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Reform Aspirations of the Complex Litigation Project

*Gene R. Shreve**

I. THE SETTING

I am grateful to the editors of this symposium for an opportunity to comment on the Complex Litigation Project. I begin by acknowledging, as the Project requires us all to do, that the term, complex litigation, now seems to mean something different, bigger, and more menacing than it once did. The Project puts the matter this way:

As used in this Project, "complex litigation" refers exclusively to multiparty, multiforum litigation; it is characterized by related claims dispersed in several forums and often involving events that occurred over long periods of time. It presents one of the greatest problems our courts currently confront.¹

Many of my distinguished co-participants have chosen to discuss how the Complex Litigation Project treats matters within a single field or procedural topic. This is understandable. No other recent event has produced for American proceduralists an outpouring of issues so numerous, intellectually rich, and controversial. The procedural problems the Project identifies and the radical measures that it often employs to solve them test many assumptions in areas including personal jurisdiction, federal subject matter jurisdiction, venue, res judicata, multi-claim and multi-party procedure, remedies, and choice of law.

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* Professor of Law, Indiana University School of Law—Bloomington. My thanks to Lauren Robel for her comments on an earlier draft, and to Perter Song, Class of 1995, for his research assistance. Thanks also to Mary Kay Kane for the splendid service she provided in assisting members of the Consultative Group and in guiding the Project to completion.

I am very glad that the editors have dedicated this symposium to the memory of Professor Donald Trautman. Those of us who experienced his influence as teacher, guide, and friend are exceedingly fortunate. This paper is for Don.

1. American Law Institute, Complex Litigation Project, Proposed Final Draft Ch. 2, cmt. a (May 13, 1993) [hereinafter Proposed Final Draft]. There may be some confusion between complex litigation defined here (discrete cases that ought to be consolidated) and the complex litigation *law* (rules for consolidating parties and claims). For definitive explanation of the latter, see Manual for Complex Litigation 2d (1985). As used in the text accompanying this note and elsewhere in the Project, complex litigation connotes something bad—the target of the Project's reform initiatives. In ordinary usage, complex litigation *law* is good. While it complicates what would otherwise be a simple case by authorizing joinder of additional parties and claims, complex litigation law is good on balance—in part because it anticipates and avoids other lawsuits. See Gene R. Shreve & Peter Raven-Hansen, Understanding Civil Procedure § 55 (2d ed. 1994) (forthcoming).

While different pieces of the picture are fascinating in themselves, it may also be interesting to take a few steps back from the Project and look at it in broader terms. That will be the approach of this paper.

After sketching the outlines of the Project, I will state the basis for my wholehearted agreement with the Institute concerning the unsatisfactory condition of current law. However, the paper then considers a rather disturbing possibility: that despite the time, care, and erudition invested in the Project, the final document is flawed by a lack of pragmatism. I maintain that the reform aspirations of the Project are politically naive, and that some of its recommendations may be instrumentally unsound. Yet I conclude the paper by suggesting that, in ways similar to the Institute's earlier study on federal and state jurisdiction, the Project is a positive development overall.

II. AN OUTLINE OF THE PROJECT

In May of 1993, the American Law Institute approved The Proposed Final Draft of the Complex Litigation Project at its annual meeting.² The contents of the Project have been summarized as follows:

Initiated to formulate standards for transferring and consolidating multiforum, multiparty actions in a single forum, the project makes a series of proposals, principally embodied in a statute to replace 28 U.S.C. § 1407 (1988), to enable transfers and consolidation of cases among federal courts, and federal and state courts. Among the more significant proposals made by the project are: authorization of nationwide personal jurisdiction in transferred and consolidated cases; authorization of antisuit injunctions and new procedures for ordering intervention and preclusion of nonintervening litigants; application of a federal choice of law statute to cases transferred and consolidated in the federal courts; a mechanism for permitting aggregation of mass tort cases in state courts (including transfers from federal court) in limited circumstances; and a model interstate compact or uniform act to allow transfer and consolidation of cases in different court systems.³

III. WHY THE INSTITUTE'S CONCERNS WERE JUSTIFIED

The ALI sought by these reforms to fight against debilitating, runaway civil litigation—typically, cases arising from the same act or pattern of acts of a defendant, yet scattered in many state and federal courts across the country. The crisis, which the Institute terms complex litigation, is real enough. It is best

2. 15 ALI Reporter No. 4, p. 1 (Summer, 1993).

3. AALS Section on Civil Procedure, *Fall 1993 Newsletter*, p. 10.

known for frustrating prompt, orderly, and even coherent resolution of mass tort cases involving a single disaster⁴ or toxic torts.⁵

The Institute's description of the problem was in line with that of other commentators and groups that have taken notice of it. First, complex litigation creates procedural redundancies. "Repeated relitigation of the common issues in a complex case unduly expends the resources of attorney and client, [and] burdens already over-crowded dockets. . . ."⁶ Second, the same phenomenon raises substantive concerns because it "delays recompense for those in need, results in disparate treatment for persons harmed by essentially identical or similar conduct, and contributes to the negative image many people have of the legal system."⁷

The ALI's concern about procedural redundancy follows familiar lines. It enlists policies of judicial economy: sensitivity to the financial and psychic expense of litigation on parties and the scarcity of judicial resources.⁸ Toxic tort cases involving asbestos provide the most vivid example of procedural redundancy in complex litigation:

Asbestos litigation on a large scale began in the mid-1970s and has continued to grow. Estimates by the Federal Judicial Center in 1990 reveal that some 29,466 asbestos personal-injury cases remained pending in the federal courts as of that date. Additionally, it is estimated that as many as 60,000 such cases currently are pending in the state courts. Asbestos also has spawned a great number of ancillary suits seeking to determine responsibility for removing the substance from buildings or to apportion blame among defendants.⁹

The ALI's additional concern over the sacrifice of substantive uniformity is also warranted, although here the lines of the Project's argument are not as distinct.

