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Rethinking Place of Business as Choice of Law in Class Action Lawsuits

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I. INTRODUCTION

In the past century, businesses have come to operate on a national and often global level. In the past century, the United States has seen an enormous nationalization and even globalization of business. As a result, the actions of a single company increasingly have the potential to affect people far beyond the boundaries of that company's home state. When one or a few companies injure large numbers of consumers across the country, aggregate litigation (namely the class action lawsuit) becomes an especially attractive remedy. Aggregating claims allows plaintiffs to save time and money and may also enable them to present a more compelling case by showing the extent of damages a defendant allegedly caused.

Though some of this litigation arises under federal law, many of the underlying claims are governed by state law. Therefore, before a court can aggregate the claims and allow plaintiffs to proceed as a nationwide class, it must decide which state's law will apply to the claims. This decision frequently creates a classic "choice-of-law problem."[1]

Rule 23 of the Federal Rules of Civil Procedure authorizes class actions as a form of aggregate litigation.[2] For certification under Rule 23(b)(3),[3] plaintiffs must show that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members" and that the class action device will provide a superior method of adjudication.[4] Rule 23(b)(3) lists a number of factors that the court should consider in making the certification decision, including "the difficulties likely to be encountered in the management of a class action."[5] A court will not likely certify a class action that encompasses too many variations in either law or fact because the class will not meet the predominance requirement or the manageability standard.

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1. Ryan Patrick Phair, Comment, *Resolving the "Choice-of-Law Problem" in Rule 23(b)(3) Nationwide Class Actions*, 67 U. CHI. L. REV. 835, 835 (2000) ("[T]he courts have often been confounded by the 'choice-of-law problem,' which refers to the fact that a federal court may be obligated to apply the law of each individual class member's state of domicile to each of their individual claims respectively, thereby frustrating Rule 23(b)(3)'s twin requirements.").

2. FED. R. CIV. P. 23.

3. Though mandatory class actions may be certified under sections 23(b)(1)(A), (b)(1)(B), and (b)(2), this Note will only address the opt-out class actions brought under Rule 23(b)(3).

4. FED. R. CIV. P. 23(b)(3).

5. *Id.*

In many class actions based on state law claims,[6] plaintiffs seeking certification have been able to prove that common questions of fact exist, or at least that the class can be divided into manageable subclasses, based on common factual backgrounds.[7] However, the requirement that there be common questions of law raises a unique set of problems[8] which have, until recently, barred plaintiffs from achieving certification of a nationwide class when the claims are based in state law.[9] State choice-of-law rules often create a situation in which the court deciding the case has to apply the laws of different states to the different class members. When a single court must apply an unmanageable number of variations in state law to the class members from different states, common questions of law do not predominate. Therefore, the class cannot be certified.

This choice-of-law problem is no small issue. In fact, it can have such a debilitating effect on an effort to bring nationwide class actions that it has come to the forefront of recent class action reform debate in Congress. With the passage of the Class Action Fairness Act,[10] it will now be easier for defendants to remove class actions to

6. State law claims would include, for example, tort claims, products liability claims, breach of warranty claims, breach of contract claims, etc. If the class action is based on federal law claims, then federal law will control and the court does not need a choice-of-law analysis.

7. *See generally* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) (discussing the predominance requirement and the possibility of subclassing when there are divergent interests among class members).

8. Some authors have suggested that the use of the disjunctive "or" in Rule 23 suggests that courts need not find common questions of law *and* common questions of fact, but rather they must simply find either common questions of law or common questions of fact. *See, e.g.*, Phair, *supra* note 1, at 845 (contending that the word "or" is "disjunctive" and therefore requires that either "questions of law or fact predominate"). Courts, however, do not take this same view, but instead require that there be both common questions of law and fact.

9. *See, e.g.*, Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 674 (7th Cir. 2001) ("A nationwide class in what is fundamentally a breach-of-warranty action, coupled with a claim of fraud, poses serious problems about choice of law, the manageability of the suit, and thus the propriety of class certification."); Castano v. Am. Tobacco Co., 84 F.3d 734, 742 (5th Cir. 1996) (decertifying a class because "the district court did not properly consider how variations in state law affect predominance"); Georgine v. Amchem Prods., Inc., 83 F.3d 610, 618 (3rd Cir. 1996) ("Initially, each individual plaintiff's claim raises radically different factual and legal issues from those of other plaintiffs. These differences, when exponentially magnified by choice-of-law considerations, eclipse any common issues in this case. In such circumstances, the predominance requirement of Rule 23(b) cannot be met."); *In re* Am. Med. Sys., Inc., 75 F.3d 1069, 1085 (6th Cir. 1996) ("If more than a few of the laws of the fifty states differ, the district judge would face an impossible task of instructing a jury on the relevant law, yet another reason why class certification would not be the appropriate course of action."); Lichoff v. CSX Transp., Inc., 218 F.R.D. 564, 572 (N.D. Ohio 2003) ("[V]ariations in state law, when the laws of multiple states are potentially applicable to a case, may severely decrease the practicality of trying the claims as a class action."); Oxford v. Williams Cos., 137 F. Supp. 2d 756, 764 (E.D. Tex. 2001) ("In a multi-state class action, variations in state law may swamp any common issues."); *In re* Ford Motor Co., 194 F.R.D. 484, 489 (D.N.J. 2000).

10. 28 U.S.C. § 1332(d)(2) (2005).

federal court.[11] As federal courts are perceived as less hospitable to plaintiff classes, allowing removal is expected to increase the defendant's chances of successfully having a class decertified once it is in federal court.[12] An amendment to this act, proposed by Senator Feinstein, would have limited a defendant's ability to have a class removed to federal court and then decertified on choice-of-law grounds.[13] The proposed amendment stated:

> (1) the district court shall not deny class certification, in whole or in part, on the ground that the law of more than 1 State will he applied; (2) the district court shall require each party to submit their recommendations for subclassifications among the plaintiff class based on substantially similar State law; and (3) the district court shall— (A) issue subclassifications, as determined necessary, to permit the action to proceed; or (B) if the district court determines such subclassifications are an impracticable method of managing the action, the district court shall attempt to ensure that plaintiffs' State laws are applied to the extent practical.[14]

The amendment, however, did not pass as part of the bill.[15] For better or for worse, courts have thus been left without a viable solution to the choice-of-law conflicts that arise in class actions.

The seemingly insurmountable choice-of-law barrier, however, has not prevented plaintiffs from continuing to seek certification of nationwide class actions. One of the most recent and perhaps most successful attempts to certify a nationwide class action based on state-

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> (2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which--
>
> (A) any member of a class of plaintiffs is a citizen of a State different from any defendant . . . .

Id. By changing the amount in controversy requirement and eliminating the complete diversity requirement, this Act makes it easier for defendants to remove class actions to federal court based on diversity jurisdiction.

11. *Id.*

12. Victor E. Schwartz et al., *Tort Reform Past, Present and Future: Solving Old Problems and Dealing with "New Style" Litigation*, 27 WM. MITCHELL L. REV. 237, 264 (2000) ("It is no surprise, then, that plaintiffs' counsel seek out the most class action friendly jurisdictions possible for their lawsuits. In most instances, these are state courts.").

> Plaintiff lawyers are likely to forum shop for a state in whicb class certification is relatively easy. They are also likely to want a large nationwide class, where the recovery (and fees) will be extensive. Because some state courts have been more liberal about certification than other courts, there will necessarily be some state class action havens.

Linda Silberman, *The Vicissitudes of the American Class Action—With a Comparative Eye*, 7 TUL. J. INT'L & COMP. L. 201, 215 (1999).

13. 151 CONG. REC. S1215-02 (2005).

14. *Id.*

15. The amendment was rejected by a vote of sixty-one to thirty-eight. U.S. Senate, Vote Summary on Feinstein Amdt. No. 4, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=1&vote=00007 (last visited Nov. 15, 2005) [hereinafter Vote].

law claims was in *Ysbrand v. DaimlerChrysler Corp.*[16] In this case, the Oklahoma Supreme Court upheld the certification of an opt-out class action by choosing the defendant's principal place of business as the controlling law.[17] By doing this, the court avoided the application of multiple state laws.[18] It found that common questions of law predominated since there was only one state's law to apply, and upheld the certified class.[19]

While *Ysbrand* remains good law in Oklahoma,[20] and certifying the class using the law of the defendant's principal place of business seems to solve the choice-of-law problem, this approach is not necessarily correct or constitutionally sound. In determining which substantive law to apply to a class, a court should only use the defendant's principal place of business in cases where, had the action been filed as an individual action, a choice-of-law analysis would lead the court to apply the law of the defendant's principal place of business.[21] Because a choice-of-law analysis will rarely, if ever, lead to this conclusion, using the law of the defendant's principal place of business is highly problematic, so courts faced with the certification decision should not take this approach.

Part II of this Note will discuss the limitations on choice of law that the Supreme Court articulated in *Phillips Petroleum Co. v. Shutts*[22] and will explore the problems that arise when courts have to make choice-of-law decisions for nationwide class actions. Part III then considers the possibility of choosing the law of the defendant's principal place of business as a method of getting around the choice-of-law problem and uses *Ysbrand* as an example. Part IV examines whether this new approach will work. This Section first explores the due process concerns implicated when a court applies the law of the defendant's principal place of business to actions that occurred outside of the state and then turns to the "bootstrapping" problem articulated in *Shutts*. Part V concludes that the approach of certifying a class using the defendant's principal place of business as the controlling law

16. 81 P.3d 618 (Okla. 2003).

17. *Id.* at 626.

18. *Id.* ("The needs of the interstate system and the basic policies of predictability and uniformity of result require that the issue of product defect be determined in one forum with one result rather than in 51 jurisdictions with the very real possibility of conflicting decisions.").

19. *Id.*

20. DaimlerChrysler tried to appeal this case to the Supreme Court, but *certiorari* was denied. DaimlerChrysler Corp. v. Ysbrand, 124 S.Ct. 2907 (2004).

21. *See* Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 575-76 (1996) (arguing that a court's choice of law analysis should be the same for individuals and class actions).

