Erie and Choice of Law After the Class Action Fairness Act

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I. INTRODUCTION

Because the Class Action Fairness Act of 2005[1] (CAFA) simply expands the jurisdiction of the federal courts,[2] the common wisdom is that CAFA should have no effect on the choice-of-law rules applied in

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

2. *See id.* §§ 4-5 (to be codified as amended at 28 U.S.C. §§ 1332 & 1453). CAFA also includes other provisions which are not directly relevant to the topic of this Article. *See, e.g., id.* § 3 (to be codified as amended at 28 U.S.C. §§ 1711-1715 and known collectively as the Consumer Class Action Bill of Rights).

federal court.[3] But the common wisdom is already under attack,[4] in part because CAFA's legislative history is replete with evidence of concern over aggressive state choice-of-law practices that can result in the application of a single state's law in a multistate or nationwide class suit.[5] In this Article, I explore and ultimately endorse the common wisdom that federal courts remain rigidly bound by state choice-of-law rules in diversity class actions.

My argument is in two parts. Part II examines why Congress believed that merely expanding the subject matter jurisdiction of the federal courts would address perceived state court abuses with respect to choice of law. Congress relied in part on the fact that lower federal courts—in the guise of applying Rule 23 of the *Federal Rules of Civil Procedure*[6]—increasingly have ignored *one* important state choice-of-law rule which may lead to application of the law of a single state—the presumption in favor of forum law.[7] But the claim that Rule 23 permits federal courts to ignore state law presumptions in favor of forum law is paper-thin and may not survive review by the United States Supreme Court.[8]

In any event, state courts have applied the law of a single state to claims in a multistate or nationwide class suit without relying on the presumption in favor of forum law.[9] And Rule 23 has not been thought to relieve federal courts of the obligation to follow state choice-of-law rules that would lead to a similar result in federal court. Congress blithely assumed that any state court which applies the law of a single state in a multistate or nationwide class suit is in clear violation of the Constitution.[10] But while federal courts arguably are more attentive to

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3. *See, e.g.*, RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 59 (4th ed. Supp. 2005) (stating that because CAFA does not include a choice-of-law provision, a federal court exercising jurisdiction under the Act is required to apply the choice-of-law rules of the state in which it sits); C. Douglas Floyd, *The Limits of Minimal Diversity*, 55 HASTINGS L.J. 613, 657 (2004) (arguing that under CAFA a federal court will be required to apply choice-of-law rules of the state in which it sits, no matter how "ill-advised" the rules may be).

4. *See* Richard A. Nagareda, *Bootstrapping in Choice of Law After the Class Action Fairness Act*, 74 UMKC L. REV. (forthcoming 2006), *available at* http://papers.ssm.com/sol3/papers.cfm?abstract_id=869001 (arguing that the passage of CAFA warrants modification of the rule that federal courts must apply the choice-of-law rules of the state in which they sit).

5. *See infra* notes 18-22, 37, 132-133 and accompanying text.

6. FED. R. CIV. P. 23 (governing the certification and conduct of class suits).

7. *See infra* Part II.B.

8. *See infra* notes 124-130 and accompanying text.

9. *See infra* Part II.A.1.

10. *See infra* note 23 and accompanying text.

federal rights than state courts, there is little support in the Supreme Court's choice-of-law jurisprudence for the proposition that application of a single state's law in a multistate or nationwide class suit is inherently improper.[11]

For all of these reasons, Congress likely was mistaken to think that expanding federal jurisdiction would resolve the choice-of-law problems it perceived. Part III accordingly considers whether federal courts may fill the gap and assist Congress in achieving its choice-of-law objective through the use of federal common law. CAFA found that state courts have used abusive choice-of-law techniques.[12] So I examine whether federal courts may rely on this finding to create modest exceptions to the longstanding rule that federal courts must apply the choice-of-law rules of the state in which they sit.

I conclude that a legislative finding is a legitimate basis for reexamining the choice-of-law rules by which federal courts effectuate their obligation to apply the "laws of the several states" under the Rules of Decision Act (RDA).[13] Federal courts nonetheless lack authority to effectuate the RDA's mandate independently of state choice-of-law rules. I recognize that a substantial body of scholarly opinion supports the view that Article III of the Constitution—in conjunction with the Necessary and Proper Clause[14]—grants the United States authority to develop choice-of-law rules independently from state law for use in federal courts.[15] But although the Full Faith and Credit Clause clearly grants Congress plenary power to develop or authorize the development of independent choice-of-law rules binding in *both* state and federal courts,[16] federal power under Article III is far more limited. Because choice-of-law rules define substantive rights, Article III cannot properly be read to authorize the use of independent choice-of-law rules, but instead requires application of the whole law of a *state*—that is, the choice-of-law rules and internal law of a state—selected without regard to its content.[17] Thus, if Congress wishes to displace state choice-of-law rules in diversity cases, it must enact—or authorize federal courts to develop—choice-of-law rules under the Full Faith and Credit Clause.

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11. *See infra* Part II.A.1.
12. *See infra* notes 131-135 and accompanying text.
13. *See* 28 U.S.C. § 1652 (2000).
14. U.S. CONST. art. I, § 8.
15. *See infra* note 178 and accompanying text.
16. *See infra* note 136 and accompanying text.
17. *See infra* Part III.B.

II. CHOICE OF LAW AND CAFA'S JURISDICTIONAL PROVISIONS

The legislative history of CAFA[18] purports to document a number of state court abuses with respect to class suits, including state decisions applying the law of *one* state to claims in nationwide class suits.[19] A central argument running through the House and Senate Reports is that these cases do not adequately take into account the interests of other states with a connection to the controversy.[20] As the 2003 House Report puts it: "The sentiment reflected in these cases flies in the face of basic Federalism principles by embracing the view that one State court can trump the contrary policy choices made by other States."[21] By contrast, the 2003 House Report praises the approach of the federal courts on choice-of-law issues which it characterizes as follows:

> Federal courts have consistently concluded that the laws of all States where purported class members were defrauded, injured, or purchased the challenged product or service must come into play. . . . And in those very few instances in which a Federal district court has toyed with the idea of engaging in "false federalism" (*i.e.*, applying a single State's law to all asserted claims), that notion has been reversed on appeal almost immediately.[22]

The House Report demonstrates why Congress believed that the choice-of-law abuses it perceived in state courts could be addressed by widening federal jurisdiction. But as I explain below, that conclusion is open to very serious question.

A. Constitutional Limits on State Choice of Law

The drafters of CAFA were persuaded that state cases applying the law of a single state in multistate and nationwide class suits were

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18. CAFA was the culmination of a long legislative process. *See* S. REP. NO. 109-14, at 1-2 (2005) (tracing the Senate history of CAFA beginning in October 1997). In describing congressional concerns and objectives, this Article will cite to the Senate Report on the Class Action Fairness Act of 2005 and the House and Senate Reports on the Class Action Fairness Act of 2003. The House did not issue a report on the Class Action Fairness Act of 2005, and the Senate did not issue its report until after enactment of the statute. All the reports express the same concerns about the choice-of-law practices of state courts.

19. *See* S. REP. NO. 109-14, at 23-27 (reporting on the Class Action Fairness Act of 2005); S. REP. NO. 108-123, at 23-26 (2003) (reporting on the Class Action Fairness Act of 2003); H.R. REP. NO. 108-144, at 13-15 (2003) (same).

20. *See* S. REP. NO. 109-14, at 23-27; S. REP. NO. 108-123, at 23-26; H.R. REP. NO. 108-144, at 13-15.

21. H.R. REP. NO. 108-144, at 14; *see also* S. REP. NO. 109-14, at 26.

22. H.R. REP. NO. 108-144, at 15; *see also* S. REP. NO. 109-14, at 25-26.

inconsistent with constitutional limitations on state choice of law.[23] But a strong argument can be made that the Constitution permits use of the law of a single state in many multistate and nationwide class suits.[24]

The Supreme Court made clear in *Phillips Petroleum Co. v. Shutts*[25] that there is no class action exception to otherwise applicable constitutional requirements with respect to choice of law.[26] If forum law is in conflict with the law of a relevant state, the forum may apply its own law only if the forum has a significant contact or aggregation of contacts creating state interests such that application of forum law would not be arbitrary or fundamentally unfair.[27]

The Court's insistence that the limits imposed on application of forum law apply equally to class suits and ordinary litigation makes

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23. *See, e.g.*, S. REP. NO. 108-123, at 51. The report stated:

> [I]t should be noted that the lead federal court—the U.S. Supreme Court—has repeatedly warned that courts should not attempt to apply the laws of one state to behaviors that occurred in other jurisdictions . . . .
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> . . . .
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> Most recently . . . the U.S. Supreme Court again warned state courts on this issue, striking down one state's effort to apply its laws to conduct that occurred elsewhere . . . .

Id. at 61 (citations omitted).

24. In so arguing, I assume that the Court will not significantly tighten existing limits on state choice of law. For an argument that the Constitution should be read to impose far more stringent limits on state law than does current doctrine, see Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992).

25. 472 U.S. 797 (1985).

26. *Id.* at 823 ("[W]e reaffirm our observation in *Allstate* that in many situations a state court may be free to apply one of several choices of law. But the constitutional limitations laid down in cases such as *Allstate* and *Home Ins. Co. v. Dick* must be respected even in a nationwide class action." (citing Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981); Home Ins. Co. v. Dick, 281 U.S. 397 (1930))); *see also id.* at 820-22 (rejecting the argument that the forum state has greater latitude to apply its own law in a class suit as an impermissible form of "bootstrap[ping]"). In a thought-provoking article, Richard Nagareda relies on this aspect of *Shutts* to raise the possibility that state courts may be required by the Constitution to treat class suits no differently than ordinary litigation with respect to choice of law. *See* Nagareda, *supra* note 4 ("[D]oes the antibootstrapping stricture have some manner of independent status, such that it warrants the invalidation of the choice made, even when the law selected is that of [a] state with the requisite contacts?"). But as long as the law chosen with respect to *each* claim—whether or not asserted in a class suit—would be constitutionally acceptable, it is hard to see a basis in the Constitution for imposing further limits on a state's choice of law.

27. *Shutts*, 472 U.S. at 821-22 (citing *Allstate*, 449 U.S. at 312-13). The Court has held that the "significant contacts" standard does not apply to statutes of limitation. *See* Sun Oil Co. v. Wortman, 486 U.S. 717 (1988). The Court in *Sun Oil* further suggested that a forum-state may apply its own law to any matter that was deemed procedural for conflict-of-laws purposes at the time the Constitution was adopted. *Id.* at 727-29.

certification of nationwide class suits substantially more difficult. When multiple bodies of substantive law apply to the claims of putative class members, it may be impossible to satisfy the predominance and superiority requirements of relevant class action rules.[28] But the Court has recognized that it may be appropriate to apply forum law even in a nationwide class suit.[29]

1. The Presumption in Favor of Forum Law

Shutts expressly authorizes application of forum law when there is a "false conflict"[30] between the law of the forum and otherwise applicable law.[31] The basis for authorizing application of forum law in such a case is clear. If the law of Texas and Oklahoma are the same on a point of law, it does not matter whether Texas or Oklahoma law applies. Thus, a choice-of-law analysis would be pointless.

This common-sense principle initially appears to be of little significance. But the principle has extraordinary significance if the party seeking application of "foreign law"—as opposed to forum law—has an obligation to prove the existence of a clear conflict. In *Sun Oil Co. v. Wortman*, the Court reaffirmed that the burden of proving the existence of a clear conflict may be placed on the proponent of foreign law.[32] As the Court explained: "[I]t is not enough that a state court misconstrue the law of another State. Rather, our cases make plain that the misconstruction must contradict law of the other State that is clearly established and that has been brought to the court's attention."[33] *Sun Oil* essentially authorizes a forum state to apply its own law when the law of another State is not clearly

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28. *See, e.g.*, Stephen R. Bough & Andrea G. Bough, *Conflict of Laws and Multi-State Class Actions: How Variations in State Law Affect the Predominance Requirement of Rule 23(b)(3)*, 68 UMKC L. REV. 1, 10 (1999) ("[V]ariation[] in state law is one of the largest barriers to [satisfying] the predominance requirement." (citation omitted)). *But see* Patrick Woolley, *Choice of Law and the Protection of Class Members in Class Suits Certified Under Federal Rule of Civil Procedure 23(b)(3)*, 2004 MICH. ST. L. REV. 799, 810-11 n.43 (arguing that the question is better analyzed under the superiority requirement); *infra* note 105 and accompanying text (discussing overlap between predominance and superiority requirements).

29. I have argued elsewhere that efforts by class counsel to facilitate certification of a class suit by urging application of one state's law may be evidence of inadequate representation in some cases. *See* Woolley, *supra* note 28, at 818-36 (discussing the relationship between the choice of law and adequate representation).

30. *See Shutts*, 472 U.S. at 818.

31. *See id.* at 816 ("We must first determine whether Kansas law conflicts in any material way with any other law which could apply. There can be no injury in applying Kansas law if it is not in conflict with that of any other jurisdiction connected to this suit.").

32. 486 U.S. 717, 731-32 n.4 (1988).

33. *Id.* at 730-31.

inconsistent with the law of the forum, even though the forum would not otherwise be authorized to apply its own law.[34]

The latitude afforded to states under *Sun Oil* makes it possible for an aggressive court to apply its own law to novel claims in a nationwide class suit and thereby make certification substantially easier. In *Sun Oil*, for example, Chief Justice Rehnquist and Justice O'Connor complained that it was unlikely that the relevant states would all apply the same interest rate to unpaid royalty payments.[35] But it was enough for the majority that the other states had not clearly decided the issue.[36]

The Senate Report on the Class Action Fairness Act of 2005 ignores *Sun Oil* and instead criticizes the decision of a Minnesota trial court that used the same technique that the Kansas court applied and the Supreme Court approved in *Sun Oil*:

> In certifying a class . . . the court adopted an understanding of Minnesota's version of the Uniform Commercial Code that was contrary to the interpretation of every other state to have considered the issue under their own versions of the UCC. And by certifying the class, the court decided that its unprecedented interpretation of the UCC would bind the remaining 43 states that had yet to decide the question . . . .[37]

Despite the Committee's outrage, the Minnesota court did not violate the Constitution by employing a presumption in favor of forum law in the absence of "clearly established" law to the contrary in states that had not decided the issue. Indeed, the court's decision to exclude the six states that had decided the question differently from Minnesota suggests that the trial court was well aware of the constitutional limits on the presumption in favor of forum law.

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34. *See id.*

35. *See id.* at 745-49 (O'Connor, J., dissenting) (criticizing Kansas's interpretations of other states' laws). The dissent summarized its objections as follows:

> Faced with the constitutional obligation to apply the substantive law of another State, a court that does not like that law apparently need take only two steps in order to avoid applying it. First, invent a legal theory so novel or strange that the other State has never had an opportunity to reject it; then, on the basis of nothing but unsupported speculation, "predict" that the other State would adopt that theory if it had the chance.

