

# PROSPECTUSES

## Prospectus for the American Law Institute's Federal Judicial Code Revision Project

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## PROLOGUE

Early in 1994, the Director of the American Law Institute (“Institute”) asked me to prepare a prospectus for “a project to formulate a revision of the Judicial Code, for possible enactment by Congress.”<sup>1</sup> The Institute’s preliminary conception of the project contemplated “principles of statutory text, including specific formulations as useful for conveying meaning, together with explanation and references,”<sup>2</sup> modeled basically on the Institute’s 1969 *Study of the Division of Jurisdiction Between State and Federal Courts* (“1969 Study”).<sup>3</sup> The Institute suggested that I focus on “clarification and rectification of the ‘technical’ provisions of the law governing federal jurisdiction, venue, joinder, process, and related subjects.” It also suggested that I avoid such politically divisive “macro” topics as the repeal of general diversity jurisdiction or of specific categories of federal-question jurisdiction.<sup>4</sup> The Institute left open whether the project ought to extend to other controversial but encapsulated clusters of issues affecting the scope and welfare of federal jurisdiction. These issues include the proper contours of the bankruptcy and admiralty jurisdictions and federal judicial review of administrative orders.

In May of 1994, I accepted the Institute’s commission, and in September of 1995, I completed my work on the original, unpublished version of this Prospectus. In December of 1995, the Council of the Institute decided formally to commence the “Federal Judicial Code Revision Project.” It appointed me to be the project’s Reporter and directed me to proceed as I had recommended in this Prospectus. In the Epilogue that follows the main text of this Prospectus as revised and reprinted below, I review the progress of the Federal Judicial Code Revision Project during its first two and one-half years.

Aside from matters of style, I have made only minor revisions in preparing this Prospectus for publication. The Introduction

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<sup>1</sup> Letter from Geoffrey C. Hazard, Jr., Director, American Law Institute, to John B. Oakley 1 (Jan. 27, 1994) (on file with author).

<sup>2</sup> *Id.*

<sup>3</sup> See generally AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969) [hereinafter 1969 STUDY].

<sup>4</sup> See Letter from Geoffrey C. Hazard, Jr., *supra* note 1, at 1-2.

has been shortened and reorganized; citations and brief comments on intervening legislative and decisional developments have been added to make the notes as useful as possible to current readers. Additionally, I have omitted an appendix on Indian-law issues affecting the federal courts not for lack of significance but because these issues demand a fuller treatment than could be attempted here. The main text has been altered substantively only to correct obvious mistakes, or to avoid misleading current readers as to important changes in the law discussed.

Much thought was given by author and editor alike to the tense and “voice” to be used in publishing in the spring of 1998 a prospectus completed in September of 1995. The value of this Prospectus lies in its survey of the law and its template for a project to reform that law. Much of this value would be lost if I revised this Prospectus to speak other than incidentally of the law as it exists at the date of publication and of the project as it has taken shape after this Prospectus was completed. What may seem obvious was confirmed by trial and error: there is no graceful way to use retrospective references if the form of a prospectus — an inherently prospective document — is to be retained.

This Prospectus can hardly refer to itself in the past tense and, thus, as published it retains its original, forward-looking focus. Except in the updated notes, the Prospectus refers to the law of September 1995 in the present tense and to the possibility of a revisory project in the future tense. Form here follows function, which is to address the desirability of revising the federal Judicial Code in prospective terms while preserving as a published document the blueprint for the actual project that remains still under construction but with the first of several tiers now in place.

## INTRODUCTION

Every Institute project has one overriding goal: theoretical improvement. The Institute’s *raison d’être* is to improve the administration of justice;<sup>5</sup> every project strives to improve the

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<sup>5</sup> See William Draper Lewis, *History of the American Law Institute and the First Restatement*

performance of our legal system within a particular area. This goal imposes two criteria on the Institute's selection of projects. First, the Institute should allocate its scarce resources to projects that deal with serious and persistent problems in the law.<sup>6</sup> Second, it should frame recommendations rectifying these problems in such a way as to enable legislators and judges, who have the legal power and political responsibility to repair and reform the law.<sup>7</sup>

This Prospectus postulates a second overriding goal that is related to, but more contingent than, the goal of theoretical improvement: actual improvement. Ultimately, a project on the Judicial Code should achieve the expeditious enactment of a substantial number of its statutory recommendations. This requires more than mere viability; it makes the actual legislative impact of the project an important measure of its success. Achievement of this goal would create momentum for successor projects to reform other provisions of the Judicial Code not touched by this project.

The goal of actual improvement requires that the project focus on two strategic principles. First, the project should be selective. Too broad a scope would not only make the project internally unwieldy, but it would also compound the risk that opponents of particular reforms will form alliances to block any implementation of the project as a whole. Second, the project should deal with the sorts of problems over which the Institute has special expertise and competence. This argues for a set of recommendations that promise practical improvement rather than normative reform of the administration of justice in the federal courts. These goals and strategies rule out an attempt to fashion a top-to-bottom, section-by-section revision of the Judicial

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*of the Law, in* RESTATEMENT IN THE COURTS 1, 21-22 (perm. ed. 1945) (attempting to produce revisions incorporating important subjects overlooked by first restatement and producing foreign language translated restatement).

<sup>6</sup> *See id.* at 21 (stating that restatement should focus on important subjects that were not covered in first restatement).

<sup>7</sup> *See id.* at 19 (noting that restatement drafters strived to make restatement useful to lawyers and judges).

Code.<sup>8</sup> Thus, the Institute should seek to lubricate, rather than retool, the gears of federal jurisdiction.

A complete rewriting of the Judicial Code, as contained in title 28, would require a prohibitive amount of time and attention. It would engender such a multitude of objections by affected institutions and interests that it would preoccupy the Institute for years and would likely founder in a vortex of political cross-currents. Title 28 encompasses a sweeping range of topics including jurisdiction and venue; organization and size of the federal courts; the key provisions of the Civil Justice Reform Act;<sup>9</sup> the basic charters of the Department of Justice, Federal Bureau of Investigation, Judicial Conference, Administrative Office, Federal Judicial Center, and Sentencing Commission; the judicial retirement and disability system; the Full Faith and Credit statute; the Parental Child Kidnapping Act; the Rules of Decision Act; and the Rules Enabling Act as well as other procedural and rulemaking provisions.<sup>10</sup>

As a first cut, this Prospectus recommends that the Institute restrict its proposals for revision of the Judicial Code to those sections governing the jurisdiction and venue of the district courts. These sections are concentrated in part IV of title 28,

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<sup>8</sup> In my view, this would be true even if such a global revision of the Judicial Code were undertaken by the Institute upon the express invitation of the leadership of Congress. The *1969 Study* illustrates that such an express invitation does not guarantee governmental receptivity to the policy-oriented recommendations that the Institute duly offers in response. I attach scant significance to the fact that the request to conduct the *1969 Study* was issued by the Chief Justice rather than the leadership of either political branch. Whatever the precise source of an invitation to assist the formal processes of government on issues at the intersection of law and politics, there remains the standing peril — indeed, the near inevitability — of significant change in the personalities in power between the time such an invitation is issued and the time at which suitably careful recommendations can emerge from the Institute's deliberative processes. In the decade it took to produce the *1969 Study*, even the leadership of the least volatile branch of government had changed significantly. Had the invitation come from one of the political branches, the sense of an intervening sea change would have been no less profound.

<sup>9</sup> Most of the provisions of the Civil Justice Reform Act, 28 U.S.C. §§ 471-482 (1994), expired on December 1, 1997, pursuant to the Act's seven-year sunset provision. See *Judicial Improvements Act of 1990*, tit. I, Pub. L. No. 101-650, § 103(b)(2), 104 Stat. 5096. See generally Carl Tobias, *The Judicial Conference Report and the Conclusion of Federal Civil Justice Reform*, 175 F.R.D. 351 (1998) (discussing effect of failure of Congress to extend seven-year period).

<sup>10</sup> See 28 U.S.C. §§ 1-482, 501-591, 1251-1631, 1652, 1738, 2071-2074 (1994 & Supp. 1995).

where they constitute chapter 85 (original and supplemental jurisdiction: sections 1330 to 1368), chapter 87 (venue: sections 1391 to 1412), and chapter 89 (removal: sections 1441 to 1452).<sup>11</sup> Analysis of the sections of title 28 within chapters 85 to 89 constitutes the bulk of this Prospectus. This Prospectus has also added one cognate provision, section 1631, that logically ought to be part of chapter 87.<sup>12</sup>

By restricting itself almost exclusively to chapters 85 through 89, this Prospectus leaves out other important topics bearing on federal jurisdiction. These omitted topics include the substantive provisions of the Foreign Sovereign Immunities Act, habeas corpus, the original jurisdiction of the United States Supreme Court, the entire field of appellate jurisdiction, and the All Writs Act. It also excludes the jurisdictional requirement of a three-judge district court for certain cases, and the jurisdictional relationship of the district courts to the Court of Federal Claims and the Court of International Trade. All of these topics are politically sensitive, most are presently volatile, and some are so highly specialized that they should be addressed by independent projects.

Also excluded from this Prospectus are issues of service of process and the territorial jurisdiction of the district courts, except where these issues are implicated by possible statutory revisions dealing with interpleader, venue, and interdistrict transfer. There are two connected reasons for this Prospectus's avoidance of service of process and territorial jurisdiction. First, new rule 4 of the Federal Rules of Civil Procedure recently addressed these issues.<sup>13</sup> Second, if the Institute proposed revising the Federal Rules by superseding statutory law, it would raise a host of questions about the desirability of ad hoc legislative intrusion into the rulemaking process. The Institute could, of course, address its proposed revisions to the Judicial Conference<sup>14</sup> or

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<sup>11</sup> These are consecutive chapters. There is no chapter 86 or chapter 88.

<sup>12</sup> Unless otherwise indicated, all future statutory citations by section number alone refer to the enumerated sections of current title 28 of the United States Code.

<sup>13</sup> See FED. R. CIV. P. 4(K) (governing territorial limits of effective service of process).

<sup>14</sup> The Judicial Conference of the United States is responsible for reviewing the operation and effect of the Federal Rules of Civil Procedure and recommending changes to the United States Supreme Court. See 28 U.S.C. § 331. See generally CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 6A, at 23-24 (5th ed. 1994) (describing structure and function of

the Supreme Court. However, the Supreme Court has recently displayed some weariness of and apathy towards the rulemaking process.<sup>15</sup> The Standing Committee of the Judicial Conference has undertaken a self-study of the pace and structure of the rulemaking process.<sup>16</sup> Therefore, the Institute should at present abstain from re-examining the Federal Rules.

In addition to the exclusion of most service-of-process issues, this Prospectus omits virtually the entire field of joinder of claims and parties except as implicated by section 1367's grant of supplemental jurisdiction. In the long run, this may be too great an omission. These issues might profitably be considered in a successor project, once the rulemaking process has recovered its equilibrium.

Despite the fact that venue provisions affecting the district courts constitute a central feature of the Prospectus, it excludes the nonstatutory doctrine of forum non conveniens as applied in an international context. It also excludes other issues indirectly affecting the choice of a federal forum, such as the doctrine of *Erie Railroad Co. v. Tompkins*<sup>17</sup> and its application to transfers of venue within the federal system. Venue issues affecting the availability of a federal forum are sufficiently tangled to benefit from the Institute's attention, and they are sufficiently simple not to tax the Institute's resources. Choice of law issues may be equally or more tangled, but they are surely not simple. The recent experience of the Complex Litigation Project<sup>18</sup> makes a convincing argument that they should be confronted only when they occupy a central rather than peripheral focus. Nonstatutory

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Judicial Conference of United States).

<sup>15</sup> See John B. Oakley, *An Open Letter on Reforming the Process of Revising the Federal Rules*, 55 MONT. L. REV. 435, 436 & n.1 (1994) (describing Chief Justice Rehnquist's remarks on proposed title 28 amendments).

<sup>16</sup> See THOMAS E. BAKER & FRANK H. EASTERBROOK, A SELF-STUDY OF FEDERAL JUDICIAL RULEMAKING: A REPORT FROM THE SUBCOMMITTEE ON LONG RANGE PLANNING TO THE COMMITTEE ON RULES OF PRACTICE, PROCEDURE AND EVIDENCE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, reprinted in 168 F.R.D. 679 (1996).

<sup>17</sup> 304 U.S. 64 (1938).

<sup>18</sup> See generally AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS WITH REPORTER'S STUDY: A MODEL SYSTEM FOR STATE-TO-STATE TRANSFER AND CONSOLIDATION 7-20 (1994) [hereinafter ALI COMPLEX LITIGATION PROJECT] (examining present difficulties and jurisdictional tensions inherent in judicial administration of complex litigation).



forum non conveniens is essentially a form of abstention and, as such, is only one of a cluster of doctrines of discretionary jurisdiction whose status in the project is next discussed.

The scope of this Prospectus is to look for areas of technical dysfunction in the current operation of the Judicial Code that can be rectified without substantial reconsideration of the normative structure of federal jurisdiction. Some of these issues have received recent and detailed, if not wholly successful, congressional attention, as in the fields of foreign sovereign immunity and bankruptcy jurisdiction.<sup>19</sup> Others have received only haphazard treatment by Congress but may merit wholesale reform so that practical issues can be addressed in service of some coherent social policy. An example of one such issue is Indian law and its peculiar conundrums of the relationship of tribal sovereignty to general principles of the relationship between state and federal law.<sup>20</sup> The commingling of policy and practice is particularly pronounced in the case law that determines the scope of the basic grants of original federal jurisdiction under sections 1331 to 1333 in federal-question, diversity, and admiralty actions. These three statutes color the construction of the numerous satellite grants of federal-question and diversity jurisdiction over specific subcategories of cases. The interplay of constitutional authority, statutory mandate, and judicial discretion is also manifest in the array of statutory and judge-made abstention doctrines limiting the exercise of jurisdiction by federal district courts.<sup>21</sup>

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<sup>19</sup> See 28 U.S.C. §§ 1471(a)-(b), 1602 (1994).

<sup>20</sup> See 25 U.S.C.A. § 3601 (West Supp. 1998) (recognizing inherent sovereignty of Indian tribes); *Kiowa Tribe v. Manufacturing Techs., Inc.*, No. 96-1037, 1998 WL 260001 (U.S. May 26, 1998) (holding that Indian tribes enjoy sovereign immunity from civil suits on contracts in state courts); DAVID E. WILKINS, *AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE* (1997) (studying judicial history of tribal sovereignty). See generally *infra* notes 269-75 and accompanying text (discussing § 1353's treatment of Indian allotments); *infra* notes 327-30 and accompanying text (discussing § 1360's treatment of state civil jurisdiction over Indians); *infra* notes 336-40 and accompanying text (discussing § 1362's grant of federal-question jurisdiction over suits by Indian tribes).

<sup>21</sup> In addition to such statutory withdrawals of jurisdiction as the Tax Injunction Act and the Johnson Act, sections 1341 and 1342 (both discussed in Part II), the Anti-Injunction Act, section 2283, the Norris-LaGuardia Act, 29 U.S.C. § 104 (1994), and the discretionary aspects of such quasi-constitutional justiciability doctrines as standing, mootness, and ripeness, see generally David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 552-55 (1985) (describing de facto discretion in exercise of federal jurisdiction), there are

These embedded issues of jurisdictional policy argue for the Institute to further circumscribe the project. Certainly the present project should not follow the *1969 Study* in seeking to deal

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four generally recognized categories of court-created abstention doctrine. Each is commonly referred to by the title of the originating case: *Pullman* abstention, *see* *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 500 (1941) (permitting deferral of federal constitutional adjudication pending resolution of related but unsettled issues of state law that might moot or substantially affect determination of federal issue); *Burford* abstention, *see* *Burford v. Sun Oil Co.*, 319 U.S. 315, 317-18 (1943) (permitting dismissal of federal litigation that threatens interference with coherent administration of state law on policy issues of substantial public importance); *Younger* abstention, *see* *Younger v. Harris*, 401 U.S. 37, 49 (1971) (mandating dismissal of federal litigation that seeks to restrain pending state criminal proceedings absent prosecutorial bad faith or attempted enforcement of patently invalid state statute); and *Colorado River* abstention, *see* *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976) (permitting in exceptional circumstances dismissal of federal litigation that might conflict with parallel state-court proceedings). *See generally* *Moses H. Cone Memorial Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 13-14 (1983) (noting that abstention is narrowly defined and permissible only in exceptional circumstances); *Colorado River*, 424 U.S. at 813-17 (holding that only exceptional circumstances may excuse federal courts from virtually unflagging obligation to exercise their jurisdiction).

There is arguably a fifth, less well-defined category of abstention at work in cases in which federal proceedings are stayed (rather than dismissed or remanded, as in *Burford*) in order "to leave the states the resolution of unsettled issues of state law." *See* WRIGHT, *supra* note 14, § 52, at 323; *e.g.*, *Lehman Bros. v. Schein*, 416 U.S. 386, 390 (1974) (endorsing use of certification procedure in diversity case to resolve unsettled issues of state law of lesser scope and importance than would be required for *Burford* abstention); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 27-28 (1959) (upholding power of district court to stay diversity-based expropriation case pending state-court construction of eminent-domain statute). The Supreme Court has emphasized of late the fluidity of the conventional categories of court-created abstention doctrine: "The various types of abstention are not rigid pigeonholes into which federal courts must fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 n.9 (1987).

The Supreme Court has recently added new gloss to three of the four principal categories of abstention. In *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1072-75 (1997), the Court strongly discouraged *Pullman* abstention when it is possible to certify questions of state law for interlocutory decision by the state courts. When an effective certification procedure is available, the *Arizonans* Court made it virtually mandatory for certification to be used to construe novel state legislation that is attacked on constitutional grounds in federal court before any consideration of its terms by state courts. In *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 712-14 (1996), the Court forbade remand or dismissal of a diversity case on *Burford* grounds where damages were sought rather than some form of equitable or other discretionary relief. The Court left open whether the alternative of a stay rather than remand or dismissal might be appropriate on *Burford* grounds in a damages case. In *Wilton v. Seven Falls Co.*, 515 U.S. 277, 282-90 (1995), the Court held that the narrow "exceptional circumstances" test for invoking *Colorado River* abstention is inapplicable when a district court exercises the much broader discretion conferred by the Declaratory Judgment Act to deny declaratory relief in a federal suit that parallels pending state-court proceedings between the same parties.

globally with abstention issues.<sup>22</sup> The perplexing question is whether to sidestep the threat to normative neutrality posed by attempting to revise or restate the more politically sensitive or judicially discretionary affirmative grants of jurisdiction and associated case law. To avoid such issues, the Institute should limit the scope of the project strictly to those sections of the Judicial Code that (1) deal primarily with the implementation of the basic grants of jurisdiction to the district courts and (2) do so in ways that are most manifestly complicated by technical flaws on the face of the relevant statutes rather than policy-driven epicycles of statutory construction. A short list of the Judicial Code sections in palpable need of statutory repair must include, at a minimum, section 1367 on supplemental jurisdiction, sections 1391 and 1404 to 1407 on venue and transfer; and sections 1441 and 1445 to 1447 on removal. Potentially eligible for inclusion on such a short list is section 1332, the general diversity statute. Section 1332 is far more facially complex than either section 1331, the general federal-question statute, or section 1333, the admiralty statute. The problems of supplemental jurisdiction under section 1367 are in large part a function of its attempt to codify the doctrine of complete diversity that is only latent in the express terms of section 1332. This situation argues for revising sections 1332 and 1367 in parallel. Certainly, there is much that could be done to improve the precision and clarity of section 1332 without rethinking the fundamental premises of general diversity jurisdiction.

This Prospectus ultimately endorses the option of improving section 1332 without re-evaluating the premises of general diversity jurisdiction. However, the Institute might reasonably conclude that too drastic a curtailment of the project's scope in pursuit of the goal of actual improvement would render the project insufficiently valuable to pursue. The Institute may wish to risk some prejudice to the goal of actual improvement in order to make sure that the degree of theoretical improvement justifies its willingness to proceed. This argues for presenting an alternative that closely parallels the organization of the

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<sup>22</sup> See 1969 STUDY, *supra* note 3, at 282-312.

Institute's *1969 Study*: revision of the entirety of chapters 85, 87, and 89 as well as the cognate transfer provision of section 1631.

Part I reviews the history of the Judicial Code and the Institute's *1969 Study*. Part II explores the issues that the chapter-by-chapter alternative would present for consideration. Each subsection in Part II ends with a recommendation whether to include the particular code section it discusses on the more restricted list of issues that the Institute should address if it elects the alternative "short list" approach. To avoid unduly inflating its length, this Prospectus deals only superficially with sections that appear to be clearly inconsistent with the project's goals. Thus, this Prospectus reserves the greatest detail for those sections included on its short list of those most eligible for revision. Part III concludes by re-evaluating and reaffirming each short-list alternative in light of the findings of Part II and proposing an order in which to implement that alternative.

## I. BACKGROUND

### A. *The History of the Judicial Code*

The drafting of the Judicial Code of 1948 began in 1877, when the first effort to codify the Judiciary Act of 1789 and eighty-eight years of subsequent additions and amendments resulted in title XIII of the Revised Statutes. The next major revision occurred with the enactment of the Judicial Code of 1911.<sup>23</sup>

The Judicial Code of 1911 was incorporated into title 28 of the proposed new and comprehensive United States Code. Enacted in 1926, the new United States Code included title 28 but only after the Senate added a proviso that the new code constituted merely prima facie evidence of the law.<sup>24</sup>

In 1943, Congress authorized the Committee on Revision of the Laws to revise substantively titles 18 and 28 for enactment into positive law.<sup>25</sup> The advisers and consultants commissioned

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<sup>23</sup> HOUSE COMM. ON THE JUDICIARY, REVISION OF TITLE 28, H.R. Rep. No. 308, at 2 (1947), reprinted in LEGISLATIVE HISTORY OF TITLE 28, UNITED STATES CODE: JUDICIARY AND JUDICIAL PROCEDURE (Roy M. Mersky & J. Myron Jacobstein eds., 1971).

<sup>24</sup> See *Revision of Titles 18 and 28 of the United States Code: Hearings on H.R. 1600 and H.R. 2055 Before Subcomm. No. 1 of the Comm. on the Judiciary*, 80th Cong., 6 (1947).

<sup>25</sup> See *id.* (stating that in 1943, Committee on Revisions of Laws was equipped with

to draft the revised codes substantially completed work on title 18 by the end of 1944.<sup>26</sup> They completed most of the work on title 28 over the next two years. Title 28 was introduced as H.R. 7124 late in the 79th Congress, on July 24, 1946. After revision, Congress enacted it into positive law as title 28 of the United States Code, effective September 1, 1948.<sup>27</sup>

The post-1948 revisions have differed fundamentally from their predecessors, and the importance of the difference can hardly be overstated. The comprehensive, clarifying, and simplifying ambitions of the 1877 and 1911 revisions had been frustrated by the pattern of subsequent legislation. This legislation generally did not seek to amend the organic acts of 1877 and 1911, but simply to add layer after layer of amendments superseding in whole or in part the preceding generation's revisions. In contrast, that has not been the case with amendments to the Judicial Code enacted since 1948. Congress has by and large refrained from placing inconsistent or superseding provisions in other titles of the United States Code that would undermine the structural integrity of the Judicial Code.<sup>28</sup> Thus, the Judicial Code of 1948 does not require a complete revision simply to incorporate subsequent amendments.

### B. *The Institute's 1969 Study*

The *1969 Study* consisted of a published compilation of drafts that the Institute adopted in 1965 and 1968. The study did not contemplate the wholesale revision of the still youthful Judicial Code of 1948, even with two decades worth of amendments. As

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means to undertake revisions of titles 18 and 28).

<sup>26</sup> *See id.*

<sup>27</sup> *See generally* LEGISLATIVE HISTORY OF TITLE 28, UNITED STATES CODE: JUDICIARY AND JUDICIAL PROCEDURE (Roy M. Mersky & J. Myron Jacobstein eds., 1971).

<sup>28</sup> This statement must be qualified because Congress has continued to indulge in its pre-1948 practice of enacting special jurisdiction, venue, and service-of-process provisions incident to substantive statutes that create new private rights of action that lie outside of title 28. To the maximum extent feasible, the project here outlined should incorporate such extraneous provisions into title 28. Should the Institute elect the more plenary of the alternative methodologies discussed below — revising selected chapters of the Judicial Code on a section-by-section basis — careful thought should also be given to including in each revised chapter a new, suitably fortified section that, absent enactment of some future legislation expressly providing otherwise, would give precedence to the revised chapter over any conflicting, unincorporated provision.

a work of scholarship, the *1969 Study* constituted an imaginative and insightful effort to optimize the jurisdiction of the federal courts within a complex system of layered government. However, as a manifesto for change, its reach exceeded its grasp: the *1969 Study* has had relatively scant impact in reforming the body of law it evaluated.

In 1976, Congress began adopting some reforms advocated by the *1969 Study* on a piecemeal basis.<sup>29</sup> It embarked on a practice of ad hoc amendment of the Judicial Code that lacked systematic coherence and largely ignored the integrated nature of the recommendations proposed by the *1969 Study*.<sup>30</sup> In many respects the 1988 and 1990 Acts haphazardly altered the rules of federal jurisdiction and venue without careful attention to the nuances or even the typography of the new legislation and with little apparent concern for the dysfunctional effects of such tinkering.<sup>31</sup>

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<sup>29</sup> In that year, the Foreign Sovereign Immunities Act made the *1969 Study's* test for transactional venue applicable in actions against foreign states. See 28 U.S.C. § 1391(f)(1) (1994). Congress took the first step toward implementing subsection 1311(a) of the *1969 Study*, which proposed that no jurisdictional amount be required in general federal-question actions. See Act of Oct. 21, 1976, Pub. L. No. 94-574, § 703, 90 Stat. 2721, 2721 (repealing jurisdictional amount in litigation against federal government and its officers and employees). Total repeal of the amount-in-controversy requirement for general federal-question actions followed in 1980. See Act of Dec. 1, 1980, Pub. L. No. 96-486, 94 Stat. 2369, 2369.

<sup>30</sup> See, e.g., 28 U.S.C.A. § 1391(a)(2), (b)(2) (West Supp. 1998) (adopting Institute's liberal standards for transactional venue). It had been preceded in 1988, however, by a liberalization of subsection 1391(c)'s test for residential venue in cases brought against corporate defendants. Subsection 1392(c)'s newly broadened residential venue test was left in effect two years later when subsections 1391(a) and (b) were amended to adopt the liberal transactional venue language of the *1969 Study*. This occurred despite the fact that the *1969 Study* had paired its recommendation for a general broadening of transactional venue with an offsetting recommendation that residential venue pertaining to corporate defendants be narrowed. See 1969 STUDY, *supra* note 3, at 15-16, 137-39.

<sup>31</sup> Among the leading examples of this new but imperfectly executed congressional activism are the imputation of state citizenship to aliens, the new standards and procedures for removal of cases and motions to remand, and the supplemental-jurisdiction statute. See Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, § 203(a), 102 Stat. 4642, 4646 (codified at 28 U.S.C.A. § 1332(a) (West 1993 & Supp. 1998)) (imputing state citizenship to aliens); Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 312(1), 104 Stat. 5089, 5114 (codified at 28 U.S.C. § 1441(c) (1994)) (changing standards for discretionary remand); Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, § 1016(b)-(c), 102 Stat. 4642, 4669-70 (codified at 28 U.S.C. §§ 1441(a), 1446(a)-(b), 1447(e) (1994)); 28 U.S.C.A. § 1447(c) (West Supp. 1998) (changing general standards and procedures for removal and remand); Judicial Improvements Act of 1990,

## II. SECTION-BY-SECTION ANALYSIS OF ISSUES MERITING REFORM

## A. Chapter 85's Treatment of Original and Supplemental Jurisdiction

## 1. Section 1330: Actions Against Foreign States

Section 1330 confers on the federal district courts subject-matter and personal jurisdiction over claims against foreign states that fall within the exceptions to foreign sovereign immunity set forth in sections 1605 to 1607. Section 1330 is just one part of the comprehensive Foreign Sovereign Immunities Act of 1976 ("FSIA"),<sup>32</sup> which amended title 28's provisions on diversity jurisdiction,<sup>33</sup> removal jurisdiction,<sup>34</sup> and venue.<sup>35</sup> Subsection 1330(a)'s grant of federal subject-matter jurisdiction is not exclusive, but state courts may exercise their concurrent jurisdiction only at the sufferance of the foreign sovereign.<sup>36</sup> This is because subsection 1441(d) confers on the foreign sovereign the virtually unlimited right of pre-trial removal. Under section 1330, whether federal parties invoke jurisdiction originally or by removal, they must try their case to the court; there is no opportunity for a jury trial.<sup>37</sup> Subsections (b) and (c) circumscribe the personal jurisdiction of the district courts by tying personal jurisdiction over a foreign state to proper service under section 1608 or voluntary appearance.<sup>38</sup> In the latter instance, however, subsections (b) and (c) permit personal jurisdiction only with re-

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Pub. L. No. 101-650, § 310(a), 104 Stat. 5089, 5113-14 (codified at 28 U.S.C. § 1367 (1994)) (adding supplemental-jurisdiction provision). See generally John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990*, 24 U.C. DAVIS L. REV. 735 (1991) (discussing and critically evaluating 1988 and 1990 Acts). Two more ad hoc but quite narrow amendments to the jurisdictional provisions of the Judicial Code were enacted in 1994 as 28 U.S.C. §§ 1368, 1445(d). See Act of Dec. 8, 1994, Pub. L. No. 103-465, § 321(b)(3)(A), 108 Stat. 4946 (codified at 28 U.S.C. § 1368 (1994)); Act of Sept. 13, 1994, Pub. L. No. 103-322, § 40302(e)(5), 108 Stat. 1942 (codified at 28 U.S.C.A. § 1445(d) (West 1994 & Supp. 1998)).

<sup>32</sup> Pub. L. No. 94-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.).

<sup>33</sup> See 28 U.S.C.A. § 1332(a)(4) (West 1993 & Supp. 1998).

<sup>34</sup> See 28 U.S.C. § 1441(d) (1994).

<sup>35</sup> See *id.* § 1391(f) (1994).

<sup>36</sup> See *id.* § 1605(a)(1) (1994).

<sup>37</sup> See *id.* § 1330(a) (1994) (stating federal district courts have jurisdiction of nonjury civil action).

<sup>38</sup> See *id.* § 1330(b)-(c) (1994).

spect to claims that are excepted from foreign sovereign immunity under sections 1605 to 1607.<sup>39</sup>

The Supreme Court has held that subsection 1330(a) draws on the full extent of Congress's constitutional power to confer federal jurisdiction over cases "arising under" federal law.<sup>40</sup> Every suit against a foreign sovereign arises under federal law, in the broadest Article III sense; it may proceed only if the foreign sovereign has abrogated its general federal immunity by conduct falling within the exceptions to foreign sovereign immunity set forth in sections 1605 to 1607. The potential federal defense of foreign sovereign immunity is the jurisdiction-conferring ingredient that makes every civil claim against a foreign sovereign arise under federal law in the expansive Article III sense upon which section 1330 is predicated.<sup>41</sup> Additionally, because jurisdiction under the FSIA is predicated on the "character of the cause" as opposed to the "character of the parties,"<sup>42</sup> it makes no difference if the party suing a foreign sovereign is an alien.<sup>43</sup>

The applicability of the FSIA can sometimes surprise litigants. A putative suit under subsection 1332(a) against an alien corporation is in fact a FSIA suit under section 1330 if the alien corporation is "an entity . . . a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof."<sup>44</sup> Section 1330 refers obliquely to "a foreign state as defined in section 1603(a)," which in turn defines "foreign state" to include a majority-owned "agency or instrumentality" of a foreign state.<sup>45</sup> This brings within the FSIA many rather ordinary looking civil defendants, including a myriad of state-owned airlines and other commercial enterprises that might otherwise appear to be subject to alienage jurisdiction rather than to jurisdiction according to the peculiar terms of section 1330.<sup>46</sup> A revised section 1330 could easily incorporate express

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<sup>39</sup> *See id.*

<sup>40</sup> *See* *Verlinden B.V. v. Central Bank of Nig.*, 461 U.S. 480, 491-93 (1983).

<sup>41</sup> *See generally* *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824).

<sup>42</sup> *See* *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 378 (1821).

<sup>43</sup> *See id.*

<sup>44</sup> *See* 28 U.S.C. § 1603(b)(2) (1994).

<sup>45</sup> *See id.* § 1603(b) (1994).

<sup>46</sup> *See generally* *Ruggiero v. Compania Peruana de Vapores*, 639 F.2d 872, 875-76 (2d Cir. 1981) (explaining scope of jurisdiction under § 1330).



reference to the “agency or instrumentality” species of “foreign state.”

On the whole, however, application of section 1330 has been relatively unproblematic since the Supreme Court clarified its constitutional basis.<sup>47</sup> Other procedural and substantive issues posed by the ambiguous drafting of the FSIA invite litigation in the lower courts secondary to the invocation of jurisdiction under section 1330.<sup>48</sup> Revision of section 1330 may be desirable, but more general revision of the FSIA would stray from the essential mission of this project. Thus, this Prospectus is equivocal regarding section 1330’s short-list status.<sup>49</sup>

## 2. Section 1331: Federal Question

Section 1331 confers jurisdiction on the district courts in cases arising under federal law.<sup>50</sup> It is well established that this statutory grant confers a considerably narrower scope of jurisdiction than could be granted under the parallel constitutional language of Article III, Section 2.<sup>51</sup> For the most part, the invocation of

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<sup>47</sup> See *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 433-35 (1989); *Verlinden B.V. v. Central Bank of Nig.*, 461 U.S. 480, 493-94 (1983).

<sup>48</sup> See Mary Kay Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 STAN. L. REV. 385, 425 (1982) (discussing pre-*Verlinden* problems arising under FSIA because of indeterminate drafting and confusing mix of procedural and substantive concerns).

One interesting procedural issue — the proper mode of trial when a foreign state-owned corporation is joined as a codefendant by its domestic subsidiary — has been resolved without a circuit split in favor of parallel jury and nonjury trial of the claims against the respective defendants. See *Gould v. Aerospatiale Helicopter Corp.*, 40 F.3d 1033, 1035 (9th Cir. 1994).

<sup>49</sup> A circuit split has developed over the applicability of the FSIA to “tiering,” where a corporation is majority-owned by another corporation that is itself majority-owned by a foreign state. See, e.g., *In re Air Crash Disaster*, 96 F.3d 932, 941 (7th Cir. 1996) (holding that FSIA protects tiered corporation); *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1461-62 (9th Cir. 1995) (finding that FSIA did not protect tiered corporation); *Hyatt Corp. v. Stanton*, 945 F. Supp. 675, 690 (S.D.N.Y. 1996) (rejecting tiering for different reasons than Ninth Circuit). See generally John Fellas, *Tiering of Ownership Interests Under the FSIA*, N.Y. L.J., Apr. 8, 1997, at 1. For new commentary on other aspects of the FSIA, see generally Stephen J. Leacock, Comment, *Joy of Access to the Zone of Inhibition: Republic of Argentina v. Weltover, Inc. and the Commercial Activity Exception Under the Foreign Sovereign Immunities Act of 1976*, 5 MINN. J. GLOBAL TRADE 81 (1996); Benjamin Eric Lovell, Note, *Export Group v. Reef Industries, Inc.: The Reconciliation of the Foreign Sovereign Immunities Act of 1976*, 21 N.C. J. INT’L L. & COM. REG. 443 (1996).

<sup>50</sup> See 28 U.S.C. § 1331 (1994).

<sup>51</sup> See WRIGHT, *supra* note 14, § 17.

general federal-question jurisdiction has been unproblematic since the 1980 repeal of any required amount in controversy.<sup>52</sup> No longer do cases turn on whether federal-question jurisdiction derives from section 1331 or the myriad of more specific grants of federal-question jurisdiction that appear elsewhere in chapter 85<sup>53</sup> and in many statutes not incorporated into title 28.<sup>54</sup>

It is remarkable, however, how much of the routine application of section 1331 depends upon bedrock doctrine that more than a century of limiting case law has engrafted upon the deceptively simple text of the statute.<sup>55</sup> The gloss of section 1331's "well-pleaded complaint" rule has fundamentally narrowed the constitutional standard for "arising under" jurisdiction.<sup>56</sup> A jurisdiction-conferring "federal question" must appear on the face of a well-pleaded complaint. This serves to exclude, by preemption or otherwise, the many cases in which federal law confers on defendants a federal defense to claims for relief predicated on facts that otherwise constitute a legally sufficient cause of action solely as a matter of state law.<sup>57</sup> Further, courts have held that section 1331 forecloses plaintiffs from evading this restriction by including in the complaint's allegations an assertion that the

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<sup>52</sup> See Act of Dec. 1, 1980, Pub. L. No. 96-486, 94 Stat. 2369.

<sup>53</sup> See 28 U.S.C.A. §§ 1334-1340, 1343-1358 (West 1993 & Supp. 1998) (including actions concerning bankruptcy, interpleader, Surface Transportation Board orders, commerce and antitrust, patents and copyrights, postal matters, internal revenue, customs, federal civil-rights provisions, elections, eminent domain, federal corporations, alien torts, consuls, bonds under federal law, Indian allotments, land grants, fines, seizures and injuries under federal law, and actions to which United States is party).

<sup>54</sup> See *Winstead v. J.C. Penney Co.*, 933 F.2d 576, 580 (7th Cir. 1991) (noting that elimination of minimum amount in controversy from § 1331 made numerous special federal jurisdictional statutes that required no minimum amount in controversy "beached whales," and finding special jurisdictional provisions of ERISA similarly redundant).

<sup>55</sup> See generally 13 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* §§ 3561-3567.1 (2d ed. 1986) (chronicling evolution of federal-question statutory construction from *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824), through *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804 (1986)).

<sup>56</sup> See *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 9-10 (1983). Compare *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 823 (1824) (upholding jurisdiction under Article III and special federal-question statute on basis of potentially dispositive "ingredient" of federal law, whether or not actually in dispute), with *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 153 (1908) (pleading in complaint of potential federal defense insufficient to invoke general federal-question jurisdiction under predecessor to present 28 U.S.C. § 1331).

<sup>57</sup> See *Mottley*, 211 U.S. at 152.

defendant's unwillingness to accede to the plaintiff's demand is based on some countervailing federal right or privilege.<sup>58</sup>

Statutory authorization of actions for declaratory relief<sup>59</sup> has introduced Byzantine complexity into the operation of the well-pleaded complaint rule.<sup>60</sup> Courts must analyze complaints for declaratory relief hypothetically, as if declaratory relief were unavailable. The district court whose jurisdiction is invoked, either originally or by removal, must determine whether it would have jurisdiction over the action were declaratory relief unavailable and the dispute brought before it by either party in an action seeking coercive relief.<sup>61</sup> Thus, the court must inquire into the nature of the hypothetically available reciprocal coercive action that the declaratory-judgment defendant might initiate to resolve the dispute. Alternatively, it must examine the coercive action that the declaratory-judgment plaintiff might bring if it were unwilling to limit its claim merely to declaratory relief.<sup>62</sup>

Another major difficulty inhering in section 1331 and its associated case law concerns the lack of an authoritative definition for the second of the two categories of cases in which a well-pleaded complaint discloses a jurisdiction-conferring federal question. The first category of statutory federal-question cases ("Category I") is easily identified according to the so-called Holmes test<sup>63</sup> that a "suit arises under the law that creates the cause of action."<sup>64</sup> Although Justice Holmes intended his test to be the exclusive definition for the jurisdictional scope of section 1331, subsequent case law firmly established the existence of a second category of cases ("Category II") that also qualify for section 1331 jurisdiction.<sup>65</sup> The "litigation-provoking problem"<sup>66</sup> has been to define the sort of federal question disclosed

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<sup>58</sup> *See id.* at 153.

<sup>59</sup> *See* 28 U.S.C. §§ 2201-2202 (1994).

<sup>60</sup> *See, e.g.,* Janakes v. United States Postal Serv., 768 F.2d 1091, 1093 (9th Cir. 1985).

<sup>61</sup> *See* WRIGHT, *supra* note 14, § 18, at 111.

<sup>62</sup> *See id.*

<sup>63</sup> *See* Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 8-9 (1983) (citing to Justice Holmes' statement in *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916)).

<sup>64</sup> *See* *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916).

<sup>65</sup> *See* *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 201 (1921).

<sup>66</sup> *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 470 (1957) (Frankfurter, J., dissenting).

by proper pleading of a state-created claim for relief that brings such a non-Category I case within the second category of cases arising under federal law.<sup>67</sup>

The preliminary filtering effect of the well-pleaded complaint rule mandates that the jurisdiction-conferring federal question be a necessary element of the state-created cause of action.<sup>68</sup> It cannot be a proposition of federal law that might simply provide a federal defense to liability under state law.<sup>69</sup> Current case law is recalcitrantly imprecise, however, in defining what constitutes such a necessary element. The reigning formulation declares that "federal question jurisdiction is appropriate when 'it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims.'"<sup>70</sup> But as the odd use of the word "appropriate" in the construction of a statute tellingly suggests, the Supreme Court has emphasized that the existence of federal-question jurisdiction in this litigation-provoking second category of cases must be determined in a pragmatic way.<sup>71</sup>

*Merrell Dow Pharmaceuticals Inc. v. Thompson*,<sup>72</sup> the most recent Supreme Court decision in this field, significantly narrowed the potential scope of Category II jurisdiction.<sup>73</sup> Although some scholars dispute this interpretation,<sup>74</sup> the case appears to abrogate Category II jurisdiction in the type of case in which it might otherwise have most frequently been invoked. In such cases a federal statute imposes some duty of care or standard of

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<sup>67</sup> This categorical distinction between two types of cases qualifying for statutory federal-question jurisdiction is more fully developed and defended, along with the analytical refinement that the "claim" rather than the "case" is the relevant unit of litigation for jurisdictional purposes, in John B. Oakley, *Federal Jurisdiction and the Problem of the Litigative Unit: When Does What "Arise Under" Federal Law?*, 77 TEX. L. REV. (forthcoming 1998).

<sup>68</sup> See *Rivet v. Regions Bank*, 118 S. Ct. 921, 922-25 (1998).

<sup>69</sup> See *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13 (1983) (stating that federal law was only relevant by virtue of being defense to obligation created entirely by state law).

<sup>70</sup> See *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 813 (1986) (quoting *Construction Laborers*, 463 U.S. at 13).

<sup>71</sup> See *id.* at 809, 813.

<sup>72</sup> 478 U.S. at 804.

<sup>73</sup> See *id.* at 812.

<sup>74</sup> The *Merrell Dow* Court went on to consider two other arguments for Category II jurisdiction after stating its putatively per se test excluding Category II jurisdiction based on a federal duty unaccompanied by a federal right to sue. See *id.* at 815-17.

conduct allegedly violated by the defendant, but the statute creates neither an express nor implied private right of action to sue to redress or to avoid harm caused by the violation of the federally imposed duty. The *Merrell Dow* Court held that Congress's failure to provide a federal right to sue to enforce the federal duty established per se that "the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction."<sup>75</sup> The Court thus rejected the views of four dissenting Justices that Category II jurisdiction should be available whenever "federal law [is] an essential element of a state law action" in the sense that there is a "possibility that the federal law will be incorrectly interpreted in the context of adjudicating the state law claim."<sup>76</sup> However, the Court declined to abrogate Category II jurisdiction altogether. Instead, it speculated that "the nature of the federal issues at stake" might not only explain the leading case that is the fountainhead of Category II jurisdiction,<sup>77</sup> but also reconcile the Holmes test for Category I jurisdiction with cases preceding that test in which the Court had found that federal-question jurisdiction was appropriate where formally federal causes of action were accompanied by overwhelming state-law issues.<sup>78</sup>

Revision of section 1331 poses a serious issue of legal policy: whether to redraft this widely applicable federal provision to codify the decisional law that has almost completely displaced the actual text of the statute. This would entail a serious incursion on the traditional flexibility of the Supreme Court to shape jurisdictional doctrine in this field.<sup>79</sup> Even if the Institute limited its treatment of section 1331 to a restatement of governing principles, it could not avoid confronting highly sensitive principles of jurisdictional policy such as those that led the *1969 Study* to propose the frank reform of diluting the effect of the well-pleaded complaint rule by permitting federal-question remov-

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<sup>75</sup> See *id.* at 814.

<sup>76</sup> See *id.* at 828 (Brennan, J., dissenting).

<sup>77</sup> See *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921).

<sup>78</sup> See *Merrell Dow*, 478 U.S. at 814-15 n.12.

<sup>79</sup> See generally Barry Friedman, *Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1 (1990) (supporting dialogic account of federal jurisdiction in which Congress and Supreme Court are acknowledged to share jurisdictional authority).

al.<sup>80</sup> This Prospectus regards the goals of the present project as incompatible with revision or restatement of section 1331 and, thus, excludes it from the short list.<sup>81</sup>

### 3. Section 1332: Diversity of Citizenship; Amount in Controversy; Costs

Section 1332 grants general diversity jurisdiction to the district courts. Like section 1331, its general federal-question jurisdiction counterpart, the main statutory grant of general diversity jurisdiction in subsection 1332(a)(1) repeats almost verbatim the operative words of Article III in conferring jurisdiction over controversies "between citizens of different States."<sup>82</sup> However, as with section 1331, the statutory use of constitutional language in section 1332 has not led the courts to construe the statutory text coextensively with the similar words of the Constitution.

The most significant constructional gloss on the statute is, of course, the "complete diversity" rule of *Strawbridge v. Curtiss*.<sup>83</sup> It is now well settled that federal judicial power under Article III, Section 2, extends to any controversy "between Citizens of different States" in which there is merely "minimal diversity" between at least two parties with opposing interests.<sup>84</sup> It is also settled, however, that the parallel statutory grant of jurisdiction over "all civil actions . . . between . . . citizens of different States" requires complete diversity between all parties with opposing interests.<sup>85</sup>

Central to many disputes regarding section 1332 diversity jurisdiction is the question of the parties' citizenship.<sup>86</sup> Almost all of the dispositive criteria for determining the citizenship of parties in putative diversity litigation are established by a web of case law only tenuously connected to the text of the supposedly

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<sup>80</sup> See 1969 STUDY, *supra* note 3, at 25.

<sup>81</sup> For critical analysis of the case law under section 1331 and commentary on several new decisions of the Supreme Court, see Oakley, *supra* note 67.

<sup>82</sup> Compare 28 U.S.C.A. § 1332(a)(1) (West 1993 & Supp. 1998), with U.S. CONST. art. III, § 2, cl. 1.

<sup>83</sup> 7 U.S. (3 Cranch) 267 (1806).

<sup>84</sup> See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-31 (1967).

<sup>85</sup> See *id.*

<sup>86</sup> See, e.g., *Mas v. Perry*, 489 F.2d 1396 (5th Cir. 1974) (surveying criteria for determining citizenship of party for purposes of diversity or alienage jurisdiction).

governing statute. For individuals, the statute sets up a basic dichotomy between citizens of the United States and citizens of foreign states.<sup>87</sup> Overlying this dichotomy is an artificial but well-established statutory assimilation of federally administered territories to conventional states<sup>88</sup> and the recent but dubious attribution of state citizenship to permanent-resident aliens domiciled in a state.<sup>89</sup> Except for permanent-resident aliens, the link between domicile and state citizenship is entirely the creature of case law, as is the entire body of law defining domicile for purposes of determining an individual's state citizenship.

When all of the statutory and case-law variables are combined, courts must deploy a complex matrix of six possible combinations of political status, as a citizen of the United States or of a foreign state or as stateless under international law, and domicile in order to determine the diversity status of individual litigants.<sup>90</sup> Where domicile is relevant, courts must determine it according to a rather tortured process of culling objective evidence of a subjective and often artificial state of mind.<sup>91</sup>

Restatement or revision of the principles governing the citizenship of natural persons for diversity purposes would be a daunting task, but one well suited to the Institute's deliberative process. The Supreme Court decided the seminal case more than a century ago; it tied individual citizenship to the concept of domicile.<sup>92</sup> The role of the concept of domicile in determining the subject-matter jurisdiction of the federal courts has never been satisfactorily explained. Instead, domicile has become a *mélange* of policy considerations deriving from unrelated fields such as personal jurisdiction, choice of law, and taxation.<sup>93</sup> A century of reported decisions has yielded a myriad of case-specific

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<sup>87</sup> Citizens of foreign states are generally referred to in nonstatutory terms as "aliens."

<sup>88</sup> See 28 U.S.C. § 1332(d) (1994).

<sup>89</sup> See the final sentence of subsection 1332(a) as amended in 1988. See generally Oakley, *supra* note 31, at 741-45. The dubious constitutionality of this provision is noted, and cases skirting that issue are collected in WRIGHT, *supra* note 14, § 24, at 155 & nn.17-19.

<sup>90</sup> See Oakley, *supra* note 31, at 743-45.

<sup>91</sup> See WRIGHT, *supra* note 14, § 26.

<sup>92</sup> See *Morris v. Gilmer*, 129 U.S. 315, 328 (1889).

<sup>93</sup> See, e.g., Richard Edson Fee, *Common Problems in the Disposition of a Deceased Alien's United States Situs Estate: A Viable Approach*, 21 VAND. J. TRANSNAT'L 599, 603-08 (1988) (describing tests for finding domicile).

ic approaches and diverging authorities.<sup>94</sup> The careful sifting and rationalization of these cases would provide welcome guidance to both the bench and bar, likely yielding a large dividend in lessened threshold litigation of unnecessarily recurring issues.

For corporations, Congress both codified and revised more than a century of incoherent case law with its 1958 enactment of subsection 1332(c)(1).<sup>95</sup> There it specified that corporate citizenship exists not only in the state of incorporation but also in the state, if different, of a corporation's "principal place of business."<sup>96</sup> A great deal of judicial energy has since been devoted to developing criteria for determining which of a far-flung corporation's many places of activity constitutes the principal place of business.<sup>97</sup> Courts have also spent energy trying to fit alien corporations with a heavy concentration of business in the United States, as well as domestic corporations operating principally in foreign countries, within this calculus.<sup>98</sup> While there is increasing consensus as to the proper questions to ask, the proper answers must be distilled from a welter of facts made even more miasmic by such analytical uncertainty as still lingers and occasionally divides the circuits.<sup>99</sup>

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<sup>94</sup> See, e.g., *Bair v. Peck*, 738 F. Supp. 1354, 1356 (1990) (discussing domicile and diversity jurisdiction).

<sup>95</sup> See 28 U.S.C. § 1332(c)(1) (1958).

<sup>96</sup> See generally *WRIGHT*, *supra* note 14, § 27, at 163-65 (reviewing legal and legislative history of 1958 amendment). Subsection 1332(c)(1) deems a corporation to be a citizen "of any State by which it has been incorporated," and despite some early controversy it is now generally settled that "any" means "every" so that multistate incorporation makes a corporation the citizen of each such state. See *id.* at 166.

<sup>97</sup> See *Diversity Jurisdiction: Where Do Dead Corporations Live?: Determining the Citizenship of Inactive Corporations for Diversity Jurisdiction Purposes*, 62 *BROOK. L. REV.* 663, 664 (1996) (stating that many tests are used to determine principal place of business for corporation having relationship with many states). See, e.g., *Kelly v. United States Steel Corp.*, 284 F.2d 850, 852-56 (3d Cir. 1960) (creating "bulk of activities" test, which emphasizes place of production and services); *Scot Typewriter Co. v. Underwood Corp.*, 170 F. Supp. 862, 865 (S.D.N.Y. 1959) (creating "nerve center" test, which considers site of executive and administrative functions to determine principal place of business).

<sup>98</sup> See Jim Whitlatch, *Diversity Jurisdiction and Alien Corporations: The Application of Section 1332(c)*, 59 *IND. L.J.* 659, 660 (1983) (noting that Congress did not consider § 1332(c)'s application to foreign corporations and courts continue to interpret statute in contradictory ways); H. Geoffrey Moulton, Note, *Alien Corporations and Federal Diversity Jurisdiction*, 84 *COLUM. L. REV.* 177, 179 (1984) (commenting that courts have been unable to agree on § 1332(c)'s effect on foreign corporations with place of business in United States).

<sup>99</sup> See, e.g., *Midlantic Nat'l Bank v. Hansen*, 48 F.3d 693, 696-97 (3d Cir. 1995) (declining to follow Second and Fifth Circuit approaches to determining principal place of busi-



Recent decisions have eliminated much but not all controversy concerning the diversity status of unincorporated associations<sup>100</sup> but only by making this issue largely parasitic on the determination of the diversity status of natural persons. If the Institute elects to take up the topic of general diversity jurisdiction, it should refrain from general reconsideration of the constitutional scope of diversity jurisdiction and the statutory gloss of the complete-diversity requirement. This Prospectus also recommends eschewing reconsideration of the "domestic relations exception"<sup>101</sup> in keeping with its general exclusion of abstention issues. It would be eminently sensible to exclude from the scope of statutory diversity jurisdiction those cases in which the plaintiff invokes the original jurisdiction of a federal district court within that plaintiff's own state of citizenship, as the *1969 Study* sought to do.<sup>102</sup> However, the proposed repeal of "in-state plaintiff" diversity jurisdiction would likely overshadow rational consideration of the merits of the rest of the Institute's treatment of diversity jurisdiction.<sup>103</sup> Thus, the Institute should ad-

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ness of inactive corporation).

The *1969 Study* would have reaffirmed the basic corporate diversity criterion of "principal place of business," but would have substantially limited the scope of corporate diversity litigation by disqualifying a commercial corporation from invoking diversity jurisdiction, either originally or by removal, in any federal district court within a state in which for two years or more the corporation had maintained a "local establishment" transactionally related to the litigation in question. See 1969 STUDY, *supra* note 3, at 10, 13. The complexity of this exception to corporate diversity jurisdiction makes it questionable whether it would have substantially curtailed the rate of threshold jurisdictional litigation concerning the diversity status of corporations.

<sup>100</sup> See *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195-96 (1990) (reaffirming that diversity status of unincorporated entity depends on citizenship of every member of entity). *But see* *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 465-66 (1980) (determining citizenship status of business trust solely by reference to trustees, without regard to citizenship of beneficiaries who were essentially limited partners in investment group). A circuit split has developed regarding the diversity status under *Carden* of individual "names" or investors in insurance syndicates organized by Lloyd's of London. Rejecting the contrary reasoning of the Sixth Circuit in *Certain Interested Underwriters at Lloyd's v. Layne*, 26 F.3d 39 (6th Cir. 1994), the Seventh Circuit has held that each name is a limited partner of the syndicate. Thus, in a suit against a Lloyd's syndicate by an Indiana corporation, the Indiana citizenship of just one of the syndicate's names was sufficient to defeat diversity jurisdiction. See *Indiana Gas Co. v. Home Ins. Co.*, Nos. 97-1381, 97-1328, 1998 WL 154848 (7th Cir. Apr. 6, 1998).

<sup>101</sup> See *Ankenbrandt v. Richards*, 504 U.S. 689, 698-701 (1992) (defining and recognizing limited domestic relations exception to federal diversity jurisdiction).

<sup>102</sup> See 1969 STUDY, *supra* note 3, at 12.

<sup>103</sup> The Judicial Conference of the United States has recently sought to "unbundle"

dress this issue as part of a separate project. The Institute might well address in the present project, however, the disarray in "realignment" doctrine,<sup>104</sup> the rules pertaining to the evaluation and aggregation of the amount in controversy,<sup>105</sup> and the previously-noted attribution of state citizenship to permanent-resident aliens domiciled in a state, as well as other essentially technical issues.<sup>106</sup> Thus, this Prospectus is equivocal regarding section 1332's short list status.<sup>107</sup>

#### 4. Section 1333: Admiralty, Maritime, and Prize Cases

Section 1333 presents the potential reviser with the same opportunities and problems as does section 1331. Like section 1331, section 1333 essentially reiterates the operational language of Article III in conferring statutory jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction."<sup>108</sup> This language leaves the determination of just which cases fall within that jurisdiction to a vast accumulation of highly nuanced case

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repeal of in-state plaintiff diversity jurisdiction from its longstanding call for repeal of the entire general-diversity statute. See WRIGHT, *supra* note 14, § 23, at 150 n.49. I was closely involved in that initiative in my capacity as Reporter to the Conference's Committee on Federal-State Jurisdiction, and witnessed the intense opposition of the organized bar and the resulting indifference of Congress. "Any proposal to modify diversity meets immediate organized opposition from those who believe that they have a vested interest in preserving, for their own advantage, the widest possible choice of forum." *Id.* at 151-52.