22. 472 U.S. 797 (1985).

cannot be used to solve the choice-of-law problem. Due process counsels against choosing the law of the defendant's principal place of business for actions having their effects in multiple states, even in individual suits. In addition, the fact that courts do not actually choose this law when presented with an individual suit suggests that under the *Shutts* anti-bootstrapping rationale, courts cannot change their treatment of the claims merely because they are structured as a class action.

II. BACKGROUND

A. Limitations Imposed on Choice of Law by Shutts

In *Phillips Petroleum Co. v. Shutts*, the Supreme Court articulated the necessary limits on a state court's decision when it chooses the substantive law to apply to a nationwide class action.[23] In this case, oil and gas royalty owners filed a suit in Kansas seeking interest payments on royalties that Phillips Petroleum had suspended while it waited for the Federal Power Commission to approve its increased gas prices.[24] Upholding the lower court's certification of the class, the Supreme Court of Kansas found that choice-of-law concerns did not require decertification.[25] Rather, it established that "the law of the forum controlled all claims unless 'compelling reasons' existed to apply a different law."[26] The court recognized no compelling reasons in the case before it and noted that because the plaintiffs had chosen to have their claims resolved under Kansas law, no due process problem existed; thus, the case could continue on a class-wide basis. [27]

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23. *See id.* at 823 (holding that a state court may apply "one of several choices of law" as long as it conforms with certain constitutional limitations). Similarly, in *Klaxon Co. v. Stentor Elec. Mfg. Co.*, the Court further articulated that when a class action grounded in state law is brought in federal court under diversity jurisdiction, the federal court must apply the choice-of-law rules of the state court where the federal court sits. 313 U.S. 487, 496 (1941).

> We are of opinion that the prohibition declared in *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938) against such independent determinations by the federal courts extends to the field of conflict of laws. 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 the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side.

Id.

24. *Shutts*, 472 U.S. at 799-800.

25. *Id.* at 803.

26. *Id.*

27. *Id.* (citing Shutts v. Phillips Petroleum Co., 235 Kan. 195 (1984)).

On appeal, the United States Supreme Court found two problems with the Kansas court's approach. First, the choice to apply Kansas law to the claims of all class members was an arbitrary choice, which violated the due process protection guaranteed to the defendant by the Fourteenth Amendment.[28] Second, the more subtle problem with the Kansas court's decision to apply forum law arose because of what the Court called "bootstrapping."[29] Essentially, the Supreme Court explained that the existence of the class itself could not justify choosing a certain state's law (in this case, the law of the forum).[30]

1. Due Process and Arbitrariness

The Fourteenth Amendment guarantees that no State will "deprive any person of life, liberty, or property, without due process of law."[31] Starting with this basic constitutional guarantee, courts have articulated a vague outline of the limits imposed by the Due Process Clause on a court's choice of law. In *Allstate Insurance Co. v. Hague*, the Supreme Court held that in order to satisfy due process, a court cannot, when choosing which state's law to apply, choose a law that would be arbitrary or unfair.[32] Therefore, if a court applies the law of a state without performing a sound constitutional choice-of-law analysis or simply defaults to the law of the forum, it may violate the defendant's Fourteenth Amendment due process guarantee.

In *Shutts*, the Supreme Court expanded upon *Allstate* and held that the application of Kansas law to a class action where over 99% of the leases in question had no apparent connection to Kansas was unconstitutional as a matter of due process.[33] The Court explained that the "application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits."[34] The issue of which state's law could be constitutionally applied remained for the lower court on remand, leaving open the possibility that "in many situations a state court may be free to apply one of several choices of law."[35] Nevertheless, the Court firmly articulated

28. *Shutts*, 472 U.S. at 822.
29. *Id.* at 821.
30. *Id.*
31. U.S. CONST. amend. XIV, § 1.
32. 449 U.S. 302, 313 (1981).
33. 472 U.S. at 822.
34. *Id.*
35. *Id.* at 823.

that "the constitutional limitations laid down in cases such as *Allstate* . . . must be respected even in a nationwide class action."[36]

The standard for invoking a state's law is higher than the standard for exercising personal jurisdiction over an absent defendant.[37] For a court to exercise personal jurisdiction over a party, that party's conduct must have created at least minimum contacts with the forum.[38] This requirement arises from due process notions of fairness to the defendant.[39] In choosing which state's law to apply to the controversy, due process restrictions require "that [a] [s]tate must have a *significant contact* or *significant aggregation of contacts*, creating state interests, such that [the] choice of its law is neither arbitrary nor fundamentally unfair."[40] Clearly, establishing "significant" contacts requires something more than the "minimum contacts" required for personal jurisdiction.[41] Though the Court in *Shutts* did not definitively answer which choice of law meets the due process requirement, it at least made clear that if each plaintiff's "contact" lacks relation to the forum state, then applying the law of the forum is not constitutional.[42]

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36. *Id.*

37. Phair, *supra* note 1, at 849; *see also* Linda J. Silberman, Shaffer v. Heitner*: End of an Era*, 53 N.Y.U. L. Rev. 33, 88 (1978) ("To believe that a defendant's contacts with the forum state should be stronger under the due process clause for jurisdictional purposes than for choice of law is to believe that an accused is more concerned with where he will be hanged than whether."); William D. Torchiana, Comment, *Choice of Law and the Multistate Class: Forum Interests in Matters Distant*, 134 U. PA. L. REV. 913, 922-23 (1986) ("[T]he consequences of reaching out to assert jurisdiction may not be as severe as the consequences of reaching out to apply forum law."). *But see* Scott Fruehwald, *Constitutional Restraints on State Choice of Law*, 24 U. DAYTON L. REV. 39, 56 (1998) (explaining that in practice, a "'[c]ourt employs restrictive scrutiny in personal jurisdiction cases, but minimal scrutiny in conflicts cases'" (quoting Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440, 454 (1982))).

38. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

Id. (quoting Miliken v. Meyer, 311 U.S. 457, 463 (1940)).

39. *See Shutts*, 472 U.S. at 807 ("The purpose of this test, of course, is to protect a defendant from the travail of defending in a distant forum, unless the defendant's contacts with the forum make it just to force him to defend there.").

40. *Id.* at 818 (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13) (emphasis added).

41. *Id.* at 821 (recognizing this distinction and noting that "[t]he issue of personal jurisdiction over plaintiffs in a class action is entirely distinct from the question of the constitutional limitations on choice of law").

42. *Id.* at 823.

2. Bootstrapping

The Supreme Court's prohibition on "bootstrapping" prevents a court from considering the existence of the class when engaging in a choice-of-law analysis.[43] In *Shutts*, the Kansas Supreme Court relied on the presence of a nationwide class to justify applying forum law.[44] It explained that when a state court has jurisdiction over a nationwide class action, the law of the forum should apply unless there are compelling reasons to apply the law of another jurisdiction.[45] The Supreme Court of the United States did not agree; it held that state court jurisdiction over the class action could not provide "an added weight in the scale when considering the permissible constitutional limits on choice of substantive law."[46] Referring to this as "something of a 'bootstrap' argument," the Court explained that the state court

> may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement that there be a "common question of law." The issue of personal jurisdiction over plaintiffs in a class action is entirely distinct from the question of the constitutional limitations on choice of law; the latter calculus is not altered by the fact that it may be more difficult or more burdensome to comply with the constitutional limitations because of the large number of transactions whicb the State proposes to adjudicate and whicb have little connection with the forum.[47]

In order to certify the class, the lower court had to find common questions of law.[48] Instead of finding common questions of law and then certifying the class because of these common questions, the Kansas Supreme Court used the fact that it had a class action before it to find that because there were plaintiffs from every state, the forum law was as good an option as any other.[49]

The "bootstrapping" problem becomes most apparent when considering what would have happened if the claims in *Shutts* had been filed individually instead of as a class action. For most of these individual claims, there would have been little reason to apply Kansas law because most of the leases were held by people in states other than Kansas.[50] Even if every one of the plaintiffs in the class had individually filed his or her claim in Kansas, the court was still not likely to have applied Kansas law. For example, Phillips Petroleum

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43. *See id.* at 821.
44. *Id.* at 820-21.
45. *Id.* at 821.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 820-21.
50. *Id.* at 801, 815-16.

was not located in Kansas,[51] and the terms of the lease were not negotiated in Kansas.[52] Therefore, a Kansas court would be hard-pressed to find justification for applying its own law to the controversy.[53] Because the Kansas court used the existence of the class action as a factor in its choice-of-law analysis, the Supreme Court found that the Kansas court overstepped the constitutional limitations on choice of law.[54]

B. The Choice-of-Law Problem [55]

After *Shutts*, courts confronted with nationwide class actions based on state law claims face a difficult problem. To satisfy Rule 23(b)(3), the certifying court has to find that the law that would apply to the claims of each of the class members is the same, or at least could be grouped into a manageable number of variations.[56] However, in determining which state's law to apply, the court cannot choose a law that is "arbitrary" or "fundamentally unfair" under *Allstate*.[57] Furthermore, after *Shutts*, a court cannot use the presence of a class to determine that the law of the forum applies, therefore supplying the requisite "question of law or fact common to the class."[58] If a court is to comply with *Shutts*, it must approach the suit as it would approach individual litigation, ignoring the fact that the litigation has been

51. *Id.* at 799.

52. *See id.* at 815 (stating that "some 97% of the plaintiffs in the case had no apparent connection to the state of Kansas except for this lawsuit").

53. Had the claims been filed individually under a traditional choice-of-law analysis, the Kansas court would probably have applied the laws of the state where the leases were executed or the laws of the plaintiffs' domiciles to each of the individual claims. *See id.* at 806-07 (explaining that "the Due Process Clause did not permit a state to make a binding judgment against a person with whom the state had no contacts" (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945))).

54. *Id.* at 822.

55. Phair, *supra* note 1.

56. *Id.* at 835; *see also* COMPLEX LITIGATION PROJECT § 2.06 (American Law Inst., Preliminary Draft No. 3, forthcoming 2005) [hereinafter 2005 Draft]; Kramer, *supra* note 21, at 586 (suggesting that claims can be grouped or subclassed so that the number of variations is manageable); Phair, *supra* note 1, at 853 ("[A] viable method for overcoming manageability concerns remains. Modern trial management techniques, such as grouping and subclassing, make it possible for a district court to manage large, complex cases in a manner foreign to the common law."). *See generally* 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, 25-28 (1999) (explaining that subclasses may be used to address variances in states' laws when "faced with a multistate class action that [] implicate[s] the laws of numerous jurisdictions").

57. Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 (1981).

58. FED. R. CIV. P. 23(a); *see Shutts*, 472 U.S. at 823 ("[T]he constitutional limitations laid down in cases such as *Allstate* . . . must be respected even in a nationwide class action.").

brought on behalf of a class, and choosing which states' laws to apply based on the choice-of-law principles of the state in which the court sits.

When a claim is brought in state court, that court will use its own state's choice-of-law principles to determine which state's law should govern the outcome of the case. Likewise, if a state-law claim is brought in federal court, the court must look to the choice-of-law principles of the state in which the court sits to determine which state's law to apply.[59] The Class Action Fairness Act does not change this analysis. Though class actions will be more easily removable to federal court, once there, the federal court will still have to apply its state's choice-of-law rules.[60] In a single-plaintiff litigation setting, the application of these rules rarely poses a problem. In a national class action, however, choice-of-law considerations become much more difficult because under many states' choice-of-law rules, the result will require the court to apply the laws of all fifty states.[61]

For example, if a suit is brought in a state that uses the law of the "place of the injury" as the governing law and the class consists of plaintiffs injured in all fifty states, the court conceivably would be faced with the possibility of applying the laws of each of the fifty states to the case.[62] This approach would not be acceptable under the Rule 23(b)(3) requirements for certification because it is impossible to say that common questions of law predominate when multiple state laws are at issue.[63] Furthermore, a court will not be able to determine that a class action is "superior" because it would be difficult, if not impossible, to manage a suit with so many variations.

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59. *See Shutts*, 472 U.S. at 835 n.16.

60. *See supra* note 10.

61. This is the same analysis whether there is a class action filed in state court (in which case the court will use its own choice-of-law principles to determine which state's law will govern) or whether the action is in federal court on diversity grounds (in which case the federal court will act as the state court in the district in which it sits and apply the same state court choice-of-law principles that the state court would have applied). *See, e.g.*, Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (finding that "[t]he conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts"). *See generally* Patrick Wooley, *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, 800-01 (2004) (arguing tbat Federal Rule 23 "should not be read to preempt the rule that federal courts apply state choice-of-law rules, including, when applicable, a state-law presumption that the law of the forum-state governs").

62. Admittedly, there would rarely, if ever, be a situation in which fifty different laws actually apply. *See* Kramer, *supra* note 21, at 585 (explaining that "there is substantial duplication among the various jurisdictions as to the applicable law").

63. *See, e.g., In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1018 (7th Cir. 2002) (finding that the suit at bar could not be certified as a class action because "a single nationwide class is not manageable" where the "claims must be adjudicated under the law of so many jurisdictions").

In re Bridgestone/Firestone, Inc. ("*Bridgestone/Firestone II*") illustrates this choice-of-law problem.[64] In this case, the Seventh Circuit decertified a class because the laws of fifty different states would have to be applied and therefore common questions of law did not predominate.[65] The case originated when a group of consumers, who either owned or leased SUVs equipped with defective Bridgestone tires, sued to recover damages for the diminished resale value of their vehicles under theories of breach of warranty and consumer fraud.[66] The Seventh Circuit reversed the district court's decision to certify the class and use the law of the defendant's principal place of business as the controlling law.[67] Though the court acknowledged that the holdings of certain earlier cases[68] indicated that the law of the defendant's principal place of business may be the appropriate law, it declined to rely on these other cases because the lower court had not done so.[69] Instead, the Seventh Circuit found that Indiana was a *lex loci delicti*[70] state, so for each plaintiff, the court would have to apply the law of the state where the financial loss was suffered.[71] Since there were plaintiffs from every state, a class action would require the court to apply multiple state laws. Because "[n]o class action is proper unless all litigants are governed by the same legal rules,"[72] the Seventh Circuit held that the class was not manageable and could not be certified.

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64. *Id.*

65. *Id.* at 1015, 1018.

66. *Id.*

67. *Id.* at 1017, 1021.

68. The lower court had relied on the holding from *Hubbard Manufacturing Co. v. Greeson*, 515 N.E. 2d 1071, 1073 (Ind. 1987), for the proposition that "when the place of the injury 'bears little connection to the legal action' a court may consider other factors, such as the place of the conduct causing the injury and the residence of the parties." *In re Bridgestone/Firestone*, 288 F.2d at 1016.

69. *In re Bridgestone/Firestone*, 288 F.3d at 1016.

> Neither Indiana nor any other state has applied a uniform place-of-the-defendant's-headquarters rule to products-liability cases. It is not hard to devise an argument that such a uniform rule would be good on many dimensions, but that argument has not carried the day with state judges, and it is state law rather than a quest for efficiency in litigation (or in product design decisions) that controls.

Id.

70. "The law of the place where the offense was committed." BLACK'S LAW DICTIONARY 930 (8th ed. 2004).

71. *In re Bridgestone/Firestone*, 288 F.3d at 1016 (The court determined that this would be "the places where the vehicles and tires were purchased at excessive prices or resold at depressed prices.").

72. *Id.* at 1015.

The problems encountered in *Bridgestone/Firestone II* are frequent obstacles for plaintiff classes.[73] Requiring courts to use a standard choice-of-law analysis and not allowing the fact that there is a potential class action to bear on this determination makes it extremely difficult for plaintiffs to bring a nationwide class action based on state law claims.

III. RECENT EFFORTS TO CERTIFY USING THE LAW OF THE DEFENDANT'S PRINCIPAL PLACE OF BUSINESS

Plaintiffs' attorneys have persisted in using new approaches to overcome the seemingly insurmountable barrier of certifying a nationwide class action based on state law claims. Because the place-of-the-injury choice-of-law rule often results in applying the laws of all fifty states, recent efforts have focused on using the law of the defendant's principal place of business as the applicable law.[74] As there is usually only one or a couple of defendants in any given litigation, applying the law of the defendant's place of business would implicate only one or a few states' laws, making the rule 23(b)(3) predominance requirement much easier to satisfy.

One way plaintiffs try to create a situation in which the court will only apply the law of one state is by reframing their claims. A typical situation in which plaintiffs attempt to certify a nationwide class action under state law arises when claims are grounded in tort or tort-like causes of action. In the typical case, there has been a defective product, multi-state action, or injury that affects people located around the country. Under normal choice-of-law rules, these types of cases would require that the court apply the law of each of the individual states.[75] As a solution to this barrier, however, creative plaintiffs' attorneys have begun shifting the focus away from the typical mass tort structure and have phrased their "injuries" in terms

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73. *See supra* note 9.

74. *See generally* Ysbrand v. DaimlerChrysler Corp., 81 P.3d 618, 627 (Okla. 2003) (upholding certification of an opt-out class action by choosing the controlling law to be that of the defendant's principal place of business).

75. "The traditional choice-of-law rule of *lex loci delicti*, under which the law of the place where the wrong is committed governs the substantive rights of the parties to a multi-state tort action, remains in effect in a number of jurisdictions." 16 AM JUR. 2D. *Conflict of Laws* § 124 (2005). *But see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (1971) (listing the relevant factors a court should take into account when making a choice-of-law decision with respect to an issue of tort and stating that the contacts include "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered").

of breach of warranty or contract.[76] This approach presses the court, in applying its choice-of-law rules, to apply the law of a state other than the state of the injury. The ultimate goal is to cast the claims in such a way that the court will choose the law of a single state as the applicable law for the claims of the class, avoiding the possibility of an unmanageable number of states' laws. The recent case of *Ysbrand v. Daimler/Chrysler Corp.*[77] illustrates this strategy.

In *Ysbrand*, a nationwide group of minivan owners filed a class action against the defendant manufacturer for damages caused by an alleged defective design in the front passenger side airbags.[78] Though this type of injury would typically give rise to a products liability or tort cause of action, the plaintiffs in *Ysbrand* chose instead to frame the issue as a breach of warranty claim under the Uniform Commercial Code ("UCC").[79] Applying the law of the defendant's principal place of business, the Supreme Court of Oklahoma upheld the certification of a nationwide class as to the breach of warranty claim, finding no choice-of-law problem.[80]

Relying on the "most significant relationship" test utilized by the district court in *Bridgestone/Firestone I*,[81] the trial court in

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76. *See, e.g.*, Bates v. Dow Agrosciences, 125 S.Ct.1788, 1793 (2005) (examining plaintiff farmers' claims of defective design, defective manufacture, negligent testing, and breach of express warranty in addition to strict liability tort claims in a suit for damage caused to peanut crops by defendant manufacturer's pesticide); *In re Bridgestone/Firestone*, 288 F.3d at 1017 ("Plaintiffs describe the injury as financial rather than physical and seek to move the suit out of the tort domain and into that of contract . . . and consumer fraud.").

77. 81 P.3d 618 (Okla. 2003).

78. When a claim is grounded in state tort law, under many states' choice-of-law rules the appropriate law to apply will be the law of the state where the injury occurred. Thus, if the plaintiffs had framed their claim in a way that resembled tort, likely they would have encountered the "choice-of-law problem" and the class would not have been certified. However, by strategically framing the issue as a breach of warranty, the plaintiff class was ahle to successfully argue that the state with the most significant tie to the litigation (and therefore the state whose law should be applied), was the place where the defendant's principal place of business was located. *Id.* at 625-26.

79. The plaintiffs also included a claim for "fraud and deceit" in their complaint. *Id.* at 621. However, this claim was not certified for class treatment because of choice-of-law concerns. *Id.* at 627. I will not further discuss the "fraud and deceit" claim in this paper, but it is worth mentioning that under traditional choice-of-law analysis, a fraud claim results in the application of the place where the contracts were made (i.e., place of injury), and so this presents the classic choice-of-law problem situation where the law of fifty different states must be applied. Because the breach of warranty claim is covered by the UCC it gives the court a little more room for creative choice of law. A point of clarification may be necessary here. Though the UCC is a uniform code that has been adopted virtually unchanged by the various states, when adopted the UCC is still *state* (not federal) law. Therefore, it is subject to state court interpretations and applications. Consequently, though it is a "uniform" standard, the applications of such standard can still vary amongst states.

