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A SURVEY AND SOME COMMENTARY ON FEDERAL "TORT REFORM"

*Michael P. Allen**

I. INTRODUCTION

For at least several decades now there has been a sustained attempt to "reform" the American tort system.¹ Simplifying matters somewhat, the central argument of current tort-reformers is that the American civil justice system is out of control and unfair to all involved, particularly defendants. These advocates contend that the system is rife with frivolous lawsuits, unethical behavior by plaintiffs' attorneys, and runaway juries.² In order to combat these perceived ills, today's tort reform proponents champion a wide array of changes to the civil justice system. These changes range from alterations in substantive tort law, to the imposition of damages caps, to restrictions on attorneys' fees.³

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1. For example, the American Tort Reform Association ("ATRA"), founded in 1986, proclaims that it is "dedicated to reforming the civil justice system." See AMERICAN TORT REFORM ASSOCIATION, ATRA:: ABOUT ATRA (2006), <http://www.atra.org/about/>. Of course, efforts to "reform" the tort system have been around for many years. See, e.g., Perry H. Apelbaum & Samara T. Ryder, *The Third Wave of Federal Tort Reform: Protecting the Public or Pushing the Constitutional Envelope?*, 8 CORNELL J. L. & PUB. POL'Y 591 (1999) (surveying federal tort reform activity from 1906 to 1999); Rachel M. Janutis, *The Struggle Over Tort Reform and the Overlooked Legacy of the Progressives and Populists*, 39 AKRON L. REV. 943 (2006) (analyzing strands of tort reform in the progressive and populist movements in Ohio).

2. See generally AMERICAN TORT REFORM ASSOCIATION, ATRA:: ABOUT ATRA (2006), <http://www.atra.org/about/> (cataloging perceived problems in the American civil litigation system).

3. See generally AMERICAN TORT REFORM ASSOCIATION, ATRA:: STATE AND FEDERAL CIVIL JUSTICE REFORMS, <http://www.atra.org/reforms/> (summarizing tort reforms in the United States).

The tort reformers have primarily focused on the states.⁴ For many reasons, that focus makes sense, particularly in historical perspective. To begin with, the national government was not as politically receptive two decades ago as it is today to tort reform efforts. Moreover, it was and remains true that “tort” issues are generically thought of as local matters. Thus, the states have provided the most prominent battlefield on which the tort reform wars have been fought. And there is no doubt that further battles in this tort reform war will occur in the states in the future.

Despite the importance of the states, they have not provided the only stage upon which the debate has been waged. There have also been significant efforts made to implement tort reform on the national level, both legislatively and judicially. This paper considers those reform efforts at the national level. I have two principal (and relatively modest) goals. First, I hope to provide a survey and summary of the major types of tort reform possible at the federal level. Second, in addition to that fundamentally descriptive effort, I provide commentary concerning open questions about the various types of reforms, the rationales for pursuing one type of reform over another, and how the actions of one branch of government can have an impact on the efforts of others. I largely leave for another day questions concerning what types of “reform,” if any, should be pursued at the federal level.

Before continuing, a definitional detour is in order. There is no denying that “tort reform” is in many respects a loaded term these days. If one advocates “tort reform,” she is taken to be arguing that the current system is, all things considered, unfair to defendants. In other words, arguments about tort reform are really arguments about restricting tort recoveries in one form or another.⁵ In short, tort reform is seen by those who oppose current efforts as a “conservative” issue used by business interests and the insurance industry to undermine the chances for and amount of recovery by victims of wrongdoing.⁶

4. For example, while discussing federal tort reform efforts as well, the overwhelming focus of the ATRA has been on legislative and judicial business in the states. *See id.*

5. *See* AMERICAN TORT REFORM ASSOCIATION, ATRA :: ABOUT ATRA (2006), <http://www.atra.org/about/> (describing the perceived abuses in the current American tort system and arguing that the current litigation climate is “bad for business” and “bad for society.”).

6. For example, one prominent critic of current “tort reform” describes matters as follows: Let us start by understanding what tort reform is. Tort reform, or as I like to call it, tort restrictionism, is nothing more than the use of outsized political clout to skew the legal system in favor of the powerful. The advantages that businesses obtain in the political system are enlisted to obtain similar advantages in the courtroom. At its most basic and essential level, the tort restrictionist agenda represents dissatisfaction with the legal system, most particularly

Yet, it need not be the case that calls for "tort reform" only refer to restricting recoveries and making the process more difficult for plaintiffs. Arguments for increasing recoveries and making the system easier for plaintiffs are just as much about reforming the civil justice system in this country. I realize that disputes about the meaning of the term "tort reform" are largely academic now; there is little chance that the politically-charged nature of the term will change anytime soon. But for purposes of this paper, when I use the term "tort reform" I am not restricting innovations to those designed to make recovery more difficult. Instead, I use the term in the broadest sense possible to include all efforts to have an effect on the tort system, whether such effects are plaintiff-friendly, defendant-friendly, or of an indeterminate nature.

This Essay proceeds as follows. In Part I, I survey the potential *types* of federal tort reform. While many of these types of reform measures could be adopted at the state level as well as nationally, some important ones could not. It is on those uniquely federal measures that I focus much of my attention. This section also considers the interrelationships of the branches of government as well as the political and legal advantages and disadvantages of various types of reform. In Part II, I discuss some of the legislation adopted in the wake of the September 11th terrorist attacks. That legislation provides a useful summary of what can be done at the federal level by combining the various avenues for reform available to the national government. It also gives one a good indication of the extent, and simultaneously, the subtlety of federal power in the American constitutional order.

II. A SURVEY (WITH SOME COMMENTARY) OF FEDERAL TORT REFORM

Federal tort reform is quite varied both in terms of the nature of reform and the agent of change. In terms of agency, tort reform comes from both the political branches of government (*i.e.*, Congress and the Executive) as well as the judiciary. It is not particularly useful, however, to categorize the tort reform efforts simply by the branch engaging in the activity as an initial matter. The fact is that many of these efforts are the result of an iterative process in which Congress or the courts react to a reform measure implemented by another branch. In

dissatisfaction with judges and juries. . . . Although it may be dressed up in the rhetoric of non-existent litigation explosions, insurance crises, horrifying economic consequences, unconscionable jury awards, and frivolous lawsuits, tort restrictionist laws are little more than relief to the habitually negligent and the intentionally reckless. Robert S. Peck, *In Defense of Fundamental Principles: The Unconstitutionality of Tort Reform*, 31 SETON HALL L. REV. 672, 673-74 (2001) (footnotes omitted).

this way, the reform efforts can mutate, often in ways that seem startling given the genesis of a particular reform proposal.

I have grouped federal tort reform efforts into four broad categories that are roughly tied to the nature of the federal activity: (A) substantive legislation, including the regulation of the standards of liability as well as the amount of damages recoverable; (B) judicial decisions interpreting the Constitution, federal statutes (including a discussion of preemption), and federal common law; (C) lawmaking focused on procedural rules; and (D) control of federal court jurisdiction and related doctrines. I discuss each of these issues separately below.

While I do not purport to provide an exhaustive description of all the issues implicated by each type of reform, I hope to set forth a meaningful discussion of the use (or misuse depending on one's point of view) of a particular federal tort reform device. Along the way, I also consider other matters such as the utility of a given reform measure as well as open questions – both of a constitutional and policy/political nature – concerning certain reform efforts.

A. Substantive Legislation

The first and probably most commonly considered type of tort reform is legislation directly addressing either tort liability or damages, what I refer to as “substantive” legislation.⁷ Such legislative action is a major focus of efforts in the states.⁸ But it is also a significant form of actual and/or potential reforms on the federal level. Indeed, substantive legislation formed an important part of the Republican party's “Contract with America” in the mid-1990s.⁹ And it remains on the legislative agenda in Congress today.¹⁰

7. For example, ATRA publishes a “Tort Reform Record” twice a year reporting on legislative and judicial developments in the area on a state-by-state basis. See AMERICAN TORT REFORM ASSOCIATION, TORT REFORM RECORD (JULY 22, 2005), http://www.atra.org/files.cgi/7927_Record7-05.pdf. The clear majority of the developments discussed in these Records are “substantive” in the sense I use the term. See *id.*

8. *Id.*

9. Paragraph 9 of the Contract with America called for the enactment of the Common Sense Legal Reform Act dealing with reforms involving product liability litigation, punitive damages, and payment of attorneys' fees, among other things. See REPUBLICAN NATIONAL COMMITTEE, REPUBLICAN CONTRACT WITH AMERICA, REPUBLICAN CONTRACT WITH AMERICAN (Sep. 27, 1994), www.house.gov/house/contract/CONTRACT.html.

10. See, e.g., Personal Responsibility in Food Consumption Act of 2005, H.R. 554, 109th Cong. (concerning lawsuits against fast food chains related to obesity in the American Population); Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 199 Stat. 2095 (Oct. 26, 2005) (concerning liability of firearm manufacturers for certain claims); The Fairness in Asbestos Injury Resolution Act of 2005, S.852, 109th Cong. (concerning creation of claims handling procedures for

An obvious advantage of such substantive legislation wherever implemented is that it directly addresses a perceived failing in the tort system. Thus, if one is concerned about the magnitude of damages for "non-economic losses," a cap on such damages will directly affect the issue.¹¹ Similarly, if one is concerned about liability being imposed on product manufacturers in circumstances not warranting the imposition of damages, legislation establishing defenses to such liability would seem to be a fairly direct means by which to address the issue.¹² However,

asbestos claims); Medical Malpractice Insurance Corporation Act, H.R. 3865, 109th Cong. (concerning "frivolous" medical malpractice claims). While substantive tort reform has certainly been a prominent component of the federal government of late, the national government has long been a player in substantive efforts to address perceived problems in the American tort system. *See* Apfelbaum & Ryder, *supra* note 1 (surveying federal tort reform activity from 1906 to 1999).

11. Legislation capping non-economic damages has been quite common at the state level. *See, e.g.*, CAL. CIV. CODE § 3333.2 (2006) (cap of \$250,000 for non-economic damages in medical malpractice actions); FLA. STAT. ANN. § 766.118 (2005) (cap of \$500,000 for non-economic damages in medical malpractice actions); KAN. STAT. ANN. §§ 60-1902, 60-1903 (2005) (cap of \$250,000 for non-economic damages in wrongful death actions); MD. CODE ANN. § 11-108 (2006) (cap of \$500,000 for non-economic damages in all actions); *see also* AMERICAN TORT REFORM ASSOCIATION, NONECONOMIC DAMAGES REFORM (2006), <http://www.atra.org/issues//index.php?issue=7340> (collecting state-by-state legislative activity concerning damages caps). It has also been proposed, although not enacted, at the federal level. *See, e.g.*, Patients First Act of 2003, S. 11, 108th Cong. (2003) (proposed cap of \$250,000 on non-economic damages in medical malpractice actions). While a cap will certainly have a direct effect on the amount of damages awarded for non-economic losses, the manner in which it will affect those damages, as well as other damages in a given case, is by no means clear. *See e.g.* Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children and the Elderly*, 53 EMORY L. J. 1263 (2004) (describing the uncertain impact of damages caps on certain vulnerable groups); Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391 (2005) (presenting empirical study concerning the impact on certain types of damages caps on overall damages awarded in medical malpractice cases); Kathryn Zeiler, *Turning from Damages Caps to Information Disclosure: An Alternative to Tort Reform*, 5 YALE J. HEALTH POL'Y L. & ETHICS 385 (2005) (arguing that statutory caps on medical malpractice recoveries are not an effective means to address health insurance issues).

