

COMMENTARY

FEDERALISM AND MASS TORT LITIGATION

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I largely agree with the burden of Tom Willging's paper assessing the use and misuse of the *Manual on Complex Litigation*.¹ Thus, I will say less about that paper than I will about the assertions of those speakers and participants at this Symposium² and others in different fora who have asserted that dramatic changes in federal law are appropriate to deal with the problem of mass tort litigation.³ I am utterly unpersuaded that anything argued today—or during the last fifteen years of this debate—provides a plausible basis for displacing state law by substantial changes in federal law, since tort law and insurance law traditionally and properly have been the province of state and not federal law.

The cluster of problems associated with mass tort litigation today are not problems that result in the frustration of any federal substantive policy. Is any statute of Congress going unenforced? Is any executive decision going unimplemented? The principal problem of mass tort litigation for the federal government and federal policy today is due to congestion in the federal district courts caused by the avalanche of state tort claims that have found their way there.⁴ How did that come about? Did Congress change the law? No. Did the federal courts change their jurisdiction or procedures in a dramatic way? No. In fact, the current state of congestion arose largely for two

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¹ See Thomas E. Willging, *Beyond Maturity: Mass Tort Case Management in the Manual for Complex Litigation*, 148 U. PA. L. REV. 2225 (2000).

² I want to thank Professor Stephen B. Burbank for inviting me to this Symposium and David Berger for his continuing support of this distinguished symposium series at the University of Pennsylvania Law School. I also wish to express my gratitude to Grace Hwang and Andrew Gable for their excellent research assistance with this paper.

³ See *infra* notes 22-32.

⁴ See Linda S. Mullenix, *Mass Tort Litigation and the Dilemma of Federalization*, 44 DEPAUL L. REV. 755, 780-82 (1995) (describing mass tort litigation as a complex aggregate of cases that originated as individual state or federal cases).

reasons. First, as a result of the more adventurous nature of our medicine, we now put devices in our bodies that we never did before, and we now use drugs and products that we either did not have before or dared not use before.⁵ Second, state legislatures and state supreme court justices have changed state tort law and state insurance law. They have expanded available claims and remedies to include such things as medical monitoring claims,⁶ fear of cancer claims,⁷ and emotional distress claims.⁸ They have adopted market share theories⁹ and revised the plaintiff's burden of proof in other situations with respect to proof of fault or causation.¹⁰ Were those good decisions or bad de-

⁵ See Kenneth T. Sigman, *Medtronic, Inc. v. Lohr: Bad Medicine for Manufacturers of Unproven Medical Devices*, 47 CATH. U. L. REV. 721, 727 (1998) (discussing litigation over the implantation of a defective new version of the cardiac pacemaker); James M. Wood, *The Judicial Coordination of Drug and Device Litigation: A Review and Critique*, 54 FOOD & DRUG L.J. 325, 330-31 (1999) (identifying the mass marketing of products as a source of increased mass tort litigation).

⁶ See, e.g., *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 430 (W. Va. 1999) (recognizing a claim for medical monitoring as a "proper subject of compensatory damages"); see also *Redland Soccer Club, Inc. v. Department of the Army*, 696 A.2d 137, 143-47 (Pa. 1997) (discussing the elements needed to establish a claim for medical monitoring under Pennsylvania common law). But see Andrew R. Klein, *Rethinking Medical Monitoring*, 64 BROOK. L. REV. 1, 4 (1998) ("[A]wards for medical monitoring in toxic exposure cases are unusual . . ."); Victor E. Schwartz et al., *Medical Monitoring—Should Tort Law Say Yes?*, 34 WAKE FOREST L. REV. 1057, 1063 (1999) (criticizing recent changes in tort law that expand the scope of available claims and remedies). For a discussion of recent developments in class treatment of medical monitoring claims, see generally Elizabeth J. Cabraser & Fabrice N. Vincent, *Class Certification of Medical Monitoring Claims in Mass Tort Product Liability Litigation*, SE01 ALI-ABA 1, 5-27 (1999).

