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The law governing federal-court jurisdiction is unnecessarily complicated. It will become even more complicated if the American Law Institute has its way.

Since 1959, gently prodded by Mr. Chief Justice Warren, the Institute has come up with proposals for comprehensive revisions of the Judicial Code. It is refreshing to see the Institute turn its attention to legislative drafting, for we have had a surfeit of Restatements and a dearth of good statutes. It is also encouraging that such an influential and intelligent body is concerned with federal jurisdiction; the subject touches the most sensitive nerves of federalism and of the separation of powers, as well as pervading even the humblest accident case, and the confusion and frequent irrationality of the present law cry aloud for correction.

Many of the ALI suggestions, especially among those not relating to diversity jurisdiction, are desirable advances. But in seeking to make the law of jurisdiction rational the Institute has too often ignored its own excellent principle, quoted above, that the law should be easy to apply. Jurisdiction should be as self-regulated as breathing; the principal job of the courts is to decide whether the plaintiff gets his money, and litigation over whether the case is in the right court is essentially a waste of time and resources.

I recognize that important policies such as the desirability of a federal jurisdiction

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3 Or his injunction, or his divorce, and so on; but let us not quibble.
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Forum for the vindication of federal rights or respect for legitimate state interests underlie the delineation of federal jurisdiction. When the choice of forum seems likely to make a substantial difference in the outcome of a case, as, for example, in prosecutions of civil-rights workers for demonstrations in Mississippi, detailed attention to the particular case may be warranted. But since Erie R. R. v. Tompkins the instances in which a substantial difference is predictable have been relatively few; in determining diversity jurisdiction, for example, it may be less important to assure disposition of each case in strict accord with jurisdictional policy than to avoid threshold litigation over the place of trial.

Maintaining our parallel state and federal court systems is an expensive habit, for it makes some jurisdictional litigation inevitable. Neither Australia nor Canada has so serious a problem; both federations seem to get along well enough by leaving most of the business of trial and initial appeal to state or provincial courts, with a federal court of last resort open to correct errors and to maintain uniformity.

The ALI, prudently, makes no attempt to emulate the Australian or Canadian experience. Despite the views of Mr. Justice Story, it seems to be generally accepted that Congress could eliminate the dual system by abolishing all inferior federal courts; but Congress is not about to do it. Because of persistent state-federal hostilities, historically more acute here than in Australia or in Canada, we do not seem to have

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5 304 U.S. 64 (1938).
6 Some original federal jurisdiction, however, is vested in the Exchequer Court of Canada, and in the Australian High Court, Commonwealth Industrial Court, Federal Court of Bankruptcy, and courts of the Australian Capital Territory. See Commonwealth of Australia Constitution Act of 1900, 63 & 64 Vict., c. 12, as amended, §§ 71-80; Judiciary Act 1903-1959 (Austl.) §§ 30, 38, 38A, 39; British North America Act of 1867, 30-31 Vict., c. 3, §§ 96, 99, 101; Supreme Court Act, CAN. REV. STAT. c. 259, §§ 35, 36, 55, 57, 62 (1952); Exchequer Court Act, CAN. REV. STAT. c. 98, §§ 17-19, 21-22, 26, 29 (1952); Z. Cowen, Federal Jurisdiction in Australia 21, 78, 92, 96-97 (1959), finding reason for dissatisfaction with the original jurisdiction of the High Court.
reached the point where Supreme Court review of state courts is always adequate to assure recognition of federal rights. Moreover, federal procedures are relatively enlightened; and the life tenure, independence, respectable salary, and prestige of the federal bench have attracted, by and large, judges of relatively high caliber. Many of us would hate to see federal courts go, for they are pretty good courts—considering, as Theodore Green is reputed to have said when asked how he felt on his ninety-third birthday, the alternative.

To achieve a unitary system by abolishing the state courts, however, is at least as unthinkable today. A constitutional amendment very likely would be required, although the result might be approximated by expanding diversity jurisdiction to encompass cases in which any two opposing parties are diverse; conferring a protective federal-question jurisdiction, if that is allowable, over the very nearly all-embracing category of cases affecting interstate commerce; and making federal jurisdiction exclusive across the board. Even if the federal courts under such a scheme purported to follow state law, however, the effective destruction of the state courts would entail a significant shift in the division of federal and state lawmaking powers, for it would deprive the states of the ability to construe their own statutes and to make common law. With both states' rights and the plums of judicial patronage at stake, the political obstacles would be overwhelming.

Some day, perhaps, we may hope that a single system of courts can be established to assure both a high degree of competence and independence and a local control of judicial lawmaking commensurate with local legislative power. Appointment by the Governor, with federal guarantees of tenure and irreducible salary, might do the trick. But the time is not ripe.

This side of Utopia some accommodation must be made for the ef-

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9 See Professor Amsterdam's vivid description, for example, of the performance of Mississippi state courts in prosecutions arising out of civil-rights activities cited in note 4 supra at 794-9.

10 State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530-1 (1967), established that this would be constitutional.

11 See HART & WECHSLER, supra note 8, at 371-2. This issue is discussed in text at notes 69-73 infra.


14 See Williams, The Role of Federal Courts in Diversity Cases Involving Mineral Resources, 13 U. KAN. L. REV. 375, 387-8 (1965), saying that even with concurrent jurisdiction the federal courts are "winning" the "contest" over adjudicating questions of state law in mineral cases: "[P]erhaps the leading jurist in oil and gas matters is to be found in a federal rather than a state court. . . ."
effective operation of two sets of courts. The cases ought to be divided between the two systems in such a way that both are given the maximum opportunity to serve the purposes for which they exist; and the division ought to be as easy to administer as is consistent with those purposes. A great many improvements along these lines can be made in the existing distribution of federal and state jurisdiction, and a great many can be made in the ALI proposals.

I proceed to the bill of particulars.

**DIVERSITY JURISDICTION**

1. *Retention of the Jurisdiction*

Of necessity the Law Institute has entered the Great Debate over whether diversity jurisdiction should be abolished or retained. I must say I find this controversy rather boring; I cannot agree with Mr. Justice Frankfurter that diversity is a great curse or with Judge Parker that it is a great blessing.16

Since *Erie* and *Klaxon* the most respectable argument for diversity jurisdiction has been that it protects outsiders from state-court discrimination.18 Only meager attempts have been made to test the

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18 The Supreme Court has often said this is the purpose of the jurisdiction. E.g., *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809); *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816); *Erie R.R. v. Tompkins*, 304 U.S. 64, 74 (1938); *Guaranty Trust Co. v. York*, 326 U.S. 99, 111 (1945). See also *Warren*, supra note 15, at 83. For the view that the basis of diversity was the fear of state legislative action against creditors, not of court bias against nonresidents as such, see Friendly, supra note 15, at 492-8.

One might of course advocate overruling *Klaxon* and retaining diversity jurisdiction to assure impartial administration of a new federal doctrine of choice among state laws; this would involve the considerations respecting original federal-question jurisdiction,
factual accuracy of this argument by the tools of social science,\textsuperscript{19} and it is not obvious either that prejudice against nonresidents is a terrible problem now\textsuperscript{20} or that federal jurisdiction is an effective antidote.\textsuperscript{21} My hunch is that it is too early to say that xenophobia has disappeared from the American scene, but I can appreciate the argument that the danger of bias is not great enough to justify the burden on federal courts and the interference with state prerogative that diversity jurisdiction entails.

Like an Orwellian broken record, John P. Frank has unabashedly argued for diversity jurisdiction on a broader basis: State Courts Bad, Federal Courts Good.\textsuperscript{22} I have come to modulate my original horrified which will be discussed in Part II of this article. Despite \textit{Erie's} well-grounded constitutional arguments, Congress probably has power under the Commerce Clause and the federal-question provision in Article III to repeal the Rules of Decision Act and reinstate an enlarged federal common law in diversity cases, see \textit{Textile Workers Union v. Lincoln Mills}, 353 U.S. 448 (1957). Such a sweeping shift in lawmaking powers, responsive to no greater pressure than a general bias in favor of the federal government and a desire to avoid choice-of-law problems, is not to be expected in a revision of the Judicial Code.

\textsuperscript{19} Two recent, modest studies involved questioning attorneys about why they chose to take diversity cases to federal courts. See Summers, \textit{Analysis of Factors that Influence Choice of Forum in Diversity Cases}, 47 \textit{IA. L. Rev.} 983, 987-8 (1962), finding that only 4.3\% of responding Wisconsin lawyers even mentioned bias and that “geographical convenience, availability of broader discovery procedures, and the notion that federal juries render higher awards are the most frequently indicated reasons for preferring a federal court”; \textit{Note, The Choice Between State and Federal Court in Diversity Cases in Virginia}, 51 \textit{VA. L. Rev.} 178, 179-84 (1965), reporting that 60\% of responding Virginia attorneys assigned bias against out-of-state plaintiffs as a reason for choosing the federal court.

It is not altogether clear what questions the researcher should put in attempting to assess the bias problem. To ask attorneys why they go to federal court is to obtain their opinion as to the existence of bias; if bias in fact is minimal, perhaps we should reconsider the desirability of burdening the system with diversity jurisdiction in order to allay groundless apprehensions. To ask state-court judges and prospective jurors whether they would be fair to out-of-state litigants seems to my lay eye to invite unreliable responses; who wants to brand himself a bigot? Subtle questionnaires like those employed to test anti-Semitism (see T. W. Adorno, \textit{et al.}, \textit{The Authoritarian Personality} 87-101 (1950)) might be devised, or an attempt made to determine by examining judgments whether outsiders lose a disproportionate number of cases in state courts or fare better in federal. But would the findings be worth the trouble?

\textsuperscript{20} Perhaps the situation most persuasive to Northern minds is that of a Yankee litigant in a Southern court. But even in this context \textit{New York Times Co. v. Sullivan}, 376 U.S. 254 (1964), was an atypical case because of its direct connection with the racial issue. A grant of jurisdiction in suits between citizens of different states arising out of a controversy over Negro rights might take care of most cases of probable bias.

\textsuperscript{21} It might be more effective if federal jurors were drawn from districts embracing parts of two or more states and if federal judges were more often assigned duties away from home. But there is some protection because the jurors are drawn from a fairly large district, because the judges are relatively free from political pressures, and possibly even because of the subconscious influence of being a part of the national government.

\textsuperscript{22} See Frank, \textit{For Maintaining Diversity Jurisdiction}, 75 \textit{Yale L.J.} 7 (1966); Frank,
reaction to Mr. Frank's position, for what he proposes is no more a perversion of constitutional authority than is the common use of the tax and commerce powers to combat such nuisances as machine guns, prostitution, and child labor;\(^{23}\) I am left to confess that, like Chief Justice Taft,\(^ {24}\) I am not yet wholly reconciled to *Champion v. Ames*.\(^ {25}\)

In brief, I cannot view either the retention or the abolition of diversity jurisdiction with appreciable choler. But after studying the Institute's proposals and essaying to improve on them, I am tempted to say that the impossibility of drafting sensible and workable limits for diversity cases is reason enough to abandon the jurisdiction.

The slightly sadistic will find it entertaining to follow the Institute's tortuous path to the conclusion that diversity ought to be retained.\(^ {26}\) The commentary begins with a ringing denunciation of the jurisdiction: "So long as federal courts continue to decide cases arising under state law without the possibility of state review, the state's judicial power is less extensive than its legislative power; this is an undesirable interference with state autonomy."\(^ {27}\) Not only is diversity bad for the states; it is bad for the federal courts too, for in diversity cases the federal courts lack "the creative function which is essential to their dignity and prestige."\(^ {28}\) Nor can diversity be justified today by its original policies of encouraging free movement of capital among the states or of enhancing the prestige of the federal government; the latter goal was long ago achieved, and there is no longer any reason to fear that an inability to take refuge in federal court will deter interstate investment. "Proof that diversity jurisdiction fulfilled a useful purpose at some time in the past is of course not proof that it continues to do so."\(^ {29}\)

Then, abruptly, the Reporters land a swift right to their own jaw,

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*Federal Diversity Jurisdiction—An Opposing View, 17 So. Cal. L. Rev. 676 (1965).* The logic of Mr. Frank's position suggests not only that diversity jurisdiction be retained but that federal courts be opened to their fullest constitutional extent; to limit the proposal to preserving the existing jurisdiction is an exercise in Realpolitik.


\(^{25}\) 188 U.S. 321 (1903) (lottery). Indeed the diversity proposition is by far the easier to accept, for there is no doubt that Congress has power to create jurisdiction of Article III cases regardless of its reasons for doing so.


\(^{27}\) *Id.* at 47.

\(^{28}\) *Id.*

\(^{29}\) *Id.* at 49.
shifting the burden of proof before suggesting any present need for
diversity jurisdiction:

Ever since 1789 the federal government has pledged to travelers
away from their home states the even-handed justice of its own
courts. This pledge is so woven into the fabric of our society
that it is taken for granted. It should not lightly be with-
drawn. General diversity jurisdiction should be retained
unless it can be asserted with confidence that the shortcomings
of the state court justice which originally gave rise to it no
longer exist to any significant degree.\(^\text{30}\)

Turning to the question of bias, the commentary seems first to
demolish the case for diversity jurisdiction again by declaring that
“none of the significant prejudices which beset our society today begins
or ends when a state line is traversed.”\(^\text{31}\) But do not despair, gentle
reader; although racial, religious, and economic bias may operate
equally against local people, “the bias which was formerly thought to op-
erate against out-of-staters as such seems still to exist to some degree with
respect to persons from a more distant part of the country.”\(^\text{32}\) Besides,
prejudice is but one aspect of the overall problem met by diversity
jurisdiction, namely, “the possible shortcomings of state justice.”\(^\text{33}\) For
example, when state venue provisions “localize the place of trial in
small constituencies . . . justice is likely to be impeded by the provin-
cialism of the local judge and jury, the tendency to favor one of their
own against an outsider, and the machinations of the local ‘court house
gang.’”\(^\text{34}\) In addition, “there have been in some states such infirmities
in practice and procedure as to jeopardize the fairness of adjudica-
tion,”\(^\text{35}\) and some metropolitan state courts “are so congested that justice
to litigants, including out-of-staters, is unconscionably delayed.”\(^\text{36}\) Con-
cededly these difficulties may be equally present in suits between parties
from the same state; but the Institute hastens to avoid the inference that
it is embracing Mr. Frank’s argument that diversity should be retained
just because federal courts are better courts:

\[\text{T]he fact that in-staters are not or cannot be similarly pro-
tected is not decisive. One obvious material difference is that}
\[\text{the citizen of a state, who may share in its political life, is}\]
properly held to responsibility for its institutions, and forced to operate within them, in ways which are inappropriate as to the out-of-stater who has no such general opportunity to play a role in having the state's system changed.37

Finally, say the Reporters, diversity can be justified apart from the actual competence or fairness of state courts, in order to prevent the nonresident who loses a lawsuit from attributing his defeat to bias or incompetence on the part of the state government, and thus to avoid what "might otherwise be a source of friction and divisiveness among the several states and their citizens."38 This consideration is especially important when an alien is a party: "It is important in the relations of this country with other nations that any possible appearance of injustice or tenable ground for resentment be avoided."39

If you think this is pretty complicated, you're right. I should prefer to adhere to the straightforward notion that diversity jurisdiction exists primarily to protect nonresidents from local prejudice. The interpleader example furnishes an additional justification, which the Institute also recognizes: Federal jurisdiction is appropriate when the multi-state nature of the parties makes it impossible for any state court to deal adequately with an entire controversy.40 In alien cases, too, there is something to the argument that the federal government should assert control over the potential causes of diplomatic embarrassment.

If diversity is to be retained, it should be tailored to meet these purposes.

2. The Determination of Individual Citizenship

   a. The Tests of Nationality and Domicile. The ALI's basic definition of diversity cases, apart from the red flag with which it begins,41 is virtually identical to the present section 1332 of Title 28:

   § 1301. . . .
   (a) Except as provided in this section and section 1302 of this title, the district courts shall have jurisdiction, originally or on removal, of any civil action between—
   (1) citizens of different States;
   (2) citizens of a State, and foreign states or citizens or subjects thereof; or
   (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties;

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37 Id. at 52-53.
38 Id. at 55.
39 Id. at 54.
40 See text at notes 121-50 infra.
41 See text at notes 207-23 infra.
where the matter in controversy exceeds the sum or value of
$10,000, exclusive of interest and costs.

(c) The word "State," as used in this chapter, includes the
District of Columbia, the Commonwealth of Puerto Rico, and
any Territory or Possession of the United States.

