LEGAL PROBLEMS OF DIVIDING A STATE BETWEEN FEDERAL JUDICIAL CIRCUITS

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Since Congress first created the circuit courts of appeals in 1891,[1] each state has always been included wholly within a single circuit. A series of bills now before Congress would break that tradition as part of an effort to give relief to the courts of appeals with the heaviest caseloads.[2] Following the recommendation of the Commission on Revision of the Federal Court Appellate System,[3] the bills propose to divide the

[1] Act of Mar. 3, 1891, ch. 517 § 2, 26 Stat. 826. The official designation of the courts was changed from "United States Circuit Court of Appeals" to "United States Court of Appeals" by the Judicial Code of 1948, 28 U.S.C. § 43(a) (1970). *See* 7B J. MOORE, FEDERAL PRACTICE § 3-1, at 85-86 (1974). *See generally* F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 93-102 (1927).

[2] S. 2988, S. 2989 & S. 2990, 93d Cong., 2d Sess. (1974). The three bills propose realignments of the Fifth and Ninth Circuits. They differ in the changes contemplated for the present Fifth Circuit, but the proposed division of the present Ninth Circuit is the same in all three.

[3] COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS; RECOMMENDATIONS FOR CHANGE, 62 F.R.D. 223, 235 (1973) [hereinafter cited as COMMISSION REPORT].

present Ninth Circuit into two new circuits, with the boundaries drawn so that two of the federal judicial districts of California would be placed in one circuit, and two in the other.[4] The Northern and Eastern Districts, sitting at San Francisco and Sacramento respectively, would be included in a realigned Ninth Circuit along with Hawaii, Guam, and five northwestern states. The Southern and Central Districts, sitting at San Diego and Los Angeles respectively, would be placed in a Twelfth Circuit together with Arizona and Nevada.

In the course of introducing the circuit realignment bills, Senator Burdick, Chairman of the Senate's Subcommittee on Improvements in Judicial Machinery and a member of the Commission, explained:

> Because the State of California comprises 10 percent of the national population and . . . alone generates two-thirds of the judicial business of the present ninth circuit, the Commission concluded that the only feasible realignment of states within the ninth circuit must include a division of the four judicial districts in California between the two new circuits in the west.[5]

The underlying problems of judicial administration which led to the Commission's recommendation[6] are not idiosyncratic to the Ninth Circuit, however, nor is California the only state for which division between circuits might be urged. The four

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The Commission was created by Congress in the Act of Oct. 13, 1972, Pub. L. No. 92-489, § 1, 86 Stat. 807. For discussion of the problems of the courts of appeals which led to the creation of the Commission, see H. FRIENDLY, FEDERAL JURISDICTION 31-47 (1973); *Hearings on S.J. Res. 122 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. (1972); *Hearings on H.R. 7378 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971); COMMISSION REPORT, *supra*, 227-230; Carrington, *Crowded Dockets and the Courts of Appeals*, 82 HARV. L. REV. 542 (1969).

[4] The Commission also recommended that the present Fifth Circuit be divided into two new circuits. COMMISSION REPORT, *supra* note 3, at 230-34. No other changes in circuit composition were recommended.

[5] 120 CONG. REC. S 1419 (daily ed. Feb. 7, 1974).

[6] The rapid increase in the caseloads of the courts of appeals has seriously affected the judicial process. In some circuits oral arguments have been drastically curtailed and decisions without opinions have become common. Simply increasing the number of judges on the busiest circuits is not an adequate solution, for "[s]erious problems of administration and of internal operation" result when the membership of a court is expanded beyond a certain number. COMMISSION REPORT, *supra* note 3, at 227. The plight of the Ninth Circuit has become especially critical:

> Since 1968 the number of appeals filed each year has consistently exceeded the number of terminations, resulting in a backlog of 170 cases per judgeship

judicial districts of New York furnish an even larger proportion of the Second Circuit's caseload than California contributes to the Ninth Circuit.[7] Early in its deliberations the Commission considered the suggestion that New York, too, should be divided between circuits. Ultimately it concluded that such a change is not now warranted; but if the Second Circuit's caseload continues to increase, the idea is likely to emerge again. Indeed, unless the "flood-tide of appellate filings"[8] suddenly ebbs, Congress may find it advisable to consider bifurcating yet other states, even if "national panels" or "national divisions" are created to share the workload of the regional appellate courts.[9] The issues raised by the Commission's proposal thus have a significance that goes beyond the borders of one state or one circuit and beyond the immediate desirability of the pending legislation.

This Article will explore the legal consequences of dividing the state of California between two circuits in accordance with the Commission's recommendation. Two kinds of inquiries are relevant. First, is the proposal feasible? What kinds of problems might be anticipated? How serious would they be, and how frequently might they arise? Second, if the plan were enacted, what would be the best way to make the system work? What steps might be taken by courts or legislatures to avoid or mitigate possible conflicts?

It is important to emphasize that the ultimate desirability of legislation implementing the Commission's recommendation (or any future proposals along similar lines) will not and should

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> at the end of Fiscal Year 1973—enough to keep the court busy for a full year even if no new cases were filed. Delays in the disposition of civil cases, often of two years or more, have seriously concerned both judges and members of the bar. The size of the court (13 authorized judgeships since 1968) and the extensive reliance it has been required to place on the assistance of district and visiting judges have threatened its institutional unity. Attorneys and judges have been troubled by apparently inconsistent decisions by different panels of the large court; they are concerned that conflicts within the circuit may remain unresolved.

COMMISSION REPORT, *supra* note 3, at 234-35.

[7] In fiscal year 1973, 88% of the filings in the Second Circuit came to the court from the four districts of New York State. California was responsible for 67% of the Ninth Circuit's cases. *See* 1973 ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR, Table B-3 (preliminary ed.) [hereinafter cited as ANNUAL REPORT]. These figures are adjusted to reflect appeals from administrative agencies and original proceedings. *See* COMMISSION REPORT, *supra* note 3, at 233 n.1.

[8] COMMISSION REPORT, *supra* note 3, at 227.

[9] *See* note 88 *infra* & accompanying text.

not turn solely on the issues considered here. Whatever the problems that might arise as a result of dividing the state, they must be weighed against the disadvantages of other possible responses to the massive appellate caseloads coming to the federal courts from the West Coast states.[10] Any course of action, including maintenance of the status quo, entails various costs, many of which implicate psychological and sociological considerations not easily articulated or measured. Nevertheless, before any balancing of costs can be intelligently undertaken, one must make an informed judgment about those factors which do lend themselves to legal analysis. This Article is put forward in the hope of advancing that aspect of the debate.

I. THE NATURE OF THE PROBLEMS

Although the division of a state between two circuits would be unprecedented in the history of the federal judiciary, the problems to be anticipated are far from unique. Certainly it would be no innovation for the federal government to maintain, within the borders of a single state, two or more courts of equal stature and frequently overlapping jurisdiction.[11] Twenty-four states today contain more than one federal judicial district,[12] and the districts within a state may take different positions on important points of law. When they do, the resulting conflicts may go unresolved for years; some may never be resolved at all, especially if the issue is one which can seldom be raised on appeal.[13] At the appellate level within a single state, conflicting rules of federal constitutional law have been handed down by the federal court of appeals and the state's highest court—tribunals whose decisions can be reviewed only by the United States Supreme Court. Until the Supreme Court chooses to resolve the disputed issue, the interpretations of both courts retain their claims to be authoritative.[14] Nor would

[10] In recent years the Ninth Circuit has handled more cases annually than any other circuit except the Fifth, which the Commission describes as "beleaguered." COMMISSION REPORT, *supra* note 3, at 234. The Ninth Circuit's filings in fiscal year 1973 totalled 2,316. The state of California alone accounted for more filings in the Ninth Circuit than there were in six of the other ten federal judicial circuits. *See* ANNUAL REPORT, *supra* note 7, Table B-3.

[11] The first permanent division of a state between federal judicial *districts* occurred in 1814, when New York was divided into a southern and a northern district. Act of Apr. 9, 1814, ch. 49, § 1, 3 Stat. 120.

[12] 28 U.S.C. §§ 81-131 (1970).

[13] *See, e.g.*, notes 28 & 80 *infra*.

[14] *See* text accompanying notes 187-98 *infra*.

it be a novelty, under evolving rules of personal jurisdiction and choice of law, for the law of a particular state to be applied and interpreted by more than one court of appeals.[15] Finally, an American lawyer would hardly be surprised to learn that the outcome of a legal dispute might turn on the selection of the forum by one of the litigants. Forum shopping is a familiar phenomenon within the federal court system as well as outside it, in both diversity and federal question cases.[16]

The question, then, is not whether problems of the kind just described would arise if a state were bifurcated between circuits; the question is whether bifurcation would add significantly to existing problems or whether the new problems would be different in any important way. The courts serve essentially two functions: settling disputes and declaring the law;[17] bifurcation of a state between circuits might have consequences for both of these functions. Consider first the problems entailed in the settlement of disputes.

A. *Conflicts of Judgments: Inconsistent Orders Against a Defendant*

Whenever two courts have authority to adjudicate a single dispute—or related disputes—the possibility exists that litigants will invoke the jurisdiction of both courts. If more than one lawsuit is allowed to proceed, a wide range of undesirable consequences may ensue. At the least, the parties and the courts will be burdened with the expense and vexation of duplicative litigation. Beyond that, the courts may reach inconsistent re-

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[15] *See, e.g.*, Spearman v. Spearman, 482 F.2d 1203 (5th Cir. 1973) (California law); Schein v. Chasen, 478 F.2d 817 (2d Cir. 1973), *vacated sub nom.* Lehman Bros. v. Schein, 94 S. Ct. 1741 (1974) (Florida law); Waters v. American Auto. Ins. Co., 363 F.2d 684 (D.C. Cir. 1966) (Missouri law); Mason v. American Emery Wheel Works, 241 F.2d 906 (1st Cir. 1957) (Mississippi law).

[16] *See, e.g.*, Summers, *Analysis of Factors That Influence Choice of Forum in Diversity Cases*, 47 IOWA L. REV. 933 (1962); Comment, *A Proposal to End the Race to the Court House in Appeals from Federal Administrative Orders*, 68 COLUM. L. REV. 166 (1968); Comment, *Forum-Shopping in the Review of NLRB Orders*, 28 U. CHI. L. REV. 552 (1961); Note, *"Mistake" and Forum Shopping in Suits for Refund of Federal Tax*, 114 U. PA. L. REV. 1244 (1966); Note, *Forum Shopping in Appellate Review of FTC Cease and Desist Orders*, 13 UTAH L. REV. 316 (1968); Comment, *The Choice Between State and Federal Court in Diversity Cases in Virginia*, 51 VA. L. REV. 178 (1965). For a collection of the extensive literature on forum shopping in federal tax cases, see Ponder, *Trial Court Litigation*, 1969 So. CAL. TAX INST. 117, 118 n.1.

[17] *Cf.* the analysis of the functions of appellate courts in Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901 (1971). *See also* Carrington, *Crowded Dockets and the Courts of Appeals*, 82 HARV. L. REV. 542, 550-554 (1969).

sults in the two cases, a situation which may tend to weaken public and professional confidence in the judicial system. Worst of all, the judgments in the redundant lawsuits may address conflicting commands to one or more of the litigants. As Hazard and Moskovitz put it, "This is not only a grave matter, it is a subversion of the very basis of the legal order. It is intolerable that a legal system should come down at the point of application to tell someone that he has orders such that he cannot help but disobey."[18]

Grave though the matter may be, it need not detain us long at this stage of the discussion.[19] The prospect of repetitive litigation, actual or potential, by parties embroiled in what is essentially a single dispute, is hardly novel in American law, and a wide variety of mechanisms has been developed for avoiding vexatious lawsuits and inconsistent judgments. These mechanisms include the stay,[20] the injunction, the doctrines of res judicata and collateral estoppel and the rules of party joinder. Under the full faith and credit clause, together with prevailing doctrines of comity, most of these mechanisms operate across as well as within jurisdictional boundaries. There is every reason to believe that they will be as effective in the bifurcated state as in any other situation where two courts have authority to adjudicate the same dispute. Indeed, some of the more efficient mechanisms, such as the joinder rules, may operate with fewer impediments, because limitations on venue and personal jurisdiction are less likely to stand in the way of comprehensive litigation within a state than across state lines.[21]

B. *Conflicts of Legal Rules*

As long as a legal question remains unresolved by a tribunal whose decision is binding on all who may be affected,

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[18] Hazard & Moskovitz, *An Historical and Critical Analysis of Interpleader*, 52 CAL. L. REV. 706, 752 (1964).

[19] For a discussion of the mechanisms for resolving or mitigating these problems, see text accompanying notes 208-81 *infra*.

[20] In the federal system, the stay is used rather than the plea in abatement. *See* D. LOUISELL & G. HAZARD, PLEADING AND PROCEDURE 680 (3d ed. 1973).

[21] The joinder rules are efficient in that they come into play during the initial litigation, when it is likely to be easiest to avoid duplicative litigation without denying anyone a full opportunity to contest any matters which may affect his interests. By contrast, the doctrines of res judicata and collateral estoppel may require a court to choose between minimizing litigation and affording someone the opportunity to be heard.

the possibility exists that conflicting rules of law will be applied by different courts. Three undesirable consequences result. First, some persons will be placed in a position of uncertainty about which rule will be applied to their transactions. Second, persons similarly situated in all legally relevant respects may be treated differently simply because they are subject to the jurisdiction of a different court.[22] Finally, litigants with access to more than one court may "shop around" for the forum which they believe will apply a rule more favorable to their case.

In recent years the problem of "conflict in the circuits" has aroused widespread concern among practitioners and judges. As Dean Griswold has observed, however, "conflicts" are no more than the visible, and often fortuitous, manifestations of a problem that is somewhat subtler and of broader dimensions; the absence of an authoritative, binding resolution of questions of law.[23] In Griswold's words, "it takes at least two decisions to make a conflict, and the law of the country remains uncertain until the conflict is finally made and then eventually resolved."[24] Indeed, in some respects this kind of uncertainty may be worse than a clear conflict between circuits: litigants with nationwide interests, such as the federal government, may be prompted to pursue multiple lawsuits in carefully chosen forums, partly in the hope of creating conflicts which will bring about Supreme Court review.[25]

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[22] One may argue that it begs the question to say that persons subject to the jurisdiction of different courts are "similarly situated in all legally relevant respects." Why is the fact that otherwise similar transactions are subject to the jurisdiction of different courts not "legally relevant"? With respect to issues of federal law, the answer is that from the very nature of the federal system, federal jurisprudence comprises a single body of law which, in theory at least, should be applied uniformly to all transactions within its purview. When issues of state law are involved, the analysis will be more complex. See text accompanying notes 315-42 *infra*.

[23] *Hearings Before the Commission on Revision of the Federal Court Appellate System*, Washington, D.C., Aug. 2, 1973, at 27-31 (testimony of Dean Griswold) [hereinafter cited as *Commission Hearings*, with place and date].

[24] Griswold, *The Supreme Court's Caseload: Civil Rights and Other Problems*, 1973 U. ILL. L.F. 615, 630.

[25] *Cf. Commission Hearings, supra* note 23, Washington, D.C., Aug. 2, 1973, at 28-29, 70 (testimony of Dean Griswold); P. Carrington & M. Rosenberg, A PRELIMINARY REPORT ON THE REVISION OF THE FEDERAL COURT APPELLATE SYSTEM 11 (Aug. 2, 1973) (working paper filed with the Commission). The problem is well summarized by Judge Hufstedler:

> The lack of reasonably prompt definitive answers to issues of national concern can thwart rational public and private planning, whether the subject is the location or design of a new dam or a factory, the licensing of a communica-

If the gravamen of the problem is the absence of an authoritative decision, the analysis appropriately begins by identifying the organ of government whose voice is not heard by those who depend on it for guidance. Federal courts decide two kinds of issues: issues of federal law and issues of state law. The Supreme Court is the ultimate arbiter of federal decisional law; the state courts, of state decisional law. The problems may therefore be divided into those involving issues of federal law and those involving issues of state law.

1. State Law Issues

Federal courts adjudicate state law issues in a variety of contexts. The consequences of dividing a state between circuits are likely to depend on the reason why a federal court is deciding a question of state law.

a. *Diversity Cases*

In a diversity case federal courts are bound, under *Erie*[26] and its progeny, to follow state decisional law on substantive issues.[27] When state law is clear, the existence of two circuits within a state should pose no problems, because judges in both circuits would be obliged to follow that law. Only when the state's decisional law is unclear will the federal courts have some latitude in interpreting it, and only then will the possibility of conflicting decisions by the two courts of appeals exist. Detailed empirical research would be required to determine how often California law is unclear and how much latitude would thereby be created for federal courts in diversity cases. It would then be necessary to make a judgment about how often the possibility of divergent interpretations would actually be realized. No one can speak with certainty, but there is strong reason to conclude that the predictions of frequent

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tions facility, or the budgeting of funds to meet demands for social services, or managing the securities markets. Moreover, the lack of certitude excessively breeds litigation, particularly when the litigants have both the motivation and the power to renew lost battles in forum after forum.

Hufstedler, *Courtship and Other Legal Arts*, 60 A.B.A.J. 545, 547 (1974).

[26] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

[27] *See generally* H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 713-49 (2d ed. P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler 1973). This is, of course, an oversimplification of the *Erie* rule, but it suffices for present purposes. *See* D. LOUISELL & G. HAZARD, *supra* note 20, at 568-69.

conflicts made by some witnesses at the Commission's West Coast hearings will not be borne out.

Even today, with no circuit boundaries bifurcating a state, conflicting federal decisions on points of state law in diversity cases are by no means impossible. In states containing more than one federal judicial district, state law may be interpreted differently in different districts, and if the decisions are not appealed, or are not appealable, the conflicts may persist.[28] Such conflicts are obviously not desirable, but the bench and bar manage to live with them, in part because they occur so infrequently.[29] Several considerations suggest that they will be neither more numerous nor more troublesome when the decisions of the district courts can be appealed to two courts of appeals rather than one.

If the doubtful issue is one which arises frequently in suits brought in the federal courts, the same issue is likely to arise in state-court litigation as well, thereby giving the state courts

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[28] For instance, in September 1964, the District Courts for the Eastern and Western Districts of Pennsylvania handed down inconsistent decisions interpreting a Pennsylvania statute providing for substituted service on foreign corporations. The issue was not resolved by the Third Circuit until January 1967 (at which time the Pennsylvania courts had still not ruled authoritatively on the question). Hartley v. Sioux City & New Orleans Barge Lines, Inc., 379 F.2d 354, 357-58 (3d Cir. 1967). *See also* Walters v. Hiab Hydraulics, Inc., 356 F. Supp. 1000, 1002 (M.D. Pa. 1973) (Pennsylvania district courts differ in "predictions" of Pennsylvania law on right of contribution).

In addition, at the appellate level, a court of appeals may be required by choice of law rules to apply the law of a state outside its circuit. *See* Van Dusen v. Barrack, 376 U.S. 612 (1964). Indeed, as the Commission notes, *any* federal court may be called upon to interpret California law. COMMISSION REPORT, *supra* note 3, at 238. Of course, there is a difference between having California law interpreted by the First and Ninth Circuits, as may happen today, and having it interpreted by two circuits both having jurisdiction within the state, as might happen under a bifurcation of the state. California practitioners might feel justified in ignoring a First Circuit decision interpreting California law; they could hardly ignore a decision by a court of appeals sitting in California and composed in part of California judges. Nevertheless, both situations may result in differential treatment and, to a lesser extent, in opportunities for forum shopping. *Cf.* Schein v. Chasen, 478 F.2d 817 (2d Cir. 1973), *vacated sub nom.* Lehman Bros. v. Schein, 94 S. Ct. 1741 (1974) (Second Circuit panel divided over interpretation of Florida law; Kaufman, J., dissenting, urged resort to certification procedure) (criticized in 87 HARV. L. REV. 675, 684-86 (1974)); Waters v. American Auto. Ins. Co., 363 F.2d 684, 689 (D.C. Cir. 1966) (D.C. Circuit engages in independent examination of Missouri law, and states that although the Eighth Circuit's views are "entitled to weight," the law of Missouri can be authoritatively gathered only from Missouri decisions).

[29] Dean Griswold, acknowledging that there could be different interpretations of state law by the two circuits, said that "[t]hat does not seem to me any more important than [that] there could be two interpretations of the Uniform Commercial Code by the Third Circuit and the Fourth Circuit. I do not think that is terribly important."

an opportunity to rule authoritatively on it.[30] On the other hand, if the issue is one which never comes before the state courts, the odds are that the federal courts will not confront it frequently either. It is always possible that there are some issues of state law that arise frequently in diversity cases but that for some reason are seldom adjudicated in the state courts; but it hardly seems likely that these are common.[31] A more plausible complication arises out of the fact that when the California courts of appeals—the intermediate state appellate courts —take different views on an issue of state law, some time may elapse before the state supreme court resolves the question authoritatively. Until the supreme court acts, the federal courts have two lines of authority to follow; in such circumstances the two circuits might opt for different rules. It is not at all clear, however, that this development would create any more uncertainty for litigants than the underlying conflict among the California courts. Indeed, the federal courts might simply follow the decision of the state appellate court sitting in the federal district where the federal case was tried.[32]

Commission Hearings, supra note 23, Washington, D.C., Aug. 3, 1973, at 71 (testimony of Dean Griswold).

[30] Judge James R. Browning of the Ninth Circuit remarked at the Commission's hearings, "there is a time lag between the time Circuit P and Circuit Q are making these rulings, and it is inconceivable to me that either the Supreme Court in California or the five District Courts of Appeal would not by that time have decided the question one way or another, if it was of any moment . . . ." *Commission Hearings, supra* note 23, San Francisco, Cal., Aug. 30, 1973, at 71 (testimony of Judge Browning). The designations P and Q correspond to the proposed Twelfth and Ninth Circuits, respectively.

[31] Judge Ben C. Duniway of the Ninth Circuit, addressing himself to this matter, commented, "California has a very highly developed jurisprudence, both common law and statutory, and it is very seldom indeed that there would be differences between circuits as to what the law of California is." Statement of Hon. Ben. C. Duniway to the Commission, Aug. 30, 1973. Judge Browning expressed the same view: "I am not impressed . . . that it arises very often, that there is an unsettled question that you really [can] go two ways on, or that [the same question] comes up more than once over a short span of time." *Commission Hearings, supra* note 23, San Francisco, Cal., Aug. 30, 1973, at 70.

[32] Under the latitudinarian rule followed by the Sixth Circuit in Lee Shops, Inc. v. Schatten-Cyprus Co., 350 F.2d 12 (6th Cir. 1963), *cert. denied,* 382 U.S. 980 (1966), and now abandoned by the Eighth Circuit in Luke v. American Family Mut. Ins. Co., 476 F.2d 1015 (8th Cir.), *cert. denied,* 414 U.S. 856 (1973), it is conceivable that a federal court of appeals today could affirm two district court rulings that reach opposite conclusions on an issue of state law. That is, if the test is whether the district court reached a "permissible" conclusion, 350 F.2d at 17, the court of appeals could hold that more than one conclusion is "permissible." This is unlikely, of course; nor has the Sixth Circuit's rule found favor among commentators. *See* 1A J. MOORE, FEDERAL PRACTICE ¶ 0.309, at 183 (1973 Cum. Supp.); C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS, § 58, at 240-41 (2d ed. 1970).

The crucial consideration is that the federal courts of appeals have no great interest in promulgating rules of state law to be applied in diversity cases.[33] Telling evidence of this attitude is found in the strong and virtually controlling weight which the courts of appeals regularly give to the determinations of state law made by district judges in diversity cases which come up on appeal. In this regard the Ninth Circuit probably goes further than some of the other circuits.[34] The court has stated repeatedly that a district judge's interpretation of the law of the state where he sits " 'will be accepted on review *unless shown to be clearly wrong*,' "[35] particularly if the highest state court has not passed on the matter."[36] When an appellate court has so consistently deferred to the views of subordinate trial courts on a particular kind of issue, there is every reason to believe that two courts inheriting its precedents, and, for the immediate future, its judges, would give the same deference, if not more, to the decision of an appellate court of equal stature and identical patrimony. Thus, if one of the new circuits adjudicates a point of California law on which there has been "no clear exposition of the controlling principle by the highest court of the . . . state,"[37] the other circuit would probably follow that decision.[38]

In light of all these considerations, it is doubtful that the evils of uncertainty and differential treatment would be significantly more widespread if state law issues in diversity cases could be brought before two courts of appeals and the state courts rather than one court of appeals and the state courts. Nor is bifurcation likely to lead to an upsurge in forum shopping, since the two courts of appeals would seldom be per-

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[33] As Judge Browning (consciously or unconsciously paraphrasing Professor Henry Higgins) put it, "They don't really care in a Federal Court of Appeals what the California law is, just so they have a rule to follow." *Commission Hearings*, *supra* note 23, San Francisco, Cal., Aug. 30, 1973, at 70 (testimony of Judge Browning).

[34] *See* 1A J. MOORE, FEDERAL PRACTICE ¶ 0.309 (1973 Cum. Supp.); C. WRIGHT, *supra* note 32, at 240-41.

[35] Owens v. White, 380 F.2d 310, 315 (9th Cir. 1967) (emphasis supplied by Ely, J., in quoting Bellon v. Heinzig, 347 F.2d 4, 6 n.3 (9th Cir. 1965)).

[36] Douglas v. Beneficial Fin. Co., 469 F.2d 453, 455 (9th Cir. 1972).

[37] Insurance Co. of N. America v. Thompson, 381 F.2d 677, 681 (9th Cir. 1967).

[38] It is also possible that the two courts of appeals would differ, not on the interpretation of state law, but on the question whether a particular issue is properly to be decided according to state or federal standards. The Supreme Court's decision in Hanna v. Plumer, 380 U.S. 460 (1965), has sharply limited the area for conflicting views on that question. *See* D. LOUISELL & G. HAZARD, *supra* note 20, at 566-69; *cf.* C. WRIGHT, *supra* note 32, at 245-47.

ceived as having views of state law that were sufficiently different to make one preferable to the other on that ground. In addition, venue rules will often deny the litigant a choice between the two circuits within the state.[39]

b. *Cases in Which the Interpretation of State Law Is Intertwined with Federal Questions*

State law issues are often raised in cases involving the enforcement of federal rights and the operation of federal statutory programs. Two broad categories of cases can be discerned: those in which rights and remedies under federal law are made by statute or judicial decision to depend on state law; and those in which a state statute or administrative regulation is challenged as repugnant to the Constitution, laws, or treaties of the United States.

(i) Federal Rights Dependent on State Law

In many situations, as a result of legislation or judicial decision, federal legal consequences turn upon a characterization furnished by state law,[40] or on a legal rule defined by the state.[41] For instance, federal tax liability may depend on state trust law;[42] state statutes of limitations may be applied in suits brought to enforce a right created by federal law.[43] Numerous other examples might be adduced.[44] Although cases raising such issues resemble diversity cases in many important respects, considerations not present in diversity litigation may give rise to additional problems in the split-state context.

First, the state law issues which are relevant to the interpretation of federal law may be, unlike those involved in diversity cases, issues which the state courts may not often have occasion to decide.[45] If this is so, the extent to which people

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[39] *See, e.g.*, 28 U.S.C. § 1391(a) (1970).

[40] *See generally* H. HART & H. WECHSLER, *supra* note 27, at 768-79.

[41] *Id.* 825-29.

[42] *See, e.g.*, Commissioner v. Estate of Bosch, 387 U.S. 456 (1967).

[43] *See, e.g.*, UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966).

[44] *See* R. CRAMTON & D. CURRIE, CONFLICT OF LAWS 829-35 (1968); H. HART & H. WECHSLER, *supra* note 27, at 491-94.

