* 1. Class action
  2. Problem is the certification of the action – for nationwide case

1. Need to make sure that the interests of the class are adequately represented by the representative Ps
   * 1. Choice of law can be a problem
     2. If law used for repr P is different from law used for other Ps, then no adeq repr of interests
     3. Can scuttle a class and lead to separate suits
   1. Agent Orange - 2 million potential Ps
      1. Transferred to EDNY
      2. Around 1000 consolidated as class
      3. But 400 opted out
      4. but they are consolidated for pretrial motions
   2. 1st ct claimed could be solved by body of fed common law
      1. may have thought Erie meant no fed common law
      2. no fed common law in diversity cases, but does exist if there is a sufficient federal interest
      3. is this an example

military connection suggests federal interest

* 1. 2nd Cir on appeal rejected fed common law approach
  2. So trial ct must make choice of law decisions of all states that had cases, like in transfer, to determine whether it can proceed as class action
     1. overwhelming too many states laws, and approaches
     2. So what does he do?
     3. Says under all approaches 2nd Rest, interest analysis, Leflar, 1st Rest
        1. all states would choose to apply “national consensus” law
        2. Idea that they all would come out the same is crazy
  3. What would 1st Rest be?
     1. Place where harm manifested itself
        1. idea that any would choose nat consensus law is insane
           1. none of them would
     2. notice, knew he could be reversed upon appeal, but was not an appealable order (at time)
        1. except under mandamus
           1. 2nd cir upheld bc very light review
        2. then case settled (which was what ct wanted)
  4. Sometimes it is argued that class action justifies separate choice of law treatment
  5. Kramer thinks no: If choice of law is substantive (in the sense that it defines the parties' rights), then courts should not alter choice-of-law rules for complex cases. The reasoning is straightforward. We start with claims that everyone concedes would otherwise be adjudicated under different laws. We combine these claims, whether through transfer and consolidation or by certifying a class, on the ground that we can adjudicate the parties' rights more effectively and efficiently in one big proceeding. So far, so good. Then, having constructed this proceeding, we are told we must change the parties' rights to facilitate the consolidated adjudication. And that makes no sense. If the reason for consolidating is to make adjudication of the parties' rights more efficient and effective, then the fact of consolidation itself cannot justify changing those rights. To let it do so is truly to let the tail wag the dog.
     1. Green: BUT if choice of law is substantive, then choice of law rules of states whose law is chosen should apply

So – if forum law on choice of law can be used that suggests it is procedural

if so, then more likely that you can change choice of law approach in class action in line with procedural concerns

1. One thing to think about is whether it really is so hard to have subclasses on the basis of different states’ rules
   * 1. Usually not that many rules out there

note, often representative Ps, in the interest of certification of class, will consent to the law that is most generous to the D

call it an election of remedies? really like (partial) settlement

for Ps from states with law that is better for them, the states can’t really object – the states give Ps rights- not saying that they must enforce them

-- but Ds will resist anyway, claiming that some unnamed Ps are being treated unfairly compared to other members of the P class

- they are really worried about themselves though

another solution is using defendant’s home law

1. if more protective of D then it is an election of remedies agai
2. another problem
   1. Cyberspace
   2. Problem of effects on many different jurisdictions at same time
   3. And no clear idea of a place where things happen
   4. problems with PJ and choice of law
3. Are these problems so much greater that the old rules can’t apply?
   1. Notice does not matter that there is a virtual world
      1. All people really care about is effect in real world
      2. So argument has to be effects are too great, too dispersed
   2. BUT are they?
      1. Telephone
      2. Mass printing
      3. these already existed and choice of law accommodated it
   3. Three schools of thought concerning internet and choice of law
      1. Need to change choice of law analysis
      2. Need new substantive law (not tied to any sovereign)
      3. No big deal (Green’s view)
   4. Choice of law clauses entered into on internet often solve problem

**Const’l Restrictions on choice of law**

Have seen much variation in sub-constitutional choice of law

– what are outer const’l limits?