Except in regard to associations and personal representatives, the
ALI draft, like the present statute, makes no attempt to define "citizen,"
and the traditional tests of nationality for foreign citizenship and domicile for American, while reasonably well understood, leave something to be desired. To exclude from foreign-citizen jurisdiction the stateless person and the American living abroad, as the lower courts have done, does accord with the purpose of avoiding offense to foreign governments; but if the danger of local prejudice justifies jurisdiction over Americans living in other American states, it surely applies to the stateless and to the expatriate, as well. Indeed diversity policy would warrant jurisdiction on foreign-relations grounds whenever one or more of the parties is claimed as a national by a foreign country, and on grounds of bias whenever one party is an American citizen or resident and the other is not—as well as in some cases wholly between non-

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43 See text at notes 74-84, 158-76 infra.
44 E.g., Psinakis v. Psinakis, 221 F.2d 418, 422 (3d Cir. 1955); Shoemaker v. Malaxa, 241 F.2d 129 (2d Cir. 1957); Pemberton v. Colonna, 290 F.2d 220 (3d Cir. 1961).
45 E.g., Williamson v. Osenton, 232 U.S. 619, 624-6 (1914).
46 E.g., Shoemaker v. Malaxa, supra note 44.
47 E.g., Van der Schelling v. U.S. News & World Report, Inc., 215 F. Supp. 756, 761 (E.D. Pa. 1963), holding that "subjects" of a foreign state were aliens who "owed allegiance to a sovereign monarch," as distinguished from aliens who were "citizens of a democracy."
48 So does the principle, see Murarka v. Bachrack Bros., 215 F.2d 547, 553 (2d Cir. 1954), that the law of a foreign state determines whether a person is its citizen. Less satisfactory in this light is the holding in Klausner v. Levy, 83 F. Supp. 599, 600 (E.D. Va. 1949), that a citizen of mandated Palestine was outside the jurisdiction: He was not a British citizen, though entitled to British diplomatic protection, because Palestine had power to confer its own citizenship; but Palestine was not a "foreign state" because it had not been "formally recognized by the executive branch." Executive non-recognition does not imply an indifference to irritations caused by state courts. Better are the Murarka holding that India became a "foreign state" substantially before its independence, 215 F.2d at 552, and the granting of permission to a Cuban agency to sue in Banco Nacional v. Sabbatino, 376 U.S. 398, 408-12 (1964), despite a break in diplomatic relations.
49 And also, very likely, to a suit between resident and non-resident aliens. But see Cuozzo v. Italian Line, 168 F. Supp. 304 (S.D.N.Y. 1958), denying jurisdiction because an alien resident was not a "citizen" of an American state. This decision follows rather logically from such holdings as Psinakis v. Psinakis, supra note 44, which held a resident alien diverse to a citizen of the state where he resided. But policy suggests jurisdiction would be proper in both cases: The resident alien is likely to be favored in a contest with a total outsider and disfavored when opposing a local citizen, so he arguably should be held a citizen of both his state of residence (or domicile) and his country of nationality, diverse (but cf. Strawbridge v. Curtiss, text at note 94 infra) to citizens of either.
residents. In order to avoid complexity in drafting or interpretation, one might therefore propose jurisdiction over all cases in which a nonresident or noncitizen of the United States is a party.\(^5\)

In light of the tenuous basis for diversity jurisdiction in any case, however, the complications which would be engendered by such a change counsel retention of the simple, established test of nationality. While the American abroad could easily be held a foreign citizen or subject, the man without a country, like the suit between two aliens,\(^6\) cannot be comfortably fitted into the language of either the existing statute or the Judiciary Article of the Constitution. If jurisdiction of such cases is to be sustained, it can only be the result of a statutory change supported as a grant of protective federal-question jurisdiction or of jurisdiction outside Article III; both these theories rely on Congressional authority over foreign affairs, and neither has been approved to date by the Supreme Court.\(^7\) Thus expansion of jurisdiction to encompass all international cases falling within diversity policy would entail serious constitutional litigation at the outset. Moreover, it would import into the foreign-citizen cases the difficult test of domicile or residence that complicates the present scheme in interstate diversity cases.

Domicile is an unsatisfactory test for American state citizenship both because it is difficult to determine and because it too frequently bears no relation to the probability of bias. John L. Lewis was held diverse to a Virginian, although he had lived in Virginia for thirty years, because he still voted in Illinois.\(^5\) A Michigan woman who had married an Illinois soldier in Wyoming and returned to Michigan after a few weeks while he was sent overseas was held diverse to a citizen of Michigan because a wife takes the domicile of her husband.\(^5\) The notions that one may be a domiciliary of a place one has never been,\(^5\) and that one retains an old domicile long after abandoning it until a new one is acquired,\(^6\) are off base in terms of possible prejudice; and the tests for

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\(^5\) The probably rather rare case of dual American and foreign citizenship could most simply be dealt with by treating the litigant as an American: In accord with Strawbridge v. Curtiss, text at note 94 infra, his additional foreign citizenship seems unlikely to create substantial danger of bias. To open the federal courts to Americans claimed by their countries of origin, on the basis of a fear of foreign embarrassment, seems excessive.


\(^7\) See text at notes 65-73 infra.


\(^6\) See RESTATEMENT, CONFLICT OF LAWS § 14, illustration 1 (1934).

\(^5\) See id. § 15(2): "To acquire a domicile of choice, a person must establish a dwelling-place with the intention of making it his home." The court justifiably rebelled in Pannill v. Roanoke Times Co., 252 F. 910 (W.D. Va. 1918), refusing to hold a former Californian
determining domicile of people who have concurrent connections with two states—such as the commuter and the modern Proserpina who spends summers in New York and winters in Florida—are highly arbitrary. On the other hand domicile provides rather well for the serviceman or college student away from home, for he seems not unlikely to be considered an outsider by some members of the community where he is stationed.

Here, as always, it is easier to criticize than to construct a satisfactory alternative. Bias is a slippery enough concept at best, and an attempt to isolate its sources becomes largely fantasy in dealing with people associated with more than one state. Because personal contacts seem more relevant to possible bias than a probably unknown domiciliary intention, some concept of settled residence seems a better test than domicile; it would take care of freakish cases in which a person is held a domiciliary of a place with which he has no present connection. But residence remains quite arbitrary in cases like those of Proserpina or of the commuter; it might dictate the less desirable result in the case of the student or soldier; and residence, like domicile, would be beastly to define. Voting registration, if it were universal among adults, would be accurate enough in light of its ease of application; automobile registration would be no solution for those without vehicles or with registrations in more than one state. Possibly the most universal hallmark would be the address one places on one's annual income tax return. Unfortunately there is no assurance that this address corresponds at all with the facts; it could easily be jimmied to produce or to defeat diversity; and, most significantly, not everybody files a return. A statutory test in terms of alternative indices could be devised, taking as conclusive the first available item in a list such as the following: voting registration, automobile registration, address on tax return, address filed with draft board, address filed with welfare agency. Absent any of these, the relatively rare remaining cases could be determined by the traditional tests of

who had been wandering about for years with no intention to return still a Californian. The result was to refuse jurisdiction despite the danger of bias, for the other party was a citizen of the forum state. A better reflection of diversity policy, but of questionable constitutionality, would allow jurisdiction of suits between persons who are not citizens of the same state.

67 Home, not business, is decisive under the RESTATEMENT, §§ 12, 13 & comment f.
68 Intention governs, according to the RESTATEMENT, § 15.
69 There is a tendency to treat such people as only visitors where they are stationed, in contexts such as divorce. E.g., Klingler v. Klingler, 254 S.W.2d 817 (Tex. Civ. App. 1953). This is due partly to the often coerced nature of a soldier's or jailbird's presence, see RESTATEMENT § 21, and partly to an unwillingness to accept unsubstantiated statements of intention when the litigant has much to gain by proving a local domicile.
domicile or of residence or excluded from the jurisdiction for lack of an
easy determining factor.\textsuperscript{60}

Such a test, while one hopes it would prove easy to administer, is
embarrassingly complicated. Moreover, the present domicile test yields
for most people a simple answer, and a change would invite litigation
where there is rather little today. Until an easy test suggests itself,
therefore, I cannot blame the ALI for leaving the statute uninformative
on the issue of citizenship; but I would hope that the courts in problem
cases would pay less heed to intention and more to physical facts than
is suggested by the traditional concept of domicile.\textsuperscript{61}

b. The District of Columbia, Puerto Rico, and the Territories. The
Institute accepts the current extension of diversity jurisdiction to
citizens of the District of Columbia, Puerto Rico, and the Territories
and proposes to include citizens of American Possessions as well. This
jurisdiction was upheld as to District of Columbia citizens in the
peculiar \textit{Tidewater}\textsuperscript{62} case, which seems unlikely to be overruled despite
the inability of the Supreme Court to agree upon a rationale. I fully
agree with Justices Rutledge and Murphy in that case that the word
"State" in Article III's diversity provisions is literally broad enough to
encompass any geographical entity such as the District of Columbia,\textsuperscript{63}
and that the words should be construed to include the District in order
to effectuate their purpose of safeguarding outsiders against possible
prejudice. This reasoning, the ALI and I agree, is equally applicable
to Territories and Possessions and has additional force in the case of
Puerto Rico, whose current Commonwealth status gives it a measure
of self-government not unlike that of the states and has been held to
bring Puerto Rico within some statutory jurisdictional provisions apply-
ing in terms only to states.\textsuperscript{64} But this argument, as to the District of

\textsuperscript{60} Alternatively, persons connected with more than one state could be held diverse to
citizens of neither, by analogy to the ALI's proposal for corporations, see text at notes
177-89 \textit{infra}. This would leave, however, a serious problem of deciding what constitutes
a sufficient connection.

\textsuperscript{61} The \textit{Restatement} tests of domicile, long discredited even in the conflicts field
because of their erroneous premise that a single criterion will serve equally well a multitude
of different policies, see authorities cited in R. \textsc{Cramton} \& D. \textsc{Currie}, \textsc{Conflict of Laws}
42-48 (1968), were not formulated with diversity jurisdiction in mind and should not be
taken as determinative.


\textsuperscript{63} There is no rigid requirement that the word "state" be given the same meaning in
various sections of the Constitution. \textit{Compare} Paul v. \textit{Virginia}, 75 U.S. (8 Wall.) 168, 177
(1869) (corporation not a "citizen" under Privileges and Immunities Clause of Article IV)
corporation as if it were a citizen under Article III by invoking the patently unreasonable
conclusive presumption that all shareholders were citizens of the incorporating state.

Columbia at least, proved unacceptable to seven of the nine Justices deciding *Tidewater*.

Justices Jackson, Black, and Burton sustained the District of Columbia provision in *Tidewater* without regard to Article III. Instead, they upheld the provision as an exercise of Congress's Article I power to govern the District. This position is somewhat more difficult to embrace; it is clear enough, as Mr. Justice Frankfurter objected, that Article III was intended as a limitation on the powers of the federal courts. But the reasons for this limitation were two: federalism and the separation of powers. According to conventional theory, authority to decide abstract or nonjudicial questions would compromise the independence of the judges and burden them with tasks they are poorly equipped to perform; while decision of nonfederal, nonmaritime cases between citizens of the same state would infringe state rights. Significantly, neither of these points is relevant to *Tidewater*: The case was certainly judicial, and it is difficult to argue that trying cases for the District of Columbia is a function of peculiarly state concern. Unfortunately this may prove only that there ought to be jurisdiction over District of Columbia citizen cases, not that there can be; for the premise of the Constitution, confirmed by the much-maligned tenth amendment, is that the federal government may exercise only powers conferred upon it by the Constitution: Unless the case comes within the judicial power defined in that document it cannot be entertained. With this a majority of the Court in *Tidewater* agreed.

On balance, however, I think Mr. Justice Jackson was right and the majority wrong: It is not necessary to read Article III to incapacitate Congress from governing the District of Columbia in light of the broad grant of power over the District in Article I. Once accepted, the Jack-
son theory is equally applicable to Territories and Possessions since Article IV gives Congress power to legislate for those areas comparable to the Article I grant respecting the District of Columbia. Puerto Rico, on the other hand, presents something of a problem; for Congress in approving Commonwealth status appears to have given up its authority over local Puerto Rico affairs— if it has constitutional power to do so.

The protective-jurisdiction theory of Professors Hart and Wechsler allows one to reach Mr. Justice Jackson's result without conceding that federal courts may be given jurisdiction outside Article III. Congress has power to enact substantive laws governing District residents, and cases arising under such laws would be federal-question cases within Article III; therefore, Hart and Wechsler argue, Congress has the power to infringe state interests to a lesser degree by creating federal jurisdiction without creating federal law. The Supreme Court once squarely rejected this notion, but under rather outmoded views of the Commerce Clause; and Mr. Justice Frankfurter's objection to protective jurisdiction on the ground that the greater does not always include the lesser fails to persuade since it suggests no reason for not including the lesser in this case. One possible reason is that the necessity to create substantive law acts as a brake on congressional expansion of jurisdiction, but this sounds hollow in light of the ease with which state laws could be adopted as the model for federal. A more serious problem with the

even at trial. It is surely not to be expected after Glidden that the Supreme Court would permit this substantial safeguard of impartial justice to be subverted by giving jurisdiction to a separate court composed of judges dependent upon the will of the Congress or of the President.

The cases permitting non-tenure judges of territorial and military courts are distinguishable from Tidewater because in the latter the creation of judicial power outside Article III does not conflict with any policy embodied in the limitations of that Article. They are cited here to show that Article III has not always been read to exhaust the judicial powers of the United States.


69 See H. Hart & H. Wechsler, The Federal Courts and the Federal System 371-2 (1953). Indeed, although they do not say why, they suggest (as in controversies involving bankruptcy trustees) that protective jurisdiction may even include cases that Congress could not subject to federal law.

70 The Genesee Chief, 53 U.S. (12 How.) 443, 451 (1851): "It would be inconsistent with the plain and ordinary meaning of words, to call a law defining the jurisdiction of certain courts of the United States a regulation of commerce."


72 See the Assimilative Crimes Act, 18 U.S.C. § 13 (1964); the long-lived Conformity Act respecting procedure, discussed in Hart & Wechsler, supra note 69, at 584-9; Clark Distilling Co. v. Western Md. Ry., 242 U.S. 811 (1917) (liquor importation). Old-fashioned fears of improper delegation to the states of congressional powers, see Washington v. W.C.
protection is the difficulty of discovering the federal law under which, as required by Article III, the case would arise. The bootstrap aspect of holding that the case arises under the jurisdictional statute could be contained by holding the jurisdiction must be related to some substantive congressional power, but this is a step beyond the usual notion that a case arises under federal law only if the cause of action or an ingredient of it is created by federal law, or if federal law must be construed in the case.73

However shaky the constitutional basis of Tidewater, a majority there sustained the equation of District citizens with those of the states; the same arguments apply to the Territories and Possessions and, with slight reservations, to Puerto Rico; the jurisdiction makes sense and is unlikely to be very offensive to anybody; and Tidewater is therefore not likely to be overruled. The ALI is quite right in preserving and extending this bar-sinister variant of diversity jurisdiction, if diversity is to be preserved at all.

c. Representative Parties and Frauds on the Jurisdiction. The ALI wants to overturn a long-standing rule regarding the citizenship of executors and administrators74 and to clarify the present confusion respecting guardians75 by providing that all personal representatives shall be deemed citizens of the same state as the person whose estate or interests they represent.76 The present rule has proved a ready vehicle for permitting litigants to manufacture or to destroy diversity at will77 —a practice that impairs whatever state and federal interests there are in the proper allocation of these cases, imposes the burden of adjudicating Dawson & Co., 264 U.S. 219 (1924) (maritime workmen’s compensation), have gone by the board. See DeSylva v. Ballentine, 351 U.S. 570, 580-1 (1956); Wilburn Boat Co. v. Fireman’s Fund Ins. Co., 348 U.S. 310, 321 n.29 (1955).

73 See Part II of this article, text at notes 275-90.
 74 E.g., Chappelledaine v. Dechenaux, 8 U.S. (4 Cranch) 306, 308 (1808); Rice v. Houston, 80 U.S. (13 Wall.) 66, 67 (1871), holding the representative a citizen of his state of domicile.

75 Compare Fallat v. Gouran, 220 F.2d 325, 326 (3d Cir. 1955), looking to the guardian’s citizenship because he had the right to sue, with Martineau v. City of St. Paul, 172 F.2d 777, 780 (8th Cir. 1949), looking to the ward’s because the action should have been brought in his name and because, even if the foreign guardian were a proper party, the controversy was essentially local. The closest Supreme Court authority is an ancient venue case, Mexican Cent. Ry. v. Eckman, 187 U.S. 429, 434 (1903), which relied on state law respecting the right to sue and which, according to Fallat, may have been superseded by Civil Rule 17(c). In any case the guardian’s home may be more relevant to litigation convenience (venue) than to bias (diversity).

76 OFFICIAL DRAFT, pt. 1, at 9, § 1301(b)(4).

77 See Mecom v. Fitzsimmons Drilling Co., 284 U.S. 188, 190 (1931), in which an administratrix had filed suit three times in state court and had each action dismissed voluntarily after removal. Finally she resigned and secured the appointment of an administrator from another state, in order, the Supreme Court found, to defeat diversity. See also Corabi v. Auto Racing, Inc., note 80 infra.
tion on federal courts without regard to jurisdictional policy, and reflects poorly on the public image of the legal system. The Congress is on record as opposing this sort of thing solidly since 1789. The famous assignee clause and the present ban on collusive or improper creation of jurisdiction, which the Third Circuit at least has held inapplicable to the most flagrant personal-representative cases, are well complemented by the ALI's proposal.

