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## Federal Jurisdiction: A Proposal to Simplify the System to Meet the Needs of a Complex Society

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## FEDERAL JURISDICTION: A PROPOSAL TO SIMPLIFY THE SYSTEM TO MEET THE NEEDS OF A COMPLEX SOCIETY

JAMES WILLIAM MOORE\* and JERE CHARLES WICKER\*\*

### INTRODUCTION

"Of this I am sure: our profession cannot fulfill the promises implicit in the idea of the rule of the law and equal justice under law if we content ourselves with being experts and specialists in great concepts but amateurs in execution."<sup>1</sup> This was Chief Justice Burger's concluding statement in his address last May to the American Law Institute. Earlier the Chief Justice had called attention to Mr. Early's provocative article urging the establishment of a National Institute of Justice,<sup>2</sup> had suggested some of the needs and objectives of a national institute, and had proposed a searching inquiry into the desirability of such an institute, its nature and purposes. To us the proposals have great merit. The establishment of a National Institute of Justice, in addition to the Institute for Court Management, the Federal Judicial Center, the National Center for State Courts, the National College of the State Judiciary, and other agencies, augurs well.

But the problem of strengthening our federal and state judicial systems to cope effectively with court congestion is an on-going problem that must be attacked continuously and from all sides. Court congestion has long been with us—too long; and it will worsen unless effective means of combating it are deployed. Added to the old grist of tort, contract, labor and tax claims are the problems generated by an expanding population and by an increasingly complex society;

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1. Burger, *Has The Time Come?*, 55 F.R.D. 119, 126 (1972).

2. Early, *National Institute of Justice—A Proposal*, 74 W. VA. L. REV. 226 (1972). Fifty-one years ago Judge Cardozo proposed a ministry of justice. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113 (1921); see 7 MOORE, FEDERAL PRACTICE ¶ 86.05 (1971) [hereinafter cited as MOORE].

claims of the poor and the lower middle income groups that press for more and better legal assistance; and environmental, consumer and urban claims—all of which indicate rather clearly that the judicial systems are confronted with the job of handling a flood of litigation that is far greater than the courts have witnessed in the past. It will certainly not do for society to fail those who, in good faith, seek judicial relief.

With deference, we offer a proposal that federal jurisdictional principles be simplified. It is, of course, not a panacea for our judicial ills. Nor is it a substitute in any way for the institutes and centers that have been established and are being proposed. But we believe that it does hold out a modicum of assistance, and it can be profitably added to the arsenal of weapons against court congestion.

The proposal embraces the following propositions: 1) original jurisdiction should implement the Federal Rules of Civil Procedure; 2) venue and process should support the functioning of the Rules; 3) jurisdictional amount should be eliminated; 4) removal jurisdiction should be reduced to a minimum; and 5) diversity jurisdiction should be retained, but simplified.

Before proceeding in detail, let us place the propositions in context. Federal jurisdictional and related principles offer alluring opportunities for experts to indulge their expertise. In the interest of federalism, logic, and rationalization of the federal system, experts too often propose a scheme that is far too complicated to produce expeditious and just results. It is necessary to reformulate for present times the concepts of jurisdiction that have been created by jurists, lawyers and professors. Lawsuits ought to be tried on the merits and not be disposed of on jurisdictional grounds except in the rare case. Simple jurisdictional provisions that can be—to borrow the admonition of the last sentence of rule 1—“construed to secure the just, speedy, and inexpensive determination of every action” are desperately needed. Changes of the sort contemplated would require a turnabout in jurisdictional thinking. Presently,<sup>3</sup>

[u]nder the most respectable authority adjudications on the merits go for naught where lack of federal jurisdiction is discovered, often late in the proceeding, and even at the appellate stage, with the deficiency sometimes raised by the party that invoked the federal court's jurisdiction, or by the appellate court on its own motion. Such doctrines, however, do not increase respect for judicial administration, and are not necessary for the preservation of the proper distribution of judicial power.

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3. 1 MOORE ¶ 0.60[4] (footnotes omitted).

As an example of the injustice inflicted upon litigants in the name of proper jurisdiction, consider *Louisville & N.R.R. v. Mottley*.<sup>4</sup> The Mottleys had sued the railroad in the federal circuit court for specific performance of a contract to provide passes. The pivotal issue was the legal effect upon the contract of the Hepburn Act.<sup>5</sup> The circuit court rendered a decree on the merits for the plaintiffs. On appeal the Supreme Court, on its own motion, raised the question whether the trial court had jurisdiction; it held that the lower court lacked jurisdiction since the federal question did not appear in the complaint well pleaded. Accordingly, the Court reversed the judgment and remanded the case to the circuit court with directions to dismiss the suit for want of jurisdiction. The plaintiffs then brought their suit in the state court. After wending its way through the state system, the suit reached the Supreme Court and was finally decided on the merits three years after the Court had dismissed the federal suit. The *Mottley* case is not atypical.<sup>6</sup> If only the experts had been involved, the result would be less deplorable; but litigants, not experts, suffered.

In *McCorkle v. First Pennsylvania Banking & Trust Co.*,<sup>7</sup> Judge Sobeloff felt reluctantly compelled to apply the *Mottley* rule.<sup>8</sup>

After three years of federal litigation, we have the cheerless task of informing the parties that their contest must be started over in the arena of the state courts. . . .

It is a frustration to dismiss a case which so obviously hinges on federal law and involves federal, rather than state, policies. Especially is this so since, despite the change of forum, the state court will still be bound to follow federal law in deciding this case. . . . For all that appears, federal law is clear in its support of appellees' position and the action we are compelled to take is all the more regrettable because the equities seem plainly with the appellees.

Whether the doctrine illustrated by *Mottley* could ever have been justified is very questionable. It certainly cannot be justified today. At least, such federal cases should be subject to *transfer* to a state court—a partner in our dual judicial system. But we would go further. As we subsequently point out, we feel that the Supreme Court should decide such cases on their merits when they are first appealed.

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4. 211 U.S. 149 (1908).

5. Interstate Commerce Act of 1906, ch. 3591, 34 Stat. 584 (codified in scattered sections of 49 U.S.C.). This Act forbids the giving of free passes or free transportation.

6. *E.g.*, *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951); *McCorkle v. First Pennsylvania Banking & Trust Co.*, 459 F.2d 243 (4th Cir. 1972).

7. 459 F.2d 243 (4th Cir. 1972).

8. *Id.* at 251 (footnotes omitted).

When a defect in subject matter jurisdiction demands that a federal court not retain jurisdiction, a procedure far more economical than dismissal would be a transfer of the case to the state court so that institution of a completely new proceeding in that court would not be necessary. Parties who were properly before the federal court would not have to be served with process again in the state proceeding, and there would be no need for repleading. Moreover, all discovery obtained by any party in the federal court would be a part of the state action. Transfer, instead of dismissal, would also eliminate the problem created where the statute of limitations has run after the federal suit has been commenced, but before the plaintiff has had an opportunity to refile his suit in the state court.

Retention of the requirement of dismissal of cases on jurisdictional grounds is a product of habit, not reason. And habit is largely to blame for the apprehensions over federal-state tensions allegedly caused by federal intervention into "state matters." Instead, our energies and ingenuity should be directed toward making the state and federal systems into working partners, each with the goal of achieving justice for the litigants in a manner which best conserves the judicial time and economy of both systems. No insurmountable constitutional problem inheres in such a suggestion. There is a strong federal interest at stake in maintaining a sound and efficient judicial system. Nothing in the Constitution suggests that a plan providing for a transfer between the two systems may not be utilized in achieving this goal. As long as the subject of the transferred case is related to any congressional power enumerated in the Constitution, Congress may determine the effect of transfer, dismissal or remand of federal proceedings.<sup>9</sup>

But more than that is demanded today. Reaching the merits of cases like *Mottley* on initial appeal would not undermine federalism. While it is true that federal courts are courts of limited jurisdiction, no court in either the federal or state judicial system has unlimited jurisdiction. The doctrine of harmless error<sup>10</sup> should apply to jurisdictional matters as it does to procedural matters.