The opportunity for substantive uniformity occurs whenever multiple claimants, in separate lawsuits, raise the same issues of fact (what the defendant

4. See, e.g., Andreas F. Lowenfeld, *Mass Torts and the Conflict of Laws: The Airline Disaster*, 1989 U. Ill. L. Rev. 157 (1989); Alvin B. Rubin, *Mass Torts and Litigation Disasters*, 20 Ga. L. Rev. 429 (1986); John H. Lowrie, Note, *Air Crash Litigation and 28 U.S.C. Section 1407: Experience Suggests a Solution*, 1981 U. Ill. L. Rev. 927 (1981).

5. See, e.g., *Breast Implant Settlement Proposed*, ABA Journal 18 (December, 1993); Arthur R. Miller & Price Ainsworth, *Resolving the Asbestos Personal-Injury Litigation Crisis*, 10 Rev. Litig. 419 (1991); Linda S. Mullenix, *Beyond Consolidation: Post-Aggregative Procedure in Asbestos Mass Tort Litigation*, 32 Wm. & Mary L. Rev. 475 (1991); Patricia Zimand, *Nation Asbestos Litigation: Procedural Problems Must Be Solved*, 69 Wash. U. L.Q. 899 (1991).

6. Proposed Final Draft, *supra* note 1, Ch. 2, cmt. a.

7. *Id.*

8. "Delayed and laborious as [it] may be in the short run, a multiple-claim or multiple-party lawsuit is usually preferable to multiple lawsuits." Consolidating matters thus "becomes the lesser of two evils, expediting resolution of the entire controversy and avoiding the drain on party and judicial resources caused by inefficient, often redundant litigation." Shreve & Raven-Hansen, *supra* note 1, § 55[B][1].

9. Proposed Final Draft, *supra* note 1, Ch. 2, cmt. b (citations omitted).

did) and law (whether the defendant did wrong). Substantive uniformity occurs if the defendant wins all or loses all of those cases.¹⁰ The arguments for substantive uniformity rests on the belief that, for like cases, a single ruling of law or finding of fact is preferable to conflicting rulings or findings on the same issue. This is not because a uniform ruling or finding will necessarily be the best conclusion a court could have reached. It is rather because, ideally, the question whether a right will ultimately be vindicated in civil litigation should not vary according to idiosyncracies (such as intelligence, personality, and legal philosophy) of the particular decision maker. Whatever advantages or disadvantages exist under the law at a given time should affect all members of society equally.

The value of substantive uniformity is not limited to complex litigation as conceived by the ALI. The principle invites applications when cases rest on totally different facts as well as when they arise from the same act or pattern of acts of a particular defendant.¹¹ Neither this, however, nor realization that substantive uniformity can never be entirely achieved under our law undercuts the force of what appears to be the ALI's objection: when several courts consider whether the same defendant should be accountable under the law and conflicting answers are given, the judiciary looks bad.

For example, can a pilot's error cause the death of airline passenger X, yet not be responsible for the death of passenger Y, who was seated in the plane next to X? Logic and justice say no. Yet the dispersal of lawsuits for the wrongful deaths of X, Y, and other passengers and crew over many state and federal courts can end with inconsistencies of this sort. Proceduralists may have spent so much time looking at the jagged boundaries of res judicata, personal jurisdiction, consolidation, and choice of law that results like the one posed in this example may no longer seem strange. Yet each substantive contradiction doubtless "contributes to the negative image many people have of the legal system."¹²

10. At the same time, substantive uniformity is not offended if one claim is decided differently because of a feature it alone possesses. Substantive uniformity would be served, for example, when the same facts have the legal consequence of victory for all plaintiffs except one, who failed to file his claim within the running of the statute of limitations.

11. In both settings, traditional legal reasoning supports continuity of results. See, e.g., George C. Christie, *Law, Norms and Authority* 44-82 (1982); Loy L. Fuller, *The Morality of Law* 81-82 (1964); Neil McCormick, *Legal Reasoning and Legal Theory* 152-94 (1978). There is wide acceptance for the view that a good judicial decision must explain why the same result would occur in a category of like cases. See, e.g., M.P. Golding, *Principled Decision-Making and the Supreme Court*, 63 *Colum. L. Rev.* 35 (1963); Edward H. Levi, *An Introduction to Legal Reasoning*, 15 *U. Chi. L. Rev.* 501, 501-02 (1948); James R. Murry, *The Role of Analogy in Legal Reasoning*, 29 *UCLA L. Rev.* 833 (1982); Kenneth I. Winston, *On Treating Like Cases Alike*, 62 *Cal. L. Rev.* 1 (1974).

12. See *supra* note 6 and accompanying text. In the words of Professor Kent Greenawalt, "For any well functioning governance, it is as important that decisions seem appropriate as well as that they are appropriate. This is especially true for the courts, which are supposed to dispense evenhanded justice." Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 *Colum. L. Rev.* 982, 999 (1978).