Id. at 749 (O'Connor, J., dissenting).

36. *Id.* at 733 ("[F]or Oklahoma as for Texas, petitioner's contention founders on the fact that it pointed to no decision indicating that an agreement to pay more than 6% interest would not be implied in circumstances such as those of the present case.").

37. S. REP. NO. 109-14, at 26 (2005); *see also* S. REP. NO. 108-123, at 25-26 (2003).

2. Choosing the Law of a Single State to Resolve True Conflicts

If a true conflict exists, *Shutts* holds that the law of a state may be applied to a claim asserted in a class suit only if the state has a significant contact or aggregation of contacts with the claim creating interests such that application of that state's law would not be arbitrary or fundamentally unfair.[38] While that standard will often mean that the law of a single state cannot be applied in a multistate or nationwide class suit, the law of a single state can be applied in a class suit if that state has a significant contact or aggregation of contacts with *each* claim in the suit.

The requirement that *each* claim have an appropriate connection with the state whose laws are to be applied has sometimes been misunderstood. In a recent decision, for example, the United States Court of Appeals for the Eighth Circuit ordered decertification of a class certified after the district court had concluded that a Minnesota consumer statute would apply to all the claims.[39] The Eighth Circuit claimed that it could not determine "whether the district court's choice of Minnesota law was arbitrary or unfair, because the court did not analyze the contacts between Minnesota and each plaintiff class member's claims."[40] But there was no need to undertake an individualized analysis of the contacts between Minnesota and each class member's claim. The district court had concluded that application of Minnesota law would be constitutional because the defendant company was headquartered in Minnesota.[41] If the district court was correct about the constitutional significance of the company's headquarters, each class claim clearly had a sufficient connection with Minnesota. Yet the Eighth Circuit chose not to decide

38. 472 U.S. 797, 821-22 (1985). In *Shutts*, the test was framed specifically in terms of "forum law" because states had tested the constitutional limits of choice of law only with respect to applications of forum law. But there is no reason to believe that the "significant contacts" standard is not equally applicable whether a forum seeks to apply its own law or the law of another state. *See* EUGENE F. SCOLES ET AL., CONFLICT OF LAWS § 3.48, at 201 (3d ed. 2000) ("[A] state may not apply the law of *another* state when the latter has no 'significant contact . . . creating a state interest.'"). In recent years, state courts aggressively have applied the law of a single other state to claims in multistate and nationwide class suits. *See, e.g.*, Ysbrand v. DaimlerChrysler Corp., 81 P.3d 618 (Okla. 2003); Peterson v. BASF Corp., 657 N.W.2d 853 (Minn. Ct. App. 2003).

39. *In re* St. Jude Med., Inc. Silzone Heart Valve Prods. Liab. Litig., 425 F.3d 1116, 1120-23 (8th Cir. 2005).

40. *Id.* at 1120.

41. *In re* St. Jude Med., Inc. Silzone Heart Valves Prods. Liab. Litig., No. MDL 01-1396 JRTFLN, 2004 WL 45504 (D. Minn. Jan. 5, 2004).

the dispositive issue, simply stating that it "suspect[ed] [that] Minnesota lacks sufficient contacts with all the parties' claims."[42]

Several state courts have reached a strikingly different conclusion. In *Ysbrand v. DaimlerChrysler Corp.*, for example, the Oklahoma Supreme Court applied Michigan law to breach of warranty claims arising nationwide against DaimlerChrysler.[43] DaimlerChrysler was headquartered in Michigan, and the Court concluded that "Michigan's interest in having its regulatory scheme applied to the conduct of a Michigan manufacturer" should be given the greatest weight.[44] Similarly, in *Peterson v. BASF Corp.*, the Minnesota Court of Appeals applied the New Jersey Consumer Fraud Act to all the claims against a New Jersey manufacturer in a nationwide class suit.[45]

There seems to be little doubt that the courts' desire to allow the class suit to proceed affected the choice-of-law analysis in both cases.[46] In *Ysbrand*, for example, the court concluded that Michigan's interest outweighed the interests of other involved states by looking at the suit as a whole.[47] The court pointedly noted that Michigan was "the only state where conduct relevant to all class members occurred."[48] But while the mode of analysis in *Ysbrand* and *Peterson* is controversial,[49]

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42. *In re St. Jude Med., Inc.*, 425 F.3d at 1120.

43. 81 P.3d at 625-30.

44. *Id.* at 626.

45. 657 N.W.2d 853, 873 (Minn. Ct. App. 2003). In a recent case, the New Jersey Appellate Division similarly approved application of the New Jersey Consumer Fraud Act to fraud claims against a New Jersey corporation in a nationwide class suit. Int'l Union of Operating Eng'rs Local #68 Welfare Fund v. Merck & Co., 894 A.2d 1136 (N.J. Super. Ct. App. Div. 2006). The Appellate Division noted that Merck's contacts with New Jersey in connection with the fraud claims at issue were "both extensive and weighty," including the fact that Merck had its corporate home in the state and that the "claimed misrepresentations and omissions in the marketing and advertising of the drug [at issue] all emanated largely from New Jersey." *Id.* at 1148-49.

46. For cogent discussions of this aspect of *Ysbrand*, see Nagareda, *supra* note 4; Steven S. Gensler, *Civil Procedure: Class Certification and the Predominance Requirement Under Oklahoma Section 2023(B)(3)*, 56 OKLA. L. REV. 289, 299-304 (2003).

47. 81 P.3d at 625-26 ("[T]he relative interest of each buyer's home state in applying its version of the UCC is more or less equal. By contrast, Michigan's interest in having its regulatory scheme applied to the conduct of a Michigan manufacturer is most significant.").

48. *Id.* at 626.

49. *Compare* Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 552-55 (1996) (arguing that courts in both consolidated and class actions have improperly manipulated choice-of-law rules for the purpose of applying the law of one state), *with* WEINTRAUB, *supra* note 3, at 57 (noting with approval that "courts 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"). The American Law Institute has 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

what matters from a constitutional perspective is whether the state whose law was chosen in each case had a constitutionally sufficient connection with *each* claim in the suit so as to permit selection of its law.[50]

While the Supreme Court has not expressly decided whether the state in which a defendant corporation is headquartered has a constitutionally sufficient interest in applying its law, there is little in its modern choice-of-law jurisprudence to suggest that the home state of the manufacturer does not have a sufficient connection so as to justify application of its law to a product liability claim.[51] *Shutts* provides no support for the view that the law selected in *Ysbrand* and *Peterson* is constitutionally infirm.[52] The Court in *Shutts* essentially reaffirmed its decision in *Allstate Insurance Co. v. Hague*,[53] a case which places "only the most minimal limitations on the power of state courts to make choice-of-law decisions."[54] *Shutts* simply makes

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parties involved in the litigation." AM. LAW INST., COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS 316 (1994). For trenchant criticism of the ALI's approach, see, for example, Kramer, *supra*, at 578-79. Professor Kramer writes:

> No one seems to notice the irony of advocating a choice-of-law rule that selects the law of a single state on the ground that complex litigation is national in character. I would have thought that the more "national" the case, the *less* appropriate it is for any single state's standard to govern. . . . [T]he appropriate solution surely cannot be to apply the law of one state—a law that may be quirky or obsolete and that, in any event, reflects the political judgment of only a fraction of the nation.

Id. (citation omitted).

50. *See supra* notes 25-29 and accompanying text; *see also supra* note 38 and accompanying text.

51. For a different view, see Allison M. Gruenwald, Note, *Rethinking Place of Business as Choice of Law in Class Action Lawsuits*, 58 VAND. L. REV. 1925 (2005).

52. *Cf.* S. REP. NO. 109-14, at 62 (2005) (citing *Shutts* for the proposition that the Supreme Court has "warned that courts should not attempt to apply the laws of one state to behaviors that occurred in other jurisdictions"); S. REP. NO. 108-123, at 60 (2003); *In re* St. Jude Med. Inc., 425 F.3d 1116, 1120 (8th Cir. 2005) ("[W]e suspect Minnesota lacks sufficient contacts with all the parties' claims.").

53. 449 U.S. 302 (1981). The Court wrote in *Shutts*: "[W]e reaffirm our observation in *Allstate* that in many situations a state court may be free to apply one of several choices of law. But the constitutional limitations laid down in cases such as *Allstate* . . . must be respected even in a nationwide class action." *Shutts*, 472 U.S. at 823.

54. Robert A. Sedler, *Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism*, 10 HOFSTRA L. REV. 59, 74 (1981) ("[I]t seems clear that the effect of the Court's holding in *Hague*, and of its doctrinal formulation of constitutional limitations on choice of law, is to place only the most minimal limitations on the power of state courts to make choice-of-law decisions."). *Allstate* held that Minnesota could apply its own law in an automobile-insurance dispute involving an accident in Wisconsin between two Wisconsin drivers in which the plaintiff's husband, a Wisconsin resident, was killed. Justice Brennan, writing for the plurality, stated that Minnesota had three contacts with the claim: (1) the state had become the home of the plaintiff after the accident, (2) the decedent had been employed in the state, and (3) Allstate was doing business in the state. *Id.* at 313-18.

clear—as *Allstate* did not—that simply "doing business" in the forum does not create a contact significant enough to justify application of forum law.[55] By contrast, the state in which a corporate defendant is headquartered has a far stronger connection with a claim against the corporation than Minnesota had to the claim in *Allstate*.

That said, language in a recent punitive damages decision arguably provides some support for the view that it would be unconstitutional to apply the law of the defendant manufacturer's home state to all the claims in a nationwide class suit. Notably, in *State Farm Mutual Automobile Insurance Co. v. Campbell*, the Court wrote:

> A State cannot punish a defendant for conduct that may have been lawful where it occurred. Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction. Any proper adjudication of conduct that occurred outside Utah to other persons would require their inclusion, and, to those parties, the Utah courts, in the usual case, would need to apply the laws of their relevant jurisdiction. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821-22. . . .[56]

The Court's language in *State Farm* is susceptible to a broad interpretation that would significantly tighten limits on state choice of law. The House and Senate Reports—citing many of the cases on which *State Farm* relied—assume that such a broad interpretation is appropriate,[57] as have a few commentators.[58] But it seems unlikely that *State Farm* is the precursor of a major shift in the Court's approach toward constitutional limits on choice of law.

State Farm decided that out-of-state conduct could not be considered by a Utah jury in awarding punitive damages to a Utah resident against a nonresident insurance company.[59] In so holding, the Court relied on two arguments that are relevant here. First, it reasoned that "[a] State cannot punish a defendant for conduct that may have

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The plurality concluded that the three contacts—at least in combination—authorized Minnesota to apply its own law to the claim, a conclusion that Justice Stevens supported on different grounds. *Id.* at 320, 331-32 (Stevens, J., concurring).

55. *Shutts*, 472 U.S. at 819, 822 (holding that Kansas lacks an "'interest' in claims unrelated to that State" even though Phillips Petroleum Co. "owns property and conducts substantial business in the State").

56. 538 U.S. 408, 421-22 (2003).

57. S. REP. NO. 109-14, at 6, 21-27; *see also* S. REP. NO. 108-123, at 7, 20-22 (2003).

58. *See, e.g.*, Gruenwald, *supra* note 51, at 1959-60; Mark Moller, *The Rule of Law Problem: Unconstitutional Class Actions and Options for Reform*, 28 HARV. J.L. & PUB. POL'Y 855, 859, 863-64 (2005).

59. *State Farm*, 538 U.S. at 421.

been lawful where it occurred."[60] But even assuming that this principle applies when a defendant is not being "punish[ed],"[61] it would seem to have little relevance in cases like *Ysbrand* and *Peterson*. In those cases, conduct relevant to each claim occurred in the state whose law was applied.[62] By contrast, *State Farm*'s conduct in Utah presumably had no effect on policyholders in other states.

Second, the Court suggested that Utah could adjudicate claims of out-of-state misconduct only if the persons affected by that alleged misconduct were joined and a proper choice-of-law analysis was conducted.[63] Relying on *Shutts*, the Court opined that as to out-of-state persons joined for such a purpose "the Utah courts, *in the usual case*, would need to apply the laws of their relevant jurisdiction."[64] The remark is ambiguous. But *State Farm* involved an attempt to penalize a corporation doing business in Utah for nationwide conduct, and *Shutts* had previously established that simply doing business in a state is not a sufficient basis for applying the law of the state to claims arising nationwide.[65] Putting aside the Court's imprecise language,

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60. *Id.*

61. *Id.* If *State Farm* is read as imposing especially restrictive limits on choice of law with respect to punitive (as opposed to compensatory) damages, it would not be the first indication that the Constitution requires especially restrictive choice-of-law rules in some areas. It has been suggested, for example, that the Constitution requires that the internal affairs of a corporation be governed by the law of the state of incorporation. SCOLES ET AL., *supra* note 38, § 23.2, at 1105 ("The internal affairs rule—application of the law of the state of incorporation to the corporation's internal affairs—has been virtually elevated to one of constitutional mandate by the U.S. Supreme Court in *CTS Corp. v. Dynamics Corp. of America*, [481 U.S. 69 (1987)] . . . ."); Richard M. Buxbaum, *The Threatened Constitutionalization of the Internal Affairs Doctrine in Corporation Law*, 75 CAL. L. REV. 29, 34-35 (1987) (arguing that "the *CTS* Court comes dangerously close to embedding . . . the 'state of incorporation' version of the internal affairs doctrine in the Constitution" (punctuation modified)); RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 9.3A, at 631-32 (4th ed. 2001) (stating that "there may be rare instances in which the need for a nationally uniform result is so compelling that the Full Faith and Credit Clause should require application of a particular state's law to an issue not yet adjudicated," and suggesting that one example "might be the determination of issues concerning the internal affairs of a corporation by the law of the state of incorporation"); *see also* McDermott Inc. v. Lewis, 531 A.2d 206, 216 (Del. 1987) ("[A]pplication of the internal affairs doctrine is not merely a principle of conflicts law. It is also one of serious constitutional proportions—under due process, the commerce clause and the full faith and credit clause . . . .").

62. *See, e.g.*, Ysbrand v. DaimlerChrysler Corp., 81 P.3d 618, 626 (Okla. 2003) ("Michigan is the only state where conduct relevant to all class members occurred."); *cf.* WEINTRAUB, *supra* note 3, 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.").

63. *State Farm*, 408 U.S. at 421.

64. *Id.* at 421-22 (citing *Shutts*, 472 U.S. at 821-22 (emphasis added)).

65. *See supra* note 55 and accompanying text.

there is no reason to think that it meant anything other than Utah could not apply its own law in such a case; it seems highly unlikely that the Court would announce a major shift in its choice-of-law jurisprudence in a few words of dicta in an opinion focused on other matters.

In short, there was no basis for congressional confidence that application of the law of a single state in multistate or nationwide class suits invariably violates the Constitution. States have authority to adopt choice-of-law rules that facilitate the application of the law of a single state in multistate and nationwide class suits. In the Parts that follow, I turn to the consequences of that authority for federal class action practice.

