BEYOND DIVERSITY: FEDERAL MULTIPARTY, MULTIFORUM JURISDICTION

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[T]he avoidance of multiplicity of suits by every device, which is jurisdictionally possible and practically convenient, should be encouraged, and should be one of the main objectives of procedural administration . . .

—Woolsey, J., in *Munson Inland Lines v. Insurance Co. of North America*.*

INTRODUCTION

At some point, most American law students gain at least a nodding acquaintance with the now-hoary case of *New York Life Insurance Co. v. Dunlevy*¹ and with Congress's adoption of federal interpleader legislation as a result of that decision. In *Dunlevy*, the Supreme Court held that a state court personal judgment against a noncitizen of that state who neither voluntarily submitted to the court's jurisdiction nor received service of process within the borders of the state was void for lack of in personam jurisdiction.² The result was that a stakeholder facing mutually exclusive claims to the same asset but unable to join the claimants as defendants in a single interpleader action in any one state, because of limits on state courts' personal jurisdiction, could be forced to pay both claims when sued separately in different states. Such a situation is intolerably unfair to the stakeholder.³ After *Dunlevy*, the sole remedy lay in creating a special form of federal court subject matter jurisdiction through which the stakeholder could require the claimants to interplead. Within a year of the *Dunlevy* decision, Congress promptly adopted this solution by passing the first of a series of federal interpleader acts.⁴

In the past several years a situation analogous to that created by *Dunlevy* has emerged and, once again, a need exists for a new form of federal court jurisdiction. The problem, although not intolerable as

* 36 F.2d 269, 271 (S.D.N.Y. 1929).

¹ 241 U.S. 518 (1916).

² See *id.* at 522-23 (citing *Pennoyer v. Neff*, 95 U.S. 714, 732-33 (1877)).

³ See, e.g., Hazard & Moskowitz, *An Historical and Critical Analysis of Interpleader*, 52 CALIF. L. REV. 706, 752 (1964) (for a legal system to insist on conflicting commands "is not only a grave matter, it is a subversion of the very basis of the legal order").

⁴ Act of Feb. 22, 1917, ch. 113, 39 Stat. 929. See generally Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U.L. REV. 1, 65 n.258, 66 n.260 (1984) (giving history of interpleader statute and discussing *Dunlevy*). The current version of the interpleader statute is codified in scattered sections of the federal Judicial Code: 28 U.S.C. §§ 1335 (federal statutory interpleader jurisdiction), 1397 (venue for actions within § 1335 jurisdiction), 2361 (for § 1335 actions, nationwide service of process and authority to enjoin other actions affecting stake) (1982).

were the inevitable and incompatible obligations permitted by *Dunlevy*, is nonetheless both widespread and undesirable. The modern counterpart to *Dunlevy* is *World-Wide Volkswagen Corp. v. Woodson*,⁵ decided by the Supreme Court seven years ago. The problem is the unavailability of any single forum in which to consolidate scattered, related litigation—a difficulty that is becoming more and more common given the increasing number of complex tort actions, such as those growing out of mass accidents and product liability claims.⁶ As a result of the statutory limitations on the authority of the federal courts⁷ and the constitutional bounds imposed on state systems by *World-Wide Volkswagen*, related proceedings arising out of the same events are often conducted as a multi-ring circus in two or more forums. It is possible to provide a single forum much more frequently than is now done. Often, however, such consolidation cannot take place in the courts of any one state because of the due process holding against state court jurisdiction in *World-Wide Volkswagen*.⁸ In the wake of that case, use of the article III authority for federal diversity of citizenship jurisdiction⁹ must be a major part of any effective, comprehensive solution.

Because technical aspects of federal court jurisdiction rank among the legal topics having the least political appeal, it is laudable and even pleasantly surprising that some interest in this problem persists on Capitol Hill. In 1983 and 1986, Representative Kastenmeier introduced jurisdiction reform bills proposing the creation of a multiparty,

⁵ 444 U.S. 286 (1980) (out-of-state automobile wholesaler and retailer doing no business in forum state are not subject to products liability suit arising there out of accident involving car sold by them being driven through state).

⁶ See *infra* text accompanying notes 47-49.

⁷ See, e.g., 28 U.S.C. §§ 1332 (diversity of citizenship and amount in controversy), 1391 (venue) (1982).

⁸ [T]he Due Process Clause “does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations. . . . [T]he Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the state of its power to render a valid judgment.

World-Wide Volkswagen, 444 U.S. at 294 (citations omitted) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

⁹ See U.S. CONST. art. III, § 2 (“The judicial Power shall extend . . . to Controversies . . . between Citizens of different States . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”).

These diversity clauses, although usually thought of as the basis for the general diversity jurisdiction, 28 U.S.C. § 1332 (1982), permit—as with statutory interpleader—more precisely targeted federal court jurisdictions to respond to problems that “grow out of the multi-state nature of our Union and hence present a special basis for federal intervention.” AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 378 (1969) [hereinafter ALI STUDY].

multiforum federal court jurisdiction.¹⁰ Kindred proposals have been advanced at least since the American Law Institute's *Study of the Division of Jurisdiction Between State and Federal Courts* in the 1960's.¹¹ The most recent series of efforts began in the late 1970's, coincident with a growing sensitivity to complex litigation problems, and includes the detailed 1979 Justice Department draft that became the basis for the Kastenmeier bills.¹² These proposals have suggested new types of diversity jurisdiction to provide a federal forum in various situations when existing limits on federal and state court jurisdiction and joinder make it difficult or impossible to bring together, in any one court, litigation arising out of multiparty, multiforum disputes. The American Law Institute (ALI) has undertaken a preliminary study of possible reforms in the statutes and rules governing complex litigation;¹³ the project's purview includes consideration of changes in federal subject matter jurisdiction, removal, venue, consolidation, process, and choice of law.¹⁴

We support the creation of a new federal subject matter jurisdiction for multiparty, multiforum litigation, but we suggest a somewhat novel approach to defining it. As an introduction to our proposed jurisdiction, Part I of this Article presents a brief history of modern action-consolidating devices and proposals. Part II discusses the various needs to be served by a new federal jurisdiction, with an eye to how the framing of a jurisdictional statute should reflect those needs. Part III suggests that recent proposals have been drafted either more narrowly than present needs require or without adequate consideration of which situations should be included in or excluded from such a jurisdiction.

The central contention of the Article, developed in Part III, is that

¹⁰ See H.R. 4315, 99th Cong., 2d Sess. § 3 (1986); H.R. 3690, 98th Cong., 1st Sess. § 4 (1983).

¹¹ See ALI STUDY, *supra* note 9, at 67-76, 375-410.

¹² See *Diversity of Citizenship Jurisdiction/Magistrates Reform—1979: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 158-62 (1979) [hereinafter *1979 House Hearings*] (draft bill with commentary). An earlier and simpler version proposed by Professor Alan Morrison appears in *Jurisdictional Amendments Act of 1979*, S. 679: *Hearings Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 179 (1979) [hereinafter *1979 Senate Hearings*], and is outlined in *Federal Diversity of Citizenship Jurisdiction: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 179-82 (1978) (statement of Alan B. Morrison, Director, Public Citizen Litigation Group, Washington, D.C.).

¹³ See *ALI Complex Litigation Project*, 7 ALI Reporter, July 1985, at 11-12.

Although the senior co-author of this Article serves on the Board of Advisers for the ALI's Preliminary Study of Complex Litigation, the Article does not represent the position of the Institute or of any other person participating in the Study.

