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RESTRUCTURING FEDERAL JURISDICTION: THE AMERICAN LAW INSTITUTE PROPOSALS

CHARLES ALAN WRIGHT*

Ten years ago this month, in the course of his annual address to the American Law Institute, Mr. Chief Justice Warren said that it is essential that we achieve a proper jurisdictional balance between the Federal and State court systems, assigning to each system those cases most appropriate in the light of the basic principles of federalism.¹

He called on the Institute to undertake a study defining, in the light of modern conditions, what the jurisdiction should be of the two systems of courts.² The Institute, of course, was glad to accept the task suggested by the Chief Justice, and in the intervening years much of the time and energy of the Institute has been devoted to this project. At the Annual Meeting in May, 1968, the lawyers and judges and professors who make up the Institute voted final approval of the recommendations submitted to them. The Reporters have since done the necessary editorial revision, and ten days from today, when Chief Justice Warren appears for the last time to address the Institute as Chief Justice, he will be presented with the final official draft of the Institute's *Study of the Division of Jurisdiction between State and Federal Courts*.³

Chief Justice Warren's proposal that a study of this kind be made was a wise one. The United States is virtually unique in having two independent systems of courts throughout the country, with one deriving its authority from the national government while the other

*The John Randolph Tucker Lecture, delivered at Washington and Lee University on May 10, 1969.

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¹36 ALI PROCEEDINGS 33 (1959).

²*Id.* at 34.

³STUDY OF DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (Official Draft 1969) (hereafter referred to as STUDY).

is the creation of the constituent members of the federal union. At the Constitutional Convention and in the ratification debates the concept of lower federal courts was vigorously resisted.⁴ They were created, however, by the Judiciary Act of 1789, and, though there are occasional suggestions even today that a single unified system of courts would be a better idea,⁵ it seems safe to assume that an institution that has existed for 180 years is likely to prove permanent. But though we have come to accept the idea of state and federal courthouses a block from each other, and of courts with jurisdiction that often overlaps, there had not been, until the Chief Justice made his suggestion, any comprehensive attempt to justify the division of functions between the two systems in terms of principles of federalism.

Indeed the jurisdiction presently vested in the federal courts is the result of statutes enacted at various times in our history with various specific purposes in mind. The present jurisdictional pattern was heavily influenced by the tragic events that culminated very near to here at Appomattox Courthouse.⁶ And the last major change in the structure of the federal courts was the Judges' Bill of 1925,⁷ a statute that is older than I am.

It is, of course, perfectly possible that, despite their age and the episodic nature of their origins, the present statutes provide for the wisest and best possible allocation of judicial business between state and federal courts. But if this should be the case, it would be a striking proof of Hamlet's assertion that "there's a divinity that shapes our ends, rough-hew them how we will."⁸ As we shall see, it was the conclusion of the American Law Institute that we have not been so fortunate, and that much improvement is possible.

CRITERIA FOR ALLOCATING JURISDICTION

What criteria are there to test the appropriateness of an allocation of jurisdiction between state and federal courts? I suggest that there are four.

First, is the division rational? There ought to be some better basis

⁴C. WRIGHT, *FEDERAL COURTS* 2-3 (1963).

⁵Anderson, *The Line Between Federal and State Court Jurisdiction*, 63 MICH. L. REV. 1203 (1965); Anderson, *The Problems of the Federal Courts—and How the State Courts Might Help*, 54 A.B.A.J. 352 (1968).

⁶Wright, *The Federal Courts—a Century After Appomattox*, 52 A.B.A.J. 742 (1966).

⁷Act of Feb. 13, 1925, 43 Stat. 936.

⁸*Hamlet*, act V, scene ii, line 10.

for allowing a federal court or a state court jurisdiction over a particular kind of case than that it has been done that way in the past.

Second, is the division clear? This is similar to what the late Professor Chafee called the Bright Line Policy.⁹ A lawyer of reasonable ability should be able to read the statute and tell with fair assurance whether a particular court has jurisdiction of his case rather than being trapped by ambiguous language into bringing his case in the wrong court.

Third, is the division consistent with efficient judicial administration? We live in an age in which most courts, state and federal, have congested dockets, and this situation is likely to become even more grave. Jurisdictional allocations cannot reduce the burden of the caseload on the entire system. The case must ultimately be heard in some court. But the jurisdictional allocation should not aggravate these burdens by permitting extensive preliminary litigation to decide where the case is to be heard, or by requiring wasteful duplication of proceedings from a single controversy in both systems of courts, or by shuttling the litigants in a particular case back and forth between the two systems.

Fourth, is the division designed to reduce friction between the two systems? In a federal system there will always be conflicts between the national government and the state governments, and between the judicial systems they have created, but the jurisdictional division should not provide unnecessary occasions for conflict.

The four matters to which I have referred are criteria for evaluation. They are not categorical imperatives. So long as we have two systems of courts, we are going to have some measure of irrationality, unclarity, inefficiency, and friction. Indeed these criteria at times point in different directions. If, for example, the jurisdictional line is painted in bold, clear strokes, it is likely to leave on one side of the line particular cases that more rationally should be placed on the other, yet the nicer distinctions a truly rational allocation would suggest can only be made by a statute that is less clear, either because of the complexity of its provisions or because it states matters very generally and leaves much to particularized determinations in individual cases. Indeed my four suggested criteria remind me somewhat of the test recently announced for determining the validity of a congressional apportionment. We can never fully satisfy these criteria, just as we can never have absolute mathematical equality in an apportionment,

⁹7. CHAFEE, *SOME PROBLEMS OF EQUITY* 311-16 (1950).

but we are entitled to demand that some justification be shown for any deviation from these.¹⁰

Anyone who is familiar with the present jurisdictional pattern must surely recognize that there are many respects in which it is seriously defective when measured by these proposed tests. Only a few examples need be given for each of the four tests to illustrate the point.

