Mass Tort Litigation and the Dilemma of Federalization

Linda S. Mullenix

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation

Linda S. Mullenix, Mass Tort Litigation and the Dilemma of Federalization, 44 DePaul L. Rev. 755 (1995) Available at: https://via.library.depaul.edu/law-review/vol44/iss3/4

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.
MASS TORT LITIGATION AND THE DILEMMA OF FEDERALIZATION

Linda S. Mullenix*

There are and always have been four basic methods that law reformers could use to design a set of choice-of-law rules for mass-tort cases. The first is simply to enact federal substantive tort or products liability legislation that would incorporate not only substantive legal standards, but also jurisdictional provisions, limitations requirements, and available remedies. In one fell swoop, then, Congress could, if it wanted to, "solve" the entire array of mass-tort litigation problems.

But, . . . there has not to date been a general clamor for substantive mass-tort law reform, which suggests that legislative politics are working either too well or too poorly. This is unfortunate because in the absence of serious consideration of substantive mass-tort law reform, reformers must instead cobble together all the separate pieces of mass-tort litigation: rules for aggregate consolidation, jurisdictional predicates, remedies, and choice of law, to name a few. Rather than having one politically unpleasant substantive tort statute, we now have a collection of analytically unpleasant procedural proposals. It is also interesting to note that none of the major institutional law reform organizations — the ABA, the ALI, and Congress — have ever seriously even mentioned the possibility of substantive mass-tort legislation. Only a stray academician here and there has sheepishly suggested that substantive law reform might provide a preferable solution, but this simple-minded recommendation has been given no serious consideration.¹

INTRODUCTION

The prodigious efforts of the American Bar Association (ABA), the American Law Institute (ALI), and Congress during the last


decade to design some means for handling mass tort litigation provides an object lesson in law reform, although it is difficult to discern the lesson. The ABA’s Mass Tort Report\(^2\) collects dust somewhere; the ALI’s Complex Litigation Project\(^3\) will sit like an intellectual colossus next to its Study of the Division of Jurisdiction Between State and Federal Courts;\(^4\) and Congress is still puttering with yet a new version of the Multiparty, Multiforum Jurisdiction Act.\(^5\) Everything has been studied, but nothing has been done. Meanwhile, mass tort litigation continues to flood state and federal dockets,\(^6\) with new kinds of “mass tort” litigation arising every few


\(^{3}\) American Law Institute, Complex Litigation Project, Proposed Final Draft (Apr. 5, 1993) [hereinafter American Law Institute, Project]. The Chief Reporter for the Project was Professor Arthur R. Miller from Harvard University Law School. The Associate Reporter was Dean Mary Kay Kane from Hastings College of Law. See Symposium, The ALI’s Complex Litigation Project: Commencing the National Debate, 54 La. L. Rev. 843 (1994) (collecting articles commenting on various aspects of the Project’s completion).


Mass tort is a curious litigation phenomenon that challenges the competency of state and federal courts but also confounds jurisdictional theory. In addressing the issue whether mass tort litigation ought to be federalized, these cases present a difficult characterization problem. Intuitively, mass tort litigation should have no special claim to federal court jurisdiction because mass tort litigation essentially has no special claim to federal court jurisdiction. See generally Paul Brodeur, Outrageous Misconduct: The Asbestos Industry on Trial (1985) (discussing litigation against asbestos makers from the 1930's to the bankruptcy of Johns-Manville in 1982); Peter H. Schuck, Agent Orange on Trial: Mass Toxic Disasters in the Courts (1986) (discussing Agent Orange litigation and proposing alternatives for compensation and deterrence).


In addition, resolution of asbestos mass tort litigation continues as a running federal court drama. See, e.g., Gordon Hunter, Asbestos Talks Turn to Future Claims, $400 Million Deal Reached in Fibreboard Case, Tex. Law., Aug. 16, 1993, at 2. 8.

8. "The definition of mass-tort litigation is itself a topic of some dispute." Mullenix, Federalizing Choice of Law, supra note 1, at 1631 n.26. In general, most commentators now distinguish mass accident cases, such as airplane crashes, from mass products liability litigation. Id. at 1631-32 n.26 (citing authorities); see American Law Institute, Project, supra note 3, at 9-25 (adopting a (presumably) more expansive working definition of mass tort).
tially is nothing more than a collection of individual, state-based torts. Certainly, for those who believe that federal courts, as courts of limited jurisdiction, should adjudicate only important federal issues relating to the national interest, these personal injury suits should not command federal attention or resources. Moreover, theories of federalism commend that state courts should be left to develop their own products liability law. With a heightened concern over increasing federalization of state law, it is difficult to discern why simple tort actions should be yet another candidate for federalization.

The case for federalizing mass tort law, then, must stem from some sense that aggregate mass tort litigation represents a whole that is larger than the sum of its parts. If mass tort litigation reasonably is to lay claim to preferential federal court jurisdiction, then it must be because this litigation phenomenon has developed some critical mass of characteristics that compel a unified federal rather than state approach. In truth, experience teaches that state courts

9. This is, of course, a grossly-caricatured version of the access-allocation problem. See William W. Schwarzer & Russell R. Wheeler, On the Federalization of the Administration of Civil and Criminal Justice (Fed. Jud. Ctr. 1994) (discussing various theories and arguments relating to the federalization issue), reprinted in 23 Stetson L. Rev. 651 (1994). 10. See id. at 17-21 (defining the argument that state and federal government responsibility should be separate and that federalization inhibits state experimentation); see also Weber, supra note 6, at 237 (discussing nationalization of mass tort law). Professor Weber discussed nationalizing mass tort law as follows:

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. Allowing disparate state policy choices carries the advantages of increased experimentation, allowance for local variation, and opportunity for enhanced public participation. . . .

Divergent state law allows different states to experiment with standards for liability and forms of relief . . . .

Id. (footnotes omitted).

are quite capable of handling mass tort litigation. In this regard, the parity debate is somewhat unhelpful in assessing whether mass tort litigation is a good candidate for federalization.

Moreover, in contrast to other recent Congressional forays into statutory federalization such as the Violence Against Women Act or the crime bill, collective personal injury torts do not embody either a pressing national concern or public policy consensus. The suggestion to federalize mass tort law, then, gives pause to even thoughtful proponents of expansive federal court access.

That mass tort litigation presents a particular federalization dilemma is evident in the schizophrenic recommendations to better process mass tort litigation. In striking fashion, these proposals similarly have suggested modifying existing federal consolidation doctrine and enacting a federalized choice-of-law regime. In essence, the reformers' preferred approach has been to split the mass tort baby: to federalize part of mass tort (applicable law), but not to federalize the rest.

---

12. Large aggregations of state asbestos cases have been successfully consolidated and handled in some state court systems. See, e.g., In re New York City Asbestos Litig., 572 N.Y.S.2d 1006 (New York Sup. Ct. 1991) (partial adjudication and settlement of 700 consolidated asbestos cases); Theodore Goldberg & Tybe A. Brett, Consolidation of Individual Plaintiff Personal Injury-Toxic Tort Actions, 11 J.L. & COM. 59, 63 (1991) (discussing various litigation issues in West Virginia consolidated asbestos cases); Alex Dominguez, Nation's Largest Asbestos Trial Opens: 8,555 Claims v. 13 Firms, CHI. DAILY L. BULL., Mar. 10, 1992, at 1 (Baltimore consolidation of Maryland asbestos litigation).

13. See generally Erwin Chemerinsky, Parity Reconsidered: Defining a Role for the Federal Judiciary, 36 UCLA L. REV. 233 (1988) [hereinafter Chemerinsky, Parity Reconsidered] (arguing that the debate on parity between federal and state courts is an unresolvable empirical question, and proposing that litigants with federal constitutional claims should choose the federal or state forum); Erwin Chemerinsky, Federal Courts, State Courts, and the Constitution: A Rejoinder to Professor Redish, 36 UCLA L. REV. 369 (1988) [hereinafter Chemerinsky, Federal Courts] (responding to Professor Martin Redish's concerns regarding institutional differences between federal and state courts, the litigants' choice of forum, and the separation of powers doctrine); Martin H. Redish, Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights, 36 UCLA L. REV. 329 (1988) (arguing that Chemerinsky's thesis does not sufficiently consider institutional differences between the federal and state forums, that the litigant-choice principle assumes federal court superiority, and that it ignores the implications of the separation-of-powers analysis); Symposium, Federalism and Parity, 71 B.U. L. REV. 593 (1991) (articles by Erwin Chemerinsky, Michael Wells, Akhil Reed Amar, and Susan N. Herman, discussing the parity debate). But see Weber, supra note 6, at 253-59 (arguing in favor of state court jurisdiction for mass tort litigation generally based on superiority of state courts to handle tort litigation).


16. See supra notes 2, 3, 5 (citing recommendations by the ABA, ALI and Congress).

17. See supra notes 2, 3, 5 (citing proposals).
One can only surmise that the law reformers were (and are) profoundly *uncomfortable* with the idea of completely federalizing mass tort, and their work product reflects a firm refusal to propose this solution.\(^{18}\) Thus, the mass tort reform projects embody a peculiar tension between theory and practice because although the reformers repeatedly invoke a national litigation crisis to justify their efforts,\(^ {19}\) they steadfastly refrain from recommending a truly national solution through federalization of mass tort law.\(^ {20}\) Indeed, even the Federal Judicial Center, in its recent summary of arguments opposing and favoring federalization of state law, has refrained from applying its analysis to the problem of mass tort litigation in federal court.\(^ {21}\)

This Article sets forth a series of qualified arguments supporting federalization of mass tort litigation. These arguments proceed not from any particular constitutional or functional theory,\(^ {22}\) but rather from the sense that "federalization is a complex process that engages many players and is driven by political, legal, economic, so-

---

18. It is impossible to know why the various law reform institutions shied away from proposing federalization of mass tort law; the "legislative history" for these various documents sheds little light, if any, on the reform possibilities eschewed. It is also impossible to know to what extent, if any, the prospect of political feasibility or infeasibility shaped the reformers' choices.

19. See, e.g., Mullenix, *Complex Litigation Reform*, supra note 1, at 178-96 (discussing and criticizing the federal interests identified in support of reform jurisdiction proposals by the American Bar Association, the American Law Institute, and Congress).