12. Many states have enacted reforms in this area. *See, e.g.*, IND. CODE ANN. § 34-20-5-1 (2005) (providing a rebuttable presumption that a product is not defective if it conformed to the "state of the art" or complied with certain government standards); LA. REV. STAT. ANN. 9:2800.54 (2005) (providing that a product may be deemed "unreasonably dangerous" only if one of four conditions are met); N.J. STAT. ANN. § 2A:58C-4 (2005) (providing that a manufacturer is not liable for a warning defect claim if it follows certain statutory requirement); *see also* TORT REFORM ASSOCIATION, PRODUCT LIABILITY REFORM (2006), <http://www.atra.org/issues/index.php?issue=7341> (collecting state product liability reforms). While there have been targeted actions on the federal level concerning substantive product liability issues, (*see, e.g.*, Swine Flu Act of 1976, 42 U.S.C. § 247B (2000) (substituting the United States as defendant in cases that could be brought against the manufacturers of the Swine Flu vaccine); Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 199 Stat. 2095 (Oct. 25, 2005) (restricting liability of gun manufactures in certain situations) no broad based reform measures in this area have become law. There have, however, been attempts at such comprehensive federal action in this area. *See, e.g.*, Product Liability Reform Act, S. 648, 105th Cong. (1997).

this direct relationship between perceived problem and proposed cure is also a potential drawback of such reform efforts. Because the goal of reform is so easily seen, and so easily communicated to the public, these types of reform efforts appear more likely to draw vocal opposition beyond representatives of core interest groups than many of the other reform avenues I discuss.¹³

Substantive legislative federal tort reform has been widely debated in the academic literature over the years.¹⁴ I do not intend to rehearse that debate. Instead, my brief comments will focus on the difficulties most often associated with substantive tort reform on the federal level and some of the advantages of this type of activity when properly pursued.

Achieving substantive legislative tort reform on the federal level tends to suffer from two major potential difficulties: one constitutional and the other political. In terms of the Constitution, there are challenges involving both individual rights and governmental structure. I discuss individual rights issues below in connection with the judiciary's role in tort reform.¹⁵ On the structural level, the debate concerns whether the federal government has the requisite *constitutional authority* to act to address perceived defects in the tort system. It is a truism that the federal government in the United States is one of limited powers.¹⁶ Whatever else that truism means, at a minimum there is a requirement to locate in the Constitution some clause to which one can cite to support Congressional action.¹⁷

13. Others have also made this suggestion. See, e.g., Eric J. Segall, *Article III as a Grant of Power: Protective Jurisdiction, Federalism and the Federal Courts*, 54 FLA. L. REV. 361, 391-92 (2002) (discussing the different political implications associated with enacting substantive legislation as opposed to jurisdictional provisions alone).

14. See, e.g., Apelbaum & Ryder, *supra* note 1; William Powers, Jr., *Some Pitfalls of Federal Tort Reform Legislation*, 38 ARIZ. L. REV. 909 (1996); *Symposium: Is H.R. 956 Really "Common Sense"?: A Symposium on Federal Tort Reform Legislation*, 64 TENN. L. REV. 557-937 (1997); *Symposium, The Federalization of State Law*, 44 DEPAUL L. REV. 715-824 (1995).

15. See *infra* Part I.B.1. The implication of constitutional rights on tort reform measures is an example of how the action of one branch can have an impact on the actions of another.

16. For example, Justice O'Connor has explained:

If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress. . . . It is in this sense that the Tenth Amendment states but a truism that all is retained which has not been surrendered.

New York v. United States, 505 U.S. 144, 156 (1992) (citations and internal quotation marks omitted).

17. Once such a particular constitutional provision is located, the Necessary and Proper Clause provides a powerful means of implementing federal power. That Clause provides that "[t]he

The Interstate Commerce Clause¹⁸ and Section 5 of the Fourteenth Amendment are those parts of the Constitution most likely to provide authorization for tort reform.¹⁹ The problem with tort reform based on either of these grounds is that the precise scope of Congressional authority under them is uncertain.²⁰ This Essay is not the place to

Congress shall have Power . . . To make all Laws which shall be necessary and proper for the carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18. The Court has long interpreted this Clause to give Congress broad power so long as its actions are rationally related to advancing an enumerated federal power. *See, e.g., Gonzalez v. Raich*, 125 S. Ct. 2195 (2005); *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

18. U.S. Const. art. I, § 8, cl. 3 (Congress shall have Power . . . "To regulate Commerce . . . among the several states . . ."). Other commentators have explored the Commerce Clause basis for federal tort reform in detail. *See, e.g.,* Robert M. Ackerman, *Tort Law and Federalism: Whatever Happened to Devolution?*, YALE L. & POL'Y REV. 429, 438-42 (1996); Apelbaum & Ryder, *supra* note 1 at 635-39; William P. Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719 (1995); Jerry J. Phillips, *Hoist by One's Own Petard: When a Conservative Commerce Clause Interpretation Meets Conservative Tort Reform*, 64 TENN. L. REV. 647 (1997); Victor E. Schwartz & Mark A. Behrens, *Federal Product Liability Reform in 1997: History and Public Policy Support Its Enactment Now*, 64 TENN. L. REV. 595, 604-07 (1997).

19. U.S. Const. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); *see also* Ackerman, *supra* note 18, at 433-38 (same); Apelbaum & Ryder, *supra* note 1, at 639-43 (discussing Section 5 as basis for tort reform measures).

20. Until 1995, there appeared to be few limits on Congress's power to legislate under the Commerce Clause. *See, e.g.,* Ackerman, *supra* note 18, at 446 (concluding in 1995 that "[a]s recently as one year ago, we might have confidently stated that the commerce power is broad enough to encompass virtually any tort legislation Congress might enact"). However, this certainty changed when the Court decided *U.S. v. Lopez* in 1995. 514 U.S. 549 (1995) (striking down the Gun-Free School Zones Act of 1990 exceeding Congress's power under the Commerce Clause). The uncertainty only grew when the Court struck down another law as exceeding congressional power over interstate commerce. *See United States v. Morrison*, 529 U.S. 598 (2000) (striking down Federal Access to Clinic Entrance Act). After *Lopez* and *Morrison*, there was a sense that Commerce Clause doctrine was in some state of disarray. *See, e.g.,* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 190-94 (7th ed. 2004) (discussing uncertainly about the Rehnquist Court's Commerce Clause cases); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, VOL. I 817-24 (3d ed. 2000) (same, although written before *Morrison* was decided). That debate will certainly intensify after the Supreme Court's recent decision in *Gonzalez v. Raich*, 125 S. Ct. 2195 (2005). In *Raich*, the Court upheld prosecution under the federal Controlled Substances Act of individuals distributing and possessing marijuana grown using entirely intrastate resources for use only by residents of the state in question. *Id.* What *Raich* means for the *Lopez/Morrison* doctrine is not yet clear, and will probably not be so for many years to come. *See, e.g., Symposium: Federalism after Gonzales v. Raich*, 9 LEWIS AND CLARK L. REV. 743-934 (2005). Correspondingly, the line between authorized and unauthorized Congressional lawmaking remains blurred, with a consequent uncertainty injected into the use of the commerce power to justify federal tort reform.

The same type of uncertainty exists under Section 5. At times the Court has read this provision in such a way as to significantly restrict Congressional lawmaking ability. *See, e.g.,* *City of Boerne v. Flores*, 521 U.S. 507 (1997) (requiring congruence and proportionality between the problem Congress identified and the actions it has taken to enforce the Amendment's guarantees).

explore the contours of the Commerce Clause or Section 5. My point is that the need to locate a specific source of Congressional authority serves as a check on the efficacy of federal substantive legislative tort reform, a check that does not exist at the state level.

Another constitutional structure issue, focused less on text and more on overarching constitutional values, further affects the ability to successfully employ tort reform at the federal level. Even if one could support federal action by reference to the Commerce Clause or some other constitutional provision, the argument is that the Constitution embodies a preference for state action in traditionally state-regulated areas.²¹ Thus, the argument continues, federal tort reform efforts are generally suspect on such a “federalism” principle.²² Such arguments are misplaced and should not dissuade proponents of federal substantive legislative action. As a matter of constitutional interpretation, it seems a far better approach to avoid grafting unwritten *limits* onto express *grants* of Congressional power. Instead, grants of power should be seen as embodying a decision of the Framers concerning the proper “intrusion” of federal authority on that of the states. It is true that the Court has recently imposed certain federalism-based limitations on Congressional power, but these restrictions have come in the narrow area of federal authority *directly* over the states as states.²³ The Court has shown little willingness to restrict Congressional authority once a Commerce Clause (or other) basis has been established outside of this narrow area. Thus, I

Yet, some recent cases perhaps suggest a weakening of this hostility to Congressional power. *See, e.g., Tennessee v. Lane*, 541 U.S. 509 (2004) (upholding Congressional power to abrogate state sovereign immunity under Title II of the Americans with Disability Act with respect to access to courts). As with the Commerce Clause, only time will tell where the precise boundaries of Congressional power lie.

21. Other commentators have also discussed this basic concept in one form or another. *See, e.g., Apelbaum & Ryder, supra* note 1, at 653-57; Harvey S. Perlman, *Products Liability Reform in Congress: An Issue of Federalism*, 48 OHIO ST. L. J. 503, 507-10 (1987); Robert L. Rabin, *Federalism and the Tort System*, 50 RUTGERS L. REV. 1 (1997). For two quite interesting discussions of federalism and tort reform, *see generally* Betsy J. Grey, *The New Federalism Jurisprudence and National Tort Reform*, 59 WASH. & LEE L. REV. 475 (2002); Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 ARIZ. L. REV. 917 (1996).

22. *See supra* note 21.

23. One type of restriction concerns attempts by Congress to “commandeer” state political branches or officials, an action that the Court has found violates the Tenth Amendment. *See, e.g., Printz vs. United States*, 521 U.S. 898 (1997) (striking down portions of the Brady Handgun Violence Protection Act); *New York v. United States*, 505 U.S. 144 (1992) (striking down portion of the Low-level Radioactive Waste Policy Amendment Act of 1985). Similarly, the Court has used the rubric of the Eleventh Amendment to limit Congressional power to abrogate the immunity of the states from suit in federal court. *See, e.g., Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (finding that Congress lacks authority to abrogate state sovereign immunity under the “Indian Commerce Clause”).

would not expect it to do so in the area of tort reform.

