The Federal Courts and the American Law Institute

PART II

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FEDERAL-QUESTION JURISDICTION

I have less to say about federal-question jurisdiction, because the ALI has done much better with this subject than with diversity. The jurisdiction itself, unlike diversity, is not very controversial, despite the well-known fact that it did not exist in the trial courts until 1875;²²⁴ it seems clear that if we are to have original federal jurisdiction at all it ought to extend to the enforcement of federal rights. The Institute accurately marshals the arguments: Federal judges have relative expertise in dealing with federal law; uniform interpretation is promoted by federal jurisdiction; state courts may be hostile to federal law. Supreme Court review of state courts, limited by narrow review of the facts, the debilitating possibilities of delay, and the necessity of deferring to adequate state grounds of decision, cannot do the whole job. The Institute endorses the general federal-question jurisdiction of the district courts in order "to protect litigants relying on federal law from the danger that state courts will not properly apply that law, either through misunderstanding or lack of sympathy."²²⁵ I agree, and I shall not expand on the argument for the jurisdiction.

One difficulty with federal-question jurisdiction is that nobody knows how to define it. Its constitutional scope is quite broad. Despite smoke screens thrown up by dissenting opinions,²²⁶ however, the Supreme Court has never suggested the jurisdiction includes the vast category of cases in which there are potential federal issues. The test of the famous *Osborn* case is rather that the case must contain some "ingre-

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²²⁴ See H. M. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 727-30 (1953).

²²⁵ TENT. DRAFT No. 6, at 69-74 (1968).

²²⁶ *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 874-6 (1824) (Johnson, J.); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 471 (1957) (Frankfurter, J.).

dient" of federal law.²²⁷ It suffices under the Constitution that a part of the case is federal, for example the authority of the National Bank to contract. There is nothing very remarkable about this, or very mysterious either; Professor Mishkin rightly says the federal government must be able to protect its interests against state hostility by opening its own courts, even when federal law forms only one rather remote element in the case. The key to the problem is Mr. Mishkin's insistence that a federal "claim" rather than "question" is the essence of the jurisdiction: A federal right may need federal-court protection even if its scope is settled beyond controversy.²²⁸ Mr. Justice Frankfurter to the contrary notwithstanding, the ingredient test remains an appropriate minimum interpretation of Article III. The controversy over the permissibility of protective jurisdiction in the absence of such a federal ingredient has been discussed above.²²⁹

The real difficulty arises because the statutory language, sensibly, has been more narrowly construed than its constitutional counterpart. Again Mr. Mishkin supplies the justification: While the power must exist to protect federal corporations, for example, in all their dealings, it is unlikely that Congress meant, absent a showing of local hostility, to burden the federal courts with a great many cases whose resolution was likely to depend entirely upon state law.²³⁰ The case of the federal corporation has been specifically excluded by statute, except when the United States is majority stockholder.²³¹ But there are other exceptions, judicially created, that create problems of application.

1. *The Well-Pleaded Complaint; Removal*

The best-known and perhaps the most-criticized exception to federal-question jurisdiction is the well-pleaded-complaint rule, which excludes from the federal trial courts most cases in which the federal claim is not a part of the plaintiff's original complaint.²³² In addition, the Court's willingness to tie this test to technical pleading rules unrelated to jurisdictional policy²³³ makes the rule operate capriciously and adds complexity to the determination of jurisdiction. The Court's

²²⁷ *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 823 (1824).

²²⁸ Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 162-3, 168-71 (1953).

²²⁹ See text at notes 68-73 *supra*. [Footnotes 1-223 appear in Part I of this article at 36 U. CHI. L. REV. 1-49 (1968).]

²³⁰ Mishkin, *supra* note 228, 53 COLUM. L. REV. at 162-3.

²³¹ 28 U.S.C. § 1349 (1964).

²³² *Louisville & N.R.R. v. Mottley*, 211 U.S. 149 (1908).

²³³ See, e.g., *White v. Sparkill Realty Corp.*, 280 U.S. 500, 512 (1930); and compare *Hopkins v. Walker*, 244 U.S. 486 (1917), with *Marshall v. Desert Properties Co.*, 103 F.2d 551 (9th Cir.), *cert. denied*, 308 U.S. 563 (1939).

apparent suggestion that in declaratory-judgment actions the test requires investigation of the rules governing pleading in a hypothetical coercive action,²³⁴ while faithful to the Declaratory Judgments Act's statement that the statute does not affect jurisdiction,²³⁵ increases the burden of threshold litigation. And the general statutory limitation of removal to cases that could originally have been brought in federal court²³⁶ assures that the well-pleaded-complaint rule deprives most litigants of a federal trial court's protection of federal rights asserted in defense or reply.

The excuse for this rule has been that it spares the courts the uncertainty of guessing whether federal issues will be raised after the complaint and enables the jurisdictional determination to be made at the outset.²³⁷ This policy is deserving; it would be wasteful if federal courts either proceeded to judgment with the risk of a tardy dismissal for failure of a federal question to appear or accepted removal of cases that had been nearly completed before a federal point was raised. Cutting off access to a federal court before the answer is filed, though, may be carrying a good thing too far, since the defendant's need for a federal forum seems quite as great as the plaintiff's. Moreover, such insistence on an immediate determination of jurisdiction is not compatible with the present provision allowing the defendant to remove when the plaintiff's claim is federal.²³⁸ I agree with the present law and with the ALI that the expenditure of state-court effort between complaint and answer does not justify depriving the defendant of a federal court to protect against misunderstanding of the plaintiff's federal right;²³⁹ a fortiori, the same wasted effort does not justify depriving the defendant of federal protection for his own federal right.

The Institute proposes to allow removal on the basis of certain federal claims raised subsequent to the complaint, but it does not authorize the plaintiff to obtain original federal jurisdiction by anticipating such a claim.²⁴⁰ This is right enough, though it may lead to a game of musical chairs like that which forced me to object to barring the local plaintiff's invoking diversity.²⁴¹ The difference is that, while

²³⁴ *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950). Possibly the Court only held the federal matter was not required to be pleaded by the declaratory plaintiff. *But see* H. M. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 774 (1953).

²³⁵ 28 U.S.C. § 2201 (1964).

²³⁶ 28 U.S.C. § 1441(a) (1964).

²³⁷ *See* TENT. DRAFT No. 6, at 96-97.

²³⁸ 28 U.S.C. § 1441(a) (1964).

²³⁹ TENT. DRAFT No. 6, at 98-99.

²⁴⁰ *Id.* at 5, 6, 94-98, §§ 1311(a), 1312(a).

²⁴¹ *See* text at notes 193-7, 207-10 *supra*.

the existence of diversity is plain from the complaint, a case does not arise under federal law until the federal claim is made. This point is practical as well as technical: The diversity defendant cannot defeat jurisdiction once attached, as could the defendant with an anticipated federal claim, by failing to make his defense. Thus, to allow anticipation by the federal-question plaintiff would not as in the diversity case assure early final resolution of jurisdiction.

Commendably, for the enlightenment of the attorney, the ALI proposes to codify the well-pleaded-complaint rule, conferring original jurisdiction of actions "in which the initial pleading sets forth a substantial claim" arising under federal law.²⁴² Commendably, the draft disposes of the declaratory-suit problem by applying the same test to actions "for a declaratory judgment."²⁴³ Looking to the actual declaratory complaint simplifies the determination and fully meets the reason for the rule: early assurance that the federal claim is really in the case. Continued reliance on pleading rules does perpetuate rather arbitrary decisions and increases complexity, but no simpler or more appropriate test suggests itself, and the importance of the problem is greatly minimized by the provision for removal and by the sensible provision allowing the federal court to try cases originally but erroneously filed there if a federal claim has since been made.²⁴⁴ With these amendments it does not seem worthwhile to put much effort into devising a more perfect test of original federal jurisdiction in this regard.

The provision for federal-defense removal was a source of considerable controversy within the Institute. The final product is a compromise falling short of the goal and inviting threshold litigation. To begin with, over the Reporters' mild objection,²⁴⁵ there is a \$10,000 jurisdictional amount.²⁴⁶ This is odd only because the Institute proposes to eliminate the amount requirement for original federal-question jurisdiction and for removal based upon the plaintiff's federal claim.²⁴⁷ Though "the national government should bear the burden of providing a forum" to people with federal claims, and though the infrequency of removal in federal-question cases, the great majority of which require no amount, shows that "removal is not now frequently used as a harassing tactic by defendants," the ALI fears that the new opportunity for federal-defense removal might be used "as a harassing tactic in

²⁴² TENT. DRAFT No. 6, at 5, § 1311(a).

²⁴³ *Id.*

²⁴⁴ *Id.* at 8, § 1312(d).

²⁴⁵ *Id.* at 101-3.

²⁴⁶ *Id.* at 6, § 1312(a)(2).

²⁴⁷ *Id.* at 5, 6, §§ 1311(a), 1312(a)(1).

small cases in which the claim is grounded on state law.”²⁴⁸ Why defendants should be thought more likely than plaintiffs to abuse their right to a federal forum is not explained, nor why invocation of that right should be deemed improper. The distinction has no merit; the amount should be required for both parties or for neither.²⁴⁹

There are other exceptions to the ALI’s proposal for federal-defense removal. First, the federal defense must be “dispositive of the action or of all counterclaims therein.”²⁵⁰ Removal on the basis of such defenses as that the plaintiff’s evidence was obtained in violation of federal law or that damages are limited by the Warsaw Convention is thus forbidden: “[S]ince the action will ultimately be resolved by state law, the need for a federal forum is less pressing.”²⁵¹ Moreover, neither constitutional immunity from state process, constitutional objection to choice of law, nor the federally guaranteed bar of a sister-state judgment or a bankruptcy decree is to be a ground for removal.²⁵² “Most challenges to state ‘long arm’ statutes are today foreclosed by prior Supreme Court decisions, and would not raise a ‘substantial defense’”; even when a substantial issue is presented, “[t]he objection to process . . . is a dilatory one, which does not go to the merits,” and in every case there is a preliminary question of the reach of state law. As for the choice of law and *res judicata* issues, “[w]hether these are defenses that ‘arise under’ federal law and whether they are ‘substantial’ are questions that are not clear. It is clear that removal on this ground should not be allowed.” No reasons are given.²⁵³

Moreover, actions by a state or its officer, agency, or subdivision to enforce the state or local “constitution, statutes, ordinances, or administrative regulations”²⁵⁴ are not to be removable on the basis of federal defenses because “proper respect for the states suggests that they should be allowed to use their own courts for routine matters of law enforcement,” except in special situations such as civil rights or suits against federal officers. For no apparent reason this exception is deliberately made inapplicable to claims based on state common law.²⁵⁵ Finally, private eminent-domain cases are made non-removable despite federal defenses: Removal of most condemnations will be prohibited by the

²⁴⁸ *Id.* at 78, 79, 101, 103.

²⁴⁹ For general consideration of the jurisdictional amount, see text at notes 367-98 *infra*.

²⁵⁰ TENT. DRAFT NO. 6, at 6, § 1312(a)(2).

²⁵¹ *Id.* at 105.

²⁵² *Id.* at 7-8, 110-1, § 1312(b)(7), (8).

²⁵³ *Id.* at 110-1.

²⁵⁴ Or suits against the state to require enforcement. *Id.* at 7, § 1312(b)(5).

²⁵⁵ *Id.* at 109.

clause just discussed, and therefore private condemnation proceedings should not be removed either.²⁵⁶

Much of this reasoning is unpersuasive. Abuse of the new provision by the assertion of frivolous defenses seems no more likely with respect to personal jurisdiction than to other issues, and in any case the problem is amply resolved by the long-standing requirement that the federal claim must be substantial,²⁵⁷ a requirement the ALI properly proposes to make explicit in the statute.²⁵⁸ That some of these cases do not "arise under" federal law in the sense of the well-pleaded-complaint rule is irrelevant; no federal-defense cases do, and that federal law does affect both choice of law and respect for judgments is indisputable.²⁵⁹ State-court hostility or misunderstanding seems no less probable in any of the excepted cases than in those the Institute would make removable; indeed the likelihood of anti-federal bias must be at its height when the state sues in its own courts. Federal issues as to personal jurisdiction, choice of law, *res judicata*, illegal evidence, and compensation for takings are often intensely factual, so that Supreme Court review may prove inadequate protection. The ALI's tautological view that it is less serious to be gypped out of a point of evidence or damages than out of a whole case does not prove that federal rights to less than the whole deserve no protection, for they are often far from insignificant. And the argument respecting private condemnation suits is no argument at all, since the reasons for excluding comparable state suits are admittedly inapplicable.

The respectable arguments for the ALI's exceptions from federal-defense removal are thus reducible to two: the desirability of allowing states to enforce their laws in their own courts and the undesirability of burdening the federal courts with numerous questions of state law. A federal trial seems necessary in all the excepted cases if uniform vindication of federal rights is to be assured, but the cost of this assurance may be too high. When the plaintiff's claim is federal, the case is likely to be dominated by federal issues, although there may be threshold questions of state law, as when state action is sought to be enjoined. Every federal-defense case contains issues of state law; when the defense is on the merits and dispositive of the action, the mix of federal and state matters is likely to approximate that of the suit to enjoin state action. But when the federal issue is collateral, like per-

²⁵⁶ *Id.* at 7, § 1312(b)(6); *id.* at 109-10.

²⁵⁷ *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103 (1933).

²⁵⁸ TENT. DRAFT NO. 6, at 5, § 1311(a); *id.* at 81-83.

²⁵⁹ *See, e.g., Crider v. Zurich Ins. Co.*, 380 U.S. 39 (1965); *Durfee v. Duke*, 375 U.S. 106 (1963).

sonal jurisdiction, there are not only state-law matters related to the federal issue itself (*e.g.*, the interpretation of a state long-arm statute); there may also be an entire trial on the merits governed entirely by state law. Pendent jurisdiction allows the federal court to avoid wasted effort by adjudicating the entire case, but the expenditure of federal resources and the invasion of state judicial prerogative are large. The ALI's proposal to forbid removal based on such relatively peripheral issues as personal jurisdiction, choice of law, *res judicata*, illegal evidence, and excessive damages is therefore in complete accord with Professor William Cohen's recent and valuable insight that original federal-question jurisdiction should be determined pragmatically in the light of, among other things, the relative dominance of federal and state issues.²⁶⁰ I cannot object to these exceptions; they will probably be easy to administer, and they will keep a healthy volume of local issues out of federal courts.

More troublesome is the exception for state enforcement cases, with its unexplained omission of suits arising under common law. These cases will often be substantially federal; the reason for excluding them from federal court is not the dominance of local issues but respect for the states. This respect seems entirely appropriate in criminal cases, which Congress has scrupulously left to state courts except in instances of extreme federal interest or state hostility, such as prosecutions of federal officers or of persons unable to enforce their civil rights in state court.²⁶¹ It may not be so pressing in civil cases, but it is worthy of consideration; I cannot oppose this exception very strongly, as it rests upon a reasonable balancing of the need for federal protection against the state's interest in being able to enforce its own laws. But I would delete the exception for private condemnation suits, which seem to me to present no special problems either of deference to state interest or of dominant state-law issues.

Present law forbids removal of federal counterclaims. The plaintiff cannot remove because removal is limited to "defendants";²⁶² the defendant presumably cannot because the original action was not cognizable in federal court.²⁶³ If state practice makes the counterclaim com-

²⁶⁰ Cohen, *The Broken Compass: The Requirement That a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890, 906-7, 916 (1967).

²⁶¹ 28 U.S.C. §§ 1442, 1443 (1964). In criminal cases, too, the myriad of federal procedural objections would practically destroy state criminal jurisdiction and burden the federal courts with state-law issues if removal were allowed.

²⁶² *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941).

²⁶³ 28 U.S.C. § 1441(a) (1964). The notion that the counterclaim itself is the relevant "civil action" seems contrary to the holding in the *Shamrock* case, *supra* note 262, that the relevant "defendant" is the party against whom the original action was brought.

pulsory, this law is likely to deprive the defendant of a federal forum. Consequently the Institute proposes to allow removal by a defendant asserting a federal claim compulsory under state law and by a party against whom any federal counterclaim is asserted.²⁶⁴ This accords with the policy underlying federal-claim and federal-defense removal, but simplicity would be served without any adverse effect I can see by eliminating the burdensome inquiry respecting state compulsory-counterclaim rules and allowing either party to remove whenever a federal counterclaim is made.

Federal defenses to counterclaims are to provide a basis for removal,²⁶⁵ but federal replies to state-law defenses to state-law claims are not. An earlier draft, loyal to the policy of providing a federal forum to vindicate federal rights, had authorized federal-reply removal;²⁶⁶ but the late stage at which replies are asserted is one minor argument in the other direction,²⁶⁷ and the probable dominance of state issues in a reply case is another.²⁶⁸ But if the plaintiff attacks the validity of a state-law defense, the federal question is likely to be of some importance in the case, and I should prefer to extend removal to federal rights claimed at any stage of the pleadings, and in any removal petition filed before trial.

Removal of Jones Act, FELA, and Fair Labor Standards Act actions, and of suits for lost or damaged freight under the Carmack Amendment, is to be forbidden.²⁶⁹ In part this bar is a continuation of present law;²⁷⁰ the entire package represents a policy decision to respect the forum choice of a widows-and-orphans type of plaintiff, and I see no reason to criticize or to extend it. It is an improvement on present law because it eliminates considerable uncertainty, and I do not feel strongly about the defendant's access to a federal forum when it is the plaintiff who would suffer from any state hostility.

²⁶⁴ TENT. DRAFT No. 6, at 6, § 1312(a)(3). No jurisdictional amount is to be required.

²⁶⁵ *Id.* at 6, § 1312(a)(2).

²⁶⁶ TENT. DRAFT No. 4, at 6, § 1312(a)(3) (1966).

²⁶⁷ *But cf.* removal on the basis of an answer to a counterclaim, which cannot be raised sooner than in a reply.

²⁶⁸ The ALI has used this one. *See* TENT. DRAFT No. 5, at 98-99 (1967).

²⁶⁹ TENT. DRAFT No. 6, at 7, § 1312(b)(1)-(4).

²⁷⁰ 28 U.S.C. § 1445 (1964) (FELA; \$3000 minimum for Carmack removal); *Pate v. Standard Dredging Corp.*, 193 F.2d 498, 500 (5th Cir. 1952) (Jones Act). The FLSA cases conflict. *Compare* *Wilkins v. Renault Southwest, Inc.*, 227 F. Supp. 647, 648 (N.D. Tex. 1964) (absurdly holding removal "expressly" barred, *see* 28 U.S.C. § 1441(a) (1964), by a provision that such actions "may be maintained in any court of competent jurisdiction"), *with* *Asher v. William L. Crow Constr. Co.*, 118 F. Supp. 495 (S.D.N.Y. 1953), allowing removal.

The emasculated²⁷¹ provision of section 1443(1) for removal by defendants unable to enforce equal federal rights in state courts is to be preserved without improvement;²⁷² section 1443(2), which has become superfluous by interpretation,²⁷³ is slated for virtual repeal;²⁷⁴ and, thank goodness, the ALI intends to reverse the pointless court-created principle that an action within exclusive federal jurisdiction cannot be removed.²⁷⁵

2. *Additional Problems of Definition*

Not all cases in which the plaintiff's claim contains a federal element are within the statutory original jurisdiction. In every case involving a federal corporation or the ownership of a patent or copyright, for example, the federal existence of the company or of the property may be implicit in the plaintiff's case; but the improbability of a challenge on these remote grounds has led to the common-sense exclusion of the corporation cases by statute²⁷⁶ and of the property cases (including those relating to the ownership of land long ago obtained from the United States) by court decision.²⁷⁷ Unfortunately, there is no very good way to express these exceptions in the statute. The ALI toyed with the idea of codification but concluded that it was better to say nothing, because the present rules are fairly well understood although hard to formulate, and because any change would create uncertainty.²⁷⁸ It is regrettable that the circle cannot be squared, but the Institute and Professor Cohen²⁷⁹ are right that we have better things to do than to keep trying the impossible.

People have tried for years to enunciate a comprehensive definition of federal-question cases. The Supreme Court from time to time has said a case arises under federal law when the cause of action is federally

²⁷¹ See *City of Greenwood v. Peacock*, 384 U.S. 808 (1966).

²⁷² TENT. DRAFT No. 6, at 8, § 1312(c).

²⁷³ *City of Greenwood v. Peacock*, *supra* note 257.

²⁷⁴ TENT. DRAFT No. 6, at 9. The narrow provision for removal by a state officer prosecuted for compliance with federal law is preserved in the proposed § 1312(c). Federal-officer removal is considered in text at notes 347-9 and the problem of the civil-rights defendant in text at notes 569-87 *infra*.

²⁷⁵ See *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916); TENT. DRAFT No. 6, at 8, § 1312(d).

²⁷⁶ 28 U.S.C. § 1349 (1964).

²⁷⁷ See, e.g., *Shulthis v. McDougal*, 225 U.S. 561, 569-70 (1912) (land); *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916) (patent); *T.B. Harms Co. v. Eliscu*, 339 F.2d 823 (2d Cir. 1964), *cert. denied*, 381 U.S. 915 (1965) (copyright).

²⁷⁸ TENT. DRAFT No. 6, at 83-85. The Reporters also feared the term "direct" might overrule *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921); see note 283 *infra*.

²⁷⁹ Cohen, *The Broken Compass: The Requirement That a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890, 907 (1967).

created,²⁸⁰ or when federal law must be construed.²⁸¹ But the former test is little help in the problem cases in which some elements are federal and some state; the latter would exclude the clearly cognizable cases in which the law is clear but a federal right needs federal vindication²⁸² and include cases in which a state has adopted federal standards for its own purposes. The cases are terribly confused on the incorporation-by-reference problem;²⁸³ I see no federal interest in hearing such controversies, and the statute could profitably and clearly be made to exclude them by requiring that federal law operate of its own force in order to support jurisdiction.²⁸⁴

The converse case has occasionally caused trouble. Federally given rights are often defined by reference to state law, either out of deference to state interests or because of the convenience of utilizing an existing standard. People have wondered, for example, why there is federal jurisdiction to determine who is entitled to renew a copyright,²⁸⁵ since the statute has been read to adopt state principles of succession; and the Supreme Court many years back denied federal jurisdiction to de-

²⁸⁰ *E.g.*, *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916).

