

Fall 1989

# The Case Against All Encompassing Federal Mass Tort Legislation: Sacrifice Without Gain

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## Recommended Citation

73 Marq. L. Rev. 76 (1990)

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# THE CASE AGAINST ALL ENCOMPASSING FEDERAL MASS TORT LEGISLATION: SACRIFICE WITHOUT GAIN

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BE IT RESOLVED that the American Bar Association, recognizing that separate adjudication of individual tort claims arising from a single accident or use of or exposure to the same product or substance is inefficient and wasteful, seriously burdens both state and federal judicial systems, poses unacceptably high risks of inconsistent results, and contributes to public dissatisfaction with the tort law system and the legal profession, adopts the following recommendations of the Commission on Mass Torts . . . .<sup>1</sup>

With this preamble as its factual predicate, the American Bar Association Commission on Mass Torts has undertaken to restructure the litigation of mass torts in the United States. It has proposed legislation which would empower federal courts to consolidate the litigation of mass torts in a single court utilizing the law of a single state.<sup>2</sup> Legislation similar to that proposed by the ABA commission is now under serious consideration by Congress. The Multiparty, Multiforum Jurisdiction Act of 1989 (H.R. 3406),<sup>3</sup> though different in many particulars from the ABA proposal, is driven by the same concern for litigation efficiency. Though the motives behind these legislative initiatives are laudable, these objectives cannot be achieved in our federal system with its constitutional constraints, without doing serious violence to long-standing principles of state sovereignty and progressive trends

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This Article was supported in part by a grant from the Lawyers for Civil Justice.

1. ABA Comm. on Mass Torts, Report to the House of Delegates i (August 1989) [hereinafter ABA Mass Torts Report]. The Commission on Mass Torts was chaired by Robert F. Hanley. Other members were Hon. Wm. Matthew Byrne, Jr., Richard Cunningham, Kenneth R. Feinberg, George S. Frazza, Professor Francis McGovern, George McKeon, Hon. Richard Ranson, Paul D. Rheingold, Leonard M. Ring, Hon. Henry Woods, and Barbara Wrubel. The Report of the Commission was concurred in by eleven of the twelve members. Paul D. Rheingold filed a lengthy and thoughtful dissent. *Id.* App. E.

2. The draft legislation is entitled the "Federal Mass Tort Jurisdiction Reform Act" and appears in the ABA Mass Tort Report, at Appendix D. Throughout the discussion, the authors will refer to both the draft legislation and the discussion in the body of the report.

3. H.R. 3406, 101st Cong., 1st Sess., 135 CONG. REC. E3275 (1989) [hereinafter H.R. 3406].

in choice of law. We believe that their goals can only be accomplished by riding roughshod over important federalism principles while concomitantly reviving regressive and thoroughly discredited choice of law rules.

To make our case, we shall briefly describe the ABA proposal and H.R. 3406. We shall then demonstrate how seriously the proposed legislation intrudes on state sovereignty and clearly articulated state interests. Finally, we will turn to the crucial choice of law provisions of the legislation. We shall conclusively show that little consideration was given by the drafters to major constitutional choice of law cases. In their haste, they simply failed to consider the practical effect of these cases on the discretion available to courts in choice of law situations. Their proposals would, in fact, handcuff the courts, forcing them to apply improvident and often wholly unwarranted choice of law principles. Without choice of law provisions, the proposed legislation is toothless. With such principles, the legislation is monstrously wrong.

## I. FEDERAL MASS TORT LEGISLATION

### A. *The American Bar Association Commission on Mass Torts Report*

In August of 1989, the American Bar Association Commission on Mass Torts issued its report to the House of Delegates suggesting radical changes in procedures for the litigation of mass tort actions. Their suggestions are embodied in a draft Federal Mass Tort Jurisdiction Reform Act.<sup>4</sup> The legislation calls for the establishment of a federal judicial panel for mass tort legislation.<sup>5</sup> Whenever at least 100 civil tort actions, claiming damages in excess of \$50,000 arising from a single accident, or use of or exposure to the same product or substance, are pending in state or federal courts, the panel may declare the cases "mass tort litigation."<sup>6</sup> Having done so, the panel is empowered to transfer some or all of the actions to a federal court<sup>7</sup> authorized to resolve all issues, including liability and damages.<sup>8</sup> The power to consolidate the disparate actions to a single federal district court is wholly discretionary. It may transfer "some or all" of the cases as it sees fit.<sup>9</sup> The transferee court may decide which issues should be tried on a consolidated basis, and which issues it wishes to remand for individualized resolution.<sup>10</sup>

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4. ABA Mass Torts Report, *supra* note 1.

5. *Id.* App. D § 103.

6. *Id.* § 103(c); *see also id.* at 5-14.

7. *Id.* § 104.

8. *Id.* § 105.

9. *Id.* § 103(c).

10. *Id.* App. D § 105(b).

Acting pursuant to the interstate commerce clause, the legislation sets forth federal question jurisdiction as the grounds for asserting removal power over pending state and federal actions.<sup>11</sup>

Though the basis for the exercise of judicial power is federal question jurisdiction, the ABA proposed statute does *not* adopt federal substantive law, nor does it call for the judicial creation of a federal common law for mass torts.<sup>12</sup> Instead, it seeks to empower federal courts to develop their own choice of law rules for mass tort cases.<sup>13</sup> In calling for legislative overruling of *Klaxon Co. v. Stentor Electric Manufacturing Co.*<sup>14</sup> in mass tort cases, the ABA proposal seeks the application of the law of a single state to govern the mass tort claim.<sup>15</sup> Though there is reference in the statutory proposal to the possibility that the transferee court might choose the law of different states for different issues,<sup>16</sup> the drafters make it clear that without the choice of a single state's governing rule for all parties, their proposal will simply not work.<sup>17</sup> The only statutory guidelines provided to the court is that it make its determination "in light of reason and experience as to which State(s) rule(s) shall apply to some or all of the actions, parties or issues."<sup>18</sup>

In addition to the aforementioned provisions, the ABA's proposed legislation has one section allowing courts to appoint impartial experts,<sup>19</sup> and another which calls for a unitary assessment of punitive damages.<sup>20</sup> The latter provision is in response to the complaint made by mass tort defendants that they are exposed to repetitive punitive damage judgments for a single course of conduct which results in harm to multiple plaintiffs.

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11. *Id.* § 104.

12. *Id.* at 28-30.

13. *Id.* § 106; *see also id.* at 30-36. The Complex Litigation Project of the American Law Institute, which is still in a preliminary stage, also contemplates a federally imposed choice of law rule for consolidated federal court cases. The choice of law rule would be contained in a federal statute, but at the present time the drafters have left open the question of "whether the federal choice of law rule should direct the application of a single state's law or might vary depending on the issue." American Law Institute, Complex Litigation Project (Tent. Draft No. 1, § 309, 1989). The proposed federally imposed choice of law rule supposedly would "reduce the incentive to forum shop among federal courts that, applying distinct state choice of law rules, may reach different conclusions about which substantive law should be applied to the underlying facts of the case." *Id.* Our objections to the underlying premises of the ABA proposal and H.R. 3406 obviously apply to the ALI Complex Litigation Project proposal as well.

14. 313 U.S. 487 (1941).

15. ABA Mass Torts Report, *supra* note 1, at 28.

16. *Id.* App. D § 106.

17. *Id.* at 33-34.

18. *Id.* App. D § 106.

19. *Id.* § 108.

20. *Id.* § 110.

*B. H.R. 3406 — The Multiparty, Multiforum Jurisdiction Act of 1989*

The Multiparty, Multiforum Jurisdiction Act of 1989<sup>21</sup> sets out to accomplish the goals set forth in the preamble to the ABA Mass Torts Commission Report. H.R. 3406 would establish a mechanism for channeling all personal injury and property damage actions arising from single event large-scale disasters into a single federal court for adjudication according to a single body of state law.

To establish this channeling mechanism, the bill would: (1) give the federal courts original jurisdiction over actions arising from such disasters;<sup>22</sup> (2) provide for consolidation in one federal court of all federal court actions arising from any such disaster;<sup>23</sup> (3) allow defendants to remove any action from state court to federal court that could have been brought in federal court in the first instance under the bill;<sup>24</sup> and (4) direct the federal district judge who gets the case to choose the state law to be applied to all actions arising from the disaster, based on a laundry-list of considerations.<sup>25</sup>

Section 2 of the bill would enact a new Section 1367 of Title 28, giving federal district courts original diversity jurisdiction over large scale disaster cases if:

- (1) The action involves "minimal diversity" between "adverse parties."
- (2) The action arises from "a single event or occurrence."
- (3) The plaintiff alleges in "good faith that 25 persons have either died or incurred injury as of result of the event or occurrence." "Injury" is defined to mean "physical harm to a natural person and physical damage to or destruction of tangible property."
- (4) "In the case of injury, the injury has resulted in damages which exceed \$50,000 per person, exclusive of interest and costs."<sup>26</sup>

In contrast to the ABA approach which asserts federal question jurisdiction, the jurisdictional base of H.R. 3406 is grounded upon diversity of citizenship. By requiring only "minimal diversity," H.R. 3406 would make it significantly easier for a party to invoke federal court jurisdiction when compared to the existing law, which requires "complete diversity." Thus, under current law, no plaintiff in a case can be a citizen of a state in which any defendant is a resident.<sup>27</sup> "Minimal diversity" means that there need be

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21. H.R. 3406, *supra* note 3.

22. *Id.*

23. *Id.*

24. *Id.* at 3275-76.