[45] For instance, the extent and incidence of federal taxes will often turn on the interpretation given wills and trust instruments under state law. The state law issues may have no substantive importance for anyone outside of their federal tax consequences, with the result that they may never be passed on by the state's highest court.

experience uncertainty in the planning of their affairs will depend on whether they perceive a tendency on the part of the courts of appeals to disagree on the points of state law which come before them in federal question cases. Similar considerations would bear on the likelihood of forum shopping. As with diversity cases, however, it would seem likely that the second court to decide a state law issue would feel a strong tendency to follow the decision of the first, particularly in the absence of a resolving mechanism.

Second, some persons may regard disparity of treatment in this kind of case as more serious than disparity in either diversity cases or cases in which the issues are purely federal. In this view, it is bad enough that federal law may mean one thing in San Francisco and another in Chicago; it is somehow worse when the federal legal system, having decided to incorporate state law, cannot decide what that state law is. Differential treatment with regard to issues involving both state and federal law is, however, no more of an affront to the principle of uniformity than differential treatment in private federal question litigation where state law is not involved. Such disparity may of course exist whether or not states are bifurcated.[46]

Finally, when issues of state law arise in the context of federal question adjudication, federal courts may have somewhat greater leeway in determining[47] and applying[48] the state rule than in diversity cases. As Professor Mishkin puts it, in cases where state law governs because of a federal decision to "incorporate" a state rule,[49] "there remains a freedom . . . to

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In this situation, under Commissioner v. Estate of Bosch, 387 U.S. 456 (1967), the federal courts need not follow the decisions of the lower state courts, but may make their own determination of state law. *See* Ufford, *Bosch and Beyond*, 60 A.B.A.J. 334 (1974). The potential for conflict is thus greater (in theory) than in cases such as those arising under the Federal Tort Claims Act, 28 U.S.C. § 1346 (1970), in which recovery turns on the application of state doctrines of *respondeat superior*, *see* Williams v. United States, 350 U.S. 857 (1955) (mem.), as to which there is likely to be no dearth of state court precedents. *But see* notes 48-50 *infra* & accompanying text.

[46] Indeed, conflicts involving issues of mixed federal and state law may arise even today in tax litigation, because "under the present system, some taxpayers in California will have the Court of Appeals for the Ninth Circuit making the appellate decision in their case and other taxpayers will have the Court of Claims making the appellate decision in their case." *Hearings on S. 1973-S. 1979 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 401-02 (1969).

[47] Mishkin, *The Variousness of "Federal Law"*, 105 U. PA. L. REV. 797, 808-10 (1957).

[48] *Id.* 804-06.

[49] *See id.* 802; H. HART & H. WECHSLER, *supra* note 27, at 768.

control the extent and methods of that adoption which is not present when a determination has been made that state law will apply because the court has no competence to do otherwise."[50] The result is that the federal courts, no longer sitting, "in effect, [as] only another court of the State,"[51] may perceive their role as including a greater responsibility for making an independent judgment about the "sounder" rule of law.[52] Suppose that a decision by a federal court in either the Ninth or the Twelfth Circuit stands, in the absence of clear state court precedents, as the best available evidence of what California law is.[53] In a diversity case, a federal court in the other circuit might well be content to follow the decision of its sister court "unless satisfied that the prior decision [was] clearly erroneous."[54] On the other hand, the argument goes, if state law governed as a matter of federal incorporation, the second court might reject the earlier decision if it thought that a different result was "sounder," even though it would not deem the prior holding "clearly erroneous."

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[50] Mishkin, *supra* note 47, at 804.

[51] Guaranty Trust Co., v. York, 326 U.S. 99, 108 (1945).

[52] *Cf.* Pomerantz v. Clark, 101 F. Supp. 341, 345-46 (D. Mass. 1951) (Wyzanski, J.); H. HART & H. WECHSLER, *supra* note 27, at 768-69; Corbin, *The Laws of the Several States*, 50 YALE L.J. 762, 775-76 (1941).

[53] In the present context, it would probably not make much difference whether the federal precedent is a decision by one of the two courts of appeals or by a district court sitting in California, because other federal courts give special weight to determinations of state law made by a federal trial judge drawn from the bar of the state and experienced in its law. *See* Luke v. American Family Mut. Ins. Co., 476 F.2d 1015, 1019 n.6 (8th Cir.), *cert. denied*, 414 U.S. 856 (1973), & authorities cited, esp. Minnesota Mut. Life Ins. Co. v. Lawson, 377 F.2d 525, 526 (9th Cir. 1967). A California district judge would of course be drawn from the California bar; on the courts of appeals, any panel would probably include at least one and often two judges appointed from California.

[54] Mitchell v. Hygrade Water & Soda Co., 285 F.2d 362, 267 (8th Cir. 1960). Curiously, the quoted standard was applied in a case involving an issue of federal law (interpretation of the Fair Labor Standards Act, 29 U.S.C. §§ 201-19 (1970)). The court stated, "Recognizing that we are not bound by the opinion of the court of appeals of another Circuit, we have accorded the instant appeals independent consideration, having in mind, however, that in the interest of uniformity, a court of appeals is not justified in refusing to follow the decision of another court of appeals unless satisfied that the prior decision is clearly erroneous." *Id.* This policy has often found expression in Eighth Circuit opinions. *Compare* Jaben v. United States, 333 F.2d 535, 538 (8th Cir. 1964), *aff'd*, 381 U.S. 214 (1965) *with* United States v. Eddy Bros., Inc., 291 F.2d 529, 531 (8th Cir. 1961) (Eighth Circuit found "impelling and cogent reasons" not to follow Ninth Circuit decision). It does not appear to be followed by any other circuit. If such a standard is appropriate to issues of federal law (which it probably is not, *see* Hufstedler, *supra* note 25, at 546), it would *a fortiori* be appropriate when issues of state law are involved.

Even if one accepts the relevance of this analysis,[55] the question remains whether the added measure of freedom it envisages could be expected to result in a higher incidence of conflicts between the circuits on issues of state law. The short answer is that it could not. Nor should the other differences between the two kinds of cases be exaggerated. Whether state law is applied "of its own force or by way of incorporation,"[56] it remains state law. Professor Mishkin ends by urging that, even in the federal question context, the task of ascertaining and applying the state law should be left largely "to the integrity and judgment of . . . lower court judges"[57]—exactly what the Ninth Circuit has been doing in diversity cases.[58] As suggested earlier,[59] this approach bespeaks deference rather than pride of opinion on the part of the courts of appeals.

When Acting Attorney General Robert H. Bork expressed a generalized concern over the danger of conflicting interpretations of state law if California were divided between two circuits,[60] Judge Ben C. Duniway of the Ninth Circuit replied tartly that the problem belonged in the category of "things that go bump in the night."[61] In his twelve years on the court, he said, he had "never known of a case in which two district courts in California have disagreed about what the law of Cal-

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[55] In discussing "the scope and techniques of adoption" appropriate for the incorporation context, Mishkin, *supra* note 47, at 804, Professor Mishkin emphasizes the importance of insuring that the state rule applied in a particular case is "entirely consistent with federal objectives." *Id.* 806; *see id.* 805, 807. This leads him to the conclusion that federal courts need not adhere to idiosyncrasies of state law, *see, e.g., id.* 805-06, but it says nothing about the appropriate attitude for a federal court in regard to the state law rules followed by another federal court in a similar context. In particular, in exploring "the techniques to be applied for ascertaining what the local rule is on a given issue," *id.* 808, Professor Mishkin addresses himself to the problem which faces a federal court when the only available state precedent is "quite old, or distinguishable, or of a lower court (or a combination of these)." He has no occasion to consider how the contours of the problem might be altered by the existence of a recent decision on the point by another *federal* court. It would be quite consistent with Professor Mishkin's analysis to say that the second court should accord great deference to the earlier federal decision.

[56] *Id.* 803.

[57] *Id.* 809-10.

[58] *See* notes 34-37 *supra* & accompanying text.

[59] Text accompanying notes 33-38 *supra*.

[60] Letter from Acting Attorney General Robert H. Bork to Senator Roman L. Hruska, Dec. 4, 1973, on file at the Commission.

[61] Letter from Judge Ben C. Duniway to Attorney General William B. Saxbe, Feb. 8, 1974, on file at the Commission. The full passage deserves quotation:

> With the greatest respect for Mr. Bork, the fears expressed in his letter remind me of the ancient Scottish prayer which goes: "From ghoulies and

ifornia is, so that [the court of appeals] had to reconcile the difference."[62] He continued:

> If there should be . . . a conflict between district courts, it seems to me almost inconceivable that the two circuits which deal with the laws of California would continue such a conflict. If one of them first decided the question, the other would almost surely follow its lead . . . . I think that the last thing the two circuits . . . would want to do would be to create or preserve a conflict between them as to what the law of California is.[63]

(ii) Construction of State Laws in Litigation Challenging Their Validity on Federal Grounds

When a litigant challenges the validity of a state law on federal grounds, the merits of the federal claim may depend on how the state law is to be construed. Often no authoritative construction by the state courts is available. It is therefore possible that two courts of appeals, adjudicating parallel challenges to a state law, might reach different conclusions because of their differing interpretations of the state law in question. As a result, the law might be held valid in one circuit but struck down in the other.[64] Uncertainty and disparity of treatment would be the probable results.

This kind of conflict is certainly undesirable, but the possibility of its occurrence should not be regarded as a significant obstacle to the Commission's proposal. Under the *Pullman* abstention doctrine,[65] "when confronted with issues of constitutional dimension which implicate or depend upon unsettled questions of state law, a federal court ought to abstain and stay its proceedings until those state law questions are definitively resolved" by the state courts.[66] *Pullman*-type abstention is ordinarily appropriate whenever two criteria are met: the state law

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ghosties and long-leggity beasties and things that go bump in the night, Good Lord deliver us." Based upon my experience of more than twelve years as a member of the Court of Appeals for the Ninth Circuit, I think that the problems that Mr. Bork foresees are in the category of "things that go bump in the night." They are not real.

[62] *Id.*

[63] *Id.*

[64] Another possibility is that the state law would be upheld in both circuits, but on the basis of different constructions of the law.

[65] Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

[66] Gibson v. Berryhill, 411 U.S. 564, 574 (1973).

is "open to a variety of constructions,"[67] and the uncertainty is such "that construction by the state court might obviate the need for (or at least help to limit) decision of the federal constitutional question."[68] If a state law is so ambiguous that two federal courts called upon to adjudicate its validity under federal law might give the statute different interpretations, that same ambiguity is likely to require abstention by both federal courts under the *Pullman* doctrine.

Abstention, however, may not always be appropriate;[69] moreover, two federal courts may disagree about the applicability of the doctrine, for its scope is by no means clear.[70] In either situation, the case begins to look very much like those in which the only issue is whether the state law, as construed, is to be struck down on federal grounds. The problems raised by such cases will be considered in detail later in this Article.[71]

2. Issues of Federal Law

If the judicial districts in California are allocated between two circuits, the two courts of appeals will sometimes differ in their interpretation of federal law. Even if only one of the courts has ruled on a particular issue, persons subject to the jurisdiction of the other court may experience uncertainty about what rule of law will be applied to their transactions. In theory, the Supreme Court exists for the purpose, among others, of resolving issues of federal law in a manner that will be binding throughout the federal court system. In practice, however, the Court leaves many such issues unresolved; indeed, it may be that the Court cannot do otherwise if it is to perform its other functions.[72] Consequently, on many issues of federal law the most authoritative resolution that can be obtained today is one that is binding only throughout a circuit.[73] For Californians affected by litigation involving issues of federal law, the division of the state between two circuits

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[67] Mishkin, *A General View of Federal Jurisdiction,* 60 F.R.D. 282, 294 (1972).

[68] H. HART & H. WECHSLER *supra* note 27, at 991; *see* Note, *Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era,* 80 HARV. L. REV. 604, 617-19 (1967).

[69] *See, e.g.,* Gibson v. Berryhill, 411 U.S. 564, 579-80 (1973).

[70] *See* H. HART & H. WECHSLER, *supra* note 27, at 980-1050.

[71] *See* text accompanying notes 101-207 *infra.*

[72] *See* STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT, REPORT, 57 F.R.D 573, 578 (1972) [hereinafter cited as STUDY GROUP]; Griswold, *supra* note 24, at 17-19.

[73] Testimony at the Commission's West Coast hearings suggested that attorneys

appears to raise all the problems of differential treatment, uncertainty, and forum shopping that result from the absence of authoritative decisions. The crucial question is whether the problems would be different from or more troublesome than those raised by inter-circuit conflicts today.

Consider first differential treatment. If the Commission's plan is enacted, a particular transaction might be held to produce ordinary income for a taxpayer in San Francisco, while a taxpayer in Los Angeles might be permitted to claim a capital gain on identical facts. Certainly it seems unfair, and even subversive of the principle of a national law, that the Internal Revenue Code should mean one thing in San Francisco and another in Los Angeles. But is it any worse than according different treatment to taxpayers in San Francisco and Chicago? To be sure, the intrastate conflict may be more visible, or visible to more people, but if the issue is even-handed treatment in *national* law, it is hard to see what difference state boundaries make when circuits disagree.

The problem of forum shopping is more complex.[74] At the outset, it is important to isolate the particular class of forum shopping decisions that concerns us here. Suppose that after the Commission's plan is enacted, an attorney having the option of laying venue in the Northern District of California in the new Ninth Circuit, or in the Central District in the Twelfth, chooses the Northern District. His selection would not necessarily indicate that he is choosing between *circuits*. He might prefer the trial judges of the Northern District, or the dockets there might be less crowded, or the Northern District might be more convenient in the context of his other practice. Nor would all circuit shopping between the Ninth and the Twelfth fall within the category of split-state forum shopping; one would have to exclude, for instance, a case in which counsel exercised a choice between the Southern District of California, in the Twelfth, and the District of Oregon, in the new Ninth.

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sometimes have difficulty securing a court of appeals ruling that will in fact be followed in the next case to come up in the circuit. *See* text accompanying notes 81-83 *infra*. Like the other circuits, however, the court maintains that a panel decision is binding on other panels unless it is overruled by the court en banc. *See* Note, *En Banc Hearings in the Federal Courts of Appeals*, 40 N.Y.U.L. REV. 563, 582 n.120 (1965) (compiling circuit rules requiring adherence to panel decisions).

[74] The term forum *shopping* is used here in a literal sense. That is, our concern is with the process of considering alternative forums, irrespective of whether the attorney ultimately brings suit in a forum other than the "natural" one.

The issue here involves only those cases in which an attorney might shop among *districts in California* for the purpose of bringing his suit in one *circuit* or the other.[75]

How often forum shopping of this kind would occur[76] and how seriously it would be regarded by the public and the bar are questions which lend themselves more to speculation than to empirical research. Nevertheless, a few a priori observations are suggested by earlier inquiries into forum shopping.[77] First, most private-law litigation will have, from the point of view of the potential forum shopper, a natural forum —the plaintiff's district, perhaps, or the district where the events in dispute took place, or the district where the attorney conducts most of his practice. Second, as suggested above, even if the attorney exercises a choice between two districts in the same state but in different circuits, he may do so for reasons unrelated to the circuit difference. Third, even when the attorney believes or hopes that the "other" circuit will follow a rule of law more favorable to his case, he may not necessarily give serious consideration to litigating there. How clear a conflict, or how strong a perception of different attitudes, would be required before an attorney would file a case in a forum other than the natural one, is a question not easily answered.[78] Certainly the variables will be numerous, including the stakes for the client, the perceived importance of the rule

[75] This proposition must be qualified in one respect. Under rules of jurisdiction and venue, a Los Angeles litigant might have the option to bring his suit in Oregon, but not in the Northern District of California. If, for some reason, he wanted to get his case into the circuit which included San Francisco, he could do so by laying venue in Oregon. While this can be considered a species of divided-state forum shopping, it is a rather implausible one; only the hypothesized motivation makes the forum shopping decision any different from what it would be if all of California were placed in the Twelfth Circuit, with Oregon in the new Ninth.

[76] We need not pause to inquire in how many cases split-state forum shopping would be a theoretical possibility. In California, the maximum number might be the number of cases which, under the rules of jurisdiction and venue, could be brought in either of the northern districts and in one or both of the southern districts. By examining the records in a random sample of cases brought in the federal district courts in California, it might be possible to determine the order of magnitude of this class of cases. Such an analysis, however, would not take into account the structuring of transactions so as to bring them within the orbit of one circuit rather than another; that species of forum shopping would probably be impossible to measure even on a theoretical basis.

[77] *See* note 16 *supra*.

[78] Similar considerations will come into play when the question for the lawyer and his client is not where to bring litigation, but whether to structure a transaction so that its consequences will be controlled by the law of one circuit rather than another.

of law to be applied, and the inconvenience of trying a case outside the attorney's home district.[79]

The considerations discussed thus far are ones which might come into play in any forum shopping decision. Two considerations unique to the split-state situation deserve mention. First, an attorney who has an opportunity to shop among circuits may be more likely to take advantage of that opportunity if he can do so without going out of state. He would probably feel more familiar with the law and procedure; he would be less likely to feel a need to hire local counsel. Second, conflicts between circuits may be more visible when both circuits encompass districts within the attorney's state; attorneys might see forum shopping possibilities which would not occur to them unless they were compelled to be aware of the other circuit's decisions.

How much effect these factors might have on forum shopping is a matter of speculation. In this connection, it is worth noting that conflicts exist even today *within* circuits. At the district court level, conflicting interpretations of federal law may persist over a substantial period of time, especially on issues seldom reviewed by the courts of appeals. For instance, the district courts in the Third Circuit differed for many years over the question whether, under the Federal Rules, liability insurance coverage is subject to discovery in negligence actions.[80] At the court of appeals level, different panels may take different approaches to federal law issues, distinguishing apparently conflicting decisions of other panels on grounds that are not persuasive to the bar or to other courts. A series of

[79] Two recent studies of forum shopping in appeals from administrative agencies suggest that a wide variety of considerations militate against extensive forum shopping for the purpose of obtaining a more favorable rule of law. *See* Comment, *Forum-Shopping in the Review of NLRB Orders,* 28 U. CHI. L. REV. 552 (1961); Note, *Forum-Shopping in Appellate Review of FTC Cease and Desist Orders,* 13 UTAH L. REV. 316, 329-34 (1968). The courts themselves tend to be unsympathetic to forum shopping. *See, e.g.,* H.L. Green Co. v. MacMahon, 312 F.2d 650, 652 (2d Cir. 1962), *cert. denied,* 372 U.S. 928 (1963); Clayton v. Warlick, 232 F.2d 699, 709 (4th Cir. 1956). An attorney, recognizing the possibility of incurring the court's hostility, might refrain from bringing a case in a forum with which it has only minimal connections. For a case in which a litigant's effort to get his case into a more favorable forum boomeranged, see Montgomery Ward & Co. v. NLRB, 339 F.2d 889, 894 (6th Cir. 1965). Sometimes courts utilize transfer mechanisms in order to frustrate blatant forum shopping. *See, e.g.,* Farah Mfg. Co. v. NLRB, 481 F.2d 1143, 1145 (8th Cir. 1973).

[80] *Compare* Bisserier v. Manning, 207 F. Supp. 476 (D.N.J. 1962), and McClure v. Boeger, 105 F. Supp. 612 (E.D. Pa. 1952) *with* Rosenberger v. Vallejo, 30 F.R.D. 352 (W.D. Pa. 1962), and Hill v. Greer, 30 F.R.D. 64 (D.N.J. 1961).

Selective Service cases in the Ninth Circuit has been interpreted along these lines.[81] Indeed, Dean Erwin N. Griswold, who as Solicitor General regularly reviewed government agencies' petitions for en banc hearings, concluded that the Ninth Circuit generally "seems to have no feeling for intra-circuit harmony."[82] The judges on one panel would endeavor to do justice in the case as it appeared to them; ten days later, another panel might decide essentially the same question the other way without any reference to the first case.[83]

Intra-circuit conflict is in some ways a more insidious problem than inter-circuit conflict. Unpersuasive distinctions are more likely to be invoked in an effort to suggest a nonexistent harmony of views; the district courts are left uncertain which path to follow; and attorneys have greater difficulty in advising clients, since the law appears to turn on the accident of panel selection.[84] Indeed, given the logistical problems raised by en banc hearings in large courts,[85] the coexistence of two circuits within a state may actually produce less uncertainty for the bar than the present arrangement. If Congress chooses to divide the present Ninth Circuit, it will be because the vol-

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[81] Letter from Assistant U.S. Attorney Lawrence W. Campbell, to the Commission, Sept. 11, 1973. In United States v. Ayala, 465 F.2d 464 (9th Cir. 1972), one panel affirmed a jury conviction for draft evasion where the registrant failed to notify his selective service board that he was no longer under active orthodontic treatment, but in United States v. Deep, No. 72-1623 (9th Cir. Feb. 26, 1973), *withdrawn for rehearing* (withdrawn decision published in advance sheet 483 F.2d No. 3, at 1044), upon very similar facts, the jury conviction was reversed because the facts not reported to the board were held "not material" to the board's decision within the meaning of 18 U.S.C. § 1001 (1970). In May 1974 Deep's conviction was affirmed by the Court en banc, overruling the panel. 497 F.2d 1316 (9th Cir. 1974).

[82] *Proposal: The Creation of a National Panel of the U.S. Court of Appeals,* 5 THE THIRD BRANCH, Dec. 1973, at 1, 5 (interview with Erwin N. Griswold) [hereinafter cited as Griswold Interview].

[83] *Commission Hearings, supra* note 21, Washington, D.C., Aug. 2, 1973, at 26 (testimony of Dean Griswold).

[84] The president of the Washington State Bar Association expressed the point this way: "[G]iven a choice between an increase in inter-circuit conflicts and [an increase in] intra-circuit conflicts, I think we would all conclude that the inter-circuit conflict was the lesser of the two evils. I think it's hell not to be able to find a home in our own circuit court." *Commission Hearings, supra* note 23, Seattle, Wash., Aug. 28, 1973, at 35 (testimony of C. Cone, Esq.). *See id.*, San Francisco, Cal., Aug. 30, 1973, at 29 (testimony of Judge Schnacke); *cf.* Harris v. Estelle, 487 F.2d 1293, 1297 (5th Cir. 1974): "The cases in this circuit on the question are conflicting in result and none reason the basis for their differing dispositions. . . . In the absence of any single clear rule in this circuit, we are free to dispose of the instant case in a manner which best reconciles the conflicting policy interests which it presents."

[85] *See* Note, *supra* note 73, at 574-77; *Commission Hearings, supra* note 23, Seattle, Wash., Aug. 28, 1973, at 116 (testimony of Judge Wright).

ume of litigation is thought to be too large to be successfully managed in any other way; and it is the large undivided circuit which has the greatest difficulty in avoiding intra-circuit conflict. Among other problems, the judges in a large circuit can communicate with each other less frequently and are less able to keep abreast of each other's opinions than might be desirable. In the bifurcated state, on the other hand, occasional uncertainties as to which circuit's law will be applied to a particular transaction or controversy may well be outweighed by greater certainty as to the law within each circuit.[86]

Many of the problems of federal law adjudication which may be created by the division of California between circuits are inherent in any system in which legal rules are promulgated by more than one court. In recent years, scholars, judges, and legislators have been working to devise mechanisms to assure authoritative resolution of issues of federal law on a nationwide basis, without requiring the Supreme Court to decide the less important points of federal law.[87] Two prominent organizations have now endorsed proposals for tribunals explicitly designed to resolve conflicts among the circuits.[88] The development of new structures for this purpose may render unnecessary any attempt to devise special mechanisms for a divided California—at least where private law issues are concerned.

C. *Special Problems of Prisoner Litigation*

Allocation of the judicial districts of California between the Ninth and the Twelfth Circuits could create especially

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[86] With respect to some kinds of federal law issues, it may not make much difference whether there are two circuits or only one. Most cases are decided by three judge panels, with virtually no possibility of en banc rehearings. When the issue is, for instance, whether an administrative agency's findings are supported by substantial evidence on the record considered as a whole, *see* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951), or whether a payment by an employer to the widow of an employee is to be treated as taxable compensation or as a tax-free gift, *see* Poyner v. Commissioner, 301 F.2d 287 (4th Cir. 1962), the appellate decision will probably depend less on the precedents of the circuit than on the attitudes of the individual judges; different panels are equally likely to reach different conclusions whether or not the judges are members of the same court. *See* Friendly, *Averting the Flood by Lessening the Flow,* 59 CORNELL L. REV. 634, 654 (1974); *cf.* Harris v. Estelle, 487 F.2d 1293, 1297 (5th Cir. 1974).

[87] *See* STUDY GROUP, *supra* note 72.

[88] *See* ADVISORY COUNCIL FOR APPELLATE JUSTICE, RECOMMENDATION FOR IMPROVING THE FEDERAL INTERMEDIATE APPELLATE SYSTEM (1974) [hereinafter cited

troublesome opportunities for forum shopping in litigation initiated by state prisoners. Such litigation constituted ten percent of the Ninth Circuit's total caseload in fiscal 1973.[89]

Under section 2241(d),[90] added to the habeas corpus statute in 1966, a California state prisoner has the option of filing an application for habeas corpus either in the district where he is confined or in the district where he was convicted and sentenced.[91] The district court chosen by the prisoner then has the discretion to transfer the application to the other of those two districts for hearing and determination. Obviously, section 2241(d) permits forum shopping by prisoners today. The question is whether forum shopping would be more widespread if the prisoner could shop not only between districts but also between circuits, and if so, whether the statute should be amended to restrict either the prisoner's options or the district court's discretion.[92]

As long as issues of criminal law, criminal procedure, prison discipline, and the scope of collateral attack remain unresolved by the Supreme Court, the courts of appeals will be, as a practical matter, the courts of last resort on such questions, and will differ in their answers. It seems probable, then, that when two courts of appeals exercise jurisdiction within a single state, the two courts will differ on at least some issues relating to criminal law, with the result that at least some prisoners will find it to their advantage to bring their applications in one circuit rather than another. If the present statute is retained, therefore, forum shopping by state prisoners will probably increase. As with federal questions generally, the mag-

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as ADVISORY COUNCIL]; SPECIAL COMM. ON COORDINATION OF JUDICIAL IMPROVEMENTS, AMERICAN BAR ASS'N, REPORT (1974) [hereinafter cited as SPECIAL COMMITTEE]; *see also* Griswold Interview, *supra* note 82, at 1.

[89] *See* ANNUAL REPORT, *supra* note 7, Tables B-3 & B-7.

[90] 28 U.S.C. § 2241(d) (1970).

[91] The provision applies only to persons "in custody under the judgment and sentence of a state court of a state which contains two or more federal judicial districts . . . ." Until 1966, a state prisoner could bring an action for habeas corpus only in the district where he was imprisoned. Consequently, prisoner litigation was concentrated in the districts where state penitentiaries were located; moreover, it was often expensive and inconvenient to hold a full hearing on a collateral attack in a court far from the locus of the trial. The 1966 legislation was designed to remedy these problems. *See* S. REP. No. 1502, 89th Cong., 2d Sess. 2 (1966).

[92] There is, of course, another possibility: the prospect of extensive or uncontrolled forum shopping might be regarded as such a serious and intractable problem that it should preclude enactment of the Commission's plan. For reasons given in the text, this conclusion would be difficult to support.

nitude of the increase would depend, in part, on the extent to which the two courts were perceived as having different rules or attitudes.

Forum shopping appears especially inequitable in litigation involving conditions within the prison rather than collateral attacks on a conviction. A state prisoner confined in the Central District after being tried and sentenced in the Northern District[93] could bring a habeas action in either the Ninth or the Twelfth Circuit to seek reforms in prison conditions, while another inmate of the same prison who had been sentenced in the Southern District[94] would not have that option.[95] Moreover, the prisoners could bring separate actions for redress of the same grievance, one in the Northern District and the other in the Central District, with all the possibilities of inconsistent decisions or orders inherent in such duplicative litigation.