Some have complained, as did Hart and Wechsler of the assignee clause, that the ALI's proposal throws out tyke as well as tub, since not all appointments or assignments altering diversity are for an improper purpose. But to investigate motive in every case invites litigation, and especially in the case of the representative the reward is not worth the effort; I see no reason to believe that there is a substantial likelihood that the outcome of a case will be affected because of prejudice for or against an individual who has nothing to gain or lose in the litigation. In the case of the guardian, it seems clear that any bias will turn upon the citizenship of the ward. In the case of the decedent, it is fair to ask whether his citizenship is relevant, since he "is the only one in the whole wide world who literally has no interest in the proceedings"; but to investigate the domicile of all beneficiaries and creditors of the estate would unjustifiably turn the jurisdictional question into a full-dress probate proceeding, and there is a great likelihood that neither judge nor jury would have been aware of or influenced by the facts so laboriously ascertained. Thus, I approve the ALI's formulation because it is exactly as simple to administer as the existing rule, avoids the unseemly possibility of appointments made to affect jurisdiction, and accords far better than the present rule with the probable focus of bias.

78 Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79.
80 Corabi v. Auto Racing, Inc., 264 F.2d 784, 785, 788 (3d Cir. 1959). An administratrix had asked and received permission to resign "in order that Letters of Administration may be granted to a non-resident" so that suit could be brought in federal court. The new appointment was held neither "collusive" nor "improper." And the appointment of a representative was earlier held not to be an "assignment" under the old assignee clause, Childress v. Emory, 21 U.S. (8 Wheat.) 642, 669 (1823).
83 Cf. McNutt v. Bland, 43 U.S. (2 How.) 8, 13-15 (1844), upholding jurisdiction of a suit on behalf of New York creditors against Mississippi defendants on a sheriff's bond, although the action had to be brought in the name of Mississippi's Governor. Nominal parties, the Court said, could be ignored; executors and administrators were unconvincingly distinguished on the ground that they held title to estate property and controlled the litigation.
84 Farage, supra note 82, at 32.
The ALI proposes to retain in substance the section 1359 prohibition against joining or creating parties "improperly" or "collusively," and to reinstate the assignee clause without its erstwhile virtue of administrability: The new section 1307(b) would disregard any transfer made "to enable or to prevent the invoking of federal jurisdiction." On the other hand the Institute apparently accepts, in general, the hornbook rules that citizenship is determined at the time of suit, and that a motive to create or to defeat jurisdiction by changing domicile is immaterial.

Simplicity of application certainly justifies the last two rules and raises some question as to the desirability of outlawing fraudulent joinder or transfer. But the Institute's distinction can be defended, for no acceptable self-administering rule suggests itself for the joinder and transfer cases. To ignore all assignments, as before 1948, might create hardship in cases of honest transfer and real prejudice; to accept all parties at face value would encourage imposition at no greater cost than the writing of a mock contract. A change of domicile, by contrast, is ordinarily a rather extreme measure to undertake simply in order to avoid the state courts; the notorious Nevada divorce problem is not analogous, because since the overruling of *Swift v. Tyson* the only effect of diversity jurisdiction is, as was said in a related context, a

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86 Id. at 21-22.
87 But see proposed § 1302(d), Official Draft, pt. I, at 12, which forbids invocation of diversity jurisdiction (see text at notes 207-23 infra) by persons who, because of an established business or commuter relationship with the forum state, could not have invoked the jurisdiction at the time the claim arose. The effect of this proposal would be to prevent a litigant from obtaining access to the federal court by abandoning an established business, a possibility that seems something less than an overwhelming opportunity for fraud on the jurisdiction. The Reporters give no reason for this odd and complicating provision, offering only that it "complements the two preceding subsections, which measure the two-year period backward from the time of invocation of diversity jurisdiction," id. at 77. It is perfectly possible to require two years' connection without ignoring the fact that the connection has been terminated.
88 Williamson v. Osenton, 232 U.S. 619, 624-5 (1914); Mollan v. Torrance, 22 U.S. (9 Wheat.) 537, 539 (1824). The requirement in removal cases of diversity when the state suit was begun as well as at the date of removal, Mansfield, Coldwater & L.M. Ry. v. Swan, 111 U.S. 579, 581-2 (1884), may very slightly reduce the danger of contrived diversity; but it is not a necessary result of the statutory requirement that the action be one in which the federal court has "original jurisdiction." It complicates the inquiry upon removal without adequate justification, and it risks possible bias when the change of home is legitimate. Its probable explanation lies in the desirability of setting jurisdiction for good when the complaint is filed. Cf. Louisville & N.R.R. v. Mottley, discussed in Part II of this article, text at notes 232-44.
89 In addition, citizenship at the time of suit seems more relevant to bias than citizenship at the time of the transaction.
change of courtrooms and not a change of law.\textsuperscript{91} We have got along with the collusive-joinder provision for a long while; I suspect the result of the ALI's new assignee clause will be not a glut of litigation but a seldom-satisfied burden of proof.\textsuperscript{92} But if litigating the fraud issue does become a burden,\textsuperscript{93} the clause should be either abandoned or made absolute.

3. Complete Diversity

a. The Strawbridge Rule. The ALI makes no attempt to deal with the problem of Strawbridge v. Curtiss,\textsuperscript{94} and the statute has never done so. The Institute doubtless assumes that by adopting the language of the prior statute it will perpetuate the rule that diversity must be "complete"—that all plaintiffs must be diverse to all defendants. I don't see why, if this is their intention, they do not make this rule explicit in the statute. While it is true that everyone who calls himself a lawyer ought to know or be able to discover the Strawbridge rule, the language of the statute is a trap for the uneducated, and there is no virtue in refusing to make it clear.\textsuperscript{95}

The assumption apparently underlying Strawbridge is that the presence of Massachusetts people on both sides of a case will neutralize any possibility of bias affecting litigants from other states. On the facts of Strawbridge itself, this was probably a fair assumption: The suit was brought in Massachusetts, there were Massachusetts people on both sides, and the interests of the parties on either side were joint. It was thus impossible for a Massachusetts court to injure a nonresident without also injuring one of its own people, and the chance of injury from bias was probably slim. But the rule of Strawbridge has been uncritically extended beyond this type of case,\textsuperscript{96} and there are three situations in which its rationale seems somewhat less compelling.

First, even if the interests are joint, the case may be different if suit

\textsuperscript{91} Van Dusen v. Barrack, 376 U.S. 612, 639 (1964) (transfer to more convenient forum).
\textsuperscript{92} See C. Wright, FEDERAL COURTS 86 (1963), observing that § 1359 "has been largely ineffective." And see the narrow interpretation of "improper" and "collusive" in Corabi v. Auto Racing, Inc., supra note 80, at 788.
\textsuperscript{93} A recent example of litigation over parties improperly joined to invoke jurisdiction is Caribbean Mills, Inc. v. Kramer, 392 F.2d 387, 391 (5th Cir. 1968), holding improper an assignment for collection. A motive to create diversity is not enough; the transfer, said the court of appeals, must be a sham, not divesting the interest of the assignor.
\textsuperscript{94} 7 U.S. (3 Cranch) 267 (1806).
\textsuperscript{95} E.g., "The district courts shall have jurisdiction of any civil action in which one party is a citizen of a state and all parties properly joined as plaintiffs are citizens of different states or foreign states from all parties properly joined as defendants."
\textsuperscript{96} E.g., Knoll v. Knoll, 350 F.2d 407 (10th Cir. 1965), cert. denied, 386 U.S. 909 (1966) (suit in state where no plaintiff was citizen); Friend v. Middle Atl. Transp. Co., 153 F.2d 778 (2d Cir. 1946) (interests not joint).
is brought in a state whose citizens are on only one side of the case. For example, if *Strawbridge* had been brought in Vermont, the home of one of the defendants, a Vermont court might conceivably have gone out of its way to benefit the lone Vermonter in the case, even though in doing so it would have aided a stranger as well. Second, the *Strawbridge* justification fails even in the state of common citizenship if the interests are not joint. When a Massachusetts plaintiff sues the drivers of two colliding automobiles, a Massachusetts court can satisfy its prejudices by finding the Vermont driver negligent and exonerating the driver from Massachusetts. Finally, joinder of a judgment-proof local defendant will not always protect a foreigner even when the interests are inseparable and the forum is the state of common citizenship; the jury and judge know who will pay the joint judgment. Thus, *Strawbridge* is often abused by the joinder of local employees in personal-injury actions against out-of-state railroads, or of local advertisers in an Alabama libel suit against the *New York Times*. If one is really concerned with providing a federal forum to protect a foreign litigant from possible bias, a re-examination of *Strawbridge* is in order along the lines suggested.

The principal objection to this suggestion is that it is rather complicated; the present rule is at least somewhat easier to administer, and that is no small matter in dealing with questions of jurisdiction. Thus it would be better to retain *Strawbridge* as an absolute rule than to modify it. Better still, however, would be to replace *Strawbridge* with a rule of minimum diversity: jurisdiction whenever one properly joined plaintiff is diverse to any proper defendant. The premise of *Strawbridge* is flimsy enough at best; it applies, as I have tried to show, to only a small percentage of the cases covered by the rule; it causes plaintiffs to split what ought to be a single law suit into two in order to obtain federal jurisdiction; and, as will appear below, the rule is subject to a number of exceptions that dissipate much of its force, increase the burden of jurisdictional litigation, give an unjustified advantage to defendants, and induce filing of actions in forms or in forums in which they will not ultimately be tried.
The Institute proposes to preserve the obscure provision now in section 1332(a) for jurisdiction of suits “between citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.” This section was inserted in 1948 to overturn lower-court decisions refusing jurisdiction when a New Yorker sued a Californian and a Frenchman; literally such an action is neither between citizens of different states nor between citizens of a state and of a foreign state.\(^\text{1}\) The present and proposed formulation, however, can be interpreted to grant jurisdiction in a suit between a New Yorker and a Californian though there are Frenchmen on both sides. Such an exception to \textit{Strawbridge} would be appropriate enough, since a New York or California court’s favor for the local litigant seems unlikely to be affected by the contending French; but this would be equally true if the cocitizen opponents hailed from Kansas, and I prefer a blanket rule for simplicity. In any case the statute should specify whether the exception is intended; the initial purpose of the “additional parties” provision could be less mysteriously conveyed, if \textit{Strawbridge} is to be preserved, by granting jurisdiction when one party is a citizen of a state and all plaintiffs are citizens of different states or foreign states from all defendants.\(^\text{102}\)

The ALI does propose one new exception to the complete-diversity rule, although it is rather difficult to recognize:

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join in a removal petition under § 1441, Fletcher v. Hamlet, 116 U.S. 408 (1886), and the statutory prohibition of removal in cases of complete diversity when any defendant is a resident of the forum state. It makes sense, as Professor Wright says, \textit{Federal Courts} 114 (1963), to deny access to a federal court to the resident defendant himself, who has nothing to fear from his own state court; it makes less sense, for reasons discussed above, to deny access to his foreign codefendants. Nor is it clear why the willingness of one foreign defendant to waive removal should deprive others of this protection. \textit{Cf.} Bradford v. Harding, 284 F.2d 307, 310 (2d Cir. 1960), rejecting both these limitations when removal was based on the federal-officer provision in § 1442. Because of the strong policy of protecting the operation of the federal government, a single officer may remove even if other officers do not join the petition and even if non-officers are also defendants. This should also be the rule under § 1441.

\(^{101}\) See J. \textit{Moore}, \textit{Commentary on the U.S. Judicial Code} 154 (1949) and cases cited.

\(^{102}\) See note 95 \textit{supra}. A related problem, though of minor practical impact, is whether \textit{Strawbridge} forbids jurisdiction of an otherwise diverse action in which parties on one or both sides are not citizens of either American or foreign states. If the rule is that common citizenship on both sides defeats diversity, the case of a noncitizen on one side clearly is cognizable and the bilateral case debatable. The \textit{Strawbridge} opinion itself requires that each person must be “entitled to sue” or be sued in federal court, suggesting that even the unilateral noncitizen case cannot be heard. Because the presence of noncitizens is not likely to eliminate bias in either case, the former interpretation accords better with diversity policy; but the latter has the advantage of having been clearly stated in easily applicable, across-the-board form in a prominent Supreme Court opinion. If \textit{Strawbridge} is codified, it ought to be stated to exclude these cases from jurisdiction for the sake of simplicity, as in note 95.
Notwithstanding any other provision of this title, whenever an action brought by or on behalf of any person is within the jurisdiction of the district courts under subsection (a) of this section, jurisdiction in that action shall also extend to any claim against the same defendant if such claim (1) is brought by such person on his own behalf or by or on behalf of any member of his family living in the same household as such person and (2) arises out of the transaction or occurrence that is the subject matter of the action.\textsuperscript{103}

What the Institute is getting at is pendent jurisdiction over related claims within a single family. Its principal concern seems to be with restrictive decisions respecting the jurisdictional amount, and in that context the proposal raises serious problems of administrability.\textsuperscript{104} But the ALI's citation of \textit{Borror v. Sharon Steel Co.}\textsuperscript{105} suggests the additional possibility of pendent jurisdiction over controversies between parties not of diverse citizenship.\textsuperscript{106} In \textit{Borror} the Third Circuit held that when a West Virginia administrator sued a Pennsylvania defendant for wrongful death, a survival claim was properly joined even if it belonged to the victim's Pennsylvania relatives.

If \textit{Strawbridge} is to be repudiated, let it be done not this way but directly and after facing the relevant issues. The \textit{Borror} case is not analogous to one in which jurisdiction is based on a federal question, or in which the pendent claim is diverse but lacks the jurisdictional amount. Joinder of the pendent claim in the latter situations by no means impairs the need for a federal court to adjudicate the claims on which jurisdiction is based; if there is to be a single proceeding to decide both claims there is good reason to have it in federal court. But when a dispute between two Pennsylvanians is joined to a dispute over which there is jurisdiction only because of diversity, the assumption underlying \textit{Strawbridge} tells us there is no need for federal jurisdiction even of the diverse claim. Judicial economy can be served, without substantial risk of bias, by a single suit on both claims in a state court. I cannot agree that family cases are so special that \textit{Strawbridge} should be relaxed for them alone, especially when such ambiguous criteria define the exception.

\textsuperscript{104} See Part II of this article, text at notes 395-8.
\textsuperscript{106} It may be that the limitation to persons "living in the same household" eliminates this possibility. But is it clear that this limitation refers to domicile in the sense that determines citizenship for diversity purposes? Grandma may still vote in Tennessee though she has been staying with the folks in Illinois for forty years; and Junior in Leavenworth may still be a citizen of Illinois although he hasn't spent a night in the house since his conviction.
b. Separate-Claim Removal. Section 1441(c), which authorizes removal of state-court actions containing "separate and independent" claims, is one of the most unfortunate provisions in the entire Judicial Code. Even its most general contours are not widely understood, and nobody knows exactly what it means. Its effect is odd on its face: The section creates an exception to the complete-diversity rule that can be invoked only by defendants, and it allows an entire case to be removed because its parts are independent. Its purposes are obscure; amendments of the original provision have left it a patchwork that poorly serves any discernible policy. The ALI wants to keep it—to amend it again, but to keep it.

There would be no need for separate-claim removal if there were no Strawbridge v. Curtiss; any lawsuit with minimal diversity would be removable under section 1441(a) since the whole suit would be originally cognizable in federal court. Strawbridge, destroying original federal jurisdiction, closed this avenue of removal; but the philosophy of that decision tells us that there is no danger of bias, and thus no need for removal, because diversity is incomplete. The statute thus makes little sense if Strawbridge is right or if Strawbridge is wrong.

The development of the statute suggests that its present form is a mésalliance of three distinct principles: a mistrust of the complete-diversity rule in certain cases; a desire to eliminate the plaintiff's forum-shopping advantage; and a policy against multiple trials involving a single transaction. We begin with Moore's insight that the section was designed to "protect a nonresident defendant, who had been joined with one or more local defendants under the relaxed and expanding state joinder provisions." Why, if Strawbridge was right (and Congress did not overrule the decision), did such a defendant need protection? Perhaps because, as the ALI commentary recognizes, the presence of a local defendant is no safeguard when interests are not joint. The Supreme Court's interpretation of the original provision conforms rather well with this thesis: Claims against concurrent tort-feasors (one of whom could be found solely at fault) were held "separable" and thus removable, while claims against an employer for acts of his employees (where liability depended on employee fault) were not.110

107 A possible problem with this position is discussed in note 120 infra.
110 Pullman Co. v. Jenkins, 305 U.S. 534 (1939), construing Act of July 27, 1866, ch. 288, 14 Stat. 306. To be sure, a foreign employee would not be protected by the joinder of his local employer, for the state court might find his act outside the scope of employment. Moreover, the common suspicion that the employer will pay doubtless makes joinder of a local employee little real protection for the foreign master.
But an out-of-state plaintiff is no more protected by the presence of a local co-party without a joint interest than is a defendant; if Strawbridge was too broad, why did Congress limit the exception to defendants? The answer may be that the foreign plaintiff has the option of protecting himself by suing alone, in the federal court; the 1866 removal provision merely canceled out his advantage by allowing the foreign defendant the same opportunity to take the diverse part of the case into federal court. Indeed this policy of equal treatment might support such a removal provision even if Congress did not think Strawbridge too broad: Both parties should have the same power to determine the forum. But this would mean the Supreme Court's interpretation was too restrictive: To equalize the plaintiff's choice, removal should have been allowed whenever the nondiverse parties were not indispensable.