<sup>104</sup> See *id.* § 30 (discussing leading case of *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63 (1941), and noting that there is "great doubt where it leads").

<sup>105</sup> See *id.* §§ 33-37.

<sup>106</sup> For example, subsection 1332(b) is of dubious utility. Subsection 1332(c)'s references to "any State" should be changed to "every State." Subsection 1332(a)(3) is the source of needless confusion. It is unnecessary insofar as it permits claims within subsections 1332(a)(1) and (a)(2) to be joined in civil action. Insofar as it permits claims between aliens incidental to claims between citizens, it is a form of supplemental jurisdiction that should be dealt with in the supplemental-jurisdiction statute.

<sup>107</sup> The jurisdictional amount for general diversity cases was increased in 1996 from an amount exceeding \$50,000 to an amount exceeding \$75,000. See Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, tit. II, § 205(a), 1996 U.S.C.C.A.N. (110 Stat.) 3847, 3850 (to be codified at 28 U.S.C.A. § 1332 (West 1993 & Supp. 1998)). For a reinterpretation of the rule of complete diversity as applied under section 1332, see John B. Oakley, *Integrating Supplemental Jurisdiction and Diversity Jurisdiction: A Progress Report on the Work of the American Law Institute*, 74 IND. L.J. (forthcoming 1998).

<sup>108</sup> See 28 U.S.C. § 1333(1) (1994); see also Warren Marwedel & Shari Friedman, *Admiralty Jurisdiction and the Great Lakes*, 24 U. TOL. L. REV. 345 (1993) (discussing history and scope of federal court's admiralty jurisdiction).

law.<sup>109</sup> Section 1333 does expressly modify the constitutional language in two important and seemingly self-contradictory ways. On the one hand it declares the statutory admiralty jurisdiction to be exclusive of state-court jurisdiction, and on the other hand it “sav[es] to suitors” their common-law remedies.<sup>110</sup> It thus confers concurrent state-court jurisdiction over the great mass of maritime litigation in which plaintiffs seek damages from defendants who are subject to the in-personam jurisdiction of a state court.<sup>111</sup>

It would be a challenging task to codify the case law that presently defines the scope of federal admiralty and maritime jurisdiction. As the *1969 Study* noted, there are “grave risks of inadvertent change” in the maritime realm that parallel those presented by the dense case law on general federal-question jurisdiction.<sup>112</sup> For the most part, the *1969 Study*’s proposed codification of maritime and admiralty jurisdiction<sup>113</sup> sought to avoid these risks through the use of self-consciously vague language,<sup>114</sup> even while acknowledging that “there are respectable

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<sup>109</sup> See, e.g., Robert Peltz, *The Myth of Uniformity in Maritime Law*, 21 TUL. MAR. L.J. 103, 104-09 (1996) (criticizing disuniformity of maritime law that leads to erratic and unpredictable outcomes).

<sup>110</sup> See 28 U.S.C. § 1333(1); see also Bradford Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1351-53 (1996) (discussing purpose and effect of “saving to suitors” clause).

<sup>111</sup> See generally GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* § 1-13, at 37-40 (2d ed. 1975) (distinguishing between ability to sue in personam in either federal or state court under savings clause and limitation of in-rem suits to federal courts). Subsection 1333(2) also confers exclusive jurisdiction on the district courts, free of the “saving to suitors” exception, over any vessel brought into the United States as a “prize” incident to enemy activity in wartime, and over any proceedings to condemn such a prize. See *id.* § 1-15, at 44. The prize jurisdiction is entirely moribund, see *id.*, although whether subsection 1333(2) should be deleted in a comprehensive modern revision remains in doubt. I can find no case this century in which prize jurisdiction has been successfully invoked, let alone a case under subsection 1333(2) as enacted in 1948. But there is evidence that several German vessels were condemned in unreported proceedings during World War II, see *id.* at 44 n.148a, and it might thus be premature and possibly an incursion into the domain of national security issues to propose the repeal of subsection 1333(2) as an anachronism. Cf. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 432-33, 437 (1989) (discussing relationship of prize jurisdiction under § 1333(2), Alien Tort Statute, 28 U.S.C. § 1350, and Foreign Sovereign Immunities Act of 1976).

<sup>112</sup> See 1969 STUDY, *supra* note 3, at 229-34.

<sup>113</sup> See *id.* at 34-35.

<sup>114</sup> See *id.* at 229-34.

arguments for providing clarification in the statute."<sup>115</sup> The Institute did elect to propose the frank reform of the maritime tort jurisdiction by adding to the existing locality test a "maritime nexus" qualification.<sup>116</sup>

The risk of unintended consequences remains, and an additional problem would confront current revisors of admiralty and maritime jurisdiction. The target remains obscured by fog, and it is now a rapidly moving target. In recent years the Supreme Court has been actively reconsidering the relevant case law, adding a new maritime nexus element to the definition of a maritime tort and sharpening the application of the traditional maritime nexus criterion for determining whether a contract is maritime in nature.<sup>117</sup> Many definitional problems remain, however, as well as controversy about the future course to be taken in this realm of federal jurisdiction.<sup>118</sup>

It is dubious whether the Institute should attempt to restate or revise the rules governing the admiralty jurisdiction of the federal courts while those rules are currently in such decisional ferment. In any event, it would be unwise to undertake such an effort as part of a general reform of chapter 85, as opposed to a specialized project on admiralty law in general. It remains as true today as in 1969 that the dominant issues in admiralty are not penumbral jurisdictional issues but rather the application of complex substantive rules of maritime law to cases well within the core of admiralty jurisdiction by any definition.<sup>119</sup> Thus,

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<sup>115</sup> See *id.* at 230.

<sup>116</sup> See *id.* at 230-34.

<sup>117</sup> See *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995) (discussing scope of maritime tort jurisdiction); *Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603 (1991) (expanding scope of maritime contract jurisdiction).

<sup>118</sup> The judicial redefinition of the maritime tort jurisdiction that has occurred over the past 23 years was prompted in part by the *1969 Study*, see *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 257-68 (1972), and is reviewed in detail in *Grubart*, 513 U.S. at 532, 534-41. The Court is divided as to the wisdom of this redefinition, and Justices Thomas and Scalia would return to the "clear, bright-line rule" of an unqualified locality test for the scope of the maritime tort jurisdiction at least as to torts occurring on a vessel. See *id.* at 549-52 (Thomas, J., concurring). For more on the continuing development of the maritime nexus test as applied in maritime contract cases, see *South Carolina State Ports Authority v. Silver Anchor, S.A.*, 23 F.3d 842 (4th Cir. 1994) and Anthony M. Sabino, *Admiralty Jurisdiction Over General Agency Contracts: The Final Voyages of Minturn and the Modern Doctrine of Exxon v. Central Gulf*, 4 U.S.F. MAR. L.J. 41 (1992).

<sup>119</sup> See 1969 STUDY, *supra* note 3, at 230. For a sense of the scope of these substantive

this Prospectus recommends that section 1333 be excluded from the short list and its revision left to a special project of the Institute.

### 5. Section 1334: Bankruptcy Cases and Proceedings

Section 1334 vests the district courts with “original and exclusive jurisdiction” of bankruptcy cases<sup>120</sup> and with in-rem jurisdiction over all property of the bankrupt.<sup>121</sup> At the same time, however, it permits state courts to exercise concurrent jurisdiction “of all civil proceedings arising under” the bankruptcy law “or arising in or related to” bankruptcy cases.<sup>122</sup> It also licenses a special form of abstention by district courts with respect to “particular proceeding[s]” subject to the concurrent jurisdiction of state courts.<sup>123</sup>

Abstention best characterizes the treatment of bankruptcy jurisdiction by the leading treatises on the jurisdiction of the federal courts.<sup>124</sup> Bankruptcy jurisdiction has aptly been characterized as “a highly specialized subspecies of federal jurisdiction, with for the most part its own specialized bar and specialized treatises.”<sup>125</sup> Bankruptcy jurisdiction is not only highly specialized but also in serious disrepair. One bankruptcy attorney has described the jurisdiction of the bankruptcy courts as the most arcane part of bankruptcy law and noted that the new amendments have provided no relief.<sup>126</sup> He stated: “The best that can be said of the 1984 amendments to the new Code is that a hitherto unacceptable situation has now been rendered intolerable by a process that reflects no credit on any branch of the federal government.”<sup>127</sup> A leading scholar of bankruptcy law

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issues as they were being litigated two decades after the *1969 Study*, see generally *1989 Admiralty Survey of the Federal Circuits*, 2 U.S.F. MAR. L.J. 91 (1990).

<sup>120</sup> See 28 U.S.C. § 1334(a) (1994).

<sup>121</sup> See 28 U.S.C.A. § 1334(d) (West Supp. 1998).

<sup>122</sup> See 28 U.S.C. § 1334(b) (1994).

<sup>123</sup> See 28 U.S.C.A. § 1334(c) (West Supp. 1998).

<sup>124</sup> See WRIGHT, *supra* note 14, §§ 10, 32, at 43 & n.18, 192 n.13 (referring to bankruptcy only as grant of exclusive jurisdiction not subject to jurisdictional amount); 13B WRIGHT ET AL., *supra* note 55, § 3570 (paying only token attention to bankruptcy jurisdiction).

<sup>125</sup> See 13B WRIGHT ET AL., *supra* note 55, § 3570.

<sup>126</sup> See Vern Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process*, 22 HARV. J. ON LEGIS. 1, 1 (1985).

<sup>127</sup> See *id.*

has expressed similar despair about the “complex and convoluted judicial system Congress created in the 1984 amendments.”<sup>128</sup> Underlying this professional malaise “is a quiet but persistent question: what function does bankruptcy serve?”<sup>129</sup>

A technically oriented, policy-neutral project on the jurisdiction and venue of the district courts cannot practicably encompass a body of law practiced and analyzed almost exclusively by specialists, founded on statutes that are as confused as they are confusing, and beset by an identity crisis. Reform of bankruptcy law and its satellite provisions affecting the jurisdiction and venue of the district courts should be addressed, if at all, in a project dedicated solely to bankruptcy. Thus, this Prospectus recommends that section 1334 be excluded from the short list and its revision left to a special project of the Institute.

#### 6. Section 1335: Interpleader

Section 1335 governs jurisdiction in the interpleader context by grounding jurisdiction in the “minimal diversity” of any two interpleaded defendants.<sup>130</sup> Thus, it parallels section 1330 in presenting no major jurisdictional difficulties because the Supreme Court has held that it extends the jurisdiction of the district courts to the full extent permitted by Article III.<sup>131</sup> Two issues of subject-matter jurisdiction and a related issue of personal jurisdiction remain problematic, however, and merit attention if the institute takes up section 1335 for revision.<sup>132</sup>

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<sup>128</sup> See Lawrence P. King, *Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984*, 38 VAND. L. REV. 675, 676 (1985). Professor King is the Editor in Chief of COLLIER ON BANKRUPTCY (15th ed. 1984).

<sup>129</sup> See Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 776 (1987); see also Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815, 824 (1987) (stating that bankruptcy can mean many things).

<sup>130</sup> See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-31 (1967). The Supreme Court's conclusion in *Tashire* was influenced by the reasoning of the Institute with respect to “Multi-Party Multi-State Diversity” in the 1965 Official Draft, Part I, which became sections 2371-2376 of the 1969 Study. See *id.* at 531 n.7 (noting Institute's proposals to revise Judicial Code to deal with multi-party, multi-litigation jurisdiction). *Tashire* also resolved a lingering dispute in the lower courts in favor of permitting the statutory interpleader of contingent defendants who “may” claim a share of the stake at some future time. See *id.* at 531-33.

<sup>131</sup> See *id.* at 531 (stating that federal courts may adjudicate diversity claims to full extent of their Article III powers so long as two adverse parties are not co-citizens).

<sup>132</sup> I have recommended against including issues of service of process and personal

First, may the court consider the citizenship of an interested stakeholder for purposes of establishing the minimal diversity required by section 1335? Those courts that favor letting an interested stakeholder's citizenship create jurisdiction reason that the interested stakeholder asserts a claim that is adverse to that of the claimants.<sup>133</sup> Thus, the parties satisfy section 1335's requirement that two or more adverse claimants be of diverse citizenship.<sup>134</sup> At least one court has decided otherwise, however, fearing that to allow federal interpleader relief based solely on the stakeholder's citizenship "would permit a Rule 22 interpleader action absent the necessary jurisdictional amount and thereby alter the prerequisites of federal jurisdiction by judicial decision."<sup>135</sup>

The second question is whether a defendant who has not been served with process should be counted for jurisdictional purposes in an interpleader action. For purposes of general diversity jurisdiction, most courts have concluded that the citizenship of defendants who have not been served cannot be considered.<sup>136</sup> In general-diversity cases, however, the issue arises only in the removal context in which the plaintiff attempts to defeat removal on the basis of diversity by naming a nondiverse defendant on whom the plaintiff is unable or unwilling to serve process.<sup>137</sup> In the context of statutory interpleader, in which

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jurisdiction within the project. If, however, the Institute elects to address such issues presently or in the future, one issue in particular deserves attention in the interpleader context.

At least one federal court has required personal service as a prerequisite to jurisdiction over a particular claimant in a statutory interpleader action. *See Metropolitan Life Ins. Co. v. Dumpson*, 194 F. Supp. 9, 11 (S.D.N.Y. 1961). The majority view is that constructive service of process pursuant to section 1655 is sufficient to confer jurisdiction. Courts adhering to the majority view fear that if claimants can exempt their claims from adjudication in an interpleader action by evading personal service, the basic policies underlying interpleader will be disserved. *See United States v. Estate of Swan*, 441 F.2d 1082, 1085 (5th Cir. 1971); *Krishna v. Colgate Palmolive Co.*, No. 90 Civ. 4116, 1991 WL 125186, at \*4 (S.D.N.Y. July 2, 1991); *Bache Halsey Stuart Shields Inc. v. Garmaise*, 519 F. Supp. 682, 687 (S.D.N.Y. 1981).

<sup>133</sup> *See* 14 WRIGHT ET AL., *supra* note 55, § 3636, at 82.

<sup>134</sup> *See Lummis v. White*, 629 F.2d 397, 403 (5th Cir. 1980), *rev'd on other grounds sub nom. Cory v. White*, 457 U.S. 85, 87 (1982); *Mt. Hawley Ins. Co. v. Federal Sav. & Loan Ins. Corp.*, 695 F. Supp. 469, 472-73 (C.D. Cal. 1987).

<sup>135</sup> *See American Family Mut. Ins. Co. v. Roche*, 830 F. Supp. 1241, 1249 (E.D. Wis. 1993).

<sup>136</sup> *See, e.g., Cripps v. Life Ins. Co. of N. Am.*, 980 F.2d 1261, 1266 (9th Cir. 1992).

<sup>137</sup> *See infra* notes 574-78 and accompanying text (discussing basic rules governing re-

only minimal diversity among the defendant stakeholders will suffice to invoke federal subject-matter jurisdiction, the plaintiff has a converse incentive to name an unserved defendant in order to create the jurisdiction-conferring minimal diversity. The Ninth Circuit has recently ruled against this practice, fearing that otherwise plaintiffs could manipulate their cases to create diversity in interpleader actions by naming a phantom defendant who is never actually brought before the court.<sup>138</sup>

This Prospectus recommends against general inclusion of issues of service of process and personal jurisdiction within this project. If the Institute were to revise section 1335, however, one such issue might usefully be addressed. In the Ninth Circuit case just referenced, the unserved defendant resided in Massachusetts and, under the nationwide service-of-process provision of section 2361, could easily have been brought before the California federal district court in which the statutory interpleader action had been filed. Cases have arisen, however, in which particular defendants cannot be served under section 2361, either because their whereabouts are unknown, or because they reside outside of the United States.<sup>139</sup> Some courts have held that a statutory interpleader action cannot bind an unserved defendant.<sup>140</sup> The great weight of authority, however, holds that if constitutionally adequate notice has been provided, constructive service of process pursuant to section 1655 is sufficient to confer jurisdiction over the interpleaded interests of defendants not personally served with process.<sup>141</sup> These courts reason persuasively that it would defeat the basic policy of the statute if claimants could

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removal of general-diversity cases); *infra* notes 691-98 and accompanying text (discussing fraudulent-joinder doctrine for determining removability of general-diversity cases).

<sup>138</sup> See *Cripps*, 980 F.2d at 1265-66; accord *Metropolitan Life Ins. Co. v. Dumpson*, 194 F. Supp. 9, 11 (S.D.N.Y. 1961).

<sup>139</sup> The issue of the scope of interpleader jurisdiction over defendants not subject to service of process within the United States was noted but not resolved in *Tashire*. See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 537 n.18 (1967).

<sup>140</sup> See, e.g., *Dumpson*, 194 F. Supp. at 11.

<sup>141</sup> See, e.g., *United States v. Estate of Swan*, 441 F.2d 1082, 1085 (5th Cir. 1971); *Krishna v. Colgate Palmolive Co.*, No. 90 Civ. 4116, 1991 WL 125186, at \*2 (S.D.N.Y. July 2, 1991); *Bache Halsey Stuart Shields Inc. v. Garmaise*, 519 F. Supp. 682, 686 (S.D.N.Y. 1981) (Weinfeld, J.).



exempt themselves from an interpleader action by evading personal service of process.<sup>142</sup>

Although the question of the binding effect of a judgment on a party not personally served with notice may be appropriately addressed in the current project, a general evaluation of service of process and personal jurisdiction would be inappropriate. Thus, this Prospectus is equivocal regarding section 1335's inclusion on the short list.<sup>143</sup>

## 7. Section 1336: Surface Transportation Board's Orders

This section creates limited exceptions to the otherwise exclusive jurisdiction of the courts of appeals to review orders of the former Interstate Commerce Commission ("ICC"), now called the Surface Transportation Board ("STB").<sup>144</sup> Subsections (b) and (c) of section 1336 deal with jurisdiction to review or enforce STB orders arising out of a referral of an issue by a court to the STB.<sup>145</sup> These subsections are uncontroversial.

A circuit split has developed, however, with respect to subsection 1336(a). Despite this Prospectus's general exclusion of issues pertaining to appellate jurisdiction, it discusses the grounds for revising subsection 1336(a) because that subsection supplements and complicates the normal scheme of administrative review of STB orders. Subsection 1336(a) creates an ill-defined subset of STB orders that are to be reviewed by the district courts. Also, it classifies this exceptional power of judicial review as a grant of original jurisdiction to the district courts.

The Seventh Circuit Court of Appeals describes well the basic structure of "bifurcated appeal" of STB orders in *Pullman-Stan-*

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<sup>142</sup> See *Bache Halsey*, 519 F. Supp. at 686.

<sup>143</sup> The Third Circuit has held that the equitable origins of the Federal Interpleader Act justify making statutory interpleader jurisdiction as discretionary as that provided by the Federal Declaratory Judgment Act. See *NYLife Distrib., Inc. v. Adherence Group, Inc.*, 72 F.3d 371, 382 (3d Cir. 1995). The contrast between "rule interpleader" and "statutory interpleader" is discussed in Donald L. Doernberg, *What's Wrong with This Picture?: Rule Interpleader, the Anti-Injunction Act, In Personam Jurisdiction, and M.C. Escher*, 67 U. COLO. L. REV. 551, 561-66 (1996).

<sup>144</sup> See 28 U.S.C.A. § 1336 (West Supp. 1998); Act of December 29, 1995, Pub. L. No. 104-88, § 305(a)(1)(2), 109 Stat. 943, 944 (changing name of Interstate Commerce Commission to Surface Transportation Board).

<sup>145</sup> See 28 U.S.C.A. § 1336(b)-(c).

*Standard v. ICC*.<sup>146</sup> *Pullman* held that the circuit courts have “jurisdiction for review of [STB] rules, regulations, and orders” under subsection 2321(a).<sup>147</sup> This appellate jurisdiction is exclusive under subsection 2342(5), except for the jurisdiction granted to district courts under subsection 1336(a) to review STB orders “for the payment of money or the collection of fines, penalties, or forfeitures.”<sup>148</sup> Generally speaking, the courts’ jurisdictions are mutually exclusive. Either the district court has jurisdiction over the review because the order was for the payment of money, or the circuit court has jurisdiction over the review because the order was for something other than money, such as a cease and desist order.<sup>149</sup> Choosing the wrong court can be a fatal error: if a petitioner mistakenly files for review in the district court, the error is unlikely to be corrected before lapse of the sixty-day time limit imposed for review in the court of appeals under section 2344.<sup>150</sup>

While subsection 1336(a) speaks only to “order[s] . . . for the payment of money . . . ,”<sup>151</sup> the Supreme Court applied the similarly worded predecessor of section 1336 to orders denying reparations.<sup>152</sup> It found that the same parties, statutes, and claims were involved in such denials as with orders allowing reparations.<sup>153</sup> Consequently, all courts treat orders for reparations and orders denying reparations as equivalent for jurisdictional purposes under subsection 1336(a).<sup>154</sup> It is also “well settled” that the courts of appeals rather than the district courts have jurisdiction to review an STB order granting both monetary and nonmonetary relief.<sup>155</sup>

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<sup>146</sup> See *Pullman-Standard v. Interstate Commerce Comm’n*, 705 F.2d 875, 881 (7th Cir. 1983).

<sup>147</sup> See *id.* at 878.

<sup>148</sup> See *id.*

<sup>149</sup> See *id.* at 880.

<sup>150</sup> See *id.* at 881.

<sup>151</sup> 28 U.S.C.A. § 1336(a) (West Supp. 1998).

<sup>152</sup> See *United States v. Interstate Commerce Comm’n*, 337 U.S. 426, 443 (1949).

<sup>153</sup> See *id.*

<sup>154</sup> See, e.g., *Pullman-Standard*, 705 F.2d at 879 (stating that district court has jurisdiction to review all ICC reparation orders); *New Process Gear Corp. v. New York Cent. R.R. Co.*, 250 F.2d 569, 572 (2d Cir. 1958) (describing scope of review by district court in ICC cases).

<sup>155</sup> See *Field Container Corp. v. Interstate Commerce Comm’n*, 712 F.2d 250, 254 (7th Cir. 1983).

The split of authority, thus, involves review of orders granting or denying only monetary relief. The Fifth, Seventh, and D.C. Circuits construe subsection 1336(a) literally, basing jurisdiction solely on the monetary nature of the order.<sup>156</sup> They apply a simple, bright-line rule: if the order involves only monetary relief, jurisdiction is in the district courts.<sup>157</sup> In the words of the D.C. Circuit, “[t]he nature of the [STB’s] order, not the difficulty, novelty, or general importance of the legal questions raised by the order, controls the question of review jurisdiction.”<sup>158</sup>

The Third and Sixth Circuits have adopted an alternative construction of subsection 1336(a), sometimes called the “functional approach” in contradistinction to the aforementioned “literal approach.”<sup>159</sup> These courts hold that if the order is of widespread importance, it belongs in the circuit courts rather than the district courts, even though it is only for the payment of money.<sup>160</sup>

The proponents of the functional approach justify it by pointing to evidence of congressional intent to provide expedited review for matters of broad public importance.<sup>161</sup> The main problem with the functional approach is that it makes the determination of the appropriate reviewing court hinge on incalculables. The attorney for the party seeking review must assess the future impact and importance of the decision on persons and entities not party to the action and then hazard a

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<sup>156</sup> See *Arkansas Power & Light Co. v. Interstate Commerce Comm’n*, 831 F.2d 569, 570-71 (5th Cir. 1987) (declaring bright-line rule that district court has jurisdiction over all cases involving monetary relief, even those containing larger issues that are normally province of appellate jurisdiction under statute); *Pullman-Standard*, 705 F.2d at 880 (adopting literal approach that all cases involving monetary relief begin at district court); *Consolidated Rail Corp. v. Interstate Commerce Comm’n*, 685 F.2d 687, 696-97 (D.C. Cir. 1982) (holding that cases involving monetary claims should be brought before district court).

<sup>157</sup> See, e.g., *Arkansas Power & Light*, 831 F.2d at 571.

<sup>158</sup> *Consolidated Rail*, 685 F.2d at 694, cited with approval in *Pullman-Standard*, 705 F.2d at 880; accord *Arkansas Power & Light*, 831 F.2d at 570-71.

<sup>159</sup> See *Empire-Detroit Steel v. Interstate Commerce Comm’n*, 659 F.2d 396, 397 (3d Cir. 1981); *Island Creek Coal Sales Co. v. Interstate Commerce Comm’n*, 561 F.2d 1219, 1222 (6th Cir. 1977); see also *Monongahela Power Co. v. Interstate Commerce Comm’n*, 640 F.2d 504, 506-07 (4th Cir. 1981) (adopting apparently functional approach for reparations without discussion of jurisdictional issue).

<sup>160</sup> See *Empire-Detroit Steel*, 659 F.2d at 397; *Island Creek*, 561 F.2d at 1221-22.

<sup>161</sup> See *Island Creek*, 561 F.2d at 1222.

guess at the proper court in which to file a petition for review. The courts adopting the functional view have failed to articulate adequately detailed criteria for making this jurisdictional determination.<sup>162</sup> In these circuits, cautious counsel are well advised to file for review in both the district court and the court of appeals, surely an inefficient practice that a more carefully drafted statute could avoid.

As Judge Posner has persuasively argued, the best course may well be not to revise subsection 1336(a) to adopt expressly either the literal or the functional approach, but rather to end the bifurcation of jurisdiction altogether by repealing subsection 1336(a).<sup>163</sup> The Institute should defer consideration of this drastic step until it undertakes a formal project dedicated principally to federal judicial review of administrative action.<sup>164</sup> Thus, this Prospectus recommends that section 1336 be excluded from the short list and its revision left to a special project.

#### 8. Section 1337: Commerce and Antitrust Regulations; Amount in Controversy, Costs

Section 1337 is the first of several special grants of federal-question jurisdiction within chapter 85 that have been rendered partly or wholly redundant by the 1980 elimination of section 1331's jurisdictional amount-in-controversy requirement. More than 1000 cases citing section 1337 were reported in Westlaw between 1980 and October 1995. The great majority of these cases have cited to section 1337 in conjunction with section 1331 as parallel grounds for federal subject-matter jurisdiction. The same standards determine whether a claim arises under federal law for purposes of either section 1331 or section 1337.<sup>165</sup> As the Fifth Circuit has declared, "section 1331's

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<sup>162</sup> See generally *Empire-Detroit Steel*, 659 F.2d at 397.

<sup>163</sup> See *Field Container Corp. v. Interstate Commerce Comm'n*, 712 F.2d 250, 253 (7th Cir. 1983) ("The divided review of ICC orders is a vestige of legal evolution — about as useful, and mischievous, as the human appendix.").

<sup>164</sup> A similar recommendation is made below with respect to section 1361. See *infra* notes 331-35 and accompanying text.

<sup>165</sup> See, e.g., *Ford Motor Co. v. Transport Indem. Co.*, 795 F.2d 538, 543 (6th Cir. 1986); see also, e.g., *Louisville & Nashville R.R. v. Donovan*, 713 F.2d 1243, 1245 (6th Cir. 1983) (finding no distinction between § 1331 and § 1337 as to superseding effect of another statute limiting normal scope of federal-question jurisdiction).

broader grant of jurisdiction over cases arising under federal laws would seem to encompass section 1337's narrower grant of jurisdiction over cases arising under federal laws regulating commerce."<sup>166</sup> In a similar vein, Judge Posner noted that although 28 U.S.C. § 1337 "was the preferred jurisdictional basis of suits seeking to enjoin the [Federal Trade Commission] in the days when section 1331 had a minimum amount in controversy requirement, it no longer makes any difference which section is used."<sup>167</sup>

Despite this overlap between sections 1331 and 1337, there is an impediment to repealing section 1337. There is a proviso to subsection 1337(a) that requires an amount in excess of \$10,000 to be in controversy in order for the district courts to have jurisdiction of suits by shippers under 49 U.S.C. § 11707 to recover for damage to or loss of their freight.<sup>168</sup> It would be inconsistent with the intent of subsection 1337(a)'s jurisdictional amount to permit plaintiffs to nullify the \$10,000 requirement by basing federal jurisdiction on section 1331 instead of section 1337.<sup>169</sup> There is much to recommend repeal of section 1337 and the incorporation of the jurisdictional-amount proviso of subsection 1337(a) into a new section collecting all such special limitations on the arising-under jurisdiction generally conferred by section 1331. However, this Prospectus is equivocal regarding section 1337's inclusion on the short list.

#### 9. Section 1338: Patents, Plant Variety Protection, Copyrights, Mask Works, Trademarks, and Unfair Competition

In many respects, section 1338 is similar to section 1337. It is simply one pea in a pod of special grants of federal-question

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<sup>166</sup> *Richardson v. United Steelworkers of Am.*, 864 F.2d 1162, 1168 n.6 (5th Cir. 1989).

<sup>167</sup> *See General Fin. Corp. v. Federal Trade Comm'n*, 700 F.2d 366, 367 (7th Cir. 1983); *see also Dickman v. F.D.R. VA Hosp.*, 148 F.R.D. 513, 514 (S.D.N.Y. 1993) (noting that elimination of jurisdictional amount under § 1331 mooted questions of "outer perimeters of other jurisdictional statutes" such as § 1337).

<sup>168</sup> *See* 28 U.S.C.A. § 1337(a) (West Supp. 1998).

<sup>169</sup> *See Kansas City Terminal Ry. Co. v. Jordon Mfg. Co.*, 750 F.2d 551, 552 (7th Cir. 1984) (commenting that Congress likely did not intend to nullify § 1337's amount-in-controversy requirement by allowing § 1331 jurisdiction); *Pillsbury Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 548 F. Supp. 28, 30-31 (D. Kan. 1982).

jurisdiction that have been rendered redundant by the abrogation of section 1331's jurisdictional amount. Its focus is a still narrower subset of section 1337's cases arising under statutes regulating commerce: cases arising under statutes relating to certain forms of federally protected intellectual property. Subsection 1338(a) deals with cases concerning patents, plant varieties, copyrights, and trademarks.<sup>170</sup> Subsection 1338(c) extends this list to include cases relating to the new form of quasi-copyright protection afforded to "mask works," which are used to produce semiconductors.<sup>171</sup> It is settled that, in principle, the standards for determining when a case arises under these particular statutes are no different from the standards applicable generally under section 1331.<sup>172</sup>

Insofar as section 1338 mandates unique treatment of cases within its scope, it is for reasons extrinsic to the arising under issue. Subsection 1338(a) declares federal-question jurisdiction in patent, plant variety, and copyright cases, as extended by subsection 1338(c) to include mask-work cases, to be exclusive of the jurisdiction of state courts.<sup>173</sup> It leaves trademark claims within the concurrent jurisdiction of state courts.<sup>174</sup> Subsection 1338(b) contains a hoary grant of "original jurisdiction" over unfair-competition claims that are related to substantial copyright/mask-work, patent, plant-variety, or trademark claims. This jurisdictional grant is clearly a special grant of what should now be deemed "supplemental jurisdiction" as that term is used in section 1367.<sup>175</sup>

Thus, section 1338 seems to be ripe for repeal as a federal-question statute, thereby leaving the conferral of jurisdiction in cases arising under its enumerated statutes to the general grant of federal-question jurisdiction in section 1331. The exclusivity of federal jurisdiction over copyright/mask-work, patent, and plant-

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<sup>170</sup> See 28 U.S.C. § 1338(a) (1994).

<sup>171</sup> See *id.* § 1338(c) (1994).

<sup>172</sup> See *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 808-09 (1988).

<sup>173</sup> See 28 U.S.C. § 1338(a).

<sup>174</sup> See *id.* (granting exclusive federal jurisdiction to patent, plant variety protection, and copyright cases but not to trademarks).

<sup>175</sup> "This statute was an ill-conceived attempt in the 1948 Judicial Code to codify the general doctrine of 'pendent jurisdiction.'" 13B WRIGHT ET AL., *supra* note 55, § 3582, at 317.

variety cases would be better specified by a new section of chapter 85 designating comprehensively all cases in which federal-question jurisdiction is exclusive. The anachronistic grant of a special category of supplemental jurisdiction could be folded into section 1367. It might include some special treatment of the standards for declining jurisdiction over supplemental unfair-competition claims when the jurisdiction-conferring claims to which they are related are exclusively triable in federal court. To the extent that section 1338 is a proxy for determining the appellate jurisdiction of the Federal Circuit under subsection 1295(a)(1), Congress could easily amend the latter statute to specify the Federal Circuit's appellate jurisdiction over intellectual-property cases in terms similar to those of present subsection 1338(a).

Unfortunately, such a simple rationalization of the jurisdictional status of section 1338 ignores two problems that are likely to make section 1338 extremely difficult to reform. The first problem is the nature of the constituency that section 1338 serves. That constituency consists of entire industries that have invested huge amounts of capital in the intellectual property protected by the federal laws within the ambit of section 1338's jurisdictional grant.<sup>176</sup> It also includes a separate service industry in its own right, the intellectual-property bar.<sup>177</sup> Intellectual-property law is likely to be a major source of growth in federal litigation in the twenty-first century.<sup>178</sup> The powerful forces it shapes, and that shape it, are unlikely to agree that its intricate status quo should be disturbed merely for the sake of elegance and coherence in the structure of chapter 85 of the Judicial Code.

The second problem is that it is impossible to discount such inertial tendencies of jurisdictional conservatism as the mindless resistance to change of special pleaders and their clients. No fair-minded scholar can deny that section 1338 is the twilight

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<sup>176</sup> See, e.g., Elyse Tanouye & Robert Langreth, *Times up: With Patents Expiring on Big Prescriptions, Drug Industry Quakes*, WALL ST. J., Aug. 12, 1997, at A1 (noting that each successful drug patent costs average of \$350 million).

<sup>177</sup> See generally <<http://www.abanet.org/intelprop>> (serving as web site of American Bar Association Section of Intellectual Property Law).

<sup>178</sup> See John B. Oakley, *The Future Relationship of California's State and Federal Courts: An Essay on Jurisdictional Reform, the Transformation of Property, and the New Age of Information*, 66 S. CAL. L. REV. 2233, 2238-44 (1993).

zone of federal-question jurisdiction, in which the rules supposedly shared in common with section 1331 operate in strange and mysterious ways.<sup>179</sup> Thus, those who would be most affected by inadvertent change in the unique contours of federal-question jurisdiction as elaborated under section 1338 have good reason to be concerned that, notwithstanding the putative identity of the concept of "arising under" for section 1331 and section 1338 purposes, it may be beyond the grasp of mere mortals to blend the two sections without affecting the scope of federal-question jurisdiction in intellectual-property cases.<sup>180</sup> Any at-

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<sup>179</sup> "The line between cases that 'arise under' patent and copyright laws, as contemplated by 28 U.S.C. § 1338(a), and those that present only state law contract issues, is a 'very subtle one' and the question leads down 'one of the darkest corridors of the law of federal courts and federal jurisdiction.'" *Arthur Young & Co. v. City of Richmond*, 895 F.2d 967, 969 n.2 (4th Cir. 1990) (citation omitted). For an excellent recent summary of the disarray of jurisdictional cases under section 1338, see Amy B. Cohen, "Arising Under" Jurisdiction and the Copyright Laws, 44 HASTINGS L.J. 337 (1993).

Cases like *Additive Controls & Measurement Systems, Inc. v. Flowdata, Inc.*, 986 F.2d 476 (Fed. Cir. 1993), and *Christopher v. Cavallo*, 662 F.2d 1082 (4th Cir. 1981), appear to have all but overruled the restrictive view of when a case arises under the patent and copyrights laws famously announced by Justice Holmes in *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916). Judge Friendly's similarly famous attempt to restate the relevant law in *T.B. Harms Co. v. Eliscu*, 339 F.2d 823 (2d Cir. 1964), has received inconsistent application not only in sister circuits, compare, e.g., *Royal v. Leading Edge Prods., Inc.*, 833 F.2d 1, 2-5 (1st Cir. 1987) (interpreting *T.B. Harms*, 339 F.2d at 823, as precluding federal jurisdiction for copyright royalty suit), with *Sullivan v. Naturalis, Inc.*, 5 F.3d 1410, 1412-14 (11th Cir. 1993) (granting federal jurisdiction for contractual dispute related to copyright transfer), *Arthur Young & Co.*, 895 F.2d at 971 (noting that difficulty and centrality of state law questions cannot defeat federal jurisdiction under copyright laws), *Vestron, Inc. v. Home Box Office, Inc.*, 839 F.2d 1380, 1381-82 (9th Cir. 1988) (holding contractual issue enough for federal jurisdiction under copyright laws), and *Goodman v. Lee*, 815 F.2d 1030, 1031-32 (5th Cir. 1987) (holding that suit to establish authorship arises under copyright laws), but even among the districts within the Second Circuit, see *Schoenberg v. Shapolsky Publishers, Inc.*, 971 F.2d 926, 931-32 (2d Cir. 1992).

If section 1338 has been a twilight zone for the lower courts, it has been a virtual Bermuda Triangle for the Supreme Court. Justice Holmes's *American Well Works* opinion was evidently invisible to the majority in the general federal-question context of *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), and in *De Sylva v. Ballentine*, 351 U.S. 570 (1956), the Court simply ignored the debates in the lower courts about the existence of jurisdiction under section 1338. See *T.B. Harms*, 339 F.2d at 827. In its most recent compass-spinning foray into the "arising under" jurisdiction of section 1338, a unanimous Court blithely declared that "a claim supported by alternative theories in the complaint may not form the basis for section 1338(a) jurisdiction unless patent law is essential to each of those theories." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 810 (1988).

<sup>180</sup> For a recent discussion and defense of the lack of congruence between the jurisdictional standards of sections 1331 and 1338, see John Donofrio & Edward C. Donovan, *Christianson v. Colt Industries Operating Corp.: The Application of Federal Question Precedent*



tempt to rationalize the jurisdictional law of section 1338 is best relegated to a separate project devoted exclusively to federal regulation of intellectual property.

#### 10. Section 1339: Postal Matters

Section 1339's original role in the allocation of federal jurisdiction was to waive the jurisdictional amount formerly required under section 1331.<sup>181</sup> However, the Postal Reorganization Act of 1970<sup>182</sup> made section 1339 redundant when it transformed the Postal Service from a cabinet-level entity within the executive branch to an independent executive agency competent to sue and be sued in its own name free of federal sovereign immunity.<sup>183</sup> The Act also independently codified within title 39 the stipulation that, with the exception of certain postal rate matters "the United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service."<sup>184</sup>

Despite the vestigial status of section 1339, a surprising circuit split has developed with respect to the Postal Reorganization Act's subsequent waiver-of-immunity and jurisdiction-conferring provisions.<sup>185</sup> Parties have also litigated the relationship between contract suits against the Postal Service and the Tucker Act's<sup>186</sup> division of jurisdiction over such suits between the district courts and the Court of Federal Claims, but as yet no circuit split has developed.<sup>187</sup>

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to *Federal Circuit Jurisdiction Decisions*, 45 AM. U. L. REV. 1835 (1996).

<sup>181</sup> See *Kipperman v. Academy Life Ins. Co.*, 554 F.2d 377, 378-79 (9th Cir. 1977).

<sup>182</sup> Pub. L. No. 91-375, 84 Stat. 719 (1970).

<sup>183</sup> See 39 U.S.C. § 401(1) (1994); *Loeffler v. Frank*, 486 U.S. 549, 555-56 (1988).

<sup>184</sup> See 39 U.S.C. § 409(a) (1994). The second sentence of subsection 409(a) further provides: "Any action brought in a State court to which the Postal Service is a party may be removed to the appropriate United States district court under the provisions of chapter 89 of title 28." *Id.*

<sup>185</sup> For an excellent summary of the discrepant case law by Chief Judge Sloviter, see *Licata v. United States Postal Service*, 33 F.3d 259, 261-63 (3d Cir. 1994).

<sup>186</sup> See 28 U.S.C. § 1346(a)(2) (1994).

<sup>187</sup> Contract claims against the United States under the "Big" Tucker Act are within the jurisdiction of the Court of Federal Claims, 28 U.S.C.A. § 1491(a)(1) (West Supp. 1998), subject to the "Little" Tucker Act's grant of concurrent jurisdiction to the district courts over contract claims not exceeding \$10,000. See 28 U.S.C. § 1346(a)(2) (1994). Reversing a judgment to the contrary, the Third Circuit has recently held these provisions inapplicable

Ideally section 1339 should be repealed and title 39's special grant of original jurisdiction relocated to chapter 85 of title 28. This might occur were the Institute to agree with the majority of the circuits that Congress intended to treat the Postal Service like a federal corporation whose statutory charter includes a sue-and-be-sued clause.<sup>188</sup> However, the existence of both a circuit split on this point and lingering Tucker Act issues suggests that any rationalization of the jurisdictional posture of the Postal Service should be reserved for a separate project on suits by and against the United States and other federal entities.<sup>189</sup>

#### 11. Section 1340: Internal Revenue; Customs Duties

In common with sections 1352, 1355, and 1356, section 1340 excludes from the jurisdiction of the district courts "matters within the jurisdiction of the Court of International Trade," formerly the Customs Court.<sup>190</sup> Although labeled a "beached whale" by Judge Posner,<sup>191</sup> one aspect of section 1340 invites caution in proposed legislation repealing this section as redundant in light of the repeal of section 1331's jurisdictional amount. Courts have traditionally held that section 1331's parallel grant of jurisdiction cannot be invoked to evade this exception.<sup>192</sup> However, existing law decrees that the jurisdiction of the Court of International Trade is in every enumerated in-

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to the Postal Service. See *Licata*, 33 F.3d at 263-64; *Benderson Dev. Co. v. United States Postal Serv.*, 998 F.2d 959, 962 (Fed. Cir. 1993).

<sup>188</sup> Cf. *American Nat'l Red Cross v. S.G.*, 505 U.S. 247, 257 (1992) (construing "sue and be sued" provision of statutory charter of federal corporation to be special grant of plenary federal-question jurisdiction). The issue of the jurisdictional consequences of federal incorporation independently of the terms of the statutory charter of a federal corporation is considered below in connection with section 1349. *American National Red Cross* emphasized that the statutory charter issue was distinct from the federal incorporation issue in determining the jurisdictional posture of suits by or against a federal corporation. See *id.* at 251 n.3., 260 n.12.

<sup>189</sup> The desirability of keeping such a project separate from general jurisdictional reform of chapter 85 is discussed below in connection with sections 1345 and 1346.

<sup>190</sup> See 28 U.S.C. § 1340 (1994).

<sup>191</sup> See *Winstead v. J.C. Penney Co.*, 933 F.2d 576, 580 (7th Cir. 1991).

<sup>192</sup> See *Eastern States Petroleum Corp. v. Rogers*, 280 F.2d 611, 613 (D.C. Cir. 1960); see also *Commodities Export Co. v. United States Customs Serv.*, 957 F.2d 223, 225, 229-30 (6th Cir. 1992) (reaffirming *Rogers*, 280 F.2d at 611, and ordering transfer of action brought under §§ 1352, 1355 to Court of International Trade).

stance exclusive jurisdiction.<sup>193</sup> Thus, the exception appears to be independently redundant and the scope of the district courts' general federal-question jurisdiction under section 1331 already limited by the exclusivity of the Court of International Trade's jurisdiction. Repeal of section 1340 would effect no change in applicable doctrines of sovereign immunity because it is settled that neither section 1331 nor section 1340 is a waiver of sovereign immunity.<sup>194</sup> Thus, this Prospectus is equivocal regarding section 1340's inclusion on the short list.

## 12. Sections 1341 and 1342: Taxes by States; Rate Orders of State Agencies

The Tax Injunction Act, codified in section 1341, and the Johnson Act, codified in section 1342, depart from the general pattern of chapter 85 by withdrawing in part the jurisdiction otherwise conferred upon the district courts.<sup>195</sup> Analytically these are statutory species of abstention law, if abstention law is conceived generically as a group of limiting doctrines that consists specifically of statutes such as sections 1341 and 1342 and nonstatutory doctrines of judicial self-restraint.<sup>196</sup> Recognizing the link between statutory and court-created abstention doctrines helps to explain judicial equivocation as to the reasoning supporting the well-settled extension of sections 1341 and 1342 beyond their express terms. This extension bars not only injunctive relief that would interfere with the administration of state tax laws, but declaratory relief<sup>197</sup> and damages<sup>198</sup> as well. This

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<sup>193</sup> See 28 U.S.C. §§ 1581-1584 (1994).

<sup>194</sup> See, e.g., *Hughes v. United States*, 953 F.2d 531, 539 n.5 (9th Cir. 1992) (stating that general jurisdictional statutes such as §§ 1331, 1340 do not waive government's sovereign immunity); *Lonsdale v. United States*, 919 F.2d 1440, 1443-44 (10th Cir. 1990) (holding that sovereign immunity cannot be waived by general jurisdictional statutes).

<sup>195</sup> See 28 U.S.C. §§ 1341-1342 (1994).

<sup>196</sup> See *supra* note 21 and accompanying text (discussing generally recognized categories of court-created abstention doctrine). Subsections 1371(a) and (b) of the *1969 Study* incorporated both the Tax Injunction Act and the Johnson Act, 28 U.S.C. §§ 1341-1342 (1994), into a general codification of abstention and stays in certain cases. See 1969 STUDY, *supra* note 3, at 282-87.

<sup>197</sup> See *California v. Grace Brethren Church*, 457 U.S. 393, 407-11 (1982) (holding that § 1341 of its own force prohibits declaratory and injunctive relief); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 298-301 (1943) (stating that federal courts, using sound discretion, may withhold declaratory relief in state tax cases whether or not statutori-

judicial equivocation also argues for caution in revising statutory abstention provisions independently of an overarching project that would examine and evaluate the entire spectrum of doctrines of discretionary jurisdiction. Such a project would be the epitome of a structurally oriented, overtly political, and policy-laden project quite different in aims from the one presently proposed.

There are three principal issues to be addressed in a revision of section 1341. The first is whether its text should be broadened to codify the Supreme Court's expansion of its literal terms to bar noninjunctive forms of relief.<sup>199</sup> Such an effort to conform the language of a statute to its settled construction appears to be consistent with an apolitical, technical revision of chapter 85. However, such a change raises more fundamental issues about codifying court-created abstention doctrines in ways that would limit the future discretion of the Supreme Court to retreat from earlier self-imposed jurisdictional limitations. Thus, such a codification may not be as apolitical as it appears, at least for so long as there remains some doubt about where comity stops and where legislative command begins in the current case law surrounding section 1341.

The second issue raises the different but no less delicate issue of the appropriate content of a statutory revision designed to clarify and codify decisional gloss on a statute. Section 1341's

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ly prohibited by § 1341); *see also* *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286-88 (1995) (noting that district courts have broad statutory discretion to decline declaratory relief in any case brought under Declaratory Judgment Act).

<sup>198</sup> *See* *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 100-07 (1981) (resolving circuit split by extending comity principles of *Great Lakes*, 319 U.S. at 293, to bar damages as well as declaratory relief without deciding whether § 1341, alone, would require that result). The Seventh Circuit, whose minority view on the availability of damages relief notwithstanding section 1341 was disapproved, has since declared that *McNary's* comity rationale effectively overruled its contrary view of the scope of section 1341. *See* *Werch v. City of Berlin*, 673 F.2d 192, 195 n.2 (7th Cir. 1982).

"No circuit court of appeals has held [section 1342] inapplicable to actions affecting state-approved rates when the relief sought is declaratory or compensatory, rather than injunctive." *Brooks v. Sulphur Springs Valley Elec. Coop.*, 951 F.2d 1050, 1054 (9th Cir. 1991). *See generally* *Miller v. NYS Pub. Serv. Comm'n*, 807 F.2d 28, 31-32 (2d Cir. 1986) (collecting cases and invoking parallel precedent construing § 1341).

<sup>199</sup> Subsection 1371(a) of the 1969 *Study* would have incorporated into the revised text of the Tax Injunction Act the constructional gloss that bars federal courts from issuing declaratory relief in state tax cases. *See* 1969 *STUDY*, *supra* note 3, at 287.

effect is contingent on the availability of “a plain, speedy and efficient remedy” in state court. Authoritative precedent establishes that this three-pronged prerequisite to the applicability of section 1341 imposes only “minimal procedural criteria” that are virtually toothless.<sup>200</sup> But there is vast disparity between any plausibly literal construction of “plain, speedy and efficient” and the “uncomfortable and distressing”<sup>201</sup> facts held to pass muster under such a minimal standard by a reluctant and almost equally divided Court.<sup>202</sup> It would amount virtually to revisory fraud to reiterate the “plain, speedy and efficient” standard without change if the Institute means to bridge the gap between the plain meaning of the present text and its settled but artificial construction.

The third issue concerns what counts as a tax for purposes of section 1341 and related doctrines of judicial self-restraint. Although this issue has not been frequently litigated, a recent case has found the issue worthy of detailed discussion and suggests that statutory clarification would be useful.<sup>203</sup>

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<sup>200</sup> See *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 512 (1981).

<sup>201</sup> See *id.* at 529 (Blackmun, J., concurring).

<sup>202</sup> A bare majority of the court decided *Rosewell* in an opinion by Justice Brennan, reversing the Seventh Circuit decision. Justice Blackmun cast the deciding vote only after declaring that “I participate in the decision with a distinct lack of enthusiasm,” noting that the state and county involved “may have little reason to be proud of the system” upheld by the Court as “plain, speedy, and efficient,” and concluding that “[o]ne might well hope, even though forlornly, that that system and its administration will be improved so that uncomfortable and distressing litigation like this case need not be pursued.” *Id.* at 528-29 (Blackmun, J., concurring). In his dissenting opinion, joined by Justices Stewart, Marshall, and Powell, Justice Stevens stated that the majority’s reading of the statute would lead to an absurd result. See *id.* at 530 (Stevens, J., dissenting). Justice Stevens pithily restated the majority opinion in the context of the facts below:

Year after year Cook County requires respondent to pay a tax that is three times as great as the amount actually due and then, after a 2-year delay, the county refunds the overassessment without interest. Because the outcome of this annual ritual is predictable, the taxpayer’s remedy is “plain” and because only about 70% of the Nation’s litigation is processed more rapidly, the remedy is also “speedy and efficient.” That is the consequence of the Court’s view that Congress was concerned with nothing more than “minimal procedural criteria” when it enacted the Tax Injunction Act.

*Id.* at 529-30 (Stevens, J., dissenting).

<sup>203</sup> See *Trailer Marine Transp. Corp. v. Rivera Vazquez*, 977 F.2d 1, 5 (1st Cir. 1992) (noting that label “tax” is often applied too broadly).

Although more complicated in form than the Tax Injunction Act, the Johnson Act has provoked less debate in the case law. Section 1342 is subject to four express qualifications, which although uncontroversial in the case law, would invite close attention from revisers seeking to conform the statutory language to its received meaning. The first, subsection 1342(1), limits its applicability to cases in which the parties base jurisdiction “solely on diversity of citizenship or repugnance of the order to the Federal Constitution.”<sup>204</sup> In an isolated but interesting case the Ninth Circuit decided that a suit to enjoin enforcement of a state regulatory order that nullified certain special utility rates stipulated in a collective bargaining agreement, was based on both statutory and constitutional theories of preemption.<sup>205</sup> Because the case was, therefore, not premised solely on the unconstitutionality of the order, the court held that it fell outside the scope of section 1342.<sup>206</sup> The subtleties of preemption law also underlie the constructional gloss on subsection 1342(2)’s requirement that to be protected from federal judicial interference, an order must “not interfere with interstate commerce.”<sup>207</sup>

The third qualification of section 1342, the “reasonable notice and hearing” requirement, has received a very narrow construction that has gone unchallenged for decades.<sup>208</sup> It applies only to proceedings to determine the reasonability of utility rates based on disputed contentions of fact and not to proceedings that consider the validity of proposed new tariffs as a matter of law.<sup>209</sup> The “plain, speedy and efficient remedy” criterion of

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<sup>204</sup> 28 U.S.C. § 1342(1) (1994).

<sup>205</sup> See *International Bhd. of Elec. Workers Local 1245 v. Public Serv. Comm’n*, 614 F.2d 206, 209-11 (9th Cir. 1980).

<sup>206</sup> See *id.* at 211.

<sup>207</sup> The 1969 Study found subsection 1342(2) to be sufficiently misleading to require rearticulation in terms of conflict with preemptive federal regulatory authority. See 1969 STUDY, *supra* note 3, at 288. State utility regulations can rarely if ever burden “interstate” commerce within the meaning of subsection 1342(2). See *New York Cent. R.R. Co. v. Illinois Commerce Comm’n*, 77 F. Supp. 520, 522 (N.D. Ill. 1948), *quoted in* *Kalinsky v. Long Island Lighting Co.*, 484 F. Supp. 176, 178 (E.D.N.Y. 1980).

<sup>208</sup> See 28 U.S.C. § 1342(3) (1994).

<sup>209</sup> See *City of Monroe v. United Gas Corp.*, 253 F.2d 377, 379-81 (5th Cir. 1958); *General Inv. & Serv. Corp. v. Wichita Water Co.*, 236 F.2d 464, 467-68 (10th Cir. 1956). To the best of my knowledge, no reported case has ever found that a rate order may be challenged under subsection 1342(3) for lack of notice and hearing.

subsection 1342(4) is clearly to be construed to the same dubious effect as the parallel language of the Tax Injunction Act, which merely tracked the language previously enacted by the Johnson Act.<sup>210</sup> This Prospectus recommends that sections 1341 and 1342 be excluded from the short list and their revision left to a special project of the Institute.

### 13. Section 1343: Civil Rights and Elective Franchise

Section 1343 grants all final jurisdiction in the district courts in civil rights and elective franchise cases. No more delicate task can be imagined than revising or repealing subsection 1343(a)<sup>211</sup> to take account of its manifest redundancy in almost every case in which it has been invoked since the elimination of section 1331's jurisdictional amount.<sup>212</sup> It will also be challenging to do this without appearing to pare back on the historic role of the federal courts as guardians of civil rights, or worse yet, actually eliminating that jurisdiction in some unforeseen way.

It is universally agreed that subsection 1343(a)(3) lacks independent utility now that section 1331 requires no amount in controversy.<sup>213</sup> The scope of subsection 1343(a)(3) is coextensive with 42 U.S.C. § 1983, and because any claim under section 1983 is the creation of federal law, it will always be jurisdictionally sufficient under section 1331. However, nagging questions remain latent in the text of the other subdivisions of subsection 1343(a) even if they are unaddressed in contemporary case law.

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<sup>210</sup> See *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 513-14 (1981).

<sup>211</sup> Section 1343 as enacted in 1948 consisted of four subsections designated subsections 1343(1) to (4). This familiar scheme was altered by a 1979 amendment adding subsection 1343(b) deeming the District of Columbia to be a state for purposes of section 1343 and renumbering subsections 1343(1) to (4) as subsections 1343(a)(1) to (4). See Act of Dec. 29, 1979, Pub. L. No. 96-170, § 2, 93 Stat. 1284.

<sup>212</sup> See Pub. L. No. 96-486, § 2(a), 94 Stat. 2369 (1980) (eliminating amount-in-controversy requirement from § 1331).

<sup>213</sup> See, e.g., *Winstead v. J.C. Penney Co.*, 933 F.2d 576, 580 (7th Cir. 1991); *Playboy Enters., Inc. v. Public Serv. Comm'n of P.R.*, 906 F.2d 25, 29 (1st Cir. 1990); *Kulick v. Pocono Downs Racing Ass'n*, 816 F.2d 895, 897 n.4 (3d Cir. 1987); *Kuehner v. Schweiker*, 717 F.2d 813, 816 n.1 (3d Cir. 1983), *cert. granted and judgment vacated on other grounds sub nom. Heckler v. Kuechner*, 469 U.S. 977 (1984).