25. *Id.*

26. *Id.*

27. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

only one plaintiff and one defendant in a case who are citizens of different states. Under the bill, there apparently need be no diversity between any plaintiff and any defendant, and only "minimal diversity" between "adverse parties." Thus, "minimal diversity" presumably would exist, for purposes of Section 1367, if two defendants were citizens of different states and one defendant asserted a cross-claim against the other.

Some additional conditions, relating to the geographical dispersion of the defendants and the location of the disaster, would also have to be satisfied for a Section 1367 action to be brought. Under this section, jurisdiction is triggered only if:

- (1) "'a defendant resides in a State and a substantial part of the event or occurrence took place in another State;
- (2) any two defendants reside in different States; or
- (3) substantial parts of the event or occurrence took place in different States.'"<sup>28</sup>

In this regard, the bill appears to be somewhat self-defeating because of the definition of a corporation's residence in subsection 1367(b)(2):

[A] corporation is deemed to be a citizen of any State, and a citizen or subject of any foreign state, in which it is incorporated or has its principal place of business, and is deemed to be a resident of any State in which it is incorporated or licensed to do business or is doing business . . . .<sup>29</sup>

Under existing law, a corporation is not a resident of a state simply because it is incorporated, licensed to do business, or actually doing business there.<sup>30</sup> Under the definition of subsection 1367(b)(2), however, corporate residence would be established on that basis. As a result, it is unlikely that two of the three alternative conditions for geographical dispersion could be satisfied. The condition that a defendant "resides" in one state and a substantial part of the event or occurrence takes place in another state rarely will be met. This is because the defendant usually will "reside" in the state where the event or occurrence took place under the "doing business" component of the definition. The condition that any two defendants "reside" in different states also rarely will be met, because virtually all large corporations do business in the same states.

According to the bill's sponsor, Rep. Robert W. Kastenmeier, the events or occurrences within the contemplation of H.R. 3604 are plane crashes, bridge collapses, hotel fires and the like.<sup>31</sup> Thus, the bill is nar-

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28. H.R. 3406, *supra* note 3.

29. *Id.*

30. 28 U.S.C.A. § 1332(c) (West Supp. 1989).

31. H.R. 3406, *supra* note 3.

rower in scope than the ABA proposal, which would cover not only single event mass disaster, but multiple exposures to a single product line. On the other hand, jurisdiction is triggered with a far lower threshold than under the ABA proposal. Only twenty-five rather than 100 claims need be involved. Furthermore, it is not necessary that there be twenty-five plaintiffs or lawsuits, only that there be twenty-five persons who are alleged to have suffered personal injury or property damage. Indeed, the federal court's jurisdiction could theoretically be invoked under Section 1367 where twenty-four injured persons have settled and only one holdout wants to sue.

Section 6 of H.R. 3406 would add a new Section 1658 to Title 28, directing a federal district court, in an action brought under new Section 1367, to determine what state's law should be applied to the action. This determination would be based on a comprehensive "interest analysis," taking into account eleven specific factors.<sup>32</sup> The court's choice of law determination would govern all other actions arising from the disaster, and all elements of each action, unless federal law applies or the court specifically provides that some other state's law shall apply. The bill does not authorize the creation of federal substantive common law for mass torts. Thus, like the ABA proposal, H.R. 3406 refuses to mandate federal substantive law, be it statutory or federal common law. Instead, state law is to be chosen as the governing rule of decision. Though the concept of a single jurisdiction's rule governing all the parties and issues of a mass disaster event is clearly

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32. The pertinent section provides:

In making this determination, a district court shall not be bound by the choice of law rules of any State, and the factors that the court may consider in choosing the applicable law include —

- (1) the law that might have governed if the jurisdiction created by Section 1367 of this title did not exist;
- (2) the forums in which the claims were or might have been brought;
- (3) the location of the event or occurrence on which the action is based and the location of related transactions among the parties;
- (4) the place where the parties reside or do business;
- (5) the desirability of applying uniform law to some or all aspects of the action;
- (6) whether a change in applicable law in connection with removal or transfer of the action would cause unfairness;
- (7) the danger of creating unnecessary incentives for forum shopping;
- (8) the interest of any jurisdiction in having its law apply;
- (9) any reasonable expectation of a party or parties that the law of a particular jurisdiction would apply or would not apply;
- (10) any agreement or stipulation of the parties concerning the applicable law; and
- (11) whether a change in applicable law in connection with removal or transfer of the action would cause unfairness.

*Id.* at E3276 § 6(a).

central to the statutory scheme, subsection 1658(b) allows the federal court to override the single jurisdiction rule on an *ad hoc* basis.<sup>33</sup>

## II. THE ASSAULT ON FEDERALISM

### A. *Respecting State Sovereignty*

Fundamental federalism considerations strongly militate against a federally required consolidation of "mass tort" cases, a federally imposed "single jurisdiction choice of law rule," and the resulting displacement of state conflicts law in such cases. Both the ABA Report and H.R. 3406 fail to give sufficient consideration to the impact of consolidation, and of the "single jurisdiction choice of law rule" on the traditional sovereignty exercised by the states in our constitutional system. The focus of both the Report and the bill is solely upon "efficiency and judicial economy," and upon the purported undesirability of "inconsistent results" in the adjudication of claims arising from the same "mass tort."<sup>34</sup> There is little, if any, concern that the price to be paid for such "efficiency and consistency" is an improper intrusion on state sovereignty, by depriving the states of their power to promulgate the rules governing disputes between private parties in "mass tort" cases, and to adjudicate such disputes in their courts.<sup>35</sup>

In American constitutional theory, the sovereignty formerly possessed by the British Crown over domestic matters evolved upon each of the states at the time of independence;<sup>36</sup> therefore, the states have the primary responsibility for developing legal rules that govern disputes between private persons, and adjudicating such disputes in their courts. As the Supreme Court noted in holding that the full faith and credit clause generally does not compel one state to displace its own law in favor of that of another state:

[T]he very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to

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33. *Id.* § 6(b).

34. *Id.* at E3275.

35. As the Supreme Court has observed in another context: "[T]he Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

36. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404 (1819). Thus, American states do not depend on the federal Constitution as the source of their power. In contrast, they retain the general regulatory and taxation power and all other powers they possessed at the time of the adoption of the Constitution, except to the extent that the Constitution prohibits or restricts a particular exercise of state power. While this principle is textually embodied in the tenth amendment, in this respect the tenth amendment is merely "declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment . . . ." *United States v. Darby*, 312 U.S. 100, 124 (1941).



substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.<sup>37</sup>

Congress, of course, has the power, as a matter of federal supremacy,<sup>38</sup> to override or displace state law in any area coming within the federal legislative power. Since the federal legislative power, particularly the power of Congress over interstate commerce, has been broadly construed,<sup>39</sup> Congress has the affirmative power to override or displace state law in "mass tort" cases. However, as we shall demonstrate, the drafters of the mass tort proposals have gone about displacing state law in mass tort cases in a manner that raises serious constitutional concerns. In any event, the measure of Congress' constitutional power is not the measure of a *proper* exercise of that power. Congress itself has recognized that any exercise of federal power should be undertaken with due regard for the traditional sovereignty of the states and their role in our federal system.<sup>40</sup>

Nowhere does Congress' regard for the traditional sovereignty of the states appear more clearly than in the matter of the states' power to develop legal rules governing disputes between private persons, and to adjudicate such disputes in their courts. Congress has recognized the primacy of state law in disputes between private persons by requiring the application of state law in diversity cases under the Rules of Decision Act.<sup>41</sup> The Supreme Court's holding in *Erie R.R. Co. v. Tompkins*,<sup>42</sup> that "state law" means the common law of the state as declared by the highest state court, and its

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37. *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939).

38. U.S. CONST. art. VI, § 2.

39. See, e.g., *Perez v. United States*, 402 U.S. 146 (1971); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

40. The regard of Congress for the traditional sovereignty of the states, when Congress is exercising the federal commerce power, was emphasized by the Supreme Court in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), where the Court held that the Constitution did not impose a "State sovereignty" limitation on the otherwise plenary commerce power of Congress, even when the federal regulation affected the "States as States." *Id.* at 550-52. According to Justice Blackmun, writing for the Court in *Garcia*, the Constitution protects state sovereignty by "rely[ing] on a federal system in which special restraints on federal power over the States inhered principally in the workings in the National Government itself, rather than in discrete limitations on the objects of federal authority," and that under the Constitution, "[s]tate sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.* at 552. These procedural safeguards relate primarily to the role of the states in determining the composition of the federal government, such as by state authority to set voting qualifications, by the role of the states in the Electoral College, and by each state's equal representation in the Senate. As Professor Tribe has explained *Garcia*: "The Court evidently envisions that the constitutional procedure for lawmaking will result in a sound balance between state sovereignty and national interests." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 480 (2d ed. 1988).

41. 28 U.S.C. § 1652 (1982).

42. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

"*Klaxon* holding,"<sup>43</sup> that this includes the application of state conflict of laws and rules, coupled with the Court's expansive interpretation of what is "substantive" for *Erie* purposes,<sup>44</sup> all reinforce Congressional recognition of the primacy of state law in governing disputes between private persons.<sup>45</sup>

Congress has also recognized the primary responsibility of the state courts to adjudicate disputes between private persons, including persons residing in different states. The exercise of diversity jurisdiction in the federal courts has been carefully limited by requiring complete diversity,<sup>46</sup> instead of the constitutionally permissible "minimal diversity."<sup>47</sup> Diversity jurisdiction in suits involving corporations is further restricted by the fact that, as subsection 1332(c) specifically provides, a corporation is a citizen both of the state where it is incorporated, and the state where it has its principal place of business.<sup>48</sup> Furthermore, in 1988, Congress increased fivefold the jurisdictional amount in diversity cases, from \$10,000 to \$50,000.<sup>49</sup>

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43. See *Klaxon Co. v. Stentor Elec. Mfg.*, 313 U.S. 487 (1941).

