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Cover Page Footnote

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COMPLEX LITIGATION REFORM AND ARTICLE III JURISDICTION

LINDA S. MULLENIX*

INTRODUCTION

THE problems surrounding resolution of complex litigation have taken center stage in procedural debate. The many substantive and procedural issues involved in complex dispute resolution have engaged the attention of the academic community,¹ the organized bar,² the

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1. The academic literature on problems of complex litigation, and of mass tort litigation in particular, is now enormous and continues to flourish. For examples of the academic literature, see P. Schuck, *Agent Orange on Trial: Mass Toxic Disasters in the Courts* (1986) [hereinafter Schuck, *Agent Orange*]; Abraham, *Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform*, 73 Va. L. Rev. 845 (1987); Bird, *Mass Tort Litigation: A Statutory Solution to the Choice of Law Impasse*, 96 Yale L.J. 1077 (1987); Bordens & Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 *Judicature* 22 (1989); Coffee, *Understanding the Plaintiffs' Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669 (1986); Coffee, *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877 (1987); Feinberg, *The Toxic Tort Litigation Crisis: Conceptual Problems and Proposed Solutions*, 24 Hous. L. Rev. 155 (1987); Lowenfeld, *Mass Torts and The Conflict of Laws: The Airline Disaster*, 1989 U. Ill. L. Rev. 157; McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U.L. Rev. 659 (1989); McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. Chi. L. Rev. 440 (1986); Mullenix, *Class Resolution of the Mass Tort Case: A Proposed Federal Procedure Act*, 64 Tex. L. Rev. 1039 (1986); Roe, *Corporate Strategic Reaction to Mass Tort*, 72 Va. L. Rev. 1 (1986); Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 Ind. L.J. 561 (1987); Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons From a Special Master*, 69 B.U.L. Rev. 695 (1989); Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 Harv. L. Rev. 849 (1984); Rowe & Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. Pa. L. Rev. 7 (1986); Rubin, *Mass Torts and Litigation Disasters*, 20 Ga. L. Rev. 429 (1986); Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. Chi. L. Rev. 337 (1986); Sherman, *Class Actions and Duplicative Litigation*, 62 Ind. L.J. 507 (1987); Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 Cornell L. Rev. 779 (1985); Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. Ill. L. Rev. 69 (1989).

2. See ABA Commission on Mass Torts, Report Number 126 to the ABA House of Delegates (August, 1989) [hereinafter ABA Report 126]. At its August, 1989 meeting, the ABA House of Delegates deferred action on the Commission's report, which called for comprehensive federal legislation to deal with mass tort litigation. See *ABA Takes Stand Against Flag Desecration Amendment*, 58 U.S.L.W. 1029, 1030 (U.S. Aug. 22, 1989). The Commission revised its Report and was prepared to submit it as renumbered Report 116 at the House of Delegates' February 1990 midyear meeting. See ABA, Summary of Action Taken by the House of Delegates of the American Bar Association 7 (Feb. 1990) [hereinafter Summary of Action]. Before the Commission submitted its re-

bench,³ institutional law-reform groups,⁴ judicial-administration research organizations⁵ and Congress.⁶

There can be little doubt that within the next decade Congress will enact legislation modifying, amending or completely revamping the pro-

vised Report for discussion and action, however, the ABA's Standing Committee on Federal Judicial Improvements offered an alternative proposal, based on a minimal-diversity expansion of federal court jurisdiction to adjudicate multiparty, multiclaim disputes, see ABA Standing Committee on Federal Judicial Improvements, Report Number 112B to the ABA House of Delegates (August, 1989) [hereinafter ABA Report 112B], which was rejected by the House of Delegates. See Summary of Action, *supra*, at 4. The Standing Committee's proposal was similar to the jurisdictional proposal in the Multiparty, Multiforum Jurisdiction Act of 1990, H.R. 3406, 101st Cong., 2d Sess., 136 Cong. Rec. H3116-19 (daily ed. June 5, 1990), and the recommendations made in the Federal Courts Study Committee Report, see Report of the Federal Courts Study Committee 44-45 (April 2, 1990) [hereinafter Federal Courts Study]. See ABA Report 112B, *supra*. Before the defeat of the Standing Committee's proposal, the Commission withdrew its revised report to further consider "the barrage of . . . criticism leveled at the Commission's report." *ABA Backs Abortion Rights, Right to Die, and Job Protection*, 58 U.S.L.W. 2474, 2477 (U.S. Feb. 20, 1990). For a report of the debate on these proposals at the February 1990 ABA House of Delegates meeting, see *id.*

3. See Pointer, *Complex Litigation: Demonstration of Pretrial Conference*, 6 Rev. Lit. 285 (1987); Rubin, *supra* note 1; Weinstein, *Preliminary Reflections on the Law's Reaction to Disasters*, 11 Colum. J. Envtl. L. 1 (1986) [hereinafter Weinstein, *Preliminary Reflections*]; Weinstein, *Procedural and Substantive Problems in Complex Litigation Arising From Disasters*, 5 Touro L. Rev. 1 (1988) [hereinafter Weinstein, *Procedural and Substantive Problems*]; Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323 (1983); see also Annual Judicial Conference Second Judicial Circuit of the United States, 115 F.R.D. 349, 374 (September 13, 1987) (Panel: Innovative Techniques for Resolving Complex Litigation).

4. See ALI Complex Litigation Project Council Draft No. 2 (Nov. 14, 1989) [hereinafter ALI Complex Litigation Project C.D. No. 2]; ALI Complex Litigation Project Preliminary Draft No. 2 (Sept. 13, 1989) [hereinafter ALI Complex Litigation Project P.D. No. 2]; ALI Complex Litigation Project Tentative Draft No. 1 (April 14, 1989) [hereinafter ALI Complex Litigation Project T.D. No. 1]. In addition, the Report of the Federal Courts Study Committee contains recommendations for complex litigation reform analogous to those of the ABA and ALI. See Federal Courts Study, *supra* note 2, at 44-45.

5. See D. Hensler, W. Felstiner, M. Selvin & P. Ebener, *Asbestos in the Courts: The Challenge of Mass Toxic Torts* (1985) (Rand, The Institute for Civil Justice); J. Kakalik, P. Ebener, W. Felstiner & M. Shanley, *Costs of Asbestos Litigation* (1983) (Rand, The Institute for Civil Justice); J. Kakalik, P. Ebener, W. Felstiner, G. Haggstrom & M. Shanley, *Variation in Asbestos Litigation Compensation and Expenses* (1984) (Rand, The Institute for Civil Justice); M. Peterson & M. Selvin, *Resolution of Mass Torts: Toward a Framework for Evaluation of Aggregative Procedures* (1988) (Rand, The Institute for Civil Justice); M. Selvin & L. Pincus, *The Debate Over Jury Performance: Observations from a Recent Asbestos Case* (1987) (Rand, The Institute for Civil Justice); see generally T. Willging, *Asbestos Case Management: Pretrial and Trial Procedures* 6 (1985) (Federal Judicial Center) (arguing for case management procedures to facilitate adjudication of complex asbestos cases); T. Willging, *Trends in Asbestos Litigation* 2 (1987) (Federal Judicial Center) (examining successful and unsuccessful techniques for facilitating adjudication of complex asbestos cases and predicting future of asbestos litigation).

6. See Multiparty, Multiforum Jurisdiction Act of 1990, H.R. 3406, 101st Cong., 2d Sess., 136 Cong. Rec. H3116-19 (daily ed. June 5, 1990). This bill essentially duplicates Title IV of the Court Reform and Access to Justice Act, H.R. 3152, 100th Cong., 1st Sess. (1987). Title IV of H.R. 3152 was not included as part of the Judicial Improvement and Access to Justice Act of 1988, which effectuated various changes in federal procedure. See Pub. L. No. 100-702, 102 Stat. 4642 (1988).

cedures governing multiparty, multiforum cases.⁷ Discussion has now progressed beyond the identification of issues and problems to debate on the structure and validity of legislative reform.

Two structural issues will inform the debate over proposed complex litigation statutes: the scope of needed procedural revision⁸ and the technical details of implementing procedural changes.⁹ Similarly, two fundamental issues concerning the validity of legislative reform will dominate the debate: the impact of proposed innovations on federalism¹⁰ and the constitutionality of new jurisdictional provisions.¹¹

Reformers have devoted considerable time and energy to drafting intricate statutory provisions dealing with the myriad problems of complex litigation.¹² The sheer length and complexity of the proposed statutes is impressive. If the jurisdictional basis for such legislation is constitutionally questionable, however, the reform efforts may prove unavailing. Proposed inter-system transfer and consolidation schemes must withstand tenth amendment challenge. In addition, the expansion of federal

7. See Multiparty, Multiforum Jurisdiction Act of 1990, H.R. 3406, 101st Cong., 2d Sess., 136 Cong. Rec. H3116-19 (daily ed. June 5, 1990). In addition to the Multiparty, Multiforum Jurisdiction Act of 1990, two separate bills have been introduced in the Senate that would regulate both substantive and procedural aspects of tort litigation. See Lawsuit Reform Act of 1989, S. 1100, 101st Cong., 1st Sess. (1989) (introduced by Senator McConnell); Joint and Several Liability Reform Act of 1989, S. 132, 101st Cong., 1st Sess., 135 Cong. Rec. S458-59 (daily ed. Jan. 25, 1989) (introduced by Senator Pressler). Comprehensive legislation overhauling major aspects of procedural law is embodied in the Civil Justice Reform Act of 1990. See H.R. 3898, 101st Cong., 2d Sess., 136 Cong. Rec. H8263-66 (daily ed. Sept. 27, 1990). This bill contains numerous elements affecting complex litigation adjudication, particularly in its provisions to track cases and create a system of "differentiated case-management" procedures. See *id.* at H8265. The impetus for this legislation was the Report of the Brookings Task Force on Civil Justice Reform, the so-called Brookings-Biden Report. See Brookings Task Force on Civil Justice Reform, *Justice For All: Reducing Costs and Delay in Civil Litigation* (1989) (The Brookings Institution).

8. For example, should the multidistrict transfer provision, 28 U.S.C. § 1407 (1988), be repealed or revised to effectuate efficient federal intra-system consolidation of cases? How do doctrines of supplemental jurisdiction, such as pendent and ancillary jurisdiction, need to be modified to accommodate multiparty, multiclaim litigation?

9. For example, what changes in venue rules should govern transferred and consolidated cases? Similarly, what choice-of-law rules should govern in the transferee court?

10. For example, may Congress, consistent with the tenth amendment, mandate the inter-system transfer of complex cases and provide for the consolidation of cases in the interests of justice, fairness and efficiency? May removal provisions be modified and expanded to permit easier removal of cases from state to federal court?

11. For example, may Congress expand federal court jurisdiction over complex cases pursuant to the arising under jurisdiction of article III? Are doctrines of pendent, ancillary and removal jurisdiction amenable to similarly expansive construction for complex litigation purposes?

12. See Civil Justice Reform Act of 1990, H.R. 3898, 101st Cong., 2d Sess., 136 Cong. Rec. H8263-66 (daily ed. Sept. 27, 1990); Multiparty, Multiforum Jurisdiction Act of 1990, H.R. 3406, 101st Cong., 2d Sess., 136 Cong. Rec. H3116-19 (daily ed. June 5, 1990); ABA Report 126, *supra* note 2, at 8d; ALI Complex Litigation Project C.D. No. 2, *supra* note 4, at 1-32; ALI Complex Litigation Project P.D. No. 2, *supra* note 4, at 1-29.

court jurisdiction to accommodate complex litigation must withstand article III scrutiny. This Article addresses the latter problem.

Perhaps the most intellectually exciting aspect of the various complex litigation proposals is the effort to modify original and supplemental federal court jurisdiction through purely procedural statutes. Unlike most prior proposed modifications of federal court jurisdiction, recently proposed procedural recommendations do not supplement a substantive-law regulation of a national problem.

The complex litigation reformers have not adequately considered the constitutional basis for modifying existing jurisdiction or permitting new federal court jurisdiction for complex cases. The reformers would hang their complex litigation jurisdictional coat on either of two pegs: some version of the so-called "protective jurisdiction" of the federal courts, or a "commerce clause" theory of federal jurisdiction, a loose variant of protective jurisdiction. In both instances, the constitutional theories are neither well-structured nor well-met, and amount to little more than constitutional finesse.

This Article examines the constitutional basis for legislatively expanding, modifying or contracting federal court jurisdiction to encompass the resolution of complex litigation. Part I first describes these theories of federal court jurisdiction relating to complex litigation and then examines jurisdictional statutes proposed by the American Bar Association ("ABA"), American Law Institute ("ALI") and Congress. Predictably, the proposed statutes rely heavily on the scholarly commentary for their constitutional theory. Part II discusses the main theories that may provide constitutional support for modifying federal court jurisdiction to accommodate the recent growth of complex litigation: (1) the protective jurisdiction theory, (2) the commerce clause theory and (3) the abstention corollary.¹³ This Article argues that each theory presents conceptual difficulties for the complex litigation reformers' legislative efforts.

Part III critiques the proposed jurisdictional statutes and the constitutional theories offered in support of modified federal court jurisdiction. It argues that the expansive jurisdictional statutes are troublesome in at least two respects. First, there is no historical precedent to support congressional expansion of article III arising under jurisdiction through a purely jurisdictional statute. Second, expanding the jurisdiction of federal courts merely to facilitate complex litigation may conflict with fundamental principles of federalism. Proposals suggesting expanded

13. See generally *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814-15 (1976) (federal court abstention may be proper where state courts and state litigants would otherwise be subjected to parallel or preemptive federal court proceedings); Friedman, *A Revisionist Theory of Abstention*, 88 Mich. L. Rev. 530, 530 n.2 (1989) (listing commentaries discussing abstention doctrines); see also *infra* notes 209-242 and accompanying text (criticizing reformers' attempts to invoke abstention theory in support of antisuit injunction provisions and state forum-consolidation schemes).

supplemental jurisdiction rely on similarly fragile arguments bootstrapped from original jurisdictional premises. In accomplishing the goal of federal jurisdiction over consolidated complex cases, the commerce clause is stretched to its outermost tenth amendment limits. Moreover, various recommendations for reducing federal court jurisdiction by reverse-removing or remanding certain complex cases to state forums rely on abstention analogies of dubious constitutional validity.

The central goal of complex litigation reform is to provide some central forum or forums for aggregative adjudication of similar or duplicative claims. The preceding points are not raised to undermine or defeat this central goal. Rather, this Article's principle purpose is to suggest certain weaknesses in the prevailing analysis and to encourage development of a sounder jurisdictional theory for aggregative procedure. Its secondary purpose is to induce reformers to state more clearly the nature of the complex litigation problem and to seek the best jurisdictional solution, as a matter of theory and practice.

If article III federal question jurisdiction cannot support expanded federal court access for complex cases, law reformers ought to acknowledge this limitation more candidly and not obscure the point in clouds of constitutional rhetoric. The reformers should realize that the best and perhaps only legislative means of providing the constitutional predicate of arising under jurisdiction for complex cases is through the simple expedient of federal tort legislation or statutory authorization of a judicially created federal common law of mass tort. The reformers should not retreat so quickly from these options.

Finally, if, by default, reform efforts ultimately rely on modifications of federal diversity jurisdiction, this jurisdictional basis ought to be clarified, especially in light of renewed and repeated proposals to abolish diversity jurisdiction. These tandem developments bring into sharper focus the prospect of specialized diversity jurisdiction for a special class of cases. Certainly, the possibility of a changed legal landscape requires better explanation and justification than current proposals offer.

I. FEDERAL COURT JURISDICTION FOR COMPLEX LITIGATION: PROPOSED STATUTORY SOLUTIONS

Institutional law reform efforts concerning complex litigation have drawn on scholarly literature for identification and analysis of procedural problems¹⁴ as well as for theoretical support of legislative proposals. Because several initiatives draw directly from this literature, this commentary will set forth the prevailing academic arguments.

In their haste to develop procedural innovations, reformers have postulated a constitutional theory for their various proposals that is neither well-articulated nor supported by existing precedent. Ironically, this du-

14. For examples of the literature, see *supra* notes 1, 3, 5.

bious constitutional theory is repeated and incorporated as authoritative doctrinal support for legislative reform.

A. *Scholarly Arguments for Article III Jurisdiction of Complex Litigation*

Reform-minded scholars and judges have focused on the two article III bases of federal court jurisdiction, diversity and arising under, to support expanded access to federal courts for consolidated resolution of complex litigation.¹⁵ Professor Thomas D. Rowe, Jr. and Kenneth D. Sibley are the leading expositors and proponents of revised diversity jurisdiction for complex litigation.¹⁶ Their proposal, a variant of a minimal diversity requirement, is constitutionally supported by the analogous minimal diversity provision of the federal interpleader statute.¹⁷ A diversity basis for expanding the reach of the federal courts appears constitutionally defensible, although not without its own special difficulties.¹⁸

Expanding federal court access for complex cases through article III arising under jurisdiction is more problematic.¹⁹ George Conway, a leading advocate of revising the current multidistrict litigation statute,²⁰ suggests that the federal courts may be given federal question jurisdiction over multiparty, multistate cases based on an expansive reading of the federal courts' so-called protective jurisdiction.²¹ But even without re-

15. There are various definitions of complex litigation in the literature. *See, e.g.*, R. Marcus & E. Sherman, *Complex Litigation: Cases and Materials on Advanced Civil Procedure* 2 (1985) ("Indeed, nobody has devised a litmus test by which one may decide whether a given case is properly labelled complex."); ALI *Complex Litigation Project* T.D. No. 1, *supra* note 4, at 11 (complex litigation "refers exclusively to multiparty, multiforum litigation; it is characterized by related claims dispersed in several forums and often over long periods of time"). This Article adopts the ALI definition of complex litigation.

16. *See* Rowe & Sibley, *supra* note 1, at 23-28; *see also* U.S. Const. art. III, § 2 ("The judicial Power shall extend . . . to Controversies . . . between Citizens of different States . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."); 28 U.S.C. § 1332 (1988) (providing for diversity jurisdiction).

17. *See* Rowe & Sibley, *supra* note 1, at 24-28; *see also* 28 U.S.C. § 1335 (1988) (providing for statutory interpleader jurisdiction); *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 530-31 (1967) (approving interpleader statute with minimal diversity article III jurisdictional basis).

18. *See, e.g.*, Comment, *The Consolidation of Multistate Litigation in State Courts*, 96 Yale L.J. 1099, 1113 (1987) (authored by George T. Conway III) [hereinafter Conway] ("Congress could thus extend federal jurisdiction over a large number of multistate cases by providing for federal subject-matter jurisdiction in cases of minimal diversity in which a threshold number of claimants alleges damages exceeding certain monetary amounts."). For a description of potential problems with the Rowe and Sibley minimal diversity proposal, *see infra* notes 261-62 and accompanying text.

19. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. Const. art. III, § 2.

20. *See* 28 U.S.C. § 1407 (1988).

21. *See* Conway, *supra* note 18, at 1113-14. Conway states that theories of protective jurisdiction "assert that the applicable federal law under which a case 'arises' could be a purely jurisdictional statute providing a federal forum for the application of state law in a

sort to the theory of protective jurisdiction, Conway suggests that the Supreme Court's decision in *Verlinden B.V. v. Central Bank of Nigeria*²² provides a basis for appropriate arising under jurisdiction.²³ This theory is flawed, however.

According to this view of *Verlinden*, Congress may use its arising under jurisdiction expansively to permit federal courts to adjudicate cases concerning issues over which Congress has legislated as a function of its article I powers. In *Verlinden*, the Court construed the challenged Foreign Sovereign Immunities Act as an exercise of article I power over foreign commerce and foreign affairs.²⁴ Such arising under jurisdiction is reinforced where the congressional grant of jurisdiction requires a concomitant application of substantive federal law, as evidenced by a detailed and comprehensive scheme of regulation.²⁵ This reading of *Verlinden* leads inexorably to the broad general proposition that legislation to expand federal court jurisdiction over complex litigation can be enacted, or the existing multidistrict statute amended, as an exercise of article I commerce clause power.²⁶

field in which Congress could (but does not) enact preemptive substantive legislation." *Id.* at 1114. This is an incorrect definition of the outer boundary of any protective jurisdiction theory. Moreover, the Supreme Court has explicitly held that Congress may not legislatively expand federal court jurisdiction through a purely jurisdictional statute passed pursuant to the article I power over interstate commerce. *See Mesa v. California*, 489 U.S. 121, 136 (1989); *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. 443, 451-52 (1851); *see also* discussion *infra* Part II A (criticizing validity of theory of protective jurisdiction as jurisdictional basis for purely procedural statute).