The transfer provision of section 2241(d) provides an easy way to avoid conflicts and frustrate attempts at forum shopping. In the situation described, for instance, the district court in the sentencing district would probably exercise its discretion to transfer the action to the district where the prison was located. By the same token, the transfer provision could be used to assure that collateral attacks on state convictions are litigated in the district—and therefore the circuit—where the prisoner was sentenced.[96] The provision is discretionary, however, and if the Commission's realignment plan is enacted,

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[93] Or Eastern District.

[94] Or Central District.

[95] *See* 28 U.S.C. § 2241(d) (1970). The inequity is mitigated by the fact that habeas actions challenging prison conditions may be brought on behalf of a class of prisoners. *See, e.g.,* Mead v. Parker, 464 F.2d 1108 (9th. Cir. 1972).

[96] *See, e.g.,* United States *ex rel.* Hammen v. Mazurkiewicz, 303 F. Supp. 629 (E.D. Pa. 1969); Laue v. Nelson, 279 F. Supp. 265 (N.D. Calif. 1968). In the latter case the court declared:

> The legislative history of [§ 2241(d)] makes clear that a district court should transfer a petition to the district in which petitioner was convicted and sentenced if the transferring court is of the view that an evidentiary hearing will be necessary before final determination can be had. . . . The purpose of this procedure is to "permit the hearing to be held by the district court for the place of conviction, the one best able to administer full justice."

Id. at 266 (quoting 2 UNITED STATES CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS 2968, 2974 (1966)). Authority for such transfers is also provided by the general transfer of venue statute, 28 U.S.C. 1404(a) (1970). *See* Braden v. 30th Judicial Circuit of Kentucky, 410 U.S. 484, 499 n.15 (1973); Wilkins v. Erickson, 484 F.2d 969 (8th Cir. 1973).

it may be desirable to amend section 2241(d) to permit the filing of habeas applications by state prisoners in only one district. Applications challenging the proceedings resulting in the conviction and sentence would be cognizable only in the district where the prisoner was convicted and sentenced; applications challenging the conditions of confinement would be cognizable only in the district where the prison is located. Such an amendment would do no more than apply to state prisoners the limitations that now govern litigation by prisoners in federal custody.[97] Congress has already expressed its judgment that the proper forum for collateral attack on a federal conviction is the sentencing district,[98] while it is generally thought that federal prisoners challenging prison practices must bring their habeas actions in the district of confinement.[99] The proposed venue restriction is thus consistent with the views of Congress and the courts on the proper administration of the habeas remedy for federal prisoners.[100]

D. *Special Problems of Litigation Involving the Validity of State Statutes and Practices*

Judges and lawyers dubious about the desirability of allocating the judicial districts of California between circuits have expressed particular concern over the consequences for litigation involving the validity of state statutes and other govern-

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[97] The suggested amendment would also eliminate the possibility that a district court, out of lack of sympathy for the rule enunciated in its own circuit, might deliberately transfer a prisoner's application to a district in the circuit with a rule of law less favorable (or more favorable) to the prisoner's contentions.

[98] 28 U.S.C. § 2255 (1970); *see* United States v. Hayman, 342 U.S. 205, 212-19 (1952); United States *ex rel.* Meadows v. New York, 426 F.2d 1176, 1181-82 (2d Cir. 1970).

[99] *See, e.g.*, Mead v. Parker, 464 F.2d 1108 (9th Cir. 1972); Ledesma v. United States, 445 F.2d 1323 (5th Cir. 1971).

[100] The discussion of habeas corpus in this section is obviously not exhaustive. Other matters which may deserve exploration include the relation between habeas corpus and actions under the Civil Rights Act, 42 U.S.C. § 1983 (1970), *see* Preiser v. Rodriguez, 411 U.S. 475 (1973); the identity of the officials who may or must be named as respondents, *see Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1166-69 (1970); and possible opportunities for officials of the state prison system to frustrate prisoners' rights by moving prisoners from institutions in one circuit to institutions in the other, *cf.* Gomes v. Travisono, 490 F.2d 1290 (1st Cir. 1973), *cert. denied*, 94 S. Ct. 3202 (1974) (rights of prisoners prior to transfer to prison in another state). It would be wrong, or at least premature, to minimize the possible difficulties; at the same time, one should note that new methods of handling prisoner complaints, now being proposed in several quarters, may moot many of them. *See, e.g.*, STUDY GROUP, *supra* note 72, at 587-88; Haynsworth, *A New Court to Improve the Administration of Justice*, 59 A.B.A.J. 841 (1973).

mental actions.[101] Would it not be possible, they ask, for a statute to be held valid in one circuit, but invalid in the other? Even worse, might not the courts issue conflicting judgments—orders such that the defendant "cannot help but disobey"[102] one of them—to a state official or administrative agency? Conflicts of this kind would justly weigh heavily against whatever benefits might accrue from the division of California between circuits. Analysis suggests, however, that the problems are by no means as intractable as some observers have assumed.

1. Conflicting Orders Directed to a State Official or Agency

A variety of mechanisms, described in detail in the concluding part of this Article,[103] are already available to channel lawsuits raising the same or related issues into a single court. Either in their present form or with modifications, these mechanisms will often permit courts to avoid duplicative litigation and thus even the possibility of inconsistent judgments. Suppose, however, that two or more lawsuits are permitted to proceed independently, either concurrently or consecutively, in district courts in the two circuits. Often they will reach the same outcome; indeed, that is likely to be the rule rather than the exception. In particular, the same outcome will result when the relevant precedents all point in one direction; in more difficult cases, when the second court finds the reasoning of the first court to be persuasive; and in doubtful cases, when the second court defers to the judgment of the first in order to avoid a conflict. Finally, even if two actions do result in inconsistent judgments about the validity of an agency practice, it does not necessarily follow that the agency must violate one order to obey the other. On the contrary, this is an extremely improbable outcome, as the following analysis will show.

Suppose, for example, that in separate lawsuits in the two circuits, two state parolees seek to compel the state parole board to hold hearings before revoking their parole. The court of appeals in the Ninth Circuit finds for the plaintiff,

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[101] *See, e.g., Commission Hearings, supra* note 23, San Francisco, Cal., Aug. 30, 1973, at 20-21 (testimony of Judge Schnacke); *id.* 41-42 (testimony of Judge Duniway); BAR ASSOCIATION OF SAN FRANCISCO, DISCUSSION RE THE COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM 31-33 (1973). It should be noted, however, that several witnesses found considerably less cause for alarm. *See, e.g., Commission Hearings* 105-07 (testimony of Professor Mishkin); notes 173, 176 *infra*.

[102] *See* note 18 *supra* & accompanying text.

[103] *See* text accompanying notes 209-81 & 303-76 *infra*.

and orders the parole board to hold the hearings. In the Twelfth Circuit the court upholds the board's refusal to do so.[104] The parole board may choose, as a matter of policy or administrative convenience, to hold hearings for parolees everywhere in the circuit.[105] Or the agency might hold hearings for parolees in the Ninth Circuit but not for those in the Twelfth.[106] In either event, the incongruity may be regarded as one which the legal system can, and in other contexts does, tolerate. As Hazard and Moskovitz put it, referring to the example of multiple suits by passengers against a railroad following a trainwreck, "[t]he legal sovereign can . . . swallow the incongruities of reaching contradictory decisions on identical law and similar facts."[107]

Inconsistent decisions involving many other state laws or regulations would fall within the same class. For instance, one court might uphold a one year residency requirement for in-state tuition benefits at the state university; the second court might strike down any residency requirement in excess of six months. The university clearly could establish a uniform six-month requirement, thus complying with the second ruling without violating the first.[108] Or suppose that one court orders the state welfare agency to permit its clients to be accompanied by counsel at hearings to consider a reduction in benefits, while the other court goes further and holds that counsel must

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[104] A conflict among the circuits on this issue was resolved by the Supreme Court in Morrissey v. Brewer, 408 U.S. 471 (1972).

[105] To be sure, in this as in many comparable situations, compliance throughout the state with the ruling which imposes the more stringent restriction would probably cost more than compliance only within the boundaries of the circuit making the ruling, but it would be no more costly than being forced to abide by the ruling of a circuit embracing the entire state. If the suit resulting in the more stringent restriction is brought as a class action on behalf of all parolees throughout the state, *see* note 114 *infra* & accompanying text, or if an injunction with statewide effect is granted, the effect will be exactly the same as if the order were affirmed by the Ninth Circuit today.

[106] It might be argued that if the parole board grants revocation hearings to parolees in the Ninth Circuit, but not to those in the Twelfth, the parolees in the Twelfth are denied equal protection. If that were so, however, the same argument could be made by a taxpayer in the Second Circuit who is denied a deduction which the Internal Revenue Service allows to taxpayers in the Seventh under a court of appeals decision applicable to that circuit. While such inconsistencies are unfortunate, they do not rise to the level of a denial of equal protection or, vis-à-vis the federal government, of due process.

[107] Hazard & Moskovitz, *supra* note 18, at 753.

[108] *See generally* Vlandis v. Kline, 412 U.S. 441 (1973). Compare the majority and dissenting opinions in Marston v. Lewis, 410 U.S. 679 (1973) (constitutionality of 50 day residency requirement for voting).

be provided for indigent clients.[109] Again, the welfare agency could obey both orders without difficulty. Or the court in one circuit might hold that the state in computing AFDC benefits may not automatically attribute the earnings of a resident minor to his or her parents, but must make an investigation in each case to determine how much the minor is contributing to the family's support.[110] The state could comply with that order without coming into conflict with a decision of the other circuit upholding the automatic attribution rule.

The point of these examples is that in a variety of common situations, federal court orders directed against a state agency may be inconsistent without being mutually exclusive. That will be true when one court requires a particular change in procedures and the other court finds the status quo permissible; it will be true also if the two orders are cumulative—that is, if one goes further than the other in mandating reform. Even decisions requiring a wide range of reforms in institutions such as prisons and mental hospitals are not likely to put the state administrator in a position of having to disobey one order or the other. Indeed, most federal court orders containing detailed requirements for changes in the operation and management of prisons or mental hospitals are designed to correct conditions in a particular institution.[111] In the few cases involving the management of the entire state prison or mental health system, it is very unlikely that one court would order the administrator not to engage in practices which the other court had found mandated by the Constitution.[112]

To be sure, in some of the situations just described, the inconsistent orders would put an administrator to a difficult choice. Consider, for example, the litigation over residency

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[109] *See* Goldberg v. Kelly, 397 U.S. 254, 257 n.3 (1970).

[110] *See* Reyna v. Vowell, 470 F.2d 494 (5th Cir. 1972).

[111] *See, e.g.*, Wolff v. McDonnell, 42 U.S.L.W. 5190, 5191 n.1 (U.S. June 26, 1974); Hamilton v. Landrieu, 351 F. Supp. 549 (E.D. La. 1972) (Orleans Parish Prison); Gates v. Collier, 349 F. Supp. 881, 898-904 (N.D. Miss. 1972) (state penitentiary); *but cf.* Procunier v. Martinez, 94 S. Ct. 1800 (1974) (state prison system); Sands v. Wainwright, 491 F.2d 417 (5th Cir. 1973) (same); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971) (same).

[112] Other pairs of orders may or may not put an agency in an impossible position, depending on the circumstances. For instance, an order by one court to spend money to upgrade a mental institution might draw upon funds which the state agency would otherwise spend to comply with the order of another court to provide schooling for retarded children. This situation, however, could arise whether the agency is subject to the jurisdiction of one circuit or two. *See, e.g.*, Wyatt v. Stickney,

requirements for in-state tuition benefits. If the chancellor complies with the more restrictive six month ruling only to the extent that he must, the university may incur administrative costs arising out of the application of different standards at different campuses (and perhaps to different students at a single campus); the differential treatment would also be unfair to the individuals involved. On the other hand, if the chancellor adopts the six month requirement throughout the state, differential treatment is avoided, but at a price: the state has been forced to abide by the result least favorable to its contentions, and the university needlessly forfeits some revenues from out-of-state tuition.[113]

This kind of dilemma, however, is one with which the law is familiar and for which preventive mechanisms were long ago developed. Among these is the class action. Even today, lawsuits challenging residency requirements, welfare agency practices, and many other state regulations are typically brought as class actions.[114] Unless particular strategic considerations dictate otherwise, the plaintiff will sue on behalf of himself and all others affected by the regulation, whether or not they are within the district (or the circuit) in which the litigation is brought. A successful suit will redound to the benefit of members of the class in both circuits,[115] and the agency will be forced to comply to exactly the same extent as it would if the Ninth Circuit were to rule on the issue today. Nor is this result an anomalous one; on the contrary, the judgment serves precisely the function envisaged for the class suit in the early cases.[116] For that matter, even if the action is not brought on

344 F. Supp. 387, 392 (M.D. Ala. 1972); Wyatt v. Stickney, 344 F. Supp. 373, 377 (M.D. Ala. 1972) (district court orders upgrading of three state institutions for mentally ill and retarded, warning that failure to comply with decrees could not be justified by lack of operating funds); Comment, Wyatt v. Stickney *and the Right of Civilly Committed Mental Patients to Adequate Treatment,* 86 HARV. L. REV. 1282, 1301-04 (1973).

[113] Also, in the interim between the decisions of the two courts, the agency may experience uncertainty about whether it will be required to follow the first court's mandate throughout the state. This dilemma, however, is one which the agency faces today between the time a district court renders a decision and the time the court of appeals affirms or reverses it.

[114] *See, e.g.,* Jefferson v. Hackney, 406 U.S. 535 (1972); Dunn v. Blumstein, 405 U.S. 330 (1972); Dandridge v. Williams, 397 U.S. 471 (1970).

[115] *See* Galvan v. Levine, 490 F.2d 1255, 1261 (2d Cir. 1973); Bermudez v. United States Dep't of Agric., 490 F.2d 718, 724-25 (D.C. Cir. 1973); Advertising Specialty Nat'l Ass'n v. FTC, 238 F.2d 108, 120 (1st Cir. 1956); *but cf.* note 196 *infra.*

[116] *See* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 367 (1921) ("If . . .

behalf of a class, the judgment will be binding on the defendant administrator throughout the state as long as it includes, as it typically does, injunctive or declaratory relief against the enforcement of the statute or regulation in question.[117]

One can, of course, hypothesize situations in which the two courts of appeals might affirm judgments containing conflicting mandates directed against a state officer or agency. Suppose, for instance, that a black applicant for a faculty position in the state university system brings suit in a district court in the Ninth Circuit alleging that the university has not fulfilled its obligations under the affirmative action program of the Department of Health, Education and Welfare.[118] The district court agrees, and, in accordance with circuit precedents, orders the Board of Regents to draw up a program which has the effect of giving a preference in hiring to black applicants. The Board of Regents complies. A suit is then filed in a district court in the Twelfth Circuit by a white applicant who claims that the program discriminates against him on account of race.[119] The precedents in the Twelfth Circuit appear to support his claim.

This hypothetical example probably seems rather farfetched. The reason, as suggested earlier, is that the orders which federal courts commonly issue against state officers do not easily lend themselves to inconsistencies such that it is impossible for the officer to obey both. Indeed, there are really

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conflicting judgments are to be avoided all of the class must be concluded by the decree."); Z. CHAFEE, SOME PROBLEMS OF EQUITY 229-30 (1950); *cf.* Williams v. Richardson, 481 F.2d 358, 361 (8th Cir. 1973); Mead v. Parker, 464 F.2d 1108, 1112 (9th Cir. 1972).

[117] It is clear that the binding effect of an injunction need not be, and ordinarily is not, limited to the territory of the issuing court. *See, e.g.*, Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448, 451-52 (1932); Louisville & N.R.R. Co. v. Western Union Tel. Co., 250 U.S. 363, 368 (1919). Complications may arise if the day-to-day administration of a state regulation is entrusted to a local government unit. *See* text accompanying notes 153-56 & note 196 *infra*. Under current law, of course, actions seeking injunctive relief against the enforcement of a state statute must be heard by a three judge district court, with direct appeal to the Supreme Court. *See* notes 141-50 *infra* & accompanying text.

What probably bothers people most in this regard is not simply the possibility of conflicting orders, but rather the opportunity for public issue groups to litigate in one circuit and, if they lose, to relitigate the issue in the other circuit in the name of plaintiffs not bound by the first decision because of inadequate notice or the definition of the class. *See* notes 137-40, 158-64 *infra* & accompanying text.

[118] *See* 45 C.F.R. § 80.5(j) (1973).

[119] *Cf.* Anderson v. San Francisco Unified School Dist., 357 F. Supp. 248 (N.D. Cal. 1972) (injunction against an "affirmative action" employment program);

only two kinds of situations in which an agency might possibly be caught between the demands of mutually incompatible court orders. The first is the situation in which the two courts order that preferences be given to different groups in the allocation of a limited resource—for example, the state fisc or jobs with a particular agency or places in a law school class. The hypothetical case represents one circumstance in which this might happen: one court's requirement of "benign" racial discrimination gives priority to one group—members of a particular minority—while a second court's rule against discrimination of any kind gives priority to another group—those who meet whatever non-racial criteria the state agency establishes. Second, there are situations in which two constitutional rights come into conflict—a fair trial and freedom of the press, property ownership and first amendment rights, free exercise of religion and nonestablishment. Clashes of this kind probably would not arise frequently in the context of the activities of state administrative agencies,[120] but the possibility does exist; because the consequences would be grave, it is necessary to consider how conflict might be avoided.

A crucial element is that of timing. Suppose that the plaintiff in the second action in the hypothetical example (the white applicant) filed his complaint while the trial of the first action was still running its course.[121] It could then be argued that he is a person who "claims an interest relating to the subject of

DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169, *vacated as moot*, 94 S. Ct. 1704 (1974) (injunction against dual admission policy reversed).

[120] One can also conjure up situations in which problems of inconsistent judgments might arise even though the same agency is not initially a party to both suits. Suppose, for example, that a district court in the Twelfth Circuit orders the Los Angeles school district to buy buses in order to promote integration, and the order is affirmed by the court of appeals. The state commissioner of education then issues a ruling that school districts can no longer spend money for buses. The regulation is attacked in the Ninth Circuit on federal constitutional grounds, but the Ninth Circuit upholds it. The local officials under court order to buy buses are subject to dismissal if they violate the contrary orders of the commissioner of education. *Cf.* Board of Educ. v. Allen, 392 U.S. 236, 241 n.5 (1968). This conflict could be avoided by making the state commissioner of education a party to the first lawsuit. The courts have held that where the participation of a state official might be required to achieve the relief to which the plaintiffs would be entitled, the state officials should be joined as defendants in a suit against local officials. *See, e.g.*, Bradley v. School Bd., 51 F.R.D. 139 (E.D. Va. 1970). The state officials would thus be bound by the judgment.

[121] This might happen if the first court had initially issued a preliminary injunction and was hearing arguments on the question whether to make the injunction permanent.

the [first] action and is so situated that the disposition of the action in his absence may . . . leave [the Board of Regents] subject to a substantial risk of incurring . . . inconsistent obligations by reason of his claimed interest,"[122] so that under rule nineteen the court in the first action would be required, upon motion by the defendant, to join the second-action plaintiff.[123] Obviously, it would be necessary to permit the newly joined party (the white applicant) to relitigate issues that might have already been litigated between the other parties,[124] but this would usually be preferable to risking inconsistent judgments.

Rule nineteen is clearly no panacea. In public law litigation, unlike most litigation arising out of private disputes, there will often be no way to identify all of the potential litigants at a time when it might be possible to bring them into a comprehensive adjudication. Even when the potential litigants can be identified, it may not be feasible to give notice to all of them, and without adequate notice a second court would naturally be reluctant to hold a second plaintiff bound by the first judgment.[125]

If the second action is not filed until after the first has gone to judgment and appeal, joinder is impossible. In that event, however, the defendant may be able to rely on the outstanding judgment as a defense to the second action. This defense will clearly be available in some kinds of cases, such as actions seeking damages for the violation of a civil right under section 1983.[126] It is an open question whether a state agency could defeat a claim for injunctive or declaratory relief by pointing to an outstanding order of another federal court prohibiting the action sought by the plaintiff. Research has uncovered no case in which the issue has arisen—not surprisingly, because Congress has required that controversies involving a request for an injunction against the enforcement

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[122] FED. R. CIV. P. 19(a).

[123] This assumes that the second plaintiff would be subject to the jurisdiction of the district court in the Ninth Circuit.

[124] *Cf.* Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 136 (1967) (ordering case reopened to permit participation by intervenors).

[125] *See* Gregory v. Tarr, 436 F.2d 513, 514 n.2 (6th Cir.), *cert. denied,* 403 U.S. 922 (1971); Pasquier v. Tarr, 318 F. Supp. 1350, 1352 (E.D. La. 1970), *aff'd per curiam,* 444 F.2d 116 (5th Cir. 1971); *see generally* Note, *Collateral Attack on the Binding Effect of Class Action Judgments,* 87 HARV. L. REV. 589 (1974).

[126] 42 U.S.C. § 1983 (1970). *See* Lockhart v. Hoenstine, 411 F.2d 455, 460 (3d Cir.), *cert. denied,* 396 U.S. 941 (1969).

of a state statute on federal constitutional grounds be adjudicated by a three judge district court, with direct appeal to the Supreme Court.[127] In addition, as suggested earlier, few state regulations or programs embrace action that has the potential for being either required or prohibited, depending on a court's reading of the federal Constitution.

In the rare instances in which parallel lawsuits threaten to result in orders that cannot be obeyed simultaneously, it will be necessary, in order to avoid a "subversion" of the legal order,[128] to provide means of assuring first that the conflict can be authoritatively resolved, and second that one or both orders can be stayed during the interim. If the first is made available, the second will probably follow; for instance, if resolution of the conflict were made the responsibility of the Supreme Court, that court would surely grant any appropriate stays. Conflict resolution devices for the state divided between circuits will be discussed later in this Article.[129]

2. Conflicting Holdings on the Validity of a State Law or Practice

To say that inconsistent judgments affirmed by the Ninth and Twelfth Circuits will not, in any but the rarest cases, place a state agency in the position of having to disobey one order or the other is not, of course, to minimize the undesirability of less acute inter-circuit conflicts.[130] The point, rather, is that such cases can be assimilated with those in which the two circuits promulgate different rules of law with respect to the federal validity of a state statute or practice. In either situation, the evils which have aroused concern are forum shopping and differential treatment.

The reasons why differential treatment is regarded as an evil need hardly be expounded at length. As Judge Friendly put it, expressing his concern over the proposal to allocate California's judicial districts between two circuits, "It seems wrong that an Angeleno should have greater (or less) federal constitutional rights if he is imprisoned in San Quentin than

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[127] 28 U.S.C. § 2281 (1970); *see* text accompanying notes 141-50 *infra*.

[128] *See* text accompanying note 18 *supra*.

[129] *See* text accompanying notes 208-411 *infra*.

[130] *See* text following note 112 *supra*.

nearer home."[131] Not all instances of differential treatment, however, will be equally troubling. Different types of activities arouse different levels of concern. Variant constitutional rules for the regulation of business enterprises, for example, may be thought more tolerable than differences in the protection accorded freedom of speech or freedom from racial discrimination. The nature of the deprivation involved is important as well. It is one thing if different constitutional rules mean that a San Diego man goes to jail for conduct which a federal court in San Francisco holds to be constitutionally protected. It is quite another matter, and probably less shocking to our sense of fairness, if the two courts interpret the Social Security Act differently and a Los Angeles welfare client gets a slightly larger family grant than a similarly situated client in Sacramento. Ideally, no doubt, the federal Constitution and laws would mean the same thing in San Diego and San Francisco (and San Antonio, for that matter); these comments are meant to suggest only that our willingness to stop short of the ideal depends not only on the countervailing considerations, but also on the context in which the ideal is invoked. The judgment involves a balancing process not dissimilar to the "spectrum of standards" which Justice White and Justice Marshall have discerned in the Supreme Court's recent equal protection cases.[132]

The specter of forum shopping is raised because so much of the litigation challenging the federal validity of state statutes and rules is initiated and guided by individuals or organizations seeking more to vindicate a principle of wide application than to secure redress for the named plaintiff.[133] If, for example, one circuit were to exhibit a greater readiness than

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[131] Letter from Judge Henry J. Friendly to A. Leo Levin, Executive Director of the Commission, Nov. 20, 1973.

[132] Vlandis v. Kline, 412 U.S. 441, 458-59 (1973) (White, J., concurring); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting).

[133] *See, e.g.*, N.Y. Times, Aug. 30, 1969, at 11, col. 2:

> Poverty lawyers at the Columbia University Center on Social Welfare Policy and Law in 1966 began planning a test case to get the man in the house eligibility rule for public assistance declared illegal. This rule held that fatherless families would lose public assistance if a man resided in the household.
>
> Edward V. Sparer, head of the center, planned the case. Howard Thorkelson went to Selma, Ala., and found a client, Mrs. Sylvester Smith.

See generally Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's*

the other to intervene in the administration of prison systems, groups seeking to have prison practices struck down on a statewide basis would naturally tend to initiate their litigation in the more favorable forum. Similarly, if one circuit gave a more expansive reading than the other to Supreme Court decisions such as *Sniadach*[134] and *Fuentes*,[135] groups seeking to challenge various attachment statutes would tend to bring their lawsuits in district courts in that circuit.[136] Even if he were not seeking a decision of statewide application, a public interest litigant might be interested in shopping for a more receptive forum; he might hope that the ruling would prompt compliance on a statewide basis, provide persuasive authority in the other circuit, or at least set a pattern for other litigants.[137]

A related source of concern is the prospect that a public issue group such as the American Civil Liberties Union or the Sierra Club, having lost in one circuit on an issue of the validity of a state law, would be able to relitigate the issue in the other circuit. If the same plaintiff were involved, the first judgment would, of course, bar a second action; but this rule would not apply to someone who was not a party to the earlier suit.[138] The organization would thus have two bites at the apple; from

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Thoughts on Section 1983, Comity and the Federal Caseload, 1973 LAW & SOC. ORDER 557, 561; Krislov, *The OEO Lawyers Fail to Constitutionalize a Right to Welfare,* 58 MINN. L. REV. 211, 219-29 (1973).

[134] Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

[135] Fuentes v. Shevin, 407 U.S. 67 (1972).

[136] The scope for differing views has probably been expanded by the Supreme Court's recent decision in Mitchell v. W.T. Grant Co., 94 S. Ct. 1895 (1974). By a vote of five to four, the Court upheld Louisiana's sequestration statute. Justice White, writing for the majority, purported to distinguish the case from *Fuentes. Id.* at 1904-05. The dissenters insisted that *Fuentes* was controlling and required invalidation of the Louisiana law. *Id.* at 1912-13, 1914. Justice Powell, while concurring in the majority opinion, stated that the Court was now "withdraw[ing] significantly from the full reach of [the] principle [enunciated in *Fuentes*], and to this extent . . . the Fuentes opinion is overruled." *Id.* at 1908.

[137] A statement addressed to the Commission on behalf of the State Bar of California emphasized this point:

> It is difficult to understand why an appellate structure should be created which would allow larger organizations wishing the resolution of certain legal questions to pick and choose where the controversy will be resolved. Certainly some of this exists today, but it is not desireable [sic], and should not be increased.

STATE BAR OF CALIFORNIA, STATEMENT CONCERNING THE RESTRUCTURING OF THE NINTH JUDICIAL CIRCUIT (1973) (on file at the Commission).

[138] A nonparty might be bound by a judgment if he were found to have "controlled" the litigation. *See* 1B J. MOORE, FEDERAL PRACTICE ¶ 0.411 [6], at 1564-67 (2d ed. 1974).

the state's point of view, the successive actions might appear to be a form of harassment. The picture is even less attractive when it is recalled that a successful attack on a state statute in the first lawsuit may well be held binding throughout the state.[139] For a public issue group guiding but not controlling litigation, the motto would be "heads, we win; tails, you lose."[140]

Given the sharp differences of judicial opinion that frequently characterize litigation involving the federal validity of state laws, the fears just described can hardly be dismissed out of hand. In considering the weight to be given them in evaluating the proposal to bifurcate California, two kinds of inquiries are relevant. First are questions directed to placing the problem in perspective. How frequently are conflicts likely to arise? What is the practical effect of a conflict between courts with respect to the validity of state law? How seriously should such a consequence be regarded? What lessons may be drawn from experience with existing situations of overlapping jurisdiction? Second, what means are available to avoid or resolve conflicts between the Ninth and Twelfth Circuits on the validity of California laws? The latter point will be taken up at the end of this article; the issue of perspective will be addressed forthwith.