⁷ See *Fibreboard Corp. v. Pool*, 813 S.W.2d 658, 675 (Tex. App. 1991) (upholding a jury instruction allowing a jury to consider fear of cancer as mental anguish in determining damages); Kenneth W. Miller, *Toxic Torts and Emotional Distress: The Case for an Independent Cause of Action for Fear of Future Harm*, 40 ARIZ. L. REV. 681, 686 (1998) (arguing that Arizona should recognize a fear of future harm cause of action).

⁸ See *Adams v. U.S. Homecrafters, Inc.*, 744 So. 2d 736, 743 (Miss. 1999) (allowing claims for emotional distress without requiring a showing of physical manifestation in simple negligence cases); Miller, *supra* note 7, at 685 (advocating the recognition of negligently inflicted emotional distress claims in Arizona).

⁹ See *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980) (holding drug manufacturers liable in a class action based on their share of the national market); Joel W. Baar, *Let the Drug Dealer Beware: Market-Share Liability in Michigan for the Injuries Caused by the Illegal Drug Market*, 32 VAL. U. L. REV. 139, 144 (1997) (discussing the use of market-share liability in civil suits against drug dealers).

¹⁰ See *Smith v. Eli Lilly & Co.*, 560 N.E.2d 324 (Ill. 1990) (reviewing the various ways courts have extended traditional burden of proof of fault and burden of causation principles in mass tort litigation). For a discussion of burden of proof barriers, see generally Suzanne Ernst Drummond, *DES and Market Share Liability in Ohio—A Lesson in How What You Don't Know Can Hurt You: Sutowski v. Eli Lilly*, 669 N.E.2d 187 (Ohio 1998), 67 U. CIN. L. REV. 1331, 1333 (1999) ("Under conventional theories of prod-

cisions? I think most of them were good, but as a proceduralist and as a professor who is in no position to change those decisions, that does not matter. They were properly made by state legislatures and state supreme court justices interpreting the common law of their state. It is not clear why any of us believe we have any mandate for reversing those decisions or for changing federal law because of these changes in state law.

Moreover, many proponents of changing federal law have neglected to mention the major roles that insurance and insurance law play in mass tort litigation. Unlike antitrust or securities fraud claims, where the loss largely falls on the wrongdoer, in mass tort litigation the loss is largely shifted to a third party insurance carrier,¹¹ and by them, through facultative and treaty reinsurance to reinsurance syndicates in London.¹² Because it is the source of the money that pays the plaintiff's bar, the defense bar, and the plaintiffs, the insurance industry is a very important player in mass tort litigation. The law of insurance has been—just like state tort law—the appropriate province of state legislatures and state supreme courts for a very long time.¹³ The direct regulation of insurance companies remains today almost entirely a state responsibility.¹⁴

ucts liability the [plaintiffs'] . . . inability to prove causation by a particular pharmaceutical company would bar their ability to recover.”).

¹¹ See, e.g., *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178 (2d Cir. 1995) (adjudicating the responsibilities of an insurance company in an asbestos case).

¹² See *Aetna Cas. & Sur. Co. v. Home Ins. Co.*, 882 F. Supp. 1328, 1331 (S.D.N.Y. 1995) (involving a suit by a health insurance company against a reinsurer to indemnify its mass tort liability obligations); *First Am. Ins. Co. v. Commonwealth Gen. Ins. Co.*, 954 S.W.2d 460, 465 (Mo. Ct. App. 1997) (describing reinsurance contracts as they relate to insolvency of an insurance company); Carole D. Bos, *A Solvency Perspective: Concerns of Insurance Carriers in Dealing with Lloyd's and the London Market*, *COVERAGE*, May/June 1994, at 19 (discussing the use of reinsurance by Lloyd's of London, a major insurance carrier).