44. See, e.g., *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). But cf. *Hanna v. Plumer*, 380 U.S. 460 (1965) (FED. R. CIV. P. 4(d)(1) interpreted narrowly).

45. While Justice Brandeis' contention, that the result in *Erie* was constitutionally required, has been the subject of much dispute, his observations in regard to the interplay between the Rules of Decision Act and respect for state sovereignty are independent from his constitutional analysis. He specifically held that the Rules of Decision Act was constitutional and that the "constitutional problem" resulted from the fact that in applying the Act, "this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States." *Erie*, 304 U.S. at 80. Those "rights," of course, related to promulgating the rules of law of the state applicable to the resolution of disputes between private persons.

46. This means that diversity jurisdiction does not exist unless *each* defendant is a citizen of a different state from *each* plaintiff. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373 (1978). The rule of complete diversity has been followed consistently ever since *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). Only the interpleader statute, 28 U.S.C. § 1335, has been construed to require "minimal diversity." *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523 (1967).

47. As the Court stated in *Tashire*: "Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens." 386 U.S. at 531.

48. Subsection 1332(c) also provides that in a direct action against an insurer, the insurer is deemed a citizen of the state where the insured resides, as well as of the state where the insurer is incorporated, and of the state where it has its principal place of business. 28 U.S.C. § 1332(c) (1986).

49. Along the same lines, when Congress enacted the Parental Kidnapping Prevention Act of 1980, it did not intend thereby to create an implied cause of action in federal court to determine which of two conflicting state custody decrees is valid. Rather, Congress' purpose in enacting the Act was to ensure that full faith and credit be given to one state's custody decree in another state, but it was the state courts that had the responsibility of implementing the Act's provisions. See *Thompson v. Thompson*, 484 U.S. 174 (1988). In that case, the Court held as follows: "State courts faithfully administer the Full Faith and Credit Clause every day; now that Congress has

Congressional respect for state sovereignty in this area is also reflected in the Court's extreme reluctance to allow federal preemption of the state's power to promulgate legal rules governing the disputes between private persons.<sup>50</sup> Thus, the Court has held that, although federal law controls the radiological safety aspects of nuclear power, it does not preempt state tort law remedies, including an award of punitive damages, for harm caused by the escape of hazardous nuclear energy materials.<sup>51</sup> Moreover, in the labor law area, where preemption is often found, the Court has held that in certain circumstances federal labor law does not preempt state tort law remedies in suits involving employers, employees, and unions.<sup>52</sup>

The foregoing illustrations demonstrate that under our federal system the states have the primary responsibility for promulgating the law governing disputes between private persons, and for adjudicating such disputes in their courts. Congress has traditionally been solicitous of the responsibility of the states in this regard. This being the case, proponents of a "federal solution" to the purported problems of "mass tort" litigation, through the displacement of state law and the role of the state courts in resolving these cases, should properly bear a heavy burden of justification. They should be required to demonstrate an overriding necessity for such a radical subversion of state sovereignty. In light of the values of our constitutional system,

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extended full faith and credit requirements to child custody orders, we can think of no reason why the courts' administration of federal law in custody disputes will be any less vigilant." *Id.* at 187.

50. Indeed, in any area, because of respect for state sovereignty, the presumption is against federal preemption. As the Court has stated:

If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.

New York State Dept. of Social Serv. v. Dublino, 413 U.S. 405, 413 (1973) (quoting *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952)). Congressional respect for state sovereignty in this regard is reflected in several Supreme Court holdings. For example, state regulation of the economic aspects of nuclear power generation is not preempted by the federal Atomic Energy Act. *See Pacific Gas & Elec. Co. v. State Energy Comm'n*, 461 U.S. 190 (1983). Similarly, a state law requiring employers to provide a one-time severance payment to employees in the event of a plant closing was not preempted either by federal ERISA or federal labor relations law. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987).

51. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984).

52. The Court has held, for example, that state courts are permitted to award damages to an employee who was subject to a retaliatory discharge for filing a worker's compensation claim. *See, e.g., Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988). In addition, a state court may award damages to a union member against the union for the intentional infliction of emotional distress arising out of the union's discrimination against the member. *See Farmer v. United Bhd. of Carpenters and Joiners of Am. Local 25*, 430 U.S. 290 (1977). Finally, state courts may provide relief against mass picketing and threats of violence. *See Automobile Workers v. Russell*, 356 U.S. 634 (1958).

state sovereignty should not be lightly cast aside in the name of "efficiency and uniformity."

Unfortunately, this is exactly what would be done under the ABA proposal, as well as H.R. 3406. We will use the terms of H.R. 3406 as the focal point for our discussion. This bill would radically subvert state sovereignty in "mass tort" cases, first by establishing minimal diversity, and more significantly, by overruling *Klaxon*, and displacing state choice of law in favor of a federally-imposed solution. Section 1658 directs the federal courts to "designat[e] a single jurisdiction whose substantive law is to be applied in all other actions under section 1367 arising from the same event of [sic] occurrence."<sup>53</sup> In addition, the federal courts are not "bound by the choice of law rules of any State."<sup>54</sup> The purpose and effect of the Bill, then, is to destroy the authority of the state courts to decide "mass tort" cases, and to determine what substantive law shall apply to the resolution of those cases.

We do not argue that it is improper in all circumstances for Congress to modify state law applicable to the resolution of disputes between private persons. In certain limited circumstances, Congress may conclude that national interests require displacement of state law, and that diverse or cumulative imposition of liability in cases with interstate or international ramifications impose an "undue burden" on interstate commerce.<sup>55</sup> Indeed, one of the authors of this Article has been a proponent of federal products liability legislation which is specifically targeted to resolve certain problems that he thinks need resolution at the national level.<sup>56</sup> Whatever may be one's views as to the wisdom of federal substantive tort legislation, the ABA proposal and H.R. 3406 do not seek to establish a national substantive norm. Where Congress legislates by creating substantive law to resolve a problem of national significance, it presumably has done so after having

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53. H.R. 3406, *supra* note 3, at E3276.

54. *Id.* A federally-imposed "single designated jurisdiction" rule is an essential feature of the ABA proposal as well.

55. The courts have given effect to these principles of preemption. *See, e.g.,* *Wood v. General Motors Corp.*, 865 F.2d 395, 414 (1st Cir. 1988) (state product liability airbag claim is preempted by the National Traffic and Motor Vehicle Safety Act); *Cippollone v. Liggett Group, Inc.*, 789 F.2d 181, 187 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987) (holding that the Federal Cigarette Labeling and Advertising Act preempts those state law damage actions relating to smoking and health that derive from cigarette warnings, advertising or promotion) (preemptive principles reaffirmed in *Cippollone v. Liggett Group, Inc.*, Nos. 88-5732, 88-5770, 88-5771, 88-5784 (3d Cir. Jan. 5, 1990) (1990 WL 184)). Preemption applies whether the federal law is embodied in a statute or a regulation, *see Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982), and whether the state law is based on a statute, regulation or common law rule. *Taylor v. General Motors Corp.*, 875 F.2d 816, 826 (11th Cir. 1989).

56. Twerski, *A Moderate and Restrained Federal Product Liability Bill, Targeting the Crisis Areas for Resolution*, 18 U. MICH. J.L. REF. 575 (1985).

weighed the merits of the issue, and chosen a national solution to it. By relying on state substantive law as the measure of the rights of the parties, the ABA proposal and H.R. 3406 look to a body of the law that is *not* national in character. The legislation, in effect, declares the mass tort problem to be a matter of overreaching federal concern, while still presuming that a "one state solution" is rational. In addition, when the law chosen is based on irrational choice of law methodology, the affront to federalism is profound.

### *B. Sacrificing State Interests*

#### 1. Single Disaster Cases

The radical subversion of state sovereignty effected by H.R. 3406 is dramatically illustrated by the following example. Twenty members of the Elks Club in Denver, Colorado, charter a bus for a trip to Arizona for an Elks Convention. The bus company, Colorado Coaches, Inc., is a Colorado corporation doing business mostly within the state. In Phoenix, thirty Arizona Elks members board the bus for a local sightseeing trip. Due to the negligence of the bus driver, the bus hits a culvert, causing the bus to overturn. All the passengers suffer serious and debilitating injuries. A Colorado statute adopted in 1987 limits recovery for non-economic loss to \$250,000 for each plaintiff.<sup>57</sup> There is no such limitation under Arizona law.

Both the cases of the Colorado plaintiffs and the Arizona plaintiffs give rise to a conflict of laws problem. This is because in both cases the parties are not residents of the same state and/or all the legally significant facts did not occur in the same state. In addition, the laws of the involved states differ on the point in issue. In the case of the Colorado plaintiffs, although both the plaintiffs and the defendant are Colorado residents, the accident occurred in another state, Arizona. In the case of the Arizona plaintiffs, although the accident occurred in Arizona, the defendant is a resident of a different state, Colorado. The laws of the involved states differ on the point in issue, in that Arizona allows unlimited recovery for non-economic loss, while Colorado limits recovery for non-economic loss to \$250,000.<sup>58</sup>

It is submitted that in these cases a functionally sound result is for the Arizona plaintiffs to obtain unlimited recovery under Arizona law, but for the Colorado plaintiffs to be limited to the \$250,000 limitation on non-eco-

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57. COLO. REV. STAT. § 13-21-102.5(3)(a) (Supp. 1987) (\$500,000 if clear and convincing evidence, otherwise \$250,000).