80. *Id.* at 626-27.

81. 155 F. Supp. 2d 1069 (S.D. Ind. 2001), *rev'd*, 288 F.3d 1012 (7th Cir. 2002).

Ysbrand determined that under Oklahoma choice-of-law principles, the law of the defendant's principal place of business should apply to the breach of warranty claim.[82] Since the law of only one state would be applied, the court found that common questions of law did predominate, and allowed certification of the class.[83]

Using the "most significant relationship" test articulated in the Second Restatement of Conflicts,[84] the trial court determined that the law of the defendant's principal place of business should apply to the UCC breach of warranty claim.[85] The Oklahoma Supreme Court agreed with this determination, explaining that because the interests of the buyers' home states in this litigation were equal, Michigan's interest in the case was the "most significant relationship."[86] To support this decision the court noted that "Michigan is where the decisions concerning the design, manufacture, and distribution of the minivans were made [and] Michigan is the only state where conduct relevant to all class members occurred."[87] As a final note supporting the certification decision, the Oklahoma Supreme Court briefly referred to the standard articulated in *Shutts*.[88] It noted that its "conclusion is consistent with the constitutional imperative" that the law chosen must not be arbitrary nor fundamentally unfair.[89]

Though *Ysbrand* is one of the most recent cases in which plaintiffs successfully obtained certification of a class of nationwide plaintiffs by using the law of the defendant's principal place of business, it is certainly not the first attempt to do so. In earlier cases, courts certified classes by choosing the defendant's place of business as the law to apply, thus getting around the choice-of-law problem. For example, in *In re ORFA Securities Litigation*,[90] the District Court of New Jersey certified a class of shareholders that claimed that the defendants had artificially inflated the price of ORFA common stock according to the law of the defendant's place of business. The court found that "although each Plaintiff may not have had direct contact with New Jersey, the Defendants had their principal place of business

82. *Ysbrand*, 81 P.3d at 625.

83. *Id.*

84. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 188(2) (1971) (listing the factors and contacts the courts should take into account in applying the "most significant relationship" test).

85. *Ysbrand*, 81 P.3d at 625.

86. *Id.* at 626.

87. *Id.*

88. *Id.* (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985)).

89. *Id.* (citing *Shutts*, 472 U.S. at 818).

90. 654 F. Supp. 1449 (D.N.J. 1987).

in New Jersey and the alleged misrepresentations which serve as the gravamen of the Complaint originated in New Jersey."[91]

Most of the earlier cases certified using the law of the defendant's principal place of business dealt with state law claims in the context of securities litigation. In class actions involving state-law claims regarding securities, the law of the defendant's principal place of business may, in fact, be the logical choice of law. Though the securities are sold nationwide, relevant conduct relating to these securities occurs in one place. Furthermore, in the interest of stabilizing the securities market, it may make practical sense to have all issues surrounding a company's securities be governed by the same substantive body of law.

Cases such as *Ysbrand*, on the other hand, move dangerously close to the realm of tort or product liability and therefore stand at the cutting edge of class action jurisprudence. In actions bearing a resemblance to tort causes of action, (such as claims for breach of warranty or products liability), the rationale for applying the law of the defendant's principal place of business is less clear than it might be in the context of securities litigation.[92] In a nationwide business, contracts are negotiated in every state, injuries occur in every state, and potential plaintiffs live in every state. Therefore, every state has an equal interest in regulating this behavior. If the decision in *Ysbrand* stands, however, there could be an expansion in the number of class actions certified using the law of only *one* state. The result would cause a dramatic increase in certified class actions and the virtual elimination of the choice-of-law problem.

IV. VIABILITY OF USING THE DEFENDANT'S PRINCIPAL PLACE OF BUSINESS AS THE CONTROLLING LAW

The practical significance of applying the law of the defendant's principal place of business to class actions is that more nationwide

91. *Id.* at 1463; *see also* Gruber v. Price Waterhouse, 117 F.R.D. 75, 81-82 (E.D. Pa. 1987) (certifying a class action under Pennsylvania law when the defendant's "principal place of business was in Pennsylvania, defendant has offices in Pennsylvania, a majority of the auditing work was performed in Pennsylvania, and the financial statements were prepared in and disseminated from Pennsylvania"); *In re* Activision, 621 F. Supp. 415, 430 (N.D. Cal. 1985) (applying California law to a class action in which the plaintiffs alleged violations of the Securities Act and California law when the defendant's "principal place of business is in California, the issuance emanated from California, and the purchasers acceptances were directed at California").

92. This is because usually with cases involving physical injury (sounding in tort), the law of the plaintiffs' home state, the place where the injury occurred, applies. Thus, plaintiffs' home state has the greatest interest in the litigation because it has the greatest interest in prohibiting injury to its residents.

classes with claims grounded in state law will be certified. If courts use the law of the defendant's principal place of business, then where there are only one or several defendants, the law of only one or a few states will apply to the class action. Thus, the choice-of-law barrier to certification will cease to exist.

Using the law of the defendant's principal place of business would not have to be the universal rule in order to drastically change the state of class action law. Even if only a few states adopted the approach that the court took in *Ysbrand*, many class actions would have a chance at certification that would not otherwise have been certified. Because jurisdiction in a nationwide class action is usually proper in any state, if only a few states allow nationwide certification using the defendant's principal place of business, plaintiffs can simply file their cases in those states and avoid choice-of-law scrutiny.

Besides increasing the sheer number of class actions that will be certified, allowing certification using the law of the defendant's principal place of business will encourage forum shopping. Those courts that allow certification using the law of the defendant's principal place of business will become "magnet forums," and will be in a position to dictate the outcome of class actions affecting the entire nation.[93] This would give these states a disproportionate amount of power, a result which runs counter to notions of state equality and sovereignty.[94] The fates of hundreds of industries around the nations would rest in the hands of a few state courts. Thus, "[l]ike the tail wagging the dog, a state with an insubstantial interest in the dispute can bind the nation."[95] Though these are the inevitable results of using the law of the defendant's principal place of business, the

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93. As a practical matter, courts such as Oklahoma that do allow this kind of certification of nationwide classes using the defendant's principal place of business will quickly become magnet forums for plaintiffs attorneys seeking certification of these types of cases. This will have the effect of encouraging forum shopping, which is problematic for many reasons. *See* David Crump & Arthur R. Miller, *Jurisdiction and Choice of Law in Multistate Class Actions after* Phillips Petroleum Co. v. Shutts, 96 YALE L. J. 1, 62 (1986) (noting that "constitutional limitations on choice of law should be interpreted to limit unreasonable forum shopping").

94. Crump and Miller note that if the lower court holding in *Shutts* would have been affirmed, it would have

> created the danger that resort to "magnet" forums might defeat the chosen substantive policy of other states. If all states adopted a similar approach, plaintiffs' attorney would be able to identify a 'best' plaintiffs' forum in any class action. This "magnet" jurisdiction would be the state most likely to hold against the defendant or to award maximum damages. That forum might ignore laws of other states that would produce a defendant's judgment or a lower recovery.

See id. at 57.

95. *Id.*

primary question is whether the method itself is constitutionally viable.

A. Due Process

In *Allstate*, the Supreme Court held that "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[96] *Shutts* applies the *Allstate* rule to class actions.[97] However, neither *Shutts* nor *Allstate* clearly articulate the bounds of what constitutes an arbitrary or unfair choice of law. Courts often discuss these terms generally in the context of due process violations.[98] Yet, like the evasive term "due process," neither "arbitrariness" nor "unfairness" have concrete definitions.[99] In attempting to answer whether the law of the defendant's principal place of business would be a constitutionally permissible choice of law in a nationwide class action, it is necessary to first question whether such a choice in an individual suit would violate the Due Process Clause's prohibition of arbitrariness and unfairness.

An arbitrary or unfair choice of law presents due process problems similar to those that arise when a court approves an

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96. Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13. In *Allstate*, the Court found that the application of Minnesota law in a case where the decedent was employed by a Minnesota company, where the defendant was present and doing business in Minnesota, and where the plaintiff became a Minnesota resident prior to the institution of the litigation was neither arbitrary nor fundamentally unfair. *Id.* at 313-320.

97. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821 (1985).

98. *See, e.g.*, Lingle v. Chevron U.S.A. Inc., 125 S.Ct. 2074, 2083-84 (2005) ("[R]egulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause."); Zadvydas v. Davis, 533 U.S. 678, 718 (2001) ("Liberty under the Due Process Clause includes protection against unlawful or arbitrary personal restraint or detention."); Rogers v. Tennessee, 532 U.S. 451, 452-53 (2001) ("There is nothing to indicate that abolition of the rule in petitioner's case represented an exercise of the sort of unfair and arbitrary judicial action against which the Due Process Clause aims to protect.").

99. *See* In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220, 233, n.21 (6th Cir. 1972).

> Probably the most that can be said in a general way is that due process embodies a test of fundamental fairness in all steps of the proceedings; and that our sense of fairness is outraged by certain assertions of jurisdiction on the part of States unconnected with the parties or with the controversy; and that this sense of unfairness stems partly from the inconvenience and expense involved, partly from the idea of unfair surprise, partly from the anticipation of an improper choice of law, and partly from general notions of the limits of a state's rightful sovereignty.