SCt starts out with high expectations

* looks like constitutionalization of choice of law
* Dick and Bradford
* But retreat later
* Very light restrictions in the end
* Also initially looks like big difference betw FF&C and due process
* Also becomes minimal but here some important difference remain

Odd – FF&C sounds like it is there to decide choice of law

EG

* Husband and wife from California get in accident in Nevada
* Nevada has spousal immunity
* California doesn’t
* Case brought before Nevada court, which uses 1st Restatement, which law applied?
  + NV
* Case brought before California court which uses interest analysis, which law applied?
  + CA

Each can apply own law?

* that does not seem like a consistent constitutional order
* compare fed/state  
  - fed law trumps state law in fed *and state* ct
* one would think that the constitution requires consistent choice of law

Home Ins Co v Dick (US 1930)

Dick – citizen of TX – sues Mex Ins Co for boat fire covered by ins contract

* PJ through garnishment by ancillary writs against two NY corps that had reinsurance contracts with Mex Co
  + Assume suit against Mex Co succeeds
    - Then there will be a debt from reins cos to Mex co
    - resins cos are present in Tex, could attach it there

So really suits against reins cos, but they can assert the defenses of the Mexican ins co

* defense, not within one year as identified in contract
* this limitation is OK under MX law, and choice of MX law provision is in contract
* K issued in MX to Mexican that was assigned to Dick
* Premiums paid in MX, payment under ins contract to be in MX pesos, loss in MX waters
* At time of loss Dick was resid of MX
* Dick appeals to TX statute forbidding contractual limitations on suing that are less than 2 years –
* article 5545 of the Texas Revised Civil Statutes
* 'No person, firm, corporation, association or combination of whatsoever kind shall enter into any stipulation, contract, or agreement, by reason whereof the time in which to sue thereon is limited to a shorter period than two years. And no stipulation, contract, or agreement for any such shorter limitation in which to sue shall ever be valid in this State.'
* TX cts applied TX law
* SCt reversed
* applying TX law violates due process
* Why not say this is a question of statutes of limitations, which is clearly governed by lex fori?

“The statute is not simply one of limitation. It does not merely fix the time in which the aid of the Texas courts may be invoked. Nor does it govern only the remedies available in the Texas courts. It deals with the powers and capacities of persons and corporations. It expressly prohibits the making of certain contracts.”

* + TX law is really addressing the contract

Hypo:

What if the contract said that the recovery was not possible unless the service in the suit was in-hand (and such specification was valid under Mexican law)?

* forum law would override contract, but why can’t a procedural interest of forum do so?
* ct suggest applying forum law would be OK in that case

It is true also that a state is not bound to provide remedies and procedure to suit the wishes of individual litigants. It may prescribe the kind of remedies to be available in its courts and dictate the practice and procedure to be followed in pursuing those remedies. Contractual provisions relating to these matters, even if valid where made, are often disregarded by the court of the forum, pursuant to statute or otherwise. But the Texas statute deals neither with the kind of remedy available nor with the mode in which it is to be pursued. It purports to create rights and obligations. It may not validly affect contracts which are neither made nor are to be performed in Texas.

hypo:

* Mexico builds in a one year statute of limitations into contract cause of action
  + the limitations period is not actually specified in the contract
  + may the Texas court use its two-year statute of limitations anyway?
  + ct punts on question…
* It is true that a state may extend the time within which suit may be brought in its own courts if, in doing so, it violates no agreement of the parties. And, in the absence of a contractual provision, the local statute of limitation may be applied to a right created in another jurisdiction even where the remedy in the latter is barred. **[Whether a distinction is to be drawn between statutes of limitation which extinguish or limit the right and those which merely bar the remedy we need not now determine.]** In such cases, the rights and obligations of the parties are not varied. When, however, the parties have expressly agreed upon a time limit on their obligation, a statute which invalidates the agreement and directs enforcement of the contract after the time has expired increases their obligation and imposes a burden not contracted for.

