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INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: JUDGE JACK B. WEINSTEIN ON CHOICE OF LAW IN MASS TORT CASES

Scott Fruehwald*

I. INTRODUCTION

Judge Jack B. Weinstein has declared: “Steps should be taken to ensure that courts provide individual justice, even in a mass context.” He has asked: “How can we provide each plaintiff and each defendant with the benefits of a system in mass torts that treats him or her as an individual person? How can each person obtain the respect that his or her individuality and personal needs should command in an egalitarian democracy such as ours?”

This author believes that obtaining individual justice in mass tort cases requires that aggregation should not change the individual outcome. The result should be the same in a class action or other aggregated case as if the same claims had been brought separately in individual lawsuits. Class actions and other aggregation mechanisms are procedural devices for combining many claims to obtain efficiency and allow suits that might not otherwise be heard; they are not otherwise devices for doing justice on a mass scale.

One area in which justice often differs between class actions and individual cases is choice of law. Judges adjudicating class actions usually apply a single jurisdiction’s law to all the parties’ claims, while, if the cases had been heard separately, the laws of different jurisdictions

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2. Id. at 3.
would probably govern different parties’ claims. For example, in In re Bendectin Litigation, the court applied Ohio law to all parties on a proximate cause issue in a drug products liability suit involving injured parties from throughout the United States against an Ohio manufacturer that had been consolidated in the Southern District of Ohio. The court said that it made this choice because “[t]he State of Ohio is responsible for regulating local aspects of the marketing, manufacture, distribution, and labeling of the drug, and thus the relationship between the parties is essentially centered in Ohio, where the tortious conduct and the safety of the product are regulated.” However, if the individual claims had been heard in the plaintiffs’ home states, some (or most) of those states would have applied forum law because the state where a product is sold and causes injury has a greater interest in regulating unsafe products than the state of manufacture does. Thus, aggregation changed some of the individual outcomes.

Most commentators support the use of a single jurisdiction’s law for all parties’ claims in class actions involving mass torts. These scholars’ justifications for the single jurisdiction rule include (1) unfairness in applying different states’ laws to different parties with injuries arising from the same tort, (2) inconsistent results caused by adopting different states’ laws for the same tort, (3) complexities, increased costs, and inefficiencies produced by using different states’

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3. See Edwin Scott Fruehwald, Choice of Law for American Courts: A Multilateralist Method 146-48 (2001) [hereinafter Fruehwald, Choice of Law]; see also, e.g., In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979, 644 F.2d 594 (7th Cir. 1981); In re San Juan Dupont Plaza Hotel Fire Litig., 745 F. Supp. 79 (D.P.R. 1990); In re Disaster at Detroit Metro. Airport on August 16, 1987, 750 F. Supp. 793 (E.D. Mich. 1989); In re Air Crash Disaster at Stapleton Int’l Airport, Denver, Colo., on Nov. 15, 1987, 720 F. Supp. 1445 (D. Colo. 1988); In re Agent Orange Prod. Liab. Litig., 580 F. Supp. 690 (E.D.N.Y. 1984); In re Paris Air Crash of March 3, 1974, 399 F. Supp. 732 (C.D. Cal. 1975); Larry Kramer, Choice of Law in Complex Litigation, 71 N.Y.U. L. REV. 547, 552 (1996). However, there have been a number of cases in recent years that have refused to certify class actions based on choice of law problems. See infra Part V.

4. 857 F.2d 290, 302-04 (6th Cir. 1988).

5. Id. at 305.

6. For more on this issue, see infra notes 202-12 and accompanying text.

laws with the same tort, and (4) forum shopping incentives created when multiple state laws govern. 8

A few commentators, however, including the present author, have criticized the use of a single jurisdiction’s law for all parties’ claims in a mass tort case. 9 Reasons for rejecting the single jurisdiction approach include (1) choice of law used to define substantive rights should be the same for complex and ordinary cases, (2) adopting a single jurisdiction’s law interferes with state sovereignty and ignores states’ interests, (3) applying a single state’s law is not substantive—or forum—neutral, (4) the single law approach makes choice of law unpredictable, (5) the single law approach might apply the law of a jurisdiction to a controversy that the lawmaker did not intend to apply to that controversy, (6) the single jurisdiction approach is unfair to the individual, and (7) it is unconstitutional. 10

This paper will evaluate individual justice in mass tort cases by examining Judge Jack B. Weinstein’s recent statement concerning his normative view of choice of law in such cases 11 and his recent choice of law decision in Simon v. Philip Morris, Inc. 12 Judge Weinstein, Senior District Judge, United States District Court for the Eastern District of New York, has been at the forefront of mass tort adjudication, having been involved in the Agent Orange case, the DES cases, the gun cases, and the tobacco cases. 13 Judge Weinstein intended that Simon would resolve most outstanding claims against Big Tobacco. 14

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10. See FRUEHWALD, CHOICE OF LAW, supra note 3, at 148-50; Kramer, supra note 3, at 549, 569; Sedler, Interest Analysis, supra note 9, at 861-64.
Part II of this paper will present Judge Weinstein's normative view on choice of law in mass tort cases in the context of his mass tort philosophy. Part III will examine Judge Weinstein's choice of law decision in Simon. Part IV will critique Judge Weinstein's normative view on choice of law and his choice of law decision in Simon. It will conclude that Judge Weinstein tramples on traditional notions of the individual in his mass tort cases. It will also argue that the fact that a case has been aggregated should not change the choice of law criteria. Finally, Part V will offer a partial solution to the choice of law dilemma in mass tort cases: subgroups for different substantive laws.

II. JUDGE WEINSTEIN'S NORMATIVE VIEW OF CHOICE OF LAW IN MASS TORT CASES

Judge Weinstein views mass tort cases as being different from traditional lawsuits. In mass tort cases, he often acts like he is dealing with a political problem that requires a political solution. He has declared: "Mass tort cases are akin to public litigations involving court-ordered restructuring of institutions to protect constitutional rights." He has asserted that:

judges, particularly in mass tort cases, cannot and should not remain neutral and passive in the face of problems implicating the public interest. In mass tort cases, the judge often cannot rely on the litigants to frame the issues appropriately. The judge cannot focus narrowly on the facts before the court, declining to take into account the relationship of those facts to the social realities beyond the courthouse.

15. In addition to his advocacy of changes in mass tort litigation, Judge Weinstein also argues for alternatives to mass tort litigation, such as alternate dispute resolution, a national health care system, a federal legislative scheme, and expansion of social security benefits. See, e.g., WEINSTEIN, INDIVIDUAL JUSTICE, supra note 1, at 4-5.
17. Jack B. Weinstein, Ethical Dilemmas in Mass Tort Litigation, 88 NW. U. L. REV. 469, 472 (1994) [hereinafter Weinstein, Ethical Dilemmas]. He once stated that "[a]s one wise scholar told me, 'Mass torts are public interest cases.'" Id. at 476. In criticizing this view, Professor Linda S. Mullenix has averred: "Judge Weinstein would very much like mass tort litigations to be 'public law' litigation because, as a 1960s-style activist judge, he could intervene assertively in mass tort cases to impose court-ordered solutions, just as he did in school desegregation and mental health cases." Linda S. Mullenix, Mass Tort as Public Law Litigation: Paradigm Misplaced, 88 NW. U. L. REV. 579, 580 (1994).
door. The judge cannot depend upon the slow creep of case-by-case adjudication to yield just results and just rules of law.\(^\text{18}\)

Thus, "judges cannot rely upon a narrow application of law to fact to yield justice,"\(^\text{19}\) and "[c]ompensation to the individual is not the end-all of modern mass tort law; remedies' effects on the community cannot be ignored."\(^\text{20}\)

Despite his statements on the importance of the individual in mass tort cases, a large part of Judge Weinstein's view of justice with mass torts is that there is a communitarian interest that transcends the individual parties.\(^\text{21}\) He has averred: "What renders a mass tort case different is the degree to which all participants—judges, lawyers, and litigants—must deal with the case as an institutional problem with sociopolitical implications extending far beyond the narrow confines of the courtroom."\(^\text{22}\) As Professor Martha Minow has observed, "[i]n this vision, justice is the touchstone and a concern for everyone, not just the named parties. Justice requires attention to whole situations, not just to neatly parsed, pristine legal issues."\(^\text{23}\) In fact, for Judge Weinstein, the judge is the community's guardian: "Because the judge is 'impartial' in the sense of lacking any personal stake in a particular outcome, the judge can, through the process of education and evaluation (i.e., judging), become ‘partial’ in favor of the communities’ best interests."\(^\text{24}\)

Because of his communitarian view of justice in mass tort cases, Judge Weinstein's approach to such cases is activist. Judge Weinstein "believes that an activist government plays a legitimate role in fostering the trust necessary to break out of collectively self-defeating pursuits of individual interests."\(^\text{25}\) Using this attitude, Judge Weinstein often ignores the niceties of precedent and the traditional role of the judge, to create