¹⁴ See *id.*

a definition of cases that are to fall within a federal multiparty, multiforum jurisdiction should be based on defendants' residence: whether any defendant has a residence in a state *other* than one where a substantial part of the events or omissions giving rise to the claim occurred. This basic criterion should hold even if some part of the events in question also occurred *in* the defendant's state of residence. Previous efforts at defining such a jurisdiction have relied on tests such as scattered state citizenship of actual or potential plaintiffs, which, we argue, produce undesirable inclusions and exclusions.¹⁵ While it would be unorthodox to frame federal court subject matter jurisdiction in terms of any defendant's residence in a state other than the locus of some events giving rise to the claim (a condition satisfied whenever codefendants reside in different states or whenever a corporate defendant has multiple residences), this criterion nonetheless would provide a practical, workable basis for the jurisdiction. Part IV then deals with other important aspects of the proposal, such as scope of coverage, invocation of the jurisdiction, joinder, and choice of law.¹⁶

Discussion of such a new federal jurisdiction must address its relationship to the already existing forms of federal jurisdiction. Part V treats the use of a multiparty, multiforum jurisdiction in federal question cases and considers the alternative possibilities of continuing or abolishing the present general diversity of citizenship jurisdiction. Keeping the latter jurisdiction is not incompatible with our proposal; peaceful coexistence is possible. The adoption of multiparty, multiforum jurisdiction, however, would cast a new light on present diversity jurisdiction and on the arguments for its retention, limitation, or abolition. Arguments against outright abolition of diversity jurisdiction could well fade if a replacement jurisdiction met modern needs better than diversity now does.

I. METAMORPHOSES OF THE PROBLEM: A SHORT HISTORY

The problem of scattered, related actions is a multifaceted one, upon which many types of procedural devices and developments have a bearing. The most common responses to the problem have been actual or proposed changes in jurisdiction and joinder. Choice of law, federal

¹⁵ See *infra* text accompanying notes 84-85.

¹⁶ To illustrate the form such a statute might take and to set out details not worth treating in the body of this Article, we include in the Appendix a draft proposal of a multiparty, multiforum jurisdictional statute with explanatory comments. The language embodying the core jurisdictional concept mentioned in the text appears in draft 28 U.S.C. § 1367(a)(2). The reader might profit from skimming the Appendix, and particularly draft § 1367, before proceeding with the rest of this Article.

venue transfer and consolidation provisions, and former adjudication principles have also come into play. In this century, perceptions of the problem and prescriptions for its solution have varied as our procedural systems and litigation patterns have evolved.

After the adoption of federal statutory interpleader,¹⁷ Professor Zechariah Chafee, Jr. addressed further reform in his essay on the equitable "bills of peace with multiple parties."¹⁸ This device was designed to deal with situations in which one party faced actions by, or needed to bring actions against, several persons, with the actions involving common questions of law or fact.¹⁹ The bill of peace is little known today, however, because modern devices serve many of its functions in different ways. Mandatory and permissive party joinder,²⁰ as well as class actions,²¹ have regularized the departure from a single-plaintiff, single-defendant model; the availability of such joinder devices in a merged system of law and equity has largely eliminated the need to seek in equity the solution to a problem insoluble at law. The abandonment of the requirement of mutuality of estoppel²² often permits prior nonparties to benefit from the preclusive effect given to rulings against prior litigants. This modern approach, in a way that is doubtless not entirely welcome to the losers, at least reduces the threat of repeated litigation on the same issue, now generally viewed as an important goal.²³

Resolving problems in complex litigation, however, can be like severing heads of the Hydra: at least two more may grow when one is lopped off. In the 1960's two main responses to such problems were Congress's adoption in 1968 of section 1407 of the Judicial Code²⁴ and

¹⁷ See *supra* text accompanying notes 1-4.

¹⁸ Chafee, *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297 (1932).

¹⁹ See *id.* at 1297.

²⁰ See, e.g., FED. R. CIV. P. 19 (joinder of persons needed for just adjudication); 20 (permissive joinder of parties); see also FED. R. CIV. P. 13(g)-(h) (cross-claims; joinder of additional parties to counterclaims and cross-claims); 14 (impleader); 22 (interpleader); 24 (intervention).

²¹ See FED. R. CIV. P. 23.

²² See, e.g., RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982).

²³ See, e.g., *Blonder-Tongue Laboratories v. University of Ill. Found.*, 402 U.S. 313, 329 (1971) (noting misallocation of resources when the mutuality principle necessitates retrial of a fully litigated claim); J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 14.14, at 687 (1985) (mutuality requirement "sacrifices judicial economy and raises the possibility of inconsistent results"); Note, *Collateral Estoppel: The Changing Role of the Rule of Mutuality*, 41 MO. L. REV. 521, 528 (1976) (stating as main argument against mutuality rule the need to reduce the number of cases in the courts).

²⁴ 28 U.S.C. § 1407(a) (1982) ("When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. . . .").

the ALI's never-enacted proposal of a dispersed necessary parties jurisdiction for the federal courts.²⁵ Both, however, attempted to deal only with discrete parts of the scattered-litigation problem. Section 1407 took federal court jurisdiction as it found it and provided only for consolidated *pretrial* proceedings; it made no provision for consolidated trials without the consent of the parties.²⁶ The ALI proposal focused solely on *necessary* parties not joinable in the courts of a single state.²⁷ The proposal was criticized as a cumbersome device responding to a theoretical problem encountered infrequently, if at all, in reality.²⁸ To the extent the problem was genuine,²⁹ moreover, it existed largely because of limitations on state court service of process;³⁰ the general

²⁵ See ALI STUDY, *supra* note 9, at 67-76 (proposed 28 U.S.C. §§ 2371-2376).

²⁶ As a practical matter, § 1407 transfers for consolidated pretrial proceedings often mean that the entire case gets resolved in the transferee court. The gathering in the transferee forum of all the parties necessary for an agreed resolution may facilitate pretrial settlement. Moreover, the federal courts may use their authority under § 1404(a) of title 28 to transfer the *trial* aspects of a complex case if it be "[f]or the convenience of parties and witnesses, in the interest of justice," and if the transferee court is one in which the litigation "might have been brought." 28 U.S.C. § 1404(a) (1982). See generally D. HERR, MULTIDISTRICT LITIGATION: HANDLING CASES BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION § 9.9 (1986) (discussing disposition of cases in the transferee court); MANUAL FOR COMPLEX LITIGATION, SECOND § 31.122 (1985) [hereinafter MANUAL] (describing power of transferee judge to transfer cases under 28 U.S.C. §§ 1404, 1406 (1982)).

The terms of these statutes nonetheless place some limits on their use; furthermore, no existing provision attempts to deal with related litigation split between federal and state courts. Cf. D. HERR, *supra*, § 3.6.7, at 34 ("Perhaps the most serious limitation on the [Multidistrict Litigation] Panel's power is its inability to facilitate coordinated or consolidated pretrial proceedings in actions that are pending in both state and federal courts."). For a discussion of existing possibilities for state-federal judicial coordination, see MANUAL, *supra*, § 31.31.

²⁷ See ALI STUDY, *supra* note 9, at 68 (proposed 28 U.S.C. § 2371(b)) (defining unjoinable defendant as "necessary" for purposes of jurisdictional provision "if complete relief cannot be accorded the plaintiff in his absence, or if it appears that, under federal law or relevant State law, an action on the claim would have to be dismissed if he could not be joined as a party.").

²⁸ See Currie, *The Federal Courts and the American Law Institute* (pt. 1), 36 U. CHI. L. REV. 1, 29 (1968). Currie noted, among other things, that the ALI Study gave "not one example . . . of a case requiring this treatment." *Id.* We searched among numerous recent reported cases on necessary party joinder and, consistent with the thrust of Professor Currie's comment, found none. *But see infra* note 29.

²⁹ See *Diversity Jurisdiction/Multi-Party Litigation/Choice of Law in the Federal Courts: Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 308-09 (1971) (statement of Prof. Paul J. Mishkin) (citing *Haas v. Jefferson Nat'l Bank*, 442 F.2d 394 (5th Cir. 1971), as one example of case in which necessary parties were not joinable in the courts of a single state). It does appear that the problem of unjoinable, dispersed necessary parties was, if not nonexistent, at least quite uncommon.