Id. (citing David P. Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533, 535 (1963)).

excessive punitive damages award.[100] In *BMW of North America, Inc. v. Gore*,[101] the Supreme Court struck down a punitive damages award, finding it to be grossly excessive and therefore in violation of the guarantees of the Due Process Clause.[102] Writing for the Court, Justice Stevens explained the protections guaranteed to the defendant by the Due Process Clause. He noted that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also the severity of the penalty that a State may impose."[103] The idea is that due process requires that the defendant receive fair warning of the punishment that he will suffer as a result of his actions. The parallel between excessive punitive damages and an unconstitutional choice of law is derived from these core notions of due process.[104]

For a court to apply the law of the forum to a case before it, at a minimum, "contacts between the forum and the parties must be of such a nature that the parties might have expected their activities to be judged under forum law."[105] This expectation was not satisfied in *Shutts*, which was precisely why the court found the choice of law to be unconstitutional. The defendant in *Shutts* was not located in Kansas nor did it have lease agreements with many people in Kansas. Further, its employees probably had never traveled to Kansas, even to execute the leases.[106] Thus, as the court explains, the application of Kansas law to the controversy seems arbitrary in the clearest sense.[107]

It would be difficult to argue that the application of the law of the defendant's principal place of business is as arbitrary as the choice of forum law in *Shutts*. There would certainly be personal jurisdiction over the defendant in its state of incorporation. Furthermore, the

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100. *See* Fruehwald, *supra* note 37, at 71 ("States' unreasonable choice of law falls into the same category as excessive punitive damages. As was true of the excessive punitive damages . . . when a state chooses its law despite another state's significantly closer connection to the controversy, it has imposed its law on its neighbors.").

101. 517 U.S. 559 (1996).

102. *Id.* at 574-75.

103. *Id.* at 574.

104. *See* Fruehwald, *supra* note 37, at 71.

105. Torchiana, *supra* note 37, at 917.

> There is no element of unfair surprise or frustration of legitimate expectations as a result of Minnesota's choice of its law. Because Allstate was doing business in Minnesota and was undoubtedly aware that Mr. Hague was a Minnesota employee, it had to have anticipated that Minnesota law might apply to an accident in which Mr. Hague was involved.

Allstate Ins. Co. v. Hague, 449 U.S. 302, 318 n.24 (1981).

106. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 814-16 (1985).

107. *Id.* at 822.

defendant cannot likely argue that it will be prejudiced if the law of its own state is applied. Thus, it is entirely feasible that a court could choose to apply the law of the defendant's principal place of business to any given suit and that such choice would not be characterized as "arbitrary."[108]

Due process protections, however, also ensure fundamental fairness to the defendant. Therefore, even a non-arbitrary choice of law may violate due process if such a choice is fundamentally unfair. For instance, even where the choice of forum law is not arbitrary, "the forum State's interest in the efficient operation of its judicial system is clearly not sufficient . . . to justify the application of a rule of law that is fundamentally unfair to one of the litigants."[109]

If a defendant acts wholly within the boundaries of a certain state, it can expect to be bound by the laws of the state in which it is acting. However, it does not necessarily follow that the defendant should therefore expect to be bound by the laws of its own state for actions taken in a different state as, "[t]he application of an otherwise acceptable rule of law may result in unfairness to the litigants if, in engaging in the activity which is the subject of the litigation, they could not reasonably have anticipated that their actions would later be judged by this rule of law."[110] For example, if a person traveled to Nevada to take advantage of Nevada's gambling laws and then returned to his home state after a weekend of gambling, it seems fundamentally unfair to hold this person liable under his home state's stricter laws against gambling for his actions in Nevada.[111]

The fact that the defendant sells its products in every state does not change the fact that it expects to be bound by the individual state laws for its actions in the individual states. The principal articulated in *Gore*, that "to punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort,"[112] holds true even in situations where a defendant is

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108. *See, e.g.*, *In re* ORFA, 654 F. Supp 1449, 1464 (D.N.J. 1987) (justifying the application of the law of the defendant's principal place of business because "[d]efendants chose to use New Jersey as their principal place of business and cannot claim surprise at being held to the state's legal standards").

109. *Allstate*, 449 U.S. at 326 (Stevens, J., concurring).

110. *Id.* at 327 (Stevens, J., concurring).

111. This illustration becomes even clearer when explained in terms of international laws. For example, in some countries, the use of marijuana is legal. Therefore, if a U.S. citizen travels to these countries and uses marijuana while there, it would be fundamentally unfair for the United States to prosecute persons who smoke marijuana legally while abroad.

112. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 573 n.19 (1996) (citing Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978)); *see also* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422 (stating that when considering the culpability of a defendant in a certain state, a jury

manufacturing a product and then selling it across the country. So, when there is a conflict between state laws, a defendant should expect to be bound by the laws of State A for its actions in State A and to be bound by State B for its actions in State B.

To illustrate this concept, we start with a conflict relevant in *Ysbrand*: the issue of whether a plaintiff can recover damages absent physical injury. Most states do not allow such recovery.[113] Therefore, when a defendant sells vehicles in those states that do not allow recovery in this situation, it has no reason to expect that it will be held liable (be "punished") for selling its faulty products in those states, so long as the products do not cause physical injury. For states that do allow recovery absent physical injury, however, the defendant is on notice that if it breaches its warranty, it may be held liable in those states that permit recovery for economic loss. The fact that the defendant happens to have manufactured the vehicles in a state that allows recovery for pure economic loss does not change the fact that when the defendant sold its products in a state that does not allow recovery for pure economic loss, it expected to be bound by the laws of that state.

Admittedly, adjudicating a single defendant's actions under the laws of the fifty states will produce inconsistent results. A defendant will be able to escape liability for certain actions in states that happen to have more lax laws. However, this is the necessary and in some ways, desirable result of having a federal system where fifty states can enact their own sets of laws.[114] For example, if Kentucky does not want to protect its citizens from the purely economic harm that results when a warranty is breached, courts should honor this decision and not allow Kentucky plaintiffs to take advantage of a different state's more favorable laws when the events giving rise to the cause of action occurred wholly within Kentucky.[115] Thus, as a matter of

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"may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred").

113. *See* Brief for Oklahoma State Chamber of Commerce and Industry, Inc. as Amicus Curiae Supporting Petitioner, Ysbrand v. DaimlerChrysler Corp., 81 P.3d 618 (Okla. 2003) (No. 03-1342) [hereinafter Amicus Brief] (discussing states that do not allow recovery for breach of warranty).

114. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) ("Whatever lack of uniformity [requiring federal courts to follow state courts' choice-of-law rules] may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors.").

115. *See* N.Y. Life Ins. Co. v. Head, 234 U.S. 149, 161 (1914).

> [I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that state... without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon

fundamental fairness to the defendant, courts should not apply the law of the defendant's principal place of business in an individual suit, and should certainly not do so on an aggregate basis.

B. The Bootstrapping Debate

Even if a court believes that the application of the law of the defendant's principal place of business should be constitutionally permissible, if the court *would not* apply the law of the defendant's principal place of business in an individual suit (either because such a choice would be unconstitutional or alternatively, because that state's choice-of-law principles would not point to the law of the defendant's principal place of business), the court cannot use the existence of the class action to justify such an application. The Court in *Shutts* held that the existence of the class itself cannot be a factor in the choice-of-law determination.[116] This has come to be known as "bootstrapping."[117] This Section questions the viability of the "anti-bootstrapping" position taken in *Shutts* as an issue distinct from the due process issue discussed above. The question of whether a court should, as a matter of due process, apply the law of the defendant's principal place of business considers each individual cause of action. The bootstrapping question asks whether, even if there were no due process barrier to applying the law of the defendant's principal place of business in each individual suit, a court could apply this law to a class of nationwide plaintiffs. An analysis of the bootstrapping question must consider whether the position in *Shutts* should be followed, or whether courts should be allowed more freedom in certifying classes using a bootstrap rationale.

1. Using the Law of the Defendant's Principal Place of Business Will Often Require Bootstrapping

A court cannot easily certify a class action using the law of the defendant's principal place of business as the controlling law without bootstrapping.[118] The recent *Ysbrand* decision serves as a useful illustration.[119]

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the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound.

Id.

116. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821 (1985).

117. *Id.*

118. *Id.*

119. *See generally* Ysbrand v. DaimlerChrysler Corp., 81 P.3d 618 (Okla. 2003).

Under most states' choice-of-law principles, an action to recover for breach of warranty will be decided under the law of the state where the plaintiff was located and the warranty was negotiated.[120] This result should have been no different in Oklahoma, where *Ysbrand* was litigated. Oklahoma follows the "most significant relationship" test outlined in the Second Restatement of Conflicts.[121] Under the Restatement, relevant factors to be considered in choice-of-law decisions for claims arising out of contract are: (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation, and place of business of the parties.[122] Furthermore, section 191 provides that when the issue involves the sale of interests in chattel, the controlling law should be "the local law of the state where under the terms of the contract the seller is to deliver the chattel unless, with respect to the particular issue, some other state has a more significant relationship."[123]

Five of the six Restatement factors clearly point to the law of the state where the sale was made as the appropriate law to govern the breach of warranty claim. The only one of these Restatement factors that might point to the defendant's principal place of business is (e), "the domicile, residence, nationality, place of incorporation and place of business of the parties."[124] However, even this factor is "offset by the fact that the plaintiffs are domiciled all over the country."[125] Thus, based simply on the factors in the Restatement, the appropriate law to apply to a breach of warranty claim adjudicated on an *individual* basis would be that of each plaintiff's state of residence. Therefore, it is readily apparent that the appropriate laws to apply to the *Ysbrand* action would have been those of the individual states where the warranties were negotiated and where the minivans were sold.

The court in *Ysbrand* complicated its choice-of-law analysis by focusing on the fact that the proposed action was a class action. It stated:

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120. *See, e.g., In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1017 (7th Cir. 2002) ("If recovery for breach of warranty or consumer fraud is possible, the injury is decidedly where the consumer is located, rather than where the seller maintains its headquarters."); Spence v. Glock, 227 F.3d 308, 315 (5th Cir. 2000) (holding that the location of the plaintiff's injury "plays an important role" in choice-of-law determinations).

121. *Ysbrand*, 81 P.3d at 625-26.

122. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(2) (1971).

123. *Id.* § 191.

124. *Id.* § 188(2).

125. *Glock*, 227 F.3d at 312.

> All 50 states and the District of Columbia bear some relationship to the parties and transactions in this dispute by virtue of the nationwide sales of the minivans. The question becomes whether the relationship of each state where the vehicles were purchased is more significant to the parties and this litigation than that of Michigan, the principal place of business of DiamlerChrysler.[126]

The court considered the class action, examined all the claims in the aggregate, and determined that out of the fifty states, Michigan had the most significant interest.[127] It noted that "Michigan is the only state where conduct relevant to all class members occurred."[128] It is precisely this statement that contradicts the mandate of *Shutts*.

