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Complex Litigation and the State Courts: Constitutional and Practical Advantages of the State Forum over the Federal Forum in Mass Tort Cases

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ARTICLES

Complex Litigation and the State Courts: Constitutional and Practical Advantages of the State Forum Over the Federal Forum in Mass Tort Cases

By MARK C. WEBER*

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Introduction

There is a paradox in current proposals for law reform in the field of complex litigation. Numerous authorities have proposed the transfer of mass tort cases, such as those that concern mass disasters and widely distributed product injuries,¹ from dispersed state and federal trial courts to consolidated proceedings in the federal district courts. These authorities include the American Law Institute,² the American Bar Association,³ the House Judiciary Committee,⁴ the Federal Courts Study Committee,⁵ and leading academics.⁶ The paradox is

1. No more elaborate definition of "mass tort cases" will be offered here. The term covers at least the cases that arise from a single-incident disaster in which there are many victims, such as a plane crash, and those that arise from a defective product that injures many people. It may also cover cases that arise from environmental contamination of a single site. See generally 3 HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 17.06 (2d ed. 1985). Some of the proposals discussed in this Article furnish their own definitions. A recent law review article contains an exhaustive review of the definition of complex litigation. Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1692-1734 (1992).

2. AMERICAN LAW INSTITUTE, *COMPLEX LITIGATION PROJECT* ch. 5 (Proposed Final Draft 1993) [hereinafter ALI].

3. AMERICAN BAR ASS'N COMM'N ON MASS TORTS, *REPORT TO THE HOUSE OF DELEGATES* (Nov. 1989) [hereinafter ABA].

4. H.R. 3406, 101st Cong., 2d Sess. (1990).

5. FEDERAL COURTS STUDY COMMITTEE REPORT 44-45 (1990) [hereinafter FCSC].

6. John McCoid, *A Single Package for Multiparty Disputes*, 28 STAN. L. REV. 707 (1976); Linda S. Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039 (1986); Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7 (1986); see Allen R. Kamp, *The Shrinking Forum: The Supreme Court's Limitation of Jurisdiction—An Argument for a Federal Forum in Multi-Party, Multi-State Litigation*, 21 WM. & MARY L. REV. 161 (1979) (supporting statutory provisions for consolidation of multistate cases in the federal courts). This view, however, is hardly universal among academics. See Richard A. Epstein, *The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal*, 10 J.L. & COM. 1 (1990) (criticizing consolidated proceedings); Roger H. Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, U. ILL. L. REV. 69 (1989) (criticizing

that the federal courts are poorly suited to handle those cases for a number of readily apparent reasons.

First, though federal district courts are required under the *Erie* doctrine⁷ to apply state law to these cases, they are unable to contribute to its sensible development and application in the mass tort area. Any attempt to anticipate changes in state law would be unlikely to make a positive contribution to legal development because of the political and popular isolation that marks the institutional perspective of the federal judiciary. The alternative of ignoring the *Erie* doctrine and creating a federal common law of mass tort would violate federalism principles. The policy and constitutional underpinnings of *Erie*, as well as the majoritarian character of elected state courts, support the maintenance of the *Erie* doctrine in the field of mass torts. Indeed, most of the major proposals suggest retaining it.⁸

Second, the federal courts should not allocate their scarce resources of time and effort to mass tort cases, which must be controlled by state law. The federal courts' expertise lies in interpreting federal statutory and constitutional provisions. Just as their political isolation makes federal courts unsuited for developing state tort law, it makes them the best protectors of individual rights; they should spend their time on civil rights and other federal law cases.

Several proponents of change recognize these problems in their proposals for federal consolidation of mass tort actions.⁹ They view

some aspects of consolidated proceedings). Various proposals call for use of federal class action procedures in mass tort cases, a form of consolidation in the federal district courts that would presumably displace state court individual proceedings. Bruce H. Nielson, Note, *Was the 1966 Advisory Committee Right?: Suggested Revisions of Rule 23 to Allow More Frequent Use of Class Actions in Mass Tort Litigation*, 25 HARV. J. ON LEGIS. 461 (1988); Patricia Zimand, Note, *National Asbestos Litigation: Procedural Problems Must Be Solved*, 69 WASH. U. L.Q. 899 (1991). Other sources proposing expansion of the federal class action rules include Briggs L. Tobin, Comment, *The "Limited Generosity" Class Action and a Uniform Choice of Law Rule: An Approach to Fair and Effective Mass-Tort Punitive Damage Adjudication in the Federal Courts*, 38 EMORY L.J. 457 (1989); Note, *Class Certification in Mass Accident Cases Under Rule 23(b)(1)*, 96 HARV. L. REV. 1143 (1983) [hereinafter Note, *Class Certification*]. A source discussing the use of bankruptcy procedures for mass torts is Note, *The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings*, 96 HARV. L. REV. 1121 (1983) [hereinafter Note, *Bankruptcy*].

7. See *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). This point is developed further in text accompanying notes 52-118.

8. ABA, *supra* note 3, at 29-34 (recommendation that state law apply, but with federal choice of law rule); ALI, *supra* note 2, ch. 6, at 375 (same); H.R. 3406, § 6 (same); Rowe & Sibley, *supra* note 6, at 37 (same); see FCSC, *supra* note 5, at 45 (not addressing changes to choice of law rules).

9. ABA, *supra* note 3, at 29 (noting difficulties of applying state law); ALI, *supra* note 2, at 208 (discussing *Erie* problems and burdens on federal courts in deciding cases that lack uniquely federal interests), and § 5.01 comment c, at 281-82 (same); FCSC, *supra*

them as the price to pay for the important judicial economy advantage of consolidation.¹⁰ But there is an unexamined premise to this reasoning: that consolidation must take place in a federal, as opposed to a state, forum.¹¹

State courts are now highly desirable forums to consolidate tort cases from other states. Barriers to aggregation of cases in state courts have fallen;¹² the larger states and many smaller ones have made changes in rules and practice to handle cases of extreme complexity in an efficient manner.¹³

A number of doctrinal developments have facilitated these changes. State court territorial jurisdiction has broadened.¹⁴ The doctrine of forum non conveniens has been all but eliminated in Texas and some other states.¹⁵ Restrictive venue rules have disappeared.¹⁶

note 5, at 45 (acknowledging workload increase for federal courts); Mullenix, *supra* note 6, at 1077 (proposing federal common law of mass tort to avoid pervasive *Erie* problems in consolidated product liability actions); Rowe & Sibley, *supra* note 6, at 45-46 (acknowledging state law basis of cases to be consolidated), 47 (discussing concern about federal docket congestion). See Robert W. Kastenmeier & Charles Gardner Geyh, *The Case in Support of Legislation Facilitating the Consolidation of Mass-Accident Litigation: A View from the Legislature*, 73 MARQ. L. REV. 535, 562 (1990) (noting objection to H.R. 3406 based on the states' primary responsibility for resolving state law disputes).

10. See sources cited *supra* note 6.

11. A handful of sources have considered the possibility of consolidation in the state courts. In 1982, Professor Schroeder advanced a state court consolidation proposal. Elinor P. Schroeder, *Relitigation of Common Issues: The Failure of Nonparty Preclusion and an Alternative Proposal*, 67 IOWA L. REV. 917 (1982). A 1987 Yale Law Journal note also brought forward a proposal. George T. Conway III, Note, *The Consolidation of Multistate Litigation in State Courts*, 96 YALE L.J. 1099 (1987). Most recently, Professor Resnick has noted the possibility of a tribunal composed of the courts of different states to handle mass tort cases. Judith Resnick, *From "Cases" to "Litigation"*, 54 LAW & CONTEMP. PROBS., Summer 1991, at 5, 56. The American Law Institute's consolidation proposal also has a state court transfer and consolidation component. Finally, the Commissioners of Uniform State Laws have proposed a uniform state court transfer and consolidation act. Nevertheless, given the number and prominence of proponents of federal consolidation, these voices are isolated cries in the procedural wilderness. Moreover, none of these proposals (save Professor Resnick's) appears to view state court consolidation as an alternative to transferring cases from state to federal courts. Either they are adjuncts to federal transfer and consolidation proposals, or they are conceptualized independently of the federal consolidation movement.

The literature on federal consolidation, on the other hand, is huge. See generally ABA, *supra* note 3, at 1c-10c (bibliography); Linda S. Mullenix, *Selected Bibliography on Complex Litigation*, 10 REV. LITIG. 561-84 (1991) (selected bibliography).

12. See *infra* text accompanying notes 219-21.

13. See *infra* text accompanying notes 222-24.

14. See *infra* text accompanying notes 241-49.

15. See *infra* text accompanying notes 267-68.

16. See *infra* text accompanying notes 269-70.

Specific procedures exist to identify and expedite cases that are likely to become complex.¹⁷

Efforts have already begun to promote transfer and consolidation in state courts. In 1991, the Commissioners of Uniform State Laws promulgated a uniform act on interstate consolidation;¹⁸ at least one state has already adopted it.¹⁹ The American Law Institute's proposal for transfer and consolidation of cases in federal courts includes a proposal for interstate consolidation of cases in state courts,²⁰ and thus provides an additional model for future developments. So do existing interstate cooperation statutes, such as the Parental Kidnapping Prevention Act.²¹ Finally, consolidating mass tort cases in state courts may be the path of least political resistance in efforts to achieve the efficiencies of combined treatment of common issues.²²

Nevertheless, some doctrinal problems will hamper any form of state court consolidation of cases whose complexity comes from interstate injuries or disasters.²³ Some limits still exist on territorial jurisdiction and venue. No consistent system exists among states to defer to other states' assertions of jurisdiction, by application of abatement or abstention. Existing full faith and credit doctrine makes the first final decision the binding one, and so creates incentives for races to the courthouse between potential litigants. Litigants may be skeptical about the impartiality and skill of the judiciary in many states. Each of these problems has its own solutions, however, and all of them combined are not as difficult as the problems with federal transfer and consolidation.

Enhanced consolidation of mass tort cases in state courts could take one of two forms. In the first form, each state would act independently to strengthen its ability to handle complex tort litigation, increasing its willingness to take jurisdiction of cases filed within its borders and consolidating them into single proceedings. At the same time, courts could use door-closing doctrines to discourage the filing of cases that would detract from the efficiency advantages of larger, ongoing suits in other states. The second form would be the creation of an interstate compact and a uniform law in each participating state

17. See *infra* text accompanying notes 216-18.

18. UNIFORM TRANSFER OF LITIGATION ACT, 14 U.L.A. 78 (Supp. 1992).

19. S.D. H.B. 1337 (enacted Mar. 13, 1992).

20. ALI, *supra* note 2, at 205, 559.

21. 28 U.S.C. § 1738A (1993).

22. See *infra* text accompanying notes 235-39.

23. For discussion of these problems and proposed solutions to them, see *infra* text accompanying notes 293-316.

to permit the voluntary or compulsory transfer of cases filed in one state to magnet forums handling the consolidated proceedings in another state. Each of the two approaches has merits and demerits. However, either would be superior to the federal alternative.

This Article explains the difficulties with consolidation of mass tort cases in the federal courts. It considers the strengths of the state court alternative, and puts forward solutions to some of the doctrinal problems that might otherwise impede consolidation of mass tort cases in state courts. Part I examines the existing proposals for transfer and consolidation of mass tort cases in the federal courts. It catalogs the problems with development of the law under the *Erie* doctrine that these proposals would cause. It considers the alternative of a federal law of mass tort, but explains the damage to federalism that approach would cause. It then takes up the question of allocating federal judicial resources to decide mass tort cases. Part II considers the advantages of consolidation of mass tort cases in state settings: those stemming from consolidation itself, from state practice developments, and from political considerations. Part III takes up various doctrinal and practical problems with state court consolidation of mass torts. On the doctrinal side, it addresses constitutional doubts, along with the problems of jurisdiction, forum non conveniens, choice of law, and conflicting jurisdiction. On the practical side, it discusses procedural disuniformities and some potential problems with judicial personnel.

The state forum is the undiscussed and undeveloped alternative to federal consolidation of mass torts. Its potential for achieving efficiency gains, while not disrupting important political and judicial structures, make the state forum superior for mass tort consolidation.

I. Federal Consolidation of Mass Torts

The movement for federal consolidation of complex cases began with the promotion of the Federal Rules of Civil Procedure. Proponents urged liberalization of strict common law joinder rules so that "one lawsuit [could] grow where two grew before."²⁴ Complex lawsuits based on federal statutory claims soon appeared.²⁵ Expansive

24. ZECHARIA H. CHAFEE, JR., SOME PROBLEMS OF EQUITY 149 (1950) ("In matters of justice, . . . the benefactor is he who makes one lawsuit grow where two grew before."); see *Mosley v. General Motors Corp.*, 497 F.2d 1330, 1332-33 (8th Cir. 1974) (discussing purpose behind joinder provisions in federal rules).

25. See FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION § 33.1 (2d ed. 1985) (discussing early complex cases under antitrust laws).

readings of the constitutionally permissible federal jurisdiction under both Article I²⁶ and the diversity²⁷ and federal question²⁸ provisions of Article III opened the door to new federal jurisdiction for consolidated tort cases that would otherwise have been handled by the state courts. By the mid-to-late 1980s, a number of proposals for expanded jurisdiction had surfaced.

A. Proposals for Federal Consolidation

The proposals for federal district court consolidation of mass tort cases from state and federal courts have more similarities than differences. Those from the American Law Institute, the American Bar Association, the House Judiciary Committee of the 101st Congress, the Federal Courts Study Committee, and leading academic commentators all have as their centerpiece the transfer of mass tort cases from dispersed state and federal courts to a single federal district court.²⁹

The American Law Institute (ALI) proposal employs a judicial panel to consolidate complex cases, including both single incident mass disaster litigation and widely dispersed product injury suits involving the same or similar products, into single federal forums.³⁰ Federal jurisdiction would be expanded to accommodate these magnet cases. The expansion would extend supplemental jurisdiction to cases that would otherwise be subject only to state court jurisdiction but that arise from the same transaction or occurrence or series of transactions or occurrences as the federal action.³¹ A federal choice of law rule would be imposed for the federal courts' use.³² Expanded removal provisions would bring additional state cases to the federal courts, subject only to highly limited conditions and exceptions.³³

The ALI proposal builds on existing devices for consolidation of cases in federal district courts, pretrial consolidation³⁴ and discretion-

26. *National Mut. Ins. Co. v. Tidewater Transp. Co.*, 337 U.S. 582 (1949).

27. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523 (1967).

28. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983).

29. For more description and comparison of the leading proposals, see Thomas D. Rowe, Jr., *Jurisdictional and Transfer Proposals for Complex Litigation*, 10 REV. LITIG. 325 (1991). Comments of proponents recognizing federalism and resource allocation objections are collected *supra* note 9.

30. ALI, *supra* note 2, §§ 5.01-.03.

31. *Id.* at § 5.03.

32. *Id.* at § 6.01(a).

33. *Id.* at § 5.01. Anti-suit injunctions would be available. *Id.* at § 5.04. Compulsory intervention and preclusion would apply to nonparty claimants. *Id.* at § 5.05.

34. 28 U.S.C. § 1407.

ary change of venue.³⁵ Unlike the current federal provisions, however, the ALI proposal would explicitly permit combined trials in magnet district courts where the cases could not all have been brought in the first place.³⁶ The resources and prestige of the ALI have made its proposal³⁷ the most fully developed and documented.³⁸

The American Bar Association (ABA) Mass Torts Commission issued a report in 1989 supporting extensive consolidation of mass tort cases in federal courts, both single-incident disaster litigation and widely dispersed product suits.³⁹ Consolidation would take place if there were at least 250 cases from a single accident or product, and all had claims in excess of \$50,000.⁴⁰ At the ABA's mid-year meeting in 1990, however, the proponents of the report withdrew a motion for its approval. The membership went on to reject a resolution supporting legislation to consolidate single-incident cases in the federal courts.⁴¹

The House Judiciary Committee of the 101st Congress also reported favorably on a plan to expand federal jurisdiction to cover single-incident mass accident cases.⁴² In contrast to the ABA proposal,

35. 28 U.S.C. § 1404.

36. ALI, *supra* note 2, at § 3.06(c). As the ALI report indicates, federal courts have consolidated cases for trial in 28 U.S.C. § 1407 transfers irrespective of that statute's applicability only to pretrial proceedings. *Id.* at 31.

37. As of this writing, however, the ALI has not published the final form of the proposal that is the subject of its reports. See ALI, *supra* note 2, at front cover (disclaimer of responsibility for draft until adoption by membership).

38. The ALI proposal is unique in supplementing a proposal for transfer of state and federal cases to a single federal forum with a proposal for transfer of some state and federal cases to a single state forum. The latter proposal, however, is much less complete and appears to be less comprehensive than the federal consolidation proposal. It would employ a panel of assigning judges and a national choice of law standard. The existence of both federal and state consolidation may give rise to a situation governed by Gresham's law (the principle that people will use an easier or less risky approach despite any long-term negative consequences to the system as a whole) in which the cases generally will gravitate toward the federal district courts. A similar phenomenon has been described with regard to concurrent jurisdiction in federal claims and civil rights jurisdiction. See *infra* notes 175-78 and accompanying text. As will be seen, this Article strongly criticizes the federal consolidation of state court cases that is at the heart of the ALI proposal.

39. ABA, *supra* note 3, at 18-25.

40. *Id.* at 27-28.

41. The Commission appeared to have miscalculated the politics of increased federal jurisdiction for these cases, a topic discussed more fully *infra* at text accompanying notes 234-36. See generally Charles Gardner Geyh, *Complex-Litigation Reform and the Legislative Process*, 10 REV. LITIG. 401, 409-14 (1991) (discussing dynamics at ABA convention). Ironically, though most of the members of the Commission were members of the defense bar, they failed to anticipate a well-organized effort by defense counsel opposed to expansion of federal jurisdiction. See *id.* at 409.

42. MULTIPARTY, MULTIFORUM JURISDICTION ACT OF 1990, H.R. REP. NO. 515, 101st Cong., 2d Sess. 1 (1990).

its proposal did not cover widely dispersed injuries from the same or similar products or other kinds of mass torts.⁴³ The Committee's plan would have transferred cases from various state and federal forums into a single federal magnet proceeding, which would employ a federal choice of law standard.⁴⁴

The 1990 Report of the Federal Courts Study Commission also endorsed the expansion of federal jurisdiction to cover mass torts and the consolidation of tort cases filed in state and federal courts in the federal district courts.⁴⁵ The Commission's endorsement was somewhat ironic, given the Report's otherwise strong emphasis on diminishing federal caseloads and reserving federal judicial time for cases that cannot be handled appropriately by state courts.⁴⁶

Academic commentators have also contributed proposals.⁴⁷ Most bear some similarity to the ALI, ABA, and Judiciary Committee proposals.⁴⁸ One that differs in several important particulars is that of Professor Mullenix. Professor Mullenix would change the law to facilitate consolidation of dispersed products cases but would retain the status quo for single-incident mass injury cases.⁴⁹ Mullenix would also permit individual plaintiffs to opt out of the combined action, subject to what she describes as "extreme disincentives."⁵⁰ Mullenix also pro-

43. *Id.* at 6-7; see H.R. 3046 § 2(a).