At its heart, then, the federalism argument is really a political one. It concerns whether the federal government *should* act in a certain area, not whether it is *constitutionally able* to do so. The answer to that question is one of policy. In sum, the federalism objection has little merit in and of itself under the Constitution.

Turning from the Constitution, there are also purely political issues that may make federal tort reform less attractive than similar efforts undertaken at the state level. As I mentioned above, a simultaneous advantage and disadvantage of substantive legislation is that there is little ambiguity concerning the goals of the government action. Such transparency in lawmaking might be something to be admired in political theory, but it can also lead to the energizing of opposition forces.²⁴ Such a result is even more likely when the reform efforts are being attempted on the national stage. Accordingly, the politics of tort reform might lead one to focus greater energy on state efforts, at least in some cases.

Of course, even if there are constitutional and political issues counseling hesitation in terms of proceeding on the federal level, one should not discount the very real practical advantages associated with such substantive legislation when it can be implemented. Most obviously, the geographic impact of federal legislation is a major asset. The passage of a single law can achieve one's aim instead of pursuing the goal one state at a time. Moreover, the costs associated with obtaining, and perhaps preserving, tort reform victories should be less when dealing with the national stage.²⁵ Finally, the power of federal legislation comes not only from its geographic sweep but from its constitutional pedigree. Under the Supremacy Clause, validly enacted federal law trumps or preempts inconsistent state law on the matter in question.²⁶ The effects of the Supremacy Clause and the related, albeit distinct concept of preemption that is covered later in this Essay²⁷ ensure

24. Others have also noted this possibility. See, e.g., Segall, *supra* note 13 at 391-92.

25. See Marshall, *supra* note 18, at 723 (discussing economic advantages of federal tort reform).

26. U.S. Const. art. VI, § 2. This article states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

27. See *infra* Part I.B.2.

that substantive federal tort reform legislation is infused with extra power.

In sum, substantive federal tort reform legislation has both certain advantages and certain disadvantages from the perspectives of its proponents. Federal authority, unlike that of the states, is limited. In addition, the stakes of national legislation may make its enactment more difficult. On the other hand, when it is possible to use the federal stage, the results will tend to be powerful in a variety of ways.

B. Judicial Decisions

Tort reform is not solely the prerogative of legislatures. On both the state and the federal levels, the judicial branch of government has played and will continue to play an important role in the area.²⁸ That involvement is in some sense unilateral; that is, in some cases the courts take steps on their own that have an impact on the tort system. In other areas, the courts' role is intimately tied to what has come before in the political branches. Such is the case when a court is called on to interpret a statutory tort reform measure. The special role of courts in the tort reform arena is one that should not be neglected. When the courts are engaged in activity in concert with or in opposition to the legislature, the impact of reform efforts of one branch will be dependent in some measure on actions in another. In this section, I address the role of the federal courts in tort reform by considering three areas: the Constitution; statutory interpretation, particularly the doctrine of preemption; and federal common law. My ultimate conclusion as to court-centered tort reform is that it can be quite powerful but also quite unpredictable and uncontrollable, at least from the perspective of tort reform advocates.

1. The Constitution

Perhaps the most powerful form of federal judicial tort reform is constitutional interpretation.²⁹ *Marbury v. Madison*³⁰ with its recognition

28. The general role of courts in the development and reform of the tort system is not without controversy. See, e.g., *Symposium: Tort Liability, The Structural Constitution, and the States*, 31 SETON HALL L. REV. 563-759 (2001) (debating respective roles of courts and legislatures).

29. Decisions of state supreme courts interpreting state constitutions have also proved to be quite powerful in tort reform matters. Some state supreme courts have struck down legislative tort reform measures for violating state constitutions. See, e.g., *Ferdon v. Wisconsin Patients Compensation Fund*, 701 N.W.2d 440 (Wis. 2005) (holding tort reform in violation of Wisconsin Constitution); *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E. 2d 1062 (holding tort reform in violation of Ohio 1999) (Ohio Constitution); *Smith v. Dept. of Insurance*, 507 So.2d 1080 (Fla. 1987) (Florida Constitution). No less "tort reform," courts in other states have rejected

of judicial review means that absent a decision of a later Court or an amendment to the Constitution, the Court's constitutional decisions are the most supreme of supreme federal law.³¹ I have already mentioned a type of constitutional interpretation that can affect tort reform measures, the determination of the scope of Congressional power.³² But the constitutional issues also potentially implicate a variety of individual rights ranging from due process, to the jury trial guarantee of the Seventh Amendment, to equal protection. Decisions of the federal courts in these areas are no less significant than those dealing with Congressional authority under the Constitution. Indeed, they may be more so because most decisions involving individual rights will be applicable to state reforms as well as federal ones.³³ I discuss below in this Part two constitutional doctrines that have had, and will likely continue to have, significant effects on tort reform measures.³⁴

A first example concerns the Supreme Court's relatively recent delineation of federal constitutional limits on punitive damage awards.³⁵

state constitutional challenges to legislative reform measures. *See, e.g.,* Colorado v. DeFoor, 824 P.2d 783 (Colo. 1992) (finding no violation of either Colorado and United States Constitutions); Etheridge v. Medical Center Hospitals, 376 S.E.2d 525 (Va. 1989) (finding no violation of either Virginia and United States Constitutions).

30. 5 U.S. (1 Cranch.) 137 (1803).

31. *Id.* at 177 (stating that "[i]t is emphatically the province and duty of the judicial department to say what the law is."); *see also* Cooper v. Aaron, 358 U.S. 1 (1958) (reaffirming the Court's role as final arbiter of the meaning of the Constitution).

32. *See supra* Part I.A.

33. The general subject of the constitutionality of tort reform measures has been widely addressed in the academic literature. *See, e.g.,* Apelbaum & Ryder, *supra* note 1, at 635-57; Peck, *supra* notes 6, at 674-82; George L. Priest, *The Constitutionality of State Tort Reform Legislation and Lochner*, 31 SETON HALL L. REV. 683, 684-87 (2001); Victor E. Schwartz, *Judicial Nullification of Tort Reform: Ignoring History, Logic, and Fundamentals of Constitutional Law*, 31 SETON HALL L. REV. 688, 690-92 (2001).

34. I could have chosen a number of other examples to make my point concerning constitutional tort reform. So, for example, I could have discussed certain of the Court's constitutional decisions that have had an impact on state defamation law. *See, e.g.,* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (imposing under the Constitution a higher burden on public officials to prove defamation); *see also* Thomas C. Galligan, Jr., *U.S. Supreme Court Tort Reform: Limiting State Power to Articulate and Develop its own Tort Law - - Defamation, Preemption, and Punitive Damages*, 74 U. CINN. L. REV. (forthcoming 2006) (discussing "tort reform" concerning defamation law). Similarly, I could have discussed here the Court's due process decisions restricting the use of settlement classes in asbestos litigation. *See, e.g.,* Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997) (decertifying settlement class in global asbestos as part of proposed global settlement agreement in part in due process grounds). I made my selections as a means to demonstrate the wide variety of possible constitutional tort reform measures. I certainly have not attempted to be comprehensive.

35. *See e.g.,* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003); Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001); BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996). I have written elsewhere about the development of the Court's jurisprudence

Most prominently, the Court has interpreted the Due Process Clause of the Fourteenth Amendment to contain a principle of proportionality limiting the size of punitive damage judgments.³⁶ Oversimplifying somewhat, the Court has tied the constitutionally permissible range of punitive damages to the compensatory damages that were or could have been awarded against the defendant.³⁷

The Court's punitive damages decisions quite clearly are an example of judicial tort reform. The Court identified a perceived problem involving excessive damage awards principally in tort or tort-like litigation.³⁸ Its solution to that problem was to restrict those awards directly via the Due Process Clause.³⁹ Thus, as with substantive legislation, constitutional tort reform in this area has a decent chance of succeeding, assuming lower courts follow the Supreme Court's lead, because there is such a close tie between the perceived problem and proposed solution. Moreover, such constitutional tort reform has the additional advantage (if one is in favor of the reform) of binding state *and* federal courts. It is also insulated from legislative change. The downside, of course, is that implementing tort reform through the courts is not as easy to control as it usually is through the legislative process. For example, one needs to find a case in which to advance a particular

concerning constitutional limits on punitive damage awards. See Michael P. Allen, *The Supreme Court, Punitive Damages and State Sovereignty*, 13 GEO. MASON L. REV. 1 (2004). Dean Galligan has also written on the tort reform aspects of these decisions. See Galligan, *supra* note 34.

36. See, e.g., *Campbell*, 538 U.S. at 418; *Gore*, 517 U.S. at 575-76. The Court's constitutional work in this area has not, however, been limited to the due process proportionality principle. For example, it has also imposed a state sovereignty based limitation on certain awards. See, e.g., *Campbell*, 538 U.S. at 421; *Gore*, 517 U.S. at 568-74; see also Allen, *supra* note 35 (discussing the Court's sovereignty-based approach). Indeed, there is a strong argument that the Court has done more than simply impose constitutional limits on the size of punitive damage awards. Instead, it appears in many respects that the Court has "constitutionalized" the very nature of this remedial device. See, e.g., Allen, *supra* note 35, at 35-36 n. 148 (discussing this issue); Michael L. Rustad, *Happy No More: Federalism Derailed by the Court that Would be King of Punitive Damages*, 64 MD. L. REV. 461, 493-515 (2005) (same). A full exploration of this issue is beyond the scope of this paper. My point is that the ways in which the Court has used constitutional interpretation to deal with a perceived tort-based problem are quite varied.

37. In the interests of accuracy, the Court has set forth three "guideposts" by which to judge the constitutionality of punitive damage awards under the Due Process Clause: the (1) degree of reprehensibility of the defendant's conduct; (2) ratio of actual or potential harm suffered by the plaintiff to the punitive damages awarded; and (3) civil or criminal sanctions that could be imposed on the defendant for comparable conduct. *Gore*, 517 U.S. at 575. In the Court's most recent pronouncement on the issue it stated that in most cases a double-digit ratio of punitive damages to compensatory damages would be unconstitutional. *Campbell*, 538 U.S. at 425.

38. See, e.g., *Campbell*, 538 U.S. at 417-18 (discussing perceived dangers associated with awarding punitive damages in a civil lawsuit).

39. See *Campbell*, 538 U.S. at 418; *Gore*, 514 U.S. at 575-76.

goal. Thereafter, the "lobbying" for reform needs to be in the context of litigation, making policy-based arguments standing alone at least marginally more difficult. Thus, while constitutional tort reform is an incredibly powerful means by which to proceed, it may not be the best approach if other more controllable means exist.