As construed, then, the original "separable controversy" removal statute seems best explained as based upon the desire to give defendants the same escape from an overbroad complete-diversity requirement that plaintiffs already enjoyed because of their ability to leave nondiverse parties out of the lawsuit. But an 1875 amendment,111 preserved in the 1948 revision and by the ALI proposal, injected a third policy consideration that threw the whole statute out of equilibrium.

The amendment, as interpreted, provided simply that upon removal of the separable diverse controversy the nondiverse components of the state-court suit were to be removed as well. The Supreme Court made clear why: Its construction of the statute, in accord with apparent congressional distrust of Strawbridge, allowed removal in many cases (e.g., concurrent tort-feasors) in which the diverse and nondiverse controversies arose out of the same transaction. Removal of the entire case was necessary in such cases to avoid two trials and consequent duplication of proof.112 But with this amendment the statute ceased to make sense, for it gave the defendant alone, unjustifiably, the opportunity to litigate in federal court without splitting one lawsuit into two. If local parties with several interests did not destroy the need for a federal forum, and if judicial economy demanded a consolidated proceeding, Strawbridge should have been relaxed for plaintiffs as well as for defendants.

Thus, after 1875, a statute designed to eliminate an unfair advantage of plaintiffs gave an equally unfair advantage to defendants. But the 1948 revision made matters ever so much worse. The Revisers found too much removal and too much litigation over separability; to reduce both113 they substituted the present term "separate and independent

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112 Barney v. Latham, 103 U.S. 205, 212-3 (1881).
113 See 28 U.S.C. § 1441(c) (1964), Reviser's Note.
claim or cause of action,” perpetuating the confusion while losing sight altogether of the relevant policies. In accord with the Revisers’ expressed intention, section 1441(c) has been authoritatively construed to forbid removal when two defendants are charged with alternative or joint and several liability for a single loss;\(^\text{114}\) the out-of-state concurrent tort-feasor for whose protection the statute was enacted has been removed from its scope.\(^\text{115}\) Moreover, the broad discretion to take jurisdiction of nondiverse claims upon removal sits very poorly with the new test of removability. For claims now are seldom removable as “separate” unless they are completely unrelated; in such a situation the judicial-economy justification for removing the nondiverse parts of the case does not apply.\(^\text{116}\) It is a contradiction in policy as well as in language, on the present interpretation of section 1441(c), to hold a claim “independent” and “pendent” at the same time.\(^\text{117}\) Thus the present statute manages to create difficult interpretive problems, fails to accomplish its policy of protecting against abuses of Strawbridge, invites the federal courts to take pendent jurisdiction when judicial administration does not call for it, and grants the defendant an unjustified advantage over the plaintiff in bringing cases less than wholly diverse into federal court.

The ALI, unfortunately, intends to retain and to broaden the defendant’s advantage, by allowing him to remove whenever he “would have been able to remove” under the general removal provision “if sued

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\(^{115}\) Some have surmised that the separate-claim statute is of no use whatever: Any claims sufficiently related to be joined in a state court may be too closely related to permit removal as “separate.” See Note, Developments in the Law—Multiparty Litigation in the Federal Courts, 71 Harv. L. Rev. 874, 896 (1958); and see Holloway v. Gamble-Skogmo, Inc., 274 F. Supp. 321, 323 (N.D. Ill. 1967): “Several cases have directly held . . . that removal under 28 U.S.C. § 1441(c) is limited to situations where joinder of claims or parties has been by plaintiff only.” Lower courts, however, have found cases that avoid Scylla as well as Charybdis [e.g., Climax Chem. Co. v. C.F. Braun & Co. 370 F.2d 616 (10th Cir. 1966), cert. denied, 386 U.S. 981 (1967) (breach of several contracts for construction of various components of a single factory); Twentieth Century-Fox Film Corp. v. Taylor, 239 F. Supp. 913 (S.D.N.Y. 1965) (breach of contracts of Richard Burton and Elizabeth Taylor relating to single movie)]; and Professor Moore stresses, without suggesting what conceivable policy is served by the distinction, that a suit by two injured accident plaintiffs against a single defendant contains two “claims” or “causes of action” even if the facts are largely common. J. Moore, Commentary on the U.S. Judicial Code 238 (1949).

\(^{116}\) But see the Taylor case cited in note 115 supra, where the court allowed removal of the whole case; the claims were “separate” but not factually unrelated.

\(^{117}\) The constitutional difficulty with the pendent-jurisdiction provision of § 1441(c) seems more acute in federal-question than in diversity cases, for there is no constitutional barrier to repealing the complete-diversity rule. State Farm Fire & Cas. Co. v. Tashire, 368 U.S. 523, 530-1 (1967). Yet surely there is some limit to the definition of “controversies” between citizens of different states in Article III, for otherwise the entire jurisdiction reserved to the states could be invaded by joining nondiverse suits with unrelated diverse ones.
alone by any party making claim against him in the State court action."  

118 This amendment, says the commentary, will eliminate the difficulty of determining separateness or separability, and will, as the existing law does not, protect the foreign tort-feasor from prejudice.  

The broadened test of removability, in addition, will justify on conservation-of-resources grounds the retention of the provision allowing removal, when appropriate, of the non-federal parts of the suit. But there are two problems with this proposal. First, it will allow removal even when there is little possibility of hurting the outsider alone, as in Strawbridge itself. This would be acceptable if Strawbridge were simply to be repealed; but, more seriously, no reason appears for relegating the parties to a game of musical chairs in which only the defendant can have the case litigated in federal court without splitting one lawsuit into two.

If Strawbridge is not satisfactory when interests are several, the modern policy against multiple lawsuits demands that the doctrine be relaxed for plaintiffs as well as for defendants. If Strawbridge is satisfactory, there is no need for separate-claim removal, because joinder destroys the effect of bias. In neither case is there any excuse for perpetuating this confusing, complicated, and unequal provision, which with every amendment has increasingly done more harm than good.  

119 Id. at 87.

120 I see no reason to retain § 1441(c) simply to equalize the plaintiff's ability to obtain a federal forum by splitting his lawsuit. Splitting lawsuits is not to be encouraged; we let plaintiffs do it only because of the administrative difficulty of ascertaining, if we made all proper parties indispensable, whether they have all been joined. And at that, as discussed in the next section of this paper, we often allow additional parties into the suit afterwards without asking the plaintiff's consent. In such cases the conflict between Strawbridge and the policy of judicial economy is striking.

More deserving is the notion that removal should be allowed when the plaintiff, instead of splitting one lawsuit, combines two unrelated ones to defeat removal. If Strawbridge is wrong, the general removal statute might still not cover the case because the whole suit could not have been brought in federal court; the unrelated claim is not part of the statutory "civil action," whose scope should be defined in terms of the transaction. But if Strawbridge were overruled, the statute should be read to equate "civil action" in the removal statute with "civil action" in the diversity section—though the state suit is broader, whatever could have been brought in federal court is the "action" and therefore removable. (Before 1948 some lower courts permitted removal under the general provision despite joinder of an unrelated, unremovable claim, because the "suit" was originally cognizable in federal court; 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), arguing implausibly that the 1948 substitution of "civil action" for "suit" may have made this no longer possible.) If Strawbridge is retained, too, I would simply repeal § 1441(c); the chance that state courts would allow joinder of wholly unrelated claims involving different parties seems too remote, and the harm done to defendants, if it occurred, too small on the Strawbridge assumption, to justify attempting once more
c. Interpleader and Dispersed Parties. Confronted by two claimants to a single insurance fund, the New York Life Insurance Company paid the money into a Pennsylvania state court and left the claimants to fight over it, only to discover that it had to pay twice; for the Supreme Court held in 1916 that state courts in interpleader could not cut off the claims of absent persons who were beyond the reach of ordinary process.\(^\text{121}\) Congress responded with the Interpleader Act, which authorizes nationwide federal-court service when a fund is sought by "two or more adverse claimants, of diverse citizenship as defined in section 1332."\(^\text{122}\) In 1939 the Court held the stakeholder need not, under this statute, be diverse to all the claimants; the statute required "diversity only between claimants," and it was constitutional because "there is a real controversy between the adverse claimants."\(^\text{123}\) In 1967, in State Farm Fire & Cas. Co. v. Tashire,\(^\text{124}\) the Court approved a block of lower-court decisions holding that in interpleader complete diversity among rival claimants was required neither by the statute nor by the Constitution.

The Interpleader Act is a well-designed response to the inadequacy of state tribunals, entirely within the purpose of the diversity jurisdiction. The Tashire holding that minimal diversity suffices is necessary to fill the gap left by limitations on state personal jurisdiction; and this fact is enough, coupled with the flexible language of Article III, to make the necessary painful distinctions. If repeal of § 1441(c) is not possible, the statute should allow removal only when the diverse claim arises out of a different transaction than the rest of the suit, and it should specify that the nondiverse, unrelated claims are to be left behind.

\(^\text{123}\) Treinies v. Sunshine Min. Co., 308 U.S. 66, 71, 72 (1939). Lower courts have continued, after Treinies, to entertain under the general diversity provision of § 1332 interpleaders in which the stakeholder is a citizen of one state and all claimants citizens of a second. E.g., John Hancock Mut. Life Ins. Co. v. Kraft, 200 F.2d 952, 953 (2d Cir. 1953). If the Court in Treinies meant that the only controversy was between the claimants (even if Strawbridge is constitutionally required, said the Court, the stakeholder's deposit and discharge "demonstrates the applicant's disinterestedness as between the claimants and as to the property in dispute," 308 U.S. at 72), there is no jurisdiction in these cases. Moreover, since the stakeholder could usually sue the several claimants in the courts of the state where they all reside, the justification for federal jurisdiction is less pressing than when the claimants are diverse from each other. At the beginning of the lawsuit, however, when jurisdiction is generally determined, the stakeholder plainly has a controversy with each claimant, as the Dunlevy case graphically illustrates. Also, the stakeholder's opportunity to interplead in a state court counts for little if he is already being sued by one of the claimants in a federal court; the risk of double liability then justifies either ancillary jurisdiction over the other claimants regardless of their citizenship, or dismissal for inability to join indispensable parties, see Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71 (1961). Treinies can and should be read to say Strawbridge is satisfied because the controversy among the claimants is diverse; there is ancillary jurisdiction over the stakeholder's controversies.
\(^\text{124}\) 386 U.S. 523 (1967).
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sustain the constitutionality of the jurisdiction. There remains the nagging question why, since federal courts can issue nationwide process in interpleader cases, state courts cannot; recent decisions suggest, rightly, that the desirability of avoiding either multiple liability or a windfall to the stakeholder today justifies extraterritorial state service according to the Supreme Court’s due-process calculus of fundamental fairness in the light of state interests, contacts, and total convenience. But federal jurisdiction remains justified until the Court has clearly upheld state authority and the states have legislated to protect the stakeholder.

The ALI proposes to retain interpleader jurisdiction, making clear in the statute that minimal diversity will suffice, that citizens of foreign states, of the District of Columbia, and of other Tidewater jurisdictions are included, and that the stakeholder is not barred by being independently liable to one or more of the claimants; allowing process, sensibly, anywhere outside the country "that process of the United States may reach" and providing for change of venue; and, most importantly, authorizing the district courts to ignore state laws respecting choice of law.

The problem of choosing among the laws of several states in diversity cases is one of the knottiest around. Its consideration involves the purposes of the diversity jurisdiction and of the Full Faith and Credit Clause, the policies underlying Erie R.R. v. Tompkins, and the unsettled principles of the conflict of laws. At the outset, in support of the ALI’s proposal, it should be noted that the reasons given by the Supreme Court for deferring to state choice-of-law doctrines have no application to interpleader cases. The purpose and effect of the Klaxon and Barrack decisions were to assure that diversity cases would be decided as if they had been brought in state court; the “accident” of diversity was intended to supply an unbiased forum but not a change of law. Because federal districts closely respect state lines, it is fair to assume actions brought in Texas federal court would have been brought in Texas if there were no federal courts. But the very basis of federal interpleader is that the case as a whole could not have been brought in any state court; the forum-shopping, outcome-determinative reasoning of Klaxon and Barrack, uncritically extended to interpleader in Griffin v. McCoach, is inapplicable.

126 See Part II of this article, text at notes 407-66.
128 304 U.S. 64 (1938).
130 313 U.S. 498 (1941).
It remains to inquire whether there are reasons other than those given by the Court for following state choice-of-law doctrines in interpleader. The general policies behind *Erie* suggest that state conflicts rules should not be followed: Maximum respect for state interests would be achieved by an independent federal examination of competing policies; and, because state courts are not open, it is only by following local choice-of-law rules that there can be any disuniformity of outcome or any forum-shopping in interpleader cases. Any broadening of the policies thought to underlie diversity jurisdiction or the Full Faith Clause would similarly militate against following state choice-of-law principles: If one purpose of either clause is to resolve interstate conflicts as a federal matter, problems of forum-shopping, uniformity, and respect for state interests disappear even in ordinary diversity cases; even state courts would follow federal choice-of-law doctrine.

In ordinary diversity cases, until choice of law is recognized to be a federal question, the undesirability of intrastate forum-shopping argues for retention of *Klaxon* despite the evils of disuniformity among federal courts and the contention that a federal choice would best effectuate *Erie's* command of deference to state concerns. In interpleader, where there is no intrastate forum-shopping, everything so far considered points toward abolishing *Klaxon*. Modern choice-of-law analysis, however, suggests difficulties with this approach and a possible argument for retaining at least some degree of deference to state conflicts doctrine even in interpleader.

Current conflicts analysis teaches that choice-of-law "rules" miss the whole point: The applicability of a state rule of absolute liability, for example, to a case with foreign elements is a question of construction of that state's law in light of its policy and of the contacts of the case with each state. Thus, in interpleader cases and elsewhere too, the diversity court's first task under *Erie* ought to be not reference to the conflicts law of the possibly disinterested state where it sits, but determination, as a matter of each state's substantive law, of which laws apply. Trouble begins if the laws of two or more states are found applicable, but many problem cases can be resolved by ruling that one


132 The argument over the relative demerits of intrastate and interstate forum-shopping, see D. Cavens, THE CHOICE-OF-LAW PROCESS 222 (1965), is thus not relevant to interpleader.

state would not wish to push its policy so far in the face of the other’s interest or the parties’ expectations.\textsuperscript{134} If balancing the competing interests proves not feasible, \textit{Klaxon} may be the most satisfactory residual solution; the ALI’s proposal allows for this dubious possibility\textsuperscript{135} by merely permitting rather than requiring departure from state rules. I therefore endorse the ALI’s proposals respecting interpleader, although because of the present incompleteness of methods of resolving true conflicts, I would not generally overrule \textit{Klaxon} but would leave the matter to be developed by the Supreme Court.

Having corralled a good thing in interpleader, the ALI proceeds to beat it to death by proposing an entirely new set of provisions for jurisdiction of controversies, minimally diverse, that are beyond the power of a single state court to determine fully and fairly. The policy is unexceptionable: If the state courts cannot do full justice because interested people are beyond state reach, open the federal courts. But the proposal takes eleven tedious pages to spell out as a statute;\textsuperscript{136} not one example is given of a case requiring this treatment; and the complicated provisions promise reams of interpretive litigation.

The basic provision would confer jurisdiction of “any civil action in which the several defendants who are necessary for a just adjudication of the plaintiff’s claim are not all amenable to process of any one territorial jurisdiction, and one of any two adverse parties is a citizen of a State and the other is a citizen or subject of another territorial jurisdiction.”\textsuperscript{137} Two difficulties are immediately apparent: Who is a “necessary” party, and how is the court to determine whether a party is “amenable to process”?

One of the beauties of interpleader is that the statute ignores these imponderables; if there are scattered claimants, there is a substantial likelihood they cannot be gathered into any state court, and that is enough for federal jurisdiction. The Institute, aware of the problem of threshold litigation in dispersed-party cases, establishes a set of objective tests to avoid “detailed inquiry as to physical presence of a party within a given jurisdiction at a particular time”: A person is “amenable to process” in a state if and only if he is domiciled, resident, or incorporated there, if the state is his principal place of business or he has an


\textsuperscript{135} See D. Currie, \textit{The Choice Among State Laws in Maritime Death Cases}, 21 VAND. L. REV. 297 (1968), for detailed discussion of a related problem, concluding optimistically that most conflicts can probably be rationally resolved by federal courts.

\textsuperscript{136} OFFICIAL DRAFT, pt. I, at 33-45, §§ 2341-6. Brief explanatory notes are included. The commentary consumes \textit{id.}, 120-59.

\textsuperscript{137} \textit{Id.} at 33, § 2341.
agent there to receive process, or if he is subject to long-arm service of process.\textsuperscript{138} This enumeration is better than nothing, but it will scarcely be easy to administer. The principal place of business has caused great difficulties under the multiple-citizenship provision now in section 1332(c);\textsuperscript{139} in addition to domicile, which may have to be determined for additional parties beyond the two necessary for diversity under the proposal, the courts are directed to investigate a new concept of “established residence”; and, not least, jurisdiction will often depend upon construction of the long-arm statutes of more than one state.