Although often referred to as the jurisdictional counterpart of 42 U.S.C. § 1985(3), 28 U.S.C. § 1343(a)(1) does not use identical terms. The cause of action created by subsection 1985(3) extends only to “the conspirators” while subsection 1343(a)(1) authorizes suit “for any act done in furtherance of [such] conspiracy,” arguably extending the scope of liability to include nonconspirators whose acts further the object of the conspiracy.<sup>214</sup> Even more broadly, subsection 1343(a)(2) extends federal jurisdiction to actions against persons who knowingly fail to frustrate conspiratorial acts within the scope of section 1985.<sup>215</sup> It cannot be said with complete confidence that these provisions do not themselves create rights to sue broader than the substantive provisions of section 1985 standing alone. It is relevant to this inquiry that 42 U.S.C. §§ 1981-1982 do not facially provide for a private right to sue. They were found actionable a century after their enactment, despite the lack of any express remedial language, in part by reference to the terms of the implementing jurisdictional language of 28 U.S.C. § 1343(4), now recodified as subsection 1343(a)(4).<sup>216</sup> In the same vein, the Supreme Court has relied in part on the expansive terms of the “right to vote” language of subsection 1343(a)(4) to hold that subsection 12(f) of the Voting Rights Act can be enforced by private suit.<sup>217</sup> This Prospectus recommends that section 1343 be excluded from the short list.

#### 14. Section 1344: Election Disputes

Section 1344 grants jurisdiction over election disputes to the district court. It is infrequently invoked and even less frequently discussed as the basis for district court jurisdiction. It is almost always mentioned as part of a string cite of jurisdictional provisions conferring jurisdiction over claims of violations of the Voting Rights Act of 1965 and the Civil Rights Act of 1871, 42 U.S.C. §§ 1973, 1983 (1994). In most such cases it is inapposite

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<sup>214</sup> See 28 U.S.C. § 1343(a)(1) (1994); 42 U.S.C. § 1985(3) (1994).

<sup>215</sup> See 28 U.S.C. § 1343(a)(2) (1994); 42 U.S.C. § 1985 (1994).

<sup>216</sup> See *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-60 & n.6 (1975) (adopting holding of *Young v. International Tel. & Tel. Co.*, 438 F.2d 757, 760 (3d Cir. 1971)); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 412 n.1 (1968).

<sup>217</sup> See *Allen v. State Bd. of Elections*, 393 U.S. 544, 554-55 & n.18 (1969).



rather than merely redundant of the other cited bases of jurisdiction — 28 U.S.C. §§ 1331, 1343 — because the plaintiffs in such cases are challenging the integrity of elections as voters rather than candidates.<sup>218</sup> The unique focus of section 1344 is on suits by candidates to establish their title to offices to which they would rightfully have been elected but for racially-based voting rights violations.<sup>219</sup> It would be a mistake, however, to regard section 1344 as eligible for repeal because it is always either inapposite or redundant. The Fifth Circuit has found it to have independent remedial significance.<sup>220</sup>

The typical Voting Rights Act case features claims for injunctive and declaratory relief leading to new elections under a restructured electoral system, and courts have generally acknowledged that such remedial power exists by implication under the Voting Rights Act.<sup>221</sup> The Fifth Circuit case, *Welch v. McKenzie*,<sup>222</sup> was exceptional because the plaintiff there claiming racially motivated election fraud in violation of 42 U.S.C. §§ 1973, 1983 was a defeated candidate for office.<sup>223</sup> The election in question had already been set aside in state-court proceedings, and the elected candidate removed from office and jailed for stuffing the ballot box with fraudulent absentee ballots.<sup>224</sup> Judge Higginbotham's opinion affirmed the district court's denial of any further relief beyond the new election already ordered by the state court. This was only because the district court's finding that the fraud in question was not racially motivated or clearly erroneous and, hence, was binding on the appellate court.<sup>225</sup>

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<sup>218</sup> See, e.g., *Irby v. Fitz-Hugh*, 693 F. Supp. 424, 431 (E.D. Va. 1988).

<sup>219</sup> Compare *Hubbard v. Ammerman*, 465 F.2d 1169, 1180 (5th Cir. 1972) (noting § 1344's inapplicability to plaintiffs challenging elections as voters rather than candidates), and *Gray v. Main*, 291 F. Supp. 998, 1000-01 (M.D. Ala. 1966), with *Irby*, 693 F. Supp. at 431 (upholding jurisdiction under §§ 1331, 1343-1344 without noting inapplicability of § 1344 for lack of any claim to recover possession of elected office), *Houston v. Haley*, 663 F. Supp. 346, 349-50 (N.D. Miss. 1987), and *Citizens for a Better Gretna v. City of Gretna*, 636 F. Supp. 1113, 1131 (E.D. La. 1986).

<sup>220</sup> See *Welch v. McKenzie*, 765 F.2d 1311, 1312-14 (5th Cir. 1985).

<sup>221</sup> For an excellent discussion of these remedial power principles, see *Dickinson v. Indiana State Election Board*, 933 F.2d 497, 500-03 (7th Cir. 1991).

<sup>222</sup> 765 F.2d at 1311.

<sup>223</sup> See *id.* at 1312-14.

<sup>224</sup> See *id.*

<sup>225</sup> See *id.*

Judge Higginbotham took pains to note that the new election ordered by the state court did not moot the defeated candidate's federal claims. He cited section 1344 as authority for the proposition that "[i]nvalidation of the election did not . . . so exhaust the remedial range of the complaint as to fully end the controversy."<sup>226</sup> Thus, it would appear that the jurisdiction specially granted by section 1344 "to recover possession of any office" may support a remedy — ordering the plaintiff to be installed in the office to which he or she would have been duly elected absent racially motivated violations of federal law actionable under 42 U.S.C. §§ 1973, 1983 — that may not be available under sections 1973 and 1983 unaided by section 1344. Thus, this Prospectus recommends that section 1344 be excluded from the short list.

15. Sections 1345 and 1346: United States as Plaintiff;  
United States as Defendant

For distinct but related reasons, revision of these statutes should not be attempted independently of a project specially devoted to the entire spectrum of substantive law and jurisdictional provisions pertaining to the litigation of particular claims by and against the federal government. The argument for leaving these provisions untouched in a more general jurisdictional revision of chapter 85 is that the principal function of neither section 1345 nor section 1346 is to confer on the federal district courts a jurisdiction they would not otherwise possess. They serve other purposes, and only a searching examination of their substantive roles in government litigation can assure that repeal or alteration of sections 1345 and 1346 would not have unintended consequences.

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<sup>226</sup> See *id.* at 1314 n.1.

Section 1345 is frequently cited but infrequently discussed.<sup>227</sup> With one dated and ill-reasoned exception,<sup>228</sup> the lower courts agree that the government's filing of a third-party complaint under rule 14 of the Federal Rules of Civil Procedure qualifies as the commencement of an action for purposes of section 1345.<sup>229</sup> The major topic of discussion is the inapplicability in section 1345 litigation of the Rules of Decision Act, 28 U.S.C. § 1652, as construed with respect to section 1332 litigation in *Erie*.

Courts have held universally that *Erie* principles have no force in section 1345 litigation.<sup>230</sup> Additionally, while state law should be considered and may be adopted as the rule of decision, state law does not govern *ex proprio vigore* but only by its selective incorporation into the federal substantive law that governs the legal rights and obligations of the national government.<sup>231</sup> Therefore, any suit to enforce an obligation owed to the United States arises under federal law, and for jurisdictional purposes nothing more is needed than section 1331 to enable the suit to proceed in a federal district court.<sup>232</sup> The major risk of casual repeal of section 1345 as jurisdictionally redundant of sec-

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<sup>227</sup> See, e.g., *United States v. \$7,137.02, Representing the Contents of Account No. 30-06387*, No. 91 C 6332, 1995 WL 505481, at \*1 (N.D. Ill. Aug. 18, 1995) (stating that court's jurisdiction comes under § 1345); *United States v. Jonmar Corp.*, No. 93 C 5669, 1994 WL 727984, at \*1 (N.D. Ill. Dec. 30, 1994) (noting court's jurisdiction pursuant to § 1345); *United States v. Brown*, No. C 79-2074, 1981 WL 1864, at \*3-4 (N.D. Iowa June 30, 1981) (stating court's jurisdiction under § 1345); *United States v. California State Auto. Ass'n*, 385 F. Supp. 669, 670 (E.D. Cal. Nov. 13 1974) (stating that § 1345 grants this court original jurisdiction over all cases by United States).

<sup>228</sup> See *Parks v. United States*, 241 F. Supp. 297, 298 (N.D.N.Y. 1965) (finding that filing of third-party complaint does not constitute commencement of action).

<sup>229</sup> Compare *United States v. Hawaii*, 832 F.2d 1116, 1117 (9th Cir. 1987) (allowing district court jurisdiction over third-party complaint according to § 1345), with *Parks*, 241 F. Supp. at 299 (denying jurisdiction under § 1345 because state is not considered "person").

<sup>230</sup> See *United States ex rel. Army Athletic Ass'n v. Reliance Ins. Co.*, 799 F.2d 1382, 1385 (9th Cir. 1986) (noting that *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), does not control when court exercises § 1345 jurisdiction).

<sup>231</sup> See *id.*; *United States v. Mercantile Nat'l Bank*, 795 F.2d 492, 494-95 (5th Cir. 1986).

<sup>232</sup> Cf. *United States v. AT&T*, 551 F.2d 384, 388-89 (D.C. Cir. 1976) (declining to resolve whether "a clash of the powers of the legislative and executive branches of the United States, with AT&T in the role of a stakeholder" gave rise to suit "commenced" by "United States" within meaning of § 1345 since "cases . . . dealing with the powers and relations of the branches of the United States, are maintainable in federal court, if justiciable at all[,] . . . under 28 U.S.C. § 1331," and jurisdictional amount then required under § 1331 was satisfied).

tion 1331 is the possibility that such repeal would be construed to alter the substantive law somehow applicable to civil actions commenced by the United States. Existing case law attributes quasi-substantive effect to section 1345 as the predicate for holding state law inapplicable, except as incorporated by reference into federal law, to claims litigated by the United States as plaintiff.<sup>233</sup>

When the United States is sued as a defendant, the principally nonjurisdictional role of section 1346 is even more manifest. The United States cannot be sued without its consent, and the fundamental role of section 1346 is the substantive one of waiving the sovereign immunity of the United States in a wide variety of carefully enumerated, technically detailed, factually sensitive, and strictly construed situations. Because any claim against the United States, as such, must be founded on a statutory waiver of sovereign immunity, it follows that any such claim arises under federal law in the most paradigmatic sense of section 1331. Yet section 1346 retains independent jurisdictional force notwithstanding the repeal of section 1331's jurisdictional amount. This is true because of the secondary effect of section 1346's waivers of sovereign immunity and those elsewhere in the Judicial Code<sup>234</sup> in distributing jurisdiction of particular claims against the United States among the district courts, the Court of Federal Claims, and the Court of International Trade.

Rationalization and simplification of the jurisdictional posture of claims by and against the United States is certainly desirable, particularly with regard to the confusing overlap in jurisdiction between the district courts and the Court of Federal Claims.<sup>235</sup> However, such an exercise affecting the very sovereignty of the United States is more akin to brain surgery than tree surgery.<sup>236</sup> It should not be undertaken as part of a general pruning of the redundant provisions of chapter 85.

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<sup>233</sup> See *supra* notes 230-32 and accompanying text.

<sup>234</sup> See 28 U.S.C.A. § 1491 (West Supp. 1998) (conferring jurisdiction of claims against United States on Court of Federal Claims); 28 U.S.C. § 1581 (1994) (conferring jurisdiction of claims against United States on Court of International Trade).

<sup>235</sup> See generally 13 WRIGHT ET AL., *supra* note 55, § 3657.

<sup>236</sup> For a sense of the delicacy of the issues involved, see *Smith v. United States*, 507 U.S. 197, 197 (1993), which notes that subsection 1346(b) does not apply to tortious acts or omissions occurring in Antarctica.

The *1969 Study* thought otherwise and proposed to overhaul the statutes within title 28 governing the jurisdiction and venue of the district courts in government litigation without addressing the underlying substantive issues or similar statutes elsewhere in the United States Code.<sup>297</sup> This Prospectus advocates maintaining a more narrow focus for the present project in order to avoid encountering the problems of manifold complexity that may have inhibited legislative implementation of the *1969 Study*.<sup>298</sup> Thus, it recommends that sections 1345 and 1346 be excluded from the short list and their revision left to a special project.

#### 16. Section 1347: Partition Action Where United States Is Joint Tenant

Section 1347 is rarely invoked and unproblematically applied. The principal contested issue has been uniformly resolved: where the title of the alleged cotenant seeking partition of property jointly held by the United States is disputed, the plaintiff cannot invoke section 1347 and its substantive counterpart, section 2409, which subjects the United States to whatever law would govern “a similar action between private persons.”<sup>299</sup> The plaintiff must, instead, proceed under subsection 1346(f) and its substantive counterpart, section 2409a, which among other things conditions the waiver of federal sovereign immunity

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<sup>297</sup> The *1969 Study* collected its revisions of those sections of title 28 dealing with suits by and against the federal government in a proposed new chapter 87 of title 28, but in so doing attempted merely to clarify and restate existing law without evaluating the proper limits of sovereign immunity or attempting to gather all jurisdictional grants for government cases included in the United States Code. See 1969 STUDY, *supra* note 3, at 38-46, 255-81.

<sup>298</sup> For a recent example of such “manifest complexity,” see *United States v. Tsosie*, 92 F.3d 1037 (10th Cir. 1996). In *Tsosie*, the Tenth Circuit held that the United States may not bring an action of trespass and ejectment under section 1345 on behalf of one Indian against another without first exhausting its remedies in tribal court. In contract actions against the United States under section 1346, a circuit split has developed as to the applicability of the Uniform Commercial Code (“UCC”) to federal contracts. Compare *Gorden v. Kreul*, 77 F.3d 152, 155 (7th Cir. 1996) (holding that federal agency overstepping its contractual rights in seizing collateral can be held accountable under UCC), with *GAF Corp. v. United States*, 932 F.2d 947, 951 (Fed. Cir. 1991) (holding UCC inapplicable to federal contracts).

<sup>299</sup> See 28 U.S.C. § 2409 (1994).

on the commencement of suit within a federally specified twelve-year period of limitations.<sup>240</sup>

When a plaintiff whose title is undisputed invokes section 1347, arguably section 2409 rather than section 1347 grants the necessary waiver of sovereign immunity permitting a partition suit against the United States.<sup>241</sup> If so, section 1347 is simply a jurisdictional grant and, as such, is redundant of section 1331. However, given the doubt about the redundancy of section 1347 as a waiver of sovereign immunity, no useful purpose would be served by repeal of section 1347 except as part of a general project on federal government litigation of the sort discussed with reference to sections 1345 and 1346. This Prospectus thus recommends that revision of section 1347 be left to such a separate project.

#### 17. Section 1348: Banking Association as Party

Although it is not frequently litigated, section 1348, which governs jurisdiction in cases where a federal banking association is a party, is sorely in need of revision. Its two seemingly disjunctive paragraphs have led some courts to conclude erroneously that the first paragraph preempts the application of any other specialized grant of federal-question jurisdiction, leaving national banks otherwise subject to suit only under the general federal-question and diversity statutes, sections 1331 and 1332.<sup>242</sup> The first paragraph is in other respects redundant and confusing.<sup>243</sup>

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<sup>240</sup> See, e.g., *Stubbs v. United States*, 620 F.2d 775, 782-83 (10th Cir. 1980); *Prater v. United States*, 612 F.2d 157, 158-59 (5th Cir. 1980).

<sup>241</sup> The Fifth Circuit has made inconsistent statements on this point, albeit in dicta and without careful discussion in either instance. Compare *Prater*, 612 F.2d at 158 (noting that § 2409 waives federal sovereign immunity in partition actions and § 1347 is simply implementing jurisdictional provision), with *Stanton v. United States*, 434 F.2d 1273, 1275 (5th Cir. 1970) (finding that § 1347 waives federal sovereign immunity in partition actions and § 2409 implements procedural and choice-of-law provision).

<sup>242</sup> See *Williams v. American Fletcher Nat'l Bank & Trust Co.*, 348 F. Supp. 963 (S.D. Ind. 1970). This view was soundly rejected, and two district court judgments predicated on it were reversed in an influential opinion of the Eighth Circuit, which featured a careful review of the legislative history of section 1349. *Burns v. American Nat'l Bank & Trust Co.*, 479 F.2d 26 (8th Cir. 1973) (en banc).

<sup>243</sup> Federal jurisdiction over suits against a national bank by the United States or any officer thereof is independently granted by section 1345. The 1969 Study, therefore, proposed pro tanto elimination of this part of section 1348. See 1969 STUDY, *supra* note 3, at

The second paragraph seeks to bring federally chartered banks within the operation of the general diversity statute, subsection 1332(a), by declaring them to be "citizens of the States in which they are respectively located." This has led to a split in authority on the meaning of the term "located," which has no obvious analogue elsewhere in the law determinative of citizenship for diversity purposes.<sup>244</sup> This Prospectus is equivocal regarding section 1348's inclusion on the short list.

#### 18. Section 1349: Corporation Organized Under Federal Law as Party

Section 1349 is essential. In its absence, the question would arise whether any suit by or against a federal corporation arises under federal law within the meaning of section 1331 simply by virtue of the corporation's federal status.<sup>245</sup> Section 1349 clearly

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42, 271. Subsection 1324(b) of the 1969 Study also proposed deletion of "the confusing reference to 'chapter 2 of Title 12'" in the first paragraph of section 1348 regarding jurisdiction over suits by national banks against the Comptroller of the Currency. *See id.* at 273; *see also* *Groos Nat'l Bank v. Comptroller of Currency*, 573 F.2d 889, 895 (5th Cir. 1978) (comparing points of confusion in correctly applying § 1348).

<sup>244</sup> Compare *United States Nat'l Bank v. Hill*, 434 F.2d 1019, 1020 (9th Cir. 1970) (stating that location means principal place of business), with *Connecticut Nat'l Bank v. Iacono*, 785 F. Supp. 30, 34 (D.R.I. 1992) (holding that location means any state in which national bank maintains branch office). The *Iacono* court was persuaded to depart from the precedent of *Hill* and similar cases by an intervening Supreme Court decision. *See Citizens & S. Nat'l Bank v. Bourgas*, 434 U.S. 35, 40 (1977). The Court construed the term "located" as used in the special venue statute governing suits against national banks, 12 U.S.C. § 94, to include any district in which a bank maintained a branch office. *See id.* at 46.

The 1969 Study would have eliminated the second paragraph of 28 U.S.C. § 1348 as recodified at subsection 1324(b) of the study, leaving the determination of the diversity status of national banks to its general provision for corporate citizenship at 28 U.S.C. § 1301(b)(1). *See* 1969 STUDY, *supra* note 3, at 271-72. The Institute thereby meant to effect no change in law since it assumed without elaboration that "location" under section 1348 meant no more than "principal place of business," which had become the standard for operationally based corporate citizenship under subsection 1332(c) as amended in 1958. *See id.* at 272. Contemporary revision of section 1348 will have to evaluate whether the *Iacono* court correctly reasoned that *Bourgas* had negated the casual equation of "location" and "principal place of business."

<sup>245</sup> *See Pacific R.R. Removal Cases*, 115 U.S. 1, 3 (1885). This issue is independent of the line of cases founded upon *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 815 (1824), and most recently extended in *American National Red Cross v. S.G.*, 505 U.S. 247, 248 (1992), which establishes that a statutory charter's conferral of juridical capacity on a federal corporation to "sue and be sued" in both state and federal courts is a special grant of federal-question jurisdiction that extends the jurisdiction of the district courts in such cases

means to limit federal-question jurisdiction based on federal corporate status only to corporations of which the United States is the majority stockholder.<sup>246</sup> Whether it does clearly what it clearly means to do is a nagging question worthy of revisory attention.

Some cases have construed section 1349 literally as withdrawing jurisdiction based on federal corporate status only when it is organized as a joint-stock corporation and the Federal Government is not a majority shareholder.<sup>247</sup> Other cases have adopted a more flexible approach, however, giving effect to section 1349 whenever the government controls a federal corporation, whether or not it has issued shares of stock.<sup>248</sup>

The *1969 Study* would have codified the flexible approach and also would have changed the negative phrasing of section 1349 to an apparently affirmative grant of federal-question jurisdiction over a qualifying corporation.<sup>249</sup> A new revision should follow the *1969 Study* in the first respect: it should also rephrase section 1349 as an affirmative grant of jurisdiction. The negative phrasing of current section 1349 would deny federal-question jurisdiction even over federally controlled corporations if sec-

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to the outer limit of federal judicial power under Article III. See *Red Cross*, 505 U.S. at 251 n.3, 260 n.12.

<sup>246</sup> See *Jackson v. Tennessee Valley Auth.*, 462 F. Supp. 45, 51 (M.D. Tenn. 1978) (disallowing jurisdiction unless United States owns more than half of corporation's capital stock), *aff'd*, 595 F.2d 1120 (6th Cir. 1979); *Central Nat'l Bank v. Reconstruction Fin. Corp.*, 134 F. Supp. 873, 875 (N.D. Ill. 1955) (stating that § 1349 limits rather than grants jurisdiction).

<sup>247</sup> See, e.g., *Hancock Fin. Corp. v. Federal Sav. & Loan Ins. Corp.*, 492 F.2d 1325, 1329 (9th Cir. 1974); *Stop the Olympic Prison v. United States Olympic Comm.*, 489 F. Supp. 1112, 1117 (S.D.N.Y. 1980).

<sup>248</sup> See, e.g., *Government Nat'l Mortgage Ass'n v. Terry*, 608 F.2d 614, 620 (5th Cir. 1979); *Collins v. American Red Cross*, 724 F. Supp. 353, 355 (E.D. Pa. 1989); *C.H. v. American Red Cross*, 684 F. Supp. 1018, 1021 (E.D. Mo. 1987); *Jackson*, 462 F. Supp. at 51. The validity of the Red Cross cases is questionable in light of the Supreme Court's subsequent determination that section 1349 is inapplicable to statutory charter cases. See *Red Cross*, 505 U.S. at 251 n.3, 260 n.12. See generally Christina Maistrellis, Comment, *American National Red Cross v. S.G. & A.E.: An Open Door to the Federal Courts for Federally Chartered Corporations*, 45 EMORY L.J. 771, 779 (1996) (discussing how federally chartered corporations may have independent grants of original jurisdiction in their charters).

<sup>249</sup> See 1969 STUDY, *supra* note 3, at 42, 271. The qualification reflects the fact that the change from negative to affirmative phrasing is highlighted in the commentary to the *1969 Study*. See *id.* at 271. The explanatory note appended directly to the proposed text of subsection 1324(a) declares it to be based "without change of substance" on the present text of section 1349. See *id.* at 42.



tion 1331 were to be reformed or reconceptualized so that federal incorporation was no longer a ground for jurisdiction thereunder. But the *1969 Study's* suggested affirmative language merits further study to avoid conflict with the Supreme Court's most recent construction of the jurisdictional effect of a sue-and-be-sued clause in a federal corporate charter.<sup>250</sup> This Prospectus is equivocal regarding section 1349's inclusion on the short list.

#### 19. Section 1350: Alien's Action for Tort

The major issue dividing the circuits in the application of the Alien Tort Statute is whether it is merely jurisdictional, or also the source of a substantive right to sue that would not otherwise exist as a matter of federal law.<sup>251</sup> Most courts have agreed upon the latter, substantive interpretation.<sup>252</sup> This interpretation makes section 1350 important, but not for jurisdictional purposes. If, indeed, it creates a federal cause of action, its jurisdictional language is redundant of section 1331, which encompasses any suit upon a federally created cause of action.

Section 1350 is jurisdictionally more interesting under the minority view that it merely provides a jurisdictional basis to enforce substantive rights created elsewhere.<sup>253</sup> To the extent

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<sup>250</sup> In its recent *Red Cross* opinion, the Supreme Court differentiated between statutory charter cases and federal incorporation cases. See *Red Cross*, 505 U.S. at 251. The language of the *1969 Study* could be construed as limiting the reach of the statutory charter cases to federally controlled corporations, which would be consistent with the result in *Red Cross* but not its reasoning.

<sup>251</sup> Compare *Art Metal-USA, Inc. v. United States*, 753 F.2d 1151, 1157 (D.C. Cir. 1985) (stating that Alien Tort Statute is jurisdictional and does not give rise to cause of action), and *Goldstar S.A. v. United States*, 967 F.2d 965, 967 (4th Cir. 1992) (noting that Alien Tort Statute has been interpreted as jurisdictional statute), with *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994) (finding that Alien Tort Statute creates cause of action).

<sup>252</sup> The seminal case is *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). The Ninth Circuit joined the Second Circuit in concluding that the Alien Tort Act creates a cause of action for fundamental human rights violations. See *In re Estate of Ferdinand Marcos*, 25 F.3d at 1475 (quoting *Filartiga*, 630 F.2d at 885); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993) (stating that § 1350 clearly authorizes remedies for aliens); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1538 (N.D. Cal. 1987) (recognizing growing consensus that § 1350 provides cause of action as well as jurisdiction), *recons. granted in part*, 694 F. Supp. 707 (N.D. Cal. 1988); *Handel v. Artukovic*, 601 F. Supp. 1421, 1426-27 (C.D. Cal. 1985) (interpreting language of § 1350 as explicitly granting cause of action).

<sup>253</sup> See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 779 (D.C. Cir. 1984) (Bork, J., concurring); cf. *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246, 256-57

that a suit under section 1350 is premised upon a right of action created elsewhere by federal law, such as a treaty provision, it again is redundant of section 1331. However, to the extent that a suit under section 1350 is premised upon a nonfederal right of action, created by state law or even international law, but not incorporated into federal statutory, treaty, or common law as such, then section 1350 is not jurisdictionally redundant except where diversity or alienage jurisdiction might exist. No such case has yet arisen, but it would pose provocative questions of the constitutional scope and limits of congressional power to grant federal jurisdiction based on a federal element or ingredient of a nonfederal cause of action or on a litigant's alienage.

The debate over the proper construction of the Alien Tort Statute is not of the sort that would profit from the Institute's attention. This is certainly true in a project focused upon clarification of the Judicial Code rather than the foreign policy of the United States. Actions brought under section 1350 generally raise sensitive issues regarding the scope of federal law as a means of redress for international human-rights violations allegedly committed by defendants who are later amenable to process in the United States.<sup>254</sup> It is invoked infrequently and should

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(D.D.C. 1985) (discussing splintered nature of judgment in *Tel-Oren*, 726 F.2d at 774, which was decided two-to-one with each member of three-judge panel writing separately). A number of other cases have followed or are consistent with Judge Bork's *Tel-Oren* opinion. *See, e.g.*, *Jones v. Petty Ray Geophysical Geosource, Inc.*, 722 F. Supp. 343, 348 (S.D. Tex. 1989) (stating that § 1350 merely serves as entrance into federal courts and does not provide cause of action); *Jaffe v. Boyles*, 616 F. Supp. 1371, 1378 (W.D.N.Y. 1985) (stating that provisions of § 1350 are jurisdictional and do not create cause of action for plaintiff seeking recovery under treaty). For a pre-*Filartiga* decision of the Second Circuit, see *Dreyfus v. Von Finck*, 534 F.2d 24, 28 (2d Cir. 1976), which states that section 1350 does not create a cause of action for recovery under a treaty.

<sup>254</sup> *See, e.g.*, *Xuncax v. Gramajo*, 886 F. Supp. 162, 180 (D. Mass. 1995). The leading case has become *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995), reaffirming *Filartiga* and upholding federal jurisdiction under section 1350 of claims based on acts of torture and murder allegedly committed against Bosnian Herzegovinians by Bosnian Serbs. Numerous federal courts have since taken cognizance under section 1350 of claims alleging torture committed in other countries. *See, e.g.*, *Abebe-Jira v. Negewo*, 72 F.3d 844, 846-48 (11th Cir. 1996) (holding that § 1350 provides private right of action for alien from Ethiopia alleging violation of international law); *Alvarez-Machain v. United States*, 107 F.3d 696, 702 (9th Cir. 1996) (stating that § 1350 provides aliens civil action for tort committed in violation of law of nations or U.S. treaty); *Hilao v. Estate of Marcos*, 103 F.3d 789, 793 (9th Cir. 1996) (holding that § 1350 provides jurisdiction for alien from Philippines for tort committed in violation of international law); *Doe v. Unocal Corp.*, 963 F. Supp. 880, 890 (C.D. Cal. 1997) (finding federal court jurisdiction for claims brought by Burmese citizens under § 1350);

be left as is until its policy ramifications have been conclusively resolved.<sup>255</sup>

## 20. Section 1351: Consuls, Vice Consuls, and Members of a Diplomatic Mission as Defendant

Section 1351 is in no sense redundant. Its overriding purpose is not to confer federal jurisdiction but to make it exclusive.<sup>256</sup> It sweeps all civil litigation against foreign envoys into the federal courts without concern for the substantive basis in state or federal law of the claims in question.<sup>257</sup> The necessity of a federal forum doubtless reflects concern for proper enforcement of the relevant immunity doctrines, as well as for the dignity of the defendants and the potential implication of the foreign relations of the United States.

Only a handful of reported cases discuss or even cite section 1351, and only a few of these discuss its interpretation or implementation in any way.<sup>258</sup> If the Institute revises section 1351 without substantive change, there is room for marginal technical improvement. The following points found in the case law could be articulated in the statute as revised: (1) jurisdiction

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*Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1193-94 (S.D.N.Y. 1996) (finding that § 1350 provides personal jurisdiction to Ghanaian citizen for claim alleging acts of torture). The lone exception is a case in which the alien defendants were foreign sovereigns within the scope of section 1330 and the other provisions of the FSIA. See *Hirsh v. State of Israel*, 962 F. Supp. 377, 385 (S.D.N.Y. 1997) (holding that § 1350 does not provide jurisdiction over foreign sovereigns of Israel and Germany).

<sup>255</sup> There has been a great deal of recent scholarship on the Alien Tort Statute. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); William S. Dodge, *Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221 (1996); Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (1997); John M. Walker, Jr., *Domestic Adjudication of International Human Rights Violations Under the Alien Tort Statute*, 41 ST. LOUIS U. L.J. 539 (1997); Edward A. Amley, Jr., Note, *Sue and Be Recognized: Collecting § 1350 Judgments Abroad*, 107 YALE L.J. 2177 (1998). Judge Walker's article is of particular interest because he sat on the panel that decided *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

<sup>256</sup> See 28 U.S.C. § 1351 (1994) (stating that original jurisdiction over consuls, vice-consuls, and members of diplomatic mission is exclusive of state courts).

<sup>257</sup> See *id.*; see also *Davis v. Packard*, 32 U.S. (1 Pet.) 276, 281-82 (1833) (stating that state courts cannot claim jurisdiction over foreign consuls with respect to civil claims).

<sup>258</sup> See *infra* notes 259-61 and accompanying text (discussing few cases dealing with § 1351).

under section 1351 may be limited by treaty;<sup>259</sup> (2) it has no application to American citizens serving as honorary consuls of foreign states;<sup>260</sup> and (3) it has no application to family members of consular officials as opposed to officials of a diplomatic mission.<sup>261</sup> Overall, however, this Prospectus concludes that inclusion or exclusion of section 1351 on the short list is insignificant to the Institute's goals.

## 21. Section 1352: Bonds Executed Under Federal Law

The 1969 Study concluded that section 1352 should be repealed as redundant<sup>262</sup> if, as the Institute recommended,<sup>263</sup> the requirement of a jurisdictional amount were removed from the general federal-question statute. Because Congress enacted the latter recommendation in 1980, retaining section 1352 serves no purpose. It has long been settled that actions upon federal bonds arise under federal law for purposes of the general federal-question statute.<sup>264</sup> Furthermore, no independent purpose is served by section 1352's reiteration of the exclusive jurisdiction of the Court of International Trade over certain bond-enforcement proceedings.<sup>265</sup> Although one may still find citations to section 1352 in decisions reported after 1980, the cases either turn on substantive issues or negate the jurisdictional significance of section 1352.<sup>266</sup> The only purpose that a revised section 1352 might serve would be as a platform for reenacting, as part of title 28, the provisions of other legislation. An example

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<sup>259</sup> See *Risk v. Halvorsen*, 936 F.2d 393, 397 (9th Cir. 1991).

<sup>260</sup> See *Foxgord v. Hirschmoeller*, 820 F.2d 1030, 1037 (9th Cir. 1987).

<sup>261</sup> See *Anderson v. Villela*, 210 F. Supp. 791, 792 (D. Mass. 1962).

<sup>262</sup> See 1969 STUDY, *supra* note 3, at 520.

<sup>263</sup> See *id.* at 24-25.

<sup>264</sup> See *Feibelman v. Packard*, 109 U.S. 421, 423-24 (1883).

<sup>265</sup> See *supra* notes 190-94 and accompanying text (discussing § 1340).

<sup>266</sup> See, e.g., *Operating Eng'rs Health and Welfare Trust Fund v. JWJ Contracting*, 135 F.3d 671, 676 (9th Cir. 1998) (finding § 1352 inapplicable because bonds in question were not executed under laws of United States); *Del Hur, Inc. v. National Union Fire Ins. Co.*, 94 F.3d 548, 549 (9th Cir. 1996) (affirming decision that subject-matter jurisdiction under § 1352 was lacking because issuance of bond was not required by U.S. law); *United States v. Insurance Co. of N. Am.*, 131 F.3d 1037, 1042 n.8 (D.D.C. 1997) (distinguishing existence of federal jurisdiction to enforce federally required bond, as under § 1352, from existence of federal substantive law governing construction of federally required bonds, and holding that state law applied for lack of any such federal substantive law).

of such legislation is the Miller Act,<sup>267</sup> which makes actions on certain federally required bonds subject to the exclusive jurisdiction of the district courts.<sup>268</sup> Thus, this Prospectus concludes that the short list's inclusion or exclusion of section 1352 is insignificant to the Institute's goals.

## 22. Section 1353: Indian Allotments

Section 1353 is "a jurisdictional recodification of 25 U.S.C. § 345."<sup>269</sup> However, it also has substantive force; it specifies the effect of a judgment and has a limited waiver of federal sovereign immunity.<sup>270</sup> As used in section 1353, "allotment" is a term of art with a narrow meaning that excludes most litigation involving Indian lands.<sup>271</sup> Although jurisdiction under section 1353 extends to actions against third parties to quiet title to allotted land, it does not waive federal sovereign immunity when the United States is the rival claimant.<sup>272</sup> The *1969 Study* deemed the jurisdictional component of section 1353 to be redundant of a general grant of federal-question jurisdiction that required no jurisdictional amount; it recommended that the substantive provisions be transferred to title 25.<sup>273</sup> The baffling developments that have since occurred in this highly specialized area of federal law confirm the essential wisdom of this ap-

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<sup>267</sup> 40 U.S.C. § 270b(b) (1994).

<sup>268</sup> See 1969 STUDY, *supra* note 3, at 24-25, 183-87, 497 (citing 28 U.S.C. § 1311(b) and discussing reasons for retaining exclusivity of federal jurisdiction in Miller Act cases).

<sup>269</sup> Brooks v. Nez Perce County, 394 F. Supp. 869, 873 (D. Idaho 1975).

<sup>270</sup> See 13 WRIGHT ET AL., *supra* note 55, § 3579, at 259-60 nn.9-10.

<sup>271</sup> See *id.* at 260 n.11. See generally Johnston v. Staley, 830 F. Supp. 1376, 1378-79 (D. Kan. 1993) (discussing two elements needed for jurisdiction under § 1353).

<sup>272</sup> See United States v. Mottaz, 476 U.S. 834, 845-46 (1986).

<sup>273</sup> See 1969 STUDY, *supra* note 3, at 415, 509 (commenting that causes of action for civil disputes involving Indian allotments of land arise under Acts of Congress and, thus, fall within federal-question jurisdiction). Insofar as the Institute regarded any suit under 28 U.S.C. § 1353 as one that would also qualify for jurisdiction under 28 U.S.C. § 1331, once section 1331's jurisdictional amount were repealed, it was remarkably prescient. It was held in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974), that suits to establish Indian title to land are uniquely federal in character for the purposes of section 1331 and the well-pleaded-complaint rule. Although it was later stated in *Mottaz*, 476 U.S. at 846 & n.9, that 25 U.S.C. § 345 and 28 U.S.C. § 1353 jointly confer on the federal courts "general subject matter jurisdiction over [all] claims to quiet title to allotments brought by Indians," whether or not the United States is a party, this would appear to be redundant of the jurisdictional scope of section 1331 as construed in *Oneida*.

proach, that Indian law should be addressed independently of general jurisdictional reform of title 28.<sup>274</sup> The Institute should defer reform of section 1353<sup>275</sup> and the cognate provisions of sections 1360 and 1362 until such time as the Institute chooses to embark on an independent project on Indian law.

### 23. Section 1354: Land Grants from Different States

Section 1354 grants federal jurisdiction over disputes regarding land grants from different states.<sup>276</sup> The *1969 Study* recommended repeal of this section on the ground that in modern times such disputes “will normally be between citizens of differ-

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<sup>274</sup> A brief survey of this confusing law was presented in an appendix on Indian law that accompanied the submission of this Prospectus to the Institute in September 1995. This appendix was not substantial enough to warrant updating and reprinting as part of the published version of this Prospectus. Two of the Supreme Court’s most recent opinions in this field amply suffice as alternative means to demonstrate the arcane and complex nature of Indian law. The Court addressed the jurisdictionally significant concept of “Indian country,” as defined by the three subsections of 18 U.S.C. § 1151 (1994). Noting that “[g]enerally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and with the Indian tribe inhabiting it, and not with the States,” *Alaska v. Native Village of Venetie Tribal Gov’t*, 118 S. Ct. 948, 952 n.1 (1998), the Court there upheld the primary jurisdiction of the state by narrowly construing subsection (b) of section 1151, which defines “Indian country” in terms of “dependent Indian communities.” In *South Dakota v. Yankton Sioux Tribe*, 118 S. Ct. 789 (1998), the Court dealt with the other two subsections of section 1151. Applying the cardinal rule that “Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights,” *see id.* at 798, the Court concluded that a reservation established by treaty in 1858 had been diminished by a process of allotment and divestiture under statutes enacted in 1887 and 1894. Thus, the Court held that a landfill site on unallotted former reservation land was not within “Indian country” as defined by subsection 1151(a) (reservation land) or subsection 1151(c) (Indian allotments) and, hence, was subject to state environmental regulation.

The “Indian country” issue is just one of many factors bearing on state or federal jurisdiction of Indian affairs. *See Kiowa Tribe v. Manufacturing Techs., Inc.*, No. 96-1037, 1998 WL 260001 (U.S. May 26, 1998). *See generally* John W. Gillingham, *Pathfinder: Tribal, Federal, and State Court Subject Matter Jurisdictional Bounds. Suits Involving Native American Interests*, 18 AM. INDIAN L. REV. 73 (1993) (proposing nine-factor test for state-court jurisdiction); *see also* Melissa L. Koehn, *Civil Jurisdiction: The Boundaries Between Federal and Tribal Courts*, 29 ARIZ. ST. L.J. 705 (1997); Symposium, *Indian Law into the Twenty-First Century*, 72 WASH. L. REV. 995 (1997); Symposium, *Indian Tribal Courts and Justice*, 79 JUDICATURE 110 (1995) [hereinafter Symposium, *Tribal Courts*].

<sup>275</sup> For examples of the nuances of interpretation confronting and sometimes dividing courts under section 1353, *see Morongo Band of Mission Indians v. California State Board of Equalization*, 858 F.2d 1376 (9th Cir. 1988), *Coleman v. United States Bureau of Indian Affairs*, 715 F.2d 1156 (7th Cir. 1983), and *Keechi v. United States*, 604 F. Supp. 267 (D.D.C. 1984).

<sup>276</sup> *See* 28 U.S.C. § 1354 (1994).

ent states.”<sup>277</sup> Two subsequent cases involving competing claims under Washington and Oregon law to islands in the Columbia River suggest that the Institute’s obituary of section 1354 may have been premature.<sup>278</sup> The corpse having shown signs of life, it would be prudent to leave section 1354 untouched in a revision of chapter 85.

#### 24. Section 1355: Fine, Penalty or Forfeiture

Section 1355 confers on the district courts exclusive jurisdiction to enforce fines, penalties, or forfeitures incurred under federal statute.<sup>279</sup> In 1992, Congress amended section 1355 to add a superfluous exception for cases within the jurisdiction of the Court of International Trade.<sup>280</sup> As discussed above in connection with sections 1340 and 1352, the exclusion of matters within the jurisdiction of the Court of International Trade lacks independent significance given the expressly exclusive nature of all jurisdiction vested in that court.<sup>281</sup> Nonetheless, the elimination of the jurisdictional-amount requirement from section 1331 did not render section 1355 redundant, in contradistinction to sections 1340 and 1352. Unlike the general grant of federal-question jurisdiction under section 1331, the jurisdiction that section 1355 vests in the district courts is exclusive of the jurisdiction of state courts.<sup>282</sup> Indeed, the better view of section 1355 is that it overlaps with sections 1345 and 1346 but

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<sup>277</sup> See 1969 STUDY, *supra* note 3, at 411.

<sup>278</sup> In *Port of Portland v. Tri-Club Islands, Inc.*, 315 F. Supp. 1160 (D. Or. 1970), a state-court quiet-title action was removed to federal court. Although some of the defendants were co-citizens of the Oregon plaintiff, the district court upheld removal jurisdiction on the ground that original jurisdiction could have been invoked under section 1354. Original jurisdiction was upheld on similar grounds in *Port of Portland v. An Island in Columbia River*, 326 F. Supp. 291 (D. Or. 1971), *rev'd on other grounds*, 479 F.2d 549 (9th Cir. 1973). In neither case did the district court have occasion to discuss whether, had section 1354 been repealed, federal jurisdiction might have been properly invoked under the interpleader statute, section 1335.

<sup>279</sup> See 28 U.S.C. § 1355 (1994).

<sup>280</sup> See Act of Oct. 28, 1992, Pub. L. No. 102-550, tit. XV, § 1321, 106 Stat. 4062.

<sup>281</sup> The exclusion was added in 1980 by the legislation changing the Customs Court to the Court of International Trade. See Act of Oct. 10, 1980, Pub. L. No. 96-417, § 507, 94 Stat. 1743.

<sup>282</sup> In the only case to discuss the matter, it was held that section 1355 is exclusive of the jurisdiction of state courts but not of tribal courts. See *United States v. Plainbull*, 957 F.2d 724, 726-27 (9th Cir. 1992).

does not otherwise parallel section 1331. Thus, section 1355 applies only to suits by or against the United States or federal officers rather than to suits between private parties.<sup>283</sup>

The frequent use of asset forfeiture proceedings in the prosecution of the “war on drugs” has brought new prominence to section 1355.<sup>284</sup> Section 1395 and cognate provisions of other

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<sup>283</sup> Were section 1355 construed otherwise, it would divest state courts of their concurrent jurisdiction over all federal private rights of action to recover particular “penalties,” such as treble damages. See *Sipe v. Amerada Hess Corp.*, 689 F.2d 396, 406 (3d Cir. 1982) (holding § 1355 inapplicable to private litigation but noting lingering uncertainty about issue). While there is language appearing to invoke section 1355 jurisdiction over private civil litigation in *Brown v. First National City Bank*, 503 F.2d 114, 117 (2d Cir. 1974), it should be discounted for three reasons: first, there was no discussion of the point; second, section 1337 was cited as an alternative basis for the jurisdiction of the district court, see *id.* at 117; and third, the court declared in dicta that it would have upheld a *Burford* abstention had it been ordered by the district court or requested by the defendant, see *id.* at 118. The claim for penalties sought by the class-action plaintiff was grounded exclusively on provisions of state law that had yet to be construed by state courts. See *id.* at 117. If the court had resolved that section 1355 was the source of the district court’s jurisdiction, it would have followed that federal jurisdiction was exclusive and abstention would have been impossible for lack of concurrent state-court jurisdiction.

While section 1355 does not confer jurisdiction over suits for penalties between private litigants, its reference to suits “for the recovery” as well as the enforcement “of any [statutory] fine, penalty, or forfeiture,” clearly does authorize suits by private parties against the government to recover property unlawfully taken by the government as a fine, penalty, or forfeiture without judicial proceedings or other lawful authority. See *Griekspoor v. United States*, 511 F.2d 137, 138 (5th Cir. 1975) (vacating and remanding based on confession of error by United States). As such, it waives the sovereign immunity of the United States and modifies the jurisdictional scheme by which claims to recover money or other property from the government are otherwise allocated to the Court of Federal Claims, the Court of International Trade, and to the district courts by the terms of section 1346. See *South Windsor Convalescent Home, Inc. v. Mathews*, 541 F.2d 910, 912 n.1 (2d Cir. 1976) (discussing distinction between jurisdiction of district courts under § 1355 and jurisdiction of claims court over “ordinary contractual claims for the recovery of monies”). This aspect of section 1355 was not discussed in the *1969 Study*, which called for the repeal of section 1355 as redundant of section 1345 and, insofar as private suits are authorized, as redundant of section 1331 if its jurisdictional amount were eliminated. See 1969 STUDY, *supra* note 3, at 184-85.

<sup>284</sup> See John B. Oakley, *Proceedings of the Western Regional Conference on State-Federal Judicial Relationships*, 155 F.R.D. 233, 256 (1993); Gary R. Brown, *Reforming Civil Forfeiture Law: The Case for an Automatic Stay Provision*, 67 ST. JOHN’S L. REV. 705, 705 (1993) (stating that recent expansion of forfeiture statutes resulted primarily from war on drugs); Karen L. Fisher, *Federal Court Jurisdiction in Civil Forfeitures of Personal Property Pursuant to the Comprehensive Drug Abuse Prevention and Control Act*, 26 IND. L. REV. 657, 657 (1993) (discussing increasing use of forfeiture since introduction of zero-tolerance policy for war on drugs in March 1988); Douglas Kim, *Asset Forfeiture: Giving up Your Constitutional Rights*, 19 CAMPBELL L. REV. 527, 533-34 (1997) (discussing expansion of forfeiture statutes in response to war on crime).



titles dealing specifically with crimes and drug trafficking<sup>285</sup> provide exceptionally broad venue choices for a section 1355 proceeding.<sup>286</sup> A split in authority developed as to whether the necessity of in-rem jurisdiction over the property in question was an independent constraint narrowing the choice of the district courts in which a section 1355 action could be brought against particular property.<sup>287</sup> In 1992, Congress added subsections (b) through (d) to section 1355.<sup>288</sup> There is no dispute that this amendment both further expanded the venue options for section 1355 actions and eliminated any independent jurisdictional constraint beyond the due process limits on the nationwide territorial jurisdiction of the federal court system.<sup>289</sup>

The 1969 Study's unequivocal recommendation for repeal of section 1355 perhaps was predicated on a misunderstanding of section 1355's independent significance as a waiver of federal sovereign immunity.<sup>290</sup> In any event it was addressed to a version of the statute that was both less complex and less frequently invoked than the current statute. As section 1355 stands today, it is part of an intricate jurisdictional apparatus for suits by and against the government whose revision should be left, if at all, to a project focused exclusively on government litigation.<sup>291</sup>

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<sup>285</sup> See 18 U.S.C.A. § 981(h) (West Supp. 1998); 21 U.S.C.A. § 881(j) (West Supp. 1998).

<sup>286</sup> See 28 U.S.C. § 1355 (1994) (stating that forfeiture actions may be brought in district court where any acts or omissions giving rise to forfeiture occurred).

<sup>287</sup> Compare *United States v. 2050 Brickell Ave.*, 681 F. Supp. 309, 313 (E.D.N.C. 1988) (holding that in-rem territorial jurisdiction is limited only by notice and reasonableness), and *United States v. One 1974 Cessna Model 310R Aircraft*, 432 F. Supp. 364, 368 (D.S.C. 1977) (finding that district court's jurisdiction in forfeiture proceeding is only limited by territorial limits of nation), with *United States v. Contents of Accounts Nos. 3034504504 & 144-07143*, 971 F.2d 974, 984 (3d Cir. 1992) (stating that without in-rem jurisdiction, district court lacks authority to hear res case), *United States v. One Lear Jet Aircraft*, 836 F.2d 1571, 1573 (11th Cir. 1988) (concluding that general rule for in-rem jurisdiction is that district court's power is derived entirely from defendant's property), and *United States v. United States Funds in Amount of \$3,035,648.50*, No. CIV-91-217E, 1991 WL 236843, at \*3 (W.D.N.Y. Nov. 4, 1991) (requiring in-rem jurisdiction in addition to proper venue).

<sup>288</sup> See Act of Oct. 28, 1992, Pub. L. No. 102-550, § 1521, 106 Stat. 4062 (broadening venue for § 1355 actions and property subject to forfeiture).

<sup>289</sup> See *United States v. Contents of Account No. 2033301*, 831 F. Supp. 337, 339 (S.D.N.Y. 1993) (discussing legislative history of 1992 amendment of § 1355). A circuit split has developed, however, as to the retroactive effect of the 1992 amendment. Compare *United States v. 51 Pieces of Real Property*, 17 F.3d 1306, 1312 (10th Cir. 1994) (denying retroactive application), with *United States v. Certain Funds Contained in Account Nos. 600-306211-006*, 96 F.3d 20, 21-27 (2d Cir. 1996) (sustaining retroactive application).

<sup>290</sup> See 1969 STUDY, *supra* note 3, at 184-85.

<sup>291</sup> Cf. *Linarez v. United States Dep't of Justice*, 2 F.3d 208, 213 (7th Cir. 1993) (stating

This Prospectus cannot presently recommend outright repeal of section 1355, although clarification and transfer of its provisions elsewhere in the United States Code may well be justified. The currently intense interrelationship between section 1355 and enforcement of important and politically sensitive policies of federal criminal law provides an additional reason to abstain from attempting to revise section 1355 as part of this project simply because section 1355 happens to be located within chapter 85.

## 25. Section 1356: Seizures Not Within Admiralty and Maritime Jurisdiction

Section 1356 confers on the district courts exclusive jurisdiction of any seizure under federal law, except those within the jurisdiction of admiralty courts or the Court of International Trade.<sup>292</sup> The *1969 Study* linked the recommended repeal of section 1355 to similar treatment of section 1356, which it deemed similarly anachronistic and redundant of other jurisdictional grants in title 28 and elsewhere.<sup>293</sup> Unlike section 1355, section 1356 is basically unchanged since 1969.<sup>294</sup> It is rarely invoked, never successfully, and the few reported cases establish that it does not waive federal sovereign immunity.<sup>295</sup> Its repeal

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that forfeiture cannot be challenged in district court if claim could have been raised in administrative proceeding but was not); *Onwubiko v. United States*, 969 F.2d 1392, 1398 (2d Cir. 1992) (discussing complex provisions for administrative and judicial review of federal seizures and disagreeing on degree of exclusivity of administrative remedies). The circuits have become deeply split over the consequences of the seizure of property under section 1355 from an individual who did not receive the prior notice and hearing that are constitutionally required in the absence of exigent circumstances. *See generally* *United States v. Marsh*, 105 F.3d 927, 931 (4th Cir. 1997) (rejecting rule of Eighth and Eleventh Circuits, requiring dismissal of forfeiture action, in favor of rule of Seventh, Ninth, and Tenth Circuits, requiring only accounting for loss of use during period of wrongful seizure).

<sup>292</sup> *See* 28 U.S.C. § 1356 (1994).

<sup>293</sup> *See* 1969 STUDY, *supra* note 3, at 184-86.

<sup>294</sup> An exclusion of cases within the jurisdiction of the Court of International Trade was added in 1980. *See* Act of Oct. 10, 1980, Pub. L. No. 96-417, § 508, 94 Stat. 1743. As previously discussed in connection with sections 1340 and 1352, this exclusion lacks independent significance.

<sup>295</sup> *See generally* *Hunsucker v. Phinney*, 497 F.2d 29, 35 (5th Cir. 1974) (noting that § 1356 rarely has jurisdictional significance); *Johnston v. Earle*, 245 F.2d 793, 794 (9th Cir. 1957) (finding that federal courts have no jurisdiction under § 1356 for damages for conversion); *Murray v. United States*, 520 F. Supp. 1207, 1209 (D.N.D. 1981) (stating that exist-

remains warranted.<sup>296</sup> This Prospectus concludes that the inclusion or exclusion of section 1356 on the short list is insignificant to the Institute's goals.

## 26. Section 1357: Injuries Under Federal Laws

Section 1357 is a curious and little-used statute. It is curious because of its internal ambiguity. It authorizes original federal jurisdiction without regard to the amount in controversy of any civil action to recover damages for injuries suffered by the plaintiff "on account of any act done by him, under any Act of Congress, for the protection or collection of any of the revenues, or to enforce the right of citizens of the United States to vote in any State."<sup>297</sup> The final clause can be read merely to expand the scope of the federal statutes whose enforcement is the predicate for injury actionable under section 1357 by including within that class not only tax and customs statutes but also the various federal voting-rights acts. Alternatively, the final clause can be read so that two distinct types of civil actions fall within section 1357: those to recover damages suffered in the course of enforcing the revenue laws and those to enforce the right to vote.<sup>298</sup> By this construction, the plaintiff need not be a federal officer if the suit is to enforce the plaintiff's voting rights, and the last clause "is quite redundant in view of 28 U.S.C. § 1343(4) (now subsection 1343(a)(4)) and the numerous other statutes giving jurisdiction of voting rights cases."<sup>299</sup>

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ing cases fail to confer jurisdiction or to waive immunity), *aff'd*, 686 F.2d 1320 (8th Cir. 1982).

<sup>296</sup> Both sections 1355 and 1356 declare the jurisdiction granted by those statutes to be "exclusive of the courts of the States." See 28 U.S.C. §§ 1355-1356 (1994). As the 1969 Study pointed out with respect to section 1355, this provision is unnecessary insofar as the jurisdiction thus extended pertains to actions brought by the United States. See 1969 STUDY, *supra* note 3, at 184. The general grant of jurisdiction over actions brought by the United States as plaintiff under section 1345 plainly provides the requisite jurisdiction and properly leaves the choice whether to sue in federal or state court to the United States. See *id.* "The United States can protect itself by its choice of forum." See *id.*

<sup>297</sup> See 28 U.S.C. § 1357 (1994).

<sup>298</sup> See *id.* Compare *Crawford v. Johnson*, 6 F. Cas. 777 (C.C.D. Or. 1868) (No. 3369) (allowing cause of action to recover damages suffered while enforcing revenue laws), with *Mabry v. Davis*, 232 F. Supp. 930, 933 n.6 (W.D. Tex. 1964) (allowing cause of action in case to enforce right to vote).

<sup>299</sup> See 1969 STUDY, *supra* note 3, at 267.