³⁰ Cf. Note, *ALI Proposals to Expand Federal Diversity Jurisdiction: Solution to Multiparty, Multistate Controversies?*, 48 MINN. L. REV. 1109 (1964) (suggesting federal provision for nationwide state court service of process as an alternative to ALI proposal).

spread of state long-arm provisions has at least considerably reduced that difficulty.³¹ The present lack of a single forum available to join all necessary parties causes probably no more than a small fraction of the difficulties engendered by the availability and use of several forums for related litigation.

More recently, Professor John McCoid has explored possible approaches to multiparty dispute problems that are left unsolved by our present joinder devices.³² He surveys preclusion of nonparties, on a theory of adequate representation;³³ compulsory intervention (enforced by giving a judgment binding effect on a nonparty with notice who failed to intervene);³⁴ and mandatory joinder that would go beyond current concepts of necessary parties.³⁵ For situations in which the benefits of consolidation outweigh the costs, McCoid finds mandatory joinder the most attractive device.³⁶ His discussion, however, focuses primarily on the procedural aspects of joinder and preclusion, dealing relatively little with the *jurisdictional* problems of complex litigation. As his title—*A Single Package for Multiparty Disputes*—reflects, his article is primarily about the complications introduced when a dispute is multiparty rather than when it is multiforum.³⁷ It is primarily on the multiforum aspects of the problem that the rest of this Article will focus, arguing that the need for a federal multiparty, multiforum jurisdiction has been heightened by recent case law developments, but that proposals to date have yet to frame the jurisdiction in the best way to fulfill its potential.

II. THE NEED FOR A FEDERAL ACTION-CONSOLIDATING JURISDICTION

The goal of reducing multiple litigation is itself hardly a controversial one and underlies such aspects of our procedural law as multiparty joinder and former adjudication rules. "In matters of justice," wrote Professor Chafee over fifty years ago, "the benefactor is he who

³¹ But cf. Kamp, *The Shrinking Forum: The Supreme Court's Limitation of Jurisdiction—An Argument for a Federal Forum in Multi-Party, Multi-State Litigation*, 21 WM. & MARY L. REV. 161, 188 (1979) (increasing Supreme Court limitations on state court jurisdiction contribute to need for ALI-type provision).

³² See McCoid, *A Single Package for Multiparty Disputes*, 28 STAN. L. REV. 707 (1976).

³³ See *id.* at 714-18.

³⁴ See *id.* at 718-24.

³⁵ See *id.* at 724-28.

³⁶ See *id.* at 728.

³⁷ Other recent joinder-focused discussions treating problems of mass tort litigation include Transgrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779 (1985); Comment, *Mandatory Mass Tort Class Actions: Litigating Catastrophes Without Creating Litigation Catastrophes*, 19 J. MARSHALL L. REV. 91 (1985).

makes one lawsuit grow where two grew before.”³⁸ Beyond the sheer economy of not having to litigate the same matters twice, consolidation of related proceedings can reduce such problems as inconsistent outcomes,³⁹ whipsawing (from the ability of defendants in separate litigations to point to a nonparty as the one truly liable),⁴⁰ and uncoordinated scrambles for the assets of a limited fund.⁴¹

These traditional concerns underlying joinder have taken on new dimensions and heightened urgency as complex and often dispersed litigation has increased. The sources of such litigation are frequently, though not exclusively, mass accident and product liability claims.⁴² The problems they pose are many, such as difficulties in coordination between state and federal courts,⁴³ dangers of bankruptcy of a defendant after several large judgments but before other plaintiffs’ claims can be satisfied,⁴⁴ and possible unfairness in connection with multiple

³⁸ Chafee, *supra* note 18, at 1297.

³⁹ See, e.g., 129 CONG. REC. H8367 (daily ed. Oct. 19, 1983) (statement of Rep. Kastenmeier) (discussing how scattered, related litigation can turn on common issue of fact yet result in inconsistent determinations on same question); cf. Brunet, *A Study in the Allocation of Scarce Judicial Resources: The Efficiency of Federal Intervention Criteria*, 12 GA. L. REV. 701, 713-18 (1978) (potential for increased efficiency and accuracy in judicial decisionmaking resulting from additional data and perspectives provided by joinder).

⁴⁰ See, e.g., *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 906, 458 P.2d 57, 67, 80 Cal. Rptr. 113, 123 (1969) (citation omitted) (in case of separate litigation, “defendant(s) in each case may be able to avoid liability . . . by pointing the finger at the absent defendant(s)”).

⁴¹ See, e.g., Chafee, *supra* note 18, at 1311-12 (discussing the desirability of joinder when a fund must be divided or liability is limited); McCoid, *supra* note 32, at 714 (plaintiffs often choose not to bring joint actions when competing for a limited pot). Recognition of this danger has led the Supreme Court to approve the use of federal statutory interpleader as a limited consolidation device when an insurer faces multiple claims exceeding its policy limits. See *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 531-33 (1967); *infra* text accompanying notes 73-75 (discussing limits on use of federal interpleader).

⁴² See Rubin, *Mass Torts and Litigation Disasters*, 20 GA. L. REV. 429, 430-33 (1986) (discussing the more than 30,000 suits arising from asbestos-related injuries; the more than 13,000 suits resulting from use of the Dalkon Shield IUD; the federal class action concerning Agent Orange, involving from 600,000 to 2.4 million persons; and other cases involving numerous plaintiffs, which are “usually impossible” to gather in “a single court or court system”); Note, *Mass Exposure Torts: An Efficient Solution to a Complex Problem*, 54 U. CIN. L. REV. 467, 467 (1985) (noting the recent proliferation of product liability suits, airplane crashes, and explosions resulting in multiforum litigation).

⁴³ See, e.g., *In re Federal Skywalk Cases*, 680 F.2d 1175, 1180-83 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982) (vacating federal class certification because of its injunctive effect against state court actions); Trangsrud, *supra* note 37, at 810 (discussing limits on consolidation when cases arise in both federal and state courts).

⁴⁴ See, e.g., *In re Northern Dist. Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 851 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983) (“Because total claims, if successful, might exceed [defendant’s] current assets, . . . the earliest . . . actions tried could exhaust [defendant’s] assets and thus . . . plaintiffs who sued later

awards of punitive damages.⁴⁵ In addition, the large number of suits split between different courts can result in delay and additional expense for the parties.⁴⁶

Three widely known, recent examples of complex litigation impeded by present limitations are the lawsuits arising out of the collapse of the skywalks at the Kansas City Hyatt Regency Hotel, the claims against the maker of the Dalkon Shield intrauterine device, and the current school asbestos cases. In various ways, all illustrate the difficulties faced by the judicial system today in handling such matters. In the skywalk cases, the claims were divided between state and federal courts because of the complete diversity rule. Although the courts did cooperate a good deal in handling the litigation, the federal trial court's effort to coordinate matters by certifying a class action was frustrated by appellate reversal.⁴⁷ Similarly, in the Dalkon Shield case, the Ninth Circuit reversed a California district court's limited class certifications meant to reduce repetitious litigation and avert dangers from multiple punitive damage awards.⁴⁸ And in 1986, the Third Circuit also partially reversed class certification by the federal trial court handling the consolidated litigation in which school districts were seeking damages under state law from asbestos manufacturers.⁴⁹

Whatever the justifications under present law for these reversals of trial court efforts to reduce scatter and repetition in litigation, the pattern of frustrated attempts raises the question whether it at least should be possible to consider increased consolidation without some of the present restraints. The sense of a growing need to bring large, uncoordinated litigation under better control seems to underlie such recent developments as the ALI's Preliminary Study of Complex Litigation⁵⁰ and the widespread discussion of class action treatment for mass tort

. . . might not be able to collect on their judgments.").

⁴⁵ See, e.g., *In re School Asbestos Litig.*, 789 F.2d 996, 1003-05 (3d Cir.) (discussing problems resulting from multiple punitive damage awards in successive cases all stemming from the same wrongful act), *cert. denied*, 107 S. Ct. 182 (1986); *In re Federal Skywalk Cases*, 680 F.2d 1175, 1187-88 (8th Cir.) (discussing concerns with regard to multiple punitive damage awards), *cert. denied*, 459 U.S. 988 (1982). See generally Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323, 327 & n.10, 331-33 (1983).