¹³ See *McCarran-Ferguson Act of 1945*, 15 U.S.C. § 1012(b) (1994) (“No Act of Congress shall be construed to . . . impair . . . any law enacted by any State for the purpose of regulating the business of insurance . . .”); *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 544-45 (1944) (discussing the history of cases that hold that the business of insurance did not constitute interstate commerce); *Bancoklahoma Mortgage Corp. v. Capital Title Co.*, 194 F.3d 1089 (10th Cir. 1999) (using state law to adjudicate an insurance fraud case); *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699, 702 (10th Cir. 1988) (holding that the McCarran-Ferguson Act leaves regulation of insurers to the states); *U.S. Fin. Corp. v. Warfield*, 839 F. Supp. 684, 688 (D. Ariz. 1993) (stating that since the McCarran-Ferguson Act of 1945, the power to regulate insurance law resided with the states); *Mendola v. Dineen*, 57 N.Y.S.2d 219, 221 (N.Y. Sup. Ct. 1945) (discussing the history of cases that hold that the business of insurance did not constitute interstate commerce).

¹⁴ See Jeffrey Clay Clark, *The United States Proposal for a General Agreement on Trade in Services and Its Preemption of Inconsistent State Law*, 15 B.C. INT'L & COMP. L. REV. 75, 87

In other words, as we debate what to do about mass tort litigation, we are intruding into two areas that for two centuries have been left to the states. That this is so is not because of an idle or passive deference to state law: since the 1930s we have been willing to regulate all sorts of behavior through the federal government. But while doing so, Congress has scrupulously, and with very few exceptions,¹⁵ respected the right of the states to develop, enforce, and apply state norms as to what kinds of behaviors give rise to a private action for damages in tort.¹⁶ So while the Federal Aviation Administration comprehensively regulates the airline industry,¹⁷ passengers injured in crashes sue under state law.¹⁸ The safety and efficacy of prescription drugs are regulated by the federal Food and Drug Administration, but state law provides the remedy for those hurt by such products.¹⁹ OSHA regulates working conditions of buildings and construction sites, but injuries are remedied under state law.²⁰

Federal courts have long respected this province of states to make tort law, even in the most extreme cases. The Second Circuit some years ago held that state, not federal law, governs the claims of soldiers fighting in the same battalion in Vietnam who were exposed to Agent

(1992) (noting that since 1944, U.S. courts have allowed the states to regulate the insurance sector under the McCarran-Ferguson Act); Mathew P. Harrington, *Health Care Crimes: Avoiding Overenforcement*, 26 RUTGERS L.J. 111, 134 (1994) ("The regulation of insurance carriers has thus far been left to the states."); Lawrence Dunn, Note, *Insurance Sales Powers of National Banks Under 12 U.S.C. § 92*, 39 N.Y.L. SCH. L. REV. 801, 828 (1994) (noting that the McCarran-Ferguson Act made insurance law a preserve of the states).

¹⁵ See Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 ARIZ. L. REV. 917, 920-21 (1996) (giving the example of the 1908 Federal Employer's Liability Act, which federalized the tort liability of interstate railroads, as an exception to the claim that American "tort law has always been state law").

¹⁶ See *id.* at 921 (noting that "the tradition of state tort law has held up remarkably well").

¹⁷ See Federal Aviation Administrative Authorization Act, 49 U.S.C. § 106 (1994) (enumerating the responsibilities of the FAA); see, e.g., *Northwest Airlines Inc. v. FAA*, 795 F.2d 195, 197 (D.C. Cir. 1986) (supporting the FAA's override of an individual airline's suspension of a pilot).

¹⁸ See *Martin v. Eastern Airlines, Inc.*, 630 So. 2d 1206, 1209 (Fla. Dist. Ct. App. 1994) (holding that "the Federal Aviation Act was not intended to preempt state common law negligence claims"). See generally Stuart J. Starr, *Torts at Twenty Thousand Feet: Federal Preemption in Commercial Aviation*, 23 BRIEF: A.B.A. SEC. TORT & INS. PRAC. 8, 44 (Fall 1993) (discussing the arguments for and against the recognition of a federal common law claim for aviation-related injuries).

¹⁹ See Food and Drug Administration Act § 903(b)(2), 21 U.S.C. § 393(b)(2) (1994) (enumerating the powers of the FDA).