Federal courts have always had a fetish about dismissing cases—even after full trials on the merits—based on some apparent defect in subject matter jurisdiction. While it is elementary that federal courts generally should not try cases improperly before them, especially if the dispute lies beyond the reach of the Constitution, it

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9. Cf. *Testa v. Katt*, 330 U.S. 386 (1947) (state courts required by art. VI of the Constitution to enforce federal statutes).

10. See 28 U.S.C. § 2111; FED. R. Civ. P. 61; 7 Moore ¶ 61.03-.12.

should be equally obvious that once a trial has begun, an enormous amount of labor and expense is wasted if the suit is dismissed.

In *American Fire & Cas. Co. v. Finn*,<sup>11</sup> the Supreme Court permitted a defendant who had removed a suit, but had then suffered an adverse verdict, to object subsequently to jurisdiction on the ground that the case was not removable.<sup>12</sup> We feel that a party who invokes the jurisdiction of the federal court should not later be allowed to contest that jurisdiction. While it is generally true that a party cannot confer jurisdiction on a federal court,<sup>13</sup> occasionally a court has retained jurisdiction apparently on an estoppel theory.<sup>14</sup> Furthermore, if an opposing party does not timely object to jurisdiction in his pleadings, he should be barred from subsequently raising the issue. And an appellate court should not be permitted to raise the question of jurisdiction *sua sponte*; the same rule should apply to the district court after a trial on the merits has begun. For while federal courts are courts of limited jurisdiction,<sup>15</sup> they are also courts of authority. It has often been stated that their judgments are not subject to collateral attack on federal jurisdictional grounds;<sup>16</sup> a similar rule should preclude direct attacks made for the first time after a trial on the merits has begun. To the proposed rule we would make but one exception: when all the parties have colluded to manufacture jurisdiction, the action should be terminated and transferred to a state court of proper jurisdiction.<sup>17</sup>

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11. 341 U.S. 6 (1951).

12. As it turned out, however, the decision resulted in more bark than bite, for the Court subsequently denied certiorari after the court of appeals had ruled that the necessity of a new trial was obviated by an amendment dropping a defendant who destroyed diversity jurisdiction. See *Finn v. American Fire & Cas. Co.*, 207 F.2d 113 (5th Cir. 1953), *cert. denied*, 347 U.S. 912 (1954).

13. As to a statutory exception to the general rule that parties cannot confer jurisdiction on the federal courts, see § 23 (b) of the Bankruptcy Act, 52 Stat. 854 (1938), 11 U.S.C. § 46 (b) (1970). This section provides: "Suits by the receiver and the trustee shall be brought or prosecuted only in courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant . . . ."

14. See *Di Frischia v. New York Cent. R.R.*, 279 F.2d 141 (3d Cir. 1960); *Klee v. Pittsburgh & W. Va. Ry.*, 22 F.R.D. 252 (W.D. Pa. 1958).

15. See U.S. CONST. art. III; 1 MOORE ¶ 0.60[3].

16. *E.g.*, *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940); *Swift & Co. v. United States*, 276 U.S. 311, 326 (1928); *Cutler v. Huston*, 158 U.S. 423, 430 (1895); *McCormick v. Sullivant*, 23 U.S. (10 Wheat.) 192, 199 (1825).

17. But when collusion has occurred between the attorneys, their sins should not be inflicted upon the innocent parties. The court, of course, should be free to discipline counsel for such conduct.

## ORIGINAL JURISDICTION SHOULD IMPLEMENT THE RULES

In order to gain the proper perspective for assessing our proposal, one must recall the historical backdrop against which the Federal Rules of Civil Procedure were written nearly forty years ago. While the Rules were still being considered by Congress in 1938, Attorney General Cummings stated in support of them:<sup>18</sup>

But the courts do not exist for the lawyers; they do not exist for the judges. They exist for litigants, and litigants are entitled to the best possible procedure that human ingenuity can render. The courts are established to administer justice, and you cannot have justice if justice is constantly being thwarted and turned aside or delayed by a labyrinth of technical entanglements.

As most students of procedure will agree, the Federal Rules of Civil Procedure have proved to be a great procedural success, largely because of their dominating principle of simplicity.<sup>19</sup> But they do not operate in a frame of jurisdictional simplicity. Quite the contrary is true. For example, consider rules 18 and 20, which deal with permissive joinder of claims and parties. The procedural problems of joinder are minimal. The jurisdictional ones are not. Thus, procedurally, if *A* sues *X* he may join as many claims as he has against *X*—even if they are wholly unrelated.<sup>20</sup> But the joinder will be abortive unless there is federal jurisdiction over each claim. If the jurisdictional basis is diversity, there will ordinarily be no problem aside from the jurisdictional amount requirement, and that will often be minimal since *A* can aggregate his claims to satisfy the jurisdictional amount.<sup>21</sup> But if there is no diversity and *A* joins two or more claims, while the joinder is procedurally proper, jurisdiction over one claim on the basis of a federal question will not afford jurisdiction over the other unless the second claim is so factually related to the first that it is within the court's pendent jurisdiction.<sup>22</sup>

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18. As quoted by Judge Frank, dissenting in *Clark v. Taylor*, 163 F.2d 940, 953 n.13 (2d Cir. 1947).

19. As a consequence, the Rules have served as a model for procedural improvements in most state judicial systems.

20. See FED. R. CIV. P. 18 (a); 1 MOORE ¶ 0.97[1]. Rule 18 (a) provides: "A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as he has against an opposing party."

21. See, e.g., *Gray v. Blight*, 112 F.2d 696, 700 (10th Cir. 1940); *Cashmere Valley Bank v. Pacific Fruit & Produce Co., Inc.*, 33 F. Supp. 946, 949 (E.D. Wash. 1940). See also 1 MOORE ¶ 0.97[1].

22. See, e.g., *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) (upholding pendent jurisdiction over the plaintiff's nonfederal claims).

Joinder of multiple parties, although proper procedurally,<sup>23</sup> is apt to raise a complex of jurisdictional problems. Thus, suppose *A* and several other passengers were injured in a bus accident and want to join in a single suit. Procedurally, there is no problem. Jurisdictionally, there is. Each plaintiff must have some jurisdictional basis to support his claim. If diversity must be the basis, minimal diversity will not suffice; under *Strawbridge v. Curtiss*,<sup>24</sup> there must be diversity between each plaintiff and each defendant. Moreover, the plaintiffs may not aggregate their claims to make up the jurisdictional amount.<sup>25</sup>

Rather than frustrating the simplicity that is the strength of the Rules, federal jurisdictional principles should complement it. In broad terms, a simple jurisdictional statute is needed that will implement the Federal Rules. Thus, with claims and parties procedurally qualified for joinder, if there is federal jurisdiction to support one claim, that should end the jurisdictional problems. There would be no need for any independent jurisdictional ground to support any of the other claims of *A* or his co-plaintiffs, whether the jurisdictional basis be diversity or some federal question.

The same approach should be taken relative to jurisdiction over counterclaims. While a federal court has ancillary jurisdiction over compulsory counterclaims,<sup>26</sup> under current practice independent jurisdictional grounds must be shown to support jurisdiction over permissive counterclaims,<sup>27</sup> except set-offs.<sup>28</sup> We propose that rule 13, with one important change, should be the sole test concerning counterclaims. As Judge Friendly has suggested,<sup>29</sup> in handling problems of

23. See FED. R. CIV. P. 20 (a), which provides in part:

All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.

Similar provisions are made in this Rule for defendants.

24. 7 U.S. (3 Cranch) 267 (1806).

25. *Pinel v. Pinel*, 240 U.S. 594 (1916). See 1 MOORE ¶ 0.97[3]. Moreover, where two or more defendants are joined by the same plaintiff, the jurisdictional amount requirement ordinarily turns on whether plaintiff's claims are joint or several, *i.e.*, whether the claims are "separate and distinct." If liability is joint, the claims may be aggregated. *E.g.*, *Siegerist v. Blaw-Knox Co.*, 414 F.2d 375 (8th Cir. 1969). But if liability is several, usually the claims against each defendant must satisfy the jurisdictional amount. See, *e.g.*, *Jewell v. Grain Dealers Mut. Ins. Co.*, 290 F.2d 11 (5th Cir. 1961); 1 MOORE ¶ 0.97[2].