In short, the Institute's concern over problems arising from highly related, yet dispersed, civil cases was entirely justified. It was commendable for the ALI to devote its resources and the valuable time and talents of its members to reducing the problem. Moreover (at least regarding mass disaster and toxic tort litigation¹³), the Institute's main goal for the Project, to advocate clear, sound, and attainable legislative reform, seems both obvious and entirely right.

VI. THE PROJECT'S CURIOUS LACK OF POLITICAL PRAGMATISM

The ALI never disavowed the importance to the Project of clarity, soundness, and legislative appeal. Yet the Institute may have been distracted in pursuit of these attributes by a different goal. If we are to judge from the final product, another (and perhaps competing) objective seems to have been to use the occasion of complex litigation reform to overhaul as much of the law of American civil procedure as possible.

Judge Jack Weinstein offered a sense of this problem when he spoke to the membership shortly before the final vote on the Proposed Final Draft of the Project:

This is such a beautiful intellectual achievement that . . . we may have been seduced into going further than anyone ever had any intention of going. The project was originally designed for mass tort cases. It is now written so that it could apply, at least theoretically, to two cases, or a handful of cases, and it provides the basis for a radical restructuring of almost all litigation

. . . [This is a] radical restructuring of litigation as we know it and it should be limited to mass cases and preferably mega mass cases. . . .

. . . As a political matter, there is no possibility of any such restructuring of litigation being adopted unless it is so limited and unless Congress is informed that this is for the very unusual case that is presenting problems.¹⁴

This paper enlarges on Judge Weinstein's criticism by enlisting pragmatism in two meanings of the term.

The first kind of pragmatism is that found in popular usage and has a meaning akin to common sense—practical assessment by an informed, logical person.¹⁵

13. Whether the Project should have invited application of its reforms to any substantive field is another matter. Proposed Final Draft, *supra* note 1, Ch. 2, Reporter's Note 1 to cmt. a, at 10, states: "Complex litigation is not the province of any single area of the law." The Note goes on to give examples including "patent and trademark suits, products liability actions and securities law violation actions, among others." *Id.*

14. 61 U.S.L.W. 2709, 2710 (May 25, 1993). At the conclusion of his remarks (which will be published as part of the annual proceedings of the Institute), Judge Weinstein stated that he was willing to vote in favor of the Project as it stood, but that its breadth made acceptance by Congress or any other group an impossibility.

15. See 2 The Oxford English Dictionary 1646 (Compact ed. 1973) (defining pragmatism as "[a]

This is how Judge Weinstein uses pragmatism in his critique. The Project is thus unpragmatic because it is politically naive. The main thrust of the Project is to create a model statute to supplant current federal procedural law. Congressional enactment is unlikely, however, because the model statute, in carrying forward the Project's reform positions, is sweeping and, at times, radical.

It is important to remember that the Institute is firing at a small target. Refusal of the courts of a particular state to pay much attention to a restatement does not mean that the ALI has wasted its time.¹⁶ Nor does the Institute commit its resources to development of a model state statute upon the expectation that any particular state will adopt it.¹⁷ The Project, however, really poses a working agenda for only one group—Congress.

V. THE INSTRUMENTAL FAILURE OF PARTS OF THE PROJECT

The second meaning of pragmatism enlisted here comes from jurisprudence and concerns the instrumental success of rules. Success can be measured by whether a rule is intelligible in application, whether the rule achieves purposive results, and whether the rule facilitates (or at least does not obstruct) the operation of other rules.¹⁸ Parts of the Project seem unpragmatic in this sense, as well. The

method of treating history in which the phenomena are considered with special reference to their causes, antecedent conditions, and results, and to their practical lessons").

16. The ALI was able to direct its restatements at a very large target: numerous common-law judges in every state judiciary. Not all observers count the influence of the restatements as a plus, but there seems little disagreement that the restatements were significant in shaping the law of many jurisdictions. See generally Herbert Wechsler, *The Course of the Restatements*, 55 A.B.A. J. 147 (1969); John Honnold, *The Life of the Law* 144-180 (1964); William D. Lewis, *History of the American Law Institute and the First Restatement of the Law* 19-21 (1945); W. Barton Leach, *The Restatements as They Were in the Beginning, Are Now, and Perhaps Henceforth Shall Be*, 23 A.B.A. J. 517 (1937); Mitchell Franklin, *The Historic Function of the American Law Institute: Restatement as Transitional to Codification*, 47 Harv. L. Rev. 1367 (1934).

17. The Institute has been interested in statutory reform from the outset. Its most notable success came (in collaboration with the National Conference of Commissioners on Uniform State Laws) with creation of the Uniform Commercial Code. See generally Grant Gilmore, *The Death of Contract* 69-85 (1974); Lawrence M. Friedman, *A History of American Law* 581-82 (1973); Honnold, *supra* note 16, at 178-79; Herbert F. Goodrich, *The Story of the American Law Institute*, 1951 Wash. U. L.Q. 283, 300-01 (1951).

At the same time, the Project does not represent the first model statute fashioned by the ALI solely for Congress. For examples in the tax field, see Honnold, *supra*, at 179; Goodrich, *supra*, at 301-03. For an example treating federal procedure, see the ALI's Study of the Division of Jurisdiction Between State and Federal Courts (1969), discussed *infra* at notes 52-54.