The proposed test of a necessary party is no more encouraging: “A defendant is necessary for a just adjudication of the plaintiff’s claim . . . if complete relief cannot be accorded the plaintiff in his absence, or if it appears that, under federal law or relevant State law, an action on the claim would have to be dismissed if he could not be joined as a party.”\textsuperscript{140} This double definition is designed to reach two kinds of cases: those in which a truly necessary party cannot be reached by state process, and those in which an erroneous state view of indispensability renders the state court in fact unavailable. A case can be made for federal jurisdiction in both situations, but determining when they are presented is no mean task. The second clause demands, again, an investigation of several bodies of law, this time probably very murky. And the Institute concedes the obscurity of its first clause: Even the “indispensable” party “has not been defined with any measure of clarity,” and the “necessary” party is still more poorly defined, because of the “inherent difficulties” of demarcating “a line on what is essentially a continuous spectrum of urgency of joinder” and because “in its procedural setting, the concept of ‘necessary’ parties is not one on which ultimate holdings rest” and therefore is seldom litigated. Consequently, “a judicial sharpening of the concept beyond what has previously been achieved” will be required: yet “there seems no better formulation to express the degree of urgency for assembling multiple parties. . . .”\textsuperscript{141} No better formulation, that is, except to abandon the game because of the cost of the candle.

The ALI proceeds to prescribe venue for dispersed-party actions (where “a substantial part” of the events occurred or “a substantial part” of the property is situated, or where “any party resides” if there

\textsuperscript{138} Id. at 33-34, 138, § 2341(c).
\textsuperscript{139} See text at notes 167-74 infra.
\textsuperscript{140} OFFICIAL DRAFT, pt. I, at 33, § 2341(b).
\textsuperscript{141} Id. at 135-6. The proposed statute makes clear that the ordinary concurrent tort-feasor is not a necessary party. Id. at 33, 136-7. Additional definitions in § 2945, id. at 41-42, would, among other things, treat a corporation chartered by two states as diverse to citizens of both.
is no such district, with the residence of corporations and associations specially defined); to authorize injunctions against related actions in state or federal courts, nationwide process (and service anywhere else "that process of the United States may reach"), and transfer (to "any other district," on anyone's motion, "for the convenience of parties and witnesses or otherwise in the interest of justice"); and to allow the district court to make its own choice among state laws. These provisions are straightforward enough, except for the uncertainty of determining what "part" of events or property is "substantial" and for the burdensome inquiry into "convenience" and "justice" in deciding upon transfer.

Two additional provisions add complexity: If there are parties beyond even the extended process authorized, the court is directed to proceed without them "unless it is satisfied that greater injustice would be caused by proceeding without them than by total failure of the action." Finally, if no more than $5,000 is at stake for any party, and if jurisdiction "would lead to undue burden on distant parties," the court may dismiss them without prejudice and proceed without them or, if convinced that "greater injustice would be caused by any continuation of the proceedings than by total failure of the action," dismiss the whole suit. No standards are provided; both provisions essentially ask the court to do what is right. Extensive proof respecting relative injury is to be expected, and the word "discretion" may not suffice, even in the one section in which it is used, to ward off time-consuming and expensive appeals.

If this were all, it would be grotesque enough. But there is more: separate provisions for removal of actions brought in state courts and for bringing in additional parties in federal actions commenced under other jurisdictional provisions. Both these sections focus upon parties "necessary for a just adjudication as to a defendant"; if such a party cannot be joined or served in state court the case may be removed, and the requirements of personal jurisdiction and complete diversity are relaxed in suits already in federal court. The definition of a "necessary" party for these two sections differs from that discussed above: A person is necessary "if he claims or may claim an interest relating to the property or transactions which is the subject of the action and is so situated that the disposition of the action in his absence may leave the defendant subject to a substantial risk of incurring double, multiple, or otherwise

142 Id. at 34-35, § 2342.
143 Id. at 38-39, § 2344.
144 Id. at 39-40, §§ 2344(d), (e).
145 Id. at 35-37, 42-43, §§ 2343, 2346.
inconsistent obligations." But for the obscure and unexplained reference to an interest in the "transaction," this looks remarkably like an interpleader situation; it seems covered by the ability of such a defendant to file interpleader in the federal court and to enjoin the action against him.\textsuperscript{146}

Thus the entire proposal for dispersed-party jurisdiction to protect defendants may be unnecessary. Moreover, in these cases the Institute dispenses with its objective standards for ascertaining amenability to state service without extended litigation: "Since there is only one jurisdiction involved, and one in which there would normally be an attempt to reach absent necessary parties, it is appropriate that when federal jurisdiction is based upon the unamenability of the absentee to state process it should turn upon whether the necessary party could with reasonable diligence have been subjected to the jurisdiction of the state court."\textsuperscript{147} Additional complexity is created by provision for stay of the federal proceeding, after removal, if there is another state court in which all parties could be joined;\textsuperscript{148} and by the complicated treatment of counterclaims.\textsuperscript{149}

I would not inflict this monster of threshold litigation upon the federal courts without the strongest showing of urgent need. The ALI has not given one instance in which such jurisdiction is needed. The dispersed-party proposals should be disapproved.\textsuperscript{150}

d. Parties Added After the Complaint. Except for the limited proposal just discussed respecting "necessary" parties the ALI does not deal with the issues, so often presented, of pendent or ancillary jurisdiction over intervenors, third-party defendants, and others brought into the case after suit is begun. These issues present in sharp detail the critical collision, overlooked by the Institute, between the complete-diversity policy of Strawbridge \textit{v. Curtiss} and the liberal joinder philosophy of the Civil Rules. Once suit is filed in federal court, judicial economy suggests that all claims arising from the transaction in suit be cleared

\textsuperscript{147} \textsc{Official Draft}, pt. I, at 141.
\textsuperscript{148} Id. at 37, § 2343(e).
\textsuperscript{149} Id. at 36, 42, §§ 2343(c), 2346(b). If a counterclaim arises out of the same transaction as the plaintiff's claim, the plaintiff shall be considered a defendant, and the defendant a plaintiff, for purposes of determining whether absent persons are necessary, and for all other purposes both parties may be deemed defendants. If the counterclaim is unrelated, the plaintiff may remove if as defendant he could have removed an independent action on the counterclaim. In a federal action based on diversity the usual venue, process, and complete-diversity requirements are relaxed for necessary additional parties when the counterclaim is compulsory.
\textsuperscript{150} To abolish \textit{Strawbridge}, of course, would eliminate the problem, except as to venue and personal jurisdiction, considered in Part II of this article, text at notes 407-46.
up at the same time; but Strawbridge forbids the plaintiff to name all
the parties concerned unless they are completely diverse.

The lower courts, rather uniformly, have tended to resolve this
problem in favor of judicial economy at the expense of Strawbridge. Defend-
ants may implead third parties liable to themselves whether they be
cocitizens of the plaintiff or of the defendant,\(^\text{151}\) and persons entitled
to intervene as of right may do so without regard to diversity.\(^\text{152}\) Where Strawbridge has been most flagrantly threatened with subversion, the
courts have balked: Indispensable parties cannot intervene unless
diverse to their adversaries, since there is no legitimate action to which
they can be appended;\(^\text{153}\) a defendant under a since-repealed provision
could not implead a party liable only to a nondiverse plaintiff;\(^\text{154}\) and
some courts say a plaintiff cannot make a claim against a nondiverse
third party brought in to answer to the defendant.\(^\text{155}\)

Except in the case of the indispensable party, permission to make
claims against nondiverse persons is necessary to keep Strawbridge from
destroying the ability of the federal courts to handle entire controversi-
es. Unfortunately, reliance on the Civil Rules to justify relaxing Straw-
bridge encounters difficulty with Rule 82's command that the Rules
not affect jurisdiction; in order to avoid this problem, as well as to over-
turn the unjustifiable exceptions discussed above, the statute ought to
make clear that additional, not indispensable, parties may be added, or
cross-claims made among existing parties, without regard to diversity
of citizenship or to amount.\(^\text{156}\)

The present law, permitting impleader and intervention to create
a federal action that could not have been brought originally in federal
court, has a musical-chairs aspect that is hard to defend. The best
justification is that the plaintiff is always free to combine all related
claims in a state court; once he has filed a limited, wholly diverse claim
in federal court, however, dismissal of the entire controversy may be a
harsh and wasteful act when nondiverse claims are appended, so that

\(^{151}\) See, e.g., Huggins v. Graves, 337 F.2d 486, 488-9 (6th Cir. 1964).
\(^{152}\) See Note, Developments in the Law—Multiparty Litigation in the Federal Courts,
71 Harv. L. Rev. 874, 905-6 (1958), and cases cited. Decisions allowing compulsory counter-
claims to be made without regard to amount are analogous but easier, since the Straw-
bridge argument that the entire controversy belongs in state court cannot be made. See
note 391 in Part II of this article.

\(^{153}\) See Note, Developments in the Law—Multiparty Litigation in the Federal Courts,
71 Harv. L. Rev. 874, 905 (1958).

\(^{155}\) E.g., Huggins v. Graves, 337 F.2d 486, 488-9 (6th Cir. 1964) (dictum).

\(^{156}\) The serious question whether venue and process should also be relaxed in the
interest of enabling related claims to be combined is considered in Part II of this article,
text at notes 444-6.
consolidation can reasonably be obtained only in a federal court. But this inducement of the plaintiff to split one lawsuit into two in order to obtain a federal trial; coupled with a relaxation of Strawbridge when additional parties are sought to be brought in, furnishes still another argument against the complete-diversity rule itself.

I conclude that Strawbridge is simply wrong and should be overruled by statute. It is Strawbridge that gives rise to pleas for such academic horrors as the dispersed-party jurisdiction; that induces a plaintiff to leave off parties who ought to be joined, only to see them added after the complaint; that causes trouble with Rule 82 on grounds that the Rules illegally expand jurisdiction; that unnecessarily splits up claims arising from a single transaction; that makes necessary the cumbersome and litigation-provoking separate-claim removal. These costs, I think, are too high to pay for the dubious principle, so clearly subject to exceptions and yet so difficult to limit effectively, that the presence of adverse cocitizens is assurance against prejudice. If diversity is retained, Strawbridge ought not to be.\(^\text{167}\)

4. Corporations and Other Associations

a. Determining Citizenship. After first indignantly protesting that “that invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen,”\(^\text{158}\) the Supreme Court in the middle of the nineteenth century decided that a corporation could be “deemed” a citizen of its state of incorporation\(^\text{159}\) or, as it said in a later case, its shareholders could be conclusively “presumed” citizens of that state, for diversity purposes.\(^\text{160}\) Why? Because, in the first place, a corporation has the same power as breathing citizens to contract, to commit torts, to sue, and to be sued; and because, in the second place, a corporation can be the victim or the beneficiary of prejudice against foreigners just as if it were a human being.\(^\text{161}\) Here, apparently, the Strawbridge assumption was not thought to operate: The presence of a shareholder from the same state as the opposing

\(^{157}\) To do away with Strawbridge would also eliminate the unseemly spectacle, in class actions and in derivative suits, of seeking out a diverse plaintiff among large numbers of interested parties. See Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921); Smith v. Sperling, 354 U.S. 91 (1957). In Hood v. James, 256 F.2d 895, 903 (5th Cir. 1958), this tactic failed. The difficulty of investigating the propriety of choosing the diverse representative is another unsavory byproduct of Strawbridge.

\(^{158}\) Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 86 (1809). This holding did not mean corporate litigation was always outside the diversity jurisdiction, as it might have; the Court treated the case as if the shareholders were parties and allowed suit because they were all alleged to be diverse from the opposing party, id. at 62, 91-92.


\(^{161}\) 43 U.S. (2 How.) at 558; 57 U.S. (16 How.) at 329.
party was not enough to remove the danger of bias. This is sensible enough, whatever one may think of Strawbridge; for the court and the jury are likely to be unaware of the residence of all the shareholders, and it would be unfortunate and cumbersome to require proof of their citizenship in order to determine jurisdiction.

But in the 1880's the Court developed a myopia about these matters. Confronted with a suit between a New York joint stock association and a citizen of another state, the Court refused jurisdiction because a joint stock company "is not a corporation." Why that mattered the Court did not say; the statute still did not mention corporations, and a much later Second Circuit decision showed that the tests applied by the Court in the early decisions deeming corporations citizens were equally applicable to the association. Joint-stock companies have the same power as corporations to contract, to commit torts, to sue and to be sued under New York law; the possibility of prejudice for or against such a company seems identical; the only difference the Second Circuit could see was a remote and contingent shareholder liability that it found indistinguishable from the liability of shareholders in banking corporations under many laws.

Yet when a similar problem concerning the status of a labor union came to the Supreme Court not long ago in United Steelworkers v. R. H. Bouligny, Inc., the Court refused jurisdiction on the ground that the problem was one for the legislature to resolve. The union is a harder case to deal with than the corporation, because of its complicated structure of locals and internationals and because of the absence of a clear state of registration; but the language of the opinion suggests that the Court would adhere to the ruling against jurisdiction in the case of the limited partnership or joint stock company, although these do not present the problems of the union.

In view of the Court's initial willingness to find a niche for corporations in the diversity statute this deference to Congress is remarkable. The application of statutes to situations not anticipated by the legislature is a pre-eminently judicial function, and the Court's refusal to decide constituted a decision against jurisdiction without considering the relevant arguments. Bouligny cannot be justified by the 1958 amendment expressly recognizing corporate citizenship, for this was plainly directed to the separate issue of eliminating abuses of the presumption of shareholder citizenship; the amendment can easily be held to leave

164 382 U.S. 145 (1965).
unimpaired the Court's power to construe "citizen" according to statutory purpose, or even to express concurrence with the Court's original view that associations having the characteristics of citizens should be treated as such. Congressional design might be violated if an association were given greater access to federal court than that allowed a corporation under the restrictive amendment, but I see no obstacle to construing "corporation" in section 1332(c) to include the joint-stock association and the limited partnership, which are identical with corporations in terms of diversity policy.

The Institute proposes to make any unincorporated association a citizen of its state of principal business, if it has capacity to sue or be sued in the forum state.\textsuperscript{165} The reference to forum-state law may be troublesome,\textsuperscript{166} but the main difficulty I have with the ALI suggestion relates to the criterion of principal place of business. This problem is the central, still unresolved problem of diversity and associations of all kinds; the inability of anyone to resolve it successfully is a powerful point against the diversity jurisdiction itself.

When a corporation or association is wholly connected with a single state, there is every reason to equate it with the ordinary citizen for diversity purposes. Just as with individuals, however, and to a much greater extent because far-flung corporations are so common, the quest to isolate bias-producing factors becomes chimerical when the corporation is not localized. It is clear enough, for example, that a New York corporation set up by New York shareholders to run a New York store staffed by New Yorkers will be regarded as a foreigner if it litigates in Georgia; it is less clear how the corporation would be regarded if a single factor were altered—if the company had a Georgia charter, or one shareholder lived in Georgia, or it had a Georgia store, or its principal or sole office were in Georgia. Whether shareholders, managers, or place of operations most affects prejudice is not known; and the problem is quite insoluble when business is done in several states.

The most obvious hallmark of corporation citizenship, and the one selected by the Supreme Court, is the state of incorporation. This, of course, is almost wholly arbitrary in terms of diversity policy: New Yorkers doing New York business are not likely to be viewed as out-


\textsuperscript{166} Capacity of an association to sue or be sued is determined by forum-state law under \textit{Fed. R. Civ. P. 17(b)}, presumably because of \textit{Erie} considerations. But the relevance of any state's law to the probable bias that should underlie the definition of citizenship is unclear. If the concern is with whether an organization has attributes of personality that may deflect the attention of prejudiced people from the individuals comprising the association, I should think a reference to the law creating the association would be more appropriate. And the unexplained reference to ability to sue in the forum state suggests the possible employment of \textit{renvoi}, a complicated and uncertain process.
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Considerers by New York courts just because they have incorporated, as they so commonly do, in Delaware. To avoid the imposition of purely local cases on the federal courts, Congress enacted in 1958 that a corporation should be deemed a citizen of the state of its principal business as well as its state or states of incorporation.\textsuperscript{167}

For the pseudo-foreign corporation—the local business incorporated in another state—this provision is fine, and the ALI is right to propose extending it to alien corporations with their principal business in an American state.\textsuperscript{168} It is also appropriate to hold the pseudo-foreign corporation a citizen of its charter state, since a state like Delaware that goes out of its way to attract foreign incorporation fees might well be expected to treat its protegés favorably in order to keep them happily registered.\textsuperscript{169} Unhappily, neither the present statute nor the ALI proposal is limited to pseudo-foreign corporations; the existing law, which the Institute accepts in this respect, has uniformly been read to require the courts to find a single principal place of business for every corporation. In the case of widespread giants like Sears, Roebuck or United States Steel the task has proved worthy of Procrustes and unworthy of the federal courts.