20. And in an oddly elliptical way, the proposals to federalize applicable law in mass tort cases seem almost a back-door method of federalizing substantive mass tort law.

21. See Schwarzer & Wheeler, supra note 9, at 9 n.22 (noting that the paper does not discuss the role or workload of the federal courts, "[a]nd with respect to federalization, it does not discuss proposals for consolidation of mass tort litigation in federal court"). Before joining the Federal Judicial Center as Director in 1990, federal district court judge Schwarzer testified on behalf of the Judicial Council of the United States in opposition to proposals to federalize mass tort law:

> 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.


cial, and pragmatic factors."

The starting point is agreement with the propositions that the "true role of the federal courts remains elusive," and that the process of federalization "is bound to be marked by a certain 'complexity and fuzziness.'" Moreover, federalization is "'not only inevitable but even desirable in giving room for flexibility, fine-tuning, recognition of difference, and accommodation of unforeseen developments.'" Finally, these arguments are predicated on a belief that the goal of the dual court system "may become less a matter of achieving a principled allocation than of realizing the optimum utilization of each system."

Part I evaluates the question of federalization of mass tort litigation in the context of analytical frameworks suggested by recent commentators. In assessing the issue of mass tort federalization against various criteria, mass tort litigation concededly presents a weak case for federalization. Mass tort litigation typically embodies few of the striking constitutional or prudential attributes commending federalization. In contrast, Professor Mark C. Weber has made a very persuasive case that state courts should be preferred forums for resolving most mass tort litigation.

Part II then examines mass tort as a novel kind of litigation phenomenon that is not easily analyzed in the context of standard federalization theory. This Section describes and explores the salient characteristics of mass tort cases that set this litigation apart from other state claims, and therefore, support a stronger case for

23. Schwarzer & Wheeler, supra note 9, at 40.
24. Id. at 45.
25. Id. at 46 (citing Shapiro, supra note 11, at 1841).
26. Id. (citing Shapiro, supra note 11, at 1841).
27. Id.
28. See infra notes 40-136 and accompanying text (analyzing the federalization of mass tort litigation as discussed by commentators). See generally Posner, supra note 22, at 130-60 (suggesting five possible ameliorative proposals); Schwarzer & Wheeler, supra note 9, at 9-39 (supplying arguments supporting and opposing federalization, but refraining from applying those arguments to mass tort litigation); Erwin Chemerinsky & Larry Kramer, Defining the Role of the Federal Courts, 1990 BYU L. Rev. 67, 87-94 (constructing a model of federal jurisdiction based on subject matter jurisdiction); Weber, supra note 6, at 216-20 (delineating arguments in opposition to federalizing mass tort litigation and supporting state courts as the preferred forum for resolution).
29. See infra notes 40-136 and accompanying text.
30. See infra notes 49-64 and accompanying text.
31. See infra notes 90-109 and accompanying text (discussing how Professor Weber illustrates the possibilities for state resolution of mass tort cases). See generally Weber, supra note 6, at 253-59 (examining the advantages and opportunities of using state courts).
32. See infra notes 137-61 and accompanying text.
federalization.

Part III concludes with alternative arguments for federalization of mass tort litigation that are not easily assimilated into traditional federalization theory. This Section suggests that mass tort litigation ought to be federalized for three simple reasons. First, although some mass tort litigation has been successfully resolved in state courts, most mass tort cases are and will continue to be filed in federal courts. Because diversity jurisdiction gives mass tort litigation access to the federal courts, mass tort litigation has been largely de facto federalized. The camel’s head (and indeed much of its body) is already inside the federal tent, creating difficult problems. Moreover, mass tort is not an instance of “creeping federalization,” but rather a catastrophic litigation phenomenon that has invaded federal courts in the last decade.

The second reason mass tort litigation should be federalized is because not only is much of mass tort litigation already in federal court, but arguably, many of these cases have been and will continue to be handled ineffectually until Congress federalizes mass tort law. Existing federal rules and procedures are inadequate to the tasks of dealing with mass tort litigation, a problem compounded by the lack of unified, governing, substantive tort law. Indeed, realization of these inadequacies in the mid-1980s prompted the institutional law reform projects. Mass tort litigation is a good candidate for federalization precisely because the federal courts are the preferred forum for these massive lawsuits, a choice unfortunately exacerbated by a lack of competent substantive law and procedural

33. See infra notes 172-204 and accompanying text.
34. See infra notes 172-78 and accompanying text.
35. Arguably, the Supreme Court has “federalized” mass tort litigation relating to AIDS cases in American Nat’l Red Cross v. S.G. & A.E., 112 S. Ct. 2465, 2469, 2472 (1992) (supporting federal question jurisdiction with “sue and be sued” language in American Red Cross’s Congressionally-granted charter) (construing Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824)). This decision has been criticized as permitting federal courts to now fashion a federal common law relating to liability standards for blood contamination, and for being essentially anti-plaintiff. See David H. Robbins, AIDS Cases in Federal Court: A Federal Question?, 61 GEO. WASH. L. REV. 490, 515-21 (1993) (arguing that Congress did not grant jurisdiction to federal courts in cases involving the Red Cross). Insofar as the American Red Cross decision is based on the anomaly of the Red Cross Charter and the presence of the Red Cross as a party-litigant, the Court’s holding does not have broader applicability for other federal mass tort cases which typically are based on the federal court’s diversity jurisdiction. Cf. Ankenbrandt v. Richards, 112 S. Ct. 2206, 2208 (1992) (retaining “domestic relations” exception to federal court jurisdiction, but allowing federal court access for diversity torts arising from domestic situations).
36. See infra notes 179-94 and accompanying text (expanding on this theory).
37. See supra notes 179-82 (citing the institutional law reform projects).
rules to handle these cases fairly and efficiently.

Moreover, existing procedural rules do not easily permit federal courts simply to relieve themselves of these cases by sending them to state courts.\(^{38}\) As long as diversity jurisdiction grants federal court access to litigants (either originally or by removal) federal courts will continue to be the forum of choice for mass tort litigants. At a minimum, reformers need to formulate their thinking about the allocation of these cases in light of this reality, rather than abstract comparative assessments of relative judicial competence.

The third and final reason for federalizing mass tort litigation is because not only are existing rules and procedures inadequate, but so are the reform proposals.\(^{39}\) After almost a decade of reform efforts, legislative solutions for processing mass tort cases have not been forthcoming. Even if Congress or the states now consider mass tort legislation, legislators ought not to adopt the various reform proposals precisely because these proposals combine procedural tinkering with half-baked federalization of choice-of-law rules. Mass tort cases ought to be entirely federalized or not, and in this regard, the major mass tort reform proposals are doctrinally incoherent. Thus, legislative enactment of these reform proposals will only further complicate mass tort litigation rather than enhance its resolution.

I. Models for Federalization: The Weak Case for Mass Tort Litigation

The debate over the proper allocation of the business of state and

38. Under existing doctrine, the only procedural means for federal courts to send cases properly within their jurisdiction to state court is pursuant to the court's remand authority. See 28 U.S.C. § 1447(c) (1982) (articulating the procedure and grounds for remand for improperly removed state cases). The concept of erroneous removal is narrowly construed, however, and federal courts are prohibited from remanding cases for purely prudential reasons such as docket congestion. See Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 345 (1976) (holding that the district court improperly remanded on a basis prohibited by the controlling statute). In addition, federal courts conceivably might invoke various abstention doctrines to decline their own jurisdiction, but to date, abstention doctrines generally have not been invoked or applied to defer to state court adjudication of parallel mass tort litigation.

The ALI Complex Litigation Project has proposed a removal jurisdiction statute as the basic jurisdiction-conferring means for intersystem consolidation. See AMERICAN LAW INSTITUTE, PROJECT, supra note 3, § 5.01, at 271-73 (citing in full the removal jurisdiction statute). Obviously, this statute is intended to facilitate federal adjudication of mass tort litigation, rather than state adjudication.

39. See infra notes 192-94 and accompanying text (expanding on this third theory).
Each successive generation of legal scholars has attempted to formulate new rational allocation theories, often imbued with insights from current intellectual trends. Just as it is seems hopeless to resolve the parity debate, so too is it difficult to conclude that any one theoretical division of subject matter jurisdiction is more compelling than any other. However, the task here is not to evaluate existing allocation arguments or to delineate new theory, but rather to assess whether particular substantive law (mass tort) is a good candidate for federalization. Hence, the dilemma of federalizing mass tort litigation will be assessed against recent allocation theories.

A. Arguments Opposing and Favoring Federalization

In the early 1990s, no doubt with an eye toward the then-pending Violence Against Women Act and the federal crime bill, the Federal Judicial Center (FJC) embarked on a project of evaluating the role of the federal courts and formulating a principled basis to assist legislators and the judiciary in thinking about allocating subject matter jurisdiction between the state and federal court systems. This effort resulted in a synthesized outline of "key proposi-
tions and major issues implicated in the debate over federalization" to guide assessment of legislative proposals to federalize aspects of state law. The FJC identified four major propositions framing the federalization debate: (1) constitutional issues; (2) public policy concerns; (3) traditional purposes of the federal courts; and (4) "quality and competence" matters. When assessed within this framework, mass tort seems an uncompelling candidate for federalization.

1. Constitutional Dimensions

The "constitutional dimensions" argument posits that the United States Constitution dictates a limited role for the federal courts and that current implementation of constitutional power and authority requires this limited role. Under this view, the Constitution confers on Congress the ability to create the lower federal courts as well as to expand or contract lower federal court jurisdiction. The standard corollary is that the Tenth Amendment reserves to the states those powers not delegated to the United States. Constitutional federalism remains a major restraint on expansive federal court jurisdiction, additionally embodied in a range of judicially-created doctrines of restraint. Finally, expansive theories of federal jurisdiction grounded in Congress's authority to regulate interstate commerce may result in "massive intrusion into areas of state responsibility [that] will diminish the role and stature of the state courts.

Id. at 4-5. Although the FJC declared its intention to remain neutral in the federalization debate, its working paper should be approached cautiously. The federal judiciary, in the last decade at least, has consistently opposed federalization and the concomitant expansion of the federal court docket. See supra note 21 (discussing Schwarzer's testimony on the proposed Multiparty, Multiforum Jurisdiction Act). Moreover, the FJC's supposedly even-handed statement of propositions relating to federalization are imbued with a subtle bias against federalization. Schwarzer & Wheeler, supra note 9, at 9, 47 (arguing chiefly in negative terms suggesting deleterious effects on the federal courts; proposing a set of "working presumptions," all negatively cast as presumptions against federalization).