44. H.R. 3046 §§ 2(a), 6(c).

45. FCSC, *supra* note 5, at 44-45.

46. See *id.* at 4-10. Although the Commission's other proposals have carefully reasoned rationales, only one conclusory paragraph supports the assertion that jurisdiction should be expanded in mass tort cases. *Id.* at 44-45. The working papers released with the report are even more brief (and somewhat more tentative) on this subject than the report itself. See JUDICIAL CONFERENCE OF THE UNITED STATES, FEDERAL COURTS STUDY COMMITTEE WORKING PAPERS AND SUBCOMMITTEE REPORTS 457-58 (1990). They cite limits on personal jurisdiction of state courts and state restrictions on service of process as a rationale. *Id.* at 457. See *infra* text accompanying notes 240-65.

47. Literature on complex litigation has been termed "enormous." Linda S. Mullenix, *Complex Litigation Reform and Article III Jurisdiction*, 59 *FORDHAM L. REV.* 169, 169 n.1 (1990). An entire law review article has been devoted merely to cataloging the proposals. See Rowe, *supra* note 29. Additional academic pieces proposing federal consolidation schemes are listed *supra* note 6.

48. Professor Rowe and Mr. Sibley seem to have stimulated the most academic thinking on the topic. See generally Rowe & Sibley, *supra* note 6. Their proposals and the others were foreshadowed by articles by Professors Kamp and McCoid. Kamp, *supra* note 6; McCoid, *supra* note 6. Still other academic commentators have proposed increased federal consolidation of mass tort cases through expansion of the federal class action rules. E.g., Tobin, *supra* note 6; Note, *Class Certification*, *supra* note 6.

49. Mullenix, *supra* note 6, at 1062-63 (relying on reports that most single-incident cases litigated under existing jurisdictional rules have settled fairly easily).

50. *Id.* at 1067. The disincentive is having to pay the full amount of attorneys fees, rather than a limited amount if one remains in the combined action. *Id.* at 1073. Imposing costs that a person would have to pay anyway does not seem "extreme," although the

poses a federal law of mass tort liability and damages, rather than a federal standard for choosing state law.⁵¹

B. *Erie* Doctrine Problems of Federal Transfer and Consolidation

*Erie Railroad v. Tompkins*⁵² requires that federal courts apply state law to issues covered by the general common law of torts and contracts.⁵³ The *Erie* doctrine reduces the role of the federal courts in such cases to that of predicting what legal rules the applicable state courts would apply to a given case, correspondingly reducing their role in legal development from making law to forecasting it. This impoverishes the law that is applied.⁵⁴ If the state law of mass tort is to be developed by judicial decisions,⁵⁵ strong majoritarian and federal-

dynamics of attorney-client decision-making may create difficulties holding the plaintiffs in the group. Attorneys pursuing their own interests may advise clients to opt out. It is doubtful that attorneys' professional responsibility will override the temptation of a larger fee. Compare John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 678-84 (1986) (looking to attorneys' financial incentives to predict litigation decisions) with MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983) (placing decisions concerning the objectives of representation on the client, rather than the attorney). Using state attorney generals or otherwise excluding private counsel from sharing in the fees from the mass proceeding will exacerbate the conflict of interest. Cf. Mullenix, *supra* note 6, at 1084-85 (proposing that state attorneys general prosecute mass tort cases, and noting that lucrative fees are an incentive for attorneys to bring individual tort actions in mass disasters).

51. Mullenix, *supra* note 47, at 221-25.

52. 304 U.S. 64 (1938).

53. Although the *Erie* doctrine applies most directly to diversity cases, its disestablishment of general federal common law affects any case whose rule of decision does not fall within a federal statute or the few areas in which the Supreme Court has explicitly permitted common law development. DAVID W. LOUISELL, ET AL., *PLEADING AND PROCEDURE* 612 (6th ed. 1989). As noted above, most proposals for federal mass tort consolidation contemplate the application of state law to the transferred cases, whether they began in state or federal court. See *supra* notes 47-49 and accompanying text.

54. Judge Friendly catalogued the problems of federal application of state law in his argument against diversity jurisdiction: "[I]n such cases federal courts cannot discharge the important objective of making law. When the state law is plain, the federal judge is reduced to a 'ventriloquist's dummy to the courts of some particular state.'" HENRY FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 142 (1973) (quoting *Richardson v. Commissioner*, 126 F.2d 562, 567 (2d. Cir. 1942) (Frank, J.)). Friendly continued that cases in which state law is unclear are worse, for the federal court cannot apply common sense but must instead "exhaustively dissect each piece of evidence thought to cast light on what the highest state court would ultimately decide." In some cases, "what passes as an attempt at prediction is a mere guess or fiat without any basis in state precedents at all. All such cases are pregnant with the possibility of injustice." *Id.* at 142-43 (citations omitted).

55. Judge Posner notes that "reported court of appeals diversity cases tend to be ones in which the state law is unclear, so that the decision must be rested on general principles of common law rather than on slavish adherence to established state precedents. Such

ism reasons exist to prefer state court development.⁵⁶ The alternative of a federal law of mass tort is even worse than that of federal courts attempting to develop or interpret state law. Nationalizing mass tort law would violate important federalism principles. Moreover, if developed by the federal judiciary, the law would be the invention of the institution least capable of the task.

1. *Majoritarian and Federalism Disadvantages to Federal Court Development of State Law*

There are valid reasons to prefer state court development of state tort law. Tort law should reflect the will of the people. Most state judges are elected,⁵⁷ and therefore directly responsible to the people. Although some commentators have criticized the process of judicial election, they cannot deny that facing the voters influences the choices that judges make. Critics have decried the low visibility of judicial elections and the difficulty of making an informed vote.⁵⁸ But participation rates in judicial elections meet or exceed those in other state and local elections.⁵⁹ Moreover, any judge who values obscurity knows that the easiest way to lose it is to decide a case contrary to the views of significant numbers of voters.⁶⁰

decisions are necessarily creative." RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 144 (1985).

56. Professor Resnick has noted that federal courts will take over the development of mass tort law under the proposals for federal transfer and consolidation. Resnick, *supra* note 11, at 56 ("The current set of proposals on aggregation use the federal courts as the central forum. Such centralization will increase federal court power and, in the context of mass torts, will shift the task of developing tort law from state to federal courts.").

57. Forty-one states employ some form of popular election for choosing or retaining judges. 29 COUNCIL OF STATE GOVERNMENTS, *THE BOOK OF THE STATES*, tbl. 4.4, at 233-35 (1992-93).

58. See Erwin Chemerinsky, *Federal Courts, State Courts, and the Constitution: A Rejoinder to Professor Redish*, 36 UCLA L. REV. 369, 372 (1988).

59. Compare Peter Kendall, *Mayoral Races Get Fast Start*, CHI. TRIB., Nov. 30, 1992, at D1 with Joseph R. Tybor & James Warren, *Comerford Weathering Vote Scare*, CHI. TRIB., Nov. 9, 1988, at C1 (finding nearly identical participation rates in election for mayor in 1991 and election for superior court in 1988). See also Herb Robinson, *Nonvoters' Problem May Be Boredom*, SEATTLE TIMES, Sept. 21, 1990, at A6 (reporting similar participation for judicial and state representative elections). In the 1992 Texas election, the candidate who received the most votes of any Democrat was running for reelection as justice of the Supreme Court. Ross Ramsey, *Election '92; No Pattern Emerged in Judicial Elections; Some Incumbents Ousted, Others Win*, HOUSTON CHRON., Nov. 5, 1992, at A31.

60. Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329, 335 n.21 (1988) ("The point is that voters will remain apathetic only as long as state judges do not make decisions which substantially anger or upset a majority of the voters.").

In fact, much of the criticism of state judicial elections has centered on how the process may influence civil liberties decisions by judges afraid of popular reaction.⁶¹ But the very factors that make elected judges doubtful arbiters in some civil liberties cases make them particularly appropriate for determining the rules of social and economic conduct applicable to tort law. Popular reaction to decisions inconsistent with popular sentiment should be encouraged in these fields. The judicial function of determining law is not simple town-meeting majoritarianism.⁶² The judges must make priorities, work compromises, and ensure stability of policy.⁶³ While judges act as individuals, the ultimate authority of the voters indirectly shapes their decisions.

Some commentators have argued that elected state judges are too attuned to popular pressure to decide tort cases fairly.⁶⁴ This attitude is a fear of too much democracy. The elected state judiciary's development of tort law is an example of popular self-governance that should be permitted to flower.⁶⁵ The whole point of the *Erie* doctrine is that while federal courts may be trusted with resolving disputes involving diverse state citizens, they are not to make the law that governs private relations in a given state. In Professor Cover's words, what "constitutes the *Erie* problem" is that "competence with respect to dispute resolution" does not necessarily carry with it "concurrency of competence in norm articulation."⁶⁶

In addition to better reflecting the will of the people, state judges are better suited to adapt law to local concerns and needs. Judges chosen by states owe their allegiance to the state and district by which they are chosen. Even appointed judges who are chosen by district will be representatives of the counties they serve; judges elected from

61. See, e.g., Richard A. Salomon & Suzanne D. Rubens, *Make Judicial Selection Make Sense*, CHI. TRIB., June 6, 1992, at C21.

62. See Louis Michael Seidman, *Ambivalence and Accountability*, 61 S. CAL. L. REV. 1571, 1576-77 (1988) (discussing accountability and independence of elected judges).

63. See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 38-42 (1991) (discussing potential instability and inconsistency of majoritarian institutions).

64. RICHARD NEELY, *THE PRODUCT LIABILITY MESS: HOW BUSINESS CAN BE RESCUED FROM THE POLITICS OF STATE COURTS* 26 (1988); see Weinstein, *infra* note 105 at 1918.

65. See FARBER & FRICKEY, *supra* note 63, at 71 n.26 ("State courts have in fact been more activist on economic matters than the federal courts. Since state judges are often elected, and since state constitutions are more easily amended than the federal Constitution, this activism may be less objectionable [than activism by federal courts].").

66. Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 645 (1981).

a locality will be that much more sensitive to local concerns. Significantly, most states elect judges by local district; courts of appeals are usually elected by region.⁶⁷ Even state supreme court justices are frequently elected by district or region to balance the conflicting interests of various parts of the state.⁶⁸

*Merrell Dow Pharmaceuticals, Inc. v. Thompson*⁶⁹ illuminates the peril of having the federal courts become the primary expositors of state tort law. In *Merrell Dow*, the Supreme Court held that no federal question jurisdiction exists for a state tort claim which has as an element the defendant's violation of the Federal Food and Drug Act.⁷⁰ The Court's decision to place a narrow construction on the jurisdiction statute⁷¹ manifests concern about having federal courts apply state tort law, even when that law incorporates federal statutory standards. The power to apply is the power to interpret, and the power to interpret is the power to displace. Although Congress asserted strong regulatory authority over medicines by enacting the Food and Drug Act regime, the Court concluded that Congress reserved to the state courts the development of tort law based on that federal authority.⁷² The Court noted that narrow constructions of the federal question jurisdiction statute reflect deference to state decision-making.⁷³ The reason for deference is that local courts can better respond to popular will and local needs.

67. See COUNCIL OF STATE GOVERNMENTS, *supra* note 57, tbl. 4.3, at 231.

68. See *id.* tbl. 4.1, at 227-28.

69. 478 U.S. 804 (1986).

70. *Id.* at 817.

71. 28 U.S.C. § 1331. The Court conceded that a federal issue in a state-created cause of action has, in other cases, led to federal question jurisdiction. Still, it noted that the factors—including the traditional governance of state law in the field—that would support the conclusion that there was no federal cause of action supported the conclusion that there was no federal question jurisdiction. *Merrell Dow*, 478 U.S. at 811-12. The Court did not perceive any federal interest, even that in uniformity of interpretation of the federal statute, that was strong enough to justify jurisdiction in the absence of a congressionally-created cause of action. *Id.* at 813-17.

72. See *id.* at 811 ("In short, Congress did not intend a private *federal* remedy for violations of the statute that it enacted.") (emphasis added).

73. *Id.* at 810-11, 815 n.12; see Patti Alleva, *Prerogative Lost: The Trouble with Statutory Federal Question Doctrine After Merrell Dow*, 52 OHIO ST. L.J. 1477, 1531 n. 193 ("Indeed, with its emphasis on cause of action, *Merrell Dow*'s remedy requirement is presumptively pro-state forum."). As Professor Alleva states, *id.* at 1515, with regard to *Moore v. Chesapeake & Ohio Ry.*, 291 U.S. 205 (1934), a case whose restrictive reading of 28 U.S.C. § 1331's predecessor foreshadowed *Merrell Dow*, "In effect, the Court acknowledged the Kentucky legislature's ability to embrace federal standards as its own without simultaneously forfeiting control over hearing the claims that it created." *Moore* held that a state tort cause of action's incorporation of Federal Safety Appliance Act standards did

Federal district and appeals judges are ordinarily drawn from the states and regions in which they sit, and so might be thought to have some sensitivity to local concerns. The life tenure and salary protection that come with the job inevitably distance them from the concerns of their communities, however. Political insulation is the whole reason for those protections.⁷⁴ Moreover, once appointed, federal judges tend to respond to national norms and to their own elite tradition.⁷⁵ This characteristic, which is so valuable when they are deciding minority rights and civil liberties issues,⁷⁶ pulls them away from the localism that ought to shape state tort law.⁷⁷

The differences in law that local majorities demand of state judges are significant, and merit respect.⁷⁸ For example, standards for and limits on punitive damages reflect local views of corrective justice that vary widely from state to state.⁷⁹ Even such seemingly routine

not bring cases asserting the cause of action within federal question jurisdiction. *Moore*, 291 U.S. at 210.

74. Redish, *supra* note 60, at 336.

75. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1124 (1977).

76. *See id.* at 1124-26.

77. Moreover, federal magnet courts handling cases consolidated from the courts of several states will lack the localized character that currently keeps federal judges sitting in diversity somewhat in touch with the law of the states in which they sit. *See* Allan R. Stein, *Erie and Court Access*, 100 YALE L.J., 1935, 1972 (1991) (noting that "the state-bound structure of the district courts [including locally drawn judges and jurors] is . . . an accommodation to the principle of federalism."). And the added distance will add special difficulties to applying more peculiar areas of state law, even choice-of-law. Judge Friendly made this point in a diversity case: "Our principal task . . . is to determine what the New York courts would think the California courts would think on an issue about which neither has thought." *Nolan v. Transocean Air Lines*, 276 F.2d 280, 281 (2d Cir. 1960), *rev'd*, 365 U.S. 293 (1961).

78. Mullenix, *supra* note 6, at 1075 ("[F]or mass-tort litigation, . . . liability standards vary markedly from state to state."); Robert A. Sedler & Aaron Twerski, *State Choice of Law in Mass Tort Cases: A Response to "A View from the Legislature"*, 73 MARQ. L. REV. 625, 629 (1990) ("The differences [in tort law] from one state to another are not mere matters of detail, but affect basic issues of duty, standard of care, causation, affirmative defenses, and recoverable damages.").

79. *Compare* *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826 (Minn. 1988) (awarding punitive damages in product liability action), *cert. denied*, 492 U.S. 926 (1989), *with* *Philippe v. Browning Arms Co.*, 375 So. 2d 151 (La. App. 1979) (holding that punitive damages are not available in product liability actions), *aff'd*, 395 So. 2d 310 (La. 1981). Although only one jurisdiction bars both exemplary and punitive damages in all civil actions, *see* *Abel v. Conover*, 104 N.W.2d 684, 688 (Neb. 1960), four states allow them only when authorized by statute, *see* *McCoy v. Arkansas Natural Gas Co.*, 143 So. 383, 385-86 (La. 1932), *cert. denied*, 287 U.S. 661 (1932); *City of Lowell v. Massachusetts Bonding & Ins. Co.*, 47 N.E.2d 265, 272 (Mass. 1943); *Stanard v. Bolin*, 565 P.2d 94, 98 (Wash. 1977); N.H. REV. STAT. ANN. § 507:16 (1992). Other states vary on issues such as the measure of exemplary or punitive damages, whether the damages are available for punishment, deterrence, or both, and whether some categories of defendants are exempt from the awards.

issues as the elements and defenses for product liability causes of action differ.⁸⁰ The differences reflect the views of the citizens of the states about which costs of accidents should be borne by whom, and under what circumstances.⁸¹ Speaking about the division of authority between state and federal courts, the Chief Justice of the Minnesota Supreme Court commented:

If state courts are able to deal with legal problems as well as or almost as well as the federal courts, jurisdiction should be assigned to the state courts not only because this is consistent with our national history, but also because it is a policy which conforms with the rule that governmental authority, whenever possible, should be exercised by that level of government most directly connected with the citizenry affected by its performance.⁸²

Moreover, as noted by American government students from Justice Brandeis to modern political scientists, states serve as laboratories to test public policies for other states and the national government.⁸³ Tort law is a field in which the experimentation has been particularly fruitful.⁸⁴

Lying beyond the general interest of majoritarian decision-making and the particular state interests in the law best adapted to local conditions is an important constitutional interest: that of having com-

See JAMES D. GHIARDI & JOHN J. KIRCHER, *PUNITIVE DAMAGES: LAW AND PRACTICE* §§ 4.02 to 4.16 (1985 & Supp. 1992) (collecting cases and statutes).

80. See ABA, *supra* note 3, at 33 (listing different state approaches to market share and risk contribution liability in product defect cases). Compare 2 AMERICAN LAW OF PRODUCTS LIABILITY § 16:9 (3d ed. 1987) (listing states that have adopted Restatement 2d of Torts § 402A) *id.* § 16:13-17 (listing states adopting other strict liability approaches) and with *id.* § 16:18 (listing states rejecting strict product liability).

81. See Robert H. Cole, *Windfall and Probability: A Study of "Cause" in Negligence Law*, (pt. 1), 52 CAL. L. REV. 459, 473 (1964) (discussing negligence law); see also Judith Jarvis Thomson, *The Decline of Cause*, 76 GEO. L.J. 137, 138 (1987) (noting role of popular sentiment in tort law).

82. Robert J. Sheran, *State Courts and Federalism in the 1980's: Comment*, 22 WM. & MARY L. REV. 789, 796 (1981). But see *id.* at 797 (stating that federal courts have superior capacity "to adjudicate certain kinds of complicated litigation . . .").

83. *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); MORTON GRODZINS, *THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES* 388-89 (1966).

84. Examples include the elimination of the privity requirement in products actions, undertaken by the New York Court of Appeals in *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916), and restriction of charitable immunity in the Illinois case *Darling v. Charleston Memorial Hosp.*, 211 N.E.2d 253 (Ill. 1965), *cert. denied*, 383 U.S. 946 (1966). After a period of percolation, these innovations were widely adopted by other state courts and legislatures.

petently functioning states.⁸⁵ The federal courts pursue that interest by leaving the states free to solve problems with which they are competent to deal.⁸⁶ State courts are quite able to deal with tort law. It is their day-to-day work and, except perhaps for family law or collection matters, the field in which the ordinary voting citizen is most likely to be party to a civil lawsuit. No pattern of state court prejudice or case mismanagement fuels the drive for federal jurisdiction over mass tort cases.