18. A deeper exposition of the roots and function of pragmatist jurisprudence is unnecessary for this paper. My purpose here is not to promote pragmatist legal theory. I intend rather to use pragmatism as a tool for examining the Project and to let the results speak for themselves. However, for readers curious about legal pragmatism, I will comment on a few aspects of the subject that receive only implicit recognition in the paper.

Debate continues over the importance of pragmatism as legal theory. My view, that pragmatism is a powerful instrument for understanding and valuing law, is developed at some length in two

subject merits a more extensive critique than this paper permits, but I will offer two examples.

A. *Compulsory Intervention*

Compulsory intervention is set out in Section 5.05 of the Project. The section states that a federal transferee court for actions consolidated under the Project may compel the intervention of nonparties with sufficiently related claims, upon a showing that their inclusion would serve the interests of the case on balance. Compulsion to intervene comes from the fact that, whether or not nonparties accept the court's invitation to intervene, they "will be bound by the determinations made to the same extent as a party, unless otherwise provided by law."¹⁹

The concept of compulsory intervention has scant recognition under current law. It is controversial because it violates a basic rule of civil procedure that judgments cannot bind nonparties.²⁰ Some commentators have found that rule too confining,²¹ but others feel it should be preserved.²² Perhaps due process requires the rule, as the Supreme Court has periodically suggested.²³ Or, perhaps it should exist merely as a matter of procedural policy.²⁴

articles. Gene R. Shreve, *Symmetries of Access in Civil Rights Litigation: Politics, Pragmatism and Will*, 66 Ind. L.J. 1 (1990); Gene R. Shreve, *Pragmatism Without Politics—A Half Measure of Authority for Jurisdictional Common Law*, 1991 B.Y.U. L. Rev. 767 (1991). *Symmetries of Access* examines connections between the American philosophical movement of pragmatism and twentieth-century jurisprudence, compares pragmatist legal theory with historical jurisprudence, natural law and positivism, and discusses the therapeutic value of clarification and mediation in pragmatic analysis. *Pragmatism Without Politics* uses the conception of pragmatist legal theory developed in the earlier article to examine various forms of federal procedural law. The critique draws on policies of judicial administration and utilizes a formula similar to that posed in the text accompanying this note.

19. Proposed Final Draft, *supra* note 1, § 5.05(a).

20. At the same time, it is true under federal preclusion doctrine and the laws of most states that a nonparty who deliberately forgoes an opportunity to intervene in a case cannot use that case later for purposes of offensive, nonmutual issue preclusion. See Restatement (Second) of Judgments § 29(3) (1988); Shreve & Raven-Hansen, *supra* note 1, § 113[B][2].

21. See, e.g., Lawrence C. George, *Sweet Uses of Adversity: Parklane Hosiery and the Collateral Class Action*, 32 Stan. L. Rev. 655 (1980); Louis Touton, Note, *Preclusion of Absent Disputants to Compel Intervention*, 79 Colum. L. Rev. 1551 (1979); Michael A. Berch, *A Proposal to Permit Collateral Estoppel of Nonparties Seeking Affirmative Relief*, 1979 Ariz. St. L.J. 511 (1979).

22. See, e.g., Richard A. Epstein, *The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal*, 10 J. L. & Com. 1, 53 (1990); Jack Ratliff, *Offensive Collateral Estoppel and the Option Effect*, 67 Tex. L. Rev. 63, 64 (1988); James R. Pielemeier, *Due Process Limitations on the Application of Collateral Estoppel Against Nonparties to Prior Litigation*, 63 B.U. L. Rev. 383 (1983).

23. See, e.g., *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7, 99 S. Ct. 645, 649 n.7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard.").

24. For recent applications of the rule that strangers to a civil lawsuit may not be precluded by it, see *Georgia v. South Carolina*, 497 U.S. 376, 391, 110 S. Ct. 2903, 2913 (1990); *Martin v. Wilks*, 490 U.S. 755, 109 S. Ct. 2180 (1989). "A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of stranger to those proceedings." *Id.* at

In any event, it was an unforced error for the Project to toss the rule out. Section 5.05 destabilizes procedure by blurring the line between intervention²⁵ and compulsory joinder.²⁶ It endows federal judges with eminent domain-like authority over claims of nonparties. The section leaves involuntary claimants without a means of escape comparable to the opt-out mechanism in class actions. It is likely to intimidate some nonparty claimants into intervening before they have had a sufficient opportunity to prepare their cases.

Consolidation under Chapter 3 of the Project would have covered significant new ground even without the added requirement of compulsory intervention. It is fair to ask then, how much did the Project gain from its insistence on the latter? If the goal is to collect all of the claims arising from the entire complex case in one court, Section 5.05 falls short. Some claimants will not be known to the transferee court. Some claimants who are identified will succeed in demonstrating that they are not ready.²⁷ If the goal is to permit an incomplete disposition of the entire complex case to cover somewhat more ground, is that relative advantage worth the controversy, costs, and confusion attending Section 5.05?

B. The Project's Unfortunate Excursion into Choice of Law

If the ALI went out of its way to be controversial on the subject of intervention, controversy was unavoidable concerning choice of law. Yet the Project's handling of choice of law resembled the strange case of compulsory intervention in one respect—the Project overreached.