22. 461 U.S. 480 (1983).

23. *See* Conway, *supra* note 18, at 1114-16 (citing *Verlinden*, 461 U.S. at 496).

24. *See id.* at 1116. *Verlinden* involved the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1330 (1988), and addressed the issue of whether that statute "could constitutionally authorize a foreign plaintiff to sue a foreign state in federal court on a nonfederal cause of action." Conway, *supra* note 18, at 1115. The Supreme Court found a valid exercise of arising under jurisdiction by the terms of the statute. *See Verlinden*, 461 U.S. at 497.

25. *See* Conway, *supra* note 18, at 1115-16.

26. *See id.* at 1116. "An amended section 1407, moreover, could not seriously be challenged on the ground that it exceeds the delegated powers of Congress under article I." *Id.*

It is well-settled law that Congress may regulate any activity, however local in nature, if it rationally finds that the activity affects interstate or foreign commerce in any discernible way. The extraordinary expense of multistate litigation today would amply justify a finding by Congress that such litigation affects interstate commerce. Federal legislation designed to curtail the waste resulting from duplicative litigation in state and federal courts would thus fall within the constitutional scope of the commerce power.

Id. at 1116-17 (citations omitted). Conway cites to a series of Supreme Court cases affirming expansive federal regulation pursuant to the commerce clause power in support of an expansive reading of the article I commerce clause powers of Congress. *See* Conway, *supra* note 18, at 1116 n.104; *see e.g.*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 537 (1985) (federal Fair Labor Standards Act's regulation of municipal employees' compensation within commerce power); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 275-77 (1981) (federal regulation of strip-mining activity within commerce power); *Perez v. United States*, 402 U.S. 146, 152-57 (1971) (loan-sharking activity may be reached under commerce clause power); *Katzenbach v. Mc-*

This "commerce clause" theory for expanded federal court jurisdiction posits that complex litigation is a commercial problem of interstate character that justifies federal regulatory intercession under Congress' article I powers. The commerce clause theory, however, advances the *Verlinden* decision beyond its facts by purporting to derive a constitutional basis for the creation of a purely jurisdictional statute not accompanied by substantive regulation.

Federal District Judge Jack Weinstein²⁷ has also advocated a commerce clause theory in support of various procedural schemes to handle complex cases.²⁸ He and other commentators have pointed out that mass tort cases instituted in state court cannot be consolidated with mass tort cases already initiated in federal court unless the state court cases satisfy federal removal standards.²⁹ To remedy this problem, Judge Weinstein suggests that "[u]nder the Commerce Clause, Congress arguably has the power to transfer to the federal court those state cases not presently removable, on the ground that in disputes of this size and nature, national issues predominate."³⁰

Even more interesting is Judge Weinstein's call to use the *Colorado River Water Conservation District v. United States*³¹ abstention doctrine³² and various procedural devices³³ to promote consolidated adjudication of complex litigation. According to Weinstein, the burden of complex litigation could be characterized as the kind of "exceptional circumstance"

Clung, 379 U.S. 294, 304 (1964) (Civil Rights Act's regulation of public accommodations within commerce clause power); *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (federal regulation of wheat grown for personal consumption valid under commerce clause power because of indirect effect upon interstate commerce); *United States v. Darby*, 312 U.S. 100, 115 (1941) (Congress has plenary commerce clause power to regulate labor conditions of manufacturers whose goods are distributed in interstate commerce). Although they demonstrate a Supreme Court trend toward liberal interpretation of the reach of the commerce clause in regulating substantive activity, these cases do not demonstrate an expansive reading of article III jurisdiction to accomplish those ends. Moreover, none of these cases involve a purely jurisdictional statute creating new federal court jurisdiction. Nonetheless, Conway concludes: that "under *Verlinden*, the application of an amended [28 U.S.C.] section 1407 would constitutionally suffice to support the exercise of federal question jurisdiction." See Conway, *supra* note 18, at 1117.

27. Judge, United States District Court for the Eastern District of New York. Judge Weinstein presided over the disposition of the Agent Orange mass tort litigation. See Schuck, *Agent Orange*, *supra* note 1, at 110.

28. See Weinstein, *Preliminary Reflections*, *supra* note 3, at 23-24; Weinstein, *Procedural and Substantive Problems*, *supra* note 3, at 17-18.

29. Weinstein, *Preliminary Reflections*, *supra* note 3, at 23; Conway, *supra* note 18, at 1107-08; Rowe & Sibley, *supra* note 1, at 33-34. Federal removal procedure is delineated by 28 U.S.C. § 1441 (1988).

30. Weinstein, *Preliminary Reflections*, *supra* note 3, at 23. Similar to Conway, see *supra* note 26, Judge Weinstein finds expansive authority in commerce clause cases recognizing broad Congressional regulatory powers. See Weinstein, *Preliminary Reflections*, *supra* note 3, at 23 n.60.

31. 424 U.S. 800 (1976).

32. See Weinstein, *Preliminary Reflections*, *supra* note 3, at 23 n.61; see also *supra* note 13 (discussing *Colorado River* doctrine).

33. See Weinstein, *Preliminary Reflections*, *supra* note 3, at 24.

that would justify federal court abstention in favor of a state forum for "competing" state cases.³⁴ Furthermore, Judge Weinstein envisions using federal stays, the doctrine of forum non conveniens and "deferential refusals to accept jurisdiction" to combine complex cases in state courts.³⁵

In addition to existing procedural rules and mechanisms for consolidated treatment of complex cases, Judge Weinstein suggests that it is constitutionally permissible to cope with the problem through a broader national approach. This approach is also based on the premise that the complex litigation phenomenon is a problem of interstate commerce.³⁶

Judge Weinstein also summons the commerce clause theory to bolster proposals for innovative choice-of-law and service-of-process provisions.³⁷ He posits that any constitutional difficulties posed by a federal statutory choice-of-law provision or by a nationwide service-of-process statute can be overcome by framing such provisions "as exercises of some specific congressional power such as that conferred by the commerce clause."³⁸ Finally, Judge Weinstein argues that "[a] declaration that these provisions are necessary in light of the strong federal interests that are implicated in the adjudication of mass torts is easily supportable."³⁹ Judge Weinstein neither explains what the strong federal interests are nor supplies the easy support, however.

B. *Constitutional Theory and Legislative Reform*

The three constitutional threads woven in the academic literature—protective jurisdiction, commerce clause power and deferential abstention—also serve as the chief doctrinal supports for the various legislative proposals dealing with complex litigation that institutional law reform groups have formulated.⁴⁰ Perhaps because they recognize the frailties of many of these arguments, the law reformers offer hybrid variations on these three themes. As good lawyers, the legislative drafters offer fall-

34. *See id.* at 23 n.61.

35. *Id.* at 23-24.

36. A more direct and comprehensive approach probably could be provided by Congress, based on its constitutional power to regulate federal court jurisdiction, its authority to legislate in matters affecting interstate commerce, including matters within the province of state and local government, and the obligation imposed on states by the Supremacy Clause. Under such a scheme, federal and state cases would be transferred to a single state forum, provided perhaps — as a matter of comity — that the state court involved consented. *Id.* at 24 (citations omitted).

37. Weinstein, *Procedural and Substantive Problems*, *supra* note 3, at 17. These proposals are grounded in the federal courts' article III diversity jurisdiction, rather than article III federal question jurisdiction. *See id.*

38. *Id.* at 17. Authoritative support is again supplied by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555 (1985). *See Weinstein, Procedural and Substantive Problems*, *supra* note 3, at 17 n.77.

39. *See Weinstein, Procedural and Substantive Problems*, *supra* note 3, at 17. Nonetheless, Judge Weinstein forgoes the easy support.

40. *See supra* notes 2, 4, 6.

back positions for weak theory: if protective jurisdiction does not pass muster, then perhaps a commerce clause argument or an appeal to abstention rationales will.

1. The ABA's Recommendations for Mass Tort Litigation: The Jurisdictional Proposal

The jurisdictional heart of the Report of the ABA's Commission on Mass Torts (the "ABA Report") was the proposal that "Congress should enact, pursuant to its power to regulate interstate commerce, legislation to permit individual actions arising in litigation declared to be 'mass tort litigation' by a federal judicial panel to be filed in or removed to a federal court without regard to the citizenship of the parties."⁴¹

Fearing problems of over-inclusion or under-inclusion that a minimal diversity standard implicates, the ABA Report eschewed tinkering with diversity as a possible jurisdictional solution for mass tort litigation.⁴² Instead, the ABA Report staked its jurisdictional basis in the arising under power of article III.⁴³ The ABA Report argued that an article III jurisdictional basis was appropriate "[b]ecause these cases involve or affect interstate commerce."⁴⁴ The ABA Report preferred this approach because "it more accurately reflects legitimate federal interests over the interstate commerce aspects of mass tort litigation while reserving to the states their traditional role in the development of tort law."⁴⁵

The ABA Report noted that article III jurisdiction is broader than federal-question jurisdiction under 28 U.S.C. section 1331, citing to the ubiquitous *Verlinden*.⁴⁶ The Report then suggested that a federal choice-of-law standard to govern punitive damage claims, which the ABA Report proposed, would satisfy *Verlinden*'s requirement that there be a federal regulatory scheme.⁴⁷ Having made this leap of logic, the ABA

41. ABA Report 126, *supra* note 2, at 40 (Recommendation 2).

42. *See id.* at 36-37. The ABA Report, relying on an analogy to federal interpleader jurisdiction and *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 530 (1967), acknowledged the constitutionality of providing for minimal diversity as a predicate to consolidated mass tort litigation. *See* ABA Report 126, *supra* note 2, at 37 n.65. Nonetheless, the ABA Report declined to adopt the Rowe and Sibley approach, citing to their article for a description of the problems of overinclusiveness and underinclusiveness. *See id.* at 37 n.37; *see also* Rowe & Sibley, *supra* note 1, at 28-31 (discussing problems inherent in designing new jurisdictional provision to insure that it provides federal forum only for those "cases in which one would be useful").

43. *See* ABA Report 126, *supra* note 2, at 37-39. Under this theory, the ABA Report was seeking to confer federal jurisdiction on some basis other than diversity of citizenship. The ABA Report states that the Edge Act, 12 U.S.C. § 632 (1988) (actions at law or equity involving international banking transactions deemed to arise under laws of United States; conferring original jurisdiction over such cases upon federal district courts), provides an analogy to its proposal. *See* ABA Report 126, *supra* note 2, at 37.

44. ABA Report 126, *supra* note 2, at 37.

45. *Id.* at 38-39.

46. *See id.* at 38 (citing *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 492 (1983)).

47. *See id.*

Report concluded that “[w]e think the presence of such federal issues in consolidated mass tort litigation maintained under a comprehensive federal statute is more than enough to satisfy Article III ‘arising under’ requirements.”⁴⁸

Unfortunately, the ABA Report was unclear about what the “federal issues in consolidated mass tort litigation”⁴⁹ were and what “federal interests over interstate commerce”⁵⁰ a mass tort case implicated. Suggesting that a federal standard for punitive damages satisfies the *Verlinden* requirement of a comprehensive federal interest is mere bootstrapping: but for the existence of such a federal standard, the federal interest to support article III jurisdiction would be insufficient. The ABA Report’s proposed choice-of-law provision provided the slim reed upon which its jurisdictional proposal rested. If that recommendation failed, there was no support for the commission’s jurisdictional proposal.

In addition, the ABA Report vacillated on the choice-of-law issue, displaying a lack of legislative nerve. Although the ABA Report urged forthright recognition of “the federal interest in the conduct or activity which forms the basis of almost all mass tort litigation,”⁵¹ it never indicated what that federal interest is. If the federal interest is in the “underlying conduct or activity,” then there must be some articulable federal substantive law that forms the basis for mass tort litigation. No such federal substantive tort law exists, however. The regulation of such conduct has traditionally been and continues to be within the province of the states. The ABA Report conceded that “it is hard to deny that something that looks very much like federal tort law may emerge.”⁵² The Report refused to propose, however, that federal common law “displace state law in mass tort cases,”⁵³ though such a federal law of torts would have supplied a stronger constitutional basis for jurisdiction.⁵⁴

Proper identification of the federal interest implicated in mass tort litigation is central to identifying a sound constitutional basis for jurisdiction in complex cases. The ABA Report demonstrated the problem by

48. *Id.* at 38 n.68 (citing *Verlinden*, 461 U.S. at 491-97). The ABA Report advocated development of a federal choice-of-law standard to determine the applicable law in cases brought under the statute. *See id.* at 40 (Recommendation 3). In support of its recommendation, the ABA Report cites to Conway, *supra* note 18, at 1114-17 (1987). *See* ABA Report 126, *supra* note 2, at 38 n.68; *see also supra* notes 21-26 and accompanying text (discussing Conway’s advocacy of federalizing mass tort law).

49. ABA Report 126, *supra* note 2, at 38 n.68.

50. *Id.* at 38.

51. *Id.* at 39.

52. *Id.* The ABA Report resorts to section 145 of the Restatement, Second of the Law of Conflict of Laws (1971). *See* ABA Report 126, *supra* note 2, at 39 n.69. The question arises why, if the reformers realize that a federalized body of tort law is bound to emerge, they do not forthrightly authorize it in their statutory proposal.

53. *Id.* at 38 n.68.

54. *See, e.g.,* *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 456-57 (1957) (finding congressional intent to authorize federal courts to develop substantive common law governing collective-bargaining contract disputes).

failing to articulate this interest. If complex litigation is itself the federal interest, then the reformers have offered a circular argument: they contend that there is a federal interest in complex litigation that provides the predicate for federal court jurisdiction over complex cases. Or, simply put, the litigation provides the jurisdictional basis for the litigation.

Moreover, the ABA Report offered a confused constitutional theory. It posited that the article I element of its jurisdictional recommendation obviated the need to "rely on the alternative but controversial theory of 'protective jurisdiction.'"⁵⁵ While this chariness over protective jurisdiction is understandable and perhaps wise, the ABA Report obscured any meaningful difference between an article III jurisdictional basis that relies on article I and the doctrine of protective jurisdiction.

The ABA Report repeatedly resorted to an interstate commerce theory to bolster its jurisdictional recommendation.⁵⁶ Without ever defining the "interstate commerce aspects of mass tort litigation," the Report argued that the interstate commerce power permits "consideration of legitimate federal interests" when selecting a rule of decision for a particular case.⁵⁷ Hence, interstate commerce supports a federal interest, which supports a federal choice of law, which supports article III jurisdiction pursuant to *Verlinden*.

In its reliance on Congress' article I interstate commerce power, the Report's theory is virtually indistinguishable from most variants of protective jurisdiction theory.⁵⁸ This constitutional confusion obviously results from the *Verlinden* decision's failure to disengage article III jurisdiction from article I legislative authority in any meaningful fashion. The Supreme Court has persistently evaded either endorsing or rejecting any theory of protective jurisdiction.⁵⁹ The *Verlinden* decision, however,

55. ABA Report 126, *supra* note 2, at 38 n.68 (citing Mishkin, *The Federal "Question" in the District Courts*, 53 Colum. L. Rev. 157, 184-96 (1953); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 Law & Contemp. Probs. 216, 224-25 (1948)). The Mishkin and Wechsler articles cited by the ABA Report are the seminal works on federal protective jurisdiction.

56. Resting jurisdiction on the interstate commerce aspects of mass tort litigation would permit consideration of legitimate federal interests when federal courts must select the rule of decision for a particular mass tort case. Additionally, an interstate commerce rationale makes it considerably easier to implement policies which we think should govern punitive damages claims in consolidated mass tort litigation.

ABA Report 126, *supra* note 2, at 40.

57. *Id.*

58. For a discussion of theories of protective jurisdiction, see *infra* Part II A.

59. The Supreme Court has avoided expressing an opinion on the validity of protective jurisdiction theory. See, e.g., *Mesa v. California*, 489 U.S. 121, 137 (1989) ("[w]e have, in the past, not found the need to adopt a theory of 'protective jurisdiction' to support Art. III 'arising under' jurisdiction . . . and we do not see any need for doing so here"). More significantly, the *Mesa* Court reiterated the distinction it thought it had made clear in *Verlinden*: "pure jurisdictional statutes which seek 'to do nothing more than grant jurisdiction over a particular class of cases' cannot support Art. III 'arising under' jurisdiction." *Id.* at 136 (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 496 (1983)). The *Mesa* Court's repetition of this point is alone sufficient to

teaches that if you hitch an article I interstate commerce horse to your legislative wagon, it can successfully haul the burden of arising under jurisdiction.⁶⁰ While the Supreme Court clearly did not intend it, *Verlinden* has provided legislators with a powerful workhorse in the commerce clause.

2. ALI's Project on Complex Litigation

ALI's Project on Complex Litigation (the "ALI Project"), an effort still in progress, attempts to develop a comprehensive approach to problems of multiparty, multiform litigation. Its most innovative chapters recommend statutory provisions for accomplishing both intra-system and inter-system consolidation of complex cases.⁶¹ Its intent is to create a set of rules that permits easy transfer of cases within the federal system and between the state and federal systems, unimpeded by the current rules and laws that frustrate such transfer and consolidation.⁶²

The ALI Project's central proposal for accomplishing federal inter-system consolidation was a federal jurisdictional statute for multiparty, multiform litigation.⁶³ As the Reporters⁶⁴ stated, this new statute was intended to provide federal subject matter jurisdiction and a federal forum for the adjudication of multiparty actions that could not be handled more effectively in state court.⁶⁵ The jurisdictional proposal proved to be too controversial, however, and was withdrawn for reconsideration and redrafting.⁶⁶ Ultimately, it was abandoned completely.⁶⁷

render the constitutional basis of most proposed multiparty, multiform jurisdictional provisions dubious. See *infra* Parts II-III.

60. See *infra* notes 154-164, 177-78 and accompanying text.

61. See generally ALI Complex Litigation Project C.D. No. 2, *supra* note 4 (proposing Revised Statute for Federal Intrasystem Consolidation and Federal-State Intersystem Consolidation); ALI Complex Litigation Project P.D. No. 2, *supra* note 4 (same).

62. See ALI Complex Litigation Project P.D. No. 2, *supra* note 4, at 30; see also ALI Complex Litigation Project T.D. No. 1, *supra* note 4, at 1-9 (earlier draft proposal dealing with scope of project, problem of complex litigation, federal intra-system consolidation and drafting of proposed statutes). These drafts are not ALI's final work product, and, as is true of all ALI works-in-progress, they carry the caveat: "[t]his document, as of the date it was printed, had not been considered by the Council or membership of The American Law Institute, and therefore does not represent the position of the Institute on any of the issues with which it deals." ALI Complex Litigation Project P.D. No. 2, *supra* note 4 (cover page).

63. See Complex Litigation Project P.D. No. 2, *supra* note 4, § 5.01, at 37-38; *id.* at 234-236.

64. Professors Arthur R. Miller and Mary Kay Kane.

65. See ALI Complex Litigation Project P.D. No. 2, *supra* note 4, at § 5.01, at 38. This suggestion also raises the unfortunate specter of the parity debate. See *supra* note 180.

66. See Memorandum from the Reporters for the Complex Litigation Project to Members of the Council of the American Law Institute (Nov. 8, 1989), in ALI Complex Litigation Project C.D. No. 2, *supra* note 4.

67. In its Memorandum to Members of the Council, the ALI Reporters state that "[p]roposals for expanded original jurisdiction for complex actions were rejected by the Advisory Committee at its October, 1989 meeting and thus are not part of the package of reforms being presented." Memorandum from the Reporters for the Complex Litigation

Although the proposal was withdrawn, examining its proposed provisions is enlightening because the proposal's structure suggests the complexities that attend any attempt to provide federal court jurisdiction over complex litigation. The ALI Project's foray into legislative drafting illustrates the seeming impossibility of providing a federal forum for the adjudication of complex cases within the constitutional bounds of federal jurisdiction. Like other reformers, the Project's Reporters failed to articulate intelligently a constitutional basis for federal court jurisdiction over complex cases.

The ALI Project's proposed jurisdictional provision, section 5.01, is interesting for a variety of reasons. The statute was a diversity-based provision with federal question elements that were not clearly evident from the statutory language.⁶⁸ On its face, the proposal seemed to be

Project to Members of the Council of the American Law Institute (Nov. 8, 1989), in ALI Complex Litigation Project C.D. No. 2, *supra* note 4. This rejection of expansive complex litigation reform parallels the experience of the ABA Commission on Mass Torts with its Report 126. See ABA Report 126, *supra* note 2, at 40.