2. *Interpretation Difficulties Under Erie Doctrine*

A state law of mass torts developed by federal courts under *Erie's* peculiar rules would be a feeble and maladapted judicial creature. One system of courts cannot simply borrow another's law in an area as dynamic as that governing mass disasters and widespread product injuries. In general, courts at the higher levels do not apply a static body of law but create and recreate law to adapt to new problems and conditions.⁸⁷ But *Erie* assumes a world of static law, or at least one in which a federal court can reliably predict what a state's highest court would do on a given legal issue.

On issues like those involved in mass torts, even a prophet would fail to capture the creativity that state courts display. For example, would a federal court applying California law have come up with the decision in *Sindell v. Abbott Laboratories*?⁸⁸ In that case, market-share liability was imposed on the defendant drug manufacturers even though the plaintiff did not know which manufacturer produced the particular medicine her mother ingested.⁸⁹ In a previous federal diversity case, the court had limited enterprise liability to cases in which a small group of defendants had both a joint awareness of risks and a joint capacity to reduce them,⁹⁰ factors that the *Sindell* court did not

85. Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1488-89 (1987).

86. See *id.* at 1489 ("Federal jurisdiction is needed to correct stagnant situations in which the states are not providing a forum or remedy for would-be federal plaintiffs. In contrast, federal jurisdiction may be counterproductive when states are actively and constructively engaged in dealing with those problems.").

87. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 166 (1921) ("I have grown to see that the [judicial] process in its highest reaches is not discovery, but creation . . .").

88. 607 P.2d 924 (Cal. 1980).

89. *Id.* An equally unpredictable result would be *Sindell's* progenitor, *Summers v. Tice*, 199 P.2d 1 (Cal. 1948), in which the burden of proof was shifted to two persons negligently firing rifles, one of whom injured the plaintiff.

90. *Hall v. E.I. DuPont de Nemours & Co.*, 345 F. Supp. 353 (E.D.N.Y. 1972). The court was applying a form of national consensus tort law that relied significantly on Cali-

require.⁹¹ Another case that illustrates the prediction problem in a dramatic fashion is *Hudgens v. Cook Industries*.⁹² The Oklahoma Supreme Court departed from previous state law by deciding to hold a shipper liable for the tort of its carrier, an independent contractor, if the carrier was selected without due care.⁹³ A federal court in a companion case from the same accident found no liability because it predicted the state would retain current law.⁹⁴ Another development in state law that a federal court could not have anticipated was the abolition of charitable immunity for public hospitals by the Supreme Court of North Carolina.⁹⁵ Just four years before that decision, a federal court sitting in diversity applied the immunity in a published opinion.⁹⁶ Yet another example is *Alvis v. Ribar*,⁹⁷ in which the Illinois Supreme Court, by stroke of a pen, abolished contributory negligence in favor of comparative negligence.⁹⁸ Federal courts sitting in diversity, like the state trial courts, had applied contributory negligence up to the very day of the decision, confident that nothing would change because of previous legislative rejections of the reform.⁹⁹

Not every unanticipated state court decision is an expansion of liability.¹⁰⁰ The district court in Colorado predicted that the Colorado Supreme Court would recognize parental consortium claims, in line with the trend in other jurisdictions, only to have the state court reject that extension of the law a year later.¹⁰¹

fornia precedent. Ultimately, the court found an absence of joint activity among the manufacturers in New York, and severed the various cases before it for litigation in other districts. *Chance v. E.I. DuPont de Nemours & Co.*, 371 F. Supp. 439 (E.D.N.Y. 1974).

91. *Sindell*, 607 P.2d at 936.

92. 521 P.2d 813 (Okla. 1943).

93. *Id.* at 816.

94. *Pierce v. Cook & Co.*, 437 F.2d 1119 (10th Cir. 1970). Eventually, the federal court allowed the losing plaintiff to return to court under Fed. R. Civ. P. 60(b). *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975).

95. *Rabon v. Rowan Mem. Hosp.*, 152 S.E. 2d 485 (N.C. 1967).

96. *Berry v. Odom*, 222 F. Supp. 467 (M.D.N.C. 1963).

97. 421 N.E.2d 886 (Ill. 1981).

98. *Id.* at 898.

99. *See id.* at 895 ("Defendants point out that, since 1976, six bills were introduced in the Illinois legislature to abolish the doctrine of contributory negligence . . .").

100. *See* Lawrence Baum & Bradley C. Canon, *State Supreme Courts as Activists: New Doctrines in the Law of Torts*, in *STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM* 83, 100 (Mary Cornelia Porter & G. Alan Tarr, eds., 1982) (discussing "restraintist" state courts that have "refused to accept much of the doctrinal change in support of tort plaintiffs that has occurred in the postwar period"), 101-02 (discussing unpredictable state courts that have picked and chosen among innovations).

101. *Compare* *Reighley v. International Playtex, Inc.*, 604 F. Supp. 1078 (D. Colo. 1985) (accepting parental consortium claim) *with* *Lee v. Colorado Dep't of Health*, 718 P.2d 221 (Colo. 1986) (rejecting parental consortium claim). Another example is whether consor-

Even the most prescient federal judge would have been unable to predict what the state courts did in these cases. How then can that judge predict what a state court would say about probabilistic causation, state-of-the-art defenses, and a host of other issues that have a special bearing on mass tort cases?¹⁰² As Judge J. Skelly Wright has noted, in the era since *Erie*, state judges have made almost all the significant contributions to the development of private law.¹⁰³ It is not that state judges are smarter or more observant than federal judges. It is partly, but not merely, that they are closer to the electorate and thus more sensitive to popular concerns. It is also that they have a freer hand because they need not mimic what they think another jurisdiction would do.

Crabbed state law predictions by federal courts will frustrate important state policies that balance the interests of victims with those of industry and commerce. The number of interested parties increases the stakes. In mass torts cases, a few wrong decisions could affect thousands of individual litigants.¹⁰⁴

tium awards in negligence actions are to be reduced for comparative negligence. The great majority of states have rejected a federal court interpretation of New Hampshire law and reduced the awards. *Compare* *Macon v. Seaward Const. Co.*, 555 F.2d 1 (1st Cir. 1977) (no reduction), *with* *Eggert v. Working*, 599 P.2d 1389 (Alaska 1979) (reduction); *Quadrone v. Pasco Petroleum Co.*, 752 P.2d 504 (Ariz. 1987) (reduction); *Nelson v. Busby*, 437 S.W.2d 799 (Ark. 1969) (reduction); *Lee v. Colorado Dep't of Health*, 718 P.2d 221 (Colo. 1986) (reduction); *Hamm v. City of Milton*, 358 So. 2d 121 (Fla. App. 1978) (reduction); *Mist v. Westin Hotels, Inc.*, 738 P.2d 85 (Haw. 1987) (reduction); *Runcorn v. Shearer Lumber Prods.*, 690 P.2d 324 (Idaho 1984) (reduction); *Blagg v. Illinois F.W.D. Truck & Equip. Co.*, 572 N.E.2d 920 (Ill. 1991) (reduction); *McGuire v. Sifers*, 681 P.2d 1025 (Kan. 1984) (reduction); *Thill v. Modern Erecting Co.*, 170 N.W.2d 865 (Minn. 1969); *Tichenor v. Santillo*, 527 A.2d 78 (N.J. Super. 1987) (reduction); *Maidman v. Staggs*, 441 N.Y.S.2d 711 (App. Div. 1981) (reduction); *Scattaregia v. Shin Shen Wu*, 495 A.2d 552 (Pa. Super. Ct. 1985) (reduction); *White v. Lunder*, 225 N.W.2d 442 (Wis. 1975) (reduction); *Weaver v. Mitchell*, 715 P.2d 1361 (Wyo. 1986) (reduction). Federal courts attempting to apply state law in that context might well have exposed the defendants to the full amount of the spouses' claims. If the federal courts held a monopoly on the hearing of these cases, the rule might never change to reflect the policy concerns of the courts that went the other direction.

102. Federal judges have a hard enough time even determining static state law without having to predict what changes it will undergo. It is a small wonder that federal judges give in to the temptation to dismiss suits on federal procedural grounds when the cases are removed to federal court, even though the state courts would have rendered decisions on the merits. *See* Stein, *supra* note 77, at 1972 (criticizing this practice).

103. J. Skelly Wright, *In Praise of State Courts: Confessions of a Federal Judge*, 11 HASTINGS CONST. L.Q. 165, 166 (1984); *accord* Baum & Canon, *supra* note 100, at 84 ("The development of tort law in the United States is almost entirely the province of the state appellate judiciary—usually state supreme courts. Although they were sometimes influenced by leading English decisions or by federal cases, most shifts in tort law originated with the state high courts themselves.").

104. *See* Note, *Bankruptcy*, *supra* note 6, at 1140 (discussing federal bankruptcy trial of state-law based tort claims: "[D]eterminations [of state tort law] always involve the possi-

This Article does not propose abolition of existing federal diversity jurisdiction. Occasionally, judges exercising that jurisdiction have made important contributions to the development of state common law,¹⁰⁵ but they should not monopolize the application of state mass tort law. Federal courts should not be permitted to displace the state courts in one of their most important functions.

State courts will still retain the power to adjudicate single-incident tort cases under the federal consolidation proposals. Though the law made in those cases may influence federal developments in mass torts, the influence will not be significant. In fields other than mass torts, the availability of mass proceedings has led to developments in substantive law that would not have come about otherwise.¹⁰⁶ There is no reason to suppose that mass torts will be an exception to this process. Context is everything in the development of tort law, and the contexts that are most likely to lead to tort law developments in the present decade are those present in the cases the reformers would send to federal court.¹⁰⁷

For example, in mass environmental disasters the common law of property damage and personal injury may well converge over the next decades to create a common law of environmental pollution torts.¹⁰⁸

bility of error When state law questions determine the rights of many thousands of litigants, considerations of comity should cause a bankruptcy court to be doubly hesitant to exercise jurisdiction."'). Moreover, the federal system has only court of appeals review, if the court of appeals is even interested, to force federal judges to make better guesses about state law. The Supreme Court does not review for error in choice of a given state's law or mistaken applications of the state's law. Even if additional review existed, it is doubtful that the judges of the court of appeals or the Supreme Court would be any better than a district judge at anticipating the tort policy of a given state. Indeed, the fact that the geographic and social distance of reviewing judges may make them worse at this job is probably part of the rationale for withholding review.

105. See Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1918 (1989) (supporting diversity jurisdiction with, among other arguments, the contention that "diversity serves an important cross-fertilizing function."').

106. Hal S. Scott, *The Impact of Class Actions on Rule 10b-5*, 38 U. CHI. L. REV. 337, 337-71 (1971) (discussing the influence of class action procedure on the development of the fraud on the market theory of liability in securities cases); see also Harry Kalven, Jr., & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 692 (1941) (noting effectiveness of class suits for employee, investor, and taxpayer actions).

107. See Kenneth S. Abraham, *What Is a Tort Claim? An Interpretation of Contemporary Tort Reform*, 51 MD. L. REV. 172, 197 (1992) (noting how recent developments in tort law have moved away from focusing on individual cases and unique facts to standardization, aggregation, and apportionment; attributing some of the change to the greater use of mass proceedings).

108. See AMERICAN LAW INSTITUTE, 2 ENTERPRISE LIABILITY FOR PERSONAL INJURY 353, 354-56 (1991) (contrasting property damage and personal injury threads of doctrine); cf. Georgene M. Vairo, *Multi-tort Cases: Cause for More Darkness on the Subject, Or a New*

That law would be impoverished if developed in single cases, for the broad social problem presented is the broadcast nature of the injury.¹⁰⁹ As another example, in widespread product injuries recurring issues of probabilistic causation may give rise to fractional recovery for tortious conduct based on probability of future harm.¹¹⁰ In individual cases, fractional recovery is far less comprehensible to juries and is thus less attractive than the conventional "more likely than not" standard.¹¹¹ From an economic standpoint, however, application of the more-likely-than-not standard may create insufficient incentive to adopt safety procedures because some actions that ought to be deterred cause a less-than-fifty percent probability of harm.¹¹² Similarly, disputes over punitive damages have a wholly different character in single-instance tort cases than they have in mass torts. States should be permitted to adapt their law of punitive damages to the newly-emerging field of mass torts.¹¹³

Mass-tort law should not be completely divorced from the law of single-incident torts. The same courts charged with development of the law in individual torts should develop the law in mass torts, so that the rules can be as harmonious and predictable as possible. Those courts are the courts of the states.

Although state legislatures may overturn poor federal interpretations of state law with new state statutes, that option is unsatisfactory as a means of wresting state tort law development from federal tribunals.¹¹⁴ First, the state legislature may be unable to take action without undue delay because of the press of other business or irrelevant political factors.¹¹⁵ Second, legislative overruling is not a substitute

Role for Federal Common Law?, 54 *FORDHAM L. REV.* 167, 169 (1985) ("As hazardous substances increasingly infiltrate our environment and the number of multi-tort cases correspondingly rises, plaintiffs, defendants and the courts are confronted with many difficult issues not presented in conventional single incident tort cases.").

109. *AMERICAN LAW INSTITUTE*, *supra* note 108, at 358.

110. See Richard W. Wright, *Causation in Tort Law*, 73 *CAL. L. REV.* 1735, 1813 (1985) (discussing fractional recovery based on probabilities of future injury).

111. See *id.* at 1816-21 (discussing multiple-defendant situations).

112. See Richard W. Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 *U.C. DAVIS L. REV.* 1141, 1200-01 (1988).

113. See *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394 (5th Cir. 1986) (applying state law to punitive damages issue in asbestos case), *cert. denied*, 478 U.S. 1022 (1986).

114. But see Kelly D. Hickman, Note, *Federal Court Abstention in Diversity of Citizenship Cases*, 62 *S. CAL. L. REV.* 1237, 1251 (1989) (asserting that state legislatures and highest courts can easily overrule erroneous interpretations of state law).

115. Earl M. Maltz, *The Dark Side of State Court Activism*, 63 *TEX. L. REV.* 995, 996, 998 (1985) (noting difficulties in legislatively overruling judicial decisions, including inertia, bicameralism, committee politics, and parliamentary maneuvering); see Baum & Canon,

for common law development. The problem is not so much that federal courts will make wrong decisions as that they will not make the shifts in the law that represent common law development. This is better done on a case-by-case basis by skilled members of the judiciary than it is by preoccupied, less expert members of the state legislature, operating outside concrete factual settings.

Federal courts in consolidated proceedings may certify questions of state law to state tribunals. That option, however, is also unsatisfactory. Few federal courts take advantage of the certification procedure—no mechanism exists to force them to do so¹¹⁶—and it has several practical disadvantages. Certification takes too long.¹¹⁷ Questions are extremely difficult to frame, and may change as the litigation progresses. The quality of attention the question receives is probably lower than if it were presented in an actual case before the state court. In an actual case, the litigants appear, convenient access exists to the full record, and the weight of responsibility for a decision on the merits falls on the deciding court; none of these factors applies to a certified question. Abstract interpretation of law, even by a court, does not substitute for interpretation in a case with concrete facts before a court that holds ultimate responsibility for the decision.¹¹⁸

supra note 100, at 94 ("Obtaining legislative consideration of a tort law issue, however, is often a vain hope. . . . [Courts have noted] that the legislature was simply too pressed with other business to put tort reform issues on its agenda.").

116. A federal court that does certify need not follow the answer it receives. Gregory Gelfand & Howard B. Abrams, *Putting Erie on the Right Track*, 49 U. PITT. L. REV. 937, 954 n.53 (1988); see *Green v. American Tobacco Co.*, 304 F.2d 70, 72 (5th Cir. 1962) (certifying question); 154 So. 2d 169, 170 (Fla.) (answering question); 325 F.2d 673, 675 (5th Cir. 1963) (ignoring answer), *cert. denied*, 377 U.S. 943 (1964); *McLeod v. W.S. Merrell Co.*, 174 So. 2d 736, 739 (Fla. 1965) (stating that *Green* applied Florida law incorrectly); *Green v. American Tobacco Co.*, 391 F.2d 97 (5th Cir. 1968) (applying Florida law expressed in *McLeod*), *overruled*, 409 F.2d 1166 (5th Cir. 1969) (*per curiam*), *cert. denied*, 397 U.S. 911 (1970).

117. Mullenix, *supra* note 6, at 1076 n.196 (reporting delay of two years in *Jackson v. Johns-Mansville Sales Corp.*, 750 F.2d 1314 (5th Cir. 1985) (*en banc*), in certification of three questions to Mississippi Supreme Court); David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 326-27 (1977) (reporting long delays).

118. The difficulty courts have with developing law in abstract settings is a significant part of the rationale for the prohibition on advisory opinions and the imposition of elaborate justiciability requirements in the federal courts. A similar difficulty will inevitably beset state courts serving an advisory capacity. Some state courts do, of course, render advisory opinions, although frequently the courts are limited to passing on legislation.

3. *A Federal Law of Mass Tort?*

Professors Vairo¹¹⁹ and Mullenix¹²⁰ as well as some other commentators¹²¹ have proposed the creation of a uniform federal law of mass tort.¹²² Professor Vairo has noted that federal mass tort law would ease the administration of a transfer and consolidation regime by eliminating difficult choice of law determinations by the magnet courts.¹²³ Professor Mullenix contends that a federal law of mass torts would make consolidated federal cases easier to adjudicate,¹²⁴ and that federal jurisdiction over mass tort cases without the application of federal law raises serious difficulties under Article III of the Constitution.¹²⁵ Because of the institutional awkwardness that federal judges

119. See generally Vairo, *supra* note 108.

120. Mullenix, *supra* note 6, at 1077.

121. Professor Epstein has proposed the extension of federal law to some areas that affect both mass and individual torts, particularly the question whether conformance to federal standards for products conclusively establishes that the product is not defective. Epstein, *supra* 6, at 31. Nevertheless, Epstein stresses the value of divergent state tort law in other areas, and criticizes the ALI proposal for overstressing uniformity of result in similar geographically dispersed cases. *Id.* at 20-23. Judge Rubin also favors national product liability standards that would be part of a uniform product liability law. Alvin B. Rubin, *Mass Torts and Litigation Disasters*, 20 GA. L. REV. 429, 443-45 (1986). Judge Rubin's approach bears some similarity to that of Judge Weinstein, who has favorably commented on the idea of a federal toxic tort statute, while also noting the attractiveness of administrative compensation schemes that presumably would apply uniform federal law. Jack B. Weinstein, *Preliminary Reflections on the Law's Reaction to Disasters*, 11 COLUM. J. ENVTL. L. 1, 33-35, 43-44 (1986). Professor Weinberg has voiced support for the legitimacy of a broad federal common law that could embrace such matters as mass tort. Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 842 (1989). Taking these approaches one step further, Professor Corr has proposed abolishing the *Erie* doctrine altogether, a proposal that, as he notes, would at least simplify first year civil procedure courses. John B. Corr, *Thoughts on the Vitality of Erie*, 41 AM. U. L. REV. 1087, 1088-89 (1992). Other judges and academic sources commenting favorably on a federal common law, including some who favor a federal common law of mass tort, are listed by Professor Mullenix in her 1986 article. Mullenix, *supra* note 6, at 1077-78 n.201. Legislative proposals are catalogued *id.* at 1078-79 n. 203.

