

The Federal Courts and the American Law Institute

PART I

David P. Currie†

"It is of first importance to have a definition so clear cut that it will not invite extensive threshold litigation over jurisdiction."

—The American Law Institute¹

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,² 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,³ 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

† Professor of Law, The University of Chicago. This is the first installment of a two-part article. The second part will appear in the Winter 1969 Issue, Volume 36, number 2.

¹ STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, pt. I, at 72 (Official Draft 1965) [Hereinafter cited as OFFICIAL DRAFT].

² See OFFICIAL DRAFT, pt. I, at vii.

³ Or his injunction, or his divorce, and so on; but let us not quibble.

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,⁴ detailed attention to the particular case may be warranted. But since *Erie R.R. v. Tompkins*⁵ 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.⁶

The ALI, prudently, makes no attempt to emulate the Australian or Canadian experience. Despite the views of Mr. Justice Story,⁷ it seems to be generally accepted that Congress could eliminate the dual system by abolishing all inferior federal courts;⁸ 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

⁴ See Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 794-9 (1965).

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.

⁷ *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 328-31 (1816).

⁸ See *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850), upholding the power of Congress to deny diversity jurisdiction when the plaintiff's assignor could not have sued in federal court; H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 17-18, 293 (1953), arguing that Story's position contradicts the "deliberate compromises of the Constitutional Convention"; U.S. CONST. art. III, § 1: "such inferior Courts as the Congress may from time to time ordain and establish." General federal-question jurisdiction was not conferred until 1875, see HART & WECHSLER, *supra*, at 727-30. Arguably, however, Article I requires that some federal trial court be open for habeas corpus. See *Eisentrager v. Forrestal*, 174 F.2d 961, 965-6 (D.C. Cir. 1949), *rev'd on other grounds*, 339 U.S. 763 (1950). See generally D. CURRIE, *FEDERAL COURTS* 87-105 (1968).

reached the point where Supreme Court review of state courts is always adequate to assure recognition of federal rights.⁹ 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;¹⁰ conferring a protective federal-question jurisdiction, if that is allowable,¹¹ over the very nearly all-embracing category of cases affecting interstate commerce;¹² and making federal jurisdiction exclusive across the board.¹³ 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.¹⁴ 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-

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*.

¹² See *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942).

¹³ *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 429-31 (1867), sustains exclusive federal jurisdiction.

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. . . ."

fective 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 curse¹⁵ or with Judge Parker that it is a great blessing.¹⁶

Since *Erie* and *Klaxon*¹⁷ 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

¹⁵ See Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 520-6 (1928); *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 53-60 (1954) (Frankfurter, J., concurring); *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 650-1 (1949) (Frankfurter, J., dissenting). For other negative responses to diversity jurisdiction see R. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 36-37 (1955); Doub, *Time for Re-Evaluation: Shall We Curtail Diversity Jurisdiction?* 44 A.B.A.J. 243 (1958); Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 510 (1928); Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 132 (1923); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 234-40 (1948).

¹⁶ See Parker, *The Federal Jurisdiction and Recent Attacks Upon It*, 18 A.B.A.J. 433, 437-9 (1932); Parker, *Dual Sovereignty and the Federal Courts*, 51 NW. U.L. REV. 407, 408-11 (1956). Accord, Taft, *Possible and Needed Reforms in Administration of Justice in Federal Courts*, 8 A.B.A.J. 601, 604 (1922); Farage, *Proposed Code Will Emascuate Diversity Jurisdiction*, TRIAL, April-May 1966, at 30; Marbury, *Why Should We Limit Federal Diversity Jurisdiction?*, 46 A.B.A.J. 379, 380 (1960); Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1 (1964).

¹⁷ *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

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,¹⁹ and it is not obvious either that prejudice against nonresidents is a terrible problem now²⁰ or that federal jurisdiction is an effective antidote.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.²² I have come to modulate my original horrified

which will be discussed in Part II of this article. Despite *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 *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.

¹⁹ Two recent, modest studies involved questioning attorneys about why they chose to take diversity cases to federal courts. See Summers, *Analysis of Factors that Influence Choice of Forum in Diversity Cases*, 47 IA. L. REV. 933, 937-8 (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"; Note, *The Choice Between State and Federal Court in Diversity Cases in Virginia*, 51 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, ET AL., *THE AUTHORITARIAN PERSONALITY* 57-101 (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?

