] concerns merely the manner and the means by which a right to recover . . . is enforced, or whether such statutory limitation is a matter of substance . . .").

12. 304 U.S. 64, 74 (1938) ("Persistence of state courts in their own opinions on questions of common law prevented uniformity; and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.").

13. 41 U.S. (16 Pet.) 1, 19 (1842) (asserting that United States was built upon integrated national market and would require integrated law on national level).

14. See Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. Rev. 1353, 1356–57 (2006). The specific application to conflict of laws is pursued further in Samuel Issacharoff, *Getting Beyond Kansas*, 74 UMKC L. Rev. 613, 619–21 (2006).

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

16. See, e.g., Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136–136y (2000); National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718 (codified as amended in scattered sections of 16 U.S.C.); and many others. Federal regulatory regimes and preemption of state substantive law are discussed extensively in Issacharoff & Sharkey, *supra* note 14.

the procedural level,¹⁷ should play out as well with respect to the proper forum for class actions challenging interstate conduct.

The upshot of this approach is to suggest a path for future development of national market cases that have been brought into the federal courts as a result of CAFA. Once these cases have been brought into federal court because they are national market cases, recreating a state-by-state choice of law daisy chain of confusion makes little sense. There is no constitutional obligation on the question of choice of law, other than the requirement of *Shutts* and *Allstate Insurance* that the choice of substantive governing law not be arbitrary or capricious. The sole constitutional command is the general due process obligation that parties be able to have settled expectations as to what their rights and duties are.¹⁸ When stripped to its essentials, due process commands that to hold a defendant to an unanticipated and foreign code of conduct after the manufacture of a product is to introduce the form of unpredictability in our day-to-day affairs that mature legal systems are designed to prevent.

Clearly the same constitutional power over interstate commerce that gave Congress the authority to promulgate CAFA would also allow the passage of substantive laws governing liability rules for the same goods sold across the national market. In light of Congress's decision to mandate statutorily the federal forum for such national market class actions, and its accompanying failure to provide substantive laws for those challenges, where should federal courts turn to determine what laws should apply in cases filed in or removed to federal court under CAFA? Part IV argues that until such time as federal law crystallizes, either by legislation or by the reassertion of a substantive common law of CAFA cases, courts

17. See Issacharoff & Sharkey, *supra* note 14, at 1410 (observing that “[a]s the scale of federal regulation grew, there was a corresponding expansion of the role of federal-court jurisdiction under [28 U.S.C.] § 1331,” which confers “federal question” jurisdiction); see also *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 125 S. Ct. 2363, 2367 (2005) (“[A] federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues.”).

18. Settled expectations as one animating principle of due process stretches as far back as Hobbes. For Hobbes, the entire purpose of government was to solve the conditions in the state of nature, in which “there is no place for Industry; *because the fruit thereof is uncertain*: and consequently no Culture of the Earth . . . [a]nd the life of man, solitary, poore, nasty, brutish, and short.” Thomas Hobbes, *Leviathan* 89 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651) (emphasis added). Wielding more authority, at least in American courts, is Justice Harlan, who argued the primary theme of *Erie* was avoiding “debilitating uncertainty in the planning of everyday affairs.” *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring). Moreover, the Supreme Court has repeatedly referred to a party's reasonable anticipation of being “haled into court” in the forum state as one determining factor in whether exercising personal jurisdiction would offend due process. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (stating that “the foreseeability that is critical to due process analysis” is likelihood that “the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there”).

will have to craft some other test, presumably by first looking to the law of the primary place of business as presumptively controlling in cases involving goods sold on an undifferentiated basis in the national market. To hold a defendant accountable under a legal standard that applies clearly to a significant part of the defendant's activity, and to impose market-wide liability on that basis, violates neither due process nor any settled expectation in choice of law, regardless of the constitutional status of the latter.

At bottom, the claim in this Essay is that the scope of nationwide conduct matters. It matters for constitutional purposes under *Shutts*. It matters for forum purposes under CAFA. And, ultimately, it must be made to function appropriately by molding realistic choice of law principles that acknowledge the true source of contested activity: undifferentiated products in national markets.

I. THE DAISY CHAIN OF CHOICE OF LAW

In an integrated national market, economic activities giving rise to claims of harm routinely cross state boundaries. Since much economic conduct is still regulated at the state level—in large part through the inherited common law regimes of contract, property, and tort—economic activity is likely to fall under the legal rules of more than one state. This problem inheres in a mismatch between the scale of the regulated conduct (across a national market) and the jurisdictional reach of the regulator (within a single state).¹⁹ This mismatch creates pressure toward the federalization of the law, reflected in the increasing preemptive authority of federal law and the broader ambit of federal court jurisdiction over cases implicating national concerns.²⁰ There are, of course, serious risks

19. The more generalized version of this argument posits the difficulty of regulating at the local level when the subjects of regulation are mobile and are free to rearrange their legal obligations to avoid the reach of the regulating body. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. Pol. Econ.* 416, 419 (1956) (“Consumer-voters are fully mobile and will move to that community where their preference patterns, which are set, are best satisfied.”). The standard Tiebout-inspired model would find that regulatory competition and the ability of consumers/voters to group themselves allows for greater responsiveness of regulation to actual preferences. See, e.g., Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 *U. Chi. L. Rev.* 1484, 1493 (1987) (“So long as preferences for government policies are unevenly distributed among . . . various localities, more people can be satisfied by decentralized decision making than by a single national authority.”). For an account of how the mismatch of regulatory authority to subject of regulation may result in underregulation of undesirable conduct, see Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 *Colum. L. Rev.* 473, 509 (1991) (positing need for coordinated federal regulation “to avoid underregulation”). For an application in the unexpected market for trust business, see Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 *Yale L.J.* 356, 416–19 (2005).

20. This is the argument developed at length in Issacharoff & Sharkey, *supra* note 14, *passim*.

with federalization around a single standard. There is the strong possibility of capture of regulatory power by the most interested parties, as well as the loss of experimentation that comes from the selection of a single standard for the entire country. Yet, whatever the benefits recognized in Justice Brandeis's famous invocation of the states as the laboratories of democracy in which "a single courageous State" may blaze new paths by trying "novel social and economic experiments,"²¹ the fact remains that the states are poorly positioned to regulate conduct that only partially occurs within their borders.

So long as federal law has not claimed the field, however, economic activity moving freely across a national market will trigger rival demands of different state legal regimes to control the conduct that affects individual states and their citizens. Douglas Laycock thoughtfully proposes a simple set of constitutional principles governing the development of choice of law, the most critical being a recognition that the "fundamental allocation of authority among states is territorial."²² The territorial component of state authority captures the inherited common law assumptions that state sovereignty corresponds to the geographic dominion of the state as the basic unit of personal, political, and commercial activity. The question, however, is how to apply this territorial conception of sovereignty when routine economic activity regularly encompasses a geographic sweep greater than the territorial claims of any individual state. Not only may the production, exchange, and use of an item in commerce occur in many states, but the legal regulation of such activity in one state may have spillover effects in other states as well. At that point, legal regulation may be a zero sum game.

Put another way, national market conduct regulated state-by-state does not present the sterile laboratories of Justice Brandeis, but what may uncharitably be characterized as a swamp.²³ Regulatory decisions of the separate states are zero sum because each state's effort to control multi-state economic conduct necessarily restricts the regulatory ambit of the other states. In any legal dispute over multistate economic conduct, a choice will have to be made over the governing law if the legal rules of the states are not the same. The effect is to place the states in a form of legal competition in which different substantive rules may favor consumers in one state at the expense of manufacturers in another state, or vice versa. Because of this competition, and given the impossibility of designing, pricing, and marketing different products for every state, states take

21. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

22. Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 *Colum. L. Rev.* 249, 251 (1992).

23. The source of this imagery is William Prosser, *Interstate Publication*, 51 *Mich. L. Rev.* 959, 971 (1959); see also Michael Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 *Geo. L.J.* 1, 2 n.5 (1991) (citing Prosser and other "[a]gricultural metaphors" that have "fertilized" conflicts literature).

advantage of the fact that manufacturers distribute uniform products.²⁴ One state's regulation of uniform products has predictable spillover effects on other states: For example, a state may use its liability regime "to benefit in-state residents with larger compensation payments, or export[] the costs of its regulation to out-of-state manufacturers and product consumers in the rest of the nation."²⁵ Eventually, a choice will have to be made about which liability regime to apply.

To make that choice, most jurisdictions apply some variant of the "most significant relationship" standard²⁶ found in the Restatement (Second) of Conflict of Laws, a multifaceted test best understood as a litany of all the conceivable considerations that may apply—what Laycock uncharitably but not incorrectly refers to as doctrinal "mush."²⁷ A few states continue to apply the Restatement (First) of Conflict of Laws, which privileges the law of the state where the ultimate harm was caused, in turn enshrined as the doctrine of *lex loci delicti*.²⁸ New Mexico confounds all expectations by using *both* the First and Second Restatements to ground its choice of law analysis.²⁹ New York has its own variant of the "governmental interest analysis" generally associated with the Second Restate-

24. This theme is explored at greater length in Issacharoff & Sharkey, *supra* note 14, *passim*. See also Gary Schwartz, Considering the Proper Federal Role in American Tort Law, 38 *Ariz. L. Rev.* 917, 950 (1996) (arguing that manufacturers have no choice but to supply uniform products to national market at uniform prices and noting prospect that state legislators "might be inclined to expand liability" at expense of nonconstituents, though concluding its "real-world application seems no more than modest").