58. It has been said that in a conflicts case "the legal order tries to integrate the diversity of which it is composed." Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297, 297 (1953).

nomic loss in accordance with Colorado law. In an interstate accident situation, the primarily interested states are the parties' home states, where the consequences of the accident and of allowing or denying recovery will be felt by the parties. The Arizona policy of allowing unlimited recovery thus will always be advanced when the victims are residents of Arizona. The application of Arizona law to determine liability in the claim of the Arizona plaintiffs against Colorado Coaches, Inc., is fully fair to the defendant, since the accident occurred in Arizona on a local sightseeing trip. There is no doubt that the Arizona plaintiffs will be able to obtain unlimited recovery there. They will bring suit against Colorado Coaches, Inc. in Arizona, where the defendant is subject to jurisdiction under the Arizona "long-arm" act, and Arizona will apply its own law, thus allowing unlimited recovery.<sup>59</sup>

In the suit between the Colorado plaintiffs and the Colorado defendant, Colorado law, limiting recovery to \$250,000 for non-economic loss, should likewise apply to determine the rights of the Colorado parties. The Colo-

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59. Under the interest analysis approach to choice of law questions, this case presents the true conflict situation. The plaintiff's home state has a real interest in applying its law allowing unlimited recovery, since the social and economic consequences of the accident will be felt by the plaintiff in that state. Likewise, the defendant's home state has a real interest in applying its law denying recovery, since the consequences of imposing liability will be felt by the defendant and its insurer in that state. Experience indicates that in true conflict situations, the forum, regardless of the particular approach to choice of law it is purportedly following, will almost invariably apply its own law in order to implement its own policy and interest. See Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the 'New Critics'*, 34 MERCER L. REV. 593, 593-95 (1983); Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformation*, 25 UCLA L. REV. 181, 231-33 (1977). In a case such as this, where a vehicular accident occurred in the plaintiff's home state and the defendant is subject to suit under that state's long-arm act, the result is so clear that it is difficult to find cases dealing directly with the question since the defendant would rarely bother to litigate the issue. In *Biscoe v. Arlington County*, 738 F.2d 1352 (D.C. Cir. 1984), a police officer from Arlington County in Virginia pursued a suspected bank robber across the District of Columbia line, where he crashed into an automobile driven by a District of Columbia citizen. *Id.* at 1354-55. Under Virginia law, the county enjoyed sovereign immunity. Under District of Columbia law, however, the county would be liable for the negligence of the officer and could not assert sovereign immunity. In this case, suit could be brought against the county in the District of Columbia under its long-arm statute. The court applied District of Columbia law to impose liability. *Id.* at 1365-66. In the interstate accident situation, the forum may also apply its own law to impose liability even when an act is done elsewhere. For example, serving liquor to an intoxicated person in an establishment close to the state line could foreseeably cause harm to a forum resident in the forum. See, e.g., *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976) (application of California law imposing "dram shop" liability against a Nevada casino that operated close to the California state line and advertised extensively in California, when an intoxicated patron of that casino was involved in an automobile accident with a California victim in California).

Arizona expressly follows the Restatement (Second)'s statement of the most significant relationship approach to choice of law, *Bryant v. Silverman*, 146 Ariz. 41, 42-44, 703 P.2d 1190, 1191-93 (1985). Clearly, in this case, Arizona would hold that it has the most significant relationship with respect to damages recoverable for this accident involving an Arizona victim in Arizona.

rado legislature has made this determination as to the proper measure of recovery for non-economic loss. Therefore, Colorado is the only state that has a real interest in having its law applied to the issue in this case because the social and economic consequences of the accident, and of imposing or denying liability, will be felt by the parties there. Thus, Colorado will apply its own law in the event that suit is brought there,<sup>60</sup> and it is likely that if suit were brought in Arizona, its courts would apply Colorado law in this case as well.<sup>61</sup>

The result in this situation, then, is that the Colorado plaintiffs would be limited to \$250,000 in damages for non-economic loss in accordance with Colorado law, because both the plaintiffs and the defendant are residents of Colorado, and the social and economic consequences of the accident and of allowing or denying recovery will be felt by the parties in Colorado. The Arizona plaintiffs, however, would obtain unlimited recovery in accordance with Arizona law, since they were injured in their home state on a purely local trip. Such a result (the Colorado plaintiffs being denied unlimited recovery in accordance with Colorado law, and the Arizona plaintiffs obtaining unlimited recovery in accordance with Arizona law) is functionally sound and fair to all the parties involved. It is irrelevant that the parties

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60. See, e.g., *Fuerste v. Bemis*, 156 N.W.2d 831 (Iowa 1968); *Tower v. Schwabe*, 284 Or. 105, 585 P.2d 662 (1978).

61. In this situation, the non-resident plaintiff can always bring suit in the state where the accident occurred, obtaining jurisdiction under its "long-arm" act. In a number of cases, the courts of the accident state have applied their own law, thus allowing recovery. See, e.g., *Milkovich v. Saari*, 295 Minn. 155, 203 N.W.2d 408 (1973); *Gagne v. Berry*, 112 N.H. 125, 290 A.2d 624 (1972); *Conklin v. Horner*, 38 Wis. 2d 468, 157 N.W.2d 579 (1968). In some cases, however, the court of the accident state has concluded that it has no real interest in applying its law allowing recovery, and has applied the law of the parties' home state, thus denying recovery. See, e.g., *Vick v. Cochran*, 316 So. 2d 242 (Miss. 1975); *Mager v. Mager*, 197 N.W.2d 626 (N.D. 1972). In New York, when the parties are from the same state, the law of the home state applies under the first "*Neumeier* rule." See *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972); see also *Schultz v. Boy Scouts of Am.*, 65 N.Y.2d 189, 480 N.E.2d 679 (1985).

Arizona, which expressly follows the state of the most significant relationship approach to choice of law, would hold that in this case the parties' home state was the state of the most significant relationship on the issue of damages recoverable. In *Bryant*, the court held that where Arizona parties were involved in a fatal accident in Colorado, Arizona was the state of the most significant relationship on the issue of damages recoverable for wrongful death. In that context it observed as follows: "Although Colorado is the state of injury, the state where the injury occurs does not have a strong interest in compensation if the injured party is a non-resident. Compensation of an injured plaintiff is primarily a concern of the state in which plaintiff is domiciled." *Bryant*, 146 Ariz. at 45, 703 P.2d at 1194 (citations omitted). For the same reasons, Arizona would have no real interest in allowing unlimited compensation for non-economic loss to a Colorado victim injured by a Colorado defendant in Arizona, and so would likely hold that Colorado is the state of the most significant relationship on this issue.

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

The intrusion of a federally imposed "single designated jurisdiction" rule, however, would require the federal court to either deny the Arizona plaintiffs unlimited recovery or, more likely,<sup>62</sup> grant the Colorado plaintiffs a "windfall." This would not be permitted according to the law of their home state. There exists no reason to deny the Colorado defendant the protection of the law which the Colorado legislature sought to bestow upon it while granting to Colorado plaintiffs a "windfall" denied to them by the legislature of their home state. The application of the "single designated jurisdiction" rule in this case, therefore, not only runs counter to progressive trends in choice of law, but unjustifiably defeats the strong policy of Colorado, in the case of the Colorado parties, without advancing any legitimate policy of Arizona. Again, if the Arizona courts were permitted to retain control over this case, they would likely respect the legitimate policy and interest of Colorado and displace Arizona law in favor of Colorado law on the point in issue.

We submit, therefore, that proper regard for the traditional sovereignty of the states in our federal system dictates that Colorado law govern the rights of the Colorado plaintiffs and the Colorado defendant, while Arizona law govern the rights of the Arizona plaintiffs and Colorado defendant arising out of an Arizona accident. This regard for state sovereignty is thwarted, however, by the "designated single jurisdiction" rule of H.R. 3406.

In arguing for the consolidation of "mass tort" litigation and the application of a federally imposed "single designated jurisdiction" rule to govern all the cases arising from the "mass tort," the American Bar Association Commission on Mass Torts has stated that:

separate adjudication of individual tort claims arising from a single accident or use of or exposure to the same product or substance is inefficient and wasteful, seriously burdens both state and federal judicial systems, poses unacceptably high risks of inconsistent results,

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62. It surely seems unjust to deprive the Arizona plaintiffs of the benefit of unlimited recovery under Arizona law for an accident occurring on a local trip simply because some of the victims were from Colorado.



and contributes to public dissatisfaction with the tort law system and the legal profession.<sup>63</sup>

The Report, however, fails to demonstrate empirical evidence that the present system of "mass tort" litigation produces any of these claimed harmful effects. Rather, the Report focuses on the difficulty of consolidating the "mass tort" cases in a single court to be governed by a single law, *and simply assumes that all of these alleged harmful effects result from this difficulty*. In addition, nowhere in the Report is there consideration of the effect consolidation and resolution of the "mass tort" cases under a federally imposed "single designated jurisdiction" rule would have on the traditional sovereignty of the states in our federal system, and the longstanding function of the states to develop the legal rules that govern disputes between private persons and to adjudicate such disputes in their courts. It is simply assumed that state sovereignty must be shunted aside in the name of "efficiency and uniformity of result" in "mass tort" litigation.