B. The Erie *Policy*

I do not argue that aggressive application of the presumption in favor of forum law or the use of other techniques—as in *Ysbrand* and *Peterson*—to select the law of only one state in nationwide class suits is wise.[66] But to the extent such techniques are constitutional,[67] federal courts cannot ignore them without running afoul of *Klaxon Co. v. Stentor Electric Manufacturing Co.*[68] *Klaxon* requires a federal court to apply the choice-of-law rules of the state in which it sits,[69] a holding premised in substantial part on the *Erie* policy.[70] As the Court explained:

> The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise,

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66. *See* Woolley, *supra* note 28, at 801 n.5.

67. Federal courts, of course, must ignore state choice-of-law rules that would lead to an unconstitutional result. *See* 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4506, at 107 (2d ed. 1996) (collecting authority) ("One rare exception to [the] frequently mechanical application of Klaxon . . . is when the invocation of the state choice-of-law rule is constitutionally prohibited under the Full Faith and Credit Clause or the Due Process Clause of the Constitution."); SCOLES ET AL., *supra* note 38, § 3.48, at 203 ("As a result of the intrastate parallelism required by *Klaxon*, the choice-of-law process in the federal courts thus raises the same questions as to constitutional limitations as does choice of law in state courts.").

68. 313 U.S. 487, 487 (1941).

69. *Id.* at 496.

70. I use the term "*Erie* policy" narrowly to refer to the nonconstitutional concern for litigant equality which has its origin in *Erie*'s discussion of the social and political defects of the *Swift v. Tyson* rule, 41 U.S. (16 Pet.) 1 (1842), and which the modified outcome determination test of *Hanna v. Plumer*, 380 U.S. 460 (1965), is designed to implement. *See* Patrick Woolley, *The Sources of Federal Preclusion Law After* Semtek, 72 U. CIN. L. REV. 527, 543-47 (2003). *Klaxon* also holds that it would be unconstitutional to treat choice-of-law rules as "general common law." 313 U.S. at 496. For further discussion of the constitutional aspect of *Klaxon*, see *infra* notes 170-171 and accompanying text.

> the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side. Any other ruling would do violence to the principle of uniformity within a state, upon which the *Tompkins* decision is based.[71]

Modern choice-of-law analysis is often indeterminate.[72] But "[i]n divining and applying the law of the forum state . . . each federal court . . . must apply the substantive law that it conscientiously believes would have been applied in the state court system."[73] Federal courts nonetheless increasingly have disdained one state choice-of-law technique that would permit selection of the law of a single state in a multistate or nationwide class suit—reliance on state law presumptions in favor of forum law.

Perhaps the best known example is Judge Richard Posner's decision in *In re Rhone-Poulenc Rorer Inc.*[74]—a decision favorably cited in the legislative history of CAFA.[75] In that case, the United States Court of Appeals for the Seventh Circuit improperly assumed

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71. *Klaxon*, 313 U.S. at 496 (citations omitted). Courts have recognized that the *Erie* policy is not absolute and can be outweighed by countervailing considerations. The Supreme Court, for example, has twice found that federal policies allocating decision making authority in federal court among judges and juries outweigh the *Erie* policy. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 428-32 (1996); Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 536-38 (1958). The Court similarly has suggested in dicta that the federal interest in the integrity of federal judicial processes may outweigh the *Erie* policy. *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 498 (2001). And I have argued that the federal interest in the proper allocation of limited federal judicial resources outweighs the *Erie* policy, an admittedly controversial position. Woolley, *supra* note 70, at 568-72. None of these interests appears relevant in this context, however. A refusal to apply state choice-of-law rules that would lead to the choice of a single state's law in a multistate or nationwide class suit can best be defended on the ground that such rules are insufficiently deferential to the interests of other states. But the *Erie* policy would be meaningless if federal courts could ignore the forum state's law whenever they disagree with choices made by state law. Richard Nagareda, in a forthcoming article, argues at length that the congressional concern over choice of law expressed in CAFA's legislative history is a "countervailing consideration," *Byrd*, 356 U.S. at 537, that warrants modification of *Klaxon*. *See* Nagareda, *supra* note 4. And I similarly argue below that CAFA provides a basis for considering whether it would be appropriate to relax *Klaxon*'s dictate in the class context. *See infra* Part III.A. For an extensive argument that countervailing considerations should trump *Klaxon* in some other contexts, see WEINTRAUB, *supra* note 61, §§ 10.5D-10.8, at 677-91.

72. *See, e.g.*, Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 974 (1994) ("[J]udicial affinity for the Second Restatement may reflect nothing more than the open-endedness of the Second Restatement's formulations; a court can reach virtually any result in any choice of law case and find some support for the result in the Second Restatement.").

73. 19 WRIGHT ET AL., *supra* note 67, § 4507, at 126-27 (noting that a federal court "functions as a proxy for the entire state court system").

74. 51 F.3d 1293 (7th Cir. 1995).

75. S. REP. NO. 109-14, at 21 (2005); *see also* H.R. REP. NO. 108-144, at 15 (2003); S. REP. NO. 108-123, at 19 (2003).

that application of Illinois law to the claims of class members in a nationwide class suit would be inconsistent with *Erie*.[76] But analysis of the case suggests the Seventh Circuit misstated the requirements of *Erie*.

Hemophiliacs infected with HIV brought state and federal suits, including *Wadleigh v. Rhone-Poulenc Rorer, Inc.*,[77] against manufacturers of blood products contaminated with HIV. *Wadleigh* was filed in the Northern District of Illinois and assigned to Judge Grady,[78] and other federal suits were transferred there for pretrial proceedings before Judge Grady pursuant to 28 U.S.C. § 1407.[79] The district judge partially certified *Wadleigh* as a nationwide class suit pursuant to Rules 23(b)(3) and 23(c)(4)(A) of the *Federal Rules of Civil Procedure*.[80] In addressing the choice-of-law issues raised by the suit, the judge rejected defendants' arguments that class certification would be inappropriate because "the negligence law of each of fifty-one jurisdictions would have to be applied by the jury, making a joint trial impossible."[81] The judge was satisfied that Illinois law, which he had applied in an earlier case involving the same issues, should apply to the ordinary negligence issues in *Wadleigh*.[82] He emphasized that the defendant had failed to demonstrate that the law of other states with respect to ordinary negligence was materially different from Illinois law.[83]

The Seventh Circuit ignored Judge Grady's careful analysis, asserting instead that

> [i]f one instruction on negligence will serve to instruct the jury on the legal standard of every state of the United States applicable to a novel claim, implying that the claim despite its controversiality would be decided identically in all 50 states and the District of Columbia, one wonders what the Supreme Court thought it was doing in the *Erie* case when it held that it was *unconstitutional* for federal courts in diversity cases to apply general common law rather than the common law of the

76. *See In re Rhone-Poulenc*, 51 F.3d at 1301-02.

77. 157 F.R.D. 410, 413-14 (N.D. Ill. 1994).

78. *See* Woolley, *supra* note 28, at 803-04.

79. *Id.*

80. *Wadleigh*, 157 F.R.D. at 426. Rule 23(c)(4)(A) authorizes a district to certify a class "with respect to particular issues." FED. R. CIV. P. 23(C)(4)(A).

81. *Wadleigh*, 157 F.R.D. at 418.

82. *See id.*

83. *See id.* at 419 ("Counsel for the fractionator defendants in this case . . . have not made any attempt to show that the Illinois definition is materially different from that of any other state."). For further discussion, see Woolley, *supra* note 28, at 804 nn.20-22.

> state whose law would apply if the case were being tried in state rather than federal court.[84]

The Seventh Circuit's analysis ignored settled law. Without so much as citing *Klaxon*, the appellate court wrapped itself in the mantle of *Erie* and invoked the spectre of "general common law" to insist that the law of all fifty states must be applied to the claims asserted in *Wadleigh*.[85] But *Klaxon* requires a federal court to apply the choice-of-law rules of the state in which it sits—in this case, Illinois' choice-of-law rules.[86] Illinois appears to follow the general rule that a party seeking application of nonforum law bears the burden of demonstrating that nonforum law applies.[87] The Seventh Circuit, however, did not consider whether defendants had met their burden below, simply concluding that material variations in negligence law among the states required decertification.[88]

The Seventh Circuit likely was correct that different state courts would respond differently to "a case such as this in which one of the theories pressed by the plaintiffs . . . is novel."[89] But it is precisely in this context that choice-of-law rules which create a presumption in favor of forum law have their greatest bite. Under *Klaxon*, federal

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84. *In re Rhone-Poulenc*, 51 F.3d at 1300.

85. The Court of Appeals misleadingly wrote:

> [The district judge] proposes to have a jury determine the negligence of the defendants under a legal standard that does not actually exist anywhere in the world. One is put in mind of the concept of "general" common law that prevailed in the era of *Swift v. Tyson*. The assumption is that the common law of the 50 states and the District of Columbia, at least so far as bears on a claim of negligence against drug companies, is basically uniform and can be abstracted in a single instruction.

Id.

86. *See* 313 U.S. 487, 496 (1941). Because *Wadleigh* was brought in the Northern District of Illinois, Illinois choice-of-law rules were applicable in the suit. *See supra* notes 75-80 and accompanying text. For further discussion, see Woolley, *supra* note 28, at 805 n.24.

87. *See, e.g.*, Soc'y of Mount Carmel v. Nat'l Ben Franklin Ins. Co. of Ill., 643 N.E.2d 1280, 1293 n.4 (Ill. App. Ct. 1994) ("While California law may be the more appropriate law to apply, we note that, under conflict of law principles, when the parties have failed to provide information as to the applicable foreign law, the forum will decide the case in accordance with its own local law." (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 136 cmt. h (1971))); Ellerbrake v. Campbell-Hausfeld, No. 01L 540, 2003 WL 23409813, at *2 (Ill. Cir. Ct. July 2, 2003) ("Illinois law presumptively applies absent a showing by defendants that conflicts in consumer fraud laws of other states require a different outcome." (citing Avery v. State Farm Mut. Auto. Ins. Co., 746 N.E.2d 1242, 1281 (Ill. App. Ct. 2001))). The legislative history of CAFA uses the *Avery* case as an example of state choice-of-law abuses. *See, e.g.*, S. REP. NO. 109-14, at 24-25 (2005).

88. *See In re Rhone-Poulenc*, 51 F.3d at 1301-02, 1304.

89. *Id.* at 1300.

courts may not ignore state choice-of-law rules,[90] even when such rules would lead to application of substantive law that federal courts would find undesirable.

1. Rule 23's Predominance Requirement

Other federal courts have avoided the requirements of *Klaxon* by assuming that the federal class action rule—Rule 23—supersedes any presumption in favor of forum law. These courts have concluded that because the proponent of the class has an obligation to demonstrate that common issues of law or fact predominate, the class proponent bears the burden of demonstrating a "false conflict" between the laws of several states if the lack of such a conflict would mean that common issues of law or fact do not predominate. This conflates two separate inquiries: (1) whether the party who bears the choice-of-law burden has met its burden under the forum-state's choice-of-law principles and (2) whether the party seeking certification has demonstrated, as required by federal law, that certification of a class suit would be appropriate.[91]

The conflation of inquiries is illustrated in *Walsh v. Ford Motor Co.*,[92] a leading case cited in the legislative history of CAFA.[93] In *Walsh*, defendant Ford Motor Company identified supposed variations

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90. For a Seventh Circuit decision recognizing that *Klaxon* applies to class litigation, see *In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation*, 288 F.3d 1012, 1014 (7th Cir. 2002) ("Because plaintiffs' claims rest on state law, the choice-of-law rules come from the state in which the federal court sits.").

91. *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 741 (5th Cir. 1996); Commander Props. Corp. v. Beech Aircraft Corp., 164 F.R.D. 529, 541 (D. Kan. 1995). *But see, e.g.*, Payne v. Goodyear Tire & Rubber Co., 216 F.R.D. 21, 27 (D. Mass. 2003) (citing with approval in the class context the rule that "the party who claims that the foreign law is different from the local law of the forum has the burden of establishing the content of the foreign law" (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 136 cmt. f (1971))); Barker v. FSC Sec. Corp., 133 F.R.D. 548, 555 (W.D. Ark. 1989); Roberts v. Heim, 670 F. Supp. 1466, 1494 (N.D. Cal. 1987) ("The courts of this district have presumed for class certification purposes that California law will apply when the defendants have not successfully argued prior to the class certification motion that, under California choice-of-law rules, the law of another jurisdiction will apply."). In *Barker*, Judge Morris Arnold wrote:

> [I]t is well settled that a court "should apply its own local law unless there is good reason for not doing so." R. Leflar, L. McDougal III, and R. Felix, *American Conflicts Law* § 102 at 288 (4th ed. 1986); *see also* 1A C.J.S. *Actions* § 19 at 345-46 (1985). It follows from this that defendants must establish material differences between the laws of relevant states. As defendants have not made such a showing, the court will not deny class certification based on choice-of-law considerations.

Barker, 133 F.R.D. at 555.

92. 807 F.2d 1000 (D.C. Cir. 1986).

93. *See* H.R. REP. NO. 108-144, at 15 n.43 (2003).

in state law governing relevant issues in opposing certification of the class,[94] but the district court "found it unnecessary for purposes of class certification to decide *which* state law applied,"[95] instead "deferr[ing] for consideration on another day 'the question of which law shall apply.'"[96] As the United States Court of Appeals for the District of Columbia Circuit recognized, this course of action was inappropriate because it is impossible to determine whether common issues of law or fact predominate without considering choice-of-law issues.[97] But instead of resting its decision solely on this ground, the court stated that class action proponents had an obligation to demonstrate that there were no variations in state law relevant to the case: "Appellees see the 'which law' matter as academic. They say no variations in state warranty laws relevant to this case exist. A court cannot accept such an assertion 'on faith.' Appellees, as class action proponents, must show that it is accurate."[98]

Because *Walsh* involved federal claims that incorporated state law,[99] it arguably has little relevance to diversity class actions.[100] But *Walsh* did not rely on the federal nature of the claims to support its conclusion that the choice-of-law burden rested on class proponents.[101] Rather, the court seemed to assume that the predominance requirement of Rule 23 required the class proponent to demonstrate that there were

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94. *See Walsh*, 807 F.2d at 1003 n.10.

95. *Id.* at 1005.

96. *Id.* at 1016.

97. *See id.* at 1017 (noting that whether issues of law predominate "can only be resolved by first specifically identifying the applicable state law variations and then determining whether such variations can be effectively managed through creation of a small number of subclasses" (internal quotations omitted)).

98. *Id.* at 1016. The majority continued: "We have made no inquiry of our own on this score and, for the current purpose, simply note the general, unstartling statement made in a leading treatise: 'The Uniform Commercial Code is not uniform.'" *Id.* (quoting JAMES J. WHITE & ROBERT S. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 7 (2d ed. 1980)). In the paragraph that followed, the court wrote: "As the Third Circuit observed . . . , to establish commonality of the applicable law, nationwide class action movants must creditably demonstrate, through an 'extensive analysis' of state law variances, 'that class certification does not present insuperable obstacles.'" *Id.* at 1017 (quoting *In re* Sch. Asbestos Litig., 789 F.2d 996 (3d Cir. 1986)). As discussed below, this latter requirement is consistent with the view that the choice-of-law burden is distinct from the certification burden. *See infra* notes 105-109 and accompanying text.