26. See, *e.g.*, *Goldstone v. Payne*, 94 F.2d 855 (2d Cir. 1938); 3 MOORE ¶ 13.15[1].

27. See, *e.g.*, *O'Connell v. Erie Lackawanna R.R.*, 391 F.2d 156 (2d Cir. 1968); 3 MOORE ¶ 13.19.

28. See *In re Monongahela Rye Liquors, Inc.*, 141 F.2d 864 (3d Cir. 1944); *Chicago Great W. Ry. v. Peeler*, 140 F.2d 865 (8th Cir. 1944); 3 MOORE ¶ 13.19.

29. See *United States v. Heyward Robinson Co.*, 430 F.2d 1077, 1087 (2d Cir. 1970) (concurring opinion).



jurisdiction over counterclaims, the compulsory-permissive distinction in rule 13 should be discarded. The potential "snowballing" effect which would follow permitting additional claims to be pleaded is more theoretical than actual.<sup>30</sup>

Jurisdictional problems concerning counterclaims are particularly complex where the United States is the plaintiff. Even where the defendant could have sued the Government originally on the claim, he may not be able to do so by way of counterclaim unless expressly authorized by federal statute.<sup>31</sup> The primary concern of the Government should be with the efficient, fair administration of justice. Accordingly, the United States should be subject to counterclaims and cross-claims in the same manner as any individual.<sup>32</sup>

This proposal is not heresy, for we favor permitting counterclaims against the Government only where sovereign immunity has been waived as to substantive liability. Nor is it heresy to suggest that rules 18 and 20 should govern the matter of joinder of claims and parties exclusively, for minimal diversity is constitutional,<sup>33</sup> and concepts of ancillary and pendent jurisdiction are so well established that a multitude of claims can be litigated in the federal district courts that have no independent jurisdictional basis: compulsory counterclaims,<sup>34</sup> including federal jurisdiction over additional parties; cross-claims; third-party claims; closely related claims that can be said to be pendent to other claims over which there is federal jurisdiction; intervening claims as of right; and suits brought by or against a federal receiver, at least in the district of his appointment. But most of these concepts of ancillary and pendent jurisdiction can be applied only with difficulty; and they do not go as far as the simple approach we advocate.

Justice Jackson once remarked that "[a] vast and utterly unjustifiable part of federal litigation concerns only the question of jurisdiction, on which great time and labor and expense are expended before the merits of a question are ever reached."<sup>35</sup> Regrettably, the remark is still on target today.<sup>36</sup>

30. *Id.* at 1088.

31. *See* *United States v. Northside Realty Associates, Inc.*, 324 F. Supp. 287 (N.D. Ga. 1971); *see also* *United States v. Shaw*, 309 U.S. 495, 500-01 (1940); *FED. R. CIV. P.* 13(d); 3 MOORE ¶ 13.28.

32. *See* 3 MOORE ¶ 13.29. *FED. R. CIV. P.* 13(d) now provides: "These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof."

33. *See* *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523 (1967).

34. *See* p. 7 *supra*.

35. R. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 37 (1955). *See also* Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1 (1968).

36. Admiralty jurisdiction also should be simplified—which in most cases will prob-

## VENUE AND PROCESS SHOULD SUPPORT THE FUNCTIONING OF THE RULES

Venue requirements today are still geared to an age when travel from New Haven to New York City was more difficult and time consuming than travel today between New York City and Los Angeles.<sup>37</sup> And venue problems are compounded when multiple-party litigation is involved. Venue requirements should be simplified, and the special venue statutes ought to be repealed, unless it can be convincingly shown that there is a special need for each provision retained. Venue in admiralty has always been relatively simple. In the absence of a pre-empting statute,<sup>38</sup> venue of in personam admiralty suits is proper in any district where the respondent is found.<sup>39</sup> Appropriate principles of similar simplicity should also govern in other federal cases. Venue should lie in any district where the defendant can be found or in any district in the state of his residence. Furthermore, additional necessary parties brought in under rule 19 or third-party defendants joined under rule 14 should not be able to object to venue.

In 1938 the draftsmen of the Federal Rules of Civil Procedure extended the reach of federal process in states having two or more districts by providing for state-wide service.<sup>40</sup> The 1963 amendments to the Rules expanded service only slightly by providing for bulge service in certain situations.<sup>41</sup> The states, on the other hand, have ex-

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ably mean expanding it somewhat. For example, one of the most uncertain jurisdictional problems in admiralty concerns the determination of whether an agreement is a "maritime contract" and thus subject to general admiralty jurisdiction under 28 U.S.C. § 1333 (1970). Common sense and logic would tell us that since the Ship Mortgage Act, 41 Stat. 1000 (1920), as amended, 46 U.S.C. § 911 (1970), is constitutional, *see* *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21 (1934), any ship mortgage would be maritime in nature. Yet in this case the Supreme Court approved the anachronistic rule that a ship mortgage (not created under the Act) was not maritime in nature. *See* *McCorkle v. First Pennsylvania Banking & Trust Co.*, 459 F.2d 243 (4th Cir. 1972); 7A MOORE ¶ 0.285[1].

37. *See* Moore, *Problems of the Federal Judiciary*, 35 F.R.D. 305, 310 (1964).

38. *E.g.*, 27 Stat. 446 (1893), 46 U.S.C. § 194 (1970) (limitation of vessel owner's liability); 41 Stat. 525 (1920), as amended, 74 Stat. 912 (1960), 46 U.S.C. § 742 (1970) (suits in admiralty by or against vessels of United States); 43 Stat. 1112 (1925), 46 U.S.C. § 782 (1970) (suits in admiralty against United States for damages caused by public vessels); 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1970) (recovery for injury to or death of seaman); 28 U.S.C. § 1395 (d) (1970) (proceedings to enforce fines, penalties, and forfeitures).

39. *See, e.g.*, *Rodriguez v. United Fruit Co.*, 236 F. Supp. 680 (E.D. Va. 1964); 1 MOORE ¶ 0.144[13.-1].

40. *See* FED. R. CIV. P. 4 (f); Moore, *Problems of the Federal Judiciary*, 35 F.R.D. 305, 310 (1964).

41. *See* FED. R. CIV. P. 4 (f), which provides in part:

[P]ersons who are brought in as parties pursuant to Rule 14 [third-party practice], or as additional parties to a pending action or a counterclaim or cross-claim therein pursuant to Rule 19, may be served in the manner stated in paragraphs (1)-(6) of subdivision (d) of this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial . . . .

tended service substantially by enacting long-arm statutes. Fortunately, federal service of process has profited from their innovations.<sup>42</sup> Federal service should be made nation-wide, similar to that which is available in a railroad reorganization proceeding under section 77(a) of the Bankruptcy Act,<sup>43</sup> and in statutory interpleader.<sup>44</sup> At the least, nation-wide process should be available as to those parties who can now be served under the bulge service provision of rule 4(f).

Transfer of an action to a more convenient forum should not be confined, as it is under the current statute, to where "it might have been brought,"<sup>45</sup> thus limiting transfer to a proper venue where the defendant can be served with process.<sup>46</sup> These restrictions are unnecessary and impede the efficient administration of justice. The transfer provision is merely a "judicial housekeeping measure"<sup>47</sup> and should not become convoluted with problems of jurisdiction. Transfer should be discretionary, subject to the judge's consideration of the convenience of all parties and witnesses concerned and the interests of justice. The current transfer provision in section 32(c) of the Bankruptcy Act<sup>48</sup> could be generally adopted. If these guidelines are followed, we perceive no hardship on the parties, regardless of whether a plaintiff or defendant makes the motion to transfer.<sup>49</sup>

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42. See FED. R. CIV. P. 4(e), which provides in part:

Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

43. 76 Stat. 572 (1962), 11 U.S.C. § 205(a) (1970). Subsection (a) provides in part: "Process of the court shall extend to and be valid when served in any judicial district. The Supreme Court of the United States shall promulgate rules relating to the service of process outside of the district in which the proceeding is pending . . . ."