This decision to apply the law of the defendant's principal place of business is an example of bootstrapping because the court has taken the existence of the class itself into consideration in making its choice-of-law determination.[129] If all of the plaintiffs in this class brought their claims individually in their respective states, those state courts, using their own choice-of-law principles, would have weighed the interests of the various states in choosing what law to apply and, most likely, would have determined that the law of the plaintiffs' home states should control.[130] Even if all of the plaintiffs in the class had filed their claims in the same forum, even if this forum had been in the state where the defendant had its principal place of business, this one forum still would not be justified in applying one law to these cases.[131] Under the anti-bootstrapping rationale offered in *Shutts*, this forum would still have to perform a choice-of-law analysis for each individual claim.[132] Though it would be able to hear and decide the individual cases, this forum would most likely have to do so using the law of the states where the plaintiffs reside, where the injury occurred, or where the sales were made.[133] In a situation like *Ysbrand* where the court chose to apply the law of the defendant's principal place of business, [134] it is only because the claims were brought as a class action that the court can justify this choice. The Supreme Court in *Shutts* stated that courts may not bootstrap in order to certify a class.[135] The court in *Ysbrand* clearly bootstrapped.[136]

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126. *Ysbrand*, 81 P.3d at 625.

127. *Id.* at 626.

128. *Id.*

129. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821 (1985).

130. *See supra* text accompanying notes 122-124 for a discussion of the Second Restatement's approach to breach of contract claims. Most of the factors weigh in favor of plaintiffs' home states.

131. *Shutts*, 472 U.S. at 821.

132. *Id.*

133. *Id.*

134. Ysbrand v. DaimlerChrysler Corp., 81 P.3d 618, 625 (Okla. 2003).

135. *Shutts*, 472 U.S. at 821.

The tension between *Ysbrand* and *Shutts* illustrates the opposing sides of the bootstrapping debate and highlights the significance of the *Shutts* anti-bootstrapping position. On one hand is the argument that bootstrapping is an entirely legitimate and, in fact, desirable way to handle class actions. On the other is the view that *Shutts* should be followed as several reasons, including *stare decisis*, counsel in favor of following the anti-bootstrapping position.

2. The Argument in Favor of Applying the Law of a Single State

In the introduction to his Article, Larry Kramer explained that there is "consensus, at least, that ordinary choice-of-law practices should yield in suits consolidating large numbers of claims and that courts should apply a single law in such cases."[137] To some degree, he is correct. There is a sector of academic writing that argues that in the interest of judicial economy, efforts should be made to erase the "choice-of-law problem."[138] One suggestion for accomplishing this is to ignore the "anti-bootstrapping" rule of *Shutts*, and instead to change the choice-of-law default rules in the class setting.[139] This was the position taken by the American Law Institution ("ALI") in the first draft of its Complex Litigation Project, published in 1993.[140] In the introductory note to the chapter on choice-of-law rules, the ALI justified altering the choice-of-law rules in the complext litigation context based on the "special needs of complex litigation."[141] The underlying premise of the ALI's proposed choice-of-law rules was that

136. *Ysbrand*, 81 P.3d at 625.

137. Kramer, *supra* note 21, at 547.

138. *See infra* note 139.

139. *See* COMPLEX LITIGATION PROJECT 398 (American Law Inst., First Proposed Draft, 1993) [hereinafter 1993 Draft] ("[T]he objective underlying the rules is to allow a single state's tort law to apply to all similar claims asserted against each defendant, to the extent it is feasible to do so. In this way, the application of § 6.01 fosters the consolidated treatment of the mass tort claims under this proposal."); James A.R. Nafziger, *Choice of Law in Air Disaster Cases: Complex Litigation Rules and the Common Law*, 54 LA. L. REV. 1001, 1013 (1994) (stating that "a consensus has emerged in favor of applying the same body of rules to govern all issues in a single case"); Kramer, *supra* note 21, at 548. *See generally* Friedrich K. Juenger, *Mass Disasters and the Conflict of Laws*, 1989 U. ILL. L. REV. 105 (1989) (calling for choice-of-law rules that simplify litigation in mass disaster tort cases).

140. 1993 Draft, *supra* note 139, at 375-443.

141. *Id.* at 379-80.

> [A]lthough the adoption of a federal choice of law code for complex cases will mean that there will be a disparity in treatment between parties in this class of cases from those engaged in smaller, but analogous, litigation not subject to transfer and consolidation under this scheme, the need to achieve justice . . . of their dispute justifies this difference.

Id.

"it would be highly desirable if a single state's law could be applied to a particular issue that is common to all the claims and parties involved in the litigation."[142] Doing so would help "maximize the efficient handling of the litigation, as well as encourage consistent results."[143] In its draft, the ALI suggested a new federal choice-of-law rule to be applied in the context of state-created actions that are consolidated under its proposed complex litigation statute.[144]

In its latest revision of the Complex Litigation Manual, scheduled for publication in 2005, the ALI takes a different approach.[145] Instead of advocating different choice-of-law default rules in class actions, the ALI states that there will be "no change in what one might call the court's choice of choice-of-law principles."[146] However, the ALI seems to leave open the possibility that the state courts' choice-of-law principles could be altered, noting "the objective is for aggregate treatment to operate seamlessly with substantive law . . . by leaving the choice of whether to innovate in the area of choice-of-law principles to the institutions with the authority to set those principles themselves."[147]

Many scholars, including Kramer, urge the enactment of a uniform choice-of-law standard, which theoretically could be crafted in such a way as to eliminate the choice-of-law problem.[148] However, as Kramer aptly points out, Congress has not yet created such a uniform standard, and until it does, courts are left to grapple with the existing patchwork of individual state choice-of-law rules.[149] This absence of

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142. *Id.* at 389.

143. *Id.*

144. *Id.* at 395-443. *See generally* Donald T. Trautman, *Toward Federalizing Choice of Law*, 70 TEX. L. REV. 1715 (1992) (arguing against individual state control of choice-of-law principles, and instead, for a federal choice-of-law rule).

145. 2005 Draft, *supra* note 56.

146. *Id.* at 127.

147. *Id.*

148. *Id.*; *see also* Paul S. Bird, Note, *Mass Tort Litigation: A Statutory Solution to the Choice of Law Impasse*, 96 YALE L.J. 1077, 1079 (1987) ("This Note therefore proposes that Congress enact a choice of law statute enabling and directing federal courts presiding over mass tort litigation to make choice of law decisions that will promote both equity and efficiency."). *But see* Robert A. Sedler, *The Complex Litigation Project's Proposal for Federally-Mandated Choice of Law in Mass Torts Cases: Another Assault on State Sovereignty*, 54 LA. L. REV. 1085, 1086 (1994) ("[T]he concept of federally-mandated choice-of-law rules for mass torts should be rejected because . . . it is inconsistent with the principles of state sovereignty that lie at the heart of our federal system.").

149. Kramer, *supra* note 21, at 549-50.

> [T]he solution is to work for the adoption of such law, something advocated by almost every commentator who has discussed complex litigation. To date, such efforts have been unavailing, and Congress has declined to legislate—whether from lack of political will, the urge to toady to palm-greasing lobbyists, or wisdom in recognizing the benefits of leaving states a role.

uniformity becomes especially relevant in light of the recent vote not to include a choice-of-law section in the Class Action Fairness Act.[150]

The absence of a uniform standard, however, does not stop academics from questioning the validity of an approach that applies fifty different state laws to what essentially is one set of actions. Many scholars advance the proposition that in applying the different state laws to the different class members, courts actually treat plaintiffs unfairly.[151] The problem is that "identical facts may have to be tried under fifty or more different laws. Such fragmentation can cause striking disparities in the recovery for the death or injury of victims of the same accident, and the plaintiffs' fates may depend less on the justice of their causes than on their selection of an initial forum."[152] Therefore, scholars argue that "[c]hoice-of-law approaches that subject the victims' claims to different substantive laws are not merely unfair: by necessitating separate trials they further complicate complex litigation."[153]

These arguments in favor of applying the laws of a single state are compelling and require consideration. On some level, we must question whether it is fair, for example, that a plaintiff who purchased a product in state A can recover damages for her injury, but one who bought the exact same product in state B cannot. Most of the proposed solutions to this inequity require some kind of congressional action. These solutions call for a uniform standard, which, as the recent attempts at certification suggest, could be the law of the defendant's principal place of business. But Congress has not yet enacted such a uniform standard,[154] and, in the absence of a congressional mandate, we are left to consider the limits of judicial action in the area of conflicts of law.

Id.

150. Vote, *supra* note 15.

151. *See* Kramer, *supra* note 21, at 566 ("[W]e are told that it is unfair to apply different laws to different parties in a complex case. To treat parties in the same consolidated mass action differently violates 'the principle that persons similarly situated ought to receive similar treatment.'"); Juenger, *supra* note 139, at 109.

152. Juenger, *supra* note 139, at 109.

153. *Id.* at 109-10.

154. *See supra* text accompanying notes 11-16.

3. Constitutional Justifications for the Anti-Bootstrapping Position

a. The Choice-of-Law Decision is Substantive, Not Procedural

The argument for choosing a single law to apply to a class action often assumes that the choice of law is merely a procedural issue, which, in the interest of furthering class litigation, weighs in favor of one law.[155] However, choice of law is not merely about procedure.[156] Rather, at its very core, choice of law is about substantive rights: "Choice of law is, literally, the assignation of rights to the parties—the decision defining what the plaintiff and defendant are entitled to on the particular facts. It is in this strong and fundamental sense, in terms of both its purpose and effect, that choice of law is substantive."[157]

The misperception of choice of law as a procedural point instead of a substantive one is perhaps hidden in cases where the laws of the different states do not conflict. In that situation, a choice of applying the law of one state over the law of another would not change the outcome—the result would be the same under either state's law. Whether the claims were brought individually or on a class-wide basis, the choice of one state's law over another would not make any kind of real, substantive difference. In this scenario, choice of law does seem to be merely a procedural technicality that should not matter in the context of class actions.