Take first the test of rationality. Suppose that while I am in Lexington this weekend the car I am driving collides with Dean Steinheimer's car, and each of us is seriously injured. He is a citizen of Virginia and I am a citizen of Texas, so that there exists between us that ancient ground for federal jurisdiction, "diversity of citizenship." I can sue Dean Steinheimer in the federal court for the Western District of Virginia, on the theory, accepted since 1789 but in recent years heavily challenged, that a Virginia state court might be prejudiced against me because I am from far away while the dean lives here. So far so good—at least for those who accept the theory that a Virginia state court might be prejudiced against a Texan while a federal court in Virginia will be free from such prejudice. Suppose however that I am not worried about prejudice and I choose to sue in state court. Even though there is still diversity between us, Dean Steinheimer cannot remove the case from state to federal court. If I am willing to take my chances with the state court, the dean, as "a citizen of the State in which such action is brought,"¹¹ is not given any choice in the matter. This still fits with the theory and is a rational pattern. But now suppose that the dean wins the race to the courthouse, and he brings suit against me before I can sue him. He may sue in the state court if he wants to—but he is also free to commence his action in federal court if he prefers. Perhaps there is some reason why a local citizen should be allowed to invoke federal jurisdiction in a suit against someone from out of state, but I have yet to understand what that reason is.

Let me give one other example of the irrationality of the present pattern. Suppose that I think that state officials are denying me the right to vote, or the right of freedom of speech, or one of the other great rights secured by the Constitution of the United States. I can sue those state officers in federal court. It does not matter how small my claim may be, or that it cannot even be valued in money.¹² But

¹⁰Cf. *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969).

¹¹28 U.S.C. § 1441(b) (1964).

¹²28 U.S.C. § 1343 (1964); *Hague v. CIO*, 307 U.S. 496, 518-532 (1939) (Stone, J., concurring).

imagine that my claim is against federal officers rather than state officers. In that case the door of federal court will be open to me only if my claim is for more than \$10,000.¹³ Judge Medina has recently referred to this as "an unfortunate gap in the statutory jurisdiction of the federal courts . . ." ¹⁴ It is indeed unfortunate, and it is almost certainly a mere happenstance of history rather than the result of a conscious choice. But a rational pattern of federal-state jurisdiction should be based on conscious choices rather than happenstances.

Many more examples could be put, but those are enough to suggest the lack of rationality of the present allocation. I turn now to clarity and Professor Chafee's Bright Line Policy. A labor union brings pressure to bear on an employer to have it fire its mine superintendent. The superintendent wants to collect damages from the union. He has two grounds on which to bring such a suit. He claims that the union is guilty of a secondary boycott, in violation of the Taft-Hartley Act, and also that the union has been guilty of a conspiracy in violation of state law. Clearly the Taft-Hartley Act claim "arises under the . . . laws . . . of the United States" and can be heard in federal court.¹⁵ Can the state law claim be joined with it—assuming there is no diversity—or must it be the subject of a separate suit in state court? The statutes are silent. There is a statute saying that a person who has a claim under the copyright, patent, or trademark laws may join with it "a substantial and related claim"¹⁶ of unfair competition but this, of course, has no application on the facts I have given you. The Supreme Court, however, has held that the statute about copyrights and patents is merely a particular application of something called "pendent jurisdiction." Whenever there is a state claim joined with a federal claim, the federal court has power to decide the whole case provided the two claims "derive from a common nucleus of operative fact" and are such that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding."¹⁷ I think this is a good rule, but one should not have to search the United States Reports in order to find it, and it is especially unfortunate that the statutes are affirmatively misleading by seeming to confine the principle much more narrowly.

Let me give one other example of lack of clarity. Suppose that a railroad has settled a claim against it some years back by agreeing

¹³28 U.S.C. § 1331(a); *Oestereich v. Selective Service System Local Board No. 11*, 393 U.S. 233 (1968).

¹⁴*Wolff v. Selective Service Local Board No. 16*, 372 F.2d 817, 826 (2d Cir. 1967).

¹⁵28 U.S.C. § 1331(a) (1964).

¹⁶28 U.S.C. § 1338(b) (1964).

¹⁷*United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

to give the claimant an annual pass for the rest of his life. Then Congress passes a statute barring railroads from giving free passes. The railroad is in a quandary. It wants to honor its contract but it also wants to obey the law. Does the statute about free passes apply where there is an existing contractual obligation to give the passes? If it does apply, is it unconstitutional since it takes away a property right of the person who would otherwise be entitled to a pass? The railroad's lawyers come up with a solution. They will bring an action for a declaratory judgment and find out from the courts what they should do in these circumstances. Can they bring this action in federal court, assuming that there is no diversity? It would seem that they should be able to do so, since the only issues in the case are issues of the meaning and constitutionality of an Act of Congress, just the kind of issues that a federal court is best qualified to hear. The average intelligent lawyer is likely to believe not only that the railroad should be able to sue in federal court but that it can do so. The suit looks like a case "arising under" the Constitution and laws of the United States, and thus to be within "federal question" jurisdiction. And the lawyer who knows that the courts have put a gloss on that statute, and have held that the federal question must appear on the face of the well-pleaded complaint, is still not likely to perceive any obstacle. The complaint in the declaratory judgment action states, as it must, a claim based directly on federal law. Despite all of this, the answer probably is that the case must be brought in state court. I say "probably" because no one can be absolutely sure of the answer until the case is actually decided. But there is strong language from the Supreme Court warning against using "artful pleading" to permit a suit that could not otherwise be heard in federal court to be brought there under the guise of an action for a declaratory judgment.¹⁸

What this appears to mean in my hypothetical case is that it is not enough for federal jurisdiction that the well-pleaded complaint presents a federal question. Instead we must turn the clock back to the days before 1934, when there was no such thing as a suit for a declaratory judgment in federal court. In those days the controversy between the railroad and the man who wanted a pass would not have been heard in federal court. The only way the case could get to court at all would be for the man to bring a suit against the railroad to require it to give him his pass. That suit, the Court held years ago, was not properly brought in federal court, since a claim for

¹⁸Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 673-674 (1950). See C. WRIGHT, FEDERAL COURTS § 18 (1963).

breach of contract is a state law claim, and the federal question entered only through the defense of the railroad that the new statute makes it unlawful for it to perform its contract.¹⁹ Since the case could not have come to federal court prior to 1934, we must resort to this ancient history to bar it from federal court today, even though we now have available an action for a declaratory judgment, something we did not have in the old days.