\(^\text{18}\). Weinstein, \textit{Ethical Dilemmas}, supra note 17, at 540.
\(^\text{19}\). \textit{Id.} at 484.
\(^\text{20}\). \textit{Id.} at 486.
\(^\text{21}\). Martha Minow has declared that "Weinstein has repeatedly crafted a role as 'judge for the situation,' defined broadly enough to move beyond private parties to wider communities." Minow, \textit{supra} note 16, at 2011.
\(^\text{22}\). Weinstein, \textit{Ethical Dilemmas}, supra note 17, at 483. Elsewhere he has stated: "We can evaluate class action procedures realistically and usefully only by considering their probable effect within a social and legal system that includes regulation, health and other forms of insurance, government benefits and compensation, and legal remedies. We must also consider how the legislature and public will view the costs and benefits of class action procedures." Jack B. Weinstein, \textit{Some Reflections on United States Group Actions}, 45 \textit{AM. J. COMP. L.} 833, 833 (1997).
\(^\text{24}\). Weinstein, \textit{Ethical Dilemmas}, supra note 17, at 542.
new approaches for complex litigation.\textsuperscript{26} He has declared, concerning an innovative decision he made concerning jurisdiction in a mass tort case: "Was a mere trial judge justified in challenging Supreme Court jurisprudence? I think so, since I believed some recent Supreme Court jurisdictional rulings to be misconceived as a matter of constitutional principle and practical effect; at some point soon they will need thorough revision."\textsuperscript{27} Judge Weinstein believes that judges should step in when the community does not solve its own problems: "As a general rule, the need for more intense court intervention is in inverse proportion to the effectiveness of the community in dealing with disasters."\textsuperscript{28}

In order to achieve his view of justice, Judge Weinstein strives to keep everything together in a single lawsuit in his court, believing that mass disaster claims should be heard in a single forum.\textsuperscript{29} As Professor Minow has observed, "[k]eep everyone in one lawsuit, and get the suit going—these are the watchwords behind Judge Weinstein’s magic."\textsuperscript{30}

Settlement is a vital part of Judge Weinstein’s mass tort philosophy. He has asserted that "[a] judge’s refusal to become involved in details of settlement or insistence that only considerations of docket management guide his or her conduct represents, I believe, an abdication of judicial responsibility."\textsuperscript{33} He has stated: "That is where settlement is important . . . . It takes it from a state-by-state basis and puts it in the context of the national and international scientific, medical, and technological community."\textsuperscript{32} Elsewhere, he has stated, "[b]y transcending the narrow interests of the few, the judge can attempt to ensure that the settlement protects both the immediate and long-term interests of the many."\textsuperscript{33}

As stated in the Introduction, Judge Weinstein ostensibly stresses the importance of "individual" justice in mass tort litigation. His examples of individual justice include:

\textsuperscript{26} Joe McLaughlin, former Dean of Fordham Law School, once introduced Judge Weinstein "as a man who 'never saw an innovation he didn't like.'" James L. Oakes, \textit{Jack Weinstein and His Love-Hate Relationship with the Court of Appeals}, 97 COLUM. L. REV. 1951, 1951 (1997).


\textsuperscript{28} Weinstein, \textit{Ethical Dilemmas}, supra note 17, at 488.


\textsuperscript{30} Minow, supra note 16, at 2017.

\textsuperscript{31} Weinstein, \textit{Ethical Dilemmas}, supra note 17, at 552.


\textsuperscript{33} Weinstein, \textit{Ethical Dilemmas}, supra note 17, at 551.
certification of classes of litigants who could not afford to bring individual cases; establishment in the Agent Orange case of the Appeals Office and telephone answering service that enable complaints to be heard, as well as a judicial policy of answering all letters sent to the court, and other innovative procedures developed in the mass tort context; ... use of magistrates and special masters and other increases in court personnel; and legal representation for the poor.  

In addition, in the DES cases, "[a]fter the settlements, one judge [Weinstein] sat down with many of the DES claimants in chambers and heard their harrowing stories."  

Judge Weinstein’s philosophy on justice in mass tort cases affects his approach to choice of law in such cases. His view on choice of law in mass torts is that a judge should be able to adopt the law of a single jurisdiction in class actions, subject to fair venue controls. He has declared that “[i]n mass torts, reduction of transactional costs, full protection of the largest number of those injured, the interest of defendants in stability, and the prompt ending of litigations usually mandate application of one law in one court.”  

The problems he finds in selecting a single state’s law in class actions include  

(1) [t]he exaggerated role and importance attached to judicial jurisdiction relative to that of choice of law ... and (2) [t]he exaggerated emphasis placed by the law of judicial jurisdiction ... on defendant’s forum contacts as opposed to those of the plaintiff and the events underlying the controversy—its epitome being the supposed constitutional requirement of a defendant-forum nexus as a sine qua non for the assertion of in personam jurisdiction.  

Judge Weinstein believes that both federal and state limits on personal jurisdiction go too far, and that there should be no restrictions on personal jurisdiction except “reasonable forum (venue) and a rational
state interest in the litigation.” He thinks that the current Supreme Court rules on personal jurisdiction are outdated, especially when the Internet or cyberspace is involved. He has asserted: “Does it make sense to prove that the e-mail or Internet satellite was over New York when plaintiff X in England ordered ‘The Product’ from Indonesia or that the airplane containing the passenger ordering ‘The Product’ was circling John F. Kennedy Airport when the order was made?”

In connection with torts involving parties throughout the world, Judge Weinstein feels that the only relevant question is: “[i]s New York a convenient forum for all of these plaintiffs, and is it fair to haul someone like the Indonesian defendant company into court in New York to resolve the entire controversy between all interested defendants and all putative plaintiffs?” The key point is that the defendant “may be part of a huge international and national network.” If a small organization is involved, a venue ruling should keep it out. Judge Weinstein then asks, with the small organizations eliminated, is it unfair to hear the controversy in a single forum?

Concerning choice of law, Judge Weinstein believes that a judge should be able to adopt a single state’s law for class actions involving mass torts. Otherwise, the problems in adjudicating a class action become insuperable:

If more than fifty different laws (including those of other nations) apply, it is almost impossible to divide the plaintiffs into sub-classes or deal with a single consolidated case in one court for pretrial or trial purposes, and to give intelligible jury instructions. Given a lack of familiarity with the laws of distant fora, transfers or forum nonconveniens decisions would scatter the suits all over the map.

Moreover, there is no longer a uniform common law of torts in the United States. Rather, “recent statutory changes resulting from battles in state legislatures between defense and plaintiff attorney lobbies have

39. Id. at 146.
40. See id. at 146-47, 149.
41. Id. at 149.
42. Id. at 150.
43. Id.
44. See id. at 150-51.
45. See id. at 151.
46. See generally id. at 151-54.
47. Id. at 152.
48. See id.
created a substantive law Tower of Babel.\textsuperscript{49} In addition, "in many mass cases, transactional costs become extreme and discrepancies in awards become impossible to justify on pragmatic or moral terms.\textsuperscript{50}"

A problem for Judge Weinstein is that, under \textit{Erie Railroad Co. v. Tompkins}\textsuperscript{51} and \textit{Klaxon Co. v. Stentor Electric Manufacturing Co.},\textsuperscript{52} a federal court must apply the tort and conflicts laws of the state in which it is sitting.\textsuperscript{53} For example, in a products liability case in a New York federal court, New York law would probably apply to those plaintiffs who bought the product in New York or are domiciled in New York because New York has an interest in protecting its residents, but in cases where a person bought the product in another state, New York conflicts rules would probably require the application of the law of the place where a person bought a product or where the person became ill from ingesting it ("the conflict's center of gravity").\textsuperscript{54}

For Judge Weinstein, the solution to this difficulty is creativity.\textsuperscript{55} He has asked:

\begin{quote}
[w]hy not hold that New York—with a large number of claimants—has an interest in seeing that the whole dispute is settled fairly, quickly, and cheaply so New York residents and others get the fullest share possible of any recovery? If this means New York law should apply to the whole dispute to reduce transactional costs, then why not develop a new New York choice-of-law rule? New York has been the leader in shifting from old choice-of-law rules to a center-of-gravity approach, so why not another shift to a more expansive view of state interest in mass cases?\textsuperscript{56}
\end{quote}

Judge Weinstein concludes that there should be a single test for choice of law and personal jurisdiction: If it is fair to assert personal jurisdiction in a forum, then a court could apply forum law to the controversy.\textsuperscript{57} Judge Weinstein does not view \textit{Phillips Petroleum Co. v. Shutts},\textsuperscript{58} the leading Supreme Court case on constitutional constraints on

\begin{footnotes}
\item[49] Id.
\item[50] Id. at 153.
\item[51] 304 U.S. 64 (1938).
\item[52] 313 U.S. 487 (1941).
\item[53] See Weinstein, \textit{Mass Tort Jurisdiction, supra} note 11, at 151.
\item[54] See id. at 151-52.
\item[55] See id. at 153.
\item[56] Id. at 153-54.
\item[57] See id. at 154.
\item[58] 472 U.S. 797 (1985); see \textit{infra} notes 108-17 and accompanying text.
\end{footnotes}
choice of law in class actions, as a barrier to this change.  He has stated: "The reason for 'significant contacts' limits on such a choice-of-law concept, or of alternative solutions such as a 'best law' rule, seem less than compelling." In addition, Judge Weinstein downplays federalism concerns:

[Should Missouri complain that its public policy is being violated by treating Missouri residents who used "The Product" under New York substantive law as fairly as possible in one combined litigation? Does Missouri have an interest in protecting its manufacturers against some parts of the suit in New York (those involving Missouri plaintiffs harmed by "The Product" manufactured in Missouri)? Does Missouri really need more difficult individual cases in its state or federal court?]