²⁸¹ *E.g.*, *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 379 (1821).

²⁸² See Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 170-1 (1953).

²⁸³ Supreme Court jurisdiction to review state-court judgments in such cases was denied in *Miller's Executors v. Swann*, 150 U.S. 132 (1893), and upheld in *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942). District-court jurisdiction was denied in *Moore v. Chesapeake & O. Ry.*, 291 U.S. 205 (1934), and upheld in *Smith v. Kansas City Title & T. Co.*, 255 U.S. 180 (1921). Jurisdiction in habeas corpus was denied in *McClain v. Wilson*, 370 F.2d 369, 370 (9th Cir. 1966), and in *Flores v. Beto*, 374 F.2d 225, 227 (5th Cir.), *cert. denied*, 387 U.S. 948 (1967). For further confusion see *Wheeldin v. Wheeler*, 373 U.S. 647 (1963), and *Avco Corp. v. Machinists' Lodge 735*, 390 U.S. 557 (1968), suggesting opposite conclusions without advertent to the issue.

²⁸⁴ One commentator would distinguish between cases in which a state has created additional remedial consequences based upon a pre-existing federal duty and those in which it has extended the duty to new factual cases. Note, *Supreme Court Review of State Interpretations of Federal Law Incorporated By Reference*, 66 HARV. L. REV. 1498, 1502-3 (1953). The subtlety of this distinction is against it, and in either case the federal government is indifferent to the outcome. There may be virtue in promoting uniformity in cooperative state-federal programs based on a common standard (*e.g.*, unemployment compensation) by providing federal jurisdiction; but it seems better, as in the case of federal incorporations, not to burden the federal courts with a lot of cases devoid of federal interest until Congress provides for jurisdiction in the case of a particular program. In the familiar *Standard Oil* case, *supra* note 283, one may be tempted to discern a federal interest in avoiding taxation of government agencies; but this concern arises from the proprietary position of the United States, not from the state's use of federal standards for determining the tax, and it is protected by the truly federal constitutional limits on intergovernmental taxation.

²⁸⁵ *De Sylva v. Ballentine*, 351 U.S. 570 (1956). See the discussion of this case in *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 827 (2d Cir. 1964), *cert. denied*, 381 U.S. 915 (1965), and in TENT. DRAFT No. 6, at 84.

termine which of two claimants was entitled to receive a land patent from the United States, because the statute provided that "local customs" were determinative.²⁸⁶ Yet the adoption of state standards does not demonstrate indifference to the outcome of a case. It is of some concern to the national government who is entitled to vote for congressmen, despite the use of state law as a reference.²⁸⁷ And when state law is adopted purely for federal convenience, as in the old Conformity Act respecting procedure,²⁸⁸ it may be unfair to expect the states to undertake the whole burden of litigation; the states do not have a burning interest in how federal courts are run.

Professor Cohen defends the refusal of jurisdiction in the land-claimant cases on the pragmatic ground that local issues are likely to predominate,²⁸⁹ but I think the difficulty of drawing lines and the ultimate federal interest in determining who gets federal benefits justify holding the case within the arising-under jurisdiction. Surely, for example, the FELA plaintiff is not to be kept out of federal court because her "widow" status is dependent upon state law.²⁹⁰ To express this in the statute would not be easy; though the Court has sometimes been wrong on this matter in the past, I would leave it for the Court to correct.

Another ambiguity in the present statute is the uncertainty whether cases arising under federal common law come within the jurisdiction. Mr. Justice Frankfurter's unpersuasive *Romero* opinion,²⁹¹ which held maritime common law outside federal-question jurisdiction because a federal forum was already available in admiralty, failed to account for the corresponding overlaps between admiralty and diversity and in the case of maritime statutes; but it left open the question of section 1331 jurisdiction over other common-law cases. Rightly concluding that federal common law requires the same vindication and uniformity as do statutes, the ALI hopes the courts will uphold jurisdiction, but

²⁸⁶ *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 508 (1900).

²⁸⁷ U.S. CONST. art. I, § 2.

²⁸⁸ Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196, 197.

²⁸⁹ Cohen, *The Broken Compass: The Requirement That a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890, 906-7 (1967).

²⁹⁰ 45 U.S.C. § 51 (1964).

²⁹¹ *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959). See the dispute over *Romero's* interpretation regarding suits for injunctions based on maritime common law in *Marine Cooks & Stewards v. Panama S.S. Co.*, 265 F.2d 780 (9th Cir. 1959), *rev'd*, 362 U.S. 365 (1960), and *Khedivial Line v. Seafarers' Int'l Union*, 278 F.2d 49 (2d Cir. 1960). Since the premise of *Romero* was the existence of an adequate remedy in admiralty, the inability of courts sitting in admiralty to give injunctions argues strongly for jurisdiction. But *Romero* may have held the maritime common law was not a "law of the United States."

it refrains from proposing an amendment to this effect lest it raise "questions about the continued applicability of existing case law the authority of which it is intended to preserve."²⁹²

The same objection is raised against making explicit the probable requirement that the case arise under a law not limited to the District of Columbia or to federal territories and possessions.²⁹³ This limitation is a good one too, for essentially local matters belong in the District of Columbia or territorial courts. Finally, the Reporters disclaim even any opinion on the unfortunate holding that an interstate compact is not a federal "law" for jurisdictional purposes.²⁹⁴ The federal interest in uniform interpretation of a compact is strong, especially since the Court has made clear that federal law governs the question;²⁹⁵ the federal courts are ideally placed to arbitrate conflicting state positions respecting compacts; and there is a federal interest in assuring that the limitations of congressional consent are respected.

I cannot see what deserving case law would be questioned by clarifying any of these ambiguities; the best argument against amending the statute to reach cases "arising under the Constitution, treaties, statutes, regulations, executive orders or agreements, and common law of the United States not limited to the District of Columbia, territories or possessions, and under interstate compacts" is the esthetically displeasing lack of simplicity. There is also the danger of excluding by negative implication some overlooked type of federal law, such as the Rules of Criminal Procedure.²⁹⁶ But since the lawyer needs to know the inclusions and exclusions, it might be better to encumber the statute with those that can be reasonably expressed than to leave him to look for relevant decisions.

3. *Exclusive Jurisdiction*

Federal jurisdiction is normally concurrent with that of the states; if neither party wants a federal forum, it is not forced upon the litigants. It is difficult to justify exceptions to this principle. Allowing the state courts to protect their dockets by refusing jurisdiction is one thing;²⁹⁷ depriving willing state courts of power to proceed when both

²⁹² TENT. DRAFT No. 6, at 86-87.

²⁹³ *Id.* at 85-86.

²⁹⁴ *Hinderlider v. La Plata Co.*, 304 U.S. 92, 109 (1938).

²⁹⁵ *Petty v. Tennessee-Missouri Bridge Comm'n.*, 359 U.S. 275, 278 (1959).

²⁹⁶ See *Cleary v. Bolger*, 371 U.S. 392, 414 n.3 (1963) (Brennan, J., dissenting), raising the question whether the Rules were "civil rights statutes" within 28 U.S.C. § 1343 (1964).

²⁹⁷ See *Missouri ex rel. Southern Ry. v. Mayfield*, 340 U.S. 1, 5 (1950) (forum non conveniens); but see *Engel v. Davenport*, 271 U.S. 33, 38-39 (1926), refusing to allow use of a short state statute of limitation in a Jones Act case.

parties desire a state adjudication is another. The divorce situation presents a strong case for exclusive jurisdiction because of the danger that both parties and the foreign court may wish to subvert the properly applicable law.²⁹⁸ But this example is atypical; the cases within federal jurisdiction do not involve this problem.

Professor Wechsler some years ago argued for continued exclusive federal jurisdiction over federal crimes on the ground that only in federal courts could defendants be assured their constitutional rights against the federal government.²⁹⁹ But this problem could be cured by allowing removal by the defendant who wants additional rights, even if the recent expansion of the rights of state-court defendants and the added fact that the federal government was prosecutor would not assure adequate protection in state court. Professor Frankfurter's long-ago suggestion that much essentially local federal criminal business be transferred to the state courts³⁰⁰ has never been taken up; perhaps a revision of the Judicial Code is not the best place to discuss it.

The complexity of antitrust cases is perhaps an indication that state courts would not be overly anxious to take on the burden of adjudicating them, or at first overly competent to do so. Patent cases may be similar in this regard, though the present narrow scope of exclusive jurisdiction leaves the state courts considerable scope to deal with patent law.³⁰¹ The ALI's notion that in patent and copyright cases there is a federal interest transcending that of the parties³⁰² is unconvincing; since nonparties would not be bound by a state decision, it is hard to see how the monopoly could be undermined or extended by state litigation. As for uniformity of decision, the desire for federal precedents does not forbid parties to arbitrate or to settle their disputes without litigation; no more should it bar recourse to a possibly more convenient and less costly state court.

Suits against the United States and for review of its administrative agencies are authorized only in federal courts, and this is reasonable: Since the United States could be expected to remove most suits brought against it in the state courts, exclusive federal jurisdiction spares the parties and the courts an extra round of filing and of court costs. In

²⁹⁸ See D. Currie, *Suitcase Divorce in the Conflict of Laws*: Simons, Rosenstiel, and Borax, 34 U. CHI. L. REV. 26, 49-53 (1966).

²⁹⁹ Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 219 (1948).

³⁰⁰ F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 293 (1928).

³⁰¹ See *Pratt v. Paris Gas Light & Coke Co.*, 168 U.S. 255, 259 (1897); *Luckett v. Del-park, Inc.*, 270 U.S. 496, 510-1 (1926).

³⁰² TENT. DRAFT No. 6, at 89.

bankruptcy cases the presence of multiple parties makes the danger of state-court error both unusually likely and unusually serious.

I would limit the exclusive jurisdiction to criminal, bankruptcy, and antitrust cases; to suits against the United States or for review of federal administrative agencies; and to certain maritime proceedings discussed below.³⁰³

4. *Pendent Jurisdiction*

State-law issues are commonly adjudicated in federal courts, regardless of diverse citizenship, if they are part of a case arising under federal law. The strength of the policy justifying this intrusion on state concerns varies according to the case, as Hart and Wechsler and the recent article by Mr. Shakman have shown.³⁰⁴ When, as in the National Bank's contract case,³⁰⁵ only a part of the federal claim itself is based on federal law, or when a federal defense is interposed to a state-created cause of action, a federal trial court could not function at all if it could not pass upon local issues. In interpleader cases the court could function if it left out of consideration claims created by state law, but the risk of exposing a stakeholder to multiple liability argues strongly for pendent jurisdiction. The Supreme Court's decisions permitting a plaintiff with a federal claim to join state-law claims arising out of the same transaction³⁰⁶ go a big step further, based entirely upon the savings in time and money of avoiding multiple trials on overlapping evidence.

As I indicated in discussing the complete-diversity rule and its exceptions,³⁰⁷ I have no difficulty in subordinating the claim of states' rights in this sort of situation to what I consider a substantial economy of resources, and I endorse the ALI's intention to codify the pendent-jurisdiction doctrine in the broad form in which the Supreme Court has recently defined it.³⁰⁸ The old test of *Hurn v. Oursler*,³⁰⁹ which

³⁰³ See text at notes 337-41 *infra*. The ALI commendably proposes to do away with exclusive jurisdiction in a number of obscure situations, as well as under the Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1964). See TENT. DRAFT No. 6, at 5, 89-94, § 1311(b).

³⁰⁴ H. M. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 804 (1953); Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 STAN. L. REV. 262 (1968).

³⁰⁵ *Bank of the United States v. Planters' Bank*, 22 U.S. (9 Wheat.) 904 (1824).

³⁰⁶ *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966); *Hurn v. Oursler*, 289 U.S. 238 (1933).

³⁰⁷ See text at note 156 *supra*.

³⁰⁸ TENT. DRAFT No. 6, at 10, § 1313(a).

³⁰⁹ 289 U.S. 238 (1933).

required a distinction between separate "claims" and separate "causes of action," was not easy to administer, and it forced the splitting of a number of cases that might better have been consolidated from the point of view of judicial economy.³¹⁰ The 1948 attempt at codification³¹¹ was a failure; no one knew whether the reviser's test of a "related" claim was meant to broaden or to preserve the *Hurn* test,³¹² and the apparent limitation of the doctrine to copyright, patent, and trademark litigation made little sense in policy and less in precedent. The statute has been largely ignored.

The *Gibbs* case gives the proper breadth to the doctrine, allowing pendent jurisdiction whenever considerations of judicial economy justify consolidation.³¹³ The ALI captures the essence of this principle, making it easily available to the harried practitioner in familiar language that lends itself to construction in light of the policy of avoiding duplication of proof: State-law claims may be entertained if they "arise out of the same transaction or occurrence or series of transactions or occurrences as the federal claim, defense, or counterclaim." The interpretive difficulties of this test, already utilized in the closely related provision defining compulsory counterclaims in Rule 13(a), seem justified by the enormous burden of duplicate litigation that can be avoided by pendent jurisdiction.

I would end the definition right there. The ALI feels the need to add a complicating qualification: "if such a determination is necessary in order to give effective relief on the federal claim or counterclaim or if a substantial question of fact is common to the claims arising under State law and to the federal claim, defense, or counterclaim."³¹⁴ In the great mass of cases one or both of these conditions will be met by the requirement that the federal and state claims arise from the same transaction; the gain in specificity of tailoring jurisdiction to policy by adding the ALI's qualification seems to me outweighed by its difficulties of application.

The ALI sensibly provides that when a case is removed to a state court all claims unrelated to the federal claim are to be remanded.³¹⁵

³¹⁰ *E.g.*, in *Hurn* itself, where the federal claim was for copyright infringement, a state-law claim for theft of an uncopyrighted version of the same play was dismissed. *See also* *Wojtas v. Village of Niles*, 334 F.2d 797 (7th Cir. 1964).

³¹¹ 28 U.S.C. § 1338(b) (1964).

³¹² *Compare* *River Brand Rice Mills v. General Foods Corp.*, 334 F.2d 770 (5th Cir. 1964), *with* *Powder Power Tool Corp. v. Powder Actuated Tool Co.*, 230 F.2d 409, 413 (7th Cir. 1956).

³¹³ *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

³¹⁴ TENT. DRAFT No. 6, at 10, § 1313(a).

³¹⁵ *Id.* at 10, § 1313(b).

This is a logical corollary of the basic pendent-jurisdiction provision: Judicial economy does not sanction depriving state courts of authority over nondiverse claims not factually related to those in federal court.

The proposal for remand is related to that old bugaboo, the separate-claim-removal statute (section 1441(c)). The problem is what to do about removal when a plaintiff joins claims under federal and state law in a state court. The answer is easy enough: If the claims are related, the whole case should be removable in order to assure correct interpretation of the federal right and to promote judicial economy; if the claims are unrelated, the federal claim alone should be removable. Before the broadening of pendent jurisdiction in *Gibbs* it was not clear that either of these goals could be reached under the general removal statute, because removal was tied to original jurisdiction, and the federal court might not have had original jurisdiction over the entire action.³¹⁶

Gibbs takes care of the related-claim case: If there is need for consolidation, there is pendent jurisdiction and the entire case is within original federal cognizance. The ALI's remand proposal indirectly solves the case of the unrelated claims, for it unmistakably implies that removal is contemplated although the state-court case contains some elements outside original federal jurisdiction; and the ALI's revised federal-question provision makes clear that federal jurisdiction exists whenever the complaint sets forth a substantial federal claim, without regard to the presence of state claims.³¹⁷ Section 1441(c), which says so much more than this, which was designed before the effective pendent-jurisdiction doctrine of *Gibbs*, and which plays hob with the diversity jurisdiction, is not needed.

The Institute resolves the dispute over whether extraterritorial federal process is effective on pendent state claims³¹⁸ by saying it is.³¹⁹ This answer is fully consistent with the policy underlying nationwide federal service in those situations in which it is authorized; if the plaintiff is to be allowed to sue the defendant far from home, he should not be discouraged from doing so, or forced to wage two lawsuits respecting

³¹⁶ See Lewin, *The Federal Courts' Hospitable Back Door—Removal of "Separate and Independent" Non-Federal Causes of Action*, 66 HARV. L. REV. 423, 426 (1953).

³¹⁷ TENT. DRAFT NO. 6, at 5, § 1311(a). See also the removal provision, § 1312(a)(1), *id.* at 6, which reinforces the conclusion by allowing removal of a "civil action" whenever there is a "claim" within original federal cognizance.

³¹⁸ Compare, e.g., *Cooper v. North Jersey Trust Co.*, 226 F. Supp. 972, 980-2 (S.D.N.Y. 1964), with *Wilensky v. Standard Beryllium Corp.*, 228 F. Supp. 703, 705-6 (D. Mass. 1964). See Ferguson, *Pendent Personal Jurisdiction in the Federal Courts*, 11 VILL. L. REV. 56 (1965).

³¹⁹ TENT. DRAFT NO. 6, at 10, 119-20, § 1313(a).

a single transaction, by being denied the right to make that process effective as to related state claims. Moreover, since the defendant is required to defend the federal claim in a distant forum, it is not likely to be appreciably more inconvenient for him to face related state-law claims there too.

My first caveat is based on the fact that state and constitutional limits on personal jurisdiction express important choice-of-law considerations as well as policies of convenience;³²⁰ care must be taken not to allow pendent personal jurisdiction to cause a change in the applicable law to the detriment of some interested state. Mechanical application of the *Klaxon* rule³²¹—following the choice-of-law rules of the forum state—would do just that, without the justification of avoiding intrastate forum-shopping, since only in the federal court is there nationwide service of process. If defendants are brought in who are beyond state reach, the analogy of *Van Dusen v. Barrack*³²² teaches that they should be treated as if the suit had been brought in a state in which they could have been sued. Unfortunately, in contrast to the transfer case, it is not always clear where the suit would have been brought if there had been no nationwide federal service; often there may be two or more available forums. The best compromise between *Erie* policy and judicial economy therefore seems to be, as the ALI suggests in interpleader,³²³ to allow the federal court to depart from state choice-of-law doctrine when that is necessary to avoid injustice to a defendant not normally subject to suit in the forum state. The Reporters' commentary so proposes.³²⁴

My second reservation respecting the relaxation of venue and personal-jurisdiction requirements for claims pendent to those subject to nationwide process is that the relaxation should be confined to claims among the original parties. Limitations on the place of trial reflect important policies of fairness and convenience in litigation; I do not think the desirability of avoiding multiple trials justifies dragging to an otherwise inappropriate forum parties not subject to nationwide process on the original claim.³²⁵

The ALI would make explicit the judicial rule that if the federal claim is disposed of, the federal court may in its discretion dismiss

³²⁰ See D. Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533.

³²¹ *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

³²² 376 U.S. 612 (1964).

³²³ See text at note 127 *supra*.

³²⁴ TENT. DRAFT No. 6, at 120.

³²⁵ See the more general discussion of place of trial and additional parties in text at note 444-6 *infra*.

pendent state claims without adjudication.³²⁶ It is obvious that litigants should not be allowed to impose upon the federal courts by appending substantial state claims to frivolous federal ones, and that judicial economy will not be served by pendent jurisdiction in such a case because there is not going to be a federal trial at all. In part this problem is taken care of by the ALI's codification of the jurisdictional substantiality requirement;³²⁷ claims clearly lacking merit will not even get in the federal door, and there is nothing to which state claims can be appended. The federal courts have also wisely refused, however, to hold a separate trial simply for state claims even when the pretrial dismissal of the federal claim is on the merits instead of for lack of jurisdiction.

The Supreme Court in *Gibbs* suggested this rule might be an absolute one by saying "certainly" the state claims should be dismissed in such a case;³²⁸ but the force of this statement, which was not necessary to the result, is weakened by the Court's describing the entire decision respecting pendent jurisdiction as discretionary. I suppose discretion, despite its uncertainty, is best in such a matter. The extent of the pre-dismissal investment of federal resources in discovery and other pretrial maneuvers will vary from case to case, as will the additional effort required to adjudicate the state claims; it would be wasteful, for example, to throw them out without prejudice if they could be disposed of on the merits before trial along with the federal claims. There may also be problems with state limitation periods that expired while the federal claim was pending.

The ALI's provision for discretionary refusal to adjudicate state claims in removed cases necessitates a special section allowing immediate appellate review of the dismissed federal claim, with a stay of the order remanding state claims pending appeal.³²⁹ This is complicated but sensible, because it avoids wasted efforts. The principle is clear and its application will be easy; the frightening bulk of the provision is deceptive.

In general, I heartily endorse the ALI's proposals regarding federal-question jurisdiction. In particular, the suggested limitation of exclusive jurisdiction, the codification of pendent jurisdiction, and the provisions for removal on the basis of federal defenses deserve prompt congressional approval. My objections to the details of these sections

³²⁶ TENT. DRAFT No. 6, at 10, § 1313(c).

³²⁷ *Id.* at 5, § 1311(a).

³²⁸ *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

³²⁹ TENT. DRAFT No. 6, at 10-11, § 1313(d).

are minor; I would gladly sacrifice them in order to see the general improvements enacted.

ADMIRALTY JURISDICTION

The Institute's modest emendations of the barnacled provisions for maritime cases are among the very best of their proposals. First, the ALI steps squarely into a controversy that Congress has unfortunately left unsettled since 1789, providing expressly that "the admiralty and maritime jurisdiction does not include a claim merely because it arose on navigable waters."³³⁰ This means that jurisdiction and choice of law respecting plane crashes, for example, can no longer be held to depend upon the irrelevant question whether the wreckage is upon the earth or the water;³³¹ the admiralty jurisdiction and its attendant federal common law³³² will henceforth be tailored to the needs of the shipping business that are their universally acknowledged justification.³³³ The more ambitious extension of admiralty jurisdiction to cover the entire aviation business—an extension clearly warranted by the precise analogy between air and water commerce in terms of the policies underlying the jurisdiction³³⁴—is not considered by the Reporters.