My third test is efficiency of judicial administration. Here the present allocation gets very bad marks. Cases do shuttle back and forth from one system to the other, often for as many as 10 or 12 years. There is extensive preliminary litigation to decide in which court a case will be heard. And there is a significant amount of duplication of litigation arising out of a single controversy in the two systems. I will cite two particularly egregious examples. Suppose an action is brought in federal court in which plaintiff alleges that he is a citizen of Florida and the defendant is a citizen of Kentucky. Defendant files an answer admitting the allegation of the citizenship of the parties and expressly agreeing that the federal court has jurisdiction. Defendant then takes depositions and occupies the time of the court with various pre-trial motions. At a point when the court has indicated it is going to decide the case for the plaintiff, and perhaps even when the statute of limitations would bar a new suit in state court, defendant files an amended answer. In the new answer he denies that he is a citizen of Kentucky, and alleges instead that he is, and at all times has been, a citizen of Florida, so that the federal court lacks jurisdiction. The court agrees, and orders the federal action dismissed.²⁰ This hardly seems to meet the test of common fairness, to say nothing of the test of efficient judicial administration, and yet the rule in federal court has long been that if at any stage of a case it appears that there is no federal jurisdiction, the action must be dismissed.

Ordinarily one or both of the parties have a choice about whether a case that could be heard in federal court shall be heard there, and, as in my suit against Dean Steinheimer, may opt for a state forum if they prefer. This is not always true, since there are some kinds of cases that Congress has said may only be heard in a federal court, that are, in the customary phrase, within "exclusive federal jurisdic-

¹⁹Louisville & N. R.R. v. Mottley, 211 U.S. 149 (1908).

²⁰Page v. Wright, 116 F.2d 449 (7th Cir. 1940); *Knee v. Chemical Leaman Tank Lines, Inc.*, 293 F. Supp. 1094 (E.D. Pa. 1968); *cf. Ramsey v. Mellon Nat'l Bank & Trust Co.*, 350 F.2d 874 (3d Cir. 1965). *But cf. Di Frischia v. New York Cent. R.R.*, 279 F.2d 141 (3d Cir. 1960).

tion." Imagine that we have one of these cases, but that plaintiff does not realize that there is no choice about it, and he sues in state court. At some later point one or both of the parties realizes the mistake, and undertakes to remove the case to the federal court where it should have been all along. Strangely—indeed incredibly—the federal court cannot hear the case. Even though the case has now been brought to the only court with jurisdiction to hear it, it is required to dismiss the case, since the state court from which the case was removed had no jurisdiction and therefore, so it is said, there was no pending case that could be removed.²¹ If someone were deliberately undertaking to devise the least efficient possible court system, this would be a pretty good rule to adopt. To the rest of us it must smack of Alice in Wonderland.

On the fourth of the proposed tests, avoiding unnecessary friction between the two court systems, the present rules come off better than they do on the first three tests, but they still could be better than they are. Why should federal courts be allowed to enjoin proceedings in a state court under a statute so general and open-ended that it is insignificant as a limitation on federal court power²² while a state court cannot enjoin federal court proceedings even to protect against vexatious and harassing relitigation of matters previously determined by the state court?²³ Why should it be possible for a litigant to bring a state court action to naught by filing a frivolous petition for removal just before the case is submitted to the jury in the state court?²⁴ Why should a state court be asked to decide questions of state law in a case while being told that it is not to pass on the federal issues, and that the parties plan to return to federal court for the ultimate decision of the case?²⁵

THE LAW INSTITUTE PROPOSALS

For the last decade the American Law Institute, in response to the request of the Chief Justice, has been examining the present jurisdictional statutes from the point of view of the four tests I have suggested, and has been attempting to devise statutory solutions that will cure the specific anomalies and deficiencies I have mentioned, as well as many more. The end result, the volume that will be presented

²¹*E.g.*, *General Investment Co. v. Lake Shore & M. S. Ry.*, 260 U.S. 261 (1922).

²²28 U.S.C. § 2283 (1964).

²³*Donovan v. City of Dallas*, 377 U.S. 408 (1964).

²⁴*See STUDY* 357-360.

²⁵*England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964).

to the Chief Justice in a few days, is 587 pages long. It includes drafts of statutes that would, if enacted, replace the present chapters of the Judicial Code dealing with jurisdiction, venue, and removal in the federal district courts, and it proposes a great many related changes to other sections of the Judicial Code and of the United States Code generally.

The work has been under the direction of Professor Richard H. Field, of the Harvard Law School, who has been Chief Reporter for the Study since its beginning. Professor Paul J. Mishkin, of the University of Pennsylvania Law School, was Reporter for the portion of the Study dealing with General Diversity Jurisdiction and Multi-Party Multi-State Jurisdiction and, since 1963, I have had the privilege of serving as Reporter for the portions of the Study other than those on which Professor Mishkin worked. We have been greatly aided in the project by a distinguished group of Advisors, including seven federal judges, five practitioners, two state judges, and two law professors. All of our work has had to run the gamut of close scrutiny by the Council of the Institute and again by the members of the Institute at the Annual Meeting. Almost all of the proposals have been before the Council and the Institute in two or more different years, as we have revised our proposals in the light of professional reaction to them. Indeed one particularly difficult section went through eight different drafts, as we struggled to reach a proper formulation. Ten years seems like an inordinate length of time to take for such a Study. In less time than that America has achieved the capability to go to the moon. But the processes of the American Law Institute are deliberate and slow-paced, in the belief that the end product acquires additional strength from the time and care that go into its preparation.

Professor Field has prepared a summary of the Institute's proposals.²⁶ The proposals now go to a committee of the Judicial Conference of the United States for study and possible submission to Congress. The summary, it is hoped, will arouse the interest of the profession and lead lawyers and judges to examine the complete text of the Study so that they may express informed comments on the subject first to the Judicial Conference and then perhaps to the Congress. I do not want to repeat here what Professor Field has done, but I do want to describe what seem to me the more important of

²⁶Field, *Jurisdiction of the Federal Courts—A Summary of American Law Institute Proposals*, 46 F.R.D. 141 (1969).

the proposals, and the reasons that underlie them, before speaking briefly of the controversy they have already aroused.