122. Among those who would consolidate mass torts in the federal courts, even the opponents of federal law for the cases generally favor a federal choice of law standard. See, e.g., ALI, *supra* note 2, at 395. Two prominent commentators oppose federal consolidation precisely because of the need to create such a standard. Sedler & Twerski, *supra* note 78, at 626. Consolidation in state courts would permit those courts to apply their own choice of law standards; if that were encouraged, this whole controversy would be avoided.

123. Vairo, *supra* note 108, at 203.

124. Mullenix, *supra* note 6, at 1077.

125. See generally Mullenix, *supra* note 47. The argument challenges conventional views about jurisdiction under Article I of the Constitution, see *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 600 (1949) (plurality opinion), and the "arising under" federal law clause of Article III, § 2, see *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 497 (1983). Because this Article concludes that neither additional federal

have in developing state law, a federal mass tort law may be the ultimate tendency of any federal consolidation mechanism.¹²⁶

Nationalizing mass tort law would be a serious mistake. Local needs and concerns are reflected in local tort law. Different results should occur in similar cases brought by plaintiffs in different states if the results embody policy decisions of those states' courts and legislatures.¹²⁷ Allowing disparate state policy choices carries the advantages of increased experimentation, allowance for local variation, and opportunity for enhanced public participation. All three of these advantages were noted above as the advantages of having state judges rather than federal judges determine state mass tort law; they deserve fuller explanation in response to the contention that there should be no state mass tort law to determine.

Divergent state law allows different states to experiment¹²⁸ with standards for liability and forms of relief. For example, over the past ten years, many states adopted limits on liability and damages under the banner of tort reform.¹²⁹ Only now are meaningful studies ap-

tort law nor additional federal jurisdiction is desirable, there is no occasion to address Mullenix's contention.

126. Judge Schwarzer of the Judicial Council of the United States stated at legislative hearings on H.R. 3406:

There are . . . proposals for multi-forum, multi-party legislation that would create Federal jurisdiction founded on the commerce clause and extending to mass torts These proposals would vastly expand federal jurisdiction, federalize much of tort law, and overburden the federal courts. Because these proposals call for a wholesale shifting of litigation from State to Federal courts and displacement of State law in areas traditionally within its purview, the Conference may be expected to oppose them.

Multiparty, Multiforum Jurisdiction Act of 1989: Hearings on H.R. 3406 Before the Subcomm. on Courts, Intellectual Property, and the Admin. of Justice of the House Comm. on the Judiciary, 100th Cong., 1st Sess. 17 (1989) (statement of Hon. William W. Schwarzer) [hereinafter, "Hearings"].

127. Edward Brunet, *The Triumph of Efficiency and Discretion Over Competing Complex Litigation Policies*, 10 REV. LITIG. 273, 287 (1991).

128. The classic statement on state public policy experimentation is that of Justice Brandeis: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). But see Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593 (1980) (assuming that state politicians seek only to be reelected, and applying public choice theory to conclude that state government choices are not likely to be innovative). Professor Rose-Ackerman's theoretical argument appears to conflict with the historical record, at least with respect to innovation in tort law. See *supra* text accompanying notes 88-104 and *infra* text accompanying notes 129-31.

129. See Joseph Sanders & Craig Joyce, "Off to the Races": *The 1980s Tort Crisis and the Law Reform Process*, 27 Hous. L. REV. 207, 220-22 (1990) (collecting statutes from 48 states).

pearing on whether these experiments were beneficial.¹³⁰ Federal preemption of tort law now would cause a national decision on changes in the law when the experimental evidence on tort reform is still out; a uniform law in the future would stifle further small-scale experimentation in tort law. Any future experiments will take place with 255 million human subjects.¹³¹

Local variations also justify differing standards of conduct and measures of compensation. Individuals vary in how risk-averse they are, and the distribution of risk-averse individuals will vary from state to state. Because greater liability leads rational businesses to make more safety expenditures, and those expenditures are certain losses in relation to wealth as a whole, a risk-prone society might opt for lower standards of liability, which will entail lower safety costs, the chance of greater overall wealth, and more risk of individual injury.¹³² Similarly, a wealthier or more risk-averse society might opt for more liability and greater safety expenditures. Making the decision at the state level will permit different solutions by different groups of people; it will also permit movement within the United States by persons attracted

130. *E.g., id.* A recent report indicates that the Clinton administration is seriously studying the results of state medical malpractice reform experiments in considering whether to build liability or damages limits into its health cost containment proposals:

Among the ideas under consideration, some of which have been tried at the state level, are these:

- Limit damages for a patient's "pain and suffering."
- Reduce damages to take account of any money the patient gets from insurance or worker's compensation.
- Allow doctors to make payments periodically, over a number of years, rather than in a lump sum.
- Encourage patients to settle claims through mediation rather than court trials.

Supporters of such measures say they have produced benefits when tried in some states, particularly California.

Robert Pear, *Clinton May Seek Lid on Doctor Fees and Liability Suits*, N.Y. TIMES, Mar. 8, 1993, at A1. Empirical studies of the experience of various states with no-fault automobile accident laws drew unfavorable conclusions. See Elisabeth M. Landes, *Insurance, Liability, and Accidents: A Theoretical and Empirical Investigation of the Effect of No-fault Accidents*, 25 J.L. & ECON. 49 (1982), which may have prevented more widespread adoption of the plans.

131. It is conceivable that Congress could authorize some small-scale experimentation with changes in an otherwise uniform codification of tort law, but it has done little in that dimension with other federal statutes that give rise to liability. A federal common law of torts might create some unplanned circuit-level differences that would yield a little comparative information, but the process would be unreliable. Moreover, if the whole goal of federal tort law is uniformity, one would expect the Congress or the Supreme Court to quash variations that could lead to useful knowledge.

132. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 158 (3d ed. 1986) (discussing example of risk preferrers and safety precaution expenditures).

to a given state's mix of safety and risk among the other considerations that determine relocation choices.¹³³

Even the content of the tort law should differ from place to place, for geographic variations will occur in the kinds of hazards that potential defendants should prevent and that potential plaintiffs should avoid. An uncovered coal hole was a more common danger in nineteenth century Boston than it would have been in a place with a warmer climate; its presence was not considered evidence of negligence there.¹³⁴ Mass torts may yield fewer examples of this type than ordinary torts, but assessments about many of the conditions and conduct that may be considered negligent will still vary from place to place.¹³⁵

Public participation is an additional value of state decision-making in tort law. Whatever influence an individual has over national government, that individual has more over state government, and still more over local government, from which many state judges are drawn.¹³⁶ Divergences of opinion among the citizens who participate in political decisions are the whole cause of different results in different places.¹³⁷ For example, elected judges in different states have disagreed about the imposition of market-share liability in defective-product cases. The legislatures of neighboring states have disagreed on damages ceilings for personal injuries.¹³⁸ The importance of per-

133. Only the most accident-prone person would actually choose a state based on its liability rules, but individuals may well choose location based on the general culture of a place, of which risk preference or aversion is a part, or on economic climate, which liability rules may affect.

134. See *Lorenzo v. Wirth*, 170 Mass. 596 (Mass. 1898) (Holmes, J.) (finding that an uncovered coal hole near a heap of coal and persons engaged in delivering the coal was not any evidence of negligence, given common experience of persons in Boston).

135. The expectations of persons making and taking prescription drugs might be fairly uniform throughout the United States, but the same statement would not apply to persons maintaining and coming in contact with hazardous sites or environmental dangers confined to a given locality.

136. Cf. ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 116 (1976) ("I should be . . . irked . . . if the Supreme Court were to void an ordinance adopted in the open Town Meeting in the . . . town in which I live—a meeting in which all citizens can participate—but I should have little such feeling about a statute enacted by the Massachusetts legislature . . . and none about a law made . . . by the Congress of the United States.").

137. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956).

138. Compare IND. CODE ANN. § 16-9.5-2-2 (West 1993) (\$500,000 limit on total recovery in medical malpractice cases; \$750,000 limit for occurrences after Jan. 1, 1990; liability limit of \$100,000 per provider) with David Heckelman, *Tort-reform bill likely to fail, Democrats Predict*, CHI. DAILY L. BULL., Mar. 8, 1993, at 1 ("Newly introduced tort-reform legislation that would limit a plaintiff's recovery of non-economic damages to \$250,000 has

mitting divergent popular opinion to lead to divergent law is buttressed by the reality that common law rules reflect and influence the morality of the areas they affect. State courts influence the development of morality in their local or regional communities through common law adjudication.¹³⁹ As popular representatives, elected judges are especially well qualified for this role. Furthermore, as noted above with respect to functions that should be reserved to state courts, allowing states to develop their own law strengthens them as governmental units.

Overriding the *Erie* doctrine in the field of mass torts would be a giant step backwards for the federalism values that *Erie* embodies. *Erie*'s direction to the federal courts to apply state law in torts and contracts guarantees the states control of the law in those areas. This protection for the states is "the very essence of federalism."¹⁴⁰ States merit the protection not only by their traditional control over tort law, but also by the experimentation, local adaptation, and public participation values that state control of mass tort law preserves. Even the Federal Tort Claims Act generally requires courts to apply the law of the state where the tort occurred,¹⁴¹ shunning the development of a

no greater chance of passing than did a similar measure that failed last year, a spokesman for House Speaker Michael Madigan said Monday.").

139. See Maltz, *supra* note 115, at 1022.

140. John R. Leathers, *Erie and Its Progeny As Choice of Law Cases*, 11 HOUSTON L. REV. 791, 794 (1974) ("The *Erie* cases embody the very essence of federalism in that the choice between federal law and state law will be made by a determination as to whose interest is paramount on a particular issue."). This view is most strongly associated with Justice Harlan, see *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J. concurring), but other commentators are in accord, e.g., Richard Freer, *Erie's Midlife Crisis*, 63 TULANE L. REV. 1087, 1096 (1989); Gelfand & Abrams, *supra* note 116, at 942-52; Martin H. Redish & Carter G. Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356, 360 (1977); see also Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 394-98 (1964) (describing and defending constitutional basis of *Erie* as limits on congressional and federal judicial control of state issues). Professor Ely disputes this view, relying on the constitutional power of Congress to pass legislation that governs state tort cases and other disputes, but that position ignores both the prudential rule that Congress should preserve federalism by generally refraining from nationalizing new areas of law and the institutional factors that keep Congress, but not the federal courts, from doing so. Compare John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 704-06 (1974) (discussing constitutional basis of *Erie*) with Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682, 1683-85 (1974) (emphasizing representation of states' interests in Congress, but not in the federal courts).

141. 28 U.S.C. § 1346(b) (1988). Some exceptions apply. See 28 U.S.C. §§ 2674, 2680 (1988).

federal common law in a field where national interest is apparent,¹⁴² but state variation matters more.¹⁴³

Professor Vairo, whose proposals for a federal common law of mass tort are the most fully developed, argues that the federalism value of *Erie* would be satisfied by an implicit congressional assertion of power over the field of mass torts through passage of legislation that partially governs activities such as product safety and design.¹⁴⁴ The argument fails, however, because the protection of federalism in national lawmaking depends on formal congressional structures that give states indirect power. The states' power comes from their control of the formation and passage of individual statutes: scrutiny of legislative text by state politicians; participation in the committee hearing process; and the actions of individual, locally-interested representatives and senators on the floor and behind the scenes.¹⁴⁵ These structures do not protect the states from "implicit" legislative delegations of power to the federal courts. The courts that would be formulating a

142. Professor Vairo argues that federal interests justifying the creation of a federal law of mass tort are enhanced when the existing consolidation device of 28 U.S.C. § 1407 is applied. Vairo, *supra* note 108, at 207-08.

143. 28 U.S.C. § 1346(b) (1988).

144. Vairo, *supra* note 108, at 176-77 n.50. *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), is inapposite. A dispute between the government of one state and a political subdivision of another over pollution is primarily a dispute over interstate relations, not pollution. Choosing a single state's law to govern interstate relations problems makes little sense; Congress and the Supreme Court have long shared responsibility for regulation of quarrels between states. The United States Constitution is the ultimate source of the duties at issue, and, as illustrated in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Constitution provides its own implied cause of action for some of the duties it imposes. LOUISELL, *supra* note 53, at 526 ("Federal claims premised on the Constitution include claims based on the provisions that subordinate the states to the Federal Government, see, e.g., *Illinois v. City of Milwaukee* . . ."); cf. U.S. CONST. art III, § 2 (assigning original jurisdiction in disputes between states to Supreme Court). On the same day *Erie* came down, Justice Brandeis himself applied federal common law to a riparian dispute that hinged on the validity and interpretation of a congressionally-authorized interstate compact. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938). Disputes like those in *Illinois v. City of Milwaukee* and *Hinderlider* are considered intrinsically federal, as are some controversies involving foreign relations. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427-28 (1964) (applying federal common law in dispute with foreign government involving act of state doctrine).

By contrast, mass tort cases, even those involving interstate activities such as pollution, are product liability or accident problems, on which state experimentation and response to local needs should be welcomed. Congress has the power to end the experimentation and local accommodation by specific lawmaking, but Congress has wisely refrained from doing so. In the absence of specific federal statutes, tort law should be governed by the state common law selected according to reasonable choice of law principles. See *supra* text accompanying notes 127-60.

145. See GRODZINS, *supra* note 83, at 376-78.

federal law of mass tort are remarkably insulated from any political influence by the states.¹⁴⁶

Professor Vairo also argues that the constitutional premise of *Erie*, that is, the absence of federal authority to regulate the fields of human behavior governed by state common law, does not apply to mass torts.¹⁴⁷ Congress has passed many laws governing the manufacture and distribution of products, the transportation of passengers, and the like.¹⁴⁸ But the Constitution assigns this power to Congress, and not to the United States government in general.¹⁴⁹ Apart from the interpretation of specific statutes, the federal courts do not have a constitutional role in the regulation of interstate commerce.¹⁵⁰ Even interpretation of federal statutes is not a monopoly of the federal courts.¹⁵¹ Congress has barred general federal jurisdiction of cases in-

146. See *supra* text accompanying notes 74-77. Professor Redish contends that the discovery of implicit, unlimited delegations of lawmaking to the federal judiciary violates the Rules of Decision Act. Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 Nw. U. L. REV. 761, 788-90, 792-99 (1989).

147. Vairo, *supra* note 108, at 175.

148. See *id.* at 175-76 n. 44-45 (collecting statutes).

149. U.S. CONST. art. I, § 8, cl. 3. Indeed, even at the time of *Erie*, Congress had enacted extensive railroad regulation; the Supreme Court could hardly have contended that Congress lacked the power to regulate liability in train-pedestrian accidents like the one that gave rise to the *Erie* case itself. See Friendly, *supra* note 140, at 397 n.66.

150. See JACK H. FRIEDENTHAL, ET AL., *CIVIL PROCEDURE* 197 (1985). Professor Vairo disagrees, stating that Congress has implicitly authorized creation of a federal common law by passing statutes. The Supreme Court interpretation of congressional intent in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, however, is that Congress did nothing of the sort in the Food and Drug Act. *Merrell Dow*, 478 U.S. 804, at 815-17. The revolutionary change of creating a federal common law of mass tort should hardly be ascribed to Congress without clear evidence. On the contrary, the evidence establishes that Congress does not want to federalize tort law. See *infra* note 151 (describing Congress's recent rejection of proposed federal product liability damages standards).

151. Although these separation-of-powers reasons would probably make a statutory federal law of tort superior to a federal common law, statutory nationalization would also frustrate the goals of state experimentation and adaptation to local conditions. The Senate recently rejected a bill that would have imposed federal standards for damages in product liability suits, creating incentives for lower settlements and restructuring the contingent-fee system. See *Senate Kills Legislation To Curb Liability Suits*, N.Y. TIMES, Sept. 11, 1992, at C4. The rejection in 1992 reduces the likelihood of favorable action in the House on any similar measure during the next session. Peter Passell, *Economic Scene: Safer Mousetraps Or Better Ones?*, N.Y. TIMES, Sept. 10, 1992, at C2. The local orientation of members of Congress, which keeps the Supreme Court from having to take an aggressive posture to preserve states' rights under the Tenth Amendment, may be operating here, just as the Supreme Court has hypothesized. See *Garcia v. San Antonio Metro. Transp. Auth.*, 469 U.S. 528, 550-52 (1985) (stating that means of selection of members of Congress and various congressional structures act to uphold state and local interests); Redish, *supra* note 146, at 767 (discussing the Rules of Decision Act: "The legislature, traditionally more responsive to state concerns than the federal judiciary, has chosen to protect federalism in-

volving federal statutes unless the statute furnishes a cause of action or some other independent basis supplies federal jurisdiction.¹⁵² *Merrell Dow Pharmaceuticals, Inc. v. Thompson* explains the reasons to be reluctant even to edge towards a federal common law of products liability. Several references in the text and an extensive footnote commented on the absence of significant federal interests in the case and the corresponding importance of the state interest.¹⁵³

It is possible to argue that states have an incentive to make the law less favorable to defendants than to plaintiffs. Plaintiffs tend to sue at home or be drawn to states whose law is favorable to them. Consequently, plaintiffs will, in comparison with defendants, be disproportionately citizens of the state who will have political influence on the state's policies. Manufacturers and other defendants with operations in other states will be the recipients of the externalized costs of the injured citizens of the forum state.¹⁵⁴ The premises of this argument are doubtful, however. Current rules of state territorial jurisdiction, which make the defendant's home state the one place in which jurisdiction is indisputable,¹⁵⁵ will draw plaintiffs to the defendant's home forum. If a state-court consolidation mechanism is in place, this tendency will be enhanced, because the magnet forum most likely to have jurisdiction will be that in which the defendant is located. Moreover, potential defendants and potential plaintiffs are concentrated in the same, most populous states, so plaintiffs are likely to be suing co-

terests by legislatively limiting federal judicial power to supplant state law."). Other difficulties with a federal common law include one ascribed to diverse state common law: principles will vary from circuit to circuit, even from court to court. *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1326 (5th Cir. 1985) (rejecting application of federal common law); *Mullenix*, *supra* note 6, at 1079. Moreover, pressure would mount on the Supreme Court to surrender more and more of its docket to resolving the conflicts, to the exclusion of other cases with more importance to national concerns.

152. *Merrell Dow*, 478 U.S. at 808-09; Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 160-63 (1953).

153. *Merrell Dow*, 478 U.S. at 810-11, 814-15 & n.12. The Court remarked favorably on a test for jurisdiction that looks to the nature of the federal interest at stake, and noted that even the violation of a federal standard as the element of a tort claim "did not fundamentally change the state tort nature of the action." *Id.* at 814-15 n.12. Professor Alleva has correctly characterized the approach of the *Merrell Dow* Court as "mechanistic" in its reliance on the absence of a federal cause of action to determine the absence of federal question jurisdiction, but the mechanistic reasoning has its function in holding the line on federalization of tort law. See generally Alleva, *supra* note 73, at 1484.