The Project cannot be faulted for giving serious thought to including conflicts law in its coverage. As noted earlier, the purpose of consolidation under the Project of many (perhaps most) related claims in a single court is to promote judicial efficiency and substantive uniformity. If the consolidated case splinters at the choice-of-law stage into categories governed by the conflicting laws of different states, then the labor necessary to sort and process claims by category defeats efficiency, and different results required by conflicting state laws defeat substantive uniformity. This is why the Institute devoted Chapter 6 to conflicts matters. The conflicts character of Chapter 6 explains why, unlike other chapters, it is not as

762, 109 S. Ct. at 2184.

25. Fed. R. Civ. P. 24.

26. Fed. R. Civ. P. 19. A strong case for keeping a clear line between rules 24 and 19 was made by the Supreme Court in *Martin*, 490 U.S. 755, 109 S. Ct. 2180. On the two rules generally, see Richard D. Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19*, 60 N.Y.U. L. Rev. 1061 (1985) and Gene R. Shreve, *Questioning Intervention of Right—Toward a New Methodology of Decisionmaking*, 74 Nw. U. L. Rev. 894 (1980).

27. Such uncertainty undercuts the whole purpose of preclusion. Cf. Charles A. Wright et al., *Federal Practice and Procedure* § 4407 (1981) ("Uncertainty intrinsically works to defeat the opportunities for repose and reliance sought by the rules of preclusion, and confounds the desire for efficiency by inviting repetitious litigation to test the preclusive effects of the first effort.").

concerned with increasing the number of claimants in a single lawsuit. Its purpose is rather to subject common issues to the same legal standard.²⁸

By itself, the subject of conflict of laws may give as much cause for despair as the specter of complex litigation.²⁹ Doubts about the coherence and intellectual integrity of modern conflicts theory are rampant among lawyers, judges, law students, and law professors who do not teach the course. Academic lawyers in the conflicts field are more inclined to take the subject seriously, and they write a good deal about it. However, they often seem to be in disagreement. In short, it has become increasingly difficult to find a consensus about what conflicts law is or ought to be.

These realizations appear to have exploded upon the Project leadership at the meeting of the Project Consultative Group in late 1990. Furor there over a draft of Chapter 6 apparently was the reason that the Project did not appear on the agenda of the Association's annual meeting in the following May. The leadership eventually regrouped around a hard-line position on conflicts and stood fast against the arguments of eminent theorists, including the late Professor Donald Trautman, Professor Friedrich Juenger, and Professor Louise Weinberg.

Much of the importance of Chapter 6 turns on Section 6.01, which governs choice of law in mass torts. Section 6.01 consists largely of two ill-matched parts.

The first part of Section 6.01, paragraphs (a) through (c), lays out a sequence of mechanical, territorial rules that tell submissive judges who wins and how to write the opinion. This part of the section reads like assembly instructions for a moderately complicated child's toy. It is so rule-bound that it should delight a judge too busy or too lazy to think about the conflicts issue in his case. In the main, the judge needs only be able to read and to have an understanding of geography sufficient to locate certain case facts (places of injury, conduct, residence, and business).

A case for corsetting judges in this way might exist if it was that easy to produce right results in complex litigation cases, but that does not appear to be true.³⁰ Moreover, even if such regimentation was a good idea, it is naive to think

28. "[I]t would be highly desirable if a single state's law could be applied to a particular issue that is common to all the claims and parties involved in the litigation." Proposed Final Draft, *supra* note 1, Ch. 6, Intro. Note, cmt. c, at 389. Thus, the "objective" both in § 6.01(a) (governing mass torts) and § 6.03(a) (mass contracts lacking effective choice-of-law provisions) is that of administering "a single state's law." *Id.*

29. I have attempted simultaneously to defend choice of law and explain its unpopularity in Gene R. Shreve, *Conflicts Law—State or Federal*, 68 *Ind. L.J.* 907 (1993); and Gene R. Shreve, *Teaching Conflicts, Improving the Odds*, 90 *Mich. L. Rev.* 1672 (1992). The classic in this vein is Arthur von Mehren, *Choice of Law and the Problem of Justice*, 41 *Law & Contemp. Probs.* 27 (1977).

30. The shortcomings of Chapter 6 were addressed eloquently in the remarks of professors Trautman, Juenger, and Weinberg, which will be published by the ALI as part of the proceedings of its 1993 annual meeting.

In addition, Chapter 6 gives every indication of becoming a major topic in conflicts literature. Several members of this symposium are discussing the chapter. A number of discussions of Chapter 6 in draft form have previously appeared. Most express disapproval. See, e.g., Louise Weinberg,

that judges would accept it. As Professor Russell Weintraub observed, "it is probably too late to turn the choice-of-law clock back. Mechanical conflicts rules, like mechanical rules in any field of law, cause covert resistance. An attempt to return to territorial choice-of-law rules would undoubtedly invite, on a greatly accelerated bases, the avoidance techniques used in the past. . . ."³¹

The second part of Section 6.01 seems to acknowledge the folly of micromanaging conflicts decisions and veers sharply toward judicial discretion. Paragraph (d) authorizes departure from the regimen of Paragraphs (a) through (c) to avert "unfair surprise or arbitrary results." Paragraph (e) authorizes courts to "allow more than one state's law to be applied" when "application of a single state's law to all elements of the claims pending against a defendant would be inappropriate." Part two of Section 6.01 is good because it cedes a necessary element of autonomy to federal conflicts judges. But parts one and two are bad in combination because they make Section 6.01 schizophrenic.