68. See ALI Complex Litigation Project P.D. No. 2, *supra* note 4, § 5.01, at 37-38. This jurisdictional statute provided:

(a) Subject to the requirements of subdivision (b), the district courts shall have original jurisdiction of civil actions arising out of the same transaction, occurrence, or series of related transactions or occurrences, if:

(1) [the matter in controversy exceeds the sum or value of \$25,000 for each of any twenty-five actual or prospective plaintiffs,][the sum or value of the injury alleged in good faith to have been incurred by any twenty-five persons exceeds \$25,000 per person,] exclusive of interest and costs, and if at least one of the actions [may be filed][is likely to be filed] or has been filed in a court of a state other than that of any other action; or

(2) [the matter in controversy exceeds the sum or value of \$5,000 for each of any five actual or prospective plaintiffs,][the sum or value of the injury alleged in good faith to have been incurred by any five persons exceeds \$5,000 per person,] exclusive of interests and costs, and if:

(A) all of the defendants cannot be joined in the courts of any one state but can be joined in a single district court under the provisions of subdivision (c); or

(B) all of the defendants to the action cannot be joined in the courts of a state in which a substantial part of the acts or omissions giving rise to the action occurred, and all of the defendants can be joined in a single district court under the provisions of subdivision (c); or

(C) a substantial part of the acts or omissions giving rise to the action occurred in two or more states.

(b) An action may be brought under subdivision (a) only if a party is a citizen of a state and any actual or prospective adverse party is —

(1) a citizen of another state,

(2) a citizen or subject of a foreign state, or

(3) a foreign state, as defined in § 1603(a) of title 28.

(c) An action may be brought under subdivision (a) in any district in which any defendant resides or in which a substantial part of the acts or omissions giving rise to the action occurred.

(d) A district court may exercise jurisdiction over parties to an action brought under subdivision (a) to the full extent of the power of a federal court under the United States Constitution and shall apply choice of law rules authorized by federal statute.

based exclusively on diversity grounds, providing an elaborate scheme of numerosity and amount-in-controversy requirements. The key section, subdivision (b), permitted federal district court jurisdiction over actions between citizens of one state and actual or prospective adversaries from another state or foreign country.⁶⁹ Although the provision for a “potential adversary” was a jurisdictional innovation, the basic diversity provision was not novel. This provision substantially tracked current notions of diversity jurisdiction, except for its inclusion of a minimal diversity requirement, broader than the complete diversity requirement of 28 U.S.C. section 1332.⁷⁰

The Commentary and Reporter’s Notes supporting the jurisdictional provision, however, reveal the Reporters’ confusion as to the true nature and scope of the proposed statute. Although the Reporters envisioned a minimal diversity requirement,⁷¹ they nevertheless asserted that amount-in-controversy requirements should not impede access to a federal forum—a position consistent with prevailing notions of federal question jurisdiction.⁷²

This theme was echoed in the Reporters’ subsequent analysis of jurisdiction based on prospective diverse parties. The Reporters asserted that “basing jurisdiction on prospective parties does not undermine the constitutionality of this jurisdiction proposal as it is based on the ‘arising under’ and not the diversity grant of jurisdiction in Article III.”⁷³ This statement is startling. There was no hint anywhere else in the ALI Report that the proposed jurisdictional statute was based on federal question grounds. On the contrary, there was every indication that it was a diversity provision.⁷⁴

The Reporters heightened the confusion over the article III basis of their jurisdiction proposal by suggesting that

[t]he major constitutional challenge to basing subject matter jurisdiction on prospective minimal diversity would be the claim that it exceeds Article III. Since this proposal grants jurisdiction over cases that may not contain a dispositive issue of federal law, the cases do not seem to arise under the laws of the United States for purposes of fed-

69. *See id.* § 5.01, at 37-38.

70. *See id.*; *see generally id.* § 5.01, at 38-67 (Commentary and Reporter’s Notes elaborating on proposed statute).

71. *See id.* § 5.01, at 51 (Reporter’s Note 12). The Reporter’s Notes indicate not only that the statute contemplated actual minimal diversity, but also that the provision would reach instances of prospective minimal diversity. *See id.* It is difficult to envision a set of facts that could not satisfy a minimal prospective-diversity requirement.

72. The policy of treating all claims as jurisdictionally sufficient is consistent with the notion that multiparty, multiforum litigation is a federal concern. Just as 28 U.S.C. § 1331 has no amount in controversy requirement for federal question cases, once an incident is of sufficient size to satisfy § 5.01, actions arising from it are sufficient jurisdictionally regardless of the amount in controversy for each claim.

Id. § 5.01, at 46.

73. *Id.* § 5.01, at 47.

74. *See id.* § 5.01, at 51.

eral question jurisdiction.⁷⁵

Any objection to a minimal diversity provision is easily answered by reference to the Supreme Court's affirmation of the minimal diversity-based federal interpleader statute.⁷⁶ Thus, it is difficult to discern why the drafters would be concerned with the minimal diversity provision's constitutionality.

In the absence of federal-law issues, the Reporters staked their jurisdictional provision on a hybrid *Verlinden* theory supplemented by the commerce clause power. According to the Reporters, *Verlinden* "suggests that a grant of federal jurisdiction over multiparty, multistate litigation may fall within federal question jurisdiction when the grant is coupled with mechanisms designed to manage the litigation."⁷⁷ Just as the Foreign Sovereign Immunities Act presented a comprehensive regulatory scheme over foreign lawsuits in *Verlinden*,⁷⁸ the proposed jurisdictional provision for complex litigation was part of a comprehensive scheme "regulat[ing] multiparty, multiform litigation."⁷⁹ This regulatory scheme bolstered the exercise of commerce clause powers.⁸⁰ To

75. *Id.* § 5.01, at 52.

76. See *supra* note 17. The Reporters note that minimal diversity requirements passed constitutional muster in *Tashire*, but nonetheless insist that their jurisdictional provision is based on federal-question grounds:

[a]lthough § 5.01 is premised on the Article III grant of power over federal questions, it is worth noting that even in the diversity context, it has been recognized that "Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens."

ALI Complex Litigation Project, P.D. No. 2, *supra* note 4, § 5.01, at 56 (quoting *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 531 (1967)).

77. *Id.* § 5.01, at 53.

78. See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 496-97 (1983).

79. ALI Complex Litigation Project, P.D. No. 2, *supra* note 4, § 5.01, at 53-54. The other provisions buttressing the jurisdictional provision call for the "development of a federal standard for the selection of transferee court (§ 3.04), the bifurcation of issues (§ 3.06) and choice of law (§ 3.09)." *Id.* § 5.01, at 53.

80. And, as part of the overall scheme to improve the handling of complex litigation, the jurisdiction constitutes a valid exercise of Article I powers over interstate commerce, which would be a sufficient basis for federal question jurisdiction.

Congress' Article I regulatory power extends over any activity that rationally can be said to affect interstate commerce. The enormous expenses, expenditures of human resources, and vast amounts of money at stake in complex litigation can be seen as having an effect upon the national economy.

Id. § 5.01, at 54.

In further, but nonetheless circular, support for the interstate commerce argument, the Reporters suggest that the diversity requirement itself ensures the interstate commerce basis for federal question jurisdiction:

[m]oreover, the requirement in § 5.01(b) that an actual or prospective party be diverse from some adverse party means that this impact is felt in at least two states; this requirement not only ensures the multistate character of the litigation and its affect on interstate commerce, but also it calls into question the ability of the states to resolve the dispute effectively by themselves.

Id.

their credit, the Reporters identified the interstate commerce element of complex litigation: the economic impact of the litigation on the national economy.⁸¹

Other arguments offered in support of the constitutional validity of the proposed legislation were, however, more troublesome. For example, the Reporters asserted that *Verlinden* not only supported jurisdiction but also concerned more than “mere[] access to federal courts.”⁸² The Reporters further suggested that complex litigation, and especially mass tort litigation, “involves an area of strong national concern that would be well served by a grant of federal jurisdiction. Thus, complex litigation might fall under a grant of ‘protective jurisdiction.’”⁸³ The Reporters noted, however, that the Supreme Court has never explicitly endorsed the protective jurisdiction doctrine, and in the end failed either to embrace or reject this theory as a possible basis for their jurisdictional proposal.⁸⁴

This left the Reporters with little else but the commerce clause argument, which became the mainstay of the jurisdictional provision.⁸⁵ The ALI Project’s proposed jurisdictional statute was innovative but conceptually schizophrenic. The provision seemed to be diversity-based.⁸⁶ The statute was, however, proffered as a federal question statute valid under article III through the auspices of article I commerce clause power, with-

Carried to its logical conclusion, this assertion would mean that all diversity cases brought under 28 U.S.C. § 1332 (1990) would support federal question jurisdiction pursuant to 28 U.S.C. § 1331 (1990).

81. ALI Complex Litigation Project P.D. No. 2, *supra* note 4, § 5.01, at 54.

82. *Id.* § 5.01, at 55.

83. *Id.*

84. *See id.*

85. To bolster this prong of their argument, the Reporters resorted to inflated constitutional rhetoric:

[t]he Commerce Clause has been construed broadly by the courts and its requirements are not demanding. As early as 1824, the Supreme Court rejected the idea that commerce was restricted to the buying and selling of goods; rather, it includes all types of business intercourse. . . . In 1937, the Court further defined the scope of the Commerce Clause, holding that the power of Congress was plenary unless an action specifically was prohibited by the Constitution or clearly fell outside the realm of interstate commerce. . . . Moreover, the Court has held that Congress has Constitutional power to regulate *de minimis* transactions involving interstate commerce because the cumulative effect of numerous small transactions can be substantial.

Id. § 5.01, at 55-56 (citations omitted) (Reporter’s Note 17). The Reporter’s Note relies on the usual litany of standard commerce clause cases in support of expansive commerce clause regulatory powers. *See id.*; *see also supra* note 26 (listing relevant commerce clause cases). The Reporters state that the test for whether Congress can act under the commerce clause is “1) whether Congress ha[s] a rational basis for determining that a particular activity affects interstate commerce, and 2) whether the means selected to regulate the activity are appropriate.” ALI Complex Litigation Project P.D. No. 2, *supra* note 4, § 5.01, at 55-56 (citing *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258-59 (1964)).

86. *See* ALI Complex Litigation Project P.D. No. 2, *supra* note 4, § 5.01, at 51 (Reporter’s Note 12).

out any commitment to a theory of protective jurisdiction.⁸⁷ The ALI Project was more explicit than the ABA Report in identifying the interstate commerce problem.⁸⁸ The ALI Project, however, offered essentially the same bootstrap argument as the ABA Report: the litigation itself provided the jurisdictional basis for the litigation.

Even more interesting was the Reporters' use of the same bootstrap arguments in support of other innovative procedural rules. For example, the liberal removal provision, which enlarged the number of cases eligible for removal,⁸⁹ was predicated on the same constitutional basis as the original jurisdictional statute.⁹⁰ Thus, the Reporters easily suggested that, "[l]ike the grant of original jurisdiction proposed in section 5.01, removal under this section appears to fit within the scope of Article III jurisdiction and probably also may be justified as an exercise of Congress' powers to regulate interstate commerce under Article I."⁹¹ Thus, for removal jurisdiction, the commerce clause rationale took a backseat to an unarticulated article III justification.

The Reporters, however, invoked a commerce clause theory as principal support for a novel anti-suit injunction provision that would permit a federal transferee court to enjoin other proceedings in state and federal courts.⁹² The Reporters suggested that injunctive power was appropriate because no one state has the power to consolidate litigation extending across state boundaries. Therefore, according to the Reporters, "a national solution requires the assertion of federal power."⁹³ Elaborating on this theme, the Reporters argued that "in addition to the federal judicial system's interest in conserving its own resources, the federal government has an interest, if not an obligation, to provide a procedure or mechanism

87. See *id.* § 5.01, at 52-56.

88. See, e.g., *id.* § 5.01, at 54-56 ("vast amounts of money at stake in complex litigation can be seen as having an effect upon the national economy").

89. See *id.* § 5.03, at 75.

90. See *id.* § 5.03, at 90-91 (Reporter's Note 9).

91. *Id.* § 5.03, at 86. The commerce clause theory seems subsidiary in the removal commentary.

92. *Id.* § 5.04, at 102. Section 5.04 provides:

(a) In actions transferred and consolidated pursuant to § 3.01, the transferee court in its discretion may enjoin relevant proceedings pending in any State or United States court whenever doing so would promote the just and efficient resolution of the actions.

(b) Factors to be considered in deciding whether an injunction should issue under subdivision (a) include

- (1) how far the actions to be enjoined have progressed;
- (2) the degree to which the actions pending in the other courts share common questions with and are duplicative of the consolidated actions; and
- (3) the extent to which the actions to be enjoined involve issues or claims of federal law.

This antisuit injunction provision is intended to overcome obstacles presented by the Anti-Injunction Act, 28 U.S.C. § 2283 (1990), which generally prohibits federal courts from enjoining state proceedings except in very limited circumstances.

93. See ALI Complex Litigation Project P.D. No. 2, *supra* note 4, § 5.04, at 113.

to remedy this interstate problem.”⁹⁴

Similarly, the commerce clause theory did yeoman service to bolster provisions relating to federal-state inter-system transfer and consolidation.⁹⁵ Relying on Judge Weinstein’s suggestion that the commerce clause might support such legislation,⁹⁶ the Reporters embraced doctrines of deferential abstention to justify provisions authorizing transfer of complex cases to state forums.⁹⁷ The Reporters concluded that litigants do not have an absolute right to have their cases heard in federal court and that the strong federal interest in solving the complex litigation problem overcomes any tenth amendment objection to foisting complex cases upon state courts: “[t]here is little question that the magnitude of the complex litigation problem confronting the nation would justify the encroachment on state sovereignty that may result from the [proposed Complex Litigation] Panel’s authority to direct state courts to take consolidated cases.”⁹⁸

Finally, the Reporters construed the *Colorado River* abstention doctrine⁹⁹ as tangentially supporting inter-system transfer.¹⁰⁰ *Colorado River* was thus manipulated to articulate instances of permissible deference to state courts:

(1) cases presenting a federal constitutional issue that might be mooted or presented in a different light by a state court determination of pertinent state law; (2) cases in which there are difficult questions of state law bearing on policy problems of substantial public import whose significance transcends the result in the case at bar; and (3) situations in which federal jurisdiction has been invoked for the purpose of re-

94. *Id.* The Reporters also suggest that “[t]his interest necessarily may subsume the interests of an individual state in providing a forum for its litigants in appropriate circumstances.” *Id.*

95. *See id.* § 5.08, at 200. Section 5.08(a) provides:

(a) Subject to the exceptions in subdivision (b), when determining under § 3.04 where to transfer actions consolidated from both state and federal courts, the Complex Litigation Panel may designate a state court as the transferee court. A state transferee court shall have the same powers and responsibilities as a federal transferee court under § 3.06, and any assertion of authority by the state transferee court that is beyond the scope of its state power shall be exercised under the general supervision of the Complex Litigation Panel.

96. *Id.* § 5.08, at 204 (Reporter’s Note 3) (citing Weinstein, *Preliminary Reflections*, *supra* note 3, at 23-24).

97. *See* ALI Complex Litigation Project P.D. No. 2, *supra* note 4, § 5.08, at 209 (Reporter’s Note 6).

98. *Id.* § 5.08, at 207-08. The Reporters conclude that “on a policy level, any legislation effectuating the proposal would be in the best interests of both the states and the federal government.” *Id.* at 208. The Reporters rely on *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976), *overruled*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), despite the fact that the Supreme Court rejected the *Usery* test in *Garcia*. *See* ALI Complex Litigation Project P.D. No. 2, *supra* note 4, § 5.08, at 206-207.

99. *See* Friedman, *supra* note 13, at 594 (explaining *Colorado River* abstention doctrine).

100. *See* ALI Complex Litigation Project P.D. No. 2, *supra* note 4, § 5.08, at 209 (Reporter’s Note 6).

straining state criminal proceedings.¹⁰¹

Although other abstention doctrines are grounded in these rationales, the Reporters completely disregarded the fact that *Colorado River* abstention is based on a policy of sound judicial administration.¹⁰² Furthermore, in a strained interpretation of *Colorado River*, the Reporters suggested that mandatory federal inter-system transfers would not violate the separation-of-powers doctrine or the federal courts' obligation to exercise jurisdiction because the complex litigation statute itself would be an exercise of the power to regulate jurisdiction.¹⁰³

This analysis begs the question of whether Congress has the constitutional authority to regulate federal court jurisdiction either by expanding

101. *See id.* § 5.08, at 209.

102. Leading Supreme Court cases describe factual scenarios where federal court abstention is appropriate: *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 27-30 (1959) (deference to state forum where case involves state interests, is intimately involved with state sovereign's prerogatives and involves uncertain questions of state law); *Burford v. Sun Oil Co.*, 319 U.S. 315, 332-34 (1943) (deference to state court to interpret complex state administrative scheme); *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941) (preference for state court resolution of state-law question that may moot federal-law issue); *see also Younger v. Harris*, 401 U.S. 37, 53-54 (1971) (non-interference with ongoing state criminal proceedings). Ironically, the Reporters cite leading abstention cases as support for the constitutionality of their proposal to provide for the removal of state cases to federal court. *See ALI Complex Litigation Project P.D. No. 2, supra* note 4, § 5.03, at 88-90. The Reporters' position is that the abstention doctrines do not impede involuntary removal of cases from state to federal courts. *See id.* § 5.03, at 88-91. Nevertheless, these same abstention doctrines are later invoked to support the proposed provision for involuntary transfer of complex cases from federal to state forums. *See id.* § 5.08, at 209.

103. *See ALI Complex Litigation Project P.D. No. 2, supra* note 4, § 5.08, at 209. The Reporters cite to Justice Brennan's observation in *Colorado River* that federal courts have a

"virtually unflagging obligation . . . to exercise the jurisdiction given them. Given this obligation, and the absence of weightier considerations . . . permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention."

Id. (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 818-19 (1976)).

In an exercise in circular reasoning, the Reporters further asserted:

[t]he *Colorado River* decision provides a good background to highlight the jurisdictional distinctions proposed by the Complex Litigation Statute. *Colorado River* deals with a federal court's obligation to exercise jurisdiction over a federal matter that has been given to it. That jurisdiction can be regulated by Congress. If Congress enacted a comprehensive Complex Litigation Statute in effect it would be regulating the jurisdiction of the federal courts through the Complex Litigation Panel. Congress can delegate its power so long as it provides specific and detailed guidelines governing the exercise of that power. The Panel, by designating the transferee courts, in effect would be regulating the jurisdiction of the federal courts. Under this view, the designation of a state transferee court would not do violence to the concerns expressed by Justice Brennan in *Colorado River* because it does not involve the question whether a single federal district judge can avoid his or her responsibilities by dismissing cases that otherwise would be within the district court's jurisdiction.

Id. (citation omitted).

it to encompass non-federal claims or by restricting it through involuntary inter-system transfers. Even more surprising was the Reporters' failure to invoke *Colorado River* for the one proposition it squarely states: that federal courts may decline to exercise validly conferred jurisdiction for reasons of sound judicial administration.¹⁰⁴

Although the ALI Project abandoned this jurisdictional statute, the theory underlying the provision survives in subsequent sections and revisions of the Project.¹⁰⁵ For example, the new removal provision, also based on a minimal diversity requirement, is predicated on "a sufficient federal interest in providing a federal forum," again without suggesting what that federal interest is.¹⁰⁶ Ironically, the Reporters now suggest that by expanding the availability of removal jurisdiction (itself a derivative jurisdiction), they avoid expanding original jurisdiction, the only other possible avenue for providing a federal forum for complex cases. Thus, a retreat is transformed into an advance:

[f]urther, [removal through the Panel on Complex Litigation] avoids the risk that the federal courts will be inundated [sic] with new cases because parties proceed directly to federal court in situations that might be handled better by the state courts. Thus, at least in the early stages of designing methods of processing multiparty, multiforum cases, removal jurisdiction is the more cautious choice.¹⁰⁷

To counter any intimations that expanded removal jurisdiction contravenes states' rights or prerogatives, the Reporters insist that "[r]emoval under this section fits within the scope of Article III jurisdiction and probably also may be justified as an exercise of Congress' Article I interstate commerce powers."¹⁰⁸ The usual suspects are marshalled in support of this assertion: the theory of protective jurisdiction,¹⁰⁹ the

104. See *Colorado River*, 424 U.S. at 817; see also Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine*, 75 Geo. L.J. 99, 101 (1986) (arguing that abstention for reasons of aiding judicial administration is unacceptable abdication of federal judicial power); Sonenshein, *Abstention: The Crooked Course of Colorado River*, 59 Tul. L. Rev. 651, 658-60 (1985) (tracing history of and analyzing *Colorado River* abstention doctrine).

