

# Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990

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## INTRODUCTION

Litigators, lend me your ears. Important changes have occurred in recent years to the basic terrain of federal jurisdiction and venue. In brief, Congress has enacted (1) a modest narrowing of the right to invoke federal jurisdiction originally or by removal; (2) a significant expansion of the right to invoke the "supplemental" jurisdiction necessary for a federal court to adjudicate claims under state law that are transactionally related to litigation in federal court; and (3) a dramatic liberalization of the law of federal venue.

These changes were enacted as just a few of the diverse and generally mundane items pertaining to federal judicial administration that were jumbled together in two omnibus statutes, the

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\* Professor of Law, University of California, Davis. B.A., University of California, Berkeley, 1969. J.D., Yale University, 1972. I have benefited greatly from collaborating with Charles Alan Wright in the preparation of the casebook supplement cited below, and from reading in draft the discussions of supplemental jurisdiction and venue that he is publishing as 13B C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3567.3 (2d ed. 1984 & Supp. 1991) and 15 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3802.1 (2d ed. 1986 & Supp. 1991). I have incorporated here portions of my analysis of the Judicial Improvements Act of 1990 that were originally drafted for use by Professor Wright in the "December 1990 Update" to C. MCCORMICK, J. CHADBOURN & C. WRIGHT, *CASES ON FEDERAL COURTS* (8th ed. 1988). I have also benefited from the generous assistance of Charles Geyh, Thomas Mengler, and Thomas Rowe in response to my inquiries about the legislative history of the 1990 Act, and from Professor Rowe's comments on the manuscript of this Article. John Fischer contributed to my research into the legislative history of the 1988 Act.

Judicial Improvements and Access to Justice Act<sup>1</sup> (1988 Act) and the Judicial Improvements Act of 1990<sup>2</sup> (1990 Act). This dull

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<sup>1</sup> Pub. L. No. 100-702, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 4642 [hereafter 1988 Act]. The enacted bill was H.R. 4807, 100th Cong., 2d Sess., 134 CONG. REC. H10,430 (daily ed. Oct. 19, 1988) (as amended), but most of the 1988 Act was first introduced as H.R. 3152, the proposed Court Reform and Access to Justice Act of 1987. H.R. 3152, 100th Cong., 1st Sess. (1987), *reprinted in Court Reform and Access to Justice Act: Hearings on H.R. 3152 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 100th Cong., 1st & 2d Sess. 452 (1988) [hereafter 1988 House Hearings]. Title I of H.R. 3152 was severed and enacted separately as the Act of June 27, 1988, Pub. L. 100-352, 102 Stat. 662, 1988 U.S. CODE CONG. & ADMIN. NEWS 766, giving the Supreme Court greater control of its docket by changing virtually all provisions for appeal as of right to review by the discretionary writ of certiorari. The balance of H.R. 3152, with amendments and some new material, was reintroduced as H.R. 4807, the proposed Court Reform and Access to Justice Act of 1988. H.R. 4807, 100th Cong., 2d Sess. (1988), *reprinted in 1988 House Hearings, supra*, at 516. In the meantime the Senate was considering S. 1482, the proposed Judicial Branch Improvements Act of 1987. S. 1482, 100th Cong., 1st Sess. (1987), *reprinted in Judicial Branch Improvements Act of 1987: Hearing on S. 1482 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 100th Cong., 2d Sess. 3-44 (1988) and in 134 CONG. REC. S16,284 (daily ed. Oct. 14, 1988).

After H.R. 4807 was originally passed by the House, 134 CONG. REC. H7,443-55 (daily ed. Sept. 13, 1988), it was amended in the Senate to conform to the amended text of S. 1482, which itself had been reworked into a compromise of the House and Senate bills. *See* 134 CONG. REC. S16,284, S16,294-98 (daily ed. Oct. 14, 1988) (description of S. 1482 as an "omnibus court reform bill" and discussion of its legislative history by its sponsor, Senator Heflin); 134 CONG. REC. S16,311 (daily ed. Oct. 14, 1988) (passage of S. 1482 followed by passage of H.R. 4807 as amended to substitute the text of S. 1482). It was this amendment to H.R. 4807 that was then accepted by the House and enacted as the 1988 Act.

The texts of the House Report accompanying H.R. 4807, and of the 1988 Act as enacted, are reprinted in 1988 House Hearings, *supra*, at 587, 714. A statement of the legislative history of H.R. 4807 up to the time that it was reported out of the Judiciary Committee appears in the House Report, H.R. REP. NO. 889, 100th Cong., 2d Sess., pt. 1, at 23-26 (1988) [hereafter 1988 HOUSE REPORT], *reprinted in 1988 House Hearings, supra*, at 609-12 and in 1988 U.S. CODE CONG. & ADMIN. NEWS 5982, 5983-86. For discussion of the elusive text of H.R. 4807 as introduced, see *infra* note 14.

<sup>2</sup> Pub. L. No. 101-650, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 5089 [hereafter 1990 Act]. It was the product of a more accelerated but no less convoluted legislative history than that of the 1988 Act. All of the provisions of the 1990 Act discussed in this article are causally connected to Title I of the 1988 Act, which created the Federal Courts Study Committee and ordered it to report within 15 months on the current state of the

packaging has obscured the importance of the new rules governing a civil litigant's choice of a federal forum. The practicing bar is largely unaware of these new rules. Where awareness exists it is generally unaccompanied by informed understanding of the significance of the changes.<sup>3</sup> I seek to correct this situation.

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nation's courts, both state and federal, and to make appropriate legislative recommendations. 1988 Act, *supra* note 1, §§ 102, 105, 102 Stat. at 4644-45, reprinted in 134 CONG. REC. H10,430, H10,430-31 (daily ed. Oct. 19, 1988). The Committee filed its report on April 2, 1990. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990) [hereafter STUDY COMMITTEE REPORT]. The Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5104, was introduced as H.R. 5381 on July 26, 1990. H.R. 5381, 101st Cong., 2d Sess. (1990), reprinted as introduced in *Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearing on H.R. 5381 and H.R. 3898 Before the Subcomm. on Courts, Intellectual Property and the Admin. of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 2 (1990). The text of H.R. 5381 as amended and reported out of the Judiciary Committee is reprinted in H.R. REP. NO. 734, 101st Cong., 2d Sess. 1, 1-15, and reprinted in part in 1990 U.S. CODE CONG. & ADMIN. NEWS 6860-6878 [hereafter 1990 HOUSE REPORT]. As amended H.R. 5381 was passed by the House on September 27, 1990. 136 CONG. REC. H8,256, H8,263 (daily ed. Sept. 27, 1990). In the course of the night of October 27, 1990, an amended version of H.R. 5381 was inserted as Title III of the eight disparate titles lumped together as S. 2648, 101st Cong., 2d Sess. (1990), 136 CONG. REC. S17,570, S17,578 (daily ed. Oct. 27, 1990). The text of S. 2648 was then inserted as the substitute text of H.R. 5316, 101st Cong., 2d Sess., 136 CONG. REC. S17,580, S17,583 (daily ed. Oct. 27, 1990); H.R. 5316, as amended, was passed by the Senate. *Id.* The Senate's amendment of H.R. 5316 was concurred in by the House at 10 minutes after midnight. 136 CONG. REC. H13,316 (daily ed. Oct. 27, 1990). Title III of the 1990 Act retained the short title of Federal Courts Study Committee Implementation Act of 1990. 1990 Act, *supra*, § 301, 104 Stat. at 5104.

It may be relevant to understanding the oddities of the 1990 Act that it was passed by the Senate immediately after the Senate concluded lengthy debate by accepting the House-Senate Conference Report and enacting the long-awaited Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 1388. When finally signed by President Bush the 1990 Act became the last public law enacted by the 101st Congress. *See History of Bills Enacted into Public Law (101st Cong., 2d Sess.)*, 137 CONG. REC. D5, D29 (daily ed. Jan. 3, 1991).

<sup>3</sup> This is not for lack of helpful commentary. In addition to the issue-by-issue analyses of particular jurisdictional and venue changes that may be found in Professor Wright's treatise, 13B C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3567.3 (2d ed. 1984 & Supp. 1991) and 15 C. WRIGHT, A. MILLER & E. WANER, *FEDERAL PRACTICE AND PROCEDURE* § 3802.1 (2d ed. 1986 & Supp. 1991), the effects of the 1988 and 1990 Acts are discussed in Siegel, *Changes in Federal Jurisdiction and*

Viewed cumulatively, and against the background of recent Supreme Court case law in related fields, the recent statutes have substantially reshuffled the deck from which choices of forum are dealt in modern American litigation.

Federal jurisdiction consists, roughly speaking, of four major types of jurisdiction. There are two over-arching categories of original jurisdiction: "federal question" jurisdiction based on the federal character of the issues and "diversity" jurisdiction based on the political characteristics of the parties. In addition there are two subsidiary types of jurisdiction that bridge the distinction between federal question and diversity jurisdiction, and may be rooted in either. "Removal" jurisdiction allows the defendant, with some exceptions and qualifications, to veto the plaintiff's choice of a state forum instead of a federal forum when both were available. "Supplemental" jurisdiction — the new statutory term for pendent and ancillary jurisdiction — allows any party to a federal lawsuit to submit for the federal court's adjudication other claims that arise from the same facts as those under litigation, even if the other claims would not qualify for federal jurisdiction absent their connection to that part of the litigation that qualifies independently for federal jurisdiction.

The recent legislation discussed here directly and substantially affects the three latter types of jurisdiction: diversity jurisdiction,

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*Practice under the New (Dec. 1, 1990) Judicial Improvements Act*, 133 F.R.D. 61 (1991); Siegel, *Changes in Federal Jurisdiction and Practice Under the New Judicial Improvements and Access to Justice Act*, 123 F.R.D. 399 (1989); Annotation, *Playing By the Rules — Congress Makes Major Changes in the Law of Venue, Jurisdiction, Removal and Limitation Periods — Public Law 101-650*, 91 FED. LITIGATOR 3 (1991); Annotation, *A Closer Look at the Judicial Improvements and Access to Justice Act*, 89 FED. LITIGATOR 35 (1989); see also Billinson, *Recent Amendments to the Removal Statute — Judicial Disimprovements and Inaccess*, 40 SYRACUSE L. REV. 1145 (1989) (criticizing 1988 Act's amendment of 28 U.S.C. § 1446(b) to prohibit removal of diversity actions more than one year after commencement); Linn, *Diversity Jurisdiction and Permanent Resident Aliens: Constitutional and Policy Implications of the 1988 Amendment to 28 U.S.C. § 1332*, 38 FED. B. NEWS & J. — (forthcoming 1991) (criticizing 1988 Act's exclusion of permanent resident aliens from alienage jurisdiction); Mengler, Burbank & Rowe, *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213 (1991) [hereafter Mengler, Burbank & Rowe, *Congress Accepts Invitation*] (discussing 1990 Act's codification of supplemental jurisdiction at 28 U.S.C. § 1367); Mengler, Burbank & Rowe, *Recent Federal Court Legislation Made Some Noteworthy Changes*, Nat'l L.J., Dec. 31, 1990 - Jan. 7, 1991, at 20, col. 1 [hereafter Mengler, Burbank & Rowe, *Recent Federal Court Legislation*] (discussing 1990 Act in general).

removal jurisdiction, and supplemental jurisdiction. Moreover, the type of jurisdiction most frequently supplemented by the new statutory grant of supplemental jurisdiction is federal question jurisdiction. Thus as a practical matter all four of the major types of federal jurisdiction have been reshaped by the recent enactments. In addition the newly liberalized law of federal venue greatly diminishes the significance of venue as an additional constraint on tactical choices among the various district courts within the federal system, beyond the need for jurisdiction over the case and the parties. By careful choice of forum a litigant can now more easily than ever have the best of three worlds: favorable substantive law,<sup>4</sup> uniform federal procedure, and the convenience of a local courthouse. In this new terrain, the litigator unversed in recent statutory developments proceeds in peril of mistakes or missed opportunities.

## I. DIVERSITY JURISDICTION

### A. *New Jurisdictional Amount Must Exceed \$50,000*

The most sweeping change effected by the new legislation is the 1988 Act's five-fold increase in the amount in controversy required for diversity jurisdiction.<sup>5</sup> Since 1980 diversity actions

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<sup>4</sup> The impact of choice of forum on substantive law (*i.e.*, the effect on outcome of trying a suit in one federal district court as opposed to another) is not limited to diversity cases. In federal question cases, there may be important differences between the substantive law to be applied by particular districts because of the existence of intercircuit conflicts about the proper construction of federal law. Defendant forum-shopping by transfer motion under 28 U.S.C. § 1404 (1988) often represents a conscious attempt to change the law to be applied in the case, because the interpretation of federal law followed in the circuit of the transferee forum will govern after the transfer. *See generally* *In re Korean Air Lines Disaster of September 1, 1983*, 829 F.2d 1171 (D.C. Cir. 1987) (holding that law of transferor forum on federal question does not have stare decisis effect in transferee forum); Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677 (1984) (concluding that, where federal claims are transferred, principle that transferee court is competent to decide correctly indicates transferee's interpretation should apply).

<sup>5</sup> 28 U.S.C. § 1332(a),(b) (1988). The amount in controversy must now exceed \$50,000. *Id.* Before the 1988 Act the jurisdictional threshold was an amount in excess of \$10,000. 28 U.S.C. §§ 1332(a), (b) (1982), *amended by* 1988 Act, *supra* note 1, § 201(a), 102 Stat. at 4646 (codified at 28 U.S.C. §§ 1331(a),(b) (1988)).

Note that the stated amount must be *exceeded* in order for jurisdiction to exist. 28 U.S.C. § 1332(a),(b) (1988). A claim for exactly \$50,000, as might

have been the only significant kind of federal litigation subject to an amount in controversy requirement.<sup>6</sup> The amount in controversy for diversity actions, originally set at \$500 by the Judiciary Act of 1789, had not been raised in thirty years.<sup>7</sup>

The increase did not take effect until May 18, 1989.<sup>8</sup> The obvious goal of the increase is to redirect at least some diversity litigation otherwise qualifying for federal jurisdiction from the federal to the state courts. Whether it will have anything more than symbolic effect remains to be seen.<sup>9</sup> The rules for determining the

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result from a dispute over an insurance policy or promissory note in that exact amount, would be jurisdictionally insufficient by the margin of one cent. *See generally* *Motorists Mut. Ins. Co. v. Simpson*, 404 F.2d 511, 515-16 (7th Cir. 1968) (holding federal jurisdiction improper because insurance company's liability limited in policy to \$10,000), *cert. denied*, 394 U.S. 988 (1969); *Brainin v. Melikian*, 396 F.2d 153 (3d Cir. 1968) (holding interest accruing on \$10,000 note not incidental to main obligation and therefore properly included in determining jurisdictional amount).