This is not to suggest that combining territorial rules and method-based criteria necessarily leads to bad conflicts law. On the contrary, a sensitive combination of the two may produce law superior to that based on only one approach.³² Conflicts decisions under Section 6.01, however, would likely be all over the lot. The first stage provides absolution for the timid or unthinking judge and the second lacks the ballast of a good set of choice-influencing criteria.³³ How could the Project have

Mass Torts at the Neutral Forum: A Critical Analysis of the ALI's Proposed Choice Rule, 56 Alb. L. Rev. 807 (1993) (disapproval); Donald T. Trautman, *Toward Federalizing Choice of Law*, 70 Tex. L. Rev. 1715 (1992) (disapproval); Linda S. Mullenix, *Federalizing Choice of Law for Mass-Tort Litigation*, 70 Tex. L. Rev. 1623 (1992) (disapproval); Russell J. Weintraub, *An Approach to Choice of Law that Focuses on Consequences*, 56 Alb. L. Rev. 701 (1993) (mixed reception); Mary Kay Kane, *Drafting Choice of Law Rules for Complex Litigation: Some Preliminary Thoughts*, 10 Rev. Litig. 309 (1991) (approval).

31. Russell J. Weintraub, *Methods for Resolving Conflict-of-Law Problems in Mass Tort Litigation*, 1989 U. Ill. L. Rev. 131, 133 (1989). I am chagrined to report that *Conflicts Law—State or Federal*, *supra* note 29, at 922, attributes this quotation to Professor Friedrich Juenger. My apologies go to both of these scholars.

32. Professor Weintraub's thoughtful "Choice-Of-Law Rule for Validity of Contracts" is an example. Russell J. Weintraub, *Commentary on the Conflict of Laws 397-98* (1986). On additional possibilities for enlisting the best qualities of both territorial rules and method, see Peter Hay & Robert B. Ellis, *Bridging the Gap Between Rules and Approaches in Tort Choice of Law in the United States: A Survey of Current Case Law*, 27 Int'l Law. 369 (1993); Symeon C. Symeonides, *Revolution and Counter-Revolution in American Conflicts Law: Is There a Middle Ground?*, 46 Ohio St. L.J. 549 (1985).

Neumeier v. Kuehner, 286 N.E.2d 454 (N.Y. 1972), achieved some success in blending territoriality and method in a series of choice-of-law rules for guest-statute accident cases. The *Neumeier* rules have been criticized. See, e.g., Symposium, *Neumeier v. Kuehner*, 1 Hofstra L. Rev. 104 (1973) (contributions by professors Twerski, Sedler, Baade, Shapira and King). Compared to § 6.01, however, they are a model of instrumental clarity and restraint.

33. Policies guiding modern theory embrace the same core concerns that exerted an unacknowledged influence under old theory, which always should have mattered—that we should consider the purpose and intended reach of rules vying for application, try to avoid choices that unfairly surprise a litigant, and be sensitive to the needs of interstate

handled the choice-of-law problem differently? There are doubtless many possibilities, including the following.

First, the Project could have erased the problem of choice between conflicting state laws by displacing all state law with federal substantive rules of liability.³⁴ A reform route through federal substantive law seems clearly within the power of Congress³⁵ and would realize in dramatic fashion the Project's own goals. Congress could place all claims based on such new federal substantive rules within the exclusive jurisdiction of federal courts. Those steps, taken with adjustments in the law of consolidation, venue, and process of the sort now recommended in Chapter 3 of the Project, would make federal transferee courts true magnets for assorted bits of the complex case. This would promote about as much procedural efficiency and substantive uniformity as one could imagine.

It would be unfair to assume that, just because the Project leadership consisted of eminent proceduralists, they were interested only in procedural solutions to the complex litigation problem. At the same time, when we consider the comparative costs, it is fair to ask why the Institute chose instead to erect the Project edifice on diversity jurisdiction. Regarding choice of law, note that in addition to inflicting upon federal judges innately difficult problems of choosing between conflicting state laws, authority to administer a *federal* choice-of-law rule³⁶ rests only on the fact of diversity jurisdiction. Perhaps the Project is correct in arguing that this arrangement is constitutional.³⁷ For that to be true, however, either the obstacle now posed by the *Erie/Klaxon* doctrine³⁸ is not a constitutional requirement,³⁹ or the power of Congress to displace state law is greater than that of the federal

federalism and international cooperation.

Shreve, *Conflicts Law—State or Federal*, *supra* note 29, at 912. For other formulations, see Restatement (Second) of Conflicts of Laws § 6(2) (1971); Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. Rev. 267 (1966).

34. "The obvious and simplest solution to this problem is through the formulation of an unambiguously federal substantive rule." Trautman, *supra* note 30, at 1731.

35. The multistate or multinational character of conflicts issues provide legislative jurisdiction for Congress as a general matter—even outside complex litigation. See Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 Geo. L.J. 1 (1991); Ralph U. Whitten, *The Constitutional Limitations on State Choice of Law: Due Process*, 9 Hastings Const. L.Q. 851, 917-18 (1982).

36. Proposed Final Draft, *supra* note 1, § 2120.

37. *Id.* Ch. 6, Intro. Note, cmt. b.

38. Federal diversity judges are bound by state choice-of-law rules. This is the combined effect of *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938) and *Klaxon Co. v. Stentor Elec. Mfg.*, 313 U.S. 487, 61 S. Ct. 1020 (1941).