Preliminarily, it is necessary to note that, under current law, many actions challenging the validity of state laws—probably including the most controversial ones[141]—must be brought before a three judge district court, with direct appeal to the Supreme Court.[142] The court of appeals becomes involved in the process only when the chief judge selects the judges to serve on the three judge courts.[143] As long as this provision remains in effect, litigation falling within its purview would not be significantly affected if the judicial districts of California were allocated between two circuits. At worst—if three

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[139] *See* note 117 *supra* & accompanying text.

[140] *Cf.* Z. CHAFEE, *supra* note 116, at 227.

[141] *See, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 350 F. Supp. 655 (S.D.N.Y. 1972), *aff'd in part, rev'd in part,* 413 U.S. 756 (1973) (aid to parochial education); Rodriguez v. San Antonio Independent School Dist., 337 F. Supp. 280 (W.D. Tex., 1971), *rev'd,* 411 U.S. 1 (1973) (state school financing system); Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970); *aff'd in part, rev'd in part,* 410 U.S. 113 (1973) (abortion statutes).

[142] 28 U.S.C. §§ 1253, 2281 (1970).

[143] *Id.* § 2284(1) (1970) (at least one judge must be a circuit judge).

judge courts are convened in both circuits, and both cases proceed to judgment—there will be a period of uncertainty until one of the judgments is reviewed by the Supreme Court. More plausibly, one of the courts will stay proceedings until the Supreme Court's decision in the first case. It would even be possible for the two proceedings to be consolidated in a single district, especially if the parties are agreeable to such a move.[144]

In June 1973, the Senate passed Senate Bill 271 to eliminate the requirement of a three judge court in constitutional litigation, except for reapportionment cases.[145] The bill has received wide support and, until recently, little opposition; it is thus quite possible that suits which must now be adjudicated by a three judge court will soon be brought before a single district judge and appealed to the court of appeals like any other case. Even today, however, when a plaintiff seeks to enjoin the operation of a state statute on the ground that it has been pre-empted by congressional action or that it is inconsistent with a federal law, no three judge court is convened.[146] Nor need a three judge court be convened when the rule challenged is of less than statewide application, even if it is a municipal ordinance which may be in force in every major city in the state.[147] Finally, it has been held that a three judge court is not required when the plaintiff seeks only a declaratory judgment and not injunctive relief.[148] Whether or not S. 271 is enacted, therefore, the courts of appeals will be adjudicating the validity of governmental practices in cases that may have a statewide impact. In light of this fact, and the likelihood that S. 271 may soon become law, it will be assumed for the sake of argument that all federal court litigation involving the validity of state laws, including those cases now

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[144] *Cf.* Valenti v. Rockefeller, 292 F. Supp. 851, 854 (W.D.N.Y., S.D.N.Y., 1968), *aff'd mem.*, 393 U.S. 405, 406 (1969) (two identical three judge courts). Inter-circuit consolidation would require the assignment of one district judge outside his circuit, as permitted by 28 U.S.C. § 292(d) (1970), upon designation by the Chief Justice. On its face, § 2284(1) does not require that the circuit judge on a three judge court be from any particular circuit.

[145] S. 271, 93d Cong., 1st Sess. (1973). *See* 119 CONG. REC. S 11114 (daily ed. June 14, 1973).

[146] Swift & Co. v. Wickham, 382 U.S. 111 (1965).

[147] *See* Moody v. Flowers, 387 U.S. 97, 102 (1967).

[148] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 154-55 (1963); AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 322-23 (1969) [hereinafter cited as ALI STUDY].

governed by the three judge court requirement, will be decided in the first instance by the regular district courts and on appeal by the courts of appeals. To the extent[149] and for the duration[150] that three judge courts are retained, the problems arising out of bifurcation are mitigated.

Apart from the three judge court requirement, conflicts will often be avoided because the judgment of the court which first adjudicates the federal validity of a state law will have a binding effect in both circuits. This outcome is most easily achieved when the court in the first action holds the statute invalid. Take first the most direct kind of challenge: the plaintiff brings suit in one of the circuits seeking an injunction against the enforcement of the statute and naming as defendant the state official charged with enforcing it. If the action is successful, the judgment will ordinarily preclude the defendant from enforcing the law anywhere within the state, and there would be no need for anyone to pursue a separate action in the other circuit. This result follows most clearly when the plaintiff has sued and won on behalf of a class,[151] but in the usual case it will be accomplished in any event as a consequence of the binding effect attaching to any injunction issued against a defendant over whom the court has in personam jurisdiction.[152]

Complications may arise when a state regulation is administered on a day-to-day basis by local government officials or

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[149] Senate Bill 271 would retain the requirement of a three judge court for cases involving the reapportionment of congressional districts of any statewide legislative body. To this extent, of course, it would make no change in present law, 28 U.S.C. § 2281 (1970). For reasons given in the preceding paragraph of the text, this means that reapportionment litigation should create no new problems in California, even if the Commission's realignment plan is adopted without special conflict resolution mechanisms. *See* text accompanying notes 141-44 *supra*.

[150] It may be that by the time the S. 271 goes into effect, Congress will have adopted conflict resolution mechanisms of general application. *See* note 88 *supra*.

[151] *See, e.g.*, Steward v. Butz, 491 F.2d 165, 166 (6th Cir. 1974); Bermudez v. United States Dep't of Agric., 490 F.2d 718, 724-25 (D.C. Cir. 1973); Advertising Specialty Nat'l Ass'n v. FTC, 238 F.2d 108, 120 (1st Cir. 1956); Theriault v. Carlson, 353 F. Supp. 1061, 1067 (N.D. Ga. 1973) *vacated and remanded on other grounds*, 495 F.2d 390 (5th Cir. 1974); Rosado v. Wyman, 322 F. Supp. 1173, 1191 (E.D.N.Y. 1970), *aff'd*, 402 U.S. 991 (1971).

[152] *See* Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448, 451-52 (1932); Theriault v. Carlson, 353 F. Supp. 1061, 1067 (N.D. Ga. 1973), *vacated and remanded on other grounds*, 495 F.2d 390 (5th Cir. 1974) ("[I]t is . . . well established that where the respondent is properly before the court, the district court decree is binding upon the respondent, not simply within the local district, but throughout the United States."). *Cf.* Bermudez v. Dep't of Agric., 490 F.2d 718, 724-25 (D.C. Cir. 1973).

agencies.[153] In such a situation, however, the first plaintiff could obtain statewide relief by bringing an action against the class of local officials who in fact enforce the state law claimed to be invalid. For instance, the courts have permitted actions against the class of "all county sheriffs . . . and of all wardens and jailers of the city and town jails of Alabama,"[154] and against the class of all Virginia state court judges empowered to commit persons pursuant to certain statutes dealing with the confinement of alcoholics.[155] Alternatively, where plaintiffs in the first suit have prevailed against a defendant state official who has power to control the relevant activities of the local agencies or administrators, individuals in the other circuit may be able to bring suit to require him to compel obedience to the first court's decree by the local agencies.[156] Even where the law is not enforced by governmental officials at all, but by private parties, it may be possible to obtain a judgment with statewide effect by bringing an action against an appropriate class of defendants.[157]

More difficult problems would be presented if, after a state statute was upheld in one of the circuits, the state sought to use the judgment to defeat an action by a different plaintiff in the other circuit. Under current law, there is probably only one circumstance in which this could be done:[158] if the first

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[153] *See* note 196 *infra.*

[154] Washington v. Lee, 263 F. Supp. 327, 329, 330 (M.D. Ala. 1966), *aff'd per curiam,* 390 U.S. 333 (1968).

[155] Rakes v. Coleman, 318 F. Supp. 181, 190 (E.D. Va. 1970). *See also id.* at 193 (suggesting that court may have duty, under FED. R. CIV. P. 19(a)(1) & 21, to join local prosecutors and perhaps police officials as defendants); *but cf.* Schneider v. Margossian, 349 F. Supp. 741, 746 (D. Mass. 1972); Wallace v. Brewer, 315 F. Supp. 431, 438 (M.D. Ala. 1970).

[156] *Compare* Anderson v. Ellington, 300 F. Supp. 789, 792 (M.D. Tenn. 1969) *with* Smith v. North Carolina State Bd. of Educ., 444 F.2d 6 (4th Cir. 1971). *See also* Schneider v. Margossian, 349 F. Supp. 741, 746 (D. Mass. 1972) (court declined to certify defendant class of all state court clerks authorized to issue trustee process writs under statute declared unconstitutional; state attorney general advised sheriffs not to serve writs dated after court's decision); Bradley v. School Bd., 51 F.R.D. 139, 142-43 (E.D. Va. 1970); note 120 *supra.*

[157] *See* Lynch v. Household Fin. Corp., 360 F. Supp. 720, 722 & n.3 (D. Conn. 1973); Research Corp., v. Pfister Associated Growers, Inc., 301 F. Supp. 497, 503 (N.D. Ill. 1969), *appeal dismissed sub nom.* Research Corp. v. Asgrow Seed Co., 425 F.2d 1059 (7th Cir. 1970). In *Lynch* the plaintiff represented a class of persons who had debts owing to them currently being garnished prior to judgment pursuant to a Connecticut statute. The defendant represented a class of persons who had garnished debts owing to the plaintiff class under that law. The court held that the class action was proper.

[158] In theory, there is a second possibility: the court might find that the plaintiff

action had been brought as a class action, and the second court found that the class representative in fact had adequately protected the interests of the class.[159] The Fifth Circuit has applied a stringent standard of de novo review on the latter issue, asking "whether the representative, through qualified counsel, vigorously and tenaciously protected the interests of the class."[160] Another approach to collateral review, however,

> would look to the performance of their obligations by both counsel and trial judge and, before a judgment is held not binding, would insist upon a showing that a defect in one went uncorrected by the other and that this defect affected the conduct of the litigation in a manner likely to have prejudiced the interests of the absent class members challenging the judgment.[161]

Unless the first court has committed an "abuse of discretion," the second court would accept the decisions of the first as to the adequacy of representation and the fairness of any settlement.[162] Under this standard, if the first action were brought by a public issue litigant on behalf of a statewide class, and pursued vigorously but unsuccessfully through trial and appeal,[163] a court in the other circuit might well hold that class members in that circuit were precluded from relitigating the issue.[164]

In situations other than those described, res judicata will probably not play a significant role in preventing duplicative litigation—for instance, when the federal validity of a state law is litigated initially in a habeas corpus action[165] or in a suit between private litigants.[166] Nor will res judicata doctrines

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in the second suit had "controlled" the prosecution of the earlier action. *See* note 138 *supra*. As a practical matter, such a situation is not likely to arise. *Cf. In re* Daly, 291 Minn. 488, 492, 189 N.W. 2d 176, 180 (1971).

[159] Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973); Research Corp. v. Edward J. Funk & Sons Co., 15 FED. RULES SERV. 2d. 580 (N.D. Ind. 1971).

[160] 474 F.2d at 75.

[161] Note, *supra* note 125, at 603-04.

[162] *Id.* 604.

[163] *Cf.* Gonzales v. Cassidy, 474 F.2d 67, 75 (5th Cir. 1973).

[164] *See* Frankel, *Some Preliminary Observations Concerning Civil Rule 23,* 43 F.R.D. 39, 45-47 (1967); Note, *Proposed Rule 23: Class Actions Reclassified,* 51 VA. L. REV. 629, 657-60 (1965).

[165] *See, e.g.,* Smith v. Goguen, 94 S. Ct. 1242 (1974).

[166] *See, e.g.,* Hernandez v. European Auto Collision, Inc., 487 F.2d 378 (2d Cir. 1973).

apply in most instances in which the first court upholds the statute, whatever the context. Here, however, other mitigating doctrines may come into play.

Review of state governmental actions by federal courts is a delicate matter whether state procedures are tested in two circuits or in one.[167] Because this is such a sensitive area, the power of the federal courts to intervene has been hedged about with restrictions, including the requirement of exhaustion of state remedies,[168] the various abstention doctrines,[169] and the Anti-Injunction Acts.[170] These statutes and doctrines will prevent many conflicts that might otherwise occur in a state divided between two circuits.[171] That is, there would be no conflict because neither court would decide the merits of the challenge to the state law; instead, both would leave the matter to the state courts.

Of course, this does not dispose of the problem in its full dimension, nor does it purport to do so. One need only read at random through a volume of Federal Reporter or Federal Supplement to see that notwithstanding the restrictions imposed by statutes and judicial doctrines, litigation attacking the validity of state laws continues to be brought and adjudicated in the federal courts. It seems probable, however, that the judges of each of the new courts would exhibit "an appropriate sensitivity to the consequences of conflicting decisions and a willingness to invoke the principles of comity and deference to a recent decision by a court of equal stature."[172] Both circuits are likely to draw a majority of their judges from the California bar, and those judges, at least, would certainly be conscious of whatever mischief might result from conflicting decisions on a particular issue.[173] In addition, as already noted, both courts would inherit the law of the

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[167] *See* COMMISSION REPORT, *supra* note 3, at 240.

[168] *See* H. HART & H. WECHSLER, *supra* note 27, at 980-85.

[169] *See id.* 1043-44 & n.1. The abstention doctrines, once thought to be in danger of destruction, *see* Note, *Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era,* 80 HARV. L. REV. 604 (1967), are now "alive and well." *Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary,* 92d Cong., 2d Sess. 751-52 (1972) (statement of Judge Friendly).

[170] *See* H. HART & H. WECHSLER *supra* note 27, at 962-66.

[171] COMMISSION REPORT, *supra* note 3 at 240.

[172] *Id.*

[173] As Judge Browning of the Ninth Circuit observed at the Commission's hearings, "responsible Judges are very reluctant to create inter-Circuit conflicts, certainly an inter-Circuit conflict [with respect] to the effect [on] single state institutions. It is

present Ninth Circuit and, in the immediate future, its judges; moreover, in many cases the precedents will point in a single direction. These circumstances suggest that conflicts will not lightly be created.[174] In some instances, to be sure, the judges of the second court of appeals will conclude that they cannot in good conscience follow the decision of their sister court upholding or striking down a state law. When this occurs, the conflict is likely to be the result of "so fundamental a clash of values"[175] that the Supreme Court will probably take the issue for review.[176] Admittedly, as Dean Griswold and others have pointed out, a conflict among the circuits no longer results automatically in a grant of certiorari by the Supreme Court;[177] but the cases cited in support of this proposition involve, almost without exception, the construction of federal tax laws and other issues of statutory interpretation.[178] No claim is made that the Supreme Court, by failing to resolve conflicts, is leaving the states in doubt as to the constitutionality of their statutes.[179]

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almost inconceivable to me." *Commission Hearings, supra* note 21, San Francisco, Cal., Aug. 30, 1973, at 72 (testimony of Judge Browning).

[174] Judge Ben. C. Duniway of the Ninth Circuit Court of Appeals expressed the point even more strongly:

> Challenges to the actions of state agencies or to the validity of state laws now arise most often in three-judge district courts . . . . There are four districts in California. Thus it has long been possible for similar actions to be filed in two different districts and to have three-judge courts in those districts come out with conflicting decisions. So far as I know, since 1961, when I became a member of this court, this has never happened. . . .
>
> If, on the other hand, three-judge courts were abolished so that decisions would be made by a single district judge, and would be appealable to the appropriate court of appeals, I think the possibility of conflict is still imaginary rather than real. The natural tendency of one circuit or one district court to follow rather than to disagree with the decision of another circuit or district court should eliminate, and I think would eliminate, the possibility of conflict . . . .

Letter from Judge Ben. C. Duniway to Attorney General William B. Saxbe, Feb. 8, 1974, at 2, on file at the Commission; *but see* text accompanying notes 182-86 *infra*.

[175] COMMISSION REPORT, *supra* note 3, at 240.

[176] The judges of the second court to consider an issue "are not going to create a conflict unless it is a matter of great moment. If it is a matter of great moment, then it is the kind of conflict the United States Supreme Court ought to be considering. . . ." *Commission Hearings, supra* note 23, San Francisco, Cal., Aug. 30, 1973, at 72 (testimony of Judge Browning).

[177] *Commission Hearings, supra* note 23, Washington, D.C., Aug. 2, 1973, at 67 (testimony of Dean Griswold).

[178] *See* Griswold, *supra* note 24, at 630-31.

[179] P. CARRINGTON, FEDERAL APPELLATE CASELOADS AND JUDGESHIPS 8 (1974) ("It is generally agreed that . . . constitutional litigation in the federal courts . . . is now well supervised by the Supreme Court. . . ."). To some extent, of course,

Even apart from the possibility of resolution by the Supreme Court,[180] Congress might well conclude that, in this as in other contexts, occasional conflicts can be lived with. Consider, for example, the situation in California today. With the state divided into four federal judicial districts, courts in two of those districts may reach opposing conclusions on the constitutionality of a state law. Until the issue is taken to the court of appeals and finally resolved authoritatively for all of California, the consequences of conflict are felt in much the same way that they would be if two circuits were exercising jurisdiction within the state.[181] Nor are conflicts at the district court level necessarily of short duration. One example is the recent litigation involving challenges to sections 9503 and 9504 of the California Commercial Code, which permit self-help repossession by creditors, without formal legal proceedings. In February, 1972, the federal court for the Southern District of California held that the two provisions violated the due process clause of the fourteenth amendment.[182] "A few weeks later and a few hundred miles to the north,"[183] the federal court for the Northern District, explicitly refusing to follow the holding of the Southern District, ruled that repossession under the authority of the Commercial Code did not constitute state action and thus did not violate a constitutional right.[184] The federal validity of self-help repossession was not settled for the entire state until October 1973, more than

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this situation may be attributed to the fact that so much of the litigation involving the constitutionality of state statutes is heard by three judge courts, with direct appeal to the Supreme Court. Many other cases, however, come within only the Court's certiorari jurisdiction. Moreover, even as to cases within the Court's appeal jurisdiction, the Court may summarily affirm, leaving its view of the issues very much in doubt. *See* Gibson v. Berryhill, 411 U.S. 564, 576 (1973); STUDY GROUP, *supra* note 72, at 596.

[180] Other conflict-resolution mechanisms may also be available. *See* text accompanying notes 303-92 *infra*.

[181] There is an important difference between these two situations, of course. The court of appeals must hear appeals brought by a party to one of the district court actions; but the certiorari jurisdiction of the Supreme Court is discretionary. This means that if a conflict arises between district courts, the losing party in the second suit can assure court of appeals review; if the conflict is between two courts of appeals, the losing party may not be able to obtain Supreme Court review even if he wants it. *But see* text following note 396 *infra*. The point is that the interim uncertainty is likely to have similar consequences in either situation.

[182] Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972), *rev'd sub nom.* Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973).

[183] Kirksey v. Theilig, 351 F. Supp. 727, 729 n.3 (D. Colo. 1972).

[184] Oller v. Bank of America, 342 F. Supp. 21, 23 (N.D. Cal. 1972).

a year and a half after the conflicting district court decisions, when the Ninth Circuit reversed the holding of the Southern District court.[185] Similar conflicts arise within the state court system; these too may remain unresolved for considerable periods. For instance, inconsistent decisions with respect to the constitutionality of various attachment statutes persisted among California's intermediate appellate courts for more than a year until the state supreme court spoke authoritatively on the issue in August 1971.[186]

Apart from conflicts among state courts and among federal courts, in recent years there have also been conflicting constitutional decisions by a state court and a federal court with jurisdiction over the state. The phenomenon has become most familiar in the area of criminal law, although it is not confined to it. Typically the conflict is created by a federal court's collateral review of a state court conviction, and typically the federal court finds a constitutional infirmity in procedures which the state courts have found to be permissible. For instance, in 1971 the Maine Supreme Judicial Court, reviewing a conviction on direct appeal, rejected a constitutional challenge to a jury charge that had been used in state criminal cases for a hundred years.[187] The defendant then sought a writ of habeas corpus in the federal courts. Both the district court and the court of appeals were persuaded by the arguments that had been rejected by the state court.[188] In a separate case a few months later, the Maine court adhered to its previous ruling, insisting in sharp terms that the First Circuit's constitutional holding rested upon a misinterpretation of state law.[189] A more unusual example comes from Illinois. The state supreme court upheld a conviction under an ordinance which the federal district court had ruled invalid;[190] the Seventh Circuit, without adverting to the merits of the con-

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[185] Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973).

[186] Randone v. Appellate Dep't, 5 Cal. 3d 536, 543 n.2, 488 P.2d 13, 16, 96 Cal. Rptr. 709, 712 (1971).

[187] State v. Wilbur, 278 A.2d 139 (Me. 1971).

[188] Wilbur v. Robbins, 349 F. Supp. 149 (D. Me. 1972), *aff'd sub nom.* Wilbur v. Mullaney, 473 F.2d 943 (1st Cir. 1973), *remanded for reconsideration,* 94 S. Ct. 889, *adhered to on remand,* 496 F.2d 1303 (1st Cir. 1974).

[189] State v. Lafferty, 309 A.2d 647 (Me. 1973).

[190] Chicago v. Lawrence, 42 Ill.2d 461, 248 N.E.2d 71 (1969); *see* Landry v. Daley, 280 F. Supp. 968 (N.D. Ill. 1968), *appeal dismissed as moot,* 410 F.2d 551 (7th Cir. 1969).

stitutional argument, held that the Illinois court was within its rights in ignoring the federal court's declaratory judgment.[191]

Conflicts between federal courts and state courts are not limited to criminal cases. Recently the New Jersey Supreme Court ruled that the state's "public policy" prevented an oil company from terminating a service station lease without good cause.[192] A few months later, the federal district court in New Jersey held that the state court's decision was "invalid and inapplicable"[193] because it interfered with the "total control" given the owner of a federally registered trademark by the Lanham Act.[194] In Arizona, a three judge federal court struck down a state statute requiring a year's residence in a county as a condition to receiving non-emergency hospitalization or medical care at county expense.[195] A year later, the state supreme court, rejecting the reasoning of the federal court,

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[191] United States *ex rel.* Lawrence v. Woods, 432 F.2d 1072 (7th Cir. 1970).

In Florida, the state court and the federal courts agreed that the state's "felony sodomy" statute was "void on its face as unconstitutional for vagueness and uncertainty in its language," but disagreed about whether the holding of unconstitutionality was to be given retroactive application. *See* Stone v. Wainwright, 478 F.2d 390 (5th Cir.), *rev'd,* 414 U.S. 21 (1973); Franklin v. State, 257 So. 2d 21, 24 (Fla. 1971). A few years earlier, the Supreme Court of New Jersey and the Court of Appeals for the Third Circuit engaged in a well-publicized difference of opinion over the proper interpretation of the United States Supreme Court's decision in Escobedo v. Illinois, 378 U.S. 478 (1964). The Third Circuit stated its position in May 1965, United States *ex rel.* Russo v. New Jersey, 351 F.2d 429 (3d Cir. 1965), and the New Jersey court stated its position in November 1965, State v. Coleman, 46 N.J. 16, 35-36, 214 A.2d 393, 403 (1965). The Supreme Court did not elucidate its holding until June 1966. Miranda v. Arizona, 384 U.S. 436 (1966).

More recently, an issue involving the admissibility of confessions divided the Massachusetts Supreme Judicial Court and the Court of Appeals for the First Circuit. *See* Eisen v. Picard, 452 F.2d 860 (1st Cir. 1971), *cert. denied,* 406 U.S. 950 (1972); Commonwealth v. Masskow, 290 N.E. 2d 154 (Mass. 1972). The Massachusetts court, adverting to the conflict and noting that its decision was "in effect reviewable by writ of habeas corpus" in the federal courts, stated that "[i]t would be undesirable for us to affirm the conviction of a defendant if the inevitable consequence were that he would be released" by a federal court holding the confession inadmissible. 290 N.E.2d at 157. The court therefore assumed, without deciding, that the federal decision "accurately states the Federal law." *Id.* This did not prevent the court from affirming the conviction, however, for the court found that the admission of the confession was harmless error. *Id.* at 158. Only a close study of the record would reveal whether this denouement should properly be characterized as an admirable effort to avoid federal-state court friction or a deplorable attempt to frustrate a federal right.

[192] Shell Oil Co. v. Marinello, 63 N.J. 402, 307 A.2d 598 (1973).

[193] Mariniello v. Shell Oil Co., 368 F. Supp. 1401 (D.N.J. 1974).

[194] 15 U.S.C. §§ 1051-1127 (1970).

[195] Valenciano v. Bateman, 323 F. Supp. 600 (D. Ariz. 1971).

upheld the requirement.[196] The United States Supreme Court noted probable jurisdiction in order to resolve the conflict.[197] More than a year and a half after the state court had upheld the statute, the Supreme Court reversed its judgment.[198]

To acknowledge that conflicts over constitutional interpretations may arise today within a single state is not, of course, to say that such clashes are desirable, nor is the existence of some conflicts an argument for designing an appellate structure that may add new ones. The point, rather, is twofold. First, as an absolute matter, there is enough play in the joints of the affected systems that they can withstand whatever strain is placed on them by the conflicts which do occur. Second, in relative terms, we are willing to tolerate these occasional conflicts, whatever mischief they may bring, because we deem them an acceptable price to pay for the various countervailing benefits. In considering the ultimate desirability of dividing California between two circuits, one must engage in a similar balancing process, taking into account the probable effect of any steps which Congress or the courts may take to prevent or resolve conflicts.[199]

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[196] Maricopa County v. Superior Court, 108 Ariz. 373, 498 P.2d 461 (1972). The litigation arose after the Maricopa County Board of Supervisors continued to enforce the durational residency requirement notwithstanding the federal court decision. The defendants in the earlier litigation included members of the Board of Supervisors of Pinal County and the state attorney general. It is not clear from the opinion of the three judge court in *Valenciano* whether the plaintiffs, who brought their action on behalf of "themselves and all others similarly situated," 323 F. Supp. at 601, sought statewide injunctive relief. *Quaere* whether a new resident of Maricopa County might have been able successfully to bring suit against the state attorney general to compel obedience by the county board to the federal court decree, *cf.* Smith v. North Carolina State Bd. of Educ. 444 F.2d 6 (4th Cir. 1971); Bradley v. School Board, 51 F.R.D. 139, 142 (E.D. Va. 1970); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1789, at 179-83 (1972); or whether the newcomer might even have been able to bring ancillary injunctive proceedings against the county board itself, *cf.* O. FISS, INJUNCTIONS 625-29 (1972). *See generally* notes 153-56 *supra* & accompanying text.

[197] Memorial Hospital v. Maricopa County, 410 U.S. 981 (1973).

[198] Memorial Hospital v. Maricopa County, 94 S. Ct. 1076 (1974).