²⁰ Perhaps the situation most persuasive to Northern minds is that of a Yankee litigant in a Southern court. But even in this context *New York Times Co. v. Sullivan*, 273 Ala. 656, 144 So. 2d 25 (1962), *rev'd*, 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.

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.

²² See Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7 (1963); 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,

Federal Diversity Jurisdiction—An Opposing View, 17 SO. CAR. 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.

²³ See *United States v. Kahriger*, 345 U.S. 22 (1953), *overruled in other respects* in *Marchetti v. United States* 390 U.S. 39 (1968) (gambling); *Sonzinsky v. United States*, 300 U.S. 506 (1937) (guns); *United States v. Darby*, 312 U.S. 100, 116-17 (1941), *overruling* *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (child labor); *Hoke v. United States*, 227 U.S. 308 (1913) (Mann Act).

²⁴ See *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922) (child labor).

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.

²⁶ OFFICIAL DRAFT, pt. I, at 47-56.

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 withdrawn. 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.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."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 operate 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."³² Besides, prejudice is but one aspect of the overall problem met by diversity jurisdiction, namely, "the possible shortcomings of state justice."³³ For example, when state venue provisions "localize the place of trial in small constituencies . . . justice is likely to be impeded by the provincialism 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.'"³⁴ In addition, "there have been in some states such infirmities in practice and procedure as to jeopardize the fairness of adjudication,"³⁵ and some metropolitan state courts "are so congested that justice to litigants, including out-of-staters, is unconscionably delayed."³⁶ Concededly 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:

[T]he fact that in-staters are not or cannot be similarly protected is not decisive. One obvious material difference is that the citizen of a state, who may share in its political life, is

³⁰ *Id.* at 51.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 52.

³⁴ *Id.*

³⁵ *Id.* at 53.

³⁶ *Id.*

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;

³⁷ *Id.* at 52-53.

³⁸ *Id.* at 53.

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. . . .⁴²

Except in regard to associations and personal representatives,⁴³ the ALI draft, like the present statute, makes no attempt to define "citizen," and the traditional tests of nationality for foreign citizenship⁴⁴ and domicile for American,⁴⁵ while reasonably well understood, leave something to be desired. To exclude from foreign-citizen jurisdiction the stateless person⁴⁶ and the American living abroad,⁴⁷ as the lower courts have done, does accord with the purpose of avoiding offense to foreign governments;⁴⁸ 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.⁴⁹ 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-

⁴² OFFICIAL DRAFT, pt. I, at 8-9.

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.*, 213 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 non-resident or noncitizen of the United States is a party.⁵⁰

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,⁵¹ 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.⁵² 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.⁵³ 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.⁵⁴ The notions that one may be a domiciliary of a place one has never been,⁵⁵ and that one retains an old domicile long after abandoning it until a new one is acquired,⁵⁶ are off base in terms of possible prejudice; and the tests for

⁵⁰ 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.

⁵¹ See *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809), limiting the alien-a-party statute on constitutional grounds.

⁵² See text at notes 65-73 *infra*.

⁵³ *Lewis v. Splashdam By-Products Corp.*, 233 F. Supp. 47, 49 (W.D. Va. 1964).

⁵⁴ *Seegers v. Strzempek*, 149 F. Supp. 35, 37 (E.D. Mich. 1957).

⁵⁵ See RESTATEMENT, CONFLICT OF LAWS § 14, illustration 1 (1934).

⁵⁶ 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 commuter⁵⁷ and the modern Proserpina who spends summers in New York and winters in Florida⁵⁸—are highly arbitrary. On the other hand domicile provides rather well for the serviceman or college student away from home,⁵⁹ 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.

⁵⁷ Home, not business, is decisive under the RESTATEMENT, §§ 12, 13 & comment f.

⁵⁸ Intention governs, according to the RESTATEMENT, § 15.

⁵⁹ 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.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.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 *Tidewater*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,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 applying in terms only to states.⁶⁴ But this argument, as to the District of

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 177-99 *infra*. This would leave, however, a serious problem of deciding what constitutes a sufficient connection.