A second, and somewhat less obvious, matter of constitutional tort reform is the Court's landmark decision in *Erie Railroad v. Tompkins*⁴⁰ and its progeny. The "*Erie* Doctrine" stands for the basic proposition that federal courts in diversity and other state law based cases must apply the substantive law that a state court of the state in which the federal court sits would apply.⁴¹ There are many theories about *Erie*, its constitutional foundations, and its ultimate meaning.⁴² I am certainly not about to enter that debate here. Rather, my point is a limited one: *an effect of Erie* and its progeny, whether intended or contemplated, is functionally similar to tort reform. The decision took the federal courts out of the business of generally crafting common law, including tort-based principles.⁴³ As a result, state courts would have the predominate role in the area. *Erie*, then, provides another example of the way in which constitutional decisions can impede legislative efforts (here on the federal level) to address perceived problems in the tort system.⁴⁴ Paradoxically perhaps, such impediments are also tort reform in their own right; they simply operate in a different direction than more

40. 304 U.S. 64 (1938).

41. *Id.* at 78; *see also* Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941) (requiring federal courts to follow state choice of law rules).

42. The academic literature on *Erie* is legion. Some of the more prominent discussions of the case include the following: Susan Bandes, *Erie and the History of the One True Federalism*, 110 YALE L.J. 829 (2001) (reviewing EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH CENTURY AMERICA* (2000)); Joseph P. Bauer, *The Erie Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235 (1999); Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964); EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH CENTURY AMERICA* (2000).

43. Indeed, it should not be forgotten that *Erie* itself was a tort case. *See Erie*, 304 U.S. 64. In addition, there were tort cases among those decisions that served as evidence to some of the need to establish a regime in which federal common lawmaking was restricted. *See, e.g.*, *Baltimore & Ohio Railroad v. Baugh*, 149 U.S. 368 (1893) (concerning federal adoption of fellow-servant rule). Professor Betsy Grey has also recently written about the way in which the *Erie* doctrine is implicated in the tort reform debate, especially with respect to the constitutionality of federal tort reform. *See Grey, supra* note 21, at 480-89.

44. Other commentators have made this point as well. *See, e.g.*, Linda S. Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039, 1076 (1986) (hereafter "*Mullenix, Federal Procedure Act*") ("The *Erie* doctrine has repeatedly proven to be a major impediment to the fair adjudication of mass-tort claims . . .").

affirmative action.⁴⁵

Both the recent punitive damages decisions as well as the more established *Erie* Doctrine are excellent examples of the Court's ability to affect changes in the tort system through constitutional rulings. Recognizing this means of tort reform is important because it suggests both a potential means of affirmatively reforming the tort system as well as a potential limitation on substantive tort reform legislation undertaken by another branch of government. So, for example, advocates of further limitations on runaway damage awards will no doubt press constitutional attacks designed to extend the *Gore/Campbell* logic.⁴⁶ On the other hand, creative arguments are being made against tort reform based on the federal Constitution.⁴⁷ The fundamental point is that the judiciary is a powerful institution in the tort reform debate as a result of its ability to interpret the Constitution.

2. Statutory Interpretation and Preemption

The reality that courts interpret legislation means that the judiciary will always be an important part of tort reform efforts. Congress or state legislatures may enact substantive tort reform measures, but those laws will only be as effective as courts interpret them to be. However, on the federal level there is an additional statutory interpretation issue that makes the judiciary an even more important player in the tort reform debate. That issue concerns "preemption."

The central idea of preemption is that federal law may displace state law in a given area under certain circumstances. That occurs, according to the Supreme Court, when Congress acts pursuant to a valid power and expressly states that it intends to preempt state law.⁴⁸ But preemption is not only possible in this way. The Court has also held that preemption can be inferred from the presence of a comprehensive

45. Interestingly, *Erie* and the multiplicity of state laws that must be applied in complex cases such as class actions have led to calls by modern-day tort reformers for a federal choice of law statute to make complex cases easier to administer. See, e.g., John S. Baker, Jr., *Respecting a State's Tort Law, While Confining its Reach to That State*, 31 SETON HALL L. REV. 698, 716-32 (2001); Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7, 37-41 (1986).

46. See Mark Geistfeld, *Constitutional Tort Reform*, 38 LOY. L.A. L. REV. 1093 (2005) (arguing that the due process principles from *Gore* and *Campbell* cannot be limited to punitive damages but are applicable to other issues in the tort system).

47. See, e.g., John C. P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L. J. 524 (2005) (arguing for a due process limit on certain types of damage limitation in tort actions).

48. See *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

federal regulatory scheme,⁴⁹ the fact that state law would act as an obstacle to achieving Congress's purpose,⁵⁰ or when state law is inconsistent with federal law.⁵¹ And the courts determine the question of Congressional intent.

The preemption doctrine as currently structured is a powerful illustration of judicial tort reform.⁵² Determining how narrowly or how broadly a federal law will displace state tort law is in many respects the equivalent of a legislative judgment by Congress concerning express preemption. In either situation, state tort policy will (or will not) be replaced with a federal judgment.⁵³ Thus, through the preemption doctrine, the federal judiciary remains an important player in the debate.⁵⁴

49. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

50. See *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

51. See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). In a recent article, Professor Stephen Gardbaum has persuasively argued that such conflict preemption is better viewed as an automatic operation of the Supremacy Clause. See Stephen Gardbaum, *Congress's Power to Preempt the States*, 33 PEPP. L. REV. 39, 40-43 (2005). As to the other forms of preemption, he further asserts that only express preemption is appropriate. *Id.* Without taking a position as to Professor Gardbaum's ultimate assertions, his difficulty in accepting implied preemption and its inherent subjectivity in terms of determining Congressional intent underscores the point I make in this section; current preemption doctrine is in many ways a form of *judicial* not legislative tort reform.

52. There has been significant academic commentary concerning preemption doctrine and its impact on the tort system. See, e.g., Richard C. Ausness, *Preemption of State Tort Law by Federal Safety Statutes: Supreme Court Preemption Jurisprudence Since Cipollone*, 92 KY. L. REV. 913 (2003-2004); Galligan, *supra* note 34; Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559 (1997); Robert B. Leflar & Robert S. Adler, *The Preemption Pentad: Federal Preemption of Products Liability Claims After Medtronic*, 64 TENN. L. REV. 691 (1997); Martin S. Scordato, *Federal Preemption of State Tort Claims*, 35 U.C. DAVIS L. REV. 1 (2001); David C. Vladeck, *Preemption and Regulatory Failure*, 33 PEPP. L. REV. 95 (2005); Timothy Wilton, *Federalism Issues in "No Airbag" Tort Claims: Preemption and Reciprocal Comity*, 61 NOTRE DAME L. REV. 1 (1986). For a recent thoughtful discussion of the serious federalism issues implicated by preemption, see Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization: Grappling with the "Risk to the Rest of the Country"*, 53 UCLA L. REV. (forthcoming 2006).

53. This effect can be seen in numerous Supreme Court cases. See, e.g., *Bates v. Dow Agrosciences LLC*, 125 S. Ct. 1788 (2005) (holding that the Federal Fungicide, Insecticide and Rodenticide Act did not preempt all state common law claims); *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002) (holding that the Federal Boat Safety Act did not preempt all state law design defect claims); *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) (holding that state tort law claim based on the absence of an airbag was preempted by the National Highway Safety Act); *Medtronic v. Lohr*, 518 U.S. 470 (1996) (the Court issued a splintered decision concerning the preemptive scope of the Medical Devices Act); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (holding that Public Health Cigarette Act of 1969 preempted the plaintiff's state tort law claims).

54. Because preemption decisions are based on interpretations of statutes, the judicial branch does not have the last word on the matter. Congress could amend a given statute if it was displeased with a court decision. This is yet another example of the interaction between the branches that can

3. Federal Common Lawmaking

A final, often neglected form of federal judicial tort reform is the federal courts' limited, but powerful, ability to craft federal common law. While *Erie* prohibited federal courts from crafting *general* common law,⁵⁵ it allowed for the development of federal common law in specific areas.⁵⁶ Such federal common law can be an important tool for federal tort reform.⁵⁷

What exactly is "federal common law" after *Erie*? At its broadest level, one could include statutory interpretation generally and preemption in particular as an example of a federal court crafting common law rules.⁵⁸ I have discussed those matters above.⁵⁹ Here, I focus on a narrower definition of federal common law by which I mean situations in which federal courts craft the rules of decision in a case either on their own or pursuant to a Congressional instruction but in which the courts are not purporting to interpret a substantive federal statute.⁶⁰

Tort reform could be accomplished using federal common law in a number of ways. Perhaps most significantly, Congress could authorize the federal courts to develop a body of substantive law in a specific area

be so critical in determining the success of reform efforts. Indeed, the Congress and the courts are not alone on the preemption playing field. Recently, the Bush Administration has advanced a strong version of "executive preemption." See, e.g., Anna Wilde Mathews, *FDA Plan Would Aid Drug Makers in Liability Suits*, THE WALL STREET JOURNAL, Jan. 14-15, 2006, at A1; Marc Kaufman, *FDA Tries to Limit Drug Suits in State Courts*, THE WASHINGTON POST, Jan. 19, 2006, at A2. Assuming such executive preemption is constitutionally authorized, its use would be a further type of federal tort reform.

55. *Erie*, 304 U.S. at 78 (asserting that "[t]here is no federal *general* common law.") (emphasis added).

56. See Friendly, *supra* note 42 at 405 (discussing growth of specific federal common law after *Erie*). The scope, validity and wisdom of making federal common law are hotly debated issues in the literature. See RICHARD H. FALLON, JR., DANIEL MELTZER, & DAVID SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 685-98 (4th 3d. 2003) (hereafter "HART & WECHSLER") (discussing various issues concerning federal common lawmaking).

57. State courts can also engage in tort reform efforts through general common law development. As with federal legislation, however, the advantages of federal common law when it can be made are its geographic scope and constitutional power under the Supremacy Clause.

58. HART & WECHSLER, *supra* note 56, at 685-86 (discussing potentially quite broad definition of federal common law).

59. See *supra* Part I.B.2.

60. A related matter that could also be considered federal common law under my definition is the implication of a private right of action under a federal statute. On the one hand such a decision can be seen as merely statutory interpretation. But it could also be viewed as something more akin to what I have included as part of federal common lawmaking. For a general discussion of implied private rights of action in the context of federal common law, see HART & WECHSLER, *supra* note 56 at 758-825.

of tort law such as product liability.⁶¹ The argument for the constitutionality of such a direction is that Congress legislated in the area under its Commerce Clause authority (or some other constitutional basis) but left the details in the development of the law to the federal courts.⁶² More controversially, the federal courts might be able to develop such federal common law "spontaneously" if the federal interest present was sufficient enough and Congress had not acted.⁶³ In short, while the potential for federal common lawmaking has been largely untapped, it is a serious means by which tort reform could be accomplished.⁶⁴ But as with the other types of judicial tort reform, controlling the development of federal common law would be quite difficult.