Let us now look at the Colorado-Arizona bus trip "mass tort" case and examine how the cases would be handled under the present system of tort litigation. This system relies primarily on state law and the state courts to determine the rights and liabilities of the parties involved in interstate accidents, "mass tort" or otherwise. The Arizona plaintiffs would doubtless file their suits against the Colorado defendant in the Arizona courts, where that defendant is subject to jurisdiction under the Arizona "long-arm" act. They will not file their suits in Colorado, not only because of possible inconvenience in doing so, but because there is a real possibility that Colorado would apply its own law in order to protect the Colorado defendant.<sup>64</sup> If the plaintiffs file separate actions, the Arizona courts would have the power to consolidate them, so the "efficiency" problem is rectified.<sup>65</sup>

The Colorado plaintiffs are also likely to sue in Arizona, hoping to obtain the application of Arizona law as the law of the state of injury instead of the less favorable law of their home state. Again, all of their cases could be consolidated with the cases of the Arizona plaintiffs, and there could be a

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63. ABA Mass Torts Report, *supra* note 1, at 12.

64. Whenever a recovery state plaintiff has sued a non-recovery state defendant in the defendant's home state, the courts of the defendant's home state have always applied their own law to deny or limit recovery, including the rare situation where the accident occurred in the plaintiff's home state. For a discussion and review of pertinent cases, see Sedler, *Rules of Choice of Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Torts Cases*, 44 TENN. L. REV. 975, 1037-38 (1977).

65. As long as all plaintiffs are from Arizona, there is complete diversity and the case could be removed to federal court. The federal court, however, is required to apply Arizona law and to reach the same result that would be reached in the Arizona state courts; here the application of Arizona substantive law on the issue of recovery for non-economic loss.

single trial on the issue of liability.<sup>66</sup> Therefore, the "efficiency" concern is satisfied. If liability is established, there would have to be separate trials on the issue of damages for each plaintiff as there is under H.R. 3406. Consequently, the Colorado plaintiffs would be limited to \$250,000 for non-economic loss in accordance with Colorado law.

The fact that the Arizona plaintiffs would recover greater damages than the Colorado plaintiffs for harm arising out of the same accident would mean that there would be "inconsistent results" in the recovery arising from the same "mass tort." It is difficult to understand why this creates any kind of problem. The "inconsistent results" are due to the fact that the parties' home states have different rules as to the amount of damages recoverable. These are also the states where the consequences of the accident and of imposing or denying liability will be felt by the parties. Once the reason for the "inconsistent results" is understood, it cannot be said to be "unacceptable" to limit each victim to the measure of recovery afforded by the law of the victim's home state. Surely, such a result is preferable to imposing a "choice of law straightjacket" that would improperly intrude on the power of Arizona to apply its substantive law for the benefit of the Arizona victims. This would also impair Colorado's ability to implement the rule of the Colorado Legislature: recovery for non-economic loss should be limited in a case involving Colorado plaintiffs and a Colorado defendant.

In the Arizona-Colorado bus trip example, the present system achieves substantially the same "efficiency" that would be achieved under H.R. 3406 without intruding upon the power of each state to apply its own law to determine the rights of its resident plaintiffs.

## 2. Multi-Exposure Cases

Consider next the matter of multi-exposure product liability cases. While this kind of litigation is not included within the present scope of H.R. 3406, it is included in the recommendations of the ABA Report.<sup>67</sup> The ABA Report refers to "toxic tort litigation," which it defines as "claims that use of or exposure to a product (including pharmaceutical drugs or medical devices) has produced an illness or condition," and says that "claims of this sort have sometimes mushroomed into tort litigation of gi-

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66. In this case, the laws of the states involved do not differ on the issue of liability.

67. The ABA Mass Torts Report contemplates that the applicable law should be that of a "single designated jurisdiction," but authorizes the federal court to select the law of more than one state to govern in particular "mass tort" litigation. *See supra* notes 14-17 and accompanying text.

gantic proportion as illustrated by litigation involving Agent Orange, Benedictin, DES, vaccines and asbestos.”<sup>68</sup>

Under the present system, in “toxic tort litigation,” the victims may bring individual or class actions against the manufacturer (or manufacturers) in any state where the manufacturer is subject to jurisdiction. Therefore, these actions can always be brought in the victim’s home state<sup>69</sup> or in the state of manufacture.<sup>70</sup> If there is complete diversity, the actions can be brought in or removed to federal court. While the state court cases brought in a single state can be consolidated to varying degrees under the rules governing multi-district litigation, in all cases, the applicable conflicts law will be that of the state in which the original suit was brought.

Let us assume that separate actions are brought by the “toxic tort” victims against the manufacturer in all fifty states. In each case, the forum is either the plaintiff’s home state or the state of manufacture. Let us also assume that there are significant variations in the laws of the different states on the various issues involved in products liability litigation, such as the standard of liability, causation, punitive damages, and the like. The law of half the states is more favorable to plaintiffs on these issues, while the laws of the other states favor manufacturers. Also, assume that the law of the state of the manufacturer is more favorable to manufacturers.<sup>71</sup> While the actions against the manufacturer in each of the fifty states can be consolidated within the state, and the federal court cases can be consolidated to a degree under the multi-district litigation rules, there will be in excess of fifty cases in different courts involving the same underlying claim.

Consider now the likely results of these cases. Where the law of the plaintiffs’ home state is more favorable to plaintiffs, the plaintiffs will sue in their home states, which will apply their own laws favoring plaintiffs. Because the consequences of the accident will be felt by the victims in their

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68. ABA Mass Torts Report, *supra* note 1, at 8.

69. Almost invariably the product will have been purchased in the victim’s home state, and the harm will have occurred there.

70. Frequently, the product will have been designed, tested, and manufactured in the state where the manufacturer has its principal place of business. If different “batches” of the product were manufactured in different states, each state is the state of manufacture for these purposes.

Suit may also be brought in any state where the manufacturer does business, subject to *forum non conveniens* considerations. Where the state in which the manufacturer is sued is not the state where the plaintiff resides or where anything relating to the design, testing or manufacture of the product occurred — that is, where the only connection that the manufacturer has with the forum is that the manufacturer carries on unrelated business activities there — the strongest justification for dismissal on *forum non conveniens* grounds is presented. See, e.g., *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195 (2d Cir. 1987).

71. The laws of all states where “batches” of the product were manufactured will be, for our purposes, more favorable to the manufacturer on these issues.

home states, these states have a real interest in applying their plaintiff-favoring law for the benefit of their resident plaintiffs.<sup>72</sup> In the remaining cases, where the law of the plaintiffs' home state is favorable to manufacturers, there is simply no conflict of laws on the point in issue, since the law of the state of manufacture is favorable to manufacturers.

Now let us assume that the law of the state of manufacture is more favorable to plaintiffs. In this situation, there is again a conflict of laws between the law of the state of manufacture and the law of the plaintiffs' home state. This time, however, the law of the plaintiffs' home state favors manufacturers, while the law of the manufacturer's home state favors plaintiffs. The plaintiffs are likely to bring their suits in the manufacturer's home state, hoping to persuade that court to apply its own law. They will argue that the state's product liability law reflects a regulatory policy, which that state is interested in applying to products manufactured there. Sometimes, the courts of the manufacturer's home state will agree, and will apply their own law.<sup>73</sup> Other times they will hold that the law of the plaintiff's home state should apply.<sup>74</sup> More to the point, so long as the suits are brought in the manufacturer's home state, it may be possible to consolidate them. By doing this, the liability issues may be determined in a single action. Multiple litigation will occur in this circumstance only if some plaintiffs bring the suits in their home states.

It cannot be disputed that, under the present system, there will be multiple litigation on the same underlying "mass toxic tort" claim. The multiple litigation will lead to "inconsistent results" because of the differing applica-

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72. Again, this is the true conflict situation, with the plaintiff from a liability state and the defendant from a non-liability state. Since the manufacturer shipped the goods into the "stream of commerce," the application of the law of any of the fifty states was foreseeable to the manufacturer at the time it acted and, therefore, it is manifestly fair to the manufacturer. Since the plaintiff's home state has a real interest in applying its own law in order to implement the victim protection policy reflected in that law, and the application of its law is fair to the manufacturer, the plaintiff's home state will apply its own law regardless of which specific approach to choice of law it is purportedly following. *See, e.g.,* *Stephan v. Sears, Roebuck & Co.*, 110 N.H. 248, 266 A.2d 855 (1970); *see also* R. SEDLER, *ACROSS STATE LINES: APPLYING THE CONFLICT OF LAWS TO YOUR PRACTICE* 58-59 (1989). As a practical matter, the out-of-state manufacturer, sued in the plaintiff's home state, will assume that the forum will apply its own law, which is more favorable to the plaintiff. The only way that the manufacturer can avoid this result is to contest jurisdiction, which will ordinarily be unavailing, since the manufacturer, by shipping the goods into the "stream of commerce," has "purposefully avail[ed] itself of the privilege of conducting [business] activities" in all fifty states and "purposefully directed its activities at residents" of all fifty states. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75 (1985) (quoting *Hansen v. Denckla*, 357 U.S. 235, 253 (1958)).

73. *See, e.g.,* *Corrigan v. Bjork Shiley Corp.*, 182 Cal. App. 3d 166, 227 Cal. Rptr. 247 (1986).

74. *See, e.g.,* *Deemer v. Silk City Textile Mach. Co.*, 193 N.J. Super. 643, 475 A.2d 648 (App. Div. 1984); *Morgan v. Biro Mfg.*, 15 Ohio St. 2d 339, 474 N.E.2d 286 (1984).

ble law when the law in some of the plaintiffs' home states is more favorable to plaintiffs and the law of the state of manufacture is more favorable to manufacturers. In this situation, the plaintiffs residing in states whose law is more favorable to plaintiffs will sue in their home states, and the home state will apply its own law for the benefit of its resident plaintiffs. The plaintiffs residing in the states whose law is more favorable to manufacturers will not have any applicable law advantage. However, as long as there can be multiple litigation in different states on the same underlying claim, there is also the possibility of "inconsistent results" due to different dispositions. Juries in different states, operating under the same applicable law, may resolve questions of fact and liability differently.