Diversity Jurisdiction

Undoubtedly the proposals of the Institute with regard to diversity jurisdiction have attracted the greatest public attention. It has been said that this portion of the Study would "emasculate" diversity jurisdiction.²⁷ I put to one side that the dictionary definition of "emasculate"²⁸ seems singularly difficult to apply in this context. Critics can be excused excursions into rhetoric. In truth no one knows what the exact effect will be. Professors Field and Mishkin, who had the responsibility for that portion of the Study, have made a conscientious attempt to analyze the statistical effect of the diversity proposals²⁹ but the imperfect nature of the existing statistics and the assumptions that must be made about how litigants will react under a very different jurisdictional scheme make an extremely rough estimate the best that can be offered. Probably 50% is as valid a figure as any. There were 21,009 diversity cases commenced in or removed to federal court in the fiscal year 1968³⁰ so that there would still be more than 10,000 diversity cases a year even in the "emasculated" jurisdiction.

Fears that cutting diversity jurisdiction in half "would seriously increase the backlog of cases in state courts, with resulting hardship and injustice to litigants" or that they will make "what might be a typical two-year wait in federal court into a three-year wait in state courts"³¹ seem plainly illusory. Ten thousand cases is a drop in the bucket of the litigation now being heard in state courts of general jurisdiction. To reduce diversity in half might increase by 1% the number of cases or of trials in the courts of a typical state³² and even this modest estimate ignores the fact that, as we shall see, the Institute's proposals for federal question jurisdiction look in the direction of allowing access to federal court in many cases that can now only be heard in a state court.

What justification is there for this major reduction in diversity jurisdiction? The answer offered is that it would rationalize the

²⁷Farage, *Proposed Code Will Emascuate Diversity Jurisdiction*, TRIAL, April/May 1966, at 30.

²⁸"1. To castrate; geld. 2. To deprive of masculine vigor of spirit; to weaken." WEBSTER'S COLLEGIATE DICTIONARY 324 (5th ed. 1946).

²⁹STUDY 465-476.

³⁰*Id.* at 468.

³¹*Conflict over Cut in Federal Civil Cases*, TRIAL, Oct./Nov. 1968, at 3.

³²STUDY 473-474.

jurisdictional lines and permit a federal action based on diversity only in those classes of cases with some valid justification for being in the national courts. When I discussed earlier my litigation with Dean Steinheimer—happily entirely hypothetical—I said that the theory of diversity is that a state court may be prejudiced against someone from out of state. Professors Field and Mishkin accept that theory, though they state it rather more elegantly than I did.

The function of the jurisdiction is to assure a high level of justice to the traveler or visitor from another state; when a person's involvement with a state is such as to eliminate any real risk of prejudice against him as a stranger and to make it unreasonable to heed any objection he might make to the quality of its judicial system, he should not be permitted to choose a federal forum, but should be required to litigate in the courts of the state.³³

Thus under the Institute's proposals, I could still sue the dean in the federal court here, since I am a visitor from another state. But if Dean Steinheimer were the one to bring suit, he could not sue me in federal court in Virginia since there is no real risk of prejudice against him as a stranger. Section 1302(a) of the proposals would not permit any person to invoke diversity jurisdiction in a state of which he is a citizen. I confessed to you earlier that I have never understood why the local citizen is allowed to bring suit in federal court, and it seems to me that this limitation is clearly needed.

The same logic suggested to the Reporters for the diversity portions of the Study that businesses that are well established in the state have nothing to fear from the judicial system of the state, and that these too should be barred from invoking the jurisdiction. It is difficult to distinguish this case in principle from that of the local citizen, though the problems of draftsmanship become considerably more complex in dealing with the business. In § 1302(b), the Reporters have attempted an elaborate definition of what they call a "local establishment" and have said that a business may not invoke diversity jurisdiction in a state in which it has maintained a local establishment for more than two years if the suit arises out of the activities of that establishment. The General Motors Corporation, I would suppose, has for many years maintained "local establishments" in many parts of Virginia. It is a major taxpayer and employer here. The proposal of the Institute is that if General Motors is involved in litigation with a Virginia citizen arising out of its Virginia activi-

³³*Id.* at 2.

ties, it should have to do so in the Virginia courts. If, however, the suit arises out of a transaction that took place in some other state, and suit is brought here, the company would remain free to take the case to federal court.

Finally the Reporters carry the principle to its ultimate, if not beyond, in what is known as the "commuter" provision.³⁴ The effect of this, which will be more significant in such metropolitan areas as New York, Philadelphia, and Chicago than it is in Virginia, is that a person who lives, for example, in Newark, New Jersey, and crosses the river each day to work in New York, could not invoke diversity either in New Jersey or in New York.

These are the principal limitations the Institute proposes for diversity, about which, as we shall see, strong controversy has already arisen. There are one or two other limitations, but it is hard to see how there can be opposition to them from anyone except those whose rationalizing principle is that a choice of forum, for whatever reason, is a good thing. Thus the Institute proposes to prevent people from playing games with jurisdiction by using artificial devices either to create or defeat diversity in particular cases.³⁵ The most popular, and least defensible, of those devices has been to have a person—frequently a secretary in the office of plaintiff's lawyer—chosen to act as executor or administrator or guardian in order either to get into or stay out of federal court, as may seem tactically most desirable in a particular case. The Institute proposes that tricks of this kind be barred by a provision that, for purposes of diversity, the citizenship of a representative be deemed to be that of the person he represents. The courts are already edging in this direction,³⁶ but this clear abuse of jurisdiction is better resolved by legislation than by litigation.

Though it has not been much noticed, there are several respects in which the Institute proposes to expand the scope of diversity jurisdiction. The law presently is that a corporation is regarded as a citizen of the state in which it is incorporated and of the state in which it has its principal place of business.³⁷ If it is involved in a lawsuit with a citizen of any state other than these two states, diversity jurisdiction exists. But the rule is very different with a partnership, a labor union, or some other form of unincorporated association. Here

³⁴*Id.*, § 1302(c).