Apart from its partial renunciation of the blind locality test for torts, the ALI does not enter the morass of irrational distinctions created by judicial attempts to delineate which cases are "maritime," and for this it is perhaps to be forgiven. An ideal statute would see to it that the locality test is no more a necessary than a sufficient condition in tort cases; the belated Extension Act,³³⁵ which includes within the jurisdic-

³³⁰ *Id.* at 19, § 1316(a).

³³¹ See *Weinstein v. Eastern Airlines*, 316 F.2d 758 (3d Cir. 1963). Better decisions, rejecting jurisdiction in cases of swimmers and divers injured by striking submerged objects or the bottom, are *Chapman v. City of Grosse Pointe Farms*, 385 F.2d 962, 965-6 (6th Cir. 1967), and *McGuire v. City of New York*, 192 F. Supp. 866, 870 (S.D.N.Y. 1961).

³³² See generally D. Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 SUP. CT. REV. 158. I agree the statute should not try to exempt pleasure boating, because of the difficulty in drafting to take account of such matters as collisions between pleasure and commercial vessels. The issue seems better dealt with as a matter of choice of law than as one of jurisdiction. See TENT. DRAFT No. 6, at 137-8.

³³³ See, e.g., Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259, 262 (1950); Stolz, *Pleasure Boating and Admiralty: Erie at Sea*, 51 CALIF. L. REV. 661, 665 (1963).

³³⁴ See D. CURRIE, *FEDERAL COURTS* 405-9 (1968).

³³⁵ 46 U.S.C. § 740 (1964). Perhaps it was the inappropriate stowage of this provision outside the Judicial Code that led the Reporters to overlook it. The incompleteness of the Extension Act and the interpretive problems it creates (see D. CURRIE, *FEDERAL COURTS* 399-403), suggest that the Reporters' fear that such a revision might cause as many problems as it would solve is not well founded. The statute should provide, in words the Reporters reject, jurisdiction over "all claims arising out of any maritime transaction or occurrence irrespective of where the claim arose or the damage or injury occurred." TENT. DRAFT No. 6, at 140-1.

tion suits for shore damage caused by a vessel, ought itself to be extended. The well-known exclusions of contracts to build and to sell ships³³⁶ ought to be explicitly eliminated. The statute ought to make clear that the "admiralty court" has full power to give equitable, quasi-contractual, or any other kind of relief necessary to do full justice between the parties; it is high time that Professor Morrison's unanswerable repudiation of the ancient and lingering limits on remedial powers in section 1333 cases were enacted into law.³³⁷

A second highly commendable proposal of the ALI is to restate the confusing saving-to-suitors clause of section 1333, which gives the misleading impression that the admiralty jurisdiction is largely exclusive. State courts, says the ALI in essentially codifying the existing decisional law, shall have concurrent jurisdiction of maritime cases except for limitation proceedings and actions in rem.³³⁸ The commentary makes clear that the state courts will be permitted to entertain suits under the Death on the High Seas Act,³³⁹ although courts have frequently and unjustifiably held federal jurisdiction exclusive.³⁴⁰ The change is a good one, in line with the general policy that suitors not desiring a federal forum should be permitted to forgo it. Limitations and in rem proceedings present the only justifiable cases for exclusive jurisdiction in maritime matters, apart from suits against the United States; both

³³⁶ See, e.g., *The Francis McDonald*, 254 U.S. 242 (1920) (construction); *The Ada*, 250 F. 194 (2d Cir. 1918) (sale). The Reporters admit the exclusion of shipbuilding is an "anomaly" but find it "of little practical significance" since it is well known; those affected "are able to safeguard their interests." TENT. DRAFT NO. 6, at 138. This is to say there is no point in making the division of jurisdiction rational, and it comes close to saying admiralty jurisdiction might just as well be dispensed with altogether. Amendment would not require emulation of the British attempt to enumerate all maritime cases, Administration of Justice Act, 1956, 4 & 5 Eliz. 2, c. 46, § 1 (1956). I agree this would invite trouble. All that is needed is to deal with the two most flagrant exceptions, with perhaps a commentary suggesting the new inclusions are to be taken as a guide for avoiding unnatural limitation of the general term "maritime." Jurisdiction should reach "all claims arising from maritime transactions, including contracts for construction or sale of vessels."

³³⁷ See Morrison, *The Remedial Powers of the Admiralty*, 43 YALE L.J. 1 (1933). The Reporters complacently assert that the problem has "apparently been cured" by the 1966 unification of civil and admiralty procedure. See TENT. DRAFT NO. 6, at 136-7, relying on FED. R. CIV. P. 1, 18, defining maritime actions to be "civil" and allowing joinder of "legal, equitable," and "maritime" claims. Even if the courts are willing to buy this persuasive argument (but see Fiddler, *The Admiralty Practice in Montana and All That*, 17 MAINE L. REV. 15, 25-26, 28, 38 (1965)), it provides only for relief ancillary to a request for a remedy traditionally maritime; the problem remains whether the admiralty jurisdiction includes an action for injunction alone. See *Khedivial Line v. Seafarers' Int'l Union*, 278 F.2d 49 (2d Cir. 1960).

³³⁸ TENT. DRAFT NO. 6, at 19, § 1316(b).

³³⁹ 46 U.S.C. §§ 761 *et seq.* (1964); TENT. DRAFT NO. 6, at 147-8.

³⁴⁰ E.g., *Wilson v. Transocean Airlines*, 121 F. Supp. 85, 93-98 (N.D. Cal. 1954). *Contra*, *Ledet v. United Aircraft Corp.*, 24 Misc. 2d 1010, 204 N.Y.S.2d 604 (Sup. Ct. 1960).

typically include numerous claimants, so that the case is both unusually difficult and unusually important.

Less understandable is the Institute's acceptance of the case law that maritime cases brought in state court are not removable simply because they are originally cognizable in admiralty.³⁴¹ The present statute was plainly designed without regard to the removal of maritime cases,³⁴² but the federal interest in providing a forum for the defendant seems just as great as in any other cases within the original federal jurisdiction. Only in the commentary, and without giving any reasons, does the ALI reveal that it means to perpetuate the *Romero* holding that cases under the general maritime law are not federal-question cases.³⁴³ Thus, the Institute means to preserve the absurd rule that removal of maritime cases is allowed only if the parties are diverse or the case is based on a federal statute. I would not give the plaintiff in a maritime case a final power to choose a state forum except in the unusual case, such as those under the Jones Act, in which there is reason to assert a special concern for the convenience of an especially needy class of plaintiffs.³⁴⁴

The best argument I have seen against allowing removal into admiralty is that removal would defeat the plaintiff's option to secure a trial by jury, which was the central purpose of the clause saving common-law remedies.³⁴⁵ Removal on the basis of diversity or a federal statute, presently allowed, is consistent with this policy (but not with the asserted policy of allowing choice of a state forum), for diversity and federal-question cases are tried "at law." And it is in regard to trial by jury that the Institute makes its most singular and forward-looking contribution to maritime law, authorizing jury trial on request of

³⁴¹ TENT. DRAFT No. 6, at 20, 154, § 1317(a). See *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 371-2 (1959) (dictum). A few courts have allowed removal. See, e.g., *Davis v. Matson Nav. Co.*, 143 F. Supp. 537 (N.D. Cal. 1956), and the modified position of the same judge in the *Crawford* case, *infra* note 342.

³⁴² See 28 U.S.C. § 1441(b) (1964), construed in *Crawford v. East Asiatic Co.*, 156 F. Supp. 571 (N.D. Cal. 1957), to forbid removal on the basis of admiralty alone if any defendant resided in the forum state.

³⁴³ *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959). See TENT. DRAFT No. 6, at 154.

³⁴⁴ The Institute's § 1312(b)(3), TENT. DRAFT No. 6, at 7, would preserve the Jones Act's prohibition of removal because of the "deliberately considered choice of Congress," *id.* at 109. The policies underlying this choice, the Reporters note, "seem equally applicable" to other maritime personal-injury actions, *see id.* at 154-5, yet the draft does not forbid their removal on diversity grounds. This oversight should be corrected, at least as to seamen's actions, which may be special. See the confusion engendered by joinder of Jones Act and other seamen's claims in state court in *Pate v. Standard Dredging Corp.*, 193 F.2d 498 (5th Cir. 1952), discussed in D. CURRIE, *FEDERAL COURTS* 364-5 (1968).

³⁴⁵ See Note, *Removal to Admiralty*, 69 YALE L.J. 442, 451 (1960).

any party, even though the basis of jurisdiction is admiralty, of all claims for damages from personal injury or death.³⁴⁶

This provision is brilliant. It may be the first attempt in the history of American law to base the right to a jury upon considerations of its appropriateness instead of on hollow historical accident. It builds upon the excellent suggestion made some years ago by Professor Charles Black that juries are out of their depth in complex commercial cases but vitally useful in accident litigation where the "estimation of the intangible but real elements of damage . . . is very much a matter of lay feeling."³⁴⁷ It provides a solution for the argument that removal into admiralty would deprive the plaintiff of his jury: Removal would do this only when the case would be better tried without one.

It would be good if the ALI's functional approach could be extended to the troublesome jury problems on the "law side" of the court, which now require a tedious and irrelevant investigation into the division of responsibility between law and equity in eighteenth-century England;³⁴⁸ but the Seventh Amendment would get in the way unless rationalization took the form of extension rather than contraction of jury trial in every instance. Meanwhile the Institute is very much to be applauded for its advanced contribution to rationality in the mode of trying maritime cases. Indeed I think it would be wise to go further and to provide that the admiralty jurisdiction is the sole basis of federal power over maritime cases. This would allow refusal of a jury in maritime cases not involving personal injury regardless of the plaintiff's designation of his claim. Surely the existence of diverse citizenship has nothing to do with whether there ought to be a trial by jury.

Three cheers for the Institute's maritime proposals. The provisions respecting jury trial, the locality rule in torts, and the jurisdiction of state courts should be enacted at once, and additional corrections should follow.

UNITED STATES AS PARTY

Sovereign immunity is the most interesting and controversial question in federal-government litigation, but the ALI is probably wise not to deal with it in a general overhaul of the law of jurisdiction. The bulk of the jurisdiction study is concerned with the issue of where a lawsuit should be tried; immunity, while often considered "jurisdic-

³⁴⁶ TENT. DRAFT No. 6, at 22, § 1319. The exception for limitation proceedings is unfortunately to be preserved, see *id.* at 162-3.

³⁴⁷ Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259, 278 (1950).

³⁴⁸ See *Damsky v. Zavatt*, 289 F.2d 46 (2d Cir. 1961).

tional" in many of its aspects, determines the quite distinct issue of whether the government can be made to respond at all. Some day Congress should eliminate the irrational, inequitable exceptions to governmental tort liability;³⁴⁹ consolidate the ragged and inconsistent statutes consenting to suit;³⁵⁰ abolish the untrusting and inconvenient requirement that government-contract actions for more than \$10,000 must be brought in the Court of Claims³⁵¹ and the provision for direct Supreme Court review of that court,³⁵² which burdens the Supreme Court with insignificant cases or deprives the litigant of all review; and make a more rational and more liberal reconciliation of individual protection and government elbow-room in suits to enjoin federal officers than that established by the benighted *Larson* decision and its sequels.³⁵³ But all these matters are somewhat tangential to the central task of deciding which cases belong in federal rather than in state court, and the ALI is justified in not holding up one important job while pursuing another.

The Institute does essay two minor alterations in this field, raising the maximum amount in district-court Tucker Act cases from \$10,000 to \$50,000³⁵⁴ (a small step in the right direction) and making an explicit provision regarding the none-too-clear right of a defendant to counterclaim when sued by the United States. The proposal is a conservative one; it would allow any counterclaim that could have been brought in a district court to begin with, or any related counterclaim that could have been brought in any court of the United States, relaxing slightly the monopoly of the Court of Claims. But immunity itself is not to be relaxed beyond the already established ability to set off

³⁴⁹ See 28 U.S.C. § 2680 (1964); *Dalehite v. United States*, 346 U.S. 15 (1953).

³⁵⁰ See e.g., *Amell v. United States*, 384 U.S. 158 (1966), and the discussion in D. CURRIE, *FEDERAL COURTS* 458-67 (1968).

³⁵¹ 28 U.S.C. §§ 1346(a)(2), 1491 (1964).

³⁵² 28 U.S.C. § 1255 (1964).

³⁵³ *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 701-2 (1949); *Malone v. Bowdoin*, 369 U.S. 643 (1962); *Dugan v. Rank*, 372 U.S. 609 (1963). As stated in Mr. Justice Douglas's concurrence in *Larson*, 337 U.S. at 705, there may be something to be said for protection against suits to obtain Government property; but the majority opinion and both the *Malone* and *Dugan* decisions rested on the unjustifiable and unworkable distinction between official acts in violation of statute and those merely illegal. See the admirable proposal of Professor Wechsler to abolish immunity except when the judgment runs against the United States as such—making clear, of course, that courts may not order an officer to cough up property owned by the United States. Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 222-3 (1948).

³⁵⁴ TENT. DRAFT NO. 6, at 25, § 1322(a)(1).

related claims against the government's recovery: "[N]o affirmative judgment may be given against the plaintiff on such a claim."³⁵⁵

This compromise should appease nobody; it relies on the economically exaggerated distinction between out-of-pocket losses and lost receipts, a distinction that can scarcely be of significance to the operations of the securely solvent government of the United States. There may be wrongs that the government should be permitted to perpetuate with impunity; if so, it should be irrelevant that the United States has a claim against the victim for an equal or larger amount. On the other hand, if it appears unfair for the government to play both sides of the street by suing and refusing to be sued, counterclaims should be allowed without regard to whether they reduce the government's winnings or result in a judgment against the United States.

The Institute preserves the present statutes pertaining to mandamus against federal officers,³⁵⁶ jurisdiction over federal corporations,³⁵⁷ and removal of state-court actions against federal officers,³⁵⁸ providing specially for venue and change of venue in government litigation³⁵⁹ and leaving untouched the provision for district-court review of ICC orders.³⁶⁰ There is no excuse for retaining this obsolete departure from court-of-appeals review in administrative cases, and especially no justification for the burdens of convening a special three-judge court and of mandatory direct appeal to the Supreme Court. The ALI excuses its inattention to this problem by noting that the Commission and the Judicial Conference are presently working on it.³⁶¹ Okay.

The provision for removal by federal officers, while slightly changed

³⁵⁵ *Id.* at 24, § 1321(b). *See* *United States v. Shaw*, 309 U.S. 495 (1940), and the ambiguities discussed in H.M. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1154-8 (1953).

³⁵⁶ TENT. DRAFT No. 6, at 26, § 1323(b). *See* 28 U.S.C. § 1361 (1964), finally enacted in 1962 to remedy a shocking gap erroneously based upon *M'Intire v. Wood*, 11 U.S. (7 Cranch) 504 (1813), which had relied on the absence of a grant of federal-question jurisdiction. This statute removes neither sovereign immunity nor the limitation of mandamus to actions not "discretionary," *see* *Smith v. United States*, 333 F.2d 70, 72 (10th Cir. 1964); clarity and simplicity might be served, as well as the case for mandamus against state or local officials improved, by substituting a reference to mandamus in the general federal-question provision for the separate section proposed by the ALI.

³⁵⁷ TENT. DRAFT No. 6, at 27, § 1324(a); *see* 28 U.S.C. § 1349 (1964).

³⁵⁸ TENT. DRAFT No. 6, at 27, § 1323(c). *See* 28 U.S.C. § 1442 (1964).

³⁵⁹ TENT. DRAFT No. 6, at 29-32, §§ 1326-27. The commentary explains, *id.* at 31, 33, that these provisions are generally similar to those for federal-questions or diversity cases, *see* text at notes 407-66 *infra*, except that in government cases venue is proper in the state where all plaintiffs, other than the United States, reside.

³⁶⁰ TENT. DRAFT No. 6, at 28, § 1325; *see* 28 U.S.C. §§ 1253, 1336, 2325 (1964).

³⁶¹ *See* TENT. DRAFT No. 6, at 186, 247.

in wording, is not described as changing the law, although a recent court-of-appeals decision casts doubt on the protective sufficiency of the existing statute by construing it more narrowly than the substantive federal law restricting damages against federal officers.³⁶² The appropriateness of this jurisdiction to assure the effective functioning of the federal government itself is evident,³⁶³ and the scope of removal should encompass every substantial claim of federal privilege. The ALI's proposed removal in federal-defense cases fails to meet this need, because it is limited by the inadvisable jurisdictional amount,³⁶⁴ and further study should be given to the question whether state hostility to federal programs is such as to justify removal of claims against federal officers even when federal defenses are not at stake.

The Institute has nothing to say about the neither settled nor satisfactory state of the law respecting the jurisdiction of state courts over federal officers. Without rhyme or reason the Supreme Court has allowed state courts to entertain criminal, replevin, and damage suits against federal officers, but not mandamus or habeas corpus;³⁶⁵ the possibility of an injunction is cloudy.³⁶⁶ Obviously such limitations as sovereign immunity bar state as well as federal proceedings, but whether the integrity of federal operations requires additional restrictions on state power over federal officers is less clear. The subject ought to be considered.

I am left with the feeling that since the ALI was not prepared to undertake a thorough consideration of the law respecting federal-government litigation it would have been better advised to leave the subject alone. Its half-baked efforts in this regard make little significant contribution and are likely to deflect attention in the future from the many and serious issues that are not effectively resolved by the draft.

THE JURISDICTIONAL AMOUNT

Ever since the 1789 Judiciary Act, which imposed a \$500 minimum in diversity cases,³⁶⁷ access to the federal courts in certain cases has been limited to cases involving a more or less substantial money value. Both

³⁶² *Morgan v. Willingham*, 383 F.2d 139, 141-2 (10th Cir. 1967),

³⁶³ See *Bradford v. Harding*, 284 F.2d 307, 309-10 (2d Cir. 1960).

³⁶⁴ TENT. DRAFT No. 6, at 6, § 1312(a)(2).

³⁶⁵ *United States ex rel. Drury v. Lewis*, 200 U.S. 1 (1906) (criminal); *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872) (habeas); *Teal v. Felton*, 53 U.S. (12 How.) 284, 292 (1852) (damages); *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 604-5 (1821) (mandamus); *Slocum v. Mayberry*, 15 U.S. (2 Wheat.) 1, 12 (1817) (replevin).

³⁶⁶ See Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 YALE L.J. 1385 (1964).

³⁶⁷ Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78.

the general diversity and the general federal-question provisions today require more than \$10,000 in controversy,³⁶⁸ in order, according to the Senate Report on the 1958 bill that raised the amount from \$3,000, not to "fritter away" the resources of the federal courts "in the trial of petty controversies."³⁶⁹

Discrimination against litigants with "only" \$10,000 at stake is not without its unsavory connotations: The amount is high enough to realize the Senate Committee's fears of turning the federal courts into tribunals "of big business," except for accident cases, and to suggest an indifference to protecting the rights of the common man. On the other hand, if the federal courts are too busy to handle all diversity and federal-question cases, it makes sense to exclude those in which state-court error or prejudice will do the least damage, and money may be as good a gauge of damage as we can practicably apply.³⁷⁰ Alternative ways to deal with the problem of congestion include the appointment of additional federal judges³⁷¹ and the exclusion of particular classes of cases, regardless of amount, in which there is relatively little need for a federal forum, an unusually high burden of litigation, or an especially potent state interest.³⁷²

The ALI does in part embrace the last alternative; in addition to approving and extending federal doctrines requiring refusal to interfere without special warrant with state taxation or regulation, it proposes to exclude federal courts from original as well as removal jurisdiction in workmen's-compensation cases arising under state law. These exceptions will be discussed below.³⁷³ But the Institute proposes to retain the \$10,000 minimum in diversity cases while abolishing it in cases arising under federal law.³⁷⁴

The justification for the difference is in part the fact that existing statutes make numerous exceptions to the amount requirement in federal-question cases now, leaving the amount required, according to the Senate Committee in 1958, only in suits challenging the validity of state statutes and in personal-injury suits brought by seamen under the Jones Act.³⁷⁵ But many attacks upon state statutes come within section

³⁶⁸ 28 U.S.C. §§ 1331, 1332 (1964).

³⁶⁹ S. REP. NO. 1830, 85th Cong., 2d Sess. 1 (1958).

³⁷⁰ See TENT. DRAFT NO. 6, at 79.

³⁷¹ See the vehement objection to such a notion in Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 515-6 (1928).

³⁷² See Meador, *A New Approach to Limiting Diversity Jurisdiction*, 46 A.B.A.J. 383, 384 (1960), making particular reference to personal-injury diversity cases.

³⁷³ See text at notes 505-10 *infra*.

³⁷⁴ See OFFICIAL DRAFT, pt. I, at 8, § 1301(a) (diversity); TENT. DRAFT NO. 6, at 5, § 1311(a) (federal question).

³⁷⁵ S. REP. NO. 1830, 85th Cong., 2d Sess. 6 (1958).

1343(3), which dispenses with the minimum amount in suits against state officers for deprivation of "any right, privilege or immunity secured by the Constitution" or by any federal law providing for equal rights;³⁷⁶ and the Jones Act, even if it does not itself confer jurisdiction without regard to amount,³⁷⁷ will very likely be held a law "regulating commerce" within section 1337,³⁷⁸ which also dispenses with the requirement. In any event, the Jones Act plaintiff can get into federal court with a small case simply by labeling his papers "Admiralty," for there has never been a jurisdictional-amount requirement in section 1333 or its predecessors.

The lack of reason behind the patchwork pattern of exceptions, the fact that the present requirement is "largely illusory,"³⁷⁹ and the difficulty of determining which cases require the amount and which do not, amply support the Institute's decision to unify the law in all federal-question cases. The further decision to accomplish unification by abolishing rather than by extending the amount requirement accords very well with the principle that the federal courts ought to be the principal enforcers of federal rights; to force small claims into state courts, the Reporters say, "would smack too much of regarding the state courts as inferior tribunals . . ."³⁸⁰ And this solution eliminates the often very difficult process of determining how much is in fact in controversy in the case at bar.