The jurisdictional amount for diversity actions brought under the Federal Interpleader Act remains a stake of \$500 or more. 28 U.S.C. § 1335(a) 1988.

<sup>6</sup> *See* C. WRIGHT, *THE LAW OF FEDERAL COURTS* § 32, at 177, 781, § 33, at 181 (4th ed. 1983).

<sup>7</sup> The \$500 amount set in 1789 was raised to \$2000 in 1887, \$3000 in 1911, and \$10,000 in 1958. *Id.* § 32, at 176.

<sup>8</sup> The increase in the jurisdictional amount applies "to any civil action commenced on or after the 180th day after the date of enactment of this title." 1988 Act, *supra* note 1, § 201(b), 102 Stat. at 4646 (1988).

The possible exercise of removal jurisdiction delayed the full effectiveness of the increase for one further year, until May 18, 1990. Until that date it was still theoretically possible to invoke removal jurisdiction in an action filed in state court on or before May 17, 1989, involving complete diversity of citizenship and an amount in controversy exceeding only \$10,000. Although removal normally must occur within 30 days of service of process on defendant, it is possible for a case not initially removable to become removable because of some change in structure, such as the plaintiff's voluntary dismissal of all claims against the only nondiverse defendant. The 1988 Act set an absolute time limit of one year, however, for the removal of an initially nonremovable diversity case. *Id.* § 1016(b)(2)(B), 102 Stat. at 4669 (codified at 28 U.S.C. § 1446(b) (1988)); *see also infra* text accompanying notes 31-35 (discussing one-year cut-off of right of removal); Billinson, *supra* note 3 (criticizing same).

<sup>9</sup> The House Judiciary Committee anticipated that increasing the jurisdictional amount to \$50,000 would reduce the diversity caseload by up to 40%. 1988 HOUSE REPORT, *supra* note 1, at 45. A recent study estimates that approximately 27% of diversity cases filed in 1987 sought \$50,000 or less in damages, but cautioned that the amount claimed in many such cases could easily be increased to meet the new threshold. Flango & Boersema,

amount in controversy are extremely deferential to the claiming party's evaluation of that amount.<sup>10</sup> Although there is provision for a cost-shifting sanction when the claiming party wins a judgment of less than \$50,000,<sup>11</sup> this is a mild deterrent, seldom enforced.<sup>12</sup>

### B. State Citizenship for Permanent Resident Aliens

The 1988 Act provides that for purposes of determining whether federal jurisdiction exists on the basis of diversity of citizenship, "an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled."<sup>13</sup> Although of limited applicability, this curious provision requires a nearly complete reconceptualization of the rules of citizenship for diversity purposes. The provision invites courts to adjudicate cases that may be beyond the constitutional power of the federal courts. Given the modest legislative

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*Changes in Federal Diversity Jurisdiction: Effects on State Court Caseloads*, 15 U. DAYTON L. REV. 405, 432-33 (1990). The increase in the jurisdictional amount to \$50,000 had been recommended by Judge Posner. See R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 131, 146-47 (1985). But after the increase, the Federal Courts Study Committee, of which Judge Posner was a leading member, expressed skepticism whether such a "pragmatic but essentially arbitrary" device would have significant effect given the expected increase in claims presented to federal courts by plaintiffs determined to invoke the diversity jurisdiction. See STUDY COMMITTEE REPORT, *supra* note 2, at 40.

<sup>10</sup> See C. WRIGHT, *supra* note 6, § 33, at 183-90.

<sup>11</sup> 28 U.S.C. § 1332(b) (1988).

<sup>12</sup> If the plaintiff wins nothing, the defendant is entitled to costs without regard to § 1332(b). FED. R. CIV. P. 54(d). Thus the cost-shifting or cost-denial authority granted by § 1332(b) has significance only when the plaintiff has won something, but the judgment is for less than the jurisdictional amount. By definition the plaintiff's claim for an amount in excess of the jurisdictional amount must have been in good faith. Otherwise the district court must dismiss for lack of subject-matter jurisdiction. Thus the plaintiff's only sin is to have recovered an affirmative amount, but less than was sought in good faith. Courts are understandably hesitant to penalize a plaintiff for having invoked in good faith the jurisdiction of the federal courts to enforce a meritorious claim. See generally C. WRIGHT, *supra* note 6, § 33, at 185-86.

<sup>13</sup> 1988 Act, *supra* note 1, § 203(a), 102 Stat. at 4646 (codified at 28 U.S.C. § 1332(a) (1988)). The conferral of state citizenship on state-domiciled, permanent-resident aliens applies only to "civil actions commenced in or removed to" federal court on or after May 18, 1989. *Id.* § 203(b), 102 Stat. at 4646.

objective to rid the federal diversity docket of a small category of essentially localized lawsuits,<sup>14</sup> one must wonder whether Congress adopted the best means to accomplish this modest end.<sup>15</sup>

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<sup>14</sup> This provision of the 1988 Act was enacted at the request of the Judicial Conference. In the floor debate immediately preceding passage of the 1988 Act in the form of amended H.R. 4807, Representative Kastenmeier, the sponsor of the original bill, H.R. 3152, declared erroneously that the resident-alien provision had been included in that bill but had inadvertently been omitted from the bill as amended in committee. 134 CONG. REC. H10,440 (daily ed. Oct. 19, 1988) (statement of Rep. Kastenmeier). In fact neither H.R. 3152 nor its successor, H.R. 4807, had any such provision when introduced.

H.R. 3152, 100th Cong., 2d Sess. (1987), as introduced on August 6, 1987, is reprinted in *1988 House Hearings*, *supra* note 1, at 452. H.R. 4807, 100th Cong., 2d Sess. (1988), as introduced on June 14, 1988, is unfortunately not reprinted in the record of the House hearing, but is available on Fiche No. 802, at coordinate B1, of the 24X microfiche edition of House Bills, 100th Cong., 2d Sess., Y 1.4/6:100, as distributed by the Superintendent of Documents of the United States, Government Printing Office (copy on file with U.C. Davis Law Review). It contains no hint of the resident-alien provision. Far from according state citizenship to permanent resident aliens, H.R. 4807 as introduced proposed in Subtitle B of Title III, § 311, to eliminate all jurisdiction based on diversity of citizenship (except in actions under the Federal Interpleader Act) and to raise the jurisdictional amount for the alienage jurisdiction to in excess of "\$50,000 in actual damages." There was no proposal to change the definition of alienage. *Cf.* 1988 HOUSE REPORT, *supra* note 1, at 25, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 5985-86 (generally describing content of H.R. 4807 when introduced as "clean bill" substituting for amended H.R. 3152).

As far as I can determine, the resident-alien provision first appears in the legislative history of the 1988 Act as § 203 of the amended version of S. 1482. It was this version of S. 1482 that, upon adoption by the Senate, became the substitute text of H.R. 4807, which in turn was passed by both chambers and enacted as the 1988 Act. *See supra* note 1 (recounting legislative history of 1988 Act). The scant legislative history of the resident-alien provision states that "any review of the immigration statistics indicates [that] large numbers of persons fall within [the] category" of permanent resident alien, and that "[t]here is no apparent reason why actions between persons who are permanent residents of the same State should be heard by the Federal courts merely because one of them remains a citizen or subject of a foreign state." 134 CONG. REC. S16,299 (daily ed. Oct. 14, 1988) (reproducing section-by-section analysis of amended S. 1482, discussing resident-alien provision of § 203).

<sup>15</sup> *See generally* Linn, *supra* note 3. Congress could have accomplished its apparent objective by simply prohibiting the exercise of alienage jurisdiction under 28 U.S.C. § 1332(a)(2)-(3) whenever permanent residents of the same state were opposing parties. There was no need to pursue this end by the far more awkward means of redefining the nature of state



Previously United States citizenship had been one of two independent conditions for citizenship of a state in the diversity calculus. The other condition was domicile in a state. When both conditions were met, the person was a citizen of a state. A United States citizen domiciled abroad was not a citizen of a state, and could not invoke or be subjected to the diversity jurisdiction. A citizen of any other country was deemed an alien regardless of domicile, and was subject as such to the species of diversity jurisdiction called "alienage" jurisdiction.

Since the 1988 Act a complete analysis of the criteria for the diversity status of natural persons requires recognition of six different combinations of political status and domicile.

1. An individual who is not a citizen of the United States but who has been admitted to the United States for permanent residence (a "permanent resident alien") is for diversity purposes deemed a citizen of the state in which that person is domiciled. Such a person is thus considered a "citizen" for the "diversity of citizenship" species of diversity jurisdiction. Such a person is not considered an "alien" for purposes of the "alienage" species of diversity jurisdiction.<sup>16</sup>

2. An individual who is a citizen of the United States is for diversity purposes deemed a citizen of the state in which that person is domiciled.<sup>17</sup>

3. An individual who is neither a citizen of the United States nor a permanent resident alien, but who is a citizen of a foreign state, is for diversity purposes deemed a citizen of that foreign state regardless whether such a person is domiciled in a state. Such a person is thus considered an "alien" for purposes of the "alienage" species of diversity jurisdiction.<sup>18</sup>

4. A permanent resident alien who is not domiciled in a state,

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citizenship in order then to defeat jurisdiction by application of the rule of complete diversity.

<sup>16</sup> 28 U.S.C. § 1332(a) (1988).

<sup>17</sup> See C. WRIGHT, *supra* note 6, § 26 (defining citizenship). Dual citizenship in the United States and a foreign country is irrelevant for purposes of diversity and alienage jurisdiction. An individual with dual citizenship is treated exclusively as a United States citizen and the dual citizenship status is disregarded. *Id.* § 24, at 138. Thus a United States citizen with dual nationality will be deemed a citizen of the state in which she is domiciled, and hence within status category 2, or if domiciled abroad will be deemed "U.S.-stateless" (as opposed to "stateless" as a matter of international law, see *infra* note 20), and hence within status category 5.

<sup>18</sup> See C. WRIGHT, *supra* note 6, § 24, at 138-39, 139 n.11.

but who is a citizen of a foreign state, is for diversity purposes deemed a citizen of that foreign state. Such a permanent resident alien is thus considered an "alien" for purposes of the "alienage" species of diversity jurisdiction.<sup>19</sup>

5. A United States citizen who is not domiciled in a state (*i.e.*, is domiciled in a foreign state) is for diversity purposes deemed a citizen of no state. Such a person is not considered a "citizen" for the "diversity of citizenship" species of diversity jurisdiction. Such a person is not considered an "alien" for purposes of the "alienage" species of diversity jurisdiction. The result is that such a person is deemed "U.S.-stateless."<sup>20</sup> The federal courts can have no subject-matter jurisdiction based on diversity of citizenship or alienage over any case to which a U.S.-stateless person is party.<sup>21</sup>

6. An individual who is neither a citizen of the United States, nor a permanent resident alien, nor a citizen of a foreign country, is for diversity purposes deemed a citizen of no state regardless whether such a person is domiciled in a state. Such a person is not considered a "citizen" for the "diversity of citizenship" species of diversity jurisdiction. Such a person is not considered an "alien" for purposes of the "alienage" species of diversity jurisdiction. The result is that such a person is deemed "stateless" in the international-law sense. The federal courts can have no subject-matter jurisdiction based on diversity of citizenship or alienage over any case to which a stateless person (other than a state-

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<sup>19</sup> This follows logically from the general principle of alienage as qualified by categories 1, 2, and 3. In general, all citizens of foreign states are deemed aliens for purposes of the "alienage" jurisdiction of 28 U.S.C. § 1332(a)(3) (1988). See C. WRIGHT, *supra* note 6, § 24, at 139. The alienage of citizens of foreign states who have been admitted to the United States for permanent residence and are domiciled in a state is disregarded per status category 1. The alienage of citizens of foreign states who as dual nationals are also United States citizens is disregarded per status category 2. The remaining citizens of foreign states who are not permanent residents of the United States fall within status category 3. The remaining citizens of foreign states who have been admitted to the United States for permanent residence but lack domicile in a state fall within status category 4.

<sup>20</sup> By "U.S.-stateless" I mean that the problem is a lack of affiliation with one of the states of the United States rather than a lack of national citizenship that would constitute "statelessness" as a matter of international law. A United States citizen domiciled abroad will have the diversity status of "U.S.-stateless" notwithstanding that citizen's possession of dual nationality. See *supra* note 17.

<sup>21</sup> See C. WRIGHT, *supra* note 6, § 24, at 138.

domiciled permanent resident alien) is party.<sup>22</sup>

The possibly unconstitutional application of the 1988 Act arises when one alien sues another in federal court on a nonfederal claim.<sup>23</sup> The 1988 Act permits this when one of the opposing aliens is a permanent resident alien accorded state citizenship on the basis of state domicile.<sup>24</sup> The 1988 Act also permits this when one state-domiciled permanent resident alien sues another, provided the opposing parties are domiciled in different states.<sup>25</sup> By facially authorizing such suits between aliens the 1988 Act conflicts with the rule of *Hodgson v. Bowerbank*,<sup>26</sup> which has generally been understood to hold that article III does not permit federal alienage jurisdiction over a suit in which aliens are the only opposing parties.<sup>27</sup>

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<sup>22</sup> See *id.* § 24, at 139 & n.11.

<sup>23</sup> See generally Linn, *supra* note 3.

<sup>24</sup> 1988 Act, *supra* note 1, § 203(a), 102 Stat. at 4646 (codified at 28 U.S.C. § 1332(a) (1988) (applying to grant of interstate diversity jurisdiction pursuant to § 1332(a)(1)).

<sup>25</sup> *Id.* (applying to grant of alienage jurisdiction pursuant to § 1332(a)(2)).

<sup>26</sup> 9 U.S. (5 Cranch) 303 (1809).

<sup>27</sup> See C. WRIGHT, *supra* note 6, § 8, at 26-27, 27 n.3. No such constitutional doubt surrounds 28 U.S.C. § 1332(a)(3) (1988), insofar as it authorizes the district courts to adjudicate cases between citizens of different states to which aliens are joined (to one or both sides) as additional parties. See *Transure, Inc. v. Marsh and McLennan, Inc.*, 766 F.2d 1297, 1298-99 (9th Cir. 1985). This is because there is no constitutional impediment to federal jurisdiction based on "minimal diversity" (provided at least one claim by or against each nondiverse party arises from the same transaction or occurrence as a claim between the diverse parties). See *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 530-31 (1967).