105. See, e.g., ALI Complex Litigation Project, C.D. No. 2, *supra* note 4, § 5.01, at 42-43 (proposed complex litigation panel would be empowered to exercise removal jurisdiction on a discretionary basis).

106. *Id.* § 5.01, at 42. The Reporters repeat this rationale without further explanation:

[t]hus, removal is limited to circumstances in which there already is a pending federal action or the size of the claims involved as well as the multistate character of the parties and the existing litigation suggest a legitimate federal interest in providing a forum for the consolidated resolution of the dispute.

Id. § 5.01, at 45-46.

107. *Id.* § 5.01, at 46.

108. *Id.* § 5.01, at 59. The reference to the exercise of Congress' article I interstate-commerce powers is gratuitous and confusing. Minimal diversity theory supports expanded removal jurisdiction, not any allied federal question doctrine. If the commerce-power theory supports expanded removal jurisdiction, it ought at a minimum to support expanded federal question jurisdiction as well.

109. See *id.* § 5.01, at 60.

[C]omplex litigation, especially mass tort litigation, involves an area of strong

Verlinden theory¹¹⁰ and the commerce clause theory as it was most recently interpreted by the Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority*.¹¹¹

Ultimately, the ALI Project's attempts to postulate some constitutional basis for various innovative jurisdictional proposals are unsatisfying. Like their ABA colleagues, the ALI Project's Reporters remain wary of protective jurisdiction theories but nonetheless rely on an article I interstate commerce rationale to permit expansion of federal court jurisdiction under article III. Ignoring the lack of substantive content to the proposed statutes, the reformers nevertheless urge that their provisions embody a comprehensive scheme of regulation. Unlike other substantive statutory schemes that have validated expanded federal-question jurisdiction, however, these provisions are purely procedural.

The elimination of the proposed original federal question jurisdictional statutory provision is of little significance. The spirit of that abandoned provision haunts its current surrogates in the guise of expanded removal and supplemental jurisdictional provisions that rely on the thin constitutional rationales developed to support the withdrawn provision. Ultimately, the Reporters are forced to state conclusorily that the apparent interstate nature of complex litigation itself shoulders the burden of constitutional jurisdiction.

If the constitutional basis for expanding federal court jurisdiction is diversity, confused and dubious invocations of protective jurisdiction, commerce clause theory or vague federal interests are unnecessary. Any reliance on article I powers is irrelevant to diversity-based jurisdictional schemes, unless diversity jurisdiction itself is narrowly (and perversely) construed as the most striking example of "protective" jurisdiction.¹¹²

Finally, the attempt to support inter-system jurisdictional provisions through abstention theory is ill-conceived and poorly drawn. Abstention theory will generally permit deferential abstention in certain well-delineated circumstances. It is altogether different, however, to imply that ab-

national concern that would be well served by a grant of federal jurisdiction.

Thus, it also might be argued that the extension of removal jurisdiction to cover related state cases could fall under a grant of "protective jurisdiction."

Id. (Reporter's Note 10 citing Mishkin, *supra* note 55; Wechsler, *supra* note 55).

110. *See id.* § 5.01, at 60. The Reporters acknowledge that the Supreme Court has never approved of the protective jurisdiction theory but state that "although *Verlinden* thus stops short of endorsing a theory of protective jurisdiction, its language hints that the court may eventually be receptive to such a theory." *Id.* (citing Note, *The Supreme Court, 1982 Term*, 97 *Harv. L. Rev.* 70, 215 (1983)).

111. 469 U.S. 528, 556 (1985). The Reporters argue that *Garcia* "further supports the notion that increased removal jurisdiction for the federal courts would not violate the basic tenets of federalism." ALI Complex Litigation Project C.D. No. 2, *supra* note 4, § 5.01, at 61 (citing *Garcia*, 469 U.S. at 531-36, 547-57).

112. *See* Mishkin, *supra* note 55, at 184. Most commentators do not recognize that Mishkin uses diversity jurisdiction as an example of jurisdiction for "protective purposes": that is, protecting the parties by bringing them into federal court. He questions "whether a similar 'protective' function may be achieved within the 'arising under' clause." *Id.* at 185.

stention theory is not offended by the abdication of federal jurisdiction and involuntary transfer of litigation to state forums. The purpose of the doctrines, grounded in principles of federalism, is to enhance inter-system comity.¹¹³ How abstention theory can buttress the constitutionality of complex litigation proposals with coercive inter-system transfer provisions is difficult to understand.

3. The Multiparty, Multiform Jurisdiction Act of 1990

Congress has taken an altogether different approach to solving the complex litigation dilemma in the proposed Multiparty, Multiform Jurisdiction Act of 1990.¹¹⁴ That Act sets forth a minimal diversity requirement for original federal court jurisdiction as well as for the removal of cases from state to federal court.¹¹⁵ Like the ABA Report and the early draft proposals of the ALI Project, the Multiparty, Multiform Jurisdiction Act has undergone substantial redrafting to narrow its jurisdictional scope.¹¹⁶

113. *See, e.g., Louisiana Power and Light Co. v. Thibodaux*, 360 U.S. 25, 29 (1959) (abstention doctrine concerned with "maintenance of harmonious federal-state relations").

114. Multiparty, Multiform Jurisdiction Act of 1990, H.R. 3406, 101st Cong., 2d Sess., 136 Cong. Rec. H3116-19 (daily ed. June 5, 1990); *see supra* note 6.

115. *See* Multiparty, Multiform Jurisdiction Act of 1990, H.R. 3406, 101st Cong., 2d Sess., 136 Cong. Rec. H3116-19 (daily ed. June 5, 1990). Section Two of the bill provides that Title 28 of the United States Code be amended to include a new section for federal court jurisdiction. *See id.* at H3116. The initial draft of the section read as follows:

§ 1367. Multiparty, Multiform jurisdiction

(a) The district courts shall have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single event or occurrence, where it is alleged in good faith that any 25 persons have either died or incurred injury in the event or occurrence and that, in the case of injury, the injury has resulted in damages which exceed \$50,000 per person, exclusive of interest and costs, if —

- (1) a defendant resides in a State and a substantial part of the event or occurrence took place in another State;
- (2) any two defendants reside in different states; or
- (3) substantial parts of the event or occurrence took place in different States.

(b) For purposes of this section —

- (1) minimal diversity exists between adverse parties if any party is a citizen of a State and any adverse party is a citizen of another State, a citizen or subject of a foreign state, or a foreign state as defined in section 1603(a) of this title;
- (2) a corporation is deemed to be a citizen of any State, and a citizen or subject of any foreign state, in which it is incorporated or has its principal place of business, and is deemed to be a resident of any State in which it is incorporated or licensed to do business or is doing business; and

(3) 'injury' means physical harm to a natural person and physical damage to or destruction of tangible property.

Multiparty, Multiform Jurisdiction Act of 1989, H.R. 3406, 101st Cong., 1st Sess. (1989).

116. The legislation was amended in subcommittee markup to define the "single-event" language of section (a) as involving an "accident at a discrete location." Section (a) now reads:

- (a) The district courts shall have original jurisdiction of any civil action involv-

The Act is a modest proposal that should have little effect on most mass tort litigation because its jurisdictional section applies only to cases that arise from a single accident.¹¹⁷ This definition omits complex cases arising from mass tort injury or mass products liability, including cases involving temporal or geographical dispersion. Therefore, this jurisdictional proposal would not reach the most notorious mass tort cases of the last decade, those involving Agent Orange, Bendectin, DES, the Dalkon Shield and asbestos.¹¹⁸ What the statute will permit is easier consolidation of single-event accidents in federal court. Hence, the statute represents little more than congressional tinkering with existing multidistrict litigation procedure.¹¹⁹

ing minimal diversity between adverse parties that arises from a single accident, where at least 25 natural persons have either died or incurred injury in the accident at a discrete location . . .

Multiparty, Multiforum Jurisdiction Act of 1990, H.R. 3406, 101st Cong., 2d Sess., 136 Cong. Rec. H3116-19 (daily ed. June 5, 1990) (emphasis added).

The term "accident" is defined as a "sudden accident, or a natural event culminating in an accident, that results in death or injury incurred at a discrete location by at least 25 natural persons." See *id.* The Committee Report indicates that "H.R. 3406 would remove the barriers that impede consolidation of related litigation in the Federal court system, in the limited context of cases arising out of single accidents in which many people are killed or injured." The Multiparty, Multiforum Jurisdiction Act of 1990, H.R. Conf. Rep. No. 101-515, 101st Cong., 2d Sess. 6 (1990) [hereinafter Report]. The House passed H.R. 3406, as amended, on June 5, 1990. See 136 Cong. Rec. H3118 (daily ed. June 5, 1990).

117. See Report, *supra* note 116, at 6.

118. The legislation's sponsor and its supporters clearly envision that the legislation will encompass only mass disaster torts such as hotel fires, bridge collapses and airplane crashes. See 135 Cong. Rec. E3275 (daily ed. Oct. 4, 1989) (statement of Rep. Robert W. Kastenmeier) [hereinafter *statement of Rep. Kastenmeier*]; *The Multiparty, Multiforum Jurisdiction Act of 1989: Hearings on H.R. 3406 before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 28-34 (1989) [hereinafter *Hearings*] (statement of Stephen C. Bransdorfer, Deputy Assistant Attorney General, Civil Division, United States Department of Justice); *id.* at 57-60 (statement of Barbara Wrubel).

A similar criticism concerning the extremely limited definition of mass torts has been voiced in dissent against the recommendations of the ABA Commission on mass torts. See ABA Report 126, *supra* note 2, at 1e (separate Statement of Paul D. Rheingold). Paul D. Rheingold, a member of the Commission, noted that the current procedural system works very well for run-of-the-mill mass tort cases, but that the Report's proposals do little to effect the major mass tort cases of the last decade:

for a very few rare types of litigations, as have occurred in the past only *three* times: asbestos, Agent Orange, and Dalkon Shield, there is a need for a radical revision of the laws we have today both procedural and substantive for the handling of these cases. The minimum necessary solution to solve the problems, which this type of litigation has heaped upon the courts and upon the litigants, calls for much more thorough-going changes in the law than this commission is presently willing to endorse.

Id. at 1e.

119. The statute also includes a provision to amend 28 U.S.C. § 1407 (1988) to permit a transferee court to retain jurisdiction in order to determine liability in the consolidated cases. See Multiparty, Multiforum Jurisdiction Act of 1990, H.R. 3406, 101st Cong., 2d Sess. § 14, 136 Cong. Rec. H3116-19 (daily ed. June 5, 1990). The statute, however, provides for the remand of cases to the original courts for damage determinations. See *id.*

Congress' tepid response to the complex litigation problem not only forestalls a national solution to complex procedural problems, but also averts constitutional debate concerning the proper basis for federal jurisdiction over complex cases. Thus, the adoption of a minimal diversity requirement for a severely limited class of accident cases¹²⁰ is politically wise and avoids the article III arising under controversy entirely. Significantly, the bill's sponsor, Representative Robert Kastenmeier, does not invoke the interstate commerce burdens of complex cases to justify enactment of remedial legislation.¹²¹ Congressional silence on the interstate commerce aspect of complex cases is notable when virtually everyone who has considered the problem has focused on this theme.

Interbranch politics may be behind Congress' timidity in dealing with the complicated problems of complex litigation. During hearings on the Court Reform and Access to Justice Act of 1988,¹²² representatives from both the Justice Department and the federal judiciary testified in support of provisions raising the amount-in-controversy requirement for diversity cases.¹²³ The executive and judicial branches supported jurisdictional proposals that might decrease the federal docket and opposed legislation that might increase the federal caseload. Thus, the policy was generally to oppose any new jurisdictional scheme that might consolidate

§ 4, at H3116. Under current multidistrict procedure, the consolidation of cases in a transferor court is for pretrial procedure only, with remand to the courts of origination for trial of individual cases. See 28 U.S.C. § 1407 (1988).

120. Even the bill's formulation of the minimal diversity requirement is controversial, however. More than one commentator has noted that the bill would allow the diversity requirement to be satisfied by any two diverse "adverse parties," which would theoretically include two defendants cross-claiming against each other. If this is true, the bill's diversity proposal would effect a significant change in the concept of diversity and might be unconstitutional. See, e.g., *Hearings, supra* note 118, at 67 (joint statement of Professors Robert A. Sedler and Aaron D. Twerski) ("[u]nder the bill, there apparently need be no diversity between any plaintiff and any defendant"); *id.* at 95 (statement of James A. Dixon, Jr., Lawyers for Civil Justice) ("Given the propensity of Americans to travel and the complex interdependencies of business in America, it is difficult to imagine a situation in which 'minimal' diversity could not be found.").

121. See statement of Rep. Kastenmeier, *supra* note 118.

At a time when the burgeoning volume of drug cases is imposing ever increasing workload pressures on the Federal courts, we must be mindful of the impact the laws we enact will have on the Federal judiciary. One of the primary objectives of this bill is to reduce duplicative litigation in the Federal courts, and so improve the efficiency of court operation. Accordingly, while this bill creates a new basis for federal jurisdiction, its net effect will be to assist rather than burden the Federal courts in their efforts to cope with workload pressures.

Id.

122. See H.R. 3152 100th Cong., 1st Sess. (1988), not enacted as part of the Judicial Improvement and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988).

123. See *The Court Reform and Access to Justice Act of 1988: Hearings on H.R. 3152 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 4-5 (1987) [hereinafter *Court Reform*] (statement of Hon. Elmo B. Hunter representing the Judicial Conference of the United States); *id.* at 26-27 (prepared statement of Hon. Elmo B. Hunter); *id.* at 230-231 (statement of Stephen J. Markman, Assistant Attorney General, Office of Legal Policy, United States Department of Justice).

massive, complex cases in the federal courts. Accordingly, both branches attacked the proposed Title IV on multiparty, multiforum jurisdiction for providing federal jurisdiction over single-event tort claims as well as over "civil actions arising out of [a] . . . series of related transactions or occurrences."¹²⁴

In exchange for its support of any multiforum, multiparty legislation, the Justice Department obtained two concessions from legislators. Congressional drafters agreed to couple any bill creating a new category of mass tort jurisdiction with a substantial reduction in diversity jurisdiction.¹²⁵ In addition, legislators agreed to define the new jurisdictional category narrowly to encompass only single-event mass disaster cases.¹²⁶ The executive branch was willing to let Congress tinker with federal jurisdiction to facilitate adjudication of airplane crashes, but drew the line at any jurisdictional proposal that would provide for federal jurisdiction over the "hard core" complex cases plaguing the courts, such as asbestos litigation.¹²⁷

Not only was the diversity amount-in-controversy increased in the subsequently enacted Judicial Improvements Act, but a revised Title IV was reintroduced with a modified jurisdictional provision tailored to single-event mass-disaster cases.¹²⁸ With this statutory change, the Judicial Conference, which had not previously taken a position on Title IV, en-

124. See Court Reform and Access to Justice Act of 1988, H.R. 3152, 100th Cong., 1st Sess. Title IV, § 1367(a) (1987).

125. This quid pro quo was discussed explicitly during the hearings on H.R. 3406. See *Hearings, supra* note 118, at 33 (colloquy between Representative Robert W. Kastenmeier and Stephen C. Bransdorfer, Deputy Assistant Attorney General, Civil Division, United States Justice Department).

126. See *Court Reform, supra* note 123, at 207-208, 225-227 (statement of Stephen J. Markman, Assistant Attorney General, Office of Legal Policy, United States Department of Justice).

127. Assistant Attorney General Markman stated:

this proposal includes provisions evidently designed to include within the new jurisdiction far more cases than would relate specifically to the previously-understood mass tort case. We cannot support such substantial extension of the scope of the new jurisdictional provisions. . . .

As the Department's position in the past had contemplated, the purpose of establishing multi-party, multi-forum jurisdiction was to deal with mass injury cases arising from discrete, spatially and temporally limited incidents, such as an airplane crash or hotel fire. The number of such mass disaster cases is quite limited; admitting them to the federal courts on a "minimum diversity" basis should create no excessive burden if other diversity jurisdiction is reduced at the same time.

Id. at 225-26.

128. The revised subsection (a) for proposed § 1367 deleted language to the effect that district courts would have jurisdiction over civil actions arising out of a "series of related transactions or occurrences," Multiparty, Multiforum Jurisdiction Act of 1988 H.R. 3152, 100th Cong., 1st Sess. (1987), and that limited jurisdiction to civil actions arising "from a single event or occurrence." Multiparty, Multiforum Jurisdiction Act of 1989, H.R. 3406 § 1367(a), 101st Cong., 1st Sess. (1989).

dorsed the new multiparty, multiform bill.¹²⁹ In testimony before the Judiciary subcommittee considering the legislation, the Conference's representative stated that the federal judiciary would not support legislation taking a root-and-branch jurisdictional approach to complex litigation. The third branch unequivocally voiced its opposition to drastic jurisdictional changes such as those proposed by the ABA and ALI.¹³⁰

If the Multiparty, Multiform Jurisdiction Act of 1990 is enacted, the statute will not make a substantial contribution toward solving the procedural problems that the truly complex cases of the past decade have generated. The bill will permit easier consolidation of accident cases in federal court. Because airplane crashes and similar disasters are currently handled efficiently through existing multidistrict litigation procedures,¹³¹ one wonders why Congress has bothered at all.

Interestingly, some of the strongest proponents of a minimal diversity requirement for complex cases simultaneously advocate the reduction or abolition of federal diversity jurisdiction over non-complex cases.¹³² This

129. See *Hearings, supra* note 118, at 17 (prepared statement of Hon. William W. Schwarzer representing the Judicial Conference of the United States).

In its March 1988 meeting, the Judicial Conference approved in principle the creation of Federal jurisdiction based on minimal diversity to consolidate in the Federal courts multiple litigation . . . involving personal injury or property damage arising out of a single event or occurrence. H.R. 3406 would create jurisdiction so limited and it is therefore supported by the Judicial Conference. . . . I wish to emphasize that the Conference's support was specifically premised on these limitations.

Id.

130. There are currently other proposals for multi-forum, multi-party legislation that would create Federal jurisdiction founded on the commerce clause and extending to mass torts, i.e., claims arising out of a series of events or occurrences, such as use of or exposure to a particular toxic substance like asbestos. 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.

Id. Judge Schwarzer also suggested that the Judicial Conference's acceptance of the multiparty, multiform provisions was contingent upon congressional enactment of provisions in the Judicial Improvements and Access to Justice Act of 1988 limiting diversity jurisdiction. See *id.* at 18. During hearings on the Court Reform and Access to Justice Act of 1988, Judge Hunter told Congress that the Judicial Conference urged modification of diversity jurisdiction. See *Court Reform, supra* note 123, at 4 (statement of Hon. Elmo B. Hunter representing the Judicial Conference of the United States). Judge Hunter's statement at the earlier hearings did not, however, indicate that the Judicial Conference's acceptance of the multiparty, multiform provisions was contingent on this quid pro quo. In fact, the Judicial Conference failed to make any comments on the multiparty, multiform provisions during the hearings on H.R. 3152.

131. See 28 U.S.C. § 1407(a) (1988) (providing for intrasystem transfer and consolidation of complex cases). Transfers are made by the Judicial Panel on Multidistrict Litigation, consisting of seven federal judges designated by the Chief Justice of the United States. See R. Marcus & E. Sherman, *supra* note 15, at 211.

132. See, e.g., *Hearings, supra* note 118, at 18-20 (prepared statement of Hon. William W. Schwarzer on behalf of the Judicial Conference of the United States) (advocating elimination of federal diversity jurisdiction over "cases that can be litigated as well in the

seeming inconsistency can only be reconciled in a federal judicial system that prohibits diversity jurisdiction for "simple" diversity cases but retains and expands it for complex cases. If the reformers indeed advocate such a transformation of federal court subject-matter jurisdiction, then the debate is subtly different: the minimal diversity abolitionists must explain why complex cases deserve a federal preference.