The diversity draft does not attempt to defend its retention of the jurisdictional amount. The federal-question draft, observing the apparent contradiction, comes to the rescue without committing itself on the other draft: "[W]here parties are relying entirely on state law, it is not inappropriate to require the states to provide a forum for cases involving a small amount."³⁸¹ The difference apparently comes not in differential need for a federal forum but in the degree of undesirability of requiring state courts to exercise small-claim jurisdiction, and in

³⁷⁶ For the undeservedly narrow construction given this statute and the Fifth Circuit's recently abandoned efforts at correction, see *Bussie v. Long*, 383 F.2d 766 (1967); *D. CURRIE*, *FEDERAL COURTS* 426-30 (1968).

³⁷⁷ 46 U.S.C. § 688 (1964).

³⁷⁸ See *Imm. v. Union R.R.*, 289 F.2d 858 (3d Cir. 1961) (FELA within § 1337); *Swanson v. Marra Bros., Inc.*, 328 U.S. 1, 5 (1946) (Jones Act supported by commerce power); *Pate v. Standard Dredging Corp.*, 193 F.2d 498 (5th Cir. 1952) (FELA removal bar incorporated by Jones Act).

³⁷⁹ *TENT. DRAFT* No. 4, at 202. However, the occasional omissions may cause unjustified hardship. See, e.g., *Flast v. Cohen*, 392 U.S. 83 (1968), where in the excitement over standing the Court overlooked the problem of amount in a suit to enjoin a federal officer from disbursing money in alleged violation of the Establishment Clause.

³⁸⁰ *TENT. DRAFT* No. 6, at 79.

³⁸¹ *Id.*

these terms the source of the governing law is indeed relevant. Whether this difference justifies the distinction, however, is another matter.

Ascertaining the amount in controversy is no mean trick. In damage actions the requirement is virtually ineffective to keep out small claims; the amount at stake is whatever the plaintiff claims, if there is a possibility the jury will award it, and the courts are understandably reluctant to investigate the merits deeply enough to determine whether there is a "legal certainty" that the amount claimed cannot be recovered or whether it was claimed in bad faith.³⁸² Provisions for denying and imposing costs when recovery falls short of the claim, the ALI tells us, have not proved very effective to deter inflated claims;³⁸³ to enforce the provisions rigidly, moreover, would hardly be fair to the honest plaintiff whose case has been compromised by the jury.

When relief other than damages is sought the plaintiff's allegation is not so conclusive, for the amount depends upon objective facts; unfortunately they do not always lend themselves to valuation. The impossibility of putting a money value on free speech, for example, may have had much to do with the statutory dispensation of the minimum in many constitutional cases;³⁸⁴ constitutional rights against the United States, however, and nonconstitutional rights such as adoption, custody, and divorce, are equally immeasurable, and no special provision is made for such cases.³⁸⁵

Short of impossibility there are difficult valuation problems when, for example, an injunction is sought. It is pretty well and sensibly settled that the amount involved is the minimum cost to a party of losing his case; one cannot contend, for instance, that his entire \$1,000,000 business is at stake when he could preserve it by buying a contested \$50 license.³⁸⁶ But it is not always easy to determine the actual cost of complying, say, with a regulatory statute;³⁸⁷ and for some unknown reason

³⁸² See, e.g., *Bell v. Preferred Life Assur. Society*, 320 U.S. 238 (1943), holding the then \$3000 requirement met in an action asking \$200,000 for fraud relating to the plaintiff's investment of \$200 in a policy worth no more than \$1000, although punitive damages were required to "bear proportion" to the injury. Some courts are willing to dismiss when on the facts a verdict exceeding the minimum would have to be set aside. E.g., *Anthony v. United Ins. Co.*, 240 F. Supp. 95 (E.D.S.C. 1965). *Contra*, e.g., *Deutsch v. Hewes Street Realty Corp.*, 359 F.2d 96 (2d Cir. 1966).

³⁸³ OFFICIAL DRAFT, pt. I, at 64-65, discussing the present 28 U.S.C. §§ 1331(b), 1332(b) (1964). The provision is to be retained, however, "because its presence may have had some benefit and because its repeal might convey an unfortunate impression." See *id.* at 9, § 1301(d).

³⁸⁴ See *Hague v. CIO*, 307 U.S. 496, 529 (1939) (Stone, J., concurring).

³⁸⁵ See Note, *Determination of Federal Jurisdictional Amount in Suits on Unliquidated Claims*, 64 MICH. L. REV. 930, 932 n.10 (1966).

³⁸⁶ See *Healy v. Ratta*, 292 U.S. 263, 269 (1934).

³⁸⁷ See *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936).

it has remained unclear to this day whether the value to the plaintiff or to the defendant is the critical fact.³⁸⁸ It matters little in terms of jurisdictional policy which of these last two positions is adopted, but the uncertainty further complicates the jurisdictional question. When installment payments are in issue, the question is likely to depend upon state law as to the immediate recoverability of contingent future sums,³⁸⁹ a matter likely to be neither very clear nor very relevant to whether the case belongs in federal court.

Aggregation of claims presents further problems. The general rule is often said to be that a single plaintiff may aggregate any claims he has against a single defendant,³⁹⁰ regardless of whether the claims are related—an issue relevant to judicial convenience—or whether any single claim meets the requirement. Ignoring these differences is probably a good idea, since it simplifies the determination without any very serious impairment of jurisdictional policy. The worst that can happen by allowing such aggregation is that a federal court may be required to litigate a few small claims that are after all diverse or federal. Counterclaims pose special problems all their own.³⁹¹

The law respecting aggregation in multi-party cases, however, is both less liberal and less simple; the difference is probably explicable in terms of the far greater risk of imposition of small and unrelated claims upon the federal courts when multiple parties are involved. It is said that claims by more than one plaintiff or against more than one defendant may be aggregated only if the parties have a "common undivided interest" and a "single title or right" is involved.³⁹² There is a

388 See *Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co.*, 239 U.S. 121, 125 (1915), upholding jurisdiction although the defendant could have removed his offending poles and wires for \$500 because the alleged damage to the plaintiff exceeded \$3000; *Mississippi & Mo. R.R. v. Ward*, 67 U.S. (2 Black) 485, 492 (1863), upholding jurisdiction to remove a bridge without regard to the extent of harm to the plaintiff; *Ronzio v. Denver & R.G.W. Ry. Co.*, 116 F.2d 604, 606 (10th Cir. 1940); "[T]he test . . . is the pecuniary result to either party which the judgment would directly produce." The possibility that the apparent discrepancy between value to plaintiffs and to defendants is illusory, see Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960), has not found its way to the courts.

389 See, e.g., *Aetna Cas. & Surety Co. v. Flowers*, 330 U.S. 464, 467-8 (1947) (workmen's compensation). Cf. *Healy v. Ratta*, 292 U.S. 263, 270-1 (1934), disallowing capitalization of an annual tax sought to be enjoined and making rather fine distinctions.

390 See, e.g., H.M. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 997 (1953). A suggestive case is *Pearson v. National Soc. of Public Accountants*, 200 F.2d 897 (5th Cir. 1953).

391 Counterclaims apparently may be anticipated, as federal defenses may not, by plaintiffs seeking federal access without sufficient grounds of their own. *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348 (1961). For additional counterclaim problems, see D. CURRIE, *FEDERAL COURTS* 439-40 (1968).

392 See *Thomson v. Gaskill*, 315 U.S. 442, 446 (1942); C. WRIGHT, *FEDERAL COURTS* 102 (1963).

dispute between circuits as to the effect of recent amendments to the Civil Rules upon the doctrine that claims may be aggregated in class actions only if the class is a "true" one;³⁹³ there even are decisions refusing pendent jurisdiction over small related claims in multiple-party cases when the principal claim exceeds the jurisdictional amount,³⁹⁴ despite the analogy to state-law claims in federal-question cases³⁹⁵ and despite the policy of avoiding multiple litigation of a single controversy.

The ALI proposes to do nothing about this tangle except to make it more impenetrable by allowing pendent jurisdiction over claims arising from the same transaction as an action already in federal court and brought by or on behalf of "any member of . . . [the plaintiff's] family living in the same household" against the same defendant.³⁹⁶ The narrowness of this provision has nothing to recommend it; the same judicial economy can be had regardless of family ties or place of abode. The Reporters' lame excuse is that relatives living together may have the same lawyer;³⁹⁷ so, however, may others, and the provision is not well tailored to this not very material coincidence. The difficulties of construction are patent and horrid: Does "family" include third cousins? Illegitimate, adopted; or step-children? In-laws? Does "living in the same household" include Grandma, who has spent the past three years in the laundry room while voting back home in Appalachia? Junior, who is in Vietnam or in Leavenworth? A married son in the coach house?³⁹⁸ And why, oh why, does it matter whether he has bought the house next door instead?

Although a cataloguing of the problem areas may exaggerate their numerical importance, it seems clear that the amount requirement, designed to keep litigation out of federal courts, has imposed a considerable burden of litigation to determine its contours, litigation that contributes nothing to the ultimate decision of the lawsuit and that drains away resources in a very unproductive manner. I should prefer to see the minimum amount abolished across the board because it is

³⁹³ Jurisdiction was upheld in *Gas Service Co. v. Coburn*, 389 F.2d 831 (10th Cir. 1968), and denied in *Snyder v. Harris*, 390 F.2d 204 (8th Cir. 1968).

³⁹⁴ *E.g.*, *Diana v. Canada Dry Corp.*, 189 F. Supp. 280 (W.D. Pa. 1960). *Contra*, *Wilson v. American Chain & Cable Co.*, 364 F.2d 558, 564 (3d Cir. 1966).

³⁹⁵ See text at notes 303-29 *supra*.

³⁹⁶ OFFICIAL DRAFT, pt. I, at 9-10, § 1301(e).

³⁹⁷ *Id.* at 65.

³⁹⁸ "It is believed that drawing the line at this point furnishes a standard that will be simple to apply. . . . Similar terminology has commonly been used in insurance policies and has frequently been construed by the courts." *Id.* at 66 n.12.

Moreover, what is the relevant time for determining whether the plaintiffs are members of the same family, living together? What is the effect of a marriage, a divorce, or a shipping out between the time of the transaction and the day suit is filed? Judging from the decisions determining citizenship under past diversity statutes, see text at notes 87-93 *supra*, the test is the time of suit, but this invites manufactured residence.

burdensome, inequitable, and in large part ineffective. Retention of the amount, moreover, adds still another straw to the mistreated camel; it makes administration of the debatable diversity jurisdiction, which is on shaky enough ground to begin with, that much more complicated and offensive.

RAISING OBJECTIONS TO JURISDICTION

Since the beginning, federal courts have indulged in the expensive habit of investigating the existence of jurisdiction on their own and at any stage of the proceedings, even overlooking garden-variety estoppel to permit objections to be raised by the disappointed suitor who invoked the jurisdiction and lost at trial.³⁹⁹ Recent scholarship has raised doubts that the practice of the courts was ever quite so atrocious as their language would suggest,⁴⁰⁰ but the books contain ample evidence of cases that reached the Supreme Court before anybody ever noticed the defect that caused dismissal. The excuse for this sort of thing is apparently the truism that limitations on federal jurisdiction often serve to protect state rights and not the interests of the litigants; for this reason, and in order to protect the federal courts from the burden of litigating cases that do not belong there, the parties cannot be allowed to confer jurisdiction by failure to object to its absence.

Adequate protection against imposition on the federal courts of cases that should have been brought in the state, however, requires in general only that the federal judge be able to notice a lack of jurisdiction on his own initiative at the pleading stage. The marginal gain in terms of jurisdictional purity from leaving the issue open even on appeal cannot justify the waste of time and money caused by throwing a case out after it has been tried. A most glaring abuse of the principle that jurisdiction can always be examined is the familiar decision in *Louisville & Nashville R.R. v. Mottley*, in which the Supreme Court threw out for want of federal-question jurisdiction a case in which two federal questions had been argued and decided below—because there was no federal issue properly in the case when the complaint was filed.⁴⁰¹

The ALI wisely proposes to eliminate this “fetish . . . inconsistent with sound judicial administration”:⁴⁰² After trial begins, federal juris-

³⁹⁹ *E.g.*, *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126 (1804).

⁴⁰⁰ Dobbs, *Beyond Bootstrap: Foreclosing the Issue of Subject-Matter Jurisdiction Before Final Judgment*, 51 MINN. L. REV. 491, 507-21 (1967). And see the refreshing invocation of estoppel, defended even on precedential grounds by Professor Dobbs, in *Di Frischia v. New York Cent. R.R.*, 279 F.2d 141 (3d Cir. 1960).

⁴⁰¹ 211 U.S. 149 (1908).

⁴⁰² OFFICIAL DRAFT, pt. I, at 106.

diction is not to be questioned for the first time unless there is new evidence or a change in law, "collusion or connivance," or the Constitution requires that the defect be noticed.⁴⁰³ Professor Dobbs considers this provision at once too narrow and too broad. It allows wasteful consideration of jurisdictional issues long after commencement of the suit, so long as trial has not begun, and it precludes later consideration of jurisdictional issues that may be truly important.⁴⁰⁴ I know of no limits on federal civil jurisdiction so important that they must be allowed to disrupt a trial already begun, if there was an opportunity to consider them before; nor do I think there is any constitutional compulsion, as the ALI overcautiously fears, to ignore the ordinary principles of judicial efficiency that foreclose issues not timely raised.⁴⁰⁵ Recent decisions commendably relaxing finality in habeas corpus cases⁴⁰⁶ rest on the high value of enforcing such important safeguards as the prohibition of involuntary confessions; no such overpowering policy requires assurance that no cases are tried in federal courts in the absence of complete diversity.

There is merit to Professor Dobbs's suggestion that the inquiry into jurisdiction be cut off earlier than the ALI proposes, perhaps thirty days after the answer is filed; and I have reservations about the ALI's permitting indefinite attack on the basis of "collusion or connivance." Which court the case is tried in, as I have been saying throughout this paper, is just not terribly important in most cases. But I heartily endorse the ALI's proposal respecting the foreclosure of jurisdictional issues, because it is a bold stroke that will eliminate a great deal of inefficiency and waste, and because it draws the necessary lines at quite acceptable places.

VENUE AND PERSONAL JURISDICTION

As in the case of the jurisdictional amount, the Reporters for the diversity draft and those for the federal-question draft have taken opposite positions regarding the place of trial in federal courts. Once again the compliant membership of the Institute has gone along with both proposals. Janus would have been proud.

For many long and unthinking years the federal courts have been

⁴⁰³ TENT. DRAFT NO. 6, at 57-58, § 1386.

⁴⁰⁴ Dobbs, *supra* note 400, 51 MINN. L. REV. at 527.

⁴⁰⁵ Cf. *M'Cormick v. Sullivan*, 23 U.S. (10 Wheat.) 192 (1825); *Durfee v. Duke*, 375 U.S. 106 (1963), refusing to permit collateral attack on a judgment for lack of jurisdiction. See OFFICIAL DRAFT, pt. I, at 108-10.

⁴⁰⁶ E.g., *Fay v. Noia*, 372 U.S. 391 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963); *Brown v. Allen*, 344 U.S. 443 (1953).

encumbered by two distinct requirements for locating the appropriate place for trying federal-court cases: personal jurisdiction and venue. Both, as the Supreme Court has noted, are based in some part on litigational convenience.⁴⁰⁷ In state courts the two concepts serve different purposes: Personal jurisdiction determines whether it is appropriate to try the case in the state at all, while venue determines the best place within the state. But there is no such justification for the dual requirement in federal courts except in the relatively rare cases with international complications, and the dual standard is a burden to administer. Moreover, the Federal Rules leave personal jurisdiction almost entirely to state law,⁴⁰⁸ and this disuniform, often inadequate practice is totally without justification when federal rights are at stake.

Like a breath of fresh air, the ALI proposes a single test for the place of trial in federal-question cases: Nationwide service is to be allowed, but suit may usually be brought only where "a substantial part" of the events or property in suit occurred or is situated, or in the state where all defendants reside.⁴⁰⁹

In essence this proposal adopts for federal-question cases the principle behind the modern crop of long-arm statutes,⁴¹⁰ modifying the common-law preference for making plaintiffs travel by permitting suit where the case arose. The "substantial part" language will doubtless give rise to some litigation, but its evident intention is to avoid the litigation-breeding and technicality-inviting tests of where a tort was committed or a contract made;⁴¹¹ the ALI's more general form is preferable.⁴¹²

However, the unexplained clause permitting suit where "a substantial part of property that is the subject of the action is situated" con-

407 See *Olberding v. Illinois Cent. R.R.*, 346 U.S. 338, 340 (1953) (venue); *International Shoe Co. v. Washington*, 326 U.S. 310, 316-7 (1945) (personal jurisdiction).

408 FED. R. CIV. P. 4. There are a few narrow provisions for nationwide service, e.g., 28 U.S.C. § 2361 (1964) (interpleader); 15 U.S.C. § 80a-43 (Investment Co. Act).

409 TENT. DRAFT No. 6, at 12-13, § 1314.

410 See D. Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533.

411 See *id.*, 1963 U. ILL. L.F. at 544-5, 554-5, 572-3, 577-9.

412 The Institute overlooks (except in interpleader and dispersed-party cases, see OFFICIAL DRAFT, pt. I, at 38-39, 45, §§ 2344(a), 2361(a)) the desirability of providing long-arm service upon parties outside the United States in cases arising here. This principle, accepted by every state in its nonresident-motorist statute, recently generalized by most states into a general long-arm statute, and approved by the Supreme Court, serves to assure the effectuation of substantive forum policies and to remove the burden of litigation travel from the plaintiff injured in his own home town by a peripatetic outsider. See R. CRAMTON & D. CURRIE, *CONFLICT OF LAWS* 477-9 (1968), and authorities cited; *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). It ought to be fully adopted for federal-question cases.

tains the potential for considerable unfairness. If the proposal embodies the outmoded and unclear distinction between actions in rem and in personam, it will be difficult to administer and out of step with modern jurisdictional thought.⁴¹³ If it means the mere presence of property in the district authorizes suit there on any claim arising out of the ownership or use of that property anywhere, it bears little relation to the policies relevant to choosing the appropriate forum. If it preserves the unfair practice of quasi-in-rem jurisdiction over claims unrelated to the forum district on attachment of property situated there, it ought to be replaced by its opposite at once.⁴¹⁴

When all defendants reside in one state, the ALI allows the plaintiff a choice of forum.⁴¹⁵ But it rejects the suggestion that suit should be permitted wherever one defendant resides if others live outside the state, because "what is convenient for one defendant will be inconvenient for the other defendant."⁴¹⁶ This is true enough, and hardship to the plaintiff in such cases is avoided by allowing suit wherever a substantial part of the events occurred.

When the events all took place outside the country, however, the ALI subordinates the defendant's convenience to the desirability of providing some forum: "No federal question case should be denied a federal forum because of restrictive rules of venue or process," so suit may be brought wherever "any defendant may be found."⁴¹⁷ This provision embodies the vice of the discredited rule allowing mere service within the jurisdiction to create authority to try causes of action unrelated to the place of forum;⁴¹⁸ it even extends the unfairness of this rule by allowing several defendants found anywhere in the country to be dragged to a district in which only one of them has been served. Moreover, when the facts have all occurred outside the United States the choice of forum may very well affect the choice of law; to allow suit

⁴¹³ See Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 277.

⁴¹⁴ See FED. R. CIV. P. 4(e), allowing use of state foreign-attachment laws; R. CRAMTON & D. CURRIE, *CONFLICT OF LAWS* 528-33 (1968), criticizing the practice.

⁴¹⁵ The preservation of the existing test of residence rather than of citizenship (see 28 U.S.C. § 1391 (Supp. II, 1967)) perpetrates the likelihood of separate tests for determining diversity and for determining venue, see *Townsend v. Bucyrus-Erie Corp.*, 144 F.2d 106, 108-9 (10th Cir. 1944). *Contra*, *Koons v. Kaiser*, 91 F. Supp. 511, 517 (S.D.N.Y. 1950); 1 J. MOORE, *FEDERAL PRACTICE* 1483-4 (2d ed. 1964), but the disparity corresponds to the different policies that underlie the two decisions: Venue is based upon litigation convenience, while diversity seeks to protect against prejudice. Domicile (see text at notes 53-61 *supra*) is an obviously inappropriate test of the former; if symmetry demands a change, both inquiries should turn on residence.

⁴¹⁶ TENT. DRAFT NO. 6, at 127.

⁴¹⁷ *Id.* at 12, 126, § 1314(a)(3).

⁴¹⁸ See D. Currie, *supra* note 410, 1963 U. ILL. L.F. at 583-4.

in the United States because of physical presence in the jurisdiction unrelated to the facts in suit may subject the defendant not only to the costs of litigating in an inconvenient forum but also to the application of American law in a case he had reason to believe would be governed by foreign law. If the facts did not happen in this country, and if one or more defendants reside abroad, the plaintiff should be left to sue elsewhere.⁴¹⁹

Corporations and associations, now regarded for venue purposes as residents of every district in which they do business,⁴²⁰ are to be considered residents under the ALI proposal only of the district of their principal place of business and, in the case of a corporation, of each district in every state of incorporation.⁴²¹ The purpose of this restriction is to avoid suits against organizations in inconvenient districts unrelated to the cause of action; as the commentary points out, suit may be brought where the facts occurred without regard to residence.⁴²² Unfortunately, this commendable goal is to be attained only at the price of a tedious inquiry into principal places of business.⁴²³ Since the plaintiff is free to sue where the acts occurred and in the corporation's charter state, I don't think the advantages of allowing one additional forum are sufficient to warrant imposing the burden of threshold litigation on the courts to determine an organization's principal place of business. Suit should be allowed only in the charter state of any association, incorporated or not, and where a substantial part of the events occurred.

One magnificent contribution of the ALI's venue proposal is that it discards at long last the troublesome and pointless special venue provisions for patent and copyright cases.⁴²⁴ Unfortunately the commen-

⁴¹⁹ If all defendants reside in this country, however, I would allow suit where any one of them resides if the facts are foreign; the federal interest in seeing to it that policies embodied in federal law are not defeated argues that reliance on foreign law should be considered in making the choice of law, *see* *People v. One 1953 Ford Victoria*, 48 Cal. 2d 595, 311 P.2d 480 (1957), rather than made a barrier to jurisdiction, and it will seldom be persuasive when all parties reside in the United States to argue that overall litigation convenience would be served by requiring a trial abroad.