⁶¹ The *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. CRAMTON & D. CURRIE, *CONFLICT OF LAWS* 42-43 (1968), were not formulated with diversity jurisdiction in mind and should not be taken as determinative.

⁶² *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949).

⁶³ There is no rigid requirement that the word "state" be given the same meaning in various sections of the Constitution. Compare *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177 (1869) (corporation not a "citizen" under Privileges and Immunities Clause of Article IV) with *Marshall v. Baltimore & O.R.R.*, 57 U.S. (16 How.) 314, 328-9 (1854), treating a 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.

⁶⁴ *Rosso v. Puerto Rico*, 226 F. Supp. 688, 693 (D.P.R. 1964) (28 U.S.C. § 2283, which

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;⁶⁵ while decision of nonfederal, nonmaritime cases between citizens of the same state would infringe state rights.⁶⁶ 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.⁶⁷ Once accepted, the Jack-

limits injunctions against proceedings in "State" courts); see *Mora v. Mejias*, 206 F.2d 377, 386-8 (1st Cir. 1953) (suggesting without deciding that Puerto Rico may be a "State" within the three-judge provision in 28 U.S.C. § 2281).

⁶⁵ See the compilation of arguments against advisory opinions in D. CURRIE, *FEDERAL COURTS* 9 (1968).

⁶⁶ See *The Genesee Chief*, 53 U.S. (12 How.) 443, 452 (1851).

⁶⁷ Cf. *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828), and *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 79 (1853), declaring that territorial and military tribunals need not meet the tenure and salary requirements of Article III because other Constitutional provisions could be read to authorize the exercise of judicial power. I think these decisions were unfortunate; they led to a situation in which it appeared that Congress could abolish the tenure of all federal trial judges, see *Crowell v. Benson*, 285 U.S. 22 (1932); *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929). Fortunately the independence of the judges seems to have been strongly reaffirmed by *Williams v. United States*, 289 U.S. 553, 580-1 (1933), which is based on the plain holding that powers falling within Article III cannot be given to judges without tenure, and by *Glidden Co. v. Zdanok*, 370 U.S. 530, 533-4 (1962), which declares that litigants in Article III courts are constitutionally entitled to Article III judges,

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 affairs⁶⁸—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.⁶⁹ The Supreme Court once squarely rejected this notion, but under rather outmoded views of the Commerce Clause;⁷⁰ and Mr. Justice Frankfurter's objection to protective jurisdiction on the ground that the greater does not always include the lesser⁷¹ 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.⁷² 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.

⁶⁸ See *Mora v. Torres*, 113 F. Supp. 309, 313-9 (D.P.R. 1953). But the Third Circuit, upholding the jurisdictional provision, holds that Puerto Rico is still a "Territory." *Americana of Puerto Rico, Inc. v. Kaplus*, 368 F.2d 431, 435-6 (3d Cir. 1966), cert. denied, 386 U.S. 943 (1967).

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): "[I]t 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."

⁷¹ *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 474 (1957) (dissenting opinion).

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. 311 (1917) (liquor importation). Old-fashioned fears of improper delegation to the states of congressional powers, see *Washington v. W.C.*

protective-jurisdiction theory 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 adjudica-

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., *Chappedelaine 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. I, at 9, § 1301(b)(4).

⁷⁷ See *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183, 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 clause⁷⁸ and the present ban on collusive or improper creation of jurisdiction,⁷⁹ which the Third Circuit at least has held inapplicable to the most flagrant personal-representative cases,⁸⁰ are well complemented by the ALI's proposal.

Some have complained, as did Hart and Wechsler of the assignee clause,⁸¹ 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.⁸² 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.⁸³ 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";⁸⁴ 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.

⁷⁹ 28 U.S.C. § 1359 (1964).

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).

⁸¹ H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 918 (1953).

⁸² See Farage, *Proposed Code Will Emascuate Federal Jurisdiction*, *TRIAL*, April-May 1966, at 30, 31-32.

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,"⁸⁵ 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."⁸⁶ On the other hand the Institute apparently accepts, in general,⁸⁷ 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.⁸⁸

Simplicity of application certainly justifies the last two rules⁸⁹ 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*⁹⁰ the only effect of diversity jurisdiction is, as was said in a related context, a

⁸⁵ OFFICIAL DRAFT, pt. I, at 21, § 1307(a).