²⁰ See Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1994) ("OSHA"); *Traudt v. Potomac Elec. Power Co.*, 692 A.2d 1326 (D.C. 1997) (dealing with a state law tort claim for violation of the OSHA).

Orange. Even though the federal government had purchased this arguably toxic and dangerous herbicide for use in a foreign war into which many plaintiffs had been conscripted, the Second Circuit concluded that the claims of the plaintiffs against the suppliers of this war material were governed by state tort law.²¹ If the rights of conscripted veterans in a foreign war are properly measured under state law—not federal law—then it hardly seems plausible that because of congestion in the federal district courts, we should abandon our traditional deference to state tort law in favor of a federal law solution. Yet some suggest that *Klaxon*²² be reversed,²³ that *Van Dusen*²⁴ be reversed,²⁵ that *Lexecon*²⁶ be reversed,²⁷ that federal subject matter jurisdiction be expanded to facilitate the aggregation of state tort claims in federal court,²⁸ that state laws regarding attorneys' fees be replaced by federal law,²⁹ that state choice-of-law rules be replaced by federal choice-of-law

²¹ See *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425 (2d Cir. 1993); *In re "Agent Orange" Prod. Liab. Litig.*, 635 F.2d 987 (2d Cir. 1980) (holding that state law governed the claims).

²² *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) (holding that federal courts must look to the law of the state in which they sit in determining questions of choice of law).

²³ See, e.g., Scott Fruehwald, *Choice of Law in Federal Courts: A Reevaluation*, 37 BRANDEIS L.J. 21, 22 (1998) (arguing that *Klaxon* "was poorly reasoned" and that "the Constitution did not mandate the decision").

²⁴ *Van Dusen v. Barrack*, 376 U.S. 612, 643 (1964) (holding that a § 1404(a) transfer of venue does not change the applicable state law).

²⁵ See, e.g., Maryellen Corna, *Confusion and Dissension Surrounding the Venue Transfer Statutes*, 53 OHIO ST. L.J. 319, 335-36 (1992) ("Imposing the requirement of [forum] convenience at the outset . . . will reduce the necessity for 'remedial' transfer and will promote judicial economy." (footnote omitted)).

²⁶ *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998) (holding that a court conducting pretrial procedures for consolidated mass tort actions cannot assign the litigation to itself for trial).

²⁷ See S. 248, 106th Cong. § 5 (1999) (overruling *Lexecon* to permit multidistrict consolidation for liability and punitive damages purposes); H.R. 1752, 106th Cong. § 310 (1999) (permitting multidistrict trial consolidation for all purposes); H.R. 1852, 106th Cong. (1999) (same); Georgene M. Vairo, *Problems in Federal Forum Selection and Concurrent Federal State Jurisdiction*, SE28 ALI-ABA 277, 395-99 (1999) (expressing concern over negative practical effects of the *Lexecon* decision). But see Benjamin W. Larson, Case Comment, *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lench: Respecting the Plaintiff's Choice of Forum*, 74 NOTRE DAME L. REV. 1337 (1999) (defending the result in *Lexecon*).

²⁸ See Robert W. Kastenmeier & Charles Gardner Geyh, *The Case in Support of Legislation Facilitating the Consolidation of Mass-Accident Litigation: A View from the Legislature*, 73 MARQ. L. REV. 535, 554 (1990) (suggesting expanding diversity jurisdiction as a way to avoid "impediments to federal consolidation of complex litigation").

²⁹ See Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119

rules,³⁰ that state tort law should give way to a national tort law,³¹ and that federal—not state—law govern punitive damages.³² What federal interest justifies such a displacement of state tort law? Or state conflicts law? Or punitive damages law? Are crowded federal dockets a sufficient predicate for putting aside centuries of federal deference to state lawmaking in torts and insurance law? Would not a more rational response to crowded federal dockets due to state tort claims be changes intended to reduce—not increase—the volume of state tort claims in federal court?