⁴⁶ See Rubin, *supra* note 42, at 434-35.

⁴⁷ See *In re Federal Skywalk Cases*, 680 F.2d at 1175. Judge Heaney delivered a lengthy dissent favoring class certification. See *id.* at 1184-93.

⁴⁸ See *In re Northern Dist. Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d at 847.

⁴⁹ See *In re School Asbestos Litig.*, 789 F.2d at 996 (order for nationwide mandatory class for punitive damages reversed; opt-out class for compensatory damages held properly certified).

⁵⁰ See *supra* note 13 and accompanying text.

actions.⁵¹

Joinder of all related matters and parties should not, of course, be pursued without concern for the problems that joinder itself can create. Consolidated litigation can get unwieldy,⁵² and the ability to file and pursue a separate action may be a valuable escape hatch if a supposedly coordinated proceeding becomes too intricate. Moreover, consolidation can conflict with important interests in individual control of actions and fair treatment of individual claims.⁵³ As the examples and discussion in this section indicate, however, the present scattering of related litigation can yield far more harmful results than consolidation. Mindful of pros and cons on both sides, we are not proposing a legal vacuum cleaner to suck all parties into a single federal court regardless of the consequences, but rather a jurisdiction that would *permit* parties to seek, and the federal courts to consider, the best ways to handle all aspects of a complex, multiforum litigation. Depending on the extent to which issues are common at different stages, the use of separate trials after joint pretrial, bifurcation of liability and damage trials, and other such tools of court management⁵⁴ should minimize the dangers of consolidation.

Recent discussion has stressed fairly large cases and the danger of the defendants or the system consolidating litigation without adequate regard to the interests of plaintiffs.⁵⁵ These emphases, however, may obscure the extent to which consolidation can both serve plaintiffs' interests and prove useful even in smaller cases. The situation underlying *World-Wide Volkswagen Corp. v. Woodson*⁵⁶ illustrates these points. The case was an automobile products liability action that arose out of a car crash in Oklahoma involving an auto bought in New York. The injured New York passengers brought suit in Oklahoma state court

⁵¹ See, e.g., Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039 (1986); Williams, *supra* note 45, at 325-36; Note, *supra* note 42, at 473-98.

⁵² See, e.g., McCoid, *supra* note 32, at 725 & n.116.

⁵³ See, e.g., Trangsrud, *supra* note 37, at 820-24. But see Williams, *supra* note 45, at 329-30 (attacking individual control argument as specious, self-interested pleading by plaintiffs' bar).

⁵⁴ See generally MANUAL, *supra* note 26 (setting forth principles and procedures for fair and efficient resolution of complex litigation); Sherman, *Restructuring the Trial Process in the Age of Complex Litigation*, 63 TEX. L. REV. 721 (1984) (reviewing W. SCHWARZER, *MANAGING ANTITRUST AND OTHER COMPLEX LITIGATION: A HANDBOOK FOR LAWYERS AND JUDGES* (1982), and W. BRAZIL, G. HAZARD & P. RICE, *MANAGING COMPLEX LITIGATION: A PRACTICAL GUIDE TO THE USE OF SPECIAL MASTERS* (1983)).

⁵⁵ See, e.g., Trangsrud, *supra* note 37, at 820-24 (discussing the effects of modern joinder devices on the individual plaintiff's interest in controlling the prosecution of his claim).

⁵⁶ 444 U.S. 286 (1980).

against the foreign manufacturer, the nationwide importer, the regional distributor, and the New York retail dealer who had sold them the car. Although the manufacturer and importer did not press challenges to territorial jurisdiction, the distributor and dealer did.⁵⁷ The Court agreed that these latter two defendants lacked the contacts with Oklahoma required by the due process clause of the fourteenth amendment and could not be compelled to defend there.⁵⁸ Plaintiffs in such a case as this, therefore, cannot pursue their claims against all the defendants in the state where the accident occurred and where presumably many of the witnesses and much of the evidence would be found. Furthermore, if the plaintiffs wanted to proceed against a local driver of the other car as well, no single court in the nation today—federal or state—could hear all their claims.⁵⁹

Commentators have criticized *World-Wide Volkswagen* for its failure to take into account the need for a single forum.⁶⁰ Our concern here, however, is not with the correctness of the holding but with its consequences. If the decision requires—as it seems to—that a person take some action creating enough of an affiliation with a state in order to be sued in its courts, the states alone cannot resolve the problem of

⁵⁷ See *id.* at 288.

⁵⁸ See *id.* at 287-99.

⁵⁹ Federal courts could not join all parties because of the complete diversity rule and because in state law cases (and many federal question ones) they must normally borrow state long-arm authority. See FED. R. CIV. P. 4(a)-(f) (limited scope of federal process; authority to act pursuant to state law). When a federal court uses a state's long-arm authority, it borrows not only the authority but also the fourteenth amendment due process limitations on state court territorial jurisdiction. See, e.g., *George v. Omni Capital Int'l, Ltd.*, 795 F.2d 415, 424-27 (5th Cir. 1986) (en banc) (dismissing claims arising under federal law against defendants for lack of personal jurisdiction under long-arm statute of state in which district court sits), *cert. granted sub nom. Omni Capital Int'l, Ltd., v. Rudolf Wolff & Co.*, 107 S. Ct. 946 (1987). These same due process limits, as defined in *World-Wide Volkswagen*, bar the state courts from asserting jurisdiction over all defendants in some cases involving geographically dispersed parties.

Even the ALI's proposed dispersed necessary parties jurisdiction would not help in this sort of case, because defendants who may be jointly or severally liable are normally regarded as merely proper parties for permissive joinder, not as necessary or indispensable ones whose joinder is to be required if feasible. See ALI STUDY, *supra* note 9, at 68 (proposed 28 U.S.C. § 2371(b), in part: "Persons against whom several liability is asserted shall not be deemed necessary for a just adjudication of the plaintiff's claim because liability is asserted against them jointly or alternatively as well."). Compare FED. R. CIV. P. 19(a) (stressing, among other things, danger of inconsistent obligations and not merely inconsistent determinations as requisite for mandatory joinder) with FED. R. CIV. P. 20(a) (providing for permissive joinder when related rights to relief are asserted against defendants jointly, severally, or in alternative).

⁶⁰ See Braveman, *Interstate Federalism and Personal Jurisdiction*, 33 SYRACUSE L. REV. 533, 537-39 (1982); Kamp, *Beyond Minimum Contacts: The Supreme Court's New Jurisdictional Theory*, 15 GA. L. REV. 19, 45-47, 53 (1980).

scattered litigation resulting from multiparty, multiforum disputes.⁶¹ And with *World-Wide Volkswagen* making it constitutionally impossible for state court systems to solve the problem, several nonconstitutional limitations render present federal jurisdiction and joinder inadequate to the task as well: The current structure of diversity jurisdiction actually splits some multiparty cases that could constitutionally come within federal jurisdiction;⁶² class actions under Federal Rule of Civil Procedure 23 and federal statutory interpleader can go only part way, even when federal jurisdiction presents no obstacles.⁶³

The shortcomings of the present diversity jurisdiction are familiar to those initiated in its intricacies, although the burden that the complete diversity requirement places on complex cases is too often overlooked.⁶⁴ A plaintiff with related state law claims against a state co-citizen and an out-of-stater can sue them together only in state court (assuming, as will not always be the case after *World-Wide Volkswagen*, that one state court system can exercise jurisdiction over both defendants). A plaintiff determined to sue the out-of-stater in the federal forum, therefore, must either bring two actions or forgo the claim against the cocitizen.⁶⁵ If citizens of different states, one of common

⁶¹ See Kamp, *supra* note 60, at 45-46. *World-Wide Volkswagen*, is, to be sure, only part of the problem—albeit a key part, because it makes clear that federal court jurisdiction must be at least a major element of any comprehensive effort at dealing with scattered litigation. Such litigation can arise either because of the inability of plaintiffs to join all proper defendants in one forum or because one or more defendants—even if suable in one jurisdiction—find themselves haled into court in different places by different plaintiffs. *World-Wide Volkswagen* relates only to the first of these two types of situations. Our courts' present inability to deal with the latter type flows from several aspects of existing federal jurisdictional statutes and procedural rules.