C. Procedural Legislation

Both the substantive legislation and court decisions discussed thus far generally have in common the directness of the "solution" to the identified "problem." There are, however, a number of more indirect methods by which one can pursue tort reform goals. In this Part I consider one such indirect method, the use of procedure and related rules.⁶⁵ Before doing so, I acknowledge that such procedural reforms might not be the most effective means of addressing a perceived

61. Professor Linda Mullenix has suggested that such federal common lawmaking would be appropriate in the area of complex litigation, including mass torts and product liability. *See, e.g.,* Linda S. Mullenix, *Complex Litigation Reform and Article III Jurisdiction*, 59 *FORDHAM L. REV.* 169, 196-211 (1990) (hereafter Mullenix, *Complex Litigation Reform*); Mullenix, *Federal Procedure Act*, *supra* note 44, at 1077-79.

62. The Court has upheld such action by Congress in other areas. *See, e.g.,* *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) (interpreting Section 301 of the Labor-Management Relations Act as authorizing the federal courts to develop a body of federal common law). I discuss jurisdictional issues more fully below. *See infra* Part I.D. Of course, success in this tactic would require the Court to determine that congressional power over interstate commerce actually extended far enough to support such an enactment. I have discussed this issue above. *See supra* Part I.A.

63. *See, e.g.,* *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) (crafting common law defense in tort action concerning a government contractor). Action in this regard would be particularly controversial because there is wide agreement that general rules of tort liability are not within the common lawmaking authority of the federal courts. *See HART & WECHSLER, supra* note 56, at 696.

64. Indeed, there is a strong argument that Congress and the courts have used federal common lawmaking in the context of tort reform broadly defined. I discuss this issue further below in connection with certain of the federal government's actions after the September 11, 2001 terrorist attacks. *See infra* Part II. Other scholars have suggested that development of federal common law could be used to address the difficulties that can be caused by the *Erie* Doctrine. *See, e.g.,* Donald T. Trautman, *Toward Federalizing Choice of Law*, 70 *TEX. L. REV.* 1715 (1992).

65. For an interesting symposium discussing the use of procedure as tort reform, see *Symposium: National Mass Tort Conference*, 73 *TEX. L. REV.* 1523-1845 (1995).

problem in the tort system. After all, unlike substantive legislation, procedural enactments are a step removed from addressing any given problem. As a result, procedural tort reform could be seen as less likely to achieve one's substantive goal.⁶⁶ Yet, even if this is so, there may be instances where procedural tort reform is the preferred course. For example, it may be that a given substantive problem is difficult to address head on. This could be because of problems associated with the substantive reform itself (such as redefining the common law standard of negligence in a way to achieve a desired result) or of political difficulties concerning a head-on approach. The point is that procedural reform, even if not as effective as substantive action, has an important role to play in tort reform efforts.⁶⁷

There are many reforms that could be grouped under the heading "procedural." Most obviously, perhaps, are the Federal Rules of Civil Procedure governing the "cradle to grave" aspects of a civil lawsuit. Amendments to and interpretations of those rules will have an impact on the ease of commencing a suit,⁶⁸ the ability to gather evidence,⁶⁹ and the likelihood of avoiding trial⁷⁰ to name but a few possibilities.⁷¹ Such

66. It may also be the case that judging the effectiveness of procedural reform is more difficult than it is for more direct tort reform measures. I leave this empirical point aside for present purposes.

67. It is precisely the potential for effective procedural reform that has prompted certain commentators to decry the tactic. See, e.g., JoEllen Lind, "Procedural Swift": *Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717, 720 (2004).

68. It is standard fare that the Federal Rules of Civil Procedure formally adopt a notice pleading standard under which a plaintiff needs to say relatively little in order to commence a lawsuit and take advantage of the myriad discovery devices available in federal court. See Fed. R. Civ. P. 8(a)(2) (requiring only that a party asserting a claim present "a short and plain statement of the claim showing that the pleader is entitled to relief"). And the Supreme Court has repeatedly underscored this fundamental premise of pleading. See, e.g., *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002) (no heightened pleading requirements for employment discrimination claims); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) (no heightened pleading requirements for civil rights claims). Thus, the formal rules and pronouncements from the Court are plaintiff-friendly in this regard. But this perspective tells only a part of the story. As Professor Fairman has demonstrated, the lower federal courts are far less supportive of liberal notice pleading. See Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987 (2003). If this is the case, then the lower federal courts are engaged in procedural reform of their own, which could have an impact on all civil cases in the federal system, including tort lawsuits. Moreover, this intra-judiciary difference in approach shows that the role of courts in tort reform is not necessarily unitary and is certainly difficult to predict.

69. The Federal Rules of Civil Procedure contain a wide array of means by which parties are able to discover information from both parties and non-parties alike. See FED. R. CIV. P. 26-37, 45. To the extent those rules are amended or interpreted to enhance or restrict discovery, there will be an impact on the ability of parties to prepare their claims and defenses.

70. For example, the increased ability to obtain summary judgment under Federal Rule of Civil Procedure 56 allows defendants to avoid trial in a great number of cases. See, e.g., *Celetox*

general procedural rules will have an impact at some level on tort cases.⁷² Of course, that impact will also be felt in all other types of cases as well.⁷³

It is also possible to engage in more targeted procedural reform. While such an effort will remain indirect, it will have a greater chance of addressing a specific problem such as perceived abuse in the tort system. An example of such targeted reform is the Private Securities Litigation Reform Act of 1995 ("PSLRA").⁷⁴ The PSLRA dealt with concern over perceived abuses in the plaintiff securities class action bar, a situation similar in many respects to current complaints concerning attorneys representing plaintiffs in certain tort matters.⁷⁵ Among other things, the PSLRA adopted a heightened pleading standard for securities fraud claims.⁷⁶ The targeted procedural statute was used as a means to achieve a more substantive result: the reduction in a certain class of lawsuit. The same type of targeted procedural statute could also be used to achieve substantive results with respect to aspects of the tort reform debate.⁷⁷

As with substantive legislation, the types of procedural reforms I have discussed are possible at both the state and federal levels.⁷⁸ Federal

Corp. v. Catrett, 477 U.S. 317 (1986) (relaxing standards for granting summary judgment to defendants in federal court).

71. Another important procedural matter in the context of tort reform is legislation concerning the class action device. I discuss this issue below. See *infra* Part I.D.

72. See Lind, *supra* note 67, at 775-76 (cataloguing ways in which federal procedural rules can affect substantive outcomes in cases shifted from state to federal court).

73. A similar type of general procedural reform measure can be seen in amendments to or interpretations of rules of evidence. So, for example, the Supreme Court's interpretation of the Federal Rules of Evidence requiring trial courts to serve as more aggressive gate-keepers to prevent the admission of "junk science" will have an impact on cutting-edge tort cases as well as other envelope-pushing litigation. See, e.g., *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993); see also Michael H. Gottesman, *Should Federal Rules Trump State Tort Policy? The Federalism Values Daubert Ignored*, 15 CARDOZO L. REV. 1837 (1994) (critically discussing the effect of evidentiary ruling on substantive state tort law).

74. Pub. L. No. 104-67, 109 Stat. 737 (Dec. 22 1995).

75. Compare ATRA statement concerning PSLRA, see <http://www.atra.org/reform/federal/?law=pslra>, with its description of the need for product liability reform. See <http://www.atra.org/issues/index.php?issue=7341> (last visited May 12, 2006).

76. See, e.g., 15 U.S.C. §§ 78u-4(b)(1)(B) (requiring that covered securities fraud complaints "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.").

77. For example, a prominent academic commentator has argued for some time that there should be a federal procedural solution to a perceived problem in the handling of mass tort cases. See e.g., Mullenix, *Proposed Federal Procedure Act*, *supra* note 44. Another example of this approach to reform can be found in the Class Action Fairness Act, which I discuss below. See *infra* Part I.D.

78. See, e.g., Cal. Civ. Code § 3294(a) (requiring a separate proceeding for the award of

reform is particularly important because a change in federal procedure will have a national impact and affect all cases in the federal system.⁷⁹ Thus, a single procedural reform can have an impact that would otherwise be possible only by engaging in repeated reform efforts on the state level. Accordingly, the jurisdictional tort reform efforts I discuss below in which cases are moved from state to federal courts take on increased importance.⁸⁰

On the legislative horizon rests a type of federal procedural reform that is markedly different from any of the reforms already discussed. Currently pending in the United States House of Representatives is the Lawsuit Abuse Reduction Act.⁸¹ On one level, this Act is an unremarkable (if not necessarily wise) example of the types of procedural reform I have been discussing. In that regard, it seeks to amend Federal Rule of Civil Procedure 11 in a number of ways, including making sanctions for filing a baseless lawsuit mandatory, removing the “safe harbor” provision for withdrawing a paper filed in violation of Rule 11, and increasing the types of sanctions that may be awarded under the rule.⁸² In other words, the Act is a prototypical attempt to use procedure to reach a desired substantive goal.

The Act is noteworthy, however, because it does not stop at merely amending a rule of federal procedure. Instead, the proposed legislation provides that the amended version of federal Rule 11 shall be applied by *state* courts in any lawsuit that “substantially affects interstate commerce.”⁸³ Thus, the legislation seeks to apply a federal procedural “solution” through the state courts. This tactic is not new, having been applied by Congress with respect to certain targeted matters.⁸⁴ However,

punitive damages); Fla. Stat. § 768.72 (requiring plaintiff to obtain permission of the court to assert claim for punitive damages).

79. Importantly in this regard, the Supreme Court has held that one almost always uses federal procedural rules in federal court instead of following the procedural law of the states. *See, e.g.,* *Hanna v. Plumer*, 380 U.S. 460 (1965).

80. *See infra* Part I.D.

81. H.R. 420, 109th Cong. (2005).

82. *Id.* at § 2.

83. *Id.* at § 3.

In any civil action in State court, the court, upon motion, shall determine within 30 days after the filing of such motion whether the action substantially affects interstate commerce. Such court shall make such determination based on an assessment of the costs to the interstate economy, including the loss of jobs, were the relief requested granted. If the court determines such action substantially affects interstate commerce, the provisions of Rule 11 of the Federal Rules of Civil Procedure shall apply to such action.

Id.

84. *See, e.g.,* Y2K Act of 1999, 15 U.S.C. §§ 6601-17 (providing for heightened pleading

the current legislation is significant for its broad brush approach to all types of litigation, or at least all types of litigation substantially affecting interstate commerce.⁸⁵

While the future of the current proposal and the prospects of similar legislation are not certain, the possibilities for federal procedural reform using a similar model are striking. For example, if Congress has the power to require state courts to apply federal procedural law in cases not based on federal substantive law,⁸⁶ then Congress could require the use of heightened pleading burdens for all or some subset of tort claims substantially affecting interstate commerce. Or it could provide for increased or restricted discovery in such cases. The point is that the extension of procedure-making power to include state courts would be a significant augmentation of Congressional power to engage in tort reform. Time will tell if Congress actually exercises such power and if the Constitution indeed provides for it.