[199] For an example of efforts by two courts to avoid "any semblance of a conflict," see Gordon v. Laborers' Int'l Union, 490 F.2d 133, 138-39 (10th Cir. 1973); Associated Gen. Contractors v. Laborers' Local 612, 489 F.2d 749 (Temp. Em. Ct. App. 1973). The "strange" and "anomalous" situation, 490 F.2d at 139, arose when appeals were taken to both the Tenth Circuit and the Temporary Emergency Court of Appeals from the same district court judgment. Both appeals dealt with the same issue, the validity of a collective bargaining contract. The Tenth Circuit expressed reluctance to decide the issue and remanded the case to the district court. The Emergency Court of Appeals, having exercised jurisdiction over a prior appeal in the same controversy, *see* Associated Gen. Contractors v. Laborers' Local 612, 476 F.2d

For further guidance in assessing the likely consequences of conflicting rules, we may look to the patterns which have developed in the evolution of our federal system. Enterprises whose operations cross jurisdictional boundaries have long conducted their business under a bewildering variety of regulations and exactions. National corporations must conform to state laws; statewide businesses must obey the regulations of local governmental units. The need to adjust operations to different requirements and prohibitions sometimes results in inconvenience and extra costs, but here too the price is regarded as a tolerable one. Similarly, many federal instrumentalities routinely adjust their operations in accordance with policies in the various states.[200]

In its decisions explicating and applying the "negative implications" of the commerce clause, the Supreme Court has carefully scrutinized the context and the effect of state regulations in order to determine whether they deal with a matter as to which uniform legislation is required throughout the nation, or whether, on the contrary, a diversity of rules is consistent with the needs of a national economy.[201] The cases are familiar.[202] When South Carolina sought to limit the width and weight of trucks passing through the state, the court found the regulation to be permissible, notwithstanding the fact that virtually all other states permitted wider and heavier trucks.[203] Later, when Illinois attempted to require trucks and trailers to use a new kind of mudguard, in conflict with the requirement of at least one other state that trucks use the conventional kind, the court struck down the law.[204] The thrust of the decisions is that some inconsistencies in regulations can be

1388 (Temp. Em. Ct. App. 1973), now concluded that the Tenth Circuit had exclusive jurisdiction over the remaining issues, and dismissed the new appeal for lack of jurisdiction.

[200] *See, e.g.*, 23 U.S.C. § 114 (1970) (construction of federal aid highways); 42 U.S.C. § 306 (1970) (old age assistance).

[201] A similar approach is used in cases involving state regulations which may clash with other exercises of congressional power. *See, e.g.*, Kewanee Oil Co. v. Bicron Corp., 94 S. Ct. 1879, 1885 (1974) (patent clause); Goldstein v. California, 412 U.S. 546, 552-55 (1973) (copyright clause).

[202] The leading case remains Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851); *see* Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945).

[203] South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938).

[204] Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959). Although *Bibb* leaves room for doubt about the exact grounds for the holding, the Court later clarified the rationale of the case: "Although we struck down the Illinois law in *Bibb*, we did so on the carefully limited basis that the contour mudguard requirement flatly con-

tolerated by interstate enterprises, notwithstanding the added cost and inconvenience; at some point, however, the burden arising out of inconsistent rules becomes so great that the state which is "out of line"[205] must give way.[206]

A similar sense of discrimination is necessary in evaluating the likely effect of a diversity of rules resulting from inconsistent decisions by the Ninth and Twelfth Circuits. Conflicts are not fungible. The extent to which we are troubled by the promulgation of different rules of law within a state will depend on a number of variables: the conduct involved, the constitutional or statutory provisions in question, the consequences of differential treatment to those affected by the inconsistent rules of law, the probable duration of the conflict, and the likelihood of resolution by an instrumentality outside the federal courts of appeals—Congress, the Supreme Court, the Judicial Conference, or any number of independent or executive-branch agencies. When all of these factors are taken into consideration, how many of the conflicts that are likely to arise in the state would resemble the truck-width case, and how many might be likened to the mudguard case?

Allocating the judicial districts of California between two circuits is not a tidy arrangement, perhaps, nor will it satisfy those for whom consistency is the supreme virtue. At the same time, one can easily overestimate the difficulties to be anticipated, even with respect to constitutional litigation. Not all challenges to the validity of state statutes are adjudicated by the federal courts;[207] not all adjudicated challenges are susceptible to conflicting resolutions; not all potential conflicts

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flicted with laws, enforced in at least one other State, that trucks must be equipped with straight mudguards." Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P.R.R., 393 U.S. 129, 140 n.13 (1968).

[205] 359 U.S. at 529.

[206] For a discussion of the "negative" aspects of the commerce clause, see D. ENGDAHL, CONSTITUTIONAL POWER: FEDERAL & STATE 285-94 (1974); 1 B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: THE POWERS OF GOVERNMENT 243-67 (1963).

[207] This observation is particularly apt with respect to California, because the state supreme court has not hesitated, in recent years, to hold state statutes unconstitutional. *See, e.g.*, Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973) (automobile guest statute); People v. Barksdale, 8 Cal. 3d 320, 503 P.2d 257, 105 Cal. Rptr. 1 (1972) (standards for abortion); Raffaelli v. Committee of Bar Examiners, 7 Cal. 3d 288, 496 P.2d 1264, 101 Cal. Rptr. 896 (1972) (statutory exclusion of aliens from practice of law); People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972) (death penalty); Randone v. Appellate Department, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971) (attachment procedures); Blair

will materialize; and not all actual conflicts will do more than scratch the skin of the body politic. For those conflicts which threaten to inflict more serious wounds, remedial and preventive medicines are available.

II. Mechanisms for Avoiding or Resolving Conflicts

After concluding that the problems that might be created by allocating the judicial districts of California between two circuits would be "of lesser magnitude and significance" than those created by other realignment proposals, the Commission adds that "any problems that might arise . . . can be resolved by existing mechanisms and others that could readily be developed."[208] Part II of this article focuses on these various mechanisms. The treatment is in three parts: existing mechanisms for avoiding inconsistent orders in litigation crossing circuit boundaries; mechanisms for avoiding or resolving conflicts in the interpretation of state law; and finally, mechanisms for avoiding or resolving conflicting decisions with respect to the validity of a state statute or practice. The discussion is intended to be suggestive rather than exhaustive.

A. *Existing Mechanisms for Avoiding Inconsistent Orders in Litigation Crossing Circuit Boundaries*

At least half a dozen mechanisms developed by Congress and the courts are available today to deal with litigation that is not confined, or that may not be confined, within a single circuit. Some of these are too familiar to warrant elaborate treatment here, but all of them serve to demonstrate that even without changes in the law, the two circuits in a bifurcated state would not lack ways to avoid duplicative lawsuits and potentially inconsistent judgments when disputes cut across circuit boundaries.

1. Transfer of Cases Between Courts of Appeals

In a variety of circumstances involving petitions for review of orders of federal administrative agencies, one court of ap-

v. Pitchess, 5 Cal. 3d 258, 468 P.2d 1242, 96 Cal. Rptr. 42 (1971) (prejudgment replevin). *See also* Martinez v. Procunier, 354 F. Supp. 1092, 1095 (N.D. Cal. 1973), *aff'd*, 94 S. Ct. 1800 (1974) (three judge court dismisses prisoners' constitutional claim as moot because question raised was resolved in prisoners' favor by California Supreme Court).

[208] Commission Report, *supra* note 3, at 238.

peals may transfer a proceeding before it to another court of appeals.[209] Most commonly, transfers are effected under the authority of section 2112(a) of the Judicial Code,[210] which provides that when proceedings have been instituted in two or more courts of appeals with respect to "the same order" of an administrative agency, all of the proceedings are to be transferred to the court in which the first appeal was instituted. More important, once the initial transfer has been effected, the transferee court has authority to transfer all of the proceedings to *any* other court of appeals "[f]or the convenience of the parties in the interest of justice." In addition to this statutory authority, the courts of appeals are held to have an "inherent discretionary power" to transfer a proceeding to another circuit "in the interest of justice and sound judicial administration."[211]

Several aspects of the transfer cases are of special interest in the present context. First, the procedure is highly discretionary. This is clearly so under the "inherent power" doctrine and under the retransfer provision of section 2112(a),[212] but there is room for discretion even under the seemingly automatic "first instituted" provision of the statute. For instance, "where the first petition to review is filed by a party who is not substantially aggrieved, in effect undercutting the assumption of a good faith petition to review,"[213] a court may decline

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[209] *See* cases cited in Annot., 22 A.L.R.3d 563 (1968).

[210] 28 U.S.C. § 2112(a) (1970). The statute provides, in relevant part:

> If proceedings have been instituted in two or more courts of appeals with respect to the same order the agency, board, commission, or office concerned shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted. The other courts in which such proceedings are pending shall thereupon transfer them to the court of appeals in which the record has been filed. For the convenience of the parties in the interest of justice such court may thereafter transfer all the proceedings with respect to such order to any other court of appeals.

For the history of the provision see Ball v. NLRB, 299 F.2d 683, 687 (4th Cir. 1962); Comment, *A Proposal to End the Race to the Court House in Appeals from Federal Administrative Orders*, 68 COLUM. L. REV. 166, 168-69 (1968) [hereinafter cited as *Race to the Court House*].

[211] Farah Mfg. Co. v. NLRB, 481 F.2d 1143 (8th Cir. 1973); Eastern Air Lines, Inc. v. CAB, 354 F.2d 507, 510 (D.C. Cir. 1965); Panhandle Eastern Pipe Line Co. v. FPC, 343 F.2d 905, 909 (8th Cir. 1965). *Contra*, Gulf Oil Corp. v. FPC, 330 F.2d 824 (5th Cir. 1965).

[212] *See, e.g.*, Saturn Airways, Inc., v. CAB, 476 F.2d 907, 909 (2d Cir. 1973); Eastern Air Lines, Inc., v. CAB, 354 F.2d 507, 511 (D.C. Cir. 1965).

[213] Public Serv. Comm'n v. FPC, 472 F.2d 1270, 1272 (D.C. Cir. 1972).

to transfer proceedings to the circuit chosen by the first petitioner.[214] As one court put it, "merely to be first in reaching a court house is not enough; lacking genuine aggrievement, one may not enter."[215] Nor is it always self-evident whether or not two petitions involve "the same order"; in deciding whether they do, the courts may exercise a certain amount of discretion, looking to the policy underlying the statute and the doctrine.[216]

Second, the transfer mechanism is regularly used to avoid the possibility of inconsistent decisions by two or more courts of appeals. For example, when various petitions for review of the Federal Communications Commission's Second Order relating to cable television were lodged in the Court of Appeals for the District of Columbia Circuit pursuant to the mandatory provision of section 2112(a), that court transferred all of the proceedings to the Eighth Circuit.[217] The District of Columbia court noted that the Eighth Circuit already had under submission cases involving the Commission's First Report and Order. Although the issues in the two sets of cases were "not completely identical,"[218] they were "intimately related,"[219] and the court sought to avoid "the anomalous results inherent in the possibility of conflicting decisions on review."[220] More recently, the First Circuit was asked to transfer a review petition to the District of Columbia Circuit, where a related proceeding was pending. The court agreed, pointing out that litigation in several circuits would lead to "possible inconsistent and delayed results on the merits."[221]

The transfer mechanism is notable also in that proceedings may be transferred or retransferred notwithstanding the objection of a petitioner who has not previously been a party to related proceedings in the transferee court. The result is that one or more petitioners may be denied their choice of forum.

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[214] Insurance Workers Int'l Union v. NLRB, 360 F.2d 823 (D.C. Cir. 1966); *see* Municipal Distrib. Group v. FPC, 459 F.2d 1367 (D.C. Cir. 1972) (dictum); UAW v. NLRB, 373 F.2d 671 (D.C. Cir. 1967); *Race to the Court House, supra* note 210, at 170.

[215] Insurance Workers Int'l Union v. NLRB, 360 F.2d 823, 828 (D.C. Cir. 1966).

[216] *See, e.g.,* ACLU v. FCC, 486 F.2d 411, 414 (D.C. Cir. 1973).

[217] Midwest Television, Inc. v. FCC, 364 F.2d 674 (D.C. Cir. 1966).

[218] *Id.* at 675.

[219] *Id.* at 675 n.6.

[220] *Id.* at 675-76.

[221] Natural Resources Defense Council v. EPA, 465 F.2d 492, 495 (1st Cir. 1972).

The point was dramatically demonstrated by a recent case arising out of a lengthy inquiry by the Federal Communications Commission with respect to regulation of cable television.[222] After the Commission's final action in the proceeding, a cable company petitioned for review in the Ninth Circuit, objecting to a divestiture order. Shortly thereafter, the American Civil Liberties Union filed in the District of Columbia Circuit a petition for review of a Commission order issued during the course of the same proceeding, but involving regulation of common carriers. Pursuant to the "first instituted" rule of section 2112(a), the Commission filed the record of the entire proceeding in the San Francisco court. The agency then moved in the District of Columbia Circuit to transfer the ACLU's petition to the Ninth Circuit. The ACLU objected, pointing out that the Ninth Circuit, in passing on the divestiture order, would not be considering the issue on which the ACLU was seeking review. The court agreed that "the particular subject matter of the two petitions is not the same,"[223] but granted the transfer nonetheless, so that "the action of the agency [would not be] subjected to fragmentary review by different courts."[224] In another recent case, the District of Columbia Circuit transferred a case to the Fifth Circuit because that court was "familiar with the background of the controversy through review of the same or related proceedings." The petitioner had objected strongly to the transfer.[225]

Finally, section 2112(a) transfers are granted notwithstanding the likelihood that the transferee court will take a different view of the merits of the case than the transferor court. In contrast to the rule applicable to many transfers at the district court level,[226] it seems to be assumed that a transferee court of appeals will apply its own law to all of the petitions before it. Indeed, this assumption is implicit in decisions ordering transfer in order to avoid "the anomalous results inherent in the possibility of conflicting decisions on review."[227] Because of the complexity of the issues raised, it is seldom possible to

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[222] ACLU v. FCC, 486 F.2d 411 (D.C. Cir. 1973).

[223] *Id.* at 414.

[224] *Id.*

[225] Municipal Distrib. Group v. FPC, 459 F.2d 1367, 1368 (D.C. Cir. 1972).

[226] *See* text accompanying notes 316-42 *infra*.

[227] Midwest Television, Inc. v. FCC, 364 F.2d 674, 675-76 (D.C. Cir. 1966).

say with assurance that a particular transfer, or denial of a transfer motion, has changed the result in a particular case, but occasionally one can make the inference.[228] Apart from specific inconsistencies in holdings, however, proceedings for review of administrative agency action constitute a class of cases in which judicial attitudes are thought to vary from circuit to circuit.[229] To the extent that this perception is accurate, transfers at the court of appeals level may well change the result of litigation. Moreover, if transfers are appropriate notwithstanding that possibility, they may be equally appropriate in other kinds of cases when "the same or related proceedings" are in litigation in a sister circuit. Legislation would be necessary to permit transfers at the court of appeals level of cases litigated in the district courts,[230] though it should be noted that under "extraordinary circumstances" a court of appeals has power to transfer a case from a district within its own circuit to a district in another circuit.[231]

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[228] *Compare, e.g.,* Placid Oil Co. v. FPC, 483 F.2d 880 (5th Cir. 1973), *aff'd sub nom.* Mobil Oil Corp. v. FPC, 94 S. Ct. 2328 (1974), *with* Public Serv. Comm'n v. FPC, 487 F.2d 1043 (D.C. Cir. 1973), *vacated and remanded sub nom.* Shell Oil Co. v. Public Service Comm'n, 94 S. Ct. 3166 (1974) (Texas Gulf Coast cases). The Fifth Circuit proceedings included several petitions transferred by the District of Columbia Circuit, *see* Municipal Distrib. Group v. FPC, 459 F.2d 1367 (D.C. Cir. 1972), while the Texas Gulf Coast cases included petitions which the District of Columbia court refused to transfer to the Fifth Circuit. *See* Public Serv. Comm'n v. FPC, 472 F.2d 1270 (D.C. Cir. 1972). The Supreme Court granted certiorari in the Fifth Circuit case after the Solicitor General emphasized the importance of resolving the conflict. *See* Memorandum for Respondent at 11-15, Mobil Oil Corp. v. FPC, No. 73-437 (U.S., filed Sept. 10, 1973). After affirming the Fifth Circuit's decision, Mobil Oil Corp. v. FPC, 94 S. Ct. 2328 (1974), the Court granted certiorari in the District of Columbia cases and remanded them for reconsideration in the light of the *Mobil Oil* decision. Shell Oil Co. v. Public Serv. Comm'n, 94 S. Ct. 3166 (1974).

[229] *See* Cooper, *Administrative Law: The "Substantial Evidence" Rule,* 44 A.B.A.J. 945 (1958). It is possible that with the courts of appeals expanded to memberships of nine and even more, differences between circuits have become less pronounced. Nevertheless, in labor cases unions continue to seek review in the District of Columbia Circuit, while employers attempt to file their petitions in circuits believed to be more favorable to their contentions. *See, e.g.,* Farah Mfg. Co. v. NLRB, 481 F.2d 1143, 1145 (8th Cir. 1973); *cf. Commission Hearings, supra* note 23, Washington, D.C., April 2, 1974, at 80 (testimony of Dean Griswold):

> We now have a strange system of review of Federal Trade Commission decisions under which there is a mad scramble to get into one court of appeals or another before anybody else does, which is largely motivated by the fact that counsel knows that one court of appeals will be more favorable to them than another will be.

[230] *See* text accompanying notes 370-72 *infra.*

[231] Koehring Co. v. Hyde Constr. Co., 382 U.S. 362 (1966).

2. Transfers of Venue under Section 1404(a)

Under section 1404(a),[232] a district court may transfer any civil action "to any other district . . . where it might have been brought," including, of course, districts in another circuit. The only statutory criteria, assuming that the action is one that "might have been brought" in the transferee district,[233] are the requirements that the transfer be "[f]or the convenience of parties and witnesses [and] in the interest of justice."[234] The proposed Federal Court Jurisdiction Act of 1973[235] would, in general, make transfers more readily available.

The importance of section 1404(a) for present purposes is twofold. First, it creates a mechanism for the transfer of cases that often operates to avoid parallel litigation in two or more circuits and thus the possibility of inconsistent determinations. Numerous cases have held that although the pendency of other similar actions in the proposed transferee district is not alone sufficient to justify a transfer, it is a persuasive factor in considering whether a motion for transfer should be granted.[236] The rationale has been summarized by Judge Weinfeld:

> There is a strong policy favoring the litigation of related claims in the same tribunal in order that: (1) pretrial discovery can be conducted more efficiently; (2) the witnesses can be saved time and money, both with respect to pretrial and trial proceedings; (3) duplicitous litigation can be avoided, thereby eliminating unnecessary expense to the parties and at the [same] time serving the public interest; (4) inconsistent results can be avoided.[237]

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[232] 28 U.S.C. § 1404(a) (1970). *See generally* H. HART & H. WECHSLER, *supra* note 27, at 1133-34; C. WRIGHT, *supra* note 32, at 162-70.

[233] For discussion of the limitation imposed by the words "where it might have been brought," see Van Dusen v. Barrack, 376 U.S. 612, 616-26 (1964); Hoffman v. Blaski, 363 U.S. 335 (1960); H. HART & H. WECHSLER, *supra* note 27, at 1135-36.

[234] Although the word "and" is not in the statute, the courts have interpreted the provision as though it were. *See* Kitch, *Section 1404(a) of the Judicial Code*, 40 IND. L. J. 99, n.1 (1965).

[235] S. 1876, 93d Cong., 1st Sess., §§ 1305, 1306, 1315 (1973); *see* ALI STUDY, *supra* note 148, at 150-55, 222-24.

[236] *See* cases cited in Annot., 1 A.L.R. FED. 15, 75-80 (1969).

[237] Schneider v. Sears, 265 F. Supp. 257, 266-67 (S.D.N.Y. 1967) (footnote omitted). *See also* Jacobs v. Tenney, 316 F. Supp. 151, 169 (D. Del. 1970).

Second, use of the transfer mechanism as a means of avoiding duplicative litigation is not dependent on an identity of parties in the various suits initially brought in the transferor and transferee courts. Thus, when similar stockholders' derivative suits[238] or class actions[239] have been brought in two districts by separate groups of plaintiffs, the courts have transferred one of the actions to the district that was otherwise more appropriate for the particular litigation. Such transfers have been ordered despite the objections of the second-action plaintiffs who were thereby denied their choice of forum. Typically these objections are answered by citation to the Supreme Court's comment in a stockholder's derivative action: "[W]here there are hundreds of potential plaintiffs, . . . all of whom could with equal show of right go into their many home courts, the claim of any one plaintiff that a forum is appropriate merely because it is his home forum is considerably weakened."[240]

3. Judicial Panel on Multidistrict Litigation

In 1968, building upon the experience in handling pretrial discovery in the electrical equipment antitrust cases,[241] Congress created a Judicial Panel on Multidistrict Litigation. Under the new section 1407,[242] when civil actions involving one or more common questions of fact are pending in different districts, the Panel may transfer those actions "to any district for coordinated or consolidated pretrial proceedings." Transfers are not limited by venue requirements or by the rules governing in personam jurisdiction.

Although the statute assumes that once the pretrial proceedings are completed, the actions will be remanded to the districts from which they were transferred, this has not hap-

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Inconsistent results might occur despite transfer unless the transferee court is free to apply its own interpretation of the applicable law to all of the cases before it even though a different rule prevails in the transferor court. For a discussion of the freedom of transferee courts to apply their own interpretation of law, see text accompanying notes 315-42 *infra*.

[238] *E.g.*, Schlusselberg v. Werly, 274 F. Supp. 758, 763-64 (S.D.N.Y. 1967).

[239] *E.g.*, Schneider v. Sears, 265 F. Supp. 257, 266 (S.D.N.Y. 1967); Freiman v. Texas Gulf Sulphur Co., 38 F.R.D. 336, 338 (N.D. Ill. 1965).

[240] Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 524 (1947). This case was cited in, *e.g.*, Schneider v. Sears, 265 F. Supp. 257, 266 (S.D.N.Y. 1967).

[241] *See* Neal & Goldberg, *The Electrical Equipment Antitrust Cases*, 50 A.B.A.J. 621 (1964).

[242] 28 U.S.C. § 1407 (1970).

pened; rather, the practical result of transfer under section 1407 has been a transfer for all purposes, including trial on the merits if one is held.[243] One writer suggests the reasons for this development:

> [I]f there is a trial on the merits, it is usually more convenient for all parties to prosecute the action in the transferee court. The judge has handled the case for a long period of time and is familiar with the facts. The counsel on each side have developed working arrangements which promote the interests of their respective clients. Therefore the parties may stipulate to *in personam* jurisdiction and venue in the transferee court.[244]

Even if the parties do not consent to a consolidated trial in the transferee district, other procedures can presently be used to achieve the efficiencies of centralized management after the completion of pretrial proceedings. For instance, the transferee judge selected by the Panel can be assigned to the transferor districts to try the cases there after remand.[245] In the alternative, and to the extent permitted by venue rules, actions can be transferred to a single district under section

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[243] Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV. L. REV. 1001, 1017 & n.78, 1028-36 (1974) [hereinafter cited as *Multidistrict Litigation*]; Note, *Consolidation and Transfer in the Federal Courts*, 22 HASTINGS L.J. 1289, 1326 (1971) [hereinafter cited as *Consolidation*]; Comment, *The Experience of Transferee Courts Under the Multidistrict Litigation Act*, 39 U. CHI. L. REV. 588, 607 (1972) [hereinafter cited as *Transferee Courts*]. *But see In re* Air Crash Disaster at Greater Cincinnati Airport, 354 F. Supp. 275 (J.P.M.L. 1973).

[244] *Consolidation, supra* note 243, at 1326.

When the bill creating the Multidistrict Litigation Panel was before Congress, the House Report noted that the bill was drafted so that it could easily be amended to provide for consolidating multidistrict litigation for trial on the merits, if efficiency so demanded. H.R. REP. No. 1130, 90th Cong., 2d Sess. 4 (1968); *see Transferee Courts, supra* note 243, at 611. After surveying the experience of courts under the present law, two recent commentators have suggested that this step be taken. *Multidistrict Litigation, supra* note 243, at 1037; *Transferee Courts, supra* note 243, at 611. Cases would be transferred in appropriate circumstances without regard to the venue rules. *Cf.* S. 961, 91st Cong., 1st Sess. (1969) (providing for transfer of all actions arising out of an airline disaster to a single district). It is interesting to note the assertion of one writer that "[b]y providing for a federal common law, Senate Bill 961 attempts to avoid choice of law problems inherent in mass multidistrict tort litigation." Comment, *The Search for the Most Convenient Federal Forum*, 64 NW. U.L. REV. 188, 201 (1969). This assumes, of course, that inter-circuit conflicts on the "federal common law" would not lead to choice of law problems. *See* text accompanying notes 315-42 *infra*.

[245] *Multidistrict Litigation, supra* note 243, at 1017-18; *Transferee Courts, supra* note 243, at 610.

1404(a) and consolidated for a trial on the merits.[246] Finally, when venue rules preclude the transfer of all pending actions to a single district, it may be possible to hold a trial on the merits that will conclusively determine all of the issues for most of the parties. In the recent yarn processing patent validity litigation,[247] the Panel emphasized this possibility in selecting the transferee district for pretrial proceedings. Although many typical choice of forum factors favored the Eastern District of New York, the majority chose the Southern District of Florida because, as one commentator put it, "all of the issues and most of the parties would be subject to a decision on the merits there."[248]

However consolidation for trial is achieved—by Panel decision, through the consent of the parties, or under new statutory transfer provisions—the judgments in the multidistrict actions will all be reviewed by one court of appeals. Consequently, the procedures developed under section 1407 and supplemented by section 1404(a) can be used to avoid not only repetitive litigation but also inconsistent judgments.

Quite apart from the various devices used to consolidate cases for trial in the transferee district, it is currently possible to achieve unitary review of questions of law in multidistrict cases. The reason is that the transferee court, through its control of the pretrial proceedings, has the power to rule on pretrial motions, including motions to dismiss and motions for summary judgment.[249] Appellate review of the court's decision then lies in the court of appeals for the transferee district. "Consequently, coordination at the appellate level will also be achieved in one Court of Appeals . . . ."[250] For instance, in ordering the transfer to a single district of more than a score of actions seeking damages for the infringement of the Butterfield patent, the Panel commented, "[I]f discovery . . . reveals no dispute of any material fact, disposition of the litigation

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[246] *Multidistrict Litigation, supra* note 243, at 1018.

[247] *In re* Yarn Processing Patent Validity Litigation, 341 F. Supp. 376, 381-82 (J.P.M.L. 1972).

[248] *Multidistrict Litigation, supra* note 243, at 1025.

[249] *See, e.g., In re* Butterfield Patent Infringement, 328 F. Supp. 513, 514 (J.P.M.L. 1970); *In re* Fourth Class Postage Regulations, 298 F. Supp. 1326, 1328 (J.P.M.L. 1969); *In re* Plumbing Fixture Cases, 298 F. Supp. 484, 490-96 (J.P.M.L. 1968); *Transferee Courts, supra* note 243, at 601-03; *cf. In re* Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973).

[250] *In re* Plumbing Fixture Cases, 298 F. Supp. 484, 495 (J.P.M.L. 1968).

by summary judgment may be appropriate. . . . [T]he result on any such motion would be the same for all parties . . . ."[251] The Panel cited its earlier decision ordering the transfer of a group of actions brought in several districts seeking to enjoin the enforcement of certain fourth class postal regulations.[252] In that case, the Panel found "a special reason"[253] for ordering the transfers: many of the plaintiffs had sought temporary restraining orders or preliminary injunctions. These had been granted in some districts and denied in others. Noting that avoidance of inconsistent decisions has been recognized as a basis for transfer under section 1404(a), the Panel said, "Similarly, during the course of multidistrict litigation, § 1407 is an appropriate means of avoiding injury to like parties caused by inconsistent judicial treatment."[254] Perhaps most interesting, the Panel emphasized the power of the transferee court to rule on the legal arguments urged by the plaintiffs. These arguments were to be raised by motions to dismiss for lack of jurisdiction over the subject matter and for failure to state a claim for relief. "Disposition of these motions by a *single* judge," the Panel stated, "will conserve judicial time and energy and minimize the likelihood of inconsistent results."[255]

Section 1407, of course, authorizes the transfer of cases only when they share one or more questions of fact, and the Panel has refused to transfer cases where the only common questions were questions of law.[256] At the same time, however, the Panel has given an expansive interpretation to the requirement of common questions of fact. One writer has even suggested that the Panel has used the presence of common, but not very important, questions of fact as a "pretext" for the unified resolution of common questions of law.[257] However that may be, the general policy of transferring cases wherever possible in order to avoid conflicting decisions on questions of law appears consistent with the intent of the drafters of

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[251] *In re* Butterfield Patent Infringement, 328 F. Supp. 513, 514 (1970).