Admittedly, it would be efficient to consolidate all of the actions in a single court and apply the law of a single state to determine liability under a federally imposed "single designated jurisdiction" rule. This "efficiency and uniformity benefit" would be achieved, however, by displacing state sovereignty in a vital area of regulation that under our constitutional system has been traditionally reserved to the states. As a result, many of these cases would be taken away from the state courts.<sup>75</sup> Additionally, the application of the "single designated jurisdiction" rule, resulting in the application of the law of the state of manufacture to govern all claims,<sup>76</sup> would prevent states with plaintiff-favoring rules from applying their law for the benefit of their own residents.

The "inefficiencies" in multiple litigation of the same underlying claim in different courts are "built-into" our federal system. The states have the primary responsibility for developing the legal rules that govern disputes between private persons, and adjudicating those disputes in their courts. The proponents of consolidation should bear a heavy burden of showing that these "inefficiencies" are so serious and place such a severe strain on judicial resources as to justify removing these cases from the state courts and consolidating them in a single federal action.

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75. This deprives the plaintiffs' home state of the power to provide a forum for its resident plaintiffs to sue to redress an injury suffered in the home state, and likewise deprives the state of manufacture of the power to provide a forum in which claims against the manufacturer could be litigated.

76. As will be demonstrated in the next section of the Article, in a "mass toxic tort" situation, the law of the state of manufacture is the only law that could *constitutionally* be applied to govern the claims of all the plaintiffs residing in different states. This result would also encourage manufacturers engaged in high risk activity to carry on their manufacturing in states with rules that protect manufacturers.

*C. The Costs of Uniformity: A Retrospective*

Even if the proponents of consolidation can sustain this burden, it is one thing to consolidate the "mass toxic tort" claims in a single federal action, and quite another thing to displace the authority of each state to prescribe the choice of law rules governing "toxic tort" claims that have been brought initially in their courts. The consolidation proposal would be less objectionable, with respect to state sovereignty, if, after consolidation, the federal court were required, as it is now, to apply the conflicts law of the state in which the suit was initially brought.<sup>77</sup>

Abandonment of the "single designated jurisdiction" rule would reduce some of the "efficiencies," since different substantive laws would apply to the claims of different classes of plaintiffs. In our "mass toxic tort" example, the liability issues in the cases involving plaintiffs from states with plaintiff-favoring laws would have to be tried separately from the liability issues in the cases involving plaintiffs from states with manufacturer-favoring laws. This loss in "efficiency," however, seems a small price to pay for preserving the sovereignty of the states in determining the law applicable to resolving disputes between private persons, and for respecting the interests of the states with plaintiff-favoring laws.

It appears, however, that "uniformity of result" is also a major objective of proponents of consolidation, as evidenced by the "single designated jurisdiction" rule embodied in H.R. 3406.<sup>78</sup> In the "mass toxic tort" example, the "uniformity of result" objective would be achieved at the expense of sacrificing the interests of the states with laws favoring plaintiffs. As we have said, under the "single designated jurisdiction" rule, it is likely that the law of the state of manufacture would be chosen to govern all of the claims. Plaintiffs from states with plaintiff-favoring laws would, therefore, be denied the protection afforded them by the law of their home state.

"Inconsistency of result" in the "mass toxic tort" situation, as in the Colorado-Arizona bus accident discussed earlier, exists because different states, in the exercise of their traditional sovereignty, have adopted different

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77. Under *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), the federal court must apply the conflicts law of the state in which it sits, and when a case is transferred from one federal court to another under 28 U.S.C. § 1404, the transferee court must apply the law that would have been applied by the transferring court if the case had remained there, regardless of which party initiated transfer. See *Van Dusen v. Barrack*, 376 U.S. 612 (1964); *Ferens v. John Deere Co.*, — U.S. —, 110 S. Ct. 1274 (1990).

78. H.R. 3406, *supra* note 3.

substantive rules in the products liability area.<sup>79</sup> Different results reached by state courts in determining the legal rights of private persons in litigation is, as the Supreme Court has observed, "part of the price of our federal system."<sup>80</sup> A requirement that the applicable law in all "multi-exposure product liability" cases be that of a "single designated jurisdiction" would radically alter the role of the states in our federal system by displacing state authority to promulgate the rules governing disputes between private persons in such cases. The proponents of "uniformity of result" simply cannot, by any stretch of the imagination, demonstrate why such "uniformity" is so necessary as to require this radical alteration of the states' traditional role in our federal system.

It is clear that both the ABA Report and H.R. 3406 give scant consideration to the impact of federally mandated consolidation and a federally imposed "single jurisdiction rule" on the traditional sovereignty exercised by the states. The effect of these proposals would radically alter the role of the states in our federal system by displacing state authority to promulgate rules governing disputes between private persons in "mass tort" cases and adjudicate such cases in their courts. Fundamental federalism considerations strongly militate against their adoption by Congress.<sup>81</sup>

Lastly, the significance of *Klaxon* to federalism under modern choice of law methodology must be carefully considered. Originally, *Klaxon* sought only to assure that the result of a law suit not be altered depending on whether suit was brought in a state or federal court. Under modern conflicts theory, state choice of law rules reflect deep felt views as to the implementation of state interests. The state interests which are in conflict in modern day tort litigation are substantial. The tort reform movement continues to be the subject of violent disagreement among state legislatures. Those states that have passed reform legislation have often set forth the

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79. "Inconsistency of result" in cases resolved under the same substantive law exists because juries in different states and possibly in different cases in the same state, have reached different results when adjudicating the same issue.

80. *Williams v. North Carolina*, 317 U.S. 287, 302 (1942). Differences in the applicable law also represent the power of each state to experiment with solutions to legal questions, such as liability for defective products. As Justice Brandeis cautioned:

Denial of the right to experiment may be fraught with serious consequences to the Nation.

It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

*New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Justice Brandeis' statement was made while arguing that the due process clause should not be used to invalidate state economic regulation. This view eventually prevailed. See, e.g., *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973).

81. See *supra* text accompanying notes 1-3.

goals of the legislation in lengthy preambles.<sup>82</sup> Unlike the speculation that often attends choice of law analysis, there is no need to guess as to what policy goals were sought to be achieved. Similarly, those states that continue to champion the rights of claimants by refusing to limit traditional tort liability have strong views as to the appropriate public policy in this vitally important area of law. In effect "interest analysis" has "*Erie*-ized" *Klaxon*. Thus, it is not merely *Klaxon* which is under attack, but the basic philosophy of *Erie*. The assault on federalism is very deep indeed.

### III. MANDATING IRRATIONAL CHOICE OF LAW

Requiring that all issues in a "mass tort" case be determined by the law of a "single designated jurisdiction" would have the effect, in practice, of defeating the legitimate interests of states in applying their own law in "mass tort" cases. It would also run counter to progressive trends in choice of law, and impose a "choice of law straightjacket" in "mass tort" cases.

At the heart of H.R. 3406 is a provision for a federally imposed choice of the substantive law of a "single designated jurisdiction" to govern the resolution of *all* liability claims in a "mass tort" case.<sup>83</sup> Section 6 is the key provision. This provision authorizes the federal court in which the "mass tort" cases have been consolidated to "determine the source of the applicable substantive law," and specifically provides that, in making this determination, the court "shall not be bound by the choice of law rules of any state . . . ."<sup>84</sup> The section sets forth a long list of factors that the court may consider in choosing the "single designated jurisdiction," which on the surface would seem to allow for flexibility in making a functionally sound choice of law decision.

We shall demonstrate, however, that the very opposite is true. The court has almost no flexibility at all because the long list of factors is simply a mirage. *Because of constitutional constraints on what state's law can be selected to apply in a conflicts case, the court's choice of the "single desig-*

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82. See, e.g., ALA. CODE § 6-5-500 to -520 (1989 Supp.); CAL. CIV. CODE § 143.1 (1986); N.D. CENT. CODE § 28-01.1-01 (1989 Supp.); UTAH CODE ANN. § 78-15-2 (1989 as amended) (The Utah Act was declared unconstitutional in 1985, but has been revived by the 1989 Utah Laws S.B. 25. By the addition of a severability clause the legislature has apparently cured the problem occasioned by the unconstitutional statute of limitation-repose provision).

83. The ABA proposal also strives to have all liability issues determined by the law of a "single designated jurisdiction," but recognizes that in some circumstances it may be necessary to look to the substantive law of more than one state. There appears to be a similar escape hatch in H.R. 3406, § 6, 1658(b). See H.R. 3406, *supra* note 3, at E3276. In truth, neither the ABA proposal nor H.R. 3406 has considered the implications of trying to have all the liability issues in a "mass tort" case determined by the law of a particular state or states.

84. H.R. 3406, *supra* note 3, at E3276.



nated jurisdiction" is very limited. As a practical matter, in the vast majority of cases, the court will be forced to choose either the totally discredited "law of the place of the wrong" rule of the First Restatement, or an equally rigid rule of "law of the place of conduct."<sup>85</sup> In some cases the court will simply "run out of law." There will be no "single designated jurisdiction" whose law could constitutionally be applied to govern all the claims in the "mass tort" case.