Professor Elinor Schroeder makes the valuable suggestion of an interstate agreement on transfer and consolidation for pretrial proceedings when related litigation is pending in courts of different states, something of a counterpart to the federal Judicial Code's § 1407. See Schroeder, *Relitigation of Common Issues: The Failure of Non-party Preclusion and an Alternative Proposal*, 67 IOWA L. REV. 917, 965 (1982). The article acknowledges, however, that the constitutional limits on state court jurisdiction imposed by *World-Wide Volkswagen* might require that transfers go only to states with which defendants have adequate contacts. See *id.* at 972-73.

⁶² See *infra* notes 64-68 and accompanying text.

⁶³ See *infra* notes 69-75 and accompanying text.

⁶⁴ See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806) (interpreting predecessor of present general diversity jurisdiction statute, 28 U.S.C. § 1332 (1982), to require that for federal diversity jurisdiction, all plaintiffs be of different state citizenship from all defendants).

⁶⁵ See, e.g., Rowe, *Abolishing Diversity Jurisdiction: The Silver Lining*, 66 A.B.A. J. 177, 178, 180 (1980). See generally Barrett, *Venue and Service of Process in the Federal Courts—Suggestions for Reform*, 7 VAND. L. REV. 608, 634 (1954) (complete diversity rule contributes to exclusion from federal courts of the very cases—those involving scattered defendants—that they are better equipped than state courts to handle).

The amount in controversy requirement in the diversity jurisdiction statute, 28

citizenship with a defendant and the other of diverse citizenship, are both potential state-law claimants and the diverse plaintiff exercises the right to choose the federal forum, then the litigation will inevitably be split, with the plaintiff who is a cocitizen of the defendant confined to state court.⁶⁶

In sum, the present diversity jurisdiction responds rather perversely to the problem of scattered litigation. Because of the complete diversity rule, it ensures the federal forum when the danger of dispersion is least—in single-plaintiff, single-defendant cases when the parties are from different states. The greater the danger of scattered litigation, *i.e.*, when more parties from more states or nations thicken the plot, the greater the chance that the litigation will be irremediably split between state and federal courts.⁶⁷ Moreover, present diversity rules even create the possibility of maneuvers to secure federal jurisdiction (such as suing only a diverse defendant in federal court) or to prevent it (such as joining diverse and nondiverse defendants, or diverse home-state defendants, in state court), on grounds that have nothing to do with the need for a federal forum.⁶⁸

As for class actions, limits on both joinder and federal jurisdiction render the federal class action device less than fully adequate to provide a single forum, even in cases with plaintiffs numerous enough to qualify for class action treatment. The 1966 Advisory Committee members revising Federal Rule 23 made plain their view that the rule was not to be used regularly in mass accident situations: such cases are “ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, [will] be present, affecting the individuals in different ways.”⁶⁹

U.S.C. § 1332 (1982), also excludes from federal court those who cannot in good faith assert state law claims exceeding \$10,000, whatever the citizenship of those against whom they claim. *Cf. Saint Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938) (for purposes of amount in controversy requirement necessary to invoke diversity jurisdiction, the sum claimed in good faith in the plaintiff's complaint controls).

⁶⁶ *Cf. Note, Air Crash Litigation and 28 U.S.C. Section 1407: Experience Suggests a Solution*, 1981 U. ILL. L. REV. 927, 945 (state court actions are beyond reach of federal pretrial consolidation under § 1407 if removal from state to federal court is impossible, as for want of diversity jurisdiction).

⁶⁷ *See, e.g., In re Federal Skywalk Cases*, 680 F.2d 1175, 1177 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982) (actions following collapse of skywalks in hotel were split between state and federal courts; actions in federal court were consolidated, as were the state court actions, but intersystem consolidation proved impossible).

⁶⁸ *See infra* note 109.

⁶⁹ FED. R. CIV. P. 23 advisory committee's notes (1966). *See generally* 3B J. MOORE & J. KENNEDY, *MOORE'S FEDERAL PRACTICE* ¶ 23.02[2.-18] (2d ed. 1985) (discussing the availability of Rule 23 in personal injury actions). The pressures of finding ways to deal with mass disaster litigation since the revision of Rule 23 in 1966

With regard to jurisdiction, although incomplete diversity problems can be circumvented by choosing named class representatives of diverse citizenship from the defendants,⁷⁰ the holding in *Zahn v. International Paper Co.*,⁷¹ which limits class membership to those who *individually* satisfy an applicable jurisdictional amount requirement, has sharply restricted class actions within the diversity jurisdiction.⁷²

have, despite the revisers' position, led both to some judicial use of the class action device in such situations and to a good deal of commentary urging its appropriateness. See, e.g., MANUAL, *supra* note 26, § 33.24, at 298 ("Courts have only recently begun to consider the propriety of forming a class under Rule 23(b)(1) and (b)(2) in the mass tort context on the theory that a single award of punitive damages is appropriate or that the claims greatly exceed the funds available."); 7B C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1783, at 73 (2d ed. 1986) (despite the Advisory Committee's comment, "In many ways Rule 23(b)(3) seems particularly appropriate for some [mass] tort cases . . ."); Gordon, *The Optimum Management of the Skywalks Mass Disaster Litigation by Use of the Federal Mandatory Class Action Device*, 52 UMKC L. REV. 215, 215-17 & nn.1-4 (1984) (class action device can ensure fairness and efficiency in mass disaster situations); Williams, *supra* note 45; Comment, *supra* note 37.

The Advisory Committee's position, however, continues to persuade many courts that mass torts should not receive class action treatment. See, e.g., C. WRIGHT, A. MILLER & M. KANE, *supra*, § 1783, at 73 & n.7. Those courts that do certify classes in such cases often do so with provision for class members to opt out. See, e.g., *In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir.), *cert. denied*, 107 S. Ct. 182 (1986). Although authorized and in some instances required under present class action rules, this measure reintroduces the dangers of dispersed litigation and inconsistent outcomes.

⁷⁰ See *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 363-64 (1921); C. WRIGHT, THE LAW OF FEDERAL COURTS § 72, at 484 (4th ed. 1983).

⁷¹ 414 U.S. 291 (1973).

⁷² See, e.g., Becker, *The Class Action Conflict: A 1976 Report*, 75 F.R.D. 167, 168 (1977).

The Supreme Court's recent decision in *Phillips Petroleum Co. v. Shutts*, 105 S. Ct. 2965 (1985), makes only a limited improvement in the courts' ability to deal with potentially scattered litigation. *Shutts* allowed state courts to exercise territorial jurisdiction over absent *plaintiff* class members who had no contacts with the forum state, provided that they were adequately represented, sent notice, and given an opportunity to appear or opt out. See *id.* at 2972-77. The holding does not appear to help when a case is unsuitable for class action treatment and, in particular, is unlikely to apply in the common mass tort situation involving several, but not a great many, scattered defendants.

In addition, the conflicts holding in *Shutts*, which limits the authority of a court hearing a multistate class action to apply forum law—may reduce the commonality of issues and the manageability that can influence a court's decision whether to certify a class action. See Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1, 68-69 (1986); Comment, *Choice of Law and the Multistate Class: Forum Interests in Matters Distant*, 134 U. PA. L. REV. 913, 915 (1986).