One can see Judge Weinstein's creativity in choice of law in In re Agent Orange Product Liability Litigation (a mass tort case involving injuries to Vietnam veterans allegedly caused by the anti-foliant chemical Agent Orange), where he faced the obstacle that he could not use federal common law because the Second Circuit had ruled that "there is [no] identifiable federal policy at stake in this litigation that warrants the creation of federal common law rules." Instead, he applied a "national consensus law of manufacturer's liability," on the ground that national consensus law was consistent with state and federal decisions. He declared, "[a] state court would therefore have no rational choice but to apply federal or national consensus common law." While it is logical to apply a single law to a situation like Agent Orange, where a large number of persons were injured by the same product under similar circumstances, there was no legal basis for Judge Weinstein's decision. There was no reason to think that any state court would apply national consensus law; if there had been a national consensus law, there would have been no conflict in the first place. Despite Judge Weinstein's statement concerning precedents, there was no real precedent for this

59. See Weinstein, Mass Tort Jurisdiction, supra note 11, at 154.
60. Id.
61. Id.
62. 580 F. Supp. 690 (E.D.N.Y. 1984). I will not deal with this case in detail because it has been discussed extensively elsewhere. See FRUEHWALD, CHOICE OF LAW, supra note 3, at 146-47; Kramer, supra note 3, at 561-64; PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 128-31 (1986); Aaron D. Twerski, With Liberty and Justice for All: An Essay on Agent Orange and Choice of Law, 52 BROOK. L. REV. 341 (1986).
63. Agent Orange, 580 F. Supp. at 693 (quoting In re Agent Orange Prod. Liab. Litig., 635 F.2d 987, 993 (2d Cir. 1980)).
64. Id. at 713.
65. Id. at 712.
The use of national consensus law was one step in forcing a settlement in this case, which satisfied Judge Weinstein's notion of mass tort justice. Judge Weinstein's choice of law decision was never challenged because his choice of law decision was never appealed because the case was settled. As Stephen B. Burbank has noted, "[i]n Agent Orange Judge Weinstein, pursuing the goal of settlement, applied what he knew was not generally understood as the law, and did everything he could to make sure that the train he was conducting was not derailed by the Court of Appeals." 68

III. JUDGE WEINSTEIN'S VIEW ON CHOICE OF LAW IN MASS TORT CASES AS SEEN IN SIMON V. PHILIP MORRIS, INC. 69

In Simon, Judge Weinstein "creatively" interpreted New York's choice of law rules to apply New York law (forum law) to all claims. 70 He could not adopt national consensus law because there was not a national concern such as existed in Agent Orange of compensating American soldiers who had been exposed to toxic chemicals in a foreign war. Rather, he had to comply with the Klaxon 71 rule that a federal court sitting in diversity must follow the choice of law rules of the state in which it sits. However, because the New York Court of Appeals had never ruled on choice of law in mass tort actions, his role was to predict how the court would rule under such circumstances. 72 He asserted that "[b]ecause the New York Court of Appeals has never directly spoken to conflicts decisions in massive class actions, courts are left to assess

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66. See id. at 696.
67. See Kramer, supra note 3, at 564.
69. 124 F. Supp. 2d 46 (E.D.N.Y. 2000).
70. See id. at 46.
71. 313 U.S. 487, 487 (1941). A few writers have attacked the validity of this rule. See Scott Fruehwald, Choice of Law in Federal Courts: A Reevaluation, 37 BRANDEIS L.J. 21, 36-44 (1998-99); Patrick J. Borchers, The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon, 72 TEX. L. REV. 79, 118-23 (1993). However, the Court has vigorously upheld the rule since Klaxon. See Ferens v. John Deere Co., 494 U.S. 516, 532 (1990); Day & Zimmermann, Inc. v. Chaloner, 423 U.S. 3, 4 (1975) ("A federal court in a diversity case is not free to engrain onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits.").
trends in New York law, history, and current scholarship to reach a 'just, fair, and logical result.'" In making this determination, he considered "the unique characteristics of the Tobacco case—the global fraud concerning the risks of highly mobile products, with huge, long term consequences for public health." He thought that, in such a case, a court should avoid fixed rules and principles.

A. Judge Weinstein on New York Choice of Law Rules and Principles and Choice of Law History

To justify his single jurisdiction choice of law decision, Judge Weinstein undertook an extensive examination of New York conflicts rules, and he traced choice of law history to antiquity. In Babcock v. Jackson, the most important New York choice of law case, the New York Court of Appeals had adopted a form of interest analysis for tort conflicts. According to Judge Weinstein:

"[t]he foundation of this current approach is that: "[j]ustice, fairness and, the best practical result, may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties has the greatest concern with the specific issue raised in the litigation."

In addition, Babcock stated that there was no reason that all issues in a case should be decided by the same state’s law:

[w]here the issue involves standards of conduct, it is more than likely that it is the law of the place of the tort which will be controlling, but the disposition of other issues must turn, as does the issue of the

73. Id.
74. Id.
75. See id.
76. See id.
77. 191 N.E.2d 279 (N.Y. 1963). Babcock involved whether New York or Ontario law would govern the issue of a car owner’s liability for negligence to a passenger in his car concerning a traffic accident that occurred in Ontario involving New York domiciliaries. See id. at 280-81. New York law would have allowed full recovery, while Ontario law did not permit a passenger in a automobile to recover from the car owner. See id. at 280. The court adopted New York law because New York had the greatest interest in the relationship between the parties. See id. at 284. In addition, since Ontario’s limitation of liability was intended to protect Ontario insurance companies, Ontario had no interest in applying its law because an Ontario insurance company was not involved. See id.
standard of conduct itself, on the law of the jurisdiction which has the
strongest interest in the resolution of the particular issue presented.79

Post-Babcock cases created guidelines for particular types of cases,
by giving "the greatest weight to those contacts which are relevant to the
policies animating the particular rules in conflict."80 These cases
distinguished between laws that regulated primary conduct (standards of
care) and laws that allocated losses after the tort occurred (guest statutes
and vicarious liability).81 With conduct-regulating rules, the law of the
jurisdiction where the tort occurred will usually govern because a
jurisdiction generally has the greatest interest in regulating conduct
within its borders—conduct-regulating rules are intended to influence
conduct to prevent injuries from occurring.82 On the other hand, when
post-event remedial rules are involved, courts consider other factors.83

Difficulties arise when the tortious conduct takes place in one state,
but the injury occurs in another state (such as when defamatory
statements are uttered in Massachusetts, but the injury occurs in
Illinois).84 According to Judge Weinstein, Schultz v. Boy Scouts of
America, Inc.85 has been misquoted for the "proposition that the 'place of
the wrong' is always where the 'last event necessary to make the actor
liable occurred.'"86 In this case, a scoutmaster allegedly molested two
New Jersey boys at a New York summer retreat, and he threatened them
at their home in New Jersey.87 When one of the boys committed suicide
in New Jersey, the boy's parents brought a wrongful death action in New
York.88 The issue was whether New Jersey's charitable immunity statute
barred the action.89 Judge Weinstein noted: "Without applying this rule
directly to the facts, the Court of Appeals acknowledged that in cases
where the alleged conduct and injury occur in different states 'under
traditional rules, the place of the wrong is considered to be the place
where the last event necessary to make the actor liable occurred.'"90

(E.D.N.Y. 1999)).
81. See Simon, 124 F. Supp. 2d at 57.
82. See id.
83. See id.
84. See id.
86. See Schultz, 480 N.E.2d at 681.
87. See id. at 681-82.
88. See id. at 682.
89. Simon, 124 F. Supp. 2d at 58.
Judge Weinstein argued that those who interpret Schultz as standing for the proposition that the last event rule always applied with conduct regulation were wrong. He declared: "This simple ‘last place’ criterion is not chiseled in stone, but rather gives way when it is at war with state interests so that the more general Babcock principle applies." First, because the court still looked at contacts relevant to the policies behind the conflicting rules, the last events test did not replace interest analysis. Judge Weinstein asserted: “The Schultz court could simply have relied on the ‘last event necessary to make the actor liable’ to pinpoint the locus of the tort. Instead, the court moved directly into interest analysis—isolating the kinds of contacts alleged in the complaint and their bearing on each respective state.” Second, the refinements of Babcock in later cases were not designed for complex cases. Finally, even though some cases nominally apply the last events test, in products liability and airplane crash cases, New York federal courts use some type of interest analysis. Judge Weinstein stated that “[i]n airplane crashes and products liability cases, even courts claiming to apply rigid rules do not strictly abide by them, but ultimately turn their decisions on some evaluation of the theoretical and practical aspects of the jurisdictions’ interests in the action.”

Judge Weinstein argued that conflicts history supported applying New York substantive law to all parties in this case. He saw two concerns undergirding choice of law analysis: (1) concepts of sovereignty and (2) fairness. He thought that modern conflicts law...
marked "a return to principles of flexibility and policy evaluations that date back to antiquity." He felt that three historical trends were relevant to the present case:

1) notions of individual justice have trumped sovereign interests in affairs that by their nature have a supranational scope; 2) the unique nature of some cases demand flexibility and comparison of alternative results achieved by applying different laws; and 3) the changing forms of personal injury in the twentieth century, due to increased mobility of goods, people, and information, may impose strong pressures on conflicts norms, and demand a return to interest based solutions in some cases.