Klaxon ended brief uncertainty whether federal conflicts doctrine was still available to federal courts sitting in diversity or was part of the federal general common law that *Erie* invalidated. Ruling it to be the latter, *Klaxon* held that the plaintiff should not be permitted to use federal diversity jurisdiction to obtain a more favorable conflicts law. Shreve & Raven-Hansen, *supra* note 1, § 41[B].

39. Whether *Erie* itself was constitutionally required has long been unsettled. For a survey of authorities divided on the question, see Shreve & Raven-Hansen, *supra* note 1, at § 38[C] n.16. If it was, then presumably so was *Klaxon*.

courts. Neither of these propositions is free from doubt under current law. At best, a diversity-based approach to choice of law adds more layers of complexity to complex litigation.

The Project's explanations for resting reform on diversity jurisdiction are not entirely convincing. It states at the outset:

Obviously, the substantive law in each of the areas in which complex litigation arises also plays a significant role in shaping the phenomenon. There are many problems associated with complex litigation that ultimately might be addressed best by reshaping existing legal theories of forms of relief, by recognizing new ones, or by developing administrative or social insurance models for delivering compensation, when appropriate. However, it is outside the scope of this Project to attempt to deal compressively with substantive law in addition to the many procedural aspects of the complex litigation problem. The specific substantive issues implicated vary from one context to the next and may be addressed most profitably by experts in each relevant field of substantive law. . . .⁴⁰

Not so fast. It begs the question to suggest, as the Project does here, that its large procedural agenda does not leave much time for examining possibilities for federal substantive reform. The absence of substantive reform is a major reason why the procedural agenda is so large. For reasons noted earlier, whole chapters of the Proposal (state court consolidation,⁴¹ federal-state consolidation,⁴² choice of law⁴³) would shrivel or disappear if the ALI had addressed federal substantive reform. Also, the passage quoted above assumes uncritical acceptance of the Project's decision to launch a broad-spectrum attack on the problems of complex litigation.⁴⁴ As the remarks of Judge Weinstein make clear,⁴⁵ this choice was neither inevitable nor particularly wise. It does not excuse neglect of substantive reform.

An observation made in the introduction to Chapter 6 may be closer to the mark:

[T]he difficulties associated with complex litigation identify it as a national problem. Certainly, the most direct way to attempt to solve the issues posed would be to adopt national standards to govern the conduct of individuals or entities who are engaging in activity having interstate effects and who now are controlled by multiple, sometimes conflicting, state laws. But the possibilities of reaching a political consensus on what the appropriate federal standard should be, as well as expecting Congress

40. Proposed Final Draft, *supra* note 1, Ch. 1, cmt. b.

41. *Id.* Ch. 4.

42. *Id.* Ch. 5.

43. *Id.* Ch. 6.

44. *See supra* note 13.

45. *See supra* text accompanying note 14.

to intrude so directly into areas historically governed by state law, appear so slim that it becomes important to look for an alternative that could improve the current processing of complex litigation in the courts—in other words, a procedural solution.

Here the ALI does sound a note of political pragmatism, and its assessment may be correct. Yet it is regrettable that the procedural content of the Proposal is so experimental and freewheeling that it stands no real chance of congressional approval either. Ultimately, the Project appears to have squandered any political advantage it might have gained by skirting substantive reform.

Even when we accept the Project's diversity-based approach, there were preferable alternatives to Section 6.01. First, the Proposal could have omitted discussion of choice of law entirely, leaving open the possibility that Congress might supplement the Project's statute with choice-of-law material, or that the matter might become a province of federal common law. Congress has, in fact, come close to enacting a conflicts statute for mass torts in recent years,⁴⁶ and the idea of a federal common law of conflicts has some support.⁴⁷ Granted, neither of these might occur, or the law made in either instance might be less than ideal. However, the two prospects may look genuinely attractive when compared to Chapter 6.

Second, the Project could have addressed choice of law in complex cases, but without the overbearing rule paraphernalia it created in Chapter 6. We must keep in mind that codifying conflicts law goes against tradition. Choice of law is one of the few enclaves of common law remaining in our jurisprudence. Except for two jurisdictions with civil law traditions, legislatures have generally been slow to move into the field.⁴⁸ This may explain why the federal conflicts bill for mass torts⁴⁹

46. For descriptions of the bill and its fortunes in Congress, see Thomas M. Reavley & Jerome W. Wesevich, *An Old Rule for New Reasons: Place of Injury as a Federal Solution to Choice of Law in Single-Accident Mass-Tort Cases*, 71 *Tex. L. Rev.* 1, 5-8 (1992); Charles G. Geyh, *Complex-Litigation Reform and the Legislative Process*, 10 *Rev. Litig.* 401 (1991). Three times the bill passed the House, but it has not been able to get through the Senate. It is currently pending as H.R. 1100, 103d Cong., 1st Sess. (1993).

47. See, e.g., Friedrich K. Juenger, *Mass Disasters and the Conflict of Laws*, 1989 *U. Ill. L. Rev.* 105, 109; Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 *U. Pa. L. Rev.* 7, 39 (1986).