46. Schwarzer & Wheeler, supra note 9, at 9.

47. Id.

48. In addition to setting forth a series of synthesized arguments opposing and supporting federalization, the Federal Judicial Center also outlined an alternative set of presumptive guidelines intended to maintain a limited role for the federal courts. Id. at 45-47. An analysis of mass tort litigation, assessed against this series of presumptions, is included in the Appendix to this article.

49. Id. at 10.

50. Id. at 12-15.

51. Id. at 10.

52. Id. at 15.
and distort the balance between the two systems."53

The chief counter-argument to a restrictive view of the requirements of constitutional federalism invokes Congress's commerce clause power and the Supreme Court's long-standing expansive interpretation of that power. In this view, "few subjects within the traditional scope of state concerns remain beyond the authority of Congress to regulate,"54 and "[t]here is no reason to inhibit Congress's power to create federal court jurisdiction in areas in which it is empowered to legislate and regulate."55 Further, an elastic notion of federalism must adapt to changing social and economic demands as well as to "exigencies of the times."56

The problem of mass tort litigation suggests almost paradigmatic arguments on either side of the constitutional debate. On the one hand, garden-variety personal injury tort or product liability litigation constitute subject matter traditionally within the purview of state regulatory power. Apart from the Federal Tort Claims Act,57 there is no federal tort law. In addition, repeated efforts have failed to enact federal products liability legislation,58 perhaps evincing Congressional reluctance to federalize tort law.

Although federal courts may entertain tort actions in their diversity jurisdiction,59 this is disfavored because, in absence of federalized tort law, it compels federal judges, under the Erie doctrine, to determine and construe state tort law — an enterprise arguably bet-

53. Id. at 16.
54. Id. at 15-16 (emphasis omitted).
55. Id. at 16.
56. Id. at 17 (emphasis omitted).
59. See Ankenbrandt v. Richards, 112 S. Ct. 2206, 2216 (1992) (finding appropriate jurisdiction based on the diverse citizenship between the parties, where a former spouse was suing on behalf of children who were allegedly abused).
ter entrusted to state courts.\textsuperscript{60} Additionally, federal interpretation of state tort law represents an intrusion into state affairs that diminishes the role and stature of those courts. Hence, because mass tort litigation represents an aggregation of individual tort actions, these cases have no special claim for federalization under constitutional theory. Indeed, federalization would represent another massive intrusion of federal judicial authority into essentially state concerns.

On the other hand, mass tort litigation embodies precisely the kind of "changing circumstances and . . . exigencies of the times"\textsuperscript{61} that suggest a need for federalization. Collective mass tort litigation represents a kind of national emergency impinging on interstate economic and social concerns that fits very well within the expansive commerce clause paradigm.\textsuperscript{62} Indeed, the American Law Institute's recommendations for mass tort litigation rely precisely on this expansive commerce clause theory to justify modification of the multi-district jurisdiction statute and enactment of a federalized choice-of-law regime.\textsuperscript{63} Finally, federalizing mass tort litigation would enhance recognition of the "closely intertwined system of state and federal authority," embodying a "unifying concept" of federalism, rather than a divisive theory.\textsuperscript{64}

2. \textit{Public Policy Dimensions}

The public policy arguments advanced in the federalization debate often are collateral to and derive from notions of federalism. Thus, "[s]ound public policy mandates a limited role for the federal courts,"\textsuperscript{65} with a special role for state courts as local laboratories for experimentation.\textsuperscript{66} Certain types of dispute resolution, therefore, should be responsive to local culture and values, which differ from state to state. In this view, federalization of state concerns inhibits local experimentation and adaptation,\textsuperscript{67} "endangers local autonomy,

\textsuperscript{60} See, e.g., Weber, supra note 6, at 265-66 (discussing how states can handle interstate conflicts in asserting jurisdiction).

\textsuperscript{61} \textsc{Schwarzer} & \textsc{Wheeler}, supra note 9, at 17 (emphasis omitted).

\textsuperscript{62} See \textit{id.} at 15-17 (discussing interpretation of the commerce clause and concerns of the state).

\textsuperscript{63} See supra note 19 and accompanying text (explaining how mass tort reformers have invoked a national litigation crisis).

\textsuperscript{64} \textsc{Schwarzer} & \textsc{Wheeler}, supra note 9, at 17.

\textsuperscript{65} \textit{id.}

\textsuperscript{66} \textit{id.}

\textsuperscript{67} \textit{id.} at 18 ("Even if adherence to federalism may at times seem to enshrine inefficiency and even inaction, it can also be a safeguard against precipitate and ill-considered action by the na-
imposes added burdens, and can undermine important state policies.\textsuperscript{68}

As a public policy matter, mass tort litigation does not represent a compelling candidate for federalization. The fifty states have differing tort and products liability laws, manifesting local values and community culture. This is most evident in different standards relating to causation, liability, limitations, and damages. Thus, individual states have good public policy claims to adjudicate collective torts under their own relevant tort law, rather than some nationalized policy. Further, some states already have experience resolving mass tort litigation, and should be free to continue to experiment or innovate with regard to resolving these aggregative litigations.\textsuperscript{69} Finally, some federal and state courts have attempted cooperative ventures in handling mass tort cases across the dual court system.\textsuperscript{70} There is no compelling policy reason to federalize mass tort litigation when local and cooperative intersystem experiments currently are underway to resolve these cases.

In response, regard for states' ability to function as local laboratories should not frustrate federal attempts to deal with problems of truly national scope.\textsuperscript{71} State autonomy concerns frequently are overstated because most federal legislation does not preempt state jurisdiction and concurrent jurisdiction permits states to pursue their own policies and innovations.\textsuperscript{72} Moreover, Congressional acts to federalize some area of the law are typically evidence of a local desire for help in response to a "demonstrated public need."\textsuperscript{73}

The responsive public policy arguments generally do not seem to enhance the case for federalizing mass tort law. There is little evidence that states feel overburdened with their mass tort docket or have expressed a desire for help from the federal system. Moreover,
the existence of ventures in dual-system mass tort litigation suggest that federal and state judges already have been seeking to develop innovative methods to cooperatively resolve mass tort cases across their jurisdictions, without derogating the authority of either jurisdiction.

Finally, public policy commends federalization when compelling national interests are at stake, such as ensuring protection of the rights of the poor, the disadvantaged, or victims of discrimination. Apart from the vague, conclusory pronouncements by the American Law Institute, proponents of mass tort federalization have yet to demonstrate what national interests are at stake in mass tort litigation that demand federal intervention. Thus, aggregative mass tort litigation fails to rise to the level of public policy concern involved in other federalized law.

3. Traditional Purposes

In addition to constitutional and public policy arguments, a third dimension of the federalization debate posits that continued expansion of federal court jurisdiction undermines the historical limited role of federal courts. This variation of the allocation debate focuses on conceptions of the "traditional purposes" of the federal courts.

The Federal Judicial Center has suggested that the traditional benchmarks of federal jurisdiction have been limited to "protection of the federal government's interests and of the fundamental rights of its citizens; the implementation of federal regulatory schemes, generally implicating civil rights or large interstate commercial activity; and the enforcement of federal criminal statutes having sig-

74. Id. at 23.
75. See supra note 19 and accompanying text (explaining how mass tort reformers have invoked a national litigation crisis).
76. See Schwarzer & Wheeler, supra note 9, at 24 (discussing this argument and articulating the "traditional indicia of federal jurisdiction"). The "traditional purposes" theory obviously is closely related to constitutional allocation arguments. Id. at 9-17 (discussing the constitutional allocation argument). In this regard, Schwarzer and Wheeler point out that Congress did not create federal question jurisdiction until 1875, and that until fairly recently, federal question jurisdiction was narrowly construed as limited to cases brought to implement the Constitution or federal legislation. Id. at 24-26. Narrow application of federal question jurisdiction continues. See, e.g., Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 817 (1986) (finding that claim based on alleged violation of the Federal Food, Drug and Cosmetic Act did not support federal "arising under" jurisdiction).
77. See Schwarzer & Wheeler, supra note 9, at 25 n.63 (presenting the "minimum model" for federal jurisdiction) (citing Chemerinsky & Kramer, supra note 28, at 87-94).
significant interstate or international dimensions."78 Professors Erwin Chemerinsky and Larry Kramer have articulated a similar model of federal court jurisdiction delineating a different list of "traditional" purposes: to adjudicate issues relating to the Constitution; to protect the sovereign interests of the federal government; to resolve interstate disputes; to interpret and apply federal law; to develop federal common law; and to review agency decisions.79

The chief corollary to the "traditional purposes" argument is that Congress's liberal use of its commerce clause power to expand federal jurisdiction reaches far beyond traditional notions of federal courts, defeating their central purpose "to adjudicate small numbers of disputes involving national interests . . . calling for [the] deliberative consideration by life-tenured judges."80 This dimension of the federalization debate, therefore, is also concerned with pragmatic effects such as docket congestion, resource allocation, and the quality of justice.81

Under a "traditional purposes" view of subject matter allocation, mass tort litigation fares poorly. Clearly, mass torts do not fit all categories describing traditional purposes of federal courts. Moreover, federalizing mass tort law seems inconsistent with the proposition that federal courts exist to resolve a "small number[] of disputes involving national interests."82 Only by arguing or concluding that mass tort resolution is a compelling national interest can one support federalization under this argument.