For example, if *A*, a citizen of California, sues *B*, a citizen of New York, for an amount in excess of the jurisdictional amount, there is diversity jurisdiction. The authorization of § 1332(a)(3) to join aliens as additional parties to the action of *A* versus *B* functions simply as a specialized congressional grant of supplemental jurisdiction, expressly countermanding the general requirement of "complete diversity." Cf. *infra* text accompanying notes 85-86, 112-13 (discussing interrelationship of supplemental jurisdiction and rule of complete diversity).

The *Hodgson v. Bowerbank* problem does arise under § 1332(a)(3), however, if both *A* and *B* are not conventional state citizens (*i.e.*, United States citizens domiciled in a state), but are rather the new breed of state-domiciled permanent resident aliens. In this situation *Hodgson's* holding negates any constitutionally permissible basis for Congress to authorize either original or supplemental jurisdiction.

*C. Vicarious Citizenship of Legal Representatives  
of Estates and Incompetents*

Resolving decisively a problem that had long troubled the courts of appeal,<sup>28</sup> the 1988 Act adopts bright line rules for certain suits by or against legal representatives.<sup>29</sup> When the fiduciary represents an infant or incompetent, the represented person's citizenship is imputed to the legal representative and becomes the exclusive determinant of the representative's citizenship.<sup>30</sup> When the fiduciary represents an estate, the relevant state of citizenship is that of the decedent alone. No attention is paid to the state(s) of citizenship normally attributable to the person or entity who is party to the suit strictly as a legal representative. Also irrelevant is the citizenship of the persons who as beneficiaries of the estate will have their inheritances increased or diminished by the outcome of the litigation.

*D. Diversity-Specific Restrictions of Removal  
and Supplemental Jurisdiction*

As discussed in greater detail in Parts II and III, the new law of removal and supplemental jurisdiction makes special provision for diversity suits with respect to the time allowed for removal jurisdiction to be invoked, the removal of separate and independ-

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<sup>28</sup> See *Martinez v. United States Olympic Comm.*, 802 F.2d 1275 (10th Cir. 1986) (citing cases addressing legal representatives and diversity). See generally C. WRIGHT, *supra* note 6, § 29, at 160, § 31, at 166-69.

<sup>29</sup> 1988 Act, *supra* note 1, § 202(a), 102 Stat. at 4646 (codified at 28 U.S.C. § 1332(c)(2) (1988)). The amendment is effective only as to actions "commenced in or removed to a United States district court on or after the 180th day after the date of enactment" (i.e., May 18, 1989). *Id.* § 202(b), 102 Stat. at 4646. The 1988 Act does not affect diversity suits against business trusts, where diversity continues to be determined by reference to the citizenship of the trustees, not the trust beneficiaries. See *Navarro Savings Ass'n v. Lee*, 446 U.S. 458 (1980).

<sup>30</sup> For example, suppose a United States citizen domiciled in New York is the aunt of an incompetent person, also a United States citizen, domiciled in Illinois. The aunt as conservator of the property of her nephew files a product liability action on behalf of the nephew, seeking damages in excess of \$50,000 from a manufacturing company incorporated in Delaware. The defendant maintains its principal place of business in New York. Under the normal rules of diversity jurisdiction such a suit could not be adjudicated in federal court, since the aunt is a New York citizen, as is the defendant by virtue of the location of its principal place of business. Under new § 1332(c)(2), however, the aunt is deemed in her representative capacity to be a citizen only of Illinois, and diversity jurisdiction therefore exists.

ent claims, and the scope of supplemental jurisdiction over claims by plaintiffs and intervenors in diversity suits. Other new details of removal jurisdiction — dealing with defendants sued under fictitious names and additional defendants joined after removal — are also significant only in diversity suits.

## II. REMOVAL JURISDICTION

### A. Jurisdictional Restrictions in Diversity Cases

#### 1. One-Year Time Limit on Removal

The general time limit for the exercise of the right of removal is thirty days, but if a case is not initially removable this thirty-day period of limitations is tolled until the defendant receives notice of a change in the status of the case that makes it removable.<sup>31</sup> The 1988 Act limited this tolling provision by imposing an absolute time constraint of one year in which an action may be removed on the basis of diversity of citizenship even if the case does not become removable until after that one-year period has expired.<sup>32</sup>

In the diversity context delayed removal most often has occurred when the plaintiff voluntarily drops or settles all claims against “removal-preventing” defendants who are either co-citizens of the plaintiff or citizens of the forum state. More rarely the removal-eligible defendants might win a ruling that the joinder of a claim against a removal-preventing defendant was so frivolous as to constitute “fraudulent” joinder.<sup>33</sup> The 1988 Act allows a plaintiff to confine an otherwise removable case to a state forum whenever the pose of an adversarial posture vis-à-vis a removal-preventing defendant can be maintained throughout the first year of pretrial proceedings.

The intent of the 1988 Act was to avoid “substantial delay and disruption” incident to “removal after substantial progress has been made in state court.”<sup>34</sup> While overall the number of diversity removals will surely be reduced, the practical and policy benefits of the one-year time limit are doubtful. Plaintiffs are encouraged to frustrate a federal right of removal through decep-

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<sup>31</sup> 28 U.S.C. § 1446(b) (1988).

<sup>32</sup> 1988 Act, *supra* note 1, § 1016(b)(2)(B), 102 Stat. at 4669 (codified at 28 U.S.C. § 1446(b) (1988)). See generally Billinson, *supra* note 3.

<sup>33</sup> See C. WRIGHT, *supra* note 6, §§ 38, 40, at 217-18, 229; Billinson, *supra* note 3, at 1148-56.

<sup>34</sup> 1988 HOUSE REPORT, *supra* note 1, at 72.

tive tactics, and defendants are encouraged to protect that right by removing cases just under the one-year wire if the plaintiff's lack of diligence in prosecuting a removal-preventing claim provides a good faith basis for arguing in federal court that the removal-preventing claim was fraudulently joined or has been compromised by an off-the-record settlement.<sup>35</sup>

## 2. No Removal Based on Joinder of Separate and Independent Claim

The 1990 Act restricted removal under 28 U.S.C. § 1441(c) to cases invoking federal question jurisdiction under 28 U.S.C. § 1331.<sup>36</sup> As originally enacted in 1948, section 1441(c) predicated removal on the joinder in a state court action of two or more claims, at least one of which would qualify for federal jurisdiction if sued upon without the joinder of the other, nonremovable claims.<sup>37</sup>

The Federal Courts Study Committee found section 1441(c) to be a breeding ground for wasteful procedural litigation, especially in diversity cases.<sup>38</sup> Most attempts at removal under section 1441(c) have been unsuccessful, and most of the few successful instances of section 1441(c) removal are suspect.<sup>39</sup> The committee recommended that section 1441(c) be retained only if (as it recommended)<sup>40</sup> the general diversity jurisdiction were eliminated. Otherwise, the committee recommended outright repeal of section 1441(c).<sup>41</sup> Congress chose to repeal neither general diversity jurisdiction nor section 1441(c), and instead revised sec-

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<sup>35</sup> See Billinson, *supra* note 3, at 1161.

<sup>36</sup> 1990 Act, *supra* note 2, § 312(1), 104 Stat. at 5114 (codified at 28 U.S.C. § 1441(a) (1988)).

<sup>37</sup> 28 U.S.C. § 1441(c) (1948) (current version at 28 U.S.C. § 1441(c) (1988)) provided:

Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

*Id.*

<sup>38</sup> STUDY COMMITTEE REPORT, *supra* note 2, at 95.

<sup>39</sup> See C. WRIGHT, *supra* note 6, § 39, at 221-25.

<sup>40</sup> STUDY COMMITTEE REPORT, *supra* note 2, at 38-39.

<sup>41</sup> *Id.* at 95.

tion 1441(c) to make it inapplicable to diversity cases.<sup>42</sup>

It is unclear what was gained by leaving section 1441(c) at play in federal-question cases. There is considerable doubt whether the Constitution permits section 1441(c) removal jurisdiction to be exercised over the entire case in most cases qualifying for section 1441(c) removal. The statute requires that the nonremovable claim be "separate and independent" of the removable federal claim. Given the construction of "separate and independent" adopted in *American Fire & Casualty Co. v. Finn*,<sup>43</sup> it is commonly understood that claims "separate and independent" enough to qualify for section 1441(c) removal are necessarily claims that do not arise from a single "case or controversy" under the test laid down for the outer constitutional limits to the supplemental doctrine of pendent jurisdiction in *United Mine Workers v. Gibbs*.<sup>44</sup> This leaves amended section 1441(c) effective only in the rare instance where the barrier to removal of the nonremovable claim is purely of statutory dimension, as where the federal claim is joined to an unrelated state law claim supported by some (but not complete) diversity of citizenship among the opposing parties, or is joined to an unrelated federal or diversity claim that is statutorily nonremovable.<sup>45</sup>

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<sup>42</sup> 1990 Act, *supra* note 2, § 312, 104 Stat. at 5114 amended 28 U.S.C. § 1441(c) to provide:

Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

28 U.S.C. § 1441(c) (1988).

<sup>43</sup> 341 U.S. 6, 11-16 (1951).

<sup>44</sup> 383 U.S. 715, 725 (1966) (holding pendent jurisdiction exists whenever there is substantial federal claim derived from common nucleus of operative fact shared with state claim such that entire action comprises one case). See C. WRIGHT, *supra* note 6, § 39, at 225. Supplemental jurisdiction is discussed in Part III, *infra* text accompanying notes 75-126.

<sup>45</sup> Even where there is no transactional relationship between the removable and the nonremovable claims, and hence no basis for supplemental jurisdiction, § 1441(c) jurisdiction can constitutionally be exercised over the nonremovable claim if there is even the slightest degree of diversity of citizenship among the parties to the nonremovable claim. In such a context § 1441(c) would operate as a statutory conferral of diversity jurisdiction to the broadest extent permitted by article III. See *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 530-31 (1967) (stating that article III gives Congress power to confer federal jurisdiction whenever

The remand provision of revised section 1441(c) no longer gives the district court plenary discretion to remand those claims that absent joinder would have been nonremovable. The new terms permit remand only as to "matters" (presumably meaning "claims") "in which State law predominates."<sup>46</sup>

It is probably no coincidence that section 1441(c)'s new provision for remand echoes the language of newly enacted section 1367(c),<sup>47</sup> but the parallelism is strange nonetheless. Unlike section 1367's supplemental jurisdiction, which by definition is limited to claims arising from the same transaction or occurrence as the jurisdiction-conferring "anchor claim," section 1441(c)'s supplemental jurisdiction is by definition<sup>48</sup> to be exercised (absent remand) over a claim arising from a different transaction or occurrence than the anchor claim. It is difficult to see what policy interests are served by narrowing a district court's power to remand an unrelated claim after its section 1441(c) removal.<sup>49</sup>

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there is minimal diversity among opposing parties). In addition, § 1441(c) could constitutionally authorize the exercise of federal jurisdiction over a transactionally unrelated nonremovable claim if that claim would be within federal jurisdiction but for a statutory bar on removal. In this context § 1441(c) would operate as a statutory exception to the bar on removal. Examples of claims subject to a statutory bar on removal that might be superseded by § 1441(c) are claims that have been brought in state court against railroads pursuant to the Federal Employers' Liability Act (Railroads), ch. 149, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. §§ 51-60 (1988)), and claims otherwise qualifying for diversity jurisdiction that have been brought in state court to enforce rights under that state's worker's compensation laws. *See* 28 U.S.C. § 1445(a) (F.E.L.A. claims are nonremovable); § 1445(c) (1988) (state workers' compensation claims are nonremovable).

In correspondence Professor Rowe has argued that § 1441(c) serves the valuable purpose of allowing removal when a plaintiff has joined an unrelated state claim to a state court suit on a federal claim against a non-diverse or forum-state-citizen defendant. Professor Rowe would construe § 1441(c) in light of article III to require remand of the unrelated state law claim, and retention by the federal court of the federal claim, so that the net effect is to allow removal of the federal claim only. *See generally* Mengler, Burbank & Rowe, *Recent Federal Court Legislation*, *supra* note 3, at 20-21.

<sup>46</sup> 28 U.S.C. § 1441(c) (1988); *see supra* note 42 (quoting § 1441(c) in full).

<sup>47</sup> New § 1367's grant of supplemental jurisdiction is discussed in Part III, *infra* text accompanying notes 75-126.

<sup>48</sup> *See* *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 11-16 (1951) (defining "separate and independent" within meaning of § 1441(c)).

<sup>49</sup> The new language permitting remand *only* where "State law predominates" apparently supersedes the case law that encouraged district



*B. New Procedures for Removal and Orders in Conduct  
of Removed Cases*

1. Notice of Removal

The 1988 Act changed the name of the document by which defendants invoke removal jurisdiction. Formerly called a “petition,” the document is now referred to as a “notice of removal.”<sup>50</sup>

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courts to use their remand powers in order to relieve the tension between § 1441(c) and provisions such as § 1445(a), *see supra* note 45, that specifically bar removal of certain federal claims. For discussion of the superseded cases, see 14A C. WRIGHT, A. MILLER & E. COOPER, *supra* note 3, § 3724, at 409 & nn. 114-16 (2d ed. 1985), 73 & nn. 114.1-2 (Supp. 1991).

<sup>50</sup> 1988 Act, *supra* note 1, § 1016(b)(2)(A), 102 Stat. at 4669 (codified at 28 U.S.C. § 1446(b) (1988)). Unfortunately the 1988 Act was not drafted with the requisite care to convert all pre-existing references to “petition” to the new terminology of “notice.” While this change was made in § 1446(b), the word “petition” still appears in all five subdivisions of § 1446(c) and in § 1446(d). The party seeking removal is still referred to as the “petitioner” in § 1447(b). The oversight as to § 1446(d) is particularly remarkable because the 1988 Act directly addressed that subsection by redesignating it. The text of what is now designated § 1446(d), which continues to refer to the “petition” rather than the “notice” of removal, was formerly § 1446(e). It was redesignated § 1446(d) because of the repeal of former § 1446(d) and its requirement of a removal bond. 1988 Act, *supra* note 1, § 1016(b)(3), 102 Stat. at 4670 (codified at 28 U.S.C. § 1446(d) (1988)).