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. 379, 381-2 (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.

⁹⁰ 41 U.S. (16 Pet.) 1 (1842).

change of courtrooms and not a change of law.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.⁹² But if litigating the fraud issue does become a burden,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*,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.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,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

⁹¹ *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964) (transfer to more convenient forum).

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.

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.

⁹⁴ 7 U.S. (3 Cranch) 267 (1806).

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."

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.⁹⁷ 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,⁹⁸ or of local advertisers in an Alabama libel suit against the *New York Times*.⁹⁹ 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.¹⁰⁰

⁹⁷ The ALI recognizes this and provides for removal by the defendant. See text at notes 118-9 *infra*; OFFICIAL DRAFT, pt. I, at 87.

⁹⁸ *Chicago, R.I. & P. Ry. v. Schwyhart*, 227 U.S. 184 (1913).

⁹⁹ *Parks v. New York Times Co.*, 308 F.2d 474 (5th Cir. 1962).

¹⁰⁰ The Supreme Court has recently held the *Strawbridge* rule not constitutionally required, *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-1 (1967). A nondiverse claim wholly unrelated to the diverse controversy, however, should not be held a part of the "action" or "controversy" within either the statute or the Constitution.

Somewhat related to *Strawbridge* because of their assumptions that one defendant can be counted on to protect the others are the judicial requirement that all defendants must

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.¹⁰¹ 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 *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 *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.¹⁰²

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

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, *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. *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. MOORE, *COMMENTARY ON THE U.S. JUDICIAL CODE* 154 (1949) and cases cited.

¹⁰² See note 95 *supra*. A related problem, though of minor practical impact, is whether *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 *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 *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.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.¹⁰⁴ But the ALI's citation of *Borror v. Sharon Steel Co.*¹⁰⁵ suggests the additional possibility of pendent jurisdiction over controversies between parties not of diverse citizenship.¹⁰⁶ In *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 *Strawbridge* is to be repudiated, let it be done not this way but directly and after facing the relevant issues. The *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 *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 *Strawbridge* should be relaxed for them alone, especially when such ambiguous criteria define the exception.

¹⁰³ OFFICIAL DRAFT, pt. I, at 9-10, § 1301(e).

¹⁰⁴ See Part II of this article, text at notes 395-8.

¹⁰⁵ 327 F.2d 165 (3d Cir. 1964), cited in OFFICIAL DRAFT, pt. I, at 65 n.10.

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.¹⁰⁷ *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."¹⁰⁸ 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.¹⁰⁹ 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*.

¹⁰⁸ J. MOORE, COMMENTARY ON THE U.S. JUDICIAL CODE 239 (1949).

¹⁰⁹ OFFICIAL DRAFT, pt. I, at 87.

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

¹¹¹ Act of March 3, 1875, ch. 137, § 2, 18 Stat. 470.

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;¹¹⁴ the out-of-state concurrent tort-feasor for whose protection the statute was enacted has been removed from its scope.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.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.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

¹¹⁴ *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951).

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*, 386 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.¹¹⁹ 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.¹²⁰

¹¹⁸ OFFICIAL DRAFT, pt. I, at 15-16, § 1304(b).

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.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."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."¹²³ In 1967, in *State Farm Fire & Cas. Co. v. Tashire*,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

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.

¹²¹ *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518 (1916).

¹²² 28 U.S.C. §§ 1335, 2361 (1964).

¹²³ *Treimies v. Sunshine Min. Co.*, 308 U.S. 66, 71, 72 (1939). Lower courts have continued, after *Treimies*, 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 *Treimies* 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). *Treimies* 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.

¹²⁴ 386 U.S. 523 (1967).

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.¹²⁵ 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;¹²⁶ and, most importantly, authorizing the district courts to ignore state laws respecting choice of law.¹²⁷

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*,¹²⁸ 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.¹²⁹ 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*,¹³⁰ is inapplicable.

¹²⁵ See especially *Atkinson v. Superior Court*, 49 Cal. 2d 338, 316 P.2d 960 (1957).

¹²⁶ See Part II of this article, text at notes 407-66.

¹²⁷ OFFICIAL DRAFT, pt. I, at 44-46, 160-2, §§ 1335, 2361.