The importance to complex litigation problems of limits on the use of class actions suggests the possibility of overcoming such difficulties not by a new federal court jurisdiction but rather by changing the statutes and rules governing class treatment. Such measures may be well worth exploring, see, e.g., Mullenix, *supra* note 51, but they cannot provide a comprehensive response. Many cases that are quite substantial but do not involve large numbers of parties are unlikely to be appropriate class actions. Moreover, a jurisdictional provision facilitating *both* class and nonclass handling would avoid

Finally, federal statutory interpleader is a device largely confined to the exigencies of the stakeholder situation, involving the threat of multiple and inconsistent liability, for which it was framed. In the leading case, *State Farm Fire & Casualty Co. v. Tashire*,⁷³ the Supreme Court disallowed the use of a single, limited insurance fund as the basis for consolidating all actions arising out of a multidefendant accident, stating that "federal interpleader was not intended to serve the function of a 'bill of peace' in the context of multiparty litigation arising out of a mass tort . . ."⁷⁴ The majority opinion acknowledged that its "view of interpleader means that it cannot be used to solve all the vexing problems of multiparty litigation arising out of a mass tort."⁷⁵

Tashire thus established that statutory interpleader in its present form often cannot do the job of consolidating multiparty, multiforum litigation. At the same time, however, it confirmed the existence of federal constitutional authority to provide for a federal court jurisdiction that *would* do so, for in the very same case the Court ruled that the complete diversity requirement is one of statutory construction only and not a constitutional limitation binding Congress.⁷⁶ Read together with *World-Wide Volkswagen*, *Tashire* underscores the great difference in the constitutional ability of the states and of the federal judicial system to deal with scattered litigation. *World-Wide Volkswagen* made it clear that *constitutional* limits on state courts' territorial jurisdiction keep the states from responding fully to the jurisdictional need; *Tashire* settles that the federal government *can* constitutionally meet the need. Although the federal courts presently lack subject matter jurisdiction and accompanying process authority to deal with the problem, no constitutional barriers appear to stand in the way of their exercising adequate federal subject matter⁷⁷ and territorial⁷⁸ jurisdiction.

skewing case-by-case choices toward the class form, with its dangers of greater submergence of individual interests.

⁷³ 386 U.S. 523 (1967).

⁷⁴ *Id.* at 537.

⁷⁵ *Id.* at 535.

Interpleader under Federal Rule of Civil Procedure 22 is even less useful than statutory interpleader as a general action-consolidating device, because Rule 22 is available only for cases otherwise within federal jurisdiction; as a practical matter, such actions are nearly always diversity cases. Rule interpleader is thus subject to the limitations imposed by the present requirements for the general diversity jurisdiction. Complete diversity is required—that is, the stakeholder cannot be of the same state citizenship as any of the claimants. Statutory interpleader requires only *minimal* diversity: any pair of claimants with different citizenships will satisfy the diversity test. See 28 U.S.C. § 1335(a)(1) (1982).

⁷⁶ See *Tashire*, 386 U.S. at 530-31; accord *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373 n.13 (1978).

⁷⁷ See *infra* note 98 and accompanying text.

⁷⁸ See C. WRIGHT, *supra* note 70, § 64, at 421 (discussing existing congressional

III. DEFINING A FEDERAL MULTIPARTY, MULTIFORUM JURISDICTION

In framing a federal jurisdictional statute to deal with scattered litigation, it is necessary to consider in detail the circumstances in which federal jurisdiction is the appropriate response. The concern is not with difficulty of issues, amounts at stake, or number of parties involved as such;⁷⁹ these sorts of "mere" complexity do not justify federal intrusion on what would otherwise be the states' domain. Rather, the initial focus belongs on situations in which the multistate nature of the federal union prevents the states from responding adequately to the problem of scattered litigation, be it simple or complex.⁸⁰

authority to provide for nationwide and international service of process); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 239-40 (1948) (arguing that constitutional authority for citizenship-based federal jurisdiction is properly usable when "there is need for process that outruns state borders").

The view of a majority of courts and commentators appears to be that in other than ordinary diversity cases, the required minimum contacts for territorial jurisdiction of a federal court are those with the United States and not with the court's district or the state in which the court sits. See, e.g., *Trans-Asiatic Oil Ltd. v. Apex Oil Co.*, 743 F.2d 956, 959 (1st Cir. 1984) (In admiralty, "[f]ederal jurisdiction being national in scope, due process requires sufficient contacts within the United States as a whole."); von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U.L. REV. 279, 332 (1983) (federal jurisdiction in statutory interpleader actions); cf. Abrams, *Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 IND. L.J. 1, 1-2 (1982) (if only one nationwide federal trial court existed, issues as to its territorial jurisdiction would virtually never arise); Schroeder, *supra* note 61, at 966 (constitutionality of federal interdistrict transfers under § 1407 has never been seriously challenged because courts are those of same sovereign).

Some writers, however, have argued strongly for more restrictive tests for the constitutionality of federal court territorial jurisdiction. See, e.g., Fullerton, *supra* note 4, at 6 (suggesting due process limits on federal court territorial jurisdiction determined by weighing of factors of inconvenience to defendant, defendant's ability to anticipate litigation in forum, and federal interests in exercising jurisdiction where asserted); Stephens, *The Federal Court Across the Street: Constitutional Limits on Federal Court Assertions of Personal Jurisdiction*, 18 U. RICH. L. REV. 697, 719-22 (1984) (advocating a multifactor reasonableness approach under the fifth amendment due process clause); cf. Abraham, *Constitutional Limitations upon the Territorial Reach of Federal Process*, 8 VILL. L. REV. 520, 535 (1963) (for fifth amendment due process reasons, federal venue might need to be confined by some requirement of fairness and relatedness of forum to action).

The justifications for a federal multiparty, multiforum jurisdiction should in great measure satisfy even the more restrictive standards for assertion of territorial jurisdiction over scattered parties. If necessary, either statutory venue standards or case-by-case regard for the convenience of parties should suffice to deal with any remaining questions.

⁷⁹ This list of characteristics of complex litigation is taken from R. MARCUS & E. SHERMAN, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* 6-7 (1985).

⁸⁰ See, e.g., ALI STUDY, *supra* note 9, at 378 (referring to problems that "do not relate simply to trial efficiency at large, but grow out of the multi-state nature of our

A threshold decision must be whether a new jurisdiction should attempt to deal only with dispersed *necessary* parties not joinable in the courts of a single state or to allow broader joinder. If we chose to deal only with necessary parties, we could quickly conclude this Article by endorsing the ALI's proposal designed for that situation or by tinkering with the ALI draft to improve it. We favor, however, a broader multiparty, multiform jurisdiction embracing *permissive* joinder in cases involving actual, or seriously threatened, scattered but related litigation of significant scale. We do so for several reasons, not the least of which is the sense that the problem addressed by the ALI draft arises fairly infrequently. By contrast, troublesome dispersed litigation of sorts with which the ALI provisions did not attempt to deal is quite common, especially because even when a single forum is available, plaintiffs in multiparty cases will often sue elsewhere.⁸¹ When such scattered litigation occurs, a federal action-consolidating jurisdiction could achieve the economies sought by the permissive joinder rules, reduce the danger of inconsistent outcomes, and counteract the case-splitting effects of the complete diversity rule.

In view of all the problems that the *Strawbridge* rule causes, an initial thought could be simply to abolish the complete diversity requirement.⁸² Although that measure would yield an easily administrable system, its adoption seems politically unlikely because of the considerable number of cases it would add to the already heavy federal court caseload. Much of that likely increase in volume, moreover, would consist of cases that present no scatter problem and have no need for a federal forum on that ground.⁸³

In this sense, minimal diversity would do too much; from another perspective, it would do too little to meet the problem of scattered liti-

Union and hence present a special basis for federal intervention"); Wechsler, *supra* note 78, at 239-40 (recognizing, inter alia, situations "where there is need for process that outruns state borders," such as federal statutory interpleader, as appropriate for grant of federal forum, because federal intervention is then premised "on a current finding of a state inadequacy. The problem is to limit intervention to the situations where it is in fact responsive to such need.").

⁸¹ See *infra* note 109.

⁸² *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). For a vigorous argument in favor of legislative overruling of *Strawbridge*, based largely on the volume of purely procedural litigation it engenders, see Currie, *supra* note 28, at 18-45.