Both the ABA Report and the ALI Project, in contemplating the complex litigation landscape, initially recommended sweeping jurisdictional changes on the theory that complex cases have a profound impact on interstate commerce. Congress, surveying the same landscape, has turned its back on the complex litigation problem and instead proposed to solve procedural problems that do not need solving, such as the disposition of airplane crashes and hotel fires.

Either complex litigation is a pressing interstate commerce problem or it is not. If it is, Congress is certainly doing little to remedy it. More troublesome is the willingness of the two other branches of government to foster this legislative lassitude. The Multiparty, Multiforum Jurisdiction Act, by its title, raises false hopes that it provides some procedural relief for the disposition of complex cases. In reality, the Act eases pain without effecting a cure. This legislative minuet raises the ultimate question of whether Congress will ever discover the interstate commerce problem presented by complex litigation.

II. THEORIES OF EXPANDED AND CONTRACTED ARTICLE III JURISDICTION

In their efforts to provide a consolidated federal forum for adjudication of complex cases, the complex litigation reformers work backwards from their pragmatic procedural solutions to their legal premises. Logic compels the concept of consolidating complex cases in single federal or state forums.¹³³ It follows, reformers reason, that there *must* be some

State courts as in the Federal courts"). The Justice Department representative also took this position at the oral hearings. *See id.* at 26 (statement of Stephen C. Bransdorfer, Deputy Assistant Attorney General, Civil Division, United States Department of Justice). The Federal Courts Study Committee has also recommended substantial abolition of diversity jurisdiction. *See* Federal Courts Study, *supra* note 2, at 44.

133. Most of the reform proposals are directed at developing devices to consolidate complex cases in single federal forums. *See* ALI Complex Litigation Project P.D. No. 2, *supra* note 4, § 5.01, at 37-38; ABA Report 126, *supra* note 2, at 37-38; *see also* Conway, *supra* note 18, at 1113 (advocating expansion of federal diversity jurisdiction over complex cases). It would be valuable to develop devices for the consolidation of such cases in single state forums as well. The tenth amendment, however, limits Congress' ability to provide for the consolidation of cases in state courts, except through removal procedures. Any state consolidation solution would need to be accomplished through interstate compacts. An ALI Complex Litigation Project proposal would have provided for consolidation devices in state courts through the auspices of a proposed panel on complex litigation. *See* ALI Complex Litigation Project P.D. No. 2, *supra* note 4, § 5.06, at 162. A later draft proposal from the ALI Complex Litigation Project offered a model interstate complex litigation compact. *See* ALI Complex Preliminary Draft No. 3 (Sept. 19, 1990) § 4.01. Judge Schwarzer also advocates the interstate-compact solution for consol-

jurisdictional theory to facilitate attainment of this common sense goal. And if existing jurisdictional theories do not fit the problem, the reformers are willing to massage, cajole, manipulate and finally contort those theories to permit novel feats of consolidation, removal, reverse-removal and remand of complex cases. Such analytic gymnastics are unacceptable.

The reformers have universally retreated from an article III federal question basis for expanded federal court jurisdiction. This Part explores whether Supreme Court precedent justifies this retreat or whether, instead, there is a credible article III basis for federal question jurisdiction in complex cases. This Part concludes that article III will support federal question jurisdiction for consolidated complex cases. In order to assert such jurisdiction, however, Congress must legislate a "package deal": a jurisdictional provision accompanied by a substantive tort law provision or a federal common law of mass torts. In other words, reformers must be willing to federalize mass tort law in order to gain admission to federal court. Anything less is doomed to frustration and will not solve the multiple dimensions of the complex litigation problem confronting federal courts.

Providing simultaneously for federal substantive tort law and federal consolidation procedure seems a reasonable construction of existing jurisdictional principles and the best solution for mass tort litigation. If a "national" or "interstate" problem of complex litigation largely based in mass tort cases exists, then such litigation presents a national problem that ought to be resolved with both federal substantive and procedural law. If reformers were to view the problem as a national one requiring the creation of federal substantive law, federal question jurisdiction and other federal procedural innovations could be accomplished easily. Moreover, this approach is well within already accepted interpretations of protective jurisdiction, including the holdings of the Supreme Court in *Textile Workers Union of America v. Lincoln Mills of Alabama*,¹³⁴ *Verlinden*¹³⁵ and *Mesa v. California*.¹³⁶

Nevertheless, the reformers remain stubbornly unwilling to accept a federal substantive law solution for mass tort litigation.¹³⁷ The price of

idation of state-based complex cases. See *Hearings, supra* note 118, at 22 (statement of Hon. William W. Schwarzer on behalf of the Judicial Conference of the United States).

134. 353 U.S. 448, 457 (1957).

135. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491-93 (1983).

136. 489 U.S. 121, 138-39 (1989).

137. See, e.g., *Multiparty, Multiforum Jurisdiction Act of 1990*, H.R. 3406, 101st Cong., 2d Sess. § 1658, 136 Cong. Rec. H3116-19 (daily ed. June 5, 1990) (authorizing federal courts to select applicable law for multiparty, multiforum cases according to delineated criteria); ABA Report 126, *supra* note 2, at 40 (Recommendation 3) (proposal to authorize federal courts to create federal choice-of-law principle to govern choice-of-law determinations for mass tort cases); ALI Complex Litigation Project, Preliminary Report on Chapter 6, Choice of Law in State Created Actions 2-4 (November 14, 1989) [hereinafter ALI Preliminary Report] (refusing to recommend congressional enactment of a federal mass tort law; criticizing congressional authorization of federal courts to develop

this resistance is the elimination of possible federal question jurisdiction, because the absence of a federal substantive law eliminates the one valid basis for asserting protective jurisdiction. Thus, the reformers may justifiably be charged with throwing out the baby (federal arising under jurisdiction), but keeping the dirty bath water (references to protective jurisdiction, commerce clause theory and abstention doctrine). If complex litigation reformers insist on referring to the interstate commerce implications of complex litigation in their recommendations, then, at a minimum, they ought to lay unambiguous claim to valid federal question jurisdiction.

A. *Protective Jurisdiction and Complex Litigation Reform*

Notwithstanding the repetition of "arising under" in both provisions, article III federal question jurisdiction is broader than the federal question jurisdiction conferred by the federal-question statute.¹³⁸ It is equally accepted that two related interpretations of article III federal question jurisdiction have emerged during two hundred years of constitutional analysis: the "original ingredient" theory and its lineal offshoot, the protective jurisdiction theory.¹³⁹

The "original ingredient" theory of article III jurisdiction derives from *Osborn v. Bank of the United States*.¹⁴⁰ In *Osborn*, Chief Justice Marshall established the firm rule (but vague concept) that if a federal question "forms an ingredient of the original cause," then jurisdiction over the case is properly vested in federal courts.¹⁴¹ The Supreme Court's subsequent interpretation of *Osborn* is exhaustively analyzed in all stan-

federal common law). For a criticism of attempts to develop a federal choice-of-law rule to apply in complex cases arising from airplane crashes, see Lowenfeld, *supra* note 1, at 170.

138. See L. Brilmayer, *An Introduction to Jurisdiction in the American Court System* 50 (1986); E. Chemerinsky, *Federal Jurisdiction* § 5.2.1, at 222 (1989); M. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 96 (2d ed. 1990); 13B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3562, at 24 (2d ed. 1984 & Supp. 1990); see also P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart and Wechsler's, The Federal Courts and The Federal System* 983-89 (3d ed. 1988) (discussing scope of arising under jurisdiction and validity of protective jurisdiction theory).

Regarding the distinction between statutory and constitutional arising under jurisdiction, Professor Redish states:

[t]he similarity in the language of the constitutional and statutory provisions has, on occasion, caused confusion in determining the appropriate scope of each provision. In analyzing federal question jurisdiction, however, it is of the utmost importance to separate the question of what jurisdiction Congress is constitutionally empowered to provide from the question of what jurisdiction Congress has actually invested in the federal courts.

M. Redish, *supra*, at 84.

139. See, e.g., P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *supra* note 138, at 983-89 (discussing protective jurisdiction theories and their origins); E. Chemerinsky, *supra* note 138, § 5.2, at 221-24 (same); M. Redish, *supra* note 138, at 83-94 (same).

140. 22 U.S. 738 (1824).

141. *Id.* at 823.

dard treatises on federal jurisdiction,¹⁴² and is relevant here only for the conceptual basis it provides for the subsequent development of a protective jurisdiction theory. For the purposes of this development, Marshall's *Osborn* formulation provides the broadest possible construction of arising under jurisdiction.

Generally stated, the concept of protective jurisdiction permits article III federal question jurisdiction where a case or controversy does not involve the construction or interpretation of some federal law. As Professor Redish notes, the theory of protective jurisdiction is just that—a theory. The doctrine is not itself a means of obtaining jurisdiction: “[i]t is merely a method of determining the constitutionality under Article III of congressional attempts to vest jurisdiction in the federal courts over purely state law matters.”¹⁴³ Thus, protective jurisdiction's crucial feature is its grant of federal jurisdiction over a case predicated upon state, not federal, substantive law.¹⁴⁴

The theory of protective jurisdiction is superficially attractive to complex litigation reformers because it provides a possible theoretical rationale for federal court jurisdiction over cases largely predicated on state tort law. All multiparty, multiforum mass tort cases have fit this description. The reformers are faced with difficulties, however, when they attempt to reconcile federal court jurisdiction over such cases with either of the two article I justifications offered for protective jurisdiction.

The two justifications, well-drawn in the literature, were first articulated in articles by Professors Wechsler and Mishkin.¹⁴⁵ Professor Wechsler states the broader theory of protective jurisdiction and Professor Mishkin the narrower. Under either view, article III federal question jurisdiction is analytically tied to article I legislative power. The broader view posits that protective jurisdiction is supportable inferentially where Congress could have legislated some substantive interest under article I, but has not done so.¹⁴⁶ The narrower theory posits that, for protective jurisdiction to be applicable, Congress must have manifested a federal

142. See, e.g., P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *supra* note 138, at 983-89 (discussing *Osborn* and subsequent constructions of the case by Supreme Court and advocates of protective jurisdiction theories); L. Brilmayer, *supra* note 138, at 51-52 (same); E. Chemerinsky, *supra* note 138, § 5.2, at 225-30 (same); M. Redish, *supra* note 138, at 84-95 (same).

143. M. Redish, *supra* note 138, at 90.

144. See *id.*

145. See Wechsler, *supra* note 55, at 224-25; Mishkin, *supra* note 55, at 184-96.

146. See Wechsler, *supra* note 55, at 224-25.

The [broader] theory . . . is that, with regard to subjects concerning which Congress has legislative power under Article I, it can pass a statute granting federal jurisdiction and that the jurisdictional statute is itself a “law of the United States” within Article III, even though Congress has not enacted any substantive rule of decision and thus state law is to be applied.

13B C. Wright, A. Miller & E. Cooper, *supra* note 138, § 3565, at 77-78 (footnotes omitted).

interest actively through legislation.¹⁴⁷

Although the theory of protective jurisdiction has proved perennially popular among academic theorists,¹⁴⁸ its expositors have made little advance on these two basic branches of the theory.¹⁴⁹ Moreover, since the Supreme Court has consistently avoided declaring a definitive position on protective jurisdiction,¹⁵⁰ the doctrine's legitimacy as a basis for expanding article III federal question jurisdiction is uncertain.

1. Evasion and Obfuscation: The Unenlightening, Unencouraging Supreme Court Record on Protective Jurisdiction

The Supreme Court's examinations of protective jurisdiction theory¹⁵¹

147. See Mishkin, *supra* note 55, at 184-96; see also 13B C. Wright, A. Miller & E. Cooper, *supra* note 138, § 3565, at 78 ("A more limited variant of this theory would allow 'protective jurisdiction' only in those areas of the law in which Congress has an articulated and active policy regulating the field.") (footnotes omitted).

148. For examples of the voluminous academic literature considering the theory of protective jurisdiction, see Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 Harv. L. Rev. 1 (1957); Brown, *Beyond Pennhurst: Protective Jurisdiction, the Eleventh Amendment, and the Power of Congress to Enlarge Federal Jurisdiction in Response to the Burger Court*, 71 Va. L. Rev. 343 (1985); Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467 (1986); Currie, *The Federal Courts and The American Law Institute*, 36 U. Chi. L. Rev. 1 (1968); Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. Rev. 542 (1983); Note, *Over-Protective Jurisdiction?: A State Sovereignty Theory of Federal Questions*, 102 Harv. L. Rev. 1948 (1989) [hereinafter Note, *Over-Protective Jurisdiction*]; Note, *Protective Jurisdiction and Adoption as Alternative Techniques for Conferring Jurisdiction on Federal Courts in Consumer Class Actions*, 69 Mich. L. Rev. 710 (1971); Note, *The Theory of Protective Jurisdiction*, 57 N.Y.U.L. Rev. 933 (1982).

149. See generally Goldberg-Ambrose, *supra* note 148, at 583-95 (discussing Wechsler and Mishkin variations of protective jurisdiction and subsequent interpretations of their theories).

150. See, e.g., *Mesa v. California*, 489 U.S. 121, 137-38 (1989) (not reaching issue of protective jurisdiction because federal interests asserted were sufficiently protected by statute permitting removal upon assertion of federal defense by federal employees sued in state court under state tort theory); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983) (avoiding need to examine theory of protective jurisdiction); *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 457 (1957) (same). But see *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 590-91 (1949) (implicit endorsement of protective jurisdiction by Justices Jackson, Black and Burton in plurality opinion).

Responding to the Court's failure to take a clear position on the doctrine of protective jurisdiction in *Mesa* and earlier cases, Professor Redish has commented that

the Court has [nonetheless] often been willing to employ an individual case to expound upon and provide clarity on a broader legal question. In the case of protective jurisdiction, it would not have been unreasonable for the Court to have taken the opportunity in *Mesa* to clarify the doctrine's reach, at least for the important and limited situation of potential state court hostility towards federal officers.

M. Redish, *supra* note 138, at 94.

151. See, e.g., *Mesa*, 489 U.S. at 137-38 (requiring federal defense to validate federal court jurisdiction pursuant to federal officer removal statute); *Verlinden*, 461 U.S. at 492-94 (finding valid exercise of federal question jurisdiction pursuant to Foreign Sovereign Immunities Act without determining precise boundaries of article III arising under juris-

have been characterized by overcautiousness and obfuscation.¹⁵² Although the Court has discussed the theory of protective jurisdiction many times, it has never forthrightly endorsed the doctrine.¹⁵³ This tradition of non-recognition has continued in the Court's two most recent forays into the realm of protective jurisdiction. The opinion of the Court in the first of these cases, *Verlinden*,¹⁵⁴ displays exemplary fancy footwork regarding article III arising under jurisdiction and the theory of protective jurisdiction.¹⁵⁵

Verlinden is a poorly articulated and unfortunate decision for protective jurisdiction enthusiasts because it provides little support for theories of expansive article III jurisdiction. First, *Verlinden* specifically repudiated reliance on a protective jurisdiction theory.¹⁵⁶ Once the Court found valid arising under jurisdiction through congressional exercise of article I legislative powers, it effectively recognized protective jurisdiction. Yet the Court avoided the options of either explicitly embracing a protective jurisdiction rationale or explaining more clearly why it refrained from relying on the doctrine.¹⁵⁷

Second, the *Verlinden* Court's determination that the provisions of the Foreign Sovereign Immunities Act embodied "an aspect of substantive

diction); *Lincoln Mills*, 353 U.S. at 456-57 (avoiding need to determine validity of protective jurisdiction doctrine by holding that statute authorizes federal courts to develop substantive federal common law); *Tidewater*, 337 U.S. at 590-91 (plurality opinion suggesting that Congress may authorize federal courts to adjudicate matters outside of article III jurisdictional categories if such judicial authority is "necessary and proper" to effectuate Congressional purposes); *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. 443, 451-52 (1851) (suggesting that federal question case cannot arise under purely jurisdictional statute passed pursuant to Congress' article I powers over interstate commerce; implicitly repudiating theory of protective jurisdiction).

152. See generally *supra* notes 138, 148 (citing authorities discussing protective jurisdiction doctrine).

153. See *supra* notes 150-151 and accompanying text.

154. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 492 (1983).

155. For interpretations of *Verlinden*, see E. Chemerinsky, *supra* note 138, § 5.2, at 227-29; M. Redish, *supra* note 138, at 89; 13B C. Wright, A. Miller & E. Cooper, *supra* note 138, § 3565, at 82; Brown, *supra* note 148, at 373-75; Note, *supra* note 110, at 209.

156. See *Verlinden*, 461 U.S. at 491 n.17.

157. The Court was convinced that it did not need to reach the petitioner's protective jurisdiction argument to resolve the dispute before it:

[i]n view of our conclusion that proper actions by foreign plaintiffs under the Foreign Sovereign Immunities Act are within Art. III "arising under" jurisdiction, we need not consider petitioner's alternative argument that the Act is constitutional as an aspect of so-called "protective jurisdiction."

Id. at 491 n.17. Yet, the Court's articulation of its basis for finding article III arising under jurisdiction sounds very much like protective jurisdiction theory:

[b]y reason of its authority over foreign commerce and foreign relations, Congress has the undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States. . . . and the primacy of federal concerns is evident.

To promote these federal interests, Congress exercised its Art. I powers by enacting a statute comprehensively regulating the amenability of foreign nations to suit in the United States.

Id. at 493 (citation omitted; footnote omitted).

federal law" was disingenuous.¹⁵⁸ The *Verlinden* decision, which permitted a foreign plaintiff to sue a foreign sovereign in a United States federal court, was predicated on a legal claim grounded wholly in state contract law.¹⁵⁹ This result clearly constitutes protective jurisdiction.¹⁶⁰ The Court conveniently ignored the central underlying facts of the case in its efforts to "find" an applicable body of substantive federal law that justified bringing the *Verlinden* lawsuit within arising under jurisdiction.¹⁶¹

Third, *Verlinden* is recognized as standing for the proposition that article III arising under jurisdiction is not supported by statutes that do nothing more than grant jurisdiction over a particular class of cases.¹⁶² Ironically, the *Verlinden* Court never stated such an authoritative principle. The Court merely alluded to this reasoning in its summary of the Court of Appeals' rationale for denying valid federal court jurisdiction.¹⁶³ From a reading of this summary, which consists largely of dicta, it is not clear that the Court endorsed the principle of jurisdictional invalidity in the absence of federal substantive law.¹⁶⁴

158. *Id.* at 496-97 (1983).

In enacting the Foreign Sovereign Immunities Act, Congress expressly exercised its power to regulate foreign commerce, along with other specified Art. I powers. As the House Report clearly indicates, the primary purpose of the Act was to "se[t] forth comprehensive rules governing sovereign immunity" the jurisdictional provisions of the Act are simply one part of this comprehensive scheme. The Act thus does not merely concern access to the federal courts. Rather, it governs the types of actions for which foreign sovereigns may be held liable in a court in the United States, federal or state. The Act codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law, and applying those standards will generally require interpretation of numerous points of federal law.

Id. (citations omitted).

159. *See id.* at 482-84. In fact, *Verlinden* would have been decided under nonfederal law by virtue of a contractual choice-of-law provision specifying application of Dutch law. *See Brown, supra* note 148, at 373 n.186 (footnote omitted).

160. "For present purposes it is perhaps enough to note that the F[oreign] S[overeign] I[mmunities] A[ct] certainly looks like an exercise of protective jurisdiction and that . . . the Supreme Court manifested a decidedly hospitable approach to suits brought under the Act." *Brown, supra* note 148, at 375.

161. The Court reached this result without reference to any theory of protective jurisdiction.

162. In *Verlinden*, we discussed the distinction between "jurisdictional statutes" and "the federal law under which [an] action arises, for Art. III purposes," and recognized that pure jurisdictional statutes which seek "to do nothing more than grant jurisdiction over a particular class of cases" cannot support Art. III "arising under" jurisdiction.

Mesa v. California, 489 U.S. 121, 136 (1989) (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491-92 (1983)) (footnote omitted).

163. *See Verlinden*, 461 U.S. at 495-96.

164. *See* 13B C. Wright, A. Miller & E. Cooper, *supra* note 138, § 3565, at 81.

The Second Circuit held that the case did not come within the "arising under" language of Article III, § 2. It reasoned that the "arising under" clause must be limited to cases arising under a substantive law, for to hold that a purely jurisdictional statute, with no substantive content, comes within the "arising under" clause would make the eight other types of jurisdiction listed in Article III, § 2 mere surplusage.