44. 28 U.S.C. § 2361 (1970). This section provides that "process and order . . . shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found."

45. 28 U.S.C. § 1404(a) (1970).

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

47. *Van Dusen v. Barrack*, 376 U.S. 612, 636 (1964).

48. 66 Stat. 424 (1952), 11 U.S.C. § 55 (1970). Subsection (c) allows the judge to transfer "to a court . . . in any other district, regardless of the location of the principal assets of the bankrupt, or his principal place of business, or his residence, if the interests of the parties will be best served by such transfer."

49. Of course, when the plaintiff moves to transfer it will be more difficult for him to make a convincing showing that transfer is justified, in view of the fact that he chose to bring suit in the present forum.

## JURISDICTIONAL AMOUNT SHOULD BE ELIMINATED

The United States Constitution itself places no limitation on access to the federal courts based on an amount in controversy. Nevertheless, beginning with the Judiciary Act of 1789,<sup>50</sup> and by successive acts, Congress has required a specified minimum amount in controversy in certain types of cases as a method of restricting access to the lower federal courts, and to the appellate docket of the Supreme Court.<sup>51</sup> Presently there is no jurisdictional amount requirement as a limitation upon the Supreme Court's appellate jurisdiction, and the monetary limit on the jurisdiction of lower appellate courts has little effect on the volume of cases brought to those courts.<sup>52</sup> Primarily, jurisdictional amount has significance today only at the trial level. Congress has progressively increased the requisite jurisdictional amount through the years. Originally set at \$500 plus for diversity in 1789, it has risen to \$10,000 plus for diversity and general federal question cases.<sup>53</sup>

Two distinguished commentators tell us that the original purpose of requiring a jurisdictional amount in diversity cases—both original and removed—was to “prevent defendants from being summoned long distances to defend small claims.”<sup>54</sup> This purpose cannot justify the jurisdictional amount requirement today, however, since a party faced with such inconvenience is protected, at least in part, by the transfer provisions of the Judicial Code.<sup>55</sup>

Congress itself believed that the increases in the jurisdictional amount requirement would protect the federal courts from “fritter[ing] away their time in the trial of petty controversies.”<sup>56</sup> Ostensibly, this concern did not arise from a fear that the dignity of the federal courts would somehow be threatened if “petty” controversies were allowed to be brought, since there are many classes of federal question cases

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50. Ch. 20, 1 Stat. 73.

51. At one time a \$5,000 minimum amount in controversy was required for Supreme Court review of circuit court civil judgments. The requirement for Supreme Court review of nonfederal question decisions from the Supreme Court of the Philippine Islands was at one time \$25,000. See 1 MOORE ¶ 0.90[1].

52. An appeal from a bankruptcy order of a monetary character involving less than \$500 may be taken only with the permission of a court of appeals, but for sums exceeding that figure, appeal is of right. Bankruptcy Act § 24, 52 Stat. 854 (1938), as amended, 11 U.S.C. § 47 (1970).

53. Ten thousand dollars became the required amount in controversy for such cases in 1958. 28 U.S.C. § 1332(a) (1958). See 1 MOORE ¶ 0.90[1].

54. H. M. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 39 (1953).

55. 28 U.S.C. § 1404(a) (1970) provides: “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.”

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

which may be instituted in federal courts regardless of the amount in controversy.<sup>57</sup> Rather, the fear is that without an amount in controversy requirement diversity cases will cause an impossible docket congestion and case overload in every federal district court. But the jurisdictional amount requirement has not worked satisfactorily to relieve crowded federal dockets. Chief Justice Warren noted that while the increase from \$3,000 plus to \$10,000 plus in 1958 "did result in a temporary reduction in the filing of private civil cases, the net effect on the workload has been very slight."<sup>58</sup> Moreover, under various theories of ancillary and pendent jurisdiction the requirement does not apply to impleaded third parties,<sup>59</sup> compulsory counterclaims,<sup>60</sup> cross-claims,<sup>61</sup> or intervention as a matter of right.<sup>62</sup>

But, it is unlikely that the courts would be deluged with small claims if there were no minimum amount requirement as to any claims. Under the Emergency Price Control Act of 1942, for example, a purchaser could institute a suit in a federal or state court to recover overcharges.<sup>63</sup> That statute specified no jurisdictional amount, despite the fact that, because of the nature of the claims, many were monetarily small—even petty. Nonetheless, no evidence ever surfaced which indicated that petty claims were brought in the federal courts. We believe that these small claims were not filed in those courts simply due to the discipline and common sense exercised by the practicing bar and the practicalities involved in the suit.

Litigation over the amount in controversy has and will continue to consume the valuable time and energy both of courts and lawyers—time and energy which could be spent more usefully trying cases on their merits. It is beyond the scope of this article to discuss all the multifaceted complexities which have presented themselves in the various cases involving the jurisdictional amount issue; but the cases are legion.<sup>64</sup> The difficulty is most acute in cases in which the matter

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57. *E.g.*, admiralty, maritime, and prize cases; bankruptcy matters and proceedings; actions involving civil rights; and suits arising under the interstate commerce and antitrust laws.

58. Warren, *Address to the American Law Institute*, 25 F.R.D. 213 (1960).

59. *See* 1 MOORE ¶ 0.90[3].

60. *See, e.g.*, *United Artists Corp. v. Masterpiece Prods.*, 221 F.2d 213 (2d Cir. 1955); 1 MOORE ¶ 0.90[3].

61. *See, e.g.*, *Coastal Air Lines, Inc. v. Dockery*, 180 F.2d 874 (8th Cir. 1950); 1 MOORE ¶ 0.90[3].

62. *See, e.g.*, *Knapp v. Hankins*, 106 F. Supp. 43 (E.D. Ill. 1952); 1 MOORE ¶ 0.90[3].

63. Ch. 26, § 205 (e), 56 Stat. 34.

64. *See, e.g.*, *Thompson v. Thompson*, 226 U.S. 551 (1913) (alimony); *Vance v. W. A. Vandercook Co. No. 2*, 170 U.S. 468 (1898) (liquidated damages); *Scott v. Donald*, 165 U.S. 58 (1897) (exemplary damages); *Smith v. Greenhow*, 109 U.S. 669 (1884) (unliquidated damages).

in dispute is of such a nature that it does not lend itself well to being reduced to a pecuniary standard of value<sup>65</sup> and in cases involving aggregation.<sup>66</sup> *Snyder v. Harris*<sup>67</sup> is illustrative of the last matter. Plaintiff Snyder, a shareholder in a life insurance company, brought a diversity suit on behalf of herself and all other shareholders similarly situated against the company's board of directors. Snyder alleged that the board members had unlawfully paid themselves funds received from the sale of their stock, which, under state law, should have been distributed among the shareholders of the company. Snyder's claim was for only \$8,740 in damages, but if all the shareholders' claims had been aggregated, the amount in controversy would have been approximately \$1,200,000. The Supreme Court, following the old *Pinel*<sup>68</sup> doctrine, held that the claims could not be aggregated and affirmed the dismissal of the suit. If the amount sought in recovery had been due the corporation rather than to the shareholders individually, the suit would have qualified as a shareholders' derivative action, and the primary claim of the corporation for \$1,200,000 would have controlled. Yet functionally, for purposes of litigation, the shareholders' class suit in *Snyder* is not materially different from the shareholders' derivative action.

Also in *Gas Serv. Co. v. Coburn*,<sup>69</sup> a companion diversity case to *Snyder*, the complaint alleged that the Gas Service Company had illegally billed and collected a city franchise tax from Coburn and others living outside the city limits. Plaintiff Coburn's claim was for only \$7.81 in overcharges, but on the basis of aggregation of the claims of the class—some 18,000 other individuals similarly situated—the amount in controversy far exceeded the jurisdictional minimum. This was a big suit, not a petty suit for the local justice of the peace. The district court held that the jurisdictional amount requirement was satisfied. The Tenth Circuit Court of Appeals upheld the lower court's jurisdiction, but the Supreme Court reversed, applying the theory of *Snyder*. If any suit deserves a federal forum, it is a suit like *Snyder* or *Coburn*. But as long as a jurisdictional amount is required to be met by each plaintiff having a separate and distinct interest, many litigants who rightfully should have access to a federal court will be excluded. Why they should be excluded remains an enigma. One thing, however, seems clear: *Snyder* has dealt a deathblow to

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65. See Kennedy, *Valuing Federal Matter in Controversy: An Hohfeldian Analysis in Symbolic Logic*, 35 TENN. L. REV. 423 (1968); 1 MOORE ¶ 0.92[5].