99. The claims in *Walsh* were brought under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 (1975). *Walsh*, 807 F.2d at 1001. The *Walsh* court concluded that "state warranty law lies at the base of all warranty claims" under the Act. *Id.* at 1016; *see also id.* at 1012-16.

100. It is far from clear that state rules govern choice of law when federal claims incorporate state law. For further discussion, see Woolley, *supra* note 28, at 808 n.36.

101. *See Walsh*, 807 F.2d at 1016-17.

no material variations in relevant state law.[102] Federal courts sitting in diversity have followed *Walsh* in conflating the choice-of-law burden with the certification burden.[103]

The conclusion that the predominance requirement bears on the allocation of choice-of-law burdens is wrong as a matter of straightforward rule construction. Cases like *Walsh* appear to assume that the proper administration of the predominance requirement demands that the choice-of-law burden be placed on the party which seeks class certification.[104] But there is no basis for this assumption. The predominance requirement largely focuses on whether use of the class device in a particular case would be an efficient use of judicial resources.[105] Determining whether common issues of law or fact predominate does not require displacing state choice-of-law rules. It requires only an evaluation of the impact of choice-of-law decisions on the viability of a class suit. Put another way, if the laws of multiple jurisdictions must be applied under applicable state choice-of-law rules, the party seeking certification bears the burden of demonstrating that certification of a class would nonetheless be appropriate despite the relevance of multiple bodies of law. But that obligation does not kick in until after the court has concluded that the law of more than one state will apply. The predominance requirement does not speak to how a court should determine what laws will apply in a class suit, and that question is logically antecedent to whether the need to apply more than one law should lead to denial of certification in any given case.

For these reasons, the choice-of-law burden and the certification burden should be deemed separate and distinct under federal law, as

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102. *See id.* District of Columbia choice-of-law rules would have placed the choice-of-law burden on Ford rather than the class proponents. *See* Joeckel v. Disabled Am. Veterans, 793 A.2d 1279, 1282 n.7 (D.C. 2002) (quoting Rymer v. Pool, 574 A.2d 283, 285 (D.C. 1990), and citing the RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 136 cmt. h (1971) for the proposition that "[w]hen parties do not raise the issue of the applicability of foreign law, the general rule is that 'a court is under no obligation to apply foreign law and may instead apply the law of the forum'").

103. *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 741 (5th Cir. 1996) (quoting with approval in a diversity case language in *Walsh* placing the choice-of-law burden on the class proponent). *Castano* was also cited with approval in CAFA's legislative history. *See, e.g.*, S. REP. NO. 109-14, at 63 n.172 (2005); H.R. REP. NO. 108-144, at 15 n.43 (2003).

104. *See Walsh*, 807 F.2d at 1011-12.

105. The predominance requirement addresses that question by asking whether the claims of absent class members are sufficiently cohesive to warrant trying the claims in a class suit as opposed to individually. The overlapping superiority requirement addresses the same question by asking, among other things, whether the class suit is "manageable," and whether it is "desirabl[e]" to "concentrat[e] the litigation of the claims" in a particular forum. *See* FED. R. CIV. P. 23(b)(3). For further discussion of the superiority requirement, see *infra* Part II.B.2.

they are, for example, under California state law.[106] In the absence of a contractual choice-of-law provision, California law places the burden of demonstrating that foreign law applies on the proponent of foreign law.[107] Only if the proponent of foreign law makes a sufficient showing must the class proponent "creditably demonstrate, through an 'extensive analysis' of state law variances, 'that class certification does not present insuperable obstacles.'"[108]

In short, if a court concludes that the party seeking application of foreign law has not made the required case under state law, choice-of-law considerations cannot lead to the conclusion that certification is inappropriate. If, on the other hand, the party seeking application of foreign law demonstrates its applicability, the party seeking certification of a class has an obligation to demonstrate that certification would be appropriate, notwithstanding the applicability of different substantive laws to the claims of the class. Because the issue of predominance is distinct from the issue of who bears the choice-of-

106. *See* Wash. Mut. Bank v. Sup. Ct., 15 P.3d 1071, 1081-82 (Cal. 2001) (articulating the distinction between the choice-of-law and certification burdens).

107. *See id.* at 1081 (rejecting the argument that the claims of class members should presumptively be governed by the law of their residence "unless the *proponent* of class certification affirmatively demonstrates that California law is more properly applied"). In the absence of a choice-of-law provision, the proponent of the class must demonstrate that "significant contacts to California exist." *Id.* If the class proponent meets this burden, the burden shifts to the proponent of foreign law to demonstrate that application of foreign law would be appropriate. *See id.* at 1080-81. Although the California Supreme Court apparently thought otherwise, the Constitution does not require the proponent of the class to demonstrate that significant contacts with California exist. *See supra* notes 30-34 and accompanying text. Because *Washington Mutual* involved contractual choice-of-law provisions, the proponent of foreign law did not bear the burden of "affirmatively showing the existence of outcome-determinative differences among applicable state laws." *Wash. Mut.*, 15 P.3d at 1085. For criticism of the court's holding with respect to choice-of-law clauses, see WEINTRAUB, *supra* note 3, at 58-59 ("If in the absence of a choice-of-law clause the party seeking to displace California law has the burden of showing that applying the law of another state will change the result, that party should retain the burden even though the laws of other states are selected by the parties' agreement.").

108. *Wash. Mut.*, 15 P.3d at 1083 (quoting *Walsh*, 807 F.2d at 1017). The court elaborated on the showing it expected from the class proponent in these circumstances:

> [T]he presentation must be sufficient to permit the [superior] court, at the time of certification, to make a detailed assessment of how the difficulties posed by the variations in state law will be managed at trial. For example, certification may be appropriate if the class action proponent shows that state law variations can be effectively managed through the creation of a small number of subclasses grouping the states that have similar legal doctrines.

Id. (citations omitted).

law burden, the predominance requirement cannot reasonably be read to displace otherwise applicable state choice-of-law rules.[109]

2. The Superiority Requirement

A more plausible argument could be made that claims relying on novel or unsettled law do not meet certification requirements because use of the class device in such cases would not be the "superior" means of resolving the controversy. The argument rests on the premise that federal courts should allow the substantive law in such cases to be developed state-by-state rather than using the law of the forum to resolve all of the claims—in the words of subdivision 23(b)(3)(C), that it would not be "desirab[le] . . . [to] concentrat[e] the litigation of the claims in the particular forum."[110] This construction of the "superiority requirement" would not formally shift the choice-of-law burden, but would do so as a practical matter.[111] An even broader argument could be made that it would not be desirable to concentrate the litigation of claims in the forum whenever the forum state would modify its ordinary choice-of-law analysis to permit application of the law of a single state in a multistate or nationwide class suit. Because the class suit aggregates individual claims,[112] the argument goes, it would not be "desirable" to certify a suit in a forum state that treats the class suit as having special significance for choice-of-law purposes.[113] Both

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109. A few state courts also have misconstrued the predominance requirement. *See* Woolley, *supra* note 28, at 816-17. But when a state so reads the "predominance requirement" of a state class action rule, it effectively has established a choice-of-law rule which binds the federal courts under *Klaxon*. *Id.* at 817-18.

110. FED. R. CIV. P. 23(b)(3)(C). Rule 23(b) provides in relevant part:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> . . . .
>
> (3) the court finds . . . that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: . . . (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum . . . .

FED. R. CIV. P. 23(b).

111. For additional discussion of this issue, see Woolley, *supra* note 28, at 812-13.

112. *See* Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571, 585-89 (1997).

113. For a contrary view, see Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 29 (1996) (suggesting that viewing the class as an entity as opposed to an aggregation of individual claims would be useful). Professor Cooper writes in relevant part:

> Really imaginative use of the entity concept might even support a more rational approach to choice of law. Viewing a class of victims as a whole, it is very difficult to understand why different people should win or lose, or win more or

arguments taken together would use the federal rules to address in a textually plausible way the concerns expressed in CAFA's legislative history.

But the superiority requirement has been construed far more modestly. *Federal Practice and Procedure* states that the factor set forth in subdivision 23(b)(3)(C)

> embodies basically two considerations. First, a court must evaluate whether allowing a Rule 23(b)(3) action to proceed will prevent the duplication of effort and the possibility of inconsistent results. . . .
>
> The other consideration a district court must take account of under subdivision (b)(3)(C) is whether the forum chosen for the class action represents an appropriate place to resolve the controversy, given the location of the interested parties, the availability of witnesses and evidence, and the condition of the court's calendar.[114]

Nor is there any evidence that the drafters of Rule 23 intended to authorize a federal court to deny class certification because the state in which the federal court sits would apply forum law to all the claims in a multistate or nationwide class suit. To the extent choice of law is relevant under subdivision 23(b)(3)(C), it should be because "there is thought to be advantage in having [state law] applied by federal judges who are familiar with the state law, and thus in trying the case in a district of the state whose law is to govern."[115] In the absence of any evidence that the framers of Rule 23 intended to address the problem, judicial innovation in this context would simply invoke Rule 23 as a convenient pretext for evading the *Erie* policy. As the Court recently emphasized, we should not easily construe congressional legislation—or federal rules—as superseding the *Erie* policy.[116]

> less, because different sources of law are chosen to govern the self-same conduct. If it were possible to imagine a class claim, it would be possible to choose a single law to govern the single claim, or—more likely—to choose a single law to govern the claim as to each defendant.

Id.

114. 7A WRIGHT ET AL., *supra* note 67, § 1780, at 184-87 (3d ed. 2005) (citations omitted).

115. Woolley, *supra* note 28, at 810 n.42 (quoting 15 WRIGHT ET AL., *supra* note 67, § 3854, at 466-67 (3d ed. 2005), which discusses the proper analysis under 28 U.S.C. § 1404(a)). *Federal Practice and Procedure* notes that the factor set forth in Rule 23(b)(3)(C) requires an analysis "similar to that used in deciding a transfer-of-venue question under Section 1404(a) of Title 28." 7A WRIGHT ET AL., *supra* note 67, § 1780, at 184-87 (3d ed. 2005).

116. This rule of construction was most clearly enunciated in Justice Scalia's dissent in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 37-38 (1998): "[I]n deciding whether a federal procedural statute or Rule of Procedure encompasses a particular issue, a broad reading that would create significant disuniformity between state and federal courts should be

More fundamentally, a construction of the superiority requirement that would allow consideration of the wisdom of state choice-of-law rules would likely run afoul of the Rules Enabling Act (REA).[117] The REA authorizes the Court to "prescribe general rules of practice and procedure"[118] for use in federal district courts and requires that such rules "shall not abridge, enlarge or modify any substantive right."[119] Because choice-of-law rules determine rights under the substantive law,[120] such rules affect substantive rights and cannot properly be viewed as rules of practice and procedure.[121] Thus, it is highly doubtful that the REA grants the Court authority to prescribe a rule prohibiting certification of multistate and nationwide class suits in which the law of a single state would be applied.[122] A rule limiting certification of class suits regulates the availability of the federal class suit, a procedural device made available by Rule 23. But acting on the

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avoided if the text permits." A unanimous Court—writing through Justice Scalia—adopted this principle in *Semtek*. Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 497 (2001). In *Semtek*, the Court read Rule 41(b) narrowly in part because if the rule were understood to govern the preclusive effect of dismissals, it "would in many cases violate the federalism principle of *Erie R. Co. v. Tompkins*." *Id.* at 503. For further discussion, see Woolley, *supra* note 28, at 814-16.

117. 28 U.S.C. § 2072 (2000).

118. *Id.* § 2072(a).

119. *Id.* § 2072(b).

120. *See infra* notes 189-190 and accompanying text.

121. Stephen Burbank, the leading authority on the Rules Enabling Act (REA), has argued that the REA was intended to prohibit rulemaking (as opposed to common law making) with respect to fundamental matters. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1015 (1982). Professor Burbank views the limits on rulemaking as intended to preserve legislative prerogatives. *Id.* There can be little doubt that choice of law is a fundamental matter as Professor Burbank uses that term. Indeed, at the time the REA was adopted, choice of law clearly was part of the "general law," rather than the law of procedure. *See infra* note 171 and accompanying text. Thus, it would appear that under Professor Burbank's construction of the REA, a federal rule taking a position on a choice-of-law matter would not be deemed a rule of "practice and procedure" within the meaning of § 2072(a). John Hart Ely—whose work on the REA remains remarkably influential—presumably would reach the same conclusion by a different path. *See* John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 725-27 (1974). Professor Ely argued that federal rules must give way to conflicting state law when a rule of state law was established for one or more "nonprocedural reasons." *Id.* (construing § 2072(b) which states that federal rules "shall not abridge, enlarge, or modify any substantive right"). Choice-of-law rules are designed—at least in part—to achieve a nonprocedural objective, that is, the selection of appropriate substantive law. The Court's decisions provide little guidance on the proper interpretation of the REA, *see* Woolley, *supra* note 70, at 591 n.297 (citing cases), but there is no reason to believe the Court would reach a different conclusion in this context.

122. By contrast, Congress undoubtedly has authority to order federal courts not to certify multistate or nationwide class suits in which the law of a single state would be applied. Whether and when class suits may be used in federal court is certainly a matter within federal regulatory power. *See* Hanna v. Plumer, 380 U.S. 460 (1965).

concerns identified by CAFA would require the Court—as rulemaker—to take a position on the soundness of choice-of-law techniques designed to facilitate application of the law of a single state in multistate and nationwide class suits. Because selection of appropriate choice-of-law techniques is beyond the purview of rulemaking authority under the REA, taking a position on the soundness of state choices is also beyond the rulemaking authority of the Court. And if the Court cannot take such a position in prescribing a federal rule, courts construing the superiority requirement are similarly constrained.

C. The Choice-of-Law Effect of CAFA's Jurisdictional Provisions

CAFA's operative language does not purport to modify choice-of-law rules in federal court. But it seems clear that, at least for the time being, the shift of cases from state to federal court will work a significant modification of choice-of-law rules in a subset of class suits—cases in which federal courts ignore state law presumptions in favor of forum law. To the extent federal courts rely on Rule 23 to place the choice-of-law burden on the class proponent, the expansion of federal jurisdiction will work a change in the choice-of-law rules that would otherwise be applicable in some states.[123]

There is reason to doubt, however, that federal decisions placing the choice-of-law burden on class proponents (regardless of state law) represent stable precedent. The key federal cases which have placed the choice-of-law burden on the class proponent simply *assume* that the certification and choice-of-law burdens must be placed on the same party.[124] Federal courts have yet to confront the principled arguments against placing the choice-of-law burden on class proponents in states in which that burden is placed on the party seeking application of foreign law. And because the key decisions in this line of cases predate *Semtek*—which insists that ambiguities in the *Federal Rules of Civil Procedure* be read in light of the *Erie* policy—lower courts have a basis for reconsidering these precedents.[125] In any

123. I assume, of course, that federal courts will otherwise "apply the substantive law that [they] conscientiously believe[] would have been applied" in the relevant state courts. *See* 19 WRIGHT ET AL., *supra* note 67, § 4507, at 126. But as Larry Kramer points out in his classic article, courts have not been loath to manipulate choice-of-law analysis to achieve a particular result in complex litigation. Kramer, *supra* note 49, at 552-66.