This gloss on *Verlinden* and previous protective jurisdiction cases has significant consequences for complex litigation reformers. Repetition of the Court's dicta dooms any prospect of creating just a "purely jurisdictional" statute for complex cases, especially in the absence of accompanying substantive federal law. If the Court has been reluctant to endorse the theory of protective jurisdiction even when an article I legislative purpose is present, there can be little hope that the Court will endorse this theory for a "purely" jurisdiction-conferring statute.

With this construction of *Verlinden* reigning, the Supreme Court's recent pronouncements in *Mesa*¹⁶⁵ represent a denouement of the protective jurisdiction saga. *Mesa* concerned the ability of federal employees prosecuted for vehicular violations under state law to remove their cases from state to federal court under a federal removal statute.¹⁶⁶ The issue was whether the federal court could assume valid federal question jurisdiction under the removal statute. The Court held that, absent the assertion of a federal defense (such as a claim of federal immunity), the removal statute alone could not confer valid arising under jurisdiction.¹⁶⁷ Implicitly, then, raising a federal defense would be a sufficient basis for valid federal arising under jurisdiction.¹⁶⁸ In *Mesa*, the drivers' failure to raise such a defense frustrated their efforts to remove their cases to federal court.¹⁶⁹

The *Mesa* Court recited what has become the canon of the protective

Id. (citing *Verlinden B.V. v. Central Bank of Nigeria*, 647 F.2d 320, 329 (2d Cir. 1981), *rev'd*, 461 U.S. 480 (1983)) (footnote omitted).

165. *See Mesa*, 489 U.S. at 137-39.

166. *See id.* at 123-24. The federal removal statute involved was 28 U.S.C. § 1442(a) (1988), which states in pertinent part:

[a] civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for any act under color of office or in performance of his duties or

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

167. *See Mesa v. California*, 489 U.S. 121, 137-38 (1989).

168. *See id.* at 137. The *Mesa* Court also suggested that the purpose of the removal statute was to overcome the so-called "well-pleaded complaint" rule, which requires the pleader to raise a federal question in the complaint in order for there to be valid federal question jurisdiction. *See id.* at 136-37. Conversely, the rule prohibits founding federal question jurisdiction on the basis of raising (or the anticipated raising of) a federal question in a responsive pleading. *See id.* (citing *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152 (1908), *overruled on other grounds*, *Smith v. Kansas City*, 255 U.S. 180 (1921)).

169. *See id.* at 127.

jurisdiction theory. First, the Court again evaded staking a position regarding protective jurisdiction even though the Government's argument invited the Court to do so.¹⁷⁰ Second, the Court construed the removal provision as purely procedural and repudiated the possibility of valid arising under jurisdiction pursuant to such a statute.¹⁷¹ Third, the Court reaffirmed the necessity for some protectable federal interest to support arising under jurisdiction.¹⁷²

Mesa is as interesting for what it did not decide as it is for what it did decide. The case left open the possibility that if there were some provable "hostility" toward federal officers in the state forum, the federal government might have better grounds for asserting a protectable federal interest and therefore valid arising under jurisdiction.¹⁷³ This suggestion recognizes a protective function for federal arising under jurisdiction similar to the purpose of diversity jurisdiction.

Professor Mishkin recognized that the theory of protective jurisdiction is linked to the underlying purpose of federal diversity jurisdiction.¹⁷⁴ According to Mishkin, the possibility of a prejudiced, unsympathetic or less effective state forum would supply a federal jurisdictional basis wholly independent of applicable federal substantive law.¹⁷⁵ This con-

170. [w]e have, in the past, not found the need to adopt a theory of 'protective jurisdiction' to support Art. III 'arising under' jurisdiction . . . and we do not see any need for doing so here because we do not recognize any federal interests that are not protected by limiting removal to situations in which a federal defense is alleged.

Id. at 137 (citing *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491 n.17 (1983)).

171. "Section 1442(a), in our view, is a pure jurisdictional statute, seeking to do nothing more than grant district court jurisdiction over cases in which a federal officer is a defendant. Section 1442(a), therefore, cannot independently support Art. III 'arising under' jurisdiction." *Id.* at 136.

172. "In these prosecutions, . . . we can discern no federal interest in potentially forcing local district attorneys to choose between prosecuting traffic violations hundreds of miles from the municipality in which the violations occurred or abandoning those prosecutions." *Id.* at 137-38. The Court noted that "no state court hostility or interference has even been alleged by petitioners." *Id.*

173. *See id.* at 137-39. In his concurrence, Justice Brennan also noted this possible rationale for protective jurisdiction:

[i]t is not at all inconceivable, however, that Congress' concern about local hostility to federal authority could come into play in some circumstances where the federal officer is unable to present any "federal defense." . . . The removal statute, it would seem to me, might well have been intended to apply in such unfortunate and exceptional circumstances.

Id. at 140 (Brennan, J., concurring); *see* M. Redish, *supra* note 138, at 93-94.

174. "The constitutional provisions for jurisdiction based on diversity of citizenship, as well as some of the other Article III clauses couched in terms of the parties to the litigation, certainly testify that use of the national judiciary for 'protective' purposes is not *per se* improper." Mishkin, *supra* note 55, at 185. Mishkin further suggests that with regard to diversity jurisdiction, "the Constitution made express provision for federal jurisdiction entirely apart from the substantive law governing the cases The function of federal jurisdiction under such circumstances must be the protection of one of the litigants from possibly unsympathetic or less effectual state tribunals." *Id.* at 185 n.125.

175. *See id.* at 184-85.

cept was similarly recognized in *Mesa*.¹⁷⁶ If the suggestion in that case were followed to its logical conclusion, *Mesa* could conceivably support the most expansive theory of protective jurisdiction.

2. The Implications of *Verlinden* and *Mesa* For a Protective-Jurisdiction Theory of Complex Litigation

What is remarkable about *Verlinden* and *Mesa* is that the Court rejected the theory of protective jurisdiction while pragmatically embracing its concrete application. The Supreme Court seems to be saying "do what I do, not what I say."

Thus, the Court will not endorse a theory of protective jurisdiction but will validate any jurisdictional statute that has an arguable article I basis or federal substantive interest manifested through a comprehensive scheme of regulation. This is certainly an open invitation to the invocation of the interstate commerce clause,¹⁷⁷ or even more creatively, the necessary-and-proper clause¹⁷⁸ as a means of expanding the jurisdiction of federal courts. As *Verlinden* amply demonstrates, one need only vaguely raise some federal substantive interest in order to pass constitutional muster.

Moreover, *Mesa* suggests that if there is some demonstrable state forum "hostility" to a federal interest, this hostility might supply a basis for arising under jurisdiction,¹⁷⁹ although such jurisdiction would not be deemed protective. *Mesa*, therefore, raises the glimmer of Mishkinian-style federal court jurisdiction derived from some intrinsic difference between the abilities of state and federal forums to adjudicate complex cases.¹⁸⁰

Thus, *Mesa* may afford fertile tilling ground for complex litigation reformers. In order to remain consistent, however, reformers must take care not to overstate the state-federal disparity argument when reverse-removal or remand proposals also loom on the reform horizon. Those

176. See *Mesa v. California*, 489 U.S. 121, 137-39; *id.* at 140 (Brennan, J., concurring).
177. U.S. Const. art. I, § 8.

178. U.S. Const. art. I, § 8. *But cf.* *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 655 (1949) (Frankfurter, J., dissenting) (rejecting Justice Jackson's position, which failed to command majority, that Congress has power to expand judicial jurisdiction beyond article III limitations through exercise of necessary-and-proper clause power); M. Redish, *supra* note 138, at 23-24 (discussing *Tidewater*).

179. Pursuant to this view, federal jurisdiction could be asserted in the absence of a specifically applicable federal substantive law.

180. See, e.g., Chemerinsky, *Federal Courts, State Courts, and the Constitution: A Rejoinder to Professor Redish*, 36 UCLA L. Rev. 369, 377 (1988) (acknowledging differences between federal and state forums, but arguing that permitting parties to choose between two forums will best insure that constitutional rights are protected); Chemerinsky, *Parity Reconsidered: Defining a Role for The Federal Judiciary*, 36 UCLA L. Rev. 233, 237 (1988) (arguing that federal courts' role is to provide a necessary "alternative forum for the vindication of constitutional rights"); Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. Rev. 329, 329-32 (1988) (arguing that federal courts offer superior forum for adjudicating constitutional disputes).

who would argue for federal forum superiority will encounter difficulty in arguing for federal prudential abstention in favor of state courts.¹⁸¹

B. *The Commerce Clause and Complex Litigation Reform*

At first glance, the independent invocation of a commerce clause theory in support of expansive federal court jurisdiction seems confusing. Regulation of interstate commerce is solely a function of article I legislative powers. Therefore, in order to be valid under Article III, an independent interstate commerce argument must also be supported by a protective jurisdiction theory. Nonetheless, complex litigation reformers argue that the Constitution provides a commerce clause basis for federal question jurisdiction distinct from the theory of protective jurisdiction.¹⁸² The reformers do not spell out this independent theory. Instead, they perfunctorily refer to the problem of interstate commerce implicated by complex litigation and to the attendant congressional power to regulate.¹⁸³ This vague invocation of an interstate commerce theory requires the reformers to apply various reigning commerce clause principles broadly. In so doing, as indicated by their universal reliance upon *Garcia*,¹⁸⁴ the reformers envision a commerce clause interpretation that supports both sweeping substantive and procedural reform.

As Professor Redish observed in regard to *Garcia*, "[o]ne might argue that in light of the extremely broad congressional authority to legislate in virtually any area, there today exists no constitutional limit on congressional power to authorize federal courts to supplant state substantive law."¹⁸⁵ If Redish is correct, the reformers' commerce clause rationale would indeed validate a jurisdictional reform proposal for complex litigation that affords a federal forum in absence of federal substantive law.¹⁸⁶

Thus, the issue is whether the commerce clause power, as construed in *Garcia*, invites or precludes any affirmative limitation on Congress' ability to confer federal question jurisdiction for certain classes of complex cases.¹⁸⁷ Stated differently, does *Garcia* permit Congress to do what the

181. See *infra* Part II B (3).

182. See ALI Complex Litigation Project P.D. No. 2, *supra* note 4, § 5.01, at 54; ABA Report 126, *supra* note 2, at 24; Weinstein, *Preliminary Reflections*, *supra* note 3, at 24. That same conceptual distinction is implied by citation to and reliance on commerce clause cases. See *supra* note 26 (citing commerce clause cases). These cases are cited apart from the separate line of protective jurisdiction cases.

183. See *supra* notes 30, 37-39 and accompanying text.

184. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); see *supra* notes 26-38 and accompanying text.

185. M. Redish, *supra* note 138, at 21 n.80 (citing *Garcia*).

186. *But see* Note, *Over-Protective Jurisdiction*, *supra* note 148, at 1963 ("Yet there is no obvious reason for reading *Garcia's* interpretation of the tenth amendment checks on the commerce power into the jurisdictional provisions of article III.").

187. See, e.g., Jablonski, Jr., *Does Garcia Preclude an Eleventh Amendment Affirmative Limitation on the Congress's Commerce Clause Power?*, 23 U. Rich. L. Rev. 1, 36 (1988) (suggesting that eleventh amendment imposes affirmative limitation on Congress' commerce clause power).

Court's protective jurisdiction cases intimate Congress cannot do: enact a purely jurisdictional statute providing access to federal court for a class of cases? Are there any constitutional limitations on Congress' ability to do this?

1. *Garcia*, the Commerce Clause Power and Federalism

Garcia is typically cited with many of the standard commerce clause cases¹⁸⁸ for the proposition that the commerce clause authorizes Congress to legislate innovative procedural rules for complex litigation.¹⁸⁹ Complex litigation is viewed as a proper object of federal interstate commercial regulation, much like labor practices, public accommodations, sick chickens and waving wheat.

Perhaps complex litigation reformers feel no need to articulate what constitutes the interstate commerce element of complex litigation because of the expansive reading they give to the commerce clause power. Nonetheless, it is easy enough to describe the interstate nature of complex cases. Such litigation involves multiple parties in many forums; it typically involves injuries from products or services bought and sold across state lines; the litigants, lawyers and judges travel from jurisdiction to jurisdiction; and the instruments of legal practice, such as telephone, express mail and fax messages, all involve interstate communications. Transaction costs, damages and remedies all have an effect on local and interstate economies.

These issues, however, obscure the fact that the legal claims underlying most complex cases are based on state rather than federal law. State substantive law supplies the theories of relief and, except for non-problematic diversity cases,¹⁹⁰ state procedural law provides a state forum for adjudication. Complex litigation reformers conclude, however, that the various interstate aspects of complex litigation provide the basis for article I commerce clause regulation of the procedural phenomenon of complex cases.¹⁹¹ In a sense this is justified, because the *Garcia* Court, in repudiating the "traditional governmental functions" limitation of *Na-*

188. For a list of the leading commerce clause cases, see *supra* note 26.

189. See, e.g., *Conway*, *supra* note 18, at 1116 ("It is well-settled law that Congress may regulate any activity, however local in nature, if it rationally finds that the activity affects interstate or foreign commerce in any discernible way."); Weinstein, *Preliminary Reflections*, *supra* note 3, at 23 ("Under the Commerce Clause, Congress arguably has the power to transfer to the federal court those state cases not presently removable, on the ground that in disputes of this size and nature, national issues predominate.") (footnote omitted).

190. Non-problematic diversity cases are those cases that satisfy the complete diversity requirement of the federal diversity statute. See *Strawbridge v. Curtiss*, 7 U.S. 267, 267 (1806). Even in cases that satisfy the complete diversity requirement and therefore have proper article III jurisdiction under 28 U.S.C. § 1332 (1988), state law provides the governing substantive law. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

191. See *supra* note 182 and accompanying text.

tional League of Cities v. Usery,¹⁹² effectively sanctioned the broadest possible article I regulatory power of Congress.¹⁹³

The invocation of *Garcia*, however, confuses the jurisdictional issue and diverts attention from the fundamental constitutional problem manifest in complex litigation reform. *Garcia* is concerned with federalism: the ability of Congress to regulate in areas in which states have traditionally exercised their police powers.¹⁹⁴ It can now be conceded that this power is broad enough to encompass any definition of complex litigation.¹⁹⁵ Nonetheless, the exercise of this federal regulatory power is a tenth amendment problem, not an article III problem. The critical commentary concerning the *Garcia* decision correctly focuses on the tenth amendment limitations on Congress' commerce clause power and views the exercise of that power as an infringement on state autonomy within a federal system of government.¹⁹⁶ It is highly questionable, however, whether the broad commerce clause power recognized in *Garcia* grants Congress the power to evade article III jurisdictional requirements.

2. *Garcia*, The Commerce Clause, and Separation-of-Powers Theory

The constitutional question that complex litigation reformers ought to be considering is not whether current commerce clause jurisprudence supports substantive congressional regulation of complex cases. Clearly it does. Rather, the reformers should address the question of whether *Garcia* or any other commerce clause theory authorizes Congress to utilize article I as a means of evading article III's jurisdictional requirements. Unless the Supreme Court endorses a theory of protective jurisdiction, it does not.

The jurisdictional problem latent in all complex litigation proposals is not a *Garcia* problem; *Garcia* obviates lurking federalism problems.¹⁹⁷ Rather, the reformers' jurisdictional proposals implicate a separation-of-

192. 426 U.S. 833, 852 (1976), *overruled*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

193. See generally Comment, *Garcia v. San Antonio Metropolitan Transit Authority and the Manifest Destiny of Congressional Power*, 8 Harv. J.L. & Pub. Pol'y 745, 764 (1985) (*Garcia's* "vision of federalism is frightening"); Comment, *State Autonomy After Garcia: Will the Political Process Protect States' Interests?*, 71 Iowa L. Rev. 1527, 1544 (1986) (political process insufficient restraint on federal commerce power; not reliable in protecting state autonomy); Comment, *The Tenth Amendment After Garcia: Process-Based Procedural Protections*, 135 U. Pa. L. Rev. 1657, 1681-82 (1987) (authored by Thomas H. Odom) [hereinafter Odom] (offering proposals for procedural safeguards of state interests in light of *Garcia*); cf. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1388 (1987) (criticizing expansive construction of commerce clause power); Redish & Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 4 Duke L.J. 569, 571 (1987) (no legitimate source for exercise of dormant commerce clause power).

194. See Redish & Nugent, *supra* note 193, at 591-99.

195. See *supra* notes 22-26 and accompanying text.

196. See *supra* note 193.

197. Federalism issues lurk, however, in proposals for expanded removal jurisdiction, reverse-removal or mandatory state consolidation that would take cases away from state

powers issue that the reformers have not identified in their commentaries. Thus, the important question is not whether article I authorizes an expansion of article III federal court jurisdiction to encompass state-based claims, but whether article III itself imposes a limit on congressional article I authority to determine the scope of federal court jurisdiction.

As a limiting principle, the separation-of-powers doctrine suggests

that even if the terms of Article III do not prevent Congress from abolishing the Supreme Court's appellate jurisdiction or the jurisdiction of the lower federal courts, other constitutional doctrines — specifically the separation of powers implicit in the constitutional scheme and the due process clause — may impose important limitations on Congress' power to regulate jurisdiction.¹⁹⁸

Separation-of-powers doctrine is recognized as imposing limitations upon Congress' ability to restrict federal court jurisdiction. Thus, it is argued that "Congress has discretion both to create lower federal courts and to determine their jurisdiction, but Congress may not restrict the jurisdiction in a manner that violates other constitutional provisions."¹⁹⁹ Moreover, separation-of-powers theory posits that while Congress may have the power to contract or expand federal court jurisdiction, Congress cannot exercise its authority in a manner that interferes with the exercise of that jurisdiction.²⁰⁰ To do so would interfere with the internal operations of a coequal branch of government.

Because analysis of the separation-of-powers issue has centered chiefly on the validity of jurisdiction-stripping enactments, most analysis of the article III separation-of-powers doctrine provides little guidance for cur-

courts or, in the alternative, force state courts to adjudicate consolidated proceedings. See *infra* Part III.

198. M. Redish, *supra* note 138, at 41. Professor Chemerinsky has also discussed the limits on Congressional power to exceed article III jurisdictional limitations:

The general rule is that Congress cannot assign to Article III courts additional duties beyond deciding Article III cases and controversies. The most important implication of this principle is that Congress cannot override constitutional limits on federal court jurisdiction. For example, if the Court finds that certain standing requirements are constitutionally required, Congress may not eliminate them by statute because the effect of doing so would be to expand federal jurisdiction beyond the limits set in Article III.

E. Chemerinsky, *supra* note 138, § 3.4, at 180.

Professor Chemerinsky notes, however, that "[c]ommentators have developed an additional theory justifying congressional expansion of federal court jurisdiction, termed 'protective jurisdiction.' This theory is that Congress may authorize jurisdiction to protect federal interests." *Id.* § 3.4, at 180 n.14 (citation omitted).

199. *Id.* § 3.3, at 173. The most frequently cited example of an impermissible restriction is one that would violate due process of law. See *id.* § 3.3, at 173-76. Other impermissible restrictions might arise from undue limitations on constitutional-rights litigation or restriction of available remedies. See *id.* § 3.3, at 176-77; see also M. Redish, *supra* note 138, at 41-52 (discussing separation of powers and due-process limitations on congressional expansion of federal court jurisdiction).