Another example of the degree of care Congress used in drafting these amendments is the express reference to divisional venue in amended § 1446(a), quoted in full *infra* note 53. While enacting amended § 1446(a) and its express reference to divisional venue, Congress simultaneously *repealed* divisional venue by a previous section of the same title of the same Act. 1988 Act, *supra* note 1, § 1001(a), 102 Stat. at 4664.

This lack of conformity did more than retain in § 1446(a) a confusing reference to the obsolete concept of divisional venue. Congress arbitrarily delayed the effective date of the repeal of divisional venue until 90 days after enactment. 1988 Act, *supra* note 1, § 1001(b), 102 Stat. at 4664. There was no delay, however, in the effectiveness of amended § 1446(a). This created a 90-day period from November 17, 1988, through February 14, 1989, in which amended § 1446(a) required removal to a particular division of a multidivision district court, and in which a removed plaintiff determined to insist on proper divisional venue in a removed action could within 30 days of the removal have moved under another provision of the 1988 Act to remand the case “on the basis of [a] defect in removal procedure.” 1988 Act, *supra* note 1, § 1016(c)(1), 102 Stat. at 4670 (codified at 28 U.S.C. § 1447(c) (1988)). *See infra* text accompanying notes 72-73.

The procedural trap created by the combination of the 90-day delay in the effective date of the repeal of divisional venue and the retention of the divisional venue language in amended § 1446(a) is particularly unfortunate because Congress was under no moral or procedural pressure or obligation

The removal statute expressly reminds the removing party that the removal document is subject to the standards of care and integrity independently demanded of any "pleading, motion, or other paper" by Rule 11.<sup>51</sup> In language parallel to that used in Rule 8<sup>52</sup> to govern the jurisdictional statement in a complaint, the notice of removal must contain "a short and plain statement of the grounds for removal."<sup>53</sup>

## 2. Repeal of Requirements of Verification and Removal Bond

The express incorporation of Rule 11's standards and potential sanctions has replaced reliance on verification and a removal bond to assure the integrity of the grounds asserted as a basis for removal and to indemnify the plaintiff for costs incurred in remanding an improperly removed action.<sup>54</sup> In addition, the 1988 Act goes beyond Rule 11 to authorize the district court to order payment of "just costs and any actual expenses, including

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to delay the effectiveness of the repeal of divisional venue and to demand in the interim that notices of removal under amended § 1446(a) be filed in the proper division on pain of possible remand. For over two decades prior to the 1988 Act it had been perfectly clear, on the highest authority, that a broadening of federal venue (such as the repeal of divisional venue, which allowed venue to be laid properly anywhere in a multidivision district) is a procedural change that may be — and is best — applied fully retrospectively. *See Denver & Rio Grande W.R.R. v. Brotherhood of R.R. Trainmen*, 387 U.S. 556, 563 (1967).

<sup>51</sup> FED. R. CIV. P. 11.

<sup>52</sup> FED. R. CIV. P. 8(a)(1).

<sup>53</sup> 1988 Act, *supra* note 1, § 1016(b)(1), 102 Stat. at 4669, amended 28 U.S.C. § 1446(a) to provide:

A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

28 U.S.C. § 1446(a) (1988).

<sup>54</sup> The verification requirement was in 28 U.S.C. § 1446(a) (1982), amended by 1988 Act, *supra* note 1, § 1016(b)(1), 102 Stat. at 4669 (current version at 28 U.S.C. § 1446(a) (1988)). The bond requirement was in 28 U.S.C. § 1446(d) (1982), repealed by 1988 Act, *supra* note 1, § 1016(b)(3), 102 Stat. at 4670.

attorney fees, incurred as a result of [an improper] removal.”<sup>55</sup> Although not express in the statute, it remains well established by case law that all properly joined and served defendants must join in the notice of removal,<sup>56</sup> and there has been no change in the statutory prohibition of removal in a diversity action when one or more defendants is a citizen of the forum state.<sup>57</sup>

### 3. Treatment of Doe Defendants

California’s idiosyncratic pleading convention of allegations against wholly fictitious “Doe” defendants<sup>58</sup> had long caused the Ninth Circuit fits in the application of the removal statutes.<sup>59</sup> Because a Doe defendant is simply a placeholder for the possible future joinder of an additional party to California litigation free of the normal statute of limitations, no specific state citizenship can be attributed to such a fictitious defendant. In the face of a strongly worded dissent, eight judges of a limited en banc panel

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<sup>55</sup> 1988 Act, *supra* note 1, § 1016(c)(1), 102 Stat. at 4670 (codified at 28 U.S.C. § 1447(c) (1988)). This provision goes beyond Rule 11 in two respects. It would appear to authorize imposition of the costs and expenses on the party who improperly removes a case, rather than on that party’s counsel. Moreover, it would appear to authorize imposition of costs and expenses for removal-related expenses even if the removal was arguably well-grounded. By contrast, Rule 11 liability is confined to “the person who signed” an unfounded “pleading, motion, [or] other paper.” FED. R. CIV. P. 11. In the ordinary case this will be counsel, not the represented party. *Cf. Business Guides v. Chromatic Communications Enters.*, 111 S. Ct. 922 (1991) (holding represented party liable for Rule 11 sanctions if party as well as counsel signs document in violation of Rule 11); *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989) (holding law firm not vicariously liable when individual attorney signed document in violation of Rule 11). Rule 11 liability is also more limited in that it attaches only when the document is signed in violation of the precautionary and good faith requirements that the signer has read the document, undertaken reasonable inquiry of the relevant facts and law, and acted without any improper purpose. It is not a sufficient basis for Rule 11 liability that the document was lacking in legal merit.

<sup>56</sup> See C. WRIGHT, *supra* note 6, § 40, at 227 & n.9.

<sup>57</sup> 28 U.S.C. § 1441(b) (1988).

<sup>58</sup> See Hogan, *California’s Unique Doe Defendant Practice: A Fiction Stranger Than Truth*, 30 STAN. L. REV. 51 (1977).

<sup>59</sup> See Note, *Doe Defendants and Other State Relation Back Doctrines in Federal Diversity Cases*, 35 STAN. L. REV. 297, 308 n.38 (1983) (noting that “federal courts from the Ninth Circuit have used . . . four distinct rules to determine when Doe defendants in cases brought under California law destroy diversity jurisdiction”).

of the Ninth Circuit<sup>60</sup> decided in *Bryant v. Ford Motor Co.*<sup>61</sup> that any undismissed claim against a Doe defendant would defeat complete diversity and hence the removability of an action even if there was complete diversity between all of the conventional, nonfictitious opposing parties. The new Ninth Circuit rule had the unwelcome consequences of allowing a case fully prepared and ready for trial in a California state court to be suddenly removed to federal court (where prior interlocutory rulings could be reconsidered and where it would lose all priority for trial) when the unserved, diversity-destroying Doe defendants were dismissed after three years of pretrial proceedings<sup>62</sup> or at the commencement of trial.<sup>63</sup>

Congress squashed this bug twice. First, it abrogated the *Bryant* rule by changing the law to provide flatly that for removal purposes "the citizenship of defendants sued under fictitious names shall be disregarded."<sup>64</sup> Thus Doe defendant allegations in Cali-

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<sup>60</sup> Because of the size of the circuit, en banc rehearings in the Ninth Circuit are heard by a panel consisting of the Chief Judge and 10 additional active judges drawn by lot. 9TH CIR. R. 35-3.

<sup>61</sup> 844 F.2d 602 (9th Cir. 1987) (en banc), cert. granted, 488 U.S. 816 (1988), grant of cert. vacated & cert. denied, 488 U.S. 986 (1988) (following enactment of 1988 Act).

<sup>62</sup> California Doe defendants are dismissed from an action if not served within three years of the commencement of the action. CAL. CIV. PROC. CODE § 583.210 (West Supp. 1991).

<sup>63</sup> For a vigorous review of these unwelcome consequences, see *Bryant*, 844 F.2d at 612-13 (Kozinski, J., dissenting).

<sup>64</sup> 1988 Act, *supra* note 1, § 1016(a), 102 Stat. at 4669 (codified at 28 U.S.C. § 1441(a) (1988)). For a helpful discussion of the background to this feature of the 1988 Act and its relationship to California state-court pleading practices, see Note, *Doe Pleading to be Disregarded in Diversity Jurisdiction: Congressional Response to Bryant v. Ford Motor Co.*, 19 GOLDEN GATE U.L. REV. 127 (1989). The author's statutory analysis should be read with caution, however, as she mistakenly assumes that the version of H.R. 4807 reported out of the House Judiciary Committee on August 26, 1988, see 1988 HOUSE REPORT, *supra* note 1, is the same version as was enacted into law. At various points the Note cites to supposed § 909, Note, *supra*, at 128 n.6, 136 n.51, 153 & n.139, or actual § 1009, *id.* at 161 n.190, 172 n.254, of the Court Reform and Access to Justice Act of 1988 (*i.e.*, the text of H.R. 4807 as printed in *1988 House Hearings*, *supra* note 1, at 516). *Cf. supra* notes 1, 14 (detailing legislative history of H.R. 4807 and associated bills that culminated in 1988 Act, which, after final Senate amendments of October 14, 1988, bore official title "Judicial Improvements and Access to Justice Act"). This is a mistake of citation, not quotation. The text of amended § 1441(a) as discussed in the Note is identical to the text of

fornia pleadings no longer create any impediment to removal. If there is complete diversity among all conventional defendants to a California complaint, the action must be removed immediately or not at all.<sup>65</sup> Second, if the presence in the litigation of one or more conventionally joined defendants is sufficient to defeat diversity and hence removal at the commencement of the litigation, the new one-year limitation on diversity removal<sup>66</sup> virtually guarantees that the belated creation of diversity upon the eve of trial, should all nondiverse conventional defendants then be dismissed, will not disrupt the state court proceedings. It is a rare case indeed involving multiple parties of diverse citizenship and a prayer for relief in excess of \$50,000 that will be ready for trial within one year of the filing of the complaint.

The immediate removability of a California action involving Doe defendants creates a potential *Erie*<sup>67</sup> problem. Had the action remained in a California court the plaintiff could have easily joined new defendants to the litigation if discovery revealed them to be potentially liable. This flexibility in the continuing conduct of the litigation is one of the major points of Doe defendant practice.<sup>68</sup> If such a potential new defendant would defeat

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§ 1441(a) as enacted, so the citation error does not affect the substantive value of the Note.

<sup>65</sup> If a case is removable when commenced, the notice of removal must be filed within 30 days of service of process on the defendants or the right to remove is waived. 28 U.S.C. § 1446(b) (1988).

<sup>66</sup> See *supra* text accompanying notes 31-35.

<sup>67</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

<sup>68</sup> The other major point is to extend the California statute of limitations. This raises a difficult problem of just how long that period of limitations—binding on the federal court under *Erie*—really is. See *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945) (barring recovery in diversity case when state statute of limitations would have barred recovery in state court). The nominal California period of limitation for an action to recover for personal injuries or wrongful death is one year, CAL. CIV. PROC. CODE § 340(3) (West 1982 & Supp. 1991), but the Doe defendant convention and California's extremely liberal policy of "relation back" of amended complaints joining new parties in place of Doe defendants functionally extends that one-year period of limitation for an additional three years from the date the plaintiff commenced the action. Federal relation-back doctrine under Rule 15(c) is far less liberal. If the plaintiff in a removed case tries to replicate the replacement of a Doe defendant by seeking leave to amend the complaint to join a new party, no relation back will be allowed. The question thus becomes one of the proper period of limitation to apply when the newly joined party raises a statute of limitations defense. Sound federal authority has concluded that the "real" period of limitation includes the three-year

complete diversity, however, the plaintiff would be forced to sue that defendant separately in a parallel state action. This would not only be wasteful of scarce judicial resources and unnecessarily expensive for the plaintiff, but would also create a risk of inconsistent results.<sup>69</sup> Congress anticipated this problem and provided that where the plaintiff's postremoval joinder of additional defendants would destroy complete diversity, the district court may either "deny joinder, or permit joinder and remand the action to the State court."<sup>70</sup> Because the denial of joinder is likely to be an abuse of discretion after the plaintiff has been involuntarily brought to federal court by removal, and because the contrary option of joinder plus remand not only conserves federal judicial resources but is also unappealable,<sup>71</sup> the joinder and remand option that Congress took the pains expressly to authorize ought to prove popular with federal judges.

#### 4. Time Limit for Motion to Remand on Procedural Grounds

The final new rule regarding postremoval procedure is a 30-day limit on motions to remand on grounds of defects in the removal procedure.<sup>72</sup> This limit applies only to procedural objections.<sup>73</sup> There has been no change in the long-standing rule requiring the district court *sua sponte* to remand a removed case at any time before final judgment if the district court becomes aware of a lack

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extension allowed by California practice, so that the newly joined party's limitations defense lacks merit if the joinder occurred within three years of the commencement of the action. See *Merritt v. County of Los Angeles*, 875 F.2d 765, 768 (9th Cir. 1989); *Cabralles v. County of Los Angeles*, 864 F.2d 1454, 1462-64 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1838 (1990); *Lindley v. General Elec. Co.*, 780 F.2d 797, 800-01 (9th Cir.), *cert. denied sub nom. Stone & Webster Eng'r Corp. v. Lindley*, 476 U.S. 1186 (1986); *Rumberg v. Weber Aircraft Corp.*, 424 F. Supp. 294, 300-01 (1976).

<sup>69</sup> In the classic multiple tortfeasor context, a concededly innocent and victimized plaintiff could end up without a remedy if both the federal and state courts conclude that the only liable party is the defendant haled before the bar of the other court. This was just the possibility that made the result in the *Finley* case unconscionable. See *infra* text accompanying notes 99-100.

<sup>70</sup> 28 U.S.C. § 1447(e) (1988) (corresponding to 1988 Act, *supra* note 1, § 1016(c)(2), 102 Stat. at 4670).

<sup>71</sup> See *id.* § 1447(d) (1988).

<sup>72</sup> *Id.* § 1447(c) (1988) (corresponding to 1988 Act, *supra* note 1, § 1016(c)(1), 102 Stat. at 4670).