⁴²⁰ 28 U.S.C. § 1391(c) (Supp. II, 1967) (corporations); *Denver & R.G.W. Ry. Co. v. Brotherhood of Trainmen*, 387 U.S. 556, 562 (1967) (unions). It is not clear whether § 1391(c) applies to corporate plaintiffs as well as to defendants. *Compare* *Southern Paperboard Corp. v. United States*, 127 F. Supp. 649, 650 (S.D.N.Y. 1955) (yes), *with* *Chicago & N.W. Ry. v. Davenport*, 94 F. Supp. 83, 85 (S.D. Iowa 1950) (no).

⁴²¹ TENT. DRAFT No. 6, at 12-13, § 1314(b).

⁴²² *Id.* at 131.

⁴²³ *See* text at notes 167-73 *supra*.

⁴²⁴ 28 U.S.C. §§ 1400(a), (b) (1964). *See* the interpretive difficulties raised in *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561 (1942); *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222 (1957); and the discussion in TENT. DRAFT No. 6, at 128-30.

tary is silent as to the equally troublesome special venue sections of the Jones Act and of the FELA; the Jones Act, which allows suit where the employer "resides" or has his "principal office,"⁴²⁵ has been held to incorporate the present general definition of corporate residence in section 1391, so that the employer may be sued wherever it does business.⁴²⁶ Presumably the ALI's proposed repeal of this general definition of corporate citizenship will modify the venue in Jones Act cases, but if the plaintiff is not to retain the advantage of choosing among nearly limitless forums I see no reason to preserve the special venue section at all. Indeed the propensity of accident plaintiffs to choose inappropriate forums has already received the disapprobation of Congress, for a distaste for such shenanigans was partly behind the enactment of the transfer-of-venue provision in 1948.⁴²⁷ I would subject all federal-question cases to the ALI's general statute.

The federal-question draft makes one venue proposal that I find wholly unacceptable. That is the codification of the existing rule that suits in admiralty may be brought wherever any defendant, or any property subject to a maritime lien, may be found.⁴²⁸ The Reporters make no effort to show why the substantial policies of litigation convenience that limit their proposal for venue in federal-question cases evaporate at the water's edge; it seems likely that they have simply been bamboozled by the antiquarian crustaceans of the admiralty bar, who maintain a monopoly of aqueous litigation by promulgating the myth that their subject is arcane. I should have thought that such nonsense had been laid to rest by the long-delayed merger of the civil and the admiralty rules. It is time the lawmakers recognized that the presence of the defendant or of his property in the forum district no more makes that place a convenient or fair one for trial of an unrelated action when the suit is labeled "admiralty" than when it is labeled "law." When the plaintiff invokes diversity, his maritime case is subject to the ordinary venue provisions; suits "in admiralty" should be too.⁴²⁹

It is noteworthy that the ALI has made its single test of the place of trial in federal-question cases one of venue rather than of personal jurisdiction. The difference lies in the judicially developed rule that

⁴²⁵ 46 U.S.C. § 688 (1964). Cf. 45 U.S.C. § 56 (1964) (FELA) ("doing business").

⁴²⁶ *Pure Oil Co. v. Suarez*, 384 U.S. 202, 207 (1966).

⁴²⁷ See Reviser's Note to 28 U.S.C. § 1404 (1964).

⁴²⁸ See 7A J. MOORE, *FEDERAL PRACTICE* 449 (2d ed. 1968); TENT. DRAFT No. 6, at 20-21, § 1318(a)(2).

⁴²⁹ The ALI points to one important qualification, namely the accepted practice of allowing process to extend throughout a harbor area regardless of state lines. TENT. DRAFT No. 6, at 158-60. If in rem process is to continue permitting suit in inappropriate forums this qualification is a good one.

a defendant may challenge a default judgment for lack of personal jurisdiction but not for improper venue;⁴³⁰ the Institute apparently takes the position that the advantages of putting a case to final rest as early as possible outweigh the inconvenience of requiring the defendant to appear in an inappropriate forum in order to establish his right not to be sued there. I disagree, because of the possibility of harassment opened up to plaintiffs with small and disputed claims, especially since the plaintiff will frequently have to sue on his default judgment in another state in order to enforce it.

For diversity cases the Institute proposes to retain the double test of venue and personal jurisdiction, defining venue much as in federal-question cases except that when the facts are foreign, venue is laid where a defendant resides, not where he may be found.⁴³¹ This last is an improvement. Personal jurisdiction, on the other hand, is left to Civil Rule 4, which in turn leaves the matter largely to state law. The Reporters believe the issue is "one appropriately to be left to the rule-making authority."⁴³² They do not say why, and I do not see why. In part, personal jurisdiction reflects the convenient place of trial, as does venue; the Reporters grant that venue is an appropriate subject for legislation. Moreover, variations in state choice-of-law principles⁴³³ are such that the choice of forum in a diversity case may very strongly affect the ultimate decision; this consequence of the place of trial suggests that the subject is not most appropriately dealt with by a body forbidden to meddle with "any substantive right."⁴³⁴

Whether there ought to be a uniform federal standard to determine the place of trial in diversity cases is a more difficult question. The lower courts have consistently held that diversity jurisdiction may not be exercised, absent a federal statute or Civil Rule, unless personal jurisdiction is conferred by state law.⁴³⁵ If the principle of the *Erie*

⁴³⁰ See, e.g., *Conn. v. Whitmore*, 9 Utah, 2d 250, 342 P.2d 871 (1959) (jurisdiction). The venue question seems to have escaped litigation; my conclusion stems in part from the common statement that lack of "jurisdiction" is virtually the sole ground for collateral attack, e.g., *Williams v. North Carolina*, 325 U.S. 226, 228, 229 (1945), and from the Court's sharp insistence, in waiver cases, that venue is not a matter of "jurisdiction." E.g., *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 167-8 (1939); THE RESTATEMENT OF JUDGMENTS, § 7, comment b (1942), makes the statement as baldly as I do, and also without citation, that a federal judgment "is not void merely because the action was brought in the wrong federal district."

⁴³¹ OFFICIAL DRAFT, pt. I, at 13-14, § 1303.

⁴³² *Id.* at 77.

⁴³³ Made applicable in diversity cases by *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

⁴³⁴ 28 U.S.C. § 2072 (1964). Contrast the authorization of Congress in Article IV of the Constitution to prescribe the effect to be given conflicting state laws.

⁴³⁵ E.g., *Arrowsmith v. United Press Int'l*, 320 F.2d 219 (2d Cir. 1963).

case is simply that the diversity court should reach the same result as would a court of the forum state,⁴³⁶ or that forum-shopping should be avoided,⁴³⁷ deference to state law is clearly correct. But I agree with Mr. Justice Harlan that *Erie's* aim is not uniformity for its own sake, but respect for state policies in the absence of countervailing federal concern.⁴³⁸ As Judge Clark has pointed out, limitations on state service of process are in all probability prompted more by constitutional doubts—or, I should add, by inertia—than by any conscious policy of solicitude toward nonresidents who enter the state.⁴³⁹ I therefore think it quite unlikely that a federal long-arm statute for diversity cases would infringe the policy of the state where the federal court sits.

More serious, perhaps, is the risk of conflict with policy of a state other than that of the forum. Insofar, however, as such policy relates to the legitimate litigation convenience of the defendant, it should be protected adequately by a federal standard based on the long-arm principle. So long as *Klaxon* remains the law care must be taken, as it has been in transfer cases,⁴⁴⁰ not to allow a federal long arm to affect the choice of law; overruling *Klaxon* obviously would help to assure that a federal law of personal jurisdiction would not frustrate state interests.

Arguably, even if state policy would not be offended by a federal standard, the federal forum should be available only if the local state court is open, for only then is there a danger of prejudice. But if the local plaintiff traveled to the defendant's home to sue, the case could be brought in federal court; I think, as illustrated by the transfer provision of section 1404(a), that since the case could properly be made federal there is a federal interest in determining which district is the most appropriate place of trial. In order to promote this federal interest and to do away with the unfortunate double standard of venue and service of process, and in recognition of the fact that state interests would not be significantly offended by enlarging personal jurisdiction in diversity cases, Congress ought to abolish venue limitations and to adopt a federal long-arm statute to govern diversity as well as federal-question and admiralty cases. So far as I can see the terms of the statute should be the same regardless of the basis for jurisdiction.⁴⁴¹

⁴³⁶ See *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

⁴³⁷ See *Hanna v. Plumer*, 380 U.S. 460, 467-8 (1965), also referring to the problem of "equal protection" for citizens of the forum state.

⁴³⁸ *Hanna v. Plumer*, 380 U.S. 460, 474-5 (1965) (concurring opinion). See also *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958); Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U.L. Rev. 383, 394-5 (1964).

⁴³⁹ *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 241 (2d Cir. 1963) (dissent).

⁴⁴⁰ *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

⁴⁴¹ Similarly, there is no need for the Reporters to avoid overruling decisions requiring dismissal in accord with state laws limiting "local" actions respecting land to the state

Multi-party litigation, the Institute recognizes, presents special problems of venue and personal jurisdiction, regardless of the basis of federal jurisdiction. In interpleader cases the ALI means to retain the present statute allowing venue "in the judicial district in which one or more of the claimants reside" and to expand the present provision for nationwide process to anywhere outside the country "that process of the United States may reach."⁴⁴² These provisions, like the relaxation of the *Strawbridge* requirement, are necessary if the interpleader statute is to accomplish its goal, and the policy of avoiding risks of multiple liability is strong enough to justify subjecting some claimants to an otherwise inappropriate forum. The same policy supports the similar provision in dispersed-party cases for extended process and for venue where a "substantial part" of events or property occurred or is located, and where any party resides if the facts are all foreign.⁴⁴³ The Reporters avoid extending to interpleader the dispersed-party venue section, which is more in line both with the ALI's general venue proposals and with the long-arm principle than is the current statute, lest the reference to "property" be held to allow suit where the stakeholder resides.⁴⁴⁴ "Property" should be dropped from the formulation and the long-arm principle of suit where the events occurred should be employed in interpleader cases.

The problem of venue and process respecting additional parties impleaded under Rule 14 or brought in to answer a counterclaim under Rule 13 is somewhat different, and the ALI does not consider it. Under present law, it has been said, the "majority" of courts dispense with venue limitations in impleader, but Rule 14's direction to "serve a summons and complaint" upon the third party requires respect for Rule 4's limits on personal jurisdiction.⁴⁴⁵ The argument for relaxing the protection against suit in an inappropriate forum is not as compelling in impleader as in interpleader, for there is no chance of multiple liability. Yet, in addition to the desirability of avoiding two trials

where the land is located. *E.g.*, *Still v. Rossville Crushed Stone Co.*, 370 F.2d 324 (6th Cir. 1966). See OFFICIAL DRAFT, pt. I, at 81. According to 1 J. MOORE, *FEDERAL PRACTICE* 1454-5 (2d ed. 1964), the present venue provision in § 1391 applies only to transitory actions; cf. *Casey v. Adams*, 102 U.S. 66 (1880) (national-bank venue statute). To the extent that the situs of the land is an appropriate place of trial a federal long-arm statute would permit suit there, but there is no excuse for adopting either federal or state rules prohibiting suit in other convenient or interested states.

⁴⁴² See 28 U.S.C. §§ 1397, 2361 (1964); OFFICIAL DRAFT, pt. I, at 45, 161-2, § 2361 (italics omitted).

⁴⁴³ OFFICIAL DRAFT, pt. I, at 34, 39, §§ 2342, 2344(a).

⁴⁴⁴ *Id.* at 161-2.

⁴⁴⁵ See Note, *Ancillary Process and Venue in the Federal Courts*, 73 HARV. L. REV. 1164, 1167 (1960).

respecting a single transaction, it is relevant that inconsistent decisions might leave a single wrongdoer bearing alone a burden that others should share. The ALI's refusal to allow suit against two defendants in the district where either resides⁴⁴⁶ suggests the Reporters would agree with me that this risk does not justify overriding the interest of the absent third party. The ALI's general provision for venue where the transaction occurred will minimize this problem, for in many cases the third-party claim will be sufficiently connected to the forum district that an original suit against the third party could be brought there. But the situation should be clarified by statute, since the Institute leaves process in diversity cases to state law and permits suit where all defendants reside.

In short, the ALI's treatment of place of trial in federal-question cases is an original and brilliant advance; in diversity and admiralty, it is plodding and myopic.

CHANGE OF VENUE

The theory is good, but it is practically unworkable. It would be mellow to try every action in the most convenient forum. But deciding where that forum is costs altogether too much time and money. Professor Kitch has effectively penetrated the complacency surrounding section 1404(a) and has exposed its complexity.⁴⁴⁷ Ignoring his advice, the ALI proposes to retain the transfer provision, to permit still more transfers, and to enact four separate sections to govern transfer.

Transfer at present is hampered, if one thinks transfer a good thing, by the statutory requirement that the receiving district be one in which the action "might have been brought." The Supreme Court has made clear that such limitations on the availability of a forum as state rules against suits by foreign personal representatives are not to interfere with the policy of finding the convenient federal forum,⁴⁴⁸ but it has held that federal venue statutes limit transfer: A defendant may not obtain transfer to a district in which the plaintiff could not have sued him, even though he is willing to waive the venue objection.⁴⁴⁹ Since the transfer statute requires that the receiving district be a convenient one, this additional requirement seems unnecessary even if one views venue statutes as affording protection to the plaintiff.

The ALI would remove this undesirable limitation in some but not

⁴⁴⁶ See text at notes 415-6 *supra*.

⁴⁴⁷ See Kitch, *Section 1404(a) of the Judicial Code: In the Interest of Justice or Injustice?*, 40 IND. L.J. 99 (1965).

⁴⁴⁸ *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

⁴⁴⁹ *Hoffman v. Blaski*, 363 U.S. 335 (1960).

in all cases. Both drafts distinguish between transfer from proper and from improper forums: If original venue is laid in the "wrong district," transfer still can be made only to a district in which the action "might have been brought."⁴⁵⁰ I see no reason for this distinction; an ad hoc determination of the best place of trial seems no less appropriate when the initial forum is improper than when it is proper. The authors of the diversity draft, apparently in fear lest plaintiffs use transfer to secure trial in an otherwise inaccessible district, makes a further distinction among cases brought in a proper forum: When the defendant seeks transfer, the case may be moved to "any district"; when the plaintiff seeks transfer, the case may be transferred only to a district in which venue and process could be had.⁴⁵¹ As usual the federal-question draft is better, relying on the requirement of convenience and the interest of justice to avoid the risk of imposition in all transfers from a proper forum.⁴⁵² The Institute also ought to make clear, as several lower courts have held, that transfer is permissible when original venue is proper but personal jurisdiction lacking;⁴⁵³ the inability of the courts to agree whether such cases fall within section 1404 or section 1406 acquires significance in light of the ALI's different definitions of the transferee forum in the two types of cases.

The diversity draft unwisely introduces a new limitation: No transfer is to be permitted to a district in which "both one or more plaintiffs and all moving defendants would be barred" from invoking diversity jurisdiction because of citizenship or established business in that state.⁴⁵⁴ Here quite vividly the ALI's policy of confining diversity to cases in which there is reason to fear bias conflicts with its policy of trial in the most convenient forum; the effort to conserve federal resources will often result in trial in a federal court inconvenient for all concerned.⁴⁵⁵ Finally, nothing but complication is gained by splitting the present general transfer provisions into separate sections for diversity, federal-question, and federal-government cases.⁴⁵⁶ Simplifica-

⁴⁵⁰ TENT. DRAFT No. 6, at 14, § 1315(b); OFFICIAL DRAFT, pt. I, at 20, § 1306(b) (district where venue and service proper).

⁴⁵¹ OFFICIAL DRAFT, pt. I, at 17, 19-20, §§ 1305(a), 1306(a).

⁴⁵² TENT. DRAFT No. 6, at 14, § 1315(a). The federal-question transfer provisions apply to maritime cases, *see id.* at 21, § 1318(c).

⁴⁵³ *See United States v. Berkowitz*, 328 F.2d 358, 361 (3d Cir. 1964) (§ 1404); *Dubin v. United States*, 380 F.2d 813, 815-6 (5th Cir. 1967) (§ 1406).

⁴⁵⁴ OFFICIAL DRAFT, pt. I, at 17-18, § 1305(b).

⁴⁵⁵ An escape hatch adds further to the burden of determining where a case will be tried: If the only appropriate federal court is closed, the action may be stayed on condition of a waiver of objections to suit in an appropriate state court. *Id.*

⁴⁵⁶ TENT. DRAFT No. 6, at 32, § 1327, repeating almost verbatim the federal-question proposal, this time for government litigation. § 1327(c) preserves and enlarges the pro-

tion counsels a single unified provision, especially since there are no significant policies justifying differences based upon the ground of jurisdiction.

Best of all, however, the transfer provisions should be eliminated. The only excuse for transfer or for its harsh predecessor, *forum non conveniens*,⁴⁵⁷ was the inexcusable overbreadth of the venue and personal-jurisdiction laws, which permitted suit against a corporation in virtually any inconvenient district in which it did business. With the Institute's laudable proposal to limit venue in order to assure that suit is commenced in an appropriate forum, this excuse disappears. The added convenience of assuring that trial is held at the more convenient of two perfectly acceptable places—the defendant's home or the place of the events—cannot be worth the extensive proof required to make the determination. The present section 1406(a), which provides for transfer as an alternative to dismissal when the suit is brought in an improper forum, should be replaced by a provision suspending the statute of limitations pending filing in an appropriate district within a reasonable period such as thirty days, in order to spare the courts the burden of passing upon which is the best place to have the trial.

One of the big factors causing delay in the determination of transfer motions has been the uncertainty surrounding reviewability of decisions to transfer or not to transfer. The ALI deals inadequately with this problem, forbidding all appellate review of the "exercise of discretion" on such a motion in some federal-question cases⁴⁵⁸ but making no mention of review in diversity cases. The federal-question review provision is right and should be extended across the board; there is a need for uniformity in determining the meaning of the transfer provision, but appellate courts should not be burdened, nor cases delayed, by additional inquiry into the relative convenience of two or more forums.⁴⁵⁹ Yet even the federal-question provision fails to make clear whether decisions respecting the interpretation of the transfer section are immediately reviewable—as they must be if an entire trial is not to be wasted—and, if so, whether in the transferor or in the transferee court. By no means should the situation in *Hoffman v. Blaski* be permitted to recur: There a transfer, upheld by the transferor court

visions now in 28 U.S.C. §§ 1406(c), 1506 (1964) for transfer when a suit within the exclusive jurisdiction of one federal court is filed in another. These provisions avoid unnecessary hardship, but suspending the statute of limitations might reach the same result with less judicial effort. Cf. text at notes 457-8 *infra*.

⁴⁵⁷ See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

⁴⁵⁸ TENT. DRAFT No. 6, at 14, § 1315(a). This provision applies only when the original forum is proper.

⁴⁵⁹ See *Kitch*, *supra* note 447, 40 IND. L.J. at 117-26.

of appeals, was struck down by the transferee court of appeals, the Supreme Court unbelievably holding that the former decision was not binding on the transferee courts.⁴⁶⁰ Interlocutory appeal adds greatly to the time and expense of litigation; even the ideal review section, limiting review to questions of law in the transferor court of appeals, would be an additional argument for abolishing the entire transfer statute.

The diversity draft proposes to codify the decision in *Van Dusen v. Barrack*, that a defendant does not get a change of law by moving for transfer from a proper forum: The transferee court is to decide the case as if it had remained where originally filed.⁴⁶¹ This is calcification as well as codification, for the decision left open the question of choice of law in cases in which the transferor state would have dismissed on grounds of forum non conveniens.⁴⁶² The philosophy of *Barrack* was to assure that the accident of diversity did not affect the outcome; if the transferor state would not have heard the case, to apply its choice-of-law rules departs from this goal. The difficulty of investigating the law and practice respecting forum non conveniens in the transferor state⁴⁶³ is a strong point in favor of the ALI's simplified version.

However, in the other two cases distinguished and reserved in *Barrack*, those of transfer from an improper forum or on the plaintiff's motion,⁴⁶⁴ the Institute is able to refine the relevant policy without requiring a burdensome investigation: In both these cases the transferee court is to apply "the same law which it would have applied had the action been commenced in that court."⁴⁶⁵ This is sound, for it keeps the transfer section from giving the plaintiff, who can shop interstate for the favorable law, the added and peculiarly federal advantage of doing so without sacrificing a convenient forum. Tying the choice of law to the federal venue statute, however, does not seem quite appropriate; *Klaxon* policy⁴⁶⁶ tells us that the critical question should be whether the case could have been brought in the courts of the transferor state.

Once again the awkwardness of attempting to reconcile deference to state choice-of-law doctrines with federal policies respecting the appropriate place of trial argues for the overruling of *Klaxon*; my only

⁴⁶⁰ 363 U.S. 335, 340 n.9 (1960).

⁴⁶¹ 376 U.S. 612 (1964); OFFICIAL DRAFT, pt. I, at 18, § 1305(c).

⁴⁶² 376 U.S. at 640.

⁴⁶³ See B. Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405, 447-9 (1955).

⁴⁶⁴ 376 U.S. 634, 640 n.29.

⁴⁶⁵ OFFICIAL DRAFT, pt. I, at 20, § 1306(c).

⁴⁶⁶ *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

reservation is the uncertainty that a satisfactory federal body of doctrine could be created to resolve cases of true conflict. And until *Klaxon* is overruled this awkwardness is an additional argument against transfer.

ABSTENTION AND RELATED DOCTRINES

From time to time, in deference to state interests, Congress has created exceptions to the general grants of diversity and federal-question jurisdiction. Thus federal courts are forbidden to enjoin the enforcement of state or local taxes or utility-rate orders if there is an effective state-law remedy;⁴⁶⁷ federal actions to enjoin enforcement of state statutes or orders are to be stayed if a state court has suspended enforcement pending an enforcement action;⁴⁶⁸ federal injunctions against pending state-court proceedings are limited by statute;⁴⁶⁹ federal habeas corpus for state convicts is available only after exhaustion of state-court remedies.⁴⁷⁰ The Supreme Court, however, in the face of statutory commands that jurisdiction extend to "all" federal-question and diversity cases as defined,⁴⁷¹ has created several additional exceptions.