66. See p. 7 *supra*.

67. 394 U.S. 332 (1969).

68. *Pinel v. Pinel*, 240 U.S. 594 (1916).

69. 389 F.2d 831 (10th Cir. 1968), *rev'd sub nom.* *Snyder v. Harris*, 394 U.S. 332 (1969).

federal consumer actions based on either diversity or general federal question jurisdiction.<sup>70</sup>

Thus it is obvious that the current rules of aggregation do not produce practical results. If an amount in controversy requirement is to be retained, then at least other plaintiffs should be able to join their claims—regardless of their value—with a plaintiff who has a claim which exceeds the minimum amount, if these claims arose out of the same occurrence or transaction. This innovation would implement procedural joinder and reduce multiple lawsuits on claims which could be tried conveniently in one proceeding. Actions such as *Snyder*, however, in which no individual plaintiff's claim exceeds \$10,000, would still be excluded from the federal courts.

A better solution would be to eliminate entirely any need for aggregating claims. The amount in controversy requirement should be completely eliminated as a jurisdictional prerequisite in all federal cases. The purpose of this simplified and broadened jurisdictional rule would be to untangle questions of jurisdiction from questions involving the value of a claim and to entitle persons to seek justice in a federal forum as long as they are willing to pay the costs.<sup>71</sup>

The district courts could be given a discretionary authority, similar to that given under the 1958 amendment to the Judicial Code,<sup>72</sup> to assess costs—including reasonable attorneys' fees—against a plaintiff who institutes an action in which the amount in controversy, considered from either party's viewpoint,<sup>73</sup> or from the viewpoint of all persons joined in the action or of a class, could not be fairly said to exceed \$10,000.<sup>74</sup> Not only would this go far in keeping small claims out of the district courts, but it would also eliminate the waste in judicial time and expense resulting from a dismissal for want of jurisdiction in those instances in which claims for less than \$10,000 are filed. A shift from a concept of jurisdiction to one of costs represents a shift from a troublesome concept that often imperils an adjudication on the merits to a concept of less serious dimensions.

#### REMOVAL JURISDICTION SHOULD BE REDUCED TO A MINIMUM

Removal jurisdiction is highly technical and is a prolific breeder

70. See also *Hackett v. General Host Corp.*, 455 F.2d 618 (3d Cir. 1972).

71. See Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEXAS L. REV. 1, 35 (1964).

72. 28 U.S.C. §§ 1331 (b), 1332 (b) (1970).

73. The present law supports the plaintiff's viewpoint test. See *Saint Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938). The value of the plaintiff's claim is at times difficult to determine. See, e.g., *Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co.*, 239 U.S. 121, 125 (1915).

74. See note 71 *supra*.

of problems that have little or no relation to the merits. An underlying philosophy of this article is that the federal and state judicial systems ought to be working partners, and that each system should recognize the integrity and competence of the other. Accordingly, we would restrict removal to situations in which a real need for a shift from a state to a federal court underlies the statute. In the rare situation in which a suit over which the federal district courts have exclusive jurisdiction is brought in a state court, it should be removable by any party to the action. And perhaps a case can be made for removal of certain suits against federal officers<sup>75</sup> or members of the armed forces.<sup>76</sup> Retention of title 28, section 1443 of the United States Code, which provides for removal of certain types of civil rights cases, is of questionable propriety since the section has been so narrowly construed that it is available only in rare instances.<sup>77</sup> Moreover, a civil rights removal statute is probably not needed, since a state suit or prosecution can be enjoined by bringing an original civil rights action under title 28, section 1343(3), and section 1983 of title 42.<sup>78</sup>

Removal under the present law is too broad. Since the state courts are competent to try diversity and federal question cases which do not lie exclusively in the federal courts, removal of these cases should be eliminated. Speaking broadly, it is only where some particular federal interest needs protection—such, perhaps, as suits against a federal officer for acts committed under federal authority—that the opportunity to remove should be authorized.

On the other hand, we would grant to state courts the discretion to transfer a case to a federal court under appropriate circumstances, such as where the suit is within the federal court's concurrent jurisdiction and the federal forum is more convenient.<sup>79</sup> The transfer

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75. See 28 U.S.C. § 1442(a)(1) (1970), which allows removal of any action against "[a]ny officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue."

76. See 28 U.S.C. § 1442a (1970), which allows removal of "[a] civil or criminal prosecution . . . against a member of the armed forces of the United States on account of an act done under color of his office or status, or in respect to which he claims any right, title, or authority under a law of the United States respecting the armed forces thereof, or under the law of war . . . ."

77. See *Georgia v. Rachel*, 384 U.S. 780 (1966).

78. See *Mitchum v. Foster*, 407 U.S. 225 (1972) (section 1983 is an express exception to the federal anti-injunction statute). But note that this does not affect the requirements of *Younger v. Harris*, 401 U.S. 37 (1971). It should also be mentioned that § 1983 is much broader than the civil rights removal statute. See *Lynch v. Household Fin. Corp.*, 405 U.S. 538 (1972) (section 1983 applies to violation of constitutional property rights, as well as all personal liberties).

79. The line of cases which laid to rest doubts as to the constitutionality of removal



provisions of section 32(c) of the Bankruptcy Act<sup>80</sup> could serve as a model. Conversely, similar circumstances may exist which would warrant transfer from a federal court to a state court.<sup>81</sup>

### DIVERSITY JURISDICTION SHOULD BE RETAINED AND SIMPLIFIED

The debate over diversity jurisdiction<sup>82</sup> is as old as the nation itself.<sup>83</sup> And the debate goes on.<sup>84</sup> Few persons, however, have advocated the complete abolition of diversity jurisdiction.<sup>85</sup> While other theories have been advanced to support federal diversity jurisdiction,<sup>86</sup>

can be extended to cases transferred from state to federal courts. See *Tennessee v. Davis*, 100 U.S. 257 (1880) (removal of a criminal prosecution against a United States officer on the basis of a federal question defense); *Railway Co. v. Whitton's Adm'r*, 80 U.S. (13 Wall.) 270 (1872) (removal of a civil cause on the basis of diversity). Here, Congress would merely be granting a limited exclusive jurisdiction to the federal court, where it could have granted initial original exclusive jurisdiction. See 1 MOORE ¶ 0.6[3].

80. See note 48 *supra*.

81. For a detailed discussion of a proposed provision for transfer of cases from federal to state courts, see pp. 2-5 *supra*.

82. U.S. CONST. art. III, § 2, contains the affirmative constitutional grant of federal court authority over diversity suits, and the Judiciary Act of 1789, ch. 20, 1 Stat. 73, which created the federal judicial system, executed that grant. The federal courts have exercised diversity jurisdiction ever since. For a detailed discussion of the history of diversity jurisdiction, see Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEXAS L. REV. 1 (1964).

83. While there were attacks made on diversity in the state ratifying conventions, in the first Congress, and in the press, they were not as intense as the criticism leveled at other parts of the Constitution. See Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROB. 3 (1948); Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEXAS L. REV. 1, 4 (1964).

84. See, e.g., Clark, *Diversity of Citizenship Jurisdiction of the Federal Courts*, 19 A.B.A.J. 499 (1933); Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1 (1968); Frank, *Federal Diversity Jurisdiction—An Opposing View*, 17 S.C.L. REV. 677 (1965); Howland, *Shall Federal Jurisdiction of Controversies Between Citizens of Different States Be Preserved?*, 18 A.B.A.J. 499 (1932); Kurland, *Mr. Justice Frankfurter, the Supreme Court and the Erie Doctrine in Diversity Cases*, 67 YALE L.J. 187 (1957); Phillips & Christenson, *The Historical and Legal Background of the Diversity Jurisdiction*, 46 A.B.A.J. 959 (1960); Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317 (1967).