Yet this redundant use is the only use to which it has ever been put. This has been true certainly since it was codified in its present form in 1948 and apparently for the eighty years preceding that date.<sup>300</sup> Faced with a dichotomy between the experience of section 1357's redundancy in practice and the logic of the role it ought in principle to play in a federal system, the *1969 Study* logically concluded that section 1357 should not only be retained, but also be expanded in scope.<sup>301</sup> Reasoning that an injured federal officer suing under section 1357 would be seeking to vindicate rights under state law and, hence, would not likely have access to federal court on conventional, statutory federal-question grounds, the *1969 Study* recast section 1357 as a special grant of federal-question jurisdiction extended to the outer limits of Article III.<sup>302</sup> It premised its protection of federal officers on the jurisdiction-conferring ingredient that the injuries must be alleged to have resulted from action under color of federal law — any federal law, not just those relating to federal revenues and voting rights.<sup>303</sup>

Although the Institute's recommendation had the flavor of a rejoinder to Holmes — the common law may be driven by experience,<sup>304</sup> but statutory law should hew to logic — its reference to the need to protect “federal marshals enforcing integration orders” reflects a classically Holmesian combination of idealism and pragmatism in responding to the felt necessities of the time.<sup>305</sup> Thirty years after the civil-rights revolution there is rea-

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<sup>300</sup> The *1969 Study* reported that section 1357 and its predecessors had been cited only three times, twice in voting-rights cases and once, in 1868, in a suit by a tax collector. *See id.* at 267-68. The tax collector sought to recover injuries caused by a bonded deputy under circumstances that today would indisputably invoke federal-question jurisdiction under sections 1331 and 1352. *See id.* at 268. The only subsequent citations have continued to be in voting-rights cases, in which section 1357 is recited as an alterative ground for the jurisdiction also conferred by sections 1331 and 1343. *See, e.g.,* *United Jewish Orgs., Inc. v. Wilson*, 510 F.2d 512, 519 (2d Cir. 1975), *aff'd*, 430 U.S. 144 (1977); *Jackson v. Nassau County Bd. of Supervisors*, 818 F. Supp. 509, 510 (E.D.N.Y. 1993); *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 686 (D. Ariz. 1992), *aff'd*, 507 U.S. 981 (1993).

<sup>301</sup> *See* 1969 STUDY, *supra* note 3, at 268.

<sup>302</sup> *See id.* at 266-68.

<sup>303</sup> *See id.* at 41, 266-68.

<sup>304</sup> *See* OLIVER W. HOLMES, JR., *THE COMMON LAW* 1 (1881) (“The life of the law has not been logic: it has been experience.”).

<sup>305</sup> *See* 1969 STUDY, *supra* note 3, at 268 (commenting that § 1357, if needed at all, is needed to provide federal forum for those injured while enforcing federal law).

son to question whether logic or a yet more noble motive justifies rescuing section 1357 from desuetude or redundancy. Were the Institute to revise section 1357, it should follow the path proposed in 1969. However, there is little cause in present circumstances to expand the scope of the project on this account alone.

## 27. Section 1358: Eminent Domain

Section 1358 extends federal jurisdiction to condemnation proceedings brought by the federal government.<sup>306</sup> With two exceptions,<sup>307</sup> all reported cases invoking jurisdiction under section 1358 could have been brought under sections 1331 and 1345.<sup>308</sup> Some cases have ruled that jurisdiction under section 1358 extends to related title disputes affecting interests in condemned land, but any special applicability of section 1358 to such issues is now clearly subsumed within the general supplemental-jurisdiction statute, section 1367.<sup>309</sup> The exceptional cases deal with inverse-condemnation suits in which the plaintiff landowner sought relief against the United States.<sup>310</sup> Other cases have persuasively ruled that section 1358 applies only to suits initiated by the United States.<sup>311</sup> The more recent of the two exceptional cases makes the obvious point that even if applicable in the inverse-condemnation context, section 1358 is redundant in light of section 1346.<sup>312</sup> Section 1358 merits outright repeal. However, because it involves suits to which the federal government is a party, that reform should be relegated to a project addressed specifically to governmental litigation.

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<sup>306</sup> See 28 U.S.C. § 1358 (1994).

<sup>307</sup> See *Weber v. United States*, No. 69 C 228, 1970 WL 442, at \*2 (N.D. Ill. Dec. 29, 1970); *Reeves v. United States*, 217 F. Supp. 939, 940 (D. Or. 1963).

<sup>308</sup> This was also the apparent conclusion of the *1969 Study*, which without discussion noted that section 1358 was subsumed within the Institute's proposed statutes granting general federal-question jurisdiction and jurisdiction over actions in which the United States was the plaintiff. See 1969 STUDY, *supra* note 3, at 521.

<sup>309</sup> See *United States v. 88.28 Acres of Land*, 608 F.2d 708, 714 (7th Cir. 1979); *United States v. 1,629.6 Acres of Land*, 503 F.2d 764, 766 (3d Cir. 1974); *United States v. 29.16 Acres*, 496 F. Supp. 924, 927 (E.D. Pa. 1980).

<sup>310</sup> See, e.g., *Weber*, 1970 WL 442, at \*2.

<sup>311</sup> See, e.g., *Ledford v. Corps of Eng'rs*, 500 F.2d 26, 28 (6th Cir. 1974); *Turtzo v. United States*, 347 F. Supp. 336, 337 (E.D. Pa. 1972).

<sup>312</sup> See *Weber*, 1970 WL 442, at \*2.

## 28. Section 1359: Parties Collusively Joined or Made

Section 1359 bars federal jurisdiction in cases where any party has been improperly or collusively joined to invoke federal jurisdiction.<sup>313</sup> The need to reexamine the scope and terms of section 1359 is contingent on the project's treatment of diversity jurisdiction in general. Section 1359 constituted one of the 1948 Code's frankest attempts at reform rather than revision. Since 1789 the general diversity statute had been qualified by the "assignee clause," which looked to the diversity status of the assignor to determine whether federal jurisdiction existed in a suit upon an assigned promissory note or other chose in action.<sup>314</sup> Section 1359 replaced this objective limit on diversity jurisdiction with a more general but expressly subjective disqualification of cases in which federal jurisdiction was invoked by "improperly or collusively" manipulating the identity of the parties or the nature of their claims.<sup>315</sup>

The Supreme Court has construed section 1359 only in the narrow context of a manifestly sham assignment in which the assignor retained a ninety-five percent interest in the proceeds of the assignee's enforcement of the claim — an assignment that the Court of course held jurisdictionally unavailing under section 1359.<sup>316</sup> There exist a host of other devices to create or defeat diversity jurisdiction.<sup>317</sup> Section 1359 falls far short of providing a comprehensive test for evaluating the effectiveness of these various manipulations.

On its face, section 1359 does not address contrivances to defeat rather than to create federal jurisdiction.<sup>318</sup> Many ques-

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<sup>313</sup> See 28 U.S.C. § 1359 (1994).

<sup>314</sup> See WRIGHT, *supra* note 14, § 31, at 181.

<sup>315</sup> See 28 U.S.C. § 1359.

<sup>316</sup> See *Kramer v. Caribbean Mills*, 394 U.S. 823, 828-29 (1969).

<sup>317</sup> See generally WRIGHT, *supra* note 14, § 31, at 184-89 (discussing creation of diversity jurisdiction by change of citizenship or selective joinder of parties and defeat of diversity jurisdiction by joinder of nondiverse parties or limitation of amount in controversy).

<sup>318</sup> See *id.* at 186. *But cf.* *Grassi v. Ciba-Geigy, Ltd.*, 894 F.2d 181, 182-86 (5th Cir. 1990) (holding that federal courts have inherent authority to disregard partial assignments when used collusively to defeat diversity-based right of removal); *Gentle v. Lamb-Weston, Inc.*, 302 F. Supp. 161, 163 (D. Me. 1969) (invoking § 1359 by analogy to disregard collusive partial assignment by plaintiffs to co-citizen of defendants in order to defeat defendants' right of removal); WRIGHT, *supra* note 14, § 31, at 186 (declaring that courts are acting pragmatically in "refusing to allow artificial devices to be as effective as they formerly were

tions remain as to its proper application to the whole range of jurisdictionally motivated stratagems and its relationship to other, conflicting principles of diversity jurisdiction. These include the irrelevance of the motivation leading to the plaintiff's acquisition of a new state of domicile<sup>319</sup> or corporate citizenship,<sup>320</sup> and the plaintiff's control of the amount in controversy.<sup>321</sup> Courts have not yet decided whether a bona fide assignment, involving real transfer of the assignor's interest in the claim, will trigger section 1359 when the motive of the transfer is to confer jurisdiction.<sup>322</sup> Even where collusion clearly would render an assignment ineffective to confer diversity jurisdiction, determining what counts as collusion for purposes of section 1359 remains challenging, to say the least.<sup>323</sup>

The 1969 Study devoted extensive consideration to section 1359 and related problems of jurisdictional manipulation in the diversity context.<sup>324</sup> The study proposed a much-expanded set of prohibitions on devices to create or defeat jurisdiction, whether by assignment, appointment, or otherwise.<sup>325</sup> If the Institute elects to look closely at the general topic of diversity jurisdiction and its interrelationship with supplemental jurisdiction,<sup>326</sup> its focus should extend to section 1359. The Institute

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in defeating diversity").

<sup>319</sup> See *Williamson v. Osenton*, 232 U.S. 619, 625 (1914) (finding that even if motivated by ability to bring suit in federal court, change in domicile is effective if parties intend to make it their home for indefinite time). *But see* *Morris v. Gilmer*, 129 U.S. 315, 328-29 (1889) (holding that plaintiff's motivation is relevant to determine whether putative change of domicile is genuine).

<sup>320</sup> See *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 524 (1928).

<sup>321</sup> See *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938) (establishing that requisite amount in controversy requires only good-faith claim by plaintiff); *Iowa Cent. Ry. Co. v. Bacon*, 236 U.S. 305, 310 (1915) (allowing plaintiff to defeat removal by voluntarily limiting amount claimed).

<sup>322</sup> See *Steele v. Hartford Fire Ins. Co.*, 788 F.2d 441, 444 (7th Cir. 1986).

<sup>323</sup> See *Airlines Reporting Corp. v. S & N Travel, Inc.*, 58 F.3d 857, 862-63 (2d Cir. 1995) (presuming that assignment between closely related entities is collusive and refusing to follow contrary Seventh Circuit authority). *But see* *Herzog Contracting Corp. v. McGowen Corp.*, 976 F.2d 1062, 1067 (7th Cir. 1992) (inferring that judge could not disregard sworn evidence contradicting collusive theory).

<sup>324</sup> See 1969 STUDY, *supra* note 3, at 22, 156-61.

<sup>325</sup> See *id.* The use of appointed representatives to confer or defeat diversity jurisdiction was also addressed in subsection 1301(b)(4) of the 1969 Study, and that recommendation was adopted virtually verbatim in the 1988 legislation enacting 28 U.S.C. § 1332(c)(2), ending a pronounced circuit split. See *WRIGHT*, *supra* note 14, § 29, at 175.

<sup>326</sup> See *infra* notes 352-63 and accompanying text (discussing supplemental jurisdiction

should examine the possible benefits of incorporating it in revised form directly into an omnibus statute. Such a statute would both specify the scope of general diversity jurisdiction and deal comprehensively with such related questions as the criteria for determining diversity, the alignment of parties, and the computation of the amount in controversy.

## 29. Section 1360: State Civil Jurisdiction in Actions to Which Indians Are Parties

Section 1360 permits state courts to exercise civil jurisdiction over Indians with respect to cases arising within "Indian country" in certain designated states.<sup>327</sup> The *1969 Study* determined that section 1360 did not belong in chapter 85 of the Judicial Code. The Institute found that it was irrelevant to the jurisdiction of the district courts because it dealt with state jurisdiction over Indians and enumerated substantive rules regarding that jurisdiction.<sup>328</sup> As previously discussed in connection with section 1353, the *1969 Study* wisely recommended that Indian law should be addressed independently of general jurisdictional reform of title 28, with the existing provisions of sections 1353 and 1360 transferred to title 25.<sup>329</sup> This deflection of Indian-law issues should not be taken as a recommendation that they be disregarded. The United States Department of Justice would welcome Institute consideration of this important but confused and perplexing body of law.<sup>330</sup> Thus, this Prospectus recommends that section 1360 be excluded from the short list and instead be the subject of a separate project.

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in connection with § 1367); *see also* *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 375 n.17 (1978) (noting tangential relationship of § 1359 to supplemental jurisdiction).

<sup>327</sup> *See* 28 U.S.C. § 1360 (1994).

<sup>328</sup> *See* 1969 STUDY, *supra* note 3, at 414.

<sup>329</sup> *See id.*

<sup>330</sup> *See* Interview with Renée M. Landers, Deputy Assistant General, Office of Policy Development (June 23, 1994) (notes on file with author). For recent commentary demonstrating that this area of federal jurisdiction remains confused and perplexing, *see* Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31 (1996), Koehn, *supra* note 274, Laurie Reynolds, *Adjudication in Indian Country: The Confusing Parameters of State, Federal, and Tribal Jurisdiction*, 38 WM. & MARY L. REV. 539 (1997), and Symposium, *Tribal Courts*, *supra* note 274.



30. Section 1361: Action to Compel an Officer of the United States to Perform a Duty

Section 1361 grants district courts original jurisdiction of any mandamus action to compel a U.S. officer, employee, or agent to perform a duty.<sup>331</sup> The 1969 Study recommended no change in section 1361, other than to incorporate it into a general provision on suits by and against government officers.<sup>332</sup> The study noted that the statute's force and its problems were primarily of a substantive nature and, hence, were beyond the scope of a jurisdictional project.<sup>333</sup>

Since the elimination of section 1331's jurisdictional amount, the independent jurisdictional effect of section 1361 is of scant importance. The recurrent issues litigated under the rubric of section 1361 are its status as a waiver of federal sovereign immunity<sup>334</sup> and its relationship to provisions such as 42 U.S.C. § 405(h) that independently limit or channel judicial review of administrative action.<sup>335</sup> These are important issues, but it is

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<sup>331</sup> See 28 U.S.C. § 1361 (1994).

<sup>332</sup> See 1969 STUDY, *supra* note 3, at 41.

<sup>333</sup> See *id.* at 269-70.

<sup>334</sup> See, e.g., *McClain v. Panama Canal Comm'n*, 834 F.2d 452, 454 (5th Cir. 1987); *Vishnevsky v. United States*, 581 F.2d 1249, 1257 (7th Cir. 1978). However, there are other decisions holding that section 1361 does not waive federal sovereign immunity. See, e.g., *Doe v. Civiletti*, 635 F.2d 88, 94 (2d Cir. 1980); *Hill v. United States*, 571 F.2d 1098, 1101 n.5 (9th Cir. 1978); *Essex v. Vinal*, 499 F.2d 226, 231-32 (8th Cir. 1974); *McQueary v. Laird*, 449 F.2d 608, 611 (10th Cir. 1971); see also, e.g., *WRIGHT*, *supra* note 14, § 22, at 131 (noting that some issues of sovereign immunity under § 1361 were mooted by 1976 amendment to 5 U.S.C. § 702, expressly waiving federal sovereign immunity as defense to certain actions). The issue of sovereign immunity was held to merge with the merits in a mandamus action seeking disclosure of alleged public documents. See *Washington Legal Found. v. United States Sentencing Comm'n*, 89 F.3d 897, 902 (D.C. Cir. 1996).

<sup>335</sup> In the words of one leading case: "§ 405(h) does not preclude assertion of § 1361 jurisdiction over claims essentially procedural in nature." *Ellis v. Blum*, 643 F.2d 68, 82 (2d Cir. 1981). The point continues to be litigated although no circuit split has developed. See, e.g., *Burnett v. Bowen*, 830 F.2d 731, 737-38 (7th Cir. 1987) (concluding that Congress did not intend § 405(h) to limit mandamus jurisdiction); *Ganem v. Heckler*, 746 F.2d 844, 850 (D.C. Cir. 1984) (holding that mandamus jurisdiction is not precluded by § 405(h)); *Kuehner v. Schweiker*, 717 F.2d 813, 819 (3d Cir. 1983) (holding that district court's jurisdiction remains unaffected by § 405(h)); *Lopez v. Heckler*, 713 F.2d 1432, 1438 n.9 (9th Cir. 1983) (noting that § 1361 would also have provided basis for district court's jurisdiction although court found jurisdiction under § 405(g)).

An analogous issue was presented in *Rogers v. Ink*, 766 F.2d 430 (10th Cir. 1985), where without expressly invoking section 1361 the plaintiffs sought declaratory and injunctive relief under the Administrative Procedure Act to force the defendant federal officials

even more apparent today than in 1969 that they are beyond the scope of a jurisdictional project. As with repeal or reform of section 1336, the Institute should leave revision of section 1361 to such time as it elects to study the general topic of federal judicial review of administrative action.

### 31. Section 1362: Indian Tribes

Congress enacted the remaining sections of chapter 85 after the completion of the *1969 Study*. Section 1362 deals with Indian-law matters, but unlike sections 1353 and 1360, it cannot be said to be out of place. Whether it is redundant is another matter.

Congress enacted section 1362 in response to a case requiring Indian tribes to litigate an important question of federal law in state court solely for lack of the jurisdictional amount then required under section 1331.<sup>336</sup> Unquestionably, Congress meant for section 1362 to allow such litigation to proceed in federal court, whatever the amount in controversy.<sup>337</sup> If that were conceded to be the only purpose of section 1362, it should be repealed as obsolete. But there is continuing debate as to whether section 1362 is indeed so limited in effect.

Some cases have held that the well-pleaded complaint rule applied under section 1331 does not limit the jurisdiction granted by section 1362.<sup>338</sup> The Supreme Court's recognition that

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to release certain federal grant funds. *See id.* at 432. The issue was not whether federal sovereign immunity had been waived but rather which waiver had priority. *See id.* The court held that the case was within the exclusive jurisdiction of the Claims Court (now Court of Federal Claims) under subsection 1346(b). *See id.* at 436. "A party may not circumvent the Claims Court's exclusive jurisdiction by framing a complaint in the district court as one seeking injunctive, declaratory or mandatory relief where the thrust of the suit is to obtain money from the United States." *Id.* at 434.

<sup>336</sup> *See Yoder v. Assiniboine & Sioux Tribes of Fort Peck Indian Reservation*, 339 F.2d 360, 364 (9th Cir. 1964).

<sup>337</sup> *See 13B WRIGHT ET AL., supra* note 55, § 3579.

<sup>338</sup> The Second Circuit has stated that the sole purpose of section 1362 was to remove any requirement of jurisdictional amount. *See Oneida Indian Nation v. County of Oneida*, 464 F.2d 916, 919 n.4 (2d Cir. 1972), *rev'd on other grounds*, 414 U.S. 661 (1974). The dissent in *Oneida*, however, believed that section 1362 should be construed more broadly than section 1331, and the "well-pleaded complaint" rule is, thus, not applicable to section 1362. *See id.* at 924-25. The dissent argued, based on legislative history, that section 1362 was intended to ensure that Indian tribes "have a forum to which they could go themselves when government departments and agencies declined to represent them." *See id.* at 924. A

aside from problems of statutory construction, normal principles of federal-question jurisdiction do not apply in the Indian-law context, complicates the issue.<sup>339</sup> Another lingering issue is the effect of section 1362 in waiving federal sovereign immunity.<sup>340</sup>

Rather than deal with these issues in isolation, they should be addressed only as part of a larger project on Indian law. In the meantime section 1362 is innocuous enough to be left as is, neither repealed nor revised.

### 32. Section 1363: Jurors' Employment Rights

No clearer case could be presented of a special jurisdictional grant that should be repealed as obsolete than section 1363. Section 1363 is the jurisdictional counterpart of subsection 1875(b), which expressly confers on federal jurors a private

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number of cases have adopted the dissent's view. *See, e.g.*, *Moses v. Kinnear*, 490 F.2d 21, 25 (9th Cir. 1973); *Fort Mojave Tribe v. Lafollette*, 478 F.2d 1016, 1018 (9th Cir. 1973); *Salt River Pima-Maricopa Indian Community v. Arizona Sand and Rock Co.*, 353 F. Supp. 1098, 1100 (D. Ariz. 1972).

The Supreme Court addressed this issue in *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976). There the Court ruled that the legislative history of section 1362 shows "that Congress contemplated that a tribe's access to federal court to litigate a matter arising 'under the Constitution, laws, or treaties' would be at least in some respects as broad as that of the United States suing as the tribe's trustee." *Id.* at 473. However, after *Moe*, the Ninth Circuit declined to interpret "arising under" in section 1362 more broadly than the identical language in section 1331. *See Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708, 709 (9th Cir. 1980). The *Gila* court found inadequate support that Congress meant to grant jurisdiction under section 1362 for a tribe to file suit every time the United States could bring an action for the tribe under 25 U.S.C. § 175. *See id.* at 714. It reasoned that all the cases that would extend the jurisdictional reach of section 1362 involved possessory rights of the tribes to tribal lands whereas the case at bar was a breach of contract case. *See id.* at 714-15. The Supreme Court addressed the issue again, stating that the enactment of section 1362 reflected Congress's opposition to restricting Indians to state court when the United States could have filed an identical suit on their behalf in federal court. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 560 n.10 (1983).

<sup>339</sup> *See Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974).

<sup>340</sup> A second issue that has arisen is whether section 1362 constitutes an abrogation of state sovereign immunity under the Eleventh Amendment. This was the view of some lower courts, *see, e.g.*, *Oneida Indian Nation v. New York*, 691 F.2d 1070, 1080 (2d Cir. 1982), but the Supreme Court later held that section 1362 was not intended to affect state sovereign immunity. *See Blatchford v. Native Village and Circle Village*, 501 U.S. 775, 783-88 (1991). Nor does section 1362 waive federal sovereign immunity in a suit for money damages against the United States. *See Rosebud Sioux Tribe v. United States*, 714 F. Supp. 1546, 1553 (D.S.D. 1989).

right of action to seek damages, injunctive relief, and civil penalties from employers who violate the broad prohibition against burdening jury service set forth in subsection 1875(a). In 1978, Congress enacted section 1363, which suspended the amount-in-controversy requirement for such actions,<sup>341</sup> just two years before Congress repealed section 1331's jurisdictional amount.<sup>342</sup> Although the rights granted by section 1875 are important and in at least two instances have required vindication by courts citing section 1363 as the basis for their jurisdiction,<sup>343</sup> section 1331 provides a fully adequate, alternative ground for jurisdiction. Thus, this Prospectus is equivocal regarding section 1363's inclusion on the short list.

33. Sections 1364 to 1366: Direct Actions Against Insurers of Members of Diplomatic Missions and Their Families; Senate Actions; Construction of References to Laws of the United States or Acts of Congress

It is indicative of the haphazard nature of sections 1364 to 1366 that for eight years each coexisted simultaneously as one of three completely unrelated sections that were nonetheless each independently enumerated as "section 1364" of the Judicial Code.<sup>344</sup> Only section 1366 has more than a marginal basis for being included in chapter 85, but none is causing particular inconvenience.

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<sup>341</sup> See Act of Nov. 2, 1978, Pub. L. No. 95-572, § 6(b)(1), 92 Stat. 2457 (codified at 28 U.S.C. § 1363).

<sup>342</sup> See Act of Dec. 1, 1980, Pub. L. No. 96-486, 94 Stat. 2369 (codified at 28 U.S.C. § 1331 (1994)).

<sup>343</sup> See *Johnson v. Appliance & T.V. Ctr., Inc.*, No. CIV.A. 86-601-D, 1987 WL 16942, at \*8 n.1 (M.D.N.C. May 7, 1987); *In re Webb*, 586 F. Supp. 1480, 1481 n.1 (N.D. Ohio 1984).

<sup>344</sup> This high point of legislative attention to the organization of the Judicial Code resulted from the enactment of three different bills in 1978. The current section 1366 was originally enacted in 1970 as section 1363, Act of July 29, 1970, Pub. L. No. 91-358, § 172(c)(1), 84 Stat. 590, but was renumbered as section 1364 when present section 1363 was added in 1978, Act of Nov. 2, 1978, Pub. L. No. 95-572, § 6(b)(1), 92 Stat. 2456. Present section 1364 was also enacted in 1978, Act of Sept. 30, 1978, Pub. L. No. 95-393, § 7(a), 92 Stat. 809, as was present section 1365, which as enacted was also numbered section 1364, Act of Oct. 29, 1978, Pub. L. No. 95-521, § 705(f)(1), 92 Stat. 1879. It is quite astounding that it took eight years for Congress to rectify this duplicative numbering. See Act of June 19, 1986, Pub. L. No. 99-336, § 6(a), 100 Stat. 633, 638-39.

Section 1364 is primarily a substantive provision creating a right of direct action against the liability insurer of a tortfeasor entitled to diplomatic immunity.<sup>345</sup> Its only nonredundant jurisdictional aspect is its declaration that the private right of action it creates is triable exclusively in federal court.<sup>346</sup>

Section 1365 creates a highly specialized cause of action for declaratory relief to determine the validity of a Senate subpoena.<sup>347</sup> Although rarely invoked, it has recently played a prominent role in a case of national importance.<sup>348</sup> Its only nonredundant jurisdictional significance, however, arises from the implicit exclusive jurisdiction it vests in the United States District Court for the District of Columbia.<sup>349</sup>

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<sup>345</sup> The legislative history of section 1364 has been discussed in two reported opinions. In *Madoo v. Globe American Casualty Co.*, 650 F. Supp. 855 (D. Md. 1986), the court ruled that the “diplomatic immunity of the mission member from civil suit at the time the complaint is filed is a necessary prerequisite to the exercise of jurisdiction under the direct action statute, 28 U.S.C. § 1364.” *Id.* at 857. This decision was legislatively overruled by the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204, § 138(a), 101 Stat. 1347 (1987). In *Windsor v. State Farm Insurance Co.*, 509 F. Supp. 342 (D.D.C. 1981), the court held that the statute was not applicable retroactively to an accident that occurred before its effective date. *See id.* at 347.

<sup>346</sup> *See* 28 U.S.C. 1364(a) (1994).

<sup>347</sup> An excellent yet succinct summary of the legislative history of section 1365, including an account of the reason for its limitation to only one of the houses of Congress, is provided by *In re United States Senate Permanent Subcomm. on Investigations*, 655 F.2d 1232, 1238 (D.C. Cir. 1981). Section 1365 was amended by the Act of Oct. 11, 1996, Pub. L. No. 104-292, § 4, 110 Stat. 3460. Pursuant to the last sentence of subsection 1365(a), this provision was formerly inapplicable to determine the scope of the Senate’s subpoena power with respect to an officer or employee of the “Federal Government acting within his official capacity.” As amended, this exclusion was limited to a dispute with a recalcitrant witness who is an officer or employee of the “executive branch of the Federal Government acting within his or her official capacity,” subject to the additional proviso that declaratory relief may be sought under section 1365 even with respect to such an official-capacity, executive-branch witness, provided that the privilege invoked by the witness is personal in nature rather than an official privilege authorized by the executive branch. There is no legislative history or committee report that speaks to this amendment, but it would appear to be addressed to situations in which an official of the executive branch, subpoenaed by a Senate committee, refuses to testify and invokes his or her Fifth Amendment privilege against self-incrimination. For insight into the tensions that produced section 1365 and a brief bit of legislative history written prior to the 1996 amendment, see Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal — Do Nothing*, 48 ADMIN. L. REV. 109, 117 (1996).

<sup>348</sup> *See* Senate Select Comm. on Ethics v. Packwood, 845 F. Supp. 17, 21 (D.D.C. 1994) (involving subpoena ordered to inspect Senator Packwood’s personal diaries).

<sup>349</sup> *See* Helms v. Master and/or Captain of SS Marshal Konev, 620 F. Supp. 1488, 1489 (E.D. La. 1985).

Congress enacted section 1366 to close the circle of the reorganization of the local court system of the District of Columbia.<sup>350</sup> It ensures that the general federal-question jurisdiction of the district courts does not intrude upon the jurisdiction of the local courts of the District of Columbia.<sup>351</sup> This Prospectus concludes that the short list's inclusion or exclusion of sections 1364 through 1366 is insignificant to the Institute's goals.

#### 34. Section 1367: Supplemental Jurisdiction

In response to the Supreme Court's decision in *Finley v. United States*,<sup>352</sup> in 1990 Congress enacted section 1367's comprehensive grant of supplemental jurisdiction to the district courts.<sup>353</sup> Some commentators consider section 1367 to be as misbegotten as the decision that provoked it.<sup>354</sup> Although the case law is not nearly as tortured as the apocalyptic literature would suggest, the statute is clearly flawed and needs repair.<sup>355</sup>

<sup>350</sup> See *Palmore v. United States*, 411 U.S. 389, 395 n.5 (1973).

<sup>351</sup> Cf. *Thomas v. Barry*, 729 F.2d 1469, 1471 (D.C. Cir. 1984) (finding that District of Columbia Home Rule Act of 1973 does not apply exclusively to District of Columbia; thus, its applicability may be challenged by general federal-question action under § 1331).

<sup>352</sup> 490 U.S. 545 (1989).

<sup>353</sup> See Judicial Improvements Act of 1990, Pub. L. No. 101-650, tit. III, § 310(a), 104 Stat. 5113.

<sup>354</sup> See Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445 (1991); see also Thomas C. Arthur & Richard D. Freer, *Close Enough for Government Work: What Happens When Congress Doesn't Do Its Job*, 40 EMORY L.J. 1007 (1991) [hereinafter Arthur & Freer, *Close Enough for Government Work*]; Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 963 (1991) [hereinafter Arthur & Freer, *Grasping at Burnt Straws*]. For additional criticism, but with less vitriol, see Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute — A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849 (1992), Karen N. Moore, *The Supplemental Jurisdiction Statute: An Important but Controversial Supplement to Federal Jurisdiction*, 41 EMORY L.J. 31, 64-67 (1992), and Wendy C. Perdue, *The New Supplemental Jurisdiction Statute — Flawed but Fixable*, 41 EMORY L.J. 69, 81-83 (1992).

<sup>355</sup> As described in the new Epilogue that concludes the published version of this Prospectus, revision of section 1367 has been the primary topic to date of the Institute's Federal Judicial Code Revision Project. See *infra* notes 716-25 and accompanying text. See generally AMERICAN LAW INSTITUTE, FEDERAL JUDICIAL CODE REVISION PROJECT: TENTATIVE DRAFT NO. 2 (1998) [hereinafter ALI TENTATIVE DRAFT NO. 2]. The following expanded bibliography is based on my Reporter's Note. See *id.* at 20-30.

The first wave of commentary began with a brief guide to present section 1367 by the three law professors most closely involved in its drafting. See Thomas D. Rowe et al., *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213

(1991). For discussion of the circumstances of enactment of the Judicial Improvements Act of 1990 and preliminary analysis of the impact of section 1367, see Oakley, *supra* note 31, at 736 & nn.1-2, 757-69.

Past commentators have discussed the scope and success of present section 1367. See generally Timothy E. Congrove, *A Look at Supplemental Jurisdiction Following its Codification*, 40 U. KAN. L. REV. 499 (1992); M. Ashley Harder, *Making a Federal Case out of It: Supplemental Jurisdiction Under 28 U.S.C. § 1367*, 22 U. BAL. L. REV. 67 (1992); Thomas Jamison, *Pendent Party Jurisdiction: Congress Giveth What the Eighth Circuit Taketh Away*, 17 WM. MITCHELL L. REV. 753 (1991); Walter Blaine Jenkins, II, *The Rise of "Supplemental Jurisdiction": Congress' Incomplete Answer to Questions Surrounding Ancillary and Pendent Jurisdiction*, 16 OKLA. CITY U. L. REV. 413 (1991); Ellen S. Mouchawar, *The Congressional Resurrection of Supplemental Jurisdiction in the Post-Finley Era*, 42 HASTINGS L.J. 1611 (1991); Thomas D. Rowe, Jr. et al., *A Coda on Supplemental Jurisdiction*, 40 EMORY L.J. 993 (1991); Thomas D. Rowe, Jr. et al., *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943 (1991) [hereinafter Rowe et al., *Reply to Freer*]; Jason C.N. Smith, *Update on Changes in Federal Jurisdiction: Supplemental Jurisdiction, Venue, and Removal*, 23 TEX. TECH L. REV. 571 (1992); Arthur D. Wolf, *Codification of Supplemental Jurisdiction: Anatomy of a Legislative Proposal*, 14 W. NEW ENG. L. REV. 1 (1992). In addition to Moore, *supra* note 354, and Perdue, *supra* note 354, three other articles are collected in Colloquy, *Perspectives on Supplemental Jurisdiction*, 41 EMORY L.J. 1 (1992); Erwin Chemerinsky, *Rationalizing Jurisdiction*, 41 EMORY L.J. 3 (1992), Rochelle Cooper Dreyfuss, *The Debate Over § 1367: Defining the Power to Define Federal Judicial Power*, 41 EMORY L.J. 13 (1992), and Joan Steinman, *Section 1367 — Another Party Heard From*, 41 EMORY L.J. 85 (1992).

More recently, other commentators have addressed present section 1367. See generally Susan Block-Lieb, *The Case Against Supplemental Bankruptcy Jurisdiction: A Constitutional, Statutory, and Policy Analysis*, 62 FORDHAM L. REV. 721 (1994); Jon D. Corey, *The Discretionary Exercise of Supplemental Jurisdiction Under the Supplemental Jurisdiction Statute*, 1995 BYU L. REV. 1263; Christopher M. Fairman, *Abdication to Academia: The Case of the Supplemental Jurisdiction Statute*, 28 U.S.C. § 1367, 19 SETON HALL LEGIS. J. 157 (1994); C. Douglas Floyd, *The ALLI, Supplemental Jurisdiction, and the Federal Constitutional Case*, 1995 BYU L. REV. 819; Darren J. Gold, *Supplemental Jurisdiction over Claims by Plaintiffs in Diversity Cases: Making Sense of 28 U.S.C. § 1367(b)*, 93 MICH. L. REV. 2133 (1995); Laura L. Hirschfeld, *The \$50,000 Question: Does Supplemental Jurisdiction Extend to Claims Between Diverse Parties Which Do Not Meet § 1332's Amount-in-Controversy Requirement?*, 68 TEMP. L. REV. 107 (1995); Marilyn J. Ireland, *Supplemental Jurisdiction over Claims in Intervention*, 23 N.M. L. REV. 57 (1993); Diane S. Kaplan, *A User's Guide to Supplemental Jurisdiction*, 27 U. TOL. L. REV. 85 (1995); Patrick D. Murphy, *A Federal Practitioner's Guide to Supplemental Jurisdiction Under 28 U.S.C. § 1367*, 78 MARQ. L. REV. 973 (1995); Kristen M. Niemi, *The "Noncontroversial" Statute: Have Expressed Concerns of U.S.C. § 1367 Come to Light?*, 72 U. DET. MERCY L. REV. 397 (1995); Shay S. Scott, *Supplemental Jurisdiction Under 28 U.S.C. § 1367*, 72 OR. L. REV. 695 (1993); Joan Steinman, *Supplemental Jurisdiction in § 1441 Removed Cases: An Unsurveyed Frontier of Congress' Handiwork*, 35 ARIZ. L. REV. 305 (1993); Afshin Ashourzadeh, Comment, *Supplemental Jurisdiction in Class Action Lawsuits: Recovering Supplemental Jurisdiction from the Jaws of Aggregation*, 26 SW. U. L. REV. 89 (1996); Amanda Dalton, Note, *Shanaghan v. Cahill: Supplementing Supplemental Jurisdiction*, 1996 BYU L. REV. 281; Elizabeth Delagardelle, Note, *Defining the Parameters of Supplemental Jurisdiction After 28 U.S.C. § 1367*, 43 DRAKE L. REV. 391 (1994); Christopher M. Green, Note, *Justice Scalia and Ancillary Jurisdiction: Teaching a Lame Duck New Tricks in Kokkoken v. Guardian Life Insurance Company of America*, 81 VA. L. REV. 1631 (1995); Mark Hutcheson, Comment, *Unintended Consequences: 28 U.S.C. § 1367's Effect on Diversity's Amount-in-Controversy Requirement*, 48 BAYLOR L. REV. 247 (1996); Heather

Section 1367 consists of five subsections. The fifth, subsection 1367(e), simply confers statehood status, for purposes of supplemental jurisdiction, on federally administered localities<sup>356</sup> in language similar to subsection 1332(d). Aside from whatever adjustment might be desirable to render consistent the language of the various statehood attributions sprinkled throughout chapters 85 through 89 of title 28,<sup>357</sup> it merits no further attention. The other four subsections of section 1367 are considered seriatim.

*a. Subsection 1367(a)*

Subsection 1367(a) begins with a sweeping grant of supplemental jurisdiction to the district courts “in any civil action of which the district courts have original jurisdiction.”<sup>358</sup> The

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McDaniel, Comment, *Plugging the “Gaping Hole”: The Effect of 28 U.S.C. § 1367 on the Complete Diversity Requirement of 28 U.S.C. § 1332*, 49 BAYLOR L. REV. 1069 (1997); Sean G. Saxon, Comment, *Civil Procedure — Free v. Abbott Laboratories: Supplemental Jurisdiction for Pendent Plaintiffs Becomes More Affordable*, 27 U. MEM. L. REV. 229 (1996); Christopher P. Simkins, Note & Comment, *Class Actions and Supplemental Jurisdiction: Will Zahn v. International Paper Co. Remain Viable?*, 1996 BYU L. REV. 707; Joel E. Tasca, Comment, *Judicial Interpretation of the Effect of the Supplemental Jurisdiction Statute on the Complete Amount in Controversy Rule: A Case for Plain Meaning Statutory Construction*, 46 EMORY L.J. 435 (1997).

<sup>356</sup> See 28 U.S.C. § 1367(e) (1994) (providing that these localities include District of Columbia, Puerto Rico, and other territories and possessions).

<sup>357</sup> Compare *id.* (stating that term “state” includes U.S. territories, District of Columbia, and Puerto Rico), and *id.* § 1332(d), with *id.* § 1343(b) (1994) (referring only to District of Columbia as state), and *id.* § 1451 (1994).

<sup>358</sup> See *id.* § 1367(a) (1994). In its only opinion to date construing section 1367, the Supreme Court has given literal effect to the fact that this sweeping grant of “supplemental jurisdiction” is not limited to “original jurisdiction.” See *City of Chicago v. International College of Surgeons*, 118 S. Ct. 523, 529 (1997).

In *City of Chicago*, the main issue was the removability of state-court litigation in which the plaintiff sought to overturn the adverse land-use rulings of a local administrative agency on a variety of grounds, some seeking on-the-record judicial review of the agency action for compliance with state law and others seeking to have the court resolve de novo various federal claims that the agency had acted unconstitutionally. See *id.* at 529-31. The Seventh Circuit had held that the state-law claims for on-the-record review of the validity of the agency action called for the exercise of appellate jurisdiction; hence, the litigation could not be removed: it did not fall with the right of removal provided by 28 U.S.C. § 1441(a) because it was not a “civil action . . . of which the district courts . . . have original jurisdiction . . . .” See *International College of Surgeons v. City of Chicago*, 91 F.3d 981, 987 (7th Cir. 1996). Reversing the Seventh Circuit but remanding the case for consideration of lingering issues of abstention and discretionary declination of supplemental jurisdiction, the Supreme Court’s majority held that the Seventh Circuit’s reasoning was foreclosed by the plain meaning of present § 1367(a). See *City of Chicago*, 118 S. Ct. at 529. The federal



drafters elected to phrase this grant in mandatory language, subject only to the exceptions expressly provided by other federal statutes or set out in subsections (b) and (c) of section 1367.<sup>359</sup> Many of the perceived problems of section 1367 result from this mandatory structure. Had the drafters sought only to restore the *status quo ex ante* by overruling *Finley*, it would have sufficed to use permissive rather than mandatory language. They could have used the term “may” rather than “shall” in both sentences of subsection 1367(a)’s authorization of supplemental jurisdiction. This was essentially what the Federal Courts Study Committee recommended.<sup>360</sup> Had subsection 1367(a) been drafted to permit but not to require the exercise of supplemental jurisdiction by the district courts, it would have functioned to ratify the existing, relatively well-understood doctrines of “pendent” and “ancillary” jurisdiction. At the same time it would have answered *Finley*’s call for express statutory authority to extend these court-created doctrines to cases in which sound judicial administration demanded the joinder of claims against “pendent parties.”<sup>361</sup>

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constitutional claims were clearly within the original jurisdiction of the district courts, and the related state-law claims were, thus, within the supplemental jurisdiction granted by present subsection 1367(a). *See id.* at 530-31. The Court placed great weight on a supposed distinction between the “original jurisdiction” required to bring subsection 1367 into play and the broader “supplemental jurisdiction” it grants over all related claims joined to those within a district court’s original jurisdiction. *See id.* at 529-32.

Whatever the merits of the majority’s approach to statutory construction and its resulting reading of present subsection 1367(a), *City of Chicago* threatens to present the district courts with a flood of cross-system appeals seeking on-the-record judicial review of local administrative agencies’ compliance with state law. *See id.* at 534-35 (Ginsburg, J., dissenting). Such a far-reaching change in the historic function of the district courts should flow from more than a semantic wrinkle in a statute utterly devoid of any apparent purpose to accomplish that end. The revised wording of the new supplemental-jurisdiction statute proposed by the Institute, *see* ALI TENTATIVE DRAFT NO. 2, *supra* note 355, would restore this aspect of the law of supplemental jurisdiction to what it was before the Court’s surprising decision in *City of Chicago*.

<sup>359</sup> *See* ALI TENTATIVE DRAFT NO. 2, *supra* note 355.

<sup>360</sup> *See* FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 47-48 (1990) [hereinafter REPORT OF THE FEDERAL COURTS] (calling for Congress to “expressly authorize” exercise of supplemental jurisdiction by federal courts including claims of joinder of additional parties against whom plaintiff has closely related state claim).

<sup>361</sup> *See generally* Oakley, *supra* note 31, at 757-65.

By electing to use mandatory language in subsection 1367(a), the drafters had to make an awkward attempt to incorporate Article III's inchoate constitutional limit on the scope of supplemental jurisdiction by codifying the test outlined in *United Mine Workers of America v. Gibbs*.<sup>362</sup> The sweeping and mandatory régime of supplemental jurisdiction subsection 1367(a) thrust upon the district court also raises difficult issues of the possible preemption of nonstatutory supplemental jurisdiction.<sup>363</sup> Finally, the mandatory structure of subsection 1367(a) required Congress to add subsection 1367(b) to limit its reach in diversity cases.

*b. Subsection 1367(b)*

Even the drafters of subsection 1367(b) admit that its attempt to accommodate the rule of complete diversity to the otherwise mandatory scope of supplemental jurisdiction was imperfect.<sup>364</sup> Critics have been less charitable.<sup>365</sup> The subsection unsuccessfully attempts to do legislatively what the courts on their own could have done almost effortlessly had Congress phrased subsection 1367(a) permissively. Moreover, subsection 1367(b) seeks

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<sup>362</sup> See *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966) (stating that federal claim and pendent state claim must arise "from a common nucleus of operative fact"). The constitutional limits of supplemental jurisdiction remain unelaborated and controversial. See *Schlumberger Indus., Inc. v. National Sur. Corp.*, 36 F.3d 1274, 1278 n.8 (4th Cir. 1994).

<sup>363</sup> Although subsection 1367(a) might be construed as preemptive of any other form of supplemental jurisdiction, the Supreme Court has apparently concluded otherwise, albeit with little elaboration of the point. The Court held that a district court lacked ancillary jurisdiction to enforce a settlement agreement pursuant to which it had dismissed a diversity suit, but declared that ancillary jurisdiction to enforce the settlement agreement would have existed if the district court had reserved such jurisdiction at the time of the dismissal. See *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381-82 (1994). The Court elaborated on *Kokkonen*, declaring that "[a]ncillary enforcement jurisdiction is, at its core, a creature of necessity" to be invoked "only in extraordinary circumstances." See *Peacock v. Thomas*, 516 U.S. 349, 359 (1996). Such extraordinary circumstances were deemed lacking in *Peacock*, where the winner of a valid federal judgment against a corporate defendant had sought to invoke ancillary jurisdiction to support a claim against a third party who had conspired to strip assets from the defendant while the judgment remained unexecuted pending appeal.

<sup>364</sup> See H.R. REP. NO. 734, at 29; Rowe et al., *Reply to Freer*, *supra* note 355, at 961.

<sup>365</sup> See Arthur & Freer, *Close Enough for Government Work*, *supra* note 354, at 1007 (arguing that "the supplemental jurisdiction statute, particularly section 1367(b), is a nightmare of draftsmanship.").

to do more than merely preserve the limits on the judge-made doctrines of pendent and ancillary jurisdiction in diversity cases imposed by *Owen Equipment & Erection Co. v. Kroger*.<sup>366</sup> This has led to charges that subsection 1367(b) reflects a hidden agenda of hostility to diversity jurisdiction.<sup>367</sup>

Subsection 1367(b) surely was drafted with good intentions, whether or not one shares its reverence of the rule of complete diversity. But just as surely, its language is problematic, overbroad, and excessively detailed. Prominent among the many concerns discussed in the case law and literature are the following:

1. Should the exclusion of pendent-party jurisdiction in diversity cases extend to alienage cases? Or, should subsection (b)'s exclusions apply only to cases "of which the district courts have original jurisdiction founded solely on [sub]section 1332[(a)(1)] of this title"?<sup>368</sup>

2. Was it sensible to extend the pre-existing bar on supplemental jurisdiction to facilitate the joinder of necessary parties under rule 19 also to bar supplemental jurisdiction over claims by plaintiffs against necessary parties who intervene as of right under rule 24, and over claims by such parties themselves when they seek to intervene as plaintiffs?<sup>369</sup>

3. Is subsection 1367(b) inadvertently overbroad in prohibiting supplemental jurisdiction "over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24"? This language appears literally to bar resort to supplemental jurisdiction by plaintiffs who have been placed in a defensive posture by the assertion against them of counterclaims, cross-claims, or claims by third parties.<sup>370</sup> All agree that, once placed in such a defen-

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<sup>366</sup> 437 U.S. 365 (1978). See generally Oakley, *supra* note 31, at 765-66 & n.14 (noting that § 1367 abrogates supplemental jurisdiction formerly exercised over claims by interveners under FED. R. CIV. P. 24(a)).

<sup>367</sup> See, e.g., Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1820 (1992) (describing § 1367 as "guerrilla warfare on diversity jurisdiction").

<sup>368</sup> See Arthur & Freer, *Grasping at Burnt Straws*, *supra* note 354, at 978; Chemerinsky, *supra* note 355, at 4; Freer, *supra* note 354, at 474; Rowe et al., *Reply to Freer*, *supra* note 355, at 949.

<sup>369</sup> See Arthur & Freer, *Grasping at Burnt Straws*, *supra* note 354, at 970-71; Freer, *supra* note 354, at 471; McLaughlin, *supra* note 354, at 920-31, 940-41; Moore, *supra* note 354, at 49-51; Perdue, *supra* note 354, at 79-81; Rowe et al., *Reply to Freer*, *supra* note 355, at 958.

<sup>370</sup> See Arthur & Freer, *Grasping at Burnt Straws*, *supra* note 354, at 967-68; Freer, *supra*

sive posture, a plaintiff should be able to assert counterclaims or to bring in third parties for indemnification under rule 14 by invoking supplemental jurisdiction.<sup>371</sup> But there is substantial doubt whether subsection 1367(b) permits this.

4. What is the status of parties seeking to intervene as defendants — thereby avoiding subsection 1367(b)'s bar on supplemental jurisdiction over “claims by persons . . . seeking to intervene as plaintiffs under Rule 24” — but who assert cross-claims against the original defendants that might justify their realignment by the court as intervening plaintiffs?<sup>372</sup>

5. What is the status under subsection 1367(b) of the joinder of additional plaintiffs who are nondiverse from the sole defendant, or whose claims are for less than the jurisdictional amount required by section 1332, and who have been joined under rules 20 or 23 rather than rules 19 or 24? Because the sole defendant is not a person “made part[y] under Rule 14, 19, 20, or 24,” on its face subsection 1367(a) requires supplemental jurisdiction to be exercised in this context, and nothing in subsection 1367(b) qualifies that mandate.<sup>373</sup> In the jurisdictional-amount context, this results in the legislature overruling *Zahn v. International Paper Co.*<sup>374</sup> A recent, leading case has held that the express text of the statute mandates such a result despite disclaimers in the legislative history of subsection 1367(b) that are inconsistent with the statute's express text.<sup>375</sup>

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note 354, at 472; Moore, *supra* note 354, at 54-55; Rowe et al., *Reply to Freer*, *supra* note 355, at 950.

<sup>371</sup> See, e.g., Rowe et al., *Reply to Freer*, *supra* note 355, at 952.

<sup>372</sup> See Freer, *supra* note 354, at 472; Ireland, *supra* note 355 at 69-72.

<sup>373</sup> See Arthur & Freer, *Grasping at Burnt Straws*, *supra* note 354, at 973-74; Rowe et al., *Reply to Freer*, *supra* note 355, at 953.

<sup>374</sup> 414 U.S. 291 (1973).

<sup>375</sup> See *In re Abbott Labs.*, 51 F.3d 524, 528-29 (5th Cir. 1995). But see *In re Potash Antitrust Litig.*, 866 F. Supp. 406, 413 (D. Minn. 1994) (holding that § 1367 is not unambiguous and resorting to legislative history to hold that supplemental jurisdiction does not extend to claims of class members for less than jurisdictional amount).

The issue of the continuing validity of *Zahn* has continued to divide the lower courts. The Seventh Circuit has joined the Fifth Circuit in holding the plain meaning of section 1367 to have overruled *Zahn*. See *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928, 931 (7th Cir. 1996). However, district courts in other circuits have ruled to the contrary. See, e.g., *Russ v. State Farm Mut. Auto. Ins. Co.*, 961 F. Supp. 808, 818-20 (E.D. Pa. 1997) (collecting conflicting cases and concluding that § 1367 did not overrule *Zahn*, 414 U.S. at 291).

6. Does subsection 1367(b) apply at all to diversity actions predicated on removal jurisdiction rather than original jurisdiction?<sup>376</sup>

*c. Subsection 1367(c)*

Subsection (c) further qualifies the mandatory nature of the supplemental jurisdiction granted by subsection (a).<sup>377</sup> Unlike subsection 1367(b), however, subsection 1367(c) does not withdraw the jurisdiction granted by subsection 1367(a).<sup>378</sup> Subsection 1367(c) seeks instead to resurrect the element of judicial discretion in the exercise of supplemental jurisdiction that the mandatory phrasing of subsection 1367(a) needlessly extinguished.<sup>379</sup> Despite the putative intent of the language of subsection 1367(c) merely to codify the standards of discretion previously set forth in *Gibbs*, subsection (c) shares subsection (b)'s problems of hypertechnicality. There are manifest discrepancies between *Gibbs'* standards and the text of subsection 1367(c);<sup>380</sup> the circuits are split as to whether these discrepancies should be overlooked.<sup>381</sup>

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<sup>376</sup> See Freer, *supra* note 354, at 471-72; Rowe et al., *Reply to Freer*, *supra* note 355, at 949; Steinman, *supra* note 355, at 314.

<sup>377</sup> See 28 U.S.C. § 1367(c) (1994).

<sup>378</sup> See *id.*

<sup>379</sup> See Oakley, *supra* note 31, at 766.

<sup>380</sup> See *id.* at 766-68.

<sup>381</sup> See *Executive Software N. Am., Inc. v. United States Dist. Court*, 24 F.3d 1545, 1560 n.12 (9th Cir. 1994) (rejecting "broad dicta" in *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176 (7th Cir. 1993), to hold that discretion to decline supplemental jurisdiction under § 1367(c) is narrower than that previously existing under principles of *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715 (1966)); *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1182 (7th Cir. 1993) (stating that legislative history of § 1367 indicated intent to codify, not alter, judicially constructed principles of pendent jurisdiction). The First, Third, and D.C. Circuits have adopted the Seventh Circuit's approach, while the Second, Eighth, and Eleventh Circuits have aligned themselves with the Ninth Circuit's reading of subsection 1367(c). See *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, No. 97-7444, 1998 WL 153011, at \*3-\*4 (2d Cir. Apr. 3, 1998) (collecting cases).

In *City of Chicago v. International College of Surgeons*, 118 S. Ct. 523, 529, 533-34 (1997), the Court appeared to assume that subsection 1367(c) merely codified the *Gibbs* discretionary factors, but mentioned the point only in passing as it noted that issues of the discretionary exercise of supplemental jurisdiction remained to be decided after the case was remanded to the courts below. The Court did not rule definitively on the scope of discretion conferred by subsection 1367(c) or even acknowledge that the circuits were divided on this point. See *id.* at 529-34. The *City of Chicago* Court's reference to *Gibbs* as determinative

Among the other knotty issues that the lower courts have found presented by subsection 1367(c) are:

1. May a court dismiss or remand a supplemental claim under subsection 1367(c) for reasons that would not support abstention if original jurisdiction was present?<sup>382</sup>

2. When a foreign sovereign is impleaded as a third-party defendant in state-court litigation and removes the entire case to federal court under subsection 1441(d), may the claims between the original plaintiffs and defendants be remanded under subsection 1367(c)?<sup>383</sup>

3. Does subsection 1447(d) preclude appellate review of remand orders under subsection 1367(c)?<sup>384</sup>

4. Does subsection 1367(c) require dismissal or remand of supplemental claims if the "anchor" claim is disposed of prior to trial?<sup>385</sup>

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of the scope of discretion under subsection 1367(c) merely echoed the view of the Seventh Circuit in *Brazinski*. Because the case in question was being remanded to the Seventh Circuit, the Court's framing of the issues left open on remand in terms of the governing law of the relevant circuit does not support the inference that the Supreme Court has *sub silentio* resolved an unacknowledged circuit split.

<sup>382</sup> In *Brown v. Woodland Joint Unified School District*, No. CIV. S-91-0032-WBS/PAN, 1992 WL 361696, at \*5 (E.D. Cal. Apr. 2, 1992), the court held that it should not decline supplemental jurisdiction on grounds that would not warrant abstention. A contrary result was reached in *United States Financial Corp. v. Warfield*, 839 F. Supp. 684, 697 (D. Ariz. 1993).

<sup>383</sup> In a split opinion, the Eleventh Circuit held that the policies of subsection 1441(d) negated the discretion to remand under subsection 1367(c). See *In re Surinam Airways Holding Co.*, 974 F.2d 1255, 1260 (11th Cir. 1992). The *Surinam* court refused to follow a contrary pre-section 1367 case, *Aliferis v. American Airlines, Inc.*, 523 F. Supp. 1189 (E.D.N.Y. 1981).

<sup>384</sup> Although this issue has received extensive appellate consideration, courts unanimously agree that subsection 1367(c) remands are reviewable free of the bar of section 1447(d). See, e.g., *In re Prairie Island Dakota Sioux*, 21 F.3d 302, 304 (8th Cir. 1994); *PAS v. Travelers Ins. Co.*, 7 F.3d 349, 352 (3d Cir. 1993); *In re Surinam*, 974 F.2d at 1257 n.4. Although these cases all upheld review by mandamus, there is oblique authority for deeming a remand order appealable as of right as a collateral order. See *McDermott Int'l, Inc. v. Lloyds Underwriters*, 944 F.2d 1199, 1203 n.5 (5th Cir. 1991) (finding remand to enforce forum-selection clause not appealable as of right).

<sup>385</sup> The general view holds that dismissal or remand in such circumstances remains a matter of trial court discretion. See, e.g., *Brady v. Brown*, 51 F.3d 810 (9th Cir. 1995); *Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260 (D.C. Cir. 1995); *Welch v. Thompson*, 20 F.3d 636 (5th Cir. 1994). However, two circuits holding strongly opposing views on the retention issue appear to agree that district courts have scant discretion in such circumstances. Compare *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 738 (3d Cir. 1994) (stating that plaintiff's attempt to forum shop is strong reason to retain state law claims after district court dismisses federal law claims), with *Wentzka v. Gellman*, 991 F.2d

*d. Subsection 1367(d)*

Subsection (d) adds a tolling provision allowing a minimum period in which a plaintiff may refile in state court “any claim asserted under subsection (a)” that the district court has dismissed.<sup>386</sup> A plaintiff may also refile “any other claim in the same action” that the plaintiff voluntarily dismisses in order to refile the entire package of claims in state court.