We have crowded federal district court dockets because state governments have been imposing this burden on a branch of the federal government and not the other way around. In other contexts, the federal government has been active over the past ten years in passing legislation in which people are given rights where the cost of providing those rights is borne by someone else. For example, with the Americans with Disabilities Act of 1990³³ Congress created a new set of entitlements, but the accommodations thus mandated are paid for by employers and property owners.³⁴ Likewise, Congress passed the Fam-

(2000) (discussing the need for revision of current handling of attorney fees in mass tort litigation and arguing for increased disclosure and federal regulation).

³⁰ See ALI, *COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS* 321-23 (1994) (proposing uniform federal criteria for the choice of state law in mass tort cases); see also Thomas M. Reavley & Jerome W. Wesevich, *An Old Rule for New Reasons: Place of Injury As a Federal Solution to Choice of Law in Single-Accident Mass-Tort Cases*, 71 *TEX. L. REV.* 1, 29 (1992) (arguing in favor of a federal choice-of-law rule that would govern single-accident mass tort cases unless all parties to a given case decide not to invoke it).

³¹ See JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* 4, 21, 146 (1995) (expressing the need for a national tort law); see also Michael A. Coccia, *Uniform Product Liability Legislation: A Proposed Federal Solution*, 1983 *TRIAL LAW GUIDE* 236, 265 (“[I]ndividual states have not, and cannot, resolve the present uncertainties caused by the product liability tort litigation system. These uncertainties can only be resolved by federal legislation.”); Charles T. Kimmett, *Rethinking Mass Tort Law*, 105 *YALE L.J.* 1713, 1714 (1996) (book review) (discussing Judge Weinstein’s proposal for a national tort law); Robert W. Kasten, Jr. & Gene Kimmelman, *Is It Time for a Uniform Product Liability Law?*, *A.B.A. J.*, May 1985, at 38 (debating the merits of a uniform federal product liability law).

³² See Thomas E. Willging, Annotation, *Mass Torts Problems and Proposals: A Report to the Mass Torts Working Group*, 187 *F.R.D.* 328, 421-25 (1999) (discussing proposals for federal punitive damages legislation); Briggs L. Tobin, Comment, *The “Limited Generosity” Class Action and a Uniform Choice of Law Rule: An Approach to Fair and Effective Mass-Tort Punitive Damage Adjudication in the Federal Courts*, 38 *EMORY L.J.* 457, 480 (1989) (“[A] federal court must be free to formulate a neutral, uniform standard of punitive damage liability to be applied to the entire plaintiff class.”).

³³ 42 U.S.C. §§ 12101-12213 (1994 & Supp. III 1997).

³⁴ See *id.* § 12112 (providing that employers must make reasonable accommoda-

ily and Medical Leave Act of 1993³⁵ conferring various rights on employees, but private employers must pay for the accommodations required under the Act.³⁶

What has happened in mass tort litigation, by contrast, is that state legislatures and state courts have expanded state tort remedies, while the burden of providing those remedies has fallen partly on the state courts and partly on the federal courts. This situation is the reverse of what happens when the federal government legislates benefits that must be provided at the expense of the states, state agencies, or others. Still, it is not clear that that is a reasoned basis for changing all the law that has been proposed to be changed in this room and elsewhere.

There is nothing in the *history* of the aggregation devices we have been discussing that gives any basis for believing that there is an existing federal mandate to make the kind of dramatic changes that have been proposed.³⁷ Rule 23 plainly was adopted to facilitate the enforcement of certain anti-discrimination statutes and certain federal regulatory regimes like the federal antitrust and securities fraud statutes.³⁸ The class action device has been marvelously effective and relatively uncontroversial in effectuating these substantive federal policies.³⁹ The Advisory Committee's Notes to Rule 23, however, clearly and explicitly indicate that the authors of the rule did not intend it to change dramatically how mass tort cases are handled.⁴⁰ Those who propose expanding the use of federal class actions to litigate mass tort claims in federal court thus can draw no support from the history of Rule 23's adoption or the intentions of its drafters.