<sup>73</sup> Cf. *supra* note 50 (providing example of venue-based procedural objection).

of subject-matter jurisdiction.<sup>74</sup>

### III. SUPPLEMENTAL JURISDICTION

#### A. *The Predecessor Doctrines of Pendent and Ancillary Jurisdiction*

##### 1. Pendent (Claim) Jurisdiction

The modern foundation for supplemental jurisdiction is the theory of “pendent” jurisdiction propounded in *United Mine Workers v. Gibbs*.<sup>75</sup> Justice Brennan’s opinion in *Gibbs* upheld the power of a federal district court to decide a state law claim unsupported by diversity jurisdiction, provided that the state law claim shares a “common nucleus of operative fact” with a claim arising under federal law that is independently of substance “sufficient to confer subject matter jurisdiction on the court.”<sup>76</sup> The transactional relationship between the state and federal claims confers jurisdictional power over the related state claim as part of a single “case” arising under federal law that is brought within the power of the court by the submission to it of the substantial federal claim.<sup>77</sup> But *Gibbs* decreed that this jurisdictional power was not to be exercised in every case.<sup>78</sup>

According to *Gibbs*, pendent jurisdiction should be exercised only when doing so would promote “judicial economy, convenience and fairness to litigants.”<sup>79</sup> Justice Brennan described three situations in which these considerations would counsel against the exercise of pendent jurisdiction: when decision of the state law issue is unnecessary,<sup>80</sup> when state rather than federal issues

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<sup>74</sup> See C. WRIGHT, *supra* note 6, § 41, at 234-35.

<sup>75</sup> 383 U.S. 715 (1966).

<sup>76</sup> *Id.* at 725 (citing *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103 (1933)). On the jurisdictional point Justice Brennan wrote for a unanimous Court of eight Justices, the Chief Justice not participating. *Id.* at 742.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 726.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* Justice Brennan stated:

Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.

*Id.*

constitute the center of gravity of the case,<sup>81</sup> or when there are nonjurisdictional reasons to try the state and federal claims separately, such as a risk of jury confusion.<sup>82</sup> In practice, post-*Gibbs* pendent jurisdiction was exercised expansively.<sup>83</sup>

## 2. Ancillary Jurisdiction

Already well in progress when *Gibbs* was decided, but well understood only in its aftermath, the doctrine of “ancillary” jurisdiction came to full flower with the advent of liberal joinder under the Federal Rules of Civil Procedure in 1938. The Federal Rules’ authorization of joinder of a wide variety of transactionally related claims, such as compulsory counterclaims, cross-claims, claims against third parties impleaded for contribution or indemnity, and claims by or against intervenors as of right, came in time to be supported by the almost automatic availability of ancillary jurisdiction. This conjunction of joinder and jurisdiction allowed the procedural goals of liberal joinder to be achieved regardless of whether the joined claims were supported by an independent

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<sup>81</sup> *Id.* Justice Brennan noted:

[I]f it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals. There may, on the other hand, be situations in which the state claim is so closely tied to questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong. In the present case, for example, the allowable scope of the state claim implicates the federal doctrine of pre-emption; while this interrelationship does not create statutory federal question jurisdiction, its exercise is relevant to the exercise of discretion.

*Id.* at 726-27 (citation omitted).

<sup>82</sup> *Id.* at 727. Justice Brennan acknowledged that “there may be reasons independent of jurisdictional considerations, such as the likelihood of jury confusion in treating divergent legal theories of relief, that would justify separating state and federal claims for trial. If so, jurisdiction should ordinarily be refused.” *Id.* (citation omitted).

<sup>83</sup> See Mengler, *The Demise of Pendent and Ancillary Jurisdiction*, 1990 B.Y.U. L. REV. 247, 250, 275. Expansive exercise of pendent jurisdiction was encouraged by the Supreme Court in *Hagans v. Lavine*, 415 U.S. 528 (1974), which also made it clear that the pendent claim need not be a state law claim but could also be a federal claim in which the then-required jurisdictional amount was lacking. See generally C. WRIGHT, *supra* note 6, § 19, at 107.



basis for federal jurisdiction.<sup>84</sup>

One form of joinder was never supported by pendent or ancillary jurisdiction, however. Plaintiff *A* might have state law claims against two defendants, *B* and *C*, arising from the same transaction or occurrence. Federal Rule 20<sup>85</sup> permits *A* to sue *B* and *C* jointly. Suppose now that there is federal jurisdiction over *A*'s claim against *B*, standing alone, because there is diversity of citizenship between *A* and *B*. There is no diversity between *A* and *C*, however. If a federal court were allowed to adjudicate the properly joined claims of *A* against both *B* and *C* whenever there would be federal jurisdiction if *A* sued *B* only, it would completely nullify the historic statutory rule requiring "complete diversity" in actions brought under 28 U.S.C. § 1332, the general grant of diversity jurisdiction.<sup>86</sup>

Most lower courts correctly perceived that the statutory command of complete diversity must control over the judicially crafted doctrines of pendent and ancillary jurisdiction.<sup>87</sup> The Supreme Court emphatically endorsed the need to apply supplemental doctrines of jurisdiction with due deference for Congressional intent in the leading case of *Owen Equipment & Erection Co. v. Kroger*.<sup>88</sup>

*P* brought a diversity suit against *D*, seeking damages in tort for the wrongful death of her husband. *D* impleaded its co-citizen *T*, a joinder permitted by Federal Rule 14<sup>89</sup> and incontrovertibly supported by ancillary jurisdiction. *T* was a corporation with dual citizenship, and as such was a co-citizen of *P* as well as *D*. Thus when *P* properly joined a claim against *T* to her original claim against *D*, as authorized by Rule 14,<sup>90</sup> ancillary jurisdiction was required in order to permit the federal court to adjudicate the claim of *P* against *T*. The Supreme Court found this sequence of joinder too similar to the forbidden *A v. B & C* scenario earlier condemned as incompatible with the rule of complete diversity. No ancillary jurisdiction was permitted over claims such as *P*'s

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<sup>84</sup> See generally C. WRIGHT, *supra* note 6, § 9, at 28-30.

<sup>85</sup> FED. R. CIV. P. 20(a).

<sup>86</sup> The general diversity statute was first read to require complete diversity in *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). See generally C. WRIGHT, *supra* note 6, § 24, at 140-41.

<sup>87</sup> See *id.* § 24, at 142-43, 143 n.36.

<sup>88</sup> 437 U.S. 365 (1978).

<sup>89</sup> FED. R. CIV. P. 14(a) (first sentence).

<sup>90</sup> *Id.* (seventh sentence).

against *T* — the claim of the original plaintiff against an impleaded third-party defendant — until Congress either abrogated the rule of complete diversity or specifically authorized such a grant of ancillary jurisdiction.<sup>91</sup>

### 3. Pendent Party Jurisdiction

A separate question was presented when the *A v. B & C* scenario featured a claim by *A* against *B* arising under federal law, with *A*'s claim against *C* being a transactionally related claim under state law. This scenario seemed to combine aspects of both *Gibbs*-style pendent jurisdiction and joinder-facilitating ancillary jurisdiction. The theory of pendent jurisdiction held that the power to adjudicate a federal claim (the "anchor" claim) included the power to adjudicate all disputes arising out of the same "case" within the article III scope of a "case or controversy," loosely defined by *Gibbs* to include all disputes sharing a common nucleus of operative fact with the anchor claim. The exercise of ancillary jurisdiction over transactionally related claims joined in reaction to the complaint demonstrated on a daily basis that the jurisdiction-conferring concept of a "common nucleus of operative fact" could bring within the jurisdiction of a federal court related disputes involving additional parties who could not independently have been required to submit to the jurisdiction of a federal court.<sup>92</sup>

The lower courts were generally receptive to what came to be called "pendent party" jurisdiction, where a state law claim against one party was joined in the complaint to a transactionally-related federal "anchor" claim against a different party. When it first considered such a case, in *Aldinger v. Howard*,<sup>93</sup> the Supreme Court disavowed the exercise of pendent party jurisdiction, but did not rule out its proper exercise in other statutory contexts. The Supreme Court's concern in *Aldinger* was that the particular statute conferring jurisdiction over the "anchor" claim — the Civil Rights Act of 1871 — had been previously construed to be inapplicable to municipalities.<sup>94</sup> Allowing a municipality to be sued in federal court on a state law claim transactionally related to a federal civil rights claim against an employee of the municipality

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<sup>91</sup> *Owen Equipment*, 437 U.S. at 373-77.

<sup>92</sup> *See id.* at 375 & n.18.

<sup>93</sup> 427 U.S. 1 (1976).

<sup>94</sup> *See* *Monroe v. Pape*, 365 U.S. 167, 187-92 (1961), *overruled in part*, *Monell v. Department of Social Servs.*, 436 U.S. 658, 663 (1978).

seemed like an end run around the previously declared limitation on the scope of the Civil Rights Act.<sup>95</sup> The *Aldinger* Court left open, however, potential pendent party jurisdiction when the federal anchor claim was *exclusively* within federal jurisdiction. In this situation, the Court noted, the plaintiff could not obtain the benefits of unitary adjudication by foregoing recourse to a federal forum and presenting all of her state and federal claims to a state court for adjudication. In such a case pendent party jurisdiction would be the only means to avoid the expense, waste, and risk of inconsistent results that would accompany separate litigation of part of a case in federal court (because of the exclusive federal jurisdiction over the claims arising under federal law) and part of a case in state court (because of a lack of diversity of citizenship to provide an independent basis for federal jurisdiction over state law claims against additional parties).<sup>96</sup>

#### 4. The *Finley* Case

In *Finley v. United States*<sup>97</sup> a bare 5-4 majority rejected the application of pendent party jurisdiction even in this compelling situation. The plaintiff (*W*) was the widow of a pilot who, with two of *W*'s children, had been killed when his private plane struck power lines while on final approach to a municipal airport under the air traffic control of the federal government. *W* sued the federal government in federal district court, the only forum open to her under the exclusive jurisdiction granted by the Federal Tort Claims Act.<sup>98</sup> By a proposed amendment to her complaint *W*

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<sup>95</sup> *Aldinger*, 427 U.S. at 16-17.

<sup>96</sup> When the grant of jurisdiction to a federal court is exclusive, for example, as in the prosecution of tort claims against the United States under 28 U.S.C. § 1346, the argument for judicial economy and convenience can be coupled with the additional argument that *only* in a federal court may all of the claims be tried together.

*Id.* at 18 (emphasis in original).

<sup>97</sup> 490 U.S. 545 (1989).

<sup>98</sup> Ch. 753, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 U.S.C. including § 1346(b) (1988)). 28 U.S.C. § 1346(b) (1988) places in federal district courts exclusive jurisdiction of civil actions on claims against United States for money damages. This was exactly the grant of exclusive jurisdiction referred to by the Supreme Court in *Aldinger*, 427 U.S. at 18 & n.13, as an example of the most compelling circumstances to which pendent party jurisdiction might apply. In one previous case the Supreme Court had granted a writ of certiorari to review of a court of appeals decision prohibiting exercise of pendent party jurisdiction in a Federal Tort

sought to join as defendants *M* (the municipal owner and operator of the airport responsible for maintaining the runway lights that were inoperative on the night of the crash) and *P* (the power company responsible for adequately illuminating the electric transmission lines with which the plane collided). There was no diversity jurisdiction to moot the issue of pendent party jurisdiction by providing an independent basis for the federal court to adjudicate *W*'s claims against *M* and *P*.<sup>99</sup>

The facts of the case provided a substantial possibility of an intolerably inconsistent outcome were the state and federal claims to be separately adjudicated. If both finders of fact were to determine that the decedent husband was innocently following the command of the air traffic controller at the time of the collision, the state court jury still might find the air traffic controller to have been at fault, while the federal judge in the nonjury trial<sup>100</sup> of the Federal Torts Claim Act proceeding would find that the air traffic controller had acted properly and that the accident would not have occurred but for inadequate illumination of the power lines and the runway. Such a combination of findings would leave *W* clearly entitled to a remedy but wholly without one because both courts concluded that the only liable party is the defendant before the other court.

Despite these compelling circumstances the Supreme Court

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Claims Act case, but the writ was dismissed when the parties settled the case prior to argument. *Ayala v. United States*, 550 F.2d 1196 (9th Cir.), *cert. granted*, 434 U.S. 814 (1977), *cert. dismissed* 435 U.S. 982 (1978). (I represented the petitioners in *Ayala* as of counsel on the brief filed in the Supreme Court after the writ of certiorari was granted.)

<sup>99</sup> The general view, in light of the *Aldinger* caveat and the grant of certiorari in *Ayala*, was that pendent party jurisdiction was appropriate when the "anchor" claim was exclusively triable in federal court. *Ayala* created a split in the circuits that continued until *Finley*, with only the Ninth Circuit adhering to the view that pendent party jurisdiction was impermissible. See *Finley*, 490 U.S. at 547; see also C. WRIGHT, *supra* note 6, § 19, at 108-09. The district court in *Finley* apparently saw the case as an opportunity for the Ninth Circuit either to reaffirm the split among the circuits or to conform to the consensus. Granting Barbara Finley's motion for leave to file the proposed amended complaint in the face of the defendants' arguments of a lack of subject-matter jurisdiction, the district court certified the unpublished order for interlocutory review under 28 U.S.C. § 1292(b) (1988). In another unpublished order, the Ninth Circuit summarily reversed on the basis of *Ayala*, and the Supreme Court then granted Mrs. Finley's petition for a writ of certiorari. See *Finley*, 490 U.S. at 547.

<sup>100</sup> See 28 U.S.C. § 2402 (1988).

held in *Finley* that proper respect for the separation of powers principle and the limited jurisdiction of the federal courts forbade the exercise of pendent party jurisdiction absent clear congressional authorization. Justice Scalia's ability to marshal a majority for this surprisingly uncompromising repudiation of pendent party jurisdiction, in the face of a stinging dissent by Justice Stevens,<sup>101</sup> was greeted by some as calling into question the future stability of the entire edifice of pendent and ancillary doctrines of jurisdiction.<sup>102</sup>

*B. The New Statutory Grant of Supplemental Jurisdiction*

*Finley* happened to be decided just as the Federal Courts Study Committee was setting up its agenda.<sup>103</sup> With three dissenting votes, the fifteen-member Committee recommended that Congress "expressly authorize federal courts to assert pendent jurisdiction over parties without an independent federal jurisdictional base."<sup>104</sup> Congress responded quickly by adding new section 1367 to Title 28 of the United States Code.<sup>105</sup> It provides:

§ 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such

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<sup>101</sup> *Finley*, 490 U.S. at 558-80.

<sup>102</sup> See Mengler, *supra* note 83, at 248, 259-60.

<sup>103</sup> See *supra* note 2 (discussing creation of Study Committee pursuant to Title I of 1988 Act).