³⁵*Id.*, § 1301(b)(4).

³⁶*McSparran v. Weist*, 402 F.2d 867 (3d Cir. 1968); *cf. Kramer v. Caribbean Mills, Inc.*, 89 S. Ct. 1487 (1969).

³⁷28 U.S.C. § 1332(c) (1964).

it is held necessary to look at the citizenship of each of the members of the association, and if any member is a citizen of the same state as the other party to the lawsuit, there is no diversity. Judge Craven, then on the district court bench, thought that such an odd distinction—by which United States Steel can take advantage of diversity jurisdiction but the United Steelworkers cannot—should no longer be applied, but the Fourth Circuit and the Supreme Court, while recognizing the desirability of changing the rule, held that change should come from Congress rather than the courts.³⁸ The Institute's proposal is that an unincorporated association capable of being sued as an entity should be regarded as a citizen of the state in which it has its principal place of business.³⁹ In addition the provision barring a corporation from invoking diversity jurisdiction in a state in which it has a local establishment would apply also to unincorporated associations.⁴⁰ The result is that these two forms of business enterprise would be treated substantially alike.

Another proposed expansion of diversity can be illustrated by my putative suit against Dean Steinheimer. Suppose that my wife is with me in the car, and she is also injured, but that her injuries are comparatively minor, and her claim is only for \$5000. Until very recently it had been thought to be the law that her claim could not be heard in federal court, since less than the \$10,000 required for diversity jurisdiction is in controversy.⁴¹ This means that either we must have two law suits arising from this single accident, with my claim heard in federal court while my wife is compelled to sue in state court, or I must forego my statutory right to bring my claim in federal court. Neither result is appealing. There were notable opinions from the Third and Fourth Circuits in 1968, rejecting the old orthodoxy, and holding that if one plaintiff has a claim for more than \$10,000 others with closely related claims for less than \$10,000 may join in the suit.⁴² Unfortunately in March of this year the Supreme Court handed down a decision that, while not directly in point, casts doubt on whether these sensible decisions can stand.⁴³ The Institute proposals include a provision that, though more limited

³⁸*United Steelworkers of America v. R. H. Bouligny, Inc.*, 382 U.S. 245 (1965), *affirming*, 336 F.2d 160 (4th Cir. 1964).

³⁹STUDY § 1301(b)(2).

⁴⁰*Id.*, § 1302(b).

⁴¹C. WRIGHT, *FEDERAL COURTS* 103-104 (1963).

⁴²*Jacobson v. Atlantic City Hosp.*, 392 F.2d 149 (3d Cir. 1968); *Stone v. Stone*, 405 F.2d 94 (4th Cir. 1968).

⁴³*Snyder v. Harris*, 394 U.S. 332 (1969).

than I would have preferred, would allow my wife's claim to be joined with mine in the federal action.⁴⁴

Quite commonly it happens that a potential plaintiff will, for tactical reasons, prefer to sue in his own state court and will be apprehensive that the defendant, from out of state, will remove the case to federal court. One way to prevent this is to join a local citizen as a codefendant. Under present law all defendants must be non-residents if there is to be removal.⁴⁵ If there is a good-faith claim against the local citizen the case must be kept in state court, and claims that the joinder of the local man is fraudulent, and was done solely to defeat removal,⁴⁶ are rarely successful and never edifying. The Institute would change this rule and allow any defendant who could have removed if he had been sued alone to do so regardless of what other defendants are joined with him.⁴⁷

One final provision of the diversity sections is worth noting. There was an interesting case a few years ago in which a North Carolina corporation sued for \$1,408.72 in the North Carolina state court. Defendant, a citizen of Virginia, who had suffered substantial injuries from the same transaction, had a claim for \$78,650.00. Under North Carolina law he was required to plead his claim as a compulsory counter-claim in the state court action. He then removed the case to federal court, and it was held that he was allowed to do so.⁴⁸ Surely this result is desirable. Otherwise a plaintiff with a small claim could force a defendant with a large claim to litigate in state court if plaintiff were first to the courthouse. Unfortunately the weight of authority is contrary to the result I have just described, and would not allow removal in these circumstances.⁴⁹ The Institute would allow removal on these facts;⁵⁰ its provision to this effect would not only contribute clarity on a point about which the law is unclear but would also lead to a more rational allocation of cases between state and federal courts.

Federal Question Jurisdiction

We can now turn away from diversity for the time being and look at what the Institute has recommended in the important area of fed-

⁴⁴STUDY § 1301(e).

⁴⁵28 U.S.C. § 1441(b) (1964).

⁴⁶C. WRIGHT, FEDERAL COURTS 88 (1963).

⁴⁷STUDY § 1304(b).

⁴⁸National Upholstery Co. v. Corley, 144 F. Supp. 658 (M.D.N.C. 1956).

⁴⁹C. WRIGHT, FEDERAL COURTS 106 (1963).

⁵⁰STUDY § 1304(d).

eral question jurisdiction. Here the basic rationale is that

... federal question jurisdiction is necessary to preserve uniformity in federal law and 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.⁵¹

Diversity jurisdiction has always been a source of much controversy but, in recent years at least, no one has doubted that questions of federal law are appropriate business for federal courts. Presently there are many cases involving important issues of federal law that cannot be brought in a federal court. This will remain true in a few instances if the Institute's proposals should be adopted, but for the most part the proposals would make a federal forum open to the parties, if either of them should prefer to litigate there, whenever there is a significant issue of federal law in the case.

The appropriateness of a federal forum for federal issues should not depend on the amount in controversy. The present stated requirement that more than \$10,000 be in controversy for federal question cases is largely illusory, and, to the extent that it is an actual limitation, as in a suit against a federal officer, it is wholly anomalous. Thus, with one limited exception,⁵² we have proposed that federal jurisdiction exist without regard to amount in controversy.⁵³

Earlier I discussed the case of the railroad that seeks a declaratory judgment to find out whether it may honor its contract to issue a free pass each year despite an Act of Congress limiting the issuance of passes. The general statute on federal question jurisdiction, § 1311(a), as we have proposed it would provide for jurisdiction in such a case in so many words, and thus eliminate the tortuous consideration of ancient analogies that is now needed to determine whether jurisdiction exists.