D. Subject Matter Jurisdiction

The final category of federal tort reform is one that is uniquely available on the national level. Under the Constitution, there are two generic court systems in the United States, those of the States, which remained in existence after the ratification of the Constitution, and those of the federal government, which were provided for under the Constitution. While there was no constitutional mandate for a federal judiciary beyond the Supreme Court,⁸⁷ there have in fact been inferior

requirements in state courts for certain claims relating to Year 2000 computer issues); Biomaterials Access Assurance Act of 1998, 21 U.S.C. §§ 1601-06 (providing rules for motions to dismiss and for summary judgment in certain cases filed in state court).

85. H.R. 420, 109th Cong., sec 3 (2005). The Lawsuit Abuse Reduction Act is also noteworthy because it attempts to regulate in which *state* courts certain types of action may be filed. So, for example, it provides that a personal injury plaintiff may commence a covered action in one of three places only: the plaintiff's home state, the defendant's principal place of business or residence, or the location in which the activity alleged to be unlawful took place. *Id.* at sec. 4. This type of procedural reform faces its own constitutional challenges. See Anthony J. Bellia, Jr., *Congressional Power and State Court Jurisdiction*, 94 GEO. L.J. (forthcoming 2006) (discussing defects in LARA).

86. The extent of Congressional power to control state court procedures has been the subject of recent academic discussion. See, e.g., Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947 (2001); Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures*, 44 VILL. L. REV. 1 (1999); Margaret G. Stewart, *Federalism and Supremacy: Control of State Judicial Decision-Making*, 68 CHI-KENT L. REV. 431 (1992).

87. See U.S. Const. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

federal courts since the founding of the Republic under the Constitution.⁸⁸ The jurisdiction of the two respective court systems in our American judicial federalism is not co-extensive. Most significantly for present purposes, the Court has long interpreted the Constitution to establish the outer limits of potential federal court jurisdiction.⁸⁹

Another important and fundamental principle is that the original jurisdiction of the federal courts is not self-executing.⁹⁰ Instead, Congress must confer jurisdiction upon the federal courts.⁹¹ The Constitution provides Congress with a significant power to affect the allocation (and potentially the outcome) of litigation by exercising its authority under Article III, section 2 to confer jurisdiction. That authority is restricted only by the outer limits of the subjects to which the judicial power may be extended. Within that universe, the allocation of judicial authority is solely in the collective hands of Congress.⁹² Accordingly, it is possible for Congress to use its jurisdiction-granting power as a means to implement tort reform at the federal level.

In this section I explore the ways in which Congress has used subject matter jurisdiction as attempted tort reform as well situations in which it could do so in the future. Before doing so, however, it is worth considering why Congress would use jurisdictional means to implement

88. Congress established inferior federal courts in the Judiciary Act of 1789. *See* An Act to Establish the Judicial Courts of the United States, 1st Cong., 1 Stat. 73 (1789).

89. Article III contains a list of nine topics over which the “judicial power shall extend.” U.S. Const., art. III, § 2, cl. 1. The Court has interpreted this list to constitute the maximum jurisdictional reach of the federal judiciary. *See, e.g.,* *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809); *see also* ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* § 3.4 (4th ed. 2003).

90. *See, e.g.,* *The Mayor v. Cooper*, 73 U.S. 247, 251-52 (1867); *Sheldon v. Sill*, 49 U.S. 441, 448-49 (1850).

91. *Sheldon*, 49 U.S. at 448-449.

92. There is a long-running academic debate concerning the ability of Congress to “strip” the federal courts of subject matter jurisdiction in specific areas. *See, e.g.,* Michael P. Allen, *Congress and Terri Schiavo: A Primer on the American Constitutional Order?*, 108 W. VA. L. REV. 309, 323 n.66 (2005) (collecting academic commentary on jurisdiction stripping legislation); HART & WECHSLER, *supra* note 56, at 319-61 (same and providing extensive commentary on the issue). Thus, whether Congress could eliminate federal court jurisdiction for either or both the Supreme Court and/or the inferior courts over certain types of lawsuits, such as those concerning challenges to state laws restricting the right of a woman to seek an abortion for example, is a hotly debated matter. I need not address these matters here because in the context of federal tort reform the jurisdictional issue concerns *granting* jurisdiction only. It is in this context that I assert that the Constitution does not limit Congress beyond setting the outer limits of jurisdiction. In this respect, I am in good company. *See, e.g.,* *Cooper*, 73 U.S. at 251-52; *Sheldon*, 49 U.S. at 448-49; *Turner v. Bank of North America*, 4 U.S. 8, 9 (1799) (opinion of Chase, J.). On the state level, jurisdiction stripping is highly relevant to tort reform. This issue is addressed by Professor Tracy Thomas in this symposium. *See* Tracy A. Thomas, *Restriction of Tort Remedies and the Constraints of Due Process: The Right to an Adequate Remedy*, 39 AKRON L. REV. 975 (2006).

tort reform, at least without simultaneously enacting substantive legislation.⁹³ After all, without altering the substantive law, the creation of jurisdiction merely shifts the forum in which a given piece of litigation will be resolved. In fact, there are several reasons why jurisdictional legislation might be used in a given situation. First, jurisdictional legislation might be used as a means to subject certain forms of litigation to federal procedural rules. Thus, if the federal rule governing the certification of class actions was seen to be more restrictive than similar rules in the states, a shift of litigation from one system to the other would be a means of reducing the number of certified class actions. It is in this way that, as I discussed above, such procedural legislation is itself a type of tort reform.⁹⁴

Second, and more importantly, there is evidence to support the supposition that shifting the forum can have quite dramatic effects on substantive litigation outcomes. For example, one study reported that "[s]tatistical analysis indicates a removal effect for diversity cases in the neighborhood of a reduction from even (or 50%) odds for plaintiffs to about 35%."⁹⁵ Thus, whether for reasons of applicable procedure, the nature of the decision-maker, or some other factor, moving cases from one court system to another can serve as means to reach substantive results, including tort reform.⁹⁶

Third, jurisdictional reform may be a means of addressing perceived problems in the tort system without simultaneously divesting the states of their traditional role in that area. If Congress adopts substantive legislation, the states are divested from that traditional role.⁹⁷ However, if Congress "merely" enacts a jurisdictional statute the states

93. If Congress did enact substantive legislation it is likely that federal subject matter jurisdiction would be conferred by general federal question jurisdiction. See 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). The issue I primarily address here is when Congress establishes federal court jurisdiction without enacting substantive law.

94. See *supra* Part I.C. Of course, to the extent Congress may impose procedural rules directly on state courts this rationale for jurisdictional legislation becomes irrelevant or at least less important. See *id.* (discussing the imposition of federal procedures on state courts).

95. Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 606 (1998). The authors went on to note that "[a] further regression controlling for the case-selection theory of locale aversion, however, raises the plaintiffs' odds to 39%." *Id.*

96. The specific effect of forum on tort actions has recently been considered by Professors Eisenberg and Morrison. See generally Theodore Eisenberg & Trevor W. Morrison, *Overlooked in the Tort Reform Debate: The Growth of Erroneous Removal*, 2 JOURNAL OF EMPIRICAL LEGAL STUDIES 551 (2005).

97. See *supra* Parts I.A. (discussing substantive legislation) and I.B.2 (discussing preemption doctrine).

may continue to develop tort law, which the federal courts are constitutionally bound to apply.⁹⁸ Of course, such a middle ground solution will only be effective if the problem one has identified is separable from substantive tort law. But assuming that is the case, a policymaker may opt for the jurisdictional solution as a means to exercise federal authority in a more subtle way than substantive lawmaking.⁹⁹

Finally, as with other forms of indirect tort reform such as procedural legislation, jurisdictional reform may not be as politically difficult to implement as substantive legislation could be. Thus, if one is concerned about avoiding political difficulties with a reform measure, jurisdictional legislation might be attractive.

Whatever the reasons, Congress has enacted jurisdictional legislation in the tort arena in a variety of ways. One recently prominent means of jurisdictional tort reform concerns diversity jurisdiction.¹⁰⁰ Congress has long provided for general diversity jurisdiction in federal courts.¹⁰¹ This provision already provides a means to obtain a federal forum in tort cases if the requirements of section 1332 are satisfied.¹⁰² The problem, however, is that the Supreme Court has consistently interpreted the statutory grant of diversity jurisdiction to require complete diversity of citizenship.¹⁰³ This is so even though the Constitution itself does not require such complete diversity.¹⁰⁴

Congress has seized on its ability to extend diversity jurisdiction by relaxing the complete diversity rule as a means to engage in tort reform.¹⁰⁵ For example, in 2002 Congress passed the poorly-drafted

98. See *supra* Part I.B.3 (discussing the *Erie* Doctrine).

99. This rationale usually applies only when Congress exercises its authority to bestow jurisdiction based on diversity of citizenship. As I explain at the end of this Part, the same may not be true when Congress purports to grant jurisdiction as a “federal question.”

100. The Constitution provides for federal courts potentially to have jurisdiction over “[c]ontroversies . . . between Citizens of different States.” U.S. Const. art. III, § 2, cl. 1.

101. See 28 U.S.C. § 1332 (2000).

102. *Id.* One of those requirements is that there be a certain amount in controversy (currently an amount greater than \$75,000) even if the requirements concerning the citizenship of the parties are satisfied. *Id.* Constriction or expansion of this amount in controversy can itself be a form of tort reform by expanding or limiting access to the federal system. I particularly thank Professor Doug Rendleman for his comments concerning diversity jurisdiction in connection with federal tort reform.

103. See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

104. See *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373 n.13 (1978) (“It is settled that complete diversity is not a constitutional requirement.” (citing *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-31 (1967))).

105. There are some commentators who have argued that despite apparent authority to the contrary, the use of “minimal diversity” statutes is not constitutional. See, e.g., C. Douglas Floyd,

Multiparty Multiforum Jurisdictional Act.¹⁰⁶ That statute removed the complete diversity requirement in certain cases in which "at least 75 natural persons have died in the accident at a discrete location. . . ."¹⁰⁷ Subject to certain exceptions set out in the statute,¹⁰⁸ these accident cases would be able to proceed in federal court although state law would still govern under *Erie*.