25. Issacharoff & Sharkey, *supra* note 14, at 1386.

26. In 1981, the Seventh Circuit offered a useful overview of the "most significant relationship" standard:

The Restatement (Second) provides two sets of criteria for the measurement of the "most significant relationship." The first set of criteria includes general factors such as the needs of the interstate system; relevant policies of the forum and other interested states; protection of justified expectations; the basic policies underlying the particular field of law; certainty, predictability and uniformity of result; and ease in the determination and application of the law to be applied. The second set of criteria includes the contacts to be taken into account in applying these principles. These contacts are: (1) the place of the injury; (2) the place of misconduct; (3) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (4) the place where the relationship between the parties is centered. These contacts are to be evaluated according to their relative importance to the issue involved and according to the purposes sought to be achieved by the relevant rules of the interested states.

In *re* Air Crash Disaster near Chi., Ill. on May 25, 1979, 644 F.2d 594, 611–12 (7th Cir. 1981).

27. Laycock, *supra* note 22, at 253.

28. States still applying *lex loci delicti* are Alabama, Georgia, Kansas, Maryland, New Mexico, North Carolina, South Carolina, Virginia, West Virginia, and Wyoming. Symeon C. Symeonides, Choice of Law in American Courts in 2005: Nineteenth Annual Survey, 53 *Am. J. Comp. L.* 559, 595 (2005).

29. *Sandoval v. Valdez*, 580 P.2d 131, 133 (N.M. Ct. App. 1978) ("Although New Mexico applies the First Restatement of Conflicts generally . . . if the application of Colorado law would violate New Mexico's public policy, this Court is not bound.").

ment. The New York approach seeks to differentiate between “conduct regulating rules” that are governed by the situs of the harm, and “loss allocating” rules that control remedies and are typically governed by New York substantive law.³⁰ California frames its distinct take on interest analysis as the “comparative impairment test.”³¹ And so it goes.

So long as most economic activity that might give rise to legal harms stays safely within the borders of a single state, the oddity of having many choice of law rules is of no great moment. The application of conflicts analysis may be more difficult than desired, and competing overlays as in New Mexico may add to litigation uncertainty, but all of this would be a rather secondary concern in structuring legal oversight of economic conduct. When conflicts did arise, they would form part of the state law expectations of the parties. As Larry Kramer explains, choice of law rules play an integral role in defining the legal rights and obligations of parties and should not be disrupted for reasons of procedural or administrative convenience.³²

Unfortunately, the conduct that triggers choice of law considerations is by definition broader than the scope of any single state, which raises the question of whether the interstate considerations are secondary or come to dominate the market. By definition, conflicts jurisprudence emerges only where the substantive law of more than one state is potentially implicated by the events in controversy and the underlying substantive laws of the competing states vary in some significant aspect. To the extent that goods or services are routinely exchanged on an interstate basis, and to the extent that the choice of law rules are imprecise, the desired objective of settling the legal expectations of the parties is compromised.

While choice of law rules generate great debate, relatively little attention is given to the effect of liberalized personal jurisdiction rules on the choice of law problem. The question of where suit may be filed exacerbates the multiple state problem underlying the choice of governing law. Perhaps the problem would not appear pressing in an era where there were clear limitations on where a party might be forced to face suit. Unfortunately for purposes of limiting which law might apply to any given

30. The key decision in New York is *Babcock v. Jackson*, which promulgated a test to discern “[t]he ‘center of gravity’ or ‘grouping of contacts’ doctrine.” 191 N.E.2d 279, 283 (N.Y. 1963). The distinction between loss allocation and conduct regulation is set out in *Padula v. Lilarn Properties Corp.*, 644 N.E.2d 1001, 1002–03 (N.Y. 1994). For a careful analysis of New York choice of law principles, see Patricia Youngblood Reyhan, *Conflict of Laws*, 55 *Syracuse L. Rev.* 855, 871–86 (2005). For an extensive application of the *Babcock* principle in the context of complex litigation, see *In re Simon II Litig.*, 211 F.R.D. 86, 165–79 (E.D.N.Y. 2002), rev’d on other grounds, 407 F.3d 125, 140 (2d Cir. 2005).

31. For an overview of California law, see Brian Panish & Kevin Boyle, *Multiple Choice: A Separate Choice of Law Analysis Is Required for Each Legal Issue Arising in a Case*, *L.A. Law.*, Apr. 2, 2004, at 37.

32. See Larry Kramer, *Choice of Law in Complex Litigation*, 71 *N.Y.U. L. Rev.* 547, 549 (1996).

controversy, the addition of post-*International Shoe*³³ personal jurisdiction analysis complicates this picture significantly.

International Shoe abandoned the common law assumption that citizens have a legitimate expectation of appearing in a court only of their domicile or where they have consented to be sued.³⁴ We now understand personal jurisdiction to be constitutionally permissible under the Due Process Clause if the forum bears a transactional relation to the claims for relief,³⁵ if suit is filed in the home forum or the principal place of business of the defendant,³⁶ if suit is filed in a forum that has sufficient contacts with the defendant as to establish general personal jurisdiction,³⁷ if service of process is executed within the forum state,³⁸ or, in a class action, if some of the members of the plaintiff class are domiciliaries of the forum state.³⁹

As a result, it is not only the choice of law regime that may vary; the forum in which that choice of law regime will be applied may also be subject to strategic manipulation. The circumstances in which suit may be brought in a variety of fora are almost limitless. At its most basic, a party can buy auto insurance in one state, but then have an accident in another. If the insurer denies coverage, the insured's claim may likely be brought in the state where the insurance was purchased or as part of an impleader action in the state where the accident occurred. As soon as we hypothesize a world in which suit can go forward in either state, we also introduce a potential confrontation between the substantive laws of the two states governing the responsibility of the insurer to the insured should the insurer deny coverage.⁴⁰ In more complicated form, a mass accident, such as an airplane crash,⁴¹ may produce a spate of litigation

33. *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

34. *Id.* at 320. Under the classic approach of *Pennoy v. Neff*, 95 U.S. 714, 723–34 (1877), suit could be held only if the respondent was a domiciliary of the forum state, had consented to suit in the state, or had been served with service of process in the forum state.

35. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299 (1980) (holding that auto dealer could not be held liable in state where it had conducted no economic activity).

36. See generally Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 *Nw. U. L. Rev.* 1112, 1115–20 (1981) (setting forth settled parameters of personal jurisdiction law).

37. See *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 416–19 (1984) (holding that purchases and business-related trips alone were insufficient to establish general personal jurisdiction).

38. See *Burnham v. Superior Court*, 495 U.S. 604, 619 (1990).

39. See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2620–21 (2005) (finding personal and subject matter jurisdiction even where not all class members could satisfy either).

40. For an example of courts addressing competing public policy concerns in an insurer's refusal to cover an insured's out of state accident, see *Shope v. State Farm Ins. Co.*, 1996-NMSC-052, ¶¶ 6–10, 122 N.M. 398, 925 P.2d 515 (N.M. 1996).

41. See, e.g., *In re Air Crash Disaster near Chi., Ill. on May 25, 1979*, 644 F.2d 594, 604–05 (7th Cir. 1981) (describing choice of law issues raised by airplane crash litigants from over ten jurisdictions).

involving multiple competing legal standards and perhaps even the ever-popular *dépeçage* approach of a separate choice of law analysis for each distinct claim. By the time we extend the combination of jurisdiction law and choice of law regimes to class actions, the possible combinations of forum law and choice of law analysis compound exponentially.

The Constitution only mildly intervenes in this area. The baseline constitutional requirement is that the choice of law rule governing particular conduct have some measure of predictability and that its application be neither arbitrary nor unfair.⁴² Stated in the negative, the imposition of a legal regime that is wholly unrelated to either the expectations of the parties or the underlying conduct threatens just the sort of arbitrariness that due process condemns in any area of governmental conduct.⁴³ But this constraint, as developed in the core case law, likely runs only to the application of the law of a state wholly disconnected from the underlying conduct,⁴⁴ or to the use of some composite liability standard not corresponding to the law of any particular state with an interest in the controversy.⁴⁵ In practice, and particularly in the case of goods distributed into a national market chain of distribution, this mild constitutional constraint does little to settle the question of which law should apply.

Consider, for example, how expectations may be difficult to settle even in the case of a single consumer complaining over a malfunctioning product. In the most routine consumer complaint, a purchaser claims that a product that was sold as guaranteed to perform a certain function is in fact incapable of performing as promised. If the claim is that the product was fraudulently conveyed with representations as to the efficacy of the product, the standard approach based on the Second Restatement yields a result of maddening indeterminacy. Assume the purchase of a toaster during a trip to a nearby mall across the state line and a malfunction when the consumer returned home. Further assume that the toaster

42. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981) (plurality opinion) (“[F]or a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”).

43. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005) (“[A] regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause.”); *County of Sacramento v. Lewis*, 523 U.S. 833, 845–46 (1998) (holding that Due Process Clause was intended to protect individual against “the exercise of power without any reasonable justification in the service of a legitimate governmental objective”).

44. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818–23 (1985) (holding that “[g]iven Kansas’ lack of ‘interest’ in claims unrelated to that State, . . . application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits”); *Allstate*, 449 U.S. at 308 (“[T]o ensure that the choice of law is neither arbitrary nor fundamentally unfair, the Court has invalidated the choice of law of a State which has had no significant contacts or significant aggregation of contacts . . . with the parties and the occurrence or transaction.” (citation omitted)).

45. See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995) (comparing such composite jury instructions to Esperanto, a would-be universal language).

had been manufactured in a third state, by a company incorporated in a fourth state, who sold it through a distributor headquartered in yet a fifth state. Finally, assume that the box containing the toaster showed a picture of toasted bread, but the putative toaster had no heating coils—simply put, it was no toaster.

According to the Restatement, “[w]hen the plaintiff’s action in reliance took place in whole or in part in a state other than that where the false representations were made,” a multipart test is needed to determine which state “has the most significant relationship to the occurrence and the parties,” consisting of no less than six factors:

(a) the place . . . where the plaintiff acted in reliance upon the defendant’s representations, (b) the place where the plaintiff received the representations, (c) the place where the defendant made the representations, (d) the . . . place of incorporation and place of business of the parties, (e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time, and (f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant.⁴⁶

Depending on how a reviewing court might choose to balance these factors, the gravamen of the injury could be the purchase, the attempted use, the packaging of the non-toaster into a box labeled “toaster,” or the original decision to sell non-toasters as if they were the real item. Since each state likely had the requisite minimum contacts with the chain of distribution leading to the injury to the plaintiff, the initial choice of forum for the legal claim would force a confrontation with the imprecision of the law of conflicts. Given the fluidity of the legal standards for determining the applicable law, even in cases in which all the jurisdictions in question are using the Second Restatement’s interest analysis, it would be extraordinary if all the relevant states fastened on the same interpretation as to how this test should resolve itself. If we assume that personal jurisdiction would lie in any of these five states, and if we assume further that the relevant states have different substantive laws on the proof required and on the measure of damages, the core problem reveals itself. An examination of the choice of law regime in each of the possible state venues would inform the filing plaintiff which substantive law would govern the transaction in question. It would also allow an informed plaintiff to calculate how differences in substantive laws would affect the possibility and magnitude of recovery. So long as personal jurisdiction was assured in any of these states, the exact same conduct between the manufacturer and the consumer could give rise to liability or no liability, damages or no damages, simple damages or treble damages, punitive or no punitive damages—all based on the strategic decision as to where the plaintiff chose to file suit.

46. Restatement (Second) of Conflict of Laws § 148 (1971).

Sometimes it is worth returning to the very foundations of a system of law for guidance. One of the primary purposes of law is to settle expectations of citizens in their daily conduct, such that they may plan with certainty, coordinate peaceably and profitably with others, and conduct their lives in a state of reasonable security about what is expected from them. As expressed with characteristic elegance by Jeremy Waldron: “Positive law, then, is supposed to be a way of securing islands of coordination among individuals with different values, and also a way of securing predictability without reproducing the disagreements that flare up whenever we proclaim our individual views about justice or the general good.”⁴⁷ Judged against the lofty aspiration of allowing legal expectations to settle, the current state of conflicts law hardly qualifies as an example of mature law providing guidance in life’s daily affairs. Rather, messy choice of law doctrines compel courts and litigants to work around the doctrinal imprecision on a case-by-case basis, with liberal jurisdictional rules and multiparty cases only compounding the difficulty.

II. KLAXON AND FORUM SELECTION

Choice of law rules are almost a secret code among the cognoscenti. These rules combine technical exigency and impenetrable logic such that the practitioners of this arcane art can challenge the mere mortals among lawyers and judges who need a simple answer to the question of what substantive law should be applied in any particular setting.⁴⁸ Linda Silberman properly notes that much more attention is paid to the question of where a case should be tried than to the law governing the dispute.⁴⁹ But the problem may lie in the infuriating instability of choice of law analysis, rendering disputes over the forum the backhanded way of trying to forecast the controlling law by at least selecting the home court for the litigation.

But this only pushes the question back one level. Why should the home forum matter for choice of law purposes? This question would never be posed unless there were different substantive outcomes among the laws of the different states, such that the selection of a choice of law regime would, at least potentially, give rise to different legal obligations altogether. And such different outcomes surely exist. But the question

47. Jeremy Waldron, *How Judges Should Judge*, N.Y. Rev. Books, Aug. 10, 2006, at 54, 59.

48. Nor is this a new critique of choice of law doctrine. See Robert H. Jackson, *Full Faith and Credit—the Lawyer’s Clause of the Constitution*, 45 Colum. L. Rev. 1, 16 (1945) (“[I]t [is] difficult to point to any field in which the Court has more completely demonstrated or more candidly confessed the lack of guiding standards of legal character than in trying to determine what choice of law is required by the Constitution.”), quoted in *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 496 (2003).

49. Under her colorful formulation, focusing too closely on forum comes close to arguing about where the accused is to be hung, rather than whether there should be a hanging in the first place. Linda J. Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. Rev. 33, 88 (1978).

persists. If the triggering event for a lawsuit is a specific occurrence, such as the purchase of the dysfunctional toaster, why would the exact same conduct be potentially governed by different legal rules depending on where the lawsuit was filed?

Perhaps if principles under either the Full Faith and Credit Clause or the Restatement were better elucidated, then the choice of forum would not matter. In that case, a contract between citizens of Ohio for a business venture in Kentucky would be governed by the laws of contract of one of the two states—and it should be clear in advance which state's laws apply, assuming there is any material difference in the underlying substantive laws. It is hard to identify a principle of justice that would render the same transaction subject to different governing legal principles because of the randomness of suit being brought in the state of agreement, the state of the venture, or even the state where one of the parties might reside at the time the dispute occurs. If the point of clear legal rules is to allow the expectations of parties to settle, then private ordering is compromised to the extent that imprecise legal rules defeat the needed predictability for parties to make informed assessments of their rights and responsibilities.

At first blush, the answer appears to have been settled in 1941 by *Klaxon*, a rather ordinary breach of contract claim between an insolvent New York company and an erstwhile Delaware business partner concerning whether New York prejudgment interest rules would apply to the ultimate verdict in the case.⁵⁰ The diversity of the parties brought the matter into federal court and the question presented was whether the newly inscribed concern of *Erie* for uniformity of treatment of similarly situated cases in state and federal court would extend to the application of the forum state's choice of law rules.⁵¹ The unhesitating answer was yes, an answer that was driven in large part by the Court's limited formulation of the impulses behind *Erie*.

For Justice Reed, writing for the Court, the key to addressing *Erie*'s concern for settlement of expectations is “the principle of uniformity” of court treatment *within* a state.⁵² While this is a correct statement of the holding of *Erie*, it is remarkably inattentive to the reason for the rule of *Erie*. The need for uniformity in *Erie* arose from the problem highlighted in the famous *Black & White Taxicab* case,⁵³ in which the jurisdictional ability to be in state or federal court triggered radically different rules of contract interpretation. The issue in *Black & White Taxicab* was the enforceability of an exclusive dealing contract for taxi service at a Kentucky railroad station. Kentucky state courts had declared such anticompetitive

50. *Klaxon Co. v. Stentor Mfg. Co.*, 313 U.S. 487 (1941).

51. *Id.* at 494.

52. *Id.* at 496.

53. *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928).

contracts to be unenforceable as against public policy.⁵⁴ This prompted the taxicab monopolist to disband, reincorporate in Tennessee, then seek declaratory relief in federal court, appealing to the “general” common law of contract enforcement independent of what Kentucky courts might hold. Now garbed in Tennessee citizenship, the taxicab company was able to enforce a contract that would have been barred as contrary to public policy for Kentucky entities, all despite the fact that the underlying franchise was in Kentucky.⁵⁵

The harm from a case such as *Black & White Taxicab* was not so much that state and federal courts might have different legal rules, but that they might be applied in an inconsistent fashion to actual litigants. The exact same transaction could be subject to different substantive rules governing the exact same conduct based solely on whether the case was in state or federal court. Collapsing the concern emerging from the pre-*Erie* cases into a single-shot inquiry as to uniformity between federal and state court treatment of the claims misses the bigger problem. The key concern under the pre-*Erie* regime was that, because of the ability to manipulate which substantive law would apply, there could be no rational settlement of expectations. In *Black & White Taxicab*, for example, either the parties should be able to rely on the enforceability of the underlying contract and manage their economic decisions accordingly, or they should not. No rational expectation could be formed in the face of diametrically conflicting rules of contract enforcement.⁵⁶ But the issue presented in the *Erie* line of cases was not the substantive differences that threatened the same transaction as such, but the fact that these differences could arise from the case being in state or federal court.

Examined from the perspective of facilitating private ordering by permitting parties to settle their affairs in light of known legal commands, the problem of intrastate consistency between state and federal courts is at best secondary. Intrastate consistency does nothing to yield predictable obligations for conduct that stretches across state lines rather than within the federal and state courts of the same state. This issue was not presented in *Erie*, which dealt only with competing claims by state and federal courts to govern the obligations of a railroad to pedestrians on its trackbed in a fixed location. The *Erie* principle of federal court fidelity to state substantive law, regardless of its source in either statute or the common law, is rooted in the need to provide uniform expectations about how the exact same conduct will be treated should it prompt legal dispute.