Some courts discuss the "nerve center" of the corporation, the place where management is carried on;\textsuperscript{170} others find the operations of the business, the manufacturing or selling, more significant.\textsuperscript{171} If a test emerges from the decisions, it seems to be that the place of manufacture or comparable activity is determinative if it is substantially localized; if operations are diffused through several states, the courts tend to pick the place where the high offices are located.\textsuperscript{172} I suppose this is about the best that can be done with such a provision.\textsuperscript{173} But I cannot approve


\textsuperscript{168} OFFICIAL DRAFT, pt. I, at 8, 57-58, § 1301(b)(1). The present provision has been read not to make alien corporations citizens of their principal places of business, Eisenberg v. Commercial Union Asr. Co., 189 F. Supp. 500, 502 (S.D.N.Y. 1960), although the court did not accept the implication of its holding by excluding the alien corporation from citizenship altogether.

\textsuperscript{169} It is odd that the ALI does not make the unincorporated joint stock association or limited partnership a citizen of its state of registration as well as of principal business. Whatever considerations justify dual citizenship for corporations in like circumstances apply equally to them.


\textsuperscript{173} But see Kelly v. United States Steel Corp., 284 F.2d 850, 854 (3d Cir. 1960), rejecting both nerve-center and operations tests in favor of the state containing the "headquarters
the action of the ALI in leaving the section untouched. In the first place the test is complicated; it requires much threshold litigation on the question of jurisdiction. Second, the result of the inquiry leaves something to be desired. Not only can there be inconsistent holdings by various courts, since they are given no statutory guidance, but I have little confidence that in U.S. Steel's case, for example, the chance of bias is substantially different in Pennsylvania than in New York. The entire inquiry seems highly fictitious, and it ought to be abandoned—not extended, as the ALI would provide, to cover unincorporated associations too.

Finding a suitable replacement for the present test is, as always, a harder question. If Strawbridge were overruled, as I have advocated, one could argue for a return to the test of shareholder citizenship: If any shareholder is diverse to an opposing party, there is jurisdiction. Such a rule, however, would create a substantial risk of fraudulent transfers that could not confidently be dealt with, even at the cost of considerable litigation, by prohibitions of improper assignments; and it would sweep into federal courts a great stream of corporate litigation that probably contains no significant danger of local prejudice, because the unknown shareholder; even if one disagrees with Strawbridge, is not likely to be the cause of xenophobic favoritism. The place of incorporation is often quite arbitrary; the principal place of business is a litigation-provoking myth; to exclude the corporation from diversity protection wherever it does business would also promote threshold litigation (recall the troubles of interpreting the old "doing-business" test of personal jurisdiction) and would expose the foreign entrepreneur to dangers of bias as real as any that exist in diversity cases: A newsstand in Birmingham would not make Alabamians view the New York Times as a local enterprise. Still more clearly, to hold corporations never citizens, or to insist on complete diversity with all shareholders, would exclude from the jurisdiction many cases in which the corporation or its opponent is in the mainstream of diversity's protective policy.

of day-to-day corporate activity and management. . . ." See also Moore & Weckstein, Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited, 77 Harv. L. Rev. 1426, 1441-5 (1964), arguing for a distinction according to the nature of the business in order to discover "the state on which the corporation most impinges." For example, "a mining or manufacturing company would probably have its greatest contact with the public at the site of its largest operating facility, where most of its employees and equipment are located; a corporation whose primary business is selling would have its greatest contact with the public in the state in which most sales are made." Such a standard increases complexity and still fails to provide a tolerable basis for decision in cases in which the company has nearly equal selling or operating contacts in several states. 174 By 1968 the annotations on principal place of business in § 1332(c) already exceeded nine pages in U.S.C.A.
The impossibility of defining corporate citizenship is one more reason why the whole diversity jurisdiction should be repealed. Short of this unlikely eventuality, I would provide specially for corporations and similar associations, whatever is done with Strawbridge, because the organization itself is likely to be a factor diminishing the impact of the individual member upon state-court prejudice. The best answer I can suggest is to make a corporation or similar organization a citizen of any state in which it is chartered, and also of that state in which it conducts substantially all its activities. This brings me full circle to an endorsement of the Supreme Court's decision that a labor union is not a citizen: Since a union has no charter state, it seems better, unless its activities are substantially confined to a single state, to look to the citizenship of individual members than to enter the litigious morass of "principal place of business."

b. The Consequence of Multiple Corporate Citizenship. Like the present statute, the Institute's proposal defines the states of which a corporation is to be deemed a citizen, but it is less than explicit as to the consequence of multiple citizenship: "A corporation shall be deemed a citizen of every State and foreign State by which it has been incorporated and of the State or foreign State where it has its principal place of business." The commentary explains that this provision "destroys diversity between the corporation and a citizen of any one of the specified states." It is unfortunate that the Reporters did not phrase the statute so as to make this clear to the congressmen who will be expected to vote on the measure and to the hurried practitioner. For the result described by the commentary is not what the law has always been, and in light of the complicated history of multiple corporate citizenship, the proposal's use of the new word "every" is not without its ambiguity.

The 1958 principal-place-of-business provision did not create the problem of multiple corporate citizenship; railroads commonly incorporated in more than one state in the nineteenth century. To indulge in understatement, the Supreme Court's attempts to fit these creatures into the diversity scheme left something to be desired. First, the Court

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175 The ambiguity in "substantially all" is no greater than that in "principal"; the test corresponds better to diversity policy; and, most importantly, the inquiry will only have to be made in close cases.

176 Nothing is said about federal corporations in the ALI draft. § 1348 now makes national banks citizens of the state where they are located; and see Feuchtwanger Corp. v. Lake Hiawatha Federal Credit Union, 272 F.2d 453 (3d Cir. 1959), finding state citizenship for a federal credit union despite Bouligy and the possibility of a negative inference from § 1348. If principal place of business is to be the test, the statute should make clear it applies to federal corporations.

177 OFFICIAL DRAFT, pt. I, at 8, § 1901(b)(1).

178 Id. at 57.
appeared to say a suit by a corporation chartered in two states was to be regarded as brought by citizens of both, so that under *Strawbridge* the corporation was never diverse to citizens of either.\(^7\) Next, relying on the old-fashioned theory that incorporation laws have no extraterritorial force, the Court held a dual-chartered corporation to be solely a citizen of the forum state if it was incorporated there.\(^8\) Then, in a complete about-face from its original position, the Court allowed a New Hampshire-Massachusetts corporation to sue Massachusetts defendants in a Massachusetts federal court; apparently a multi-state corporation was diverse to everybody.\(^9\)

Not content to have announced three mutually inconsistent rules without disowning any of them, the Supreme Court proceeded to suggest that the first incorporation was determinative;\(^10\) that it mattered whether the second charter had been given to individuals or to a corporation;\(^11\) that the place the cause of action arose was,\(^12\) was not,\(^13\) and might be\(^14\) decisive; and that an incorporation compelled as a condition of doing business could be ignored.\(^15\) Then, quietly proud, the Supreme Court retired from the field for forty-two years.

Left to their own devices, the lower courts employed the necessary

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\(^{10}\) St. Louis & S.F. Ry. v. James, 161 U.S. 545, 560-5 (1896); Southern Ry. v. Allison, 190 U.S. 526, 532 (1903); Louisville, N.A. & C. Ry. v. Louisville Trust Co., 174 U.S. 552, 563 (1899). See also St. Joseph & G. Is. R.R. v. Steele, 167 U.S. 659, 663 (1897). The plaintiff alleged it was a corporation of Kansas and Nebraska, sued a Kansas defendant in Kansas, and was booted out of federal court. Because neither the "nature" of the corporation nor the state of its original incorporation was alleged, the court said the case was governed by the old *Wheeler* decision, supra note 179, forbidding two related corporations from joining as plaintiffs against a citizen of either charter state.

An important antecedent of the original-incorporation cases was Pennsylvania R.R. v. St. Louis, A. & T.H.R.R., 118 U.S. 290, 296 (1886), in which an Illinois corporation was allowed to sue an Indiana corporation in Indiana federal court, over the defendant's objection that the plaintiff was incorporated in Indiana as well. The Court held that Indiana had not incorporated the railroad but had merely given the Illinois corporation authority to operate in Indiana. "It may not be easy in all such cases to distinguish between the purpose to create a new corporation which shall owe its existence to the law or statute under consideration, and the intent to enable the corporation already in existence under laws of another State to exercise its functions in the State where it is so received." Accord, Goodlett v. Louisville & N.R.R., 122 U.S. 391, 409-10 (1887); Martin's Adm'r v. Baltimore & O.R.R., 151 U.S. 673, 684 (1894). But *James*, *Louisville*, and *Allison* went further, admitting that for some purposes there had been a second corporation.

\(^{11}\) St. Louis & S.F. Ry. v. James, 161 U.S. 545, 565 (1896).


\(^{13}\) Southern Ry. v. Allison, 190 U.S. 526, 535 (1903).


\(^{15}\) Missouri Pac. Ry. v. Castle, 224 U.S. 541, 546 (1912).
machete, ultimately agreeing that the order or method of incorporation and where the case arose were immaterial and that compulsory incorporations were not to be considered. The First and Fourth Circuits thought, in accord with some of the old Supreme Court decisions, that the corporation was a citizen of the forum state alone if chartered there; the Third, thinking it absurd that a New Jersey plaintiff could sue a New York-New Jersey corporation in federal court in New York but not in New Jersey, held the railroad diverse to everybody in any court.

It was in this state of affairs that the Supreme Court in 1954 reviewed the First Circuit decision in Jacobson v. New York, N.H. & H.R.R., refusing federal jurisdiction in Massachusetts over an action by a Massachusetts plaintiff against a Massachusetts-Connecticut corporation. The Court played it close to the vest. Here is its full opinion: "The judgment is affirmed. Patch v. Wabash R. Co., 207 U.S. 277; Memphis & Charleston R. Co. v. Alabama, 107 U.S. 581; Seavey v. Boston & Maine R. Co., 197 F.2d 485." To some commentators this made everything clear: Except for compulsory incorporations, which were to be disregarded, "if such a corporation was a party to a lawsuit in one of the states in which it was incorporated, it would be considered, for diversity purposes, solely a citizen of that state." 

This was indeed what the First Circuit had held in Seavey, but the citation of Patch and Memphis makes it less than certain that the Supreme Court was embracing everything said in Seavey, in view of the suggestions in both of the former cases respecting the place the cause of action arose—a fact that was also noted in the opinion of the First Circuit in Jacobson itself. One thing the Supreme Court unmis-
takably did was to reject the Third Circuit principle that a dual corporation is always diverse to everybody. Another thing it did was inexcusably to miss a golden opportunity to eliminate the lingering debris.

Congress complicated matters further in 1958 by providing that a corporation should be deemed "a citizen of any state by which it has been incorporated and of the state where it has its principal place of business." Legislative history excludes the possibility of holding the corporation with principal business outside its charter state diverse to everybody; Congress explicitly wanted to keep controversies between such a company and citizens of its principal place of business out of the federal court in that state. Beyond this, however, the statute is opaque. The courts have consistently held that when a corporation has dual citizenship because of its place of business it is never diverse to a citizen of its charter state; yet some have concluded that the forum rule still applies to multiple incorporations. This peculiar distinction is warranted neither by diversity policy nor by the language of the statute, which seems to equate incorporation and principal business; its only explanation is that to apply the forum rule to principal-business cases would create jurisdiction of suits not cognizable before 1958 (i.e., suits between a Delaware citizen and a Delaware corporation in the state of its principal business), contrary to the amendment's policy of restricting jurisdiction. If this distinction is the law, it ought to be abolished; the ALI, though obscurely, would abolish it by destroying the forum rule altogether.

Despite the metaphysical origins of the forum rule, it is defensible in terms of diversity policy. In the state of common citizenship the Strawbridge assumption works quite well for the multi-chartered corporation, for it is literally impossible to harm the foreign corporation

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factors as whether the incorporation in Z was voluntary, whether Z was the first place of incorporation, and whether the cause of action arose in Z"—as well as whether the decision will increase or decrease diversity jurisdiction.

198 Of course, an increase of jurisdiction in some cases, compensated for by reductions in other areas, is not necessarily incompatible with a statute whose purpose was to rationalize as well as to limit jurisdiction.
without hurting the local as well. But, just as in the case of multiple individual parties, when suit is brought in a state of which only the corporation is a citizen there is nothing to protect the outside opponent from favoritism for the partly local enterprise. However, so long as Strawbridge is retained in cases not involving multiple corporate citizenship, there seems no reason to make an exception for corporate cases, and the ALI's proposal ought to be approved.

If Strawbridge were to be overruled, there would be an argument for retaining the forum rule so as to deny jurisdiction in multiple corporate-citizenship cases in the state of common citizenship, for the reason indicated above; but such a rule would create complexity. Moreover, as graphically illustrated by Majewski v. New York Central R.R.,\(^{199}\) the forum rule despite its basis in diversity policy is irreconcilable with the policy of trial in the most appropriate federal forum reflected by the transfer provision in 28 U.S.C. § 1404(a). Sued by a Michigan plaintiff in Illinois federal courts, a railroad incorporated in both Michigan and Illinois had the action transferred to Michigan for litigation convenience; the Michigan federal court transferred it right back because there was diversity only in Illinois.

Simplicity would suggest, if Strawbridge were overruled, that the multi-state corporation be made diverse to everyone; but this would destroy Congress's commendable 1958 effort to localize the pseudo-foreign corporation. It might therefore be best, if minimal diversity is to suffice, to ignore incorporation entirely if the corporation does substantially all its business in a single state, and otherwise to allow jurisdiction whenever a corporation is voluntarily chartered by more than one state. But this proposal again is not without complications; the only simple way to exclude the pseudo-foreign corporation is, despite the dent this makes in the overruling of Strawbridge, to accept the ALI position that a multi-state corporation is never diverse to a citizen of any of its home states. If we must put up with diversity jurisdiction, I would recommend this as the least disruptive course.

c. Direct Actions and Derivative Suits. The ALI, finding "sound" the 1964 amendment to section 1332(c) that deems a liability insurer a citizen of the state of which its insured is a citizen, as well as of its own home states, incorporates this provision in its diversity proposals.\(^{200}\) There is no merit whatever in the Senate Committee's argument that cocitizenship between the plaintiff and the insured takes these cases outside the purpose of the diversity grant;\(^{201}\) Strawbridge is unconvinc-

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200 OFFICIAL DRAFT, pt. I, at 8-9, § 1301(b)(3).
201 S. REP. No. 1308, 88th Cong., 2d Sess. 7 (1964).
ing enough in a case like this even when the insured cocitizen is joined as a party, and the notion that his mere existence protects the insurer from bias when he is not even sued is quite ridiculous. To the extent that the direct-action provision resulted from docket pressure on the Louisiana federal courts, the persuasive answer is to appoint more judges or to exclude all accident cases; there is nothing special about direct actions in terms of diversity policy. Even if Strawbridge is retained, this statute should be repealed.

Abolition of Strawbridge would also eliminate the occasionally perplexing problem of realigning parties as plaintiffs or as defendants according to their real interests. Most commonly this issue arises in shareholders’ derivative suits, in which the corporation, having refused to sue, is named as a defendant. Yet the corporation will benefit if the plaintiff wins, for he sues to enforce a corporate claim. Accordingly, early decisions suggested that the corporation was to be realigned as a plaintiff unless its management was, as a later dissent put it, in the hands of those against whom the corporate claim was asserted. Impressed by the fact that such a test might well require an extensive investigation of the merits in order to determine jurisdiction, the Supreme Court not long ago prescribed a simpler test: The corporation was a defendant if management was “definitely and distinctly opposed to the institution of this litigation.” The result seems to be, as predicted by the dissent, that the corporation is always a defendant in a derivative suit; for Rule 23.1, like the familiar law on which it was based, allows the shareholder to sue only if the corporation will not. The opportunity for fabricating diversity therefore is enhanced: In most large corporations it is possible to find some shareholder not a cocitizen of the corporation or of the ultimate defendants.

The relevance of all this to diversity policy is somewhat remote. The inquiry ought to be directed toward ascertaining whether the citizenship of the corporation is likely to have an effect upon possible bias for or against the ultimate parties, but this is not at all easy to assess. That the corporation will benefit from the plaintiff’s victory is perhaps canceled out by the refusal of the corporation to sue; maybe the best answer would be to assume the triers of fact will view the contest as one entirely between the shareholder and the ultimate defendants, so that, like the stakeholder in interpleader, the corporation’s citizen-

ship should be ignored.\textsuperscript{205} If the corporation participates in the action, its citizenship will become relevant, but it would not help judicial administration to postpone the determination of jurisdiction until after trial has begun.

Like most rules respecting diversity, the realignment of corporations in derivative suits is not terribly important. The present law is rather clear, and that is the main thing. Overruling Strawbridge would dispose of the remaining alignment problems.\textsuperscript{206}

5. Invoking Diversity at Home

This brings me to the three important new exceptions to diversity jurisdiction proposed in the ALI's section 1302. The first and most general is a provision that even when there is diverse citizenship no one may invoke the jurisdiction in a state of which he is a citizen.\textsuperscript{207} This has long been the rule in removal cases: The defendant may remove only if he is not a citizen of the forum state.\textsuperscript{208} Commentators have often pointed out the inconsistency of forbidding the resident defendant to remove while permitting the resident plaintiff to sue in the federal court;\textsuperscript{209} and the ALI quite correctly observes that, since the philosophy behind diversity jurisdiction is to protect the outsider, it does not justify allowing the local party to sue in federal court.\textsuperscript{210}

I have two reservations about this logical proposal. The first is a fear that it may lead simply to increased procedural litigation instead of excising a substantial volume of cases from the federal courts; the second is that in some instances the diversity policy of providing a forum only for the help of the outsider comes into conflict with the policy of trying cases in the most convenient forum.