[252] *In re* Fourth Class Postal Regulations, 298 F. Supp. 1326 (J.P.M.L. 1969).

[253] *Id.* at 1327.

[254] *Id.*

[255] *Id.* at 1328.

[256] *See, e.g., In re* Pension Fund Class Action Litigation, 360 F. Supp. 1400 (J.P.M.L. 1973).

[257] *Transferee Courts, supra* note 243, at 603. *See also Multidistrict Litigation, supra* note 243, at 1004 n.15.

section 1407. Dean Phil C. Neal, one of the authors of the legislation, testified at the Senate hearings:

> I think, for example, about the various rulings on questions of law which came up early in the electrical equipment cases such as the tolling of the statute of limitations, the effect of the fraudulent concealment doctrine, the effect of the pleas of nolo contendere and so on.
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> . . . .
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> . . . [T]here would certainly be an advantage in having only one court decide those questions instead of having to get dozens of different decisions in different courts with conflicts eventually resolved by appeal.[258]

4. Injunctions Against Litigation

It is generally accepted today that

> when a case is brought in one federal district court, and the case so brought embraces essentially the same transactions as those in a case pending in another federal district court, the latter court may enjoin the suitor in the more recently commenced case from taking any further action in the prosecution of that case.[259]

As this statement may suggest, injunctions against litigation are ordinarily issued against persons who are parties to an action pending in the court which issues the injunction.[260] The power is not limited to such situations, however; in at least one important class of cases—interpleader suits under section 1335[261]—a court may enjoin litigation by all persons claiming an interest in the money or property which is the subject of the litigation, whether or not those persons are initially parties to the interpleader suit.[262]

In a leading decision ordering a district court to grant an injunction, the Third Circuit, speaking through Judge Maris,

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[258] *In Re* Plumbing Fixture Cases, 298 F. Supp. 484, 491 n.1 (J.P.M.L. 1968).

[259] National Equip. Rental, Ltd. v. Fowler, 287 F.2d 43, 45 (2d Cir. 1961).

[260] *See, e.g.*, Austin v. Texas-Ohio Gas Co., 218 F.2d 739, 743 (5th Cir. 1955); Commercial Union Ins. Co. v. Adams, 231 F. Supp. 860, 867-68 (S.D. Ind. 1964).

[261] 28 U.S.C. § 1335 (1970).

[262] *See* text accompanying notes 276-81 *infra*.

emphasized the undesirability of "duplicating litigation";[263] but also noted that if multiple lawsuits were permitted, they might result in conflicting decisions, which in turn might require separate appeals to different circuits.[264] The opinion thus recognized that the injunction might have the effect, and perhaps the purpose, of avoiding conflict at the court of appeals level.

5. Stays of Proceedings

Like the injunction, the stay of proceedings in a second court has the purpose of avoiding duplicative litigation, often with the effect of preventing conflicting judgments. The cases hold that a federal district court has inherent power to stay proceedings before it to await the disposition of an action pending in another district.[265] In virtually all of the many reported cases in which that power has been exercised, the two actions have involved the same parties, but, as with the injunction, the power is not limited to such situations. The point is illustrated by the Supreme Court's decision in *Landis v. North American Co.*,[266] a case of particular relevance to the divided state situation. A group of holding companies brought suit in the District of Columbia to enjoin enforcement of the Public Utility Holding Company Act of 1935.[267] Among the defendants were members of the Securities and Exchange Commission. On the same day, the Commission filed a bill of complaint in the Southern District of New York to compel another group of holding companies to register with the Commission in accordance with the statute. In both courts the crucial issue was the constitutionality of the Act. A motion was then filed on behalf of the Commission to stay the proceedings in the District of Columbia until the validity of the Act

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[263] Crosley Corp. v. Hazeltine Corp., 122 F.2d 925, 930 (3d Cir. 1941).

[264] *Id.*

[265] *See, e.g.*, Powell v. American Export Lines, 146 F. Supp. 417 (S.D.N.Y. 1956). The considerations relevant to the granting of a stay are similar to those bearing on the appropriateness of an injunction. *See* Texaco, Inc. v. Borda, 383 F.2d 607, 608-09 (3d Cir. 1967); National Equip. Rental, Ltd. v. Fowler, 287 F.2d 43, 47 (2d Cir. 1961) (Lumbard, C.J., dissenting); Rosenfeld v. Schwitzer Corp., 251 F. Supp. 758, 763-64 (S.D.N.Y. 1966); Puritan Sportswear Corp. v. Puritan Fashions Corp., 232 F. Supp. 550, 555 (S.D.N.Y. 1964); *cf.* Levin v. Mississippi River Corp., 289 F. Supp. 353, 363 (S.D.N.Y. 1968).

[266] 299 U.S. 248 (1936).

[267] 15 U.S.C. §§ 79 to 79z-6 (1970).

had been determined in the New York case. The district court granted the motion, and the Supreme Court held that it had not abused its discretion in doing so. Justice Cardozo stated:

> [S]ome courts have stated broadly that, irrespective of particular conditions, there is no power by a stay to compel an unwilling litigant to wait upon the outcome of a controversy to which he is a stranger. . . . Such a formula . . . is too mechanical and narrow.
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> . . . .
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> . . . Especially in cases of extraordinary public moment, the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted.[268]

The Supreme Court then held that the stay could be extended only until the district court in the New York litigation had rendered its first decision.

Justice Cardozo's opinion appears to assume that the issue of the constitutionality of the Public Utility Holding Company Act would ultimately be determined by the Supreme Court. That assumption could not be made about all issues of federal law today. Nevertheless, a stay of proceedings by one court would still permit the sorting out and simplification of the common issues in the other court. Moreover, the disposition in the first case might satisfy all parties, obviating the need for further proceedings in the second action. Thus, while the stay is no panacea for inconsistent judgments, it may be effective in many of the situations in which inconsistent judgments would otherwise be possible.[269]

6. Service of Process in Another Circuit

Under present law, a district court in a state containing more than one federal judicial district may issue process to be served anywhere within the state, not only within its own district.[270] Unless the law were changed, this would mean that a district court in a state bifurcated between circuits would regularly be issuing process to be served outside its circuit.

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[268] 299 U.S. at 255-56.

[269] *See* Schechter v. Weinberger, 498 F.2d 1015 (D.C. Cir. 1974) (holding case pending final resolution of Third Circuit case raising same issue).

[270] FED. R. CIV. P. 4(f).

There would be no reason to change the rule, however. It is hardly anomalous today for a court to issue process to be served outside of its territorial jurisdiction; both state and federal courts do so routinely under state long-arm statutes.[271] Moreover, in a limited class of cases, federal district courts are permitted to serve process outside the state in which the court sits but within 100 miles of the place where the action is tried.[272] The purpose of this rule, in the words of the Advisory Committee, is "to promote the objective of enabling the court to determine entire controversies."[273] The effect is to empower district courts to extend their reach even into another circuit, to permit unitary litigation.

The "bulge service" provision is especially noteworthy because its drafters were explicitly attempting to foster unitary litigation in "metropolitan areas spanning more than one State."[274] This situation is analogous to that of a state spanning more than one circuit. In both instances, the controversy underlying the litigation cuts across jurisdictional lines; in both instances, one jurisdiction ought to be able to reach out into the other (consistently, of course, with the requirements of due process) to settle the controversy in a single proceeding.

Finally, service of process outside the circuit of the district court issuing the process would probably raise no constitutional problems, since the Supreme Court has suggested that Congress could, if it wished, authorize federal courts to serve process anywhere in the United States.[275]

7. Statutory Interpleader

Although the rules of party joinder have already been mentioned, special note should be taken of the Federal Interpleader Act.[276] Interpleader is designed to avoid the possibil-

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[271] Rule 4(f) permits federal courts to utilize state long-arm statutes.

[272] FED. R. CIV. P. 4(f). Similar provision is made in FED. R. CIV. P. 45(e) for the service of a subpoena for a hearing or trial. Bulge service supplements the authority which federal courts have to utilize state long-arm statutes.

[273] *Advisory Committee's Note*, 31 F.R.D. 627, 629 (1963) (FED. R. CIV. P. 4(f)).

[274] *Id.*

[275] Mississippi Publishing Co. v. Murphree, 326 U.S. 438, 442 (1946) (dictum). When the bulge service provision was first added to the federal rules, its constitutionality was challenged in several cases. The challenges were uniformly rejected, primarily on the authority of *Mississippi Publishing Co.* *See* Annot., 8 A.L.R. FED. 784, 793 (1971). *See also* Coleman v. American Export Isbrandtsen Lines, Inc., 405 F.2d 250 (2d Cir. 1968).

[276] 28 U.S.C. §§ 1335, 1397, 2361 (1970).

ity that a litigant will be subjected to two or more judgments upholding competing and inconsistent claims to a single fund or obligation.[277] Two aspects of the statutory scheme are of special interest here. First, as in any interpleader proceeding, the initiative rests with the person who fears inconsistent judgments. The principle—though not the statute itself—might therefore suggest a means whereby a state administrative officer who fears multiple lawsuits seeking to compel changes in his agency's practices could bring all the potential challengers into a single proceeding and thus avoid the risk of inconsistent orders.[278]

Second, to ensure the effectiveness of statutory interpleader, the statute provides that a district court may issue process to all claimants anywhere in the United States, and that once process is issued, the court may restrain the claimants from instituting or prosecuting a proceeding in any court, state or federal, affecting the property or obligation involved in the interpleader action.[279] This provision, too, suggests a way of avoiding inconsistent orders against a state administrative officer in the bifurcated state. Obviously, the concept of a "claim" would have to be broadened, and provision would have to be made for notice to all potential claimants. Procedures evolved for the class action[280] may provide useful guidance in the development of notice mechanisms.[281]

B. *Mechanisms for Avoiding or Resolving Conflicts in Interpretation of State Law: Abstention and Certification*

For reasons discussed earlier, issues of state law—whether in diversity cases or in other contexts—probably have the least potential for giving rise to troublesome conflicts if the judicial districts of California are divided between the Ninth and the Twelfth Circuits.[282] Nevertheless, a good deal of apprehension

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[277] This is a somewhat oversimplified statement of the purpose of an interpleader proceeding. For a more extensive analysis, see Hazard & Moskovitz, *supra* note 18, at 750-63.

[278] Consider the action of Southern Illinois University in bringing a class action against faculty members fired in a budgetary crisis. The university sought a judgment holding that the civil rights of 106 discharged employees had not been violated. Washington Post, Feb. 11, 1974, at A-3, col. 1.

[279] 28 U.S.C. § 2361 (1970).

[280] FED. R. CIV. P. 23.

[281] The literature on notice provisions in class actions is extensive. *See* 7A C. WRIGHT & A. MILLER, *supra* note 196, §§ 1786-88.

[282] *See* text accompanying notes 26-71 *supra*.

has been expressed in this regard, and it may be worthwhile to consider briefly mechanisms for avoiding such conflicts.

The first of these is abstention. While abstention is associated in many minds with cases involving the federal validity of state statutes,[283] it is by no means limited to such cases. Abstention may be ordered in a variety of situations sharing the common characteristic that a federal-court decision may turn on an issue of state law which "cannot be satisfactorily determined in the light of the state authorities."[284] To be sure, resort to abstention in diversity cases has aroused great controversy; the Fifth Circuit's *Delaney* decision,[285] under which abstention is freely ordered in cases involving important and unsettled questions of state law, has been extensively criticized,[286] and the scope of the doctrine generally is by no means clear.[287] Nevertheless, the Supreme Court has recently reaffirmed the proposition that "[s]ound judicial administration" may require abstention under at least some circumstances in diversity cases.[288] Abstention cannot, then, be dismissed as a means of avoiding conflicting decisions between the two circuits on issues of state law (outside of the context of federal constitutional adjudication), but neither can it be expected to play a significant role.

A more promising device is that of certification. In its report, the Commission notes that "if it were thought that the federal courts were having undue difficulty in interpreting

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[283] *See* text accompanying notes 65-70 *supra.*

[284] ALI STUDY, *supra* note 148, at 289.

[285] United Serv. Life Ins. Co. v. Delaney, 328 F.2d 483 (5th Cir. 1964); *see also* the separate opinion of Brown, C.J., sitting by designation in W.S. Ranch Co. v. Kaiser Steel Corp., 388 F.2d 257, 262 (10th Cir. 1967), *rev'd per curiam,* 391 U.S. 593 (1968).

[286] *See* authorities collected in C. WRIGHT, *supra* note 32, § 52 n.51.

[287] *See* H. HART & H. WECHSLER, *supra* note 27, at 998-1005.

[288] Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593, 594 (1968) *(per curiam). See also id.* at 595 (Brennan, J., concurring). For an exhaustive exegesis of the decision, see Comment, *The Need for More Definitive Standards in the Employment of Federal Court Abstention,* 14 UTAH L. REV. 196 (1969). The authors, attempting to extract standards from the Court's brief and cryptic opinion, note that the

> Court identified four circumstances justifying federal abstention: the crucial issue involved was of 'vital concern' to the arid state of New Mexico; the issue was a 'truly novel one'; a declaratory judgment was 'actually pending in the state courts'; and abstention would allow the federal court litigants 'the benefit of the same rule of law' as state court litigants and, thus, would be in the interest of 'sound judicial administration.'

Id. 201.

state law,"[289] the state legislature could provide for certification to state courts of doubtful issues of state law. Like abstention, certification has received a mixed reception in the courts and the literature,[290] but on this point the enthusiasts appear to predominate. "[T]he weight of scholarly opinion"[291] is that certification "not only achieves the objective of abstention—to prevent federal invasion of the state law-making function and to avoid needless federal-state friction—but also represents a more perfect attempt at cooperative judicial federalism, since concern for state sovereignty is implemented through a more efficient and simpler proceeding."[292]

During the current term the Supreme Court seized an opportunity to add its voice to those endorsing the certification procedure. In *Lehman Brothers v. Schein,*[293] the Court granted certiorari to review a decision of the Second Circuit in a trio of cases turning on a novel and unsettled question of Florida corporate law.[294] Review was limited to the issue whether the court of appeals erred "in not certifying the question of Florida law to the Florida Supreme Court pursuant to Florida's certification procedure."[295] Echoing the comments of scholars, the Court declared that use of the certification device "does of course in the long run save time, energy, and resources and helps build a cooperative judicial federalism."[296]

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[289] *See* COMMISSION REPORT, *supra* note 3, at 239. At the Commission's hearings, a question was raised whether the California Supreme Court could constitutionally answer certified questions without running afoul of the rule against advisory opinions. *Commission Hearings, supra* note 23, San Francisco, Cal., Aug. 31, 1973, at 23 (testimony of G.W. Shea, Esq.). A similar argument was rejected by the Washington Supreme Court in *In re* Elliot, 74 Wash. 2d 600, 610-11, 446 P.2d 347, 354-55 (1968). The same objection was initially raised to the enactment of declaratory judgment statutes; it is therefore relevant that the California courts, unlike those of various other jurisdictions, have been hospitable to the concept of declaratory relief. *See* Hess v. Country Club Park, 213 Cal. 613, 2 P.2d 782 (1931); Blakeslee v. Wilson, 190 Cal. 479, 213 P. 495 (1923); 15 CAL. JUR. 2d *Declaratory Relief* § 4 (1954).

[290] *Compare, e.g.,* Lillich & Mundy, *Federal Court Certification of Doubtful State Law Questions,* 18 U.C.L.A.L. REV. 888 (1971) (favorable), *with* Mattis, *Certification of Questions of State Law: An Impractical Tool in the Hands of the Federal Courts,* 23 U. MIAMI L. REV. 717 (1969).

[291] Lillich & Mundy, *supra* note 290, at 899.

[292] Note, *Inter-Jurisdictional Certification,* 111 U. PA. L. REV. 344, 350 (1963).

[293] 94 S. Ct. 1741 (1974).

[294] Schein v. Chasen, 478 F.2d 817 (2d Cir. 1973).

[295] Lehman Bros. v. Schein, 94 S. Ct. 568, *granting cert. to* Schein v. Chasen, 478 F.2d 817 (2d Cir. 1973). The Second Circuit's refusal to certify the question of Florida law is criticized in 87 HARV. L. REV. 675, 684-86 (1974).

[296] 94 S. Ct. at 1744 & n.8.

In the case before it, the Court continued, resort to certification "would seem particularly appropriate in view of the novelty of the question and the great unsettlement of Florida law, Florida being a distant State." At the same time, apparently mindful that in the federal system the primary responsibility for interpreting state law rests with the lower courts,[297] the Court emphasized that the use of the procedure in a given case "rests in the sound discretion of the federal court."[298] Therefore, rather than holding that the court of appeals did or did not err, the Court remanded the case so that the court of appeals could "reconsider" the advisability of certification.[299] The import of the decision was further clouded by the Court's failure to indicate to what extent its reluctance to dictate the use of the procedure rested on the unique character of diversity litigation; the possibility remains that the lower courts may be accorded less discretion in cases where state law issues arise in other contexts.[300]

Whatever the scope of the Court's decision, however, it bears emphasizing that neither abstention nor certification would be necessary for the overwhelming majority of the state law issues that arise in diversity cases, because either the law will be too clear to give rise to a conflict or the uncertainties will be resolved by the California courts without the need for special federal-state mechanisms.[301] If undue difficulties should arise, the certification route remains open to the legislature.[302]

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[297] Kurland, *Mr. Justice Frankfurter, the Supreme Court, and the Erie Doctrine in Diversity Cases,* 67 YALE L.J. 187, 216 (1957).

[298] 94 S. Ct. at 1744.

[299] *Id.*

[300] In a concurring opinion, Justice Rehnquist laid heavy emphasis on the fact that *Lehman Brothers* was a "purely diversity case," *id.* at 1746, and implied that he might narrow the discretion where the choice "trench[ed] upon the fundamentals of our federal-state jurisprudence." *Id. Cf.* Clay v. Sun Ins. Office, Ltd., 363 U.S. 207 (1960). Although *Clay*, too, was a diversity case, federal constitutional questions lurked beneath the issues of state law that were ultimately certified to the Florida Supreme Court. *See* Sun Ins. Office, Ltd. v. Clay, 319 F.2d 505, 508 (5th Cir. 1963), *rev'd,* 377 U.S. 179 (1964). In *Clay*, the Court gave strong support to certification, 363 U.S. at 212, and it is difficult to explain Justice Rehnquist's observation in *Lehman Brothers* that "the Court has today *for the first time* expressed its view as to the use of certification procedures by the federal courts." 94 S. Ct. at 1746 (emphasis added).

[301] For a recent case in which a three judge district court declined to invoke a certification procedure after concluding that the "possibilities of unseemly conflict" between federal and state courts were "remote," see Bay State Harness Horse Racing & Breeding Ass'n v. PPG Indus., Inc., 365 F. Supp. 1299, 1303 (D. Mass. 1973).

[302] Judge Ben C. Duniway of the Court of Appeals for the Ninth Circuit has said, "I would guess that if California were divided between two circuits there would

C. *Mechanisms for Avoiding or Resolving Conflicting Decisions on the Validity of a State Law*

Whatever its merits in other respects, the Commission's plan is likely to encounter rough sledding in Congress unless the bar and the public in California feel confident that the validity of state laws will not be left in limbo by conflicting decisions in the two circuits. However infrequently such conflicts might arise, their consequences are widely regarded as serious enough that it is necessary to find ways of avoiding or resolving them if the realignment plan is to be found acceptable. As the Commission emphasizes, however, existing mechanisms can go a long way to achieving those purposes, and a wide variety of new mechanisms might be devised.[303] In the following pages, emphasis will be placed on devices for which precedents are available, for unless a procedure has been tried and found effective in comparable circumstances, it is not likely to win the confidence of those who are apprehensive about the consequences of bifurcating the state.

1. Limitations on Venue

Several witnesses at the Commission's hearings suggested that one way to avoid inter-circuit conflicts with respect to the validity of state laws would be through restrictions on venue. It would be possible, for instance, to require that actions seeking injunctive or declaratory relief against the enforcement of a state statute or administrative regulation be brought in the district in which the state capital is situated.[304] Such a provision, however, would not affect the cases in which the federal validity of a state law is challenged in some other legal context, such as a habeas corpus action[305] or a suit between private litigants.[306] Nor would it, or any other venue statute Congress

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be little difficulty in persuading the California legislature to adopt the Florida [certification] procedure . . . ." He adds, "This is only one of the many ways in which the problem envisaged, if it should arise, could be taken care of." Letter from Judge Ben C. Duniway to Attorney General William B. Saxbe, Feb. 8, 1974, on file at the Commission.

[303] *See* COMMISSION REPORT, *supra* note 3, at 238-40.

[304] *See Commission Hearings, supra* note 23, San Francisco, Cal., Aug. 30, 1973, at 91 (testimony of Professor Stolz); *id.* 42 (testimony of Judge Duniway).

[305] *See, e.g.*, Smith v. Goguen, 94 S. Ct. 1242 (1974).

[306] *See, e.g.*, Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 612, 106 Cal. Rptr. 388 (1973).

is likely to enact, reach local ordinances that are in wide use throughout the state.[307]

Even if one could draft a venue statute encompassing such cases, or if a statute reaching only the one class of cases were deemed adequate, strong policy arguments would militate against its enactment. A venue limitation of the kind suggested would run counter to the congressional policy embodied in the Mandamus and Venue Act of 1962,[308] which removed prior limitations on the venue of suits against federal government officials acting in their official capacities.[309] To be sure, requiring a San Diego welfare client to bring suit in Sacramento to challenge a ruling of the state welfare commissioner may be thought significantly less burdensome than requiring challengers of federal action to sue in the District of Columbia; yet most Californians are likely to share the view of Professor Preble Stolz that "[i]t would be a first class nuisance to [people in the metropolitan centers of San Francisco and Los Angeles] to have to go to Sacramento to litigate."[310] Moreover, it must be acknowledged that people in southern California might not take kindly to the prospect that the validity of state legislation would always be tested, as far as the federal courts become involved,[311] in the northern circuit. For these reasons, whatever the theoretical merits of a venue limitation as a device for avoiding conflicts, the political and practical objections seem to be insurmountable.

2. Transfer and Consolidation

One way of avoiding parallel constitutional adjudications without permanently shutting out either the northern or the southern circuit would be through the transfer and, where appropriate, the consolidation of actions brought in district courts in the two circuits. Such transfers might be effected at either the district court or the court of appeals level. Use of

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[307] *See Commission Hearings, supra* note 23, San Francisco, Cal., Aug. 30, 1973, at 106 (testimony of Professor Mishkin).

[308] 28 U.S.C. §§ 1361, 1391(e) (1970). The cases construing § 1391(e) are collected in Annot., 9 A.L.R. FED. 719 (1971). *But see* O'Keefe v. New York City Bd. of Elections, 246 F. Supp. 978 (S.D.N.Y. 1965) (constitutional challenge to Voting Rights Act of 1965 could not be brought in local forum).

[309] *See* H. HART & H. WECHSLER, *supra* note 27, at 1385-90.

[310] *Commission Hearings, supra* note 23, San Francisco, Cal., Aug. 30, 1973, at 91 (testimony of Professor Stolz).

[311] *See* note 207 *supra* & accompanying text.

the transfer device is possible today in some kinds of cases; mechanisms of broader application can be devised, drawing upon the experience of courts in dealing with multidistrict litigation,[312] transfers of venue under section 1404(a),[313] and transfers of petitions for review of administrative agency orders.[314]

a. *Law to be Applied*

An important preliminary question is whether the court to which an action is transferred (the transferee court) is free to decide the transferred case according to the precedents of its circuit and its own view of the law, or whether, on the contrary, it must apply the law that would have been applied by the court where the action was initially brought (the transferor court). Unless the transferee court can apply a uniform rule of law to the various cases before it, transfers will lose most of their utility as a device for avoiding conflicting decisions, though they might still be desirable as a means of achieving economies for courts and litigants.[315]

Although questions of the law to be applied after a change of venue have been litigated frequently in the federal courts with respect to issues governed by state law,[316] there is little authority on the law to be applied by the transferee court with respect to issues of federal law.[317] Recently the point was raised

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[312] *See* text accompanying notes 241-58 *supra.*

[313] *See* text accompanying notes 232-40 *supra.*

[314] *See* text accompanying notes 209-31 *supra.*

[315] *See* text accompanying note 237 *supra.*

[316] *See* H. HART & H. WECHSLER, *supra* note 27, at 1139-40.

[317] The question was raised by the petition for certiorari in Morgan v. Automobile Mfrs. Ass'n, 414 U.S. 1045 (1973), *denying cert. to In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122 (9th Cir. 1973). Petitioner, a California farmer, filed a private antitrust action in the Eastern District of Pennsylvania against the domestic automobile manufacturers, alleging a conspiracy to suppress the development of air pollution control technology. Numerous similar suits were pending in districts throughout the country. Acting upon its own initiative, the Multidistrict Litigation Panel consolidated all of the actions for coordinated pretrial proceedings in the Central District of California. *In re* Motor Vehicle Air Pollution Control Equipment, 311 F. Supp. 1349 (J.P.M.L. 1970). The defendants then moved to dismiss the actions for lack of standing to sue under section four of the Clayton Act, 15 U.S.C. § 15 (1970). The district court denied the motions, but the Court of Appeals for the Ninth Circuit reversed. *In re* Multidistrict Air Pollution M.D.L. No. 31, 481 F.2d 122, 129-30 (9th Cir. 1973). Petitioner then sought certiorari, arguing, *inter alia*, that the Ninth Circuit erred in applying its own law of standing to a case filed in a district in the Third Circuit and consolidated for pretrial purposes in a district in the Ninth Circuit. Petition for Certiorari at 10-13. He contended, first, that section 1407 did not authorize "the consolidation forum . . . to contravene the law applied in the origi-

before the Judicial Panel on Multidistrict Litigation in one phase of the plumbing fixtures antitrust litigation.[318] After a series of transfers over a period of four years, approximately 370 actions were pending in the Eastern District of Pennsylvania. The State of North Carolina then filed an action in the Eastern District of North Carolina. Pursuant to the Panel's rules for "tag-along" cases,[319] the clerk of the Panel entered a conditional order transferring North Carolina's suit to the Pennsylvania court. The defendants supported the transfer, but the state resisted, solely because of its fear that the transferee court would apply Third Circuit law, rather than Fourth Circuit law, in deciding whether the state could maintain a treble damage action against the particular defendants under section

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nal court and dismiss a complaint," *id.* at 11; and, second, that application of Third Circuit law was required by Van Dusen v. Barrack, 376 U.S. 612 (1964). *Id.* at 11-13. As already noted, however, the drafters of section 1407 clearly intended to empower the consolidation court to rule on motions raising substantive issues, so as to "[h]ave only one court decide those questions instead of . . . dozens of different decisions in different courts." *See* note 249 *supra* & accompanying text. This purpose could not be accomplished unless the consolidation forum—at both trial and appellate level—could apply a single rule of law to all of the cases before it. For reasons given in the text, the decision in *Van Dusen v. Barrack* does not dictate a contrary result.