48. For discussions of developments in these jurisdictions, Louisiana and Puerto Rico, see Symeon C. Symeonides, *Private International Law Codification in a Mixed Jurisdiction: The Louisiana Experience*, *Rabels Zeitschrift* (Max-Planck-Institut 1993); Symeon C. Symeonides, *Louisiana's New Law of Choice of Law for Tort Conflicts: An Exegesis*, 66 *Tul. L. Rev.* 677 (1992); Symeon C. Symeonides, *Revising Puerto Rico's Conflicts Law: A Preview*, 28 *Colum. J. Transnat'l L.* 413 (1990). Statutory choice of law in the United States otherwise tends to be a relatively isolated occurrence: for example, some choice-of-law provisions are found in uniform state laws, see Thomas G. Ryan, *Reasonable Relation and Party Autonomy Under the Uniform Commercial Code*, 63 *Marq. L. Rev.* 219 (1979), and some are found in borrowing statutes and workers' compensation statutes, see Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 357, 370 (1992).

49. See *supra* note 43.

takes a fairly modest approach, offering a series of choice criteria, but not attempting to alter the content of American conflicts law. Even more cautious, an ABA study proposed a federal conflicts statute for complex cases that stated: "Whenever State law supplies the rule of decision, the court may make its own determination in light of reason and experience as to which State(s) rule(s) shall apply . . ."⁵⁰ In contrast, Chapter 6—with its initial suspicion of judicial discretion and emphasis on territorial, mechanical answers—seems closer in spirit to the positions of critics who have argued for the radical transformation of modern conflicts theory.⁵¹

It comes down to this. To promote the Project's core objectives of judicial efficiency and substantive uniformity in the complex case, the central adjustment necessary for choice of law is that the same substantive law govern as many claims as possible. Whether or how the quality of law producing that unitary choice could be improved is a different and relatively peripheral question. Other diversity-based proposals for complex litigation reform appear to grasp this distinction.⁵² Why the Project does not, why it instead uses the occasion of complex litigation reform to reinvent American conflicts theory, is puzzling.

Some experimentation, of course, is unavoidable if current legal barriers to consolidation are to be eliminated. What I fault the Project for is experimentation that is both needless and unsound. The tack the Project takes in Chapter 6, like its adoption of compulsory intervention in Section 5.05, is an occasion of unforced error.

VI. EPILOGUE

The latter portion of this paper has dwelt on some of the Proposal's frailties. At least as much time could have been spent praising its various strengths. Granted, the Proposal embodying Project reforms will not be adopted by Congress in anything close to its entirety. Yet it may influence smaller changes in federal procedural law. Moreover, the Proposal and the process leading to its creation have been tonic for the academic community. Perhaps the Project's greatest contribution will be to inform a generation of proceduralists of the most important and difficult issues of the day.⁵³

50. ABA Commission on Mass Torts Report to the House of Delegates, Appendix D: Model Federal Mass Tort Jurisdiction Reform Act, § 106.

51. See, e.g., Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249 (1992); Gottesman, *supra* note 35.

52. See *supra* notes 47 and 48 and accompanying text. Cf. Report of the Federal Courts Study Committee 44-45 (1990) (recommending complex litigation reform but declining to take a position on choice of law).

53. Such a result would not be accidental. A leading figure in the early history of the ALI once wrote of the restatements: "It has been hoped from the beginning of the Institute's work that one of the collateral benefits derived from it would be the stimulation of American legal scholarship through discussion of the problems met with in the course of restatement. An examination of the pages of our law reviews . . . will show that this hope has been realized to the full." Herbert F. Goodrich,

If this prediction proves accurate, the impact of the Proposal will be a good deal like that of the Institute's *Study of the Division of Jurisdiction Between State and Federal Courts*.⁵⁴ The impact of the Study in changing federal statutory law was modest at best.⁵⁵ The Study drew its share of criticism.⁵⁶ Yet it energized thought about policies of federal jurisdiction and concerns of federalism. In its own way, the Project's contribution may be as great.

Institute Bards and Yale Reviewers, 84 U. Pa. L. Rev. 449, 450 (1936).

54. American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* (1969). For descriptions of the Study, see Charles A. Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 Wash. & Lee L. Rev. 185 (1969); Richard H. Field, *Jurisdiction of Federal Courts—A Summary of American Law Institute Proposals*, 46 F.R.D. 141 (1969); Symposium, *The American Law Institute's Proposals on the Division of Jurisdiction Between State and Federal Courts*, 17 S.C. L. Rev. 659 (1965) (contributions by professors Charles A. Wright and Richard H. Field, and by attorney John P. Frank).

55. The model statute providing the Study's structure was never adopted as such by Congress. Some smaller pieces of the package became law in time. For example, elimination of a jurisdictional amount requirement for general federal question jurisdiction (posed in § 1311 of the Study's model statute) finally occurred through amendment of 28 U.S.C. 1331 in 1980. Act of Dec. 1, 1980, Pub. L. No. 96-486, 94 Stat. 2369. However, it is difficult after the passage of so much time to assume that the change was greatly influenced by the Study. Moreover, many Study recommendations are still at odds with federal law. Removal of state cases to federal court on the strength of federal question defenses (authorized in § 1312 of the Study's model statute) is an example.

56. E.g., David P. Currie, *The Federal Courts and the American Law Institute—Part I*, 36 U. Chi. L. Rev. 1 (1968); J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 Wayne L. Rev. 317 (1967); John P. Frank, *Federal Diversity Jurisdiction—An Opposing View*, 17 S.C. L. Rev. 677 (1965).