124. *See supra* note 91 and accompanying text.

125. The precedential value of decisions which improperly read class action rules as superseding the presumption in favor of forum law may also be questioned on another ground. These decisions often involve mistakes relating to other aspects of choice of law that

event, the Supreme Court has not yet had an opportunity to weigh in on the question.[126] The Court has shown little reluctance in the procedural context to reject even entrenched precedent that it believes incorrect.[127] In light of the Court's traditional defense of *Klaxon*[128] and its more recent insistence on reading ambiguous federal rules in light of the *Erie* policy,[129] there is reason for optimism that federal courts will eventually reject the view that placing the choice-of-law burden on the class proponent is consistent with the *Erie* policy.

But even if federal courts continue to find authority in Rule 23 to ignore state law presumptions in favor of forum law, Rule 23 has never been understood to authorize federal courts to ignore state choice-of-law cases that do not rely on the presumption in favor of forum law to apply a single state's law to claims in a multistate or nationwide class suit. Thus, federal courts have not, and likely will not, rely on Rule 23 to curb all state choice-of-law techniques that Congress deemed abusive. In the Part that follows, I ask whether federal courts nonetheless have common law authority to modify *Klaxon* to address the choice-of-law concerns enunciated by the Congress which enacted CAFA.

III. CAFA AND JUDICIAL POWER

A. CAFA and Federal Common Law

To this point, I have challenged the congressional assumption that simply expanding the jurisdictional reach of federal courts in CAFA can legitimately have an effect on the law applied in multistate and nationwide class suits. But in addition to expanding the jurisdiction of the federal courts, CAFA specifically found that state courts were acting in an abusive manner by "making judgments that impose their view of the law on other States and bind the rights of the residents of those States."[130] In this Part, I consider what effect this finding should

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justify decertification. *See, e.g.*, Walsh v. Ford Motor Co., 807 F.2d 1000, 1017 (D.C. Cir. 1986); Woolley, *supra* note 28, at 817 n.62.

126. One Justice, Ruth Bader Ginsburg, has ruled on the issue. She jointly authored the leading decision placing the choice-of-law burden on the class proponent when she was a judge on the United States Court of Appeals for the District of Columbia. *See Walsh*, 807 F.2d at 1000. But the ruling on the burden issue was not essential to the court's judgment in that case. *See supra* notes 95-97 and accompanying text.

127. *See, e.g.*, Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998).

128. *See infra* note 160 and accompanying text.

129. Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 497 (2001).

130. The finding reads in relevant part:

have on how federal courts proceed with respect to choice of law in class suits.

1. The Congressional Finding

The finding itself is far from self-explanatory. Whenever a state court decides a multistate or nationwide class suit, it has no choice but to bind the residents of other states and to "impose" its view of the law on other concerned states. That is true even when the court applies the laws of other states in deciding the case. But Congress could not possibly have meant to condemn as "abusive" the inevitable result of state court decision-making in a multistate or nationwide class suit.

It could be argued that Congress intended to find "abusive" only state choice-of-law results that were unconstitutional. But although there is some evidence that Congress believed the techniques criticized in the legislative history were unconstitutional,[131] there is no reason to believe that the congressional purpose in passing the legislation was to enforce the Court's view of constitutional limitations on choice of law. The central argument made in the committee reports is that aggressive application of a single state's law in a multistate or nationwide class is contrary to an appropriate understanding of interstate federalism,[132] not that the state courts were violating constitutional limits on state choice of law. Particularly telling in this regard is the congressional reports' failure to cite the Court's decision in *Sun Oil*, a decision which held constitutional a technique the reports harshly criticize as abusive.[133] Likewise, the Senate was notably unreceptive to efforts to amend

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(4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are—

. . . .

(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4, 4-5 (to be codified at 28 U.S.C. § 1711 note).

131. *See supra* note 23 and accompanying text.

132. The 2005 Senate Report states:

> The sentiment reflected in these cases flies in the face of basic federalism principles by embracing the view that other states should abide by a deciding court's law whenever it decides that its own laws are preferable to other states' contrary policy choices. Indeed, such examples of judicial usurpation, in which one state's courts try to dictate its laws to 49 other jurisdictions, have been duly criticized by some congressional witnesses as "false federalism."

S. REP. NO. 109-14, at 26 (2005); *see also* S. REP. NO. 108-123, at 23-26 (2003); H.R. REP. NO. 108-144, at 14 (2003).

133. *See supra* note 37 and accompanying text.

CAFA to authorize federal courts to apply the law of a single state in a class suit when it would be constitutional to do so.[134] In short, the legislative history indicates that Congress had a very specific concern in mind: the use of aggressive choice-of-law techniques designed to permit application of the law of a single state in a multistate or nationwide class suit. The legislative finding is best read as embodying this concern.

2. A Common Law Solution?

The most comprehensive judicial solution to the concern expressed by Congress in its choice-of-law finding would be the development of a preemptive federal common law rule that would displace "abusive"—albeit constitutional—state choice-of-law rules in

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134. Senator Jeff Bingaman originally prepared an amendment to the legislation which would have expressly authorized application of the law of a single state in certain consumer class actions. The amendment provided in relevant part:

> (a) the district court may apply the rule of decision of one state having a sufficient interest in the claim that the application of that state's law is permissible under the Constitution; and
>
> (b) if the district court declines to exercise discretion conferred by subpart (a), class certification shall not be denied, in whole or in part, on the ground that the law of more than one state will be applied.

E-mail from Pam Gilbert to Patrick Woolley and Samuel Issacharoff, Mar. 15, 2006, 15:15 (EST) (on file with author). Senator Bingaman's amendment never made it to the floor.

In submitting a compromise amendment worked out with Senator Bingaman, Senator Dianne Feinstein explained:

> The original solution proposed by Senator *Bingaman* was a bit too broad because it could impact consumers in States with strong consumer protection laws such as my State of California. What we tried to do, and did, was develop a compromise amendment that provides Federal judges with guidance on how to proceed in these cases, while leaving the judges with the discretion they need to manage their court dockets.

151 CONG. REC. S1157-02, S1166 (2005). The Bingaman-Feinstein compromise amendment, which was intended to apply "[n]otwithstanding any other so-called choice of law rule," essentially required federal courts to "attempt to ensure that plaintiffs' State laws are applied *to the extent practical*." *Id.* (emphasis added). But because the amendment also provided that federal courts shall "not deny class certification, in whole or in part, on the ground that the law of more than one State will be applied," the amendment as a practical matter authorized federal courts to apply the law of a single state when doing so was constitutional and necessary to achieve class certification. *Id.*

The Amendment was defeated by a vote of 38-61. *Id.* at S1184. The significance of that defeat in ascertaining legislative intent is limited somewhat by the insistence of leading proponents of the legislation that the bill brought to the floor not be amended for any reason. *See id.* at S1171 (statement of Sen. Grassley) ("We have the House in position now, even after all of these compromises we have made which have diluted the bill more than I would have liked to have done, of passing a bill the leadership in the House of Representatives tells us they will take the way we pass it and send it to the President as long as there are no changes. . . .").

both state and federal court.[135] The Full Faith and Credit Clause gives Congress plenary authority to preempt choice-of-law rules that could otherwise be constitutionally applied in state court.[136] Many commentators have suggested that the Constitution likewise authorizes judicial development of such rules without explicit congressional action.[137] But the Court has made clear that it will not act to preempt state choice-of-law rules in the absence of a congressional directive to do so.[138]

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135. *Cf.* Donald T. Trautman, *Toward Federalizing Choice of Law*, 70 TEX. L. REV. 1715, 1733 (1992) ("Just as federal constitutional law can effectively impose limits on state-created defamation law, one can imagine federal choice-of-law rules acting only as boundaries on the operation of state choice-of-law rules." (footnotes omitted)).

136. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the *Congress* may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, *and the Effect thereof*." (emphasis added)); *see also* Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255 (1998) (recognizing that Congress has authority to regulate choice of law under the second sentence of the Full Faith and Credit Clause despite reading the first sentence more narrowly than the current understanding of the Clause); Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 23-28 (1991) (discussing congressional power to preempt state choice-of-law rules). Article IV appears to give Congress authority over choice-of-law rules in state, not federal court. But if Congress preempts state choice-of-law rules under Article IV, there can be no question that the same rules will apply in federal court under Article III.

137. *See, e.g.*, William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 23-25, 41-42 (1963) (arguing that Congress and the Court have defaulted on their responsibility to the states to allocate spheres of legal control among the states and calling for judicial imposition of a comparative impairment analysis under the Full Faith and Credit Clause); Harold W. Horowitz, *Toward a Federal Common Law of Choice of Law*, 14 UCLA L. REV. 1191, 1194 (1967) (arguing that because there should be no autonomy in the federal system "for a state to resolve a problem of conflict of its law with that of another state[,] [f]ederal courts and state courts should be viewed as participating together in the development of federal choice-of-law principles, with the Supreme Court as the final arbiter as it is in other areas of federal common law"); Laycock, *supra* note 24, at 251 (arguing that because Congress has failed to enact federal choice-of-law rules, it properly "falls to the federal courts to derive specific choice-of-law rules in the course of adjudicating disputes under the Constitution and the [Full Faith and Credit] statute"); Linda Silberman, *Can the State of Minnesota Bind the Nation?: Federal Choice-of-Law Constraints After* Allstate Insurance Co. v. Hague, 10 HOFSTRA L. REV. 103, 130 (1981) (calling for "a set of federal common law restraints, founded upon and in service of the full faith and credit clause and the basic structure of the federal system contemplated in the Constitution."). *But see* Whitten, *supra* note 136, at 264 (contending that the first sentence of the Full Faith and Credit Clause "does not deal with the question of what 'substantive' effect state statutes should have in other states," leaving the matter to the states unless Congress acts under the second sentence of the clause).

138. In *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981), for example, every Justice participating in the decision rejected the argument that the Full Faith and Credit Clause was a basis for the development of federal common law choice-of-law rules. Writing for the plurality, Justice Brennan insisted:

CAFA cannot be construed as providing such authority. The statute includes a finding that criticizes the choice-of-law practices of some states, but the operative provisions of the Act do not regulate choice-of-law. While a congressional finding may aid in the construction of a statute, it is simply "a recital of considerations which in the opinion of [Congress] existed and justified the expression of its will in the . . . act."[139] It has no operative force as legislation,[140] and for that reason cannot be construed as a delegation of congressional authority. Moreover, the development of even modest preemptive federal common law choice-of-law rules for use in state and federal court would far exceed the scope of CAFA because CAFA is limited to class suits filed in or removed to federal court.[141] In short, there is no basis for reading CAFA as a congressional delegation to the courts to create preemptive common law choice-of-law rules for use in state and federal court.

A much stronger argument can be made that federal courts should consider the statutory finding in fashioning common law to determine *which* state's law should govern under the Rules of Decision

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> It is not for this Court to say whether the choice-of-law analysis suggested by Professor Leflar is to be preferred or whether we would make the same choice-of-law decision if sitting as the Minnesota Supreme Court. Our sole function is to determine whether the Minnesota Supreme Court's choice of its own substantive law in this case exceeded federal constitutional limitations. Implicit in this inquiry is the recognition, long accepted by this Court, that a set of facts giving rise to a lawsuit, or a particular issue within a lawsuit, may justify, in constitutional terms, application of the law of more than one jurisdiction.

Id. at 307 (plurality opinion); *see also id.* at 323 (Stevens, J., concurring) ("[T]he fact that a choice-of-law decision may be unsound as a matter of conflicts law does not necessarily implicate the federal concerns embodied in the Full Faith and Credit Clause."); *id.* at 332 (Powell, J., dissenting) ("The Court should invalidate a forum State's decision to apply its own law only when there are no significant contacts between the State and the litigation.").

139. Carter v. Carter Coal Co., 298 U.S. 238, 290 (1936) (emphasis omitted).

140. *Id.* (holding that a finding does "not constitute an exertion of the will of Congress which is legislation" (emphasis omitted)).

141. *See* 28 U.S.C.A. § 1711(2) (West 2005) (defining the term "class action" as used in CAFA to mean "any civil action filed in a district court of the United States under rule 23 of the Federal Rules of Civil Procedure or any civil action that is removed to a district court of the United States that originally filed under a State Statute or rule of judicial procedure authorizing an action to be brought by 1 or more representatives as a class action."). This definition significantly limits CAFA's scope. CAFA, for example, expressly limits attorney's fees in coupon settlements reached in federal court, but provides no regulation of similar state court settlements. *Compare id.* § 1712 (regulating attorney's fees in coupon settlements in a "class action," *with id.* § 1711(2) (narrowly defining the term "class action" as used in CAFA). The gap essentially permits defendants and class counsel to evade the limits on attorneys' fees imposed by CAFA for the protection of class members by negotiating a settlement and then seeking certification and approval of the settlement in state court.

Act (RDA). The RDA has sometimes been understood to require a federal court to apply the choice-of-law rules of the state in which it sits.[142] If this understanding were correct, *Klaxon* would govern choice-of-law in federal courts unless an "Act[] of Congress otherwise require[s] or provide[s]."[143] CAFA cannot be said to provide for, or require, a departure from *Klaxon* because its operative provisions do not address choice of law. The text of the RDA, however, provides no support for the conclusion that a federal court must apply the choice-of-law rules of the state in which it sits. The RDA simply requires federal courts to apply "[t]he laws of the several states,"[144]

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142. *See, e.g.*, Ely, *supra* note 121, at 714-15 n.125 (criticizing Henry Hart's argument that the RDA does not compel application of the choice-of-law rules of the state in which a federal court sits). Justice Scalia also has taken the position that the decision in *Klaxon* was an interpretation of the RDA. Dissenting in *Ferens v. John Deere Co.*, 494 U.S. 516, 533-40 (1989), he wrote:

> For me, [*Klaxon*] involves an interpretation of the Rules of Decision Act, and the central issue is whether § 1404(a) alters the "principle of uniformity within a state" which *Klaxon* says that Act embodies. I think my approach preferable, not only because the Rules of Decision Act does, and § 1404(a) does not, address the specific subject of which law to apply, but also because, as the Court acknowledges, our jurisprudence under that statute is "a vital expression of the federal system and the concomitant integrity of the separate States."

Id. at 539 (Scalia, J., dissenting). Justices Brennan, Marshall, and Blackmun joined Justice Scalia in his dissent.

143. 28 U.S.C. § 1652 (2000).