Proposed statutes include, e.g., S. 1876, 92d Cong., 1st Sess. (1971) (would drastically curtail diversity); S. 939, H.R. 11508, 72d Cong., 1st Sess. (1932) (would abolish diversity); H.R. 2516, 85th Cong., 1st Sess. (1957) (would eliminate corporations from diversity jurisdiction altogether).

85. Justice Frankfurter was perhaps the greatest advocate of an all federal question docket in federal courts. See *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 56 (1954). But there are others. E.g., Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1 (1968); Kurland, *The Distribution of Judicial Power Between National and State Courts*, 42 J. AM. JUD. SOC'Y 159 (1959).

86. Alexander Hamilton believed that diversity jurisdiction was necessary to preserve the equal right to privileges and immunities for United States citizens. THE FEDERALIST No. 80, at 440-41 (Colonial ed. 1901) (A. Hamilton); see Moore & Weckstein,

originally one of its main purposes was to give out-of-state litigants an opportunity to avoid any possible prejudice—actual or imagined—in a state court.<sup>87</sup> While it would be difficult to determine whether local bias against out-of-staters actually results in significantly unfair treatment in state courts today,<sup>88</sup> our instincts tell us that some local bias exists at varying times and places.<sup>89</sup> But the inquiry whether the *original* purpose of diversity was to protect noncitizens from the possibility of local bias and, if so, whether conditions of local bias and prejudice still exist, is misplaced. If this were the only justification for retaining diversity jurisdiction, our attitude would be to favor its abolition.<sup>90</sup>

Irrespective of what beliefs caused the founding fathers to include diversity jurisdiction in the constitutional grant, the basic question today is whether it continues to serve a useful purpose. If it does, it should be retained—indeed expanded if warranted. As Judge Wright so aptly remarked:<sup>91</sup>

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*Diversity Jurisdiction: Past, Present, and Future*, 43 TEXAS L. REV. 1, 19 (1964). But of course this theory could not be relied on by corporations. See *Western Turf Ass'n v. Greenberg*, 204 U.S. 359, 363 (1907). It has been suggested that the draftsmen of the Constitution realized that the availability of diversity courts would encourage enterprise and the investment of foreign capital in a state. See *Marbury, Why Should We Limit Federal Diversity Jurisdiction?*, 46 A.B.A.J. 379, 380 (1960).

87. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816); *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809); Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEXAS L. REV. 1, 15 (1964). At one time a major argument for abolishing diversity was that litigation in federal courts was more expensive than in state courts and therefore favored wealthy litigants. But the validity of this assertion has been seriously questioned, even by members of the federal judiciary. See Friedenthal, *New Limitations on Federal Jurisdiction*, 11 STAN. L. REV. 213, 215 (1959).

88. See Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 4-5 & n.19 (1968).

89. Identification of the precise reason behind bias against noncitizen defendants—particularly corporate defendants—would be most difficult. Even if prejudice were established in a particular instance, there would be no way to determine whether such prejudice stemmed from a general suspicion of foreigners or prejudice against big, "fat-cat" business entities—whether local or foreign. See Ball, *Revision of Federal Diversity Jurisdiction*, 28 ILL. L. REV. 356, 361 (1933); Moore & Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 HARV. L. REV. 1426, 1448-49 (1964).

90. In fact it may be that the local bias premise for diversity jurisdiction has spent itself. The Judicial Code of 1948 discarded a post-Civil War enactment which authorized removal by an out-of-state litigant on the basis of apprehended prejudice or local influence. See Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEXAS L. REV. 1, 11 (1964). The Reviser's Note to 28 U.S.C. § 1441 (1970) states: "These provisions, born of the bitter sectional feelings engendered by the Civil War and the Reconstruction period, have no place in the jurisprudence of a nation since united by three wars against foreign powers. Indeed, the practice of removal for prejudice or local influence has not been employed much in recent years."

91. Wright, *The Federal Courts and the Nature and Quality of State Law*, 13

The fact that the Fathers included diversity in the Constitution primarily because they feared non-resident litigants might suffer prejudice in state courts need not and should not preclude its use a century and three-quarters later for novel reasons only now perceived; if the Constitution confers the authority, we may exercise it in furtherance of any decent social purpose.

To reject this notion is to adopt a view counter to the fiber of American constitutional jurisprudence. The Constitution could not have remained a viable instrument—in spite of the wisdom and far-sightedness of its draftsmen—without the willingness of the federal legislature and judiciary to read and apply its provisions in light of contemporary problems and needs. Indeed, how encrusted our constitutional safeguards would be had the Supreme Court taken a rigid stance through the years with respect to the Bill of Rights!

We realize, of course, that the mere fact that diversity jurisdiction is as old as the federal judiciary itself—whereas general federal question jurisdiction is nearly a century younger<sup>92</sup>—is not a sufficient reason to retain it. But there are reasons for retaining, and even expanding, diversity jurisdiction. It was this jurisdiction which brought our nation's courts to the people; and its application was a great cohesive force in our country. That force has not spent itself.

The best evidence in support of diversity jurisdiction is simply that "it works."<sup>93</sup> Everyone directly concerned—the litigants and their lawyers—is generally pleased with that jurisdiction. This is the true test.<sup>94</sup> The large number of diversity cases filed is evidence of the desirability and need to continue and expand the present system.<sup>95</sup> Approximately fifty-eight per cent of all original diversity actions filed in 1968 were by home-state plaintiffs.<sup>96</sup> This fact is rather convincing evidence that, on the whole, the home-stater does not consider that his own courts may be biased in his favor. He prefers the federal courts for other reasons. The reasons are mainly procedural, even though some features of federal practice that might be appealing to a litigant may be standard practice in courts of his state. A partial check

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WAYNE L. REV. 317, 327 (1967) (footnotes omitted).

92. Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470, 28 U.S.C. § 1331 (1970).

93. 1 MOORE ¶ 0.6[1].

94. Criticism of the present system is almost entirely unsupported by data or stated experience. Most of the criticism is simply based on the desire to lighten the federal dockets. See Frank, *Federal Diversity Jurisdiction—An Opposing View*, 17 S.C.L. REV. 677 (1965).

95. See Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7, 13 (1963).

96. ALI, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 467 (1969). These figures are based on statistics gathered by the Administrative Office of the United States Courts.

list of features of federal courts which account for their popularity—regardless of the citizenship of the plaintiff—includes: simple, non-technical pleadings; third-party practice; broad discovery;<sup>97</sup> a realistic attitude toward harmless error; effective pretrial procedures; a possibly superior jury system as provided by the Jury Selection and Service Act of 1968;<sup>98</sup> greater confidence of some litigants in the competence and impartiality of federal judges; greater authority of the federal judge over the trial; less crowded dockets resulting in a speedier trial;<sup>99</sup> simpler and less expensive appellate procedures; and a better staffed and maintained system of courts because of the financial resources back of them.<sup>100</sup> In short, justice is served (certainly not impaired) by the in-state plaintiff who seeks the diversity court to obtain a speedier, more fairly administered trial. And the out-of-state defendant has no cause to complain since he benefits from all the same advantages, and enjoys the added assurance of impartiality thrown into the bargain.<sup>101</sup>

We do not wish to be understood as demeaning the state courts by our praise of federal courts. The brightest hours in our judicial history have been those which witnessed the state and federal courts working harmoniously in deciding both state and federal matters. For example, in bankruptcy litigation, resolution of an objection that the claimant has received a voidable preference<sup>102</sup> or a fraudulent transfer<sup>103</sup> will often turn on both state and federal law. Jurisdictionally,

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97. Of course, many states have followed the federal pattern and have developed procedural systems just as effective as the federal system.

98. 28 U.S.C. § 1861 (1970).

99. See *Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. 1, at 245 n.5 (1971) (statement of John E. Kennedy); Summers, *Analysis of Factors that Influence Choice of Forum in Diversity Cases*, 47 IOWA L. REV. 933 (1962); Note, *The Choice Between State and Federal Court in Diversity Cases in Virginia*, 51 VA. L. REV. 178 (1965).