Both objections can be illustrated by the example of a suit by a Pennsylvania plaintiff against a Delaware defendant. The Institute would permit suit to be filed in the federal court in Delaware, or in any available state court, but not in federal court in Pennsylvania. But the ALI does not say the case cannot be heard in the Pennsylvania federal court. If suit is filed in a state court in Pennsylvania the defendant may remove, and it seems not unlikely that he will since he is the party with reason to avoid the state court. And if suit is filed in the Delaware

\textsuperscript{205} See text at notes 122-3 supra.
\textsuperscript{206} See, e.g., Indianapolis v. Chase Nat'l Bank, 314 U.S. 63 (1941); Reed v. Robilio, 376 F.2d 332 (6th Cir. 1967).
\textsuperscript{207} OFFICIAL DRAFT, pt. I, at 11.
\textsuperscript{208} 28 U.S.C. § 1441(b) (1964).
\textsuperscript{210} OFFICIAL DRAFT, pt. I, at 68.
federal court, the defendant may move to transfer it to the Pennsylvania federal court. It would be unfortunate if the ALI's proposal were read to preclude the transfer, because Pennsylvania may be by far the better place to try the case. But if the motion is granted, or if the suit is filed in Pennsylvania and removed, there has been a wasteful game of musical chairs. The present rule is assuredly impossible to justify if one looks only to the policy of providing a forum for the out-of-state litigant, but it makes a good deal of sense because it simplifies the task of judicial administration.

The ALI's second suggestion along these lines is that a commuter be forbidden to invoke diversity jurisdiction in the state where he works.\footnote{Official Draft, pt. I, at 12, § 1302(c). To protect the person who "has his principal place of business or employment in another state for a limited time," see id. at 75, the ALI requires that the relationship be maintained for "more than two years." And, to assure "an alien's right of access to a federal court," the provision applies only to United States citizens. Id.} This is not to make him a citizen of both states, for the commentary expressly reserves the right of a citizen of his work state to sue him in the federal court where the commuter lives.\footnote{Id. at 75-76. Here the ALI abandons what it earlier urged, see text at notes 26-40 supra, as a principal justification for diversity jurisdiction: "It may be true that state justice has shortcomings which the commuter cannot as a practical matter do anything to correct, but the in-stater who works by his side is not significantly more likely to have an effective voice in the matter."} The rationale is that the man who works in New York or Philadelphia is not likely to be the victim of prejudice in the courts of New York or Pennsylvania just because he goes back to Jersey to sleep.\footnote{Id. at 17-18, 19-20, §§ 1305(b), 1306(a).}

This assessment is hard to quibble with, but I oppose the proposal. First, it will have a merry-go-round effect like that of the first suggestion discussed above. It is true that when the commuter sues a New Yorker in New York there can be no removal; but removal is probable whenever the defendant is not a citizen or commuter of the forum state. Moreover, the New Yorker can go to New Jersey to sue the commuter in the federal court, and the convenient forum may be New York. The ALI would forbid transfer to New York because neither party could have invoked original jurisdiction there;\footnote{Id. at 17-18, 19-20, §§ 1305(b), 1306(a).} this tying of transfer to original jurisdiction is faithful to the bias rationale but hard to reconcile with section 1404(a). Nor is it an answer that transfer is already limited to courts in which the suit might have been brought. That limitation can itself be criticized, but the existing limitations are venue and perhaps also personal jurisdiction, which at least purport to reflect the same convenience policy as section 1404 itself.\footnote{See Hoffman v. Blaski, 363 U.S. 335 (1960); Van Dusen v. Barrack, 376 U.S. 612 (1964).}
The commuter provision does seem to present fewer construction problems than many of the ALI proposals, but there may be some trouble in determining whether a state is the party's "principal" place of employment. If he is proprietor of a business he will also be covered by the next exception to be considered, and he may be barred without deciding whether his principal business is in the forum state. If he is the ordinary desk or factory employee with only one job the task is easy. But what if he works eight hours in New York by day and eight more in New Jersey at night? What if he is a salesman whose territory is the metropolitan area? A construction worker who spends considerable time in two or more states? I oppose the commuter provision as an unnecessary, litigation-provoking complication that is not worth the trouble. If we are to have diversity jurisdiction we should make it as workable as possible by adhering to the simplest test of residence that we can devise, and without complications.

The third exception in draft section 1302 is to forbid a corporation or other business to invoke federal jurisdiction in any state where it has a "local establishment." This in my view is the most unfortunate as well as the most significant of the ALI's proposals. It is in discussing this section that the Reporters make their statement, quoted at the beginning of this paper, about the desirability of a clear test for jurisdiction; it is in drafting this section that the Reporters most singularly fail to live up to their own exhortation.

They do produce a most gruesome catalogue of specific definitions of established place of business. A more arbitrary set of rules could scarcely be devised; the Institute would distinguish, among other things, between the buying and the selling of goods in a state because only the latter brings the business into substantial contact with the public. But the most striking fact about these horrible specifics is that they leave enormous gray zones that will plague the courts with additional problems of construction. There is a provision that one is not to be held to have a local establishment because of the activities of an "independent commission agent, broker, or custodian." Does this adopt the variable and intensely factual test for distinguishing between servants and independent contractors? Or does it import a new and equally vague doctrine whose contours are not yet even suggested? The exception applies only to "entities organized or operated primarily for the pur-

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216 OFFICIAL DRAFT, pt. I, at 11-12, § 1302(b). The provision applies only to organizations incorporated or having their principal business in the United States, and the establishment must have been maintained for over two years.

217 Id. at 72.

218 Id. at 71. The draft also distinguishes between selling concerns maintaining a stock of goods within the state and those filling orders of local salesmen from outside, "consistent with the emphasis on visible competition with local enterprise." Id.
pose of conducting a trade, investment, or other business enterprise" in order to permit "charitable, religious, or educational institutions, . . . labor unions and fraternal societies" to invoke jurisdiction where they have an established place of activity. If it were not for this explicit commentary I would have thought the test of "business" broad enough to include education unless it is given away free. Is the test to be the type of activity engaged in, or has "business" to do with the making of profit only?

Finally, even if the specific and numerous definitions present no other ambiguities, there is the impossible requirement that the action be one "arising out of the activities" of the local establishment. The Reporters helpfully advise us that this test is more restrictive than a prior formulation that would have excluded actions "related to" the establishment, but no attempt is made to define either phrase. Nor is it very clear why there should be any such limitation. None is proposed for the commuter; the difference is puzzling, since the basis of both provisions is that the established worker or business needs no protection against local bias. The explanation is the desire to limit the risks of litigation that a business takes when establishing a foreign place of business; but why the Reporters feel the need of this limit is obscure, since they think the corporation is in no danger of bias.

Further, even if the proposal were not both arbitrarily detailed and litigation-breeding, it would be questionable in terms of the bias policy. It is hardly credible that a substantial bias against a foreign business is destroyed because it sets up a local store; surely the presence of a wholly-owned newsstand in Birmingham would not help the New York Times very much in an Alabama court. Indeed one of the original reasons for diversity jurisdiction, we are told, was the attraction of capital from other states; not only does this suggest that corporations should be treated as citizens, since they are a principal means of investing capital, but it also indicates that the man who invests money in another state may need protection.

Finally, if I agreed with the Institute that a corporation should not be allowed to sue in its place of established business, I would suggest that the statute abolish the second category of principal place of business. There seems no excuse for two levels of difficult threshold determination even before we get to venue and service of process. My

219 Id. at 74.
220 See id. at 73, leaving the question of subsidiary corporations to be decided “in light of the particular facts.”
221 Id. at 73.
222 Id. at 72-73.
223 Id. at 49.
suggestion would be, if I agreed with the ALI on this, that a corporation be made a citizen of every state where it did business.

This painfully long discussion gives an idea of the enormous infrastructure that has grown up to support and to define the diversity jurisdiction. In my view the security given out-of-state interests by this jurisdiction is not worth the burden of defining and administering it. But the American Law Institute, rather than proposing to simplify the jurisdictional determination, is intent upon complicating it. I dissent.
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; 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." 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, 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-
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. 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.

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. The case of the federal corporation has been specifically excluded by statute, except when the United States is majority stockholder. 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. In addition, the Court's willingness to tie this test to technical pleading rules unrelated to jurisdictional policy makes the rule operate capriciously and adds complexity to the determination of jurisdiction. The Court's
apparent suggestion that in declaratory-judgment actions the test requires investigation of the rules governing pleading in a hypothetical coercive action, while faithful to the Declaratory Judgments Act's statement that the statute does not affect jurisdiction, increases the burden of threshold litigation. And the general statutory limitation of removal to cases that could originally have been brought in federal court 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. 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. 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; 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. 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. The difference is that, while

237 See Tent. Draft No. 6, at 96-97.
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." 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.

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." 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." 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: "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.

Moreover, actions by a state or its officer, agency, or subdivision to enforce the state or local "constitution, statutes, ordinances, or administrative regulations" 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. 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 Id. at 7, § 1312(b)(5).
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.\footnote{Id. at 7, \S 1312(b)(6); \textit{id.} at 109-10.}

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,\footnote{Levering \& Garrigues Co. \textit{v.} Morrin, 289 U.S. 103 (1933).} a requirement the ALI properly proposes to make explicit in the statute.\footnote{TENT. DRAFT No. 6, at 5, \S 1311(a); \textit{id.} at 81-83.} 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.\footnote{\textit{See}, \textit{e.g.}, Crider \textit{v.} Zurich Ins. Co., 380 U.S. 39 (1965); Durfee \textit{v.} Duke, 375 U.S. 106 (1963).} 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-
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. 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. 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"; the defendant presumably cannot because the original action was not cognizable in federal court. If state practice makes the counterclaim com-

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, 315 U.S. 100 (1941).
263 28 U.S.C. § 1441(a) (1954). 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.\textsuperscript{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,\textsuperscript{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;\textsuperscript{266} but the late stage at which replies are asserted is one minor argument in the other direction,\textsuperscript{267} and the probable dominance of state issues in a reply case is another.\textsuperscript{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.\textsuperscript{269} In part this bar is a continuation of present law;\textsuperscript{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.

\textsuperscript{264} Tent. Draft No. 6, at 6, § 1312(a)(3). No jurisdictional amount is to be required.
\textsuperscript{265} Id. at 6, § 1312(a)(2).
\textsuperscript{266} Tent. Draft No. 4, at 6, § 1312(a)(5) (1966).
\textsuperscript{267} But cf. removal on the basis of an answer to a counterclaim, which cannot be raised sooner than in a reply.
\textsuperscript{268} The ALI has used this one. See Tent. Draft No. 5, at 98-99 (1967).
\textsuperscript{269} Tent. Draft No. 6, at 7, § 1312(b)(1)-(4).
The emasculated provision of section 1443(1) for removal by defendants unable to enforce equal federal rights in state courts is to be preserved without improvement; section 1443(2), which has become superfluous by interpretation, is slated for virtual repeal; and, thank goodness, the ALI intends to reverse the pointless court-created principle that an action within exclusive federal jurisdiction cannot be removed.

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 statute and of the property cases (including those relating to the ownership of land long ago obtained from the United States) by court decision. 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. It is regrettable that the circle cannot be squared, but the Institute and Professor Cohen 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

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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.
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.
created,\textsuperscript{280} or when federal law must be construed.\textsuperscript{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 vindication\textsuperscript{282} 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;\textsuperscript{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.\textsuperscript{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,\textsuperscript{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-

\begin{footnotes}
\footnotetext{280}{E.g., American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916).}
\footnotetext{281}{E.g., Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 379 (1821).}
\footnotetext{282}{See Mishkin, The Federal "Question" in the District Courts, 53 Colum. L. Rev. 157, 170-1 (1953).}
\footnotetext{283}{Supreme Court jurisdiction to review state-court judgments in such cases was denied in Miller's Executors v. Swann, 150 U.S. 132 (1898), 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 adverting to the issue.}
\footnotetext{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 proprietory 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.}
\footnotetext{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.}
\end{footnotes}
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. 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. And when state law is adopted purely for federal convenience, as in the old Conformity Act respecting procedure, 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, 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. 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, 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).
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. 1960), rev'd, 362 U.S. 550 (1959), 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.”

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. 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. The federal interest in uniform interpretation of a compact is strong, especially since the Court has made clear that federal law governs the question; 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. 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; depriving willing state courts of power to proceed when both

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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).
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. 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. 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 courts 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. The ALI's notion that in patent and copyright cases there is a federal interest transcending that of the parties 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

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 fed-
eral administrative agencies; and to certain maritime proceedings dis-
cussed below.303

4. **Pendent Jurisdiction**

State-law issues are commonly adjudicated in federal courts, regard-
less of diverse citizenship, if they are part of a case arising under federal
law. The strength of the policy justifying this intrusion on state con-
cerns 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 func-
tion 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 sav-
ings in time and money of avoiding multiple trials on overlapping
evidence.

As I indicated in discussing the complete-diversity rule and its ex-
ceptions,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

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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
§ 1311(b).
262 (1968).
(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.\textsuperscript{310} The 1948 attempt at codification\textsuperscript{311} was a failure; no one knew whether the reviser's test of a "related" claim was meant to broaden or to preserve the \textit{Hurn} test,\textsuperscript{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 \textit{Gibbs} case gives the proper breadth to the doctrine, allowing pendent jurisdiction whenever considerations of judicial economy justify consolidation.\textsuperscript{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."\textsuperscript{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.\textsuperscript{315}

\textsuperscript{310} E.g., in \textit{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. \textit{See also} \textit{Wojtas v. Village of Niles}, 334 F.2d 797 (7th Cir. 1964).

\textsuperscript{311} \textit{28 U.S.C. § 1338(b)} (1964).

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


\textsuperscript{314} \textit{TENT. DRAFT No. 6}, at 10, § 1313(a).

\textsuperscript{315} \textit{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

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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.
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; 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 rule—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 ser-
vice of process. If defendants are brought in who are beyond state
reach, the analogy of Van Dusen v. Barrack 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, 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.

My second reservation respecting the relaxation of venue and per-
sonal-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 im-
portant 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 pro-
cess on the original claim.

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

See D. Currie, The Growth of the Long Arm: Eight Years of Extended Jurisdiction


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. 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; 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; 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. 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

826 Tent. Draft No. 6, at 10, § 1313(c).
827 Id. at 5, § 1311(a).
829 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." 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; the admiralty jurisdiction and its attendant federal common law will henceforth be tailored to the needs of the shipping business that are their universally acknowledged justification.

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 jurisdiction—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, which includes within the jurisdic-

330 Id. at 19, § 1316(a).
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.
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 ex-
tended. The well-known exclusions of contracts to build and to sell
ships
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 be-
tween the parties; it is high time that Professor Morrison's unanswer-
able repudiation of the ancient and lingering limits on remedial powers
in section 1333 cases were enacted into law.\footnote{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." \textit{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."}

A second highly commendable proposal of the ALI is to restate the
confusing saving-to-suitors clause of section 1333, which gives the mis-
leading 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.\footnote{46 U.S.C. §§ 761 \textit{et seq.} (1964); \textit{Tent. Draft No. 6}, at 147-8.}
The commentary makes clear that the state courts will be permitted to entertain suits under the
Ledet v. United Aircraft Corp., 24 Misc. 2d 1010, 204 N.Y.S.2d 604 (Sup. Ct. 1960).} although courts have frequently and
unjustifiably held federal jurisdiction exclusive.\footnote{\textit{Tent. Draft No. 6}, at 19, § 1316(b).} 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
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. The present statute was
plainly designed without regard to the removal of maritime cases, 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.

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.

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. 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

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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, "are 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.*, 198 F.2d 498 (5th Cir. 1952), discussed in D. Currie, *Federal Courts* 364-5 (1969).

any party, even though the basis of jurisdiction is admiralty, of all
claims for damages from personal injury or death.\footnote{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.”\footnote{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;\footnote{348}
but the Seventh Amendment would get in the way unless rationaliza-
tion 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 mari-
time 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 ques-
tion 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-

\footnote{346} Tent. Draft No. 6, at 22, § 1819. The exception for limitation proceedings is un-
fortunately to be preserved, see id. at 162-3.

\footnote{347} Black, Admiralty Jurisdiction: Critique and Suggestions, 50 Colum. L. Rev. 259, 278
(1950).