Judge Weinstein also thought that recent scholarship and precedent in complex litigation suggested that the wheel had "turned to a 'period of equity and natural law' with regard to modern, complex tort problems." He stated that "[m]ost modern scholarship concludes that choice of law rules can, and should, lead to the application of either a few state laws, a single state law, federal common law, national consensus law, or abandoning Klaxon analysis altogether in complex litigation." In addition, according to Judge Weinstein, judges have preferred material justice in conflicts cases, and courts have been influenced by the new scholarship in many single-accident mass-disaster cases. For example, in In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979, the court used the "most significant relationship" test to justify application of Illinois law on punitive damages [to smooth] over minor differences in various relevant state laws.

Judge Weinstein concluded his long analysis of New York choice of law rules and conflicts history by stating:

There are fewer such values [in choice of law] than one might think. In fact, there are only two that are really important, and they have taken clear shape in the decision making of the Twentieth Century. The first is rooted in sovereignty and the need for the accommodation of differences, the second in the judicial impulse to decide conflicts cases in ways that make good sense. In all the difficult cases it is these values that are invariably in conflict. Resolving the tension between them is what is hard—and controversial—in choice of law.


100. Simon, 124 F. Supp. 2d at 66.
101. Id. at 67.
102. Id.
103. Id.
104. See id. at 68-69.
105. 644 F.2d 594, 616 (7th Cir. 1981).
106. Simon, 124 F. Supp. 2d at 69 (emphasis added).
[w]hile New York has fashioned some rules to lend uniformity to conflicts analysis in general, these rules do not contemplate a complex fact pattern such as this one. This area of the law in New York is still cooking. Under these circumstances, courts are required to return to the fundamental rule of New York, the Babcock interest analysis.107

Judge Weinstein also had to deal with constitutional limitations. The defendants had argued that, even if they had done substantial business in New York and even if they had operated a national fraud from New York, New York courts could not apply its law to individual transactions that were not clearly connected to the state.108 They declared that under Phillips Petroleum Co. v. Shutts,109 a state “must have a significant contact or significant aggregation of contacts to the claims asserted by ‘each member of the plaintiff class’ to ensure that the choice of that state’s law is not arbitrary or unfair.”110 Judge Weinstein believed that there were significant contacts to satisfy this due process and full faith and credit standard.111 First, two of the defendants had their principle places of business in New York, and they had been headquartered there for many years.112 Second, much of the tobacco industry’s conduct occurred in New York, especially the alleged conspiracy that lead to the plaintiffs’ damages.113 Third, the firm the tobacco companies’ retained to create their public relations program was a New York corporation with its principal place of business in New York, and this firm recommended that the industry establish a subcommittee of chief executives resident in New York.114 Fourth, the major tobacco companies also created entities in New York that produced important data that the tobacco companies used to argue against the link between smoking and lung cancer, heart disease, and other illnesses.115 Fifth, the tobacco industry had numerous business and legal connections to New York.116 Finally, the tobacco industry sells a substantial quantity of cigarettes in New York.117

107. Id.
108. See id.
111. See id. at 70-71.
112. See id. at 70.
113. See id.
114. See id.
115. See id.
116. See id. at 70-71.
117. See id. at 71.
B. Judge Weinstein's Application of New York Choice of Law Principles and Rules to the Tobacco Litigation

After establishing the choice of law principles to be applied in meticulous detail, Judge Weinstein had to ascertain whether there was a material conflict of laws. He thought that the main elements of fraudulent concealment, the plaintiffs' core theory, although not uniform in every state, shared many characteristics. A plaintiff must generally establish that "(1) the defendant had a duty to disclose; (2) the defendant suppressed material facts; (3) the suppression induced the plaintiff to act or to refrain from acting; and (4) the plaintiff suffered damages as a proximate result of the defendant's conduct." He noted, however, that there are some significant differences in the elements of fraudulent concealment among the states. First, at least three alternatives—superior knowledge, partial disclosure, and fraudulent concealment—including a duty to disclose. Second, the relevant jurisdictions disagree whether reliance is determined objectively or subjectively. Consequently, since there are conflicts between New York law and the other relevant states' laws, Judge Weinstein needed to undertake a choice of law determination.

Judge Weinstein decided that New York's interest was stronger than any other state's interest. Under New York law, the most important contacts for determining state interests in tort cases are the parties' domiciles and the locus of the tort. The plaintiffs were domiciled and harmed throughout the country, while the defendants were domiciled in New York, North Carolina, and Kentucky. Judge Weinstein, however, felt that "the gravamen of defendants' misconduct occurred in New York."

Judge Weinstein then compared the relevant states' interests. He stated that the main reasons for applying forum-locus law (New York law) in this type of case are: "(1) to protect medical creditors who provided services to injured parties; (2) to prevent injured tort victims..."
from becoming wards in the locus state; and (3) to deter future tortfeasors in the locus state.” He felt that New York and the other states had an interest in the first two factors because smoking had created a medical crisis that had substantially burdened all fifty states. Concerning the third factor, deterrence, he stated that “New York has an obvious and substantial interest in ensuring that it does not become either a base or a haven for law breakers to wreak injury nationwide.” According to the complaints, a substantial part of the alleged conspiracy occurred in New York.

Judge Weinstein admitted that the plaintiffs’ domicile states might have a regulatory interest in compensatory damages. However, he asserted that “[s]tates that disallow or limit compensatory damages, just as those that disallow punitive damages, are more interested in controlling excessive liability (or loss allocation) than in punishing and deterring conduct.” Judge Weinstein argued that “[i]n complex tort litigation, jurisdictions with the strongest nexus to the offending conduct have the greatest interests in punishment and deterrence.” Judge Weinstein concluded that New York had a greater interest than the other states in establishing compensatory damages because issues of general compensatory liability affect the regulation of dangerous conduct within New York. He declared:

Determining general questions of liability under New York law dovetails well with a policy ensuring that New York can enforce its own set of civil obligations amongst its own domiciliaries and serve as an effective forum for determining injuries for its own (and others’) citizens, who, without a centralized trial, may be left without an effective remedy.

Judge Weinstein thought that the interests of the other states were less important because he envisioned transferring individual

128. Id. (citing Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679 (N.Y. 1985)).
130. Id.
131. See id. (“CTR, which was a major vehicle” for perpetuating the conspiracy, operated in New York. A number of critical meetings of Tobacco representatives necessary to orchestrate the scheme allegedly occurred in New York, and at least two of the companies, Lorillard and Philip Morris, Inc., have their principle places of business in New York.”).
132. See id.
133. Id. at 72-73.
134. Id. at 73.
135. See id.
136. Id. at 74.
compensatory damages questions to the individuals’ home states. He asserted: “Through the use of depecage . . . each claimant will rely upon his or her own state law with regard to critical individual recovery issues.” In addition, Judge Weinstein argued that “[s]tates can have a broader concern with the protection of the welfare of their own citizens than in the strict application of their own law.” Similarly, he stated, “a state’s policy interest in allowing application of similar rules of law and redress for its citizens in another forum may outweigh an interest in strict application of its own law—particularly if the result is a lack of an effective remedy for its residents.” He also believed that states have an interest in the welfare of all Americans, regardless of where they might live. He maintained: “It is understandable that each state will be sympathetic to the needs of out-of-state residents, particularly when those needs are intertwined with those of its own citizens.”

IV. CRITIQUE OF JUDGE WEINSTEIN’S NORMATIVE VIEWS ON CHOICE OF LAW IN MASS TORT CASES AND HIS CHOICE OF LAW DECISION IN SIMON

This author disagrees with Judge Weinstein’s general views on justice in mass tort cases, his normative views on choice of law, and his choice of law decision in Simon.

A. Critique of Judge Weinstein’s View of Justice in Mass Tort Cases and His Normative Approach to Choice of Law in Such Cases

This author disagrees with Judge Weinstein’s view of justice in mass tort actions. While a judge’s decision does affect the community,
the judge should focus on the individual claims. In a mass tort case, each plaintiff by definition has a significant injury. For example, in connection with the Bendectin litigation, Professor Roger H. Trangsrud has observed, "[i]n my view the use of a mass trial to resolve the great bulk of the Bendectin claims was a mistake because the claims in that case were substantial, merited individualized trials, and were afforded only a compromised due process when tried as a group." A mass tort case is not like aggregation of many small claims, none of which would be worthwhile pursuing on an individual basis. Nor, is a mass tort case like a class action in which there has been an injury to a group, as in a discrimination case. In the case of mass torts, class action rules or other procedural joinder or consolidation rules should be used only to bring a number of similar cases together for judicial efficiency; such rules should not change the case's outcome. In addition, as some scholars have pointed out, Federal Rule of Civil Procedure 23 was never intended to dramatically change how mass tort cases are handled, but, rather, was
to the latency of many diseases, (2) conflicts among current clients because of varying objectives, (3) conflicts between class members and class counsel when settlements may not be in the best interests of clients, and (4) problems of communication between attorneys and class members. See Genine C. Swanzey, Note, Using Class Actions to Litigate Mass Torts: Is There Justice for the Individual? 11 GEO. J. LEGAL ETHICS 421, 434 (1998); see also Roger C. Cramton, Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction, 80 CORNELL L. REV. 811, 823-36 (1995). Concerning the problem of the conflict between present and future claimants, Professor Coffee has stated:
[d]efendants can offer plaintiffs' attorneys a global settlement by which they agree to settle the plaintiffs' attorneys' entire inventory of existing cases at the prevailing market rate for such claims if the same attorneys will agree to bring and settle a class action on behalf of other (largely future) claimants on a less favorable basis.