54. *Id.* at 525.

55. *Id.* at 522–24.

56. The same problem presented itself in *Erie*: The railroads should operate assuming either a duty of care to trespassers or a duty of non-negligence. The steps they took and the costs would be different depending on the level of care owed, which in turn could not be governed by two different legal regimes.

What is striking about *Klaxon* is the complete absence of any attempt to provide the same aim of uniform expectations governing a set course of conduct. Rather, *Klaxon* mechanically extends the *Erie* prohibition on federal courts departing from settled state court practices into an area that of necessity implicates concerns beyond intrastate conduct. It is not that *Klaxon* is unaware of this issue, it is just that Justice Reed expressly disclaims any interest in resolving this more significant problem of unsettled law:

Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent “general law” of conflict of laws.⁵⁷

The opinion is silent as to why such uniformity should not be pursued. The relation between state authority and the federal interest in a national economic market is a problem that dates from the founding of the Republic and later emerged doctrinally as the core of *Swift v. Tyson*.⁵⁸ If national market conduct is impaired by states favoring certain classes of commercial interests in a systematic way, federal encouragement of uniformity is hardly an affront to dual sovereignty.⁵⁹ Even setting aside the problems in the implementation of *Swift*, given the ability to bring the same claims in federal or state court (as in *Black & White Taxicab*), a discerning reading of *Erie* would have occasioned a more serious examination of the principle of settled legal expectations. *Erie* castigated the conflict of legal authority of similar conduct for incubating a “new well of uncertainties.”⁶⁰ These uncertainties were the true problem with the *Swift* regime as it was applied in practice, making *Klaxon*’s recreation of them in service to *Erie* almost perfectly backwards.

Klaxon turns on a peculiarly formalistic reading of the *Erie* problem, one that is strikingly reminiscent of what would subsequently emerge as the “outcome determinative” approach advocated by Justice Frankfurter, most notably in *Guaranty Trust Co. v. York*.⁶¹ In *Guaranty Trust*, Justice Frankfurter read the *Erie* concern as being triggered by any deviation in

57. *Klaxon*, 313 U.S. at 496.

58. 41 U.S. (16 Pet.) 1 (1842).

59. The journey from *Swift* to *Erie*, and the animating concerns of both, is detailed at length in Issacharoff & Sharkey, *supra* note 14, at 1399–1408.

60. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938).

61. 326 U.S. 99, 109 (1945) (requiring federal diversity courts to follow state rules that “significantly affect the result of a litigation”). *Guaranty Trust*’s outcome determinative test was ultimately abandoned. See *Hanna v. Plumer*, 380 U.S. 460, 466–67 (1965) (stating that “[o]utcome-determination’ analysis was never intended to serve as a talisman” and that choices between state and federal law should be made “by reference to the policies underlying the *Erie* rule” rather than any “litmus paper’ criterion”). But see *Gasparini v. Ctr. For Humanities, Inc.*, 518 U.S. 415, 428 (1996) (identifying “outcome affective” test for diversity cases that draws on some elements of *Guaranty Trust*).

the treatment of a case based on whether a defendant found itself in state or federal court. In trying to rein in the claims of federal judges to be able to mold a substantive general common law, Frankfurter unleashed a rule that barred any distinct federal practices, even on matters so presumably procedural as whether service of process or filing of suit had to be accomplished by the running of the statute of limitations. For Frankfurter, the importance of *Erie* was identity of treatment in federal or state court, regardless of the actual significance of the practices involved.

Justice Reed assumes a similar view of the central purposes of *Erie* in *Klaxon*, decided just four years prior to *Guaranty Trust*. Paradoxically, as Caleb Nelson has observed, *Klaxon* weakens one of diversity jurisdiction's core purposes in protecting out-of-state litigants from in-state bias: "As originally conceived, diversity jurisdiction would undercut such schemes . . . [because] an out-of-state manufacturer who was sued by an in-state consumer could remove the case to a federal court, which would apply the state's products-liability laws only if general choice-of-law rules supported that result."⁶² The mechanical application of home state choice of law rules facilitated extending the reach of state law beyond a particular state's own borders, producing, in the words of Michael Greve, "a paradigmatic violation of state integrity."⁶³

Further, both *Klaxon* and *Erie* predate *International Shoe* and the re-making of forum law in the image of evolving due process standards. Justice Reed's rather cavalier dismissal of the concern over the lack of interstate consistency under the *Klaxon* rule has never been seriously re-examined in light of the liberalization of the law governing which forum might have jurisdiction over any particular case. Once the minimum contacts approach of *International Shoe* took hold, the key problem became the lack of interstate consistency. What Justice Reed passingly addressed and cast aside in *Klaxon* would now manifest itself as a serious lack of intracontroversy consistency over the treatment of the exact same dispute depending on where the plaintiff chose to file suit. Moreover, this lack of intracontroversy consistency now plagued all multistate controversies, regardless whether they were filed in state or federal court.

There are two other striking features about *Klaxon*. The first is that the authority it claims from *Erie* did not survive the demise of the outcome determinative test. By the time of the Warren Court, and of federal courts' more muscular assertion of their independent authority to proclaim their own procedural rules, the restrictive account of the federal interest took on an increasingly anachronistic tone. As most clearly expressed by Justice Harlan in *Hanna v. Plumer*, the point of *Erie* was precisely to lend predictability to legal expectations so as to promote private ordering:

62. Caleb Nelson, The Persistence of General Law, 106 Colum. L. Rev. 503, 566–67 (2006).

63. Michael Greve, Federalism's Frontier, 7 Tex. Rev. L. & Pol. 93, 100 (2002).

I have always regarded [*Erie*] as one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems. *Erie* recognized that there should not be two conflicting systems of law controlling the primary activity of citizens, for such alternative governing authority must necessarily give rise to a debilitating uncertainty in the planning of everyday affairs.⁶⁴

Under this view, the question of whether the primary actor, here the defendant, can conform its conduct to the risks and rewards of settled law implicates a reliance issue of constitutional dimensions. To the extent that *Klaxon* fails to enable the litigant to do so, the formal recitation of *Erie* is insufficient to sustain the approach.

Second, nowhere in *Klaxon* does Justice Reed find an independent source of constitutional authority for the rule that federal courts are bound by the choice of law regime of the states in which they sit. Indeed, the Supreme Court recently confirmed the nonconstitutional status of choice of law regimes. This time, the issue came up in *Franchise Tax Board v. Hyatt*, in the rather bizarre context of allowing Nevada state courts to assess whether the California Franchise Tax Board could be held liable for tortiously claiming unpaid taxes from a California resident who happened to move to Nevada.⁶⁵ Despite the fact that the Board was immunized from suit under California law, the Supreme Court refused to impose a constitutional template and allowed Nevada to declare that, under its laws, damages were available since the harm continued after the plaintiff's move to Nevada.⁶⁶

If the ultimate aim is predictability in the enforcement of laws, then the *Klaxon* focus on intrastate uniformity between cases filed in state and federal court is at the very least secondary. In fact, respect for the proper boundaries of state authority may require that "[w]hatever deference is appropriately paid by the federal courts to the states pursuant to the *Erie* doctrine arises from the demands of federalism."⁶⁷ *Klaxon*'s categorical insistence on following home state choice of law rules may actually retard predictable legal regulation by facilitating the ability of a state to impose its legal rules on out-of-state actors. This is a problem of horizontal federalism which resists easy solution absent federal oversight.⁶⁸ The more interesting inquiry, therefore, is whether the *Klaxon* approach is not only secondary but actually antithetical to achieving settled expectations in what Justice Harlan would term "primary activity." Under the facts presented in *Franchise Tax Board*, for example, it is hard to envision an

64. 380 U.S. at 474 (Harlan, J., concurring).

65. 538 U.S. 488, 490–94 (2003).

66. *Id.* at 497–99.

67. Allan R. Stein, *Erie* and Court Access, 100 Yale L.J. 1935, 1941 (1991).

68. See, e.g., Scott Fruehwald, The Rehnquist Court and Horizontal Federalism: An Evaluation and a Proposal for Moderate Constitutional Constraints on Horizontal Federalism, 81 Denv. U. L. Rev. 289, 327–33 (2003) (presenting justifications for greater constraints on horizontal federalism).

issue more primary than whether or not a regulatory body enjoys immunity from suit. And yet the absence of any coordinating principle of intracontroversy consistency yields precisely the type of disruption to settled expectations over primary conduct that Justice Harlan identifies as the heart of the *Erie* inquiry.

III. NATIONAL MARKET CLASS ACTIONS

Two major themes emerge from the foregoing. First is the idea of the role of law as providing settled expectations in the daily interactions of life. Second is the importance of consistency of legal treatment of comparable claims in helping to settle expectations. The claim thus far is that contemporary choice of law doctrine fails this charge. Part of the failure has to do with the difficulties attendant to the current state of conflict of laws doctrine. But a more significant part has to do with the curious effort to run choice of law questions, necessarily implicating multistate interests, through the *Erie* doctrine and its fixation with intrastate integrity of adjudication.