Two years after the adoption of Rule 23, Congress passed the Mul-

tions for persons with disabilities); *see also* *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 542 (7th Cir. 1995) ("The employer must be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work.").

³⁵ 29 U.S.C. §§ 2601-2654 (1994 & Supp. III 1997).

³⁶ *See id.* § 2612 (requiring employers to allow employees to take up to 12 weeks of family leave a year).

³⁷ *See supra* notes 22-32 and accompanying text (listing proposed changes that would displace state tort law in favor of federal law).

³⁸ *See* FED. R. CIV. P. 23(b)(1)(B) advisory committee's note (noting that shareholder actions, such as actions to compel the declaration of a dividend, should ordinarily be conducted as a class action).

³⁹ *See In re Sugar Indus. Antitrust Litig.*, 73 F.R.D. 322, 329 (E.D. Pa. 1976) (granting class certification in antitrust litigation against parties engaged in the production and sale of refined sugar).

⁴⁰ *See* FED. R. CIV. P. 23 advisory committee's note ("A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action . . .").

tidistrict Litigation ("MDL") Act.⁴¹ It was not passed in response to a crisis in the tort system or backlogs of state tort claims crowding out other worthy federal business. It was passed because of the electrical equipment price-fixing cases and the problems posed by the management of complex antitrust cases.⁴² Since then, the MDL Act has been quite successful in achieving its purposes both in the securities fraud and antitrust areas.⁴³ When the avalanche of private antitrust litigation that will inevitably follow the Microsoft litigation is filed,⁴⁴ the MDL Panel, and maybe even the class action rule, will be quite useful as aggregation devices for handling those cases to the extent that they share common questions of fact.

There is no basis, however, in the history of either Rule 23 or the MDL Act for believing that there is a federal mandate for the aggregation of state tort claims. As with Rule 23, there is no basis for asserting that the Congress in 1968 intended the MDL Act to be used to consolidate large numbers of mass tort claims for mass trial in a single federal district court.⁴⁵ Some have argued, however, that even if there is no federal interest in providing for such aggregation, or federal policy frustrated by non-aggregation, there are fundamental inequities when state tort claims are separately litigated. The suggestion seems to be one of two related contentions. One is that it is wrong when an airline passenger in seat 12A is entitled to punitive damages under the law of the state that governs his claim and the passenger next to him in seat 12B is not. Alternatively, one might reference any other significant difference between the states on matters of tort law. It is ar-

⁴¹ 28 U.S.C. § 1407 (1994 & Supp. 1997) (providing for consolidation of cases from different districts for pretrial proceedings).

⁴² See Robert A. Ragazzo, *Transfer and Choice of Federal Law: The Appellate Model*, 93 MICH. L. REV. 703, 748 (1995) (noting that the MDL Act was a response to thousands of electrical price-fixing cases).

⁴³ See Richard L. Marcus, *Confronting the Consolidation Conundrum*, 1995 BYU L. REV. 879, 885 (noting the growing role of consolidation in antitrust cases); Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV. L. REV. 1001, 1001 n.1 (1974) (remarking on the role of MDL procedures in the expeditious disposition of nearly 2000 private damage actions involving 25,000 electrical equipment price-fixing claims).

⁴⁴ See *United States v. Microsoft Corp.*, 65 F. Supp. 2d 1 (D.D.C. 1999) (making findings of fact, including a finding that Microsoft enjoyed monopoly power in its relevant market).

⁴⁵ See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998) (holding that § 1407 was not intended to be used to conduct mass trials in transferee forums); Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 804-09 (1985) (asserting that transfers pursuant to § 1407 should be for pretrial purposes only).

gued that the existence of such differences is unfair.⁴⁶ This argument, however, should have been addressed to James Madison or to Congress. It does not belong in a symposium on the procedural challenges posed by mass tort litigation. When we have fifty states and defer to state tort law, there will be such differences. These differences belong in our federal system, and there is nothing wrong with such disparate rules or outcomes. Our government is organized the way it is to allow for precisely these differences.