Proponents of mass tort federalization also might question the usefulness of this principle. Hence, the "search through history for the traditional role of the federal courts or traditional indicia is unavailing,"83 because "[t]he history of federal jurisdiction reveals no bright lines that have traditionally divided the business of the federal courts from that of the states."84 Furthermore, the notion that

78. Id. at 24.
79. See id. at 25 n.63 (citing the model proposed by Chemerinsky & Kramer, supra note 28, at 87-94).
80. Id. at 29.
81. See id. at 29-34 (addressing the characteristics, role, and purpose of the federal system).
82. Id. at 29.
83. Id. at 27.
84. Id. at 28. In discussing the difficulty of the laundry-list approach to delineating the "traditional purposes" of federal courts, Schwarzer and Wheeler make two interesting and related points. First, they note that "[h]istory suggests not so much a separate domain for the federal courts, but a twofold strategy by Congress: to attack perceived national problems through national legislation and to provide an alternative forum to respond to dissatisfaction with state courts." Id.
federalizing mass tort litigation would burden the federal dockets and impair the quality of justice is a strawman argument. Federalizing mass tort should not expand the federal courts’ workload because the majority of these cases already are in federal court under diversity jurisdiction.85

4. Quality and Competence Matters

A final dimension of the allocation debate pragmatically examines the impact of expanded jurisdiction on the quality and competence of federal courts, implying a federal superiority worth protecting and preserving.86 Federalization of additional subject matter perilously contributes to docket congestion and “inexorable pressures to increase the number of [federal] judges.”87 An increased federal judiciary, in turn, “jeopardizes consistency, diminishes collegiality, and impairs the quality of the justice process.”88 Moreover, increased federalization makes little sense in times of shrinking federal resources.89

The response to these pragmatic concerns is that workload and resource issues should not determine questions of federal jurisdic-

at 28-29. As indicated above, there is little indication that mass tort litigants are dissatisfied with state courts as forums for resolution of these cases.

However, Schwarzer and Wheeler additionally suggest that “the business of the federal courts is shaped more by litigants voting with their feet than by abstract, federalism-based notions about the division of business between state courts and federal courts.” Id. at 29. This point does have relevance for mass tort litigation, where an overwhelming majority of litigants have voted with their feet to use federal diversity jurisdiction to pursue their litigation in federal court.

85. In this regard, federal mass tort litigation is analogous to the familiar physics principle that matter can neither be created nor destroyed. Since mass tort litigation already is burdening the federal diversity dockets, the effect of federalizing these cases would not constitute a net increase on the federal dockets. Indeed, by federalizing mass tort under federal question jurisdiction and providing for sensible consolidation and substantive law, federal courts could effectively decrease the burden of this type of litigation already on their dockets.

86. See Schwarzer & Wheeler, supra note 9, at 35. The authors state this concern vividly: The purpose of the federal courts is to provide a tribunal of undoubted integrity and competence for the adjudication of disputes imbued with a federal, that is, national interest. Public confidence in those courts is a vital ingredient of our constitutional system. Yet federalization is surely contributing to a deterioration in the quality of justice federal courts are able to dispense.

Id.

87. Id.

88. Id. at 36.

89. Id. at 37-38. Schwarzer and Wheeler comment: “It makes little sense to pursue a course of federalization at a time when, as a result of resource limitations, many federal courts lack the staff and facilities needed for their existing workloads, and judges in many district courts and courts of appeals are working to capacity.” Id. at 37.
In the context of mass tort litigation, resource-allocation arguments probably support federalization rather than undermine it. Federalized mass tort cases will not demand increased federal court resources but will use existing resources more efficiently. Hence, federalization of mass tort litigation arguably will enhance efficient resource allocation for cases that currently are inefficiently processed in the court’s diversity jurisdiction.

B. Rational Self-Interest Federalization

Judge Richard Posner, discussing the problem of allocating responsibilities between state and federal courts, prefers good, “cold-blooded” analysis which “give[s] no weight to the pieties of federalism.” Hence, he eschews evaluating federalization problems by reference to constitutional theory, or for that matter, efficiency values. In other words, Judge Posner would not assess mass tort federalization against the Judicial Center’s framework. Instead, he prefers an allocation model “built on the assumption that people, including judges, act in accordance with their rational self-interest, whose promptings are not solely those of conscience, though conscience plays a role.”

This rational self-interest model is predicated on an economic theory of cost and benefit “externalization.” Under this view, “[i]f either the benefits or the costs of a governmental action are experienced outside the jurisdiction where the action is taken,” then “there is an argument for assigning responsibility to a higher level of government.” This concept of externalities supports certain kinds of exclusive federal court jurisdiction, such as the Federal Tort Claims Act. Judge Posner’s allocation theory works well

90. See id. at 36-38 (discussing increases in the federal courts’ workload and available resources).
91. See Posner, supra note 22, at 169-92 (exploring why there are separate state and federal court systems).
92. Id. at 171.
93. Id. (“I acknowledge that the relationship between the states and the federal government cannot be regarded solely as an expedient one, designed to promote liberty or efficiency or other values and alterable from time to time as circumstances, or the values themselves, change.”).
94. Id. at 172.
95. Id. at 175.
96. Id. at 174-75 (citing, for example, national defense as illustrative of the “benefits” externality, and interstate industrial pollution as illustrative of a “costs” externality).
when Congress creates a federal right to correct an interstate externality for which state judges might “lack enthusiasm” for enforcement, although this conclusion is circular.\textsuperscript{98} Further, where the costs and benefits of actions are largely felt within states, Judge Posner would repute “substantive lawmaking policy” there.\textsuperscript{99} The costs and benefits, for example, of intrastate car accidents ought to be governed by state tort law principles.\textsuperscript{100}

Judge Posner further recognizes a role for federal courts in their diversity jurisdiction for interstate torts involving nonresident victims and a possibility of cost externalization.\textsuperscript{101} Thus, diversity jurisdiction serves to overcome economic externalities more than it serves the Framers’ desire to reduce interstate hostility of residents towards non-residents.\textsuperscript{102} On this view, interstate mass torts arguably involve externalized costs that support a theory for federalization. However, Judge Posner qualifies his views by suggesting that any unequal application of state law usually results in future corrective party behavior that accounts for expectations about the application of local law.\textsuperscript{103} If such self-correcting remedial behavior occurs in multistate transactions, then it is difficult to support a reasonable federalization theory on state tort and contract claims.\textsuperscript{104}

In general, Judge Posner’s theory requires an assessment of which system bears the economic consequences of law enforcement.\textsuperscript{105} In a rational economic universe, then, states should acquire jurisdiction over subject matter that maximizes its investment in protecting local interests, and the federal government for national interests.\textsuperscript{106} However, the theory of externalities is difficult to conceptualize and ap-

\textsuperscript{98} POSNER, supra note 22, at 175. This formulation, however, assumes the subject matter allocation for which Judge Posner is attempting to articulate a theory.

\textsuperscript{99} Id. (using tort law as an example of law appropriate for state government).

\textsuperscript{100} Id.

\textsuperscript{101} Id. at 175-76 (stating, in qualifying this theory, the possibility that non-residents may be deterred from traveling due to disfavorable tort laws, and the effect of short-term offices for judges on the welfare of the residents). Judge Posner notes, in conclusion that: “On this view the rationale for diversity jurisdiction is similar to that for using the commerce clause of Article I of the Constitution to prevent the states from establishing tariff-like obstacles to interstate commerce.” Id. at 176.

\textsuperscript{102} Id. at 176-77.

\textsuperscript{103} Id. at 176.

\textsuperscript{104} See id. (discussing diversity jurisdiction application to state tort and contract claims with reference to state residents versus non-residents).

\textsuperscript{105} See id. at 178 (discussing allocation of law enforcement responsibilities and the financial consequences in the federal and state arena).

\textsuperscript{106} Id. (using the example of a possible overlapping interest of state and federal governments in prosecuting bank robbery or bank fraud cases).
ply in the context of mass tort litigation,107 where the consequences of these cases in transaction costs alone, without regard to compensatory recovery, are spread throughout the system.

Judge Posner also posits another economic argument in support of federalization. This theory is based on economies of standardization and illustrated by federal admiralty jurisdiction.108 He concludes that the existence of admiralty jurisdiction constrains the costs of international trade, which would unduly increase if shipowners were instead subjected to the vagaries of different local courts, personnel, procedures, and applicable law.109 Hence, admiralty jurisdiction is an economically efficient solution to escalating costs, affording shipowners sued in tort or contract, one set of courts that apply a common body of law in each country.110

By analogy, federalization of mass tort jurisdiction is an economically efficient solution to mass tort litigation. Such federalization could contain the increasing costs of multistate commercial enterprise, affording manufacturers and corporate defendants who are sued in mass tort (or mass tort contract claims) a set of federal courts that would apply a common body of products liability or mass tort substantive law. Thus, Judge Posner's admiralty illustration, as he recognizes, suggests a useful argument in support of federalizing multistate mass-tort litigation, although he eschews such an "overinclusive" application.111

107. See Schwarzer & Wheeler, supra note 9, at 43 (criticizing the allocation theory based on economic externalities).
109. Id.
110. Id. at 178-79.
111. Judge Posner recognizes that the logical extension of admiralty jurisdiction may prove "overinclusive" as a method for allocating federal court subject matter jurisdiction. Id. at 179. Thus, he suggests:

There was a time when ocean shipping was the only major international business, but it is no longer. A company that manufactures a product shipped all over the world, and that under modern, expansive notions of personal jurisdiction is amenable to suit in a multitude of local courts for the consequences of an accident caused by the product, can argue as persuasively as any shipping line that it should not only have access to the national courts of each country (which it can get in the United States by virtue of the "alienage" jurisdiction in Article III, a counterpart to the diversity jurisdiction), but also be subject to a uniform national body of law, equivalent to admiralty law, administered in those courts.

Id.

By virtue of the fact that Judge Posner believes that his admiralty jurisdiction theory may be "overinclusive," this suggests that he might not favor this theory in support of federalizing multistate mass tort litigation.
C. The Brief for Preferring State Courts as Forums for Resolution of Mass Tort Litigation

Professor Mark C. Weber has set forth the most thorough review of justifications for preferring state courts for the resolution of mass tort cases. A major portion of his analysis delineates arguments against federalizing mass tort law, based either on constitutional grounds or on prudential aspects of the parity debate. In general, his arguments draw on considerations similar to the Federal Judicial Center's synthesized analytical model. Thus, Professor Weber argues that majoritarian and federalism concerns, as well as practical resource problems, counsel against federalizing mass tort. Furthermore, as a political reality, he suggests that law reformers might better spend their energies promoting state solutions to mass tort litigation, which he believes have a better chance of legislative success.