Petitioner's argument also seems inapposite in the circumstances of the particular case. The point was raised for the first time in the petition for certiorari. In his brief in the Ninth Circuit, far from contending that Third Circuit law controlled, petitioner had urged the court to rely on principles established in Ninth Circuit cases. Brief for Respondents at 9, Morgan v. Automobile Mfrs. Ass'n, 414 U.S. 1045 (1973) (quoting Brief for Appellees at 22, *In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122 (9th Cir. 1973)). Even in the Supreme Court, petitioner did not argue that application of the Third Circuit's standing test would compel a different result in his case, *see* Petition for Certiorari, *supra,* at 13-14; indeed, after analyzing the cases in the various circuits, a noted authority has concluded that "the doctrinal alignment of the Courts of Appeal is not hard and fast, and equivalent results can be reached in most cases under either the 'target area' test or the 'direct injury' test, or under a combination of the tests sometimes encountered." L. SCHWARTZ, INTER-CIRCUIT CONFLICT AND RELATED UNCERTAINTY OF LAW IN THE ANTITRUST FIELD 6 (1974) (on file at the Commission). Finally, petitioner's concern about "forum shopping between circuits," Petition for Certiorari, *supra,* at 12, came with ill grace "from a California citizen and resident, normally governed by Ninth Circuit decisions, who claim[ed] to be subject . . . to 'Third Circuit law' [only] because he chose to file his complaint in a federal court in Philadelphia." Brief for Respondents, *supra,* at 8. Although it is possible that petitioner brought his action in the Eastern District of Pennsylvania because the law there was thought to be more favorable to his claims, this seems unlikely, since the Ninth Circuit was regarded as more "liberal," at least on the standing issue, than the Third. *See* L. SCHWARTZ, *supra,* 6-7. It seems more probable that the forum was chosen because petitioner's attorneys practice in Philadelphia. *Cf.* note 79 *supra* & accompanying text.

[318] *In re* Plumbing Fixtures Litigation, 342 F. Supp. 756 (J.P.M.L. 1972).

[319] *See* J.P.M.L.R. 1, 12, 53 F.R.D. 119-20, 123 (1971).

four of the Clayton Act.[320] The state expressed the belief that the Third Circuit had interpreted the requirements of the Act less favorably to antitrust plaintiffs than the Fourth Circuit.[321] The Panel granted the transfer nonetheless, asserting that the state's fears were "groundless," because "[i]t is clear that the substantive law of the transferor forum will apply after transfer . . . ."[322] The point was not developed; the only authority cited was *Van Dusen v. Barrack.*[323]

Barrack was a diversity case decided by the Supreme Court in 1964. The Court held that "in cases such as the present, where the defendants seek transfer, the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue."[324] As this quotation indicates, the Court was careful to limit its holding to situations where a *defendant* seeks a transfer under section 1404(a).[325] In support of its conclusion, the Court emphasized that a contrary holding would permit a defendant to "get a change of law as a bonus for a change of venue."[326] This rationale, however, would not necessarily apply if the initiative for the change of venue came not from the defendants, but from an impartial tribunal concerned primarily with judicial efficiency and the avoidance of conflicts.[327] For this reason alone, it is questionable whether the Panel was justified in assuming without discussion that the ruling in *Barrack* would apply to an antitrust action transferred under section 1407.

There is a more important reason, however, for thinking that the *Barrack* decision does not necessarily preclude the application of a uniform rule of law by a transferee court when issues of federal law are involved. A reading of the opinion makes clear that the Supreme Court addressed itself only to the question of the *state* law to be applied after a change of

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[320] 15 U.S.C. § 15 (1970).

[321] *Cf. In re* Western Liquid Asphalt Cases, 487 F.2d 191, 197, 198 n.6 (9th Cir. 1973).

[322] 342 F. Supp. at 758. The Panel noted that the transferee court had "expressly affirmed this point," *id.* (citing Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 309 F. Supp. 1053, 1055 (E.D. Pa. 1969)).

[323] 376 U.S. 612 (1964).

[324] *Id.* at 639.

[325] *See id.* at 639-40.

[326] *Id.* at 635-36.

[327] *Cf., e.g., In re* Motor Vehicle Air Pollution Control Equipment, 311 F. Supp. 1349 (J.P.M.L. 1970) (transfer to single district under § 1407 considered by Panel on own initiative); *In re* Kaehni Patent, 311 F. Supp. 1342 (J.P.M.L. 1970) (Panel

venue.[328] While some of the Court's comments suggest a principle applicable to both kinds of issues,[329] that interpretation is undercut by the Court's reliance on "the policy underlying *Erie R. Co. v. Tompkins*."[330] The Court emphasized that "the 'accident' of federal diversity jurisdiction [should] not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed."[331] By its own terms, this rationale would not apply to cases brought in federal courts because of the federal question involved, or to the issues of federal law on which such cases turn.

The distinction between the two kinds of issues was brought into sharp focus by the Second Circuit's decision in *H.L. Green Co. v. MacMahon*,[332] a case cited with approval in *Barrack*.[333] In an opinion by Chief Judge Lumbard, the court, following the reasoning that the Supreme Court would later accept, held that section 1404(a) could not be used by a defendant to defeat the plaintiff's choice of the state whose law would be applied to his action.[334] The law of the transferor forum would thus follow a case to the transferee court. At the same time, the court observed that the plaintiff could not resist the transfer of his action to another district on the ground that the "transferee court will or may interpret *federal* law in a manner less favorable to him."[335] The court agreed with the Fourth Circuit that "if there is a conflict of views among circuits, 'this presents a matter for consideration by the Supreme Court on application for certiorari, not for consideration by a district judge on application for transfer . . . .' "[336] Implicit

on own initiative, issues order to show cause why actions should not be transferred to single district for coordinated or consolidated pretrial proceedings).

[328] *E.g.*, 376 U.S. at 639 ("A change of venue under § 1404(a) generally should be, with respect to state law, but a change of courtrooms."); *see id.* at 626-43 *passim*.

[329] *E.g.*, the Court's hostility to the use of § 1404(a) as a forum-shopping instrument or to a rule that would induce courts to deny transfers "despite considerations of convenience, if to do so might conceivably prejudice the claim of a plaintiff who had initially selected a permissible forum." *Id.* at 636 & n.35.

[330] *Id.* at 637.

[331] *Id.* at 638.

[332] 312 F.2d 650 (2d Cir. 1962), *motion for leave to file petition for writ of cert. or other appropriate writ denied*, 372 U.S. 928 (1963).

[333] *See* 376 U.S. at 631-33. Of course, the Supreme Court did not address itself to the validity of the distinction drawn by the Second Circuit.

[334] 312 F.2d at 652-53.

[335] *Id.* at 652 (dictum) (emphasis supplied).

[336] *Id.* (quoting Clayton v. Warlick, 232 F.2d 699, 706 (4th Cir. 1956)). *See also* Ackert v. Bryan, 299 F.2d 65, *rehearing denied*, 299 F.2d 72 (2d Cir. 1962), in which

in this analysis is the assumption that the transferee court is not required to follow the views of the transferor court's circuit on matters of federal law. Judge Lumbard explained the rationale for treating issues of federal law differently from issues of state law:

> The federal courts comprise a single system applying a single body of law, and no litigant has a right to have the interpretation of one federal court rather than that of another determine his case.
>
> However, insofar as the federal courts apply state law, they apply the law of fifty separate jurisdictions, rather than one.[337]

Even the Multidistrict Litigation Panel, notwithstanding its seemingly incorrect holding when the point was squarely raised, has, in other contexts, recognized the force of the considerations relied on by Judge Lumbard. The Panel has several times held that "the prospect of an unfavorable ruling by the transferee court or the possibility that another district judge may be more favorably disposed to a litigant's contentions are clearly not factors considered by the Panel in determining whether transfer under section 1407 is appropriate."[338] More directly in point are the Panel's decisions in the Butterfield patent[339] and the postal rate cases,[340] where transfers were ordered, among other reasons, to minimize the likelihood of inconsistent results in different courts.[341] These decisions must assume that the transferee court would apply a uniform rule of law to all of the cases before it; otherwise, the rationale would not support the transfers. In this regard, it is worth noting that in the postal rate litigation, the possibility of conflicting decisions was more than speculative; the various district courts had already reached inconsistent decisions on

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the court upheld the transfer of a case from the Southern District of New York to the District of Minnesota, even though an Eighth Circuit decision, in apparent conflict with the rule in the Second Circuit, appeared to require that the Minnesota court dismiss the action. *See id.* at 73-74 (Friendly, J., dissenting).

[337] 312 F.2d at 652.

[338] *In re* 7-Eleven Franchise Antitrust Litigation, 358 F. Supp. 286, 287-88 (J.P.M.L. 1973); *see In re* Texas Gulf Sulphur Securities Litigation, 344 F. Supp. 1398, 1400 (J.P.M.L. 1972).

[339] *In re* Butterfield Patent Infringement, 328 F. Supp. 513 (J.P.M.L. 1970).

[340] *In re* Fourth Class Postage Regulations, 298 F. Supp. 1326 (J.P.M.L. 1969).

[341] *See* notes 251-55 *supra* & accompanying text.

the question whether interim relief should be granted to the plaintiffs.[342]

In light of these considerations, the *Barrack* decision need not disturb the conclusion of the Second and Fourth Circuits that a plaintiff may not resist the transfer of his action on the ground that the transferee court may interpret federal law in a manner less favorable than the court where the action was brought. Viable, too, is the proposition that the transferee court should be free to apply its view of federal law uniformly to the actions transferred to it, as well as to the actions originally brought there. If these conclusions prevail, transfers can be used, where otherwise appropriate, to achieve unitary adjudication of the questions of federal law which arise in the context of challenges to the validity of state statutes.

b. *Availability of Transfers under Present Law*

Before turning to details of transfer mechanisms designed to avoid conflicts with respect to the federal validity of a California statute, it is important to note that in the most important class of cases—suits seeking injunctive or declaratory relief against an agency or official of the state—transfers could be effected today with no change in present law. Under sections 1391(b) and 1392(a), such actions could be brought in any district of the state.[343] By virtue of section 1404(a), if litigation is begun in more than one district, any of those courts have power, upon motion by the defendant, to transfer the action to another district "[f]or the convenience of parties and witnesses, in the interest of justice."[344] Because questions of law or fact relating to the operation and effect of the statute are likely to predominate over any questions affecting the rights of particular plaintiffs,[345] "the convenience of parties and witnesses" is likely to be better served by a trial in any one court than by multiple trials in several courts. In this regard, selection of a particular court will probably be less important than the avoid-

[342] *See* 298 F. Supp. at 1327.

[343] 28 U.S.C. §§ 1391(b), 1392(a) (1970). In this regard, no change would be made by the proposed Federal Court Jurisdiction Act of 1973. *See* S. 1876, 93d Cong., 1st Sess., § 1314(a) (1973).

[344] 28 U.S.C. § 1404(a) (1970). *See* text accompanying notes 232-40 *supra*. Transfers may also be granted upon request of the plaintiff. *See* C. WRIGHT, *supra* note 32, at 166.

[345] *Compare* FED. R. CIV. P. 23(b)(3).

ance of parallel litigation.[346] As stated earlier, the pendency of a similar action in another court is regarded as a persuasive factor, though not a conclusive one, in the decision whether to grant a transfer.[347] Moreover, under the principle stated by Judge Lumbard, no plaintiff could resist the transfer of his action on the ground that the transferee court might interpret federal law in a less favorable manner than the court selected by him.[348] All that is left, then, is the general proposition that the plaintiff has the right to bring his action in the forum of his choice, subject only to the rules of jurisdiction and venue. Suits seeking relief against the enforcement of a state statute, however, would seem to fall within the principle quoted earlier: "[W]here there are hundreds of potential plaintiffs, . . . all of whom could with equal show of right go into their many home courts, the claim of any one plaintiff that a forum is appropriate merely because it is his home forum is considerably weakened."[349]

All of these considerations suggest that when parallel lawsuits are brought in two or more districts, each challenging the federal validity of a state statute and seeking an injunction or declaratory judgment against a state officer or agency, the court where the second action is brought will often be able to transfer that action to the district where the first action is pending. To be sure, use of the transfer mechanism would leave room for a certain amount of forum shopping and racing to the courthouse.[350] That is, public-issue litigants would attempt to ensure that the first challenge to a state statute was brought in the circuit perceived as more favorable to the particular claim. If, however, the issue is one on which the circuits have divided (in cases arising in other states, for example), or are likely to divide, the question will probably be resolved ultimately by the Supreme Court, and any advantage gained would be transitory at best.

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[346] *Cf. In re* Cross-Florida Barge Canal Litigation, 329 F. Supp. 543, 544 (J.P.M.L. 1971).

[347] *See* text accompanying note 236 *supra.*

[348] *See* text accompanying notes 332-37 *supra.*

[349] Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 524 (1947); *see* text accompanying notes 238-40 *supra.*

[350] *But cf.* Currie, *The Federal Courts and the American Law Institute,* 36 U. CHI. L. REV. 268, 335 (1969): "A race to the courthouse is arbitrary and unseemly, but it is no more so than [a] race to judgment in two suits filed one after the other, and it involves a good deal less waste."

Transfers under section 1404(a) need not be limited to situations in which the second suit is brought while the first is still pending. On the contrary, if, after the first action has gone to judgment in one district, a similar suit is filed in a second district, the second court could transfer the new action to the first forum in accordance with the principles developed by the courts of appeals with respect to review of administrative agency orders.[351] In passing upon transfer requests, the courts of appeals have sought to promote "the general Congressional purpose of avoiding forum conflicts and forum shopping."[352] They have emphasized the desirability of transferring cases to a circuit " 'familiar with the background of the controversy through review of the same or related proceedings,' "[353] even when the earlier proceedings have been concluded in the other circuit.[354] One situation in which these principles might be invoked is that in which a public issue group, hoping for a different result after one circuit has upheld a state law, induces a different plaintiff to bring suit in the other circuit.[355] If the state then moves to transfer the action to the district in which the first suit was adjudicated, the court must weigh the plaintiff's presumptive right to choose his forum against the considerations of judicial efficiency relied on in the court of appeals transfer cases. One suspects that the court would be reluctant to use section 1404(a) transfers as an ad hoc device for avoiding conflict, or to deny its own circuit an opportunity to rule on the issues raised by the plaintiff.

These last considerations are likely to carry strong weight even when the first-instituted action is still pending in the other court. Moreover, whatever one's conclusions about the desirability of transfers after the first suit has gone to judgment, section 1404(a) has several other limitations as a device for avoiding conflicts. Where the state is not a party to the second suit, it is possible that no one would even request a transfer.[356] Most important, because a transfer order may for practical purposes determine the outcome of the case, it is

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[351] *See* text accompanying notes 209-31 *supra.*

[352] Eastern Air Lines, Inc. v. CAB, 354 F.2d 507, 511 (D.C. Cir. 1965).

[353] Municipal Distrib. Group v. FPC, 459 F.2d 1367, 1368 (D.C. Cir. 1972).

[354] *See, e.g.,* Farah Mfg. Co. v. NLRB, 481 F.2d 1143 (8th Cir. 1973); Municipal Distrib. Group v. FPC, 459 F.2d 1367, 1368 (D.C. Cir. 1972).

[355] *See* text accompanying notes 133-40 *supra.*

[356] *But see* text accompanying notes 363-64 & note 397 *infra.*

probably unwise to remit the decision to the virtually unreviewable discretion of the district court.[357] For these reasons, if the transfer mechanism is thought attractive as a general matter, a better approach is to devise a scheme directly addressed to the problem at hand.

c. *Kinds of Cases that Might Be Transferred*

The cases which come to mind most readily as candidates for inclusion in a transfer statute are those in which a plaintiff seeks declaratory or injunctive relief against the enforcement of a state statute or a generally applicable administrative order. Appropriate language could be borrowed, with a slight modification, from the American Law Institute's proposed federal jurisdiction statute: the provision would apply when two or more actions are filed "seeking an injunction or declaratory judgment against a state officer (or the state or an agency thereof) on the ground that his acts or threatened acts, taken under authority of a generally applicable state statute, administrative order, or constitutional provision, are contrary to the Constitution[, treaties or laws] of the United States."[358] If one is concerned with the evils of forum shopping and differential treatment, however, the stare decisis effect of a decision granting or denying declaratory relief against a private party defendant has as much potential for mischief as a decision for or against the state.[359] Consequently, it might be desirable to bring within the statute's coverage actions seeking injunctive or declaratory relief against the acts or threatened acts of *any person*, taken under the authority of a generally applicable statute, administrative order, or constitutional provision.[360]

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[357] *See* H. HART & H. WECHSLER, *supra* note 27, at 1137.

[358] *See* ALI STUDY, *supra* note 148, at 53 (proposed 28 U.S.C. § 1374); *compare* S. 1876, 93d Cong., 1st Sess. § 1374 (1973).

The language in the text differs from that of the ALI STUDY in that it extends to challenges based on federal treaties and laws as well as to constitutional challenges. The reason is that conflicting decisions are likely to have much the same consequences whether the cases involve constitutional issues or statutory interpretation. Moreover, the Institute, in drafting the proposed § 1374, was mindful of the many drawbacks of requiring cases to be heard by three judges rather than one, and sought to limit the procedure to cases in which it found an especially compelling justification for departing from the single-judge norm. There are no comparable reasons for limiting the availability of a discretionary transfer provision designed to avoid inter-circuit conflicts in the bifurcated state. *See also* note 406 *infra*.

[359] *Cf.* ALI STUDY, *supra* note 148, at 325.

[360] *See, e.g.*, Hernandez v. European Auto Collision, Inc., 487 F.2d 378 (2d Cir. 1973).

By the same token, legislation should extend to any case in which the validity of a generally applicable state statute, rule or order is drawn into question, whoever the litigants are and whatever the procedural context may be. On the other hand, where litigation is not brought primarily to vindicate a federal right, or where the claim of federal invalidity is one of many issues raised by a litigant (as in a collateral attack on a state conviction), the plaintiff's interest in litigating in the forum chosen by him may deserve priority. In those same cases, too, the likelihood that the federal question will actually be adjudicated may be rather attenuated.[361] One way of dealing with the problem would be to exclude such cases entirely from the operation of the transfer statute. In the interest of obtaining maximum flexibility, however, it is probably preferable to extend the reach of the statute to the broadest category of cases, while making clear that the court passing upon a motion for transfer should take the countervailing considerations into account and deny the transfer if they predominate.[362]

d. *Initiative for Requesting Transfer*

As the preceding paragraphs have suggested, there are many different kinds of cases which can provide opportunities for testing the federal validity of a state law, and which by the same token may give rise to conflicting decisions and all of the evils associated with conflict. At the same time, it is clear that various considerations can militate against transfers, and that these will operate with greater or less force in different cases. It seems desirable, therefore, to avoid any provisions for automatic transfer; instead, transfers should be permitted in a broad class of cases, with the decision in particular cases entrusted to a court. The next problem is to devise a mechanism by which the determination may be made.

It seems wise to place the initiative for requesting a transfer in the hands of the state.[363] The question in the first in-

[361] In other cases, the federal question may be so clearly settled by prior authority that as a practical matter there will be no risk of conflicting decisions; in such cases the transfer would not be justified as a device for avoiding conflict, although it might still be appropriate for other reasons. *See, e.g.*, 28 U.S.C. § 1404(a) (1970).

[362] Of course, any new transfer legislation would supplement the provisions now in force; thus, even if new legislation is narrowly drafted, § 1404 will often permit transfers in situations in which the new statute might not.

[363] *Cf.* H.R. 3805, 92d Cong., 1st Sess. § 5 (1971) (direct appeal from judgment granting injunction against enforcement of state statute for repugnance to federal

stance is whether the consequences of inconsistent decisions loom large enough, as a practical and political matter, to invoke the transfer mechanism. The most informed answer will come from the agency whose practices are attacked, or, in other cases, from the attorney general. Obviously, the right to request a transfer cannot be meaningfully exercised without an awareness of pending litigation. Notice will be no problem in lawsuits seeking relief against the acts of a state agency or officer, but as emphasized above, the federal validity of a statute can be adjudicated in other contexts as well. It would therefore be necessary to enact legislation to ensure that the state attorney general will receive notice of all federal court litigation involving the validity of state laws, and that the state will have an opportunity to intervene as a party in such litigation, at least to the extent of being able to request a transfer. The statute should provide for notice and intervention not only in cases involving issues of federal constitutionality, but also in cases in which the challenge is based on alleged repugnance to federal treaties or laws.[364]

e. *Nature of the Tribunal*

Under both section 1404(a), relating to change of venue at the district court level, and section 2112(a), dealing with transfers at the court of appeals level, requests for transfers are addressed to a tribunal empowered to adjudicate the case on its merits if the transfer is denied. In the present context, such a provision might well be fatal to the utility of a transfer scheme. An important goal in creating a conflict avoidance mechanism is to eliminate, or at least to minimize, any suspicion that transfers might be granted or denied as a stratagem to accomplish a particular result on the merits. This means that the tribunal which passes on motions for transfer should be one which will not decide the case in any event, and which will not be perceived as having any stake in the determination

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Constitution, but only if state attorney general files certificate stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice).

[364] A provision for notice and hearing is included in S. 271, 93d Cong., 1st Sess. § 5 (1973), the Senate-passed bill to abolish three judge courts. *See* 119 CONG. REC. S 11,114 (daily ed. June 14, 1973); note 397 *infra*. As presently written, however, the requirement of S. 271 would apply only to litigation involving issues of federal constitutionality. *See* note 358 *supra* & note 406 *infra*.

of whether a particular issue is to be adjudicated by a particular circuit.

These considerations suggest that requests for transfers should be addressed to a tribunal similar to the Judicial Panel on Multidistrict Litigation. Indeed, since the number of requests is not likely to be large, it might be convenient to assign the responsibility to the Panel itself. The Panel has had several years' experience in making forum selection decisions on the basis of considerations very similar to those which would be relevant in the present context.[365] The Panel is free of any ties to either circuit.[366] Finally, if conflict resolution mechanisms of general applicability are adopted, the Panel could be divested of the divided state transfer responsibility without the need for dismantling a special tribunal or administrative machinery functioning in only the one class of cases.

How much discretion should the Panel have, and what criteria should guide it? In its decisions under the present statute, the Panel decides two kinds of questions: the desirability of assigning multidistrict cases to a single court, and the selection of the transferee district.[367] The former has already been considered. With regard to the latter, it seems desirable to build upon the model of section 2112(a), which provides that all petitions for review of a single administrative agency order are to be transferred automatically to the circuit in which the first petition was instituted; the statute contains a provision for further transfer, but unless a party takes the initiative, all related petitions will be adjudicated by the circuit in which the first petition was filed.[368] It is this last aspect that is crucial here. If the Panel's discretion is limited to transferring later-filed actions to the court where the challenge was first raised, there is the minimum of opportunity for even the appearance of manipulation. The determination whether to order a transfer in a particular case can then be made on the basis of more neutral considerations: the likelihood that the

[365] *See generally Transferee Courts, supra* note 243, at 590-95. *Compare* the majority opinion in *In re* Butterfield Patent Infringement, 328 F. Supp. 513 (J.P.M.L. 1970) *with* that case's dissenting opinions.

[366] Federal judges from the Ninth and Twelfth Circuits sitting as members of the Panel might be required to disqualify themselves in cases involving transfers under the new legislation.

[367] *See, e.g., In re* Yarn Processing Patent Validity Litigation, 341 F. Supp. 376, 381 (J.P.M.L. 1972); *Transferee Courts, supra* note 243, at 593-94.

[368] *But see Race to the Court House, supra* note 210, at 171-74.

validity of the statute will in fact be adjudicated in both actions, the likelihood of conflicting decisions, the consequences of conflict, the interest of the second litigant in having his case tried in the forum of his choosing, the extent to which other issues will be contested, and the presence of factual questions unique to each case.[369]

f. *Level of Transfer*

In discussing the merits of a transfer mechanism, there is a tendency to assume that transfers would be effected at the district court level. Certainly this would be possible; but if the concern is to avoid conflicts between the two courts of appeals, a provision for transfers between district courts might turn out to be statutory overkill. Transfers, after all, operate to deny at least one litigant his choice of forum; even if the transfer request is ultimately denied, the availability of the procedure provides an opportunity for delay and vexation. These difficulties suggest that the mechanism should be tailored as narrowly as possible to meet the particular need created by dividing a state between circuits. Providing for transfers only at the appellate level would mean that the matter would not even be raised until two courts had actually decided the merits of an attack on the federal validity of a state statute. No doubt it was these considerations that prompted the Commission, in discussing transfers as a conflict-avoidance device, to cite section 2112(a), the provision dealing with transfers by Courts of Appeals of administrative agency orders, as a model rather than section 1404(a) or section 1407.[370]

Section 2112(a) is not a perfect model, however. Unlike petitions for review of an administrative agency order, appeals from district court adjudications of the validity of a statute cannot be expected to reach the two courts at roughly the same time.[371] Of course, it would be possible to permit transfers even after the first case has been disposed of by one court of appeals;

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[369] *See* text accompanying notes 360-62 *supra.*

[370] *See* COMMISSION REPORT, *supra* note 3, at 240.

[371] Some might find it anomalous that decisions of a district court would be subject to review by more than one court of appeals, but this situation exists today under § 211 of the Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, § 2, 85 Stat. 748-50, *amending* Pub. L. No. 91-379, §§ 201-06, 84 Stat. 799. The statute gives the Temporary Emergency Court of Appeals exclusive jurisdiction of appeals from all federal district courts in cases arising under the Act. *Cf.* note 199 *supra. See also* the description of the jurisdiction of the "national division of the

but in such a situation the transfer would clearly determine the outcome, and just as clearly deprive the second court of appeals of an opportunity to reach the issue. As an abstract matter, there is nothing wrong with this result; for instance, in suits seeking declaratory or injunctive relief against a state officer or agency, the judgment in one circuit—or for that matter one district—will have a binding effect throughout the state, even without any transfers.[372] The difference lies in how the two situations are likely to be perceived. It is one thing when a single in personam judgment restrains a defendant's conduct outside as well as within the court's territorial jurisdiction; it may be quite another when a transfer procedure precludes a second court of equal status from ever deciding an issue which would otherwise come before it.

g. *Transfer Mechanisms Generally*

Whatever mechanisms are devised for assigning the transfer decision to a neutral tribunal, the result is to limit adjudication of the merits of the federal claim to one circuit, and to exclude participation by the other. From one point of view, this should not be objectionable. A variety of factors militate against either circuit's developing a reputation as being especially receptive or hostile to challenges to state statutes. Both circuits can be expected to draw a majority of their judges from the state of California, and the nominations of those judges would generally be subject to the same influences, including vetoes by the same Senators.[373] Moreover, most cases would be decided by randomly selected panels of three judges, making it more difficult for either court to develop "a distinct ideological bias."[374] In particular cases, it will probably be more a matter of chance than calculation whether the initial

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United States Court of Appeals" in SPECIAL COMMITTEE, *supra* note 88, at 7, and of the "national panel" proposed by former Solicitor General Griswold, in Griswold Interview, *supra* note 82, at 5, 7.

[372] *See* text accompanying notes 114-17 *supra*.

[373] *See* H. CHASE, FEDERAL JUDGES: THE APPOINTING PROCESS 43-45 (1972).

[374] *Commission Hearings, supra* note 23, San Francisco, Cal., Aug. 30, 1973, at 72 (testimony of Judge Browning). *But see id.*, Los Angeles, Cal., Aug. 31, 1973, at 33-34 (testimony of Assistant U.S. Attorney Campbell). Indeed, it would probably be difficult today to point to any of the courts of appeals as being consistently more favorable or less favorable than others to federal constitutional claims. This in turn may be attributable to the tendency of panels on at least some courts to go their own way without great regard for what other panels are deciding. *See* Griswold, *The Judicial Process*, 31 FED. B.J. 309, 325 (1972).

challenge is brought in one circuit or the other;[375] constitutional cases are therefore likely to be litigated in both circuits with roughly equal frequency. If this analysis is correct, neither northern nor southern Californians should have any reason to feel a sense of affront that the validity of a particular statute is adjudicated by the other circuit rather than their own.[376]

Notwithstanding these considerations, Congress may conclude that appellate decisions as to the validity of California laws should not be made by a tribunal with jurisdiction over only a portion of the state. There are two ways of avoiding that situation: the creation of special tribunals, composed either of judges from both circuits or of judges associated with neither circuit; or a requirement that conflicts between the circuits be settled by the Supreme Court.