¹²⁸ 304 U.S. 64 (1938).

¹²⁹ *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

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 interests¹³¹ 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.¹³² 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.¹³³

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

¹³¹ See *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958); *Hanna v. Plumer*, 380 U.S. 460, 474-5 (1965) (Harlan, J., concurring).

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

¹³³ See *Baxter, Choice of Law and the Federal System*, 16 *STAN. L. REV.* 1, 22-42 (1963); *Horowitz, Toward a Federal Common Law of Choice of Law*, 14 *U.C.L.A.L. REV.* 1191 (1967).

state would not wish to push its policy so far in the face of the other's interest or the parties' expectations.¹³⁴ If balancing the competing interests proves not feasible, *Klaxon* may be the most satisfactory residual solution; the ALI's proposal allows for this dubious possibility¹³⁵ 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 *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;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."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

¹³⁴ See B. Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754, 757-8 (1963).

¹³⁵ See D. Currie, *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.

¹³⁶ OFFICIAL DRAFT, pt. I, at 33-43, §§ 2341-6. Brief explanatory notes are included. The commentary consumes *id.*, 120-59.

¹³⁷ *Id.* at 33, § 2341.

agent there to receive process, or if he is subject to long-arm service of process.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);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."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. . . ."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

¹³⁸ *Id.* at 33-34, 138, § 2341(c).

¹³⁹ See text at notes 167-74 *infra*.

¹⁴⁰ OFFICIAL DRAFT, pt. I, at 33, § 2341(b).

¹⁴¹ *Id.* at 135-6. The proposed statute makes clear that the ordinary concurrent tortfeasor is not a necessary party. *Id.* at 33, 136-7. Additional definitions in § 2345, *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);¹⁴² 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.¹⁴³ 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.¹⁴⁴ 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.¹⁴⁵ 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.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."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;¹⁴⁸ and by the complicated treatment of counterclaims.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.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 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

¹⁴⁶ 28 U.S.C. §§ 1335, 2361 (1964).

¹⁴⁷ OFFICIAL DRAFT, pt. I, at 141.

¹⁴⁸ *Id.* at 37, § 2343(e).

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.

¹⁵⁰ To abolish *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*. Defendants may implead third parties liable to themselves whether they be cocitizens of the plaintiff or of the defendant,¹⁵¹ and persons entitled to intervene as of right may do so without regard to diversity.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;¹⁵³ a defendant under a since-repealed provision could not implead a party liable only to a nondiverse plaintiff;¹⁵⁴ and some courts say a plaintiff cannot make a claim against a nondiverse third party brought in to answer to the defendant.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 controversies. Unfortunately, reliance on the Civil Rules to justify relaxing *Strawbridge* encounters difficulty with Rule 82's command that the Rules not affect jurisdiction; in order to avoid this problem, as well as to overturn 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.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 counterclaims to be made without regard to amount are analogous but easier, since the *Strawbridge* 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).

¹⁵⁴ *Friend v. Middle Atl. Transp. Co.*, 153 F.2d 778 (2d Cir. 1946).

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.¹⁵⁷

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,"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,¹⁵⁹ or, as it said in a later case, its shareholders could be conclusively "presumed" citizens of that state, for diversity purposes.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.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.

¹⁵⁹ *Louisville, C. & C.R.R. v. Letson*, 43 U.S. (2 How.) 497, 558 (1844).

¹⁶⁰ *Marshall v. Baltimore & O.R.R.*, 57 U.S. (16 How.) 314, 328 (1854).

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."¹⁶² 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.¹⁶³ 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.*,¹⁶⁴ 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

¹⁶² *Chapman v. Barney*, 129 U.S. 677, 682 (1889). *Accord*, *Great Southern Fireproof Hotel Co. v. Jones*, 177 U.S. 449 (1900) (limited partnership).

¹⁶³ *Mason v. American Express Co.*, 334 F.2d 392 (2d Cir. 1964).

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.¹⁶⁵ The reference to forum-state law may be troublesome,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-

¹⁶⁵ OFFICIAL DRAFT, pt. I, at 8, § 1301(b)(2).