A more recent example of such a use of diversity jurisdiction is the Class Action Fairness Act of 2005 ("CAFA").¹⁰⁹ CAFA is a complex statute filled with potential interpretative issues,¹¹⁰ but its core is fairly clear. Congress created diversity jurisdiction over certain class action lawsuits that had previously been confined to the state court systems due to the complete diversity requirement.¹¹¹ It did so specifically to address perceived abuses in the complex litigation system in the United States.¹¹² By shifting these cases from state courts to the federal system, Congress sought to achieve a substantive end. CAFA is another example of the use of the power to confer diversity jurisdiction with an effect that is indistinguishable from more "traditional" tort reform in many

The Limits of Minimal Diversity, 55 HASTINGS L. J. 613 (2004). Others have raised concerns based more on general principles of federalism. See, e.g., Georgine Vairo, *Judicial v. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort Cases and Other Complex Litigation*, 33 LOY. L.A. L. REV. 1559 (2000).

106. 28 U.S.C. § 1369 (2000). Evidence of the poor drafting can be seen in the statute's definition of the term "injury," a word that does not appear in the statute itself. *Id.* For helpful discussions of this statute, see Lind, *supra* note 67, at 737-45; James M. Underwood, *Rationality, Multiplicity & Legitimacy: Federalization of the Interstate Class Action*, 46 S. TEX. L. REV. 391, 435-39 (2004).

107. 28 U.S.C. § 1369(a) (2000). In terms of relaxing the general diversity requirements, the statute specifically requires only "minimal diversity" and does not contain a requirement that there be any specific amount in controversy. *Id.*

108. See, e.g., 28 U.S.C. § 1369(b)(2000) (setting forth "[l]imitation of jurisdiction of the district courts").

109. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (Feb. 18, 2005).

110. See generally Georgine M. Vairo, *Class Action Fairness Act of 2005*, Legal Studies Paper No. 2005-22 (Sept. 2005) (hereafter "Vairo, *Class Action Fairness*"), available at <http://ssrn.com/abstract=806405> (analyzing CAFA including its ambiguities).

111. Pub. L. No. 109-2, 119 Stat. 4, § 4 (Feb. 18, 2005) ("Federal District Court Jurisdiction for Interstate Class Actions"). However, CAFA is not solely a jurisdictional statute. While it does not purport to alter the substantive law concerning liability, it does affect matters beyond jurisdiction, whether one terms them substantive, procedural or some mixture of both of these classifications. For example, the statute contains a number of provisions concerning the use of so-called coupon settlements. *Id.* at § 3. In that same regard, CAFA provides for specific ways in which to calculate attorneys' fees in certain cases. *Id.* Nevertheless, the major thrust of the statute is jurisdictional.

112. See Pub. L. No. 109-2, 119 Stat. 4, § 2 (Feb. 18, 2005) (setting forth Congressional findings and purpose).

respects.¹¹³

A more controversial use of jurisdictional statutes involves the creation of federal question jurisdiction.¹¹⁴ If Congress substantively legislated under a valid grant of power such as the Commerce Clause or Section 5 of the Fourteenth Amendment,¹¹⁵ there would be no jurisdictional issue. A claim under any such statute would “arise under” federal law and Section 1331 would provide a valid jurisdictional basis.¹¹⁶

The dicey issue in federal question cases is when Congress purports to grant subject matter jurisdiction under the rubric of a “federal question” but where it does *not* enact substantive legislation. The Court has held that a pure jurisdictional statute – that is one that purports to grant the federal courts jurisdiction based on a federal question but that does no more than provide for jurisdiction – is not constitutionally valid.¹¹⁷ But there are ways in which something that looks a great deal like a “pure” jurisdictional statute has been held to be pass constitutional muster. First, a jurisdictional grant can be seen as a command by Congress to have the federal courts craft federal common law on the subject in question.¹¹⁸ Such an approach would raise the issues I have already discussed above concerning federal common law more generally.¹¹⁹ It would also be an action in which more would be done than shift cases between court systems. Instead, state law would be displaced by federal law, here crafted by the federal judiciary.¹²⁰

A second potential means of achieving federal jurisdiction under a

113. See Vairo, *Class Action Fairness*, *supra* note 110 at 1 (describing CAFA as “an integral part of President Bush’s tort reform efforts”); see also Issacharoff and Sharkey, *supra* note 52 (discussing CAFA in context of federalism issues).

114. The Constitution provides that such jurisdiction may be conferred on the federal courts. See U.S. Const. art. III, § 2, cl. 1 (“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 . . .”).

115. See *supra* Part I.A. (discussing substantive legislation).

116. See, e.g., *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 125 S. Ct. 2363, 2366 (2005); *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916).

117. See, e.g., *Mesa v. California*, 489 U.S. 121, 136 (1989). Certain commentators have argued that the Court’s statements in this regard are dicta and that such statutes should be allowed. See, e.g., Segall, *supra* note 13, at 379-80.

118. See, e.g., *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) (interpreting Section 301 of the Labor-Management Relations Act as authorizing the federal courts to develop a body of federal common law).

119. See *supra* Part I.B.3.

120. I leave to the side the difficult issue of when a court crafting federal common law should adopt the relevant state law as the federal common law to be applied. See HART & WECHSLER, *supra* note 56 at 698-709 (discussing the issue).

"pure" jurisdictional statute is to characterize such an effort as a means of protecting important federal interests, so-called "protective jurisdiction."¹²¹ The possibilities for federal tort reform if protective jurisdiction is legitimate are obvious. Congress could conclude that medical malpractice, for example, is a significant federal issue (perhaps because of its impact on interstate commerce). Therefore, Congress could enact a jurisdictional statute shifting medical malpractice claims to federal court. State law would still be applied, but the decision maker and relevant procedures would have changed. The difficulty with this basis for federal tort reform is that the constitutionality of protective jurisdiction is far from clear.¹²²

The upshot of the discussion in this Part is that Congress's ability to manipulate the subject matter jurisdiction of the federal courts under Article III of the Constitution is a powerful means of engaging in tort reform at the national level.¹²³ It is one that has been used in the past

121. "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. . . . [P]rotective jurisdiction's crucial feature is its grant of federal jurisdiction over a case predicated upon state, not federal, substantive law." Mullenix, *Complex Litigation Reform*, *supra* note 61, at 199.

122. For example, the Court has refused to squarely hold whether "protective jurisdiction" is constitutionally permissible. *See, e.g., Mesa*, 489 U.S. at 137; *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491 n. 17 (1983). In addition, academic opinions have been mixed concerning the constitutionality of this means of conferring federal court jurisdiction. Some commentators believe that protective jurisdiction is a valid means by which Congress can confer jurisdiction. *See, e.g., Paul Mishkin, The Federal "Question" in District Courts*, 53 COLUM. L. REV. 157 (1953); Segall, *supra* note 13, at 370-92; Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216 (1948). Others argue that it is not. *See, e.g., Carole Goldberg-Ambrose, The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. REV. 542, 550 (1983); Mullenix, *Complex Litigation Reform*, *supra*, note 61, at 198-206. For an overview of the issue, *see HART & WECHSLER, supra* note 56, at 840-55.

Despite the lack of constitutional clarity in this area, there are certain enacted or proposed federal tort reform measures that in many respects seem to require the acceptance of some form of protective jurisdiction. I discuss such an example below concerning the September 11, 2001 terrorist attacks. *See infra* Part II. Another example going beyond tort reform concerns the Foreign Sovereign Immunities Act. The Court held that jurisdictional grants in that statute created sufficient substantive law to warrant federal question jurisdiction. *See Verlinden*, 461 U.S. at 496-97. However, the Court's holding in that regard has been questioned. *See, e.g., Howard P. Fink, Linda S. Mullenix, Thomas D. Rowe, Jr., & Mark V. Tushnet, FEDERAL COURTS IN THE 21ST CENTURY: CASES AND MATERIALS* 240-41 (2d ed. 2002); Segall, *supra* note 13, at 379-81.

123. Once cases are in the federal system additional measures can be taken as part of a "reform" effort. *See Symposium: Multidistrict Litigation and Aggregation Alternatives*, 31 SETON HALL L. REV. 877-925 (2001). For example, cases can be shifted within the federal system for consolidated handling under the Judicial Panel on Multidistrict Litigation. *See* 28 U.S.C. § 1407 (2000). And those interested in tort reform have not neglected this aspect of the fight. There is currently pending in Congress the Multidistrict Litigation Restoration Act of 2005 that would, among other things, allow cases transferred under Section 1407 to be tried in the transferee district.

several years and, one suspects, will remain on the agenda of those pursuing tort reform in the immediate future. And it is a form of tort reform that will require the federal courts to deal with important issues concerning the potential reach of the federal judicial power.¹²⁴

III. AN EXAMPLE: SEPTEMBER 11, 2001

Much as with the assassination of President John Kennedy for one generation, most Americans remember exactly where they were when they learned about the terrorist attacks on September 11, 2001. That event will likely have legal, political, and social implications for years to come. In this Part I discuss certain federal legislation enacted after the September 11th attacks. This legislation provides a useful example of how the varied powers of the federal government that I have discussed thus far can be used in conjunction with one another to address a crisis. Moreover, this legislation deals directly with the tort system in the United States, albeit with respect to a narrow set of claims. It shows, however, how the power of the federal government could be brought to bear powerfully on more general “tort reform” issues.

Only eleven days after the terrorist attacks, Congress passed and President Bush signed into law the Air Transportation Safety and System Stabilization Act (“ATSSSA”).¹²⁵ ATSSSA is a remarkable statute enacted to address a remarkable event in our Nation’s recent history. A significant part of the statute concerns “stabilizing” the

See H.R. 1038, 109th Cong. (2005). Under current law, cases must be remanded to the transferor court for trial. *See* *Lexecon Inc. v. Milberg*, 523 U.S. 26 (1998).

124. I would be remiss not to mention abstention here. Simplistically speaking, the Supreme Court has crafted a number of doctrines grouped under the heading “abstention.” The common feature of the doctrines is that under each of them a federal court declines to hear a case over which it unquestionably has jurisdiction. *See generally* Chemerinsky, *supra* note 89 at 761-63 (setting forth an overview of the doctrine). The abstention doctrines are controversial for many reasons, among which is that they may be seen to unconstitutionally undermine Congressional power over the jurisdiction of the federal courts. *Compare* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 *YALE L.J.* 71 (1984) (arguing that abstention is unconstitutional) with Michael Wells, *Why Professor Redish is Wrong About Abstention*, 19 *GA. L. REV.* 1097 (1985) (defending the constitutionality of abstention doctrines). For my purposes here, the importance of the abstention doctrines is that the courts will themselves play a potentially important role in any jurisdictional tort reform.

125. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (Sept. 22, 2001) (codified as amended at 49 U.S.C. § 40101 (note)). In November 2001, Congress passed the Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (Nov. 10 2001). This statute dealt primarily with additional security measures taken concerning commercial aviation in the United States. *See id.* at Title I. Title II of the statute amended the ATSSSA in certain respects. *Id.* at Title II. In my discussion I refer to the ATSSSA as it was amended by the November 2001, legislation.

airline industry through a wide variety of primarily financial means.¹²⁶ My focus, however, is on Title IV of ATSSSA dealing with "Victim Compensation."¹²⁷

Title IV of the ATSSSA reflects Congress's use the wide range of power available to it under the Constitution, in this case to address the potential civil litigation impact of the 9/11 terrorist attacks.¹²⁸ First, Congress enacted substantive legislation. Most prominently, it established the "September 11th Victim Compensation Fund" (the "Fund") "to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001."¹²⁹ Congress directed the Attorney General to appoint a Special Master to administer the Fund and to promulgate regulations concerning its operation.¹³⁰ In addition, the Special Master was to determine eligibility for participation in the Fund as well as the amount of payments to those deemed eligible.¹³¹ The Special Master's determinations were to be immune from any judicial review.¹³² And, significantly, to be eligible for

126. See Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (Sept. 22, 2001), Title I ("Airline Stabilization"); Title II ("Aviation Insurance"); Title III ("Tax Provisions").

127. *Id.* at Title IV.

128. The ATSSA has begun to yield quite interesting academic commentary. See e.g., Robert A. Ackerman, *The September 11th Victim Compensation Fund: A Effective Administrative Response to National Tragedy*, 10 HARV. NEG. L. REV. 135 (2005); Linda S. Mullenix, *The Future of Tort Reform: Possible Lessons From the World Trade Center Victim Compensation Fund*, 53 EMORY L. J. 1315 (2004); *Symposium*, 36 IND. L. REV. 229-463 (2003); *Symposium: After Disaster: The September 11th Compensation Fund and the Future of Civil Justice*, 53 DEPAUL L. REV. 205-830 (2003); *Symposium: War Damage Insurance After Fifty Years*, 9 CONN. INS. L. J. 1-210 (2002-2003).

129. ATSSSA, Title IV, sec. 403.

130. *Id.* at § 404. Attorney General Ashcroft appointed attorney Kenneth Feinberg to serve as special master. See U.S. DEPT. OF JUSTICE, ATTORNEY GENERAL ASHCROFT ANNOUNCES THE APPOINTMENT OF THE SPECIAL MASTER TO ADMINISTER THE SEPTEMBER 11 VICTIM COMPENSATION FUND (Nov. 26, 2001), available at www.usdoj.gov/victimcompensation/dojpr2.pdf. Whether or not the Fund was "successful" depends almost entirely on one's definition of that often nebulous term. For present purposes, I merely refer one to the Special Master's final report concerning his administration of the Fund so the reader can make his or her own assessment. See FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001, available at www.usdoj.gov/final_report.pdf and www.usdoj.gov/final_report_vol2.pdf. For a limited perspective from the Special Master himself, see Kenneth Feinberg, *The Building Blocks of Successful Compensation Programs*, 20 OHIO ST. J. ON DISP. RESOL. 273 (2005).

131. ATSSA, Title IV at § 405. The statute itself provided only broad guidance in this respect. *Id.* at § 404-406.

132. *Id.* at § 405 (b)(3) ("Such a determination [of matters under the Fund] shall be final and not subject to judicial review."). This clause has not barred all judicial review associated with the decisions of the Special Master. See *Schneider v. Feinberg*, 345 F.3d 135 (2d Cir. 2003) (upholding

participation in the Fund, a person needed to forgo most claims that could have been brought in a civil action.¹³³

Both the Congressional action creating the Fund and Special Master Feinberg's administration of it raise many issues.¹³⁴ What is clear beyond doubt is that Title IV of the ATSSSA is a powerful example of substantive federal legislation dealing with the tort system. With it, Congress took an entire category of cases that could have been made as tort claims and provided another avenue by which there could be a resolution of potential disputes. Moreover, it took the unusual step of largely agreeing to pay for the resolution of those disputes itself.¹³⁵ Thus, through substantive legislation Congress sought to provide compensation to victims without requiring potential wrongdoers such as the airlines or private security companies to make payments to the victims. This is dramatic tort reform. There is no substantive reason why it could not be adopted in other areas, although the political realities might make such action impossible or at least quite difficult.¹³⁶

Congress also used the ATSSSA to reach beyond the claims of victims and their relatives. In doing so, Congress may have engaged in substantive lawmaking again, but it also used its power to confer jurisdiction on the federal courts. In Section 408 of the statute, as amended, Congress purported to create a "Federal cause of action for

the validity of the challenged regulations, interpretative methodologies and policies adopted by Special Master Feinberg).

133. ATSSSA, Title IV at § 405(c)(3)(B). Claims against certain collateral source providers as well as the terrorist themselves were exempt from this ban on civil litigation. *Id.*

134. For example, is it fair to have provided victims of this one act of terrorism with benefits when victims of other acts of terror did not receive benefits? Is it appropriate for Congress essentially to delegate lawmaking authority to a private individual such as the Special Master? Is it constitutionally permissible to insulate decisions concerning the Fund from all judicial review? Were the compensatory damages rules adopted in the statute and by the Special Master consistent with the goal of making the victims whole? Is it appropriate to relieve potentially responsible parties such as airlines from liability? These questions, and countless others that could be posed, provide fodder for much thought. *See* sources cited *supra* note 128 (discussing many of these issues).

135. *See* ATSSSA, Title IV at § 406(b) ("This title constitutes budget authority in advance of appropriations Acts and represents the obligation of the Federal Government to provide for the payment of amounts for compensation under this title.").

136. An example of how politics can get in the way of substantive reform can be seen in connection with the so-called asbestos litigation crisis. While interpretation of the data varies widely, there is little doubt that asbestos litigation has consumed and seems likely to continue to consume significant judicial resources in state and federal courts. *See generally* STEPHEN J. CARROLL, ET AL, ASBESTOS LITIGATION (Rand 2005). The asbestos problem seemed to call out for a federal solution. And there were and are attempts to do so. *See, e.g.*, The Fairness in Asbestos Injury Resolution Act of 2005, S.852, 109th Cong (2005). Yet, the problem remains as debate and political infighting continue.

damages arising out of the hijacking and subsequent crashes [of the aircraft involved]."¹³⁷ Such "federal cause of action" was to "be the exclusive remedy for damages arising out of the hijacking and subsequent crashes of such flights."¹³⁸ And Congress further directed that all such actions were required to be brought in the United States District Court for the Southern District of New York.¹³⁹ In sum, using many of the techniques I surveyed in Part I, Congress purported to (1) establish federal law; (2) create (exclusive) federal jurisdiction; (3) expressly preempt state law; and (4) establish exclusive venue in a single federal district court.

As with the creation of the Fund, there are a host of issues that one could raise concerning the creation of this "federal cause of action." The federal jurisdiction created was not based on diversity of citizenship, but rather on the basis that any claim under the statute would arise under federal law.¹⁴⁰ Yet, Congress did not really enact substantive federal law to govern the "federal cause of action" the ATSSSA was said to create. Instead, it directed that "[t]he substantive law for decision in any such suit [filed under the ATSSSA] shall be derived from the law, including choice of law principles, of the State in which the crash occurred unless such law is inconsistent with or preempted by Federal law."¹⁴¹ Thus, in many respects, Congressional power to bestow federal jurisdiction for claims that would not be encompassed under diversity jurisdiction raises the serious constitutional question I discussed above concerning the limit of Congressional power over federal subject matter jurisdiction.¹⁴²

There are various ways in which one could address this question. First, it could be that the incorporation of state law is sufficient in and of itself to create federal law.¹⁴³ This is even more likely when one

137. ATSSSA, Title IV at § 408(b)(1).

138. *Id.*

139. *Id.* at § 408(b)(3).

140. *See supra* Part I.D (discussing diversity and federal question jurisdiction).

141. ATSSSA, Title IV at § 408(b)(2).

142. *See supra* Part I.D. The Second Circuit Court of Appeals has recognized the potential constitutional issues flowing from the creation of this exclusive federal cause of action but has disclaimed a need to resolve them. *See The Canada Life Assurance Co. v. Conventium Ruckversicherung (Deutschland) A.G.*, 335 F.3d 52 (2d Cir. 2003) (holding that Section 408 did not encompass claims for economic loss with only a "but for" causal relationship to the events of September 11th).

143. This was largely the tact taken by the Second Circuit Court of Appeals in upholding the constitutionality of Congress's actions in this regard. *See In re: WTC Disaster Case*, 414 F.3d 352, 371-80 (2d Cir. 2005). The court went on to address the extent to which Congress had sought to preempt state tort law, implicating yet another of the tort reform measures I have discussed. *See id.*; *see also supra* Part I.B.2 (discussing the preemption doctrine).

considers that Congress did enact *some* substantive law by capping the damages that certain defendants could face in any civil action that might be filed.¹⁴⁴ Alternatively, it is possible to view this portion of the ATSSSA as a direction to the federal courts to craft federal common law with the relevant state law serving merely as a starting point. Finally, and perhaps most intellectually honest and satisfying, the ATSSSA in this regard can be seen as a contemporary example of protective jurisdiction.¹⁴⁵ What is certain is that Congress has used its powers in combination in a manner that, at a minimum, pushes the constitutional envelope.¹⁴⁶

IV. CONCLUSION

The ATSSSA is a prime example of many of the types of federal tort reform that are possible. In turn, a consideration of the broader range of possible federal action concerning perceived defects in the tort system, tells us a great deal about the kind of governmental structure the Framers established in the Constitution. For example, we see in this area that the federal government is one of limited powers; one must be able to find some express grant of authority on which to base action. Once such a basis for action has been located, national power is quite strong. Congress (or the courts) can in such a situation legislate aggressively, even displacing state law in traditionally state-regulated areas. But the national government can also enter the debate in ways far more subtle than taking over such a state function. It can influence matters in a more nuanced manner through such means as procedure and jurisdiction.

144. See, e.g., ATSSSA, Title IV at § 408(a) (capping damages for airlines at the amount of applicable liability insurance).

145. Professor Segall has strongly made this argument. See Segall, *supra* note 13, at 388-92.

146. I could also have used Congressional legislation passed after the Three Mile Island nuclear accident to make a similar point. In 1988 Congress enacted the Price-Anderson Amendments Act of 1988. See Pub. L. No. 100-408, 102 Stat. 1066 (Aug. 20, 1988). Among other things, that Act purported to create a “federal cause of action” for matters related to the nuclear incident. See 42 U.S.C. § 2014(hh). As with the ATSSSA, Congress did not enact substantive law, other than a damages cap. Instead, it directed the federal courts to apply relevant state law. *Id.* The Third Circuit Court of Appeals upheld the constitutionality of these provisions, reasoning that Congress had legislated substantively. See *In re: TMI Litigation Cases Consolidated II*, 940 F.2d 832, 848-60 (1991).

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The upshot of this analysis should be a renewed respect for the governmental structure created over two-hundred years ago in Philadelphia. One may not always support particular actions of the federal government in the realm of "tort reform," but one may still admire the governmental structure under which such actions can be taken.