This problem takes on greater significance in complex cases involving multiple parties, multiple jurisdictions, and the need to iron out the interests of multiple jurisdictions in controlling the underlying conduct. As a general matter, courts tend to cut through the brambles of messy doctrine to resolve multistate cases that have to be litigated in a way that honors the basic intuition of treating comparable cases in like fashion, what I have termed “intracontroversy consistency.” The picture is more complicated in class actions in which the preliminary decision to certify a class offers a procedural mechanism to offload the case from a court’s docket and uncertainty over choice of law doctrine becomes a major determinant of how the case will be resolved. This section addresses both how courts have handled choice of law issues in complex multistate cases and the effect of CAFA on that treatment.

A. *Choice of Law in Complex Cases*

As with the sun during an eclipse, it is best to observe choice of law doctrines indirectly. Despite the inability of choice of law rules readily to yield intracontroversy consistency, the fact is that courts do muddle through. Consolidation of multiple actions arising from a single event are common, particularly since the adoption of the multidistrict litigation (MDL) procedures for federal court consolidation of related pretrial proceedings.⁶⁹ The most obvious candidates for some kind of rough-cut harmonization of potentially competing state laws are the mass harm cases,

69. See 28 U.S.C. § 1407 (2000). See generally *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) (setting forth conditions for and limitations on pretrial consolidations of MDL cases).

prototypically airline crashes,⁷⁰ in which courts require simplifying legal rules to make common determinations as to causation and liability standards.

The poster child for this approach is the Seventh Circuit's eminently sensible, but much-criticized, choice of law determination in the *In re Air Crash Disaster near Chicago* litigation.⁷¹ The question presented in the MDL consolidation—which included 118 different personal injury cases involving citizens of many states and foreign countries and filed in a variety of federal courts—was whether punitive damages would be available against McDonnell Douglas, the airplane manufacturer, and American Airlines, the carrier of the doomed airliner. The Seventh Circuit adopted the Restatement (Second) approach, but interpreted it to ascertain which state had the “most significant interest” in the case.⁷² This narrowed the contending state laws to the principal place of business of the defendants *or* the site of the contested wrongful conduct. Finding no principled way to distinguish these two, the Court decided to break the deadlock by applying the law of Illinois, the site of the accident and, perhaps not coincidentally, the forum for the litigation.⁷³ The upshot was to rely on Illinois law to allow punitive damages claims to go forward against the manufacturer but not the airline carrier.⁷⁴

Independent of the choice of law minuet performed by the Seventh Circuit is a broader point about the use of common sense approaches to deal with legal ambiguity in multijurisdictional disputes. Courts dealing with claims of common harm in duplicative factual settings appear motivated by a desire to find a principle that persons similarly situated should receive similar treatment.⁷⁵ This principle lay at the heart of the American Law Institute's (ALI) proposal to codify the unifying impulse into a distinct conflict of laws approach for complex litigation.⁷⁶ Indeed, this principle emerges as the analytic heart of the Seventh Circuit's recasting of the Restatement (Second) to promote rules that “emphasize certainty, predictability, uniformity of result, and ease in the determination

70. For an account of how airline crashes raise characteristic questions of harmonizing state laws, see Andreas F. Lowenfeld, *Mass Torts and the Conflict of Laws: The Airline Disaster*, 1989 U. Ill. L. Rev. 157, 160–63 (focusing on the Seventh Circuit's treatment of *In re Air Crash Disaster near Chicago* to show typicality of harmonization concerns).

71. *In re Air Crash Disaster near Chi., Ill.* on May 25, 1979, 644 F.2d 594 (7th Cir. 1981).

72. See *id.* at 611.

73. See *id.* at 616.

74. *Id.* at 633. For one of the many critical assessments of how this resolution comports with conflict of laws analysis, see Kramer, *supra* note 32, at 554–60.

75. Cf. Friedrich K. Juenger, *Mass Disasters and the Conflict of Laws*, 1989 U. Ill. L. Rev. 105, 122 (arguing that Restatement (Second) of Conflict of Laws should be revised so that home states of all parties are taken into account in order to promote similar treatment of persons who are similarly situated).

76. See Am. Law Inst., *Complex Litigation: Statutory Recommendations and Analysis* 316 (1994).

and application of the law to be applied.”⁷⁷ This is nothing other than the concept of intracontroversy consistency developed previously in this Essay.

Despite widespread dissatisfaction with the state of conflicts law, in terms of both case law and scholarship, not a great deal turns on fine tuning such an inherently flawed doctrine. For all the criticism of the Restatement (Second) approach to conflict of laws, the ALI has never ventured a third edition, largely because the effort seemed daunting and the likely payoff small. In many areas of law, such as most disputes touching on the Uniform Commercial Code, the differences in state law are relatively inconsequential. In other areas, such as standards of liability in tort, or the availability of punitive or exemplary damages, the differences could be more substantial. But in most cases, some mediating principle could be worked out and the parties would have to live with it. In federal courts in particular, the case-specific determinations in a diversity action would not be binding on the state courts, and any ruling that appeared to do justice to the parties in the case would be unlikely to provoke either en banc or certiorari review of the choice of law rulings of a federal appellate panel.

The ability of courts to muddle through the imprecise law of conflicts is compromised in the class action setting. Until class actions became more “adventuresome” in the 1980s,⁷⁸ class actions were not only overwhelmingly concentrated in federal court, but concerned claims primarily governed by federal law, such as civil rights, securities, or antitrust claims. Oftentimes there were pendent state claims such as for fraud or negligent misrepresentation that posed thorny choice of law problems, but these could be shoved aside since the main event would invariably be a class action under controlling federal law.⁷⁹ For the most part, class action law developed in federal courts at a safe distance from difficult choice of law commands. Class action law took on a different look once attention turned to aggregate treatment of mass harm cases presented either as tort actions or consumer cases. Previously unexamined parts of Federal Rule of Civil Procedure 23, particularly the predominance and manageability requirements for the certification of a class seeking dam-

77. *In re Air Crash Disaster near Chi.*, 644 F.2d at 616.

78. The term, originally used by the drafter of Federal Rule of Civil Procedure 23, Benjamin Kaplan, was adopted by Justice Ginsburg to describe the continued expansion of class action practice to encompass ever greater efficiencies in mass harm cases. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617–18 (1997). See generally Jack Weinstein, *Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolidations, and Other Multiparty Devices* (1995) (discussing mass tort litigation issues that arose during 1980s and 1990s, including Agent Orange, Dalkon Shield, and asbestos cases); William Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 *Cornell L. Rev.* 837 (1995) (analyzing rules governing certification of class actions and proposing alternatives).

79. See Kramer, *supra* note 32, at 564–65 (describing variety of avoidance techniques applied by federal court to circumvent peripheral state law issues).

ages, suddenly took on lives of their own. The Supreme Court assumed that, at least in cases seeking economic damages, the obstacles to certification would be slight: "Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws."⁸⁰ But that was not to be.

As class action practice expanded into the domain of consumer cases spreading over the entire national market, the battles over the certifiability of these cases as class actions largely turned on the amenability of common adjudication of cases potentially implicating the laws of many states.⁸¹ Translated into the class action lingo of "predominance" and "manageability," these cases spawned a cottage industry in what has been termed "gridlaw": the use of overlays of competing state laws to determine whether the underlying legal standards were compatible.⁸² The resulting litigation battles turned on the plaintiffs' suggesting common inquiries at extraordinary levels of abstraction, only to be met by defendants' "catalogu[ing] in microscopic detail each legal or factual variation suggesting the existence of individual questions."⁸³

The willingness of courts to certify class actions in the face of competing accounts of the compatibility or incompatibility of varying state laws became the fault line in the battles over class certification.⁸⁴ But class actions brought a challenge independent of the ability of courts to muddle through in routine choice of law cases. Regardless whether an airline crash case was tried in one jurisdiction or many, and regardless which variant of substantive law was ultimately selected, the cases were going to proceed until a sufficient body of decisional law could establish the value of the plaintiffs' claims. Similarly, in a claim for insurance indemnification crossing state lines, or in any other typical situation in which courts have to choose among competing state laws, under one state's laws or another's, the case would be able to go forward and some standard of law could be crafted that would allow the parties to test the merits of the claims presented.

80. *Amchem*, 521 U.S. at 625.

81. For a general discussion of the choice of law overlay on class action law, see Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 *Colum. L. Rev.* 717 (2005).

82. See Linda M. Mullenix, *Gridlaw: The Enduring Legacy of Phillips Petroleum Co. v. Shutts*, 74 *UMKC L. Rev.* 651, 654 (2006) (arguing that current applicable law question as it applies to multistate actions is "semi-ridiculous" and "burdensome," especially for defendants). The use of grids to develop patterned jury instructions to accommodate variations in state law was first proposed in *In re School Asbestos Litigation*, 789 F.2d 996, 1010 (3d Cir. 1986).

83. *Principles of the Law of Aggregate Litig.* § 2.03 reporter's notes, cmt. b (Discussion Draft 2006).

84. For examples of noteworthy cases, see, e.g., *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1015-16 (7th Cir. 2002); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1302 (7th Cir. 1995).