144. *Id.* In a fascinating book, Wilfred Ritz argues that as a historical matter the reference to the "laws of the several states" does not refer to the law of individual states. WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING THE MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE 79 (1990). After a thorough canvass of the historical evidence, he argues that "[i]t would have literally been unthinkable for the members of the First Congress to have directed national courts sitting in diversity cases to apply the law of the states in which they sat." *Id.* Rather, "[t]he 'laws of the several states' meant American law, regardless of the source from which it came, and regardless of whether it was statute or common law." *Id.* at 147. Professor Ritz further suggests that section 34 of the Judiciary Act of 1789—the precursor of the modern RDA—deals with the use of American law in criminal cases and was intended only as a stopgap measure until a new nation criminal code could be prepared. *Id.* at 11. But whatever the intent of the first Congress, the RDA came to be viewed as a statement of a fundamental principle which transcends the statute itself. *See, e.g.*, Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) (concluding that the law of individual states includes matters previously thought to be governed by general law); Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842) ("In all the various cases, which have hitherto come before us for decision, this court ha[s] uniformly supposed, that the true interpretation of the thirty-fourth section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality . . . ."). As the Court explained in 1945:

> In exercising their jurisdiction on the ground of diversity of citizenship, the federal courts, in the long course of their history, have not differentiated in their regard for State law between actions at law and suits in equity. Although § 34 of

nowhere prescribing a rule for determining *which* state's law is to be applied.[145] Moreover, the admonition that "[t]he laws of the several states . . . shall be regarded as rules of decision . . . *in cases where they apply*"[146] can be read as an express grant of common law authority to determine which state's law a federal court will apply.[147]

Klaxon is best understood as stating a federal common law rule designed to resolve a crucial choice-of-law question left open by the RDA. The *Klaxon* decision—which nowhere cites to the RDA—grounds its holding in the *Erie* policy.[148] The assumption that *Klaxon* is grounded in the RDA is often premised on the conclusion that *Erie* reads the RDA as mandating a policy of vertical uniformity between federal and state courts sitting in the same state.[149] But a close look at

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> the Judiciary Act of 1789 directed that the "laws of the several states . . . shall be regarded as rules of decision in trials at common law . . . ," this was deemed, consistently for over a hundred years, to be merely declaratory of what would in any event have governed the federal courts . . . .

Guar. Trust Co. v. York, 326 U.S. 99, 103-04 (1945) (citations omitted).

145. The first Congress understood how to direct federal courts to apply the law of the state in which they sat. As William Baxter explained:

> [T]he same men who enacted section 34 five days later passed the Process Act. Section 2 of that act, which is separated from section 34 in the statute book by one page, directed that procedures in the federal courts "shall be the same in each state respectively as are now used or allowed in the supreme courts of the same."

Baxter, *supra* note 137, at 41 (footnote omitted); *see also* RITZ, *supra* note 144, at 83-87, 140-41 (marshalling the evidence that the draftsmen of the Judiciary Act of 1789 used the terms "several" and "respective" in a discriminating way).

146. 28 U.S.C. § 1652 (emphasis added).

147. *See* Baxter, *supra* note 137, at 41 ("The phrase 'in cases where they apply' has a quality of deliberate flexibility that suggests the drafters did not think it wise to attempt specification of the cases to which any one state's law would apply."). Randall Bridwell and Ralph Whitten have argued that the "Rules of Decision Act itself embodies a direction to the federal courts to determine when a particular state's law will 'apply' under international conflict of laws rules, which the early cases indicate would have controlled even if the Act itself had never been passed." RANDALL BRIDWELL & RALPH U. WHITTEN, THE CONSTITUTION AND THE COMMON LAW 135 (1977). I argue below that after *Erie*, federal courts in diversity cases must choose the *whole* law of a state. *See infra* Part III.B.

148. *See supra* notes 69-71 and accompanying text. For discussion of the constitutional aspects of *Klaxon*, see *infra* notes 170-171 and accompanying text.

149. John Hart Ely, for example, has argued with respect to *Klaxon*:

> [T]he problem reduces itself to a choice of uniformities, specifically a choice between horizontal uniformity among all federal courts and vertical uniformity between the federal and state courts of a given state. But that choice was at the heart of the disagreement between *Swift* and *Erie*, and *Erie signaled a recognition that although the promotion of one kind of uniformity inevitably sacrifices the other, the Rules of Decision Act had made a choice, and had chosen vertical uniformity. Quarreling over which kind of disuniformity is worse may be great fun, but the controlling statute says that "the laws of the several states" shall be the rules of decision.*

the decision reveals that the *Erie* Court treated vertical uniformity as a desirable consideration in construing the statute, not as a statutory command.

Erie held that the phrase "laws of the several states," which federal courts ordinarily are required to follow, includes state common law on matters of so-called general law.[150] That holding expressly overruled *Swift v. Tyson*[151] in which the Court held that with respect to matters of general law, a federal trial court was not bound by the decisions of state courts.[152] Federal courts, as the Court stated in *Swift*, could exercise independent judgment about what the law on a matter of general law should be.[153]

Erie—which required application of state tort law rather than a federal general common law rule of torts[154]—enunciated three justifications for overruling *Swift*. First, the Court concluded that the legislative history of the RDA suggested that federal courts should apply state law—including state interpretations of the general law.[155] Second, the Court concluded that "[e]xperience in applying the doctrine of *Swift v. Tyson*, had revealed its defects, political and social."[156] In particular, the Court concluded that *Swift* had led to an unfortunate lack of uniformity between state and federal courts and that the forum shopping that resulted had led to unequal protection of the laws.[157] Finally, the Court concluded that federal courts had exceeded their constitutional authority in applying their own independent views on matters of general law.[158]

Ely, *supra* note 121, at 714-15 n.125 (emphasis added).

150. *Erie*, 304 U.S. at 78-79. *Pleading and Procedure* helpfully explains the concept of general law:

> General law was a general common law, applied more or less uniformly by all civil courts, federal and State, in the United States. There is no precise modern equivalent. Perhaps the closest modern domestic analogy is the general law summarized in the Restatements of the American Law Institute. For example, the *Restatement (Second) of Contracts* describes the law of contracts as generally applied in American courts. The law of the Restatement is not that of any single jurisdiction, but serves as a source of law for courts seeking to conform to a general national standard.

GEOFFREY C. HAZARD, JR. ET AL., PLEADING AND PROCEDURE: STATE AND FEDERAL 451 (9th ed. 2005).

151. 41 U.S. (16 Pet.) at 18.

152. *Id.*

153. *Id.* at 18-19.

154. *Erie*, 304 U.S. at 79-80.

155. *Id.* at 72-73.

156. *Id.* at 74.

157. *Id.* at 74-75.

158. *Id.* at 78.

It is the second ground of the decision—which relied on the defects, political and social, of the *Swift* regime—which is the genesis of the *Erie* policy. Significantly, the Court used the *Erie* policy to *construe* the phrase "the laws of the several states," concluding that the phrase encompassed matters of so-called general law. The Court nowhere found that the RDA itself mandated application of the *Erie* policy. Such a finding would have been strange indeed because the policy was born of "[e]xperience in applying the doctrine of *Swift v. Tyson*,"[159] an experience which postdated enactment of the RDA.

In short, *Erie* does not read a policy of vertical uniformity into the RDA. And *Klaxon*—which expressly invokes the *Erie* policy of vertical uniformity—nowhere cites to the RDA. The conclusion is inescapable that reliance on the *Erie* policy in *Klaxon* was a matter of judicial judgment, not statutory command.

Given the Court's long experience with the difficulties created when state and federal courts in the same state apply different bodies of law, it is not surprising that the Court in *Klaxon* insisted that a federal court should apply the choice-of-law rules of the state in which it sits. Nor is it surprising that the Court has refused to create independent choice-of-law rules.[160] Even assuming that federal courts have the power to displace state choice-of-law rules in federal court, they should be reluctant to do so; judicial restraint counsels against giving federal courts free rein to evaluate and displace constitutional state choice-of-law rules in diversity cases. But CAFA changes the calculus in an important way.

While CAFA's operative provisions do not address choice of law, CAFA includes a finding that certain state choice-of-law practices in the class context are abusive. Congress clearly is competent to evaluate state choice-of-law rules, as the Full Faith and Credit Clause makes clear, and deference to a legislative finding can hardly be characterized as a form of judicial activism in this context. The RDA *requires* that federal courts develop choice-of-law rules in order to implement its command that "[t]he laws of the several states" be

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159. *Id.* at 74.

160. *See, e.g.*, Ferens v. John Deere Co., 494 U.S. 516, 532 (1989) (refusing to develop independent federal choice-of-law rules in transfer cases); Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3, 4 (1975) ("A federal court in a diversity case is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits."); *see also* Griffin v. McCoach, 313 U.S. 498, 503-04 (1941) (applying *Klaxon* in a case in which the federal court had authority to exercise nationwide jurisdiction).

applied.[161] And in developing common law, federal courts properly may take legislative developments into account. As the Court once explained, "[i]t has always been the duty of the common-law court to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherited body of common-law principles."[162] The substantial expansion of diversity jurisdiction in CAFA—an expansion intended to curb state court abuses of the class device[163]—qualifies as a major legislative innovation. For these reasons, the congressional finding may properly serve as a basis for a reexamination of *Klaxon* in the class context.

Where that reexamination will lead is unclear. To the extent federal courts conclude that they have authority to develop independent choice-of-law rules for use in diversity cases, there is good reason to believe that they will defer to the congressional finding and ignore what Congress deemed "abusive" state choice-of-law practices. For unless the federal courts do so, a significant congressional objective will be frustrated. As the legislative history makes clear, Congress expanded the diversity jurisdiction of the federal courts in part because it believed that federal courts would not apply the aggressive state choice-of-law techniques condemned in the legislative history.[164] Thus, courts attentive to congressional policy objectives will

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161. *See supra* notes 144-148 and accompanying text.

162. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 392 (1970); Abner J. Mikva & James E. Pfander, *On the Meaning of Congressional Silence: Using Federal Common Law To Fill the Gap in Congress's Residual Statute of Limitations*, 107 YALE L.J. 393, 417 (1997) ("*Moragne* establishes that the Court may reconsider a rule of federal common law that gave rise to the passage of a limited federal statute."); Robert F. Williams, *Statutes as Sources of Law Beyond Their Terms in Common-Law Cases*, 50 GEO. WASH. L. REV. 554, 556 (1982) ("Courts can justifiably use statutes beyond their terms as sources of law for common-law decisionmaking, because the policies underlying statutes often have significance beyond the text they inspired."); *see also* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 951 (1992) ("[I]t may be too easy simply to say that because the legislature dealt only with A, the law governing related area B *must* remain as it is."). CAFA is relevant in this context because the *Erie* policy is not absolute. *See, e.g.*, Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 536-37 (1958) ("[C]ases following *Erie* have evinced a broader policy to the effect that the federal courts should conform as near as may be—*in the absence of other considerations*—to state rules even of form and mode where the state rules may bear substantially on the question whether the litigation would come out one way in the federal court and another way in the State Court if the federal court failed to apply a particular local rule." (emphasis added)).

163. *See supra* notes 18-22, 37, 132-133 and accompanying text.

164. *See, e.g.*, S. REP. NO. 108-123, at 61 (2003) ("A premise of the Class Action Fairness Act is that this problem can be corrected by expanding federal jurisdiction over interstate class actions, the theory being that federal courts will not engage in 'false federalism' games."). "False federalism" was defined earlier in the report as "judicial

have to consider whether modest relaxation of the *Klaxon* rule would be appropriate in the class context.[165] However, as I explain below, federal courts lack power under Article III to develop even modest choice-of-law rules independently of state law.[166] While federal courts are not constitutionally required to apply the choice-of-law rules of the states in which they sit, when choosing substantive law in a diversity case, federal courts must apply the whole law of a state without regard to its content.[167] Thus, federal courts have no power to avoid application of "abusive" state choice-of-law rules by departing from *Klaxon*.

B. Choice-of-Law Rules and Article III

Analysis of the constitutional limits on the development of choice-of-law rules for use in federal diversity cases must begin with *Erie*. The Court held in relevant part:

> Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in

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usurpation, in which one state's courts try to dictate its laws to 49 other jurisdictions." *Id.* at 26.

165. The need for modesty in this regard is underscored by the insistence of the reports that the expansion of federal jurisdiction was not intended to change significantly the substantive law applied in class suits. *See, e.g.*, S. REP. NO. 108-123, at 56 ("[F]ederal court[s] *normally* would apply the same state substantive law as a state court considering the same case." (emphasis added)); *see also* S. REP. NO. 109-14, at 61 (2005) ("[C]lass action decisions rendered in federal court should be the same as if they were decided in state court—under the *Erie* doctrine, federal courts must apply state substantive law in diversity cases."); S. REP. NO. 108-123, at 48 ("[T]he Act does not change the application of the *Erie* Doctrine, which requires federal courts to apply the substantive law dictated by applicable choice-of-law principles . . . .").

166. *See infra* Part III.B. Because the RDA's reference to the "laws of the several states" is ambiguous, the RDA might conceivably be read to require application of the whole law of a state—including its choice-of-law rules—rather than simply the internal law of the state. From that perspective, the statute would leave to federal common law only the question of *which* state's whole law will govern in any given case. The Court, however, has not construed "laws of the several states" to include the whole law of the states. And the construction of the RDA most consistent with the Court's jurisprudence since *Swift v. Tyson* simply requires federal courts to apply the *internal* law of the states. *Supra* notes 144-148 and accompanying text (arguing that *Klaxon* is not mandated by the RDA). For these reasons, I focus in Part III.B on whether Article III permits federal courts to create independent choice-of-law rules.

167. Congress has authority under Articles III and IV to require all courts—state and federal—to apply or develop a single body of choice-of-law rules to select the internal law of a State. *See supra* note 136 and accompanying text (discussing congressional authority to preempt State choice-of-law rules in state and federal court).

> the Constitution purports to confer such a power upon the federal courts.[168]

As John Hart Ely once suggested, *Erie*'s constitutional holding is best understood as premised on the understanding that "nothing in the Constitution provide[s] the central government with a general lawmaking authority of the sort the Court had been exercising under *Swift*."[169]

Klaxon appears to track *Erie*'s constitutional reasoning when it proclaims: "We are of opinion that the prohibition declared in *Erie R. Co. v. Tompkins* against such independent determinations by the federal courts, extends to the field of conflict of laws. . . . It is not for the federal courts to thwart [state] policies by enforcing an

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168. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938); *see also* Hanna v. Plumer, 380 U.S. 460, 471 (1965) ("We are reminded by the *Erie* opinion that neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution." (footnote omitted)).

169. Ely, *supra* note 121, at 703. Justice Harlan, concurring separately in *Hanna*, argued for a different understanding of *Erie*'s constitutional holding. Relying on the work of Henry Hart, Justice Harlan wrote:

> 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.* And it recognized that the scheme of our constitution envisions an allocation of law-making functions between state and federal legislative processes which is undercut if the federal judiciary can make substantive law affecting state affairs beyond the bounds of congressional legislative powers in this regard. . . .
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> . . . To my mind the proper line of approach in determining whether to apply a State or federal rule, whether "substantive" or "procedural," is to stay close to basic principles by inquiring if the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to State regulation. If so, *Erie* and the Constitution require that the State rule prevail. . . .