The reason for this anomalous, unsound, and self-defeating choice of law result is the interaction of the "single designated jurisdiction" concept with constitutional constraints on choice of law in a conflicts case. The due process and full faith and credit clauses of the Constitution impose certain minimal limits on which state's law can be selected to apply in a conflicts case. While these limits ordinarily will not prevent a state court from making a decision to apply its own law or the law of another state in a particular case,<sup>86</sup> these limits become restrictive when an effort is made to apply the substantive law of a "single designated jurisdiction" in a "mass tort" case. This is especially true when multiple plaintiffs reside in a number of different states, and where the conduct in question occurs in more than one state.<sup>87</sup>

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85. The "law of the place of the wrong," which has long been rejected due to its rigidity, stems from the RESTATEMENT (FIRST) OF CONFLICTS OF LAW § 377 (1934). The "law of the place of conduct," as the only other constitutionally permissible alternative, is just as rigid. See *infra* notes 86-99 and accompanying text.

86. See Sedler, *Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism*, 10 HOFSTRA L. REV. 59, 68-74 (1981).

87. The impact of *Allstate* and *Shutts* (see *cites infra* notes 88, 92) on both the ABA proposal and H.R. 3604 was the subject of almost no discussion in the text of the ABA Mass Torts Report. It was first raised in the Congressional Hearings on H.R. 3604 in written testimony submitted by the authors to the Subcommittee on Courts, Intellectual Property and Administration of Justice, Committee on the Judiciary of the House of Representatives on November 15, 1989. Several scholarly sources referenced in the footnotes to the ABA Mass Torts Report have considered the problem in one fashion or another. For example, Professor Mullenix simply assumes that the only method to bypass the complex choice of law problems engendered by single forum litigation of mass tort claims is either for the judiciary to adopt federal common law or for Congress to adopt substantive tort law provisions to govern mass tort cases. See Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039, 1075-79 (1986). It will be recalled that both the ABA proposal and H.R. 3604 specifically eschew such an approach. Professors Rowe and Sibley, whose work had a significant influence on both the ABA and the drafters of H.R. 3604, address choice of law as an afterthought. Although the authors advocate the legislative overruling of *Klaxon* in mass torts cases, and development of federal choice of law principles through use of an extensive list of factors, the authors indicate no awareness that *Shutts* limits the practical choices available to a federal court seeking to use a "single jurisdiction rule." Rowe & Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7, 37-44 (1986).

Professors Miller and Crump recognize that the drafting of a federal choice of law statute for multiparty, multistate federal jurisdiction case presents serious difficulties. Yet, the authors have

The constitutional test for the application of a state's law in a conflicts case was stated by the Supreme Court in *Allstate Insurance Co. v. Hague*,<sup>88</sup> as follows: "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."<sup>89</sup> Under this test, a state's law may be constitutionally applied where the state has an interest in applying its law in order to implement the policy reflected in that law, and the application of its law is not fundamentally unfair to the other party, or where the state has sufficient factual contacts with the underlying transaction, so that it is reasonable for its law to be applied on the basis of those contacts.<sup>90</sup> Where the application of a state's law cannot be justified either under an "interest and fairness" test or a "factual contacts" test, such application is "arbitrary" and thus, constitutionally impermissible.<sup>91</sup>

In *Phillips Petroleum Co. v. Shutts*,<sup>92</sup> the Supreme Court held that in multi-party claims the constitutional test controls the application of a state's law to the claim of *each individual party*, notwithstanding that the suit takes the form of a "nationwide class action." In *Shutts*, a class action was brought in Kansas, by royalty owners residing in all fifty states, against a natural gas producer that produced or purchased natural gas from leased land, located in eleven different states. Plaintiffs claimed an entitlement to interest on suspended royalty payments. The Kansas court applied Kansas substantive law to *all* of the claims in the case, although over ninety-nine percent of the gas leases were located in other states, and ninety-seven percent of the plaintiffs were non-residents. The Supreme Court held that the application of Kansas law to determine all of the claims was "sufficiently arbitrary and unfair as to exceed constitutional limits."<sup>93</sup>

Kansas tried to justify the application of Kansas law in this case on the ground that it took the form of a "nationwide class action," in which Kansas was the forum. The Supreme Court rejected this justification as being

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not directly considered the rather commonplace hypothetical presented herein and the relationship between a "single jurisdiction rule" and constitutional law principles. See Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1, 78-79 (1986).

88. 449 U.S. 302 (1981).

89. *Id.* at 312-13. While the above test was set forth in a plurality opinion in *Allstate*, it was subsequently endorsed by the full Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-19 (1985).

90. See Sedler *supra* note 86, at 72-74.

91. For a thorough discussion of this point see Sedler, *supra* note 86, at 85-92.

92. *Phillips Petroleum Co.*, 472 U.S. 797 (1985).

93. *Id.* at 822.

contrary to the limits on selection of a state's law that had been set forth in *Allstate*. The Court noted that those limits "must be respected even in a nationwide class action."<sup>94</sup> Since Kansas had no interest in applying its law to claims unrelated to Kansas and, of course, no factual connection with those claims, the application of Kansas law to determine those claims was unconstitutional.

H.R. 3406 has the effect of converting a "mass tort" case into a "nationwide class action" and requires the federal court to select a "single jurisdiction's substantive law" to govern all the claims. As *Shutts* makes clear, however, the fact that a "nationwide class action" was involved is irrelevant with respect to constitutional limitations on selection of the applicable law. The constitutional limitations on selection of a state's law apply to the claim of each individual party.

The interaction of the "law of a single designated jurisdiction" approach of H.R. 3406, with constitutional constraints on choice of law in multiparty claims, will force the federal court into a "choice of law straightjacket." This effect is clearly illustrated by the following typical "mass tort" case. One hundred fifty California residents leave Los Angeles on a flight to New York, with a stopover in Detroit, Michigan. In Detroit, another twenty-five passengers, all from Michigan, embark for the last leg of the flight to New York. The aircraft, manufactured by Gruman Aircraft in New York, crashes on take-off from the Detroit airport, killing all on board. The allegation is that the crash was due to a design defect in the landing gear. Under the law of California, as announced in *Barker v. Lull Engineering Co.*,<sup>95</sup> if a plaintiff demonstrates that an alleged design defect is the cause of the injury, the burden shifts to the defendant to prove that under risk-utility guidelines the product was not defective. It is widely acknowledged that the California rule is extremely favorable to plaintiffs and effectively imposes strict liability for design defect. Under Michigan and New York law, the burden of proof, that the product was defective, is on the plaintiff. If the product conformed to the state-of-the-art at the time of manufacture, the manufacturer is relieved from liability. Thus, for all practical purposes, under Michigan and New York law, a manufacturer can be held liable only for negligence.

The Supreme Court set forth the constitutional test for the selection of a state's law in *Allstate*. Thus, in this situation, California law could be applied to determine the tort claims of the California survivors against Gruman Aircraft, since California has an interest in applying its law to

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94. *Id.* at 823.

95. 29 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

determine the claims of the California survivors. Furthermore, the application of California law is not unfair to Gruman Aircraft, which has a large number of airplanes flying in California, including the airplane involved in the fatal crash.<sup>96</sup> For the same reason, Michigan law could be applied to determine the claims of the Michigan survivors, and of the California survivors as well, since the accident occurred there. New York law likewise could be applied to determine all of these claims, since the airplane was designed and manufactured in New York.<sup>97</sup>

However, under the constitutional test, California law could *not* be applied to determine the claims of the survivors of Michigan residents. With regard to their claims, California has no factual contacts with the underlying transaction. Thus, the mere presence of a single non-California victim, who boarded the plane outside of California, precludes the application of California law to determine the claims of the California survivors. This amounts to a "single plaintiff veto" on an otherwise functionally sound choice of law result, and defeats the strong interest of California in applying its rule favoring plaintiffs for the benefit of the California victims. Since one state's law must be chosen under the "single designated jurisdiction" rule, it cannot be that of California, but a rule from Michigan or New York favoring defendants.

In this example, constitutional constraints on the selection of a state's law, interacting with the "single designated jurisdiction" requirement, combine to produce a patently unsound and unfair result. California has a real interest in applying its own law to implement the policy favoring plaintiffs reflected in that law, and would do so if suit were brought in California. California is precluded from advancing its own policy and interest because of the fact that some of the victims boarded the airplane in Michigan.

Such a patently unsound and unfair result could also occur in a "mass tort" arising from a simple bus crash that involves two states. Consider the following example: Twenty-five Wisconsin senior citizens embark on a three-day trip to Indiana on Greyhound Tours.<sup>98</sup> While the group is in Indiana, a friend of one of the members of the Wisconsin group joins the tour for the day. While traveling in Indiana, the bus is involved in a collision with a car driven by an Indiana resident, seriously injuring all of the

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96. In practice, the survivors of the California victims would bring their suit against Gruman in California, and it is likely that California would apply its rule favoring plaintiffs for the benefit of the survivors.

97. As regards the survivors of the Michigan victims, there is no conflict of laws on the point in issue between the law of the victims' home state, where the accident occurred, and the law of the state of manufacture.

98. For these purposes, Greyhound Tours is properly considered a Wisconsin party.

passengers. Both the driver of the bus and the driver of the Indiana car were negligent; however, the Indiana driver was driving twenty-five miles per hour over the speed limit. The allocation of fault between the parties is thirty percent to Greyhound and seventy percent to the Indiana driver. Indiana is one of ten states that has abolished joint-tortfeasor liability, while Wisconsin retains the traditional common-law joint tortfeasor doctrine. The driver of the Indiana car carries only \$500,000 of liability insurance and has no other significant assets. That amount is \$10,000,000 short of the amount necessary to compensate the seriously injured plaintiffs. Greyhound has adequate insurance to cover all claims.