100. See *Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. 1, at 292 (1971) (statement of Wayne C. Smith, Jr.).

101. It was once feared that defendants would be subjected to oppressive costs, especially when long journeys to the court were necessary. See Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEXAS L. REV. 1, 4 (1964). But considering the proliferation of federal courts throughout the nation, the limits of venue, process and personal jurisdiction, and the change of venue provisions in the Code, this objection lacks merit.

102. See Bankruptcy Act § 60(b), 52 Stat. 870 (1938), 11 U.S.C. § 96(b) (1970). By virtue of § 60(a)(2), 64 Stat. 25 (1950), 11 U.S.C. § 96(a)(2) (1970), state law determines when a transfer is made.

103. See Bankruptcy Act § 70(e), 52 Stat. 882 (1938), as amended, 11 U.S.C. § 110(e) (1970), under which both state and federal law are made applicable in determining whether the transfer is fraudulent. See also § 70(c), 64 Stat. 26 (1950), as amended, 11 U.S.C. § 110(c) (1970)—the “strong arm” clause—under which the rights, benefits, and defenses provided for the trustee in § 70(c) will depend on both federal and state law.

the Bankruptcy Act provides for concurrent use of both state and federal courts in avoiding preferences and fraudulent transfers<sup>104</sup> and utilizes principles of diversity in section 23.<sup>105</sup> Whether a plenary suit would proceed faster in a state or federal court might depend on docket conditions existing at the particular time. The important thing is that the litigant has a choice, and it is this *choice* that best serves the ends of justice. Thus realistic federalism utilizes both state and federal courts when concurrent jurisdiction serves a useful purpose, as in bankruptcy.

A close cooperation between the state and federal judicial systems is needed in order to administer effectively our state and federal laws. That the opportunity to sue in federal courts will result in an "inevitable destruction of the dignity and prestige of state courts and disruption of federal-state relationships"<sup>106</sup> is fantasy. Why should the experts want to curtail diversity jurisdiction when the litigants and their counsel—and even the state courts<sup>107</sup>—want to retain broad diversity jurisdiction?

In an address to the Fifth Circuit Judicial Conference, Chief Justice Richard W. Ervin, Supreme Court of Florida, made the following remarks:<sup>108</sup>

We in Florida, by gradual degrees under your benign encouragement, understand that ours is a dual citizenship and that federal

104. See §§ 60(b), 67(e), 70(e)(3), 52 Stat. 870, 878, 882 (1938), 11 U.S.C. §§ 96(b), 107(e), 110(e)(3) (1970).

105. 52 Stat. 854 (1938), 11 U.S.C. § 46 (1970). Subsection (a) gives federal district courts jurisdiction over controversies between receivers and trustees and adverse claimants "in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants." See note 13 *supra*.

106. See *Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. 1, at 119 (1971) (statement of Richard H. Field). See also ALI, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 47 (1969).

107. *E.g.*, in letters from Chief Justice Alvin C. Strutz, North Dakota Supreme Court, to Senator Quentin Burdick, Sept. 20, 1971, the sponsor of a bill which would curtail diversity jurisdiction, S. 1876, 92d Cong., 1st Sess. (1971), and from Chief Justice B. K. Roberts, Florida Supreme Court, to Senator Edward Gurney, Sept. 22, 1971, both justices unequivocally expressed strong opposition to the proposal to contract federal diversity jurisdiction. See *Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. 1, at 267-68 (1971). And Judge J. Skelly Wright, United States Court of Appeals for the District of Columbia, remarked: "If any state legislators, judges, lawyers, or litigants have issued public protests founded on states' rights principles against federal court assumption of diversity jurisdiction, those protests have not crossed my desk." Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 321 (1967).

108. As quoted in Dyer, *State Trial Courts from a Federal Viewpoint*, 54 JUDICATURE 372, 376 (1971).

citizenship requires federal judges and state citizenship requires state judges. Of course, some decisional conflicts result from a dual judicial system, but by and large, we have a good working relationship and cooperation between Florida's state judiciary and the federal judiciary. There is a considerable degree of deference, understanding and respect for the respective spheres of decision making between the Florida judiciary and the federal judiciary. Much of the carping and caviling voiced many years ago by state leaders in Florida against the federal judiciary is no longer heard.

Perhaps *Erie R.R. v. Tompkins*<sup>109</sup> is partly responsible for the growing cooperation between state and federal courts, since it swept away much of the federal abuse in the area of nonfederal substantive law. Gone, for example, are the evils of the *Black and White Taxicab* case.<sup>110</sup>

Both the fact that the Constitution contains an affirmative grant to create diversity jurisdiction and the fact that the present scheme works well cast the burden of a strong showing on those who would constrict this jurisdiction. Diversity cases do possess a federal element. The federal court is the only tribunal to which all the parties can claim allegiance, whether the party invoking the federal court's jurisdiction is local or from out-of-state.<sup>111</sup> In this sense, the federal government has an interest in administering these disputes, regardless of the substantive law applied.

Moreover, although specific grants of other types of jurisdiction were made by Congress to the circuit courts from time to time, such as grants over patent infringement and suits under the postal laws, diversity jurisdiction over actions at law and suits in equity accounted for most of the civil grist for the circuit courts until well toward the end of the last century. Diversity cases have been and are today just as much the business of federal courts as are federal question cases. Consider a small, and realistically speaking, local labor dispute—a federal question case—versus the large diversity suit. What makes the latter more "local" than the former?<sup>112</sup>

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109. 304 U.S. 64 (1938).

110. *Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928) (Kentucky corporation re-incorporated in Tennessee to gain access to federal court to take advantage of the "general" federal law and thereby avoid an unfavorable decision under Kentucky law); see Frank, *For Maintaining Diversity Jurisdiction*, 73 *YALE L.J.* 7, 9-10 (1963). The fear which some once held that state courts would eventually cease to function has proved to be totally absurd.

111. Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 *TEXAS L. REV.* 1, 25 (1964).

112. See Frank, *Federal Diversity Jurisdiction—An Opposing View*, 17 *S.C.L. REV.* 677 (1965).

Finally, the spirit of cooperation which diversity jurisdiction has nurtured between the state and federal systems has helped to improve both. It has brought the Federal Rules to the state systems. Furthermore, the federal system, through the Federal Judicial Center and the Administrative Office of the United States Courts, has provided the opportunities and resources for improvement of our national judiciary.<sup>113</sup> We doubt that these and other national efforts would be as fully supported by the general bar were it not for the frequency with which the "state" practitioner appears in federal court. If crowded federal dockets are the real root of concern—and we think that they are—unloading federal diversity cases on the state courts is not the solution.<sup>114</sup> Aside from the fact that the state courts do not want to accommodate these cases, since their own dockets are already overburdened,<sup>115</sup> it would solve little; in fact, it would probably create more problems. Statistics indicate generally that the average waiting time for trial is at least one year and four months longer in state than in federal courts.<sup>116</sup> Given that state of affairs, justice for the litigants will hardly be improved by a mere shift of cases from the federal docket to the state docket. In the final analysis it would seem that if diversity cases belong in the federal courts, any resulting congestion should be dealt with by the federal courts—not cast onto the states.<sup>117</sup> The answer to federal court congestion must lie elsewhere.

The sensible solution is not only to retain diversity jurisdiction, but to simplify it. As a general proposition, the *Strawbridge*<sup>118</sup> rule of complete diversity seriously hampers joinder in an original action of multiple parties, since it requires complete diversity between the plaintiffs on the one hand and the defendants on the other,<sup>119</sup> subject

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113. See *Hearings on S. 1867 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. 1, at 245 n.5 (1971) (statement of John E. Kennedy).

114. Indeed, the federal docket congestion may not be as bad as it seems. According to Senator Burdick, based on the 1970 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, over eighty-three per cent of all diversity cases filed are concluded prior to trial. Burdick, *Diversity Jurisdiction Under the American Law Institute Proposals: Its Purpose and Its Effect on State and Federal Courts*, 48 N.D.L. REV. 1, 18 n.49 (1971).