In support of a state approach, Professor Weber argues that a number of doctrinal and practical barriers to state court accessibility have eased in recent years, making state courts more attractive forums for mass tort litigation. First, he suggests that expansive long-arm statutes and personal jurisdiction rulings have loosened

112. See generally Weber, supra note 6, at 253-74 (explaining advantages and opportunities of state forums, and giving solutions for problems within the state forum).
113. Id. at 224-45 (arguing against federalization of mass-tort largely based on Erie choice-of-law grounds).
114. Id. at 245-53 (arguing against federalization of mass-torts on prudential grounds that federalization will add to federal court congestion, delay, mediocrity, etc.). Professor Weber also suggests that federalizing state-based tort actions is not within the traditional "core functions" of the national judiciary. Id. at 249-51; see supra notes 64-72 and accompanying text (discussing the "traditional purposes" theory of judicial subject matter allocation).
117. See id. at 257-59. Professor Weber's rendition of the lack of political success in promulgating any of the proposed national recommendations for mass tort is generally accurate. However, as he understands, the reasons for these failures are largely speculative. The lack of momentum for enacting existing proposals may stem from many sources, including the sense that these proposals are inadequate or not the best federal solutions. These reasons, however, do not support a general conclusion that other unarticulated federalization proposals similarly would be doomed to political failure.
Moreover, Professor Weber has little support for believing that state solutions to mass tort litigation are any more politically palatable than federalized solutions. Ironically, many of his recommendations for state court processing of these cases include aspects of federalization, such as a Congressionally enacted federalized choice-of-law, or federalized service of process. See infra notes 106-09 and accompanying text (explaining how Professor Weber relies on partially federalized solutions, while advocating state forums).
118. See Weber, supra note 6, at 259-73.
federal constitutional restrictions on States' abilities to assert jurisdiction over both non-resident plaintiffs and defendants.\(^{119}\) Additionally, to the extent that states desire to retain control over the development of their tort law, states have an incentive to ease territorial restrictions in mass tort cases. This trend, then, makes it easier for states to aggregate litigants within their borders. Moreover, he argues, state sovereignty theories of personal jurisdiction virtually have been in a century-long remission, so that state consolidation of mass tort ought not to offend state sovereignty prerogatives.\(^{120}\)

Second, Professor Weber suggests that States’ forum non conveniens doctrines and venue principles have also been liberalized to enhance litigant access, as well as the opportunity for consolidation.\(^{121}\) Third, Professor Weber points out that state courts already have considerable experience in construing and applying choice-of-law principles in multistate litigation, and should therefore have no more difficulty in determining applicable law in state consolidated mass tort cases.\(^{122}\)

A major problem with a state approach to mass tort litigation is that individual tort cases typically are filed in multiple state (as well as federal) courts. Because there are no existing procedural mechanisms for collecting dispersed tort cases, Professor Weber suggests two ways to accomplish this. One method is for states to make their courts attractive by liberalizing jurisdictional requirements coupled with “door closing” doctrines, to discourage individuals from filing in more than one forum.\(^{123}\) This option would not require concerted state action, nor Congressional intervention. A second method of collecting dispersed tort cases is through interstate compact agreements, permitting interstate transfer and consolidation of multistate tort cases. This would require concerted cooperative state action and Congressional approval.\(^{124}\) Under either option, Professor Weber optimistically concludes that differences in state procedural rules\(^{125}\)

\(^{119}\) Id. at 259-62.

\(^{120}\) Id. at 262-63 (distinguishing the resurgence of state sovereignty theory in Burnham v. Superior Court, 495 U.S. 604 (1990): “Moreover, a majority of the Court has not embraced the return to sovereignty ideas.”).

\(^{121}\) Id. at 263-64.

\(^{122}\) Id. at 264-66.

\(^{123}\) Id. at 266.

\(^{124}\) Id. at 267-70 (discussing, additionally, the proposed Uniform Transfer of Litigation Act).

\(^{125}\) Id. at 271-72. In a most interesting but sad justification of state court authority, he rationalizes away differences in state procedural rules by suggesting that the Civil Justice Reform Act of 1990 has rendered federal practice just as chaotically confusing as multiple state practice. Id.
and comparative "uneven judicial personnel" are practical problems amenable to solution.\textsuperscript{128}

Professor Weber has extensively detailed the rationales supporting a state approach to resolving mass tort litigation, and very ably argued the states' position in the parity debate.\textsuperscript{127} However, his arguments on behalf of state courts as the preferred forums to adjudicate mass tort cases are largely based on favorable interpretations of state doctrine and optimistic forecasts of state behavior. For example, his expansive jurisdictional conclusions, while perfectly plausible, neglect to account for the recent ascendancy of party autonomy in forum choice through increasing use of contractual forum selection clauses, as well as parallel choice-of-law clauses.\textsuperscript{128}

Since potential corporate defendants increasingly use forum-selection clauses to ensure maximum control over preferential forum access, liberalized state personal jurisdiction doctrine may prove to be thoroughly irrelevant. Thus, while liberalized state jurisdictional rules (or favorable state substantive tort law) might lure potential mass tort plaintiffs to certain states, it seems equally likely that potential corporate defendants will turn to contractual forum selection clauses precisely to avoid such states. Except for two or three states, most states now enforce forum selection and choice-of-law provisions. Unless the majority of states reconsiders this public policy, state enforcement of forum selection and choice-of-law clauses could defeat progressive attempts to assert state mass tort personal jurisdiction.

\begin{itemize}
  \item \textsuperscript{126} Id. at 272-73.
  \item \textsuperscript{127} See Weber, supra note 6.
\end{itemize}
Similarly, Professor Weber's prognosis about state forum non conveniens doctrine and venue provisions seems overstated, if not premature.\textsuperscript{129} Texas, the most prominent state to very publicly abandon forum non conveniens dismissals, was rapidly transformed into the World's Forum of Last Resort.\textsuperscript{130} That experience not only demonstrated that displaced litigants will march with their feet, but it also induced Texas to rethink whether it wanted to be the repository for the world's tort plaintiffs.\textsuperscript{131}

The most striking feature about Professor Weber's analysis, however, is the frequency with which he resorts to or incorporates partial federalized solutions for his state mass tort proposals.\textsuperscript{132} Thus, ironically, in discussing methods of achieving expanded state territorial authority over multistate mass tort cases, he suggests that Congress could authorize nationwide service of process for state courts handling mass tort cases.\textsuperscript{133} Similarly, when discussing applicable law problems involved in multistate mass torts, he again notes that "Congress could create [a uniform choice of law] for state courts to use when they handle transferred or otherwise consolidated mass tort cases."\textsuperscript{134} His recommendations for interstate transfer include the creation of interstate compact agreements which require Con-

\begin{itemize}
\item \textsuperscript{129} See Weber, supra note 6, at 252.
\item \textsuperscript{130} See Dow Chemical Co. v. Alfaro, 786 S.W.2d 674, 679 (Tex. 1990) (recognizing that Texas law prohibited a forum non conveniens dismissal), \textit{cert. denied}, 498 U.S. 1024 (1991); see also American Dredging Co. v. Miller, 114 S. Ct. 981, 985-87 (1994) (finding that federal law did not pre-empt Louisiana state law regarding the doctrine of forum non conveniens in admiralty cases originally filed in state court under the Jones Act).
\item \textsuperscript{132} See generally Weber, supra note 6.
\item \textsuperscript{133} Id. at 263.
\item \textsuperscript{134} Id. at 265 ("If one were willing to accept the drawbacks — largely the damage to federalism — of a uniform choice of law . . . ."). Professor Weber's suggestion is the one chosen by the American Law Institute in the \textit{Complex Litigation Project}, the Multiparty, Multiforum Jurisdiction Act, and other reform initiatives. See supra notes 2-5 and accompanying text (citing efforts to design a means to handle mass tort litigation).
\end{itemize}
gressional approval. He further suggests that interstate recognition of mass tort judgments could be enhanced by federal legislation modeled on the Parental Kidnapping Prevention Act. Thus, at the same time Professor Weber very ably illustrates the possibilities for state resolution of mass tort cases, he simultaneously exposes many of the stresses and strains of his state recommendations. Indeed, his concluding sections practically demonstrate the inevitability -- the unavoidability -- of some federalized solutions to aspects of mass tort litigation. In the same fashion that the American Law Institute and others have issued mass tort recommendations partially federalized and partially not, so to even the strongest proponent for state resolution of these cases envisions federalization of some aspect of this litigation phenomenon.

II. Mass Tort as a Litigation Phenomenon: The Problem of Combined Substantive and Procedural Federalization

When measured against various federalization criteria, the prospect of federalizing mass tort does not seem especially compelling. Yet, Professor Weber's strong arguments in support of state authority obliquely suggest the intractability of facets of mass tort litigation. Even he concedes that some aspects of interstate mass tort cases perhaps might best be dealt with through federal legislation. Why is it that law reformers vacillate between state and federal recommendations, seeming incapable of synthesizing a holistic solution for mass tort litigation?

It is easy to dismiss the prospect of federalizing mass tort if it is conceptualized simply as personal injury tort or products liability litigation. Tort law quintessentially is state common law. Yet, virtually any state claim -- including tortious injury -- has access to federal court if the litigants satisfy diversity requirements, al-

---

135. Weber, supra note 6, at 267-68 (recommending the Uniform Transfer of Litigation Act, which does not implicate Congressional federalization).
136. Id. at 269.
137. Id. at 259-74.
138. See supra notes 112-36 and accompanying text (discussing the arguments articulated by Professor Weber).
139. See Weber supra note 6, at 268 (discussing federal courts' jurisdictional advantages in handling mass tort cases).
140. Subject, of course, to long-standing exceptions such as the domestic relations exception, recently reaffirmed by the Supreme Court. See Ankenbrandt v. Richards, 112 S. Ct. 2206, 2216 (1992) (upholding diversity jurisdiction, but stating that the domestic relations exception is inappropriate in a suit where a former spouse, on behalf the the allegedly abused children, sues
though the case is subject to substantive state law under the *Erie*
doctrine. Federal court access for state claims already exists; thus, the concept of federal courts adjudicating mundane state tort claims is not entirely alien. Moreover, recently enacted supplemental and removal jurisdiction statutes permit and even encourage state claims to be litigated in federal court, under the Article III concept of "one case or controversy." In the federal courts' diversity docket, most mass tort cases are already "federalized."

But true federalization of mass tort litigation implies something different, which is Congressional enactment of substantive federal tort law that simultaneously confers federal question jurisdiction on this category of cases. Justification for this kind of federalization must rest on an assessment whether mass tort litigation is something significantly different than any other state-based diversity litigation.