The substantive nature of choice of law becomes readily apparent when there is a conflict in law. If there are differences in the applicable laws, this "may mean the difference between winning and losing, between unlimited damages and a cap, between recovering punitive damages and being limited to compensation."[158] For example, if State A allows courts to award punitive damages for a certain type of claim, but State B does not, the decision whether to decide the case under the law of State A or State B will dramatically affect the amount that the plaintiff can recover. This effect is heightened when a court bootstraps. Doing so allows it to create a cause of action or

155. *See, e.g.*, 1993 Draft, *supra* note 139, at 375 ("[I]t becomes important to look for an alternative that could improve the current processing of complex litigation in the courts—in other words, a procedural solution. This Chapter proposes the enactment of a coherent and uniform federal choice of law code for these cases as an essential ingredient of that procedural approach."). *But see* 2005 Draft, *supra* note 56 (citing Kramer for the proposition that choice of law is substantive, not procedural).

156. Kramer, *supra* note 21, at 569.

157. *Id.*

158. *Id.* at 589.

recovery amount not only for an individual, but also for every single member of the proposed class. Both *Ysbrand* and *Shutts* illustrate this effect, and in each of these cases, the choice of law dramatically affected the substantive rights of the parties. In *Shutts*, the decision to apply Kansas law over Texas or Oklahoma law would have significantly increased the amount each plaintiff could recover.[159] Similarly, in *Ysbrand*, the decision to apply Michigan law, as opposed to the law of the plaintiffs' home states, may have created an otherwise lacking cause of action for the plaintiffs as there is a chance that plaintiffs would recover for pure economic loss under Michigan law, while they would not be able to do so under the laws of their respective home states.

b. A Court is Not the Appropriate Body to Alter Substantive Rights

Judicial economy, efficiency, and "fairness" to the plaintiffs provide compelling justifications for choosing one law to govern an entire group of similar claims. However, choosing which one law to apply is not necessarily a simple task. More importantly, the "solution" of having claims from plaintiffs in all the fifty states governed by the law of only one state is not necessarily a desirable outcome.[160] The ability to alter and enlarge the rights of potential parties should lie with the inherent lawmaking authority of the legislative branch, not with the judicial system.

Rule 23 of the Federal Rules of Civil Procedure outlines the procedural requirements for class actions.[161] In the Rules Enabling Act, Congress delegated to the Supreme Court "the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts."[162] It is through this express delegation that the Court finds the authority for all of the rules it creates and enforces. Yet, Congress specifically limited this rulemaking power by including in the Rules Enabling Act the

159. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985) (noting that because of the different interest rates Kansas, Texas, and Oklahoma used in calculating this type of damages, "[t]he conflicts on the applicable interest rates alone . . . certainly amounted to millions of dollars in liability").

160. Kramer, *supra* note 21, at 57.

> [W]e are told we must change the parties' rights to facilitate the consolidated adjudication. And that makes no sense. If the reason for consolidating is to make adjudication of the parties' rights more efficient and effective, then the fact of consolidation itself cannot justify changing those rights. To let it do to is truly to let the tail wag the dog.

Id.

161. FED. R. CIV. P. 23.

162. Rules Enabling Act, 28 U.S.C. § 2072(a) (2005).

restriction that "[s]uch rules shall not abridge, enlarge or modify any substantive right."[163] By restricting the Court's power to only procedural issues, the Rules Enabling Act specifically aims "to exclude rulemaking by the Supreme Court, and to require that any prospective federal lawmaking be done by Congress, where the choice among legal prescriptions would have a predictable and identifiable effect on [existing legal] rights."[164] Thus, in the Rules Enabling Act, Congress specifically reserves the power to alter existing rights for itself, forbidding the Court from undertaking such a task.

This general mandate is helpful as an explanatory tool but loses some relevance in the context of nationwide class actions filed in state courts. Though state courts' class action rules often mirror the language of Federal Rule 23, states are allowed to interpret and apply their own versions of Rule 23.[165] Nonetheless, the idea that courts cannot use procedural rules to enlarge the substantive rights of parties carries over into many of the state courts. Most states have their own equivalents of the Rules Enabling Act, which similarly limit the power of the courts to making procedural rules but not changing substantive rights.[166] Some states even explicitly mandate that in making procedural rules, courts "shall not abridge, enlarge or modify the substantive rights of any litigant."[167] Thus, if class actions are filed in states that do have such a rule, courts will be limited (as are federal courts) in their ability to use procedure to change substantive rights.

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163. *Id.* § 2072(b)

164. Richard Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 190 (2003) (citing Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1114 (1982)).

165. *See* J.R. Clearwater, Inc. v. Ashland Chem. Co., 93 F.3d 176, 180 (5th Cir. 1996) ("While Texas Rule of Civil Procedure 42 [governing class actions in Texas courts] is modeled on Rule 23 of the Federal Rules, and federal decisions are viewed as persuasive authority regarding the construction of the Texas class action rule, a Texas court might well exercise this discretion in a different manner.").

166. *See, e.g.*, ALA. CODE § 12-2-7 (2005) ("The Supreme Court shall have authority: . . . (4) To make and promulgate rules governing the administration of all courts and rules governing practice and procedure in all courts; provided, that such rules shall not abridge, enlarge, or modify the substantive right of any party."); DEL. CODE ANN. tit. 10, § 561(b) (2005) ("The rules shall not abridge, enlarge or modify any substantive right of any party, and they shall preserve the right of trial by jury as at common law and as declared by the statutes and Constitution of this State."); MO. REV. STAT. § 477.010 (2005) ("The supreme court shall have the power to direct the form of writs and process; and to promulgate general rules for all courts of the state. No such forms or rules shall abridge, enlarge or modify the substantive rights of any litigant nor be contrary to or inconsistent with the laws in force for the time being."); N.Y. C.P.L.R. § 102 (2005) ("No rule so amended, rescinded or adopted shall abridge or enlarge the substantive rights of any party.").

167. N. M. STAT. § 38-1-1 (2005).

A judicial alteration of substantive rights would also be problematic under the separation of powers doctrine.[168] Therefore, even those states that do not explicitly restrict a court's ability to expand substantive rights should observe such a policy to maintain the functional roles of the court and legislature. Legislatures exist to make decisions about which rights should and should not be recognized.[169] Thus, when a court attempts to alter substantive rights through procedural rules, it steps into the boundaries of powers specifically reserved to the legislature.[170] As Professor Charles Alan Wright noted, "[C]hanges with more predictable consequences for identifiable interest groups 'should come from those who are elected to make laws, with full awareness of what they are doing.'"[171] The legislature is a political body specifically designed to determine what liberties should be restricted in the interest of the broader community.[172] Democratically accountable legislatures are the proper

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168. *See* Burbank, *supra* note 164, at 1025-26 (arguing that the Rules Enabling Act was created not to address federalism concerns, but rather, to address the appropriate allocation of power between Congress and the courts).

169. *See* Bus. Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 565 (1991).

> The grant of authority to regulate procedure and the denial of autbority to alter substantive rights expresses proper concern for federalism and separation of powers. Congress desired the courts to regulate 'practice and procedure,' an area where we have expertise and some degree of inherent authority. But Congress wanted the definition of substantive rights left to itself in cases where federal law applies, or to the States where state substantive law governs.

Id.

> A legislative body is in a far better position than a court to form a correct judgment concerning the number of persons affected by a change in the law, the means by which information concerning the law is disseminated in the community, and the likelihood that innocent persons may be harmed by the failure to receive adequate notice.

Texaco, Inc. v. Short, 454 U.S. 516, 532 (1982); *see* Ferguson v. Skrupa, 372 U.S. 726, 729 (1963) ("Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation."); *see also* C. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4509 (1982); 16A AM. JUR. 2D *Constitutional Law* §§ 246-312 (2004).

170. *See* Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 70-72 (1998).

> As to some matters that fall in the area where procedure and substance overlap, separation of powers concerns and the constitutional structure prohibit a court from regulating them, even on a case-by-case basis, in the absence of some legislative or constitutional directive . . . [For example,] some substantive matters involve policy choices of such significance that, even though federal courts may determine their scope as a matter of common law in appropriate cases, separation of powers considerations mandate that they be subject to prospective regulation only by a democratically elected legislature, rather than by court-promulgated rule.

Id.

171. Nagareda, *supra* note 164, at 190 (citing Charles Allen Wright, *Procedural Reform: Its Limitations and Its Future*, 1 GA. L. REV. 563, 570 (1967)).

172. *See* Kelleher, *supra* note 170.

governmental unit to judge what will be best for society as a whole. Courts are not structured to handle these types of "judgment call" situations and so they cannot, in any sense, be thought of as the appropriate body to enlarge or diminish people's rights or to choose between competing rights.[173] Rather, their role in the government is to judge the legality or illegality of actions from a neutral standpoint.[174]

This limitation on courts seems simple enough: a court may enact and apply procedural rules, but such procedural rules cannot alter substantive rights.[175] Though this division between what a court can and cannot do procedurally seems clear in theory, in practice it becomes much more muddled.[176] As Wright stated, "[E]very procedural rule has consequences of a substantive nature, for every such rule may affect the outcome in some cases, and some of them are deliberately intended to alter the outcome in many cases."[177] If procedural rules, including Rule 23, are not to be used to enlarge substantive rights, then a court cannot use the class action device itself to justify changing substantive law by applying choice-of-law rules to class actions that are different from those than it would apply to individual suits.

The modern class action lies on the dividing line between acceptable procedural actions and unacceptable alteration of substantive rights. Though the class action itself is merely a procedural device for aggregating potential claims, there are many instances in which courts step dangerously close to, or perhaps even into, the prohibited realm of substantive rights. Thus, if a court uses the presence of a class action to make a choice-of-law decision that enlarges the rights of individual plaintiffs, essentially creating substantive rights that would not exist were the claims brought on an individual basis, the court is using procedural rules improperly to alter the substantive rights of parties. These "unexplained inconsistencies in the application of choice-of-law principles to a class action may signal a constitutional violation."[178] Different treatment of aggregated claims is highly problematic if the result is to enlarge the body of rights held by the individual claimants.[179]

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173. *See supra* note 169.

174. *Id.*

175. *See* Nagareda, *supra* note 164, at 190-91.

176. *Id.*

177. Wright, *supra* note 171, at 570.

178. Crump & Miller, *supra* note 94, at 62.

179. *See* Kramer, *supra* note 21, at 572-74.