154. Mr. Hay has raised a somewhat similar argument with regard to state choice of law rules and offered a refutation on different grounds. Bruce L. Hay, *Conflicts of Law and State Competition in the Product Liability System*, 80 Geo. L.J. 617 (1992). See generally POSNER, *supra* note 55, at 175-77 (raising similar argument with respect to diversity jurisdiction and answering it).

155. See *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

citizens. Insurance companies, who actually pay, are similarly concentrated in the larger states and may well be co-citizens with the plaintiffs.

Additional considerations will keep the courts from making the law too unfavorable, even to out-of-state defendants. Even if the actual defendants in a given case have their operations out of state, the rules of law imposed by the court will have to be applied uniformly to in-state defendants as well. Furthermore, out-of-state defendants, like defendants generally, have some "repeat-player" advantages in influencing courts;¹⁵⁶ they and their insurers have the ability to influence state legislatures as well.¹⁵⁷ Perhaps because of the weakness of the argument's premises, empirical evidence does not support the conclusion that state law is unfavorable to defendants. State law cannot accurately be described as more adverse to defendants than comparable federal tort law found in such areas as admiralty or federal employers' liability. In fact, over recent years there has been a decrease in product liability recoveries, which might be traced to the influence of defendants and insurance companies on state judges and juries.¹⁵⁸ Tort reform, a major priority of insurers and the corporations they cover, has also succeeded at the state rather than the national level.¹⁵⁹

An argument might also be made that varied tort law standards make standardized manufacture and marketing difficult. That position is inconsistent with the American national experience, in which state tort law has varied widely from place to place at the same time that national manufacturing and distribution have become pervasive. The tendency of the state law regime will be to induce national makers and distributors to conform to the most difficult standard. Low-risk-of-liability pockets will exist throughout the country but there is no reason to think this condition is bad.

Congress does have ties to state and local government¹⁶⁰ that federal judges, once appointed, do not need to maintain. For that reason, a law of mass torts created by Congress may be more sensitive to local needs than one devised by the judiciary using common law powers. But the very uniformity that is the reason for federal mass tort law

156. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

157. See Sanders & Joyce, *supra* note 129, at 218 (describing role of insurance companies and industry groups in lobbying for state tort reform packages).

158. Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731, 791 (1992).

159. See Sanders & Joyce, *supra* note 129, at 214-18.

160. See Mishkin, *supra* note 140, at 1685; Mishkin, *supra* note 152, at 160-63.

would frustrate the federalism objectives of experimentation, adaptation to local needs, and participation, no matter where in the national government the law originated.

C. Resource Allocation Problems of Federal Transfer and Consolidation

Even the strongest proponents of transfer and consolidation of mass tort cases to the federal courts recognize that their proposals would exacerbate case congestion in the district courts and courts of appeals.¹⁶¹ The congestion problem is already severe. From 1958 to 1988, the number of cases filed in the district courts tripled; the number filed in the courts of appeals increased more than ten times.¹⁶² Federal judges were hardly underworked in the 1950s.¹⁶³ Although the number of federal judges has more than doubled since that time, and the judges receive more extensive staff support than previously, both the backlog of cases and the length of time to termination have increased markedly in recent years.¹⁶⁴ The proposals to consolidate complex litigation in the district courts will flood those courts' dockets with complicated cases, which by their nature require intensive judicial intervention at all stages.¹⁶⁵ The judges will respond in the only manner they can: delaying other judicial business until enough of it simply goes away.¹⁶⁶

Adding more judges presents its own problems.¹⁶⁷ Proliferation of judges would diminish judicial prestige, discouraging good candidates from taking the job. Unavoidably, it would force those selecting judges to dip lower into the pool of interested candidates.¹⁶⁸ These

161. See sources cited *supra* note 6. Some critics of federal consolidation base their opposition, in part, on the expected congestion the cases will cause. See, e.g. *Hearings*, *supra* note 126, at 17 (statement of Judge Schwarzer).

162. FCSC, *supra* note 5, at 5.

163. POSNER, *supra* note 55, at 77.

164. FCSC, *supra* note 5, at 5-6.

165. See FEDERAL JUDICIAL CENTER, *supra* note 25, at 5-6.

166. Judge Posner has written, "A judicial system's short-run response to higher demand is delay. Delay not only postpones but reduces demand; it diminishes the expected benefit of litigating to the plaintiff by reducing the present value of any judgment he receives . . . , and thus makes substitutes such as settlement and . . . arbitration more attractive." POSNER, *supra* note 55, at 11.

167. *Id.* Some would argue that because courts do not charge users anything but a nominal cost for adjudicating their cases, increasing the system's capacity will simply enable still more people to bring their disputes to the newly-improved federal judicial system. Judge Posner states: "It is like building an expensive highway to relieve congestion but charging users nothing: there is no incentive for the users to seek substitutes that may be cheaper for society as a whole, so congestion soon reasserts itself." *Id.*

168. *Id.* at 40, 99; accord FRIENDLY, *supra* note 54, at 28-30.

losses would reduce the quality of justice in the federal statutory and constitutional cases the federal judiciary must decide.¹⁶⁹

Congestion, delay, and mediocrity are the sad facts of modern life. Every judicial system tolerates them to some degree. Should their increase be tolerated to achieve the perceived advantages of consolidation of mass tort cases in federal courts? Considerations of comparative advantage between state and federal forums counsel "no."

Federal judges' most appropriate role is the interpretation of federal constitutional and statutory law,¹⁷⁰ especially in politically sensitive cases.¹⁷¹ These are the cases in which their political insulation

169. See POSNER, *supra* note 55, at 40, 99. The Federal Courts Study Committee summarized this point:

The independence secured to federal judges by Article III is compatible with responsible and efficient performance of judicial duties only if federal judges are carefully selected from a pool of competent and eager applicants and only if they are sufficiently few in number to feel a personal stake in the consequences of their actions. Neither condition can be satisfied if there are thousands of federal judges. The process of presidential nomination and senatorial confirmation would become pro forma because of the numerosity of the appointees; a sufficient number of highly qualified applicants could not be found unless salaries of federal judges were greatly increased; and a judge who felt like simply a tiny cog in a vast wheel that would turn at the same speed whatever the judge did would not approach the judicial task with the requisite sense that power must be exercised responsibly—especially when the judge, by reason of having life tenure, lacked the usual incentives to perform assigned tasks energetically and responsibly.

FCSC, *supra* note 5, at 7. Both Judges Posner and Friendly have commented on the difficulty and possible futility of significant increases in court of appeals judges. FRIENDLY, *supra* note 54, at 28-30, 45-46 (noting probable decrease in candidate quality, rise in panel conflicts and need for en banc proceedings, and diminution in collegiality); POSNER, *supra* note 55, at 99-100.

Professor Chemerinsky, writing on the subject of federal-state court parity, contends that even a doubling of the federal judiciary would not create trouble attracting the most desirable candidates. Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 324; accord Stephen Reinhardt, *Too Few Judges, Too Many Cases*, A.B.A. J., Jan. 1993, at 52 ("We have 160 court of appeals judges . . . They are, undoubtedly, all fine individuals. However, I can assure you that there are far more than 160 other persons in the legal community who are just as fine, just as qualified and just as talented as we are."). Still, Chemerinsky does not deny that prestige does lure promising candidates to the job, and that prestige is inversely related to the number of persons holding the position. Chemerinsky, *supra* at 324. Although he holds out hope for salary increases to compensate for the prestige decrease, he recognizes the possibility of political obstacles to raises for the judiciary. *Id.* As Chemerinsky notes, the question is really an empirical one. *Id.* The difficulty is that the population of the United States is the human subject of any experiment on the topic.

170. See AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 164-68 (1969); DAVID CURRY, FEDERAL COURTS 139 (4th ed. 1990); MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 96 (2d ed. 1990); Allea, *supra* note 73, at 1495.

171. Neuborne, *supra* note 75, at 1115-17.

and elite tradition make them far better adjudicators than many state judges will be. Professor Neuborne has identified the factors that make federal judges particularly good at enforcing constitutional rights of unpopular individuals and groups.¹⁷² These include technical competence on constitutional issues, widespread attitudes in support of individual rights claims, and political insulation.¹⁷³ Even a commentator who opposes the notion of an "elite" federal judiciary agrees that federal judges' political independence makes them better at adjudicating federal constitutional claims than state courts are.¹⁷⁴

The advantages enjoyed by federal courts in interpreting the Federal Constitution and laws evaporate when the federal judges turn their attention to tort cases controlled by the common law of the states. Although the smaller number of federal judges and some aspects of federal selection and staffing may lead to generally high levels of technical proficiency,¹⁷⁵ the technical proficiency is likely to be concentrated in areas such as federal statutes, procedure, and constitutional law. Moreover, some aspects of technical proficiency are of greater importance in civil rights cases, where the claims challenge conventional approaches to the law.¹⁷⁶ On the other hand, the "ivory tower syndrome" described by Professor Neuborne, which leads federal judges to disregard "distasteful and troubling fact patterns" and uphold constitutional claims,¹⁷⁷ cannot be expected to be beneficial when working in the fact-driven world of tort law. Sensitivity to the facts of the case and the real-world effects of legal rules ought to be the driving forces in the development and application of the law of torts.¹⁷⁸

172. *Id.* Professor Chemerinsky has noted that the general question of federal-state court parity (or the superiority of one or the other) is an empirical one, though Professor Redish has responded that in the absence of agreed-upon empirical measures, institutional factors are the best way to resolve the debate. Compare Chemerinsky, *supra* note 169, at 236, with Redish, *supra* note 60, at 330.

173. Neuborne, *supra* note 75, at 1120-21.

174. Michael Wells, *Against an Elite Federal Judiciary: Comments on the Report of the Federal Courts Study Committee*, 1991 B.Y.U. L. REV. 923, 947, 953-54. Wells' overriding concern is maintaining the federal courts as a forum for claims by individuals with few resources who are suing government bureaucracies and other large institutions. *Id.* at 954-55. Flooding the federal courts with complex tort cases will push such cases still further back in the queue. State courts are the better forum for mass tort cases despite—even because of—the likelihood of large, though primarily nongovernmental, institutions as defendants. See *infra* text accompanying notes 315-16.

175. See Neuborne, *supra* note 75, at 1121.

176. *Id.* at 1123.

177. *Id.* at 1125.

178. ROBERT E. KEETON, *VENTURING TO DO JUSTICE* 65-71 (1969).

The theory of federal-state allocation of governmental power further supports keeping the federal courts free to concentrate on federal claims, while leaving state courts in charge of tort cases. Federal judges earn their political independence by filling their role as a check on the overwhelming legislative and executive power of the national government. By contrast, state judges interpreting state law need less power, and it is entirely appropriate to have political incentives—such as elections—for the faithful performance of their duties, including development of the law.¹⁷⁹ Indeed, the very vulnerability to political pressure that makes state courts less effective at enforcing federal law makes them better expositors of tort law.¹⁸⁰

Several prominent commentators have argued that the abstention doctrine permits federal judges to frustrate the objectives that Congress meant to achieve by assigning jurisdiction to the federal courts.¹⁸¹ Abstention is almost entirely a federal common law development premised on state interests.¹⁸² If federal courts hinder the national interest by abstaining from exercise of jurisdiction that Congress intentionally assigned to them, they commit as great a sin by neglecting cases within their traditional jurisdiction because their dockets are clogged with complex state law mass torts.

179. Federal judicial independence therefore ought to play a role in the proper allocation of federal and state jurisdiction:

The federal government's potential monopoly power was much in the thinking of the framers of the Constitution, and one of the checks they set up against it . . . was the independent judiciary with its lifetime tenure and secure (except for inflation) compensation. This costly check—it is costly to have a body of officials insulated from the usual incentives to efficient performance—would have less social value at the state level, where the power to be checked is not nearly as great. So it is not a surprise that the terms of employment of state judges (most of whom are elected) are indeed less conducive to judicial independence Since we thus have a body of judges, the federal judges, who—not adventitiously but for reasons derivable from the theory of federalism—have . . . greater independence from political influences, we should in deciding how to allocate responsibilities between state and federal judges take the federal judges' greater independence into account. It is a factor intrinsic to the theory.

POSNER, *supra* note 55, at 173 (emphasis in original).

180. See *supra* text accompanying notes 57-86.

181. Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 74 (1984) ("[N]either total nor partial judge-made abstention is acceptable as a matter of legal process and separation of powers, wholly apart from the practical advisability of either form of the doctrine."); see Ann Althouse, *The Misguided Search for State Interest in Abstention Cases: Observations on the Occasion of Penzoil v. Texaco*, 63 N.Y.U. L. REV. 1051, 1086-87 (1988) (arguing that federal courts should abstain only when doing so advances federal interests); Althouse, *supra* note 85, at 1525-27 (contending that federal interest in effective functioning of states should guide withholding or application of federal jurisdiction); Hickman, *supra* note 114, at 1255.

182. See Redish, *supra* note 181, at 76, 78-79.

Professor Bator, in his spirited defense of federal-state judicial parity, never denied that federal judges have institutional advantages in federal law cases due to their expertise in federal statutory and constitutional interpretation and their insulation from politics.¹⁸³ Moreover, although he argued with force that state courts are often as good at constitutional interpretation as federal courts,¹⁸⁴ he did not challenge the proposition that federal courts are better at federal constitutional and statutory interpretation than they are at anything else, notably at interpretation of the state common law of torts.¹⁸⁵ Even if the federal courts are better at applying state common law than state courts are, they should still specialize in federal law interpretation because they make better use of their time doing that than applying state law.¹⁸⁶ The comparative advantages of the two systems dictate that the federal one should specialize in federal law interpretation while the state one should engage in state statutory interpretation and the development of common law in tort and other private law areas.¹⁸⁷

The tort cases merely serve as distractions from the core function of the third branch of national government.¹⁸⁸ In a time of scarce re-

183. See Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 623 (1981) (granting assumption).

184. *Id.* at 630-31.

185. Indeed, Bator stated that his central concern was "the proper role of state judges in deciding issues of federal law." *Id.* at 608 (emphasis in original). He distinguished diversity cases and others in which the court is interpreting state law. See *id.* at 607 n.9. Notably, two other authorities who fall on the pro-parity side of the debate also stop at the point of saying that state courts are or may be as receptive to federal constitutional and statutory claims as federal courts. Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1983). They do not deny that federal courts are better suited for federal law adjudication than for state court adjudication, or that federal judges' time is better spent on federal law rather than state law cases.

186. See Kristin Bumiller, *Choice of Forum in Diversity Cases: Analysis of Survey and Implications for Reform*, 15 LAW & SOC'Y REV. 749, 773 (1981) (stating with regard to diversity jurisdiction, "abolitionists might well grant the divergence of quality between federal and state courts, and yet claim that diversity cases do not present legal issues worthy of federal court resources."). *Id.*

187. This argument of comparative advantage is loosely analogous to the economic argument for complete specialization by trading partners in that activity in which each has the comparative, rather than absolute advantage. See generally MORDECHAI E. KREININ, *INTERNATIONAL ECONOMICS: A POLICY APPROACH* 188-90 (1971) (describing economic theory of comparative advantage).

188. Restrictive interpretations of federal jurisdiction under 28 U.S.C. § 1331 (1988) and its predecessors have had the important function of allowing the federal courts to concentrate on important federal cases and keeping those courts from getting clogged with personal injury claims. William Cohen, *The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890, 911-12 (1967); see Alleva, *supra* note 73, at 1557 ("[T]he [Merrell Dow] Court's jurisdiction denial did serve the im-

sources, when the federal court system can never expect to deal with more than a fraction of the entire judicial activity of the United States,¹⁸⁹ the federal courts should only exercise jurisdiction "where everything is to be gained and nothing is to be lost by granting original jurisdiction to inferior federal courts."¹⁹⁰ When Judge Friendly sketched out this "minimum model" of federal jurisdiction, he included those cases in which the United States was seeking to enforce federal civil and criminal law, suits against the United States, admiralty cases, and bankruptcy, patent, and trademark cases.¹⁹¹ Friendly also noted an "almost universal agreement" that federal courts should have broad powers to hear cases arising under federal constitutional and statutory provisions, particularly under the civil rights laws.¹⁹² Judge Posner's optimal scope of federal jurisdiction applies concepts of federalism and comparative political independence of judges to include federal statutory cases in which federal legislation or administration of state law by federal courts would correct state externalities: tort suits against the United States and many federal criminal cases, most admiralty cases, and cases involving assertions of rights by members of politically weak groups.¹⁹³

portant federal interest in relieving federal docket pressures, an interest that probably figured into the Court's rationale.").

189. The fraction is about one-tenth. FCSC, *supra* note 5, at 4.

190. FRIENDLY, *supra* note 54, at 8.

191. *Id.* at 9-11.

192. *Id.* at 75, 109. Friendly thought serious restrictions ought to be placed on the timing and subject matter of private civil rights actions in federal courts, *id.* at 90-107, but felt that the federal courts had no more important business than enforcing civil rights laws in cases brought by the United States government. *Id.* at 68 n.10. He favored legislation giving federal courts exclusive jurisdiction over air crashes, apparently on the ground that only federal courts could consolidate the proceedings brought by multiple claimants. *Id.* at 110. As indicated below, that premise is dubious. See *infra* text accompanying notes 240-65.

193. POSNER, *supra* note 55, at 175-81. In recent years, few others have attempted to create complete blueprints for assertions of federal court power. Notable, however, is Professor Amar's position, which is that federal judicial power ought to extend, either at the trial or appellate level, to every class of case listed in Article III of the Constitution. Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205 (1985). Amar's unusual interpretation of Article III places ultimate responsibility for the protection of federal rights on one or another tier of federal courts. *Id.* at 207-10. Because the position advanced here places responsibility for protection of state rights, rather than federal rights, on state courts, it is not inconsistent with Amar's position. Although Congress could place many mass tort cases under the diversity umbrella, Amar would not require Congress to do so. Under Amar's interpretation, diversity cases may, but need not be, heard by one or another federal court. *Id.* at 245-46 & nn.130-31, 269. In fact, Amar proposes that any increase in the caseload of the federal judiciary caused by adoption of his position could be offset by restricting diversity. "Once Article III is properly understood, it is clear that permissive diversity cases should yield to

Both of these minimum models apply federal judicial power to cases that the state courts could be expected to judge less ably than their federal counterparts, those in which the United States government's own interest is of overriding importance, and those in which the political insulation of federal judges gives them needed impartiality that state judges lack. Absent from the list are tort cases, ordinary or complex. The only justifications for assertion of federal jurisdiction over these cases are externalities, which have already been discussed,¹⁹⁴ and jurisdictional and practice barriers, which are no justification at all.¹⁹⁵ Allocating federal jurisdiction to complex cases controlled by state law draws resources from the cases that a federal court system must resolve for the good of the nation.