<sup>104</sup> STUDY COMMITTEE REPORT, *supra* note 2, at 47-48. This quoted recommendation, which is the Committee's formal, black-letter recommendation, ch. 2, § B.2.b., calls only for express congressional authorization of the pendent party jurisdiction that *Finley* directly disavowed. The explanatory text accompanying this recommendation is more broadly phrased to call for the codification of ancillary and pendent claim jurisdiction as well as the conferral of pendent party jurisdiction: "[W]e recommend that Congress expressly authorize federal courts to hear any claim within federal jurisdiction, including claims, within federal question jurisdiction, that require the joinder of additional parties, namely, defendants against whom that plaintiff has a closely related state claim." STUDY COMMITTEE REPORT, *supra* note 2, at 47. The congressional response took the broader approach.

<sup>105</sup> 1990 Act, *supra* note 2, § 310(a), 104 Stat. at 5113-14 (codified at 28 U.S.C. § 1367 (1988)).

supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if —

- (1) the claim raises a novel or complex issue of State law,
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
- (3) the district court has dismissed all claims over which it has original jurisdiction, or
- (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term 'State' includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States."

Although *Finley* remains the law for previously filed actions,<sup>106</sup> Congress has now expressly authorized the district courts to exercise pendent party jurisdiction (and other forms of supplemental jurisdiction) in all federal civil actions filed on or after December 1, 1990. The grant of jurisdiction is sweeping. It extends to the limits of article III, thus ratifying and incorporating the constitutional analysis of *United Mine Workers v. Gibbs*.<sup>107</sup>

Section 1367(a) extends supplemental jurisdiction in unqualified terms to include claims by or against additional parties, subject to the constraint that such claims against new parties "are so

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<sup>106</sup> Section 1367's new grant of supplemental jurisdiction applies only to "civil actions commenced on or after the date of the enactment of this Act" (i.e., December 1, 1990). 1990 Act, *supra* note 2, § 310(c), 104 Stat. at 5114.

<sup>107</sup> 383 U.S. 715 (1966). See *supra* text accompanying notes 75-83 (discussing *Gibbs* and associated doctrine).

related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III.” Clearly the intent of Congress was to confer supplemental jurisdiction in pendent party cases such as *Finley*, if that is within the power to Congress to do.<sup>108</sup> It is widely and probably wisely assumed that Congress’s decisive action has settled the matter.<sup>109</sup> Nonetheless, the Supreme Court has yet to speak definitively on the scope of an article III case with respect to claims by or against additional parties. In *Owen Equipment & Erection Co. v. Kroger*,<sup>110</sup> the Court merely acknowledged its ancillary jurisdiction precedents in order to distinguish them.<sup>111</sup> In *Finley* the Court was prepared only to “assume, without deciding, that the constitutional criterion for pendent-party jurisdiction is analogous to the constitutional criterion for pendent-claim jurisdiction.”<sup>112</sup>

Section 1367(b) reflects Congressional endorsement of the concern expressed in *Owen Equipment* that free-wheeling ancillary jurisdiction over additional parties might undermine the policy goals of section 1332’s nonconstitutional rule of complete diversity.<sup>113</sup> The vague phrasing of section 1367(b) could also, but need not, be construed to go beyond pre-existing law in limiting the availability of ancillary jurisdiction over nondiverse parties seeking to intervene as of right as plaintiffs to protect their interests in federal litigation brought by others. The House committee report suggests an ill-conceived intent to ward off an imagined threat to the rule of complete diversity.<sup>114</sup> It would be

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<sup>108</sup> “This section would authorize jurisdiction in a case like *Finley*, as well as essentially restore the pre-*Finley* understanding of the authorization for and limits on other forms of supplemental jurisdiction.” 1990 HOUSE REPORT, *supra* note 2, at 28.

<sup>109</sup> See, e.g., Mengler, Burbank & Rowe, *Congress Accepts Invitation*, *supra* note 3, at 213 (stating that “Congress filled a widening chasm in the jurisdictional authority of the federal courts”). The authors later acknowledge that “*Finley* assumed without deciding that adding claims against pendent parties would be constitutional in federal question cases,” but suggest that this was an implied reaffirmation of “the broad constitutional scope of a ‘case’ recognized in *Gibbs*.” *Id.* at 215 n.13.

<sup>110</sup> 437 U.S. 365 (1978).

<sup>111</sup> *Id.* at 375 n.18.

<sup>112</sup> *Finley v. United States*, 490 U.S. 545, at 549 (1989).

<sup>113</sup> See 1990 HOUSE REPORT, *supra* note 2, at 29 & n.16.

<sup>114</sup> The relevant language of § 1367(b) declares that “the district courts shall not have supplemental jurisdiction . . . over claims by persons . . . seeking to intervene as plaintiffs under [Federal] Rule [of Civil Procedure] 24 . . . when exercising supplemental jurisdiction would be inconsistent with

unfortunate if section 1367's overall policy of encouraging efficient joinder and consistent adjudication were thwarted by a construction of section 1367(b) that ruled out supplemental jurisdiction over a nondiverse intervenor in a diversity action whose interest in the action qualifies the intervenor as merely a Rule 19(a) "necessary" party<sup>115</sup> but not as a Rule 19(b) "indispensable" party.<sup>116</sup> Intervention as of right by such a party has traditionally avoided prejudice to the intervenor from an action destined to continue whether or not intervention is permitted.

By the juxtaposition of sections 1367(a) and 1367(c) Congress appears to have created a strong presumption in favor of the exercise of supplemental jurisdiction. Section 1367(a) grants the jurisdiction in mandatory terms ("shall have supplemental jurisdiction") subject to section 1367(c)'s rather strict standards for when the district courts may decline to exercise supplemental jurisdiction. These standards combine the language of discretion found in *Gibbs*<sup>117</sup> with the language of abstention.<sup>118</sup> Abstention

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the jurisdictional requirements of Title 28 section 1332." The committee report would direct this sledgehammer at the head of a single gnat:

Anomalously, under current practice, the same party might intervene as of right under Federal Rule of Civil Procedure 23(a) [sic] and take advantage of supplemental jurisdiction, but not come within supplemental jurisdiction if parties already in the action sought to effect the joinder under Rule 19. Subsection (b) would eliminate this anomaly, excluding Rule 23(a) [sic] plaintiff-intervenors to the same extent as those sought to be joined as plaintiffs under Rule 19.

1990 HOUSE REPORT, *supra* note 2, at 29 & n.18 (citing 7C C. WRIGHT, A. MILLER & M. KANE, *FEDERAL PRACTICE AND PROCEDURE* § 1917, at 472-81 (2d ed. 1986)). The referenced text discusses a single case, dating from well before the advent of the Federal Rules, in which a nondiverse necessary party was allowed, possibly erroneously, to intervene as of right by invoking ancillary jurisdiction. *Drumright v. Texas Sugarland Co.*, 16 F.2d 657 (5th Cir.), *cert. denied*, 274 U.S. 749 (1927). "[S]o far as any commentator has been able to find, this is the only reported case in which this sequence of events has occurred." 7C C. WRIGHT, A. MILLER & M. KANE, *supra*, § 1917, at 481.

<sup>115</sup> FED. R. CIV. P. 19(a).

<sup>116</sup> FED. R. CIV. P. 19(b).

<sup>117</sup> See *supra* text accompanying notes 79-83.

<sup>118</sup> The House Judiciary Committee reported that subsection (c): codifies the factors that the Supreme Court has recognized as providing legitimate bases upon which a district court may decline jurisdiction over a supplemental claim. Subsection (c)(1)-(3) codifies the factors recognized as relevant under



doctrines have never been understood to be a plenary grant of discretion to the district courts,<sup>119</sup> but rather have functioned to permit the district courts to decline to exercise their otherwise mandatory jurisdiction for extraordinary reasons of respect for state authority or to avoid unnecessary adjudication of federal constitutional issues.<sup>120</sup> Importing abstention considerations into

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current law. Subsection (c)(4) acknowledges that occasionally there may exist other compelling reasons for a district court to decline supplemental jurisdiction, which the subsection does not foreclose a court from considering in exceptional circumstances. As under current law, subsection (c) requires the district court, in exercising its discretion, to undertake a case-specific analysis.

1990 HOUSE REPORT, *supra* note 2, at 29.

The report is misleading insofar as it characterizes the subsection (c) factors as simply a restatement of the factors discussed in *Gibbs* as pertinent to the district court's discretion. This is true only of § 1367(c)(2), which substantially parallels the second factor discussed in *Gibbs*. Section 1367(c)(4) is substantially narrower—"exceptional" circumstances, "compelling" reasons—than the parallel language in *Gibbs* acknowledging that "there may be reasons independent of jurisdictional considerations . . . that would justify separating state and federal claims for trial" such that "jurisdiction ordinarily should be refused." *United Mine Workers v. Gibbs*, 383 U.S. 715, 727 (1966). Section 1367(c)(3) is also narrower than its *Gibbs* counterpart. The new statutory factor, permitting a district court to decline to adjudicate a supplemental claim when the district court has dismissed all claims independently within its jurisdiction prior to its adjudication of the supplemental claim, codifies a scenario that *Gibbs* offered merely as an *illustration* of the exercise of a broader discretion to avoid "[n]eedless decisions of state law." *Id.* at 726. This leaves § 1367(c)(1), which has no direct counterpart in *Gibbs*. The *Gibbs* factor of avoidance of needless decisions of state law—codified in part by § 1367(c)(3)—is not the same thing as § 1367(c)(1)'s statutory factor permitting a district court to decline to exercise supplemental jurisdiction over a claim that "raises a novel or complex issue of state law." 28 U.S.C. § 1367(c)(1) (1988). This is the language that introduces, in the articulation of the very first statutory factor, what I describe as "the language of abstention." *Cf.* *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976) (reiterating that "[a]bstention is also appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar").

<sup>119</sup> See *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 358-59 (1989); *Colorado River Water Conservation Dist.*, 424 U.S. at 813 (stating that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule").

<sup>120</sup> See *Colorado River Water Conservation Dist.*, 424 U.S. at 815 n.21 (speculating that "the presence of a federal basis for jurisdiction may raise the level of justification needed for abstention").

the standards governing district courts' discretion to decline to exercise supplemental jurisdiction would appear substantially to curtail that discretion vis-à-vis the discretion formerly accorded district courts under *Gibbs*.<sup>121</sup>

Section 1367(d)'s tolling provision gives litigants a minimum of 30 days to file a timely action in state court on any claim asserted under section 1367 that is dismissed by the district court. This cures the possible prejudice faced by litigants such as the plaintiff in *Owen Equipment & Erection Co. v. Kroger*,<sup>122</sup> whose fate after the dismissal of her supplemental claim was left to the vagaries of state law tolling doctrines. The tolling provision also applies to "any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim [that was dependent on the exercise of supplemental jurisdiction]." <sup>123</sup> This seems intended to address the situation presented in *Aldinger v. Howard*.<sup>124</sup> There the Court rested its decision in part on the assumption that the plaintiff had available to her a state forum with jurisdiction to adjudicate in a single action all her claims against a group of defendants, some of whom were not then deemed subject to suit on a claim arising under federal law.<sup>125</sup> As of December 1, 1990, a litigant in the position of Monica Aldinger could sue in federal court, invoking supplemental jurisdiction under section 1367 to permit adjudication of a transactionally related claim under state law against the party not subject to suit under federal law. If the district court thought that the state law claim was novel and complex, or substantially predominated over the federal claims, or for some other exceptional reason dismissed the state law claim without dismissing the federal claims, the tolling provision would allow the litigant to dismiss volunta-

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<sup>121</sup> See Steinglass, *New Act May Broaden the Scope of Claims Involving Section 1983*, NAT'L L.J., Apr. 22, 1991, at 21, col. 1 (noting § 1367 cuts back on discretion of district courts to refuse to exercise pendent jurisdiction in civil rights cases).

<sup>122</sup> 437 U.S. 365 (1978). The *Owen Equipment* case is discussed *supra* text accompanying notes 88-91.

<sup>123</sup> 28 U.S.C. § 1367(d) (1988).

<sup>124</sup> 427 U.S. 1 (1976). The *Aldinger* case is discussed *supra* text accompanying notes 93-96.

<sup>125</sup> *Aldinger*, 427 U.S. at 15, 18; see also *id.* at 36 & n.17 (Brennan, J., dissenting) (disagreeing with denial of pendent party jurisdiction of Ms. Aldinger's state claims but agreeing that Ms. Aldinger's federal claims under 42 U.S.C. § 1983 were within concurrent jurisdiction of Washington state courts).

rily the federal claims and refile the entire suit in the alternative state forum free of limitations problems.<sup>126</sup>

#### IV. VENUE

##### A. 1966 and All That

The 1990 Act completed a three-stage, three-decade process of eliminating venue as a significant independent constraint on choice of a federal forum. Prior to 1966 the general rule of federal venue laid venue only in the district in which all defendants resided,<sup>127</sup> with the anomalous exception that in cases in which diversity of citizenship was the exclusive basis for federal subject-matter jurisdiction, venue could also be laid in the district in which the plaintiff resided.<sup>128</sup> This created the lively possibility that an action within federal subject-matter jurisdiction could not be brought in federal court without each defendant's waiver of the venue objection; this possibility was an inevitability in any federal question action in which the necessary party rule required the joinder of two or more defendants residing in different states.<sup>129</sup>

This problem was largely overcome by the 1966 amendment to the general federal venue statute<sup>130</sup> which provided the additional option in both diversity and federal question actions that venue might be laid in the district "in which the claim arose."<sup>131</sup>

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<sup>126</sup> The House Judiciary Committee described the intended effects of § 1367(d) as follows:

The purpose is to prevent the loss of claims to statutes of limitations where state law might fail to toll the running of the period of limitations while a supplemental claim is pending in state court. It also eliminates a possible disincentive from such a gap in tolling when a plaintiff might wish to seek voluntary dismissal of other claims in order to pursue an entire matter in state court when a federal court dismisses a supplemental claim.

1990 HOUSE REPORT, *supra* note 2, at 30.

<sup>127</sup> See C. WRIGHT, *supra* note 6, § 42, at 239-40. If all defendants resided in different districts of the same state, venue was proper in any of these districts. 28 U.S.C. § 1392(a) (1988). "There [was] no corresponding provision for plaintiffs who reside in different districts in the same state suing on the basis of diversity." C. WRIGHT, *supra* note 6, § 42, at 240.