In the class action context, the battle was not over which state's laws should apply, but over whether the claims could be aggregated. 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. As the Supreme Court has explained, the policy underlying class actions is "to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."⁸⁵

Behind the contested claims as to how rival state laws affected a proposed class action stood the simple economic reality that many putative class actions, particularly those involving low individual value consumer claims, were going to rise or fall on the question of whether aggregation could be accomplished through the class action mechanism. These cases were typically unviable as individual claims and could survive only if the transactional cost of an individual claim was reduced through aggregation. To the extent that class certification could be denied altogether, legal challenge to the underlying conduct was impossible. By the same logic, to the extent that the case could be forced into the template of fifty different state-by-state class actions, the transaction cost threshold could be raised, perhaps to the point of capsizing the viability of the case altogether, or at the very least, driving down the expected settlement value of the claims. The perceived willingness of some particularly malleable state courts to facilitate class certification through liberal choice of law rulings was one of the central animating concerns behind CAFA.

B. *The Impact of CAFA*

Much can be made of the political impulses animating CAFA. Despite some grudging language in the Act's preamble about the salutary role that class suits may serve in overcoming transactional barriers, the 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 "adventurous" aggregated proceedings. On the other hand, while Congress had the power to prohibit both class actions and multistate class actions, it did neither. Rather, the main argument made on behalf of CAFA was that the decision whether to certify cases of national market import was too important to leave to the vagaries of state court administration. Thus, John Beisner, the chief proponent of CAFA,

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

confirmed that the central concern was to bring cases of national import into a national forum:

Who should be charged with responsibility for handling such types of large-scale, interstate class actions involving issues with significant national commerce implications—federal judges who are selected by the President and confirmed by the U.S. Senate or state court judges who are elected by a few thousand voters in a rural county?⁸⁶

The final legislative compromise could reach only so far as depositing these cases in federal court, again presumably by removal, but could not reach any further instruction as to how the cases were to be handled once removed.⁸⁷ Indeed, much of that work was left to the curious and constitutionally-suspect creation of retrospective *postenactment* legislative history.⁸⁸

CAFA clearly sought to keep in place the inherited choice of law regime, under the assumption that the spiral of choice of law dictates of the multiple states where the claims accrue would effectively bar nationwide class actions.⁸⁹ The question is what exactly had been inherited. The starting point is *Shutts*, a case that allowed a nationwide gas royalty case to go forward in Kansas, but prohibited Kansas from applying its substantive laws on the calculation of damage interest rates to transac-

86. Class Action Fairness Act of 2001: Hearing on H.R. 2341 Before the H. Comm. on the Judiciary, 107th Cong. 49 (2002) (statement of John Beisner, Partner, O'Melveny & Myers, LLP), available at http://commdocs.house.gov/committees/judiciary/hju77557.000/hju77557_of.htm (on file with the *Columbia Law Review*).

87. For an instructive account of the legislative compromise, including the no-amendment rule that doomed any efforts to address the choice of law issues, see Patrick Woolley, *Erie* and Choice of Law After the Class Action Fairness Act, 80 Tul. L. Rev. 1723, 1748–49 & n.134 (2006).

88. For example, in *Abrego Abrego v. Dow Chemical Co.*, the Ninth Circuit faced the question of whether the burden remains on the defendant to establish federal jurisdiction. Though CAFA is silent on this point, a Senate Judiciary Committee Report issued ten days after its passage asserts that the plaintiff should bear the burden. The court chose to disregard the legislative history, stating that “the statute is not ambiguous” and such ambiguity is a “necessary condition” of a resort to legislative history. *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 683 (9th Cir. 2006).

In *Brill v. Countrywide Home Loans, Inc.*, the Seventh Circuit, faced with a similar question, reached a similar conclusion:

But when the legislative history stands by itself, as a naked expression of “intent” unconnected to any enacted text, it has no more force than an opinion poll of legislators—less, really, as it speaks for fewer. Thirteen Senators signed this report and five voted not to send the proposal to the floor. Another 82 Senators did not express themselves on the question; likewise 435 Members of the House and one President kept their silence.

Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448 (7th Cir. 2005).

89. The legislative history makes many such references. For academic commentary assuming a multistate choice of law analysis, see Russell Weintraub, Commentary on the Conflict of Laws 59–60 (2005 Supp.) (reading CAFA to require application of choice of law rules of state where court sits).

tions that had nothing to do with Kansas.⁹⁰ From *Shutts* comes the prohibition on “bootstrapping,” by which the decision to certify a class itself compels an alteration of substantive laws in order to render the class action a manageable enterprise.⁹¹ Richard Nagareda makes the antibootstrapping prohibition a key feature of his argument in favor of what is termed a “preexistence” principle, by which the joinder of claims should not alter the manner in which claims would be handled if tried individually.⁹² In similar fashion, other commentary criticizes the use of distinct choice of law regimes for class actions on the implicit grounds that a material change in the obligations of the defendant would ensue.⁹³

There are two questions that follow. The first is how significant this antibootstrapping or preexistence principle should be. For example, in *Sun Oil Co. v. Wortman*,⁹⁴ the Court seemed to back away from the principle presented in *Shutts*. In *Wortman*, the issue presented was whether aggregation of claims in Kansas could protect the viability of suits brought on behalf of out-of-state plaintiffs who would have been time barred in their home jurisdiction or in any other conceivable forum for suit. Indeed, but for the fact of being joined in a class action in Kansas, a state in which these plaintiffs would have had no claim of jurisdiction absent the class action device, their legal claims would have been extinguished. The question presented was whether the extension of liberalized personal jurisdiction to Kansas as a result of the certification of a class action there would allow Kansas to apply its exceptionally long statute of limitations to claims having no transactional relation to Kansas. At first blush, this appeared to be as improper as Kansas applying its interest rate calculations to claims that were equally unrelated transactionally to the Kansas forum.

The Court, however, in an opinion by Justice Scalia, found that longstanding common law principles would allow for the application of *lex fori* rather than *lex loci* to the determination of the statute of limitations for claims brought in Kansas, even if the underlying dispute bore no relation to Kansas whatsoever.⁹⁵ Accordingly, the fact that *Shutts* liberalized personal jurisdiction for nationwide class actions did not require, as a

90. Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

91. *Id.* at 821.

92. Richard A. Nagareda, The Preexistence Principle and the Structure of the Class Action, 103 Colum. L. Rev. 149, 181–86 (2003).

93. See, e.g., Mark Moller, The Rule of Law Problem: Unconstitutional Class Actions and Options for Reform, 28 Harv. J.L. & Pub. Pol’y 855, 871–72 (2005) (illustrating potential of class actions to alter burdens of proof); Allison M. Gruenwald, Note, Rethinking Place of Business as Choice of Law in Class Action Lawsuits, 58 Vand. L. Rev. 1925, 1959–60 (2005) (arguing that certification of class allows one state’s laws to govern all claims, risking “an unconstitutional infringement on the power of every other state”).

94. 486 U.S. 717 (1988).

95. It is worth noting that much of the academic criticism of the pliable Restatement (Second) approach to choice of law determinations observes that the practical upshot is often an application of *lex fori* in the name of conflicts resolution. See, e.g., Patrick J. Borchers, The Choice-of-Law Revolution: An Empirical Study, 49 Wash. & Lee L. Rev. 357, 380–82 (1992).

constitutional matter, trying the underlying claims as if they were still in their home courts. Unlike the *Guaranty Trust* outcome-determinative formalism of the early *Erie* line of cases, the Court in *Wortman* drew a different line around whether the application of one or another decisional rule violated preexisting substantive commitments.

Putting *Shutts* and *Wortman* together yields an interesting mix that unfortunately places great pressure on the wobbly divide between substance and procedure. Under *Shutts*, the happenstance of Kansas serving as the forum for nationwide litigation cannot serve as the predicate for imposing an unrelated substantive obligation on the defendant. Under the facts presented, the Court found that using Kansas's substantive determinations of interest obligations was unconstitutionally arbitrary and unfair if premised on the procedural determination to certify a class in Kansas. At the same time, the Court allowed Kansas law on the statute of limitations to revive moribund claims, since such applications of *lex fori* did not disrupt the settled expectations of the defendant.

The second question is what exactly the fact of removing these cases from state courts altogether does for the principles underlying *Shutts*. To the extent that federal courts are instructed to promote predictability by mirroring the treatment that would be offered in state court proceedings, what happens when Congress decrees that, in the great bulk of these cases, there will be no more state court proceedings? Just recently the Court addressed a related issue in the application of the Securities Litigation Uniform Standards Act (SLUSA),⁹⁶ holding that SLUSA preempts many state law class actions claims.⁹⁷ The questions posed by SLUSA and CAFA are different, particularly since CAFA eschewed any alteration of substantive law or even of choice of law regimes. But the concern about creating a dominion of exclusive federal oversight does raise the question of what should serve as the baseline for measuring federal court fidelity to preexisting legal treatment. If federal courts are to be the only game in town for national market consumer cases, it is difficult to argue that they should handle them the way all other courts do. There are simply no other courts in the game anymore.

Assuming no further congressional action, what choices are available to federal courts facing a proposed nationwide class action? Were they to apply a federal common law to a class of cases that could, by virtue of CAFA, only proceed in federal court, such common law adjudication would be unlikely to run afoul of the Rules Enabling Act (REA).⁹⁸ By its terms, the REA applies only to the rulemaking authority of the Supreme Court and commands that “[s]uch rules shall not abridge, enlarge or

96. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified in scattered sections of 15 U.S.C.).

97. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 126 S. Ct. 1503, 1514 (2006).

98. See Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015, 1023–26 (1982) (arguing that REA's primary purpose was to divide responsibility between Court and Congress, with incidental effect of protecting state lawmaking).

modify any substantive right.”⁹⁹ Therefore, while the REA limits the rulemaking authority of the Supreme Court, it does not constrict the common law powers of the federal courts.¹⁰⁰ Nor is it clear how the Rules of Decision Act (RDA)¹⁰¹ would deem the choice of law regime of the states were we to begin with a more modern rendition of the *Erie* doctrine than that provided by *Klaxon*.¹⁰²

There is more than a touch of irony in holding fast to a doctrine honoring state autonomy in the context of a statute that takes away precisely the power of state courts to adjudicate nationwide class actions. While there may be some thin authority for this claim,¹⁰³ it is hard to apply any principle of uniformity of treatment to achieve this result. A half century ago, Professor Hart sharply criticized *Klaxon* for having “paralyzed the capacities of the federal courts to further one of the central desiderata of a federal system.”¹⁰⁴ That principle, noted Hart, was that “uniformity of obligation as between particular individuals, regardless of the locus of litigation, is almost invariably desirable The promotion of this kind of uniformity . . . is one of the functions of the principles of the conflict of laws.”¹⁰⁵ The question is whether *Klaxon* has any ongoing applicability to cases in which *intrajurisdictional* consistency is no longer an issue since Congress has taken state courts out of the mix altogether.

This brings us squarely to what courts should do under CAFA. Through CAFA, Congress sought to “restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction”¹⁰⁶ and to stem an “[a]buse[]” that was “keeping cases of national importance out of Federal court.”¹⁰⁷ CAFA provides for special jurisdictional and removal rules for a class of cases that Congress believes implicate important national market concerns. For these cases, Congress

99. 28 U.S.C. § 2072(b) (2000).

100. See John Hart Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 697–99 (1974) (arguing that *Erie* is unconstitutional rule resting on statutory constraints of REA and RDA).

101. 28 U.S.C. § 1652.

102. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (“It is not for the federal courts to thwart such local policies by enforcing an independent ‘general law’ of conflict of laws.”).

103. See *Griffin v. McCoach*, 313 U.S. 498, 503–06 (1941) (applying Texas state choice of law regime to federal interpleader claim that by its terms could never have been brought in state court). For criticism of this outcome, see Charles Alan Wright & Mary Kay Kane, *Law of Federal Courts* 392 (6th ed. 2002) (“Even if the *Klaxon* doctrine is accepted, there is ground to argue that *Griffin v. McCoach* goes too far”).

104. Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 513 (1954).

105. *Id.* at 514.

106. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4, 5 (to be codified in scattered sections of 28 U.S.C.).

107. *Id.* § 2(a)(4).

hoped to battle “false federalism”¹⁰⁸ by preventing a single state from imposing its class action practices in cases of national scope. CAFA proclaims its fidelity to *Erie*,¹⁰⁹ but its notion that the main harm is to be found in the wrong cases ending up in state courts is a far cry from the animating principle of *Erie*, and by extension *Klaxon*. Those cases were concerned with uniformity of treatment of claims that could end up in state or federal court depending on the happenstance of the amount in controversy and the citizenship of all the parties involved; they did not decide which cases should or should not be in state or federal court.¹¹⁰ The aim and effect of CAFA was to define a distinct form of procedural treatment for interstate cases which would keep them out of the hands of presumably supine state courts.

The question then is whether there is some basis for courts to follow a simplifying strategy when dealing with national market cases that are consolidated in federal court as a result of CAFA.¹¹¹ Put another way, if 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?¹¹² Some cases that were once exclusively state law matters take on a different hue as the scale of the market economy expands. The cases that CAFA sends to federal court do not represent the entire universe of such cases. But they do constitute a discrete set of cases in which Congress has determined that their national market implications deserve particularized treatment.

108. H.R. Rep. No. 108-144, at 15 (2003), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_reports&docid=f:hr144.108.pdf (on file with the *Columbia Law Review*) (internal quotation marks omitted) (defining “false federalism” as “applying a single State’s law to all asserted claims”); see also S. Rep. No. 109-14, at 63 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 59 (using same language).

109. S. Rep. No. 109-14, at 49 (“[CAFA] does not change the application of the *Erie* Doctrine.”).

110. See Woolley, *supra* note 87, at 1753 & n.149 (distinguishing between concerns of “horizontal” and “vertical” integration of claim treatment).

111. See Weintraub, *supra* note 89, at 57 (“[C]ourts utilizing interest and most significant relationship analysis have sometimes facilitated certification of a national class action by applying to all claims the law of the state that was the center of defendant’s wrongful conduct.”). This is in effect the ALI proposal of a decade ago. The ALI proposed a set of choice of law rules for complex litigation which is premised on the view “that it would be highly desirable if a single state’s law could be applied to a particular issue that is common to all the claims and parties involved in the litigation.” Am. Law Inst., *supra* note 76, at 316.

112. See Edward H. Cooper, Rule 23: Challenges to the Rulemaking Process, 71 N.Y.U. L. Rev. 13, 29 (1996) (arguing that different members of “class of victims” should not “win or lose” based upon choice of law, but stating that “single law” could fairly apply to single class action claim). The idea of the class action as an independent entity is most developed in David Shapiro, Class Actions: The Class as Party and Client, 73 Notre Dame L. Rev. 913, 917 (1998).

IV. AN IMPERFECT SOLUTION

Ideally, CAFA should have answered this question. There is little doubt that if 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.¹¹³ But legislation is an imperfect art and CAFA cases are now descending upon the federal courts. So far the decisions under CAFA have concerned only the anticipated transitional questions of which cases fall under the Act's jurisdiction, generally based on when the case was filed or the complaint last amended.¹¹⁴ But soon enough federal courts will find themselves faced with an apparently meritorious claim on the substance of the claimed harm, with no clear direction from Congress on how to handle it, and with a doctrinal mess in terms of conflict of laws.

An imperfect solution is available, even without the resolution of the entire choice of law morass. Building on the jurisdictional basis of CAFA, it is possible to fashion a presumptive baseline rule for national market conduct that transcends the regulatory reach of any particular state. The underlying principle is extraordinarily simple: Any actor who engages in nationwide economic activity must be accountable to one single rule of readily discernible substantive law when challenged on the basis of its nationwide activity. In some sense, the intuition is the same as that underlying the change in personal jurisdiction law from *Pennoyer v. Neff* to *International Shoe*. Ultimately, *International Shoe* stands for the proposition that the fortuity of a corporation's presence or incorporation in a specific state should not insulate it from accountability for conduct that affects distant reaches of the country.¹¹⁵

A similar principle is found in Federal Rule of Civil Procedure 4(k)(2), which provides that federal courts may exercise general personal jurisdiction "over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state."¹¹⁶ This rule provides a default backstop for foreign entities that are national market actors in the United States, but whose contacts with any given state are sufficiently diffuse so as to defeat the principle that general jurisdiction must lie somewhere. Rule 4(k)(2) "broadens the geographical applica-

113. See generally Issacharoff & Sharkey, *supra* note 14 (discussing pressures toward federalization of national market claims under preemption and federal jurisdiction law).

114. CAFA applies to any action "commenced" on or after February 18, 2005. Pub. L. No. 109-2, § 9, 119 Stat. 4, 14 (2005) (to be codified in scattered sections of 28 U.S.C.). For an overview of the different approaches to determining the commencement date in relation to amended pleadings, see *Prime Care of Ne. Kan., LLC v. Humana Ins. Co.*, 447 F.3d 1284, 1286 (10th Cir. 2006) ("[C]ourts addressing post-CAFA pleading amendments have held that such amendments either (1) do not affect the pre-CAFA commencement date . . . ; (2) affect the commencement date only if they do not relate back; or (3) affect the commencement date if they do not relate back or if they add new defendants . . .").

115. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 313-21 (1945).

116. Fed. R. Civ. P. 4(k)(2).

tion of the minimum contacts doctrine beyond the boundaries of the forum state to include all contacts to the United States as a whole.”¹¹⁷ The Advisory Committee Notes explain that the purpose of Rule 4(k)(2) was to “correct[] a gap in the enforcement of federal law,” whereby defendants would be “shielded from the enforcement of federal law by the fortuity of a favorable limitation on the power of state courts.”¹¹⁸

The central role of Rule 4(k)(2) is to ensure appropriate accountability of market actors, regardless of the fortuity of geography. Judge Frank Easterbrook sets out the underlying rationale:

A defendant who wants to preclude use of Rule 4(k)(2) has only to name some other state in which the suit could proceed. Naming a more appropriate state would amount to a consent to personal jurisdiction there (personal jurisdiction, unlike federal subject-matter jurisdiction, is waivable). If, however, the defendant contends that he cannot be sued in the forum state and refuses to identify any other where suit is possible, then the federal court is entitled to use Rule 4(k)(2).¹¹⁹

A similar principle could be crafted to fashion a default rule in any class action challenging nationwide conduct. One approach would be to hold the defendant accountable under the substantive laws of its own home state for its conduct, regardless of where the harm manifested itself. There are difficulties with this approach. It could have the effect of inducing home corporations to lobby fiercely for laws that would shield them from liability in their home jurisdictions. And, even when applicable, it might not resolve all issues in multidefendant cases in which there could be multiple home laws that might apply.