The misallocation is exacerbated by the reality that the federal judges, under *Erie*, cannot develop a body of mass torts law apart from their predictions of state decisions, however inadvisable that development might be. It would "badly squander the resources of the federal judiciary" to apply them to state law mass torts in a way that "precludes the attainment of one of a judge's most important functions, namely 'to establish a precedent and organize a body of law.'"¹⁹⁶

Moreover, federal judges, particularly the many whose previous careers were spent as government attorneys, may be inexperienced in state tort and insurance law. Their judicial experience will give them expertise in federal criminal procedure, in the interpretation of the United States Constitution, federal statutes, and federal regulations,¹⁹⁷ but only passing familiarity with state tort law. Expansion of jurisdiction over mass tort cases would give the federal judges more exposure, but the cases will remain a minority of their dockets. And even if district court judges are familiar with the tort law in the states in which they sit, the members of the circuit appeals panels will often be drawn from other states and will lack whatever specialized expertise the lower courts may have.

mandatory federal question jurisdiction." *Id.* at 269. His ideal system of trial jurisdiction and appellate review is one in which "state courts are the last word on state law; federal courts, on federal law." *Id.* at 270.

194. See *supra* text accompanying notes 154-59.

195. See *infra* text accompanying notes 240-316.

196. FRIENDLY, *supra* note 54, at 143 (quoting Judge J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 323 (1967)).

197. REDISH, *supra* note 170, at 2 ("[F]ederal courts have developed a vast expertise in dealing with the intricacies of federal law, while the state judiciary has, quite naturally, devoted the bulk of its efforts to the evolution and refinement of state law and policy.").

In addition, some efficient means of handling complex cases may be forbidden to the federal courts by the requirements that cases be tried only by Article III judges and decided by juries. Once a case is within federal jurisdiction, a duly-appointed judge with life tenure and salary protection must preside over the case.¹⁹⁸ If the case falls within the traditional areas of the common law or is sufficiently analogous in its form and relief, the Seventh Amendment requires a jury.¹⁹⁹ These principles mean that a district judge cannot assign individual trials on damages or exposure to toxic products or conditions to a magistrate or other judicial officer without the parties' consent; a jury will need to be empaneled in each case. A defendant who wants the caseload burden itself to stall or abort the imposition of liability²⁰⁰ will withhold consent to a non-Article III judge, and will insist on a jury. Techniques of sampling and statistical projection have great promise in easing the burden of deciding individual exposure and damage questions.²⁰¹ In sampling, some plaintiffs' cases will be fully adjudicated and then serve as models for settlement and voluntary adjudication of others' claims. However, both Article III and the Seventh Amendment are thought to confer personal rights on the individual,²⁰² which may conflict with the nonconsensual use of these techniques in a federal forum.

State use of magistrates and other auxiliary adjudicators varies,²⁰³ but states are at least free to add ordinary judges to the ranks when needed without facing a federal constitutional obstacle to laying them off later.²⁰⁴ Jury trial rights also vary from state to state, but many

198. See *Gomez v. United States*, 490 U.S. 858 (1989) (construing the Magistrates' Act to avoid a constitutional conflict by holding that it does not authorize a magistrate to preside over jury selection in felony trial without the defendant's consent).

199. *Granfinanciera, S.A., et al. v. Nordberg*, 492 U.S. 33 (1989).

200. See *Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649, 666 (E.D. Tex. 1990) (reasoning that holding individual trials for all asbestos cases in district would be impossible, preventing plaintiffs' access to the courts).

201. Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 826-39 (1992).

202. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986) (stating that Article III confers a "personal right"); see also *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990) (granting mandamus against federal district court's use of sampling and statistical inference to determine awards in mass asbestos case).

203. Compare DEBORAH R. HENSLEY, ET AL., ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS 78-79 (1985) (describing use of magistrates in New Jersey) with ILLINOIS JUDICIAL CONFERENCE, ILLINOIS MANUAL FOR COMPLEX LITIGATION 14 (1991) (describing limits on use of masters in Illinois).

204. Federal judges have life tenure and their salaries cannot be decreased while they are in office. U.S. CONST. art. III, § 1, cl. 2.

states retain a much greater range of flexibility in the use of juries or non-jury fact finders.²⁰⁵ Traditional judges and juries should be involved in trying individual questions of exposure or damages, but states have an advantage in handling complex tort cases because they may delegate more issues when appropriate.

II. State Court Consolidation: Advantages and Opportunities

Aggregating cases from courts now in various states into a single state court forum carries the judicial economy and consistency advantages of federal consolidation. These advantages flow from consolidation itself. Consolidation in a state forum, however, may confer additional advantages from new doctrinal developments and recently improved procedures for handling complex cases in several states. Moreover, improvements in state judicial systems that would facilitate just adjudication of complex cases may be easier to obtain than expansions of federal jurisdiction.

A. The Advantage of Transfer and Consolidation

The flaws in the idea of consolidation in a federal forum should not obscure the real benefits of consolidating individual cases into larger proceedings. The primary benefit is efficiency. Multiple cases to resolve the same factual and legal issues entail multiple costs to litigants, attorneys, witnesses, and courts. The advantage of consolidation is a familiar one, and was a primary impetus behind the liberal joinder and class action provisions of the original Federal Rules of Civil Procedure, as well as the still more liberal 1966 revisions. The objective was to make single proceedings out of multiple lawsuits.²⁰⁶ Besides eliminating duplication, consolidation can also enhance efficiency by allowing greater opportunity for the use of sampling techniques.²⁰⁷

A secondary advantage of aggregation is a greater likelihood of consistent results in factually similar cases. The same factfinder is

205. See RICHARDSON R. LYNN, JURY TRIAL LAW & PRACTICE 11-12 (1986) (collecting cases).

206. See *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 724 (1966) ("Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties, and remedies is strongly encouraged."); *Mosley v. General Motors Corp.*, 497 F.2d 1330, 1332 (8th Cir. 1974) ("The purpose of [Fed. R. Civ. P. 20] is to promote trial convenience and expedite the final determination of disputes, thereby preventing multiple lawsuits. Single trials generally tend to lessen the delay, expense and inconvenience to all concerned.").

207. Saks & Blanck, *supra* note 201, at 850-51.

more likely to be consistent with itself than multiple factfinders would be with each other. Uniformity of result in mass tort cases is a major selling point for proponents of a federal common law of products liability.²⁰⁸ Nevertheless, consistency may be real or false. Differences in law that affect liability or damages for various plaintiffs should yield different, not similar, results in their cases.²⁰⁹ Consolidation of cases in the appropriate state forums promotes uniformity of result when the facts and the applicable law are the same, while permitting the difference in result that different state law causes. The disuniform results will enable states' voters and politicians to make more informed choices whether and how to modify their tort law.²¹⁰

Even efficiency should not be pursued too far. Individual fairness²¹¹ and participation interests²¹² may work in the opposite direction, as do some diseconomies of scale. Depending on the situation, consolidation into several proceedings, rather than a single one, may best meet the combined goals of efficiency, appropriate consistency, fairness, and participation.²¹³ Nevertheless, the haphazard consolidation now available under the federal class action rule, the federal

208. See Vairo, *supra* note 108, at 178-81.

209. Moreover, two inconsistent decisions, one of which is correct, would be better than two consistent decisions which are erroneous on the facts or the law. The appearance of justice matters, but the reality of justice matters more.

210. Sedler & Twerski, *supra* note 78, at 632, 635.

211. See Transgrud, *supra* note 6, at 69.

212. *Id.* at 70-76; see Roger H. Transgrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 816-31 (1985) (elaborating argument). Nevertheless, if the gridlock produced by the multitude of individual cases keeps all but a few from coming to trial, plaintiffs as a group are far worse off than if they suffer some decrease in autonomy and individual attention. See *Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649, 666 (E.D. Tex. 1990) (reasoning that the defendants' demand for individual trials for all asbestos cases in district would prevent most plaintiffs' access to the courts). Moreover, the sampling and aggregation techniques available in combined litigation may improve the quality of individual decisions, not diminish it. See Saks & Blanck, *supra* note 201, at 826-39. Finally, although mass proceedings may be expected to influence the substantive law, there is no reason to believe that the influence will be bad. Mass harm is the reality of mass society; law should be molded to deal appropriately with it. See generally Scott, *supra* note 106, at 337-71 (discussing the impact of class actions on the development of rules of liability in securities cases).

213. Some concern may exist about the risk that parallel proceedings will result in multiple awards of punitive damages for the same conduct by a single defendant. See Kevin M. Forde, *Punitive Damages in Mass Tort Cases: Recovery on Behalf of a Class*, 15 LOY. U. CHI. L.J. 397, 398 (1984). Courts may reduce the damages in light of other punitive damages verdicts, however. See Paul D. Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CAL. L. REV. 116, 136-137 (1968) (citing *Ostpowitz v. Wm. S. Merrell Co.*, No. 5879-1963, N.Y.L.J., Jan. 11, 1967, at 21 (Sup. Ct., Westchester County, N.Y.), *appeal docketed sub nom. Ostpowitz v. Richardson-Merrell, Inc.* (App. Div., 2d Dep't, Apr. 26, 1967)).

transfer statutes, and abstention and preclusion doctrines diminish fairness and participation without obtaining the full advantages of consolidation.²¹⁴ The federal class action rule is drafted to exclude ordinary tort cases. Even if it were revised, changes in jurisdiction statutes would be needed to make it a true consolidation vehicle. These changes, as noted above, would be unwise. Section 1404 of Title 28 merely permits suits to be transferred to places they could have been brought in the first place, which may not be a single forum. Section 1407, in practice, is more flexible, but, once again, federal consolidation is full of difficulties. Preclusion was once thought to hold great promise as a means of promoting efficiency, but the reluctance of courts to apply preclusion in tort cases has limited its value.²¹⁵ A federal court may abstain in favor of parallel activity in other federal courts or in the state courts, but this voluntary action does not guarantee the accumulation of those suits that ought to be heard together in the forum where they most logically would be heard. Enhanced state court consolidation would be preferable.

B. Capabilities of State Forums

State forums will frequently be those in which mass tort cases most logically would be heard. Nevertheless some question remains whether state courts are capable of hearing them and rendering fair decisions. A range of recent developments that have improved state courts' capacity to resolve mass tort cases suggests that they are.

Many state courts have adopted case management procedures,²¹⁶ some of which compare favorably with federal court procedures for

214. See *Transgrud*, *supra* note 212, at 782-83 (rejecting some currently available means of consolidated treatment of mass torts).

215. Michael D. Green, *The Inability of Offensive Collateral Estoppel to Fulfill Its Promise: An Examination of Estoppel in Asbestos Litigation*, 70 IOWA L. REV. 141, 147-52, 172-78 (1984); see Schroeder, *supra* note 11, at 928, 931-32; John P. Burns et al., *Special Project: An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 VAND. L. REV. 573, 660, 666-90 (1983) (collecting and discussing cases).

216. HENSLEY, *supra* note 203, at 76-78; see *Asbestos Claims Facility v. Berry & Berry*, 219 Cal. App. 3d 9 (1990) (describing management procedures in complex tort case); Paul D. Rheingold, *The Hymowitz Decision—Practical Aspects of New York DES Litigation*, 55 BROOKLYN L. REV. 883, 896 (1989) (describing New York court's use of management order, uniform discovery, and assignment of all cases to a single judge in consolidated mass tort case, though noting that state judges had less experience with mass litigation than federal counterparts and state rules lacked some provisions conducive to mass litigation); Franklin M. Zweig & Hazel A. White, *Courts Eager for Tools to Manage and Adjudicate Science Cases*, STATE JUST. INST. NEWS, Winter 1993, at 4 (describing specialized courts for toxic torts and other cases involving complex scientific evidence in New York City and Philadelphia); see also WILLIAM E. HEWITT ET AL., *COURTS THAT SUCCEED: SIX PROFILES OF SUCCESSFUL COURTS V-XV* (1990) (noting case management initiatives in large urban

handling complex cases. One example is New Jersey, where a report from the mid-1980s told that magistrates supervised discovery and judges handled trials in complex asbestos cases under a rigid schedule of plans and reporting.²¹⁷ At the same time, the federal court in New Jersey, faced with reluctance by judges to accept transferred cases and to supervise discovery aggressively, was "at a standstill in dispositions."²¹⁸ Joinder has been liberalized in many states to facilitate consolidation.²¹⁹ State class action rules are in place²²⁰ and may be more amenable to mass tort claims than the federal class action rule.²²¹ States have successfully used bifurcation of issues²²² and trial of representative cases²²³ to dispose of complex tort litigation. States have also established deferral registries for claims that are not yet ripe.²²⁴ Although deferral enhances both justice and efficiency,²²⁵ federal courts may lack the authority to take this step.²²⁶

State courts have acquired extensive experience in complex injury and environmental suits. What is thought to be the most complex civil toxic-waste lawsuit ever heard in an American court is currently

courts that conduct general judicial business efficiently). Some states have set procedures for designation, assignment, and subsequent handling of all types of complex litigation. E.g., CAL. CODE JUD. ADMIN. § 19 (West 1991).

217. HENSLER, *supra* note 203, at 78-79, 103.

218. *Id.* at 100-01.

219. See, e.g., N.Y. CIV. PRAC. L. & R. 601 (McKinney 1990).

220. See, e.g., N.Y. CIV. PRAC. L. & R. 901-09 (McKinney 1990 & Supp. 1993); see also James M. Klein, *An Overview of Class Actions in Ohio*, 20 CAP. U. L. REV. 909 (1991) (describing practice under OHIO R. CIV. P. 23).

221. Compare Fed. R. Civ. P. 23 advisory committee note ("A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action [under Rule 23(b)(3)] . . .") (1966) with *Schreibman v. Linn*, 415 N.Y.S.2d 430 (App. Div. 1979) (applying class action procedures to injury cases against doctor).

222. Theodore Goldberg & Tybe A. Brett, *Consolidation of Individual Plaintiff Personal Injury-Toxic Tort Actions*, 11 J.L. & COM. 59, 63 (1991) (discussing separation of liability and punitive damages from other issues in consolidated asbestos proceeding in West Virginia courts); see *Lowe v. Norfolk & W. Ry. Co.*, 463 N.E.2d 792, 808-10 (Ill. Ct. App. 1984) (approving severance of some damages issues in complex environmental disaster case).

223. See Henry J. Reoke, *Asbestos Makers Lose Big Trial*, A.B.A. J., Oct. 1992, at 18 (describing jury findings for three of six "sample plaintiffs"); see also Alex Dominguez, *Nation's Largest Asbestos Trial Opens*, CHI. DAILY L. BULL., Mar. 10, 1992, at 1 (describing start of trial of six representative cases, to be followed by "minitrials" of other plaintiffs).

224. See, e.g., *Burns v. Celotex Corp.*, 587 N.E.2d 1092 (Ill. App. 1992); *In re Asbestos Cases*, 586 N.E.2d 521 (Ill. App. 1991).

225. Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541, 542 (1992).

226. See *id.* at 581-93 (discussing legal objections to federal courts' establishing deferral registries, though concluding that the courts have the authority).

pending before a state judge in California.²²⁷ A Maryland Circuit Court heard the largest civil asbestos trial in the country, with 8,555 cases consolidated into it, in 1992.²²⁸ An action with more than 700 consolidated asbestos cases recently proceeded to partial settlement and partial adjudication in New York.²²⁹

Procedural uniformity may be an advantage of federal consolidation over consolidation in the state courts, but that argument cannot be pressed too far. Not only is there a trend towards uniformity in state practice rules,²³⁰ but there are significant disuniformities in federal practice. Part of the disuniformity stems from the federal courts' practice tending to resemble local state court practice.²³¹ A more potent centrifugal force in federal practice is the recent proliferation of local practice rules.²³² Most recently, the Civil Justice Reform Act has spawned advisory groups to propose civil justice expense and delay reduction plans, which may turn the proliferation of variant local rules into an explosion.²³³ Of course, differences between state and federal practice that stem from state initiatives to facilitate handling mass tort cases are hardly an advantage of federal consolidation.

C. Political Considerations

The various calls for expanded federal court jurisdiction over consolidated mass tort cases all would require Congressional action. Congress, however, will not necessarily be persuaded by the same policy concerns that may move academics and judges. Perhaps the role of legal commentators is not to predict the likelihood of political success for their proposals, but anyone advocating a reform must make a

227. The suit has about 4,000 plaintiffs, fewer than those covered by the Agent Orange litigation in the federal courts in the 1980s, but it involves more than 200 chemicals, making it more technologically complex than the Agent Orange suit. Nick Madigan, *Largest-Ever Toxic-Waste Suit Opens in California*, N.Y. Times, Feb. 5, 1993, at B9.

228. See *Asbestos Makers Lose Big Trial*, *supra* note 223. The celebrated *Cimino* asbestos litigation in the federal courts involved consolidation of 3,031 cases. *Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649 (E.D. Tex. 1990).

229. *In re New York City Asbestos Litigation*, 572 N.Y.S. 2d 1006 (Sup. Ct. 1991). Comparably large consolidated asbestos cases have been heard in other states. See Goldberg & Brett, *supra* note 222, at 61 (reporting experience of lawyer with eight trials in several West Virginia courts, each trial involving ten to nearly 2,000 cases).

230. See Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2030, 2044 (1989).

231. See *id.* at 2044 ("The country is too large and the judges, local rules, and legal cultures too diverse to permit the [full] advertised uniformity [of federal practice].").

232. *Id.* at 2019-26.

233. Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 379-81 (1992).

rough prediction of what is likely to succeed politically if only to determine where to expend scholarly resources.

Recent experience suggests that political resources would be better spent supporting reforms aimed at enhanced state court consolidation rather than expanded federal mass tort consolidation efforts. Proposals to expand federal consolidation gain their strongest support among elite groups of lawyers and politicians, but fail when they confront more broadly representative bodies. The American Bar Association proposal sailed through committee, but could not command a majority among the House of Delegates; even a resolution to support legislation for federal consolidation of mass accidents failed to pass.²³⁴ House Bill 3406 succeeded in the House Judiciary Committee but failed on the Senate floor.²³⁵ The costs of federal consolidation proposals fall on specific groups and individuals, while judicial economy benefits the United States population as a whole. Consequently, only a strong consensus on terms of a proposal will enable it to survive the legislative process.²³⁶

Important special interest groups fear federal consolidation. Consumers worry that it is the first step to a federal torts or products law that would diminish liability and curtail incentives for safety. Trial lawyers fear decreases in liability, but they are also concerned about the impact on practice, even if the underlying law were to remain unchanged. Federal courts are often thought to be the domain of large firms, rather than solo or small-firm practitioners.²³⁷ Many lawyers prefer the state courts, which they know intimately, rather than the sometimes forbidding federal tribunals.²³⁸

234. At the 1990 mid-year meeting of the ABA, the backers of the Mass Tort Commission's report withdrew their request for adoption of the report. The ABA membership then rejected a resolution to support legislation similar to the H.R. 3406. Geyh, *supra* note 41, at 410; *see also Hearings, supra* note 126 (letter from L. Stanley Chauvin, President, American Bar Association, to Judge Joseph F. Weis).