There is uncertainty regarding the meaning of “any claim asserted under subsection (a).”<sup>387</sup> Does it apply to any claim that the plaintiff asserts under subsection (a) no matter how clear the exclusion of the claim from supplemental jurisdiction under subsection (b)? Alternatively, does it apply only to “any claim [properly] asserted under subsection (a)” that the district court dismissed not for lack of supplemental jurisdiction, but rather because the district court elected not to exercise supplemental jurisdiction for one of the discretionary reasons permitted by subsection 1367(c)? A close reading of the legislative history conclusively supports the latter construction.<sup>388</sup> Congress clearly intended subsection 1367(d) to facilitate discretionary dismissal under subsection 1367(c) by relieving courts of concerns about the inequitable consequences of state limitations law barring the dismissed claim from refiling.<sup>389</sup> This leaves exposed to serious prejudice the hapless plaintiff whose good-faith invocation of supplemental jurisdiction is frustrated, not by the operation of subsection 1367(c), but by the construction of a troubled subsection 1367(b) as barring supplemental jurisdiction. The solution, however, is to clarify subsection 1367(b) rather than to enact a general equitable tolling statute applicable whenever federal jurisdiction is defectively invoked. This Prospectus recommends that section 1367 should be included on the short list.

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423, 425 (7th Cir. 1993) (stating that district court should not retain state law claims after dismissing federal law claims unless extraordinary circumstances exist).

<sup>386</sup> See 28 U.S.C. § 1367(d) (1994).

<sup>387</sup> See *id.*

<sup>388</sup> See CHARLES ALAN WRIGHT & JOHN B. OAKLEY, *Supplement* to CHARLES T. MCCORMICK ET AL., *CASES AND MATERIALS ON FEDERAL COURTS* 68 (9th ed. 1997).

<sup>389</sup> See *id.* (distinguishing tolling of claims dismissed for discretionary reasons from nontolling of claims dismissed for lack of jurisdiction).

### 35. Section 1368: Counterclaims in Unfair Practices in International Trade

The Uruguay Round Agreements Act of December 8, 1994 added section 1368 to title 28.<sup>390</sup> It confers on the district courts "original jurisdiction of any civil action based on a counterclaim raised [in proceedings before the International Trade Commission ("ITC")] pursuant to subsection 337(c) of the Tariff Act of 1930." However, the counterclaim must be transactionally related to "the opposing party's claim in the [ITC] proceeding under section 337(a) of that Act."

At least to those whose expertise in matters of federal jurisdiction does not extend to specialized problems of international trade and the protection of intellectual property, section 1368 is something of a "stealth amendment." Congress adopted it on a "fast-track" basis to remedy international concerns that certain trade protection proceedings of the ITC under section 337 of the Tariff Act of 1930<sup>391</sup> violated the nondiscrimination provisions of the General Agreement on Tariffs and Trade.<sup>392</sup> Whether its location in chapter 85 will cause unintended mischief cannot presently be foreseen. Pending its construction and application, it would be premature to venture its revision, especially because it implicates highly specialized concerns of foreign policy. Thus, this Prospectus recommends that section 1368 be excluded from the short list.

#### *B. Chapter 87's Treatment of Venue and Transfers*

##### 1. Section 1391: Venue Generally

The general venue statute has received a good deal of recent congressional attention.<sup>393</sup> This has resulted in some welcome

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<sup>390</sup> See Pub. L. No. 103-465, § 321(b)(3)(A), 108 Stat. 4809, 4946-47 (1994).

<sup>391</sup> See 19 U.S.C.A. § 1337(c) (West Supp. 1998).

<sup>392</sup> See John B. Pegram, *Should the U.S. Court of International Trade Be Given Patent Jurisdiction Concurrent with that of the District Courts?*, 32 HOUS. L. REV. 67, 98-102 (1995).

<sup>393</sup> Subsection 1391(c) was comprehensively amended in 1988 in response to a 1985 recommendation of the Judicial Conference of the United States. For discussion and evaluation of its legislative history, see *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1582 (Fed. Cir. 1990), which discusses whether Congress intended to liberalize or restrict venue in patent cases. See also Oakley, *supra* note 31, at 771-72; Charles S. Ryan, *The Expansion of Patent Venue Under the Judicial Improvements and Access to Justice Act (Part I)*, 77 J.



reforms, but a flawed statute and inconsistent case law continue to bedevil the seemingly simple task of determining the districts of proper venue for civil actions within the jurisdiction of the district courts.<sup>394</sup>

Subsections (a) and (b) set forth distinct criteria for laying venue in suits supported solely by diversity jurisdiction.<sup>395</sup> Each contains three subdivisions, differing only slightly in the third subdivision of each subsection.

Subsection (c) deals specially with the venue status of corporate defendants. Subsection (d) suspends the requirement of proper venue for suits against aliens. Subsection (e) contains exceptionally liberal provisions for most suits against the United States or its executive officers and agencies. Subsection (f) sets forth special venue rules for section 1330 actions under the Foreign Sovereign Immunities Act.

*a. Subsections 1391(a) and (b)*

The 1990 amendments directed these subsections towards convergence, but they have yet to meet. The path of subsection 1391(a) has been particularly bumpy, but as corrected in 1991 and 1992 its first two subdivisions now mirror those of subsection 1391(b).<sup>396</sup> Both diversity and federal-question actions authorize either residential or transactional venue.<sup>397</sup> Residential

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Subsections 1391(a) and (b) were substantially, but imperfectly, rewritten in 1990 in response to the recommendations of the Federal Courts Study Committee. *See* REPORT OF THE FEDERAL COURTS, *supra* note 360, at 94. For criticism of the drafting of the 1988 and 1990 amendments, *see* Oakley, *supra* note 31, at 769-82. Some of the flaws of the 1990 amendments to these subsections were corrected by technical amendments enacted in 1991 and 1992. Act of Dec. 9, 1991, Pub. L. No. 102-198, § 3, 105 Stat. 1623; Act of Oct. 29, 1992, Pub. L. No. 102-572, § 504, 106 Stat. 4513. As noted below in connection with subsection 1391(a)(3) and section 1392, Senator Hatch has introduced two bills in the current Congress which would make minor but welcome changes requested by the Judicial Conference.

<sup>394</sup> *See* WRIGHT, *supra* note 14, § 42, at 263-71.

<sup>395</sup> Subsection 1391(a) speaks of suits "founded only on diversity of citizenship," but in virtue of section 1397, the special venue statute for interpleader suits under section 1335, the effect of subsection 1391(a) is confined to suits under the general diversity statute, section 1332. *See* 28 U.S.C.A. § 1391(a) (West Supp. 1998).

<sup>396</sup> *See id.* § 1391(a)-(b) (West Supp. 1998).

<sup>397</sup> *See id.*

venue requires that all defendants reside in the same state.<sup>398</sup> If so, any district of that state in which one or more defendants reside is a proper venue choice.<sup>399</sup> The alternative, and the exclusive choice where it is available and the defendants reside in more than one state, is transactional venue.<sup>400</sup> The two subsections differ only in their specification of a “fallback” venue option, operative only when neither residential nor transactional venue is available.<sup>401</sup>

Subsection 1391(a)(3) governs fallback venue in a diversity action. It permits the action to be brought wherever “any defendant is subject to personal jurisdiction at the time the action is commenced.”<sup>402</sup>

Subsection 1391(b)(3), which lays venue in “a judicial district in which any defendant may be found,” governs fallback venue in a federal-question action.<sup>403</sup> The legislative history of the 1990 amendments suggests that Congress intended no difference between “may be found” and “subject to personal jurisdiction.”<sup>404</sup> No case has yet construed “may be found” for purpos-

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<sup>398</sup> See *id.*

<sup>399</sup> See *id.*

<sup>400</sup> See *id.*

<sup>401</sup> See *id.*

<sup>402</sup> See *id.* § 1391(a)(3). As enacted subsection 1391(a)(3) permitted an action to be brought wherever “the defendant[s] [are] subject to personal jurisdiction at the time the action is commenced.” *Id.* This odd limitation of subsection 1391(a)(3) to plural defendant cases was an important constraint under the terms of the 1990 amendments as originally enacted because a drafting error led to the enactment of the subsection 1391(a)(3) option as an alternative to residential or transactional venue rather than as a fallback option eligible only in the rare case in which neither the residential venue option nor the newly liberalized transactional venue option could be used. The inadvertent result was virtually to repeal the venue requirement, the infelicity of which could be curbed by seizing on the odd plural defendant language of subsection 1391(a)(3) as enacted in 1990. See *Samuelson v. Honeywell*, 863 F. Supp. 1503, 1509-10 (E.D. Okla. 1994); 15 *WRIGHT ET AL.*, *supra* note 55, § 3802.1, at 5 (Supp. 1998); *Oakley*, *supra* note 31, at 777-82. Once subsection 1391(a)(3) was converted to a fallback venue option by the 1992 technical amendment, the plural defendant language no longer made sense. It was deleted by a technical amendment in 1995, which substituted the present language authorizing fallback venue in a diversity suit in a district in which any defendant is subject to personal jurisdiction. See Act of Oct. 3, 1995, Pub. L. No. 104-34, § 1, 109 Stat. 292, 292.

<sup>403</sup> See 28 U.S.C.A. § 1391(b)(3).

<sup>404</sup> See David D. Siegel, *Changes in Federal Jurisdiction and Practice Under the New (Dec. 1, 1990) Judicial Improvements Act*, 133 F.R.D. 61, 74 (1991).

The Institute is indirectly responsible for the variation in language between “subject to personal jurisdiction” and “may be found” in subsections 1391(a) and (b). The inspiration for the 1990 amendments was Recommendation 5.B.2 of the Federal Courts Study Commit-

es of subsection 1391(b)(3).<sup>405</sup> It would be best if subsections 1391(a) and (b) were merged into a single subsection applicable to both diversity and federal-question suits before the occasion arises for mischievous construction of subsection 1391(b)(3) as posing a different standard from that of subsection 1391(a)(3).<sup>406</sup>

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tee that subsections (a) and (b) be clarified and harmonized by, inter alia, broadening the criterion of transactional venue and eliminating the anachronistic venue option in diversity cases of the district in which all plaintiffs reside. *See* REPORT OF THE FEDERAL COURTS, *supra* note 360, at 94. The Committee noted that a liberalized test of transactional venue had already been inserted into subsection 1391(e) by the 1976 Foreign Sovereign Immunities Act and cited the Institute's 1969 Study in support of eliminating the plaintiffs-residence venue option in diversity actions. In fact, the 1969 Study was the source, virtually in haec verba, for the liberal test of transactional venue added to subsection 1391(e) in 1976 and imported in 1990 into subsections 1391(a) and (b) as well. Thus, it is likely that the authors of the 1990 amendments paid close attention to the 1969 Study and took from there the idea of adding a third, fallback venue option. *See* 1969 STUDY, *supra* note 3, at 15, 135 (proposing fallback diversity venue where "any defendant resides"); *id.* at 30, 218-19 (suggesting fallback federal-question venue where "any defendant may be found").

Unfortunately the 1969 Study did not elaborate the reasoning behind making residence the key to fallback venue in diversity cases but presence the key to fallback venue in federal-question cases. Perhaps the reasoning turned on a felt need for the utmost liberality in venue where the claim was based on federal law and a greater willingness to remit litigants to the alternative forum of a state court when a venue-barred claim arose under state or foreign law, but this was not expressed. *See id.* at 135 & n.28, 218-19 (commenting on fallback diversity venue and fallback federal-question venue). It is particularly confounding to read in the 1969 Study (just two paragraphs after the commentary noting but not explaining the "may be found" fallback venue option in federal-question cases) an objection to the use of the very same "may be found" language as a venue option in patent and copyright cases under 28 U.S.C. § 1400(a). The comment states that "repeal of § 1400(a) avoids use of the obsolete term 'found' and avoids the 'anomaly in saying that a defendant has been 'found' in a district when in fact process has been served upon him pursuant to a statute which operates only when he cannot be found there.'" *See id.* at 219-20 (quoting *Time, Inc. v. Manning*, 366 F.2d 690, 697 (5th Cir. 1966)).

<sup>405</sup> There appears to be no case in which fallback venue under subsection 1391(b)(3) has been properly upheld. Numerous cases have correctly noted the inapplicability of subsection 1391(b)(3) because other grounds for venue were available. A surprising number have displayed confusion about the fallback status of subsection 1391(b)(3) by citing it as an alternative basis for venue otherwise existing, in the same or another district, under subsections 1391(b)(1) and (2) or another venue provision. *See, e.g.,* *Xuncax v. Gramajo*, 886 F. Supp. 162, 193 (D. Mass. 1995) (finding venue proper under § 1391(b)(3) in suit for extraterritorial torts committed by foreign national who was served with process and hence "found" within district, despite acknowledgment that venue was also proper under § 1391(d)); *Williams v. Cook County Sheriff's Dep't.*, No. 93-C-212, 1995 WL 319845, at \*2-\*3 (N.D. Ill. May 25, 1995) (invoking § 1404, rather than § 1406, to transfer case in order to cure lack of personal jurisdiction and purporting to find proper fallback venue in transferor district under § 1391(b)(3) despite acknowledgment that good venue also existed in transferee district under § 1391(b)(2)).

<sup>406</sup> Should the use of "found" in subsection 1391(b) be construed prior to the merger

The merger of subsections (a) and (b), or at least the harmonization of their fallback provisions, would not complete the work of reforming the basic venue law of the federal district courts. Uncertainty still surrounds the central and normally dispositive concepts of residential and transactional venue.<sup>407</sup> Although the great weight of authority equates the conception of residence used to lay venue with the conception of domicile used to determine the state of an individual's citizenship for diversity purposes, a circuit split persists.<sup>408</sup> More recent is the emerging uncertainty regarding the new test for transactional venue.<sup>409</sup>

Prior to 1990, courts had many difficulties associated with determining a singular district "in which the claim arose" for transactional venue purposes.<sup>410</sup> The 1990 amendments rendered this debate moot. However, the new and much more liberal test for transactional venue did not abrogate venue constraints altogether. It embraces any of possibly numerous districts

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of subsections 1391(a) and (b), it is to be hoped that "found" will be construed to be synonymous with "subject to personal jurisdiction." See WRIGHT, *supra* note 14, § 42, at 262 & n.36.

<sup>407</sup> See *id.* § 42, at 263.

<sup>408</sup> See *id.* (summarizing authority supporting better view that citizen of state resides for venue purposes only in district in which citizen is domiciled). This view is supported by the Revisers' Notes to the 1948 Judicial Code, which declare that "reside" was substituted for the earlier term "whereof he is an inhabitant" for purposes of clarity, with place of residence deemed to be synonymous with place of inhabitation. See UNITED STATES CODE CONGRESSIONAL SERVICE, NEW TITLE 28, UNITED STATES CODE JUDICIARY AND JUDICIAL PROCEDURE WITH OFFICIAL LEGISLATIVE HISTORY AND REVISER'S NOTES 1701, 1847 (West Publishing Co. & Edward Thompson Co. 1948) (citing *Shaw v. Quincy Mining Co.*, 145 U.S. 444, 448 (1892)). In dicta, the *Shaw* Court equated "whereof he is an inhabitant" with the place of "citizenship" and noted the "incongruity" of referring to a citizen of a multidistrict state as a citizen rather than an inhabitant of the particular district in which the party was domiciled. See *Shaw v. Quincy Mining Co.*, 145 U.S. 444, 447 (1892).

For a recent restatement of the preferred view equating place of residence for purposes of venue with place of domicile for purposes of citizenship, see *Manley v. Ingram*, 755 F.2d 1463, 1466 n.3 (11th Cir. 1985). However, the Ninth Circuit has ruled to the contrary, stating that "[t]he statutory criterion is residence, not citizenship. The terms are not synonymous." See *Arley v. United Pac. Ins. Co.*, 379 F.2d 183, 185 n.1 (9th Cir. 1967). The Tenth Circuit appears to hold a similar view, albeit rooted in precedent interpreting a pre-1948 residential venue statute. See *Townsend v. Bucyrus-Erie Co.*, 144 F.2d 106, 108 (10th Cir. 1944).

<sup>409</sup> See *infra* notes 410-16 and accompanying text (describing different approaches taken by courts for determining transactional venue).

<sup>410</sup> See generally *Leroy v. Great W. United Corp.*, 443 U.S. 173, 183-87 (1979).

in which “a substantial part” of the litigation-provoking events occurred, or in which “a substantial part” of the property in issue is located. Although a frank divergence of opinion has not yet crystallized in the case law, published reports applying the new test suggest a small difference that is likely to develop into contrary lines of authority.<sup>411</sup>

Some courts have adopted what might be called a “qualitative” approach that permits courts to lay transactional venue in virtually any district that can rationally be said to have been affected by the conduct of which the plaintiff complains.<sup>412</sup> This approach achieves the twin purposes of the new test: to reduce threshold litigation over transactional venue while still imposing some limit on plaintiffs’ choice of venue.<sup>413</sup> However, other courts have not been willing to accept so toothless a standard for transactional venue. These courts adopt instead a more “quantitative” approach that entails weighing the relative substantiality of contacts in the district where the plaintiff filed suit versus those in other potential districts in which transactional venue might more obviously exist.<sup>414</sup> The best way to end debate over the right approach may be to replace the word “substantial” in subsections 1391(a)(3) and 1391(b)(3) with the word “significant.”

Further confounding the law of venue in the federal district courts are a welter of judge-made and statutory exceptions to the basic venue principles of subsections 1391(a) and (b). With ancient roots in case law and indirect ratification in the terms of section 1392, the “local action” doctrine requires many claims involving title to, possession of, or harm to real property to be brought in the district in which the affected property is located.<sup>415</sup> However, the distinction between local and transitory actions affecting real property remains surprisingly ill-defined.<sup>416</sup>

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<sup>411</sup> See *infra* notes 412-14 and accompanying text (describing qualitative versus quantitative approach to transactional venue).

<sup>412</sup> See, e.g., *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Ltd. Partnership*, 34 F.3d 410, 412 (7th Cir. 1994); *Setco Enters. Corp. v. Robbins*, 19 F.3d 1278, 1281 (8th Cir. 1994).

<sup>413</sup> See *Oakley*, *supra* note 31, at 774-75 & n.150.

<sup>414</sup> See, e.g., *Eastman v. Initial Invs., Inc.*, 827 F. Supp. 336 (E.D. Pa. 1993); *Magic Toyota, Inc. v. Southeast Toyota Distribs., Inc.*, 784 F. Supp. 306 (D.S.C. 1992).

<sup>415</sup> See 15 WRIGHT ET AL., *supra* note 55, § 3822.

<sup>416</sup> See WRIGHT, *supra* note 14, § 42, at 269. Subsection 1303(c) of the 1969 Study recom-

Admiralty actions have a particularly strange status for venue purposes in the wake of the 1966 amendments to the Federal Rules of Civil Procedure. Rules 1, 9(h), and 81(a)(1) were amended to bring most claims for relief under maritime law within the definition of a "civil action," but by contemporaneous amendment of rule 82, admiralty actions were exempted from the general venue rules applicable to "civil actions" under section 1391.<sup>417</sup> This left in force the exceptionally liberal rules of venue traditionally applicable in admiralty except as occasionally narrowed by admiralty-specific special venue statutes.<sup>418</sup> However, rule 82's narrow focus in exempting admiralty actions only from the general venue rules for civil actions paradoxically leaves applicable to admiralty actions the venue-transfer provisions of section 1404.<sup>419</sup>

Quite aside from maritime matters, there is an unfortunate host of other special venue statutes that make ad hoc exceptions to the operation of the general venue rules.<sup>420</sup> Most of these statutory exceptions broaden what were once the far more narrow venue options stipulated by former subsections 1391(a) and (b).<sup>421</sup> Given the liberality of the current general venue rules, the entire enterprise of exceptional statutory venue provisions

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mended a partial reform by deeming actions for trespass upon or harm done to land to be transitory actions subject to the general venue requirements governing civil actions in federal district courts, but other than suggesting "a fresh appraisal" of "ancient dogma," the Institute did not address the larger issues of whether any local action rule should survive that appraisal and, if so, how local actions should be defined. See 1969 STUDY, *supra* note 3, at 139-40. The hazy nature of the local-action rule in current federal venue practice is also discussed below in connection with section 1392. See *infra* notes 452-53 and accompanying text (discussing definition of local actions).

<sup>417</sup> Rule 82 provides in pertinent part: "An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C. §§ 1391-93." FED. R. CIV. P. 82. Section 1393 has been repealed. See 28 U.S.C. § 1393, *repealed by* Pub. L. No. 100-702, tit. X, § 1001(a), 102 Stat. 4664 (1988). To the extent that section 1392's indirect codification of the local action rule might otherwise be applicable in an admiralty context, the section is abrogated for admiralty venue purposes by rule 82. See, e.g., *Grubart v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 532 (1995).

<sup>418</sup> See 15 WRIGHT ET AL., *supra* note 55, § 3817, at 172-73. The traditionally liberal rules of venue in admiralty would have been reaffirmed and codified under subsection 1318(a) of the 1969 Study. See 1969 STUDY, *supra* note 3, at 36, 247.

<sup>419</sup> See *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 20-23 (1960).

<sup>420</sup> See WRIGHT, *supra* note 14, § 42, at 267 nn.64-65.

<sup>421</sup> See *id.* at 267. For a general view of the pre-1966 general venue scheme and the expansive effects of the 1966 and 1990 amendments, see *id.* § 42, at 256-58.

merits searching review.<sup>422</sup> Whether review should lead to revision, however, requires informed sensitivity to the specialized bodies of law and policy served by the venue provisions unique to such encapsulated fields as admiralty, bankruptcy, governmental litigation, intellectual property, and the like. As discussed below in connection with section 1400, this Prospectus advocates that the Institute defer revision of special venue provisions pending detailed examination of the specialized fields of law to which they relate.

*b. Subsection 1391(c)*

Congress rewrote the special rules governing residential venue for corporate defendants in 1988.<sup>423</sup> Other than the problem of the applicability of subsection 1391(c) to special venue provisions such as section 1400 or others not included in chapter 87 of title 28,<sup>424</sup> the major arena of controversy has predictably been the construction of the second sentence of subsection (c).<sup>425</sup> It maladroitly applies the rule of the first sentence — personal jurisdiction over a corporate defendant is also sufficient to establish residential venue as to that defendant — to states consisting of more than one federal district.<sup>426</sup> It ought to have

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<sup>422</sup> As discussed below in connection with section 1400, the more serious threat to the coherence of federal venue law is posed by those special statutory venue provisions that Congress has failed to incorporate into chapter 87 of title 28 of the United States Code. *See infra* notes 478-97 and accompanying text. It is anomalous that such provisions, generally included as a careless afterthought in legislation creating a new substantive right to sue for federal judicial relief at the behest of special pleaders, are insulated from more general reform of federal venue by the very irresponsibility of their ad hoc enactment. *Cf.* 1969 STUDY, *supra* note 3, at 498 (listing United States Code's special venue provisions other than those in title 28).

<sup>423</sup> *See* David D. Siegel, *Changes in Federal Jurisdiction and Practice Under the New Judicial Improvements and Access to Justice Act*, 123 F.R.D. 399, 405-08 (1989) (commenting on amendment to 28 U.S.C. § 1391(c) and its effects on venue of action against corporate defendant); Ryan, *supra* note 393, at 90-91 (stating that Congress amended § 1391(c) in attempt to better define venue in suits with corporate defendants).

<sup>424</sup> *See* VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574, 1576-84 (Fed. Cir. 1990) (holding § 1391(c) applicable to § 1400(b)); McCracken v. Automobile Club, Inc., 891 F. Supp. 559, 562-63 (D. Kan. 1995) (holding § 1391(c) applicable to venue under ERISA, 29 U.S.C. § 1132(e)(2) (1994)).

<sup>425</sup> *See* Rocket Jewelry Box, Inc. v. Noble Gift Packaging, Inc., 869 F. Supp. 152, 157 (S.D.N.Y. 1994).

<sup>426</sup> The second sentence of subsection 1391(c), as one court has dryly noted, "is not a model of clarity." *See id.* at 157. It was not part of the recommendation of the Judicial Con-

sufficed to allow section 1404 to govern the shifting of litigation among the districts of a multidistrict state. Instead, subsection 1391(c) requires district courts to engage in a hypothetical<sup>427</sup> and fictitious<sup>428</sup> analysis of the power of a single district in a multidistrict state as if that single district were a state in its own right.<sup>429</sup> It must determine the district's power to assert personal jurisdiction over the defendant corporation based on the extent and significance of the corporate defendant's contacts with only that district.<sup>430</sup>

Not surprisingly, a conflict of authority has arisen as to whether the hypothetical analysis of the power of personal jurisdiction of a single district qua fictitious state is to proceed under general federal minimum-contacts principles of personal jurisdiction. The alternative view looks to the possibly more limited power of personal jurisdiction authorized by the long-arm statute of the particular state within which the district in question is located.<sup>431</sup>

Other problems, as yet unlitigated, lurk within both sentences of subsection 1391(c). One problem concerns the applicability of a federal, nationwide service-of-process provision unaccompanied by some special and preemptive venue provision.<sup>432</sup> Other

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ference upon which the 1988 overhaul of subsection 1391(c) was otherwise based. See Oakley, *supra* note 31, at 771 n.141 (discussing confusion manifested by legislative history of § 1391(c)); Charles S. Ryan, *The Expansion of Patent Venue Under the Judicial Improvements and Access to Justice Act (Part II)*, 77 J. PAT. & TRADEMARK OFF. SOC'Y 187, 193-94 (1995) (discussing legislative history of 1988 amendment to § 1391(c)).

<sup>427</sup> See *Bicicletas Windsor, S.A. v. Bicycle Corp. of Am.*, 783 F. Supp. 781, 785-86 (S.D.N.Y. 1992).

<sup>428</sup> See, e.g., *Zinn v. Gichner Sys. Group*, No. CIV.A. 93-5817, 1994 WL 116014, at \*2 (E.D. Pa. Apr. 5, 1994).

<sup>429</sup> See *id.* (engaging in fictitious venue analysis because of inability to treat Eastern District as separate state).

<sup>430</sup> See *id.*

<sup>431</sup> See *Smehlik v. Athletes and Artists, Inc.*, 861 F. Supp. 1162, 1169-71 (W.D.N.Y. 1994) (summarizing conflicting case law).

<sup>432</sup> Where venue as to the corporate defendant is controlled by subsection 1391(c) and nationwide service of process is authorized, the logical but probably unintended effect of amended subsection 1391(c) is to repeal the venue requirement and to treat the corporate defendant as subject to suit in any district (like an alien under § 1391(d)), even one wholly unconnected to any acts of the defendant or to any of the events giving rise to the claim for relief. See Siegel, *supra* note 404, at 273-74. One court has so held even under the Clayton Act, 15 U.S.C. § 22 (1994), which contains both a nationwide service-of-process provision and a special venue provision. See *Daniel v. American Bd. of Emergency Med.*, 988 F. Supp. 127, 143-44 (W.D.N.Y. 1997) (holding that broader venue options provided by §



problems arise because Congress did not simply repeal the venue requirement for corporate defendants and let such defendants challenge their adversary's choice of forum only by moving to dismiss for lack of personal jurisdiction or moving to transfer under section 1404. Instead, subsection 1391(c) forges a more complex link between venue and the power of the forum to subject the defendant to personal jurisdiction as of "the time the action is commenced."<sup>433</sup> This link raises two critical questions. First, whether the power of the forum to assert personal jurisdiction over the defendant needs to be related to the particular suit in issue in order to establish residential venue as to that suit.<sup>434</sup> Second, whether the venue-conferring existence of personal jurisdiction over the defendant may ever turn on facts that occur subsequent to the commencement of the action.<sup>435</sup>

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1391(c) control over narrower special venue provision of Clayton Act even if combination of § 1391(c) and nationwide service-of-process under Clayton Act makes special venue provision of Clayton Act superfluous).

<sup>433</sup> The second sentence of subsection 1391(c) refers to "the time *an* action is commenced" rather than "the time *the* action is commenced," as referred to in subsection 1391(c)'s first sentence. See 28 U.S.C. § 1391(c) (1994). But, this discrepancy appears only to be a drafting inconsistency with no intended difference in meaning.

<sup>434</sup> See Oakley, *supra* note 31, at 773 (noting that only guesswork and implication can remedy certain shortcomings of 1988 amendment to § 1391(c)). For example, a corporate defendant is subject to personal jurisdiction of a forum with respect to lawsuit A, sub judice at the time of filing of an unrelated lawsuit B in the same forum does not make the forum the residence of the corporate defendant for purposes of lawsuit B unless the forum has independent power to assert personal jurisdiction over the corporate defendant with respect to lawsuit B. See *id.*

<sup>435</sup> Personal jurisdiction may depend on events after the action commences because personal jurisdiction is based on unrelated but continuous and systematic contacts between the defendant and the forum state. The contacts may reach the critical mass of "general jurisdiction" after the commencement of the action in question. See generally Christian E. Mammen, Note, *Here Today, Gone Tomorrow: The Timing of Contacts for Jurisdiction and Venue Under 28 U.S.C. § 1391*, 78 CORNELL L. REV. 707 (1993) (arguing that for venue purposes, contacts to be considered are those accrued at time of claim). In addition, the defendant might become subject to the jurisdictional power of the forum state by waiver or consent without simultaneous waiver of its federal venue objection. It may be true in most instances that consent-based personal jurisdiction is attributable to a contract entered into before litigation is commenced. See, e.g., *National Equip. Rental, Ltd. v. Szukhant*, 375 U.S. 311 (1964) (upholding personal jurisdiction based on contractual designation of agent for service of process). For a corporate defendant, such a contract would presumably also operate to make the selected state or district the residence of the defendant for venue purposes pursuant to subsection 1391(c). On the other hand, most instances of waiver of the right to object to personal jurisdiction, such as by failure to make a timely objection, see FED. R. CIV. P. 12(h)(1), will likely turn on events occurring after litigation is commenced and, thus, fall outside the scope of subsection 1391(c). But it will not always be easy to deter-

The final serious issue left statutorily unresolved by subsection 1391(c) is its application to unincorporated associations subject to suit in their own right.<sup>436</sup> Federal case law has established a general rule of analogy that treats unincorporated associations as if they were corporations for purposes of subsection 1391(c).<sup>437</sup> However, the doctrine by which "unincorporated associations [are] assimilated to corporations for purposes of venue"<sup>438</sup> ought to be made express in any further reform of subsection 1391(c).

*c. Subsections 1391(d) to (f)*

The remaining subsections of section 1391 are only slightly less problematic than those already discussed. By the express terms of the governing statute it is clear, but paradoxical, that the special citizenship status of permanent-resident aliens domiciled in a state under subsection 1332(a) expressly modifies only their treatment for purposes of subject-matter jurisdiction under sections 1332, 1335, and 1441.<sup>439</sup> This leaves unaffected subsection 1391(d)'s suspension of any venue requirement in suits against aliens.<sup>440</sup> If state-domiciled resident aliens are to be

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mine whether a defendant is subject to personal jurisdiction on the basis of prelitigation contacts or consent as opposed to waiver attributable to litigative conduct after the action was commenced. *See Insurance Corp. of Ireland, Ltd. v. Campagnie des Bauxites de Guinee*, 456 U.S. 694 (1982) (upholding personal jurisdiction over corporate defendant based on business contacts with forum state but only because such contacts were presumed as sanction for repeated failure to comply with discovery orders).

<sup>436</sup> The juridical capacity of unincorporated associations as entities in their own right is generally determined by the law of the state in which a federal suit is filed as to claims arising under state law, subject to broader entity treatment with respect to claims arising under federal law. *See* FED. R. CIV. P. 17(b); *see also Underwood v. Maloney*, 256 F.2d 334, 337 (3d Cir. 1958) (stating that where jurisdiction is based on diversity rather than federal question, court determines unincorporated association's juridical capacity by reference to state law).

<sup>437</sup> *See Denver & Rio Grande W. R.R. v. Brotherhood of R.R. Trainmen*, 387 U.S. 556, 561 (1967); *see also Penrod Drilling Co. v. Johnson*, 414 F.2d 1217, 1223 (5th Cir. 1969); *FSI Group v. First Fed. Sav. and Loan Ass'n*, 502 F. Supp. 356, 357 (S.D.N.Y. 1980).

<sup>438</sup> *See* WRIGHT, *supra* note 14, § 42, at 267.

<sup>439</sup> *See* 28 U.S.C.A. § 1332(a) (West 1993 & Supp. 1998). The 1988 amendment creating this special citizenship status for permanent-resident aliens is discussed above. *See supra* notes 31, 89 and accompanying text.

<sup>440</sup> *See* WRIGHT, *supra* note 14, § 42, at 264 n.44. If indeed the attribution of state citizenship to aliens is constitutional, then a citizen of another state or an alien domiciled in no state or in a state other than the domicile of the defendant can sue a permanent resi-

treated as citizens of the United States domiciled in a state for purposes of diversity jurisdiction, no sound reason exists for failing to give such quasi-state citizens the same venue protection against inconvenient suit as any other diversity defendant.<sup>441</sup>

Also in need of Institute attention is subsection 1391(e). Congress intended subsection 1391(e) to tilt the venue scales in favor of citizen-plaintiffs versus the government.<sup>442</sup> However, deep rifts have developed between the interests of the national citizenry in the enforcement of environmental norms and the citizens of the particular localities whose economies may be thereby depressed. Thus, subsection 1391(e) has become one focal point of the "sagebrush rebellion."<sup>443</sup> This rebellion is a debate centered more on substantive than procedural policy but it is sensitive to the relative likelihood that federal courts in the District of Columbia will grant injunctive relief, as opposed to courts situated in the localities most likely to suffer from the adverse economic effects of such injunctions.<sup>444</sup>

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dent alien under subsection 1332(a)(2) in any district court of the United States in which personal jurisdiction can be asserted — even if only on the basis of the "tag" jurisdiction legitimated by *Burnham v. Superior Court*, 495 U.S. 604 (1990).

<sup>441</sup> Writing before the 1988 amendment that conferred quasi-state-citizenship status on some aliens, Professor Degnan and Dean Kane criticized the July 1985 Tentative Final Draft of the Institute's Revised Restatement of Foreign Relations Law for failing to give "necessary guidance" on choice-of-forum issues in suits against alien defendants. See Ronan E. Degnan & Mary Kay Kane, *The Exercise of Jurisdiction over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L.J. 799, 801 (1988) (citing RESTATEMENT OF THE LAW, FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 421 note 1 (Tentative Final Draft 1985)). The same commentators noted that the suspension of venue limitations for suits against aliens raises quasi-constitutional fairness concerns that should be addressed by careful application of the principles of forum non conveniens, including transfer among federal districts under subsection 1404(a). See *id.* at 815-16 & n.74. The interdistrict transfer statute, see 28 U.S.C. § 1404(a) (1994), is discussed below. See *infra* notes 524-28, 531-34 and accompanying text.

<sup>442</sup> See H.R. REP. NO. 1936, at 1 (1960) (stating that § 1391(e)'s purpose is to allow plaintiffs to bring action against United States locally rather than being limited to District of Columbia).

<sup>443</sup> See David P. Currie, *Venue and the Sagebrush Rebellion*, in *VENUE AT THE CROSSROADS* 65 (Steven R. Schlesinger ed., 1982) (discussing proposals to amend § 1391 (c)).

<sup>444</sup> See WRIGHT, *supra* note 14, § 42, at 270-71 (discussing perceived venue abuses); Cass R. Sunstein, *Participation, Public Law, and Venue Reform*, 49 U. CHI. L. REV. 976, 990-1000 (1982) (discussing venue reform proposals). See generally, e.g., *Defenders of Wildlife v. Andrus*, 455 F. Supp. 446 (D.D.C. 1978) (issuing injunction in District of Columbia against motorboating on lake in Nevada).

Subsection 1391(f) may also need revision. The venue provisions of subsection 1391(f) concerning suits against foreign sovereigns date to 1976. Subsection (f) pioneered statutory use of the Institute's liberal "substantial part" test for transactional venue,<sup>445</sup> since imported into subsections (a) and (b) as well. In another respect, however, subsection (f) lags behind modern venue law. It retains language borrowed in 1976 from former subsection (c) that looks to where the defendant is "licensed to do business or . . . doing business" as the test for residential venue in suits against an "agency or instrumentality of a foreign state."<sup>446</sup> This class of defendants includes any alien corporation that is majority-owned by a foreign state.<sup>447</sup> The "doing business" language of former subsection (c) was the source of "immense trouble" prior to its repeal when present subsection (c) was enacted in 1988.<sup>448</sup> The parallel "doing business" language that survives in subsection (f) should be deleted, and subsection (c) and (f) should be harmonized for the future.<sup>449</sup> This Prospectus recommends that section 1391 should be included on the short list.

## 2. Section 1392: Defendants or Property in Different Districts in Same State

Former subsection 1392(a) became redundant after the 1988 repeal of the divisional venue statute, former section 1393.<sup>450</sup> Former subsection 1392(a) was itself repealed in 1996, with former subsection 1392(b) redesignated as section 1392 without subsections.<sup>451</sup>

In general the courts have applied section 1392 without much problem or discussion, despite its oddly indirect incorporation of the common-law "local action" rule. One controversy, however,

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<sup>445</sup> See 1969 STUDY, *supra* note 3, at 15, 30; REPORT OF THE FEDERAL COURTS, *supra* note 360, at 94.

<sup>446</sup> See 28 U.S.C. § 1391(f)(3) (1994).

<sup>447</sup> See *id.* § 1603(b)(2) (1994).

<sup>448</sup> See WRIGHT, *supra* note 14, § 42, at 266.

<sup>449</sup> For a canvass of other venue-related problems under subsection 1391(f), see Kane, *supra* note 48, at 410-11.

<sup>450</sup> Former 28 U.S.C. § 1393 was repealed by the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, tit. X, § 1001(a), 102 Stat. 4664 (1988).

<sup>451</sup> See Act of Oct. 1, 1996, Pub. L. No. 104-220, § 1, 110 Stat. 3023, 3023.

recurs. It concerns whether actions of a local nature are defined by state or federal law.<sup>452</sup> One district court attributes the problem to the fact that “judicial grafting of common law concepts upon a statutory jurisdictional and venue scheme has left open a number of issues that remain in dispute today.”<sup>453</sup> Expressly adopting a local action rule for federal venue purposes and specifying the criteria for determining when an action is local in nature would improve section 1392. If the local action rule is discarded, section 1392 should be repealed. This Prospectus recommends that section 1392 should be included on the short list.

### 3. Section 1394: Banking Association’s Action Against Comptroller of Currency

Section 1394 provides a special venue option for actions brought by national banking associations under the jurisdiction granted by section 1348.<sup>454</sup> It was of greater significance under former law, when the general federal-question venue statute limited venue to the defendant’s residence. Another attraction was the construction of section 1394’s predecessor as permitting extraterritorial service of process upon the Controller of the Currency.<sup>455</sup> The lower courts divided on whether shareholders of defunct banks could avail themselves of the benefits of the predecessor to section 1394.<sup>456</sup>

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<sup>452</sup> Compare *Minichiello Realty Assocs., Inc. v. Britt*, 460 F. Supp. 896, 897 (D.N.J. 1978), *aff’d*, 605 F.2d 1196 (3d Cir. 1979) (holding that state law governs), and *Hasburgh v. Executive Aircraft Co.*, 35 F.R.D. 354, 355 (W.D. Mo. 1964), with *Hayes v. Gulf Oil Corp.*, 821 F.2d 285, 288 (5th Cir. 1987) (noting but not resolving conflict in authority as to whether federal or state law governs), and *Raphael J. Musicus, Inc. v. Safeway Stores, Inc.*, 743 F.2d 503, 506 (7th Cir. 1984), and *Kavouras v. Fernandez*, 737 F. Supp. 477, 478 (N.D. Ill. 1989).

<sup>453</sup> See *Home Sav. Ass’n v. State Bank*, No. 90-C-1748, 1991 WL 23638, at \*2 (N.D. Ill. Feb. 15, 1991). Another lingering issue is whether the filing of a local action in the wrong district is merely a waivable venue defect or a nonwaivable defect of subject-matter jurisdiction now that transfer is available to cure defects of subject-matter jurisdiction resulting from the filing a case in the wrong federal district court. See 28 U.S.C. § 1631 (1994); *infra* notes 561-73 and accompanying text. The prevailing view is that the local action rule limits the subject-matter jurisdiction of the district courts. See *Hayes*, 821 F.2d at 290-91.

<sup>454</sup> See 28 U.S.C. § 1394 (1994) (stating that civil actions by national banking associations to enjoin Comptroller of Currency may be prosecuted in judicial district in which association is located).

<sup>455</sup> See *First Nat’l Bank v. Williams*, 252 U.S. 504, 510 (1920) (noting that § 1394’s predecessor allowed service of process on defendant anywhere defendant was found).

<sup>456</sup> See *O’Conner v. Watson*, 81 F.2d 833, 835 (5th Cir. 1936) (allowing stockholders of

Although the 1969 Study proposed to preserve both section 1394 and its extraterritorial-service feature,<sup>457</sup> section 1394 appears to have become moribund and ripe for repeal. The 1982 repeal of a troublesome special venue statute, former 12 U.S.C. § 94, solved most of the venue problems respecting national banks.<sup>458</sup> Unlike section 1348, its jurisdictional counterpart, however, section 1394 deals exclusively with litigation against a federal officer. Its revision or repeal, therefore, is left more appropriately to a project dealing generally with governmental litigation. This Prospectus concludes that the short list's inclusion or exclusion of section 1394 is insignificant to the Institute's goals.

#### 4. Section 1395: Fine, Penalty, or Forfeiture

Section 1395 specifies the venue for actions to recover fines, penalties, and forfeitures brought under the jurisdiction conferred by section 1355. It is too politically sensitive to be addressed by this project.

Some critics have thought section 1395 to be superfluous because most statutes conferring these causes of action also specify venue.<sup>459</sup> For instance, the forfeiture statutes have their own venue provisions.<sup>460</sup> Such provisions allow the government to bring the forfeiture action where the defendant is found or where he is prosecuted.<sup>461</sup> Further, subsection (e) of this sec-

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defunct bank to bring suit despite objections by bank's liquidators); *Abel v. Hellawell*, 25 F. Supp. 446, 447 (E.D.N.Y. 1938) (concluding that in view of nonexistence of bank, stockholders were national banking association under meaning of statute). *But see* *Stein v. Delano*, 35 F. Supp. 260, 262 (D.N.J. 1940) (holding that "persons who happen to be shareholders in a national banking association" cannot avail themselves of predecessor to § 1394), *aff'd*, 121 F.2d 975 (3d Cir. 1941).

<sup>457</sup> See 1969 STUDY, *supra* note 3, at 44, 279-80. Extraterritorial service was also authorized in any action under the Institute's general federal-question statute. *See id.* at 31, 222.

<sup>458</sup> See generally 15 WRIGHT ET AL., *supra* note 55, § 3813.

<sup>459</sup> *See id.* § 3820, at 198 n.13 (collecting differing venue provisions of statutes conferring causes of action for penalties, forfeitures, and fines).

<sup>460</sup> *See id.* § 3820, at 198.

<sup>461</sup> See 18 U.S.C.A. § 981(h) (West Supp. 1998); 21 U.S.C.A. § 881(j) (West Supp. 1998). Interesting venue issues arise in cases applying these other statutes. For example, these statutes apply only if the property to be seized belongs to the defendant. *See United States v. 349 S. 4th Ave.*, 792 F. Supp. 36, 37 (E.D. Va. 1992). However, courts will sometimes "pierce the title" of the property to determine whether it really belongs to the defendant. *See, e.g., United States v. 51 Pieces of Real Property*, 17 F.3d 1306, 1310 (10th Cir. 1994)

tion seems to have outlived its original usefulness following the aftermath of the Civil War.<sup>462</sup> As previously discussed in connection with section 1355, the 1992 amendments to that putatively jurisdictional statute significantly broadened venue options in forfeiture actions. Arguably, section 1395 lacks any continuing vitality, but the Institute should not undertake to revise or repeal section 1395 independently of section 1355. Section 1395 should be excluded from the short list and its revision left to a special project.

#### 5. Section 1396: Internal Revenue Taxes

Section 1396 is permissive insofar as it allows the government to lay venue under the provisions of other statutes.<sup>463</sup> When the government sues under section 7403 of the Internal Revenue Code, however, some courts have held that the in-rem or quasi-in-rem nature of the action requires it to be brought only in the district where the res is situated.<sup>464</sup> However, at least one court has allowed suit where a taxpayer had its principal place of business, even though the res in dispute was located elsewhere.<sup>465</sup> Whatever slight confusion may exist under section 1396, the task of its revision should be left to a separate project on governmental litigation.

#### 6. Section 1397: Interpleader

Section 1397 lays venue in statutory interpleader actions in any district in which a claimant resides, notwithstanding that the vast majority of claimants may reside elsewhere.<sup>466</sup> This in ef-

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(citing other cases that have found venue proper when subject property, though its title is held in another person's name, is really owned by criminal defendant).

<sup>462</sup> The Institute's *1969 Study* declared subsection (e) unnecessary. See 1969 STUDY, *supra* note 3, at 277 (commenting that Congress may be trusted to provide appropriate legislation in such "an unhappy state of events"). Moreover, the study characterized the entire section as "antiquated" and "in part obsolete." See *id.*

<sup>463</sup> See *United States v. First Midwest Bank*, No. 94-C-7365, 1995 WL 447762, at \*1 (N.D. Ill. July 21, 1995).

<sup>464</sup> See *United States v. Stone*, 59 F.R.D. 260, 264 (D. Del. 1973) (noting that venue in § 7403 actions, like in-rem and quasi-in-rem actions, is proper only in district where res is situated).

<sup>465</sup> See *United States v. Cameron Constr. Co.*, 246 F. Supp. 869, 871 (S.D.N.Y. 1965).

<sup>466</sup> See *Westinghouse Elec. Corp. v. United Elec. Radio & Mach. Workers of Am.*, 92 F.

fect may provide nationwide venue if one claimant is a corporation, because subsection 1391(c) defines the residence of a corporation as any district in which it is subject to personal jurisdiction.<sup>467</sup> Additionally section 2361 provides for nationwide service of process in statutory interpleader actions.<sup>468</sup>

Despite the permissive tone of “may be brought,” courts have held section 1397 to provide the exclusive venue option for “statutory” interpleader actions in which parties invoke jurisdiction under section 1335.<sup>469</sup> The practical effect of this construction is limited, however, by the 1990 repeal of former subsection 1391(a)’s provision permitting venue in a general diversity action to be laid in the district in which the plaintiff resides.<sup>470</sup> In the past, this might have invited a stakeholder desirous of suing at home to seek to invoke “rule” interpleader, suing under subsection 1332(a) and joining rival claimants under rule 22 of the Federal Rules of Civil Procedure rather than statutory interpleader.<sup>471</sup> The mandatory construction of section 1397 may still have bite, however, because current subsection 1391(b) permits venue to be laid in the district in which a substantial part of the property in issue is located. Thus, for reasons of convenience some stakeholders may still seek to invoke rule interpleader rather than statutory interpleader.

Although these are minor problems, if the Institute were to take up revision of section 1335, it might also usefully revise section 1397. Such revision could either make express or qualify section 1397’s mandatory nature, and clarify its relationship to subsection 1391(c) and section 2361.

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Supp. 841, 843 (W.D. Pa. 1950). *But see* Kennametal v. International Union, 161 F. Supp. 362, 363 (D. Pa. 1958) (finding lack of venue under § 1397 where only interpleaded defendant who resided in district where suit was filed declined to assert claim against interpleading stakeholder).

<sup>467</sup> See 28 U.S.C. § 1391(c) (1994).

<sup>468</sup> See generally 7 WRIGHT ET AL., *supra* note 55, § 1712, at 74 (Supp. 1998) (discussing combined effects of §§ 1391(c), 2361).

<sup>469</sup> See, e.g., Big Island Yacht Sales, Inc. v. Dowty, 848 F. Supp. 131, 133-34 (D. Haw. 1993) (stating that interpleader action must be brought in district where at least one claimant resides, notwithstanding permissive language).

<sup>470</sup> See Janet Cooper Alexander, *Unlimited Shareholder Liability Through a Procedural Lens*, 106 HARV. L. REV. 387, 445 (1992).

<sup>471</sup> Commentators have discussed the relationship between statutory interpleader and rule interpleader. See, e.g., Doernberg, *supra* note 143, at 561 (discussing relationship between federal statutory interpleader and federal rule interpleader).



7. Section 1398: Interstate Commerce Commission's  
[Surface Transportation Board's] Orders

Generally, an administrative agency's enabling statutes specify venue for the review of administrative decisions.<sup>472</sup> Section 1398 is the exception; it specifies venue for review of ICC orders in the Judicial Code.<sup>473</sup> It provides that a civil action is proper only in the district in which a party bringing the action resides or has its principle office.<sup>474</sup> Section 1398 has a narrower corporate-residency definition than the general venue statute, which the courts have held to restrict corporate residency to the place of incorporation.<sup>475</sup>

Section 1398 has not been amended to reflect the abolition of the ICC and the transfer of some of its functions to the STB. Section 205 of the ICC Termination Act of 1995 provides, however, that any unamended statutory reference to the ICC is to be deemed to refer to the STB.<sup>476</sup> One hopes Congress will soon conform the terminology of section 1398 to that of its jurisdictional counterpart, section 1336. This Prospectus recommends that any substantive revision of either section 1336 or section 1397 be left to a project dealing generally with federal review of administrative action.

8. Section 1399: Partition Action Involving United States

Section 1399 is a special venue statute for actions in which the United States is a joint tenant or tenant in common.<sup>477</sup> It has provoked little comment and no controversy. It is a codification of the common law's local-action rule and, as such, is arguably redundant of section 1392, if section 1392 were revised to state more clearly a generally applicable local-action rule for the

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<sup>472</sup> See 15 WRIGHT ET AL., *supra* note 55, § 3816, at 166.

<sup>473</sup> See 28 U.S.C. § 1398 (1994).

<sup>474</sup> See *id.*

<sup>475</sup> See *Montgomery Ward & Co. v. Anderson Motor Serv.*, 339 F. Supp. 713, 717 (W.D. Mo. 1971); *Zonolite Co. v. United States*, 209 F. Supp. 597, 598-99 (W.D. Pa. 1962).

<sup>476</sup> See ICC Termination Act of 1995, Pub. L. No. 104-88, § 205, 109 Stat. 803, 943 (1996).

<sup>477</sup> See 28 U.S.C. § 1399 (1994).

federal courts. As with its jurisdictional counterpart — section 1347 — revision or repeal of section 1399 should be left to a special project on governmental litigation.

### 9. Section 1400: Patents and Copyrights

Section 1400 deals separately with venue in copyright and mask-work cases as opposed to patent-infringement cases. Subsection 1400(a) provides that copyright and mask-work cases may be brought “in the district in which the defendant or his agent resides or may be found.”<sup>478</sup> This has been construed to lay venue in any district in which the defendant would be subject to personal jurisdiction were the district a separate state.<sup>479</sup> Subsection 1400(a) thus makes applicable to all defendants, regardless of corporate status, the special rule of residential venue with respect to corporate defendants under the general venue statute, section 1391(c).<sup>480</sup> In common with subsection 1400(b), subsection 1400(a) does not address the proper venue of an action with multiple defendants residing in different districts. Aside from this lacuna, subsection 1400(a) is unproblematic.

Subsection 1400(b) is far more controversial. It provides that a patent-infringement case “may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.”<sup>481</sup>

Several commentators have criticized subsection 1400(b) and even urged its repeal.<sup>482</sup> They argue that subsection 1400(b) fosters extensive litigation over venue in patent cases, creates unnecessary disparity between patent infringement and declarato-

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<sup>478</sup> See *id.* § 1400(a) (1994).

<sup>479</sup> See, e.g., *Columbia Pictures Television v. Krypton Broad., Inc.*, 106 F.3d 284, 288-89 (9th Cir. 1997), *rev'd on other grounds sub nom. Feltner v. Columbia Pictures Television, Inc.*, 118 S. Ct. 1279 (1998); *Milwaukee Concrete Studios v. Field Mfg. Co.*, 8 F.3d 441, 445-47 (7th Cir. 1993).

<sup>480</sup> See *supra* notes 423-38 and accompanying text (discussing history, construction, and application of § 1391(c)).

<sup>481</sup> See 28 U.S.C. § 1400(b) (1994).

<sup>482</sup> See, e.g., 15 WRIGHT ET AL., *supra* note 55, § 3823, at 215 (noting that § 1400 should be repealed); American Bar Ass'n, *Proposed Resolution 401-1*, ABA SEC. PAT., TRADEMARK & COPYRIGHT REP. 240 (1989) [hereinafter *Proposed Resolution 401-1*] (stating that § 1400 should be repealed); Ryan, *supra* note 426, at 207 (supporting repeal of § 1400).

ry actions, and restricts venue with anachronistic definitions of residency.<sup>483</sup> The main problems under subsection 1400(b) are:

1. Subsection 1400(b)'s restrictive construction seems to promote the "inefficient adjudication of patent infringement suits."<sup>484</sup> Specifically, two phrases — "act of infringement" and "regular and established place of business" — have caused the most conflicts among district courts.<sup>485</sup> Although Congress's establishment of the Federal Circuit to harmonize this "hypertechnical case law"<sup>486</sup> has begun to have a positive impact, especially on the corporate-residency definition, these terms remain hotly contested by forum-shopping patent lawyers.<sup>487</sup>

2. Subsection 1400(b) preserves a disparity between patent-infringement actions and declaratory-judgment suits.<sup>488</sup> The patent-venue section constitutes an exception to the general "mirror image rule" for declaratory judgments.<sup>489</sup> Under subsection 1400(b), an action brought by an alleged infringer for a declaration of noninfringement and patent invalidity falls under the general venue statute.<sup>490</sup> However, an action for patent in-

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<sup>483</sup> See 15 WRIGHT ET AL., *supra* note 55, § 3823, at 215 (commenting that § 1400 fosters wasteful litigation concerning venue); *Proposed Resolution 401-1*, *supra* note 482, at 243 (discussing disparity between declaratory actions and patent infringement).

<sup>484</sup> See Ryan, *supra* note 426, at 208.

<sup>485</sup> See, e.g., *Warner-Lambert Co. v. C.B. Fleet Co.*, 583 F. Supp. 519, 520 (D.N.J. 1984) (commenting that act of infringement is inducement of infringement); *Lemelson v. Ampex Corp.*, 372 F. Supp. 708, 713-14 (N.D. Ill. 1974) (finding regular and established place of business on basis of contract negotiations); *Hercules, Inc. v. Minnesota State Highway Dep't*, 337 F. Supp. 795, 802 (D. Minn. 1972) (identifying act of infringement as contributory infringement); *Ferguson v. Ford Motor Co.*, 77 F. Supp. 425, 434 (S.D.N.Y. 1948) (noting regular and established place of business on basis of connection to patent infringement).

<sup>486</sup> See Richard C. Wydick, *Venue in Actions for Patent Infringement*, 25 STAN. L. REV. 551, 551 (1973).

<sup>487</sup> See *Codex Corp. v. Milgo Elec. Corp.*, 553 F.2d 735, 738 (1st Cir. 1977) (noting perceived advantages of securing court hospitable to patents). The Federal Circuit has contributed rationality to section 1400 in *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574 (Fed. Cir. 1990). The court held that for purposes of corporate residency, the general venue statute supplements section 1400, rather than supplanting it as the Supreme Court had held in *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222 (1957). See *VE Holding Corp.*, 917 F.2d at 1579-80. Note, however, that this does not completely harmonize sections 1391 and 1400(b) because individuals still fall under the unique patent venue provisions.

<sup>488</sup> See 15 WRIGHT ET AL., *supra* note 55, § 3823, at 221-22; Ryan, *supra* note 426, at 208.

<sup>489</sup> See 15 WRIGHT ET AL., *supra* note 55, § 3823 at 221-22.

<sup>490</sup> See *United States Aluminum Corp. v. Kawneer Co.*, 694 F.2d 193, 195 (9th Cir.

fringement damages falls under subsection 1400(b)'s special venue provision.<sup>491</sup> As a result, an alleged infringer has more venue options than a patent holder.<sup>492</sup>

3. Subsection 1400(b) retains residency requirements at odds with the general venue statute. The Federal Circuit harmonized subsection 1400(b)'s corporate residency requirements with subsection 1391(c)'s requirements in *VE Holding Corp. v. Johnson Gas Appliance Co.*<sup>493</sup> However, individuals and unincorporated associations still fall under the sui generis requirements for patent venue.<sup>494</sup> Courts' strict construction of patent-venue provisions as applied to individuals is at odds with the liberality of venue under the general venue statute.