¹⁶⁶ Capacity of an association to sue or be sued is determined by forum-state law under FED. R. CIV. P. 17(b), presumably because of *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 *renvoi*, a complicated and uncertain process.

siders 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.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.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 protégés favorably in order to keep them happily registered.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;¹⁷⁰ others find the operations of the business, the manufacturing or selling, more significant.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.¹⁷² I suppose this is about the best that can be done with such a provision.¹⁷³ But I cannot approve

¹⁶⁷ 28 U.S.C. § 1332(c) (1964). See S. REP. No. 1830, 85th Cong., 2d Sess. 4 (1958).

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 Assr. 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.

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.

¹⁷⁰ E.g., *Sabo v. Standard Oil Co.*, 295 F.2d 893, 895 (7th Cir. 1961); *Scot Typewriter Co. v. Underwood Corp.*, 170 F. Supp. 862, 865 (S.D.N.Y. 1959).

¹⁷¹ E.g., *Anniston Soil Pipe Co. v. Central Foundry Co.*, 216 F. Supp. 473, 475-6 (N.D. Ala. 1963), *aff'd*, 329 F.2d 313 (5th Cir. 1964); *Inland Rubber Corp. v. Triple A Tire Serv., Inc.*, 220 F. Supp. 490, 496 (S.D.N.Y. 1963).

¹⁷² See 1 J. MOORE, FEDERAL PRACTICE 717.77-78 (2d ed. 1964); *Bruner v. Marjec, Inc.*, 250 F. Supp. 426, 427 (W.D. Va. 1966).

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.¹⁷⁴ 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.¹⁷⁵ 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."¹⁷⁶

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."¹⁷⁷ The commentary explains that this provision "destroys diversity between the corporation and a citizen of any one of the specified states."¹⁷⁸ 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

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 *Boulogny* 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, § 1301(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.¹⁷⁹ 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.¹⁸⁰ 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.¹⁸¹

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;¹⁸² that it mattered whether the second charter had been given to individuals or to a corporation;¹⁸³ that the place the cause of action arose was,¹⁸⁴ was not,¹⁸⁵ and might be¹⁸⁶ decisive; and that an incorporation compelled as a condition of doing business could be ignored.¹⁸⁷ 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

¹⁷⁹ *Ohio & Miss. R.R. v. Wheeler*, 66 U.S. (1 Black) 286, 297, 298 (1862).

¹⁸⁰ *Railway Co. v. Whitton's Adm'r*, 80 U.S. (13 Wall.) 270, 283-4 (1872); *Muller v. Dows*, 94 U.S. 444, 447-8 (1877); *Memphis & C.R.R. v. Alabama*, 107 U.S. 581, 585 (1883).

¹⁸¹ *Nashua & L.R.R. v. Boston & L.R.R.*, 136 U.S. 356, 381-2 (1890).

¹⁸² *St. Louis & S.F. Ry. v. James*, 161 U.S. 545, 560-5 (1896); *Southern Ry. v. Allison*, 190 U.S. 326, 332 (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.

¹⁸³ *St. Louis & S.F. Ry. v. James*, 161 U.S. 545, 565 (1896).

¹⁸⁴ *Memphis & C.R.R. v. Alabama*, 107 U.S. 581, 585 (1883).

¹⁸⁵ *Southern Ry. v. Allison*, 190 U.S. 326, 335 (1903).

¹⁸⁶ *Patch v. Wabash R.R.*, 207 U.S. 277, 283 (1907).

¹⁸⁷ *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.¹⁸⁸ 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;¹⁸⁹ 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.¹⁹⁰

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.*,¹⁹¹ 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."¹⁹²

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.¹⁹³ One thing the Supreme Court unmis-

¹⁸⁸ See the decisions cited in notes 189-90 *infra*.

¹⁸⁹ *Seavey v. Boston & M.R.R.*, 197 F.2d 485, 487 (1st Cir. 1952); *Town of Bethel v. Atlantic C.L.R.R.*, 81 F.2d 60, 68, 69 (4th Cir. 1936) (both refusing jurisdiction in the state of common citizenship); *Boston & M.R.R. v. Breslin*, 80 F.2d 749, 750 (1st Cir. 1935) (upholding jurisdiction in the charter state where the opposing party was not a citizen).