145. Concerning the aggregation of many small claims in one suit, Judge Weinstein has stated: "The main advantage of such mass actions is that one litigation protects the rights of many. Persons who would otherwise have claims that are too small to warrant the attention of entrepreneurial lawyers or who simply do not know that their rights have been violated can be protected." Jack B. Weinstein, Adjudicative Justice in a Diverse Mass Society, 55 REC. 193, 200 (2000). This author agrees, as long as the purpose of the lawsuit is to protect the public, not to obtain a large attorney's fee.

146. As Professor Mullenix has noted: "We should not lose sight of the fact that mass tort litigation is, after all, merely a collection of individual tort cases brought together by time and circumstance." Mullenix, supra note 17, at 581. Similarly, Judge Posner has declared in a class action case, "[t]he diversity jurisdiction of the federal courts is, after Erie, designed merely to provide an alternative forum for the litigation of state-law claims, not an alternative system of substantive law for diversity cases." In re Rhone-Poulene Rorer, Inc., 51 F.3d 1293, 1302 (7th Cir. 1995).
meant to facilitate federal antidiscrimination statutes and federal regulatory schemes, like antitrust and securities regulation.\textsuperscript{147}

Judge Weinstein’s notion of justice in mass tort cases departs from the basis of our legal system, which is intended to allow individuals to assert their claims and receive compensation for the wrongdoing of others. As Professor Trangsrud has stated, “[t]he first purpose of our civil justice system is and should be to offer corrective justice in disputes arising between private parties.”\textsuperscript{148} He has further observed, “[f]or centuries, in England and in America, tort claimants with substantial injuries could expect to control how, when, and where their cases would be tried.”\textsuperscript{149} As Professor Stephen C. Yeazell has noted, “[c]ollective litigation sacrifices individual to group welfare. Forced to bring or defend claims as groups, individuals lose the control they might otherwise exert over their lawsuits; sometimes they also lose substantive rights they would be able to exercise were the suit brought against them individually.”\textsuperscript{150}

When a person is injured in a mass disaster, that person needs full compensation. It is not enough just to punish the wrongdoer. In many mass tort cases, plaintiffs do not get a fair share of the settlement.\textsuperscript{151} For example, as Judge Weinstein has observed, in the asbestos cases, less than forty percent of the total amount expended by defendants will go to the injured.\textsuperscript{152} Similarly, in the Bank of Boston litigation, plaintiffs’ attorneys received eight million dollars in fees despite the fact that the bank deposited less than nine dollars in each class member’s account, and it withdrew up to ninety dollars from some accounts.\textsuperscript{153}

Similarly, a defendant’s liability should not increase because claims have been combined rather than heard individually. If additional punishment is merited, that additional punishment should come from criminal law or administrative action, not from a judge making new

\textsuperscript{147} See, e.g., Roger Trangsrud, \textit{Federalism and Mass Tort Litigation}, 148 U. PA. L. REV. 2263, 2269 (2000) (citing the Advisory Committee Notes to Rule 23) [hereinafter Trangsrud, \textit{Federalism}]. The same is true for the Multidistrict Litigation Act. Congress did not pass it in response to a crisis in the tort system or a multitude of state claims in federal court, but as a reaction to the electrical equipment price-fixing cases and problems of managing complex antitrust cases. \textit{See id.} at 2269-70.

\textsuperscript{148} Trangsrud, \textit{Mass Trials}, supra note 144, at 74.

\textsuperscript{149} Id. at 70.


\textsuperscript{151} \textit{See infra} notes 152-53 and accompanying text.

\textsuperscript{152} See Weinstein, \textit{Preliminary Reflections}, supra note 29, at 22.

\textsuperscript{153} See Kamilewicz \textit{v. Bank of Boston Corp.}, 100 F.3d 1348, 1349 (7th Cir. 1996).
rules. In addition, class certification often forces unfair settlements. Judge Jerry E. Smith has written:

In the context of mass tort class actions, certification dramatically affects the stakes for defendants. Class certification magnifies and strengthens the number of unmeritorious claims . . . . In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail.\(^5\)

Finally, there are also social costs to class actions. Settlement of class actions may make products more expensive or cause the unavailability of some products.\(^5\) It may also cause manufacturers to be wary of innovation.

It is true that without Judge Weinstein’s approach, “justice” might not have been done in certain cases. For example, in Agent Orange, causation problems and governmental immunity would probably have prevented the plaintiffs from being compensated in a court of law.\(^5\) However, that was a problem with substantive law, and that problem should have been solved through legislation or by the Supreme Court overruling its precedents, not by a judge who does not like binding authority.

A major problem with Judge Weinstein’s approach to mass tort cases is that his decisions do not have to be accounted for because most mass tort cases are settled.\(^5\) He makes a preliminary decision on jurisdiction or choice of law, and that decision is not subject to judicial review because the case is settled.\(^5\)

\(^{154}\) Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) (citations omitted); see also In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1297-1300 (7th Cir. 1995).


\(^{156}\) See WEINSTEIN, INDIVIDUAL JUSTICE, supra note 1, at xii.

\(^{157}\) See Swanzey, supra note 143, at 427-28.

\(^{158}\) Professor Kramer has observed:

The stated premise of provisional certification is that the court can always decertify later if the choice-of-law issues complicate matters too much. But later never comes, and never will, because the cases always settle first—as judges know better than anyone. The provisional certification ploy thus enables the court to create a class without letting any pesky choice-of-law problems get in the way.

Kramer, supra note 3, at 565.
Forced settlements do not always result in justice—for plaintiffs or defendants. Sheila Birnbaum has declared that “the class action—a ‘procedural’ device intended to achieve certain efficiencies of scale through aggregation—is a mighty sword that can affect the substantive outcome of the litigation without regard to the ‘merits’ of the claims.” For example, as Judge Weinstein has pointed out, judges in Mississippi in complex cases often force large settlements on defendants with the threat of even larger jury verdicts with punitive damages. For instance, in one mass asbestos suit in Mississippi, Mississippi plaintiffs were awarded over eighteen times the damages that similarly situated plaintiffs from other states received. Judge Weinstein has quoted one defense attorney involved in such cases: “It’s no secret that there are state courtrooms in Mississippi which have become notorious for awarding outlandish verdicts to asbestos claimants who are not sick and as a result, asbestos cases from all over the country tend to migrate there.” The unfairness is not limited to defendants. For example, courts have used the single law approach to choice of law to deny punitive damages to some plaintiffs when their home states would probably have awarded them such damages.

Judge Weinstein’s “emphasis” on his notion of individual justice does not compensate for what the individual loses in his mass tort jurisprudence. Listening to the plaintiffs’ “harrowing stories” does not make up for the loss of substantive rights. There is more to respecting the individual than communication.

This author also disagrees with Judge Weinstein’s normative views on choice-of-law in mass tort cases. First, reduction of transaction costs is not a reason to change the applicable law and apply a single jurisdiction’s laws to all claims. Parties’ claims and defenses should be

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159. Birnbaum, supra note 155, at 351.
160. See Weinstein, Mass Tort Jurisdiction, supra note 11, at 147 n.7.
161. See id. at 147.
162. Id. at 147 n.7 (quoting Stephen Labaton, Top Asbestos Makers Agree to Settle 2 Large Lawsuits, N.Y. TIMES, Jan. 23, 2000, at A22 (quoting Richard A. Weinberg, counsel of the GAF Corporation)).
163. See FRUEHWALD, CHOICE OF LAW, supra note 3, at 147.
165. See Weinstein, Mass Tort Jurisdiction, supra note 11, at 145.
166. Some scholars have argued that the efficiency gains from mass tort cases are speculative. See, e.g., Trangsrud, Mass Trials, supra note 144, at 78-79.
governed by the same law that would have controlled absent aggregation. Individuals have the right to have the proper law control their conduct, not the law of a state with which they have a weak connection or no connection at all. The fact that several states’ laws might apply, making maintenance of a class action difficult, is irrelevant. Efficiency is not more important than applying the proper law.

Second, full protection of the largest number injured does not support use of the single jurisdiction rule. Substantive law protects injured persons. Some states’ substantive laws provide more protection than other states’ substantive laws. As Judge Weinstein has pointed out, there is no longer a uniform tort law in this country. Living with your state’s governing law is part of being a community. This fact does not change solely because cases have been aggregated. In fact, that states have different laws on a particular issue might be a reason to not aggregate cases in the first place.

The related problem of different recoveries by different parties in the same lawsuit also does not warrant the single jurisdiction rule. While there may be a “substantive law Tower of Babel” in American tort law, this disagreement among the states is caused by legitimate disagreement on the goals of tort law. The states have the sovereignty to enact their own tort law, and a federal judge has no authority to override those decisions; as Judge Weinstein himself has noted, Erie and Klaxon still govern federal judges. As Professor Trangsrud has observed, the different recovery argument:

167. Professor Kramer has asserted: “Because choice of law is part of the process of defining the parties’ rights, it should not change simply because, as a matter of administrative convenience and efficiency, we have combined many claims in one proceeding; whatever choice-of-law rules we use to define substantive rights should be the same for ordinary and complex cases.” Kramer, supra note 3, at 549.


169. See Weinstein, Mass Tort Jurisdiction, supra note 11, at 155.

170. See id. at 152.

171. See id. Professor Kramer has observed that “[n]o one seems to notice the irony of advocating a choice-of-law rule that selects the law of a single state on the ground that complex litigation is national in character.” Kramer, supra note 3, at 578.