Now assume both passengers are from the same state and their claims are governed by the same state tort law. The second contention is that there is something wrong if the plaintiff in seat 12A gets a large recovery and the plaintiff in 12B gets a much smaller recovery. Our system, however, has never been organized or designed to assure equality of outcome between similarly situated plaintiffs in tort litigation. Rather, it has been designed to provide equality of opportunity to present evidence and arguments using common procedures before an appropriately neutral decision maker.⁴⁷ Who is to say whether the judgment for plaintiff 12A is too high and the judgment for plaintiff 12B too low? Maybe they are both too high and too low. Our system affords no objective measure for calculating such awards. The goal of our system ought not to be equality of outcome in tort litigation, but appropriate transsubstantive neutrality with respect to the procedures afforded the litigants who have similar tort claims and who seek justice in our civil courts.⁴⁸

The discussion at this Symposium, like similar discussions held at other venues over the last two decades, reminds me of Professor Fuller's famous article in which he describes certain disputes that are so polycentric—like setting wages and prices—that they do not belong in our federal courts.⁴⁹ The debate we have been having for many years over the proper management of mass tort litigation sounds to

⁴⁶ See *In re School Asbestos Litig.*, 789 F.2d 996, 1001 (3d Cir. 1986) (recognizing that different treatment of similarly situated plaintiffs in mass tort cases is partly a result of variations and permutations in the states' tort laws).

⁴⁷ See Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1743-50 (1992) (noting that courts should use transsubstantive techniques when they are available).

⁴⁸ See *id.* at 1808-09 (arguing that transsubstantive procedures should not be abandoned in favor of special procedural rules that depend on the size or complexity of a case).

⁴⁹ See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978) (noting that polycentric tasks, which exist when the disposition of a single item or particular issue has implications for the proper disposition of every other item or issue, are unsuitable for adjudication).

me like such a polycentric dispute. This long debate has not resulted in large groups of academics, judges, or practitioners coalescing around certain articulate schools of thought about how we should proceed—at least none that I have been able to identify. There is a complete melange of views on whether aggregation of mass tort claims is good or bad, and, if it is good, how it should and should not be accomplished.⁵⁰ There is wide disagreement among those who favor aggregation over what changes should be made in our law and what changes should not be made.⁵¹ Those who oppose aggregation of mass tort claims oppose it for all sorts of different reasons.⁵² After fifteen years of debate, it is rather remarkable that there is not a greater commonality of view—at least among those on the same side of the debate over whether or not aggregation is desirable.

In conclusion, I would urge us to return to Professor McGovern's suggestion to expand the role of federal courts in coordinating pre-trial activities while remanding cases to their original state or federal courts for trial.⁵³ We make a mistake if we think that any federal rule change by itself will secure the fair and orderly adjudication of mass tort claims, given the reality that the federal courts are not the only forum where this game is played. If asbestos cases are bottled up in

⁵⁰ See Barry F. McNeil & Beth L. Francsali, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 487-507 (1996) (asserting that aggregation of cases is problematic and that courts can adequately address mass torts using conventional procedures); Alvin B. Rubin, *Mass Torts and Litigation Disasters*, 20 GA. L. REV. 429, 441 (1986) (recognizing that reforms to aggregation procedures have been stalled due to a lack of consensus regarding the substance of these reforms); Heather M. Johnson, Note, *Resolution of Mass Product Liability Litigation Within the Federal Rules: A Case for the Increased Use of Rule 23(b)(3) Class Actions*, 64 FORDHAM L. REV. 2329, 2379 (1996) (arguing that more classes should be certified under Rule 23(b)(3)). *But see* Note, *Class Certification in Mass Accident Cases Under Rule 23(b)(1)*, 96 HARV. L. REV. 1143, 1143 (1983) (concluding that joint litigation is superior to separate actions in mass accident cases and proposing "increased use of the rule 23(b)(1) class action").