First of all, as the result of an ancient dictum⁴⁷² only recently challenged by a district court,⁴⁷³ the federal courts have refused jurisdiction to grant a divorce or to award alimony. The Supreme Court has said there is no federal jurisdiction to administer an estate or to probate a will.⁴⁷⁴ Proceedings such as workmen's compensation that state law has committed to the exclusive jurisdiction of an administrative agency will not be entertained by federal courts.⁴⁷⁵ Moreover, the Supreme Court in the *Burford* and *Alabama* cases refused to interfere, despite the presence of diversity or a federal question, with the enforcement of state administrative orders regarding permission to drill for oil or to

⁴⁶⁷ 28 U.S.C. §§ 1341, 1342 (1964). The rate provision, § 1342, is somewhat more qualified.

⁴⁶⁸ 28 U.S.C. § 2284(5) (1964).

⁴⁶⁹ 28 U.S.C. § 2283 (1964).

⁴⁷⁰ 28 U.S.C. § 2254(b), (c) (Supp. II, 1967).

⁴⁷¹ 28 U.S.C. §§ 1331, 1332 (1964).

⁴⁷² *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1859). Arguments for and against exclusive divorce jurisdiction are considered in D. Currie, *Suitcase Divorce in the Conflict of Laws*; Simons, Rosenstiel, and Borax, 34 U. CHI. L. REV. 26, 49-53 (1966).

⁴⁷³ *Spindel v. Spindel*, 283 F. Supp. 797 (S.D.N.Y. 1968).

⁴⁷⁴ *Markham v. Allen*, 326 U.S. 490, 494 (1946) (dictum).

⁴⁷⁵ *Cf. Crider v. Zurich Ins. Co.*, 348 F.2d 211 (5th Cir. 1965), *cert. denied*, 382 U.S. 1000 (1966), holding in deference to Alabama law that an Alabama court would not entertain a claim for compensation under Georgia law that Georgia committed exclusively to its own commission; *Zeidner v. Wulforst*, 197 F. Supp. 23 (E.D.N.Y. 1961), respecting a statute confining suits against a government agency to the New York Court of Claims.

discontinue a train: The oil case was touchy and complex and the rail case "local," and in both, the states had provided an adequate, centralized avenue for review of administrative determinations.⁴⁷⁶ Mr. Justice Frankfurter, paraphrasing Marshall's admonition that courts have "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given,"⁴⁷⁷ and stressing that it was the very premise of federal jurisdiction that state-court remedies were not adequate to protect federal interests, dissented in both cases. Finally, relying in part on the traditional notion (not found in the statute unless by use of the word "may") that declaratory relief is "discretionary," the Supreme Court has held that federal courts should not issue declaratory judgments as to state taxes;⁴⁷⁸ and it has invoked the equitable reluctance to enjoin criminal proceedings in order to refuse interference, absent compelling circumstances, with threatened state criminal prosecutions alleged to contravene federal law.⁴⁷⁹

In addition to these court-made principles requiring dismissal of cases not explicitly excepted by Congress from the general jurisdiction grants are the Supreme Court's familiar doctrines of abstention and certification, both championed, inconsistently enough, by Mr. Justice Frankfurter,⁴⁸⁰ and both resulting, in theory, in referring not the entire case but particular state-law issues to state courts for decision.⁴⁸¹ Apparently Mr. Justice Frankfurter's sense of duty was satisfied so long as the federal court decided part of the case: "Abstention," as the Court several times said meaninglessly, involves not "the abdication of jurisdiction, but only the postponement of its exercise."⁴⁸²

As originally conceived in the *Pullman* case, abstention meant sending the parties to a state court for an interpretation of unclear state law in suits to enjoin the enforcement of state law on constitutional grounds. In this type of case abstention served to avoid three misfortunes: premature decision of constitutional questions, the misinter-

⁴⁷⁶ *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) (oil); *Alabama Pub. Serv. Co. v. Southern Ry.*, 341 U.S. 341 (1951) (railroad).

⁴⁷⁷ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

⁴⁷⁸ *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943).

⁴⁷⁹ See text at notes 549-59 *infra*. See also *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 228 (1908), refusing to entertain a challenge to state rail rates because the "legislative" process of rate-making included a review in the state's highest court that had not been utilized: "Litigation cannot arise until the moment of legislation is past." Cf. also the decisions, *infra* text at notes 574-5, staying federal actions pending the outcome of related state proceedings to avoid multiple litigation.

⁴⁸⁰ *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941) (abstention); *Clay v. Sun Ins. Office*, 363 U.S. 207 (1960) (certification).

⁴⁸¹ See *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964).

⁴⁸² *E.g., id.* at 416.

pretation of state law, and friction between the federal courts and the states. Consequently, abstention was not proper if the constitutional question was insubstantial or the state law clear. Mr. Justice Brennan's separate opinions, though he was not an especial champion of the doctrine, recognized a second category of cases in which abstention was proper: Those in which state law was unclear and a federal decision might seriously disrupt state activities or unsettle a "delicate balance in the area of federal-state relationships."⁴⁸³

Two additional Frankfurter opinions, however, carried abstention to perhaps greater lengths. In *Louisiana Power & Light Co. v. City of Thibodaux*,⁴⁸⁴ over three dissents, the Court upheld abstention in an expropriation case based on diversity, because state law was unclear and eminent domain was of special concern to the state. There was no substantial constitutional question to avoid, and the suit was not of a type formerly equitable. In the light of a decision rendered the same day refusing to recognize eminent domain as a subject excluded from the diversity jurisdiction,⁴⁸⁵ Mr. Justice Brennan objected in dissent that abstention in *Thibodaux* could be based only on a distaste for the diversity jurisdiction or on the ambiguity of the state law; neither of these, he thought, should suffice. In *Clay v. Sun Insurance Office*, again over dissents, the Court ordered a lower court to take advantage of a Florida statute authorizing replies by the state supreme court to questions of Florida law certified to them by other appellate courts.⁴⁸⁶ There was a substantial constitutional issue in *Clay*, and the state law was unclear; but the danger of friction was reduced because the action was for damages and between private parties, involving neither the interdictory effect of an injunction nor the abrasive of a decision against a state official.

The Fifth Circuit Court of Appeals took advantage of the *Thibodaux* and *Clay* decisions to invoke both abstention and certification in run-of-the-mill diversity cases on the single ground that state law was unclear.⁴⁸⁷ As David Liebenthal has observed,⁴⁸⁸ this procedure was a natural outgrowth of the necessity to follow state decisional law after *Erie R. R. v. Tompkins*; but it was very much a negation of the poli-

⁴⁸³ See *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 32 (1959) (dissent); *Martin v. Creasy*, 360 U.S. 219, 225, 226 (1959) (concurrence).

⁴⁸⁴ 360 U.S. 25 (1959).

⁴⁸⁵ *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959).

⁴⁸⁶ 363 U.S. 207 (1960).

⁴⁸⁷ *United Services Life Ins. Co. v. Delaney*, 328 F.2d 483 (1964) (abstention); *Green v. American Tobacco Co.*, 325 F.2d 673 (1963) (certification).

⁴⁸⁸ Liebenthal, *A Dialogue on England: The England Case, Its Effect on the Abstention Doctrine, and Some Suggested Solutions*, 18 W. RES. L. REV. 157, 158 n.2 (1966).

cies behind the diversity jurisdiction, for the obscurity of state law furnishes a unique opportunity for undetectable implementation of bias. Moreover, there is often very little left for the federal court to decide after the state courts have settled the only disputed legal issue in the case.⁴⁸⁹

Even the Fifth Circuit has now receded from its extreme position,⁴⁹⁰ and the Supreme Court's decisions by no means justify abstention on the basis of unclear state law alone. Not only did *Thibodaux* attempt, if weakly, to distinguish the earlier *Meredith* decision holding unclear state law insufficient ground for abstention,⁴⁹¹ but the opinion is based in large part upon the allegedly special nature of eminent domain. Moreover, the case can be easily fitted into Mr. Justice Brennan's second category of permissible abstention cases, for an adverse federal decision based upon an error of state law would have prevented the local government from carrying out its large-scale plan to provide utility service to its constituents.⁴⁹² *Clay*, which involved the less drastic device of certification, was after all a case containing a substantial constitutional question to be avoided.

In the past few years the Supreme Court has shown an increasing reluctance to invoke the doctrine of abstention in the traditional constitutional cases. The Court manages always to discover that there has been too much delay already⁴⁹³ or that because of the nature of the issue (overbreadth or vagueness) state-court clarification would not obviate the constitutional question.⁴⁹⁴ In addition, in one recent case the Supreme Court added to the elapsed delay two new factors that could severely limit abstention: Neither party had requested abstention, and a federal injunction would not impair "an entire legislative scheme of regulation" because the statute was attacked only as applied to foreign commerce.⁴⁹⁵

⁴⁸⁹ In *Thibodaux*, however, the federal court ultimately settled the amount of compensation after the state court established the right of expropriation. 373 F.2d 870 (5th Cir. 1967).

⁴⁹⁰ See *Howell v. Union Producing Co.*, 392 F.2d 95, 98 (5th Cir. 1968).

⁴⁹¹ *Meredith v. Winter Haven*, 320 U.S. 228 (1943), *discussed*, 360 U.S. at 27 n.2.

⁴⁹² See *Record*, at 5-6.

⁴⁹³ *Griffin v. County School Bd.*, 377 U.S. 218, 219 (1964); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 329 (1964).

⁴⁹⁴ *Baggett v. Bullitt*, 377 U.S. 360, 375-8 (1964); *Dombrowski v. Pfister*, 380 U.S. 479, 490-2 (1965), also noting that the good faith of the state officials was challenged; *Zwickler v. Koota*, 389 U.S. 241 (1967).

⁴⁹⁵ *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 329 (1964). See also *McNeese v. Board of Educ.*, 373 U.S. 668, 674 (1963), declaring it immaterial in an action to correct school segregation that the conduct might violate state law; *Davis v. Mann*, 377 U.S. 678, 690-1 (1964), stressing the absence of pending state proceedings; *Harman v. Forstsenius*, 380 U.S. 528, 537 (1965), emphasizing the "fundamental" nature of the right to

Despite the disfavor in which the present Supreme Court seems to hold its own doctrine, the Institute proposes to give both abstention and certification an honest statutory pedigree.⁴⁹⁶ The proposed categories of abstention are the accepted ones laid out by Mr. Justice Brennan: There must in any case be an unresolved state-law issue, and in addition either a substantial constitutional question to avoid, "serious danger of embarrassing the effectuation of State policies" by an erroneous decision of state law, or "other circumstances of like character," whatever that means. Certification on the other hand, despite the Reporters' initial inclination to disregard it,⁴⁹⁷ is to be allowed whenever, absent "undue delay" or prejudice to the parties, a controlling state-law question "cannot be satisfactorily determined in the light of the State authorities." But abstention and certification are both to be barred in suits by the United States or its officers, and in suits to redress the denial, on racial grounds, of the right to vote, or of equal protection.⁴⁹⁸

It is a logical corollary of the policies behind abstention that after decision of the disputed state-law issue the case can be brought back to federal court for further disposition. In this way, the Court has said, both state and federal courts do what is most within their competence: Each decides issues of its own law.⁴⁹⁹ But this procedure creates problems of its own. The Reporters' summary of the relevant considerations is brilliant:

To litigate these cases entirely through the federal courts strains state-federal relations, may require the premature decision of federal constitutional questions, and requires the federal court to pass on questions of state law in circumstances under which an erroneous decision may seriously interfere with state substantive policies. To litigate such cases entirely

vote and the "immediacy" of the need for decision because an election was impending. *But cf.* *Scott v. Germano*, 381 U.S. 407 (1965), surprisingly requiring a federal court to stay implementation of a reapportionment order because the state supreme court, in an action filed after the federal, had also held the old law invalid.

⁴⁹⁶ TENT. DRAFT No. 6, at 38-40, § 1371(c)-(g).

⁴⁹⁷ *Id.* at 214.

⁴⁹⁸ Present law allows abstention in federal-government cases. *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 228-30 (1957). *But cf.* *Department of Employment v. United States*, 385 U.S. 355, 358 (1966), holding the stay provision of 28 U.S.C. § 1341 (1964) inapplicable to suits by the United States; and the like decision respecting the limitation on enjoining state-court actions (§ 2283) in *Leiter* itself, 352 U.S. at 224-6.

⁴⁹⁹ *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415-6 (1964). Under *England* the litigant must walk a tight rope: He is required to make the state court aware of his constitutional claim, so the state law can be construed to avoid it; but if he argues his constitutional claim to the state court he loses his right to return to the federal. 375 U.S. at 419-20.

through the state courts, with review in the United States Supreme Court; deprives plaintiff of federal fact-finding, and of federal protection during the pendency of the state action. To shuttle the cases back and forth from state to federal court, as present doctrines permit, "operates to require piecemeal adjudication in many courts . . . thereby delaying ultimate adjudication on the merits for an undue length of time."⁵⁰⁰

The ALI's solution, concededly not a perfect one, is to forbid abstention altogether unless the federal claims, "including any issues of fact material thereto," can be adequately protected by Supreme Court review of the state-court decision; if the federal court does abstain, the entire case is to be tried in state court, with federal jurisdiction retained only to assure interim protection and to allow recapture of the litigation in case the state proceeding proves ineffective to reach a prompt final disposition.⁵⁰¹

I disagree. If we must have abstention, I think we should preserve the power of the federal court to decide all issues except unclear matters of state law, since this arrangement sacrifices as little as possible of the important policy of providing a federal forum. The ALI's compromise unfortunately would require the federal court to make still another threshold investigation in order to decide whether to decide the case, and it may not always be easy to decide whether Supreme Court review would be adequate protection. Surely the ALI does not propose that the federal court try to assess the likelihood that a particular state court would seek to cheat the plaintiff out of his federal rights;⁵⁰² presumably, the test would be the extent to which the federal right depends upon the facts to be found and whether or not the right would be defeated by an adverse ruling on state law. I think the test for abstention, if we must have it at all, ought to be simpler than this: Abstention on the disputed state question alone, whenever resolution of that question may avoid a serious issue of constitutional law. The ALI's second category of abstention cases is too vague to be easily administrable, and many cases involving the risk of "embarrassing the effectuation of State policies" will be encompassed in the provision regarding constitutional cases. If there must be a second category, it should be made more understandable and more concrete: Cases in which a state official is sought to be enjoined from enforcing unclear state law.

⁵⁰⁰ TENT. DRAFT NO. 6, at 206.

⁵⁰¹ *Id.* at 38-39, §§ 1371(c), (d).

⁵⁰² *Cf. City of Greenwood v. Peacock*, 384 U.S. 808, 827-8 (1966).

But I would dispense with abstention altogether. I do not share the view that the federal courts, whose job is in significant part to enforce the Constitution, ought to carry their understandable desire to postpone ultimate confrontations so far as to refuse to decide the case. Finding narrow grounds of decision in order to avoid constitutional questions is no disservice to the litigant; forcing him to split his lawsuit in two or denying him a federal forum is. In ordinary diversity cases, moreover, abstention is likely to deprive the plaintiff of a federal hearing as to the only question of importance; in constitutional cases, even if the federal question and its attendant facts are to be decided by the federal court and if a state-created right is not a requisite of the federal, the delays and added cost of abstention, which have been chronicled in hideous detail,⁵⁰³ give the practice a Bleak House aspect that in my mind is too high a price to pay for the gains in avoiding error, friction, and constitutional questions. Last of all, if the question were a close one, I think the balance would be swung by the time saved if federal courts did not have to go through the troubles of deciding whether or not to abstain—an issue whose difficulty is attested to by the substantial number of Supreme Court decisions attempting with only limited success to define the limits of the doctrine.

Certification the Institute would authorize in order to clarify any foggy state-law issue.⁵⁰⁴ Certification has the decided advantages of allowing somewhat greater protection of the rights of litigants by having the facts stipulated or stated by the federal court and by assuring federal disposition of all but the certified issues, and of mitigating cost and delays by sending the disputed question directly to the state's highest court, dispensing with the necessity for a state-court trial. Unfortunately it presents the questions to the state court in rather abstract form, which may not be conducive to an accurate answer. Whether or not the unavoidable costs and delays are merited by the avoidance of error is arguable; at least the Institute's certification proposal is clear and easy to administer, except for the requirement that certification not cause undue delay or prejudice. I think I should prefer to let the federal courts muddle through murky state law on their own, in the interest of judicial economy, but I do not object strongly to the certification proposal.

The Institute also intends to preserve the existing statutory limitations on federal jurisdiction to enjoin state taxes or rate orders, to extend the limitation to embrace declaratory judgments, and to include

⁵⁰³ See Note, *Consequences of Abstention by a Federal Court*, 73 HARV. L. REV. 1358 (1960).

⁵⁰⁴ TENT. DRAFT NO. 6, at 39, § 1371(e).

in the limitation suits attacking state orders respecting the use or conservation of natural resources.⁵⁰⁵ There are exceptions to the rate limitation that the ALI means to restate and make applicable to resource cases: The order must have been made after reasonable notice and hearing and, according to the new formulation, must not have been "superseded by any Act of Congress or administrative regulation thereunder." The reason for these exceptions, presumably, is the importance of assuring the supremacy of preemptive federal laws toward which state courts may lack sympathy and of protecting the due-process rights of litigants. Other claims of federal right, such as the ho-hum assertion of confiscation, are less likely to require federal protection; and the protection of out-of-state litigants in diversity cases is to be sacrificed in order not to risk erroneous interference with substantial state policies in matters likely to be scientifically or economically complicated and outside the normal purview of federal judges. The balance struck by the ALI is a reasonable one, especially if one does not take too seriously the dangers of bias that underlie diversity jurisdiction. I have less sympathy for the long-standing limitation on enjoining state taxes; constitutional issues in such cases may often be substantial and state law lacking in specialized complexity. But I doubt that repeal could be pushed through Congress.

In 1958 Congress forbade removal of cases arising under state workmen's-compensation laws.⁵⁰⁶ The diversity draft proposes to exclude these cases from the original jurisdiction as well.⁵⁰⁷ This move goes beyond the principle of allowing the states to concentrate proceedings before an expert tribunal, for it bars federal review of the initial agency decision. It also goes behond the 1958 policy of protecting the needy litigant's choice of a convenient state forum, as in FELA and Jones Act cases,⁵⁰⁸ for the ALI would forbid the injured employee to sue in a federal court. The rationale given is to relieve the federal courts of a substantial burden of litigation and to prevent the race to the courthouse door. Moreover, say the Reporters, these cases "are more appropriate for state determination."⁵⁰⁹ That was not what Congress said in 1958, and it is not clear why compensation cases are any less deserving than other accident litigation of a federal forum. Perhaps the proposal is a first step toward Dean Meador's goal of excluding all accident cases because of their large litigation cost and their re-

⁵⁰⁵ *Id.* at 38, §§ 1371(a), (b).

⁵⁰⁶ 28 U.S.C. § 1445(c) (1964).

⁵⁰⁷ OFFICIAL DRAFT, pt. I, at 10, § 1301(f).

⁵⁰⁸ See text at notes 269-70 *supra*; S. REP. NO. 1830, 85th Cong., 2d Sess. (1958).

⁵⁰⁹ OFFICIAL DRAFT, pt. I, at 66-67.

moteness from the commercial context that arguably presents the greatest threat of prejudice.⁵¹⁰

The Sixth Tentative Draft contained a proposed section intended to codify the existing judicial exclusion of domestic-relations and estate-administration cases from federal jurisdiction.⁵¹¹ The idea of codification was a good one, but the Institute's members were unable to agree on the definition of the excluded subjects—not surprisingly, in view of the amorphous state of the law—and the section was removed from the draft by a unanimous vote.⁵¹² If these exclusions are justified, it is because of the danger of error in administering laws that depend more upon the judge's sensitive discretion than upon what can be found in the books.⁵¹³ The question should be further studied.

THREE-JUDGE DISTRICT COURTS

It is not surprising that I am enthusiastic over the ALI's proposals respecting three-judge district courts in constitutional cases, since they are largely derived from my own.⁵¹⁴ I shall not repeat here what I have spelled out in detail elsewhere, except to note that the ALI draft would eliminate the difficulty posed by the *Phillips* and *Bransford* cases⁵¹⁵ of determining whether the complaint really attacks the validity of a statute or of an executive or administrative decision; would extend the requirement to the declaratory-judgment case, which is indistinguishable in principle from the suit for injunction;⁵¹⁶ would tailor the cure to the disease by dispensing with the three-judge court unless the state requests it; and would make clear that the courts of appeals may review the refusal of the trial judge to call for a three-judge court.⁵¹⁷ The change regarding declaratory judgments rationalizes the law without adding complexity; the other changes will substantially

⁵¹⁰ See Meador, *A New Approach to Limiting Diversity Jurisdiction*, 46 A.B.A.J. 383, 384 (1960).

⁵¹¹ TENT. DRAFT No. 6, at 36, § 1330.

⁵¹² See 36 U.S.L.W. 2740-1 (1968).

⁵¹³ See D. Currie, *Suitcase Divorce in the Conflict of Laws: Simons, Rosenstiel, and Borax*, 34 U. CHI. L. REV. 26, 49-53 (1966). The existing limits are discussed in Vestal & Foster, *Implied Limitations on the Diversity Jurisdiction of Federal Courts*, 41 MINN. L. REV. 1 (1956).

⁵¹⁴ D. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1 (1964); TENT. DRAFT No. 6, at 240-1.

⁵¹⁵ *Phillips v. United States*, 312 U.S. 246 (1941); *Ex parte Bransford*, 310 U.S. 354, 360-1 (1940).

⁵¹⁶ Three judges were held not required in declaratory-judgment actions in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 152-5 (1963).