115. See, e.g., note 107 *supra*.

116. See *Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. 1, at 265 (1971) (statement of John P. Frank).

117. See Doub, *Time for Re-Evaluation: Shall We Curtail Diversity Jurisdiction?*, 44 A.B.A.J. 243, 246 (1958).

118. See p. 7 *supra*.

119. For the particular woes *Strawbridge* has inflicted on courts in diversity suits where corporations are parties, see Moore & Weckstein, *Corporations and Diversity of*

to a proper alignment of the parties to represent their true interests<sup>120</sup> and the fact that the citizenship of formal parties is disregarded.<sup>121</sup> In the interest of simplifying federal jurisdiction and implementing the Federal Rules, the *Strawbridge* rule should be replaced by a minimal diversity rule. This can be done constitutionally.<sup>122</sup> Hence, in a case involving joinder of multiple parties procedurally proper under rule 20,<sup>123</sup> diversity jurisdiction would exist as long as there is diversity between one plaintiff and one defendant, irrespective of the citizenship of the other parties—plaintiffs or defendants.

Requiring only minimal diversity would also eliminate the need to resort to strained applications of ancillary and pendent jurisdiction theories to soften the complete diversity rule.<sup>124</sup> It would ordinarily dispose of the problems of realignment of parties.<sup>125</sup> And with the simple venue provisions and expanded sweep of process heretofore suggested,<sup>126</sup> most of the problems of obtaining jurisdiction over persons needed for a just adjudication under rule 19 would be eliminated.

Regarding corporations, the concept of dual citizenship<sup>127</sup> should be abolished. Instead, a corporation should be considered a citizen of the state where it has its principal place of business. That a business is incorporated in a particular state has no relevance in itself to proper concepts of citizenship. By limiting corporate citizenship to the state where it has its principal place of business, the definition would comport more with the realities of citizenship of natural persons, which is geared to domicile. A single-state corporate citizenship would eliminate the problems concerning the multistate corporation,<sup>128</sup> in-

*Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 HARV. L. REV. 1426, 1429 (1964).

120. See *City of Dawson v. Columbia Ave. Title & Trust Co.*, 197 U.S. 178 (1905); *Alexander v. Washington*, 274 F.2d 349 (5th Cir. 1960).

121. See *Mexican Cent. Ry. v. Eckman*, 187 U.S. 429 (1903); *Nunn v. Feltinton*, 294 F.2d 450 (5th Cir. 1961).

122. See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-31 (1967).

123. See pp. 6-7 *supra*.

124. See 1 MOORE ¶ 0.60[8.4]; 1A MOORE ¶ 0.163[3]; 1B MOORE ¶ 0.504; 3 MOORE ¶¶ 13.15, .19, .36, 14.25-.27; 3A MOORE ¶ 18.07; 3B MOORE ¶ 24.18.

125. See Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 34 (1968). Professor Currie correctly observes that application of the theories of ancillary and pendent jurisdiction in order to avoid the *Strawbridge* rule violates rule 82, which provides that the Rules "shall not be construed to extend or limit" jurisdiction. *Id.*

126. See pp. 9-10 *supra*.

127. See 28 U.S.C. § 1332 (c) (1970). The corporation is a citizen "of any State by which it has been incorporated and of the State where it has its principal place of business . . . ."

128. See, e.g., *Jacobson v. New York, N.H. & H.R.R.*, 347 U.S. 909 (1954), *aff'g mem.* 206 F.2d 153 (1st Cir. 1953) (multistate corporation incorporated in forum state regarded as incorporated solely in the forum state for purpose of determining citizenship); *Patch v. Wabash R.R.*, 207 U.S. 277 (1907) (multistate corporation could not remove



cluding whether a corporation has been "compelled" to incorporate as a condition of doing business in a state.<sup>129</sup>

Finally, section 1332(c) of title 28, which treats an insurer sued under a direct action statute as a citizen of the insured's state, should be repealed. The purpose of the statute is to prevent a local plaintiff from suing the insurer of a local tort-feasor in the federal courts of that state, since it is felt that the direct action statute unfairly enables the local plaintiff to avoid suing in his own state courts. What Congress apparently failed to realize, however, was that in disabling the in-state plaintiff, the provision treats the foreign insurance company unfairly.<sup>130</sup> Moreover, in such direct action suits, the defendant insurer is the real party in interest; thus complete diversity exists when the local tort-feasor is not joined.

#### OTHER METHODS TO ALLEVIATE DOCKET CONGESTION SHOULD BE CONSIDERED

Much more can be done even under the present system to avoid waste of judicial energy. For example, greater use could be made of magistrates. Many federal judges have already found them tremendously helpful in motion practice and in policing discovery.

Extensive use of masters to act in the nature of "vice-judges," and generally to aid the judge in mundane, fact-finding matters has been somewhat unsuccessful for two reasons: too much patronage has been practiced, and the cost of the masters has been imposed on one or both parties. Improper patronage could be avoided by providing a panel of masters appointed by the courts of appeals; if a district judge determined to appoint a master, he would select from the panel. Moreover, we feel that the cost of masters ought to be borne by the Government rather than by the litigants.

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from court of forum state in which it was incorporated); *Southern Ry. v. Allison*, 190 U.S. 326 (1903) (state which "forced" corporation to obtain a charter as a condition for doing business not considered for purposes of determining citizenship); *Memphis & C.R.R. v. Alabama*, 107 U.S. 581 (1882) (incorporation in forum state where opposing party resided defeated diversity for removal purposes even though party was incorporated in other states as well, since it was not "forced" to obtain a charter as a condition for doing business in forum state); *Seavey v. Boston & Me. R.R.*, 197 F.2d 485 (1st Cir. 1952) (same holding as *Jacobson*); *Jaconski v. McCloskey & Co.*, 167 F. Supp. 537 (E.D. Pa. 1958) (multistate corporation regarded solely as citizen of forum state if principal place of business located in that state, even though not incorporated in forum state).

129. *E.g.*, *Missouri Pac. Ry. v. Castle*, 224 U.S. 541 (1912). See generally Moore & Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 HARV. L. REV. 1426, 1429 (1964).

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

Federal judges could do much themselves to nudge the flow of cases through their courts. Pressure should be put on lawyers not to overdo discovery. Cases should be set down for early trial just as soon as the issues are determined. Rule 11<sup>131</sup> ought to be utilized more to keep dilatory motion practice to a minimum. Some districts require that motions be submitted on memoranda as a general proposition, granting hearings thereon only in unusual cases. Judges should refuse to grant continuances except when justifiable reasons are clearly demonstrated. The creation of more judgeships is, of course, not a final cure. On the other hand, the number of judges should be ample to handle all the proper judicial business before them with expedition, but with such leisure time that the judge may bring to the case at hand the art of judging.<sup>132</sup> When judges reach retirement age, but do not retire, provision should be made for the appointment of a new judge—not as a replacement, but merely to provide such additional judicial manpower as there would be if the judge had retired. The judge should not be reduced to an automaton processing a daily quota of cases on his docket. But, just as the presence of diversity cases on the federal dockets has not interfered with the creativity of federal judges, an increase in the number of judges will not depreciate the quality of the federal judiciary.<sup>133</sup> The size and power of the federal judiciary has grown substantially since 1789, but the integrity and competence of that institution have kept abreast of those changes.

Undoubtedly, other suggestions can be made to improve and simplify principles of jurisdiction and procedure. Let us turn away from jurisdictional concepts that would delight Baron Parke, who loved procedural entanglements of any type. Let us make simplification of jurisdiction our goal, and let us keep the federal courts as working partners with state courts in the diversity area.

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131. FED. R. CIV. P. 11 provides that "[t]he signature of an attorney constitutes a certificate by him . . . that . . . [the pleading] is not interposed for delay." This requirement applies to all motions and any other papers provided for by the Rules. See FED. R. CIV. P. 7 (b) (2).

132. See generally Burger, *The State of the Federal Judiciary—1972*, 58 A.B.A.J. 1049 (1972).

133. See Moore, *Problems of the Federal Judiciary*, 35 F.R.D. 305, 307-08 (1964).