4. There is no apparent need for a special patent-venue statute; the general venue statute would suffice. Though the federal courts have exclusive jurisdiction over patent suits, the propriety of an exclusive patent-venue statute does not follow as a corollary. Significantly, the American Bar Association's Intellectual Property Section has called for subsection 1400(b)'s repeal in favor of having patent actions fall under the general venue statute.<sup>495</sup> This repeal would reduce the potential for further conflict among the district courts. If, as one commentator fears, any of the other circuits depart from the Federal Circuit's construction of subsection 1400(b), issues such as corporate residency will become problematic yet again.<sup>496</sup>

Section 1400 epitomizes the broader problem of proliferation of checkerboard venue statutes that detract from the generality

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1982); 15 WRIGHT ET AL., *supra* note 55, § 3823, at 221.

<sup>491</sup> See 28 U.S.C. § 1400(b) (1994).

<sup>492</sup> This inequity is qualified, however, by the discretion of a district court to decline to exercise its jurisdiction under the Declaratory Judgment Act. See *Proler Steel Corp. v. Luria Bros. & Co.*, 225 F. Supp. 412, 414 (D. Tex. 1964) (dismissing declaratory judgment action brought against alleged infringer in order to force plaintiff to bring coercive suit for patent infringement in proper district for such suit).

<sup>493</sup> See 917 F.2d 1574, 1578-80 (Fed. Cir. 1990).

<sup>494</sup> One case has held that amended subsection 1391(c)'s "personal jurisdiction rule" should also apply to partnerships in patent cases. See *Injection Research Specialists v. Polaris Indus.*, 759 F. Supp. 1511, 1512-16 (D. Colo. 1991) (upholding venue under § 1400(b) based on defendant partnership's concession that it was subject to district court's personal jurisdiction).

<sup>495</sup> See Ryan, *supra* note 426, at 207.

<sup>496</sup> See Ryan, *supra* note 393, at 88 (stating that it is possible that Federal Circuit's ruling on venue will not override conflicting circuit court decisions).

of section 1391.<sup>497</sup> It is perhaps unduly timid to recommend that, as with section 1338, section 1400's reform be left to a project dedicated to intellectual property issues. The Institute is unlikely to rationalize venue in general if it defers reform of each special-interest venue section until the Institute takes up the entire body of law of which it forms a minor part. Nonetheless, this Prospectus recommends that the Institute focus the present project on reform of the general venue provisions, and only when that has been accomplished seek to cut the Gordian Knot of the many competing special venue provisions.

#### 10. Section 1401: Stockholder's Derivative Action

In stockholder-derivative actions, section 1401 supplements the venue options available under the general venue statute.<sup>498</sup> Section 1401 afforded derivative plaintiffs a powerful advantage under pre-1990 law, when venue in a diversity action could be laid in the district in which the plaintiff resides: it permitted a derivative suit to be filed wherever the corporation itself resided.<sup>499</sup> Under current law, it would seem that section 1401 has only the much more modest effect of permitting plaintiffs to file suit in the state in which all the "real" defendants reside, even if the injured corporation does not share that state of residence. Despite this discrepancy, the short list's inclusion or exclusion of section 1401 is insignificant to the Institute's goals.

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<sup>497</sup> See, e.g., 15 WRIGHT ET AL., *supra* note 55, § 3814, at 146 n.1 (noting that special venue statutes for recovery of fines, penalties, or forfeitures are "scattered throughout the United States Code"); *id.* § 3809, at 92-93 n.21 (commenting that Clayton Act suit under 15 U.S.C. § 22 has special venue provisions); *id.* § 3811, at 33 n.24 (Supp. 1998) (stating that venue provision of Staggers Rail Act, 49 U.S.C. § 11707(d)(2)(A)(ii) (1994), has been held to be unaffected by 1988 amendment of general venue statute); *id.* § 3812, at 136 n.13 (remarking that antitrust actions have their own special venue provision under 15 U.S.C. § 15 (1994) and Labor Management Reporting and Disclosure Act has special venue provision under 29 U.S.C. § 412 (1994)).

<sup>498</sup> See *Industrial Waxes, Inc. v. International Rys. of Cent. Am.*, 193 F. Supp. 783, 786 (S.D.N.Y. 1961).

<sup>499</sup> See generally 7C WRIGHT ET AL., *supra* note 55, § 1825 (discussing pre-1990 status of § 1401).

## 11. Section 1402: United States as Defendant

Section 1402 deals principally with venue in actions brought under section 1346. For the reasons discussed above in connection with sections 1345 and 1346, the Institute should defer reform of section 1402 until the Institute undertakes a comprehensive project on government litigation.<sup>500</sup> This is not to deny that there are manifest problems with section 1402, some of which this Prospectus identifies in a brief review of its four subsections in the reverse order of their enumeration.

Subsection 1402(d) is the venue counterpart of subsections 1346(f) and 2409a.<sup>501</sup> It uncontroversially limits venue in quiet-title actions to the locality of the property in question.<sup>502</sup> Subsection 1402(c) in part provides a similar local-action rule respecting the levy of property in tax-collection disputes.<sup>503</sup> However, in the event that “no levy is made,” it lays venue in “the judicial district in which the event occurred which gave rise to the cause of action.”<sup>504</sup> This narrow rule of transactional venue shares the vice of former subsections 1391(a)(2) and 1391(b)(2) in tying venue to “the occasionally fictive assumption that a claim may arise in only one district.”<sup>505</sup>

Subsection 1402(b) is the venue counterpart of subsection 1346(b), the “principal provision of the Federal Tort Claims Act.”<sup>506</sup> It, too, perpetuates the vice of looking for a single district in which “the act or omission complained of occurred,” but mitigates this vice by affording the plaintiff the popular alternative of suing in the district in which the plaintiff resides.<sup>507</sup> There are conflicting decisions as to where prisoners reside for venue purposes.<sup>508</sup> Some courts flatly assert that prisoners do

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<sup>500</sup> See *supra* notes 235-38 and accompanying text (discussing reform of §§ 1345-1346).

<sup>501</sup> See 28 U.S.C. § 1402 (1994).

<sup>502</sup> See *id.* § 1402(d).

<sup>503</sup> See *id.* § 1402(c).

<sup>504</sup> *Id.*

<sup>505</sup> See *Leroy v. Great W. United Corp.*, 443 U.S. 173, 184-85 (1979).

<sup>506</sup> See *Richards v. United States*, 369 U.S. 1, 6 (1962) (describing § 1346(b)).

<sup>507</sup> See 28 U.S.C. § 1402(b) (1994). Nonresidents of the United States are entitled to sue under subsection 1346(b), but for them transactional venue is the only option. See *Smith v. United States*, 507 U.S. 197, 201-03 (1993).

<sup>508</sup> See *Bailey v. United States*, No. 92-3186-RDR, 1992 WL 331320, at \*1 (D. Kan. Oct. 23, 1992) (examining conflicting cases).

not change domicile when incarcerated.<sup>509</sup> These cases hold that prisoners who bring suits against the United States in their districts of incarceration cannot base venue on their residency in the district.<sup>510</sup> Other courts hold that prisoners reside where they are imprisoned for purposes of subsection 1402(b).<sup>511</sup>

Subsection 1402(a) is the most problematic part of section 1402. It governs venue for actions under subsection 1346(a). The general rule of subsection 1402(a)(1) is that plaintiffs may bring such actions only in the district where they reside.<sup>512</sup> Subsection 1402(a)(2) qualifies this rule as to corporate tax-refund actions only.<sup>513</sup> In addition to specifying special rules of corporate residence, subsection 1402(a)(2) permits transfer "to any other district."<sup>514</sup> However, it otherwise tracks section 1404 by permitting transfer where it will serve "the convenience of the parties and witnesses, in the interests of justice."<sup>515</sup> Subsection 1402(a)(2) leaves uncertain the rules governing the district of residence of corporations in other than tax-refund suits. It is underinclusive because it fails to extend its transfer provision to tax-refund suits by individuals. Although it appears that Congress intended this section to protect individual taxpayers from transfer sought by the government, the net effect may be to expose the taxpayer to conflicting litigation in a distant forum that is essentially a compulsory counterclaim to the taxpayer's refund action.<sup>516</sup>

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<sup>509</sup> See, e.g., *Brimer v. Levi*, 555 F.2d 656, 658 (8th Cir. 1977); *Abreu v. United States*, 796 F. Supp. 50, 52 (D.R.I. 1992).

<sup>510</sup> See, e.g., *Brimer*, 555 F.2d at 658 (holding that despite incarceration in Western District of Missouri, prisoner was not resident there and venue was, therefore, improper); *Abreu*, 796 F. Supp. at 52 (holding that prisoner's residence does not change to district of incarceration).

<sup>511</sup> See generally *Housand v. Heiman*, 594 F.2d 923, 925-26 n.5 (2d Cir. 1979) (noting trend toward allowing prisoner to establish domicile in his place of incarceration by satisfying prerequisites).

<sup>512</sup> See 28 U.S.C. § 1402(a)(1) (1994).

<sup>513</sup> See *id.* § 1402(a)(2) (1994).

<sup>514</sup> See *id.*

<sup>515</sup> See *id.*; see also *WRIGHT*, *supra* note 14, § 44, at 282-83 & n.51 (discussing significance of unrestricted range of transfer to "any other district" under § 1402).

<sup>516</sup> See *Caleshu v. United States*, 570 F.2d 711, 713 (8th Cir. 1978) (allowing simultaneous suits in Missouri by taxpayer for refund and in Hawaii by government for collection); *Caleshu v. Wangelin*, 549 F.2d 93, 95 (8th Cir. 1977) (holding that only actions by corporations against United States seeking tax refund may be transferred to any other district in interest of justice).

More troublesome still is the uncertainty under subsection 1402(a)(1) whether nonresident aliens and foreign-domiciled citizens of the United States may sue for a tax refund in any district court.<sup>517</sup> A divided panel of the Eleventh Circuit has ruled that the dismissal of nonresident alien's tax-refund suit for lack of any proper venue under subsection 1402(a)(1) would be unconstitutional. The panel apparently concluded that no venue requirement at all applies to such actions.<sup>518</sup> This Prospectus recommends that section 1402 be excluded from the short list and its revision left to a special project.

## 12. Section 1403: Eminent Domain

Like section 1399, section 1403 is a harmless but probably redundant local-action provision that accompanies a redundant jurisdictional counterpart, in this case section 1358. There seems no compelling reason to retain it. However, this Prospectus recommends leaving its repeal to a project on government litigation.

## 13. Section 1404: Change of Venue

Only brief attention need be paid to the three subsections of section 1404 other than subsection 1404(a).

Subsection 1404(d) is no longer obsolete and underinclusive. Formerly it brought within the operation of section 1404 the District Court for the District of the Canal Zone, a court that no longer exists<sup>519</sup> and failed to mention territorial courts such as the District of the Virgin Islands that had also been held to be eligible for section 1404 transfers.<sup>520</sup> A 1996 amendment has

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<sup>517</sup> See *Malajaeian v. United States*, 504 F.2d 842, 843-45 (1st Cir. 1974) (holding that nonresident alien must seek tax refund by suit in claims court rather than district court for lack of any district court with proper venue under § 1402(a)(1)); *Shaw v. United States*, 422 F. Supp. 339, 340-41 (S.D.N.Y. 1976) (transferring tax-refund suit, brought by citizens of United States who were domiciled in Great Britain, to claims court for lack of proper venue in any district court under § 1401(a)(1)).

<sup>518</sup> See *Alegria v. United States*, 945 F.2d 1523, 1526-28 (11th Cir. 1991).

<sup>519</sup> See 28 U.S.C.A. § 1404(d) (West Supp. 1998). Pursuant to paragraph 5 of article XI of the Panama Canal Treaty of 1977 and 22 U.S.C. §§ 3831 and 3841 to 3852, the District Court for the District of the Canal Zone was phased out of existence over a 30-month "transition period" that began on October 1, 1979 and ended at midnight on March 31, 1982.

<sup>520</sup> See 15 WRIGHT ET AL., *supra* note 55, § 3845, at 340 n.1 (citing statutes and cases



deleted reference to the Canal Zone, and now provides expressly for transfers to and from the district courts of Guam, the Northern Mariana Islands, and the Virgin Islands.<sup>521</sup>

Subsection 1404(c) deals with intradivisional venue, leaving the matter entirely within the discretion of the local district court.<sup>522</sup> This has sparked no controversy, but ought to be left to the local rules of the various district courts. Local rules ought also to supersede subsection 1404(b), which governs in needlessly prolix terms the transfer of cases between the formal divisions of a district.<sup>523</sup>

Subsection 1404(a) is responsible for “a veritable flood of litigation.”<sup>524</sup> While many of the decisions simply report the determination and weighing of contested facts, it is unfortunate that something as conceptually simple as a change-of-venue statute has occupied so much professional and judicial attention.<sup>525</sup> Much of the attention directed to subsection 1404(a) and its authority relative to subsection 1406(a) and other transfer provisions reflects choice-of-law considerations that fuel the forum-shopping contest.<sup>526</sup> Other sources of considerable debate are the availability and scope of appellate review.<sup>527</sup> These

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deeming District of Puerto Rico and District of Virgin Islands to be eligible districts for purposes of § 1404(a)).

<sup>521</sup> See Act of Oct. 19, 1996, Pub. L. No. 104-317, tit. VI, § 610(a), 110 Stat. 3860.

<sup>522</sup> See *Matthews v. North Slope Borough*, 646 F. Supp. 943, 945-46 (D. Alaska 1986) (holding that law of transferee court governs issues of federal law).

<sup>523</sup> The concept of divisional venue is obsolete and unmourned in the wake of the 1988 repeal of former section 1393. See generally 15 WRIGHT ET AL., *supra* note 55, § 3809 (Supp. 1998) (stating that there is no longer requirement that venue lie in particular division within district because of 1988 repeal of § 1393). Many districts operate in an essentially divisional fashion by local rule, with transfer among the different courthouses governed by much more flexible terms than subsection 1404(b) provides for transfer between formally designated districts. See, e.g., E.D. CAL. R. 3-120(d) (allowing transfer to another court upon motion or for good cause); see also Comment, *The Local Rules of Civil Procedure in the Federal District Courts — A Survey*, 1966 DUKE L.J. 1011, 1021-23 (applauding use of local rules for intradistrict allocation of cases).

<sup>524</sup> See WRIGHT, *supra* note 14, § 44, at 279.

<sup>525</sup> See *id.*

<sup>526</sup> See, e.g., *Ferens v. John Deere Co.*, 494 U.S. 516 (1990) (holding that transferor court's law applies); *In re Korean Air Lines Disaster*, 829 F.2d 1171 (D.C. Cir. 1987) (holding that law of transferee court governs issues of federal law); *Ellis v. Great Southwestern Corp.*, 646 F.2d 1099, 1109-11 (5th Cir. 1981) (holding that transferee court's law applies to issues of state law in diversity case after transfer to cure lack of personal jurisdiction).

<sup>527</sup> See, e.g., WRIGHT, *supra* note 14, § 44, at 285 (noting that decisions regarding availability of appellate review of transfer orders are inconsistent even within single circuit).

issues have added a layer of exquisite complexity to a putative contest over relative convenience. The approach of the 1969 Study was to deal separately and in great detail with change of venue internally to each of the major heads of jurisdiction, expressly addressing choice-of-law issues in the diversity context.<sup>528</sup> This Prospectus recommends more modest reform at the lower levels of complexity, directed to the grounds and choices for transfer and the currently overlapping application of sections 1404, 1406, 1407, and 1631. While this approach would not entirely tame excessive litigation over transfer issues, it could substantially reduce the flow and cost of such litigation.

This Prospectus recommends curing the problem of overlap by revising subsection 1404(a) to make clear that it authorizes transfer only when dictated by convenience interests, not the need to save the plaintiff from the prejudicial consequences of having brought suit in a court without proper subject-matter jurisdiction, venue, or personal jurisdiction over the defendant. Section 1631, which might well be renumbered section 1405 to replace the vestigial statute that is presently section 1405, should be revised to make clear that it is the vehicle for transfer to cure a lack of subject-matter jurisdiction. Section 1406 should be broadened to make express what some courts have implied: that it permits transfer for lack of personal jurisdiction as well as improper venue.<sup>529</sup> Section 1407 should be reexamined to determine whether it should authorize what the Supreme Court has recently held it presently forbids: transfer in the interest of judicial efficiency that is permanent and not merely for pretrial purposes.<sup>530</sup>

Specific to subsection 1404(a) remains the problem of defining the range of eligible transferee districts. *Hoffman v. Blaski*<sup>531</sup> construed subsection 1404(a)'s reference to "where it might have been brought" as limiting that range to those dis-

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<sup>528</sup> See 1969 STUDY, *supra* note 3, at 18-21, 32, 36, 46.

<sup>529</sup> See, e.g., *Ellis*, 649 F.2d at 1103-06 (noting that some courts have interpreted § 1406 so broadly that venue and personal jurisdiction issues are treated as if they are interchangeable).

<sup>530</sup> See *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956, 962 (1998) (noting that § 1407 obligates Judicial Panel on Multidistrict Litigation to remand case to original court when pretrial proceedings are completed).

<sup>531</sup> 363 U.S. 335 (1960).

tricts in which the plaintiff could have brought suit without reliance on the defendant's waiver of valid objections to venue or personal jurisdiction.<sup>532</sup> Leading commentators have argued for the repeal of that constraint,<sup>533</sup> and the *1969 Study* took basically the same position.<sup>534</sup>

This Prospectus cautions against wholesale rejection of *Hoffman*. Section 1407 should be the vehicle for such a geographically unlimited transfer power, mediated by the Judicial Panel on Multidistrict Litigation. Section 1404 should be structured and invoked to serve legitimate convenience interests. However, the proposed reform would likely lead to virtually routine transfer motions in federal-question suits by litigants motivated to attain the tactical benefits of intercircuit splits on issues of federal law<sup>535</sup> or of the unfortunate new disuniformity in federal procedure<sup>536</sup> rather than by any genuine concern for the greater convenience of the desired alternative forums. Some have already questioned whether section 1404 is worth the candle;<sup>537</sup> allowing transfer to any district whatsoever would vastly compound these concerns. The Institute should consider other

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<sup>532</sup> See *id.* at 342-43. There is confusion as to whether the statute of limitations is an additional concern under the "where it might have been brought" standard of subsection 1404(a). Compare *Boswell v. Baton*, No. 91-CV-1475, 1993 WL 293990, at \*4 (N.D.N.Y. Aug. 4, 1993) (holding that transfer is not permitted to district in which defendant would have effective limitations defense), with *Packer v. Kaiser Found. Health Plan*, 728 F. Supp. 8, 12 (D.D.C. 1989) (stating that lapse of statute of limitations in potential transferee district is irrelevant under § 1404(a)).

<sup>533</sup> See 15 WRIGHT ET AL., *supra* note 55, § 3845, at 341.

<sup>534</sup> See 1969 STUDY, *supra* note 3, at 154 (retaining restriction only as to transfer of diversity action upon plaintiff's motion); see also WRIGHT, *supra* note 14, § 44, at 283 n.51 (citing 1958 amendment of § 1402(a)(2)'s transfer provision regarding tax-refund suits by corporations, eliminating phrase "where it might have been brought").

<sup>535</sup> Cf. *In re Korean Air Lines Disaster*, 829 F.2d 1171, 1174-75 (D.C. Cir. 1987) (holding that after § 1407 transfer, construction of federal law adopted by governing circuit of transferee district must be applied notwithstanding split with circuit law of transferor district). See generally Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677 (1984).

<sup>536</sup> See generally WRIGHT, *supra* note 14, § 63A (describing how Civil Justice Reform Act of 1990 required all 94 federal district courts to implement local plans to combat problems of expense and delay); Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 382 (1992) (arguing that Act encourages proliferation of complex and divergent local rules); Carl B. Tobias, *Civil Justice Reform and Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1992) (describing trend toward disuniformity of federal civil procedure).

<sup>537</sup> See WRIGHT, *supra* note 14, § 44, at 286 n.77.

means of reforming *Hoffman* such as Professor Waggoner's proposal to permit transfer to any district in which the defendant could have sued the plaintiff in a hypothetical suit reciprocal to that brought by the plaintiff.<sup>538</sup> Because of these concerns, this Prospectus recommends that section 1404 be included on the short list.

#### 14. Section 1405: Creation or Alteration of District or Division

Section 1405, dealing with the effect on venue choices of the creation of a new district or division, is entirely uncontroversial but virtually insignificant. Legislation creating new districts or divisions is surpassingly rare. In the event such legislation is proposed in the future, it could easily incorporate the transitional provisions currently set forth in section 1405. Thus, the short list's inclusion or exclusion of section 1405 is insignificant to the Institute's goals.

#### 15. Section 1406: Cure or Waiver of Defects

Courts have interpreted subsection 1406(a), which allows transfer of an action laying venue in the wrong district to another district "in which it could have been brought," in parallel with the slightly different phrasing of subsection 1404(a)'s reference to transfer of a case to an alternative district "where it might have been brought," as interpreted in *Hoffman*.<sup>539</sup> However, the restriction on eligible transferee districts is uncontroversial in the context of subsection 1406(a) because a section 1406 transfer does not disturb a valid choice of forum.<sup>540</sup> It seeks only to spare the plaintiff the prejudice of dismissal as a consequence of filing suit in a forum in which the suit cannot proceed over the defendant's objection.<sup>541</sup> While it

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<sup>538</sup> See Michael J. Waggoner, *Section 1404(a), "Where It Might Have Been Brought": Brought by Whom?*, 1988 BYU L. REV. 67.

<sup>539</sup> See WRIGHT, *supra* note 14, § 44, at 277.

<sup>540</sup> See *id.*

<sup>541</sup> See *id.*

might be desirable to codify the case law that dismissal is preferable to transfer only in extraordinary circumstances, the cases reflect little confusion on the point.<sup>542</sup>

As previously noted in connection with section 1404 and discussed below in connection with section 1631, there is considerable confusion about the overlapping applicability of sections 1404, 1406, and 1631 to cases in which the defendant has some basis for objecting to the plaintiff's choice of forum on a ground other than, or in addition to, improper venue. A principal objective of transfer reform would be to clarify the respective roles of these statutes. Thus, this Prospectus recommends including section 1406 on the short list.

#### 16. Section 1407: Multidistrict Litigation

Parties have used section 1407 in a wide variety of litigation, including aircraft disasters, antitrust actions, products liability cases, intellectual property litigation, and other aggregate cases rooted in a common question of fact.<sup>543</sup> There are only two types of cases ineligible for consolidation under section 1407. They are antitrust actions brought by the United States under subsection 1407(g) and actions by the Securities and Exchange Commission for equitable relief pursuant to the securities laws under 15 U.S.C. § 78u(g).<sup>544</sup>

Section 1407 allows consolidation of cases involving common questions of fact pending in different districts into one district for pretrial proceedings.<sup>545</sup> Theoretically, following such proceedings each case "shall" be remanded back to the original district for trial, unless the transferee judge terminates it.<sup>546</sup> In

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<sup>542</sup> See generally 15 WRIGHT ET AL., *supra* note 55, § 3827, at 269-72 & nn.24-26. As amended in 1996 in tandem with subsection 1404(d), subsection 1406(c) now permits transfer to and from the district courts of Guam, the Northern Mariana Islands, and the Virgin Islands. See Act of Oct. 19, 1996, Pub. L. No. 104-317, tit. VI, § 610(b), 110 Stat. 3860, 3860.

<sup>543</sup> See generally 15 WRIGHT ET AL., *supra* note 55, §§ 3861-3867; Earle F. Kyle, IV, *The Mechanics of Motion Practice Before the Judicial Panel on Multidistrict Litigation*, 175 F.R.D. 589 (1998).

<sup>544</sup> See *id.* § 3862, at 509-10. The rationale for these exclusions is to prevent "tag-along" civil damage suits from impeding the speedy resolution of government enforcement of the antitrust and securities laws. See *id.*

<sup>545</sup> See *id.* at 512.

<sup>546</sup> See 28 U.S.C. § 1407(a) (1994). Subsection 1407(h) allows consolidation for all pur-

reality, courts remand only a small fraction of cases back to the transferor court for trial.<sup>547</sup> Most cases are either terminated while in the transferee court or tried in the transferee court.<sup>548</sup>

Trial in the transferee court has resulted in part from the common but now disapproved practice of a transferee court using subsection 1404(a) to transfer consolidated actions to the transferee court for trial.<sup>549</sup> This practice in turn led to the possibility of retaining the cases for trial becoming a major factor in the Multidistrict Panel's choice of transferee district.<sup>550</sup> When a section 1404 transfer has been unavailable because the transferee court is not a district where the action "might have been brought," courts have retained the case for trial if the parties consented.<sup>551</sup> There is obvious tension between such a practice and the rule of *Hoffman*, which disallows reliance on consent in order to expand the range of transferee districts.

The legislative history of section 1407 shows that Congress did not intend section 1407 to authorize transfer for other than pretrial purposes, but recognized that a more plenary power of multidistrict transfer might be shown to be desirable by "future experience."<sup>552</sup> The Supreme Court has now enforced the lim-

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poses, including trial, of actions brought under section 4C of the Clayton Act, which defines *parens patriae* actions by state attorneys general. *See id.* § 1407(h) (1994).

<sup>547</sup> *See* 15 WRIGHT ET AL., *supra* note 55, § 3861, at 501 & n.21 (citing study that found that during first eight years of operation of § 1407, of 2800 cases terminated during that period, only 114 had been remanded to transferor court prior to termination).

<sup>548</sup> *See* Blake M. Rhodes, Comment, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U. PA. L. REV. 711, 726 n.87 (1991) (noting that in early 1980s judges remanded less than five percent of cases that panel transferred and citing Robert J. Ward, *Multidistrict Litigation Procedures in the United States*, 1982 TRIAL LAW. GUIDE 249, 256).

<sup>549</sup> *See id.* at 726.

<sup>550</sup> Because section 1404 allows transfer only to districts where the action "might have been brought," the Panel may refuse to consolidate cases in the otherwise best location and instead consolidate in a location that will allow retaining the cases for trial. *See, e.g., In re Yarn Processing Patent Validity Litig.*, 341 F. Supp. 376 (J.P.M.L. 1972). There the panel transferred the cases to the Southern District of Florida, despite a three-judge dissent providing a detailed analysis of why the Eastern District of New York was the best forum, because it was doubtful that personal jurisdiction existed over one of the defendants in New York. *See id.* (holding that transfer to Florida was more appropriate because New York might not be able to assert personal jurisdiction over important party); *see also id.* at 389 (Weinfeld, J., dissenting) (arguing that Eastern District of New York was only practical transferee forum).

<sup>551</sup> *See, e.g., In re Alien Children Educ. Litig.*, 501 F. Supp. 544, 551 n.7 (S.D. Tex. 1980).

<sup>552</sup> *See* H.R. REP. NO. 1130, at 4 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1902 (sug-

ited scope of section 1407 as enacted.<sup>553</sup> When the Institute conducts the suggested study of the transfer provisions as a group it should consider amending the language of section 1407 to authorize transfer for all purposes, including trial.<sup>554</sup>

A major benefit of such a change is that the Multidistrict Panel would then take into account the full consequences of a proposed transfer. A collective and expert body should weigh the policy consequences of transfer-until-termination. It should not leave this balancing to the on-the-fly discretion of a single transferee judge. Under the now-disapproved case law reading present section 1407 to permit terminal transfer, the overriding factor in determining whether a judge should consolidate cases was the expected gain in judicial efficiency.<sup>555</sup> Subsection 1407(a) includes "the convenience of parties and witnesses" as a criterion for consolidation, but this factor received insufficient consideration.<sup>556</sup> Consolidation has been ordered even when all parties in the matter objected.<sup>557</sup> Were section 1407 revised as suggested to provide for transfer-until-termination, it should also be revised to give greater weight to the parties' convenience interests as a countervailing reason to deny transfer.

In the *1969 Study*<sup>558</sup> and the recent Project on Complex Litigation,<sup>559</sup> the Institute offered expressly normative recommendations for consolidating litigation by expanding the subject-matter jurisdiction and transfer powers of the federal courts. The scope of reform of section 1407 contemplated here would neither replicate nor conflict with these visionary proposals. For purposes of this project, the principal aim would be technical

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gesting that if Congress enacts § 1407 and future experience justifies extending it to include consolidation and coordination for trial purposes, then only minor amendments would be necessary to present language of bill).

<sup>553</sup> See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956, 963-64 (1998).

<sup>554</sup> See Rhodes, *supra* note 548, at 746-49 (discussing transfer procedure and advantage of having panel judges decide if claims should be transferred for trial).

<sup>555</sup> See *id.* at 719 (stating that court's purpose in consolidation or coordination of pretrial proceedings is to promote efficient justice).

<sup>556</sup> See *id.* at 720 (commenting that weight accorded to convenience factor has been minuscule).

<sup>557</sup> See, e.g., *In re Air Crash Disaster at Stapleton Int'l Airport*, 720 F. Supp. 1505, 1513 (D. Colo. 1989).

<sup>558</sup> See 1969 STUDY, *supra* note 3, at 528-31.

<sup>559</sup> See ALI COMPLEX LITIGATION PROJECT, *supra* note 18, at 21-262.

clarification and adjustment of section 1407 vis-à-vis the transfer provisions of sections 1404, 1406, and 1631. Although the proposed revision of section 1407 to permit a transfer final for all purposes would unquestionably raise some normative concerns, it would not substantially depart from common practice as it existed before the Supreme Court's recent, restrictive interpretation of section 1407.<sup>560</sup>

17. Sections 1408 to 1412: Venue of Cases Under Title 11; Venue of Proceedings Arising Under Title 11 or Arising in or Related to Cases Under Title 11; Venue of Cases Ancillary to Foreign Proceedings; Jury Trials; Change of Venue

This Prospectus omits consideration of the special bankruptcy-venue provisions in sections 1408 to 1412 as well as section 1411's inappositely located treatment of the right to jury trial in bankruptcy actions. For the reasons stated above in connection with section 1334, this Prospectus recommends excluding bankruptcy matters from the scope of this project.

18. Section 1631: Transfer to Cure Want of Jurisdiction

Section 1631 is found in chapter 99 of title 28, rather than chapter 87, but is considered here because it ought to be revised and included in chapter 87 as a counterpart to the transfer provisions set forth in sections 1404, 1406, and 1407. Section 1631 as so revised would expressly deal only with transfer between federal courts to cure a defect in subject-matter jurisdiction. It is tempting to consider more sweeping revision of section 1631 to embrace transfer from federal to state courts. However, the complex issues posed by fitting such a federal-state transfer provision into the existing web of concurrent jurisdiction, removal, and remand provisions would overshadow the prospects of achieving more modest but needed technical reform.

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<sup>560</sup> See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956, 962-63 (1998) (describing broad scope of prevailing practice under § 1407 rejected by Court).



Section 1631 allows a federal court to transfer an action upon finding “a want of jurisdiction” to any other federal court in which the action “could have been brought.”<sup>561</sup> Added in 1982,<sup>562</sup> Congress intended this provision to alleviate extant problems of subject-matter jurisdiction and new complications of subject-matter jurisdiction arising out of the simultaneous creation of the new Federal Circuit.<sup>563</sup> Unfortunately, section 1631’s vague statutory authority to transfer for “want of jurisdiction” is not closely tailored to achieve this limited legislative objective. This has led courts to split over whether section 1631 allows transfer only for lack of subject-matter jurisdiction or whether transfer may be effected to cure other problems as well.

Rather than constituting a simple binary circuit split, the cases construing section 1631 can best be described as encompassing a range of gradations.<sup>564</sup> The most restrictive approach treats sec-

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<sup>561</sup> See 28 U.S.C. § 1631 (1994). Transferee courts include all district courts, appellate courts, the Court of Federal Claims, and the Court of International Trade. See *id.* § 610 (1994).

<sup>562</sup> See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, 55.

<sup>563</sup> See S. REP. NO. 97-275, at 40 (1982), *reprinted in* 1982 U.S.C.C.A.N. 11, 40 (commenting that § 1631 would help avoid misfiling problems associated with creation of Federal Circuit); Jeffrey W. Tayon, *The Federal Transfer Statute: 28 U.S.C. § 1631*, 29 S. TEX. L. REV. 189, 200 (1987) (noting that Congress sought to remedy problems arising out of creation of Federal Circuit). The key legislative material states:

Because of the complexity of the Federal court system and of special jurisdictional provisions, a civil case may on occasion be mistakenly filed in a court — either trial or appellate — that does not have jurisdiction. By the time the error is discovered, the statute of limitations or a filing period may have expired. Moreover, additional expense is occasioned by having to file the case anew in the proper court. Section 301 [of the Federal Courts Improvement Act] adds a new chapter to title 28 that would authorize the court in which a case is improperly filed to transfer it to a court where subject matter jurisdiction is proper. . . . This provision is broadly drafted to allow transfer between any two Federal courts.

S. REP. NO. 97-275, at 40. See generally 15 WRIGHT ET AL., *supra* note 55, § 3842, at 323 n.10 (disapproving of contrary claims about intent and effect of § 1631).

<sup>564</sup> See, e.g., Tayon, *supra* note 563, at 224 (arguing that language of § 1631 is broad enough to support different interpretations).

This “range of gradations” is illustrated by a new, quasi-circuit-split that has arisen over the necessity for the actual transfer of a case under section 1631, as opposed to the mere “transferability” of a case under section 1631, in order for an eligible transferee court to have subject-matter jurisdiction of a case wrongly filed in one court and then refiled, without transfer, in the proper court.

In the compelling case of *Rodriguez-Roman v. INS*, 98 F.3d 416 (9th Cir. 1996), a mem-

tion 1631 as a cure only for defects of subject-matter jurisdiction.<sup>565</sup> The most expansive approach allows section 1631 to cure mere venue problems in the absence of any jurisdictional problem.<sup>566</sup>

Courts that read section 1631 to allow transfer only for lack of subject-matter jurisdiction believe that their construction comports most closely with legislative intent.<sup>567</sup> Courts construing the statute to permit transfer to cure a want of in-personam jurisdiction reason that Congress intended section 1631 "to enhance citizen access to justice."<sup>568</sup> Thus construed, section 1631

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ber of the Cuban merchant marine who had jumped ship and illegally entered the United States was denied asylum and ordered deported by the INS despite the substantial possibility that he would be sentenced to death, or at least for a prolonged term of imprisonment, were he indeed repatriated to Cuba. Upon the erroneous advice of counsel, he filed a timely pro se petition for review in the Eleventh Circuit. *See id.* at 421. The clerk of that court returned the petition unfiled because the Eleventh Circuit was not the proper court in which to file such a petition. *See id.* He then filed an untimely petition in the proper court, the Ninth Circuit. *See id.* The panel opinion of Judge Reinhardt granted the petition and vacated the deportation order, *see id.* at 432, with Judge Kozinski concurring and stating that he "generally agree[d]" with the panel opinion, *see id.* That opinion reached the merits only after reaffirming a series of earlier Ninth Circuit cases "which permit the lack of jurisdiction to be cured under § 1631 even if a case was not actually transferred, so long as it is transferable." *See id.* at 421 (citing *Clark v. Busey*, 959 F.2d 808, 812 (9th Cir. 1991)); *Kolek v. Engen*, 869 F.2d 1281, 1284 (9th Cir. 1989); *In re McCauley*, 814 F.2d 1350, 1352 (9th Cir. 1987).

The Ninth Circuit acknowledged that it was creating a possible circuit split with *Howitt v. United States Department of Commerce*, 897 F.2d 583, 584 (1st Cir. 1990), which had held that section 1631 could cure a jurisdictional defect only if the court of appeals in which an appeal had been timely but erroneously filed first transferred the case to the proper circuit. *See Rodriguez-Roman*, 98 F.3d at 422. But it distinguished *Howitt* on the ground that there the First Circuit had indicated as an alternative ground for its decision that the potential transferor court would not have been obligated to transfer rather than dismiss the case for lack of jurisdiction because the case was so lacking in apparent merit that transfer might well not have been within the "interests of justice" required by section 1631. *See id.*

<sup>565</sup> *See, e.g., Nose v. Rementer*, 610 F. Supp. 191, 192 (D. Del. 1985) (noting that § 1631 applies only to cases where transferor court lacks subject-matter jurisdiction and holding § 1404(a) to be proper basis for transfer to cure lack of personal jurisdiction).

<sup>566</sup> *See International Bhd. of Elec. Workers v. Interstate Commerce Comm'n*, 832 F.2d 91, 93 (7th Cir. 1987) (holding that § 1631 authorizes transfer for lack of proper venue between courts of appeal).

<sup>567</sup> *See Boswell v. Baton*, No. 91-CV-1475, 1993 WL 293990, at \*2 (N.D.N.Y. Aug. 4, 1993); *Mortensen v. Wheel Horse Prods., Inc.*, 772 F. Supp. 85, 87-88 (N.D.N.Y. 1991); *McTyre v. Broward Gen. Med. Ctr.*, 749 F. Supp. 102, 105 (D.N.J. 1990); *Levy v. Pyramid Co.*, 687 F. Supp. 48, 51 (N.D.N.Y. 1988), *aff'd*, 871 F.2d 9 (2d Cir. 1989).

<sup>568</sup> *See Ross v. Colorado Outward Bound Sch., Inc.*, 822 F.2d 1524, 1526 (10th Cir. 1987); *Hill v. United States Air Force*, 795 F.2d 1067, 1070-71 (D.C. Cir. 1986); *Slatick v. Director, Office of Worker's Compensation Programs, United States Dep't of Labor*, 698

would complement sections 1404 and 1406, which on their face allow for transfer only to cure venue problems.<sup>569</sup> If section 1631 permits transfer to cure a lack of personal jurisdiction, it moots the need for a strained construction of either section 1404 or section 1406 to permit such a transfer “in the interests of justice.”<sup>570</sup>

The most interesting of the cases reading section 1631 to permit the cure of any jurisdictional defect is *United States v. American River Transportation Inc.*<sup>571</sup> There the district court announced that it relied on “the plain language of the provision, the purpose of the Act, as well as the precedent cited above in finding that this provision applies to *any* type of jurisdiction, including in rem jurisdiction.”<sup>572</sup>

In at least two instances courts have used section 1631 to cure improper venue even when there was no jurisdictional defect at all.<sup>573</sup> Given its useful function and the great range of uncer-

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F.2d 433, 434 (11th Cir. 1983); *Carty v. Beech Aircraft Corp.*, 679 F.2d 1051, 1066 & n.17 (3d Cir. 1982).

<sup>569</sup> See 28 U.S.C. § 1404 (1994); *id.* § 1406 (1994).

<sup>570</sup> See *Murphy v. Klein Tools, Inc.*, 693 F. Supp. 982, 986 (D. Kan. 1988) (arguing that § 1631 removes need for courts to read § 1406(a) broadly when transferring case for lack of jurisdiction).

In *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 465-66 (1962), the Supreme Court held that the transferring district did not need to have personal jurisdiction over the defendant in order to avoid dismissal by transfer of the case under section 1406 to a district in which proper venue and personal jurisdiction both exist. This prompted the Fifth Circuit to hold that if the doubly wrong plaintiff in *Goldlawr* could file suit in a district with neither proper venue nor personal jurisdiction and could benefit from transfer rather than dismissal, a plaintiff who filed suit in a district of proper venue but improper personal jurisdiction ought to fare no worse. See *Dubin v. United States*, 380 F.2d 813, 814-15 (5th Cir. 1967). *Dubin* has elicited a small literature of cases and commentary, both following and questioning its holding and debating whether such a transfer is properly grounded, if at all, in section 1404 rather than section 1406. See *Ellis v. Great Southwestern Corp.*, 646 F.2d 1099, 1105-07 (5th Cir. Unit A June 1981).

<sup>571</sup> See *United States v. American River Transp. Inc.*, 150 F.R.D. 587, 591-93 (C.D. Ill. 1993).

<sup>572</sup> *Id.* at 591 (emphasis added).

<sup>573</sup> See *Dornbusch v. Commissioner*, 860 F.2d 611, 615 (5th Cir. 1988); *International Bhd. of Elec. Workers v. Interstate Commerce Comm'n*, 832 F.2d 91, 93 (7th Cir. 1987). Two other circuits have relied on the inherent power to order the transfer of appeals within their jurisdiction when one of the parties has refused to waive a venue objection, construing section 1631 as consistent with but not an alternative to this pre-existing inherent power. See *Becker v. Commissioner*, 852 F.2d 524, 526 (11th Cir. 1988); *Alexander v. Commissioner*, 825 F.2d 499, 502 (D.C. Cir. 1987).

tainty as to its proper scope of application, this Prospectus recommends that section 1631 be included on the short list.

### C. Chapter 89's Treatment of Removal Jurisdiction

#### 1. Section 1441: Actions Removable Generally

With the exception of subsection 1441(c), the problems of the basic removal statute are expository rather than substantive. They are recurrent problems nonetheless, and lend themselves well to revision.<sup>574</sup> Departing here from its general model of evaluation and recommendation, this Prospectus articulates the specific text by which section 1441 might be revised.<sup>575</sup> It first proposes expository revision of subsections 1441(a) and (b), punctuated with explanatory comments as to each subsection. It then proposes and justifies substantive revision of subsection 1441(c), and concludes by proposing minor, technical revision of subsection 1441(d).

##### a. Subsection 1441(a)

The Institute should rewrite subsection 1441(a) to state clearly the basic rule of removal, retaining most of the existing text but with extraneous matter stricken and the language of current subsection 1441(e) inserted into subsection 1441(a). As so revised subsection 1441(a) would read:

Except as provided in section 1445 of this chapter, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed to the district court of the United States for the district embracing the place where such action is pending. The court to which such action is removed is not precluded

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<sup>574</sup> The 1969 Study did not deal separately with removal jurisdiction in general. The provisions of current section 1441 were integrated into each of the revised heads of federal jurisdiction proposed by the Institute. See 1969 STUDY, *supra* note 3, at 140 (commenting that proposed § 1304 would replace provisions of present § 1441 as applied to diversity cases). By contrast, the Institute did propose to treat the mechanics of removal discretely and collectively in a new chapter 89 of title 28. See *id.* at 336-65.

<sup>575</sup> As discussed below in the Epilogue to this Prospectus, see *infra* notes 716-25 and accompanying text, a substantially different and more extensive set of proposed new removal statutes has since been presented to the Advisers, but has not yet been considered by either the Council or in the membership of the Institute. See AMERICAN LAW INSTITUTE, FEDERAL JUDICIAL CODE REVISION PROJECT: PRELIMINARY DRAFT NO. 2 (Sept. 3, 1997).

from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

This proposed revision makes the following changes:

1. Present subsection 1441(a) begins "Except as otherwise provided expressly by Act of Congress . . ." This is changed to a proviso requiring any such exception to be incorporated into section 1445. No justification exists for enacting limitations on removal in particular substantive statutes. As a matter of legislative discipline and sound judicial administration all such exceptions should be collected in section 1445.

2. The proposed revision deletes the language of current subsection 1441(a) specifying "by the defendant or defendants" and its implied but settled rule that all defendants must join in the notice of removal. Such language should be inserted into section 1446, which specifies the other procedures for effecting removal.

3. The proposed revision strikes the reference to removal to the proper division within a particular district as obsolete under modern venue principles.

4. The proposed revision deletes the final sentence of present subsection 1441(a), added in 1988 to resolve the status of "Doe-defendant" actions arising primarily in California. This sentence should be inserted in subsection 1441(b), where other diversity-specific qualifications to the general removal statute may be found.

5. The final sentence of revised subsection 1441(a) restates in haec verba the 1986 repeal of the rule of "derivative jurisdiction," which barred removal jurisdiction over an action within the exclusive jurisdiction of the federal courts that was mistakenly filed in a state court.<sup>576</sup> This language currently appears as subsection 1441(e).<sup>577</sup> While the language of present subsection 1441(e) may not be ideally drafted, no one doubts its purpose and effect. It should therefore be retained, but incorporated into subsection 1441(a)'s general grant of removal jurisdiction.

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<sup>576</sup> See Judicial Improvements Act of 1985, Pub. L. No. 99-336, § 3, 100 Stat. 633, 637 (1986).

<sup>577</sup> See 28 U.S.C. § 1441(e) (1994).

*b. Subsection 1441(b)*

The Institute should revise subsection 1441(b) to set forth clearly the special rules of removal jurisdiction applicable when removal is based solely on diversity jurisdiction. As so revised subsection 1441(b) would read:

For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded. Any civil action of which the district courts have original jurisdiction based solely on the citizenship of the parties shall be removable only if no properly joined and served defendant is a citizen of the State in which such action was brought.

Proposed new subsection (b) differs from current law as follows:

1. Revised subsection 1441(b) retains without change the relocated language of the 1988 provision regarding Doe defendants presently set forth as the second sentence of present subsection 1441(a).

2. The second sentence of revised subsection 1441(b) alters the language but not the effect of existing subsection 1441(b). The rephrased rule expressly makes the bar on removal by a forum-state citizen applicable only to removal predicated solely on diversity jurisdiction.

*c. Subsection 1441(c)*

Subsection 1441(c) has been a persistent source of jurisdictional confusion since its ill-explained introduction into the Judicial Code of 1948.<sup>578</sup> Congress enacted current subsection 1441(c) in 1990 as an equally ill-explained partial response to the recommendation of the Federal Court Study Committee that subsection 1441(c) be repealed unless general diversity jurisdiction were abolished.<sup>579</sup>

The 1990 amendment of subsection 1441(c) and the contemporaneous enactment in 1990 of the new supplemental-jurisdiction statute, section 1367, have created confusion about the

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<sup>578</sup> See WRIGHT, *supra* note 14, § 39, at 234; 14A WRIGHT ET AL., *supra* note 55, § 3724, at 359-60.

<sup>579</sup> See Oakley, *supra* note 31, at 748-50.

relationship between removal of a “separate and independent” claim under subsection 1441(c) and the standards for the exercise of supplemental jurisdiction. Suppose claim A is within the original jurisdiction of the federal courts but claim B, if sued upon independently, is not. If claim A and claim B are transactionally related so that, in the words of subsection 1367(a), claim B is “part of the same constitutional case or controversy under Article III of the United States Constitution,”<sup>580</sup> a case in which claims A and B are joined in the complaint could be filed originally in federal court. As such, the parties could remove it under the general rule of removal of the proposed revision of subsection 1441(a). Whether parties litigate such a case in federal court based on original jurisdiction or removal jurisdiction, the same standards of present subsection 1367(c) for discretionary refusal to exercise jurisdiction over supplemental claims should apply.

Some district courts have thought, however, that subsection 1441(c) provides greater discretion to remand removed claims than is permitted under the narrower standards of subsection 1367(c).<sup>581</sup> Such courts have sometimes labored to find supplemental claims in fact “separate and independent” rather than treat these categories as mutually exclusive.<sup>582</sup> This permits those courts to take advantage of the supposedly greater remand authority under subsection 1441(c). The courts may then order remand of the entire case because the presence in a removed case of a purportedly “separate and independent” claim authorizes the remand even of the removal-enabling federal-question claim if state law predominates as to that claim as well.<sup>583</sup> Other courts have simply held that the policies justifying remand of the entire case under subsection 1441(c) apply

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<sup>580</sup> See 28 U.S.C. § 1367(a) (1994).

<sup>581</sup> See, e.g., *Moore v. DeBiase*, 766 F. Supp. 1311, 1319-21 (D.N.J. 1991) (holding that § 1441(c) permits court to remand all claims when “the state law claims are more complex or require more judicial resources to adjudicate or are more salient in a case as a whole than the federal law claims”); *Holland v. World Omni Leasing, Inc.*, 764 F. Supp. 1442, 1443-45 (N.D. Ala. 1991).

<sup>582</sup> See, e.g., *Moore*, 766 F. Supp. at 1321 n.18.

<sup>583</sup> See, e.g., *id.* at 1320-21. The *Moore* reasoning has since been rejected by that court’s governing circuit in the salutary case of *Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 787 (3d Cir. 1995).

by analogy to permit remand of the entire case under subsection 1367(c).<sup>584</sup>

Appellate regulation of these adventurous and ill-conceived decisions has been inhibited by the general prohibition on appellate review of an “order remanding a case to the State court from which it was removed” under subsection 1447(d).<sup>585</sup> This prohibition has had the perverse effect of appearing to insulate from review a decision remanding an entire removed case — federal-question claim included — in which the district court finds that “State law predominates.”<sup>586</sup> In most reported instances, the district court has been clearly wrong in invoking subsection 1441(c) as authority to remand an entire case that was properly removed under subsection 1441(a) because federal-question claims were joined with supplemental claims.<sup>587</sup> In two cases, however, the courts of appeals have sustained their jurisdiction to repudiate such misapplication of subsection 1441(c) as a general source of discretionary authority to remand an entire case “in which State law predominates.”<sup>588</sup>

It is tempting to urge wholesale repeal of subsection 1441(c). However, a persuasive case can be made that it retains vitality as an antidote to attempts to impair the right of removal of federal-question claims by joining them to wholly unrelated state-law

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<sup>584</sup> See, e.g., *Spaulding v. Mingo County Bd. of Educ.*, 897 F. Supp. 284, 289 (S.D.W. Va. 1995); *Administoff Inc. v. Kaster*, 799 F. Supp. 685, 690 (W.D. Tex. 1992). But see *Williams v. Huron Valley Sch. Dist.*, 858 F. Supp. 97, 99-100 (E.D. Mich. 1994). For a comprehensive but unpersuasive analysis invoking abstention principles to approve of both variations of this trend of authority, see Edward Hartnett, *A New Trick from an Old and Abused Dog: Section 1441(c) Lives and Now Permits Remand of Federal Question Cases*, 63 *FORDHAM L. REV.* 1099, 1159-81 (1995).

<sup>585</sup> See 28 U.S.C. § 1447(d) (1994).

<sup>586</sup> See *id.* § 1441(c) (1994).

<sup>587</sup> See Hartnett, *supra* note 584, at 1176.

<sup>588</sup> See *Lancaster*, 45 F.3d at 784 (sustaining appellate jurisdiction only by doubtful finding that underlying federal-question claim filed in state court under 42 U.S.C. § 1983 had been removed under 28 U.S.C. § 1443 rather than § 1441 and, hence, order remanding it was removable under exception to § 1447(d) pertaining to cases removed under § 1443); *Buchner v. FDIC*, 981 F.2d 816, 818 (5th Cir. 1993) (relying for its appellate jurisdiction on express provision of 12 U.S.C. § 1819(b)(2)(C) conferring on FDIC right to appeal any order remanding case removed to district court by FDIC).



claims.<sup>589</sup> Instead, subsection 1441(c) should be revised as follows:

Whenever a claim or cause of action of which the district courts of the United States have original jurisdiction without regard to the citizenship of the parties is joined in the complaint with one or more claims that are not within the original or supplemental jurisdiction of the district courts of the United States, the entire case may be removed and the district court shall remand any joined claim or claims that are not within its original or supplemental jurisdiction. The district court may remand any removed claim over which it has supplemental jurisdiction as provided in section 1367(c) of this title.

This proposed revision of subsection (c) makes the following changes:

1. The proposed revision of subsection 1441(c) makes no major substantive change in present law as properly applied. The proposed revision clarifies, however, that parties may join claims properly removable in their own right in state court to two distinct types of claims that are not independently removable. Most of the joined claims, while not independently removable, will bear a sufficient relationship to the independently removable claim to qualify for supplemental jurisdiction because they arise from the same constitutional case as the independently removable claim. In the rare instance where a plaintiff contrives to join an independently removable claim to a wholly unrelated state law claim in order to frustrate the defendant's right to removal, revised subsection 1441(c) allows removal of the entire case. However, it requires, rather than merely permits, remand of what has formerly been called the "separate and independent" nonremovable claim.

2. The proposed revision avoids the constitutional doubts presented by subsection 1441(c)'s currently discretionary language by requiring remand when original or supplemental jurisdiction does not exist over a claim removable solely by virtue of subsection 1441(c).<sup>590</sup> If supplemental jurisdiction does exist,

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<sup>589</sup> See Hartnett, *supra* note 584, at 1143 n.251 (stating joinder of unrelated claims as between given plaintiff and defendant is permitted by rule 18 of Federal Rules of Civil Procedure and similar provisions in pleading rules of most states).

<sup>590</sup> See WRIGHT, *supra* note 14, § 39, at 238-40.

then the standards of section 1367 subsume the remand power of the district court; this is consistent with the Supreme Court's decision in *Carnegie-Mellon University v. Cohill*.<sup>591</sup> That case permitted remand rather than dismissal of a removed claim when the district court used its discretion properly to refuse to exercise its supplemental jurisdiction over that claim.<sup>592</sup>

3. The terminology of "separate and independent" claims has caused more confusion than it is worth, and the revised statute drops this language from subsection 1441(c). Instead, the twin concepts of original and supplemental jurisdiction are used to distinguish claims removable under subsection 1441(a) without need of subsection 1441(c) from those that would be nonremovable absent subsection 1441(c). The revision expressly invokes the rules governing discretionary remand of supplemental claims under subsection 1367(c) to make it clear that remand of such claims is not otherwise permitted. This limit is based on the now mandatory remand authority subsection 1441(c) grants with respect to claims that are not eligible for either original or supplemental jurisdiction.

4. The proposed revision clarifies current law in two other respects. First, the newly qualified phrase "joined in the complaint" forecloses removal under subsection 1441(c) based on the subsequent joinder of a counterclaim, cross-claim, or third-party claim that would not qualify for the original or supplemental jurisdiction of the federal courts. As such, it resolves a long-standing division among the lower federal courts.<sup>593</sup> Second, the proposed revision refers to claims that "are not within the original or supplemental jurisdiction of the district courts" rather than to claims that are "otherwise non-removable," as does current subsection 1441(c).<sup>594</sup> This revision settles another split in authority by making clear that subsection 1441(c) trumps section 1445. The joinder of a conventionally removable claim to one rendered nonremovable solely by operation of section 1445, or other federal statutory limitation on removal jurisdiction not

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<sup>591</sup> 484 U.S. 343 (1988).

<sup>592</sup> See *id.* at 351-57.

<sup>593</sup> See 14A WRIGHT ET AL., *supra* note 55, § 3724, at 389-94 & nn.60-65 (collecting cases and endorsing majority rule deeming such ancillary claims to be nonremovable under § 1441(c)).

<sup>594</sup> See 28 U.S.C. § 1441(c) (1994).

yet incorporated into section 1445, cannot frustrate the defendant's right to a federal forum as to the conventionally removable claim.<sup>595</sup>

*d. Subsection 1441(d)*

Subsection 1441(d) need be revised only by removing the obsolete reference to "and division" in the specification of the district to which a foreign sovereign may remove an action.

2. Sections 1442 to 1442a: Federal Officers Sued or Prosecuted; Members of Armed Forces Sued or Prosecuted

The *1969 Study* recommended merger of these provisions, but with some alterations of their scope.<sup>596</sup> Such a joint revision

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<sup>595</sup> See generally WRIGHT, *supra* note 14, § 39, at 237 n.27 (discussing majority view that § 1441(c) permits removal of claims that would otherwise be nonremovable under § 1445). It should be noted that the discretionary power to remand supplemental claims under subsection 1367(c) would not extend to claims that could have been filed within the original jurisdiction of the federal courts, but were filed instead in state court, from which they could be removed only under subsection 1441(c) because their conventional removal was prohibited by section 1445 or some other special statutory limitation on removal. The proposed revision of subsection 1441(c) should be altered to confer express authority to remand such conventionally nonremovable claims that are within the original jurisdiction of the district courts if that is thought essential to its fair operation in the relatively rare case in which this problem might arise.