172. Professor Kramer has stated, “[s]uch differences in outcome reflect the fact that different states with legitimate interests have made different judgments about how to handle tort problems.” Kramer, supra note 3, at 579. Similarly, Professor Southerland has declared, “[e]ach state in the United States is sovereign. Each has power within broad limits set by the Constitution to make law for its own territory.” Southerland, supra note 99, at 452.

173. See infra Part V.

174. Weinstein, Mass Tort Jurisdiction, supra note 11, at 152.

175. See Southerland, supra note 99, at 485.
should have been addressed to James Madison or to Congress . . . . When we have fifty states and defer to state tort law, there will be . . . differences. These differences belong in our federal system, and there is nothing wrong with such disparate rules or outcomes. Our government is organized [this] way . . . to allow for precisely these differences. 176

Judge Weinstein’s downplaying of federalism concerns is troubling. 177 States have the power to make their own decisions concerning what is fair in a torts case—what torts are compensated, any limitations on that compensation, and the amount of damages. 178 As Professor Southerland has declared, “[w]e have conflicts cases because, in a surprising number of ways, the law-making bodies of the various states see the world quite differently.” 179 A federal judge should not usurp a state’s authority to make its own laws. Does a federal judge automatically have a better notion of justice than a state legislature? In any case, a federal judge lacks the power to make such a decision under Erie and Klaxon. 180

Third, the defendant’s interest in stability also fails to justify the single jurisdiction rule. 181 If defendants have such an interest, they would stipulate to a single jurisdiction’s law! Defendants do not lose the right to have the proper law applied to their cases solely because claims and parties have been aggregated.

Finally, the prompt ending of the litigation 182 does not call for the single jurisdiction rule. As with transaction costs, judicial efficiency should not affect the applicable law. The applicable law is the most important aspect of a case. The point of aggregation is to be more efficient. If choice of law problems destroy that efficiency, the case should not be a class action.

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176. Trangsrud, Federalism, supra note 147, at 2271.
177. See Weinstein, Mass Tort Jurisdiction, supra note 11, 154.
178. As Judge Patrick Higginbotham has noted, “[i]t is easy to say that we will dispense with the nuanced differences among the state laws, but, remember, those nuanced differences are reflections of state policies.” The Federalist Society: Conference: Civil Justice and the Litigation Process: Do the Merits and the Search for Truth Matter Anymore? Day One: Panel One: Class Action Litigation: Introduction, 41 N.Y.L. SCH. L. REV. 337, 377 (1997).
179. Southerland, supra note 99, at 455.
180. Professor Kozyris has declared: “I question whether the national judge has the authority, the knowledge and the capability to develop such an ad hoc common-law type ‘jus gentium.’” Kozyris, supra note 155, at 1166.
181. See Weinstein, Mass Tort Jurisdiction, supra note 11, at 145.
182. See id.
In sum, Judge Weinstein’s creativity is not a solution to choice of law problems in mass tort cases. A judge should follow the proper choice of law rules, not try to find a “creative” justification to circumvent those rules. As Judge J. Harvie Wilkinson, III, has declared:

There is a price to be paid for confusing legal roles. Think for a moment of how it feels to be bested by someone who does not follow the rules. Then multiply your sense of personal disillusionment by the millions. There is nothing so corrosive to public confidence in public institutions as the idea that a decision, whether right or wrong, represented at heart an arrogation of authority. Such usurpation is unbecoming in constitutional democracies that should rest on the idea that the crude displacement of proper decisionmaking channels is little better than a putsch.\footnote{J. Harvie Wilkinson, III, \textit{Foreword: The Question of Process}, 98 Mich. L. Rev. 1387, 1390-91 (2000).}

\section*{B. Critique of Judge Weinstein’s Choice of Law Ruling in Simon}


Judge Weinstein’s analysis of New York choice of law rules is basically correct. Under \textit{Babcock} and its progeny, a New York court would have adopted the law of the state with the greatest interest in having its law applied.\footnote{See \textit{id.} at 54.} Despite its statement that in split conduct/injury cases the place of the wrong is where the last event to make the actor liable occurred, \textit{Schultz} is not an impediment to adopting the law of the state where the conduct took place if that state is the most interested state.\footnote{See \textit{id.} at 58-59.} First, this statement in \textit{Schultz} is dicta. The issue was loss distribution—whether charitable tort immunity applied—not conduct regulation.\footnote{See Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679, 681-82 (N.Y. 1985).} More importantly, as Judge Weinstein noted, \textit{Babcock} and its progeny (including \textit{Schultz}) indicate that New York would not adopt the simplistic analysis of the last event rule.\footnote{See \textit{Simon}, 124 F. Supp. 2d at 54-59.}

In his historical analysis, Judge Weinstein overstated the trend toward substantive fairness in choice of law. In modern conflicts law and

\begin{itemize}
\item \footnote{See Simon v. Philip Morris, Inc., 124 F. Supp. 2d 46, 78 (E.D.N.Y. 2000).}
\item \footnote{See \textit{id.} at 54.}
\item \footnote{See \textit{id.} at 58-59.}
\item \footnote{See Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679, 681-82 (N.Y. 1985).}
\item \footnote{See \textit{Simon}, 124 F. Supp. 2d at 54-59.}
\end{itemize}
scholarship, there are several conflicting trends, including the need for uniformity and predictability, recognition of sovereign interests, and fairness in several contexts. Choice of law history does not support any single approach to resolving conflicts. Judge Weinstein also overstated the role of flexibility in modern conflicts. Again, there is no clear trend. Judge Weinstein is correct that many federal judges are using the single jurisdiction rule in class actions and mass tort cases; however, as this author has observed elsewhere, in doing so, these judges are ignoring state choice of law rules that under Erie and Klaxon they are required to follow.

Judge Weinstein’s discussion of New York conflicts rules, choice of law history, modern conflicts law, and modern scholarship is an attempt to convince the reader that he does not have to follow the existing rules. Since substantive fairness is his main inquiry, and since the New York Court of Appeals has not considered choice of law in a similar mass tort action, Judge Weinstein does not have to follow the niceties of New York conflicts rules. He is able to create his own rules that will obtain the result he wants in harmony with his mass tort philosophy. However, substantive justice is not the only value in litigation. Consistency, predictability, and respect for reasonable expectations are also important values. As Judge Wilkinson has recently stated, “[a] vision of society where substantive outcomes alone are paramount thus threatens to engulf us.”

The major problem in Judge Weinstein’s analysis arises when he applies interest analysis to the facts of Simon. This case is a split conduct/injury case. Some of the conduct—involving a significant part of the conspiracy—took place in New York. However, the companies sold cigarettes in all fifty states, they advertised in all fifty states, the

189. For a history of choice of law in the twentieth century, including recent developments, see Fruehwald, Choice of Law, supra note 3, at 9-46. See also Symeon C. Symeonides, American Choice of Law at the Dawn of the 21st Century, 37 Willamette L. Rev. 1 (2001).
190. See Fruehwald, Choice of Law, supra note 3, at 9-46.
191. See id. at 146-47.
192. See id. at 53-54. As Ronald Dworkin has written:
Hercules [the ideal judge] is prevented from achieving integrity viewed from the standpoint of justice alone—coherence in the substantive principles of justice that flow throughout his account of what the law now is—because he has been seeking a wider integrity that gives effect to principles of fairness and procedural due process as well.
193. Wilkinson, supra note 183, at 1387.
injured parties were citizens of all fifty states, and the injuries occurred in all fifty states. 195

As Judge Weinstein stated, under New York conflicts rules, there are three main reasons for adopting forum/locus law in a case: “(1) to protect medical creditors who provided services to injured parties; (2) to prevent injured tort victims from becoming wards in the locus state; and (3) to deter future tortfeasors in the locus state.” 196 Judge Weinstein’s conclusion that all fifty states, including New York, have an interest in the first two factors is somewhat misleading. New York has an interest in protecting New York medical creditors who treat patients who have tobacco related injuries. However, New York has no interest in protecting medical creditors in other states. Some of the plaintiffs were treated by New York doctors, but the majority were not. Similarly, New York has an interest in preventing its citizens from becoming wards of New York. However, New York has no interest in the citizens of other states who were injured outside New York who might become wards of those other states. Again, the majority of plaintiffs are not New York citizens. Thus, New York does not have an interest in applying its law to other states’ citizens under factors one and two.

Judge Weinstein’s faulty analysis of factors one and two is caused by the fact that he refuses to see the plaintiffs as individuals. One cannot just lump all parties and claims together. 197 A party who is an Oklahoma citizen, who bought the cigarettes there, and who developed a cigarette related disease there is situated differently from a person whose connections are with New York. The fact that the Oklahoma citizen’s claims are somehow procedurally combined with a New York citizen’s claims does not make the Oklahoma claims New York claims.

195. See id. at 56, 72. Of course, the facts are even more complicated than this because many of the plaintiffs may have moved from state to state during their long exposure to tobacco smoke.

196. Id. at 72 (citing Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679 (N.Y. 1985)). Some scholars have criticized interest analysis’ concept of interest as being too narrow. See LEA BRILMAYER, CONFLICT OF LAWS 85-89 (1995); Joseph William Singer, Real Conflicts, B.U. L. REV. 1, 35-45 (1989). A state may have an interest in protecting outsiders or a state may want to limit tort damages for foreign corporations in order to encourage companies to do business in that state. Some scholars have also criticized interest analysis’ interests as being hypothetical. See BRILMAYER, supra, at 112, 229-30. The fact that someone might become a ward of a state is no justification to adopt that state’s law.