At the same time, these countervailing tendencies are by no means certain. Michael McConnell has argued, for example, that the present system is producing the opposite effect—a host of pro-plaintiff laws that, given the undifferentiated nature of the national market, allow states with generous liability rules to impose costs that are ultimately borne by consumers in other states.¹²⁰ The extent of the pro-liability bias is certainly open to challenge,¹²¹ but undoubtedly there will be some impact from any choice of law regime on underlying liability rules.

117. *Exter Shipping Ltd. v. Kilakos*, 310 F. Supp. 2d 1301, 1313 n.4 (N.D. Ga. 2004) (citing *World Tanker Carriers Corp. v. M/V Ya Mawlaya*, 99 F.3d 717 (5th Cir. 1996)).

118. Fed. R. Civ. P. 4(k)(2) advisory committee’s note. As explained by Judge Frank Easterbrook, Rule 4(k)(2) “responds to the Supreme Court’s suggestion that the rules be extended to cover persons who do not reside in the United States, and have ample contacts with the nation as a whole, but whose contacts are so scattered among states that none of them would have jurisdiction.” *ISI Int’l, Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 548, 551 (7th Cir. 2001).

119. *ISI*, 256 F.3d at 552.

120. Michael W. McConnell, *A Choice-of-Law Approach to Products-Liability Reform*, in *New Directions in Liability Law*, 37 Proc. Acad. Pol. Sci. 90, 91–97 (1988) [hereinafter McConnell, Approach].

121. Bruce Hay, in particular, has painted a more complicated picture of the effects of choice of law rules on the substantive liability standards of the states. See generally

The issue for this Essay is how to craft a choice of law rule that conforms to the underlying national market conduct. The need for some nationwide standards pushes toward a federalization of the common law, a point that Catherine Sharkey and I have explored at greater length.¹²² But in the absence of that, courts must make do and determine principles by which to choose amongst the varying state laws in cases that now come to federal court precisely because of a congressional determination that the underlying economic conduct is national in scope. All of the possible choices have downsides. McConnell proposes a point of sale rule,¹²³ which Michael Gottesman has criticized on grounds of practicality.¹²⁴ Gottesman himself proposes a victim's domicile rule,¹²⁵ which McConnell argues will simply encourage ever-expanding liability.¹²⁶ There are sound theoretical reasons to suppose that any choice of law rule, including the one proposed here, will have unfortunate and perhaps unforeseen consequences. The question is which one best conforms to the underlying economic conduct and the reasonable expectations of affected parties, something that the status quo fails to provide.¹²⁷

Despite its potential shortfalls, the use of such a home state default rule ensures accountability without compromising the substantive rights of any party. Under this approach, an individual plaintiff seeking recovery in her home state would be free to avail herself of her home state's law, if her state's choice of law rules so ordained. And, since multijurisdictional personal jurisdiction for a class action requires notice and the ability of individual plaintiffs to opt out of a case,¹²⁸ any plaintiff could choose to sue under more suitable home state law by excluding herself from the class action. But the 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. Unlike the application of Kansas law to conduct

Bruce L. Hay, *Conflicts of Law and State Competition in the Product Liability System*, 80 *Geo. L.J.* 617 (1992) (arguing that bias in adjudication of choice of law issues decreases pro-plaintiff legislative bias with regard to product liability).

122. See generally Issacharoff & Sharkey, *supra* note 14.

123. McConnell, *Approach*, *supra* note 120, at 98.

124. See Gottesman, *supra* note 23, at 43.

125. *Id.* at 42.

126. McConnell, *Approach*, *supra* note 120, at 97.

127. See Gottesman, *supra* note 23, at 50 ("The benefits of a federal statute—a uniform national rule and a single authoritative interpreter of the rule—would mark a substantial improvement over the status quo under almost any set of rules that might be enacted . . ."); see also McConnell, *Approach*, *supra* note 120, at 97 ("[E]ither of these fixed rules—the plaintiff's state governs or the manufacturer's state governs—would be preferable to the current system . . .").

128. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) ("The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation Additionally, . . . due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class . . .").

unrelated to Kansas in *Shutts*, there is nothing apparently arbitrary or unfair in holding a party accountable to the laws of the state in which the party chooses to organize its primary economic activity.

At some level, the question of choice of law for national market conduct is a replay of the problems leading up to the Court's breakthrough decision in *International Shoe*. The problem there was how to reconcile traditional notions of territorial sovereignty with the economic reach of the modern corporation. So long as commerce was nationwide but jurisdiction restricted to the state of domicile, consumers were left with the unfathomable choice of having to track down a corporation to its headquarters if they wanted to seek relief for conduct transacted in the consumers' home state. The minimum contacts analysis of *International Shoe* was premised on the notion that a nationwide market requires a transactional conception of jurisdiction lest there be no prospect for meaningful legal oversight of what was becoming a seamless national market.¹²⁹

Some courts have fashioned a variant of this jurisdictional approach by holding a manufacturer accountable to the laws of the state of its principal place of business when challenged in a nationwide class action.¹³⁰ For the most part, however, these courts have adopted as their rationale the need to permit a class action to go forward, thereby invoking the bootstrapping charge that procedural law is determining what substantive law applies.¹³¹

What is being proposed here, however, is not a distinct choice of law rule for all class actions, one in which the substantive law to be applied is being driven by the selected procedural device. For example, single state class actions would proceed unaffected. Rather the object is to craft a sensible choice of law rule that corresponds to the identified national scope of the underlying conduct, the jurisdictional predicate for cases brought into federal court under CAFA.

While this approach would promote intracontroversy consistency, it is admittedly imperfect. There is a certain irony in seeking to harmonize

129. Nor is *International Shoe's* functional account of legal accountability a particular outlier. For example, any market actor in the United States, including foreign corporations, must be amenable to general personal jurisdiction in some defined jurisdiction in the United States so that an aggrieved party may file suit somewhere in the United States without jurisdictional uncertainty. Fed. R. Civ. P. 4(k). In a related vein, defendants are denied the right to remove actions to federal court if sued in their home venue, a recognition of the distinct accountability to the home forum. 28 U.S.C. § 1441(b) (2000).

130. See, e.g., *Int'l Union of Operating Eng'rs Local #68 Welfare Fund v. Merck & Co.*, 894 A.2d 1136, 1148–49 (N.J. Super. Ct. App. Div. 2006); *Ysbrand v. DaimlerChrysler Corp.*, 2003 OK 17, ¶¶ 15–16, 81 P.3d 618, 626. For a careful overview of the choice of law issues in such cases, see Elizabeth J. Cabraser, *The Manageable Nationwide Class: A Choice-of-Law Legacy of Phillips Petroleum v. Shutts*, 74 UMKC L. Rev. 543, 558–67 (2006).

131. Richard A. Nagareda, *Bootstrapping in Choice of Law After the Class Action Fairness Act*, 74 UMKC L. Rev. 661, 672–75 (2006).

national market standards around the laws of a single state.¹³² There is the risk that home state defendants will urge the passage of consumer unfriendly laws, turning every state into a variant of Delaware or South Dakota in terms of sheltering favored industries.¹³³ But at least this would allow consideration of the merits of legal claims under an established regime of substantive law. That is far preferable to procedural jousting over makeweight law.

At bottom, this Essay is addressing a deep-seated conflict between state level regulation and the need for unitary treatment of the national market. As Earl Dudley and George Rutherglen have recently noted, compatibility with state law, while “legitimate and deserving of consideration,” is not necessarily the driving aim of the federal court system.¹³⁴ *Erie* assumed a world in which controversies arose within a state and faithful application of a state’s laws could reasonably settle the expectations of all concerned persons. But in a society in which people, goods, and services cross state lines with abandon, the premise of *Erie* seems a fleeting memory. Even the dockets of the federal courts reflect the increasing interstate scope of economic activity, “as federal courts now handle over seven times as many diversity cases, and are staffed by over four times as many Article III judges, as when *Erie* was decided.”¹³⁵ As federal power expands, the *Erie* doctrine feels besieged and *Klaxon* retains little conceptual force. As compared to the “efficient, fair, and uniform operation of the federal courts,”¹³⁶ trying to pretend that state-centric rules still dominate most economic activity appears an odd indulgence. At least with regard to cases brought into federal court under CAFA, Congress has dispensed with that indulgence altogether.

132. See Kramer, *supra* note 32, at 578 (“No one seems to notice the irony of advocating a choice-of-law rule that selects the law of a single state on the ground that complex litigation is national in character.”).

133. See Samuel Issacharoff & Erin F. Delaney, Credit Card Accountability, 73 U. Chi. L. Rev. 157, 160–61 (2006) (discussing political pressures in South Dakota and Delaware to provide laws favorable to credit card issuers incorporated in those states).

134. Earl C. Dudley, Jr. & George Rutherglen, Deforming the Federal Rules: An Essay on What’s Wrong with the Recent *Erie* Decisions, 92 Va. L. Rev. 707, 747–48 (2006).

135. *Id.* at 748.

136. *Id.*