### A. Describing Mass Tort Litigation

Aggregate mass tort litigation represents a litigation phenomenon that distinguishes it from other state claims seeking federalization. Although it is somewhat difficult to define complex mass tort litigation, mass tort cases generally embody a collection of similar descriptive attributes. Thus, mass torts generally begin their "litiga-
tion life” as individual tort cases filed in state or federal court, dispersed throughout each system. These individual tort cases involve different individual plaintiffs asserting common legal claims against common defendants. These individual tort claims typically involve specific, but related or similar underlying fact patterns.

In the early stages of a nascent mass tort phenomenon, defendants may either elect to negotiate a global settlement, as in the Silicon-breast implant litigation, or to litigate individual cases, as in the DES, Bendectin, and cigarette litigations. At this stage, defendants typically resist plaintiffs’ efforts to procedurally consolidate cases. If parties choose to litigate individual cases, then a pattern of defendant victories will slow any movement towards aggregation, whereas a pattern of plaintiff victories will encourage consolidation.

A “mature mass tort” generally signifies a pervasive pattern of defendant losses, coupled with known or ascertainable settlement values. Once a “mature” mass tort has emerged, it is likely that (either or both) plaintiff and defense lawyers will seek consolidation of individual cases in a state or federal forum. In the most advanced mass torts, such as asbestos litigation, lawyers for the plaintiffs, defendants, and third-party insurers will seek global settlements typically using the class action settlement device.

As the institutional law reformers recognized, consolidation of individual tort cases in a state or federal forum gives rise to difficult procedural and substantive problems. Hence, consolidated mass


147. It is equally likely that plaintiffs may wish to individually litigate their tort claims to maximize tort recovery or possible punitive damages, if available under state law.

148. See McGovern, Resolving Mass Tort, supra note 144, at 688-94 (discussing the resolution of mature mass torts).

149. See supra note 144 (listing cases involving global settlements).

150. See infra notes 151-72 and accompanying text (illustrating the reformers’ recognition of problems arising when tort cases are consolidated).
tort cases embody a peculiar litigation phenomenon which transforms the simple state tort into something conceptually different. This difference supports the need for federalization.

B. Mass Tort Distinguished From Simple Tort: Differences for the Federalization Debate

Nascent federal mass tort litigation begins as individual diversity tort lawsuits, scattered throughout the federal system. The diversity basis of federal mass tort litigation gives rise to two very distinctive problems of federal mass tort: difficulties with procedural consolidation, and complex issues in ascertaining applicable substantive law.

Individual tort cases may be aggregated in the federal system through at least four different procedural means; dispersed multiparty cases may be aggregated through use of the federal class action rule,151 Rule 42 consolidation,152 the multidistrict litigation statute (used in conjunction with federal transfer rules),153 or federal interpleader provisions.154 But, as the American Law Institute's Complex Litigation Project and others have extensively documented, these various procedural devices have limitations that impair their effectiveness as consolidation devices.155 This failure of existing procedural rules to effectively process aggregate diversity mass tort litigation suggests the need for new, federalized procedural law to govern these cases.156

Although some mass tort cases have been successfully aggregated under one or another of these devices, each consolidation mechanism involves special difficulties. For example, litigants have successfully resisted aggregating individual tort claims as class action litigation

151. See Fed. R. Civ. P. 23 (setting forth guidelines for federal class action suits); see also Charles A. Wright et al., supra note 141, at §§ 1759-84 (discussing federal class actions).
155. See, e.g., American Law Institute, Project, supra note 3, at 9-25 (introducing the problem of complex litigation); id. at 27-46 (analyzing limitations of existing federal procedural devices); see supra note 2 (listing various ABA Mass Tort reports).
156. The failure of existing procedural rules to address the peculiar problems of consolidated mass tort litigation was recognized by the reform institutions that undertook the mass tort projects in the mid 1980s. See supra notes 2, 3, 5 (noting various efforts to handle mass tort litigation).
for failure to meet various Rule 23(a) or (b) requirements. Others have challenged mass tort class actions for failure to satisfy diversity subject matter jurisdiction, or personal jurisdiction requirements. Still others have challenged mass tort settlement actions on ethical or due process grounds. Similarly, Rule 42 consolidation is a largely ineffectual and cumbersome device for litigating hundreds if not thousands of mass tort claims. The multidistrict litigation statute requires complete diversity among litigants, and is useful only for coordinating pre-trial proceedings. Federal interpleader provisions, which would avoid the complete diversity problem, have not been successfully invoked in the mass tort context.

Federal mass tort litigation, then, is characterized by a pervasive failure of existing federal consolidation rules to provide adequate

157. See, e.g., In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 856 (9th Cir. 1982) (decertifying a nationwide class because the class did not satisfy either 23(a)(3) or 23(b)(3) requirements), cert. denied, 459 U.S. 1171 (1983); In re Federal Skywalk Cases, 680 F.2d 1175 (8th Cir.) (vacating mandatory class certification order which prohibited class members from settling punitive damage claims and enjoined plaintiffs from pursuing state court claims), cert. denied, 459 U.S. 988 (1982); see also American Law Institute, Project, supra note 3, at 35-43 (discussing class action suits under Federal Rule 23).


163. The first sentence of the multidistrict litigation statute provides: "When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a) (1982).

164. See American Law Institute, Project, supra note 3, at 43-45 (discussing federal interpleader rules).
means for aggregating and adjudicating multiparty, multiforum tort cases. In addition, other procedural rules and doctrine have frustrated the ability of federal courts to efficiently handle diversity mass tort litigation. For example, federal courts have rejected the application of collateral estoppel principles to bar relitigation of repetitive claims and defenses. Because there are no mandatory federal joinder rules, federal courts lack the power to collect all individual claimants (and defendants) in one federal forum. Similarly, federal courts generally have declined to use either abstention doctrine to stay their own mass tort jurisdiction, or to use the Anti-Injunction Act to stay parallel state mass tort jurisdiction.

Federal diversity mass tort cases, arising from state causes of action, entail various substantive law problems relating to tort standards and defenses, limitations rules, and available remedies (compensatory and punitive damages). In addition to consolidation

165. See, e.g., In re Bendectin Prods. Liab. Litig., 732 F. Supp. 744, 749 (E.D. Mich. 1990) (holding that plaintiffs were not collaterally estopped from bringing action against Bendectin manufacturer); Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 339-43 (5th Cir. 1982) (holding that doctrine of collateral estoppel should not be applied to defendants who were not parties to prior litigation, nor to defendants who were parties to prior litigation where issues were left ambiguous); Migues v. Fibreboard Corp., 662 F.2d 1182, 1187-89 (5th Cir. 1981) (holding that all asbestos products could not be regarded as unreasonably dangerous as a matter of law); see also AMERICAN LAW INSTITUTE, PROJECT, supra note 3, § 5.05, at 340-74 (providing for more expansive use of preclusion doctrine in relation to proposed mandatory intervention rules). But see Lynch v. Merrell-Nat'l Lab., Division of Richardson-Merrell, Inc., 646 F. Supp. 856, 861-62 (D. Mass. 1986) (holding that plaintiffs were collaterally estopped from relitigating the issue of causation), aff'd on other grounds, 830 F.2d 1190 (1st Cir. 1987).

166. See Fed. R. Civ. P. 19, 24 (setting forth guidelines on joinder and intervention); Martin v. Wilks, 490 U.S. 755, 768 (1989) (stating that joinder serves the interests involved in litigated cases more than a duty of mandatory intervention). See generally AMERICAN LAW INSTITUTE, PROJECT, supra note 3, § 5.05, at 345-46, cmt. a, illus. 2 (commenting on revisions for the rules of joinder).


168. See, e.g., In re Federal Skywalk Cases, 680 F.2d 1175 (5th Cir.) (vacating mandatory class certification order which prohibited class members from settling punitive damage claims and enjoined plaintiffs from pursuing state court claims), cert. denied, 459 U.S. 988 (1982). But see Carlough v. Amchem Prods. Inc., 10 F.3d 189, 204 (3d Cir. 1993) (holding that injunction against state claims was appropriate under the Anti-Injunction statute); In re Joint E. & S. Dist. Asbestos Litig., 134 F.R.D. 32, 38-39 (E.D. & S.D.N.Y. 1990) (applying the "in aid of" exception of the Anti-Injunction Act to enjoin pending state cases against the manufacturer).

169. Some "mass tort" cases also may involve causes of action sounding in other legal theories, such as contract law. See In re School Asbestos Litig., 789 F.2d 996, 1008 (3d Cir. 1986) (holding that claim for injunctive relief constituted action for money damages and, therefore, could not be maintained as a class action); see also Mullenix, Beyond Consolidation, supra note 161, at 496 (describing claims).
problems, aggregated diversity mass tort cases involve complicated choice-of-law issues compelled by the *Erie* doctrine. Thus, applicable law in transferred and consolidated federal mass tort cases must be determined by reference to what Professor Andreas Lowenfeld has called the "*Van Dusen v. Barrack*" game.\(^{170}\) In mass tort cases where individual lawsuits initially are dispersed in all fifty states, theoretically, it is possible for the law of all fifty states to be available in the consolidated federal diversity mass tort. The federal judge must either fragment the mass tort case and apply different law to different parties and claims,\(^{171}\) or apply one state’s law to the entire case.\(^{172}\)

In sum, the mature federal mass tort litigation scarcely resembles a simple state tort or a simple diversity tort, which generally are amenable to fair and efficient resolution. The whole of a federal mass tort case is indeed greater than its constituent state parts. The multiparty, multiform nature of the massive litigation transforms the simple state tort into a litigation phenomenon, with a peculiar set of procedural and substantive attributes.

To characterize mass tort as merely another facet of state law seeking federalization, then, cheapens the federalization debate. Mass tort is unlike state probate matters, state criminal law, or even state domestic relations law (which arguably has a greater claim to federalization than state probate). When state probate, criminal, or domestic relations cases gain access to federal court through diversity jurisdiction, these cases have not generated the problems that mass tort cases involve. Even simple diversity torts do not generate the process problems involved in aggregate torts. Hence, the diversity mass tort litigation phenomenon, as a distinctive litigation en-


\(^{171}\) See id. at 160-63 (discussing In re Air Crash Disaster Near Chicago, Ill. on May 25, 1979, 500 F. Supp. 1044 (N.D. Ill. 1980), rev’d in part, aff’d in part, 644 F.2d 594 (7th Cir.) (holding that punitive damages were not recoverable against airline manufacturer in wrongful death action), and cert. denied, 454 U.S. 878 (1981)); Mullenix, *Beyond Consolidation*, supra note 161, at 519-22 (discussing In re School Asbestos Litig., 789 F.2d 996 (3d Cir.), cert. denied, 479 U.S. 852 (1986), and cert. denied, 479 U.S. 915 (1986)).