BUT does suggest that even if TEX law was understood as procedural it could not override a limitations period specified in the contract that is valid under the applicable law of contracting

* Deprives garnishees of property w/ due process
* BC no contact w/ TX at the time of contracting
* The Texas statute as here construed and applied deprives the garnishees of property without due process of law. A state may, of course, prohibit and declare invalid the making of certain contracts within its borders. Ordinarily, it may prohibit performance within its borders, even of contracts validly made elsewhere, if they are required to be performed within the state and their performance would violate its laws. But, in the case at bar, nothing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas.

Why due process rather than FF&C?

After all FF&C applies to laws, not just judgments

* Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.
* BUT not laws of other countries
* BUT due process does apply to aliens – MX company is the one being denied due process (also reinsurers)
  + Notice that this has nothing to do deference to Mexican interests
  + probably has to do with expectations of parties
* attempt to constitutionalize the place of contracting rule?
* probably not
* Dick is written by Brandeis and Brandeis dissented in earlier case
  + Dodge –
    - Mo resident purchases insurance from NY ins co at MO office
    - Applied for loan on ins policy
    - Accepted in NY
    - defaulted on loan
    - Under term of policy and NY law the ins co could cancel policy to repay loan
    - MO law does not allow cancellation of policy
    - insured died and widow wants to collect
      * MO ct applied MO law
      * SCt reversed
        + Loan contract entered into in NY
        + so NY law applied
        + Despite manifest MO interest

Really Brandeis is trying to change Dodge

So not place of K rule constitutionalized

* + better to say a question about party expectations
  + Could never have anticipated application of MX law
* another important element
  + Dick claimed publ policy exception allows ct to apply TX law
  + Dick urges that article 5545 of the Texas law is a declaration of its public policy; and that a state may properly refuse to recognize foreign rights which violate its declared policy. Doubtless, a state may prohibit the enjoyment by persons within its borders of rights acquired elsewhere which violate its laws or public policy; and, under some circumstances, it may refuse to aid in the enforcement of such rights. But the Mexican corporation never was in Texas; and neither it nor the garnishees invoked the aid of the Texas courts or the Texas laws. The Mexican corporation was not before the court. The garnishees were brought in by compulsory process. Neither has asked favors. They ask only to be let alone.
  + Point is Dick’s suit in under MX law and so can’t use publ policy exception to get rid of MX defense – like Holzer

FF&C

Bradford Elect Light v Clapper

Clapper – citizen of VT – worked for Bradford (VT corp w/ PPB in VT)

Clapper sent to NH to take care of some fuses

* accident
* electrocuted
* administrator chooses to sue in NH
* NH allows election of common law or workers comp
* VT requires you to waive out of workers comp in beginning of relationship
* NH ct applied NH law
  + SCt reversed
* Start with choice of law analysis
  + 1st rest?
    - Place of injury – NH
    - so ct is saying 1st Rest is unconstitutional
* Why talk about state interests rather than party expectation?
  + D sent him to NH
  + could anticipate NH law
* Conclusion that FF&C requires application of VT law
* Because Vt policy gravely impaired if law not applied
  + What about NH interest in its tort law applying?
    - * it has a deterrence interest

Ct suggests a greatest interest rule or comparative impairment rule is constitutionally mandated

Pacific Employers Ins. Co. v. Industrial Acc. Comm’n (US 1939)

P is from Mass, employed by Mass D, sent to work in CA and injured there. P files workers comp claim in CA

Defendant raises defense of MA law, which has lower recovery

Ct allows CA to apply law

* here CA has interest
* “Although Massachusetts has an interest in safeguarding the compensation of Massachusetts employees while temporarily abroad in the course of their employment, and may adopt that policy for itself, that could hardly be thought to support an application of the full faith and credit clause which would override the constitutional authority of another state to legislate for the bodily safety and economic protection of employees injured within it. Few matters could be deemed more appropriately the concern of the state in which the injury occurs, or more completely within its power.”
* no balancing anymore
  + basically overruled Bradford
  + just need a legitimate interest for a state to extend its law to an event
  + does not have to be stronger interest