Access to a federal court for the determination of federal questions should not depend on where in the country the parties live or can be served with process. Accordingly we propose to allow nationwide service of process and to provide a broad choice of venue, so that suit may be brought in a convenient court.⁵⁴

The most important change required, however, by this general rationale of the appropriate scope of federal question jurisdiction is

⁵¹*Id.* at 4.

⁵²*Id.*, § 1312(a)(2).

⁵³*Id.*, §§ 1311(a), 1312(a)(1), 1312(a)(3).

⁵⁴*Id.*, § 1314.

that the Institute has accepted the view of the Reporters that the door of the federal court should be open where federal law is relied on as a defense in a case. It should not be limited, as it has been since 1894, to those cases in which federal law is the basis of the plaintiff's claim.⁵⁵ The importance of uniformity in federal law, and the special competence of federal judges to interpret federal law, does not depend on whether that law is relied on in the complaint or in the answer. Thus we propose, in § 1312(a)(2), to allow either side to remove if there is a substantial defense asserted arising under the Constitution, laws, or treaties of the United States. This is the one place in the federal question section in which we have preserved the requirement that more than \$10,000 be in controversy. Removal on the basis of a federal defense is a device with which we have had no modern experience, and there are fears that it might be used as a tactic for harassing plaintiffs with small claims. Accordingly it was thought best to limit the device, initially at least, to those cases in which a significant sum is at stake. We have also specifically excluded from removal, by § 1312(b), nine particular classes of cases in which removal seems inappropriate.

Removal on the basis of a federal defense was the hardest fought issue within the Institute in the federal question area, if not indeed in the entire Study. There was agreement throughout that this kind of removal should be permissible in some cases, but there were serious differences about how broadly this should be allowed. Indeed at one point the Institute, by a vote of 102 to 92, directed that the Reporters bring back alternative drafts of the federal defense removal section, one allowing this kind of removal generally and the other narrowing removal on this ground.⁵⁶ We did so, and at the 1967 Annual Meeting, the Institute, after extensive debate, voted decisively in favor of the broader and more general draft.⁵⁷ My judgment on the point is clearly a biased one, but I believe that this provision is a major advance toward a more rational allocation of division of jurisdiction.

Two of the other proposals in the federal question area go to matters I cited at the outset as examples of defects in the present statutes. You will recall the case of the mine superintendent with two claims against a union, one based on the Taft-Hartley Act and one based on state law, who could have found out that he could bring the entire action in a federal court only by studying the Supreme Court

⁵⁵Tennessee v. Union & Planters' Bank, 152 U.S. 454 (1894).

⁵⁶43 ALI PROCEEDINGS 309 (1966).

⁵⁷44 ALI PROCEEDINGS 83 (1967).

decisions and ignoring what seem the plain implications of the present statutes. We have attempted to provide guidance for a person in that position by defining with some care, in § 1313, the circumstances under which a claim created by state law may be heard because it is joined with a related federal claim. The statute should further the Bright Line Policy by making an obscure and confusing part of the law clearer than it has been.

We also addressed ourselves to the strange rule that a case exclusively within federal jurisdiction may not be removed from state to federal court. We specifically abolished the rule, so that such a case under our proposals would be removable.⁵⁸ But we went beyond that to cut down the occasions in which such a situation can arise by proposing repeal of most of the provisions for exclusive federal jurisdiction,⁵⁹ so that exclusive jurisdiction is confined to the situations in which there is a strong federal interest that seems to require a federal forum, and obscure, unneeded statutes making jurisdiction exclusive in various cases do not remain on the books as traps for the unwary.

In one respect we declined a tempting opportunity to clarify federal question jurisdiction. Though there are many cases in point, and some of the greatest names in the history of the Supreme Court have spoken to the question, there is still no clear test by which to tell when a case is one "arising under" the Constitution, laws, or treaties of the United States. We were strongly pressed to draft our general statute on federal question jurisdiction in analytical terms, and to provide a clear test for jurisdiction. We decided not to do this, and to retain, with some minor improvements, the cryptic language of the present statute. The fact is that while this issue raises fascinating intellectual problems, and provides marvelous examination questions for law professors to use, in practice it is of almost no significance. I doubt if I see as many as one reported decision a year in which there is any serious question whether the case is or is not within federal question jurisdiction. In the real world almost all cases fall within stereotyped patterns for which the answer is perfectly clear. No elaborate research is required to see that a suit to recover overtime wages under the Fair Labor Standards Act does arise under federal law, while my automobile accident suit against Dean Steinheimer does not. Most other cases are equally easy. Since the law, however

⁵⁸STUDY §§ 1312(d), 1317(b).

⁵⁹*Id.*, § 1311(b).

murky in theory, does work well in practice, we concluded that any attempt to clarify it by substituting new language might indeed lead to lack of clarity as courts were forced to struggle with a new text rather than applying the familiar rules developed under the old.

General Provisions

I will not discuss the sections of the Study dealing with admiralty and maritime jurisdiction⁶⁰ or with cases to which the United States is a party.⁶¹ Here we accepted the existing division of business between state and federal courts and attempted only to restate it in a clearer and more coherent fashion. There are however a number of general provisions, applicable to all heads of federal jurisdiction, that require at least brief mention.

First, the Supreme Court since 1940 has developed a variety of rules, generally known as the "abstention doctrines," that recognize various circumstances in which a federal court, though it has jurisdiction, ought to defer to the state courts and let the state courts answer some or all of the questions the case poses.⁶² The circumstances in which these doctrines are applicable are not clearly defined. In the last three years there are at least 94 reported opinions of the lower courts in which they have struggled to apply the doctrines and have reached wildly inconsistent results. When a court decides that one of the abstention doctrines requires it to abstain in a particular case, the result frequently is endless expense and delay, as a case starts out in the federal court, is then litigated through the whole system of state courts on some issues, and finally returns for further litigation in the federal system in the light of the answers the state courts have given on the state law matters. Our proposed § 1371, attempts to deal with this in statutory terms. It defines a rather narrow class of cases in which it is desirable that the federal court defer to the courts of the state, and provides procedures that ordinarily will mean that if the federal court does so defer, the federal court is then out of the case for good and the suit proceeds to judgment in the state courts. I hope this provides a more rational allocation than the present amorphous court-made doctrines. I am confident that it is clearer, less wasteful, and that it will reduce conflict between the two systems.