⁸³ Such cases would include multistate plaintiff cases against a single defendant based on events in the defendant's home state, or single-plaintiff lawsuits involving scattered defendants all of whom have constitutionally sufficient contacts with a single state. Minimal diversity would also, of course, retain the present federal jurisdiction over single-plaintiff, single-defendant lawsuits in which diversity is present and the jurisdictional amount requirement is satisfied. Such cases virtually never raise any threat of scattered litigation.

gation. Under a minimal diversity rule, it would still be possible for a defendant to be sued on the same event in federal court by diverse plaintiffs and in state court by nondiverse (or diverse) plaintiffs. If we wanted to deal with this situation by consolidation in federal court, some *removal* provision would be needed. Such a provision would have to include a definition of situations in which multiforum litigation is a significant enough concern to justify the availability and use of the federal forum. Yet just such a definition would also be needed in any provision for *original* multiparty, multiforum jurisdiction in those cases, and *only* those cases, in which scattered litigation was a genuine prospect. Consolidation by removal under a broad minimal diversity regime thus offers no advantages over consolidation by a more precisely focused original jurisdiction scheme.

The 1979 Justice Department proposal, although a worthy early effort in a difficult and previously little-explored area, did not focus adequately on the situations in which scattered-litigation problems would and would not arise. An effect of the proposal's somewhat complicated provisions was to require that victims—either prospective or actual plaintiffs—be citizens of at least two different states.⁸⁴ Although the scattered-victims requisite is satisfied in most mass disasters (the main concern of the Justice Department proposal), the requirement produces some undesirable exclusions and inclusions. If, for example, a mixed-citizenship tour group is involved in a single-bus crash in the home state of all defendants (driver, company, etc.), the home state's courts are a logical forum,⁸⁵ and yet the scattered-victims focus could

⁸⁴ In addition to requiring threshold numbers of victims, types of claims, and amounts involved, the proposal provided for jurisdiction if the action was "between a plaintiff who is a citizen of a state and any defendants, as long as any defendant and any person injured in the event, transaction, occurrence, or course of conduct is a citizen of a state different from that of any plaintiff" 1979 *House Hearings*, *supra* note 12, at 159. (The 1983 and 1986 Kastenmeier bills have used language that is identical or has the same effect. See H.R. 4315, *supra* note 10, § 3 ("citizen of a State and a defendant"); H.R. 3690, *supra* note 10, § 4(a)(1) (language identical to that found in the Justice Department proposal).) The phrasing appears to include injuries inflicted on a multistate group by a single defendant acting solely in his home state, because a plaintiff diverse from the defendant would also be a citizen of a state different from that of some other victim. See 1979 *House Hearings*, *supra* note 12, at 160 (section-by-section analysis).

⁸⁵ Local bias against out-of-staters could very well be a reason why the defendants' home state courts might not be the *only* logical forum. We cannot resolve here all the empirical issues that might support abolition, curtailment, or retention of the present general diversity jurisdiction. See generally Bumiller, *Choice of Forum in Diversity Cases: Analysis of a Survey and Implications for Reform*, 15 *LAW & SOC'Y REV.* 749 (1981) (reporting most common factors influencing choice of federal and state forums); Goldman & Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry*, 9 *J. LEGAL STUD.* 93 (1980) (finding that attorneys' perceptions of local prejudice enter into the calculation of forum choice). Existing diversity jurisdiction in

admit such a dispute to federal court. But if a single-citizenship group is involved in an accident with defendants from several states, as might well be the case with a local club's air tour, the failure to satisfy the scattered-victims requirement would exclude the case from federal court despite the possibility of multiforum litigation.

We propose a different approach to avoid these problems and to provide the basis for a jurisdiction focused precisely on those cases in which multiforum litigation is a genuine possibility. The main factor that appears to isolate and define this situation is whether any defendant has a residence⁸⁶ in a state other than the one in which a substantial part of the acts or omissions giving rise to the action occurred.⁸⁷ This situation will always exist if defendants have different residences,⁸⁸ as it will if a defendant has a certain residence and at least part of the acts or omissions occurred elsewhere.⁸⁹ Federal jurisdiction

fact responds to the problem of local prejudice imperfectly and at times perversely, for it lets an in-state *plaintiff* sue in federal court. It even permits structuring a lawsuit to try to take advantage of any home-state bias by joinder of nondiverse parties or home-state defendants in state court so as to prevent removal.

⁸⁶ The use of residence, rather than citizenship, is deliberate. Defendants can always be sued where they live, whatever their citizenship. For individual American citizens, residence and state citizenship will usually coincide. But a resident alien could be a citizen of no American state and still be sued in two states on the same event if he resided in one and the events occurred in another. And a corporation, which is deemed for federal venue purposes to be a resident of "any judicial district in which it is incorporated or licensed to do business or is doing business," 28 U.S.C. § 1391(c) (1982), might be sued in various jurisdictions on claims arising out of the same events, even if it were a citizen of only one state.

⁸⁷ For language designed to cast this concept in statutory form, see draft § 1367(a)(1)-(2) in the Appendix. Litigation scattered among American courts could also arise even without a defendant residing in one state and events occurring in another if, for example, a nonresident alien was the only defendant and substantial parts of the events in question took place in two or more American states. The draft statute attempts to provide for such situations as well.

⁸⁸ Cf. Barrett, *supra* note 65, at 634 ("[T]hought should be given to a jurisdictional statute which would give the federal courts jurisdiction of nonfederal question cases in all those situations and only those situations where there are several defendants and the defendants reside in different states, even though one or more of the defendants may reside in the same state as the plaintiff."); Kessler, *Corporations and the New Federal Diversity Statute: A Denial of Justice*, 1960 WASH. U.L.Q. 239, 248 (scattered-defendants situations "would certainly be a desirable area for the intervention of federal jurisdiction. Unfortunately, Congress has declined to make it available in all but a few specialized types of cases.").

⁸⁹ In this latter situation, all plaintiffs and all defendants could be of the same citizenship, thus leaving the constitutional requirement of minimal diversity unsatisfied. For example, a team might charter a local bus with a local driver, head for a game in another state, and run off the road in a single-vehicle accident in the other state. Although the plaintiffs might sue in the courts of both states, any multiplicity would be beyond the reach of a diversity-based federal jurisdiction. Consequently, a federal jurisdictional statute should include a minimal diversity requirement in addition to the requisites discussed in the text. Such no-diversity situations still involving possible scattered litigation suggest that state law provisions for transfer from the courts of one state

need not, of course, always be provided whenever these conditions exist; if plaintiffs choose to bring all their claims in the courts of one state, for example, removal to federal court would be unnecessary.⁹⁰ It also is not worth expending the resources of the federal forum on quite small cases, even when scattered litigation is possible or actually occurring. Such contingencies can be treated by the implementing provisions of a federal action-consolidating jurisdiction, such as a requirement of a minimum amount in controversy per victim or perhaps, for cases involving small numbers of victims, a requirement of proof of unavailability of a single state forum and a right of removal defined more narrowly than the original jurisdiction.⁹¹

It would, of course, be somewhat unorthodox to include in a grant of federal *subject matter* jurisdiction a focus on the location of events. We are more accustomed to definitions based on federal questions or parties' citizenships. Yet it is only by virtue of law school indoctrination and venerable custom that we are used to regarding citizenship as related to subject matter jurisdiction. It would be little or no stranger to take the locus of events into account.⁹² The function of this element of the definition is to limit a jurisdiction based on minimal diversity to the purpose for which it is established: dealing with problems of scattered litigation. In parallel fashion, the existing grant of statutory interpleader *jurisdiction* includes reference to the *joinder* device of interpleader;⁹³ and the ALI's definition of its dispersed necessary parties jurisdiction included determinations of indispensability of the scattered defendants and their amenability to process in one jurisdiction.⁹⁴ As these examples illustrate, innovative definitional features may be neces-

to those of another could be a useful adjunct to a federal jurisdiction. *See generally* Schroeder, *supra* note 61, at 963-66 (proposing interstate agreement regarding consolidation of scattered litigation cases).