⁵¹⁷ TENT. DRAFT No. 6, at 43-46, §§ 1374-6. For confusion regarding appeals, see *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962), and later cases noted in D. CURRIE, *FEDERAL COURTS* 553-4 (1968).

reduce the burden of administering the three-judge provisions, which has been considerable. The Institute also feels on sufficiently firm ground to propose abolition of the three-judge requirement in actions attacking federal as opposed to state statutes because of the absence in such cases of an irritant to federal-state relations and because federal trial judges today are not engaged in any substantial degree in the practice of sabotaging federal statutes.⁵¹⁸

I hope the Congress will buy these amendments, and I should be happier still if the three-judge requirement could be abolished across the board; the special court when required decreases the efficiency of federal judges by a factor of three, and the Supreme Court is burdened with the sole responsibility of reviewing three-judge cases regardless of their importance.⁵¹⁹ I have said elsewhere that I can understand the desire for the safeguard of numbers against error or prejudice when important state programs are at stake and the value of the extra prestige of three judges in cushioning the friction of striking down state laws, and I recognize that the number of three-judge cases has not been intolerable.⁵²⁰ The special court, in short, is a means of making the necessary medicine of federal review of state laws less irritating and less subject to abuse than it might otherwise be. Nevertheless, if I had my druthers I would eliminate the three-judge court altogether and spare the federal courts not only the inefficiencies of its actual operation but also the considerable burden, only partly relieved by the proposed amendments, of deciding when three judges are required and what can be done by the single judge.

INJUNCTIONS AGAINST SUIT

"The use of injunctions to stay actions at law," says Pomeroy, "was almost coeval with the establishment of the chancery jurisdiction."⁵²¹ The Supreme Court has held it proper for one federal court to restrain a litigant from proceeding in another federal court,⁵²² and for a court of one state to enjoin a litigant from suing in another state.⁵²³ But in most cases judicial economy would be better served by defending an existing action than by bringing a second action to enjoin the first; and, especially when the two courts are of different sovereignties, an injunction forbidding suit can be a ready cause of irritation. In ex-

⁵¹⁸ TENT. DRAFT NO. 6, at 248-9.

⁵¹⁹ 28 U.S.C. § 1253 (1964).

⁵²⁰ D. Currie, *supra* note 514, 32 U. CHI. L. REV. at 3-12.

⁵²¹ 5 J. POMEROY, EQUITY JURISPRUDENCE § 2058 (4th ed. 1919).

⁵²² *Steelman v. All Continent Corp.*, 301 U.S. 278 (1937).

⁵²³ *Cole v. Cunningham*, 133 U.S. 107, 121 (1890).

treme cases courts in which a litigant has been enjoined from proceeding have responded by enjoining enforcement of the injunction: "This court need not, and will not, countenance having its right to try cases, of which it has proper jurisdiction, determined by the courts of other States, through their injunctive process."⁵²⁴ "The place to stop this unseemly kind of judicial disorder," wrote Illinois Justice Schaefer in protest against such a disposition, "is where it begins."⁵²⁵

Congress in 1793 emphatically shared Mr. Justice Schaefer's opinion, enacting an apparently absolute prohibition against federal courts' enjoining state-court proceedings.⁵²⁶ Various possible justifications for this ban were discussed by Mr. Justice Frankfurter's Court opinion in *Toucey v. New York Life Insurance Co.*: antifederal sentiments engendered by the assertion of jurisdiction over a state in *Chisholm v. Georgia*;⁵²⁷ the policy against splitting one litigation between two court systems; and the 1793 prejudice against equity jurisdiction. The opinion concluded that Congress desired to "avoid friction between the federal government and the states resulting from the intrusion of federal authority into the orderly functioning of a state's judicial process."⁵²⁸

Unfortunately the prohibition did not long remain absolute. Congress modified the anti-injunction statute itself in 1872 to allow injunctions against state suits when authorized by the bankruptcy laws;⁵²⁹ other statutes expressly or impliedly authorizing anti-suit injunctions were held to qualify the earlier prohibition;⁵³⁰ and frequent dicta established, in the teeth of the statute, that an injunction was permissible against state proceedings "seeking to interfere with property in the custody of the [federal] court"⁵³¹ because, Mr. Justice Frankfurter said, "contest between the representatives of two distinct judicial systems over the same physical property would give rise to actual physical friction," an extreme example of the very kind of mischief the statute was designed to prevent.⁵³² Finally, when the Supreme Court in *Toucey* itself repudiated earlier decisions thought to establish an additional ex-

⁵²⁴ *E.g.*, *James v. Grand Trunk W.R.R.*, 14 Ill. 2d 356, 372, 152 N.E.2d 858, 867 (1958).

⁵²⁵ *Id.*, 14 Ill. 2d at 375, 152 N.E.2d at 868.

⁵²⁶ Act of March 2, 1793, ch. 22, § 5, 1 Stat. 333, 335.

⁵²⁷ 2 U.S. (2 Dall.) 419 (1793).

⁵²⁸ 314 U.S. 118, 130-1, 135 (1941).

⁵²⁹ Rev. Stat. § 720.

⁵³⁰ The Interpleader Act, ch. 273, § 2, 44 Stat. 416 (1926), expressly allowed an injunction against "any suit or proceeding in any State court." See also *Providence & N.Y.S.S. Co. v. Hill Mfg. Co.*, 109 U.S. 578, 599-600 (1883) (Limitation of Liability Act); *Dietzsch v. Huidekoper*, 103 U.S. 494 (1881) (removal statutes, which dated from 1789 but had been recodified).

⁵³¹ See, *e.g.*, *Kline v. Burke Constr. Co.*, 260 U.S. 226, 235 (1922).

⁵³² *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 135 (1941).

ception allowing an injunction against harassing relitigation of matters concluded by a federal judgment,⁵³³ Congress amended the statute completely in 1948.

The result was the present section 2283, which allows a federal court to enjoin state proceedings in three situations: "as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The purpose of the revision, according to the Reviser's Notes, was to "restore the basic law as generally understood and interpreted prior to the *Toucey* decision." The "expressly authorized" provision is a substitute for the earlier bankruptcy exception, broadened "to cover all exceptions"; "in aid of its jurisdiction" provides symmetry, for unexplained reasons, with the All Writs section⁵³⁴ and preserves the power to enjoin after removal from state courts; "to protect or effectuate its judgments" overrules *Toucey*.

This detailed commentary is not sufficient to dispel the dense clouds of ambiguity enveloping this most obscure of all jurisdictional statutes. Since the Reviser meant to preserve existing statutory exceptions to the injunctions ban, the term "expressly authorized" is poorly chosen: Several statutes held to have qualified the original prohibition were anything but express.⁵³⁵ Consequently "expressly" has consistently been read to mean "impliedly"; the latest craze is to hold "express" the authorization of the Civil Rights Act of 1871,⁵³⁶ which says nothing about proceedings in other courts or injunctions against them: Every person who under color of state law deprives another of constitutional rights "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." It is still unclear whether a statute giving the federal courts exclusive jurisdiction is sufficiently "express." Apparently the Reviser hoped to emphasize

⁵³³ *E.g.*, *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921). *See also* *Simon v. Southern Ry.*, 236 U.S. 115 (1915), allowing an injunction against the enforcement of judgments obtained from state courts by fraud. This exception too was disapproved in *Toucey*, 314 U.S. at 136.

⁵³⁴ 28 U.S.C. § 1651 (1964).

⁵³⁵ *E.g.*, 11 U.S.C. § 29(a) (1964) (Bankruptcy Act: A "suit" against the bankrupt "shall be stayed"); 46 U.S.C. § 185 (1964) (Limitation Act: All proceedings "shall cease").

⁵³⁶ 42 U.S.C. § 1983 (1964). The power to enjoin was upheld in *Cooper v. Hutchinson*, 184 F.2d 119, 124 (3d Cir. 1950), and asserted in dissent in *Cameron v. Johnson*, 262 F. Supp. 873, 885 (S.D. Miss. 1966), *aff'd on other grounds*, 390 U.S. 611 (1968). *Contra*, in addition to *Cameron*, is *Baines v. City of Danville*, 337 F.2d 579 (4th Cir. 1964). *See also* *Dilworth v. Riner*, 343 F.2d 226, 230-2 (5th Cir. 1965), distinguishing *Baines* in order to hold an injunction against state proceedings "expressly authorized" by the public-accommodations sections of the 1964 Civil Rights Act: "no person shall . . . attempt to punish" for exercising protected rights.

that authorization for an injunction against suit was not to be lightly inferred, but the result has been nothing but confusion.

Injunctions "necessary in aid of" federal jurisdiction, the Reviser said, were meant to include those in removed cases. This statement creates still further doubt as to the meaning of the "expressly authorized" clause, since the removal statute's direction that "the State court shall proceed no further"⁵³⁷ is no less "express" than others that apparently come within the first exception. Lower courts have held, in addition, that "in aid of . . . jurisdiction" includes the old *in rem* exception,⁵³⁸ probably because there is no other likely place to insert it and because the Revisers meant to leave the law unchanged except for *Toucey*. The Supreme Court too has found additional meaning in "aid of . . . jurisdiction," allowing the National Labor Relations Board to obtain an injunction against a state-court suit to restrain a secondary boycott within the exclusive jurisdiction of the Board: "If the state court decree were to stand, the Federal District Court would be limited in the action it might take. . . . To exercise its jurisdiction freely and fully it must first remove the state decree."⁵³⁹

In a very similar case, however, the Court held no injunction could issue when requested by the union: Only the Board was authorized by statute to resort to the court's equity powers; the union's injunction plea was not ancillary to any jurisdiction of the district court over the underlying labor dispute, and "such non-existent jurisdiction therefore cannot be aided."⁵⁴⁰ This holding was entirely in accord with the statutory language, but the argument for an injunction was as compelling in the one case as in the other. The requirement that the injunction be ancillary to pre-existing federal jurisdiction is without basis, and it suggests the possibility that the prohibition can be avoided by simply adding to the complaint a request for declaratory judgment, so long as the amorphous requirement of "necessary" is met.⁵⁴¹

Lower courts, relying on the Reviser's disclaimer of an intention to alter the law apart from *Toucey*, have indicated that, in accord with decisions under the earlier prohibition, the pendency of multiple *in personam* actions respecting the same transaction is not a ground for enjoining state proceedings.⁵⁴² Again the statutory language is mis-

⁵³⁷ 28 U.S.C. § 1446(e) (1964).

⁵³⁸ *E.g.*, *Hyde Constr. Co. v. Koehring Co.*, 388 F.2d 501, 508 (10th Cir.), *cert. denied*, 391 U.S. 905 (1968).

⁵³⁹ *Capital Serv., Inc. v. NLRB*, 347 U.S. 501, 505-6 (1954).

⁵⁴⁰ *Amalgamated Clothing Wkrs. v. Richman Bros. Co.*, 348 U.S. 511, 519 (1955).

⁵⁴¹ *But see* *Baines v. City of Danville*, 337 F.2d 579, 583, 587 (4th Cir. 1964), where the court was unimpressed by the addition of a declaratory plea.

⁵⁴² *E.g.*, *Hyde Constr. Co. v. Koehring Co.*, 388 F.2d 501, 508 (10th Cir.), *cert. denied*, 391 U.S. 905 (1968), citing *Kline v. Burke Constr. Co.*, 260 U.S. 226, 230 (1922).

leading, for the necessity of an injunction seems more pressing in such a case than in most of those in which the writ is allowed. The defense of *res judicata*, which the overruling of *Toucey* allows to be the subject of an injunction, can always be raised in the state court and reviewed by the highest federal court if necessary, and a state court that proceeds despite removal can be reversed on appeal. But the state court need not relinquish jurisdiction just because the same controversy is pending in a federal court; an injunction is literally the only way to prevent the federal court's jurisdiction from being effectively destroyed by a prior state judgment. The difficulty with this argument is that there has never been a federal right, except in cases of removal or exclusive jurisdiction, to be free from multiple actions arising from a single transaction. The Reviser's Notes do not suggest an intention to create one. Thus the second category of cases in which state suits may be enjoined, like the first, is framed in language so vague as to defy construction except by reference to the pre-existing law that it was intended to codify; and it conforms but poorly to the policies that ought to determine the availability of such injunctions.

The exception permitting injunctions to "protect or effectuate" federal judgments probably means only that the binding effect of a federal judgment can be asserted by enjoining state proceedings on the same cause of action. This is the purpose made explicit by the Reviser. It seems unlikely that injunctions against concurrent state actions, forbidden before the amendment and not referred to in the commentary, were meant to be allowed in order to protect future federal judgments; the judgments referred to, the Fourth Circuit has properly held, are those already entered.⁵⁴³ But a recent Supreme Court decision suggests a way around the ban: Section 2283 forbids only injunctions, not declaratory judgments;⁵⁴⁴ if the plaintiff obtains a declaration of his rights from a federal court, an injunction against further state proceedings may be necessary to effectuate the declaratory judgment.

As if this were not enough, the Supreme Court, notwithstanding its declaration that the prohibition is "qualified only by specifically defined exceptions" and "not to be whittled away by judicial improvisations,"⁵⁴⁵ has held the prohibition inapplicable to suits brought by the United States, because statutes divesting pre-existing rights or privileges "will not be applied to the sovereign without express words to that

⁵⁴³ *Baines v. City of Danville*, 337 F.2d 579, 587 (1964).

⁵⁴⁴ *Cf. Zwickler v. Koota*, 389 U.S. 241 (1967) (nonstatutory policy against enjoining state criminal proceedings).

⁵⁴⁵ *Amalgamated Clothing Wkrs. v. Richman Bros. Co.*, 348 U.S. 511, 514, 516 (1955).

effect" and because denying an injunction would so frustrate "superior federal interests . . . that we cannot reasonably impute such a purpose to Congress from the general language of 28 U.S.C. § 2283 alone."⁵⁴⁶ What these interests were the Court did not say; Congress, I think, had made it clear that it was willing to risk the occasional denial of relief in a deserving case in order to make certain that injunctions against state suits would not be granted on the basis of ordinary equitable considerations. But this questionable decision may well have influenced the Fourth Circuit in making the following statement, which is the epitome of judicial nihilism: "The statute . . . is inapplicable in extraordinary cases in which an injunction against state court proceedings is the only means of avoiding grave and irreparable injury. In our view, the congressional command ought to be ignored only in the face of the most compelling reasons"⁵⁴⁷ Congress cannot be blamed for this sort of thing; perhaps these opinions suggest it is futile for Congress to try to define limits in this field, for the courts may not heed them. One hopes we have not reached that point.

The present statute, like its predecessor, has been held not to forbid injunctions against state-court proceedings that have not yet been instituted,⁵⁴⁸ although no hint of this distinction has ever intruded into the statutory language and although the degree of offense to the states may not be very different in the two classes of cases. This ruling has led the Court into some rather strained maneuvering of the determinative date,⁵⁴⁹ and it makes the result depend upon a race to the courthouse. Moreover, freedom from the strictures of section 2283 does not assure the plaintiff's success, for the Supreme Court has embraced the equitable reluctance to interfere with criminal proceedings as an additional means of avoiding unnecessary friction with the states even when the prosecution has not been begun.

The exact contours of this second limitation on suit injunctions are not much clearer than those of the statute itself. *Douglas v. City of Jeannette*⁵⁵⁰ forbade enjoining prosecution under an ordinance held unconstitutional on the same day; the want of equity was clear, since there was no reason to think the state would continue prosecution in the face of the invalidating decision. *Stefanelli v. Minard* carried the principle further by refusing to enjoin state-court use of illegally seized evidence even though at the time there was no Supreme Court review

⁵⁴⁶ *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 224, 226 (1957).

⁵⁴⁷ *Baines v. City of Danville*, 337 F.2d 579, 593 (1964).

⁵⁴⁸ *Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1965).

⁵⁴⁹ *See id.*

⁵⁵⁰ 319 U.S. 157 (1943).

of fourth amendment claims. There was no threat of irreparable injury, the Court amazingly said; and piecemeal intervention to try collateral issues was worse than enjoining the whole trial because it would "invite a flanking movement against the system of State courts" on the myriad questions of procedural due process.⁵⁵¹ Later decisions respecting injunctions against the use of various kinds of illegal evidence have left nothing but uncertainty;⁵⁵² of particular interest is the statement by three Justices favoring such injunctions that section 2283 was inapplicable even after the state prosecution had begun because "the thrust of the relief is only to enjoin the use of wire-tap evidence, not to enjoin the action itself."⁵⁵³

In the important case of *Dombrowski v. Pfister*⁵⁵⁴ the Court found circumstances justifying an injunction against a state prosecution held not to have been pending at the decisive moment: an attack on overbreadth grounds upon a state law impinging upon freedom of expression. The "chilling effect" of such a law upon constitutional rights would not, the Court said, be removed by a series of prosecutions. Moreover, the Court added in refusing to sanction abstention, the prosecution had been brought in bad faith for purposes of harassment.

Probably either bad faith or overbreadth affecting expression would suffice after *Dombrowski*;⁵⁵⁵ but most recently, in *Cameron v. Johnson*, the Court over dissent found against rather convincing allegations of bad faith, declared a Mississippi demonstration statute neither too vague nor too broad, and held that allegations that the conduct in issue was protected by the first amendment were insufficient to permit an injunction, apparently even against merely threatened proceedings.⁵⁵⁶ On the other hand, shortly before *Cameron*, the Court held in *Zwickler v. Koota* that the limitations on injunctions against threatened state prosecutions are inapplicable to suits for declaratory judgment: The federal courts are the primary forums for vindicating federal rights, and a suitor's choice of forum should be respected.⁵⁵⁷

Where all this leaves us is far from plain. *Douglas v. City of Jeannette*

⁵⁵¹ 342 U.S. 117, 122-3 (1951).

⁵⁵² *Cleary v. Bolger*, 371 U.S. 392 (1963); *Pugach v. Dollinger*, 365 U.S. 458 (1961); *Wilson v. Schnettler*, 365 U.S. 381 (1961); *Rea v. United States*, 350 U.S. 214 (1956).

⁵⁵³ *Cleary v. Bolger*, 371 U.S. 392, 406 (1963) (dissent); *Pugach v. Dollinger*, 365 U.S. 458, 462 (1961) (dissent).

⁵⁵⁴ 380 U.S. 479 (1965).

⁵⁵⁵ See *United Steelworkers v. Bagwell*, 383 F.2d 492 (4th Cir. 1967), and *Carmichael v. Allen*, 267 F. Supp. 985 (N.D. Ga. 1967), both allowing injunctions without finding harassment; *Cameron v. Johnson*, 390 U.S. 611 (1968), denying an injunction on the ground that neither overbreadth nor bad faith was established.

⁵⁵⁶ 390 U.S. 611 (1968). See also *Zwickler v. Boll*, 391 U.S. 353 (1968).

⁵⁵⁷ 389 U.S. 241 (1967).

had sensibly said that an injunction was proper "in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent."⁵⁵⁸ *Dombrowski* and *Cameron* seem to particularize this standard into categories with little regard for the basic policy: Overbreadth and bad faith seem decisive, and the likelihood of adequate state-court relief is ignored. Thus the decisions leave something to be desired in terms both of policy and of clarity, and the statute remains wholly silent on the subject.

The ALI proposes a thorough revision of section 2283.⁵⁵⁹ Making clear that the prohibition extends to injunctions against the enforcement of state-court judgments as well as against state-court proceedings,⁵⁶⁰ the proposal would rightly assure that injunctions within the enumerated exceptions issue not automatically but only if "otherwise warranted." The present three exceptions become seven. The vague exceptions for injunctions in aid of jurisdiction and to protect federal judgments are narrowed and clarified: "to protect the jurisdiction of the court over property in its custody or subject to its control," and "to protect or effectuate an existing judgment of the court." Judicially created exceptions allowing injunctions sought by the federal government, and temporary injunctions "pending determination of whether this section permits grant of a permanent injunction," are codified. The troublesome "expressly authorized" language is replaced: An injunction is proper if "an Act of Congress authorizes such relief or provides that other proceedings shall cease." This exception is meant to include bankruptcy, limitation, and removal cases as well as those under more specific statutes; it would be enough if the statute said that a federal court might "stay any proceeding" or that a state court "shall proceed no further."⁵⁶¹ Although statutory interpleader would be embraced within this exception, a separate provision is made for injunction "in aid of a claim for interpleader" in order to take care of "equitable interpleader" under Rule 22.⁵⁶² The commentary expressly disapproves injunctions against the enforcement of state-court judgments obtained by fraud, in order to prevent "fragmentation" of the controversy, and because the state court is better able "to determine what it has passed upon."⁵⁶³ No injunction is to be allowed merely

⁵⁵⁸ 319 U.S. 157, 163 (1943).

⁵⁵⁹ TENT. DRAFT NO. 6, at 41-42, § 1372.

⁵⁶⁰ Nothing, however, is said about enjoining the use of evidence in state courts, though the problem has several times reached the Supreme Court. See text at notes 551-3 *supra*.

⁵⁶¹ TENT. DRAFT NO. 6, at 223-4.

⁵⁶² *Id.* at 226-27.

⁵⁶³ *Id.* at 233-34.

because federal jurisdiction is exclusive, but the Institute's proposal to allow removal in such cases would make this academic.⁵⁶⁴ Injunctions are not to issue merely to avoid multiple in personam litigation. The most important and probably most controversial of the new exceptions is designed to protect civil rights: "to restrain a criminal prosecution that should not be permitted to continue either because the statute or other law that is the basis of the prosecution plainly cannot constitutionally be applied to the party seeking the injunction or because the prosecution is so plainly discriminatory as to amount to a denial of the equal protection of the laws."⁵⁶⁵

If we must have a list of cases in which anti-suit injunctions are to be allowable, the Institute's list is not a bad one; it certainly is better than the list we have. The *in rem*, interpleader, government-litigation, temporary-injunction, and *res judicata* exceptions are without obvious ambiguities and should be easy enough to administer.⁵⁶⁶ The same cannot be said with assurance of the civil-rights and statutory-authorization exceptions. The latter makes it necessary to construe each proffered federal statute to determine whether or not it authorizes suit injunctions; this inquiry has not proved easy in the past. The civil-rights provision is important and desirable enough to outweigh any objection to its difficulty of administration, but of course it should be made as simple as is consistent with the basic policy it embodies.