Next, we have dealt with injunctions from one court against proceedings in the other system of courts. We have sought to limit the

⁶⁰*Id.*, §§ 1316-1319.

⁶¹*Id.*, §§ 1321-1327.

⁶²C. WRIGHT, FEDERAL COURTS § 52 (1963).

situations, and define them more clearly, in which a federal court may enjoin state court proceedings,⁶³ while at the same time we have put in statutory form for the first time, and somewhat broadened, the rule on when a state court may enjoin federal court proceedings.⁶⁴

There are some circumstances, of which the most important are suits to enjoin enforcement of a state statute on the ground that it is unconstitutional, in which a special kind of federal court, made up of one judge of the court of appeals and two district judges, is required.⁶⁵ Any lawyer or judge who has ever had occasion to be concerned with one of these cases will agree with Judge Friendly's description of the statutes calling for this special three-judge court as "deceptively simple."⁶⁶ We concluded, with some hesitation, that the general idea of having a three-judge court should be preserved, although we have narrowed the kinds of cases in which it is required. Perhaps the most significant innovation here is that we propose that this special court be convened only on the request of the state official who is being sued. This should reduce the number of cases in which this procedure, which takes such a heavy toll of judicial time, is used, but it has an even more important consequence. Presently it seems to be the law that the requirement of three judges is a jurisdictional requirement.⁶⁷ Thus if it never occurs to any party or to the court that the three-judge statute applies, and a case is fully tried before a single judge, it is necessary to start all over again if an appellate court later should decide that the case is within the three-judge requirement. Our proposal would avoid "so bizarre a result"⁶⁸ as this and in other ways would make it easier than it now is to tell whether three judges are needed.

Another group of proposals deal with the procedure for removing a case from state court to federal court.⁶⁹ These resolve ambiguities in the present statutes on this subject, and also put an end to the outrageous practice by which a case in state court can be stopped in its tracks at the last minute by a frivolous petition for removal.⁷⁰ There is also an extensive series of sections dealing with what is

⁶³STUDY § 1372.

⁶⁴*Id.*, § 1373.

⁶⁵28 U.S.C. § 2281 (1964).

⁶⁶*Sardino v. Federal Reserve Bank of New York*, 361 F.2d 106, 114 (2d Cir. 1966).

⁶⁷*Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 153 (1963); *Borden Co. v. Liddy*, 309 F.2d 871 (8th Cir. 1962); *Riss & Co. v. Hoch*, 99 F.2d 553 (10th Cir. 1938).

⁶⁸*Sardino v. Federal Reserve Bank of New York*, 361 F.2d 106 (2d Cir. 1966).

⁶⁹STUDY §§ 1381-1384.

⁷⁰*Id.*, § 1383(a).

called "multi-party multi-state diversity jurisdiction."⁷¹ These would make it possible for a federal court to hear certain rare cases in which the parties who must be joined are scattered in different states and there is presently no court, state or federal, that can obtain jurisdiction over all of them.

Finally I would call your attention to § 1386, a provision that has long been needed in the federal courts. It ends the ancient rule that an objection to federal jurisdiction can be raised at any time. It is designed to prevent waste of judicial resources by smoking out any objections to jurisdiction early in the litigation, and by preventing, under normal circumstances, any consideration of defects in jurisdiction after the federal court has begun trial on the merits.

REACTION TO THE PROPOSALS

This package of proposals for restructuring the relation between state and federal courts is extensive and complicated. Inevitably it has already aroused opposition and no doubt more is to come. It would be astonishing if any lawyer were to review all of the Institute's work without finding details here and there with which he disagrees. If I were free to rewrite the draft to express my own preferences on how each of the subjects it deals with should be handled it would differ in many respects from the document as it now appears.

The diversity proposals, for example, were completed before I became associated with the project and my reservations about them have long been a matter of public record.⁷² I accept generally the rationale that underlies the diversity proposals, but I think that the rationale has been stretched too far in barring a commuter from invoking federal jurisdiction in the state in which he works. I fear also that the provisions about businesses with a "local establishment," though rationally defensible, are so complex that in this instance rationality should have been sacrificed in favor of clarity and efficiency of judicial administration.

Even in the portions of the Study for which I was Reporter, there are things I would have preferred to see handled differently. Some are matters of small detail while others are of greater importance. I am totally opposed, for example, to the provision allowing a federal court to certify to a state court questions of state law in those states

⁷¹*Id.*, §§ 2371-2376.

⁷²ALI PROCEEDINGS 69, 72 (1964). See also C. WRIGHT, FEDERAL COURTS § 23 (1963).

that allow their courts to give advisory opinions of this kind.⁷³ I agree with Judge Hale, of the Washington Supreme Court, that "the certification procedure is a dilatory one and in the long run compounds the very delays it is claimed to help curtail and magnifies the uncertainties it is claimed to eliminate."⁷⁴ But the members of the Institute listened very attentively while Professor Field and I stated our objections to the certification provision and they then voted overwhelmingly in favor of the provision.⁷⁵ I remain stubbornly unconvinced on the subject, but when such distinguished persons as Dean Griswold of the Harvard Law School and Judge Gignoux of the District Court in Maine argued strongly for the position the Institute ultimately took, it demonstrates that many of these issues are difficult ones, on which men of reason and good will do not always come to the same conclusion.

I have mentioned my own doubts only to emphasize the point that the document that will be given to the Chief Justice in a few days does not contain my recommendations, nor those of Professor Field or Professor Mishkin. They are rather the recommendations of the American Law Institute, and represent the collective judgment after years of work and study of a large group of learned people who have undertaken a disinterested appraisal of how these hard questions of jurisdiction can be solved in a fashion that will best serve our country.