\(^{172}\) See AMERICAN LAW INSTITUTE, PROJECT, supra note 3, § 6.01, at 395-98 (discussing choice of law rules in state actions and articulating when a state’s law governs); see also In re Bendectin Litig., 857 F.2d 290, 305 (6th Cir. 1988) (finding that the law of the development site or site of the manufacturer controls), cert. denied, 488 U.S. 1006 (1989); In re Richardson-Merrell, Inc., 545 F. Supp. 1130, 1134 (S.D. Ohio 1982) (determining that the law of the place of the manufacturer and plaintiffs’ residence controls), aff’d sub. nom. Dowling v. Richardson-Merrell, Inc., 727 F.2d 608, 615 (6th Cir. 1984).
tity, gives support for an enhanced claim for federalization.

III. ALTERNATIVE ARGUMENTS FOR FEDERALIZATION OF MASS TORT LITIGATION

The debates whether to federalize various aspects of state law typically are grounded in constitutional, prudential, or interdisciplinary theories of the allocation of judicial business. As discussed above, these analytical frameworks counsel that mass tort litigation is not an especially strong candidate for federalization. Diversity mass tort litigation, however, is not an abstract problem. Sheer pragmatism, then, suggests a set of alternative arguments for federalizing this litigation phenomenon.

Although some mass tort cases have been handled solely through state auspices or through federal-state cooperative administration, the great majority of mass tort cases have been filed and processed (or are being processed) in federal court. Thus, beginning in the late 1970s, federal courts have been the forums of choice for mass tort litigants. The roll call of prominent mass tort cases chiefly have been federal cases: consider, for example, litigation relating to asbestos, Agent Orange, Dalkon Shield, Bendectin, DES, swine flu vaccine, lead paint, silicone breast implants, defective heart valves, repetitive stress injury, HIV-infected blood products, and even tobacco. For whatever reasons, mass tort plaintiffs have chosen to litigate in federal court and defendants have gained similar access through diversity removal.

The reasons for this phenomenon are less important than the phenomenon itself. What matters most is the reality that litigants have voted with their feet and marched overwhelmingly into federal court. It is somewhat belated, then, to analyze the relative merits and demerits of federalizing mass tort litigation when mass tort litigation has already been de facto federalized by virtue of its perva-

173. See, e.g., AMERICAN LAW INSTITUTE, PROJECT, supra note 3, at 207 (commenting that 8,500 asbestos cases were consolidated in Baltimore City Circuit Court); see also id. at 206-08 (discussing allocation of mass tort cases between state and federal court systems).

174. See, e.g., id. at 213-15 (describing examples of federal-state cooperative resolution of mass tort cases). Even when there is joint federal-state cooperative resolution of overlapping mass tort cases, the federal court typically will take a lead role in aggregating cases and negotiating a settlement. See, e.g., In re Silicone Gel Breast Implants Prods. Liab. Litig., 793 F. Supp. 1098, 1098 (J.P.M.L. 1992) (granting motions made to centralize actions against manufacturers of silicone gel breast implants).

175. See supra notes 144-46 and accompanying text (citing and discussing these types of cases).
sive presence across the federal diversity docket. Hence, the debate whether to federalize mass tort litigation is not an abstract exercise about transforming an ordinary state claim into a new federal cause of action. These cases are already in federal court. Thus, the relevant question is not about creating actionable new federal rights, but about effective resolution of current federal cases.

Moreover, not only are mass tort cases de facto federalized, but there are no effective procedural or prudential mechanisms to send these cases to state court once they are filed in federal court. Thus, in the mass tort context, federal courts have not successfully invoked or applied federal abstention theory to decline their properly invoked diversity jurisdiction. Nor do the removal rules permit federal courts to remand state mass tort cases, unless removal has been improvidently granted — a provision that has been largely unavailing to circumscribe the federal mass tort docket. Furthermore, arguably, the recent expanded federal removal and supplemental jurisdiction statutes now enhance litigants' ability to pursue multiple state claims in federal court.

Finally, the fact that mass tort litigation is already largely federalized distinguishes these cases from other state claims seeking federalization. The refusal of federal courts, for example, to hear domestic relations and probate cases — whether justified or not — does not mask a problem of excessive federal filings of these kinds of litigation. There is little evidence that domestic relations or probate cases have flooded the federal dockets, or will do so in the future. Rather, the primary issue regarding federalization of these kinds of claims is whether historically excluded cases should now have preferential federal court access and thereby add new litigation to the existing federal docket.

Moreover, as extensively canvassed above, existing procedural rules and doctrine have proved significantly ineffective to resolve ag-

176. See 28 U.S.C. §§ 1441, 1446, 1447 (1982) (delineating removal procedures). Under recently amended 28 U.S.C. § 1441(c), after an entire action has been removed to federal courts, the federal court then has discretion to remand "all matters in which State law predominates." Id. § 1441(c).


178. See 28 U.S.C. § 1441(c) (1982) (federal removal provision); id. § 1367(b) (supplemental jurisdiction provision); see also AMERICAN LAW INSTITUTE, PROJECT, supra note 3, §§ 5.01-5.03, at 271-73, 301-02, 316-17 (expanding opportunities for litigants to participate in federal consolidated proceedings through proposed removal and supplemental jurisdictional provisions).
None of these procedural deficiencies, of course, address the equally compelling problems of applicable substantive law in federal mass tort litigation. In short, in the absence of a federalized choice-of-law scheme for mass tort litigation (or federal substantive mass tort standards), federal judges must determine on a case-by-case basis the applicable state substantive law in each new mass tort litigation. Applying the principles of the *Erie* doctrine, federal judges must ascertain limitations periods, theories of liability, standards of proof, and damages for each new mass tort litigation, often with inconsistent and disturbing effects. While such "dislocations" are the normal result of a two-tier court system and the *Erie* doctrine, the results in mass tort cases are more far-reaching than in the ordinary simple diversity tort.

After extensive study of the problems relating to mass tort litigation, three major reform proposals remain viable as of January 1995. These proposals are embodied in the American Law Institute’s *Complex Litigation Project*,180 Congress’s Multiparty, Multiforum Jurisdiction Act,181 and the Uniform State Transfer of Litigation Act.182 None of these proposals will adequately address the range of problems entailed in dual-system mass tort cases. Instead, each provides, at best, only partial solutions to selected problems.

The final draft of the American Law Institute’s *Complex Litigation Project* ("Project") manifests a strong bias in favor of state court resolution of mass tort cases.183 Thus, the *Project* failed to endorse a federal jurisdictional statute for mass tort cases,184 or even address the relationship of its proposals to federal class action procedure.185 Instead, the *Project* focused on modifying the existing multidistrict litigation statute as well as enhanced removal procedures and federal supplemental jurisdiction.186 In addition, more than half

---

179. See supra notes 15-67 and accompanying text (discussing consolidation, class actions, and joinder).

180. AMERICAN LAW INSTITUTE, PROJECT, supra note 3.


183. See AMERICAN LAW INSTITUTE, PROJECT, supra note 3, at 208 (“Even when diversity jurisdiction limitations are not a bar, litigation in the federal courts may not always be the most desirable means of handling complex litigation.”).

184. See Mullenix, *Unfinished Symphony*, supra note 5, at 981-95 (discussing the federal jurisdictional proposals).

185. Id. at 984-87 (discussing Rule 23 and the American Law Institute's *Complex Litigation Project*).

186. See AMERICAN LAW INSTITUTE, PROJECT, supra note 3, §§ 3.01-3.08, at 46-204 (proposing a standard for transfer and consolidation through a new Complex Litigation Panel); id.
of the Project is consumed with delineating a detailed federalized choice-of-law regime for ascertaining a single applicable law for consolidated federal mass tort cases. While these proposals are internally logical, in the end they represent only partial solutions to federal diversity mass tort cases. Many of the existing impediments to effective federal resolution of mass tort litigation will remain if the Project's proposals are enacted into federal law.

Although the American Law Institute's (ALI) federal proposals are interesting, perhaps more noteworthy are the Institute's proposals relating to state court resolution of mass tort litigation. Thus, a considerable portion of the Complex Litigation Project is devoted to intersystem resolution of mass tort cases, with an emphasis on mechanisms for consolidating mass tort cases in state court. Not only has the ALI suggested a method by which the federal Complex Litigation Panel could designate a state court as a transferee forum for federal mass tort cases, the Institute has also urged states to utilize interstate compacts for interstate mass tort consolidation. Finally, the Institute has also recommended states to adopt a uniform complex litigation act.

After years of considered deliberation of the problems entailed in mass tort litigation, the ALI produced a set of recommendations that largely tinker with federal procedure, but instead manifest a strong bias in favor of state resolution of mass tort litigation. This is fine, but the ALI state proposals verge on the fantastic. States have shown little inclination to enter into interstate compacts to resolve future (and as yet unknown) mass tort cases, and it may be years before states individually adopt the Uniform Transfer of Litigation Act. If states are not to become the primary forums for resolution of mass tort litigation, that leaves most future mass tort cases in federal court by default, subject to wholly inadequate procedural

---

1§§ 5.01-5.03, at 271-323 (articulating proposed removal and supplemental jurisdiction provisions).
187. See id. §§ 6.01-6.08, at 395-537 (delineating choice of law principles for mass tort cases).
188. See id. §§ 4.01-4.02, at 220-66 (discussing consolidation in state courts).
189. See id. at 271-323 (discussing opportunities for intersystem consolidation); id. at 220-66 (discussing consolidation in state courts); id. at app. B (advocating certain procedures for transfer and consolidation of state proceedings).
190. Id. § 4.01, at 220-21 (designating a state court as a transferee forum for federal actions).
191. Id. § 4.02, at 248 (formulating an "Interstate Complex Litigation Compact" or a "Uniform Complex Litigation Act").
192. Id.
193. See supra note 179-91 (discussing the ALI's position).
and substantive law available there.