235. Kastenmeier & Geyh, *supra* note 9, at 559-60.

236. Geyh, *supra* note 41, at 404 ("As long as complex-litigation reform maintains a low political profile, and pressure to pass legislation of some sort is therefore limited, the most likely outcome—in the absence of a consensus as to how best to proceed—will be in a decision not to move forward, for want of time, interest, and expertise.").

237. Not surprisingly, at non-elite law schools, the enrollments for state civil practice courses far surpass those for the federal courts course.

238. Bumiller, *supra* note 186, at 770 ("An expressed preference for state or federal procedures seems to be related to the experience of the attorney."); POSNER, *supra* note 55, at 143 ("[L]awyers sometimes will steer a case to the court system with which they happen to have more experience.").

Unless there is a change in underlying law, the concerns of the consumers seem groundless.²³⁹ The concerns of trial lawyers and small-scale practitioners are merely an expression of self-interest. The real reasons to oppose federal consolidation are the concerns about institutional competence, democracy, and allocation of resources. But the existence of widespread concern matters, even if the concerns are misplaced. If federal consolidation will not succeed, or will succeed only at a tremendous political cost, politicians will abandon it. Reformers should explore other ways to obtain the same advantages. Solving the apparent problems of state court consolidation may be the best way.

III. State Court Consolidation: Problems and Solutions

A number of existing procedural doctrines may make interstate transfer and consolidation into state forums troublesome. Nevertheless, law reform efforts, many of them already well underway, will ease nearly all of these difficulties. The problems are both doctrinal and practical.

A. Doctrinal Problems of State Court Consolidation

Some problems with interstate transfer and consolidation derive from outmoded or otherwise troublesome legal doctrines. These include territorial limits on personal jurisdiction, forum non conveniens restrictions, choice of law, possible jurisdictional conflicts among states, and potential conflict with the Constitution's interstate compacts clause and the Tenth Amendment. Although the problems are vexing, they are amenable to resolution either at the judicial or legislative level.

1. Fourteenth Amendment Due Process and Territorial Authority

If a court cannot exercise jurisdiction over anyone outside its boundaries, it will face insurmountable obstacles trying to consolidate a national products injury case; it will have difficulties even with a mass disaster case when one or more of the actors is an out-of-state entity. This problem is the main reason that reformers argue for federal, rather than state, consolidation.²⁴⁰ Nevertheless, both state law

239. Of course, if, as Professor Mullenix suggests, federal consolidation requires the creation of federal tort law, the consumers should have very real concerns about that law's content.

240. *E.g.*, ABA, *supra* note 3, at 25; Kastenmeier & Geyh, *supra* note 9, at 539. The ALI proposal does not rely explicitly on this proposition.

and federal constitutional law can be, and are being, modified to make territorial jurisdiction an insignificant barrier.

Although state law may limit territorial authority of state courts, the restrictions are subject to reform efforts by legislatures and by the courts themselves. A trend exists to expand the authority to the boundaries set by the Due Process Clause of the Fourteenth Amendment. Some states have done so by legislation,²⁴¹ others by judicial interpretation of vaguely-worded long-arm statutes.²⁴² Legislatures and courts who want to retain control over the development of their own tort law have a significant incentive to permit broad territorial jurisdiction in mass tort cases. Otherwise parties could be forced by jurisdictional constraints to litigate the same matter elsewhere.

Federal constitutional restrictions on state court jurisdiction are also amenable to reform. A general trend towards expansion of state court jurisdiction began almost as soon as the ink was dry on *Pennoyer v. Neff*.²⁴³ Through the expansion of in rem jurisdiction and the development of concepts of implied consent and corporate presence, courts have eroded state sovereignty-based restrictions.²⁴⁴ The interests of the states and the goal of efficient functioning of the judicial system as a whole have justified the expansion.²⁴⁵ The Supreme Court has cited judicial efficiency in upholding broad territorial jurisdiction in state court class actions. In *Phillips Petroleum Co. v. Shutts*,²⁴⁶ the Court noted that plaintiffs involuntarily brought into a suit do not have as strong an objection as defendants involuntarily brought to another ju-

241. E.g., CAL. CIV. PROC. CODE § 410.10 (West 1973); ILL. ANN. STAT. ch. 735, para. 5 § 2-209 5/2-209 (Smith-Hurd 1993); N.J. STAT. ANN. R4:4-4 (West 1992); R.I. Gen. L. § 9-5-33 (1985); see FLEMING JAMES JR. & GEOFFREY C. HAZARD, CIVIL PROCEDURE § 2.16, at 80 (3d ed. 1985) (describing trend).

242. *Nelson v. Miller*, 143 N.E.2d 673, 679 (Ill. 1957) (stating that purpose of long-arm statute was to extend jurisdiction to due process limits), *limited*, *Green v. Advance Ross Electronics Corp.*, 427 N.E.2d 1203, 1206 (Ill. 1981), *reinstated*, ILL. ANN. STAT. ch. 735, para.5 § 2-209 (Smith-Hurd 1993); *Sybron Corp. v. Wetzel*, 385 N.E.2d 1055 (N.Y. 1978) (giving broad reading to New York long-arm statute).

243. 95 U.S. 714 (1877).

244. Philip B. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 578 (1958); Mark C. Weber, *Purposeful Availment*, 39 S.C. L. REV. 815, 824 (1988); see *Shaffer v. Heitner*, 433 U.S. 186, 200-05 (1977); see also Geoffrey C. Hazard Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 272-81 (describing expansion of state jurisdiction under traditional reasoning).

245. *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958). But see *id.* at 251 (cautioning that not all restrictions on personal jurisdiction will fall).

246. 472 U.S. 797 (1985).

risdiction, and held that general procedural due process is the touchstone for analysis.²⁴⁷

Furthermore, according to many authorities, the due process limits on state courts apply equally to federal courts.²⁴⁸ Federal Rule of Civil Procedure 4(f)'s limit on federal court service of process has prevented this objection from receiving full development in the courts, but a federal consolidation procedure with nationwide service of process would draw the fire. If the question comes down to one of fairness, convenience, or even reasonable expectations based on past practice, the limits on personal jurisdiction of a state or federal court should be the same for any consolidated proceeding.²⁴⁹

Consolidation in a single state court may require other state courts to render themselves inhospitable to claimants who would rather sue there. State courts may impose restrictions on the free choice of litigants. The state creates the cause of action, and may provide that it arises only when the plaintiff observes procedures such as submitting to the jurisdiction of a different state. The Supreme Court has held that states may limit the scope of tort liability by analogous means, such as tolling rules that depend on service of process,²⁵⁰ or immunities that limit the classes of permissible defendants.²⁵¹ Waiver of jurisdictional objections to counterclaims is another widely accepted condition of plaintiff's filing a cause of action in a state's courts.²⁵² States interested in promoting a rational system of state court consolidation should require as a precondition to filing suit that the litigant has been excluded from a consolidated action in another state that plaintiff could conveniently join.

247. *Id.* at 808-12; see Weber, *supra* note 244, at 838 n.119, 864 (discussing merger of territorial jurisdiction and general procedural due process analyses in *Shutts*).

248. *E.g.*, Robert A. Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 VILL. L. REV. 1 (1988); Pamela J. Stephens, *The Federal Court Across the Street: Constitutional Limits on Federal Court Assertions of Personal Jurisdiction*, 18 U. RICH. L. REV. 697 (1984); see Mullenix, *supra* note 6, at 1065 (discussing territoriality objection to federal class action).

249. *Shutts* supports this proposition by merging the analysis of territorial objections of plaintiffs with their general procedural due process objections. See sources cited *supra* note 247. The latter objections apply with equal force to consolidation of proceedings in a federal forum.

250. Walker v. Armco Steel Corp., 446 U.S. 740 (1980) (case decided under *Erie* doctrine); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949) (same).

251. Martinez v. California, 444 U.S. 277 (1980).

252. See Adam v. Saenger, 303 U.S. 59 (1938) (enforcing judgment on counterclaim). A comparable, widely-recognized requirement is submission to business licensing laws. See Woods v. Interstate Realty Co., 337 U.S. 535 (1949) (applying doctrine in diversity case under *Erie*).

States may not subject causes of action to procedures that unfairly deny notice and hearing rights.²⁵³ Thus interstate transfer and consolidation procedures will still need to accommodate geographic considerations that compromise the ability to appear and prosecute one's case.²⁵⁴ The due process requirements in this context should be no different than those that would apply to federal courts consolidating complex litigation.²⁵⁵ In either case, travel costs that would defeat the right to present one's case violate due process. In either case reducing the duties of the distant plaintiff would prevent a violation of due process.²⁵⁶

In *Burnham v. Superior Court*, the Supreme Court reaffirmed a state's power to assert personal jurisdiction over a defendant within its territory.²⁵⁷ *Burnham*, however, does not present an obstacle to state court consolidation of mass tort cases. *Burnham* may mark a return to sovereignty reasoning in cases that consider the scope of state court territorial authority. The plurality opinion stated that continuously observed traditional rules of territorial jurisdiction—which state sovereignty underlies—satisfy due process.²⁵⁸ This reasoning does not give rise to any valid objection to interstate transfer and consolidation. If the objection is based on sovereignty, the state court, as the organ of the sovereign, may waive it by agreeing to transfer the case to another forum. While the individual litigant does not have power to waive the sovereign's prerogative,²⁵⁹ the sovereign itself does.²⁶⁰ Sovereignty doctrine is often thought of as a restriction on the reach of state courts. Whatever effect *Burnham* has on sovereignty doctrine, however, the application in that case actually expanded the jurisdic-

253. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Vitek v. Jones*, 445 U.S. 480 (1980).

254. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809-10 (1985) (discussing absent class member's burdens in light of due process standards).

255. In *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 209 (1958), the Supreme Court confirmed that due process protects the right of a plaintiff to sue for monetary relief in the federal courts. In that case, the Court found that dismissal for failure to produce documents that plaintiff was not able to produce would violate the Federal Rules. *Id.* at 212.

256. See *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (approving certification of nationwide plaintiff class action).

257. 495 U.S. 604 (1990).

258. *Id.* at 609-10.

259. The inability of the defendant to waive the objection of the sovereign was the Supreme Court's original reason for rejecting sovereignty as the basis for limits on territorial authority. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinée*, 456 U.S. 694, 701-03 n.10 (1982); see *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.13 (1985).

260. See *Schroeder*, *supra* note 11, at 970 (stating that agreement between states permitting transfer of cases would eliminate any sovereignty-based objection to jurisdiction).

tion of the state court by giving broad approval to transient service of process.²⁶¹ Indeed, the opinion declares that continually-used traditional exercises of jurisdiction satisfy due process, without saying anything about what fails to satisfy due process.²⁶²

Moreover, a majority of the Court has not embraced the return to sovereignty ideas. A group of justices of equal size to that endorsing the plurality opinion in *Burnham* relied on concepts of fairness to support the assertion of state court jurisdiction in the case.²⁶³ Fairness concepts would make the application of territorial restrictions uniform in the state and federal courts. Those ideas would also allow for an expansion of jurisdiction to accommodate serious interests of the state and the judicial system, such as state court consolidation of mass tort cases.

An alternative possibility for achieving the same result of expanded state court territorial authority would be for Congress to authorize nationwide service of process for state courts handling mass tort cases. Congress has authorized nationwide service in some actions brought under federal jurisdiction that is concurrent with state court jurisdiction.²⁶⁴ Courts are divided whether this congressional action overrides restrictive state long-arm statutes or expands the state jurisdiction otherwise available under the minimum contacts test.²⁶⁵ Because minimum contacts applies only to defendants,²⁶⁶ and the test is flexible to accommodate interests like consolidation, minimum contacts should not create a serious difficulty.

2. *Forum Non Conveniens and Venue*

The state law of forum non conveniens has undergone major changes in the last generation so that it now will rarely present a serious obstacle to interstate consolidation of mass torts. The country's third-largest state has effectively abolished forum non conveniens.²⁶⁷

261. *Burnham*, 495 U.S. at 628.

262. Elsewhere, the author of the *Burnham* opinion has approved the use of a government interests-individual fairness calculus in determining whether newly-established adjudicatory procedures satisfy due process. *Connecticut v. Doebr*, 111 S. Ct. 2105, 2123 (1991) (Scalia, J., concurring in part and concurring in the judgment).

263. *Burnham*, 495 U.S. at 628-40 (Brennan, J., concurring in judgment).

264. *E.g.* Securities Act of 1933, 15 U.S.C. §§ 77a, 77v (1988); Investment Advisors Act of 1940, 15 U.S.C. § 80b-14 (1988).

265. David Carlebach, Note, *Nationwide Service of Process in State Courts*, 13 CARDOZO L. REV. 223, 247-49 (1991) (discussing cases).

266. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985).

267. *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 498 U.S. 1024 (1991).

Other states have greatly liberalized the doctrine in recent years.²⁶⁸ State venue law may impose some restrictions, although venue laws that permit suit to be heard where any properly joined defendant is found²⁶⁹ will hardly present serious obstacles to the location of controversies with many defendants. Unlike current federal statutes, state law does not necessarily require that cases transferred in-state be tried where they could have been brought in the first instance.²⁷⁰ Of course, both forum non conveniens and venue are subject to legislative revision by the states. The legislatures might adopt broad rules only for consolidated cases without otherwise disrupting the restrictions currently in place.

3. *Choice of Law*

Most proposals for federal consolidation include a federal uniform choice of law standard. Actions consolidated into a single, national magnet forum all but require a single choice of law. It is hard to imagine a jury keeping straight fifty, or even a dozen, different legal rules to be applied to different plaintiffs on different issues presented at trial. No federal choice of law rule exists, however, and present doctrine under the federal consolidation statutes requires the application of the choice of law rules of the state in which the transferred action was filed, guaranteeing a multiplicity of rules in a consolidated action. Hence, the reformers propose the creation of a single rule for consolidated federal cases.²⁷¹

268. *Smith v. Board of Regents*, 302 S.E.2d 124, 125-26 (Ga.Ct. App. 1983) (finding that forum non conveniens doctrine did not apply in Georgia); *Kassapas v. Akron Shipping Agency, Inc.*, 485 So. 2d 565 (La. Ct. App. 1986) (holding that forum non conveniens did not apply in absence of statute); *Burrington v. Ashland Oil Co.*, 356 A.2d 506, 510 (Vt. 1976) (limiting forum non conveniens dismissals to cases of vexatious conduct); see Stein, *supra* note 77, at 1974 ("Several states have completely eliminated discretionary dismissal of certain actions on the ground of forum non conveniens."); see also David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937, 950-52 (1990) (discussing trends and noting tendency of international litigation to flow to states that have limited or abolished the doctrine). But see *Werner v. Werner*, 526 P.2d 370, 378 (Wash. 1974) (reinstating forum non conveniens after its rejection in *Lansverk v. Studebaker-Packard Corp.*, 338 P.2d 747 (Wash. 1959)).

269. *E.g.*, ILL. ANN. STAT. ch. 735, para. 5 § 2-209 (Smith-Hurd 1993).

270. Compare 28 U.S.C. § 1404 (1988) (permitting transfer of case to location in which it could have been filed) with ILL. SUP. CT. R. 187 (permitting unlimited transfer of case on grounds of forum non conveniens).

271. One significant source of opposition to the federal consolidation proposal is the necessary adoption of a uniform choice of law rule, and its likely uniform application to different groups of plaintiffs in a consolidated action. See Sedler & Twerski, *supra* note 78, at 626.

State courts, of course, have their own choice of law rules, and are quite experienced with applying them. Thus if consolidation takes place by means of state courts simply rejecting cases when the litigants can join in ongoing litigation in another state, there would be no need for a uniform choice of law rule. However, it may be that state courts could never obtain the greatest practical advantage from consolidation of similar litigation unless they accept cases transferred from other state or federal forums. Even in this instance, the states need not adopt the same choice of law rules. The application of another state's choice of law would be another factor for litigants to consider if their transfer decision is to be voluntary, and another for the judge to consider if it were compulsory. In either case, the scope of consolidation may diminish somewhat, but one should not ignore the advantage of consolidating one thousand cases into one in each of a dozen interested forum states. Moreover, manageability may be greater in a dozen consolidated cases that go along in parallel than in one giant case in a single forum. If one were willing to accept the drawbacks—largely the damage to federalism—of a uniform choice of law,²⁷² Congress could create one for state courts to use when they handle transferred or otherwise consolidated mass tort cases.²⁷³

State courts should have no more difficulty applying other states' law in mass tort cases than they do in other cases. But a serious problem lies in the fact that the courts of one state will need to apply, and thus necessarily to develop, foreign states' law, negating some of the will-of-the-majority and adaptation-to-local-conditions advantages of state, rather than federal, transfer and consolidation. If it is undesirable to have federal judges, even those drawn from the state, developing a state's mass tort law, it is also unwise to have judges of another state developing the law.

The short response to this objection would begin by noting the strong tendency among states using the Restatement (Second) of Con-

272. See *id.*

273. This view thus differs from that put forth by Professors Sedler and Twerski, who find overruling of *Klaxon Co. v. Stentlon Elec. Mfg. Co.*, 313 U.S. 487 (1941) to be a prime objection to extant consolidation proposals. Robert A. Sedler & Aaron D. Twerski, *The Case Against All Encompassing Federal Mass Tort Legislation: Sacrifice Without Gain*, 73 MARQ. L. REV. 76, 86 (1989). Sedler and Twerski do not consider the possibility that the choice of law rule imposed by a uniform system could be complex enough to accommodate different states' interests by treating their citizens differently than those of other states. Uniformity of result might be disuniform with regard to categories of persons who rationally ought to be treated differently. A choice of law rule of this type would of course be less uniform, and substantially more difficult to apply, than one that guarantees that the same state's law covers all parties in the proceedings.

flict of Laws to apply their own law to issues of liability and damages in tort cases.²⁷⁴ If no mechanism exists to transfer cases from state court to state court around the country, state courts should feel free to apply their own law to the consolidated cases of all those who opted to sue within the forum. This should occur even if the choices were constrained by other states discouraging the litigants from filing in those forums.

A somewhat more elaborate response would apply if states adopted a transfer and consolidation mechanism: the mechanism they adopt should take the tendency to apply forum state law into account. More specifically, cases should be sent to a given state largely on the basis of whose law would apply to the case under the state's choice of law rules. Erroneous predictions could be remedied by remand or further transfer to a different state forum. This idea is not as far-fetched as it might seem. Courts frequently frame separate subclasses in class action litigation on the basis of the law to be applied to the subclass.²⁷⁵ A mechanism for interstate consolidation might divide a mass tort case along similar lines and transfer particular groupings of plaintiffs and defendants to different states according to the law to be applied in the cases. Uniformity of result would suffer in comparison to that found in cases consolidated into a single proceeding in a single forum, but the disuniformity may be appropriate given the identity of the various groups of parties.²⁷⁶ Even if state courts would need to develop other states' mass tort law in some instances, an elected state judge is still a better expositor of tort law than a life-tenured judge from the federal system.