200. See M. Redish, *supra* note 138, at 47.

rent complex litigation proposals.²⁰¹ These proposals, by contrast, involve jurisdiction-conferring provisions, and thus raise the unexplored question of whether the expansion of jurisdiction to include state law-based complex cases would be constitutionally permissible.²⁰²

No one contests Congress' authority to vest jurisdiction in the lower federal courts to the full extent of article III. The issue that complex litigation reform raises, however, is whether "Congress [could] go even further and add other matters to the jurisdiction of the federal courts."²⁰³ The answer must surely be no; any other construction contains the potential for the exercise of article I power to divest state courts of their adjudicatory functions completely.²⁰⁴ While *Garcia* eliminates any tenth or eleventh amendment limitations on congressional exercise of the commerce clause power,²⁰⁵ it does not eliminate article III's limitations on the jurisdiction of federal courts.²⁰⁶ Thus, although minimal diversity proposals come within Congress' authority to vest federal courts with diversity jurisdiction to the full extent of article III,²⁰⁷ it is doubtful that any proposal to create federal court jurisdiction to hear state-based claims, in the absence of federal substantive legislation, can pass constitutional muster.²⁰⁸ If this is to be accomplished, evading the theory of protective jurisdiction that is so anathema to the Supreme Court will be difficult. Ironically, it seems that only by adopting a theory of protective jurisdiction could the Court give full effect to *Garcia*'s recognition of broad interstate commerce power. *Garcia*, while recognizing a broad congressional interstate commerce regulatory power, does not go so far

201. See *id.* at 41-52; E. Chemerinsky, *supra* note 138, § 3.4, at 180.

202. See E. Chemerinsky, *supra* note 138, § 3.4, at 180. The threshold question of what constitutes an article III case or controversy is itself a subject of current academic debate. See, e.g., Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. Rev. 205, 240-46 (1985) (distinguishing between two categories of article III cases, those that are party defined and those that are subject matter defined); Bandes, *The Idea of a Case*, 42 Stan. L. Rev. 227, 281-92 (1990) (defining case for article III purposes through reference to federal courts' role in protecting federal constitutional rights).

203. E. Chemerinsky, *supra* note 138, § 3.4, at 178.

204. In his *Lincoln Mills* dissent, Justice Frankfurter recognized that the doctrine of protective jurisdiction implies that federal courts have the power to strip state courts of adjudicatory power. See *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 473-76 (1957) (Frankfurter, J., dissenting); see also M. Redish, *supra* note 138, at 92-93 (discussing Frankfurter dissent); C. Wright, *The Law of Federal Courts* 110-111 (4th ed. 1983) (criticizing theory of protective jurisdiction).

205. See Note, *Over-Protective Jurisdiction*, *supra* note 148, at 1963.

206. "[T]he Court's reluctance to find substantive protections in the tenth amendment should carry no weight in the jurisdictional context." *Id.* at 1964; see also *supra* notes 187, 193 (discussing limitations upon congressional expansion of federal court jurisdiction).

207. See *supra* notes 16-18, 76.

208. Of course, federal courts hear what are in essence state-based claims when adjudicating diversity suits that meet the current requirement of complete diversity. See 28 U.S.C. § 1332 (1988); *supra* note 190; see also Note, *Over-Protective Jurisdiction*, *supra* note 148, at 1964 n.121 ("Even commentators who favor *Garcia*'s rationale might argue that states should be accorded deference in interpreting their own bodies of law.").

as to permit concomitant expansion of article III jurisdiction. Thus, in the absence of federal substantive regulation, only a theory of protective jurisdiction can give federal jurisdictional effect to the regulatory power recognized by *Garcia*.

3. The Abstention-Doctrine Corollary

In what may be their most unusual and resourceful legal analysis, the complex litigation reformers have attempted to use abstention theory to support proposed inter-system procedural devices, most notably antisuit injunction²⁰⁹ and reverse-removal provisions.²¹⁰ The invocation of abstention theory as a support for these proposals²¹¹ is anomalous because abstention theory is not directed at the expansion or contraction of federal court jurisdiction. Rather, abstention doctrine is concerned with circumstances in which courts choose not to exercise their jurisdictional power.²¹² The reformers' manipulation of abstention theory to support devices designed to consolidate cases in federal and state courts simultaneously suggests the weaknesses in abstention theory, while highlighting the logical tensions in complex litigation jurisdictional theory.

a. *Abstention Theory in Support of Antisuit Injunction Provisions*

In an effort to ensure consolidation of cases in either federal or state court, complex litigation reformers propose expanding the antisuit injunctive power to halt parallel or duplicative proceedings in another forum.²¹³ The simple idea is to close down any individualized litigation in an alternative forum, thereby forcing litigants to adjudicate claims in one

209. See, e.g., ALI Complex Litigation Project C.D. No. 2, *supra* note 4, § 5.04, at 102 (proposed antisuit injunction provision); Weinstein, *Preliminary Reflections*, *supra* note 3, at 23 n.61 (discussing federal courts' power to stay or dismiss parallel state proceedings or dismiss federal cases where there are parallel state proceedings).

210. See, e.g., ALI Complex Litigation Project P.D. No. 2, *supra* note 4, § 5.08(a), at 200 (proposed reverse-removal provision); Conway, *supra* note 18, at 1120-21 (arguing that federal courts have power to transfer complex cases to state courts under rule of *Colorado River*).

211. See *supra* notes 13, 31-34, 99-104 and accompanying text.

212. See Friedman, *supra* note 13, at 534. Abstention theory is a popular subject among academic commentators. For examples of the recent literature, see Gibson, *Private Concurrent Litigation in Light of Younger, Pennzoil, and Colorado River*, 14 Okla. City U.L. Rev. 185 (1989); Stravitz, *Younger Abstention Reaches a Civil Maturity: Pennzoil Co. v. Texaco Inc.*, 57 Fordham L. Rev. 997 (1989); Vairo, *Making Younger Civil: The Consequences of Federal Court Deference to State Court Proceedings—A Response to Professor Stravitz*, 58 Fordham L. Rev. 173 (1989); see generally C. Wright, *supra* note 204, § 52, at 302 (4th ed 1983) (discussing abstention doctrines). For a good bibliographic note on recent academic commentary on the various abstention doctrines, see Friedman, *supra* note 13, at 530 n.2.

213. See ALI Complex Litigation Project C.D. No. 2, *supra* note 4, § 5.04 at 102. Section 5.04 provides:

(a) In actions transferred and consolidated pursuant to § 3.01, the transferee court may enjoin related proceedings, or portions thereof, pending in any State or United States trial court whenever it determines that the continuation of those actions substantially impairs or interferes with the consolidated actions

consolidated proceeding. There is no bar in federal law to using such injunctions in parallel, duplicative federal proceedings,²¹⁴ although such injunctions do require the cooperation of the federal courts.²¹⁵

There are, however, only three methods to overcome the state antisuit injunctive bar.²¹⁶ The first is through congressional authorization,²¹⁷ the second is through judicial declaration that such an injunction is " 'necessary in aid of [the federal court's] jurisdiction,' "²¹⁸ and the third is through a finding that an injunction is necessary to protect or effectuate a court's judgment.²¹⁹ The reformers have chosen the statutory route.²²⁰ They rationalize this choice by arguing that what Congress can take away it can also give back: "[t]he principle behind this exception [of express congressional authorization] is relatively simple: [28 U.S.C.] Section 2283 [the federal anti-injunction statute] is a congressional limit on federal judicial power, and therefore Congress can override or alter those limits in appropriate circumstances."²²¹

Such a state-proceeding injunctive power raises concerns about federalism. The anti-injunction statute was enacted to " 'prevent needless friction between state and federal courts.' "²²² The reformers' proposals to

and that an injunction would promote the just and efficient resolution of the actions.

(b) Factors to be considered in deciding whether an injunction should issue under subsection (a) include

- (1) how far the actions to be joined have progressed;
- (2) the degree to which the actions pending in the other courts share common questions with and are duplicative of the consolidated actions; and
- (3) the extent to which the actions to be enjoined involve issues or claims of federal law.

214. See *Kerotest Mfg Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183-85 (1952).

215. See, e.g., *Sherman*, *supra* note 1, at 518-522 (describing injunctive dispute between federal trial judges in Eastern District of Pennsylvania and Eastern District of Texas).

216. See 28 U.S.C. § 2283 (1988); 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §§ 4224-26, at 515-19 (2d ed. 1988).

217. See 17 C. Wright, A. Miller & E. Cooper, *supra* note 216, § 4224, at 520-28.

218. *Id.* § 4225, at 528 (quoting 28 U.S.C. § 2283 (1988)).

219. See *id.* § 4226, at 534-58.

220. See *supra* Part I.

221. ALI Complex Litigation Project C.D. No. 2, *supra* note 4, § 5.04, at 111. Inexplicably, the ALI Reporters have not made the most logical choice, which is to permit judges to issue such injunctions in complex cases for the purpose of promoting judicial economy. Without having chosen that route, the ALI Reporters nonetheless seem to suggest that promotion of judicial economy is a compelling motivation underlying the proposed statute. The Reporters state:

[t]he rationale supporting injunctive power in the complex litigation context is very analogous [to the interpleader statutory exception]. The purpose behind requiring all actions to be consolidated before the transferee court is both to reduce the diseconomies caused by claim dispersion and to protect litigants from duplicative and potentially conflicting or inconsistent results. As with interpleader, no one state has the power to effect a solution that will reach across state boundaries; a national solution requires the assertion of federal power.

Id. § 5.04, at 112 (citation omitted).

222. C. Wright, *supra* note 204, § 47, at 278 (quoting *Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co.*, 309 U.S. 4, 9 (1940)).

override this antisuit injunctive prohibition must be supported by a justification that does not encroach on the federalism concerns underlying the statute. With shameless ingenuity, the reformers capture abstention theory and turn it on its head to serve the ends of federalized, consolidated proceedings. The reformers suggest that

[t]he federalism concerns articulated in various abstention doctrines are merely prudential. They are binding on the courts by the operation of stare decisis, but they do not delimit Congress' ability to regulate the federal courts. However, determination that abstention doctrines do not pose a barrier to legislation authorizing antisuit injunctions in complex litigation does not mean that the federalism notions they embrace should be or are ignored.²²³

Thus, the reformers use abstention theory, which has traditionally been interpreted to permit federal court abdication of jurisdiction in favor of parallel state court proceedings, to justify the denial of state court jurisdiction over complex cases. Rather than using abstention doctrine to restrict the exercise of federal jurisdiction, the reformers press abstention theory into service to expand federal jurisdiction. This is reverse mandatory abstention, and how this serves the ends of federalism and comity is unclear.²²⁴

In a further bizarre manipulation of abstention theory, the antisuit injunction advocates pay ritual obeisance to federalism concerns by pointing to the discretionary nature of the injunctive power. Thus, "[i]n exercising its discretion, the transferee court will weigh the possible negative effect a particular injunction may have on the proceeding to be enjoined against the benefits of encouraging aggregative proceedings.²²⁵ Included in the calculus will be the concerns reflected in the various abstention doctrines."²²⁶ The discretionary factors included in the calculus, derived from the various abstention doctrines, include: how far the various actions have progressed; the degree to which the actions pending in other forums duplicate consolidated proceedings; and whether the actions to be enjoined involve issues or claims of federal law.²²⁷

These enumerated factors bear scant relation to the policies of federalism and comity underlying the three major branches of abstention theory.²²⁸ This list, however, bears an uncanny resemblance to so-called

223. ALI Complex Litigation Project C.D. No. 2, *supra* note 4, § 5.04, at 113.

224. The Drafters assert that abstention doctrines are prudential rather than constitutional. *See id.* But *see* E. Chemerinsky, *supra* note 138, § 3.4, at 180 (noting possibility that some elements of abstention doctrines are constitutionally compelled).

225. The Reporters cite to a list of factors to be considered by district courts. *See* ALI Complex Litigation Project C.D. No. 2, *supra* note 4, § 5.04(c), at 113 (citing factors listed *id.* § 5.04(b), at 102).

226. *Id.* § 5.04, at 113 (citation omitted).

227. *See id.* § 5.04(c)-(d), at 115-20.

228. *See supra* note 102 and accompanying text. Although the abstention doctrines are all well-delineated, there is some debate on their characterization. *See, e.g.,* Fried-

fourth-branch abstention, notorious for its frank reliance on "considerations of '[w]ise judicial administration'"²²⁹ and for its lip service to the interests of federalism and comity.²³⁰ Although reliance on fourth-branch abstention doctrine is dubious enough, the reformers again perpetrate a peculiar theoretical inversion: in the interests of consolidated complex litigation, prudential factors are invoked not to yield federal court jurisdiction but to shore it up.

What is ultimately most confusing about the reformers' invocation of abstention theory in support of antisuit injunction provisions is that such proposals distort abstention theory to support a result antithetical to the doctrine's underlying purpose. Abstention doctrine conventionally sanctions federal court deference to state court adjudication. It is this very deference that accomplishes the traditionally stated goals of federalism and comity.²³¹ Implicit in this deference is an acceptance of the parity of forums.²³² The reformers would have us believe that forced abdication of parallel state proceedings also accomplishes these goals. The logic is that by enjoining duplicative state proceedings and inducing consolidation in a federal forum, the interests of the dual judicial system as a whole are better served.²³³ Federalism is thus enhanced through the assertion of federal judicial power. The reformers ignore, however, that a state antisuit injunction is coercive, while federal court abstention is voluntary. Asserting that either procedure is discretionary does not alter this fundamental distinction. It is one thing to abdicate; it is another to be dethroned.

b. *Abstention Theory in Support of State Forum Consolidation Schemes*

At least two separate complex litigation reform proposals would authorize a new judicial panel on complex or multidistrict litigation to transfer cases to and from state courts.²³⁴ Current statutory provisions

man, *supra* note 13, at 535 n.20 (arguing that abstention doctrines cannot be strictly categorized).

229. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (quoting *Kerotest Mfg Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952)); see *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 13-16 (1983); see also Mullenix, *supra* note 104, at 102 (critical of *Colorado River* abstention discretionary factors); Sonenshein, *supra* note 104, at 652 (same).

230. Although the antisuit injunction advocates cite to the *Colorado River* factors, they nowhere cite to *Colorado River* as authority for the list. Instead, *Colorado River* abstention is innocently lumped with the other abstention doctrines. See ALI Complex Litigation Project C.D. No. 2, *supra* note 4, § 5.04, at 114.

231. See *supra* note 102; *supra* note 113 and accompanying text.

232. See *supra* note 180 and accompanying text.

233. See ALI Complex Litigation Project P.D. No. 2, *supra* note 4, § 5.08, at 204 (Reporter's Note 3) (citing Weinstein, *Preliminary Reflections*, *supra* note 3, at 23-24).

234. See ALI Complex Litigation Project P.D. No. 2, *supra* note 4, § 5.08, at 200-03; Conway, *supra* note 18, at 1107-12. The provision proposed in Preliminary Draft Number Two of the ALI Project would have provided:

(a) Subject to the exceptions in subdivision (b), when determining under § 3.04

permit intra-system federal transfer and consolidation of cases²³⁵ as well as removal of cases from state court to federal court.²³⁶ There is, however, no provision for reverse-removal of cases originally filed in federal court to state court.²³⁷

The advocates for reverse-removal proposals have also ingeniously found doctrinal support for such consolidation schemes in abstention theory. The arguments for reverse-removal parallel the arguments for

where to transfer actions consolidated from both state and federal courts, the Complex Litigation Panel may designate a state court as the transferee court. A state transferee court shall have the same powers and responsibilities as a federal transferee court under § 3.06, and any assertion of authority by the state transferee court that is beyond the scope of its state power shall be exercised under the general supervision of the Complex Litigation Panel.

(b) The Panel shall not have authority to transfer to a state court any action that is within the exclusive jurisdiction of the federal courts, or any action that has been removed to a federal court under the provisions of 28 U.S.C. § 1441(d), 28 U.S.C. § 1442, or 28 U.S.C. § 1443, or brought in federal court under the provisions of 42 U.S.C. § 1983. In any action brought by the United States under 28 U.S.C. § 1345, or removed by it under 28 U.S.C. § 1444, the government shall have the right to be exempted from transfer to a state court.

(c) When determining whether a state court should serve as the transferee court, the Complex Litigation Panel should consider, in addition to the criteria set forth in § 3.04, factors such as

(1) the number of the individual cases that were pending in state courts relative to the number of actions pending in federal courts;

(2) in how many states the state and federal cases are located;

(3) whether the law of a particular state is likely to govern the litigation; and

(4) any other factor indicating that a particular state or federal interest should be accommodated.

(d) Other than as provided in § 3.07(b), all appeals in proceedings transferred and consolidated in a state court pursuant to this section shall be heard in the United States Court of appeals for the circuit in which the transferee court designated by the Complex Litigation Panel is located.

ALI Complex Litigation Project P.D. No. 2, *supra* note 4, § 5.08, at 200.

Section 5.08 did not reappear in the revised Chapter 5 of the ALI Project. The Reporters noted that the revisions for the Council Draft were directed at inter-system federal consolidation and had not addressed the possibility of consolidating federal and state cases in the state court systems. *See* Memorandum from the Reporters for the Complex Litigation Project to Members of the Council of the American Law Institute (Nov. 8, 1989), in ALI Complex Litigation Project C.D. No. 2, *supra* note 4. This portion of the ALI Complex Litigation Project, concerning state-to-state transfer and consolidation, is forthcoming. *See id.*

235. *See* 28 U.S.C. § 1407(a) (1988).

236. *See* 28 U.S.C. § 1441 (1988).

237. This effect, of course, can be achieved through exercise of the abstention doctrines: the federal court retains jurisdiction of a filed case, but simply refuses to exercise that jurisdiction. This allows the state case to proceed to final judgment. The judgment then has preclusive effect on the parallel but dormant federal proceeding. For a list of the leading abstention cases, *see supra* note 102. Federal courts also have the power to remand cases improperly removed to federal court under the statutory removal provisions. *See* 28 U.S.C. § 1447(c) (1988). The complex litigation proposals do not contemplate a "remand" insofar as the proposed provisions contemplate ordering cases originally filed in federal court into state court, rather than sending them back to a state court of origination. *See* ALI Complex Litigation Project P.D. No. 2, *supra* note 4, § 5.08, at 200.

the antisuit injunction provision. The reformers argue that the policy rationales for abstention theory also justify the reverse-removal of cases from federal courts and the consolidation of such cases in state forums.²³⁸ On this score, at least, the reformers have their abstention theory correct. Rather than relying on laudatory references to the general abstention values of federalism and comity, the reformers directly invoke fourth-branch abstention as the theoretical vehicle justifying reverse-removal.²³⁹

The reformers offer sparse guidance concerning the standards for such reverse-removal, but, curiously, they express parity concerns. The reformers insist that "transfer to a state court should only occur when it is clearly demonstrated that litigation before the state tribunal would be as fair and efficient as litigation in federal court."²⁴⁰ Parity, then, seems to be a one-way street. Whereas it is presumptively proper to enjoin state proceedings in deference to consolidated federal proceedings, no such presumption of adjudicative ability flows in favor of state court proceedings.

238. See, e.g., Conway, *supra* note 18, at 1120 ("Indeed, the policies reflected in the proposal resemble the values motivating the judicially created abstention doctrines, which have become an important part of the legal landscape of federalism.").

239. The clearest articulation of this prudential abstention doctrine and its implications for the inter-system transfer of complex cases states:

Colorado River reflects a recognition by the Supreme Court that, in cases in which rights determined by state law are at stake, consolidated adjudication in state court may be preferable to parallel litigation in state and federal courts. The Court's willingness in *Colorado River* to allow in effect a substantial transfer of litigation from a federal to a state court — without any mention of possible administrative burdens that the state court might suffer as the result of abstention — suggests that the Court assumed that the federalistic benefits of having a state court adjudicate state-created rights outweighed any such administrative burdens. Similarly, any burden that might result from the [proposed intersystem transfer provision] would be justified by the fact that the added burden faced by state courts would be that of interpreting and administering their own law.

Id. at 1121; cf. Weinstein, *Preliminary Reflections*, *supra* note 3, at 1, 23-24 (justifying inter-system transfer and consolidation based on interstate commerce theory, with possible stays supported by *Colorado River* abstention theory). A Reporter's Note to Preliminary Draft Number Two of the ALI Project cites *Colorado River* for general abstention principles, see ALI Complex Litigation Project P.D. No. 2, *supra* note 4, § 5.08, at 209 (Reporter's Note 6), not for its principle holding: that abstention for reasons for sound judicial administration is permissible when certain "exceptional circumstances" are present. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976). In addition, *Colorado River* is inappropriately cited as supporting broad concepts of congressional exercise of article III jurisdictional powers. See ALI Complex Litigation Project P.D. No. 2, *supra* note 4, § 5.08, at 209 (Reporter's Note 6). The Reporter's Note raises a separation-of-powers question latent in the proposed statutory provision: whether Congress can delegate jurisdiction-conferring ability to a judicial panel. See *id.*

240. Conway, *supra* note 18, at 1110. Conway explains that the panel making this determination should give serious consideration to a state court's caseload, its ability to handle the litigation as demonstrated by past experience, and the existence or absence of efficient state procedural rules. See *id.* Conway's proposed system of federal court review poses a grave risk of undermining policies of federalism and intra-system comity.