Whether the ALI's exceptions exhaust the cases in which an injunction is desirable may be debated; so may whether the exceptions are themselves all warranted. It seems especially unfortunate that nothing is said about injunctions against prosecutions not yet instituted; the case for statutory specification seems equally strong whether or not the state suit has begun. But my objection is more fundamental. The attempt to specify exceptions is an understandable attempt to make sure the courts do not err by granting either too few or too many injunctions. But specificity necessarily creates problems of statutory construction and runs the serious risk of excluding unforeseen cases of urgent need.

Anti-suit injunctions, whether litigation is pending or threatened, are undesirable because of the friction they cause. But sometimes they are the only effective means of protecting federal rights, as in labor disputes in which a state-court injunction might effectively destroy an

⁵⁶⁴ *Id.* at 232-33.

⁵⁶⁵ *Id.* at 226.

⁵⁶⁶ The "in rem" label, however, is neither wholly self-defining nor very relevant to injunction policy.

organizational campaign despite the state court's lack of jurisdiction,⁵⁶⁷ and in cases in which state courts are unwilling to prevent prosecutions for the exercise of constitutional rights. Both these cases have been held outside the permissive terms of the present statute; while the ALI proposal would partly correct these omissions, additional cases requiring an injunction may appear at any time. I think the courts should be free to deal with them according to the demands of policy. I would suggest a simple statute underlining that the test for an injunction against suit is more strict than the ordinary equitable requirements. The Fourth Circuit's formulation, impermissible as a statutory-construction device, seems appropriate as a new statute: The federal courts shall not enjoin pending or threatened proceedings in state courts unless there is no other effective means of avoiding grave and irreparable harm.⁵⁶⁸

Civil-rights litigation, however, is a very special case. Perhaps the greatest single flaw in the present Judicial Code is the absence of an effective remedy to protect civil-rights workers against improper prosecutions. Habeas corpus has never caught on as a pre-trial remedy, though the statutory exhaustion requirement applies only to persons already convicted by a state court, and though the judicially created exhaustion requirement could and should be held satisfied if the state fails to provide a means of protecting the litigants against the burdens of the trial itself.⁵⁶⁹ Removal, which the Supreme Court effectively destroyed in the nineteenth century by reading into the predecessor of section 1443 the requirement that the petitioner attack a state statute on its face,⁵⁷⁰ enjoyed a brief flurry of popularity a few years back until the Supreme Court killed it again by adhering, except in public-accommodation cases, to the earlier test.⁵⁷¹ The possibility of

⁵⁶⁷ See *Amalgamated Clothing Wkrs. v. Richman Bros. Co.*, 348 U.S. 511, 526 (1955) (dissent). The need for an injunction has been somewhat alleviated by the relaxation of finality for appealing state-court labor injunctions, see *Construction Laborers v. Curry*, 371 U.S. 542 (1963), and by the holding that a contempt citation cannot stand in such cases if the state-court injunction is ultimately set aside, *In re Green*, 369 U.S. 689 (1962).

⁵⁶⁸ See *Baines v. City of Danville*, 337 F.2d 579, 593 (4th Cir. 1964).

⁵⁶⁹ See 28 U.S.C. § 2254 (Supp. II, 1967); Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Trial*, 113 U. PA. L. REV. 793, 882-908 (1965).

⁵⁷⁰ *Virginia v. Rives*, 100 U.S. 313 (1880); *Kentucky v. Powers*, 201 U.S. 1 (1906).

⁵⁷¹ *City of Greenwood v. Peacock*, 384 U.S. 808 (1966); *Georgia v. Rachel*, 384 U.S. 780 (1966) (public accommodations). The distinction is not satisfactory. Moreover, *Peacock* limited the companion provision for removal of one prosecuted for acts "under color of authority" of certain federal laws to federal officers and others aiding enforcement, while *Rachel* held free-speech claims outside the removal provisions.

an injunction, brightened by *Dombrowski v. Pfister*⁵⁷² and by assertions in the lower courts that the 1871 Civil Rights Act "expressly authorized" anti-suit injunctions,⁵⁷³ was dimmed considerably when the Court held in *Cameron v. Johnson*, even without considering section 2283, that the protected nature of a state-court defendant's activities did not justify an injunction against prosecution.⁵⁷⁴

Something ought to be done about this situation. Some state courts have shown themselves unable or unwilling to prevent the prosecution of civil-rights workers who have done no wrong. Anyone doubting the accuracy of this statement need only read Professor Amsterdam's graphic description of Mississippi justice⁵⁷⁵ to be convinced and horrified. But drafting the most appropriate response is no mean task.

Bills have been introduced in Congress from time to time to broaden removal in these cases. The 1966 Civil Rights Bill, for example, would have allowed removal by any defendant being prosecuted for exercising his rights of racial equality or for exercising his constitutional freedoms in advocating racial equality, and also by any Negro or civil-rights worker prosecuted on any ground in a state in which Negroes were systematically discriminated against in the courts.⁵⁷⁶ The ALI proposal, directed toward the same two abuses—prosecution for protected activity and harassment by groundless prosecution for acts not directly related to protected activity—is considerably more conservative: The activity must be "plainly" protected, and the unrelated prosecution must be shown in the individual case to be "so plainly discriminatory as to amount to a denial of the equal protection of the laws."⁵⁷⁷

I think the ALI is too grudging with respect to the protection of constitutionally protected activities; because the factual context of a civil-rights demonstration is so critical in determining whether or not the activity is protected, and because of the extreme unwillingness shown by some state courts to enforce federal rights, what is needed is a federal trial of the facts relevant to the constitutional claim. In all probability, if a policeman testified that a demonstrator struck him with a sign, the federal court could not find the prosecution "plainly" forbidden; yet, it is precisely in cases of conflicting testimony that an impartial trier of fact is most indispensable and Supreme Court re-

⁵⁷² 380 U.S. 479 (1965).

⁵⁷³ See note 536 *supra*.

⁵⁷⁴ 390 U.S. 611 (1968).

⁵⁷⁵ Amsterdam, *supra* note 569, 113 U. PA. L. REV. at 794-9.

⁵⁷⁶ S. 2923, 89th Cong., 2d Sess. (1966), Title IV.

⁵⁷⁷ TENT. DRAFT No. 6, at 42, § 1372(7).

view least effective.⁵⁷⁸ I am not perturbed by allegations that providing for a federal trial of the facts would deprive the states of the power of enforcing their criminal laws; when the states learn to enforce their laws fairly, they may be permitted to enforce them. In the meantime the protection of constitutional rights of expression and of racial equality are far more important than the preservation of the sensibilities of state officials. As in the congressional proposal noted above, the remedial statute should be limited to racial-equality cases since it is in the battle for racial equality that state courts have most flagrantly displayed an incapacity to do justice.

Much more troublesome to me is what to do about prosecutions not directly related to protected activity but designed to harass those with the temerity to challenge existing patterns of racial discrimination. The recent prosecution of Aaron Henry⁵⁷⁹ strongly suggests such harassment and demonstrates as well the ineffectual attempts of the Supreme Court to deal with the problem on direct review. Federal habeas corpus after conviction allows re-examination of the facts,⁵⁸⁰ but it comes too late to avoid the hardships of long and costly state-court proceedings, excessive bail or incarceration pending final decision, and the lingering cloud of criminal charges as an encumbrance on the ability to hold a job or to live a normal life. Yet the sweeping proposal of the 1966 Civil Rights Bill is not a pleasant prospect. It is one thing to ask the federal courts to examine prosecutions arising directly out of civil-rights demonstrations, since the frequency of such prosecutions is manageably small and the likelihood of overreaching by state officials great. It is quite another thing to allow every Negro prosecuted in Mississippi to remove his trial to the federal court. The impairment of the state's legitimate interests in a law enforcement is much greater under such a proposal, as is the burden imposed on the federal courts; and while it may be that Negroes are never treated with proper respect or fairness in Mississippi courts, it is surely not true that every prosecution of a Mississippi Negro is likely to be on a false charge. Moreover, when the petitioner has no federal defense to the prosecution it is not entirely

⁵⁷⁸ The proposal is further weakened by the commentary's explanation that the state law in question, or one just like it, must have been "authoritatively determined" to be invalid on its face or as applied to such a case. TENT. DRAFT No. 6, at 230. The absence of precedent is irrelevant to the need for an injunction, and the requirement as defined leaves litigants defenseless against newly enacted laws. Without the definition the term "plainly" would invite litigation over the imponderable boundary between unconstitutional and very unconstitutional laws.

⁵⁷⁹ *Henry v. Mississippi*, 379 U.S. 443 (1965).

⁵⁸⁰ See *Townsend v. Sain*, 372 U.S. 293 (1963).

clear that the case is one constitutionally arising under federal law and thus properly within the jurisdiction of the federal courts.

Accordingly, I think the provision for federal protection against harassment of civil-rights workers for conduct not directly related to their protected activities should be narrower than that proposed in the 1966 bill. The ALI's proposal, on the other hand, is likely to have very little effect. It requires not only a showing that the prosecution is "plainly discriminatory" but also that it amounts to a denial of equal protection. "Discriminatory" by itself requires something more than proof that no crime was in fact committed; the test should not be further qualified by the impossible standard of "plainly," which is likely to deprive the defendant of a federal trial of the crucial issue of bad faith. Moreover, the requirement that the prosecution deny equal protection is at best confusing. Perhaps the phrase is tautological: Discriminatory enforcement of laws is by definition a denial of equal protection. Prosecution with no evidence is also a deprivation of liberty or property without due process;⁵⁸¹ completeness suggests due process should also be mentioned if "discriminatory" is not sufficient. In addition, "discriminatory" does not fully capture the essence of the problem. Prosecution under a statute seldom used is, of course, one way to harass unpopular people; prosecution for common offenses on trumped-up charges is another. I think bad faith, the term used by the Supreme Court in discussing anti-suit injunctions,⁵⁸² should be added to "discriminatory" and the confusing, possibly redundant reference to equal protection removed.

My proposal would require the federal court to dismiss unless it found the unrelated prosecution baseless or discriminatory; it could not proceed to try the facts and determine whether an offense had in fact been committed. Thus the courts would be unable to protect fully against harassment, but full protection could be assured only at the enormous cost of allowing all suits against civil-rights workers to be tried in federal court. This would be better than the proposal to include all suits against Negroes, since by no means all Negroes are active fighters for equal rights and since the greatest danger of harassment is to those who are. I think the broader proposal would be constitutional: If it is demonstrated that Negroes are excluded from electing judges, or from sitting on juries, or if they systematically are given higher sentences or subjected to higher bail than other people similarly situated, the likelihood that the state courts will treat Negroes or their advocates unfairly is substantial enough to make a federal trial forum an appropriate means of assuring that the state does not deny them

⁵⁸¹ *Thompson v. City of Louisville*, 362 U.S. 199 (1960).

⁵⁸² *See, e.g., Dombrowski v. Pfister*, 380 U.S. 479, 490 (1965).

the equal protection of the laws. Such cases, even without a specific federal defense except the probability of unfair treatment by state courts, would arise under federal law—the statutory grant of jurisdiction as a reasonable exercise of the power given by the fifth section of the fourteenth amendment.⁵⁸³

Whether therefore the statute ought to provide a federal forum whenever a civil-rights worker is prosecuted in a state whose courts are unfair to Negroes, or only to allow a federal court to abort charges that are baseless or discriminatory, depends upon the gravity and extent of state-court impropriety in this sort of case. In the absence of more detailed evidence I favor the more limited version, especially because requiring proof that the claim is without basis would permit the statute to be drafted without the necessity of defining the class within its protection. To protect the civil-rights worker alone would be incomplete, for he can be harassed by prosecution of his family and friends; even to define the civil-rights worker, outside the context of a prosecution for civil-rights activity directly, would be difficult,⁵⁸⁴ and defining his friends and relations adequately would be impossible. The problem, in other words, is not one that can be wholly solved without doing away with state criminal jurisdiction altogether, and perhaps with state civil jurisdiction too.

It remains to discuss whether injunction, removal, or habeas corpus is the best avenue for providing federal relief against improper state prosecutions. The ALI favors injunction, because removal has the disadvantage of automatically stopping the state proceeding before it has been determined to be illegal.⁵⁸⁵ Removal need not have this consequence, and it can be argued that the everyday process of removal is less irritating than the extraordinary, peremptory command of the injunction. But the injunction has the advantage of making clear that the federal court is expected only to determine the single issue of federal right, while removal suggests, though again it could be made otherwise, that the entire trial is to be federal. More serious are the technical limitations of removal and of habeas corpus as they have been defined. A case can be removed only after it has been filed in state court, and habeas lies, so far, only if there is some form of custody or restraint of the state-court defendant.⁵⁸⁶ It does not work if the de-

⁵⁸³ See the discussion of protective jurisdiction, text at notes 68-73 *supra*.

⁵⁸⁴ Would a single letter to the mayor suffice? Participation in a march ten years before?

⁵⁸⁵ TENT. DRAFT NO. 6, at 114.

⁵⁸⁶ 28 U.S.C. § 2241 (1964). For relaxation of this requirement see *Jones v. Cunningham*, 371 U.S. 236 (1963) (parole); *Peyton v. Rowe*, 390 U.S. 978 (1968) (sentence not yet being served).

fendant is only to be fined or to be subjected to civil liability, or if he is free on bail. A statute, of course, could remove these limitations at the expense of the English language; although terminology ought to be the least of our worries, I agree with the ALI that injunction lends itself best to covering the diverse situations in which federal protection should be provided.

Finally, I think it clear that a special provision must be made to assure that such injunctions will in fact be issued. In all but civil-rights cases I think it sufficient to provide that injunctions against suit may be granted only when necessary to prevent grave and irreparable harm. But under just such a formulation, developed by the courts themselves without statutory compulsion, the Supreme Court has recently held that an injunction will not issue to forbid prosecution for civil-rights activities protected by the Constitution in Mississippi.⁵⁸⁷ Congress should make clear its disagreement.

A serious question is whether there ought to be a requirement of exhaustion of state remedies before seeking the federal injunction. In cases not involving civil rights such a requirement makes sense; if there is a reasonably efficient pre-trial state procedure for protecting the federal right, it should be first explored in order to minimize friction. But to require Mississippi picketers to ask the state courts to enjoin prosecution seems rather futile. The likelihood of a state's acting improperly, of course, will be relevant to the plaintiff's case for proving irreparable injury, but the statute should make clear that the necessity for federal protection of civil rights is so great and the likelihood of state impropriety so high that the delays and costs of applying for state pre-trial relief need not always be incurred.

The ALI also proposes to relax the Supreme Court's virtually absolute ban on state-court injunctions against federal proceedings.⁵⁸⁸ The amendment is a good thing; there may be occasions when, as in the filing of multiple actions on a cause of action already concluded by judgment, the state court is in the best position to prevent irreparable harm. But the danger that state-court injunctions might interfere with the legitimate operations of the federal courts, and the frequent insufficiency of Supreme Court review to correct the excesses of state courts in injunction cases, suggest that the ALI is right in defining the occasions for such injunctions very strictly. The two categories are easy to understand: "to protect the jurisdiction of the court over property in its custody or subject to its control" and "to protect against vexatious

⁵⁸⁷ *Cameron v. Johnson*, 390 U.S. 611 (1968).

⁵⁸⁸ *Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964), admitted in dictum the possibility of state-court injunctions to protect in rem jurisdiction.

and harassing relitigation of matters determined by an existing judgment of the State court in a civil action.”⁵⁸⁹

The problem of multiple litigation deserves special mention. Two suits over a single controversy are almost never tolerable. The policy against the resultant waste of time and money is reflected in federal rules respecting *res judicata* and pendent jurisdiction. Yet the notion persists that a party is free to sue the same defendant twice at the same time, though not consecutively, or that a defendant may sue the plaintiff in another court at the same time. A race to the courthouse is arbitrary and unseemly, but it is no more so than the present race to judgment in two suits filed one after the other, and it involves a good deal less waste. The Judicial Code should be amended to provide that a state or federal court must stay any action filed, whether in rem or in personam, concerning substantially the same parties and subject matter already in issue in another court. If, however, because of joinder of parties or causes the second court can more fully decide the controversy than can the first, the first suit should be stayed.⁵⁹⁰

MISCELLANEOUS MATTERS

The ALI proposals do not deal with the entire Judicial Code, nor even with all its jurisdictional provisions. The sections dealing with court organization are obviously outside the scope of the inquiry. Less clear, however, is the exclusion of appellate jurisdiction and habeas corpus from general consideration. The latter omission can be explained by the desire not to jeopardize the new Code by controversial provisions and the former simply by saying that the district courts are a big enough problem to tackle at one time. I hope the Institute will soon give its attention to these other matters too; the passage of the new Code, if that is to be, should not obscure the real problems that exist outside it.

The major problem affecting appellate jurisdiction is to free the Supreme Court from the lingering burden of appeals that it has no power to decline.⁵⁹¹ The Court can serve its principal function of clarifying important questions of law only if it is free from the obligation of deciding insignificant cases; recognizing the conflicting demands on

⁵⁸⁹ TENT. DRAFT NO. 6, at 42-43, § 1373.

⁵⁹⁰ Present law apparently gives the trial judge considerable discretion in this regard. *See, e.g.,* Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180 (1952) (two federal actions); *Scott v. Germano*, 381 U.S. 407 (1965) (requiring stay by federal court pending resolution of a later-filed state reapportionment suit); *Amdur v. Lizars*, 372 F.2d 103, 106-7 (4th Cir. 1967).

⁵⁹¹ *E.g.*, 15 U.S.C. § 29 (1964); 18 U.S.C. § 3731 (1964); 28 U.S.C. §§ 1252, 1253, 1254(2), 1257(1) (1964).

its time, the Court has resorted to less than legitimate practices to spare it undesired appeals.⁵⁹² Congress ought to make the certiorari practice applicable throughout the Court's jurisdiction; since the Supreme Court is entrusted with the substantive protection of federal rights, it can be trusted to determine which cases are most in need of review.⁵⁹³

Especially onerous and without cause are the provisions for direct review of district-court decisions in routine ICC and government anti-trust cases; either the Court is required to probe the facts extensively, with great waste of its time, or the case receives no effective review at all.⁵⁹⁴ Government antitrust cases should be reviewed in the courts of appeals; ICC orders, like those of the NLRB and many other federal agencies, should be tested in the courts of appeals as well. I also would repeal the provisions for direct Supreme Court review of orders dismissing criminal indictments⁵⁹⁵ and holding federal statutes unconstitutional in government litigation.⁵⁹⁶ Surely not all decisions frustrating criminal prosecutions demand the attention of the Supreme Court,⁵⁹⁷ and the ALI's willingness to abolish three-judge courts for testing federal statutes⁵⁹⁸ suggests that the companion provision for direct appeal of constitutional cases is no longer warranted either. Finally, the provision for direct review of three-judge courts in cases attacking state statutes is a natural response to the fact that three judges hear the case to begin with; but the speed of direct Supreme Court review is not called for unless the state law has been held unconstitutional, and in any event I should prefer to see the three-judge requirement done away with.

The law of post-conviction review is in quite a mess, thanks in part to the Supreme Court's commendable expansions of habeas corpus and to the lack of congressional sympathy. Perhaps in this state of affairs the reformer is best advised not to stir up the legislative hornets. But desirable changes would include broadening habeas for military

⁵⁹² See, e.g., *Naim v. Naim*, 350 U.S. 985 (1956); Wiener, *The Supreme Court's New Rules*, 68 HARV. L. REV. 20, 51 (1954). Cf. the certification practice, discussed in D. CURRIE, *FEDERAL COURTS* 223-4 (1968).

⁵⁹³ See Moore & Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 VA. L. REV. 1, 45 (1949).

⁵⁹⁴ See the Court's protest against the antitrust provision in *United States v. Singer Mfg. Co.*, 374 U.S. 174, 175 n.1 (1963). An ALI proposal to modify this statute, see TENT. DRAFT No. 5, at 37-38, 209-13, was omitted in the later version because the matter is under consideration by Congress. TENT. DRAFT No. 6, at 247.

⁵⁹⁵ 18 U.S.C. § 3721 (1964).

⁵⁹⁶ 28 U.S.C. § 1252 (1964).

⁵⁹⁷ See generally the critical article by Professor Kurland, *The Mersky Case and the Criminal Appeals Act: A Suggestion for Amendment of the Statute*, 28 U. CHI. L. REV. 419 (1961).

⁵⁹⁸ See text at notes 517-8 *supra*.

prisoners from its present confused state to the full relief now afforded state prisoners;⁵⁹⁹ unifying the ragbag of remedies available to the federal civil prisoner;⁶⁰⁰ and eliminating altogether the weakening custody requirement.⁶⁰¹ Short of constitutional mootness, every claim of an unconstitutional conviction or sentence should be given one full hearing in a federal civil court.

CONCLUSION

Perhaps I shall be accused of attempting to put the law of federal jurisdiction into a strait jacket like that forged by Joseph Beale in the conflict of laws.⁶⁰² As one who has fought for several years to eradicate the last traces of Beale's legacy⁶⁰³ I am somewhat sensitive to such a charge, but I think there is a difference. In the first place, Beale's system never attained the virtues of simplicity for which it was created. In the second, he picked the wrong field to stress simplicity: While the choice between federal and state courts will seldom predictably affect the outcome of a case, the choice between competing substantive laws is often a matter of critical importance. I would not sacrifice much for simplicity; my proposals for eliminating jurisdictional complexity are based upon the belief that in many cases it is not very important whether a case is tried in federal or in state court. I should like to summarize my position, in the words of Judge Charles E. Clark, as a protest against "the waste, if not frustration, of a trial to decide if there shall be a trial."

⁵⁹⁹ See D. CURRIE, *FEDERAL COURTS* 189-98 (1968).

⁶⁰⁰ See *id.* at 209-11.

⁶⁰¹ See note 586 *supra*.

⁶⁰² See J. BEALE, *CONFLICT OF LAWS* (1935), *passim*.

⁶⁰³ See R. CRAMTON & D. CURRIE, *CONFLICT OF LAWS* (1968), *passim*.