Hanna v. Plumer, 380 U.S. 460, 474-75 (1965) (Harlan, J., concurring) (emphasis added) (citing HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURT AND THE FEDERAL SYSTEM 678 (1953)). Whatever merit Justice Harlan's formulation may have as a policy matter, his insistence that the Constitution requires avoidance of "conflicting systems of law controlling the primary activity of citizens" is flatly inconsistent with the well-established constitutional principle that "in many situations a State court may be free to apply one of several choices of law." Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 823 (1985). Justice Harlan's standard is also inconsistent with the very structure of the *Erie* opinion, which treats concerns about the predictability of the law applied in federal court as a policy consideration that does not rise to the stature of a constitutional principle. *See supra* notes 154-159 and accompanying text. And as Professor Ely notes, Justice Harlan's standard misconceives the relationship between state and federal law. *See* Ely, *supra* note 121, at 701 ("[I]n asserting that the test [he] suggested was one of constitutional magnitude, he helped perpetuate a constitutional misapprehension that the majority had striven mightily to allay the misapprehension of the State enclave theory.").

independent "general law" of conflict of laws."[170] Because choice of law was general law before *Erie*,[171] the Court's reasoning in *Klaxon* has substantial conceptual force. But to the extent the majority premises its constitutional argument on the pre-*Erie* status of conflicts law, the argument is incomplete. While there can be no doubt that the pre-*Erie* status of conflicts law does not authorize federal courts to fashion their own choice-of-law rules, *Klaxon* fails to consider whether Article III—under some other theory—authorizes Congress to create or authorize the creation of choice-of-law rules applicable in diversity cases.

There can be no question that the federal government must have *some* authority with respect to choice of law under Article III of the Constitution. Even if, as I argue below, federal courts are required to apply the *whole* law of a state in diversity cases—including its conflict-of-laws principles—there must be some basis for determining *which* state's whole law governs.[172] *Klaxon* selects the whole law of the state in which the federal court sits. But while there are excellent

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170. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (internal citation omitted).

171. 19 WRIGHT ET AL., *supra* note 67, § 4506, at 75 (noting that the "common practice" of district courts before *Erie* was to apply their own choice-of-law rules); Whitten, *supra* note 136, at 265 n.23 ("Like the general commercial law in *Swift*, conflict-of-laws matters were considered a part of the 'general law' and the federal courts could exercise independent authority to interpret the content of conflicts doctrine in diversity cases."); Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for* Erie *and* Klaxon, 72 TEX. L. REV. 79, 112 (1993) ("[G]eneral law . . . covered matters such as commercial law and conflict of laws in which uniformity was desirable, thus making the subjects inherently 'general' in nature."); David F. Cavers, *The Changing Choice-of-Law Process and the Federal Courts*, 28 LAW & CONTEMP. PROBS. 732, 737-38 (1963) (noting that under *Swift v. Tyson* "choice-of-law questions fell into the domain of 'general law'"); Note, *Congress, the* Tompkins *Case, and the Conflict of Laws*, 52 HARV. L. REV. 1002, 1005 n.17 (1939) ("Under *Swift v. Tyson* the federal courts in many situations were accustomed to regard choice of law rules as a matter of 'general law.'"); Note, *Is There a Federal Law of Conflict of Laws?*, 24 IOWA L. REV. 784, 784 (1939) ("Prior to the *Tompkins* case, conflict of laws was regarded as part of the 'general law', and the federal courts applied their own principles." (citation omitted)); *see also* Note, *Application by Federal Courts of State Rules on Conflict of Laws*, 41 COLUM. L. REV. 1403, 1403 n.3 (1941) ("[T]hough the Supreme Court seems never to have expressly held that conflict of law rules were matters of 'general law' upon which the federal courts had the power to make independent determination, at least one circuit court has so held. . . . [T]here are indications of such a view in the Supreme Court." (citations omitted)).

172. *See* Louis L. Manderino, Erie v. Tompkins*: A Geography Lesson*, 5 DUQ. L. REV. 465, 474 (1967) (noting that the federal government has "authority to make the initial determination as to which state's law is applicable; otherwise . . . a federal court could not get its feet off the ground in a diversity suit, because it would be lost for a guiding first principle in the selection of applicable state law"). Professor Manderino believes that Article III provides authority for the United States to develop an "independent body of conflict of laws rules." *Id.* For reasons explained in the text, I disagree.

grounds for the rule in *Klaxon*,[173] there is no reason to think that federal courts in diversity cases are constitutionally compelled to apply the whole law of the state in which they sit.[174] The *Erie* policy—of which the *Klaxon* rule is an exemplar—is not constitutionally compelled[175] and in fact provides a workable basis for selecting state law only because Congress created federal districts along state lines.[176] Indeed, in cases in which federal judicial process runs beyond the jurisdiction of the state in which the federal court sits—interpleader cases, for example—serious questions can be raised about the appropriateness of the *Klaxon* rule. In such cases, it might well be appropriate to rely on some other basis for determining *which* state's whole law should apply or to develop preemptive federal choice-of-law rules under the Full Faith and Credit Clause.

The harder question is whether Article III authorizes the use of independent choice-of-law rules in diversity cases to select the internal law of a State in the same way that States—within boundaries set by the Due Process and Full Faith and Credit Clauses—are allowed to do.[177] It has often been asserted that Article III confers such power.[178]

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173. *See, e.g.*, Laycock, *supra* note 24, at 282 ("The Court [in *Klaxon*] was right to conclude that choice-of-law rules could determine results, and that choice-of-law rules should therefore be the same in both state and federal court.").

174. For an example of another—albeit less administrable—standard, see *Richards v. United States*, 369 U.S. 1, 9-16 (1962) (construing the Federal Tort Claims Act, 28 U.S.C. § 1346 (1958), to require federal courts to apply the whole law of the state where the act or omission occurred).

175. *See supra* notes 150-159 and accompanying text.

176. *See* Manderino, *supra* note 172, at 471-73 (relying on the fact that Congress is not required to organize federal districts within state lines to argue that a federal court is not constitutionally required to apply the choice-of-law rules of the state in which it sits); Alfred Hill, *The Erie Doctrine and the Constitution*, 53 NW. U. L. REV. 541, 545, 557-58 (1958) (same); *see also* AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 448 (1969) ("If . . . Congress may bring in defendants from states other than that in which the federal court sits . . . there can hardly be reason of constitutional dimension for requiring the federal court to follow the choice-of-law rule of the state in which it [sits].").

177. The American Law Institute has argued that Congress has the power to create independent choice-of-law rules that would apply *only* in federal court under the Commerce and Full Faith and Credit Clauses. *See* AM. LAW INST., *supra* note 176, at 310-11. It could be argued that such rules would not regulate "commerce" or determine the "effect" of state law as those terms are used in Articles I and IV, but would only impose rules of decision in federal court. I need not address that issue here. Any federal court power to develop choice-of-law rules based on the legislative finding in CAFA rests on the need to determine *which* state's law applies under the RDA. The RDA unquestionably is an exercise of power under Article III and the Necessary and Proper Clause.

178. *See, e.g.*, 19 WRIGHT ET AL., *supra* note 67, § 4506, at 77-78 ("It also is possible to find a constitutional basis for the independent determination of conflicts questions by the federal courts from the implications of the grant of judicial power in Article III, particularly

But there are grounds for serious doubt that Article III sweeps so broadly.[179]

The strongest argument for reading Article III to grant the federal government full power to develop independent choice-of-law rules is history. As Patrick Borchers notes in a fascinating article, it "appears that those involved in the drafting and the ratification battle contemplated an independent role for diversity courts" with respect to choice of law.[180] The historical evidence is striking, but cannot be dispositive. For the evidence that the framers of the Constitution contemplated that federal courts sitting in diversity would have an independent role with respect to all matters of "general law" is equally

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when taken together with the Necessary and Proper Clause of Article I, Section 8."); RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 637 (5th ed. 2003) ("[S]urely Congress, acting under its power to make laws "necessary and proper" to the exercise of jurisdiction under Article III, could authorize the formulation of federal choice-of-law rules for the federal courts. . . ."); Symeon C. Symeonides, *The ALI's Complex Litigation Project: Commencing the National Debate*, 54 LA. L. REV. 843, 852 (1994) (stating that "at least for federal courts, the Judicial Power Clause in combination with the Necessary and Proper Clause" provides "constitutional power to federalize the law of choice of law" (footnotes omitted)); AM. LAW INST., *supra* note 49, at 311 ("A conclusion that the Constitution does not give Congress the power to authorize independent federal choice of law doctrines appears incongruous with the recognized congressional authority to administer the federal court system . . . ."); Henry J. Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 402 (1964) ("For Congress to direct a federal court sitting in State A whether to apply the internal law of State A, B or C, or to use its own judgment which to apply, can well be said to be 'necessary and proper' to enabling federal judges to function . . . .").

179. I have not been alone in expressing such doubts. *See, e.g.*, David E. Seidelson, *Section 6.01 of the ALI's Complex Litigation Project: Function Follows Form*, 54 LA. L. REV. 1111, 1112 n.2 (1994) ("I have serious reservations about the constitutional propriety of fashioning federal conflicts laws to be applied to cases presently governed by [*Erie* and *Klaxon*].").

180. Borchers, *supra* note 171, at 98; *see also id.* at 90-98. Other commentators have also relied on history to argue that federal courts have power to create independent choice-of-law rules. *See, e.g.*, Hill, *supra* note 176, at 544 ("[I]t does not seem reasonable to ascribe to the framers of the Constitution an intention that the local choice of law rules should always govern in the federal courts."); AM. LAW INST., *supra* note 176, at 446 (arguing that the historical evidence "indicates that one of the purposes sought to be achieved by the creation of the diversity jurisdiction might well have been the application of choice-of-law rules different from, or at least independent of, those of state courts"); Baxter, *supra* note 137, at 31-41 (relying on history for the proposition that the grant of diversity jurisdiction was intended to allow federal courts to reach independent judgments on choice of law); Leonard S. Goodman, *Eighteenth Century Conflict of Laws: Critique of an* Erie *and* Klaxon *Rationale*, 5 AM. J. LEGAL HIST. 326, 355 (1961) ("Concurrent state practice and the debates over the Constitution tended to prove that by the time of Constitutional ratification, independent choice of law was generally within the judicial function, and that it was recognized as within the scope of the federal diversity jurisdiction.").

persuasive.[181] Yet there is no reasonable prospect that *Erie*—a cornerstone of our modern constitutional structure[182]—will be overruled in the absence of a radical shift in our understanding of the appropriate relationship between states and the federal government. For these reasons, whether Article III should be read to authorize the development of independent choice-of-law rules, depends not on history, but on whether such rules are consistent with the constitutional vision of *Erie*.

Those who construe Article III to authorize the creation of independent choice-of-law rules for use in federal courts argue that such authority is an inherent aspect of judicial power. As David Cavers notes in a memorandum prepared for the American Law Institute, a state court has power to apply its choice-of-law rules even when the state's only connection with the controversy is the commencement of suit there.[183] He continues: "Similarly, though the federal courts be viewed under *Erie* as constitutionally without power to prescribe substantive rules for decision in diversity of citizenship cases, the grant of judicial power over such cases seems sufficient to authorize formulation of choice-of-law rules."[184] In the same vein, Alfred Hill writes that "[i]t is difficult to understand why . . . the federal judicial power should be regarded as an inferior sort of judicial power which does not carry with it authority to choose the applicable substantive law."[185]

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181. Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1276-90 (1996) (arguing that *Swift v. Tyson* was consistent with the text and history of Article III); Borchers, *supra* note 171, at 81 ("[T]he drafting and ratification history supports the conclusion that diversity was intended at least in part as a protection against aberrational state laws, particularly those regarding commercial transactions."); *see also* William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1516-76 (1984) (analyzing federal courts' application of general common law). *See generally* BRIDWELL & WHITTEN, *supra* note 147.

182. 19 WRIGHT ET AL., *supra* note 67, § 4503, at 24 ("It is impossible to overstate the importance of [*Erie*]. . . . [I]t goes to the heart of the relationship between the federal government and the states . . . ."); Friendly, *supra* note 178, at 422 ("The complementary concepts—that federal courts must follow state decisions on matters of substantive law appropriately cognizable by the states whereas state courts must follow federal decisions on subjects within national legislative power where Congress has so directed—seem so beautifully simple, and so simply beautiful, that we must wonder why a century and a half were needed to discover them . . . .").

183. AM. LAW INST., *supra* note 176, at 444.

184. *Id.*

185. Hill, *supra* note 176, at 545. Earl Maltz demonstrates that this argument reaches well beyond choice-of-law rules. Earl M. Maltz, *Choice of Forum and Choice of Law in the Federal Courts: A Reconsideration of* Erie *Principles*, 79 KY. L.J. 231, 237 (1990)

The straightforward answer to why federal judicial power should be limited in this context is that the use of independent choice-of-law rules in federal diversity cases to choose indisputably substantive rules of law would undermine the constitutional holding of *Erie*.[186] An illustration provides a vivid example of the threat that independent federal choice-of-law rules pose in this regard. Assume that the federal courts—freed from the constraints of *Klaxon*—chose to apply Professor Leflar's "better law approach"[187] to select the internal law of a State.[188] Federal courts relying on the better-law criterion would approach choice of law in federal courts using virtually the same choice-of-law assumptions that *Erie* rejected as a constitutional matter. Once again, they would be focused on finding and applying the "right rule," rather than on applying the whole law of a state. And even if a federal "better law approach" were limited—as the Due Process Clause of the Fifth Amendment likely requires—to selecting the law of a state with an appropriate connection to the controversy, federal courts would still be enmeshed in making judgments about which state's substantive law is better.

The "better law approach" would be especially unsuitable as a choice-of-law rule for the federal courts. But as Larry Kramer explains, "[c]hoice of law is, literally, the assignation of rights to the parties—the decision defining what the plaintiff and defendant are entitled to on the particular facts. It is in this strong and fundamental

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("Normally a court that has jurisdiction over a cause of action also has the authority to determine the legal rules governing that cause of action.").

186. As the Court in *Erie* insisted: "Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' .... And no clause in the constitution purports to confer such a power upon the federal courts." Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938); *see also supra* notes 168-169 and accompanying text.

187. The "better law" approach authorizes a court to select the "better law" in choosing among the law of relevant jurisdictions. *See* Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 295 (1966); Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1587 (1966); *see also* SCOLES ET AL., *supra* note 38, § 2.13, at 51-58. Professor Laycock has argued that the "better-law approach" is unconstitutional. *See* Laycock, *supra* note 24, at 312-13 (arguing that the better-law approach and its variations violate the Full Faith and Credit Clause); *cf.* Allstate Ins. Co. v. Hague, 449 U.S. 302, 307 (1981) (plurality opinion) ("It is not for this Court to say whether the choice-of-law analysis suggested by Professor Leflar is to be preferred ....").