Concerning the third factor, Judge Weinstein is correct that New York does have an "interest in ensuring that it does not become either a base or a haven for law breakers to wreak injury nationwide." But, is this interest more important than the interests of the states where the cigarettes were sold and caused the injuries?

As stated in Schultz, the traditional rule was that the law of the state where the last act occurred governs choice of law in torts cases. This rule has been strongly criticized on the grounds that it is mechanical and that it sometimes adopts the law of a state with a tenuous connection to the controversy. For example, a passenger from New York buys a ticket in New York from a New York incorporated airline for a flight from Albany, New York to Newark, New Jersey. Assume the plane crashes just inside the New Jersey border due to the negligent maintenance of the aircraft in New York, and the passenger is killed. Should New Jersey law govern the wrongful death action solely because the accident occurred there, despite the stronger connections to New York? Most judges and scholars would conclude that New York law controls because the significant connections are with New York or because New York has a greater interest than New Jersey in applying its law.

There is much wisdom, however, in using the last act rule in most cases. The state where an accident occurred will usually have the greatest interest in having its law apply for conduct regulation. For example, if two citizens from New York are injured in a traffic accident in Montana with all portions of the negligence happening in Montana, then Montana law should govern issues of liability because Montana has the greatest interest in regulating conduct that occurred entirely within its borders.

Split conduct/injury cases, such as the tobacco cases, are harder. Assume that a manufacturer makes a car with defective brakes in Michigan, and those defective breaks cause an accident in North...
Carolina to a North Carolina citizen who bought the car there. Assume that Michigan law has a cause of action for strict liability under products liability, but that North Carolina requires proof of negligence for recovery. Which state’s law should govern liability issues? Obviously, both states have an interest in applying their laws. Michigan has an interest in regulating the conduct of manufacturers that make products in Michigan, and North Carolina has an interest in regulating products that are sold in North Carolina or cause injuries on its roads or to its citizens. North Carolina, however, has the strongest interest in applying its law (or the closest connection) to this case. Michigan’s interest would be satisfied by using its law with injuries that happen in Michigan. While it may not want its manufacturers to export defective products to other states, it does not have a strong interest in providing compensation for injuries that occur outside its borders to nonresidents. On the other hand, North Carolina has a vital interest in regulating conduct and preventing injuries within its borders. It should not have to depend on other states’ laws to protect its citizens.

This author is not the only scholar to advocate choosing the law of the state where a product was sold and caused injury, rather than the state of manufacture. For example, Professor Phaedon John Kozyris has recently proposed the following choice of law rules for consumer products to be applied in the following order:

Rule (a) [the plaintiff’s] home state at the time of such acquisition there or such acquisition in another state [by the victim] if also at that time the same kind of product of the same manufacturer was also so available at his home state . . . . Rule (b), that the victim in all situations [third parties who did not themselves acquire the product or it was not acquired for them] should be entitled to opt for the law of the place of harm if it coincides with his then home, provided that when the product was originally acquired the same kind of the same manufacturer was also available there through commercial channels . . . [and] for all hopelessly non-local situations, where the significant affiliations are so dispersed as not to come within these concentrations . . . . Rule (c), a pure and simple application of the law of the state of the consensual acquisition-delivery at the initial transaction on a theory of ease of application, of more likely fairness as party-mutual and of greater consistency with the basic assumption of state authority.

203. See, e.g., Kozyris, supra note 155, at 1176-77.
204. Id.

http://scholarlycommons.law.hofstra.edu/hlr/vol31/iss2/2
Significantly, Professor Kozyris considers the place of design-making irrelevant, declaring that:

[s]ince we are dealing here not with criminal activity, and not with activity that can cause any harm by itself, but only with civil compensation of persons harmed by products, it seems to me that the state where the preparatory acts of merely designing and making (and storing) the product are taking place has no reason to concern itself with its specifications and with the potential recoveries for harm caused. The product cannot cause any harm until it is delivered to a user, until it is placed in the market. It is the state where those transactions take place that has the major reason to address these issues, and balance the considerations, both for preventive and for corrective purposes. 205

He added, "[t]he fact that unilateral decisions may be made there about the design, manufacture and even marketing of the product should not be enough, for purposes of simple civil liability, to trigger the application of its law." 206 He also noted that recent case law tends to follow the above analysis. 207

Simon is similar to the above Michigan-North Carolina hypothetical, but there are significant differences that call even more strongly for the application of the laws of the states where the plaintiffs were domiciled, bought the cigarettes, and developed tobacco-related diseases. While in the hypothetical all the conduct—the manufacture of the defective product—occurred in Michigan, in Simon some of the conduct took place outside New York. There is no indication that the conspiracy was confined to New York: the cigarettes were manufactured outside New York, and advertising that induced the plaintiffs to buy cigarettes occurred in all fifty states. Thus, the injury occurred in all fifty states—and some of the conduct causing that injury took place in all fifty states. In addition, the combination of these factors is different for each plaintiff. In such circumstances, it is extremely hard to justify applying a single jurisdiction’s law to all parties’ claims.

Again, Judge Weinstein wanted to adopt a single state’s law because he saw the case as involving an injury to only one entity—the public. 208 However, individuals suffered very real injuries—death, cancer, heart disease, etc. There may also be an injury to the public as a

205. Id. at 1177-78.
206. Id. at 1178.
207. See id.
whole, but the individual suffering caused by smoking dwarfs that public interest.

Judge Weinstein’s choice of law decision is unfair to the individuals involved in the case. No matter how egregious the conduct might be, there is no compensable injury unless the relevant sovereign’s law establishes a remedy that applies to the plaintiff.\textsuperscript{209} New York certainly did not intend that its tort law apply to every tort that occurs in the world. Furthermore, plaintiffs’ recovery and defendants’ conduct should not be governed by the law of a state that has a weak connection to a case or by the law of a state when another state has a significantly stronger connection to the controversy.\textsuperscript{210} As was established above, the states where the cigarettes were sold and where the smoking-related disease developed had a stronger connection to (or interest in) the case.\textsuperscript{211} Again, a state has a very strong interest in regulating conduct within its borders.\textsuperscript{212} If justice requires that parties should be compensated for a particular injury, that justice should be accomplished through substantive law, not through manipulation of choice of law rules.\textsuperscript{213} Choice of law analysis requires a “sense of detachment” on the judge’s part.\textsuperscript{214} As Judge Wilkinson has stated: “In an increasingly diverse country with many competing visions of the good, it is critical for law to aspire to agreement on process—a task both more achievable than

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\textsuperscript{209} Professor Kramer has observed:

The court in a multistate lawsuit must determine whether some rule of positive law confers a right to recover. Making this determination is a problem of interpreting laws offered by the parties to support their contentions. The only difference when it comes to choice of law is that, instead of asking whether the plaintiff must prove that the defendant acted negligently or was within the scope of his or her employment, we ask whether the plaintiff must prove that he or she is from the state or that the accident occurred within the state. But the extraterritorial reach of a law is still an element of a claim or defense based on that law, determined by a process of interpretation that is, because it directly defines the parties’ rights, the very paradigm of what we mean by “substantive.”

Kramer, supra note 3, at 571-72.

\textsuperscript{210} For more on this concept, see FRUEHWALD, CHOICE OF LAW, supra note 3, at 71-78, 103-19.

\textsuperscript{211} See supra text accompanying notes 208-10.

\textsuperscript{212} See supra text accompanying note 202.

\textsuperscript{213} Professor Kozyris has observed, “the question of whether a state has the power and a good reason to apply its own or another law in a particular context is entirely different from the question of whether the chosen law is substantively just.” Kozyris, supra note 155, at 1171.

\textsuperscript{214} See Wilkinson, supra note 183, at 1388 (“[B]y refusing to ask the institutional questions a priori, we deny ourselves a sense of detachment.”).
\end{flushright}
agreement on substance and more suited to our profession than waving the banners of ideological truth." 215

In addition, as was mentioned above, use of a single state's law in a mass tort case may not always result in a justice. 216 For example, forum law may not allow punitive damages, while a plaintiff's home state might. Likewise, the forum state might limit damages or provide a defense when a state with a closer connection to the controversy does not.

This author's Kantian view of the individual in mass tort cases contrasts markedly with Judge Weinstein's communitarian-utilitarian notion. 217 Under utilitarianism, "human actions and practices should be evaluated ultimately in terms of their tendencies to advance the general welfare or social good—i.e., to produce as a consequence other happiness or well-being or satisfaction of a majority of persons." 218 In other words, choices should be made to produce "[t]he greatest happiness for the greatest number." 219 On the other hand, Kant felt that "[a]ll rational persons have a right not to be used without their consent even for the benefit of others." 220 Kantianism respects and protects the special status of rational, autonomous persons. 221 Under Kantianism, "it is always wrong to victimize, [and every individual] has an absolute right to be protected against such victimization." 222 As Ronald Dworkin has stated: "Individual rights are . . . trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them." 223 Moreover, under Kantianism, part of a rational

215. Id. at 1387. By process, Judge Wilkinson means what institution should make the decision. He further asserted that "[a] multicultural nation may find in process a means of muting differences. A society beset by bewildering change may find in process stable ways of making that change come about. A culture torn over questions of personal autonomy may discover in process a means of decentralizing and diversifying outcomes." Id. at 1393-94.