4. *Interstate Conflicts in the Assertion of Jurisdiction and Application of Binding Effect*

There are two basic means by which enhanced consolidation of mass tort cases in state courts could be achieved. In the first, each state would act independently to improve its ability to handle complex tort litigation, increasing its willingness to take jurisdiction of cases filed within its borders and consolidating them into single proceedings in an appropriate state trial court. At the same time, the court would use door-closing doctrines to discourage the filing of cases that would detract from the efficiency advantages of ongoing mass tort suits in

274. See WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICTS OF LAWS § 69(a)(2), at 201 (1984).

275. FEDERAL JUDICIAL CENTER, *supra* note 25, at 217.

276. Sedler & Twerski, *supra* note 78, at 635-36.

other states, creating incentives for the plaintiffs in the cases to join those suits. Cases that otherwise might be heard in federal court could be kept from that forum if the federal courts made sensible use of abstention doctrines.

In the second approach, the states would create an interstate compact and adopt a uniform law to permit the voluntary or compulsory transfer of cases filed in one place to magnet forums handling consolidated proceedings in the other state. This latter option could also be accomplished by Congressional action, at least if the state voluntarily opted to participate in the plan.

The first option has a significant advantage in not requiring any formal concerted action by the states, nor any intervention from Washington. States can simply work towards it on their own. Efficiency gains will be lost during the period of drift, and the efficiency gains will never be quite as great as those of a more formal system, but few expenditures, political or otherwise, would be necessary to bring the transition about. Indeed, the mere continuation of existing trends should lead to it.

The disadvantage of this approach is that some state courts might resist the trend and issue rulings asserting jurisdiction when both efficiency and fairness dictate that the court should decline to hear the case in favor of another forum. An injunction by one state of the proceedings in another state risks triggering an injunction by the second state against proceedings in the first.²⁷⁷ When parallel proceedings go ahead in two states, existing full faith and credit law holds that the first valid judgment binding the parties is the effective one.²⁷⁸ Parties vying for the advantages of different forums might thus engage in a race to, and a race through, the courthouse to gain the first valid judgment.

The widespread state adoption of some doctrinal reforms might minimize these jurisdictional conflicts, however. This independent action by states would move towards a true system of interstate consolidation of mass tort cases in the state courts. Currently, the law in many jurisdictions provides that an action will abate if there is a prior pending action between the same parties on the same cause of action.²⁷⁹ Courts could facilitate interstate consolidation by expanding

277. KENNETH H. YORK, ET AL., REMEDIES: CASES AND MATERIALS 152 (5th ed. 1992).

278. *Hanson v. Denckla*, 357 U.S. 235, 256 (1958).

279. See, e.g., CAL. CIV. PROC. CODE § 430.10(c) (West Supp. 1993); ILL. ANN. STAT. ch. 735, para.5 § 2-619(a)(3) (Smith-Hurd 1993); N.Y. CIV. PRAC. L. & R. 3211(a)(4) (McKinney 1992). In the federal system, this doctrine takes the highly discretionary form of

this doctrine to allow abatement or dismissal of the action when a case exists elsewhere against the same defendant and plaintiff conveniently can join his or her cause of action in the proceeding. Courts could also induce interstate consolidation with the careful use of *forum non conveniens* doctrine.²⁸⁰ As has been discussed, this doctrine has weakened in recent years, facilitating consolidation of mass torts in state forums. A modification of the doctrine would help consolidation more than abolition would, however. The courts should consider the existence of an action the plaintiff conveniently could join when they determine whether to grant the defendant's motion for dismissal under the doctrine.²⁸¹ The absence of actions elsewhere and the likelihood that other parties could conveniently join the action under challenge should be reasons to deny the motion to dismiss.

States could transform this tentative promotion of interstate consolidation into a real system of interstate transfer by adopting the Uniform Transfer of Litigation Act,²⁸² which permits the transfer of all or part of a suit brought in one state to the courts of another state.²⁸³ The grounds for transfer are simply that the transfer "serve the fair, effective, and efficient administration of justice and the convenience of the parties and witnesses."²⁸⁴ As drafted, the law applies both to multiparty and simple proceedings, but a relevant factor in the transfer decision is "the public interest in securing a single litigation and disposition of related matters."²⁸⁵ The law expands the personal jurisdiction of the court receiving the litigation to incorporate the jurisdiction of the transferring court.²⁸⁶ Whether the states will voluntarily adopt this provision is unclear. Currently, only one state has adopted the law, although several more have it under consideration.²⁸⁷

Colorado River abstention. See *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 818 (1976).

280. See *supra* note 267-70 and accompanying text.

281. Under current law in New York, for example, the presence of litigation that could be joined would appear to be a relevant factor in the dismissal decision. See N.Y. Civ. PRAC. L. & R. 327(a) (McKinney 1983). Domicile or residence of a party in the state does not preclude dismissal. *Id.*; see *Silver v. Great Am. Ins. Co.*, 278 N.E.2d 619 (N.Y. 1972).

282. 14 U.L.A. § 78 (Supp. 1992).

283. *Id.* at § 101.

284. *Id.* at § 104.

285. *Id.*

286. *Id.* at § 203; see *id.* at § 101 cmt.

287. South Dakota has enacted the bill. S.D. H.B. 1337 (enacted Mar. 13, 1992). Legislators have introduced bills in Kansas, S.B. 62 (introduced Feb. 11, 1992), Nebraska, L.R. 319 (introduced Mar. 25, 1992) (studying enactment), Virginia, H.B. 834 (introduced Jan. 23, 1992), and West Virginia, S.B. 588 (introduced Feb. 17, 1992).

Fear that these reforms would not be widely adopted or that they would not be effective may counsel for a second form of consolidation, one that has a more formal mechanism backing it. One such mechanism would be the creation of a panel of judges from various states issuing orders about which cases should be transferred and consolidated with which other cases to what courts.²⁸⁸ An interstate compact or act of Congress would be required for this latter initiative. It would also require an organization to administer the system once created.

An even more elaborate device would be the actual creation of a multistate court,²⁸⁹ but this has little advantage over mechanisms that simply steer the cases to state forums that can handle them. It also has some of the drawbacks of federal consolidation: judges who are not responsible to the voters of a state will be developing and applying the state's law and may need to have some universal choice of law standard for the mega-consolidations that would occur.

A third proposal, a kind of compromise between the two principal choices of relying on independent state action and creating an interstate or federal bureaucracy, might follow the model of the Parental Kidnapping Prevention Act. Section 1738A of Title 28 requires states to enforce, and not to modify, child custody determinations made by the courts of other states, when those courts have properly asserted jurisdiction under the Act.²⁹⁰ By requiring full faith and credit be given to these determinations, the Act induces parties to join in a single proceeding in a logically chosen jurisdiction. Application of this model to mass tort cases would require Congress to pass a full faith and credit provision compelling dismissal of tort cases that could be joined with actions in other states that had properly been determined to meet the statutory criteria for magnet proceedings.

288. This is essentially the proposal of the American Law Institute, which is appended to the ALI's proposal for transfer of federal and state cases to the federal courts and consolidation there. ALI, *supra* note 2, ch. 4, at 205; *see also* Schroeder, *supra* note 11, at 963-66 (making a similar proposal); Conway, *supra* note 11, at 1107-08 (proposing that Federal Judicial Panel on Multidistrict Litigation transfer litigation for consolidation in state courts).

289. *See* Resnick, *supra* note 11, at 56.

290. Proper assertions of jurisdiction are those of the court of a state which is the child's home state on the basis of a residency test; which meets a connections, best interests of the child, and convenience test when there is no home state; which is the state of temporary residence under emergency conditions; or which meets a best interests test when no other state court meets the other tests or the courts of a state that meets the test have declined jurisdiction. 28 U.S.C. § 1738A(c) (1988). *See generally* Christopher L. Blakesley, *Child Custody—Jurisdiction and Procedure*, 35 EMORY L.J. 291 (1986) (discussing Uniform Child Custody Jurisdiction Act, 9 U.L.A. 116-170 (1979)).

Nevertheless, the model of § 1738A may not be ideal. Because it confers jurisdiction on the first state to properly assert it, § 1738A both encourages races to the courthouse and fails to guarantee that the forum obtaining jurisdiction is the optimal one to decide the action. Moreover, § 1738A has received mixed reviews about its ability to operate without a private cause of action to enforce it in federal court,²⁹¹ which the Supreme Court found that Congress did not intend to confer.²⁹² If the § 1738A model were adopted, Congress would be well advised to add an effective remedy in an impartial tribunal, and perhaps to modify the standard so that being first to assert jurisdiction does not necessarily grant control. Mediation of competing state assertions of jurisdiction under a new full faith and credit law would be a more appropriate role for the federal courts than monopolizing the development of substantive state tort law.

Each of the principal models for state court consolidation of mass torts thus has its advantages and drawbacks, as does a compromise between the two. Considerations of competence, federalism, and allocation of resources, combined with realistic observations of state courts' abilities, still dictate that any of these proposals would be superior to consolidation of mass tort cases in federal courts.

5. *Federal Constitutional Objections*

An agreement among states permitting interstate transfer and consolidation may face doctrinal difficulties under the interstate compact clause of the United States Constitution.²⁹³ Although the interstate compact clause appears to require congressional approval of all agreements between states, the Supreme Court has limited the scope of the provision to include only those arrangements that add a new political presence between the state and the federal governments or increase the states' basic sphere of authority.²⁹⁴ An interstate agree-

291. See Andrea S. Charlow, *Jurisdictional Gerrymandering and the Parental Kidnapping Prevention Act*, 25 FAM. L.Q. 299 (1991) (contending that denial of federal jurisdiction undermines Act); Anne B. Goldstein, *The Tragedy of the Interstate Child: A Critical Reexamination of the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act*, 25 U.C. DAVIS L. REV. 845 (1992) (criticizing effectiveness of Act); Steven M. Schuetze, Note, *Thompson v. Thompson: The Jurisdictional Dilemma of Child Custody Cases under the Parental Kidnapping Prevention Act*, 16 PEPP. L. REV. 409 (1989) (doubting effectiveness of Act if states do not adhere, in absence of federal remedy).

292. *Thompson v. Thompson*, 484 U.S. 174 (1988).

293. U.S. CONST. art I, § 10, cl. 3 ("No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . .").

294. *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 479 (1978); see JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 9.5(a), at 316 (4th ed. 1991).

ment to transfer cases, even if it entails a panel of judges from different states to preside over the transfers, does not alter federal-state power relationships in such a way as to require congressional approval under the compact clause.²⁹⁵

Congressional action to promote transfer and consolidation in the state courts might conceivably face a Tenth Amendment²⁹⁶ objection. Nevertheless, if the congressional act merely permitted states to voluntarily participate in the system, the law would face no difficulties.²⁹⁷ Although the Supreme Court has recently held unconstitutional a federal regulatory effort that required state legislative or executive action and left no choice to the state,²⁹⁸ the Court has permitted Congress to impose significant involuntary law-enforcement obligations on the state courts under the authority of the Supremacy Clause and the Constitution's implicit understanding that state courts would be a primary means to enforce federal law.²⁹⁹

B. Practical Problems of State Court Consolidation

Beyond doctrine, there are practical problems to a regime of transfer and consolidation in the state courts. Nevertheless, two of the most serious problems, practice rules differences and uneven judicial personnel, are amenable to solution. They do not present difficulties any worse than those faced by federal courts in consolidated proceedings.

1. Differences in Practice Rules

Although practice rules differ from state to state, the differences are not so great that they would present insurmountable obstacles to interstate consolidation. As noted above, though practice from state to state has grown more uniform in recent years, federal practice has blossomed into a multitude of different forms.³⁰⁰ The Civil Justice Reform Act will increase federal multiplicity.³⁰¹ At the state level,

295. Schroeder, *supra* note 11, at 969-70. Reciprocal legislation merely making courts of one state enforce duties that are owed in another state does not require congressional approval under the compact clause. *New York v. O'Neill*, 359 U.S. 1, 6 (1959).

296. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

297. See *South Dakota v. Dole*, 483 U.S. 203 (1987) (rejecting Tenth Amendment challenge to law withholding federal subsidies unless the states engaged in voluntary action).

298. See *New York v. United States*, 112 S. Ct. 2408 (1992).

299. See, e.g., *Howlett v. Rose*, 496 U.S. 356 (1990); *Testa v. Katt*, 330 U.S. 386 (1947).

300. See *supra* text accompanying notes 230-33.

301. See generally Mullenix, *supra* note 233.

there are only two basic regimes, one that is similar to the Federal Rules, and the other that has grown out of the Field Codes adopted in the mid-nineteenth century.³⁰² Even between the two systems, significant aspects of practice overlap. For example, liberal discovery is a hallmark of the Federal Rules, but code states now have discovery rules that are similar to the federal ones.³⁰³ Pleading standards, once thought to be a major difference between practice influenced by the federal rules and code practice, now show close similarity between federal courts and the courts of many code states.³⁰⁴

2. *Corruption and Incompetence*

Corruption and incompetence may continue to worry litigants subject to consolidation of their cases before a state judge. The problem is smaller than imagined, however. The tort system now relies largely on state judges; the only danger of consolidation is placing greater responsibility in the hands of a single judge.³⁰⁵ The uneven quality of some states' judicial personnel also reflects the range of jobs that state judges perform.³⁰⁶ State courts of general jurisdiction hear only eight percent of state court cases;³⁰⁷ the quality of judges in traffic, small-claims, and family courts that hear the other ninety-two percent do not affect the desirability of consolidation of mass tort claims in state courts of general jurisdiction. State supreme courts and court administrators may be expected to choose the judges receiving the consolidated cases with some care.³⁰⁸ Moreover, incompetence and

302. See JACK H. FRIEDENTHAL, ET AL., CIVIL PROCEDURE § 5.1, at 238 (1985) (describing pleading).

303. LOUISELL, *supra* note 53, at 902.

304. Whereas states have moved towards notice pleading standards, the federal courts have moved towards code pleading. Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 435-36, 444-51 (1986); see also John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1426 (1986) (on pleading policy, finding "important similarity to the Federal Rules in two-thirds of the states.").

305. This statement may not be entirely accurate, for there may be an opportunity for better adjudication foregone if the proposals for federal consolidation are not adopted. Nevertheless, any advantage from using federal judges for these cases will be outweighed by the cost to other federal caseload priorities, as well as the harm to federalism and related interests.

306. VICTOR E. FLANGO, ET. AL., THE BUSINESS OF STATE TRIAL COURTS 76 (1983).

307. *Id.*

308. See *Bankers Trust Co. v. Braten*, 420 N.Y.S.2d 584, 587 (Sup. Ct. 1979) (describing administrative judge and administrative assignment committee system of designating particular judges for complex litigation); ILL. SUP. CT. R. 384 (establishing means of selecting single circuit for consolidated multi-circuit case).

corruption are hardly unknown among federal judges,³⁰⁹ and life tenure makes dishonest or bumbling federal judges extremely difficult to weed out.

An additional consideration is the strong effort by many states to train and assist their judiciaries, particularly in the handling of mass tort cases. One state has produced a judges' manual for complex litigation, with an entire chapter devoted to mass tort cases.³¹⁰ At least twenty-four states have judicial evaluation programs in some stage of operation.³¹¹ The State Justice Institute, which provides financial support to projects improving the administration of justice in the states, has given priority to establishing procedures for the selection and removal of judges, and for the education and training of judges and other court personnel.³¹² From 1987 to 1992 the Institute funded 183 training projects, most at levels in excess of six figures.³¹³ Because enhancing the capacity of the state courts to handle consolidated mass tort cases will benefit the federal court system by freeing the federal courts' time, it is entirely appropriate for the federal government to fund projects to improve the state judiciary's ability to handle the suits. Given the current fiscal problems of many state governments, further judicial improvement projects may well depend on increases in federal funding.³¹⁴

Finally, trying consolidated mass tort cases in state court systems may induce politically powerful forces such as organized trial lawyers,

309. See, e.g., *Nixon v. United States*, 113 S. Ct. 732 (1993) (case arising from impeachment of federal judge for perjury); *Hastings v. United States Senate*, 492 U.S. 930 (1989) (impeachment case of federal judge for bribery).

310. See ILLINOIS JUDICIAL CONFERENCE, *supra* note 203.

311. *Conference Examines Judicial Performance Evaluation*, NAT'L CTR. FOR STATE CTS. REP'T, July, 1991, at 1. Some have argued that states have gone too far in subjecting judges to attorney evaluation. E.g. Philip B. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665, 668 (1969) (discussing evaluation in California).

312. *Final Grant Guidelines Fiscal Year 1993*, STATE JUST. INST. 1992 at 13.

313. *Id.* at 89-101. Among the projects are a \$183,500 effort to strengthen state court capacity to adjudicate toxic torts cases, and numerous programs on handling complex trials. *Id.* at 92-94. Total grants awarded in fiscal year 1992 exceeded \$11.6 million. *SJI Awards More than \$11.6 Million in FY '92*, STATE JUSTICE INST. NEWS, Winter 1993, at 2. Appropriations are in danger for fiscal year 1994, however. STATE JUSTICE INSTITUTE NEWS, Spring 1993, at 1.

314. David Bailey, *Pinch-Penny Justice: Courts Are Struggling To Get By, Make Do*, CHI. DAILY L. BULL., Apr. 24, 1993, at 1. The federal courts are hardly better suited to handle additional caseload responsibilities, however. See Richard Carelli, *Fiscal "Train Wreck" Seen for Federal Courts*, CHI. DAILY L. BULL., Mar. 17, 1993, at 1; *Federal Courts May Halt New Civil Jury Trials Due to Lack of Funds*, CHI. DAILY L. BULL., Mar. 31, 1993, at 1.

associations of manufacturers, and insurers to push for further improvement of the state courts.³¹⁵ Recently, a group studying an urban juvenile court suffering from inefficient and irregular procedures suggested recruiting associates from large law firms to represent parties in proceedings there in order to increase the visibility of problems and generate political pressure for reform.³¹⁶ If improvement is needed in the courts that receive consolidated mass tort cases, the persons with the greatest stake in improvement will be among those most able to obtain it. Assigning mass tort cases to the federal courts would diminish the quality of justice in that system, but adding the cases to the states' dockets would be likely to cause an increase in the quality of state judicial performance.

Conclusion

Federal jurisdiction should not be treated as the default option in the consolidation of mass tort proceedings. Efficiency gains of consolidation can be obtained without violence to federalism by use of the state courts. The values of federalism are important ones: experimentation, adaption to local conditions, and popular participation. There is no good reason to displace the elected judiciaries of the states in a role they perform well and can perform even better if doctrinal and practical reforms are made. Use of the state courts would be a better allocation of scarce adjudicatory resources, and would strengthen the states in an area in which constitutional structures give them independence. At the minimum, the alternative of state consolidation deserves the serious discussion that consolidation in the federal courts has received.

315. See Neuborne, *supra* note 75, at 1130 n.88 (predicting that if diversity jurisdiction were ended, business interests would obtain improvements in quality of state courts).

316. Tripp Baltz, *Chicago Bar Association Tackles a Problem Child: Juvenile Court*, CHI. LAWYER, Oct. 1991, at 4; see Helen Lucaitis, *New Chief Judge of Juvenile Court in Hurry to Begin Tackling Long-Time Problems*, CHI. DAILY L. BULL., Mar. 3, 1992, at 2.