If Indiana law applies, the twenty-five Wisconsin residents will be limited to thirty percent recovery against Greyhound. Since the liability of Greyhound is several, rather than joint, it is responsible only for its share of the fault. If Wisconsin law applies, this limitation would not operate to reduce recovery, because of joint and several liability. There is no doubt that the Wisconsin plaintiffs would bring suit against Greyhound in Wisconsin, and Wisconsin would apply its law, thereby imposing full liability against Greyhound. However, under the "single designated jurisdiction" rule of H.R. 3406, the federal court could not constitutionally select Wisconsin law in this case. Since one of the plaintiffs is from Indiana and the accident occurred in Indiana, involving an Indiana driver, Wisconsin law could not constitutionally be selected to govern the claim of the Indiana plaintiff against the Indiana driver.<sup>99</sup> Thus, in this "mass tort" case, only Indiana can be the "single designated jurisdiction" whose law can be constitutionally applicable to govern the claims of all the plaintiffs. The result prevents Wisconsin law from being applicable in governing the liability of Greyhound Tours as to the Wisconsin plaintiffs, and does not allow Wisconsin to apply its law and implement the policy reflected in that law.

In an earlier discussion, we utilized a "toxic tort" hypothetical to demonstrate how the substantial interests of states in their domiciliaries would be sacrificed under the suggested mass tort proposals.<sup>100</sup> We now call on that same hypothetical to demonstrate how constitutional constraints will force the courts to choose the law of the state of manufacture to the detriment of plaintiffs. In our hypothetical case we assumed separate actions brought by "toxic tort" victims against a manufacturer in all fifty states. We further assumed that the law of half of the states favored plain-

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99. Wisconsin has no interest in applying its law to allow recovery to an Indiana victim against an Indiana driver where the accident involving that victim had no factual contacts with Wisconsin.

100. See *supra* text accompanying notes 67-76.

tiffs on various issues in products liability litigation, and the law of the other states favored manufacturers. The law of the state of manufacture was more favorable to manufacturers.

To simplify things, we will have one group of victims living in California, another group of victims living in Michigan, and the product manufactured in New York. The matter in issue is California's burden-shifting rule in design defect claims, discussed in connection with the California-Michigan airplane crash. Again, the law of California could not be constitutionally selected to govern the claims of the Michigan victims, since California would have no interest in applying its law for the benefit of Michigan victims injured in their home state. The only state's law that could be constitutionally selected to govern the claims of all the "toxic tort" victims is the law of the state of manufacture, New York, with its manufacturer-protecting rule. New York is the only state having factual contacts with the underlying transaction with respect to the claims of all the victims residing in different states. In addition, the state of one group of victims would have no interest in applying its plaintiff-favoring rule for a group of victims residing in another state.

The "mass toxic tort" situation can also be used to demonstrate the point that in some cases, there is no "single designated jurisdiction" whose law could be constitutionally selected to govern the claims of all the victims. This will occur in the case in which different manufacturers, operating in different states, are sought to be held liable to groups of victims residing in different states, on the same underlying "toxic tort" claim. We will assume that the point in issue relates to determining liability on the basis of "market share." Again, to simplify things, one group of victims resides in State A and another group in State B. One company manufactured the product in State C, and another manufactured the product in State D.

On the issue of "market share" liability, the laws of State A and State C favor victims, while the laws of State B and State D favor manufacturers. Assuming that both manufacturers do business nationwide, the law of State A could be constitutionally selected to govern the claims of the State A victims against both manufacturers, but the law of State A could not be constitutionally selected to govern the claims of the State B victims, and vice-versa. The law of State C could constitutionally be selected to govern the claims of both the State A and the State B victims against the State C manufacturer, but could not constitutionally be selected to govern their claims against the State D manufacturer. Nor could the law of State D be selected to govern the claims against the State C manufacturer. In this case, because of constitutional constraints, we have "run out of law." There is no "single designated jurisdiction" whose law could constitutionally be se-

lected to govern the claims of all the victims residing in different states against defendants who manufactured the product in different states.

#### IV. AD HOC VARIANCE FROM THE SINGLE JURISDICTION RULE

Both the ABA proposal and H.R. 3406 would allow the federal court to override the single-jurisdiction rule on an *ad hoc* basis. Although these provisions can be seen as providing sufficient flexibility to allow for sensible choice of law, it is unlikely that they will be utilized with great frequency. The entire purpose of the mass disaster litigation proposal is to simplify litigation and bring about efficient results. If courts will seek to foster the interests of states as dictated by modern choice of law analyses they will have no alternative but to fractionalize the litigation. Whether this is done by mimicking the choice of law analysis of the transferor state, as is the case today under *Klaxon*<sup>101</sup> and *Van Dusen*,<sup>102</sup> or by a federal court conducting its own policy-oriented choice of law analysis, the ultimate result in terms of litigation efficiency is likely to be the same. Different law will apply to different parties and different issues.

In order to avoid fractionalization, a court will be compelled to opt for the law of a single jurisdiction. As we have demonstrated, the only law that will be applicable to all parties will be the *lex loci delicti* or the *lex loci rei actus*. In the case of multiple product liability defendants, *lex loci delicti* will most often be the only law that can constitutionally be applied to all parties. In the case of multiple plaintiffs and a single defendant, either *lex rei actus*, or some aspect of corporate domicile, will govern. It is of some interest that the ABA Mass Tort Report rejected such bright line choice of law rules. The drafters note:

If the federal standard yielded litmus-like results — for example, the law of the state of defendant's incorporation or its principal place of business — ascertaining the governing state law would be easy. There are, however, obvious drawbacks to such bright-line rules including the real or fanciful fear that defendants engaged in high-risk activity may gravitate toward states with the most protective tort rules.<sup>103</sup>

Precisely because the drafters did not account for *Allstate* and *Shutts*, they have mandated that federal courts adopt the very choice of law rules that they find so objectionable. Ultimately, choice of law either reverts back to the stone age or the goal of efficiency is a mirage.

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101. *Klaxon v. Stentor Elec. Mfg.*, 313 U.S. 487 (1941).

102. *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

103. ABA Mass Tort Report, *supra* note 1, at 31-32.

The question must be confronted. Do the goals of efficiency and uniformity justify the application of rigid choice of law rules that sacrifice the interests of states, as well as a majority of the litigants? We believe that the late Brainard Currie long ago put that argument to rest when he demolished the First Restatement territorially-oriented choice of law rules.<sup>104</sup> The examples provided in the preceding sections vividly demonstrate that the price to be paid for these goals is unacceptably high. This would be true even if the problems presently posed by mass disaster litigation were of sufficient merit to warrant a legislative response. It is *a fortiori* correct if heed is paid to the views of Paul D. Rheingold, the dissenting member of the Mass Tort Commission.<sup>105</sup>

Paul Rheingold brought to the commission vast experience in mass tort litigation, having been deeply involved in such major cases as Dalkon Shield, asbestos, DES, Mer/29, oral contraceptives, Aralen and swine flu vaccine. Rheingold argued that only three mass tort cases have presented serious management problems to the American court system: asbestos, Agent Orange and Dalkon Shield. In each of these cases, the courts have been besieged by several hundred thousand potential claimants. For more routine mass tort cases, Rheingold asserted that the present structure of multi-district litigation works so well that it is rare for cases to be returned to the transferor court for actual litigation.

Rheingold argued convincingly that for the smaller mass disaster cases, changing the present system is not warranted. However, for the true mega-mass disaster cases, the changes proposed by the ABA do not even begin to meet the problem. Those cases require more than procedural changes to manage the litigation. Serious changes in substantive law on such issues as causation and liability to future claimants, whose causes of action have not yet matured, must be effected if there is any hope of resolving the mega-mass disaster cases. In short, Rheingold concluded that the ABA Report seeks change where none is needed and is far too timid for the truly serious mass disaster cases.

We have demonstrated that both the ABA proposal and H.R. 3406 will require courts to deprive plaintiffs and defendants of important rights that would normally accrue to them under state law. The choice of law imposed would often be nonsensical. In the vast majority of routine mass disaster cases, no problem would even remotely warrant such unjust results to individual claimants. As for the true mega-mass disaster cases, though a problem does exist, we remain unconvinced that stripping litigants of their

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104. See B. CURRIE, *SELECTED ESSAYS ON THE CONFLICTS OF LAWS* (1963).

105. See ABA Mass Tort Report, *supra* note 1, App. E.



rights based on an irrational choice of law rule is the solution. In those cases, there is no alternative to directly federalizing the cause of action and fashioning special rules that will address both the procedural and substantive law problems which are indigenous to them.

### CONCLUSION

Starting with laudable motives, the drafters of the ABA Mass Torts Commission Report<sup>106</sup> and H.R. 3406<sup>107</sup> have proposed a method for dealing with mass tort litigation which seeks to foster more efficient management of this genre of cases. In doing so, they have failed to account for several major constitutional choice of law cases. They have assumed that courts have flexibility in choosing law that they simply do not possess under the dictates of *Allstate Insurance Co. v. Hague*<sup>108</sup> and *Phillips Petroleum v. Shutts*.<sup>109</sup> As a practical matter, once homage is paid to governing constitutional law principles, courts will be forced to resolve the choice of law issues by utilizing regressive choice of law rules. Admittedly, the legislation will help the "trains run on time." However, the courts will soon discover that most of the passengers will be going in the wrong direction. The ABA Mass Torts Commission Report and H.R. 3406 deserve outright rejection. They cannot meet their stated goals without causing more harm than good.

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106. *Id.* at i.

107. H.R. 3406, *supra* note 3.

108. 449 U.S. 302 (1981).

109. 472 U.S. 797 (1985).