With paternalistic concern, the ALI Project's proposal suggests that "care must be taken not to offend traditional notions of comity and sovereignty."²⁴¹ The Reporters counsel, however, that "[t]he most effective way to assuage these concerns would be for the Panel to maintain jurisdiction over any action that it transfers to a state court and exercise a superintendency power over rulings on some of these matters."²⁴² The clear message is that state courts and state judges ought not to be trusted with the weighty business of adjudicating complex cases originally filed in federal courts.

Notably, the reformers are cautious enough not to rely solely on abstention-theory analogies. The reformers suggest that if reverse-removal provisions cannot be supported by abstention theory, *Garcia*, the utility infielder of inter-system jurisprudence, can be invoked to rationalize devices for federal-state remand.²⁴³ For complex litigation reformers, *Garcia* instructs that the tenth amendment is not offended by such federal intrusion into state affairs.²⁴⁴

In the end, the complex litigation reformers have constructed a circular theory supported by interlocking authoritative precedent. Thus, what protective jurisdiction theory will not permit, the Supreme Court's *Verlinden* decision will permit. What *Verlinden* will not permit, *Garcia* and interstate commerce theory will permit. What *Garcia* will not permit, abstention theory will permit. And, when abstention theory has been stretched to its logical limit, *Garcia* may again be summoned to save the jurisdictional day.

The reformers cannot escape the fundamental tensions that exist in their efforts to confer consolidated jurisdiction for complex cases. Nowhere is this more evident than in the attempts to hitch jurisdictional theory to abstention doctrines. As one commentator has astutely noted,

there is a fundamental inconsistency in the Court's jurisprudence concerning the exercise of federal jurisdiction. In cases construing congressional statutes to confer jurisdiction, the Court expressed a concern about state court protection of federal rights. But in cases ordering abstention from the exercise of federal jurisdiction, the Court denied any such concern, vigorously asserting state sensitivity to claims of federal rights.²⁴⁵

241. ALI Complex Litigation Project P.D. No. 2, *supra* note 4, § 5.08, at 213.

242. *Id.* § 5.08, at 213. This proposal, like Conway's, exhibits a paternalistic attitude towards the ability of state courts to administer and adjudicate cases.

243. *See supra* Part II B.

244. *See* ALI Complex Litigation Project P.D. No. 2, *supra* note 4, § 5.08, at 206-07. Not only do the Reporters find support in *Garcia*, but they also contend that their inter-system transfer proposal would pass muster under *Garcia's* predecessor case, *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). *See* ALI Complex Litigation Project P.D. No. 2, *supra* note 4, § 5.08, at 207; *see also* Conway, *supra* note 18, at 1117-19 (suggesting that such an inter-system transfer provision would not violate the tenth amendment under the rules of *Garcia* or *National League of Cities*).

245. Friedman, *supra* note 13, at 538-39.

So it is with the complex litigation reform efforts. On the one hand, the reformers assert that complex litigation grounded in state substantive law is a problem of national dimension, constituting a federal interest that deserves a federalized solution.²⁴⁶ This interest in turn justifies the expansion of diversity jurisdiction,²⁴⁷ federal intra-system transfer and consolidation devices,²⁴⁸ as well as antisuit injunctions against duplicative state proceedings.²⁴⁹ On the other hand, the very same national concern justifies forced reverse-removal to state forums, with concomitant parity assessments and potential federal court supervision of the proceedings.²⁵⁰ If complex litigation is a national problem, then some complex cases should not be selectively shunted off to state court, perhaps to be "supervised" by federal courts. In addition, the reformers anomalously propose federal court abstention or reverse-removal of federal cases to state forums in derogation of the policy underlying diversity jurisdiction: to permit parties to avoid state court bias.²⁵¹

III. ARTICLE III JURISDICTION AND POSSIBILITIES FOR FEDERAL COURT ACCESS FOR STATE-BASED COMPLEX LITIGATION

There is a resurgence of interest in the meaning of the case-and-controversy requirement for federal court jurisdiction.²⁵² The thrust of this analysis is to reject the "private rights" model of adjudication and replace it with a model of the federal courts as adjudicators of constitutional claims. Some article III theorists argue for a public law model that "recognize[s] the cognizability of collective rights and collective harms,"²⁵³ meaning constitutional rights rather than private harms.²⁵⁴

This analysis of the role of federal courts presents a problem for the complex litigation reformers in their efforts to develop an appropriate

246. See *supra* notes 22-26, 51, 77-81, 85 and accompanying text.

247. See *supra* notes 16-18, 69 and accompanying text.

248. See, e.g., ALI Complex Litigation Project C.D. No. 2, *supra* note 4 (proposing Revised Statute for Federal Intrasystem Consolidation and Federal-State Intersystem Consolidation).

249. See *supra* notes 92-94, 213-233 and accompanying text.

250. See *supra* notes 234-44 and accompanying text.

251. See Friedman, *supra* note 13, at 540-41.

252. See, e.g., Amar, *Law Story* (Book Review), 102 Harv. L. Rev. 688, 716-18 (1989) (distinguishing jurisdiction over cases from jurisdiction over controversies); Bandes, *supra* note 202, at 230 (primary role of federal courts is to enforce Constitution; public law model of litigation produces coherent concept of case); see also M. Redish, *supra* note 138, at 36-41 (critical of Amar's analysis).

253. See Bandes, *supra* note 202, at 229.

This model would recognize explicitly that the highest use of the Court's resources is to resolve difficult questions of constitutional interpretation. A primary tenet of this idea of a case is that the Constitution is the most important source of rights. The federal judiciary's role is to adjudicate claims of constitutional violation, and the case limitation should be construed to facilitate that role.

Id. at 284.

254. See *id.* at 284-85.

theory for federal court jurisdiction over complex cases. Historically, the private-rights litigation model has permitted federal courts to protect "traditional material interests, such as property, wealth and contractual rights."²⁵⁵ With the growth and increasing bureaucratization of modern society, this private rights model, it is argued, is now "an anomaly."²⁵⁶

Article III theorists who adopt a public law model of federal court jurisdiction would establish a "principle of preference" for cases concerning "ideological constitutional interests" over disputes "concerning property or pecuniary interests derived from common law."²⁵⁷ Complex litigation is essentially state-based tort or contract litigation: it is private-rights litigation writ large. Therefore, it falls outside the public law model and is precisely the type of "pecuniary" litigation that many contemporary article III theorists think ought to be accorded lower preferential treatment. Yet the complex litigation reformers contend that complex litigation is a national problem that requires a national solution through consolidated federal proceedings.²⁵⁸

According to a public law analysis, the issue is whether private rights complex litigation can lay some special claim to article III federal court jurisdiction to adjudicate aggregative claims. Does the aggregation of numerous "pecuniary" claims transform state-law-based complex cases into something greater than the individual private injury case? Alternatively, is the public law model, grounded in constitutional rights, inadequate as a descriptive paradigm because it excludes collective private-injury litigation?

A. Diversity-Based Reform Proposals for Complex Litigation

In their quest for federal court jurisdiction over complex cases, the reformers ignore the theoretical debate over the scope of article III. The reformers merely present the problem as whether federal jurisdiction over complex cases is to be founded in the diversity or the arising under jurisdictional powers of article III.²⁵⁹ Most reform proposals have chosen to vest jurisdiction for complex cases in an expanded minimal diver-

255. *Id.* at 282.

256. *Id.* at 283.

The focus on individual as opposed to collective and community interests fails to account for the need for aggregate action in the face of increasingly bureaucratized government. The use of the federal courts for the protection of material interests like property, at the expense of less tangible interests like liberty and equality, is at variance with national goals and values. The model no longer describes the proper use of the federal judicial power.

Id. (citation omitted).

257. *Id.* at 289-90.

258. Professor Bandes does leave the door open to such a notion when she states: "[j]udicial efficiency, economy, and fairness to litigants should also receive preference to the extent they increase the attractiveness of the federal forum for constitutional litigants." *Id.* at 290.

259. *See, e.g.,* ABA Report 126, *supra* note 2, at 36 (discussing risks of over- and under-inclusion posed by minimal diversity provisions).

sity requirement.²⁶⁰ Although this is a reasonable approach to conferring jurisdiction, it is not the better option.

There are at least four problems with diversity-based proposals for federal court jurisdiction over complex litigation. First, minimal diversity jurisdiction will never be able to capture all related cases for consolidated adjudication. If the purpose of reform is to consolidate all similar claims in one federal forum, then certain of the reform proposals will not achieve their ends. Legislation with scattered-victims requirements or cases in which all plaintiffs and defendants shared the same citizenship would defeat diversity jurisdiction. This is the problem of underinclusion that the ABA Report recognized.²⁶¹

Second, the reformers' proposals for expanded minimal-diversity requirements are at odds with repeated calls for the abolition of diversity jurisdiction.²⁶² Reformers who wish to rid the courts of general diversity jurisdiction must be prepared to justify retaining federal court jurisdiction for some types of diversity cases. One solution is to abolish diversity jurisdiction for simple diversity cases but to maintain it for the class of complex cases. However, this end can only be accomplished if there is some basis for distinguishing individual diversity cases from aggregative diversity cases, one that is related to the underlying rationale for diversity jurisdiction. The reformers must explain why state-based claims, individually pursued, should not be amenable to federal court jurisdiction, while the same diversity-based cases ought to have federal court access when aggregated.

Third, diversity-based complex litigation reforms are imperilled to the extent that they adopt arguments from both sides of the parity debate. The reformers cannot have it both ways. Reformers contend that complex litigation is a national problem that requires a federal solution.²⁶³ It is difficult to rationalize locating that solution in diversity-based reforms that look to state substantive law while tacitly rejecting state procedural mechanisms as inadequate to the task of complex adjudication. Expanding diversity jurisdiction to take cases out of state court either by original or removal jurisdiction implies that federal forums provide superior procedural rules and other advantages. This may be true, but the reformers cannot then propose reverse-removal or other state-based consolidation reforms that belie the unstated premise of federal forum supe-

260. See *supra* notes 16-18, 68-71, 115 and accompanying text.

261. See *supra* note 42; see also Rowe & Sibley, *supra* note 1, at 25 (minimal diversity "requirement produces some undesirable exclusions and inclusions"). Moreover, exercising the coercive power of antisuit injunction provisions to prevent parallel proceedings in such circumstances will not promote comity. Rather, such injunctions will become punitive.

262. See, e.g., *Hearings*, *supra* note 118, at 26-32 (statement of Stephen C. Bransdorfer, Deputy Assistant Attorney General, Civil Division, United States Department of Justice) (supporting statutory limitation upon diversity jurisdiction); Federal Courts Study, *supra* note 2, at 44 (suggesting elimination or substantial curtailment of diversity jurisdiction).

263. See *supra* notes 22-26, 94 and accompanying text.

riority. Whatever else *Garcia* may have accomplished, the case does not suggest that state courts may become the dumping grounds for undesirable complex cases.

Moreover, diversity-based reforms are inconsistent with the abstention theory that permits federal courts not to exercise properly conferred jurisdiction. If the purpose of expanding federal court access in complex cases through minimal diversity is to provide a procedurally better forum, then it is inconsistent to invoke abstention theory to permit sending such cases back to state court for the purpose of promoting sound judicial administration. Furthermore, remanding diversity-based cases to state forums contravenes the principle purpose of federal diversity jurisdiction, which is to protect against potential state bias. Surely this goal and the goal of ensuring the availability of superior procedural rules should take precedence over countervailing federal court interests in docket-clearing and state court interests in adjudicating complex cases.

Finally, diversity-based reforms are less desirable because they impel unfortunate choice-of-law consequences.²⁶⁴ At worst, a diversity-based complex case would be subject to a confusing multitude of inconsistent state rules. The complex litigation reformers seek to avoid this dilemma by choosing instead a federalized choice-of-law provision.²⁶⁵ Yet even such a principle will not eliminate the necessity of applying various state-law rules to different groups of similarly situated litigants. Thus, although cases may be consolidated for more efficient procedural adjudication, the applicable substantive law will differ for similarly situated plaintiffs and defendants. Thus, what diversity-based reforms gain in procedural efficiency, they lose in substantive consistency.

B. *Federal Question Reform Proposals for Complex Litigation*

Any suggestion that complex litigation jurisdictional reform may be founded upon article III arising under jurisdiction is now largely academic. The reformers abandoned such notions early in their legislative drafting efforts. Despite the wholesale abandonment of such a jurisdictional basis, the reformers' rhetoric, as well as the authorities they invoke in support of diversity-based jurisdictional reforms, continue to be grounded in the theories undergirding federal question jurisdiction. The reformers repeatedly refer to protective jurisdiction²⁶⁶ and the interstate

264. See generally, Juenger, *Mass Disasters and the Conflict of Laws*, 1989 U. Ill. L. Rev. 105, 109-10 (subjecting mass tort plaintiffs to differing substantive-law standards may result in unfairness); Lowenfeld, *supra* note 1, at 168-69 (discussing difficulties of developing single federal choice of law standard for mass torts); see also Weintraub, *Methods for Resolving Conflict-of-Laws Problems in Mass Tort Litigation*, 1989 U. Ill. L. Rev. 129, 141 (arguing that application of single federal substantive law to mass torts would insure fairness to litigants and eliminate choice of law problems).

265. See, e.g., *supra* notes 43-54 and accompanying text (discussing federal choice-of-law standards proposed by ABA).

266. See *supra* notes 21, 83-84 and accompanying text.

nature of the "complex litigation problem,"²⁶⁷ and they invoke the commerce clause power in support of legislation over virtually any area of substantive or procedural law.²⁶⁸ Most vexing of all, abstention theory is selectively used to justify both the exercise²⁶⁹ and non-exercise²⁷⁰ of federal jurisdiction over certain types of complex cases.

The intuition of the complex litigation reformers is correct: there ought to be one federal or state forum in which to adjudicate consolidated complex cases. Ultimately, the problem is not a theoretical one at all: it is political. Stated simply, the reformers do not wish to pay the price of true complex litigation reform, which is to federalize both the problem and the solution. The reformers are willing to pay ritual lip service to the federal nature of the problem (hence the recurring commerce clause rhetoric), but are not willing to commit to a federalized substantive-law solution to this problem. Complex litigation reform is not impeded by the failure of an ethereal article III jurisdictional theory, but rather by the intransigence of those who do not wish to see federalized tort or products-liability law.

Institutional and corporate entities, the usual defendants in mass tort litigation, have little interest in advocating procedural reform to adjudicate such cases efficiently. Indeed, such defendants have every interest in endless litigation and delay, and little to gain from expedited, consolidated proceedings adjudicated according to a single federal tort-liability standard. Similarly, the organized defense bar has little to gain from reforms that may reduce the number of individual lawsuits and accompanying attorneys' fees. Local plaintiffs' attorneys also stand to gain little because individual personal-injury lawsuits are the bread and butter of the small practitioner. Federalized, consolidated mass tort litigation would most likely take these cases away from small practitioners and give them to the large, nationwide law firms with resources to manage such complex cases.

The persons most affected by mass tort injury and who would derive the greatest benefit from complex litigation reform are those least able to effect such reform: the plaintiffs whose cases are frustrated by endless court congestion and delay. This group includes potential future plaintiffs as well. With the increased potential for environmental disasters, currently unknown plaintiffs also have a stake in complex litigation reform. There is, however, no one in the current reform debate to advocate change on behalf of these people. There is no one to urge that mass tort injury has reached a level of severity meriting a national solution through the federalization of substantive and procedural law. There is no one to urge redress through federal question jurisdiction for such harm.

It is possible to create perfectly valid federal court arising under juris-

267. See *supra* notes 26, 30, 36-39, 48-50, 79-81 and accompanying text.

268. See *supra* notes 26, 28, 56-57, 81, 189 and accompanying text.

269. See *supra* notes 213-233 and accompanying text.

270. See *supra* notes 99-103, 238-44 and accompanying text.

diction for complex cases, and the reformers surely know this. This goal can be accomplished in one of two ways. The first is to pass a federal substantive law governing complex cases, something more than the interstitial set of procedural rules that the reformers currently contemplate. *Verlinden* notwithstanding, procedural reform, no matter how intricate, is still procedural reform, and it cannot bootstrap federal court jurisdiction by itself. Only federal substantive law will successfully support federal court jurisdiction over complex cases. The second method is to invoke directly the article I commerce clause power to regulate the activity affecting interstate commerce: mass torts. At the same time Congress may confer on the judiciary the power to create federal common law to implement that federal scheme of regulation. This is the lesson of *Lincoln Mills*.²⁷¹

There are many reasons for preferring an expansion of federal court arising under jurisdiction to encompass the resolution of complex cases by either method of federalizing the underlying substantive law. First, neither method entails reliance on the theory of protective jurisdiction, of which the Supreme Court is so chary. Second, current Supreme Court precedent clearly sanctions both methods.²⁷² Third, if complex cases were federalized, both substantively and procedurally, any persuasive power of the abstention analogy would dissipate. Once the substantive law governing complex cases is federalized, state interests in adjudicating individual claims would be mooted and principles of sound judicial administration would presumptively favor federal court adjudication. Moreover, either approach avoids agonizing *Erie* questions²⁷³ and choice-of-law problems.²⁷⁴

Finally, conferring clear federal question jurisdiction over complex litigation arguably brings such litigation within an expanded view of the public law paradigm of article III jurisdiction. If some higher value is served by having federal courts adjudicate collective rights and interests in the constitutional public-law sense, then surely a federalized model of private-rights complex litigation should also be within the ambit of this model. If private-law complex litigation is a national problem, and therefore an interstate commerce problem, it should be governed by a uniform federal substantive law.

271. See *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 456-57 (1957). In *Lincoln Mills*, Justice Douglas upheld the power of Congress to displace state substantive law by federal common law. See *id.*

272. See *supra* note 271.

273. See *supra* note 190 and accompanying text.

274. See, e.g., Multiparty, Multiforum Jurisdiction Act of 1990, H.R. 3406, 101st Cong., 2d Sess. § 1658, 136 Cong. Rec. H3116-19 (daily ed. June 5, 1990) (permitting district court to choose applicable substantive law without being bound by state choice-of-law rules); ALI Preliminary Report, *supra* note 137, at 3-4 (proposing federal choice-of-law standard to be applied in complex cases); ABA Report 126, *supra* note 2 at 40 (Recommendation 3) (same).

CONCLUSION

The complex litigation reformers are on the right and wrong tracks. They are on the right track insofar as they recognize the importance of modifying procedural rules to permit maximum collective resolution of complex cases. They are on the wrong jurisdictional track, however. In taking the diversity spur, they are proceeding in the wrong direction. While minimal diversity is a constitutionally defensible basis for expanding federal court jurisdiction, it is not the best means to support federal court access for complex cases. In choosing the diversity basis, the complex litigation reformers are confronted with a variety of difficult issues: the problem of underinclusion; the concomitant desirability of abolishing diversity jurisdiction in general, and retaining diversity jurisdiction for complex cases; the implications of the parity argument; and the inconsistency latent in the invocation of abstention doctrine and the reverse-removal proposals.

If the complex litigation reformers continue down the diversity track, they also are heading for a choice-of-law disaster. Although the reformers refuse to propose that federal substantive law govern complex cases, they acknowledge that such cases are part of a national problem and propose the enactment of a federalized choice-of-law rule to apply in complex cases. Nothing better symbolizes the confusion and ambivalence of the reformers than their insistence on diversity-based jurisdictional reform coupled with this federalized choice-of-law principle.

At a minimum, complex litigation reformers choosing the minimal-diversity route ought to jettison references to protective jurisdiction theories, the commerce clause, article I jurisprudence and abstention analogies. These discussions amount to a theoretical cacophony that weakens rather than strengthens the case for article III jurisdiction over complex cases.

Federalizing the substantive law governing complex cases will assure valid federal court jurisdiction over complex litigation. This will not occur, however, because it is politically unacceptable to enact a federal tort law or a federal products-liability law. Even more unthinkable is the possibility of empowering federal judges to create a federal common law for mass tort cases. Instead, reformers will continue to declare ingenuously that a federal problem exists, but they will stop short of proposing a true federal solution. The result will be weak procedural reform supported by bad procedural theory.

Mass tort injuries and environmental disasters are part of the price of modern technology. While it is perhaps a gloomy forecast, it is incomprehensible that pervasive products-injury cases will cease to exist or that environmental pollution will abate. When thousands of people are injured through corporate or institutional behavior, there ought to be a

better way to redress such injuries. The reformers are now tinkering with the law. Some day, however, the magnitude of the complex litigation problem will finally impel an appropriate federal solution.