⁵¹ See Willging, *supra* note 32, at 417 (listing several proposals "to federalize selected aspects of products liability standards while leaving other aspects to the states," and concluding that "such approaches seem to aggravate a preexisting problem"); Sofia Adroque, *Mass Tort Class Actions in the New Millennium*, 17 REV. LITIG. 427, 430 (1998) (suggesting that viable mechanisms exist within the courts to curtail abuses of mass tort aggregation devices); Johnson, *supra* note 50, at 2379 (suggesting several changes to current practices by courts in mass tort cases).

⁵² See McNeil & Francsali, *supra* note 50, at 487-501 (describing objections to class action treatment for mass torts).

⁵³ See Francis E. McGovern, *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867 (2000) (suggesting that the federal courts be given increased responsibility for pretrial activities, but that trials be handled by a case's original court).

federal court in Philadelphia, the plaintiffs' lawyers will go elsewhere.⁵⁴ If federal courts are hostile to mass tort class actions, plaintiffs' counsel will repair to more class action friendly state courts.⁵⁵ The same goes for settlement class actions.⁵⁶

To manage mass tort litigation comprehensively in both state and federal courts, we must do what Professor McGovern suggests: expand the use of federal courts to discover, assemble, and distribute the information that is necessary for the actors in the system to make informed judgments about the merits of their cases. That means common discovery, and, as Mr. Rheingold has suggested, it means whatever can be done to avoid the need for duplicative depositions, document productions, and the like.⁵⁷ When that is done, however, let the litigants repair to their own courthouses and try their cases. After they do, a verdict record will develop, settlement patterns will emerge, and the lawyers and their clients will find their way to a just and defensible outcome. To deal with the problem of state court outliers, the Anti-Injunction Act⁵⁸ should be amended to permit a transferee judge in a § 1407⁵⁹ proceeding, or perhaps the MDL Panel itself, to temporarily stay proceedings in those state courts where the progress of those cases might undermine the fair and efficient pretrial management of the aggregated proceeding pending in federal court. In short, the proper response to the phenomenon of complex mass tort litigation today is to facilitate the consolidation of factually related claims for pretrial discovery in an appropriate venue, but then, in

⁵⁴ See Alexandra Makosky, Comment, *The King's Bench Power in Pennsylvania: A Unique Power that Provides Efficient Results*, 101 DICK. L. REV. 671, 690 (1997) (observing that, at one time, the Philadelphia court system was overburdened because it had received the third highest number of asbestos cases in the country).

⁵⁵ See *Scott v. American Tobacco Co.*, 725 So. 2d 10, 11 (La. Ct. App. 1998) (approving a tobacco class action which had been decertified in federal court); Elizabeth J. Cabraser, *The Road Not Taken: Thoughts on the Fifth Circuit's Decertification of the Castano Class*, SB24 ALI-ABA 433, 447 (1996) (asserting that after *Castano*, plaintiffs are virtually compelled to file multiple suits in various state courts); Susan E. Kearns, Note, *Decertification of Statewide Tobacco Class Actions*, 74 N.Y.U. L. REV. 1336, 1354 (1999) (noting that after the class decertification in *Castano*, actions to certify statewide tobacco cases were filed across the nation).

⁵⁶ See *The Future of Class Actions in Mass Tort Cases: A Roundtable Discussion*, 66 FORDHAM L. REV. 1657, 1663 (1998).

⁵⁷ See Paul D. Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116 (1968) (describing the successful group discovery process utilized in a mass litigation involving a prescription drug).

⁵⁸ 28 U.S.C. § 2283 (1994).

⁵⁹ 28 U.S.C. § 1407 (1994 & Supp. III 1997).

most cases, to try those tort claims in state and federal court in the traditional manner.⁶⁰

⁶⁰ See Trangsrud, *supra* note 45, at 782 (“Although joint *discovery* on common issues is desirable in most mass tort cases, the joint *trial* of such issues requires . . . substantial departures from those [procedures] usually followed in simple tort cases and adversely affect[s] the fairness of the entire adjudicative process.”); Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 69 (arguing that mass trials are not the best method “to adjudicate mass tort cases” and “[t]he better course is to coordinate and consolidate pretrial discovery and motion practice but then individually try the tort cases in an appropriate venue”).