3. Specially Constituted Tribunals

Venue restrictions and transfer mechanisms are devices for avoiding conflicts by assuring that decisions on the validity of state laws are made by only one of the two circuits with jurisdiction in the state. By their very nature, such solutions exclude one of the circuits from participation in the decisional process, a consequence which may be found unacceptable. We turn, therefore, to mechanisms which escape this liability, either by providing a role for both circuits or by remitting the final determination to a neutral tribunal.

One solution would be to permit cases involving the federal validity of state laws to be heard and decided by the two courts of appeals sitting en banc together. Such hearings could be granted in accordance with the flexible criteria used today to determine whether cases are to be heard en banc by

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[375] The forum for the initial challenge may depend, for instance, on the identity and location of the particular group or individual who first comes to feel that the issue is ripe for testing. Moreover, even where tactical considerations come into play, the litigant may be more interested in bringing the case before a particular trial court than in a particular circuit. According to testimony at Commission hearings, there is a certain amount of forum shopping today in three judge court cases, even though such cases may be appealed as of right to the Supreme Court. *Commission Hearings, supra* note 23, Los Angeles, Cal., Aug. 31, 1973, at 32 (testimony of Assistant U.S. Attorney Campbell).

[376] Indeed, one should not be too quick to assume that Californians in one section of the state or the other would regard one circuit as "their own," or that residents of the state other than attorneys would even be conscious of which circuit is responsible for striking down a state law.

a single circuit.[377] Thus, joint en banc hearings need not be limited to situations of actual conflict; they might also be appropriate for questions of great public importance,[378] or in situations in which it is thought desirable to settle an issue at the earliest possible time, to avoid even the chance of conflict between the circuits.[379]

A joint en banc procedure carries overtones of a proposal, rejected by the Commission, to "restructure" the present Ninth Circuit into two "divisions" rather than create two new circuits.[380] The difference is that under the plan discussed here, a proceeding involving both circuits would be invoked only in the one circumstance in which there is a special need for it; otherwise, the two circuits could function independently, without any need "to coordinate the activities of the two divisional headquarters and the directives of the two divisional chief judges."[381] Nor would there be any need for the two courts to attempt to maintain a consistency of decisional law, except with respect to issues raised by challenges to the federal validity of California laws. Providing for joint en banc hearings only in the one class of cases would thus mitigate the drawbacks feared by the Commission if the "divisional" structure were adopted.

This is not to say that the procedure would be free of difficulties. The two courts together would have at least fifteen, and perhaps as many as eighteen, judges.[382] The experience of the Fifth Circuit has been that en banc hearings pose serious problems, in terms of both logistics and the adjudicative process, when the number of judges participating is fifteen.[383] The same problems militate against the desirability of convening such a large body of judges in order to prevent

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[377] *See generally* Note, *supra* note 73, at 578-98.

[378] *See id.* 586-92; *cf.* FED. R. APP. P. 35(a)(2).

[379] *Cf.* Boraas v. Village of Belle Terre, 476 F.2d 806, 825-27 (2d Cir. 1973) (Timbers, J., dissenting from denial of reconsideration en banc), *rev'd*, 94 S. Ct. 1536 (1974); Note, *supra* note 73, at 586.

[380] *See* COMMISSION REPORT, *supra* note 3, at 241.

[381] *Id.* 242.

[382] *See id.* 235. In 1972 the Judicial Conference urged the creation of two new circuit judgeships for the present Ninth Circuit, to bring the total to 15. JUDICIAL CONFERENCE OF THE UNITED STATES, PROCEEDINGS 36 (1972).

[383] *See Commission Hearings, supra* note 23, New Orleans, La., Aug. 22, 1973, at 150-52 (testimony of Judge Godbold); Statement with Reference to Circuit Realignment submitted by eight active judges of the Fifth Circuit to the Commission, Aug. 23, 1973, at 2, on file at the Commission.

Californians from experiencing the consequences of conflicting decisions. Moreover, because the procedure is so cumbersome—especially with the judges scattered from Hawaii to Montana to Arizona—the court might be reluctant to grant joint en banc hearings in some cases in which they would serve the purpose envisioned for them.[384]

To avoid these problems, the function of resolving conflicts on the validity of California laws might be assigned to a panel of judges selected from the two circuits, rather than to all of them. Various methods of selection could be devised; for instance, the panel might be composed of the four most senior judges, together with the three most junior.[385] The objections to such a procedure are much the same as those raised to the selection method suggested by the Freund Study Group for their proposed National Court of Appeals;[386] the validity of California laws, the argument goes, should not turn on the decision of any randomly convened group of judges.[387] On the other hand, the fear of creating opportunities for "packing" a court according to political inclinations or judicial philosophy would probably rule out such methods as selection by the President or even the Chief Justice.[388] Even if an acceptable method of selection can be found, there remains Judge Friendly's caveat that limiting en banc proceedings "to a reviewing division, . . . would inevitably breed justifiable dissension."[389]

One can invent other ways in which a special tribunal could be constituted, but these require no more than a brief mention. For instance, it would hardly seem worthwhile to create a "fourth tier" court intermediate between the Courts

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[384] With an en banc court of 15 judges, the hearing alone consumes judge time in which five cases could be heard by panels. *See* Note, *supra* note 73, at 576-77.

[385] Because the courts of appeals are national as well as regional courts, it would be undesirable to create any system limiting the panel to California judges.

[386] STUDY GROUP, *supra* note 72, at 591.

[387] *Cf., e.g.*, H. FRIENDLY, FEDERAL JURISDICTION 52-53 (1973).

[388] *But see* Economic Stabilization Act Amendments of 1971, § 211(b)(1), Pub. L. No. 92-210, § 2, 85 Stat. 749, *amending* Pub. L. No. 91-379, §§ 201-06, 84 Stat. 799. An intriguing possibility would be to assign cases to a panel consisting of nine judges, one selected by each of the Justices of the Supreme Court from among the judges of the two circuits.

[389] H. FRIENDLY, *supra* note 387, at 45. Judge Godbold of the Fifth Circuit Court of Appeals expressed a similar view. *Commission Hearings, supra* note 23, New Orleans, La., Aug. 22, 1973, at 151-52 (testimony of Judge Godbold).

of Appeals and the Supreme Court.[390] Nor would the judges or the public be likely to accept any plan which assigned the decision-making power to a tribunal composed of judges selected from outside both circuits. It should be noted, however, that if Congress accepts the recommendations of an American Bar Association group[391] and the Advisory Council on Appellate Justice[392] for the creation of a new court, or "division," to resolve inter-circuit conflicts, that tribunal might appropriately be entrusted with the function of resolving conflicts between federal courts over the validity of California laws.

4. Supreme Court Resolution

If it is thought undesirable either to exclude one of the circuits from the decisional process or to create a new tribunal for reconciling the differences between them, a third alternative may appear attractive: assigning the conflict-resolution function to the Supreme Court of the United States. It has already been suggested that in those situations in which the Ninth and Twelfth Circuits hand down inconsistent decisions with respect to the federal validity of a state statute, the issue is likely to be one that the Supreme Court will take for review in any event because of the difficulty or the fundamental clash of values involved.[393] The existence of a conflict would furnish an additional, and perhaps decisive, reason for granting review. Nevertheless, Congress may conclude that it is not sufficient to rely on the Court's discretion—that the possibility of conflicting adjudications on the validity of a state law at the court of appeals level is so serious that in the absence of other mechanisms (or even notwithstanding their availability), the Supreme Court must be compelled by statute to resolve the conflict. The realignment bill now before the Senate reflects this view. It would amend section 1254 of the Judicial Code[394] to provide that cases in the courts of appeals could be reviewed

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[390] *Cf.* SPECIAL COMMITTEE, *supra* note 88, at 5 (listing among its principles "a 'fourth tier' of courts should be avoided if at all possible").

[391] *Id.* The Committee's recommendation that Congress create a "national division of the United States Courts of Appeals" for the purpose, among others, of eliminating inter-circuit conflicts was approved by the ABA House of Delegates at its midwinter 1974 meeting.

[392] ADVISORY COUNCIL, *supra* note 88.

[393] *See* text accompanying notes 172-79 *supra.*

[394] 28 U.S.C. § 1254 (1970).

> [b]y appeal, where is drawn in question, the validity of a State statute or of an administrative order of statewide application on the ground of its being repugnant to the Constitution, treaties, or laws of the United States: Provided, however, that this subsection shall apply only when the court of appeals certifies that its decision is in conflict with the decision of another court of appeals with respect to the validity of the same statute or administrative order under the Constitution, treaties, or laws of the United States.[395]

The proposed amendment has the advantage of being narrowly directed to the potential conflicts that have aroused the greatest apprehension among judges and members of the bar in the Ninth Circuit. Whatever its merits, however, the amendment is largely superfluous. Under the present section 1254(2), an appeal may be taken to the Supreme Court as of

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[395] S. 2988, 93d Cong., 2d Sess. § 7 (1974). Of course, the fact that a case comes within the Court's appeal jurisdiction does not mean that it will receive plenary consideration. *See* SUP. CT. R. 15(1)(f); R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 193-202, 230-34 (4th ed. 1969). Nor will summary affirmance by the Court of a case coming within its appeal jurisdiction necessarily settle the underlying federal issues. *See* Vlandis v. Kline, 412 U.S. 441, 454-55 (1973) (Marshall, J., concurring); Gibson v. Berryhill, 411 U.S. 564, 576 (1973); STUDY GROUP, *supra* note 72, at 596. These difficulties should not seriously affect the usefulness of the mandatory review procedure included in the Senate bill, however. If the Court summarily affirms the judgment in a case appealed under the proposed § 1254(4), the bench and bar in both circuits could justifiably assume that the other circuit's contrary decision had been overruled. This would be equally true whether the state law had been upheld or struck down by the decision from which the appeal is taken. A summary reversal, on the other hand, would leave the decision of the other circuit to stand unchallenged within the state. (Summary reversal is unlikely, however, unless an intervening decision by the Court has settled the underlying federal issue. *See* R. STERN & E. GRESSMAN, *supra*, 233-34). In either event, the statute would serve the purpose of eliminating uncertainty caused by the existence of conflicting circuit court decisions. Of course, to the extent that uncertainty results from the generally unsettled state of the law, *see, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 490 (1971) (Harlan, J., concurring), Californians will be no better off than anyone else. It is worth noting that the California bar is familiar with the state supreme court's practice of "disapproving" decisions of the intermediate appellate courts which are inconsistent with supreme court rulings. *See, e.g.*, People v. Superior Court, 7 Cal. 3d 186, 206, 496 P.2d 1205, 1220, 101 Cal. Rptr. 837, 852 (1972).

There remains the possibility that the United States Supreme Court might dismiss an appeal under the proposed § 1254(4) for lack of jurisdiction. First, an appeal lies only if the case draws in question the validity of state law on the ground of repugnance to the Constitution, treaties, or laws of the United States. This phrase is derived from 28 U.S.C. § 1257(2) (1970), which governs review by appeal from state court decisions. *See* text accompanying notes 398-406 *infra*. If, in accordance with its interpretation of section 1257(2), the Court finds that the case does not draw in question the validity of a state statute, but, for instance, only the validity

right "by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States . . . ."[396] This means that if the new Ninth Circuit strikes down a California statute after the Twelfth Circuit has upheld it, the Ninth Circuit decision may be appealed to the Supreme Court as of right. The conflict would thus be resolved by the Supreme Court. If the decision creating the conflict is the one holding the statute valid, *that* decision would not fall within the Supreme Court's appeal jurisdiction, but of course the first decision, holding the law invalid, would have been subject to appeal; and it seems reasonable to suggest that if the state would be satisfied only with a Supreme Court resolution of the issue, it should have taken the appeal at the time of the first decision.

This discussion assumes that the state will be a party to any court of appeals litigation in which the validity of a state statute is at issue. Under present law, this assumption is not justified; but, as already suggested, legislation could easily be enacted to ensure that the state attorney general receives notice of all federal court litigation involving the validity of state laws and that the state has an opportunity to intervene as a party in such litigation, and to take an appeal if the losing private litigant chooses not to do so.[397]

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of an official's particular exercise of his statutory powers, the appeal will be dismissed. *See* H. HART & H. WECHSLER, *supra* note 27, at 637-40; R. STERN & E. GRESSMAN, *supra*, 109-10; STUDY GROUP, *supra* note 72, at 604-06. Second, the Court might conclude that the certifying court of appeals erred in finding that its decision was "in conflict with the decision of another court of appeals with respect to the validity of the same statute or administrative order under the Constitution, treaties, or laws of the United States." S. 2988, 93d Cong., 2d Sess. § 7 (1974). One must assume that the Court would not reach that conclusion unless it was persuaded that the two decisions could be harmonized, so that Californians would not be bedeviled by the problems of inconsistent rulings. That question is probably academic, however, for the wording of the proposed statute suggests that certification by the second court of appeals is both necessary and sufficient to satisfy the second jurisdictional prerequisite. Under this reading, the Supreme Court would not be free to re-examine the court of appeals determination that a conflict exists. *Compare* 28 U.S.C. § 1254 (3) (1970) (governing certification of questions of law by the courts of appeals); *see also* H. HART & H. WECHSLER, *supra* note 27, at 1585-86; Moore & Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 VA. L. REV. 1, 42-45 (1949). In any event, if the appeal is dismissed, the Court may still grant certiorari to resolve the issues involved. 28 U.S.C. § 2103 (1970); City of El Paso v. Simmons, 379 U.S. 497, 502-03 (1965); *see, e.g.*, DeFunis v. Odegaard, 94 S. Ct. 538, *granting cert. to* 82 Wash. 2d 11, 507 P.2d 1169 (1973), *vacated as moot*, 94 S. Ct. 1704 (1974).

[396] 28 U.S.C. § 1254(2) (1970).

[397] *See* text accompanying notes 363-64 *supra*. FED. R. CIV. P. 24(b) now permits a state officer or agency to intervene in an action whenever a party "relies for ground

By its terms, section 1254(2) applies only to state "statutes," not to state administrative orders or constitutional provisions. Because few appeals have been taken under this provision,

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of claim or defense upon any statute or executive order administered by" the agency or officer, "or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order . . . ." The rule, however, does not give the state a right to intervene; in considering the state's application, the court must consider "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *See* 3B J. MOORE, FEDERAL PRACTICE ¶ 24.10[5] (1974). Moreover, the provision does not apply to cases involving the validity of statutes which are not administered by an agency.

The Senate bill to eliminate the three judge court requirement in constitutional litigation, except for reapportionment cases, includes a provision to ensure that the state attorney general will receive notice of all federal court litigation in which the constitutionality of "any statute of that state affecting the public interest is drawn in question." S. 271, 93d Cong., 1st Sess. § 5 (1973); *see* 119 CONG. REC. S 11,114 (daily ed. June 14, 1973). The state would then be permitted to intervene for the presentation of evidence and for argument on the question of constitutionality. Upon intervention, the state would have, "subject to the applicable provisions of law, . . . all the rights of a party . . . to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality."

In the present context, the crucial question is whether this provision would give the state the right to appeal from a decision holding a state law unconstitutional if the private litigant relying on the law chose not to do so. The proposed statute is modeled upon 28 U.S.C. § 2403 (1970), which permits intervention by the United States when the constitutionality of an act of Congress is called into question. The question whether the United States may alone take an appeal from a judgment of unconstitutionality appears never to have been litigated in a reported case. Commentators at the time the provision was first enacted expressed doubts about the constitutionality of such an appeal. 38 COLUM. L. REV. 153, 156-62 (1938); 51 HARV. L. REV. 148, 149-51 (1937). A more recent discussion suggests that because the government is "charged as sovereign with the protection of the public interest," it might be possible to justify an appeal by the United States from a holding of unconstitutionality which the private litigants were willing to accept. 65 HARV. L. REV. 319, 322-23 (1951). However that may be, the paucity of litigation on the issue suggests that in practice, litigants who rely on statutes challenged as unconstitutional are willing to appeal from adverse decisions whenever the government wishes to do so. (Of course, it is quite uncommon today for a court to hold a federal statute unconstitutional.) Indeed, the phenomenon which largely prompted the enactment of what is now § 2403—the use of collusive suits to challenge the validity of legislation, *see* 38 COLUM. L. REV. at 153-54; 51 HARV. L. REV. at 149 n.3—appears largely to have vanished. This may result from the different character of the issues litigated. *Cf.* Douglas, *The Supreme Court and Its Case Load*, 45 CORNELL L.Q. 401, 411 (1960).

These issues are largely theoretical. Whether or not S. 271 is enacted, the state will be a party to most litigation in which the federal validity of a state law is drawn in question; where the state is not initially a party, the courts will often allow intervention under rule 24(b); and where the state is not made a party, a litigant relying on a state law can be expected to appeal a judgment holding the law invalid when another federal court has reached, or might plausibly reach, a contrary decision.

Under neither the proposed § 1254(4) nor the present law could the state appeal from a court of appeals decision, not otherwise appealable by it, if the court ruled in favor of the validity of a state law. *See* Public Serv. Comm'n v. Brashear Freight Lines, 306 U.S. 204, 206 (1939). It might appear from the literal language of 28 U.S.C. § 1254(1) (1970) that the state could ask the Supreme Court to review a

the Supreme Court has not often had occasion to construe it,[398] but similar language in the statute governing review of state court decisions has been interpreted very broadly. Section 1257(2) of the Judicial Code[399] permits an appeal as of right from a state court decision upholding "a statute of any state" against a claim that it is repugnant to the Constitution, treaties or laws of the United States. The Court has said that the term "statute" includes "[a]ny enactment, from whatever source originating, to which a State gives the force of law,"[400] and "every act legislative in character to which the State gives sanction, no distinction being made between acts of the state legislature and other exertions of state law-making power."[401] Under this approach, appeals have been held to lie from decisions upholding an order of the regents of the state university,[402] court rules,[403] regulations of administrative agencies,[404] and even municipal ordinances.[405] If the legislative history of the proposed section 1254(4) were to make clear that "statute" is to be interpreted in accordance with the construction given the word in cases appealed under section 1257(2), it would be unnecessary to refer explicitly to administrative orders as well as to statutes.[406]

Apart from the niceties of statutory drafting, the trend of scholarly opinion in recent years has been to oppose reten-

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case by certiorari even though the state had prevailed on all issues in the court of appeals. To allow such a petition, however, "would seem to be inconsistent with the Court's settled refusal to entertain an appeal by a party successful in obtaining a final judgment in his favor in the lower court." R. STERN & E. GRESSMAN, *supra* note 395, at 30. This alone would suggest that if the state wishes to assure Supreme Court resolution of an issue concerning the validity of a state law, it should seek review of any adverse decision, whether or not litigation is in progress in the other circuit. Such a practice would render the proposed amendment to § 1254 unnecessary.

[398] *See* R. STERN & E. GRESSMAN, *supra* note 330, at 31.

[399] 28 U.S.C. § 1257(2) (1970).

[400] Williams v. Bruffy, 96 U.S. 176, 183 (1877).

[401] Hamilton v. Regents of Univ. of Cal., 293 U.S. 245, 258 (1934). *See* R. STERN & E. GRESSMAN, *supra* note 395, at 83-84; H. HART & H. WECHSLER, *supra* note 27, at 641-42.

[402] Hamilton v. Regents of Univ. of Cal., 293 U.S. 245 (1934).

[403] Lathrop v. Donahue, 367 U.S. 820 (1961).

[404] La Crosse Tel. Corp. v. Wisconsin Employment Relations Bd., 336 U.S. 18 (1949); Sultan Ry. v. Department of Labor, 277 U.S. 135 (1928).

[405] King Mfg. Co. v. City Council, 277 U.S. 100 (1928).

[406] Adding a reference to "administrative orders" also carries a risk, albeit probably a small one, that the courts might give an undesirably narrow reading to the new provision. That is, the term "statute" might be held to exclude not only administrative orders, but also other "exertions of state lawmaking power," *see* note 401 *supra*, which might not be characterized in common parlance as "statutes,"

tion of the Supreme Court's appeal jurisdiction and to favor making all cases reviewable only by certiorari.[407] Although the Freund Study Group's proposal for a National Court of Appeals aroused wide controversy, there was general approbation for its suggestion that the appeal jurisdiction be abolished.[408] If the Study Group's recommendations on this point are accepted, section 1254(2) would no longer assure Supreme Court review of one of two conflicting decisions by a court of appeals with respect to the federal validity of a state law.[409] The proposed section 1254(4) would then serve an independent function, but by the same token it would appear to be inconsistent with the policies suggesting the repeal of section 1254(2).[410] While one might regret an inroad on the principle

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but which have been held to fall within the term as used in § 1257(2). *See* notes 400-05 *supra*. Moreover, the proposed statute approaches dangerously closely to the language of 28 U.S.C. § 2281 (1970), which requires three judge courts in certain constitutional cases ("any . . . statute . . . or . . . an order made by an administrative board or commission acting under State statutes . . . ."). That statute has been interpreted more narrowly than § 1257(2). *See* ALI STUDY, *supra* note 148, at 320-22; H. HART & H. WECHSLER, *supra* note 27, at 969-72. There is all the more reason, therefore, to follow the relevant language of § 1257(2) *in haec verba*.

At the same time, the proposal sensibly extends to claims under federal treaties and laws as well as to constitutional claims, clearly following the pattern of § 1257(2) rather than § 2281. The consequences of conflicting decisions will be equally pernicious whether the conflict involves constitutional or statutory interpretation, although in the latter instance Congress as well as the courts could settle the question one way or the other. *Cf.* ALI STUDY, *supra* note 148, at 322.

[407] *See, e.g.*, STUDY GROUP, *supra* note 72, at 595-605; Moore & Vestal, *supra* note 395, at 42, 44; authorities cited in note 408 *infra*.

[408] *See, e.g.*, H. FRIENDLY, *supra* note 387, at 50; Gressman, *The National Court of Appeals: A Dissent*, 59 A.B.A.J. 253, 258 (1973).

[409] Other routes to Supreme Court review would, of course, remain open. The Study Group's proposals would not affect the Court's power, under 28 U.S.C. § 1254(1) (1970), to grant certiorari to review any case in a court of appeals *before* the court of appeals has rendered judgment. Under SUP. CT. R. 20, the writ will be granted "only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court." This mechanism might be appropriate in those rare cases in which parallel lawsuits in the two circuits threaten to result in conflicting orders being addressed to a state agency.

The Study Group does recommend repeal of the authorization for certification of questions from a court of appeals to the Supreme Court. STUDY GROUP, *supra* note 72, at 603. Other authorities, however, have suggested that the certification procedure can be used to advantage as a means of resolving conflicts among, or perhaps even within, the circuits. Moore & Vestal, *supra* note 395, at 35-37. (At the same time, the authors urge that certification *not* invoke the Supreme Court's obligatory jurisdiction. *Id.* at 43-44).

[410] Apart from the problems discussed in note 395 *supra*, the appeal jurisdiction is believed undesirable because of the burdens it places on the Supreme Court; the "complications for counsel and the Court arising from a bifurcated system of

that the Supreme Court should not be required to hear appeals, the practical effect on the Court's docket is likely to be small; it would be surprising if even three or four cases a year were appealed under the proposed amendment.[411]

III. CONCLUSION

The likelihood that conflicting judgments or inconsistent rules of law would result from the allocation of California's judicial districts between two circuits cannot be predicted with confidence. Moreover, the frequency with which such conflicts might occur does not provide an adequate measure of the seriousness of the problem; a sharp increase in forum-shopping in diversity tort cases might be regarded as a low price to pay for the benefits of a more equitable division of appellate caseloads, while a single instance in which a state agency was caught between conflicting commands of federal courts might

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review," STUDY GROUP, *supra,* note 72, at 605; and the ambiguity of the resulting summary dispositions. As stated in the text, cases certified under the proposed § 1254(4) are not likely to add significantly to the Court's workload, but the other objections cannot be put aside so easily. Even more than existing provisions permitting appeals, the proposed legislation would require the Supreme Court to adjudicate the merits of a federal claim which almost by hypothesis will involve perplexing and sensitive issues, at a time when the Court may believe the issues not ripe for consideration. Although the Court may affirm or reverse summarily without foreclosing its ultimate resolution of the questions, such summary action "creates problems for lower courts and makes unnecessary work for the .Court itself in the future as litigants, uncertain of the significance of a summary disposition, seek clarification by bringing to the Court other cases raising the same point." *Id.* These problems could be avoided, without exposing Californians to the consequences of conflicting decisions, by using a transfer mechanism rather than requiring the Supreme Court to resolve conflicts.

[411] The proposed statute diverges from the usual pattern in that invocation of the Court's jurisdiction would require action both by a litigant and by the court below. *Compare, e.g.,* 28 U.S.C. §§ 1254(2), 1254(3) (1970). In this respect the closest parallel in existing law is 28 U.S.C. § 1292(b) (1970), permitting appeals to the courts of appeals from certain interlocutory orders of the district courts. By mandating that the conflict be certified as such by the second court of appeals, the provision seeks to assure that the Supreme Court will not have to spend any undue amount of time puzzling over a litigant's attenuated claim that a conflict exists. *But see* note 395 *supra. Compare* H.R. 3805, 92d Cong., 1st Sess. § 5 (1971) (reprinted in Ammerman, *Three-Judge Courts,* 52 F.R.D. 293, 313, 315 (1971)) (permitting direct appeal from judgment granting injunction against enforcement of state statute for repugnance to federal Constitution, but only if state attorney general certifies that immediate consideration by Supreme Court "is of general public importance in the administration of justice"; Supreme Court has discretion to deny direct appeal and remand case to appropriate court of appeals).

The mechanics of the certification process are left to be worked out by the courts. Presumably the initiative would lie with a litigant unsuccessful in the court

be regarded as too high a price regardless of the benefits to judicial administration that might be achieved through bifurcating a state. Further, mechanisms appropriate for avoiding one kind of conflict may be unnecessarily cumbersome in other situations.

One generalization does bear repeating: none of the conflicts likely to arise in the divided-state situation are unique. A judicial system which can handle the delicate problems raised by federal injunctions against state-court proceedings and the logistical problems raised by multitudinous suits in related antitrust cases should be equal to the task of preserving harmony between two federal appellate courts sitting within one state.

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of appeals. *Cf.* note 397 *supra.* The principal question is at what point he would be required to seek the certification. This in turn may depend on whether the procedure is regarded as essentially part of the Supreme Court's processes or as the last step at the court of appeals level, similar to a petition for rehearing. Under the first approach, a party seeking to appeal pursuant to proposed § 1254(4) might be required, at the time of filing the notice of appeal, *see* SUP. CT. R. 10, to make a motion in the court of appeals asking that court to certify that a conflict exists within the terms of the statute. *Cf.* FED. R. APP. P. 5. If such a procedure is adopted, it might be desirable for the Supreme Court to amend its rules to make clear that if the court of appeals denies the motion to certify, the jurisdictional statement would be treated as a timely petition for certiorari. *Cf.* 28 U.S.C. § 2103 (1970); R. STERN & E. GRESSMAN, *supra* note 395, at 89-92. The other way of handling the matter would be to require a party seeking Supreme Court review under proposed § 1254(4) to make the motion for certification of the conflict in accordance with the rules now governing petitions for rehearing, and perhaps within the same time limits. *See* FED. R. APP. P. 40(a). The Supreme Court, too, could then treat the motion as analogous to a petition for rehearing in the court below, so that the time for filing a petition for certiorari or a notice of appeal would not begin to run until the court of appeals had acted on the motion. *See* R. STERN & E. GRESSMAN, *supra* note 395, at 248-50, 332.

Other procedural matters deserving attention are the format and contents of the motion to certify and of the certification statement itself. Is it sufficient for the party, and later the court of appeals, simply to identify the earlier decision which is claimed to be in conflict with the case in which review is sought? Or should a more detailed explanation be required? *Cf.* 3D CIR. R. 22 (effective May 1, 1974) (requiring petition for rehearing on ground of conflict to cite conflicting cases specifically). In practice, the opinion of the second court of appeals is likely to discuss the nature of the conflict in as much detail as the Supreme Court might want, so that elaborate supporting documents would probably be superfluous.