\footnote{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;\textsuperscript{349} consolidate the ragged and inconsistent statutes consenting to suit;\textsuperscript{350} abolish the untrusting and inconvenient requirement that government-contract actions for more than $10,000 must be brought in the Court of Claims\textsuperscript{351} and the provision for direct Supreme Court review of that court,\textsuperscript{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.\textsuperscript{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 $50,000\textsuperscript{354} (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

\footnotesize{\textsuperscript{349} See 28 U.S.C. § 2680 (1964); Dalehite v. United States, 346 U.S. 15 (1953).}
\footnotesize{\textsuperscript{350} See e.g., Amell v. United States, 384 U.S. 158 (1966), and the discussion in D. Currie, Federal Courts 458-67 (1965).}
\footnotesize{\textsuperscript{351} 28 U.S.C. §§ 1346(a)(2), 1491 (1964).}
\footnotesize{\textsuperscript{352} 28 U.S.C. § 1255 (1964).}
\footnotesize{\textsuperscript{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, \textit{Federal Jurisdiction and the Revision of the Judicial Code}, 13 Law & Contemp. Prob. 216, 222-3 (1948).}
\footnotesize{\textsuperscript{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."\textsuperscript{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,\textsuperscript{355} jurisdiction over federal corporations,\textsuperscript{357} and removal of state-court actions against federal officers,\textsuperscript{358} providing specially for venue and change of venue in government litigation\textsuperscript{359} and leaving untouched the provision for district-court review of ICC orders.\textsuperscript{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.\textsuperscript{361}

The provision for removal by federal officers, while slightly changed

\textsuperscript{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).

\textsuperscript{357} 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, 338 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.


\textsuperscript{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.

\textsuperscript{360} Tent. Draft No. 6, at 28, § 1325; see 28 U.S.C. §§ 1293, 1336, 2225 (1964).

\textsuperscript{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.\textsuperscript{362} The appropriateness of this jurisdiction to assure the effective functioning of the federal government itself is evident;\textsuperscript{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;\textsuperscript{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;\textsuperscript{365} the possibility of an injunction is cloudy.\textsuperscript{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.

\textbf{THE JURISDICTIONAL AMOUNT}

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

\textsuperscript{362} Morgan v. Willingham, 383 F.2d 139, 141-2 (10th Cir. 1967).
\textsuperscript{363} See Bradford v. Harding, 284 F.2d 307, 309-10 (2d Cir. 1960).
\textsuperscript{364} Tent. Draft No. 6, at 6, \S 1312(a)(2).
\textsuperscript{366} See Arnold, The Power of State Courts to Enjoin Federal Officers, 73 Yale L.J. 1885 (1964).
\textsuperscript{367} Act of Sept. 24, 1789, ch. 20, \S 11, 1 Stat. 73, 78.
the general diversity and the general federal-question provisions today require more than $10,000 in controversy, 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." 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. Alternative ways to deal with the problem of congestion include the appointment of additional federal judges 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. 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. But the Institute proposes to retain the $10,000 minimum in diversity cases while abolishing it in cases arising under federal law.

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. But many attacks upon state statutes come within section

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).
373 See text at notes 505-10 infra.
374 See Official Draft, pt. 1, 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; and the Jones Act, even if it does not itself confer jurisdiction without regard to amount, will very likely be held a law "regulating commerce" within section 1337, 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," 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 . . . ." 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." 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, 388 F.2d 766 (1967); D. Currie, Federal Courts 426-30 (1968).
378 See Imm v. Union R.R., 289 F.2d 858 (3d Cir. 1961) (FELA within § 1337); Swanson v. Martin Bros., Inc., 328 U.S. 1, 5 (1946) (Jones Act supported by commerce power); Pate v. Standard Drilling 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 pos-
sibility the jury will award it, and the courts are understandably re-
luctant 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.\textsuperscript{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;\textsuperscript{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; un-
fortunately they do not always lend themselves to valuation. The im-
possibility 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;\textsuperscript{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.\textsuperscript{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 los-
ing 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.\textsuperscript{386} But it is not always easy to determine the actual cost of com-
plying, say, with a regulatory statute;\textsuperscript{387} and for some unknown reason

\textsuperscript{382} See, e.g., Bell v. Preferred Life Assur. Society, 320 U.S. 238 (1944), holding the
then $3000 requirement met in an action asking $200,000 for fraud relating to the plaint-
in’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
Realty Corp., 359 F.2d 96 (2d Cir. 1966).

\textsuperscript{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.” \textit{See id.} at 9,
§ 1301(d).


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

\textsuperscript{386} See Healy v. Ratta, 292 U.S. 263, 269 (1934).

\textsuperscript{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. 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, 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, 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.

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. There is a

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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. Deriver & R.G.W. Ry. Co., 116 F.2d 604, 606 (10th Cir. 1940); “The 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.


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; there even are decisions refusing pendent jurisdiction over small related claims in multiple-party cases when the principal claim exceeds the jurisdictional amount, despite the analogy to state-law claims in federal-question cases 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. 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; 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? 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).
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.
399 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 lan-
guage 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 gen-
eral 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 Louis-
ville & 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 in-
vocation of estoppel, defended even on precedential grounds by Professor Dobbs, in Di
401 211 U.S. 149 (1908).
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. 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.

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. Recent decisions commendably relaxing finality in habeas corpus cases 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

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403 Tent. Draft No. 6, at 57-58, § 1886.
404 Dobbs, supra note 400, 51 Minn. L. Rev. at 527.
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. 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, 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.

In essence this proposal adopts for federal-question cases the principle behind the modern crop of long-arm statutes, 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; the ALI’s more general form is preferable.

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

409 Tent. Draft No. 6, at 12-13, § 1314.
412 The Institute overlooks (except in interpleader and dispersed-party cases, see Official Draft, pt. I, at 38-39, 45, §§ 2944(a), 2961(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. 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.

When all defendants reside in one state, the ALI allows the plaintiff a choice of forum. 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." 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." 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; 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

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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)) perpetuates 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, 125, § 1314(a)(3).
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.\textsuperscript{419}

Corporations and associations, now regarded for venue purposes as residents of every district in which they do business,\textsuperscript{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.\textsuperscript{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.\textsuperscript{422} Unfortunately, this commendable goal is to be attained only at the price of a tedious inquiry into principal places of business.\textsuperscript{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.\textsuperscript{424} Unfortunately the commen-

\textsuperscript{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.


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

\textsuperscript{422} Id. at 131.

\textsuperscript{423} See text at notes 167-73 supra.

Federal Jurisdiction

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; 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. 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.” 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 principles 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.”

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. If the principle of the 

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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.”


432 Id. at 77.


case is simply that the diversity court should reach the same result as
would a court of the forum state,\(^4\) or that forum-shopping should be
avoided.\(^3\)\(^7\) Deference to state law is clearly correct. But I agree with
Mr. Justice Harlan that \textit{Erie}'s aim is not uniformity for its own sake,
but respect for state policies in the absence of countervailing federal
concern.\(^3\)\(^8\) 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 solici-
tiousness toward nonresidents who enter the state.\(^3\)\(^9\) 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 prin-
ciple. So long as \textit{Klaxon} remains the law care must be taken, as it has
been in transfer cases,\(^4\)\(^0\) not to allow a federal long arm to affect the
choice of law; overruling \textit{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 in-
terest 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.\(^4\)\(^1\)


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


\(^{439}\) \textit{Arrowmith v. United Press Int'l}, \textit{320 F.2d} 219, 241 (2d Cir. 1963) (dissent).


\(^{441}\) 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." 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. 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. "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. 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 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.


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

444 Id. at 161-2.

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 resides 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. 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, 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. 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

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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).
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.” 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. 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. 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; 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. 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. Finally, nothing but complication is gained by splitting the present general transfer provisions into separate sections for diversity, federal-question, and federal-government cases. Simplifica-
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, 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 cases 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. 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.

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.\textsuperscript{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 \textit{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.\textsuperscript{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.\textsuperscript{462} The philosophy of \textit{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 state\textsuperscript{463} is a strong point in favor of the ALI’s simplified version.

However, in the other two cases distinguished and reserved in \textit{Barrack}, those of transfer from an improper forum or on the plaintiff’s motion,\textsuperscript{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.”\textsuperscript{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; \textit{Klaxon} policy\textsuperscript{466} 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 \textit{Klaxon}; my only

\textsuperscript{460} 363 U.S. 335, 340 n.9 (1960).
\textsuperscript{461} 376 U.S. 612 (1964); \textit{OFFICIAL DRAFT}, pt. I, at 18, § 1305(c).
\textsuperscript{462} 376 U.S. at 640.
\textsuperscript{464} 376 U.S. 634, 640 n.29.
\textsuperscript{465} \textit{OFFICIAL DRAFT}, pt. I, at 20, § 1306(c).
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; 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; federal injunctions against pending state-court proceedings are limited by statute; federal habeas corpus for state convicts is available only after exhaustion of state-court remedies. The Supreme Court, however, in the face of statutory commands that jurisdiction extend to "all" federal-question and diversity cases as defined, has created several additional exceptions.

First of all, as the result of an ancient dictum only recently challenged by a district court, 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. 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. 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

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475 Cf. Crider v. Zurich Ins. Co., 348 F.2d 211 (5th Cir. 1965), *cert. denied*, 382 U.S. 1000 (1965), 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. Mr.
Justice Frankfurter, paraphrasing Marshall’s admonition that courts
have “no more right to decline the exercise of jurisdiction which is
is given, than to usurp that which is not given,” 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 “dis-
cretionary,” the Supreme Court has held that federal courts should
not issue declaratory judgments as to state taxes; 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.

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, and both resulting, in theory, in referring not the
entire case but particular state-law issues to state courts for decision.
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.”

As originally conceived in the Pullman case, abstention meant send-
ing 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 mis-
fortunes: premature decision of constitutional questions, the misinter-
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-

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.
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. Forssenius, 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. 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, 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.

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. 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.


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."  

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.  

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; 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).
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, 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. 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

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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 con-
servation of natural resources.\textsuperscript{505} There are exceptions to the rate
limitation that the ALI means to restate and make applicable to re-
source 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 regula-
tion 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 eco-
nomically 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 limita-
tion 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 work-
men's-compensation laws.\textsuperscript{506} The diversity draft proposes to exclude
these cases from the original jurisdiction as well.\textsuperscript{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 beyond the 1958 policy of protecting
the needy litigant's choice of a convenient state forum, as in FELA
and Jones Act cases,\textsuperscript{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."\textsuperscript{509} That was not what Con-
gress 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-

\textsuperscript{505} Id. at 38, §§ 1371(a), (b).
\textsuperscript{506} 28 U.S.C. § 1445(c) (1964).
\textsuperscript{507} OFFICIAL DRAFT, pt. I, at 10, § 1301(f).
\textsuperscript{508} See text at notes 269-70 supra; S. REP. No. 1830, 85th Cong., 2d Sess. (1958).
\textsuperscript{509} OFFICIAL DRAFT, pt. I, at 66-67.
moteness from the commercial context that arguably presents the greatest threat of prejudice.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{513} The question should be further studied.

\textbf{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.\textsuperscript{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 \textit{Phillips} and \textit{Bransford} cases\textsuperscript{515} 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;\textsuperscript{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.\textsuperscript{517} The change regarding declaratory judgments rationalizes the law without adding complexity; the other changes will substantially

\begin{footnotes}
\textsuperscript{511} TENT. DRAFT NO. 6, at 35, § 1330.
\textsuperscript{512} See 36 U.S.L.W. 2740-1 (1968).
\textsuperscript{514} D. Currie, \textit{The Three-Judge District Court in Constitutional Litigation}, 32 U. CHI. L. REV. 1 (1964); TENT. DRAFT NO. 6, at 240-1.
\textsuperscript{515} Phillips v. United States, 312 U.S. 246 (1941); \textit{Ex parte} Bransford, 310 U.S. 354, 360-1 (1940).
\textsuperscript{516} Three judges were held not required in declaratory-judgment actions in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 152-5 (1963).
\textsuperscript{517} TENT. DRAFT NO. 6, at 43-46, §§ 1574-6. For confusion regarding appeals, see Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962), and later cases noted in D. Currie, \textit{Federal Courts} 553-4 (1968).
\end{footnotes}
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textbf{Injunctions Against Suit}

"The use of injunctions to stay actions at law," says Pomeroy, "was almost coeval with the establishment of the chancery jurisdiction."\textsuperscript{521} The Supreme Court has held it proper for one federal court to restrain a litigant from proceeding in another federal court,\textsuperscript{522} and for a court of one state to enjoin a litigant from suing in another state.\textsuperscript{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-

\begin{itemize}
\item \textsuperscript{518} Tent. Draft No. 6, at 248-9.
\item \textsuperscript{519} 28 U.S.C. § 1253 (1964).
\item \textsuperscript{520} D. Currie, \textit{supra} note 514, 82 U. CHI. L. REV. at 2-12.
\item \textsuperscript{521} 5 J. Pomeroy, \textit{Equity Jurisprudence} § 2058 (4th ed. 1919).
\item \textsuperscript{522} Steelman v. All Continent Corp., 301 U.S. 278 (1937).
\item \textsuperscript{523} Cole v. Cunningham, 133 U.S. 107, 121 (1890).
\end{itemize}
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-

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525 Id., 14 Ill. 2d at 375, 152 N.E.2d at 868.
526 2 U.S. (2 Dall.) 419 (1793).
527 314 U.S. 118, 135 (1941).
529 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 (1888) (Limitation of Liability Act); Dietzch v. Huidekoper, 103 U.S. 494 (1881) (removal statutes, which dated from 1789 but had been recodified).
ception allowing an injunction against harassing relitigation of matters concluded by a federal judgment. 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 section 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. 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, 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

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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.


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").

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”\textsuperscript{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,\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{542} Again the statutory language is mis-

\textsuperscript{537} 28 U.S.C. § 1446(e) (1964).
\textsuperscript{539} Capital Serv., Inc. v. NLRB, 347 U.S. 501, 505-6 (1954).
\textsuperscript{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.
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. But a recent Supreme Court decision suggests a way around the ban: Section 2283 forbids only injunctions, not declaratory judgments; 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," 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

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

549 See id.
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. Later decisions respecting injunctions against the use of various kinds of illegal evidence have left nothing but uncertainty; 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."

In the important case of Dombrowski v. Pfister 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; 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. 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.

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

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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.
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."\textsuperscript{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.\textsuperscript{559} Making clear that the prohibition extends to injunctions against the enforcement of state-court judgments as well as against state-court proceedings,\textsuperscript{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."\textsuperscript{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.\textsuperscript{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."\textsuperscript{563} No injunction is to be allowed merely

\textsuperscript{558} 319 U.S. 157, 163 (1943).
\textsuperscript{559} Tent. Draft No. 6, at 41-42, § 1372.
\textsuperscript{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.
\textsuperscript{561} Tent. Draft No. 6, at 223-4.
\textsuperscript{562} Id. at 226-27.
\textsuperscript{563} Id. at 235-34.
because federal jurisdiction is exclusive, but the Institute's proposal to allow removal in such cases would make this academic. 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." 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. 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
organizational campaign despite the state court’s lack of jurisdiction, 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.

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. 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, 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. The possibility of

667 See Amalgamated Clothing Wkrs. v. Richman Bros. Co., 348 U.S. 511, 525 (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 (1965), 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).

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


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

671 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* and by assertions in the lower courts that the 1871 Civil Rights Act "expressly authorized" anti-suit injunctions, 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.

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 justice 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. 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."

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-

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572 380 U.S. 479 (1965).
573 See note 536 supra.
574 390 U.S. 611 (1968).
576 S. 2923, 89th Cong., 2d Sess. (1966), Title IV.
577 Tent. Draft No. 6, at 42, § 1372(7).
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 Henry 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, 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.


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; completion 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, 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

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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.\footnote{583}{See the discussion of protective jurisdiction, text at notes 68-73 supra.}

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,\footnote{584}{Would a single letter to the mayor suffice? Participation in a march ten years before?} 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.\footnote{585}{TENT. DRAFT No. 6, at 114.} 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.\footnote{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).} It does not work if the de-
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

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\(^{588}\) 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.
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and harassing relitigation of matters determined by an existing judgment of the State court in a civil action.\footnote{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.\footnote{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.\footnote{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

\footnote{589 Tent. Draft No. 6, at 42-43, § 1573.}
\footnote{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).}
its time, the Court has resorted to less than legitimate practices to spare it undesired appeals.\textsuperscript{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.\textsuperscript{593}

Especially onerous and without cause are the provisions for direct review of district-court decisions in routine ICC and government antitrust 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.\textsuperscript{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 indictments\textsuperscript{595} and holding federal statutes unconstitutional in government litigation.\textsuperscript{596} Surely not all decisions frustrating criminal prosecutions demand the attention of the Supreme Court,\textsuperscript{597} and the ALI's willingness to abolish three-judge courts for testing federal statutes\textsuperscript{598} 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

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\item[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.


\item[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).

\item[598] See text at notes 517-8 supra.
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prisoners from its present confused state to the full relief now afforded state prisoners;\textsuperscript{599} unifying the ragbag of remedies available to the federal civil prisoner;\textsuperscript{600} and eliminating altogether the weakening custody requirement.\textsuperscript{601} Short of constitutional mootness, every claim of an unconstitutional conviction or sentence should be given one full hearing in a federal civil court.

\textbf{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.\textsuperscript{602} As one who has fought for several years to eradicate the last traces of Beale’s legacy\textsuperscript{603} 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.”

\textsuperscript{599} See D. Currie, \textit{Federal Courts} 189-98 (1968).
\textsuperscript{600} See \textit{id.} at 209-11.
\textsuperscript{601} See note 586 supra.
\textsuperscript{602} See J. Beale, \textit{Conflict of Laws} (1935), \textit{passim}.
\textsuperscript{603} See R. Cramton & D. Currie, \textit{Conflict of Laws} (1968), \textit{passim}. 