If a plaintiff in state A joins a class action filed in state B and thereby gains a cause of action the plaintiff would not have had under normal choice-of-law principles, then the presence of the class action has enlarged this plaintiff's substantive rights. Thus, even if it is not apparent that a procedural rule alters existing rights, if the effect is to change the rights of the parties involved, then there is a conflict with the mandate of the Rules Enabling Act, the state equivalents of this Act, and the central premise of the doctrine of separation of powers.

To illustrate the problem that arises when courts impermissibly bootstrap and use the choice-of-law decision to alter parties' rights, we return to *Ysbrand*. In *Ysbrand*, the court overstepped constitutional bounds and used procedure to potentially enlarge almost all of the plaintiffs' preexisting substantive rights. Most of the plaintiffs resided in states that did not allow recovery for breach of warranty when there was no physical injury.[180] Therefore, many would not have had a cause of action had they brought their claims individually, either in their own respective states or in another state, because choice-of-law considerations would likely have forced their cases to be decided under the laws of the states where the sale was made. Even if all the plaintiffs had individually filed their cases in Michigan, where recovery for pure economic loss might be available, the Michigan court would not have applied Michigan law to their claims. Rather, it would have applied the laws of the individual states to each individual claim. Although it is uncertain whether Michigan allows recovery for breach of warranty when there is no actual

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180. *See* Amicus Brief, *supra* note 113, at 6.

> Many, if not most, jurisdictions that have considered the viability of such "no injury" economic-loss-only warranty claims have refused to recognize them, holding that purchasers of an allegedly defective product do not have a cognizable claim if the defect has not manifested itself in the product they own. *See, e.g.*, Yost v. General Motors Corp., 651 F. Supp. 656, 658 (D.N.J. 1986) ("Damage is a necessary element of both counts—breach of warranty and common law fraud."); Jarman v. United Industries Corp., 98 F. Supp. 2d 757, 768 (S.D. Miss. 2000) (plaintiff did not have a claim for breach of warranty because, "unless there is actually a failure in product performance, there is no basis at all for claiming that the plaintiff has been damaged in any way"); Feinstein v. Firestone Tire and Rubber Co., 535 F. Supp. 595, 602 (D.C.N.Y. 1982) (under New York's version of the Uniform Commercial Code, "[t]ires which lived full, productive lives were, by demonstration and definition, 'fit for the ordinary purposes' for which they were used; hence they were 'merchantable' . . ., and no cause of action for breach of an implied warranty can arise"); Carlson v. General Motors Corp., 883 F.2d 287, 298 (4th Cir. 1989) (no claim for breach of implied warranty of merchantability for plaintiffs who alleged damages attributable only to "lost resale value"); In re Air Bag Products Liability Litigation, 7 F. Supp. 2d 792 (E.D. La. 1998) (plaintiffs could not state a claim under either Louisiana or Texas law for economic loss from allegedly defective air bags).

Id.

physical injury,[181] I will assume that Michigan does in fact allow such a cause of action to illustrate the potential problem. By allowing the claims to be grouped together as a class action and certified under the law of Michigan, the *Ysbrand* court created a cause of action for plaintiffs who would not otherwise have had one. Thus, the Oklahoma court used its procedural rules via the class action device to expand the substantive rights of would-be plaintiffs in an impermissible manner. If the class action device enables the court to hold the defendant liable under one state's law to all of the plaintiffs in a given class, the court would create a situation where the defendant "could be found liable to plaintiffs residing in all 50 States and the District of Columbia for conduct that would not be actionable if [it] were sued in individual actions in jurisdictions applying a different law."[182]

Because of the limitations placed on state courts through their individual versions of the Rules Enabling Act and the doctrine of separation of powers, when making preliminary procedural decisions a court should ignore the presence of the class action itself.[183] Instead, a court must examine the potential class members' claims and rights individually when answering questions such as choice of law.[184] The mere fact that a class is proposed does not give the court freedom to treat the individual rights of the class members in ways that are different than if the case were brought as a series of individual claims. Thus,

> consolidation alone does not warrant changing the applicable law. A state may or may not have a sensible approach to choice-of-law problems, and it may or may not want to change its approach. But whatever approach a state uses, it should use the same approach across the board; an individual's rights should not change just because his or her claim is adjudicated togetber with the claims of others.[185]

c. Possible Infringements on the Rights of Other States

In addition to providing practical guidance to state and federal courts, state choice-of-law rules are also significant in a greater way. The underlying force driving (and, perhaps more importantly, restricting) choice-of-law considerations is the U.S. Constitution.[186] As

181. *Id.* at 7 ("Respondents have argued, and Petitioner disputes, that Michigan is in the minority and will permit a 'no injury' claim.").

182. *Id.*

183. Kramer, *supra* note 21, at 576.

184. *Id.*

185. *Id.*

186. Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 250 (1992).

Professor Douglas Laycock explains, "choice of law within the United States is inherently constitutional law. Choice-of-law questions are about the allocation of authority among the several states."[187] Courts of one state adjudicating claims of litigants that are not citizens of that state, or claims regarding actions that took place beyond the states' borders stand on the brink of overstepping their constitutionally allocated powers.[188] Therefore, "when a state chooses its law despite another state's significantly closer connection to the controversy, it has imposed its law on its neighbor. Accordingly, other states' interests are not respected, and, more importantly for due process, neither are the interests of the citizens of those states."[189]

As the United States does not have federal choice-of-law principles to restrict states' adjudicatory powers, the choice-of-law principles of the individual states check the ability of courts to adjudicate actions from other states using the laws of yet other states. If one state's law should govern a claim but the forum state incorrectly applies a different state's law, the forum state subtracts from the power of the state whose law should be applied to the claim. In the class action setting, this constitutional issue is magnified because the certifying state risks overstepping the bounds of forty-nine states, not just one. Thus, the question of whether the law of the defendant's principal place of business is an appropriate choice of law is crucial. The effect of an incorrect choice-of-law decision would be an unconstitutional infringement on the power of every other state.

A court certifying a class using the law of the defendant's principal place of business will create precisely such an infringement: it will take claims that, if filed individually, would most likely be governed by the laws of individual states, and through the use of the class action, will allow the law of one state to govern all of the claims. For example, the sale of a minivan manufactured by a company incorporated in Michigan by a Texas dealer within the state of Texas to a Texas consumer will be regulated and adjudicated under the laws of Michigan if a court takes the *Ysbrand* approach. This violates the

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> Constraints on state choice of law emanate primarily from the United States Constitution. The main constitutional clauses that provide constraints on choice of law are the Due Process Clause of the Fourteenth Amendment, which limits a state's power over the individual and protects individual liberty, and the Full Faith and Credit Clause, which preserves state sovereignty.

Fruehwald, *supra* note 37, at 40. *See generally* Kermit Roosevelt, III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2503-34 (1999) (discussing the full faith and credit clause implications of a court's choice-of-law decision).

187. Laycock, *supra* note 186, at 250.

188. *See* Fruehwald, *supra* note 37, at 70.

189. *Id.* at 71.

most basic notion of state sovereignty. Texas is the state that has an interest in the adjudication of the claim, so Texas law is the law that should govern.

As the Supreme Court articulated in *State Farm Mutual Auto Insurance Co. v. Campbell*, "A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction."[190] The principles of federalism reserve to each state the power to regulate commerce within its borders. Therefore, a class action that wholly usurps this power and places it in the hands of the state where the defendant holds its principal place of business unconstitutionally infringes on the individual power reserved for each of the fifty states.[191]

V. CONCLUSION: BECAUSE CONSTITUTIONAL VIOLATIONS OCCUR WHEN A COURT CERTIFIES USING THE LAW OF THE DEFENDANT'S PRINCIPAL PLACE OF BUSINESS, COURTS SHOULD NOT USE THIS METHOD

The constitutional problems that arise when a court uses the law of the defendant's principal place of business as the controlling law dictate that this approach should not be tolerated. A court faced with a class action grounded in state law claims should only use the law of the defendant's principal place of business when a valid choice-of-law analysis conducted on an individual basis would point to the law of the defendant's principal place of business as controlling law.[192] The constitutional problem arises because courts usually do not choose the law of the defendant's principal place of business when the case arises out of actions in a different state. Furthermore, such choice may be flawed because of due process concerns of fundamental fairness to the defendant. Therefore, "[i]f courts cannot consolidate

190. State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 422 (2003); *see also* Healy v. Beer Inst., 491 U.S. 324, 336 (1989) ("[T]he 'Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders.'"); Amicus Brief, *supra* note 113.

191. Amicus Brief, *supra* note 113, at 4.

> [I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that state . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called into question and hence authorities directly dealing with it do not abound.

N. Y. Life Ins. Co. v. Head, 234 U.S. 149, 161 (1914).

192. Kramer, *supra* note 21, at 576.

without changing the applicable law, they should forego consolidation and find a different answer."[193]

There may, in fact, be a better answer. There are other possible ways to get around this so-called choice-of-law problem, such as grouping state laws, separating individual issues, and even conducting fifty-state surveys and awarding damages accordingly.[194] Of course, out of all these methods, the option of certifying under one single law (e.g., the law of the defendant's principal place of business) seems the most attractive as it is somewhat of a "quick fix."

If, under the choice-of-law methodology of the forum state, a court would have actually chosen to apply the law of the defendant's principal place of business to each individual claim, nearly all of the concerns raised by this Note would be moot. The existence of the class action would do nothing more than add to the sheer number of claims. If, however, a choice-of-law analysis on an individual basis would not point to the law of the defendant's principal place of business as controlling, then the law of that state cannot be used. This is true regardless of whether due process prevents a court from applying the law of the defendant's principal place of business. Courts cannot use the existence of a potential class to justify using the law of the defendant's principal place of business if the state's choice-of-law rules would not dictate the application of this law in an individual case. Therefore, unless Congress solves the choice-of-law problem by creating a uniform federal choice-of-law standard or by enacting federal law to govern the substantive claims raised in these types of class actions, the choice-of-law problem will and should remain a barrier to the aggregate treatment of claims grounded in state law.

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193. *Id.* at 580.

194. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 815 (1985).

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