<sup>596</sup> See 1969 STUDY, *supra* note 3, at 41, 270. In parallel with its treatment of the grant of original jurisdiction brought by federal officers to recover damages for injuries incurred because of their performance of official duties, *see id.* at 41, 266-68, discussed above in connection with 28 U.S.C. § 1357, the *1969 Study* would have broadened the scope of 28 U.S.C. §§ 1442-1442a to include all official duties of federal officers, not just those authorized by the particular categories of federal law enumerated in the present text of sections 1442 and 1442a. The *1969 Study* would have repealed, *sub silentio*, the rights of removal presently conveyed by subsections 1442(a)(2) and (b). Both provisions deserve repeal, although the failure of the *1969 Study* to explain or even acknowledge their proposed repeal provides further evidence of the difficulty faced by any massive revision project, no matter how carefully executed, in avoiding unexplained or unintended changes in the law.

Subsection 1442(a)(2) deals with actions against property holders whose title is derived from a federal officer. Judge Newman has since provided a definitive legislative history, tracing its origin to 1833 and noting that it was unaccountably broadened in 1948 by the deletion of its previous restriction to title passed by federal revenue officers. *See Town of Stratford v. City of Bridgeport*, 434 F. Supp. 712, 714 n.1 (D. Conn. 1977). Nonetheless it was there held inapplicable because it requires that the title dispute "affect[s] the validity of a law of the United States." *See id.* at 715. This restriction also defeated jurisdiction in the only other reported case in which removal under subsection 1442(a)(2) has been at-

remains sound, but its current articulation should take account of several significant developments in case law. Arguably, the Institute should leave such revision to a project focusing specifically on government litigation.

The Supreme Court has twice considered section 1442 in recent years. The first case put a gloss on the language of the statute that should be incorporated into any revision.<sup>597</sup> The second case read the statute literally, but its rule and possible extension should be more clearly stated in a revised statute.<sup>598</sup> The lower courts agree that a corporation is a "person" within the meaning of section 1442<sup>599</sup> and that nonfederal defendants need not join in an effective removal under section 1442.<sup>600</sup> However, there is a surprising split of authority as to the removability of a state attorney-discipline proceeding against a United States Attorney.<sup>601</sup> Courts have found section 1442a ap-

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tempted. *See* *Crow v. Wyoming Timber Prods. Co.*, 424 F.2d 93, 96 (10th Cir. 1970) (holding that this case does not involve validity of any law of United States).

Subsection 1442(b) is an arcane provision concerning in-personam suits by aliens against federal officers who when sued are residing outside of their state of citizenship. Presumably it is intended to override the restriction of subsection 1441(b) against removal of a diversity or alienage suit by a forum-state citizen, on the theory that the federal officer is resident out-of-state incident to federal duties and upon removal could move to transfer the case under section 1404. There is no reported case of its being invoked, let alone invoked successfully.

<sup>597</sup> *See* *Mesa v. California*, 489 U.S. 121, 139 (1989) (stating that removal is permitted under § 1442 only when predicated on colorable federal defense).

<sup>598</sup> *See* *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 79 (1991) (holding that federal agencies cannot directly invoke § 1442 when sued). Three courts have held that the reasoning of *Primate Protection League* — that state courts can be depended upon to rule properly on issues of federal sovereign immunity, and that the rationale for section 1442 removal is the intractability of issues of qualified official immunity — requires the preclusion of removal under section 1442 of a suit against a federal officer in his or her official, as opposed to individual, capacity. *See* *American Policyholders Ins. Co. v. Nyaacol Prods., Inc.*, 989 F.2d 1256, 1261 (1st Cir. 1993); *Western Sec. Co. v. Derwinski*, 937 F.2d 1276, 1278-79 (7th Cir. 1991); *Turner v. Rubin*, 863 F. Supp. 1198, 1203-04 (D. Haw. 1994).

<sup>599</sup> *See, e.g.*, *Akin v. Big Three Indus.*, 851 F. Supp. 819, 822-23 (E.D. Tex. 1994) (stating that Fifth Circuit and many district courts have concluded that corporation is "person" for purposes of § 1442).

<sup>600</sup> *See, e.g.*, *Ely Valley Mines, Inc. v. Hartford Accident & Indem. Co.*, 644 F.2d 1310, 1314-15 (9th Cir. 1981) (concluding that rule requiring all defendants to join in removal does not apply to removal under § 1442).

<sup>601</sup> *See* *Kolibash v. Committee on Legal Ethics of the W. Va. Bar*, 872 F.2d 571, 573 (4th Cir. 1989) (holding that removal of such proceeding was upheld and appellate jurisdiction to reverse contrary remand order was deemed unimpaired by § 1447(d)). *But see In re John*

plicable to military reservists and retired officers,<sup>602</sup> but in general have deemed it to be redundant of section 1442.<sup>603</sup> Courts commonly analyze the attempted removal of cases by military personnel solely under section 1442 with no independent consideration of the effect of section 1442a.<sup>604</sup> This Prospectus is equivocal regarding the inclusion of sections 1442 and 1442a on the short list.

### 3. Section 1443: Civil Rights Cases

While the *1969 Study* was in preparation, a closely divided Supreme Court construed subsection 1443(1) very narrowly in *City of Greenwood v. Peacock*.<sup>605</sup> The Institute expressed a distinct lack of enthusiasm for the reasoning of this case.<sup>606</sup> However, because the fundamental issues involved “would more appropri-

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Doe, Esquire, 801 F. Supp. 478, 482 (D.N.M. 1992) (criticizing *Kolibash*, 872 F.2d at 571, for failing to adequately consider whether bar-discipline proceeding was “civil action or criminal prosecution” within meaning of § 1442). For a scathing attack on *Kolibash*, see Franklin D. Cleckley, *Clearly Erroneous: The Fourth Circuit’s Decision to Uphold Removal of a State-Bar Disciplinary Proceeding Under the Federal-Officer Removal Statute*, 92 W. VA. L. REV. 577, 578-79 (1990). Such academic commentary is tinged by the intense opposition of the organized bar to the “Thornburgh memo” issued by former Attorney General Richard Thornburgh, which purported to authorize federal attorneys to disregard state-enforced rules of legal ethics prohibiting direct communication with another party known to be represented by counsel. See Ernest F. Lidge III, *Government Civil Investigations and the Ethical Ban on Communicating with Represented Parties*, 67 IND. L.J. 549, 558 (1992). Although I am sympathetic to these concerns over high-handed conduct by federal prosecutors, it seems to me obvious that the standards of conduct of federal attorneys must be governed by federal law, however desirable it may be that these standards duly incorporate national norms of attorney conduct as enforced in state courts. Thus, I would revise section 1442 to codify the result in *Kolibash*.

<sup>602</sup> See *Howard v. Sikula*, 627 F. Supp. 497, 499-500 (S.D. Ohio 1986); *In re Marriage of Smith*, 549 F. Supp. 761, 765 (W.D. Tex. 1982).

<sup>603</sup> See, e.g., *Puerto Rico v. Santos-Marrero*, 624 F. Supp. 308, 309 (D.P.R. 1985) (stating that military personnel may ask for removal under either § 1442 or § 1442a because they are “officers of the United States”).

<sup>604</sup> See, e.g., *North Carolina v. Cisneros*, 947 F.2d 1135, 1140 (4th Cir. 1991) (holding that removal of marine corporal’s criminal prosecution for vehicular manslaughter during military convoy was barred by § 1442’s requirement of colorable federal defense).

<sup>605</sup> See 384 U.S. 808 (1966). The four dissenting Justices in *Peacock* joined the judgment but not the opinion of the Court in a companion case, *Georgia v. Rachel*, 384 U.S. 780 (1966), in which the narrow circumstances permitting removal under subsection 1443(1) were held to exist. See *Rachel*, 384 U.S. at 789-90 (limiting § 1443(1) removal of civil rights claims to only those asserting rights comparable to those protected by Civil Rights Act of 1866).

<sup>606</sup> See 1969 STUDY, *supra* note 3, at 204-05.

ately [be addressed] in a civil rights bill than a jurisdictional study," the Institute proposed to reenact the existing language of subsection 1443(1) without change.<sup>607</sup>

The 1969 Study recommended repeal of the first "branch" of subsection 1443(2), deeming it, as narrowed by *Peacock*, to be redundant of the Institute's revised version of the federal-officer removal statute, subsection 1442(a)(1).<sup>608</sup> The Institute originally recommended repeal of the second branch of subsection 1443(2), dealing with suits against state officers for refusing to enforce state law, because of the preemptive effect of federal civil-rights laws.<sup>609</sup> The Institute later rescinded this action, however, after the Reporters urged that the second branch of subsection 1443(2) "ought to be retained even though it is most unlikely that it will be used extensively, if at all."<sup>610</sup> This has proved to be a wise decision. Three modern cases have clearly demonstrated the continuing importance of the second branch of subsection 1443(2), now generally termed the "refusal clause."<sup>611</sup>

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<sup>607</sup> See *id.* at 27, 203-06. The Institute also proposed to create an express exception to its revised version of the Anti-Injunction Act that would blunt "the strongest argument against the *Peacock* result" by permitting a federal court to enjoin a pending state criminal proceeding upon a showing that the state law in question was "plainly" unconstitutional as applied to the defendant or that the prosecution was "so plainly discriminatory as to amount to a denial of the equal protection of the laws." See *id.* at 52, 205-06, 308-10. The need for such an exception has been mooted by the subsequent determination that the equitable relief authorized by 42 U.S.C. § 1983 falls with the "expressly authorized" exception to the Anti-Injunction Act. See *Mitchum v. Foster*, 407 U.S. 225, 241-42 (1972). Although abstention principles ordinarily forbid civil-rights injunctions against pending state criminal prosecutions, these principles are subject to exceptions for "bad faith and harassment" or where the prosecution seeks to enforce "flagrantly and patently" unconstitutional statutes. See *Younger v. Harris*, 401 U.S. 37, 49, 53 (1971) (quoting *Watson v. Buck*, 313 U.S. 387, 402 (1941)). Thus, the *Younger* exceptions track, in principle at least, the terms of subsection 1372(7) of the 1969 Study.

<sup>608</sup> See 1969 STUDY, *supra* note 3, at 41, 203-04.

<sup>609</sup> See *id.* at 187-91.

<sup>610</sup> See *id.* at 203-04.

<sup>611</sup> As the Second Circuit was moved to declare:

The purpose of the "refusal clause" is to provide a federal forum for suits against state officers who uphold equal protection in the face of strong public disapproval. Congress evidently believed it necessary to provide a federal forum for cases which from the nature of the issues involved stir local passions, because the tenure and independence of federal judges are constitutionally guaranteed, and therefore federal courts are more removed from and generally less susceptible to parochial pressures.

Although the present era of civil-rights enforcement is arguably less volatile than that of the *1969 Study*, the Institute should follow today the generally cautious approach adopted then. The marginal benefit of repeal of the first branch of subsection 1443(2) does not justify the risk that the Institute would appear to be endorsing a curtailment of federal protection of civil rights.<sup>612</sup>

This section should not be revised. The *1969 Study* found it to be a distinctly wormy can of sensitive principles, hoary text, and recent case law.<sup>613</sup> Thus, this Prospectus recommends excluding section 1443 from the short list.

#### 4. Section 1444: Foreclosure Action Against United States

Subsection 2410(a) waives federal sovereign immunity to permit joinder of the United States to a state or federal suit to determine title to property as to which the United States holds or claims a lien.<sup>614</sup> Section 1444 is a relatively straightforward provision granting the United States the option to remove to federal court any suit in state court to which it has been made a party under section 2410.<sup>615</sup> Section 1444 is not redundant of the general removal statute, subsection 1441(a), because subsection 2410(a) is not itself a grant of federal jurisdiction.<sup>616</sup>

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Greenberg v. Veteran, 889 F.2d 418, 421-22 (2d Cir. 1989); see also White v. Wellington, 627 F.2d 582, 585-87 (2d Cir. 1980) (reversing district court order remanding action to state court because appellants had "absolute right" to remove under § 1443(2)); Bridgeport Educ. Ass'n v. Zinner, 415 F. Supp. 715, 722 (D. Conn. 1976) (holding that refusal to comply with prohibitions of racial discrimination under 42 U.S.C. § 1981 and title VII of 1964 Civil Rights Act, 42 U.S.C. § 2000e-2000e-17, provides basis for removal under § 1443(2)).

<sup>612</sup> This is especially true given the Institute's frank skepticism of the reasoning of *Peacock*. It is only in virtue of that decision that the first branch of section 1443(2) lacks independent force. See 1969 STUDY, *supra* note 3, at 204-05.

<sup>613</sup> See *id.* at 205.

<sup>614</sup> See 28 U.S.C. § 2410 (1994).

<sup>615</sup> One glitch under section 1444 is the fact that the 1986 amendment abrogating the doctrine of "derivative jurisdiction," subsection 1441(e), applies by its literal terms only to cases removed under section 1441. By appeal to the "equity of the statute," however, subsection 1441(e) has sensibly been held to permit removal under section 1444 of a state-court case to which the United States has been joined under subsection 2410(a) even if the state court lacked subject-matter jurisdiction. See *North Dakota v. Fredericks*, 940 F.2d 333, 336-39 (8th Cir. 1991) (suggesting that state court may have lacked jurisdiction because of exclusive tribal-court jurisdiction).

<sup>616</sup> See *Kadson v. G.W. Zierden Landscaping, Inc.*, 512 F. Supp. 172, 174-75 (D. Md.

Thus, a plaintiff cannot file a suit in federal court merely because the plaintiff has joined the United States as a party. Rather, it requires diversity or some other ground of federal jurisdiction.<sup>617</sup> The only pressing reason to revise section 1444 is to broaden it to grant general removal jurisdiction over any suit to which the United States is a party. This was the *1969 Study's* recommendation.<sup>618</sup> However, as discussed above in connection with sections 1345 to 1347 and 1355, this Prospectus proposes that jurisdictional issues arising incident to the waiver of federal sovereign immunity should be left to a separate project on government litigation.<sup>619</sup>

### 5. Section 1445: Nonremovable Actions

As enacted in 1948, section 1445 consisted of three subsections expressly barring removal of, respectively: (a) actions by injured employees or their survivors against railroads under the Federal Employers Liability Act; (b) actions by shippers against common carriers under the Carnack Amendment for delay, loss, or damage to freight unless the value of the claim exceeds \$10,000; and (c) actions "arising under" state workers' compensation laws.<sup>620</sup> Congress added new subsection (d) in 1994.<sup>621</sup> It bars removal of civil actions to redress gender-motivated violence under section 40302 of the Violence Against Women Act.<sup>622</sup>

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1981) (holding that § 1444 expressly grants substantive right to remove suits brought in state courts against United States under § 2410 that is independent of any right to remove such suits on federal-question grounds under § 1441(a)).

<sup>617</sup> See generally WRIGHT, *supra* note 14, § 22, at 129 n.23 (listing statutes in which United States has consented to be sued).

<sup>618</sup> See 1969 STUDY, *supra* note 3, at 40, 262-65.

<sup>619</sup> See *supra* notes 227-41, 279-91 and accompanying text (discussing §§ 1345-1347, 1355). It is indicative of the complexity of the issues involved that adoption of the *1969 Study's* expansive revision of section 1444 would require detailed attention to the continuing utility of such arcane special provisions for removal jurisdiction over suits involving federal entities as those pertaining to the Federal Deposit Insurance Corporation, 12 U.S.C.A. § 1819(b)(2)(B) (West Supp. 1998), the Thrift Depositor Protection Oversight Board, *id.* § 1441a(a)(11) (West Supp. 1998), and the Resolution Trust Company, *id.* § 1441a(b) (West Supp. 1998).

<sup>620</sup> See 28 U.S.C.A. § 1445(a)-(c) (West 1994 & Supp. 1998) (citing nonremoveable actions).

<sup>621</sup> See Violence Against Women Act of 1994, Pub. L. No. 102-322, 108 Stat. 1796, 1902-55 (codified as amended at 28 U.S.C.A. § 1445(d) (West 1994 & Supp. 1998)).

<sup>622</sup> See *id.* Subtitle C of the Violence Against Women Act, sections 40301 to 40304, en-



Section 1445 is misleadingly underinclusive as a specification of nonremovable categories of cases. It ought to be revised to include several other categories of cases that have been judicially determined to be nonremovable or are expressly declared nonremovable by statutes not incorporated into title 28.<sup>623</sup> Re-

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acted the "Civil Rights Remedies for Gender-Motivated Violence Act," which in subsection 40302(c) created a new federal private right of action to sue for damages suffered in the course of "a crime of violence motivated by gender." Subsection 40302(e)(3) conferred on state and federal courts concurrent jurisdiction over the new federal tort under subsection 40302(c), subsection 40302(e)(4) limited the scope of supplemental jurisdiction under 28 U.S.C. § 1367 to exclude "any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree," and subsection 40302(e)(5) expressly amended 28 U.S.C. § 1445 to add new subsection (d), making nonremovable any action brought in state court under subsection 40302(c).

In my view, it is a constructive development for Congress to have incorporated the new restriction on removal jurisdiction into the express text of the relevant section of title 28. Arguably any proposed revision of section 1367 should also make express the exclusion from supplemental jurisdiction of certain claims transactionally related to a claim under the Civil Rights Remedies for Gender-Motivated Violence Act that has been filed originally as a federal-question action in a federal district court.

<sup>623</sup> It is well established that actions by injured seamen or their survivors under the Jones Act are nonremovable because of the express incorporation of the remedial scheme of the Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-60 (West 1986 & Supp. 1998), by the Jones Act, 46 U.S.C.A. app. § 688 (West Supp. 1998). *See, e.g.,* Burchett v. Cargill, Inc., 48 F.3d 173, 175-78 (5th Cir. 1995) (noting general rule that Jones Act cases are not removable, but permitting removal where Jones Act claim was fraudulently joined to otherwise removable action); *Civil v. Waterman S.S. Corp.*, 217 F.2d 94, 97 (2d Cir. 1954) (stating in dicta that Jones Act claimant's choice of forum cannot be overridden by removal); 14 WRIGHT ET AL., *supra* note 55, § 3674, at 467 n.31 (collecting cases applying general rule); *cf. id.* § 3729, at 491 n.40 (collecting cases holding that § 1445(a) bars removal of suits under Jones Act).

It is also commonly held that the concurrent jurisdiction in admiralty of the federal courts over maritime claims brought in state court under the saving-to-suitors clause of subsection 1333(1) will not suffice to permit removal under section 1441, and such actions may be removed only if there is some independent, nonmaritime basis for federal jurisdiction, such as complete diversity of citizenship and the requisite amount in controversy under subsection 1332(a). *See* *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959) (holding that claims under general federal maritime law do not "arise under" federal law for purposes of general federal-question statute, § 1331). Although the policy justification for restricting removal of saving-clause cases seems clear, the theoretical justification for reading that restriction into the terms of present section 1441 has been questioned. *See generally* 14 WRIGHT ET AL., *supra* note 55, § 3674 (discussing kinds of admiralty cases that fall within removal jurisdiction).

Actions brought in state court under the Securities Act of 1933 may not be removed. *See* 15 U.S.C. § 77v(a) (1994). The same is true of state-court actions under the Interstate Land Sales Full Disclosure Act of 1968, *id.* § 1719 (1994), and the Condominium and Cooperative Abuse Relief Act of 1980, *id.* § 3612 (1994), but these two statutes provide an exception permitting removal when the United States or any officer or employee of the

vision of section 1445 would also permit resolution of a persistent circuit split regarding the removability of actions under the Fair Labor Standards Act.<sup>624</sup> Removal law as a whole would be clarified and simplified if section 1445 were further revised to nullify any limitation on removability not expressly set forth therein.

Several other issues are ripe for consideration in a revision of section 1445 and related sections governing removal jurisdiction and procedure. First, whether removal in violation of section 1445 is a nonjurisdictional defect waived under subsection 1447(c) if not objected to within thirty days.<sup>625</sup> Second,

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United States sued in an official capacity is a party.

<sup>624</sup> The issue turns on the provision of the Federal Labor Standards Act ("FLSA") that an action may be "maintained" in either state or federal court. *See Sicinski v. Reliance Funding Corp.*, 461 F. Supp. 649, 650-51 (S.D.N.Y. 1978). The line of cases construing "maintained" to bar removal begins with *Johnson v. Butler Bros.*, 162 F.2d 87, 88-89 (8th Cir. 1947). The opposing line of cases adopts the better view that the 1948 enactment of the "[e]xcept as otherwise expressly provided" language of subsection 1441(a) precludes giving "maintained" such a removal-defeating construction. *See, e.g., Cosme Nieves v. Deshler*, 786 F.2d 445, 450-51 (1st Cir. 1986) (stating that statutory language does not bar exercise of right to removal). The district courts have split on similar grounds over the removability of suits under the somewhat different language of the Consumer Credit Protection Act, 15 U.S.C. § 1640(e) (1994). *See Sicinski*, 461 F. Supp. at 650-51. Although the courts have upheld removal, the issue has also arisen under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 626(b) (1994), which incorporates by reference the remedial provisions of the FLSA and other special statutory grants of concurrent jurisdiction over federal causes of action. *See Winebarger v. Logan Aluminum, Inc.*, 839 F. Supp. 17 (W.D. Ky. 1993) (holding ADEA action removable). *See generally* 14A WRIGHT ET AL., *supra* note 55, § 3729, at 497-98 (discussing removability of cases under Consumer Credit Protection Act and Agricultural Adjustment Act).

The claim that cases permitting the removal of FLSA actions reflect the better view is grounded in principles of statutory construction, not jurisdictional policy. The *1969 Study* would have expressly precluded removal of FLSA actions by adding a new clause to its proposed revision of section 1345, reasoning that "[t]hese cases are typically for a very small sum and would invite the use of removal as a harassing tactic." *See* 1969 STUDY, *supra* note 3, at 26, 201-03.

In other respects the *1969 Study* preserved and broadened the existing exclusions of section 1445, codifying the nonremovability of Jones Act suits under subsection 1445(a) and removing the jurisdictional amount from subsection 1445(b) so as to make all Carnack Amendment suits nonremovable. A substantial innovation of the *1969 Study* was its provision for removal of cases based on the pleading of a federal defense; the effect of this innovation was limited, however, by barring removal in three types of cases in which state courts would typically have a strong interest in adjudicating the federal defense, and barring removal in any case on the basis of federal *res judicata* or choice-of-law principles. *See id.* at 25-27, 201-03.

<sup>625</sup> The Fifth Circuit has so held, *see Williams v. AC Spark Plugs Div. of General Motors Corp.*, 985 F.2d 783 (5th Cir. 1993), reasoning by analogy from its earlier holdings that

whether the nonremovability of a claim under section 1445 can be trumped by removal of the entire case under subsection 1441(c).<sup>626</sup> Third, whether the “fraudulent joinder” doctrine may be invoked to remove a case despite the putative joinder of a nonremovable claim.<sup>627</sup> Finally, whether a retaliato-

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removal of a diversity case despite the presence of a forum-state defendant in violation of subsection 1441(b) and removal of a saving-clause maritime case in violation of the *Romero* dictum are also mere procedural defects. See *In re Shell Oil Co.*, 932 F.2d 1518, 1521-23 (5th Cir. 1991) (holding that removal of diversity case by forum-state citizen is waivable defect); *Baris v. Sulpicio Lines*, 932 F.2d 1540, 1543-46 (5th Cir. 1991) (holding that removal of federal maritime claim by nondiverse defendant is waivable defect); see also *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 457-58 (5th Cir. 1998) (reaffirming *Williams*, 985 F.2d at 783, to hold removal of federal maritime claim by nondiverse defendant is waivable defect). Leaning the other way are the Eighth Circuit, which has held that removal of a diversity case notwithstanding a forum-state defendant is a nonwaivable jurisdictional defect for purposes of subsection 1447(c), see *Hurt v. Dow Chemical Co.*, 963 F.2d 1142, 1145-46 (8th Cir. 1992), and the Third Circuit, which has similarly held that removal in violation of a forum-selection clause is not a waivable procedural defect, see *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1212 (3d Cir. 1991). Many other courts have held, however, that violation of the forum-state defendant rule is a waivable procedural defect and, thus, indirectly support the Fifth Circuit's position with respect to removal in violation of section 1445. See *Farm Constr. Servs., Inc. v. Fudge*, 831 F.2d 18, 21-22 (1st Cir. 1987); *Ravens Metal Prods., Inc. v. Wilson*, 816 F. Supp. 427, 428-29 (S.D.W. Va. 1993); *Veltze v. Bucyrus-Erie Co.*, 791 F. Supp. 1363, 1365 (E.D. Wis. 1992); *Taylor v. St. Louis S.W. Ry. Co.*, 128 F.R.D. 118, 119-20 (D. Kan. 1989); *Recchion ex rel. Westinghouse Elec. Corp. v. Kirby*, 637 F. Supp. 290, 294 (W.D. Pa. 1986).

<sup>626</sup> A 1996 amendment to subsection 1447(c) appears to have ratified the view of the Fifth Circuit, and rejected the contrary view of the Third and Tenth Circuits, by expanding the scope of the 30-day waiver provision to include any “defect” in removal that does not entail a “lack of subject matter jurisdiction.” See 28 U.S.C. § 1447(c) (1994) amended by Act of Oct. 1, 1996, Pub. L. No. 104-219, 110 Stat. 3022 (striking “any defect in removal procedure” and inserting “any defect other than lack of subject matter jurisdiction” into § 1447(c)). There remains lingering uncertainty, however, about what constitutes a nonwaivable, jurisdictional defect that requires removal of a removal case. See *infra* notes 671-73 and accompanying text (discussing 1996 amendment to § 1447(c)). The distinct minority view is that section 1445 controls over subsection 1441(c). See *Gamble v. Central of Georgia Ry. Co.*, 486 F.2d 781, 783-85 (5th Cir. 1973), *overruled on other grounds by Lirette v. N.L. Sperry Sun, Inc.*, 820 F.2d 116 (5th Cir. 1987) (en banc); *Green v. Hajoca Corp.*, 573 F. Supp. 1120, 1123 (E.D. Va. 1983). The contrary view commands by far the greater support. See, e.g., *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1197 (9th Cir. 1988); *Gonsalves v. Amoco Shipping Co.*, 733 F.2d 1020, 1026 (2d Cir. 1984); *Farmers & Merchants Bank v. Hamilton Hotel Partners*, 702 F. Supp. 1417, 1420-21 (W.D. Ark. 1988); *Samczyk v. Chesapeake & Ohio Ry. Co.*, 643 F. Supp. 79, 80 (E.D. Mich. 1986); *Titus v. Reynolds Metals Co.*, 637 F. Supp. 369, 370 (D. Md. 1986); *Kinsey v. Nestor Exploration Ltd.* — 1981A, 604 F. Supp. 1365, 1369 (E.D. Wa. 1985); *Hages v. Aliquippa & S. R.R. Co.*, 427 F. Supp. 889, 891-92 (W.D. Pa. 1977).

<sup>627</sup> See *Burchett v. Cargill, Inc.*, 48 F.3d 173, 175-76 (5th Cir. 1995) (applying objective test to determine as matter of law baseless Jones Act claim had been fraudulently joined);

ry-discharge case “arises under” state worker-compensation laws for purposes of subsection 1445(c).<sup>628</sup>

Revision of section 1445 should be part of a major overhaul of the principal statutes granting and regulating removal jurisdiction, along with revision of sections 1441, 1446, and 1447.

## 6. Section 1446: Procedure for Removal

Section 1446 governs removal procedure. Although removal is usually unproblematic, there are a number of traps for the unwary that would benefit from revisory attention.

Most of the problems arise from the possibility under the second paragraph of subsection 1446(b) that an initially nonremovable case may become removable in light of events occurring after the plaintiff files the complaint.<sup>629</sup> This is true even if the right to remove does not arise until late in the litigation process.<sup>630</sup> Particularly problematic is the “voluntary-involuntary” rule relating to the effect on removability of the dismissal of all nondiverse defendants.<sup>631</sup>

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Lackey v. Atlantic Richfield Co., 990 F.2d 202, 207 (5th Cir. 1993). *But see* Chacon v. Atchison, Topeka & Santa Fe Ry. Co., 320 F.2d 331, 332 (10th Cir. 1963) (stating that absent any issue of fraudulent attempt to evade removal, courts should not look beyond allegations of complaint to determine if joinder of FELA claim renders case nonremovable). The potential for a circuit split exists because of the general disarray of the fraudulent joinder doctrine as applied to the joinder of a diversity-defeating defendant. “The United States Courts of Appeals for the Fourth, Fifth, Ninth, and Tenth Circuits follow the ‘pierce the pleadings’ approach [where the court examines the entire state court record to determine if the plaintiff might possibly prove a cause of action]. . . . [T]he Third and Eleventh Circuits favor the limited ‘pleadings only’ approach [where the court examines only the plaintiff’s pleadings]. . . . The United States Courts of Appeals for the First, Second, Sixth, Seventh, and Eighth Circuits are split internally.” James F. Archibald III, Note, *Reintroducing “Fraud” to the Doctrine of Fraudulent Joinder*, 78 VA. L. REV. 1377, 1379 n.16 (1992).

<sup>628</sup> Although the issue is of course sensitive to the particular state legal scheme in question, there is a clear difference in philosophy between *Spearman v. Exxon Coal USA, Inc.*, 16 F.3d 722, 725 (7th Cir. 1994) (holding Illinois retaliatory discharge claim to be removable), and *Jones v. Roadway Express, Inc.*, 931 F.2d 1086 (5th Cir. 1991) (holding Texas retaliatory discharge claim to be nonremovable), as manifested by the dissenting judge’s reliance in *Spearman* on the reasoning of *Jones*. See *Spearman*, 16 F.3d at 728 (Diamond Rovner, J., dissenting).

<sup>629</sup> See *Powers v. Chesapeake and Ohio Ry. Co.*, 169 U.S. 92, 101 (1898).

<sup>630</sup> See *id.*

<sup>631</sup> See, e.g., *Weems v. Louis Dreyfus Corp.*, 380 F.2d 545, 548 (5th Cir. 1967) (discussing voluntary-involuntary rule); see also, e.g., *Ushman v. Sterling Drug, Inc.*, 681 F. Supp. 1331, 1335 (C.D. Ill. 1988) (noting that district courts in First, Third, Fourth, Sixth, and Eleventh

Under the voluntary-involuntary rule, when a court dismisses a removal-defeating claim with the plaintiff's consent, the case becomes removable.<sup>632</sup> However, when such a dismissal is without the plaintiff's consent, the case does not become removable despite the change in its structure.<sup>633</sup> An exception is that the death of a nondiverse defendant may render a case removable, despite the evident lack of the mournful plaintiff's consent.<sup>634</sup>

Two rationales have been advanced as the basis for the voluntary-involuntary rule. These are the "efficiency/finality" view and the "control" view. The former justifies the rule on the basis of notions of judicial economy and comity, principally centered around finality.<sup>635</sup> A voluntary dismissal is final, while an involuntary dismissal is generally appealable to state appellate courts. Should the plaintiff prevail, complete diversity would once again be destroyed.<sup>636</sup> Additionally, removal will preclude the plaintiff from pursuing an appeal because the state courts lose jurisdiction over the case upon the filing and serving of the removal papers.<sup>637</sup> Thus the voluntary-involuntary rule is also a rough way of preventing duplicative judicial proceedings.

The other rationale is the control basis. It takes plaintiffs' right to control their cases to be the underlying rationale for the rule.<sup>638</sup> Courts discussing this basis often invoke an analogy to the rule of *Louisville & Nashville Railroad v. Mottley*.<sup>639</sup> The *Mottley* rule requires that the eligibility of a case for statutory

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Circuits have applied rule).

<sup>632</sup> See *Weems*, 380 F.2d at 548.

<sup>633</sup> A directed verdict is a classic example of involuntary dismissal. See *id.*

<sup>634</sup> See *Bradley v. Halliburton Oil Well Cementing Co.*, 100 F. Supp. 913, 917-18 (E.D. Okla. 1951).

<sup>635</sup> See *Self v. General Motors Corp.*, 588 F.2d 655, 660-62 (9th Cir. 1978) (Ely, J., dissenting).

<sup>636</sup> See *Arthur v. E.I. du Pont*, 798 F. Supp. 367, 368 (S.D.W. Va. 1992).

<sup>637</sup> See *Self*, 588 F.2d at 661 (Ely, J., dissenting) (noting that former § 1446(e), now § 1446(d), bars further action by state courts until removed case is remanded); see also *Ward v. Resolution Trust Corp.*, 972 F.2d 196, 198 (8th Cir. 1992) (holding post-removal order by state appellate court to be void because § 1446(d) divested that court of jurisdiction).

<sup>638</sup> See *Jenkins v. National Union Fire Ins. Co.*, 650 F. Supp. 609, 613 (N.D. Ga. 1986) (declaring "simply incorrect" cases that apply voluntary-involuntary rule by reference to "appealability/finality rationale" and noting that deference to plaintiff's control of litigation was crucial point on which early cases turned regarding voluntary-involuntary rule).

<sup>639</sup> 211 U.S. 149 (1908). See, e.g., *Insinga v. LaBella*, 845 F.2d 249, 253 (11th Cir. 1988); *Self*, 588 F.2d at 657-58.

federal-question jurisdiction — either originally under section 1331<sup>640</sup> or by removal under section 1441(a)<sup>641</sup> — be determined by reference only to the well-pleaded allegations of the complaint, without consideration of the defendant's pleadings.<sup>642</sup> This control rationale seems to be the only one that the Supreme Court articulated in the early cases from which the modern rule has developed.<sup>643</sup>

In most cases, applying the voluntary-involuntary rule does not depend on choosing a rationale. In some situations, however, the rationale chosen logically determines whether the court may apply the rule. For example, sometimes the state ruling is final. If the court uses only the efficiency/finality model, then the action should be removable. With no chance for appellate reversal, there is no reason for the rule. This is the Second Circuit's approach.<sup>644</sup> On the other hand, if the court uses the control model, then even state courts' final decisions cannot make a nonremovable action removable. Even though there may be no chance for appellate reversal, the plaintiff is still the master of the cause of action.<sup>645</sup> The Eleventh Circuit has endorsed both policy rationales, but has allowed removal if an involuntary dismissal was for lack of jurisdiction, rather than on the merits.<sup>646</sup> It deems such a jurisdictional dismissal to be akin to a finding of fraudulent joinder.<sup>647</sup>

In sum, the voluntary-involuntary rule is almost universally accepted in removal jurisprudence. In cases in which the distinction between rationales is important, courts other than those in the Second Circuit generally endorse the plaintiff-control theory

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<sup>640</sup> See 28 U.S.C. § 1331 (1994).

<sup>641</sup> See *id.* § 1441(a) (1994).

<sup>642</sup> See *Mottley*, 211 U.S. at 152-54.

<sup>643</sup> See *Jenkins*, 650 F. Supp. at 613-15 (discussing turn-of-century Supreme Court cases).

<sup>644</sup> See *Quinn v. Aetna Life and Cas. Co.*, 616 F.2d 38, 40 n.2 (2d Cir. 1980) (concluding that plaintiff's failure to file timely appeal of state trial court's order dismissing nondiverse defendants was functional equivalent of voluntary dismissal of those defendants).

<sup>645</sup> See 14A WRIGHT ET AL., *supra* note 55, § 3721, at 211; *cf.* *Poulos v. NAAS Foods, Inc.*, 959 F.2d 69, 73 n.4 (7th Cir. 1992) (holding that federal court considering fraudulent-joinder argument was not bound by state-court judgment). Recently, adherence to this approach seems to have waned.

<sup>646</sup> See *Insinga v. LaBella*, 845 F.2d 249, 253-54 (11th Cir. 1988).

<sup>647</sup> See *id.* at 254-55.

when specifying an underlying rationale for the rule.<sup>648</sup> In the Eleventh Circuit, both voluntary dismissals and involuntary dismissals for lack of jurisdiction suffice to render a case removable.<sup>649</sup>

A rule of such importance should have a less inchoate rationale, and should be made express in the text of subsection 1446(b). Also meriting express treatment in the text of the statute is the possibility that a party may have waived its right to remove, either by pre-litigation execution of a forum-selection agreement or by a wide variety of post-litigation conduct.<sup>650</sup>

Another obvious bar to removal results when a defendant exceeds the statutory thirty-day limit. The courts, however, have disagreed on when the limitations period begins to run. The Fifth Circuit has held that the thirty-day removal period begins for all defendants when the first defendant receives service.<sup>651</sup> This approach is reasoned to “follow[] logically from the unanimity requirement.”<sup>652</sup> In contrast, the Fourth Circuit has held that each individual defendant has its own thirty-day period to remove.<sup>653</sup> Less obvious than the thirty-day statutory limit is the much shorter time constraint that courts have imposed if the case becomes removable immediately before or during trial.<sup>654</sup>

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<sup>648</sup> See *id.* at 254.

<sup>649</sup> See *id.* But see *Arthur v. E.I. du Pont*, 798 F. Supp. 367, 369 n.2 (S.D.W. Va. 1992) (rejecting Eleventh Circuit’s rule permitting removal after involuntary dismissal for lack of jurisdiction because of efficiency/finality concern that such dismissal might have been reversible error by state trial court).

<sup>650</sup> See generally *WRIGHT*, *supra* note 14, § 38, at 232 & nn.61-63 (summarizing cases holding right of removal may be waived constructively); 14A *WRIGHT ET AL.*, *supra* note 55, § 3721, at 222-23 & nn.102-03 (noting split in authority on contractual waiver of right of removal and collecting cases holding right of removal may be waived constructively).

<sup>651</sup> See *Getty Oil Corp. v. Insurance Co. of N. Am.*, 841 F.2d 1254, 1263 (5th Cir. 1988); *Brown v. Demco, Inc.*, 792 F.2d 478, 481 (5th Cir. 1986). Several cases have followed the Fifth Circuit’s “one strike” rule. See, e.g., *Nanji v. Coral Group Ltd.*, 760 F. Supp. 142, 143 (E.D. Ark. 1991); *Pic-Mount Corp. v. Stoffel Seals Corp.*, 708 F. Supp. 1113, 1114 (D. Nev. 1989); *Cohen v. Hoard*, 696 F. Supp. 564, 566 (D. Kan. 1988); *Nannuzzi v. King*, 660 F. Supp. 1445, 1447 (S.D.N.Y. 1987).

<sup>652</sup> See *Brown*, 792 F.2d at 482.

<sup>653</sup> See *McKinney v. Board of Trustees of Mayland Community College*, 955 F.2d 924, 928 (4th Cir. 1992); see also *Creekmore v. Food Lion, Inc.*, 797 F. Supp. 505, 508 (E.D. Va. 1992). A number of cases have adopted the Fourth Circuit’s “to each his own” standard. See, e.g., *Ford v. New United Motors Mfg., Inc.*, 857 F. Supp. 707, 709 (N.D. Cal. 1994) (citing cases holding that each defendant has 30 days to remove); *Garside v. Osco Drug, Inc.*, 702 F. Supp. 19, 21-22 (D. Mass. 1988) (criticizing premise that each defendant in multiparty litigation has absolute veto over removal).

<sup>654</sup> See *Walker v. AT&T*, 684 F. Supp. 475, 475-76 (S.D. Tex. 1988) (commenting that

In one case, the court held that a defendant had waived its right to remove even though the period of delay between the time that the case became removable and the notification of intent to remove was a matter of minutes.<sup>655</sup>

Under a 1988 amendment to subsection 1446(b), a party cannot remove a case on the basis of diversity more than a year after the action was originally filed.<sup>656</sup> This rule has been strongly and aptly criticized as a backhanded attack on diversity jurisdiction, inviting abuse by plaintiffs who wish to defeat "a defendant's right to a federal forum."<sup>657</sup> While the courts retain the means to thwart bad-faith manipulation of the one-year limitations period,<sup>658</sup> the Institute should reconsider the premises of the rule.

The foregoing examples illustrate but by no means exhaust the range of problems that courts must confront in applying section 1446. The principal aims of revision should be to evaluate the rationale for various rules that presently restrict the right

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15-minute delay is grounds for denial of right to removal).

<sup>655</sup> See *id.* at 478 (holding that defendant must give immediate notification of intent to remove and that delay of between 15 minutes and slightly more than one hour was sufficient to estop defendant from removing case after voluntary dismissal during trial).

<sup>656</sup> See 28 U.S.C. § 1446(b) (1994), as amended by Act of Nov. 19, 1988, Pub. L. No. 100-702, § 1016(b), 102 Stat. 4669, 4670. See generally Oakley, *supra* note 31, at 747-48 (discussing background and effect of 1988 amendment).

<sup>657</sup> See George D. Billinson, *Recent Amendments to the Removal Statute — Judicial Disimprovements and Inaccess*, 40 SYRACUSE L. REV. 1145, 1146 (1989).

<sup>658</sup> See *Kinabrew v. Emco-Wheaton, Inc.*, 936 F. Supp. 351, 352-53 (M.D. La. 1996) (deeming one-year bar to be procedural rather than jurisdictional constraint and holding plaintiff, who delayed service for over one year, equitably estopped from objecting to removal); *Morrison v. National Benefit Life Ins. Co.*, 889 F. Supp. 945, 949-51 (S.D. Miss. 1995) (involving plaintiff who initially sought only \$49,000 in damages, but after one year amended complaint to seek two million dollars in damages); see also *Breese v. Hadson Petroleum (USA), Inc.*, 947 F. Supp. 242, 244 (M.D. La. 1996) (holding that one-year limitations period applies only to second paragraph of § 1446(b) and this is inapplicable to initially removable action that was promptly removed within 30 days of service, notwithstanding that plaintiff delayed service for more than one year); *Zogbi v. Federated Dep't Store*, 767 F. Supp. 1037, 1040 (C.D. Cal. 1991). But see *Howell v. St. Paul Fire & Marine Ins. Co.*, 955 F. Supp. 660, 662-63 (M.D. La. 1997) (holding that one-year period for removing cases on basis of diversity jurisdiction barred removal but on record not suggestive of bad faith); *Rezendes v. Dow Corning Corp.*, 717 F. Supp. 1435, 1437-39 (E.D. Cal. 1989).

In the first decision by a court of appeals to confront the issue, the Ninth Circuit has rejected *Rezendes* and agreed with those district courts that have construed the one-year limitations period to apply only to cases that were not initially removable under the first paragraph of subsection 1446(b). See *Ritchey v. Upjohn Drug Co.*, No 96-17014, 1998 WL 151387, at \*4 (9th Cir. Apr. 3, 1998).



of removal and to incorporate the deserving ones into the express text of section 1446. Thus, this Prospectus recommends that section 1446 should be included on the short list.

### 7. Section 1447: Procedure After Removal Generally

Section 1447 provides for remand of cases improperly removed from state courts. However, many problems inhere in its application and merit revisory attention.

Under a 1988 amendment to subsection 1447(c) that Congress revisited in 1996,<sup>659</sup> the courts were split as to whether removal of a diversity case by an in-state defendant in violation of the bar of subsection 1441(b)<sup>660</sup> was a mere “defect in removal procedure” that was waived if a motion to remand was not made within thirty days. The Eighth Circuit characterized removal by an in-state defendant as constituting a nonwaivable defect of subject-matter jurisdiction.<sup>661</sup> The majority rule, however, held such removal to be a waivable procedural defect subject to the thirty-day period for remand.<sup>662</sup> The 1996 amendment appears to have ratified the majority rule but in terms so vague that distinctions between waivable and nonwaivable defects in removal continue to divide the lower courts.<sup>663</sup>

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<sup>659</sup> See 28 U.S.C. § 1447(c) (1994) amended by Act of Oct. 1, 1996, Pub. L. No. 104-219, 110 Stat. 3022 (striking “any defect in removal procedure” and inserting “any defect other than lack of subject matter jurisdiction” into § 1447(c)).

<sup>660</sup> See 28 U.S.C. § 1441(b) (1994).

<sup>661</sup> See *Hurt v. Dow Chemical Co.*, 963 F.2d 1142, 1145-46 (8th Cir. 1992).

<sup>662</sup> See, e.g., *In re Shell Oil Co.*, 932 F.2d 1518, 1521-23 (5th Cir. 1991); *Farm Constr. Servs., Inc. v. Fudge*, 831 F.2d 18, 22 (1st Cir. 1987); *Veltze v. Bucyrus-Erie Co.*, 791 F. Supp. 1363, 1365 (E.D. Wis. 1992); *Taylor v. St. Louis S.W. Ry.*, 128 F.R.D. 118, 119-20 (D. Kan. 1989); see also, e.g., *Recchion ex rel. Westinghouse Elec. Corp. v. Kirby*, 637 F. Supp. 290, 294 (W.D. Pa. 1986) (collecting pre-1988 cases holding that right to seek remand on basis of procedurally defective removal is subject to waiver by plaintiff’s post-removal conduct).

The pre-1996 division of authority over what constituted a procedural, as opposed to jurisdictional, defect was not limited to the problem of removal of a diversity case by an in-state defendant. See *infra* notes 675-79 and accompanying text (discussing other conflicts over procedural versus jurisdictional defects). Compare *Barnes v. Westinghouse Elec. Corp.*, 962 F.2d 513, 515-16 (5th Cir. 1992) (holding that plaintiff’s failure to comply with 30-day requirement resulted in waiver of right to object to removal of diversity case more than one year after commencement), with *Green Point Sav. Bank v. Hidalgo*, 910 F. Supp. 89, 91-92 (E.D.N.Y. 1995) (finding that one-year statutory limitation for removal of case was jurisdictional and plaintiff’s failure to file remand motion within 30-day statutory period did not constitute waiver).

<sup>663</sup> Compare *Archuleta v. Lacuesta*, 131 F.3d 1359, 1362-63 (10th Cir. 1997) (holding that

In its current form, subsection 1447(c) distinguishes between remand for lack of subject-matter jurisdiction and remand based on "any defect other than lack of subject matter jurisdiction."<sup>664</sup> Nonjurisdictional defects must be challenged within thirty days after the filing of the notice of removal.<sup>665</sup> However, because subject-matter jurisdiction cannot be conferred by consent, a jurisdictional defect may be raised at any time during the litigation and by any party, or by the court on its own motion.<sup>666</sup> Although the intent of the thirty-day rule justifies treating borderline cases as involving nonjurisdictional errors of removal procedure rather than jurisdictional defects,<sup>667</sup> the courts of appeals have not treated the issue uniformly.<sup>668</sup> The split of authority that developed over the "procedural" or "jurisdictional" status of subsection 1441(b)'s bar on removal by an in-state

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district court's remand due to lack of subject-matter jurisdiction was not reviewable under § 1447(c)-(d)), *with Somoano v. Ryder Sys., Inc.*, 985 F. Supp. 1476, 1477 (S.D. Fla. 1998) (finding that remand order was reviewable because it was based on consideration other than lack of subject-matter jurisdiction or defect in removal procedure).

<sup>664</sup> See 28 U.S.C. § 1447(c) (1994), amended by Act of Oct. 1, 1996, Pub. L. No. 104-219, 110 Stat. 3022.

<sup>665</sup> See *id.*

<sup>666</sup> The second sentence of subsection 1447(c), left unchanged by the 1996 amendment of the first sentence, provides: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." See 28 U.S.C.A. § 1447(c) (West Supp. 1998); see also FED. R. CIV. P. 12(h)(3) (requiring dismissal of action "[w]henver it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter"). See generally *Mt. Healthy Sch. Bd. v. Doyle*, 429 U.S. 274, 278 (1977) (reaffirming that federal court is obliged to consider contention that it lacks jurisdiction whenever it is raised and sua sponte whenever jurisdictional doubt arises).

The Supreme Court has recently held, however, that a district court's erroneous denial of a valid motion to remand a case that had been removed without subject-matter jurisdiction became moot and was not a basis for reversing the court's subsequent judgment on the merits if federal jurisdictional requirements were met at the time judgment was entered. See *Caterpillar Inc. v. Lewis*, 117 S. Ct. 467, 472-77 (1996).

<sup>667</sup> See *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1544 (5th Cir. 1991) (defining procedural defect as any defect not going to question of whether case originally could have been brought in federal district court); 14A WRIGHT ET AL., *supra* note 55, § 3739 (stating that Congress intended procedural defect to cover wide variety of defects in removed actions including lack of subject-matter jurisdiction).

<sup>668</sup> See, e.g., *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1213-14 (3d Cir. 1991) (criticizing Fifth Circuit's approach as based on erroneous principle that one should use legislative history if statute is clear). The *Foster* court read the legislative history to allow for more than one basis for remand not expressly noted in subsection 1447(c), referring to the fact that the House Report mentions at least one ground for remand that is neither part of subsection 1447(c) nor the 30-day limit. See *id.*

defendant has been paralleled with respect to the one-year time limit for removal that subsection 1446(b) imposes in diversity cases. The Fifth Circuit has held that untimely removal is a mere procedural defect,<sup>669</sup> but its reasoning has been rejected by the Sixth Circuit.<sup>670</sup>

In addition to problems concerning the timing of objections to removal jurisdiction, there is a split of authority concerning the time-frame applicable to the underlying issue of whether, and when, there is a lack of subject-matter jurisdiction of the type that mandates the case's remand under subsection 1447(c). The Seventh Circuit limits remand under subsection 1447(c) for lack of subject-matter jurisdiction to jurisdictional defects existing at the time of removal only.<sup>671</sup> It reasons that "neither the text of the revised subsection 1447(c) nor its legislative history implies that Congress altered the traditional view expressed in *St. Paul* . . . that jurisdiction present at the time a suit is filed or removed is unaffected by subsequent acts."<sup>672</sup> The Third

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<sup>669</sup> See *Barnes v. Westinghouse Elec. Corp.*, 962 F.2d 513, 515-16 (5th Cir. 1992); see also *Gray v. Moore Business Forms*, 711 F. Supp. 543, 545 (N.D. Cal. 1989). The Fifth Circuit has also held that violations of various other statutory restrictions on removal constitute mere procedural defects. See *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 457-58 (5th Cir. 1998) (holding that removal of admiralty action in violation of § 1333(1) is waivable procedural defect); *Williams v. AC Spark Plugs*, 985 F.2d 783, 786 (5th Cir. 1993) (holding that removal of worker's compensation case in violation of § 1445(c) is waivable procedural defect); see also *Hopkins v. Dolphin Titan Int'l, Inc.*, 976 F.2d 924, 925-26 (5th Cir. 1992) (holding that removal in violation of § 1441(c) was procedural defect and implying that remand would have been improper absent timely motion to remand); *Lirette v. N.L. Sperry Sun, Inc.*, 820 F.2d 116, 117 (5th Cir. 1987) (en banc) (applying pre-1988 law to hold right to object to removal of Jones Act case in violation of § 1445(a) was waived for lack of timely objection).

<sup>670</sup> See *Brock v. Syntex Labs., Inc.*, 791 F. Supp. 721, 722-23 (E.D. Tenn. 1992) (holding that one-year limitation is jurisdictional). The Sixth Circuit's unpublished opinion expressly adopted the "thoughtful opinion" and "reasoning" of the district court. See *Brock v. Syntex Labs., Inc.*, Nos. 95-5740, 92-5766, 1993 WL 389946, at \*1 (6th Cir. Oct. 1, 1993); see also *Smith v. MBL Life Assurance Corp.*, 727 F. Supp. 601, 602-04 (N.D. Ala. 1989).

<sup>671</sup> See *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708 (7th Cir. 1992) (interpreting § 1447(c) only to apply to remands ordered because jurisdiction was defective at time of removal).

<sup>672</sup> See *In re Shell Oil Co.*, 966 F.2d 1130, 1133 (7th Cir. 1992) (referring to *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283 (1938), which held that district court retains jurisdiction of removed case despite post-removal reduction in amount in controversy).

and Fifth Circuits, however, interpret subsection 1447(c) to apply to any jurisdictional remand, even if based on a jurisdictional defect that did not arise until after removal.<sup>673</sup>

Controversy over the scope of subsection 1447(c) is generally secondary to the question of the reviewability of a remand order under subsection 1447(d).<sup>674</sup> Although all remand orders would appear to be immunized from appellate review by subsection 1447(d), subject to express exception only for civil-rights cases removed under section 1443, the Supreme Court has construed subsection 1447(d) narrowly to bar appellate review only of remand orders authorized by subsection 1447(c).<sup>675</sup> Thus, courts have held that remands based on abstention,<sup>676</sup> discretionary declination of supplemental jurisdiction,<sup>677</sup> and forum-selection clauses<sup>678</sup> are reviewable. These courts reason that such remands, although contingently permissible, are not remands for "lack of subject matter jurisdiction" or because of a "defect" in the process of removal within the meaning of subsection 1447(c).<sup>679</sup>

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<sup>673</sup> See *Linton v. Airbus Industrie*, 30 F.3d 592, 599-600 (5th Cir. 1994) (holding that jurisdictional remands based on "post-removal events" are "granted on § 1447(c) grounds"); *Carr v. American Red Cross*, 17 F.3d 671, 680-81 (3d Cir. 1994) (rejecting Seventh Circuit's construction of § 1447(c) as incompatible with revised language of § 1447(c) as amended in 1988).

<sup>674</sup> See 28 U.S.C. § 1447(d) (1994).

<sup>675</sup> The Supreme Court initially held that remand orders on grounds unauthorized by subsection 1447(c) were reviewable by writ of mandamus. See *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 345-46, 352-53 (1976). The Court has recently reaffirmed that subsection 1447(d) bars review only of remand orders authorized by subsection 1447(c), see *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995), but has disavowed *Thermtron* to the extent that it held that remand orders are reviewable only by mandamus rather than by appeal. See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712-14 (1996) (holding abstention-based remand order to be collateral order appealable as of right as final decision under § 1291).

<sup>676</sup> See *Quackenbush*, 517 U.S. at 712-14.

<sup>677</sup> See *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 347-48, 357 (1988) (noting without disapproval determination by court of appeals that remand order was reviewable, and upholding remand order on merits); *J.O. v. Alton Community Unit Sch. Dist.*, 909 F.2d 267, 270 (7th Cir. 1990) (analyzing unquestioned exercise of appellate jurisdiction in *Cohill*, 484 U.S. at 343, to indicate that discretionary remand of supplemental claims is not authorized by § 1447(c) and hence is reviewable under construction of § 1447(d) in *Thermtron*, 423 U.S. at 336).

<sup>678</sup> See, e.g., *Milk 'N' More, Inc. v. Beavert*, 963 F.2d 1342, 1344 (10th Cir. 1992) (holding that remand based on forum-selection clause was appealable as collateral order); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 278 (9th Cir. 1984).

<sup>679</sup> See, e.g., *SBKC Serv. Corp. v. 1111 Prospect Partners, L.P.*, 105 F.3d 578, 580-81 (10th

Particularly difficult issues arise when a district court determines in the course of post-removal litigation that for some reason associated with the merits of a federal-question claim, it should remand the entire case for lack of jurisdiction. The applicable law, although conceptually muddy and confusingly articulated, is well-established and unambiguous in its command: a determination that a colorable claim arising under federal law lacks merit as a matter of law is not grounds for dismissing the claim for lack of jurisdiction.<sup>680</sup> The courts of appeals agree that a mistaken remand of such a case on jurisdictional grounds cannot be reviewed when the remand is ordered promptly after removal on the basis of the record of the case as it was removed.<sup>681</sup> Given the relationship of subsection 1447(d)'s bar of appellate review to the scope of the remand power conferred by subsection 1447(c), and given their disagreement over the applicability of subsection 1447(c) to remands based on post-removal events,<sup>682</sup> the circuits are predictably divided over their power to review putative jurisdictional remands that are premised on a determination of the merits of a federal-question claim in light of the post-removal development of the litigation.

The Fifth Circuit holds such remands nonreviewable because that circuit rejects the view that a remand based on a post-removal event falls outside the scope of subsection 1447(c).<sup>683</sup>

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Cir. 1997) (reaffirming holding in *Milk 'N More*, 963 F.2d at 1342, that forum-selection clause remands are reviewable and citing cases showing that every other circuit addressing issue has held likewise).