Naturally the recommendations of the Institute have not gone unchallenged. It is surely an exaggeration to say, as a publication of the American Trial Lawyers Association has done, that the Institute's proposals have "brought a storm of protest against change from bar associations, trial lawyers and state judges."⁷⁶ Debate and criticism there have been. This was certainly to be expected, and, so long as it is reasoned debate and responsible criticism, it is all to the good. I welcome, for example, the two lengthy articles in which Professor David Currie, of the University of Chicago Law School, has analyzed with skill and care every aspect of the proposals, agreeing with some and disagreeing with others.⁷⁷ Nor am I surprised that distinguished members of the profession should publicly express very different attitudes about the general approach taken in the diversity sections. Some persons whose voices must be listened to with the utmost respect

⁷³STUDY § 1371(e).

⁷⁴In *re Elliott*, 446 P.2d 347, 371 (Wash. 1968) (dissenting opinion).

⁷⁵43 ALI PROCEEDINGS 371-388 (1966).

⁷⁶*Supra* note 31.

⁷⁷Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 268 (1968-1969).

believe that that head of jurisdiction should remain substantially unchanged and perhaps even be expanded.⁷⁸ Others, such as Professor Currie, conclude that "the security given out-of-state interests by this jurisdiction is not worth the burden of defining and administering it,"⁷⁹ and would eliminate this head of jurisdiction entirely. Finally there are those who think the balance struck by the Institute with regard to diversity is the right one⁸⁰ and that it "makes a good deal of sense."⁸¹

I confess to disappointment at those segments of the organized bar that have hurried to announce their opposition to any change that would significantly limit the present jurisdiction of the federal courts—though they are apparently not adverse to expansion of that jurisdiction. The Committee on Jurisprudence and Law Reform of the American Bar Association, for example, on the basis of a very brief report, has recommended that the ABA oppose the Institute's diversity proposals.⁸² Action on this was postponed by the House of Delegates on the ground that it would be premature to act until the Institute had completed its entire Study.⁸³ The National Board of the American Trial Lawyers Association, apparently speaking of the diversity provisions only, though this is not entirely clear, has called the proposals "dangerous, unwise, arbitrary and an obstruction to full and fair administration of justice."⁸⁴ The attitude of these critics is best summed up by the bar association in one of the western states that resolved that it was against any of the Institute's proposals that would restrict federal jurisdiction and for those proposals that would broaden federal jurisdiction.

It would be pleasant to think that this enthusiasm for federal jurisdiction is a tribute to the high quality of the federal courts. If that were so, it would be time to institute a crash program for the improvement of the state judicial systems. The proposition would have been

⁷⁸Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEXAS L. REV. 1 (1964); *supra* note 72. Judge J. Skelly Wright has expressed a generally similar view in his article, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317 (1967).

⁷⁹Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 49 (1968-1969).

⁸⁰C. MCGOWAN, *THE ORGANIZATION OF JUDICIAL POWER IN THE UNITED STATES* 85-87 (1969); Marden, *Reshaping Diversity Jurisdiction: A Plea for Study by the Bar*, 54 A.B.A.J. 453 (1968).

⁸¹*Asher v. Pacific Power and Light Co.*, 249 F. Supp. 671, 678 (N.D. 1965).

⁸²92 ABA REP. 450 (1967).

⁸³*Id.* at 329-330.

⁸⁴*Supra* note 31.

tested if the Institute had proposed extending federal jurisdiction as far as the Constitution permits, but making that jurisdiction exclusive so that the option of a state forum would no longer have been available. My guess is that the critics I have just described would have been even more outraged by such a proposal, for I believe the basis for their position is not that they love the state courts less but that they love a choice of forum more. Of course it is tactically advantageous to be able to choose, and to pick for each case the system of courts in which a favorable result seems more likely. But surely our dual court structure was created to serve some loftier purpose than tactical maneuvering. It is dismaying to see respected bar groups asserting a vested interest in preserving jurisdictional statutes that have developed quite fortuitously and that are demonstrably irrational, unclear, inefficient, and productive of unnecessary friction.

CONCLUSION

So far I have discussed these matters as one who had a part in working with them and who has therefore a natural bias in their favor. It is hard to view objectively a report that one has helped to draft. But I was a Reporter for the American Law Institute for only a little more than five years, while all of my adult life has been spent in working, both as a writer and as a reformer, for the improvement of the administration of justice in American courts. It is in that capacity, and with as much objectivity as I can muster under the circumstances, that I would like to appraise the Institute's proposals as a whole.

In my judgment adoption of the recommendations of the American Law Institute would be a major step in the right direction for the better administration of justice and for the wise ordering of our federal system. The proposals there presented would make the division of jurisdiction between the two systems more rational than it has been in the past. That is a significant accomplishment, but it is the least important accomplishment of the proposals. If we must choose between a reasoned division of jurisdiction and a workable division of jurisdiction, I would choose the latter every time. The Institute's proposals, I suggest, do make the system more workable. They minimize conflicts between the two judicial systems. They promote efficiency by cutting down on duplicative and unnecessary litigation. And, most important of all in my judgment, they make the jurisdictional line far clearer than it has ever been in the past. They provide answers

in the statute book itself that any lawyer or judge can read and understand to questions that heretofore have either required elaborate study in the cases and the textbooks to answer or that have indeed been unanswerable.

It is easy to find fault with this or that proposal. Any of us can do that. But if each person interested in the well-being of our courts insists on his own pet provisions, we shall be so busy arguing among ourselves that any prospect for meaningful reform will be irretrievably lost. I hope that all of those who care about our courts will give careful study to the full text of the Institute's recommendations. If these persons conclude, as I have done, that the things with which they agree far outweigh those aspects of the proposals with which they disagree, if they conclude that on balance the adoption of the recommendations would improve the administration of justice in the United States, then I hope that they will support enactment of the proposals as a whole. There will be time enough later to refine and improve particular details. My most earnest hope—and my strong conviction—is that as lawyers examine the proposals of the American Law Institute, they will ask not what effect those proposals would have on their fees, or on the class of clients they habitually represent, but whether the proposals are in the best interest of the courts of our great country.