217. Judge Weinstein says that he relies upon Kant, along with Bentham, Rawls, Nozick, and others. See WEINSTEIN, INDIVIDUAL JUSTICE, supra note 1, at 6. However, his mass tort philosophy relies much more on Bentham (utilitarianism) than Kant.


219. Id.

220. Id. at 79.

221. See id. at 82.

222. Id. at 81.

223. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY xi (1978).
life is the ability to make reliable predictions. As Professor Bailey H. Kuklin has stated: "[O]ne can hardly be considered an autonomous, moral person responsibly conducting one’s own affairs if the consequences of one’s actions are substantially unexpected."225

Adopting a single jurisdiction's rule for all parties in a mass tort case would usually satisfy utilitarianism. The greater efficiency and reduction of transactions costs would outweigh a few individuals' losses of their substantive rights. In some instances, if the tort claims were not aggregated, then many injured persons would not receive compensation.

Kantianism, however, would not accept the above solution. If aggregation results in any significant loss to an individual, the dignity and autonomy of that individual has not been respected.226 The fact that there has been an overall gain for the collective does not justify the victimization of the individual.227 In addition, an autonomous individual cannot make a rational choice when the law is unpredictable, as it is under a choice of law system where choice of forum determines the applicable law.228

Respect for state sovereignty also affects individual justice. Proper allocation of power under our federal system protects individual liberty.229 As James Madison wrote:

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.230

Similarly, Justice O'Connor has written:

State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power. . . . Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance

225. Id.
226. See supra notes 221-22 and accompanying text.
227. See supra note 220 and accompanying text.
228. See supra notes 224-25 and accompanying text.
of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. 231

Judge Weinstein’s choice of law decision ignores state sovereignty completely. As noted above, Judge Weinstein downplays the states’ interest by declaring that a state has an interest in seeing that its citizens are compensated, rather than having its laws applied. 232 However, this is a decision for the states to make; a federal judge does not have the authority to overrule a state’s decision concerning its laws. The United States Constitution gives the federal government limited powers, and those powers not explicitly given to the federal government are reserved to the states. 233 In addition, who is to say that Judge Weinstein’s decisions are wiser than those of state legislatures? 234 Despite Judge Weinstein’s conclusion that choice of law has entered “‘a period of equity and natural law,’” 235 natural law principles have not been commonly used by American courts since the early twentieth century. 236 In any event, under federalism principles, a federal judge cannot use natural law to overrule state positive law.

The constitutional dimensions of Judge Weinstein’s decision also relate to individual justice since the Constitution is largely concerned with protecting individuals. Judge Weinstein is probably correct that his

232. See supra note 140 and accompanying text.
233. See U.S. Const. amend. X; see also New York, 505 U.S. at 187 (stating that the Constitution “divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day”); Brzonkala v. Va. Polytechnic Inst., 169 F.3d 820, 903 (4th Cir. 1999) (Niemeyer, J., concurring), aff’d sub nom. United States v. Morrison, 529 U.S. 598 (2000) (“What had emerged from Philadelphia in 1787 was a legal text creating a government constructed upon principles of federalism. The Constitution accomplishes this result by limiting the power of the national government, and giving it only enumerated powers.”).
234. Professor Southerland has wisely asserted:

Diversity, in my view, is not unhealthy. What is unhealthy is the presumption that we know what is best for other people; what is unhealthier still is the willingness to impose our judgments on them, by main force if necessary. The arrogance of power has been a recurring theme in the discordant music of this century. More than most, those of us drawn to the legal system seem prone to the delusion that we have answers for the ills of society. The temptation to prescribe for others is powerfully seductive; recognizing the impulse for what it is is the first step in resisting it.
Southerland, supra note 99, at 501.
236. See FRUEHWALD, CHOICE OF LAW, supra note 3, at 48.
decision is constitutional under *Shutts*. The fact that a significant portion of the conspiracy occurred in New York probably satisfies *Shutts*’ requirement that “New York must have a significant contact or significant aggregation of contacts to the claims asserted by ‘each member of the plaintiff class’ to ensure that the choice of that state’s law is not arbitrary or unfair.” However, this author believes that a due process case after *Shutts* makes Judge Weinstein’s decision questionable under the Due Process Clause of the Fourteenth Amendment. In *BMW of North America, Inc. v. Gore*, the Supreme Court ruled that a state could not calculate punitive damages based on conduct in other states that was not illegal in those states. In *Gore*, BMW had not disclosed the fact that it had repainted Gore’s car before delivery. Such conduct was illegal in Alabama, the forum state, and approximately half of the other states, but what BMW had done was legal in about half the states. The Court held that Alabama could not calculate punitive damages based on conduct that was legal in certain states under the due process clause because in doing so Alabama was imposing its policy on the other states. The Court reasoned that a state is not only limited by the federal power over interstate commerce, but also by “the need to respect the interests of other States.” Therefore, “it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors’ lawful conduct in other States.” In applying New York law to claims where the tobacco was sold in another state, to non-New York citizens with the injury occurring outside New York, New York is imposing its policy on other states. Judge Weinstein is not respecting the states’ interests, and he is trying to change conduct that is lawful in other

237. See Simon, 124 F. Supp. 2d at 69-71. This author has argued elsewhere that the constitutional limits set forth in *Shutts* and *Allstate*, are too liberal. See FRUEHWALD, CHOICE OF LAW, supra note 3, at 65-94; Scott Fruehwald, Constitutional Constraints on State Choice of Law, 24 U. DAYTON L. REV. 40 (1998). Professor Kozyris has stated similarly, “we should support a broad reading and an effective application of the above-mentioned U.S. constitutional limitations on the excessive outreach of state power.” Kozyris, supra note 155, at 1170. I will limit the discussion in this paper to existing constitutional constraints on choice of law.

238. Simon, 124 F. Supp. 2d at 69.


240. See id. at 564.

241. See id. at 565.

242. See id. at 572-73, 585.

243. Id. at 571.

244. Id. at 572.
JACK B. WEINSTEIN AND CHOICE OF LAW

states. Accordingly, Judge Weinstein's choice of law decision violates the due process clause under *Gore*.

V. A PARTIAL SOLUTION: SUBGROUPS FOR DIFFERENT SUBSTANTIVE LAWS

Judge Weinstein suggested that if the Court of Appeals rejects his choice of law determination that the court should remand to decide whether subclasses could accommodate the variations in state law. He noted that an appendix to plaintiffs' brief demonstrated that there were few material differences among the states on fraudulent concealment.

The use of subclasses for different state substantive rules is a legitimate method of maintaining a class action. This device can allow for variations in state law, and not permit the class action to change the substantive outcome. For example, the court in *In re Prudential Insurance Co. of America Sales Practices Litigation* found that "Class Counsel [had] grouped potentially applicable state laws systematically into manageable patterns, completely obviating potential complications from choice of law differences." In addition, as Ryan Phair has noted, the predominance requirement of Rule 23 can be satisfied by a common question of law or fact.

The use of subclasses may not be as difficult as some commentators and judges claim. There will not be fifty different substantive rules—

246. See id. Of course, such a determination should not ignore significant differences between state choice of law rules as some mass tort cases have done.

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. In addition, in order to maintain the type of class action that is usually used with mass torts, the court must find that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. Civ. P. 23(b)(3). Of these requirements, choice of law problems have the most effect on commonality, predominance, and superiority.
sometimes there will be no differences and there will rarely be more than three or four choices. As Professor Kramer has stated, “the court should be able first to reduce the number of conflicts to a relatively manageable number and then to group states for purposes of conflicts analysis.”

When the variations in state law become too complex, a court should refuse class certification. For example in Castano v. American Tobacco Co., a case seeking compensation for nicotine addiction, the Fifth Circuit decertified the class action because of the lower court’s failure to consider how variations in state law would affect two class action requirements: predominance and superiority. Concerning predominance the court declared, “[i]n a multi-state class action, variations in state law may swamp any common issues and defeat predominance.” In this case, the lower court had not properly considered how variations in state law might affect predominance because the parties had only briefly addressed the matter and the court’s review of state law variances was cursory. Concerning superiority, the court found extensive manageability problems with the class, including difficult choice of law determinations. The court also rejected plaintiffs’ contention that a class trial would preserve judicial resources as speculative. Moreover, there was no “negative value suit” in this case because individual damages claims are high, punitive damages are available in many states, and the prevailing parties may recover attorney’s fees under many states’ consumer protection acts. The court asserted, “certification of an immature tort [a tort that has not been widely litigated] brings with it unique problems that may consume more judicial resources than certification will save.”

250. Kramer, supra note 3, at 583.
252. 84 F.3d at 740-41.
253. Id. at 741.
254. See id. at 742.
255. See id. at 747.
256. See id.
257. See id. at 748.
258. Id. at 749.
VI. CONCLUSION

Choice of law is a vital part of any lawsuit because it establishes the parties’ substantive rights and defenses. For individual justice to exist in mass tort actions, aggregation cannot change the substantive law that is to be applied. Judge Weinstein’s choice of law decision in Simon that applied New York law to all parties’ claims in the name of efficiency and communitarianism changed the substantive law for some of the parties. Consequently, Judge Weinstein failed to respect the dignity and autonomy of many of the individuals in that case.