<sup>680</sup> See *Bell v. Hood*, 327 U.S. 678, 681-83 (1946) (holding that well-pleaded claim based on federal law suffices to invoke federal-question jurisdiction even if dismissed for failure to state claim upon which relief can be granted, unless immaterial or wholly insubstantial and frivolous).

<sup>681</sup> See *In re Aimoco Petroleum Additives Co.*, 964 F.2d 706, 708 (7th Cir. 1992) (noting that "even an obviously erroneous invocation of § 1447(c) is untouchable" provided that "the judge believed that subject matter jurisdiction was missing at the outset"); *Tillman v. CSX Transp. Co.*, 929 F.2d 1023, 1026-27 (5th Cir. 1991) (noting that if remand order invokes "magic words" of § 1447(c), such as "lacks subject matter jurisdiction," this has "magical effect" of making remand "totally unreviewable" even if "clearly erroneous").

<sup>682</sup> See *supra* notes 671-73 and accompanying text (discussing circuit split over applicability of § 1447(c) to jurisdictional defects not existing at time of removal).

<sup>683</sup> See *Angelides v. Baylor College of Med.*, 117 F.3d 833, 835-36 (5th Cir. 1997) (refusing to review remand of federal-question case for lack of jurisdiction even when based on resolution of immunity and nonexhaustion defenses); *Linton v. Airbus Industrie*, 30 F.3d 592, 595-99 (5th Cir. 1994) (refusing to review remand of case removed under Foreign Sovereign Immunities Act based on substantive determination that defendants were not

The Seventh Circuit takes a squarely opposing position. Because it holds that a jurisdictional remand predicated on a post-removal event is outside the scope of subsection 1447(c), it deems its jurisdiction to review such a remand to be unimpeded by subsection 1447(d).<sup>684</sup> The Third Circuit's position is the most complex. While it agrees with the Fifth Circuit that a purportedly jurisdictional remand falls within subsection 1447(c) even if based on a post-removal event,<sup>685</sup> it has held that "where a separable and final determination has been made by the district court, whether substantive or jurisdictional, which determination triggers a remand, we will review both the underlying final order and the remand order itself."<sup>686</sup> Further variations may be found in the law of the Fourth<sup>687</sup> and Ninth<sup>688</sup> Circuits.

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entitled to immunity).

<sup>684</sup> See *In re Amoco*, 964 F.2d at 708-10 (vacating remand order presumed to have been based on lack of jurisdiction incident to change of parties that court of appeals determined was not of jurisdictional significance, and ordering district court to decide merits of case determined by court of appeals in light of governing substantive law to be one arising under federal law).

<sup>685</sup> See *Carr v. American Red Cross*, 17 F.3d 671, 680-81 (3d Cir. 1994) (rejecting contrary view of Seventh Circuit).

<sup>686</sup> *Id.* at 682-83 (reversing purportedly jurisdictional remand of federal-question case based on substantive legal effect of release by plaintiff of one defendant from joint-tortfeasor liability).

<sup>687</sup> See *Jamison v. Wiley*, 14 F.3d 222, 238-40 (4th Cir. 1994) (vacating remand of case removed on basis of colorable federal immunity defense later rejected on merits by district court, on ground that such merits-based remand was "error of sufficient magnitude to merit mandamus relief"). Although the Fourth Circuit appeared to condition this holding on the fact that the district court's remand order did not expressly invoke the "magic words" of subsection 1447(c) by relying on a lack of subject-matter jurisdiction, *see id.* at 232, and characterized the district court's rationale as a discretionary decision to decline to exercise its jurisdiction, *see id.* at 233, the Fifth Circuit has since "purposefully declined to follow" what it termed "the Fourth Circuit's evisceration of § 1447(d)" in *Jamison*. See *Angelides*, 117 F.3d at 836.

<sup>688</sup> See *Clorox Co. v. United States Dist. Court*, 779 F.2d 517, 519-20 (9th Cir. 1985) (treating petition for writ of mandamus as appeal and reversing remand of ERISA case, despite indirect but inarticulate reliance on § 1447(c), because "remand was based on a substantive decision on the merits apart from any jurisdictional decision"). In an earlier case, the Ninth Circuit had held on similar grounds that the remand of a diversity case removed in violation of a forum-selection agreement was reviewable notwithstanding subsection 1447(d), even though the district court had apparently invoked its remand power under subsection 1447(c) and, thinking that subsection 1447(d) thus insulated its remand order from review had refused to stay the remand order pending appeal. See *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 276-77 (9th Cir. 1984). In the course of its analysis, the Ninth Circuit stated that had the district court remanded for lack of diversity, subsection "1447(d) would no doubt apply, because, even if clearly erroneous,

Since Congress enacted subsection 1447(e) in 1988, district courts have had discretion to allow joinder of parties after removal so that the presence of the additional, nondiverse defendants destroys subject-matter jurisdiction.<sup>689</sup> If joinder is permit-

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a district court's decision that it lacks subject matter jurisdiction to hear a case is not reviewable." See *id.* at 276. Although the Ninth Circuit did not say that a remand based on a forum-selection agreement would similarly be immunized from review on the "magic words" theory of the Fifth Circuit if only the district court labelled such a substantively based remand to be for lack of subject-matter jurisdiction, the Third Circuit has leaped to that conclusion. See *Carr*, 17 F.3d at 681. Thus, perhaps too quickly, the Third Circuit concluded that "the *Pelleport/Clorox* doctrine is not available to us" as support for its idiosyncratic holding that, without relying on the Seventh Circuit's distinction between jurisdictional defects present at the time of removal and those arising thereafter, it could review a remand order "grounded in § 1447(c) and justified by the district court on a jurisdictional basis" because that purportedly jurisdictional remand was contingent on a decision of substantive law as applied to the merits of a federal-question case. See *id.* at 681-84.

<sup>689</sup> See 28 U.S.C. § 1447(e) (1994). Subsection (e) was added to section 1447 by Act of Nov. 19, 1988, Pub. L. No. 100-702, § 1016(c), 102 Stat. 4670. It codifies a practice previously followed in some courts under authority of FED. R. CIV. P. 20. See, e.g., *Desert Empire Bank v. Insurance Co. of N. Am.*, 623 F.2d 1371, 1374-77 (9th Cir. 1980). See generally *Oakley*, *supra* note 31, at 756 (explaining purpose of § 1447(e) as accommodating federal removal law to substantive features of California joinder practice and operation of California's statutes of limitation).

The two-step process under subsection 1447(e), whereby remand of a case hinges on an underlying decision to permit joinder of a jurisdictional spoiler, has created perplexing problems for the courts of appeals that are derivative of the more general problem of subsection 1447(d)'s limitation on appellate review of remand orders. Not surprisingly, this has led to a split among the circuits. The Fourth Circuit has held that a remand order under subsection 1447(e) is wholly unreviewable under subsection 1447(d), treating the underlying joinder decision as a nonsubstantive decision inseparable from the ensuing remand decision. See *Washington Suburban Sanitary Comm'n v. CRS/Sirrine, Inc.*, 917 F.2d 834, 836 & n.4 (4th Cir. 1990). The Fifth Circuit has taken an essentially identical position, holding that a remand order under subsection 1447(e) is immunized from review by subsection 1447(d) even when the joinder and remand decisions are indeed separable in the sense that the district court clearly erred in concluding that the joined party destroyed the subject-matter jurisdiction of the court. See *Tillman v. CSX Transp., Inc.*, 929 F.2d 1023, 1026-29 (5th Cir. 1991). The Third Circuit, on the other hand, has distinguished *Washington Suburban* and rejected *Tillman* to hold that where the joinder decision is based on resolution of a disputed issue of substantive law it is a separable decision that remains eligible for appellate review notwithstanding the subsequent remand of the case for lack of subject-matter jurisdiction. See *Powers v. Southland Corp.*, 4 F.3d 223, 226-30 (3d Cir. 1993) (holding that § 1447(d) did not bar review of joinder decision, but that it was independently nonreviewable because it was not final decision for purpose of 28 U.S.C. § 1291).

It is an interesting question whether this split in authority ought to survive the intervening decisions of the Supreme Court in *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995), and *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996). In declaring that "§ 1447(d) must be read in *pari materia* with § 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)," *Petrarca*, 516

ted, the district court must remand the case back to state court.<sup>690</sup> This has placed a new twist<sup>691</sup> on the perennial problem of whether the joinder of a diversity-defeating defendant is to be disregarded and removal allowed, under the “fraudulent joinder” doctrine.<sup>692</sup>

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U.S. at 127, the Court was merely restating the holding of *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 345-46 (1976), a case predating the 1988 enactment of subsection 1447(e) and the ensuing circuit split over the reviewability of subsection 1447(e) remand orders. And the *Petrarca* Court went on to state: “As long as a district court’s remand is based on a timely raised defect in removal procedure or on lack of subject matter jurisdiction — the grounds for remand recognized by § 1447(c) — a court of appeals lacks jurisdiction to entertain an appeal of a remand order under § 1447(d).” *Petrarca*, 516 U.S. at 127-28. Remanding a case after permitting joinder of a jurisdictional spoiler under subsection 1447(e) because that joinder has created “a lack of subject matter jurisdiction” would, thus, seem to be a “ground” for remand “recognized by § 1447(c)” even if the remand was independently authorized as well by subsection 1447(e). Moreover, the *Petrarca* Court emphasized that subsection 1447(d) applies to remands for lack of subject-matter jurisdiction even under a special removal statute, 28 U.S.C. § 1452 (1994), that includes its own remand provision. See *Petrarca*, 516 U.S. at 128-29.

But *Quackenbush*, after reiterating that subsection 1447(d) bars review only of remands “on grounds specified in § 1447(c),” see *Quackenbush*, 517 U.S. at 712 (quoting *Petrarca*, 516 U.S. at 127), concluded that an “abstention-based remand order” could be reviewed free of the bar of subsection 1447(d) because “it is not based on lack of subject matter jurisdiction.” See *id.* As the *Quackenbush* Court discussed at length in the balance of its opinion, abstention law boils down to the following proposition: “in cases where the relief sought is equitable in nature or otherwise discretionary, federal courts not only have the power to stay the action based on abstention principles, but can also, in otherwise appropriate circumstances, decline to exercise jurisdiction altogether by either dismissing the suit or remanding it to state court.” See *id.* at 721. The decision whether to permit joinder of a jurisdictional spoiler under subsection 1447(e) entails “general equities analysis,” see *Powers*, 4 F.3d at 226, and consideration of “fundamental fairness,” see *Amon v. Nelson*, No. 91 Civ. 3844, 1992 WL 8337, at \*4 (S.D.N.Y. Jan. 15, 1992), and results in the district court discretionarily relinquishing the subject-matter jurisdiction that it previously possessed and could have continued to exercise. Thus, the decision to permit joinder and remand a case under subsection 1447(e) may be sufficiently analogous to the exercise of equitable discretion to remand a case on abstention grounds as to invite reconsideration whether such remands are indeed grounded in a “lack of subject matter jurisdiction” within the meaning of subsection 1447(c). If such reconsideration leads to the conclusion that a remand under subsection 1447(e) is not for “lack of subject matter jurisdiction” in the sense used by subsection 1447(c), then *Quackenbush* stands for the proposition that subsection 1447(e) remands should be appealable as collateral orders under 28 U.S.C. § 1291 (1994). See *Quackenbush*, 517 U.S. at 712-13.

<sup>690</sup> See *Amon*, 1992 WL 8337, at \*2-\*5 (applying fundamental fairness test to determine whether to permit joinder).

<sup>691</sup> See *Le Duc v. Bujake*, 777 F. Supp. 10, 12 (E.D. Mo. 1991) (invoking fraudulent joinder doctrine to determine whether to permit joinder of diversity-defeating defendant under § 1447(e)).

<sup>692</sup> See generally 13B WRIGHT ET AL., *supra* note 55, § 3606 (discussing fraudulent joinder



The federal courts generally recognize two types of fraudulent joinder. The first type involves plaintiffs who “fraudulently plead jurisdictional facts in order to subject a nondiverse defendant to state court jurisdiction . . . .”<sup>693</sup> The second involves a plaintiff who “joins a non-diverse defendant against whom he could not possibly prove a cause of action.”<sup>694</sup> A circuit split has developed, with several courts recognizing only one of these categories of fraudulent joinder.<sup>695</sup> The Fourth, Fifth, and Tenth Circuits follow the “pierce the pleadings” approach, in which the court examines the entire state court record to determine if the plaintiff might possibly prove a cause of action.<sup>696</sup> The Third and Eleventh Circuits follow the “pleadings only” approach in which the court examines only the plaintiff’s pleadings.<sup>697</sup> The First, Second, Sixth, Seventh, and Eighth Circuits “are split internally.”<sup>698</sup> Based on the many conflicts in authority construing section 1447, this Prospectus recommends including section 1447 on the short list.

#### 8. Section 1448: Process After Removal

Section 1448 authorizes district courts to allow proper service of process to be completed in actions removed from state courts.<sup>699</sup> Although this section’s application is generally straightforward, the language “process or service may be completed” is not literally true.<sup>700</sup> Federal rather than state law gov-

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and devices to defeat diversity jurisdiction); 14 *id.* § 3641 (discussing joinder and ways to avoid diversity jurisdiction).

<sup>693</sup> See Archibald, *supra* note 627, at 1387.

<sup>694</sup> See *id.*

<sup>695</sup> See *id.*

<sup>696</sup> See *AIDS Counseling and Testing Ctrs. v. Group W. Television, Inc.*, 903 F.2d 1000, 1004 (4th Cir. 1990); *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. 1981); *Dodd v. Fawcett Publications, Inc.*, 329 F.2d 82, 85 (10th Cir. 1964); see also *Lewis v. Time, Inc.*, 83 F.R.D. 455, 460 (E.D. Cal. 1979) (following same approach).

<sup>697</sup> See *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990); *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553, 1562 (11th Cir. 1989).

<sup>698</sup> See Archibald, *supra* note 627, at 1379 n.16. Some cases in these circuits have applied the “pierce the pleadings” method. See, e.g., *Brusseau v. Electronic Data Sys. Corp.*, 694 F. Supp. 331, 334 (E.D. Mich. 1988); *Kocot v. Alliance Mach. Co.*, 651 F. Supp. 226, 227 (S.D. Ill. 1986); *Pappas Co. v. E. & J. Gallo Winery, No. Civ.A. 83-3348-K*, 1984 WL 2930, at \*2933 (D. Mass. Jan. 17, 1984).

<sup>699</sup> See 28 U.S.C. § 1448 (1994).

<sup>700</sup> See *id.*

erns completion of service of process after removal.<sup>701</sup> The reason for this is that process served under state provisions before removal does not comply with the procedures contained in the Federal Rules.<sup>702</sup> The Ninth Circuit has expressly recognized this gloss on section 1448.<sup>703</sup> Other courts find that they cannot “complete” state process because that process failed to comply with federal rules.<sup>704</sup> Another decision appears to lay down the rule that state process delivered after removal can never satisfy section 1448 requirements, and that the serving party must always obtain federal process.<sup>705</sup> The short list’s inclusion or exclusion of section 1448 is insignificant to the Institute’s goals.

#### 9. Section 1449: State Court Record Supplied

Section 1449 appears unproblematic. It provides that district courts may secure necessary records from the state court from which the action was removed.<sup>706</sup> Thus, its inclusion on or exclusion from the short list is insignificant to the Institute’s goals.

#### 10. Section 1450: Attachment or Sequestration; Securities

Section 1450 provides that orders in conduct of the litigation issued by the state court prior to removal, including injunctions and attachment of property, and any bonds or other undertakings by the parties, shall remain in effect until dissolved or modified by the district court.<sup>707</sup> In implementing section 1450, the district courts universally follow the guidelines announced by the Supreme Court in *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*.<sup>708</sup> Thus, it is well established that state orders and injunc-

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<sup>701</sup> See *Velten v. Daughtrey*, 226 F. Supp. 91, 92 (W.D. Mo. 1964).

<sup>702</sup> See FED. R. CIV. P. 4.

<sup>703</sup> See *Beecher v. Wallace*, 381 F.2d 372, 373 (9th Cir. 1967).

<sup>704</sup> See *Bruley v. Lincoln Property Co., Inc.*, 140 F.R.D. 452, 454 (D. Colo. 1991) (holding that completion of service must conform with federal rules).

<sup>705</sup> See *Wade v. Clawson*, No. CIV.A.89-2385, 1989 WL 138735, at \*5 (D.N.J. Nov. 17, 1989) (citing *Dean Mktg., Inc. v. AOC Int’l*, 610 F. Supp. 149, 152 (E.D. Mich. 1985)).

<sup>706</sup> See 28 U.S.C. § 1449 (1994).

<sup>707</sup> See *id.* § 1450 (1994).

<sup>708</sup> See *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 439-40 (1974) (holding that order such as temporary injunction that is subject to automatic expiration as matter of law remains in effect after removal only for so long as provided by state

tions will lapse by their own terms after removal even though this rule does not appear in the text of the statute. The short list's inclusion or exclusion of section 1450 is insignificant to the Institute's goals.

#### 11. Section 1451: Definitions

Section 1451 uncontroversially confers statehood status upon the District of Columbia for purposes of chapter 89's removal provisions. The short list's inclusion or exclusion of section 1451 is insignificant to the Institute's goals.

#### 12. Section 1452: Removal of Claims Related to Bankruptcy Cases

Subsection (a) provides, with certain limited exceptions, that a party may remove "any claim or cause of action" arising in a state-court civil action to a district court that "has jurisdiction of such claim or cause of action" under section 1334.<sup>709</sup> There is an artful and confusing distinction in section 1334 "between the words 'case' and 'proceeding,'" such that "a case commenced under the Bankruptcy Code differs substantially from a typical civil action commenced in state or federal court to resolve a two-party dispute."<sup>710</sup> The partial-removal provision of section 1452 compounds the general jurisdictional dysfunction thus associated with section 1334.<sup>711</sup> As stated by Professor Gibson, "[t]hrough courts have applied the removal provision with some frequency, they have tended to do so without giving careful attention to its wording and purpose."<sup>712</sup>

Subsection (b) provides that the district court may remand such claims back to the state court "on any equitable ground,"

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law or federal law, whichever period is shorter).

<sup>709</sup> See 28 U.S.C. § 1452(a) (1994). Section 1334 confers on the district courts original and exclusive jurisdiction of bankruptcy cases. See 28 U.S.C.A. § 1334 (West Supp. 1998). See generally *supra* notes 120-29 and accompanying text (discussing complex and highly specialized nature of bankruptcy jurisdiction).

<sup>710</sup> See Lawrence P. King, *Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984*, 38 VAND. L. REV. 675, 677 (1985).

<sup>711</sup> See S. Elizabeth Gibson, *Removal of Claims Related to Bankruptcy Cases: What Is a "Claim or Cause of Action"?*, 34 UCLA L. REV. 1, 2-3 (1986).

<sup>712</sup> See *id.*

free of appellate scrutiny.<sup>713</sup> A circuit split exists as to the scope of the preclusion of appellate review of remand orders under subsection 1452(b). The Third and Eleventh Circuits hold that review is precluded only if the remand is based on equitable grounds and, hence, that a remand for lack of jurisdiction is subject to reversal on appeal.<sup>714</sup> The Second, Fifth, and Seventh Circuits hold to the contrary that subsection 1452(b) precludes appellate review of any removal order.<sup>715</sup>

These issues of the scope and reviewability of the removal jurisdiction and remand power granted to the district courts by section 1452 present tempting targets for revision as part of a general overhaul of chapter 89. However, they are too closely connected to the general confusion surrounding bankruptcy jurisdiction to warrant the Institute's consideration independent of a special project on bankruptcy law.

### III. FINAL RECOMMENDATIONS AND PLAN OF IMPLEMENTATION

#### A. *Summary of Part II*

Part II's review of the basic issues facing a plenary revision of chapters 85, 87, and 89 has been long and tedious, but not pointless. This is a dense thicket indeed, and there are many perils in marching through it just because it is there. This Prospectus has advocated in Part I a more selective, short-list approach to revision of the Judicial Code. The suggested approach would focus primarily on technical problems of jurisdiction and

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<sup>713</sup> See 28 U.S.C. § 1452(b) (1994).

<sup>714</sup> See *National Developers, Inc. v. Ciba-Geigy Corp.*, 803 F.2d 616, 619 (11th Cir. 1986); *Pacor, Inc. v. Higgins*, 743 F.2d 984, 993 (3d Cir. 1984); see also *Shumate v. Shumate*, 914 F.2d 1492, n.1 (4th Cir. 1990) (discussing but taking neither side of split).

<sup>715</sup> See *In re Cathedral of the Incarnation*, 90 F.3d 28, 32-33 (2d Cir. 1996); *Hernandez v. Brakegate Ltd.*, 942 F.2d 1223, 1225 (7th Cir. 1991); *Sykes v. Texas Air Corp.*, 834 F.2d 488, 492 (5th Cir. 1987). The Sixth and D.C. Circuits have followed *Sykes* in unpublished opinions. See *Petrarca v. Things Remembered, Inc.*, No. 94-3980, 1994 WL 814600, at \*1 (6th Cir. Nov. 15, 1994), *aff'd*, 516 U.S. 124 (1995); *Brown v. Seeber*, No. 88-7163, 1990 WL 80910, at \*2 (D.C. Cir. June 13, 1990). In *Petrarca*, the Supreme Court's affirmance did not resolve the circuit split. The district court's remand order was premised on untimely removal in violation of FED. R. BANKR. P. 9027 and the Supreme Court held that appeal was, therefore, barred by subsection 1447(d), barring appeal of remand orders based on a timely objection to a procedurally defective removal, whether or not subsection 1452(b) might independently have barred appellate review. See *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127-29 (1995).

venue that burden the bench and bar in the daily operation of the federal courts, and that are consistent with the revisory goals of actual as well as theoretical improvement. As a final juxtaposition of the short-list approach and the plenary alternative, this Prospectus presents below in tabular form a summary of recommendations regarding each section examined in Part II. It is organized in groups in the order of their relative suitability for revision, should the Institute choose to follow the short-list approach. Thus, the first group is the core of the short list. The second group could feasibly be included under the short-list approach. The third group could be added to the short list without great threat to the goal of actual improvement because the revisory issues they present, if any, are of scant significance. The fourth group consists of important and problematic sections best deferred to specialized revisory projects. Finally, the fifth group are those least suitable for revision according to the goals and philosophy that this Prospectus recommends for the project.

#### 1. Recommended for Short List

Section 1367 Supplemental Jurisdiction  
Section 1391 Venue Generally  
Section 1392 Defendants or Property in Different Districts in Same State  
Section 1404 Change of Venue  
Section 1406 Cure or Waiver of Defects  
Section 1407 Multidistrict Litigation  
Section 1441 Actions Removable Generally  
Section 1445 Nonremovable Actions  
Section 1446 Procedure for Removal  
Section 1447 Procedure After Removal Generally  
Section 1631 Transfer to Cure Want of Jurisdiction

#### 2. Equivocal Recommendation — Feasible for Short List

Section 1330 Actions Against Foreign States  
Section 1332 Diversity of Citizenship; Amount in Controversy; Costs  
Section 1335 Interpleader [Jurisdiction]

- Section 1337 Commerce and Antitrust Regulations; Amount in Controversy, Costs
- Section 1340 Internal Revenue; Customs Duties
- Section 1348 Banking Association as Party
- Section 1349 Corporation Organized Under Federal Law as Party
- Section 1359 Parties Collusively Joined or Made
- Section 1363 Jurors' Employment Rights
- Section 1397 Interpleader [Venue]
- Section 1442 Federal Officers Sued or Prosecuted
- Section 1442a Members of Armed Forces Sued or Prosecuted

### 3. Insignificant or in Scant Need of Revision

- Section 1351 Consuls, Vice Consuls, and Members of a Diplomatic Mission as Defendant
- Section 1352 Bonds Executed Under Federal Law
- Section 1354 Land Grants from Different States
- Section 1356 Seizures Not Within Admiralty and Maritime Jurisdiction
- Section 1357 Injuries Under Federal Laws
- Section 1364 Direct Actions Against Insurers of Members of Diplomatic Missions and Their Families
- Section 1365 Senate Actions
- Section 1366 Construction of Reference to Laws of the United States or Acts of Congress
- Section 1394 Banking Association's Actions Against Comptroller of Currency
- Section 1401 Stockholder's Derivative Action
- Section 1405 Creation or Alteration of District or Division
- Section 1448 Process After Removal
- Section 1449 State Court Record Supplied
- Section 1450 Attachment or Sequestration; Securities
- Section 1451 Definitions

### 4. Appropriate for Revision by Specialized Projects

- Section 1333 Admiralty, Maritime and Prize Cases (Maritime Law)
- Section 1334 Bankruptcy Cases and Proceedings (Bankruptcy Law)

- Section 1336 Surface Transportation Board's Orders (Judicial Review of Administrative Action)
- Section 1338 Patents, Plant Variety Protection, Copyrights, Mask Works, Trademarks, and Unfair Competition (Intellectual Property Law)
- Section 1339 Postal Matters (Government Litigation)
- Section 1341 Taxes by States (Abstention/Discretionary Jurisdiction)
- Section 1342 Rate Orders of State Agencies (Abstention/Discretionary Jurisdiction)
- Section 1345 United States as Plaintiff (Government Litigation)
- Section 1346 United States as Defendant (Government Litigation)
- Section 1347 Partition Action Where United States is Joint Tenant (Government Litigation)
- Section 1350 Alien's Action for Tort (Foreign Policy)
- Section 1353 Indian Allotments (Indian Law)
- Section 1355 Fine, Penalty or Forfeiture (Government Litigation)
- Section 1358 Eminent Domain (Government Litigation)
- Section 1360 State Civil Jurisdiction in Actions to Which Indians are Parties (Indian Law)
- Section 1361 Action to Compel an Officer of the United States to Perform a Duty (Administrative Action)
- Section 1362 Indian Tribes (Indian Law)
- Section 1395 Fine, Penalty or Forfeiture (Government Litigation)
- Section 1396 Internal Revenue Taxes (Government Litigation)
- Section 1398 Interstate Commerce Commission's [Surface Transportation Board's] Orders (Judicial Review/Administrative Action)
- Section 1399 Partition Action Involving United States (Government Litigation)
- Section 1400 Patents and Copyrights (Intellectual Property Law/Specialized Venue Provisions)
- Section 1402 United States as Defendant (Government Litigation)
- Section 1403 Eminent Domain (Government Litigation)
- Section 1408 Venue of Cases Under Title 11 (Bankruptcy Law)

- Section 1409 Venue of Proceedings Arising Under Title 11 or Arising in or Related to Cases Under Title 11 (Bankruptcy Law)
- Section 1410 Venue of Cases Ancillary to Foreign Proceedings (Bankruptcy Law)
- Section 1411 Jury Trials (Bankruptcy Law)
- Section 1412 Change of Venue (Bankruptcy Law)
- Section 1444 Foreclosure Action Against the United States (Government Litigation).
- Section 1452 Removal of Claims Related to Bankruptcy Cases (Bankruptcy Law)

#### 5. Inappropriate for Revision

- Section 1331 Federal Question
- Section 1343 Civil Rights and Elective Franchise
- Section 1344 Election Disputes
- Section 1368 Counterclaims in Unfair Practices in International Trade
- Section 1443 Civil Rights Cases

#### *B. Recommended Course of Action*

Given the manifold problems in need of reform disclosed by inspection of the many sections excluded from the short list, it seems ironic to reaffirm the recommendation that these problems should be ignored for the present. The crucial premise for such preterition is the supposition that the Institute's interest in revising the Judicial Code is neither transitory nor merely academic. Real reform, achieved through legislative enactment of and judicial acquiescence in the Institute's recommendations, requires a long march begun by small steps in the most promising direction.

The Institute should relegate many of the problems that a plenary section-by-section revision would need to address to more specialized projects. This is not to deny the importance of the sections of chapters 85 to 89 affecting these topics. The modest scope of the present project is intended to be foundational for later projects of greater risk and ambition.

The present project should be constructed in a modular, exogenous sense both internally and prospectively. This Prospec-



tus recommends proceeding simultaneously to develop three modular sets of proposed reforms. These reforms should deal with the short list of topics most suitable for immediate revision, expanded to include most of the topics about whose inclusion on the short list this Prospectus is equivocal or indifferent.

### 1. Supplemental and Original Jurisdiction

This module would propose revisions of section 1367 and, at least for initial working purposes, section 1332. Taking up the general diversity statute entails clear risks of entering the political crossfire that breaks out whenever the diversity status-quo is threatened. However, the possibility of helpful yet technical revisions accompanied by a restatement of applicable case law cannot fully be gauged without first attempting the task. Given this initial choice to stray beyond supplemental jurisdiction, the module should also work on revision of sections 1330, 1335, 1337, 1340, 1348, 1349, 1363, and perhaps some of the other minor sections of chapter 85 as to which this Prospectus indicates indifference.

### 2. Venue and Transfers

This module should deal with sections 1391, 1392, 1404, 1406, 1407, and 1631. If the project includes interpleader issues in the module on chapter 85, it should also include section 1397 on the chapter 87 short list. This Prospectus is indifferent as to inclusion of sections 1394, 1401, and 1405.

### 3. Removal Jurisdiction and Procedure

This module should revise sections 1441 and 1445 to 1447. Although it borders on issues best left to consideration in a later project on litigation involving the United States or its officials, this Prospectus recommends provisionally including sections 1442 and 1442a on the chapter 89 short list. This Prospectus remains indifferent as to inclusion of sections 1448 to 1451.

### C. *Plan of Implementation*

Each module should be self-contained: it should be presented in its own right for the Institute's approval and possible enactment by Congress, subject to later incorporation into a published compilation of completed modules addressing related topics. However, the Institute should not view the first three modules proposed above as exhaustive of the efforts of the Institute in revising the Judicial Code. Subject to evaluation of the practical success of the initial modules, the Institute should be prepared to expand its efforts to address some or all of the issues that this Prospectus has deferred from present consideration. In this sense, the revisory project recommended by this Prospectus would be but the first stage of a continuing and ultimately more global set of proposed revisions of the Judicial Code.

## EPILOGUE

### A. *Background*

The Institute is composed of about 2700 elected members as well as several hundred other members: life members (a status attained twenty-five years after election to membership), ex officio members (various leading judges, lawyers, and legal educators), a few honorary members, and a small but growing number of members of the legal profession of foreign countries. The governing body of the Institute is its Council, composed of about sixty members of the Institute elected by the membership.<sup>716</sup>

After considering this Prospectus, the Council decided on December 6, 1995 to commence what is formally called the Federal Judicial Code Revision Project. I was appointed the

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<sup>716</sup> See generally AMERICAN LAW INSTITUTE, ANNUAL REPORTS OF DIRECTOR AND TREASURER apps. at 61-188 (1998) (reprinting Certificate of Incorporation and Bylaws of Institute, Rules of Council, and rosters of all officers, committees, and members); American Law Institute, *Council Adds 44 to Elected Membership*, ALREPORTER, Fall 1997, at 18 (stating that as of Oct. 24, 1997, there were 2727 elected members and 34 members of legal profession of foreign countries); American Law Institute, *61 Become Life Members*, ALREPORTER, Summer 1997, at 10 (stating that there were 661 life members at time of May 1997 Annual Meeting); AMERICAN LAW INSTITUTE, THIS IS THE AMERICAN LAW INSTITUTE (1994) (describing structure and activities of Institute).

Reporter for this Judicial Code project and directed to proceed according to the general outline of this Prospectus, subject to the recommendations of an interim, ad hoc advisory panel convened on December 9, 1995 to discuss with me the recommendations of the Prospectus and the initial development of the project.

The Institute's projects proceed in annual or biennial cycles organized around the Annual Meeting of the Institute, a four-day event held in the second or third week of May. No draft speaks for the Institute until the membership votes to affirmatively approve it at an Annual Meeting. Drafts are developed for submission to and possible approval by the membership in a three-step process.

Initial treatments, called preliminary drafts, are submitted for review by a panel of Advisers: generally about twenty lawyers, judges, and law professors expert in the field. Advisers are generally, but not always, members of the Institute. This leads to a particularly intensive form of peer review of the Reporter's work product. Preliminary drafts are circulated to the Advisers several weeks in advance, and the Advisers then travel at the Institute's expense to its headquarters in Philadelphia, and occasionally to another location, where they meet with the Reporter for two days to discuss the content of the preliminary draft.

Preliminary drafts are also circulated to the Members Consultative Group ("MCG"). Any member of the Institute can join the MCG for any ongoing project. The Reporter meets for one day to discuss the current preliminary draft with any members of the MCG willing to travel at their personal expense. The practice for the Judicial Code project has been to schedule the conference with the MCG on the day immediately following the two-day conference with the Advisers, thus subjecting each preliminary draft to three successive days of intensive review.

The Director of the Institute participates in the discussion of a preliminary draft with both the Advisers and the MCG, generally joined by one or both of the two Deputy Directors. Based on those discussions, the Director in consultation with the Reporter decides whether the preliminary draft is ready to be revised in light of discussion for presentation to the Council. A council draft is intended to be a working version of a draft for presentation to the membership. After advance review of a coun-

cil draft and discussion of it with the Reporter, generally for several hours, the Council decides whether to authorize preparation of a draft for presentation to the membership, called a tentative draft.

The Council launched the Judicial Code project with a sense of some urgency. The problems identified by this Prospectus with respect to the current law of supplemental jurisdiction, removal, and venue were sufficiently palpable that Congress might undertake to legislate in these areas sooner rather than later. It was also thought that some members of Congress might be receptive to the recommendations of the Institute. The Judicial Code project was, therefore, assigned a fairly fast development cycle, calling for a preliminary draft to be considered by the Advisers and the MCG in September 1996 and each year thereafter, in the hope of generating a council draft to be considered by the Council each December and a tentative draft to be considered by the membership the following May. That schedule has to date been maintained.

Two full cycles of preliminary, council, and tentative drafts have been completed, and on May 14, 1998, the Institute unanimously approved the revised supplemental-jurisdiction statute that Tentative Draft Number 2 ("T.D. No. 2") proposed to replace present 28 U.S.C. § 1367 (1994). The progress from inception through approval of T.D. No. 2 has not been linear, however. The various drafts culminating in T.D. No. 2 have differed substantially in their content. I discuss elsewhere that process of development,<sup>717</sup> and I leave to the 190 pages of T.D. No. 2 a full account of the content and ambition of the revised section 1367 that it proposes. Reprinted below as Section B of this Epilogue is the proposed new legislative text and explanatory note that the Institute has approved, but it does not contain the extensive commentary presented in T.D. No. 2 that was also approved by the Institute. Section C briefly highlights two of the important features of this revision of section 1367 and concludes with an outline of my present sense of the future course of the Judicial Code project.

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<sup>717</sup> See Oakley, *supra* note 107.

*B. Statutory Change*<sup>718</sup>

Title 28 of the United States Code is amended by repealing section 1367 of Chapter 85 and subsection (e) of section 1447 of Chapter 89, and by adding to Chapter 85 a new section 1367 as follows:

**§ 1367. Supplemental Jurisdiction**

(a) *Definitions.* As used in this section:

(1) A “freestanding” claim means a claim for relief that is within the original jurisdiction of the district courts independently of this section.

(2) A “supplemental” claim means a claim for relief, not itself freestanding, that is part of the same case or controversy under Article III of the Constitution as a freestanding claim that is asserted in the same civil action.

(3) “Asserted in the same pleading” means that the relevant claims have been asserted<sup>719</sup> either in the pleading as originally filed with the court, or by amendment of the pleading, or by the pleader’s assertion of a claim other than a counterclaim or a claim for indemnity or contribution<sup>720</sup> against a third party

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<sup>718</sup> This section is copyrighted material reprinted verbatim from ALI TENTATIVE DRAFT NO. 2, *supra* note 355, at 1-9, except as indicated in the footnotes discussing amendments adopted pursuant to discussion at the Annual Meeting of the Institute on May 14, 1998. The owner of the copyright is the Institute, which has granted permission for this material to be published here without waiver of its copyright as to any other publication or republication.

<sup>719</sup> Pursuant to discussion with the membership of the Institute on May 14, 1998, Tentative Draft Number 2 (“T.D. No. 2”) was amended by the Reporter to substitute the word “asserted” for the word “joined” that appears at this point in the text of revised section 1367 as printed in T.D. No. 2. The intent of the amendment is to refer consistently to the connection between a freestanding and a supplemental claim that invokes the jurisdictional restriction of subsection (c) as the status of having been “asserted” in what is defined to be the “same pleading” rather than the more ambiguous status of the two claims having been “joined.”

<sup>720</sup> Pursuant to discussion with the membership of the Institute on May 14, 1998, T.D. No. 2 was amended by the Reporter to insert the words “other than a counterclaim or a claim for indemnity or contribution” at this point in the text of revised section 1367 as printed in T.D. No. 2. The intent of the amendment is to make clear that subsection (c)’s restriction of supplemental jurisdiction in diversity litigation does not apply to a counterclaim or claim for indemnity or contribution that a plaintiff might assert against a previously impleaded third-party defendant as a result of the plaintiff having first been placed in a defensive posture by the assertion against the plaintiff of a claim by a

impleaded in response to the pleading, or by order of the court reformulating the pleading, or by the assertion of the claim or defense of an intervenor who seeks to be treated as if the pleading had asserted<sup>721</sup> a claim by or against that intervenor.

(4) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(b) *General grant of supplemental jurisdiction.* Except as provided by subsection (c) or as otherwise expressly provided by statute, a district court shall have original jurisdiction of all supplemental claims, including claims that involve the joinder or intervention of additional claiming or defending parties.

(c) *Restriction of supplemental jurisdiction in diversity litigation.* When the jurisdiction of a district court over a supplemental claim depends upon a freestanding claim that is asserted in the same pleading and that qualifies as a freestanding claim solely on the basis of the jurisdiction conferred by section 1332 of this title, the court shall have jurisdiction of the supplemental claim under subsection (b)<sup>722</sup> only if it —

(1) is asserted representatively by or against a class of additional unnamed parties; or

(2) would be a freestanding claim on the basis of section 1332 of this title but for the value of the claim; or

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defendant or third-party defendant.

<sup>721</sup> Pursuant to discussion with the membership of the Institute on May 14, 1998, T.D. No. 2 was amended by the Reporter to substitute the word "asserted" for the word "joined" that appears at this point in the text of revised section 1367 as printed in T.D. No. 2. The intent of the amendment is to refer consistently to the connection between a freestanding and a supplemental claim that invokes the jurisdictional restriction of subsection (c) as the status of having been "asserted" in what is defined to be the "same pleading" rather than the more ambiguous status of the two claims having been "joined."

<sup>722</sup> Pursuant to discussion with the membership of the Institute on May 14, 1998, T.D. No. 2 was amended by the Reporter to insert the words "under subsection (b)" at this point in the text of revised section 1367 as printed in T.D. No. 2. By stating expressly that the jurisdictional restriction of subsection (c) qualifies only the scope of the supplemental jurisdiction conferred by subsection (b), the amendment is intended to avoid a construction of subsection (c) that would conflict with the supplemental jurisdiction independently granted by 28 U.S.C.A. § 1332(a)(3) (West 1993 & Supp. 1998). *See generally* ALI TENTATIVE DRAFT NO. 2, *supra* note 355, at 20-21 (discussing § 1332(a)(3)'s grant of supplemental jurisdiction).

(3) has been joined to the action by the intervention of a party whose joinder is not indispensable to the litigation of the action.

(d) *Discretion to decline to exercise jurisdiction.* This section does not permit a district court to decline to exercise jurisdiction of any freestanding claim except as provided by subsection (e). A district court may decline to exercise jurisdiction of a supplemental claim if —

(1) all freestanding claims that are the basis for its jurisdiction of a supplemental claim have been dismissed before trial of that claim; or

(2) the supplemental claim raises a novel or complex issue of State law that the district court need not otherwise decide; or

(3) the exercise of supplemental jurisdiction would substantially alter the character of the litigation; or

(4) in exceptional circumstances, there are other compelling reasons for declining supplemental jurisdiction.

(e) *Joinder of additional defendant after removal.* If after removal of a civil action the plaintiff moves to amend the complaint to join a supplemental claim against an additional defendant that is subject to the jurisdictional restriction of subsection (c), the district court may either deny such joinder, or permit such joinder and remand the entire action to the State court from which the action was removed, or permit such joinder without remanding the action. In exercising its discretion the district court shall consider judicial economy, convenience, and fairness to litigants, as well as the reasons permitting supplemental jurisdiction to be declined under subsection (d). If the district court decides to permit such joinder without remanding the action, it may exercise supplemental jurisdiction of the claim so joined as provided by subsections (b) and (d) without regard to the jurisdictional restriction of subsection (c).

(f) *Disposition of supplemental claims; tolling of limitations period.* When a district court lacks or declines to exercise supplemental jurisdiction, the court shall dismiss the supplemental claim unless it was joined before removal of the action, in which case the district court shall remand the claim to the State court from which it was removed. The period of limitations for the following claims shall be tolled until 30 days after their dismissal be-

comes final, unless the applicable law provides for a longer tolling period:

(1) any supplemental claim dismissed because the district court lacks or declines to exercise supplemental jurisdiction; and

(2) any other claim in the same civil action that is voluntarily dismissed as the result of a notice or stipulation of dismissal, or motion for order of dismissal, filed within 30 days after —

(A) the dismissal or remand of a supplemental claim because the district court lacks or declines to exercise supplemental jurisdiction; or

(B) the court's decision under subsection (e) to refuse to permit the joinder of a supplemental claim against an additional defendant.

### EXPLANATORY NOTE

*Subsection (a)* has no direct counterpart in present § 1367. As with all other subsections of the revised statute, subsection (a) is introduced by a topical catchline.

Subsections (a)(1) and (a)(2) distinguish between the jurisdictional posture of a “freestanding” claim and a “supplemental” claim. This distinction is employed by subsections (b) to (f) as the basis for defining and limiting the scope and administration of the supplemental jurisdiction of the district courts. It reflects and ratifies current practice under the various statutes that confer original jurisdiction of specified “actions” on the district courts. Despite the “action-specific” language of these statutes, original jurisdiction attaches on a claim-by-claim or “claim-specific” basis.

Subsection (a)(2) follows current law by defining the relationship between freestanding and supplemental claims in terms of the constitutional concept of a single “case or controversy” that embraces both claims.

Subsection (a)(3) defines comprehensively and in detail the key concept of “asserted in the same pleading” that subsection (c) uses to replicate the effect of the rule of complete diversity. Taken together, subsections (a)(3) and (c) form one of the two most important new features of the revised statute.

The rule of complete diversity has conventionally but mistakenly been understood as requiring an “action-specific” applica-



tion of the general diversity statute, 28 U.S.C. § 1332. If this were true, there would be inherent tension between the claim-specific operation of supplemental jurisdiction and the action-specific effect of the rule of complete diversity. But in fact the rule of complete diversity is a rule about supplemental jurisdiction, which operates to bar the exercise of supplemental jurisdiction as to some but not all supplemental claims that may be joined in certain procedural contexts to freestanding claims in diversity cases.

The critical challenge is to limit the scope of supplemental jurisdiction in diversity cases in a way that limits initial access to federal court but does not impede the joinder of what used to be called “ancillary” claims. Such claims — compulsory counterclaims, cross-claims, claims against third parties, and claims by or against intervenors as of right — should generally qualify for supplemental jurisdiction when filed in reaction to litigation that has survived the initial jurisdictional filter of the rule of complete diversity.

In the vast preponderance of cases, this goal would be achieved if subsection (c) merely withdrew supplemental jurisdiction in diversity cases with respect to any supplemental claim that qualifies for supplemental jurisdiction on the basis of a freestanding claim to which it was joined in the complaint. In the standard case, the jurisdictional restriction of subsection (c) would thus operate to negate jurisdiction over a supplemental claim between a plaintiff and a nondiverse defendant that is (or but for the restriction would be) asserted in the original complaint. But comprehensive protection of the rule of complete diversity requires that subsection (c) operate more broadly. This requires the careful but unfamiliar language used in subsection (a)(3) to define the scope of the jurisdictional restriction of subsection (c).

Subsection (a)(3) must refer to “asserted in the same pleading” rather than “joined in the complaint” because the package of a freestanding diversity claim and some jurisdictionally dependent supplemental claim may occasionally be joined to unrelated litigation by some pleading analogous to but distinct from the complaint — such as an answer asserting a set of permissive counterclaims between partially diverse parties.

A second source of the complexity that subsection (a)(3) must exhibit is the possibility that the scope of the complaint or analogous pleading may be expanded by a variety of means that functionally if not formally add to the complaint a supplemental claim that implicates the rule of complete diversity. Most obviously, a complaint that asserts a claim between diverse parties may be amended to assert a claim by or against an additional, nondiverse party. Subsection (a)(3) makes clear that, regardless of the form of such amendment as superseding or merely expanding the original complaint, the newly added claim is to be treated jurisdictionally as if it had been asserted in the complaint at the commencement of the action. Other joinder scenarios that subsection (a)(3) anticipates and subjects to the jurisdictional restriction of subsection (c) are the assertion by a plaintiff of a supplemental claim (other than a counterclaim or a claim for indemnity or contribution)<sup>723</sup> against a previously impleaded third party, the reformulation of the complaint or analogous pleading by order of the court directing the addition of claims by or against new parties under the compulsory-joinder provisions of Rule 19, and the intervention of new parties who wish to participate in the litigation as if they had been joined as parties by the complaint or analogous pleading.

Subsection (a)(4) is identical to present § 1367(e), but is relocated from the end of the statute to the end of the definitional subsection with which the statute now begins.

*Subsection (b)* sets forth in claim-specific terms a general grant of supplemental jurisdiction that is functionally identical to that of present § 1367(a), with one important clarification that would undermine<sup>724</sup> a recent, controversial decision of the Supreme

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<sup>723</sup> The Reporter has added this parenthetical qualification to the text of the Explanatory Note as printed in T.D. No. 2 in order to conform the Explanatory Note to the amended statutory text of proposed subsection (a)(3). See *supra* note 720 and accompanying text (specifying and explaining Reporter's amendment of subsection (a)(3)).

<sup>724</sup> As printed in T.D. No. 2, this sentence concludes: "with one important clarification that would effectively overrule a recent, controversial decision of the Supreme Court." Pursuant to discussion with the membership of the Institute on May 14, 1998, the Reporter has replaced the words "effectively overrule" with the word "undermine" in referring to the impact that subsection (b) of proposed new section 1367 would have on a recent decision of the Supreme Court. See *infra* notes 726-27 and accompanying text (discussing *City of Chicago v. International College of Surgeons*, 118 S. Ct. 523 (1997), in light of subsection

Court. The Court there held that the “supplemental jurisdiction” granted by present § 1367(a) is not necessarily limited to “original jurisdiction,” and thus embraces state-law claims for on-the-record judicial review of rulings by local administrative agencies even if such claims require federal district courts to exercise cross-system appellate jurisdiction. Revised § 1367(b) makes clear, as present § 1367(a) does not, that the supplemental jurisdiction it grants is a form of original jurisdiction. Nothing in the literal terms of revised § 1367(b) permits district courts to exercise cross-system appellate jurisdiction. This is the second of the important new features of revised § 1367.

The final clause of subsection (b) follows the final sentence of present § 1367(a), but changes the reference in current law to “additional parties” to read “additional claiming or defending parties.” This recognizes, as does the related language of subsection (a)(3) dealing with claims joined constructively by an intervenor, that from a claim-specific perspective the intervention of an additional defending party constructively results in the joinder of a claim against that party. If this constructive claim is a supplemental claim, it is within the supplemental jurisdiction conferred by subsection (b).

*Subsection (c)* is functionally analogous to present § 1367(b) but differs substantially in its terms and, to a lesser degree, in its scope. In most fundamental respects its restriction of supplemental jurisdiction preserves the present operation of the rule of complete diversity.<sup>725</sup> Subsection (c) broadens the scope of supplemental jurisdiction in diversity actions beyond that authorized by present § 1367(b) with respect to nondiverse intervenors and claims for less than the jurisdictional amount by or against diverse coparties.

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(b)'s proposed change in law).

<sup>725</sup> As printed in T.D. No. 2, this sentence reads: “In most fundamental respects its restriction of supplemental jurisdiction preserves the present operation of the rule of complete diversity as applied to actions between citizens of different states.” The concluding words, “as applied to actions between citizens of different states,” have been deleted by the Reporter. They had significance in an earlier draft, which would have preserved the rule of complete diversity with respect to a suit between citizens of different states but not with respect to suits between state citizens and aliens. See AMERICAN LAW INSTITUTE, FEDERAL JUDICIAL CODE REVISION PROJECT: TENTATIVE DRAFT NO. 1, at 6, 10, 98-102 (1997). They were carried forward inadvertently to T.D. No. 2, which draws no such distinction between diversity suits in which aliens are or are not parties.

*Subsection (d)* is substantially similar in form and effect to present § 1367(c), but with greater emphasis on the specific circumstances that may justify a district court in declining to adjudicate a particular supplemental claim. The new first sentence makes clear what current law merely implies: that the discretion to decline to exercise jurisdiction applies only to supplemental claims. The four categories of circumstances permitting supplemental jurisdiction to be declined parallel those specified by current law, but the first three have been refined and reorganized.

As under current law, only the fourth category requires the district court to conclude that “exceptional circumstances” exist. While any of the first three categories may thus justify a district court in declining to exercise supplemental jurisdiction in an otherwise unexceptional case, these three categories vary markedly in the degree to which the qualifying circumstances exist objectively or only in the subjective judgment of the district court. The revised order in which these three categories are specified reflects the increasingly subjective nature of each ground for declining supplemental jurisdiction.

*Subsection (e)* replaces present 28 U.S.C. § 1447(e) and expands the scope of discretion of a district court to respond fairly and efficiently to a postremoval motion in a diversity case by which the plaintiff seeks to amend the complaint so as to join a claim against an additional, nondiverse defendant. Present § 1447(e) is indifferent to whether the claim in question has any relationship to other claims in the previously removed action, and permits the district court to respond to such a motion in only two ways, either by denying the motion to amend, or by granting it and remanding the entire action. New § 1367(e) requires that the claim in question be a supplemental claim, and gives the court the third option of granting the motion and adjudicating the claim against the nondiverse defendant pursuant to a special grant of supplemental jurisdiction.

Present § 1447(e) provides no standards for the court to consider in weighing the two options it permits. By contrast, new § 1367(e) directs the court to choose in its discretion among the three options it permits after considering judicial economy, convenience, and fairness to litigants — the general justifications for supplemental jurisdiction — as well as the rea-

sons permitting supplemental jurisdiction to be declined under new § 1367(d). In thus choosing among the three options provided by subsection (e), the court is not subject to subsection (d)'s presumption in favor of the exercise of supplemental jurisdiction. Should the court decide to permit the joinder without remanding the entire action, however, subsection (d) governs the subsequent exercise of the district court's jurisdiction. The court may later decline to exercise supplemental jurisdiction if authorized to do so by subsection (d), but may not later decline to exercise jurisdiction with respect to any freestanding claims.

*Subsection (f)* begins with a new sentence making clear that when the district court declines to exercise supplemental jurisdiction in a removed case, the supplemental claim in question should be remanded to state court rather than dismissed. The balance of subsection (f) follows present § 1367(d) in providing a minimum of 30 days in which a dismissed claim can be filed in state court free of the bar of an otherwise applicable statute of limitations, but expands this tolling provision to embrace supplemental claims dismissed because the district court lacks supplemental jurisdiction as well as claims dismissed because the district court has declined to exercise its supplemental jurisdiction.

Subsection (f) also follows present law in extending the tolling provision to embrace claims voluntarily dismissed after other claims are dismissed on jurisdictional grounds, but broadens the scope of this secondary tolling provision in two respects. First, it is made applicable when the predicate dismissal of a supplemental claim is for the nondiscretionary reason that there is a lack of supplemental jurisdiction. Second, it is made applicable when the refusal to exercise supplemental jurisdiction takes the form of the denial of joinder under subsection (e).

The effect of these expanded tolling provisions is to give district courts greater flexibility in the administration of supplemental jurisdiction by assuring that related claims can be prosecuted together in state court should some but not all such claims be excluded from federal court on jurisdictional grounds. In order to avoid undue disruption of state-court proceedings, however, subsection (f) limits the time in which the secondary tolling provision may be invoked to a 30-day period following the predicate action by the district court. Because most volun-

tary dismissals in mature actions require leave of court, only the filing of the requisite motion need occur within the specified period. The moving party should not be held accountable for whatever additional time it takes for the court to rule on the motion.

### C. Conclusion

The focus of this revision of the supplemental-jurisdiction statute is a reconceptualization of the nature of federal jurisdiction as fundamentally “claim-specific” rather than “action-specific.” The definitional distinction in subsections (a)(1) and (a)(2) between “freestanding” and “supplemental” claims is fundamental to the revised statute’s express conferral of supplemental jurisdiction in claim-specific terms that reflect and ratify established practice in the federal courts and, thus, alleviate the tension that presently exists between the claim-specific operation of supplemental jurisdiction and the facially action-specific language of the basic statutes conferring original jurisdiction on the federal district courts.

Subsection (a)(3)’s complex definition of “asserted in the same pleading” is the lynchpin of the new statute’s response in subsection (c) to the central problem that has arisen in the construction and application of present section 1367: how to reconcile a plenary grant of supplemental jurisdiction that supports the joinder of additional parties with pragmatic preservation of the rule of complete diversity as a limiting principle of the federal courts’ general diversity jurisdiction.

Subsection (b) renders moot the essential reasoning of the Supreme Court in the recent case of *City of Chicago v. International College of Surgeons*.<sup>726</sup> The Court there held that present section 1367’s grant of “supplemental jurisdiction” is not limited in terms to a grant of original jurisdiction and, thus, extends the jurisdiction of the district courts to supplemental claims seeking on-the-record judicial review of the application of state law by local administrative agencies, whether or not such review entails the exercise of appellate rather than original jurisdic-

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<sup>726</sup> 118 S. Ct. 523 (1997).

tion.<sup>727</sup> If the proposed revision of section 1367 were to become law, the Court would have to revisit the question whether the district courts, as courts of original jurisdiction even with respect to supplemental claims, may adjudicate supplemental claims for judicial review in which independent factfinding is foreclosed by the applicable state law governing such supplemental claims.

This Prospectus originally anticipated a project that would deal sequentially with supplemental jurisdiction, venue, and then removal: the same order in which these subjects are taken up by the Judicial Code. This was a mistake. The fundamental rule of removal is that the right of removal is contingent on the original jurisdiction of the district courts over at least some claims in an action commenced in state court against a defendant who seeks to invoke the right of removal. There is, therefore, a logical relationship between the scope of the district court's original jurisdiction, as extended to embrace supplemental claims, and the scope of the right of removal. The better sequence is to follow revision of the supplemental-jurisdiction statute with revision of the removal statutes, dealing thereafter with the venue and transfer statutes.

My work on removal has already started. I included a partial draft of revised removal statutes in Preliminary Draft Number 1 as an illustration of how a claim-specific model of federal jurisdiction would be implemented in the removal context and I presented a complete draft of revised removal statutes in Preliminary Draft Number 2. After lengthy and informative discussion of these statutes with the Advisers and MCG in September 1997, I postponed further work on removal until the Institute's work on supplemental jurisdiction had been completed. I anticipate that the third cycle of drafts will be devoted to removal jurisdiction, culminating (if all goes well from the Reporter's perspective) in the membership's initial consideration of revised removal statutes in May 1999. As was the case with supplemental jurisdiction, I expect that this first review of new statutory material will be for discussion only, with a mature draft on removal coming back to the membership for a vote in May

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<sup>727</sup> See *id.* at 530-33.

2000. It is possible that the draft then before the membership might combine a second look at removal with a first look at revised venue and transfer statutes, so that work on venue and transfer could be completed in May 2001. But it is also possible that removal, an intricate and challenging topic about which there is presently great disarray in the law of the lower courts, will occupy the attention of the membership for several years before revision of the venue and transfer statutes completes the work of the Judicial Code project as proposed by this Prospectus.