<sup>128</sup> See C. WRIGHT, *supra* note 6, § 42, at 238-41.

<sup>129</sup> See *id.* at 240-41.

<sup>130</sup> Act of Nov. 2, 1966, Pub. L. No. 89-714, 80 Stat. 1111 (amending 28 U.S.C. §§ 1391(a),(b) and repealing § 1391(f)).

<sup>131</sup> 28 U.S.C. §§ 1391(a),(b) (1988) (corresponding to 1990 Act, § 311, 104 Stat. 5114).

Despite its liberalizing effect, the new provision for transactional as well as residential venue proved to be unduly narrow.<sup>132</sup> In a comprehensive study of federal jurisdiction and venue, the American Law Institute (ALI) criticized the “where the claim arose” standard as “litigation-breeding,”<sup>133</sup> and recommended that venue be properly laid in any of the (however many) districts in which had occurred “a substantial part” of the events or omissions giving rise to the litigation, or in which was located “a substantial part” of the property at issue in the litigation.<sup>134</sup>

*B. The 1988 Act: Personal Jurisdiction as a Venue Criterion for Corporate Defendants*

The next stage in Congress’s liberalization of federal venue standards dealt with residential rather than transactional venue. Although the determination of where individuals reside for venue purposes has remained generally uncomplicated,<sup>135</sup> there had long been confusion over the standards for applying residential venue rules to corporations. In 1939 the Supreme Court ruled that an out-of-state corporation’s appointment of a resident agent in a particular state subjected it to venue in that state.<sup>136</sup> In 1948 Congress codified this rule in broadened form, decreeing in 28 U.S.C. § 1391(c) that for venue purposes a corporate defendant was a resident of any district in which it was “incorporated or

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<sup>132</sup> See generally C. WRIGHT, *supra* note 6, § 42, at 242-43.

<sup>133</sup> AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 137 (1969).

<sup>134</sup> *Id.* at 10 (§ 1303(a)(1) (general diversity venue)), 30 (§ 1314(a)(1) (general federal question venue)); see also *id.* at 137, 218 (explaining rationale for “substantial part” test for transactional venue).

<sup>135</sup> Most circuits equate place of residence with place of citizenship in determining residential venue options. By this view an individual is deemed to reside for venue purposes at the place of domicile that determines state citizenship for diversity purposes. In a distinct minority are the Ninth and Tenth Circuits, which deem the place of current residence of a person domiciled elsewhere to be controlling for venue purposes. See C. WRIGHT, *supra* note 6, § 42, at 243-44 & nn.30-34; see also *United States v. Otherson*, 637 F.2d 1276, 1280 n.4 (9th Cir. 1980) (reaffirming Ninth Circuit’s “flat[ ] disagree[ment]” with other circuits on this point).

<sup>136</sup> *Neirbo v. Bethlehem Shipbuilding Co.*, 308 U.S. 165 (1939). The theory of the case was not that the agency created corporate “residence” in the state but rather that the appointment of the agent constituted “consent” to venue in the same fashion that it constituted consent to personal jurisdiction.

licensed to do business or [was] doing business.”<sup>137</sup> Forty years later Congress returned to the subject of residential venue in suits against corporations.

As completely revised by the 1988 Act, section 1391(c) collapses the concepts of venue and personal jurisdiction by providing that “a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction.”<sup>138</sup> Unfortunately Congress was not willing to accept the logical consequence of this collapse: repeal of the venue requirement in cases against corporations.<sup>139</sup> The problem lay in large, multidistrict states.

Under former section 1391(c) the lower courts had divided on whether a corporation incorporated or licensed to do business in a multidistrict state should be deemed to “reside” for venue purposes in all of the districts of that state, even if the actual conduct of its business was confined to a particular district.<sup>140</sup> The 1988 revision of section 1391(c) sought to avoid the perceived unfairness of subjecting corporations to state-wide venue in a multidistrict state<sup>141</sup> by the clumsy device of analyzing the existence of personal jurisdiction on a district-by-district basis, as if each district in a multidistrict state were a state in its own right. Thus the

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<sup>137</sup> 28 U.S.C. § 1391(c) (1982), *amended by* 1988 Act, *supra* note 1, § 1013(a), 102 Stat. at 4669 (codified at 28 U.S.C. § 1391(a) (1988)).

<sup>138</sup> 28 U.S.C. § 1391(c) (1988).

<sup>139</sup> An unqualified redefinition of venue by equation to personal jurisdiction makes the venue requirement redundant. Under such a regime the only basis for a defendant to object as of right to the plaintiff’s choice of forum would be the forum’s lack of jurisdictional power to impose a valid judgment on the defendant.

<sup>140</sup> See 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 381, at 110-13 (1976).

<sup>141</sup> See 1988 HOUSE REPORT, *supra* note 1, at 70. The report indicates that the language of new § 1391(c) originated with the Judicial Conference. *Id.* Cf. REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE 71 (1987) (recommending, free of any caveats about multidistrict states, “that a corporation for venue purposes should be deemed to reside in any judicial district in which it was subject to personal jurisdiction at the time the action commenced”).

It appears from the report that the Judiciary Committee may have misunderstood the problem of corporate venue in a multidistrict state. Referring to the terms of 28 U.S.C. § 1391(c) (1982), laying venue in a suit against a corporation “in any judicial district in which it is incorporated or licensed to do business or is doing business,” the committee correctly declared that “[r]ead literally, the statute appears to make venue proper in any district in a multidistrict state in which a corporation is incorporated,

1988 revision of section 1391(c) in its first sentence repeals the independent requirement of proper venue by making personal jurisdiction the sole constraint (where federal subject-matter jurisdiction exists) on the plaintiff's choice of the state in which to sue a corporation in federal court. Then in its second sentence new section 1391(c) schizophrenically reimposes a venue requirement when a corporation is sued in a multidistrict state, and looks awkwardly to the law of personal jurisdiction to determine when venue is proper.

In a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.<sup>142</sup>

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licensed to do business, or doing business." 1988 HOUSE REPORT, *supra* note 1, at 70. (emphasis in original).

The committee went on to describe incorrectly the intended effect of new § 1391(c) as follows:

[In] multidistrict states in which a corporation is *not* incorporated or licensed to do business, the venue determination should be made with reference to the particular district in which a corporation is sued. Thus, for example, a corporation that confines its activities to Los Angeles (Central California) should not be required to defend in San Francisco (Northern California) unless, of course, venue lies there for other reasons. This amendment would accomplish that purpose.

1988 HOUSE REPORT, *supra* note 1, at 70 (emphasis added).

This is either confused or mistaken. The word "not" that I have italicized above should be deleted if the committee's statement is to make sense. Under former § 1391(c) a corporation doing business exclusively in the Central District of California and not licensed or incorporated in California was subject to federal suit based on residential venue only in the Central District of California. The problem arose if such a defendant *was* rather than "*was not*" incorporated or licensed to do business in California. Only the fact of such incorporation or license would give it corporate "residence" in every district of California if the language of former § 1391(c) were "read literally." No amendment was needed to confine defendant's-residence-based federal venue to the Central District of California with respect to a suit against a corporation not incorporated in California, not licensed in California, and doing business only in the Central District of California.

The same errant language was used by Senator Heflin on the floor of the Senate to explain the effect of new § 1391(c). 134 CONG. REC. S16,307 (daily ed. Oct. 14, 1988).

<sup>142</sup> 28 U.S.C. § 1391(c) (1988).

There are a number of details concerning the application of new section 1391(c) that a better-drafted statute might have answered without guesswork. Nonetheless the major details can be worked out by implication. Given the general objective of permitting federal litigation to go forward against a corporation wherever plaintiff can succeed in establishing personal jurisdiction over the corporation, it is safe to assume that new section 1391(c)'s venue criterion of "subject to personal jurisdiction" is a reference to Federal Rule 4's standards for service of process, including the Rule 4(e)<sup>143</sup> incorporation of state long-arm statutes when the defendant is not subject to service of process within a state and no federal nationwide service-of-process statute applies. Likewise it seems obvious that where the basis for personal jurisdiction is "specific" rather than "general" jurisdiction,<sup>144</sup> the phrase "subject to personal jurisdiction" means "subject to personal jurisdiction with respect to the claim asserted by the plaintiff." The fact that the defendant corporation is "subject to [the] personal jurisdiction" of a federal district court in virtue of pending litigation against it there of claim A should not, standing alone, qualify that district as the "residence" of that corporation for purposes of litigating there an unrelated claim B by the same or any other plaintiff.<sup>145</sup> Finally, while the phrase "most significant contacts" is confusingly foreign to the analysis of personal jurisdiction,<sup>146</sup> it presumably locates venue in that district within a multidistrict state in which suit was most

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<sup>143</sup> FED. R. CIV. P. 4(e).

<sup>144</sup> See generally *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 nn.8-9 (1984) (defining "specific" and "general" jurisdiction).

<sup>145</sup> Cf. 4A C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1125, at 325 (2d ed. 1987); 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 140, § 3808, at 85 (explaining that ancillary and pendent theories of personal jurisdiction and venue require that claims be related).

<sup>146</sup> "Significant contacts" is a term of art within analysis of the due process regulation of state court choice of law. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981). The concern of "significant contacts" in choice of law analysis differs fundamentally from the "minimum contacts" analysis of personal jurisdiction. The contacts of the *plaintiff* with the forum state are highly significant in determining whether "significant contacts" exist for choice of law purposes, *id.* at 318-19, but are irrelevant to whether the requisite "minimum contacts" exist to permit a state to exercise personal jurisdiction over the defendant. The power to exercise personal jurisdiction over a nonconsenting defendant requires "sufficient contacts among the *defendants*, the litigation, and the [forum] State." *Shaffer v. Heitner*, 433 U.S. 186, 189 (1977) (emphasis added).

foreseeable given the defendant's less-than-"minimum contacts" with the state as a whole.<sup>147</sup>

*C. The 1990 Act: Substantial Relaxation  
of Federal Venue Requirements*

The third and latest stage of Congressional venue reform is the 1990 Act's comprehensive revision of 28 U.S.C. §§ 1391(a), (b),<sup>148</sup> governing the basic provisions for venue in diversity and federal question cases. Responding to the call of the Federal Courts Study Committee<sup>149</sup> both to eliminate the anomaly of broader residential venue in diversity actions and to adopt the ALI's transactional venue test in place of the "litigation-breeding"<sup>150</sup> search for the single district "in which the claim arose," Congress enacted the following new basic venue provisions.

§ 1391. Venue generally

(a) A civil action wherein jurisdiction is founded only on

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<sup>147</sup> The Supreme Court has repeatedly declared that "'the foreseeability that is critical to due process analysis [of minimum contacts] . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.'" *Burger King v. Rudzewicz*, 471 U.S. 462, 474 (1985) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)) (alteration added). In the event personal jurisdiction over the defendants were based on a federal nationwide-service-of-process statute that was unaccompanied by a special preemptive venue provision, presumably the plaintiff would have the choice of suit in every state in the union. In multidistrict states, however, it would appear that the personal jurisdiction conferred by a nationwide-service-of-process statute would not automatically make a corporate defendant resident for venue purposes in every district. At least one district will always qualify as the defendant's residence under the "most significant contacts" test, and where defendant's contacts with one or more districts are sufficient to constitute "minimum contacts" independently of the nationwide-service-of-process statute, presumably each such district will count as a residence of the defendant.

<sup>148</sup> 1990 Act, §§ 311(1), 311(2), 104 Stat. at 5114 (to be codified at 28 U.S.C. §§ 1391(a),(b)).

<sup>149</sup> For further discussion of the Study Committee's venue recommendation and Congress's response, see *infra* note 162.

<sup>150</sup> "Litigation-breeding" is the ALI's phraseology. See *supra* text accompanying note 133. It is echoed in the report of the House Judiciary Committee. 1990 HOUSE REPORT, *supra* note 2, at 23. In a similar vein the Federal Courts Study Committee had reported that "[t]he implication that there can be only one such district encourages litigation over which of the possibly several districts involved in a multi-forum transaction is the one 'in which the claim arose.'" STUDY COMMITTEE REPORT, *supra* note 2, at 94.



diversity of citizenship may, except as otherwise provided by law, be brought only in

(1) a judicial district where any defendant resides, if all defendants reside in the same State,

(2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or

(3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only [if]<sup>151</sup> (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.<sup>152</sup>

Neither of the Federal Courts Study Committee's objectives appear to have been accomplished.<sup>153</sup> The ALI's test for transactional venue is more liberal than the "in which the claim arose test," but hardly comes warranted as less likely to be "litigation breeding." Congress's new basic venue provisions seem certain to invite recurrent district court litigation, and in trying to embellish on the Committee's recommendations Congress managed to reinstate the very anomaly of broader venue in diversity than federal-question actions that the Committee had sought to abolish. Gone is the option of diversity plaintiffs to lay venue in the district in which all plaintiffs reside.

Overall, however, the curious effect of the new venue criteria is a substantial expansion of venue choices, especially in diversity cases, and hence the encouragement of even wider-ranging forum shopping than had been the case.

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<sup>151</sup> Obviously this is a typographical error; the word "in" was intended.

<sup>152</sup> 28 U.S.C. § 1391 (1988) (as amended by 1990 Act, *supra* note 2, § 311(2), 104 Stat. at 5114).

<sup>153</sup> Cf. Mengler, Burbank & Rowe, *Recent Federal Court Legislation*, *supra* note 3, at 21, cols. 1, 2 (commenting that "Congress . . . amended the general venue statute, 28 U.S.C. § 1391, by adopting in part, but going beyond, the recommendations of the Federal Courts Study Committee," in some instances "reject[ing] the committee's recommendations and substitut[ing] its own reforms").

## 1. Residential and Transactional Venue

The first venue criterion in both diversity and federal-question cases is now the residence of the defendants. All defendants must reside in the same state, but venue is proper in any district in which any defendant resides. This renders superfluous section 1392's unrepealed parallel provision regarding defendants residing in different districts of the same state. The 1988 Act's expansive definition of corporate residence in terms of personal jurisdiction remains in full effect.