¹⁹⁰ *Gavin v. Hudson & M.R.R.*, 185 F.2d 104, 105-7 (1950), *overruled in DiFrischia v. New York Cent. R.R.*, 279 F.2d 141 (3d Cir. 1960).

¹⁹¹ 206 F.2d 153 (1953), *aff'd mem.*, 347 U.S. 909 (1954).

¹⁹² C. WRIGHT, *FEDERAL COURTS* 77 & n.19 (1963); Moore & Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 HARV. L. REV. 1426, 1429 (1964). The few cases brought in states in which a multi-state company was not chartered held the corporation was not diverse to a citizen of any incorporating state. *Waller v. New York, N.H. & H.R.R.*, 127 F. Supp. 863 (S.D.N.Y. 1955) (applying *Strawbridge*); *Baltimore & O.R.R. v. Thompson*, 8 F.R.D. 96, 98 (E.D. Mo. 1948) ("In this State the incorporating States all stand on equal footing."); *Dodd v. Louisville Bridge Co.*, 130 F. 186, 197 (W.D. Ky. 1904) (fuzzy, and probably alternative holding).

¹⁹³ See the extensive discussion of doubts surviving *Jacobson* in Friedenthal, *New Limitations on Federal Jurisdiction*, 11 STAN. L. REV. 213, 232-5 (1959), suggesting that the conflicting decisions may ultimately yield a principle requiring the courts to "weigh such

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."¹⁹⁴ 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.¹⁹⁵ 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;¹⁹⁶ yet some have concluded that the forum rule still applies to multiple incorporations.¹⁹⁷ 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.¹⁹⁸ 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

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.

¹⁹⁴ 28 U.S.C. § 1332(c) (1964).

¹⁹⁵ See S. REP. NO. 1830, 85th Cong., 2d Sess. 4 (1958).

¹⁹⁶ *E.g.*, *Diesing v. Vaughn Wood Products, Inc.*, 175 F. Supp. 460 (W.D. Va. 1959); *Harker v. Kopp*, 172 F. Supp. 180 (N.D. Ill. 1959), both denying jurisdiction in the state of principal business.

¹⁹⁷ *E.g.*, *Majewski v. New York Cent. R.R.*, 227 F. Supp. 950 (W.D. Mich. 1964); *Hudak v. Port Authority Trans-Hudson Corp.*, 238 F. Supp. 790 (S.D.N.Y. 1965). *Contra*, 1 J. MOORE, FEDERAL PRACTICE 723.50-.58 (2d ed. 1964); 1 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE & PROCEDURE 142 n.93.1 (Wright ed. 1960), arguing that the amendment destroys diversity in any forum.

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-

¹⁹⁹ 227 F. Supp. 950 (W.D. Mich. 1964).

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 judges²⁰² 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.²⁰³ 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."²⁰⁴ 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-

²⁰² See Weckstein, *The 1964 Diversity Amendment: Congressional Indirect Action Against State "Direct Action" Laws*, 1965 WIS. L. REV. 268.

²⁰³ See, e.g., *Doctor v. Harrington*, 196 U.S. 579 (1905), as explained in *Smith v. Sperling*, 354 U.S. 91, 104 (1957) (dissenting opinion).

²⁰⁴ *Swanson v. Traer*, 354 U.S. 114, 116 (1957); *Smith v. Sperling*, 354 U.S. 91 (1957).

ship should be ignored.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.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.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.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;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.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

²⁰⁵ See text at notes 122-3 *supra*.

²⁰⁶ See, e.g., *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63 (1941); *Reed v. Robilio*, 376 F.2d 392 (6th Cir. 1967).

²⁰⁷ OFFICIAL DRAFT, pt. I, at 11.

²⁰⁸ 28 U.S.C. § 1441(b) (1964).

²⁰⁹ See, e.g., H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 898 (1953).

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.²¹¹ 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.²¹² 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.²¹³

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;²¹⁴ 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.²¹⁵

²¹¹ 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.*

²¹² *Id.*

²¹³ *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."

²¹⁴ *Id.* at 17-18, 19-20, §§ 1305(b), 1306(a).

²¹⁵ 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."²¹⁶ 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;²¹⁷ 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.²¹⁸ 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-

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.²¹⁹ 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,²²⁰ 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,²²¹ 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;²²² 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;²²³ 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.