Not much needs to be added concerning the Multiparty, Multiforum Jurisdiction Act. The various versions of this legislation, still unenacted, will not address the needs of the truly complex mass tort cases.\(^{194}\) This is no surprise; through successive drafts this legislation was specifically modified to cover only single-site mass accidents rather than the truly dispersed mass tort case. Finally, while the Uniform Transfer of Litigation Act does provide a means for interstate cooperative resolution of state-based mass tort cases,\(^{196}\) it may be years before states ratify this uniform law. Until then, mass tort litigants must continue to choose between state or federal forums as they currently exist.

**Conclusion**

In December, 1994, the Long Range Planning Committee of the United States Judicial Conference issued a report recommending modifications of federal court jurisdiction that would restrict access to federal court for certain types of litigation.\(^{196}\) The proposals included a recommendation that federal court diversity jurisdiction be severely restricted or eliminated.\(^{197}\) Nonetheless, the proposal specifically recommends that "[d]iversity jurisdiction . . . also be retained for consolidated 'mass tort' litigation, which will require a

---

194. See generally Mullenix, *Federalizing Choice of Law*, supra note 1, at 1638-62 (discussing problems with the American Law Institute's proposal to federalize determinations of choice-of-law in mass tort litigation and articulating possible approaches to choice-of-law in mass tort); Mullenix, *Unfinished Symphony*, supra note 5, at 979, 999-1000 (concluding that the ALI did not consider problems surrounding complex mass tort cases).


197. Id. at 25 ("RECOMMENDATION 6: Congress should diminish the impact of diversity jurisdiction on the federal courts' dockets by eliminating diversity jurisdiction, except in actions involving aliens, interpleader actions, and cases in which the petitioner can clearly demonstrate local prejudice in the relevant state court.").

In commenting on the proposal to modify or eliminate federal diversity jurisdiction, the New York Times reported:

Federal courts should no longer be required to take cases merely because they involve citizens of different states. Such cases should be heard by a Federal judge only if the plaintiffs can show that state courts would be prejudiced against them. This type of case, in which Federal judges apply state law, accounts for one of every four civil cases filed in Federal district court and "constitutes a massive diversion of Federal judge power."

relaxation of the traditional ‘complete diversity’ requirement . . . ”\(^{198}\) Whether state courts are adequate to handle the influx of federal mass tort cases remains to be seen.

The prospective demise of federal diversity jurisdiction, however, should not moot the debate over federalization of mass tort litigation. Indeed, if such a demise is imminent (a dubious proposition), then it seems an especially propitious time for Congress to consider truly federalizing mass tort litigation through a comprehensive substantive and procedural mass tort statute. In the interim, if Congress significantly retrenches federal diversity jurisdiction, this could result in an unintended blessing for mass tort litigation. Either state courts will demonstrate their superior abilities to handle these cases, or they will supply a good empirical basis for the parity argument favoring federalization.

APPENDIX: WORKING PRESUMPTIONS TO ASSESS FEDERALIZATION

The Federal Judicial Center’s study of civil and criminal federalization offers an alternative set of presumptive guidelines to assess legislative candidates for federalization.\(^{199}\) Stated negatively, these presumptions are intended to provide guidelines to Congress and the executive branches to assist in “[p]reserv[ing] a [l]imited [r]ole for the [f]ederal [c]ourts.”\(^{200}\)

The following evaluates mass tort litigation as a candidate for federalization in the context of the Judicial Center’s “useful set of working presumptions”:\(^{201}\)

A presumption against expanding federal jurisdiction without a demonstrated need for a national solution, determined after careful examination of the facts.

This presumption probably counsels against federalization of mass tort because no one has yet demonstrated a “need for a national solution” based on careful examination of the facts. In addition, no one has clearly defined the “national problem” of mass tort that requires such a national solution, apart from the bundle of substantive and procedural complications raised by these cases. The “facts”

198. COMMITTEE ON LONG RANGE PLANNING, supra note 196, at 25.
199. See SCHWARZER & WHEELER, supra note 9, at 45-47 (discussing the alternative set of guidelines).
200. Id. at 45. Despite the Center’s purported “neutrality” in the federalization debate, id. at 1-5, the Center’s statement of presumptions in the negative manifests a bias against federalization.
201. Id. at 47.
relating to resolution of mass tort litigation are mixed: some federal courts resolve mass tort cases reasonably well, while other federal courts do not; and some states capably handle mass tort litigation.

This negative presumption is countered by the shared belief of law reformers — most notably the American Law Institute — that mass tort embodies a litigation crisis requiring a national solution. While in the 1970s and early 1980s mass tort litigation tended to be localized in a few federal district courts, mass tort cases in the 1990s typically are of national proportions. Repetitive, duplicative tort litigation is filed across all ninety-four federal district courts as well as state courts. Mass tort cases burden state and federal dockets, waste resources, delay justice, and incur undue expense (particularly high transaction costs). In an interstate sense, inefficient resolution of dual-system mass tort litigation impairs local and national economies. This view of mass tort, then, supports an expansive commerce clause theory for Congressional intervention to assist in resolving a problem of national dimensions.

A presumption against expanding federal jurisdiction unless less drastic alternatives, such as providing funding or other resources to the states, have been found to be inadequate to meet the need.

This presumption requires that "less drastic alternatives" be provided and shown inadequate to handle the state-based problem, before turning to the solution of federalization. This is a somewhat inapt proposition for mass tort, because no one yet has proposed that Congress (or some other body) provide state funding to handle state mass tort dockets, nor has a state-funding alternative been tried. Although federal and state courts have engaged in cooperative mass-tort resolution, this has not entailed cost redistribution. Moreover, federal funding for state mass-torts would do little to ameliorate the current federal diversity docket, unless more efficient state resolution would encourage mass tort plaintiffs to vote with their feet and elect the state court system.

Another "less drastic alternative" to federalization of mass tort might be provided through the Uniform Transfer of Litigation Act.\textsuperscript{202} This uniform state law permits consensual state-to-state transfer of cases, and if used by mass tort litigants, might provide a

MASS TORT LITIGATION

"less drastic" and more efficient state-based solution to mass tort litigation.

The problem in assessing mass tort against this "less drastic alternative" criterion is that such options either are not forthcoming (e.g., federal funding of state-based mass tort), or not implemented (e.g., the Uniform Transfer of Litigation Act). As with all newly-minted uniform state laws, it will take years for states to enact the Act, and longer to assess whether this is "adequate" to better resolve state-based mass tort cases.

A presumption against expanding federal jurisdiction unless the resources needed to make it effective are provided.

This proposition embodies the fear that an increased federal caseload inevitably requires more judges, magistrates, clerks, physical space, and so on. Therefore, state law presumptively ought not to be federalized unless Congress simultaneously subsidizes excessive judicial costs resulting from federalization.

This presumption generally favors federalizing mass tort litigation because in providing for federal question jurisdiction, procedural aggregation, and governing substantive law, federalized mass tort would capture federal diversity cases while simultaneously eliminating diversity mass torts from federal diversity docket. Hence, federalized mass tort ought not to require additional resources, but should use existing resources more efficiently.

It is conceivable that federalized mass tort might induce a need for increased resources if an influx of state-based cases to federal courts represented an additional economic burden. Since the essence of mass tort is aggregated litigation, however, it hardly seems to matter — in any economic sense — how these cases originally are dispersed across the state and federal court systems. Once aggregated in federal court, mass tort ought to be handled more efficiently than dispersed individual torts.

A presumption against expanding federal jurisdiction beyond the limits of what is essential to meet the identified need, avoiding over-breath and the risk of unintended consequences.

This proposition is a variation of the "less drastic alternative" presumption, counseling against federalized solutions to "identified needs" that are too broad or potentially will give rise to more problems (unintended ones, at that). The spirit of this negative presumption animates the American Law Institute's approach to mass
tort litigation in the *Complex Litigation Project*,\(^2^0^3^\) as well as Congress's proposals in the various versions of the Multiparty, Multiforum Jurisdiction Act.\(^2^0^4^\) Having characterized mass tort litigation as a crisis of national proportions (the "identified need"), both recommend revising the multi-district litigation statute and federalizing choice-of-law. Certainly, the recommendations to revise the multidistrict litigation statute "avoids overbreath," but the choice-of-law proposals do not (federalizing mass tort choice-of-law rules essentially ignores the overbreath issue).

Finally, while the phenomenon of unintended consequences is well recognized, it is almost impossible to discern how to assess this risk when evaluating possible federalization of state-based law. Surely the essence of unintended consequences is that they are difficult to predict. Who, then, can possibly guess and evaluate the risk of the unintended consequences of federalizing mass tort litigation? Who can assess the risk of the unintended consequences for federalizing any area of state law?

A presumption against expanding federal jurisdiction when it would unduly impair the independence of states and hamper their ability to innovate.

This presumption embodies the constitutional dimensions of the federalization debate. The presumption weighs against federalizing mass tort because federalization would hamper states' ability to innovate in this area, and thus, impair state independence. A federalized mass tort statute providing jurisdiction, aggregation, and substantive law might cause many litigants to choose the federal forum over the state courts.

A presumption against permitting legislation that expands federal jurisdiction to operate without oversight and periodic review.

This presumption is concerned with unwise federalization and would implicitly require that new federalization proposals include automatic Congressional or executive oversight (for possible revocation). None of the proposed legislative recommendations to federalize aspects of mass tort include oversight provisions, so this presumption weighs against current proposals. It is difficult to discern, however, why any proposed federalized mass tort statute should include oversight provisions when most other areas of federalized substantive law do not.

---

\(^2^0^3^\) AMERICAN LAW INSTITUTE, PROJECT, supra note 3.
A presumption against federal prosecution of state-law crimes unless state prosecution would be demonstrably inadequate and so long as other important federal interests are not unduly impaired.

This negative presumption applies only to federalization of criminal law and has no application to the dilemma of federalizing state-based mass tort. The presumption essentially repeats the constitutional and parity concerns embodied in other presumptions, but directed particularly at criminal law. Hence, this negative presumption chiefly reflects the Judicial Center’s preoccupation (in 1994) to deflect possible federalization of criminal law.205

205. See Schwarzer & Wheeler, supra note 9, at 1-5 (articulating the purpose behind its propositions in the debate over federalization).