The second venue criterion in both diversity and federal-question cases relates to the location of the transaction or occurrence giving rise to the litigation. The former definition of transactional venue sought to limit venue on this basis to just one district. The new definition under both section 1391(a) and section 1391(b) replaces "*the* judicial district in which the claim arose" with the broader criterion of "*a* judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." This is the criterion proposed in 1969 by the ALI.<sup>154</sup>

## 2. Fallback Venue in Federal Question Cases

The third venue criterion in a federal-question case, including an action in which diversity exists but is not the sole basis for jurisdiction, is that if venue is not available on the basis of the residence of all defendants in one state and if no substantial part of the claim arose anywhere in the United States, fallback venue is provided where *any* defendant may simply be *found*, pursuant to new section 1391(b)(3).<sup>155</sup> Being "found" may be one way of being subject to personal jurisdiction, according to the transient

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<sup>154</sup> See *supra* text accompanying notes 133-34. The 1990 Act also amended § 1391(e), respecting venue in actions against federal agencies, officers, and employees, to replace the "in which the claim arose" provision with the same "substantial part" language used in new §§ 1391(a) and 1391(b). 1990 Act, *supra* note 2, § 311(3), 104 Stat. at 5114 (amending 28 U.S.C. § 1391(e) (1988)). The first statutory use of the ALI's "substantial part" language dates to the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified at scattered sections in 28 U.S.C.). The venue provision of that Act adopted the ALI formulation as the standard for transactional venue in suits against foreign sovereigns. *Id.* § 5, 90 Stat. at 2987 (codified at 28 U.S.C. § 1391(f) (1988)).

<sup>155</sup> 1990 Act, *supra* note 2, § 311(2), 104 Stat. at 5114 (to be codified at 28 U.S.C. § 1391(b)(3)).

jurisdiction doctrine approved in *Burnham v. Superior Court*,<sup>156</sup> but it is not enough to lay venue under subsection (b) that a defendant not present in a particular district be subject to the “long-arm” personal jurisdiction of that district.<sup>157</sup> When a federal-question case is eligible for the fallback venue of new section 1391(b)(3), however, the presence of just one defendant in a district will suffice, and other defendants not present in the district but subject to personal jurisdiction there can then be haled into that district without objection on venue grounds.

### 3. Personal Jurisdiction as a Venue Criterion in Multiple-Defendant Diversity Cases

The third venue criterion in an action in which diversity is the only basis for federal jurisdiction is any district in which “the defendants” — presumably all undismissed defendants — “are subject to personal jurisdiction,” pursuant to new section 1391(a)(3).<sup>158</sup> This extends to all unincorporated diversity defendants the piggybacking of venue on personal jurisdiction that Congress introduced with its 1988 amendment to section 1391(c), relating only to corporate defendants. Unlike the third option for federal-question cases, this option in diversity cases is not limited to situations in which there is no other district in which the action might otherwise be brought.

On its face new section 1391(a)(3) allows venue to be laid in any district in which the defendants are subject to personal jurisdiction. In multiple-defendant cases, this result may not be objectionable. If there is some district in which all the defendants can be sued, that may well be an appropriate forum. But new section 1391(a)(3) makes no sense in cases in which there is only one defendant. If it applied to those cases, then new sections 1391(a)(1) and 1391(a)(2) would be wholly superfluous. In effect, the venue requirement would be repealed. There would be no need to inquire where the defendant resides or where the claim arose if venue were always proper in any district in which defendant is subject to personal jurisdiction. And since new section 1391(a)(3) is not limited to “fallback” use, unlike the expressly “if

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<sup>156</sup> 110 S. Ct. 2105 (1990).

<sup>157</sup> See *id.*; see also Mengler, Burbank & Rowe, *Recent Federal Court Legislation*, *supra* note 3, at 21.

<sup>158</sup> 1990 Act, *supra* note 2, § 311(1), 104 Stat. at 5114 (to be codified at 28 U.S.C. § 1391(a)(3)).

none of the above" limitation to third venue option of its counterpart in new section 1391(b),<sup>159</sup> the effect would be again to allow a substantially broader choice of venue in diversity cases than in federal-question cases. The anomaly that the Federal Courts Study Committee had hoped to end would thus be not only restored, but indeed expanded.

#### 4. A Saving Construction of the 1990 Act

The seemingly curious use of the plural "defendants" in new section 1391(a)(3) turns out to provide a sound basis for avoiding the senseless results that would follow were the equation of personal jurisdiction and venue to be applicable in every diversity case, rather than only those involving multiple defendants. The report of the House Judiciary Committee,<sup>160</sup> although seriously

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<sup>159</sup> *Id.* § 311(2)(3), 104 Stat. at 5114 (to be codified at 28 U.S.C. § 1391(b)(3)).

<sup>160</sup> The report's discussion of the 1990 Act's drastic changes in the law of federal venue consisted in its entirety of the following three paragraphs.

Section 110 adopts the recommendation of the Study Committee at page 94 of its Report. Subsection (1) would amend 28 U.S.C. 1391(a) to allow venue in a district in which any defendant resides, if all defendants reside in the same state. This is taken from the ALI study and adheres to the traditional belief that it is fair and convenient to allow suit where the defendants reside.

The Subsection 2 amendment relates to venue in cases where jurisdiction is not founded solely upon diversity of citizenship. It is taken verbatim from the ALI study and has already been adopted in Section 1391(f), which applies to civil actions against foreign states, added by the Foreign Service Immunity Act of 1976. The great advantage of referring to the place where things happened or where property is located is that it avoids the litigation breeding phrase "in which the claim arose." It also avoids the problem created by the frequent cases in which substantial parts of the underlying events have occurred in several districts.

Subsection 3 is meant to cover the cases in which no substantial part of the events happened in the United States and in which all the defendants do not reside in the same state. This provision would act as a safety net by allowing venue in a "judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced." [sic]. If personal jurisdiction cannot be brought in a single federal court, this proposal does not create any new basis for personal jurisdiction. Instead two actions must be brought in separate courts.

1990 HOUSE REPORT, *supra* note 2, at 23.

garbled,<sup>161</sup> supports the inference that the pluralization of “defendants” was intentional and that but for a drafting error the third venue option in diversity cases would, like the third venue option in federal-question cases, be restricted to “fallback” use.<sup>162</sup>

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<sup>161</sup> As discussed in detail *infra* note 162, the report appears to refer to a different draft of the legislation than was reported by the committee and subsequently enacted. 1990 HOUSE REPORT, *supra* note 2, at 23. For further discussion of the discrepancies between the text of the legislation as enacted and as discussed in the House Judiciary Committee report, see 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 140, § 3802.1 (Supp. 1991).

<sup>162</sup> The report declares that the new venue legislation “adopts the recommendation of the [Federal Courts] Study Committee at page 94 of its Report.” 1990 HOUSE REPORT, *supra* note 2, at 23. The referenced recommendation called for Congress to take two steps. The first step was to broaden transactional venue by using the ALI’s “substantial part” test rather than the litigation-breeding “in which the claim arose” test. The second step was to narrow residential venue in diversity actions by eliminating venue based on the residence of the plaintiff, thereby eliminating the anomaly of broader residential venue in diversity cases than in federal-question cases. STUDY COMMITTEE REPORT, *supra* note 2, at 94.

The House Judiciary Committee report states that “Subsection (1)” of the proposed legislation “would amend 28 U.S.C. § 1391(a) [the venue statute for diversity cases] to allow venue in any district in which any defendant resides, if all defendants reside in the same state. This is taken from the ALI study and adheres to the traditional belief that it is fair and convenient to allow suit where the defendants reside.” 1990 HOUSE REPORT, *supra* note 2, at 23. Although the report does not say so, this takes the second step recommended by the Federal Courts Study Committee by implicitly repealing the provision for residential venue based on where the plaintiffs reside. The report also does not mention that “Subsection (1)” of the new venue legislation, 1990 Act, § 311(1), 104 Stat. 5114, enacts an entirely new § 1391(a) that deals not only with (1) residential venue in diversity cases but also with (2) transactional venue and (3) venue in any district in which “the defendants” are subject to personal jurisdiction at the time the action is commenced.

The House Judiciary Committee report next states that the “Subsection (2) amendment relates to venue in cases where jurisdiction is not founded solely upon diversity of citizenship” (*i.e.*, the federal-question venue provision of 28 U.S.C. § 1391(b)). 1990 HOUSE REPORT, *supra* note 2, at 23. Here the report declares the proposed legislation would change the test for transactional venue by adopting the ALI’s broader “substantial part” language. The report does not state that this effectuation of the first step of the Federal Courts Study Committee’s recommendation would also be made applicable to transactional venue in diversity cases. The venue provision reported by the House Judiciary Committee, *see id.* at 5, (reporting § 110 of H.R. 5381, as amended, which was identical to the venue provision of the 1990 Act, *supra* note 2, § 311, 104 Stat. at 5114), in fact inserts

This inference gains support from consideration of the reasons why Congress might rationally have thought that there would rarely be a need for “fallback” venue where a single defendant is sued in federal court on a nonfederal claim, given the primary venue criteria set forth as new sections 1391(b)(1) and 1391(b)(2). In order to be subject to suit on such a claim, the defendant must be either a state citizen or an alien. In order to be a state citizen within the sense required for diversity jurisdiction the defendant must be domiciled in a state,<sup>163</sup> and there would be residential venue in that state of domicile.<sup>164</sup> If the defendant were an alien, venue would be proper in any district.<sup>165</sup>

I conclude that the third venue option in diversity cases under new section 1391(a)(3) was intended to be a fallback provision applicable only to multiple defendant cases. The limitation of this third option to use only as a last resort, where no district of proper venue exists on the basis of residential or transactional venue, was unfortunately omitted from the legislation as enacted. It should be reinstated by technical amendment, to preserve the sense and the sensibility of what Congress was asked to pass. In the meantime the effect of the failure to limit this third option to fallback use should be cabined by rigorously confining its applica-

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identically worded subdivisions (1) and (2) in both the diversity venue statute, new § 1391(a), and the federal-question venue statute, new § 1391(b).

The House Judiciary Committee report then reaches the zenith of its confusion by its description of “Subsection (3).” Subsection (3) of the relevant legislation, § 110(3) of H.R. 5381 as amended and reported, § 311(3) of the 1990 Act as enacted, deals with transactional venue in suits against the United States or its officers and agencies. 1990 Act, *supra* note 2, § 311(3), 104 Stat. at 5114 (amending 28 U.S.C. § 1391(e) (1988)). *See supra* note 154. That is not the “Subsection (3),” however, to which the report refers. Rather, the phantom “Subsection (3)” referred to in the House Judiciary Committee report equates personal jurisdiction and venue in the terms ultimately enacted as the third venue option for diversity cases only, new § 1391(a)(3). The report describes this third venue option as a *fallback* option to be used when transaction venue is not available because the events in question arose abroad and residential venue is not available because there are *multiple defendants* who do not all reside in the same state. 1990 HOUSE REPORT, *supra* note 2, at 23.

<sup>163</sup> *See* C. WRIGHT, *supra* note 6, § 24, at 138.

<sup>164</sup> Conceivably such a state citizen could be deemed for venue purposes to be a resident of a foreign country under the definition of residential venue followed by the Ninth and Tenth Circuits, *see supra* note 135, but there is no reported case to this effect.

<sup>165</sup> “An alien may be sued in any district.” 28 U.S.C. § 1391(d) (1988).

bility to multiple-defendant actions. Failure to do so will only exacerbate the forum-shopping temptations<sup>166</sup> created by the fail-

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<sup>166</sup> The following "soapbox oration" on the ill-considered scope of the third venue option in diversity cases is adapted from that published previously in Professor Wright's "December 1990 Update" to C. MCCORMICK, J. CHADBOURN & C. WRIGHT, *CASES AND MATERIALS ON FEDERAL COURTS* (8th ed. 1988), at 10-11, in which Oakley of California explains to Wright of Texas the possibilities for creative forum-shopping.

Personal jurisdiction has always been fairly easy to establish in multiple forums as against major business enterprises, and now the same is true as to ordinary Joes and Janes who like to travel, thanks to the approval of transient jurisdiction in *Burnham v. Superior Court*, 110 S. Ct. 2105 (1990). Let's suppose that you want to sue my wife, Freddie, and me in New Mexico because New Mexico's substantive law looks good to you and your cause of action implicates New Mexico's interests significantly enough to allow New Mexico to apply its own law to your claim against us. Your only problem is our lack of minimum contacts with New Mexico. *Burnham* and your knowledge that we will soon be driving from Davis to Austin solves that problem for you. So be it. Forum-shopping is your right and privilege — but (formerly) only at a price. As Freddie likes to say, the problem with having a baby is that, afterwards, you have a baby. If you wanted to try your case against us under New Mexico law, you had to try your case against us in New Mexico, and in a state court unless we removed the action. Your attempt to file a diversity suit against us in the New Mexico federal court would allow us to transfer it under 28 U.S.C. § 1406 (1988), with a resulting change in substantive law. So your forum-shopping might well leave you stuck in a New Mexico state court, at some considerable inconvenience.

But no longer. Bargain forum-shoppers, come to federal court for a 3-for-1 forum-shopping special. Sorry, this offer limited only to multiple-defendant suits qualifying for diversity jurisdiction. If you qualify, enjoy the federal courts' triple-value special. *First*, shop as you regularly would among the forums with personal jurisdiction over the defendants. Enjoy the special due process discount of *Burnham*, which may bring many more forums within your reach than you had ever thought possible. Then, as usual, pick the forum with the best substantive law. *Second*, enjoy the new Congressional waiver of any concern in multiple-defendant actions about that old federal courts bugaboo, proper venue. For diversity suitors Congress now says personal jurisdiction will suffice to establish venue over the hapless defendants if they can collectively be subjected to personal jurisdiction in the plaintiff's chosen forum, wherever that might be, even if the defendants were just driving through the forum when *Burnham* lowered the boom. After shopping for

ure to restrict to fallback use new section 1391(a)(3)'s equation of venue and personal jurisdiction in diversity actions. For the meantime, Congress has in effect repealed the federal venue requirement in multiple-defendant diversity actions.

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a New Mexico forum, for example, bring your suit under the familiar Federal Rules of Civil Procedure and enjoy the other conveniences of suit in the federal court system. *Third*, at no extra charge, you can now transfer that suit from silly old New Mexico, which had favorable law for you but little else to recommend it as a forum. Not only are you not stuck in New Mexico state court — you're not even stuck in New Mexico. Go to our special federal courts forum-shoppers convenience desk and exchange there your *Ferens* coupon for a free 28 U.S.C. § 1404 (1988) transfer to that more convenient venue where you would have sued in the first place but for the favorable substantive New Mexico law — which of course will follow your lawsuit wherever it may go. Shoppers who have misplaced their *Ferens* coupon may obtain another by clipping it from any published report of *Ferens v. John Deere Co.*, 110 S. Ct. 1274 (1990).