188. Professor Borchers has recommended a similar approach if *Klaxon* is overruled. *See* Borchers, *supra* note 171, at 126 (arguing that in matters of general law, "[d]iversity courts ought to ... apply a choice-of-law approach that examines the rules of the states having a reasonable connection with the dispute and chooses the rule that will reach the result most closely according with modern standards of justice" (footnote omitted)).

sense, in terms of both its purpose and effect, that choice of law is substantive."[189] Thus, the broader difficulty is that *any* choice-of-law regime inevitably defines the substantive rights of the parties in diversity cases.[190] This neither Congress nor the federal courts have power to do under Article III.[191] To avoid usurping state authority to define substantive rights, federal courts must apply the whole law—including the choice-of-law rules—of a state chosen without regard to its content. *Klaxon* serves admirably in that regard.

That is not to say that federal judgments about choice of law are illegitimate. Indeed, many have argued persuasively that the federal government is in the best position to prioritize among the interests of

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189. Kramer, *supra* note 47, at 569; *see also id.* at 569-72 (elaborating on the argument that choice of law defines substantive rights). Professor Kramer does not argue that the use of independent choice-of-law rules in federal court would be unconstitutional. *See id.* at 574.

190. Allan Ides has argued that choice-of-rules "do not create substantive rights and obligations; rather, they provide a method for determining which body of law will define those rights and obligations. They are, in short, procedural and well within the regulatory authority of Congress over the federal judicial system." Allan Ides, *The Supreme Court and the Law To Be Applied in Diversity Cases: A Critical Guide to the Development and Application of the* Erie *Doctrine and Related Problems*, 163 F.R.D. 19, 33 (1995); *see also* Barbara Ann Atwood, *The Choice-of-Law Dilemma in Mass Tort Litigation: Kicking Around* Erie, Klaxon, *and* Van Dusen, 19 CONN. L. REV. 9, 46-47 n.180 (1986) ("Like ordinary procedural rules, choice-of-law rules do not define the rights and liabilities of the parties but provide necessary direction in the management of the litigation."). But the fact that choice-of-law rules "provide a method" for defining rights and obligations does not render choice-of-law rules any more "procedural," than rules of statutory construction. In fact, choice-of-law rules can sometimes best be conceptualized as rules of statutory construction. One highly influential modern choice-of-law approach, for example, treats choice of law largely as a problem of statutory construction. Brainerd Currie's governmental interest approach

> [f]ocus[es] directly on the content of the substantive laws of the states implicated in the conflict. [Professor Currie] argued that the "ordinary process of construction and interpretation" would reveal the policies underlying those laws and would, in turn, determine their intended sphere of operation *in terms of space.*
>
> According to Currie, whenever a case falls within the spatial reach of a law as delineated by the interpretive process, the state from which that law emanates has a government interest in applying such law in order to effectuate its underlying purpose.

SCOLES ET AL., *supra* note 38, § 2.9, at 26-27. Traditional choice-of-law rules can also sometimes be conceptualized as rules of statutory construction. *See* GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 546-52 (3d ed. 1996) (noting that the presumption against extraterritorial application of federal statutes had its origin in the territorial approach of traditional choice-of-law thinking); Ala. Great S. R.R. v. Carroll, 11 So. 803, 807 (Ala. 1892) ("Section 2590 of the Code, in other words, is to be interpreted in the light of universally recognized principles of private, international, or interstate law, as if its operation had been expressly limited to this state, and as if its first line read as follows: 'When a personal injury is received in Alabama by a servant or employee' . . . .").

191. *See supra* note 186 and accompanying text; *infra* notes 194-203 and accompanying text.

various states.[192] And Article IV, Section 1—the Full Faith and Credit Clause—authorizes the United States to override the choices States would otherwise make.[193] But to the extent Congress has not acted to preempt state choice-of-law rules under Article IV, the judgments inherent in the selection of a constitutionally appropriate substantive rule of law must be left to the states.

Given Congress's power over choice of law under Article IV, it is tempting to dismiss as irrelevant questions about the scope of that power under Article III. But the distinction is highly relevant from the standpoint of *Erie*'s constitutional vision. What the Court sought to do in *Erie* was deny Congress and the federal courts power to make substantive law in diversity cases. From that perspective, those who have discounted *Erie*'s constitutional holding on the ground that Congress had power under the Commerce Clause to enact a substantive tort rule governing the case have missed the point.[194] While Congress's power under the Commerce Clause is broad, it is not unlimited.[195] The power to make substantive law in any case within the judicial power of the United States would significantly expand federal power to create substantive law in areas the federal government might otherwise be unable to reach.[196] *Erie* helps safeguard the vision of the

192. *See supra* notes 136-137 and accompanying text.

193. *See supra* note 136 and accompanying text.

194. Jonathan M. Gutoff, *Federal Common Law and Congressional Delegation: A Reconceptualization of Admiralty*, 61 U. PITT. L. REV. 367, 381 (2000) ("Brandeis' explicit constitutional objection was directed not at the power of Congress to regulate conduct or interstate railway lines, which it surely has, and, most likely, would have been considered to have had in 1938, but at the general law-making authority conferred by Swift in the absence of State legislation." (footnote omitted)); Ely, *supra* note 121, at 703 n.62 (recognizing that congressional legislation based upon the commerce clause could have covered the specific tort issue in *Erie*, but properly insisting that the "*Erie* opinion's point was that there was no constitutional basis for the sort of general law making authority exercised under the *Swift* doctrine" and "that Congress therefore could not have delegated such general authority to the courts"). Professor Borchers—and others—have argued that "Brandeis's concern has been obliterated as a practical matter by the expansion of congressional commerce authority." Borchers, *supra* note 171, at 118; *see also* Maltz, *supra* note 185, at 237 (relying on Congress's "expansive power over commerce" for the proposition that "the doctrine of *Swift v. Tyson* clearly would be acceptable under modern constitutional analysis" if authorized by Congress).

195. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995).

196. The potential breadth of judicial power under Article III is breathtaking. *See* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967) ("In a variety of contexts this Court and the lower courts have concluded that Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens."); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 823 (1824) ("[W]hen a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit

federal government as one of limited substantive powers by generally requiring recourse to constitutional provisions that expressly grant substantive lawmaking power.[197] And as I have argued, the development of independent choice-of-law rules enmeshes the federal government in substantive lawmaking outside the proper scope of Article III.

Hanna v. Plumer does not suggest otherwise.[198] The *Hanna* Court held:

> [T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.[199]

Justice Harlan pithily summarized the standard as "arguably procedural, *ergo* constitutional."[200] But while *Hanna* permits broad assertions of federal authority in matters that are arguably procedural, it speaks only tangentially to choice of law.

It is true that a few choice-of-law rules may be deemed arguably procedural within the meaning of *Hanna*, even when used to select substantive rules of law. Rule 44.1 of the *Federal Rules of Civil Procedure*—which primarily sets forth rules of pleading and evidence with respect to the laws of foreign countries[201]—is an excellent example. But most choice-of-law rules cannot be characterized independently from the rules they select.[202] For that reason, the use of

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Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.").

197. Federal power sometimes has been based on structural inferences that an area is inherently federal. *See generally* FALLON ET AL., *supra* note 178, at 732-58.

198. 380 U.S. 460, 460 (1965).

199. *Id.* at 472.

200. *Id.* at 476 (Harlan, J., concurring).

201. Rule 44.1 provides:

> A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

FED. R. CIV. P. 44.1.

202. *See supra* notes 186-190 and accompanying text. Factors considered in the choice of indisputably substantive law sometimes have procedural overtones. Take, for example, the *Restatement (Second)*'s identification of the "ease in the determination and application of the law to be applied" as one of the factors to be weighed in determining which

independent choice-of-law rules in federal diversity cases to choose indisputably substantive rules of law would undermine the basic constitutional holding of *Erie*.[203]

By contrast, there can be no constitutional objection to the use of independent choice-of-law rules to choose a rule of state law that is "arguably procedural." If Article III authorizes a federal rule of decision on a matter, Article III *a fortiori* authorizes the use of independent choice-of-law rules to borrow appropriate state law as the federal rule of decision. But the RDA makes clear that federal courts have no lawmaking authority *even over arguably procedural matters* "except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide."[204] Put another way, the RDA draws no distinction between arguably procedural and clearly substantive matters with respect to choice of law or anything else. Thus, unless a congressional statute can be read to authorize federal courts to create a federal rule of decision on an "arguably procedural" matter, the RDA leaves the matter to the states, and federal courts are bound to apply the choice-of-law rules of a state.

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state has the "most significant relationship" with respect to a particular legal issue. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(g) (1971). Of course, a judicial system clearly has a procedural interest in the ease with which it can determine and apply a legal rule to a case within its courts. But it would prove too much to conclude that choice-of-law rules are "arguably procedural" because the selection and application of choice-of-law rules may make a case simpler or harder to resolve. By that reasoning, federal courts could be directed in diversity cases to apply the rule of substantive law that would be the easiest for a federal court to administer. Such a directive would not be as objectionable as a directive requiring use of the better law, but both directives would give federal courts power to substitute federal choices for state choices with respect to substantive law in federal courts. *Erie* tells us that federal courts do not have power to make independent choices about the substantive law that will apply in federal court. But that is precisely what federal courts could do if they could apply independent choice-of-law rules to select the law governing indisputably substantive matters.

203. *See supra* notes 186-197 and accompanying text.

204. 28 U.S.C. § 1652 (2000); *see also* Woolley, *supra* note 70, at 536 ("Although not every legal rule is a 'rule of decision,' it has long been settled that matters which traditionally were 'procedural' for conflict-of-law purposes may be 'rules of decision' within the meaning of the RDA."). Statutes creating the federal courts and bestowing jurisdiction upon them implicitly authorize federal courts to develop a common law of civil procedure governing the *internal* process of adjudication in a civil case with respect to matters not addressed by a federal statute or the *Federal Rules of Civil Procedure*. Woolley, *supra* note 70, at 538 n.59. Thomas Merrill similarly has argued—on different grounds—that the RDA does not bind federal courts to use state rules of decision with respect to matters of internal procedure. *See* Thomas W. Merrill, *The Common Law Powers of the Federal Courts*, 52 U. CHI. L. REV. 1, 46-47 (1985) (arguing that rules which "involve merely 'a matter of judicial procedure or internal court governance'" are not rules of decision within the meaning of the RDA).

It could be argued, for example, that Congress has authority to enact statutes of limitation for diversity cases.[205] Statutes of limitation in diversity cases nonetheless are left to state law under the RDA.[206] Federal courts accordingly have no power to choose a statute of limitations in a diversity case through independent choice-of-law rules. Rather, they must select an applicable limitations period by applying the choice-of-law rules of a neutrally selected state.

To summarize, Article III prohibits the use of independent choice-of-law rules to choose clearly substantive law, except when a choice-of-law rule can be deemed arguably procedural. And because the RDA draws no distinction between clearly substantive and arguably procedural rules of decision, the RDA similarly restricts the use of independent choice-of-law rules to choose even arguably procedural state law.

It remains to apply this framework to the two techniques Congress specifically identified for opprobrium in the legislative history. One technique the legislative history condemns is application of the law of the state in which the defendant is headquartered. There is no question that under the framework outlined above, federal courts may not ignore state choices in these circumstances. Choice-of-law rules in this context are making a choice among rules of substantive law and cannot be characterized as "arguably procedural." A much harder case is presented by a federal choice-of-law rule that abrogates a state law presumption that forum law governs in the absence of proof with respect to "foreign" law.

The question posed is whether choice-of-law presumptions—like the matters addressed in Rule 44.1—should be deemed "arguably procedural," even when used to select substantive law. Evidentiary presumptions founded on an assessment of probabilities usually are thought to sound in procedure,[207] and the origin of the presumption in

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205. *Cf.* Sun Oil Co. v. Wortman, 486 U.S. 717 (1988) (holding that because statutes of limitation were deemed "procedural," at the time the Constitution was adopted, a forum state may apply its statute of limitations to all suits brought in the forum).

206. *See* Bauserman v. Blunt, 147 U.S. 647, 652 (1893) (holding in a diversity case that "[n]o laws of the several states have been more steadfastly or more often recognized by this court, from the beginning, as rules of decision in the courts of the United States, than statutes of limitations of actions, real and personal, as enacted by the legislature of a state, and as construed by its highest court"); *see also* Woolley, *supra* note 70, at 569 (arguing that federal courts "have no authority to develop common-law rules of limitation for suits in federal court").

207. *Cf.* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 134 cmt. b (recognizing that rules "designed to facilitate a finding in accordance with the balance of probability" are rules

favor of forum law appears to have been procedural in this sense. The *Restatement (First) of Conflicts*, for example, recognized a presumption only with respect to matters governed by the common law[208]—a presumption consistent with the understanding that the common law was generally uniform. But given the modern understanding that states legitimately can make different policy choices with respect to the common law, the presumption that in the absence of evidence the law is the same in every state can no longer rationally be understood as "procedural"—that is, as reflecting an evidentiary judgment about probabilities. Rather, application or rejection of the presumption reflects policy choices about the extent of deference owed to the substantive law of nonforum states. That is especially so when a state court would use the presumption in favor of forum law aggressively for the purpose of facilitating a multistate or nationwide class suit.[209] *Hanna* accordingly does not authorize federal courts to ignore state law presumptions or other state choice-of-law rules that favor certification of multistate and nationwide class suits. Federal courts must respect state choice-of-law rules, even when doing so would frustrate the choice-of-law objective enunciated in CAFA's legislative history.

IV. CONCLUSION

In short, Congress erred in assuming that of the expansion of federal subject matter jurisdiction in CAFA could legitimately influence choice-of-law in multistate and nationwide class suits. Congress undoubtedly has power under Articles III and IV to impose—or authorize the development of—choice-of-law rules binding in *both* State and federal courts. But in expanding diversity jurisdiction over class suits, Congress left its power over choice of law wholly unexercised. Unless and until Congress enacts a choice-of-law

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"concerned primarily with judicial administration" for which it is appropriate to apply forum law").

208. *Compare* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 622 (1934) ("In the absence of evidence, the common law of another common-law state is presumed to be the same as the common law of the forum."), *with id.* § 623 ("There is no presumption that the statutory law of another state is the same as that of the forum.").

209. If state law presumptions in favor of forum law were deemed "procedural," it is likely that federal courts would have authority to ignore such presumptions. Statutes creating the federal courts and bestowing jurisdiction on them implicitly grant federal courts common law authority with respect to matters of procedure. *See supra* note 204 and accompanying text. Federal courts ordinarily respect the *Erie* policy in deciding whether to apply a federal common law rule of civil procedure in a diversity case. But CAFA provides a strong basis for departing from the *Erie* policy. *See supra* notes 161-163 and accompanying text.

policy that governs class suits, federal courts will remain rigidly bound by state choice-of-law rules.