⁹⁰ Another unnecessary, and possibly even harmful, inclusion in a jurisdictional definition would be the scattered-victims provision of the original Justice Department proposal. Such a feature makes sense only if general diversity jurisdiction and the complete diversity rule survive. If they do, a state law case with entirely in-state defendants, but both in-state and out-of-state plaintiffs, is likely to be split between state and federal courts. Without the present diversity jurisdiction, scattered litigation would usually occur only when there were defendants of different residences, or when a defendant resided somewhere else than where some of the events in the suit occurred.

⁹¹ *See infra* text accompanying notes 96-115.

⁹² Determining where events took place for purposes of ascertaining jurisdiction should be relatively easy, especially because the definition could be phrased so as not to call for a finding of a single locus for the transactions in question. Present determinations on citizenship for diversity jurisdiction purposes and on the district "in which the claim arose," 28 U.S.C. § 1391(a) (1982), for venue rulings can be far more complex than findings on where a substantial part of the events at issue occurred.

⁹³ *See* 28 U.S.C. § 1335 (1982).

⁹⁴ *See* ALI STUDY, *supra* note 9, at 67-68.

sary to serve the purposes of a multiparty, multiforum jurisdiction.

The focus on dispersion of events and defendants should be the core of the definition of a federal action-consolidating jurisdiction, for such a definition includes only those cases in which scattered litigation is possible. That does not, however, complete the task of framing such a jurisdiction; refinement and supplementation by other features such as process, removal, transfer, and choice of law are also necessary. Again, it may not be desirable to provide the federal forum for the smallest cases meeting the bare requisite of dispersion of events and defendants. Therefore, we turn next to a discussion of the several principal features beyond the core jurisdictional definition itself that must be considered in framing such a new jurisdiction.

IV. IMPLEMENTING THE JURISDICTION

If Congress resolved to establish a federal multiparty, multiforum jurisdiction, it would face many subsidiary decisions about its characteristics.⁹⁵ At least some of these decisions, such as jurisdictional amount requirements, would properly be political, informed by such considerations as estimated impact on federal caseloads and concern for intrusion on the domain of the state courts. We do not attempt here to resolve these matters. We seek instead to identify the major decisions that would have to be made and the factors influencing them, and also to suggest which choices are appropriately left to political judgment and which ones seem better governed by more strictly technical concerns. In short, we are not trying to advance a rigid and unchangeable proposal. Rather, after arguing for a new jurisdiction, we have suggested that certain core problems should be approached in particular ways. Beyond that, we believe that the jurisdiction's incidental features do not pose insuperable problems and can be handled by various approaches.

A. Coverage

The 1979 Justice Department proposal would have limited the

⁹⁵ Although it would be tempting to draft the simplest possible jurisdictional statute and leave vexing details to be worked out in judicial practice, such an approach could encounter difficulties because various well-established subsidiary aspects of our present system were evolved without regard for the consolidation of scattered, related litigation. *See, e.g., infra* text accompanying notes 105-08 (requirement that all members of plaintiff class must individually have claims as large as jurisdictional amount); *infra* text accompanying notes 122-38 (unsuitability of present choice-of-law principles governing state law cases in federal court). Thus, rather than leave all the details for judicial development, the jurisdictional legislation itself should not only establish a general framework, but also address at least some of the foreseeable complications.

availability of the new federal jurisdiction to situations involving "personal injury or injury to the property of twenty-five or more persons" in which "the sum or value of the injury to any twenty-five persons exceeds \$10,000 per person, exclusive of interests [sic] and costs."⁹⁶ The focus of the proposal was thus on substantial mass torts, such as airline crashes and drug liability cases. The limits imposed were of three kinds: subject matter, number of persons injured, and dollar value of injuries. Technically, the definition of the jurisdiction could eliminate all such restrictions and still be workable, although without some limits it might bring too many cases into federal court.⁹⁷ Even expanded to its broadest limits, however, the jurisdiction would remain constitutional, as long as it required minimal diversity.⁹⁸

Various requirements narrowing the jurisdiction may be justified or politically necessary; but if the problems of scattered litigation are important enough to warrant creating a new federal jurisdiction, any limits imposed on such a jurisdiction should interfere as little as possible with its basic action-consolidating purpose and should themselves serve significant ends. Among the factors that should influence decisions on whether and how to limit the jurisdiction are: caseload, intrusion into state courts' domains, administrability, and the danger of leaving no single forum provided for scattered litigation outside the limits of the new jurisdiction.

One concern with subject matter limits like those in the Justice Department and Kastenmeier proposals is that they create the threat of threshold disputes on preliminary procedural issues, quite apart from

⁹⁶ 1979 *House Hearings*, *supra* note 12, at 158. Representative Kastenmeier's 1983 and 1986 bills have essentially the same coverage requirements but include language requiring that the sum or value of injury be "alleged in good faith." See H.R. 4315, *supra* note 10, § 3; H.R. 3690, *supra* note 10, § 4.

⁹⁷ We have not been able to think of a way to make any meaningful estimate of the likely caseload under a new federal multiparty, multiforum jurisdiction; in part, of course, the caseload would depend on the jurisdiction's definitional terms, which could be broad or narrow. Congress might wish to start experimentally with a definition including only fairly large cases to get an idea of the burdens on the federal judiciary before considering whether to broaden coverage. It might even be wise to make the jurisdiction explicitly discretionary, lest the economy goals be frustrated in massive consolidated cases. See *infra* text accompanying note 111. In any event, it seems unlikely that the workload generated by a new jurisdictional provision could be significantly greater than that imposed by the existing diversity jurisdiction, which makes the federal forum available on a basis unrelated to need, even when other related cases are pending in state courts open to the diversity plaintiff.

⁹⁸ See ALI STUDY, *supra* note 9, at 426-36. "Congress apparently may found jurisdiction on less than total diversity of citizenship among all adverse parties, and may authorize process of a federal court to run throughout the country, without regard to the respondent's earlier relationship with the particular district to which he is summoned." *Id.* at 378.

the merits. Would property damage, if that were one type of claim within the jurisdiction, include loss to intangibles? Such an issue might be among the simpler ones in borderline cases as counsel vied to be in or out of federal court. The difficulties that have arisen in defining the domestic relations exception to general diversity jurisdiction,⁹⁹ for example, suggest the wisdom of keeping subject matter limits to a minimum. Nonetheless, if the problem of scattered litigation is regarded as particularly acute in a single field, or if Congress wants to experiment with a limited version of the jurisdiction with an eye to possible expansion later, subject matter limits could be justifiable.

Limits based on scale—number of actual or potential parties and amounts at stake—should pose fewer threshold litigation problems, but they present difficulties of their own. Some scale minimums seem essential to keep out trivial cases; if federal statutory interpleader, responding to the acute problem of conflicting liabilities, can exclude cases involving a stake below \$500,¹⁰⁰ a dispersed-parties jurisdiction responding to the difficulties of scattered litigation need not be all-inclusive.¹⁰¹ For example, some limit based on the number of persons involved seems entirely reasonable. A definition permitting the jurisdiction to be readily invoked when there are very few parties might tempt plaintiffs' counsel to go defendant-shopping in order to have a forum choice.

Yet the problems of scattered litigation can be present even in smaller cases. Confining federal multiparty, multiforum jurisdiction to big cases would leave smaller ones exposed to the dangers that the jurisdiction is meant to address, dangers that can often be avoided today *only* if a federal forum is available.¹⁰² Indeed, smaller cases are in one sense particularly attractive, because in handling them the federal courts could provide the useful action-consolidating service they are uniquely suited to render, but without always having to deal with cases of great complexity. The best solution to such dilemmas may be to define the jurisdiction so as not to confine it exclusively to very large cases, but to include safeguards allowing it to be invoked in medium-

⁹⁹ See, e.g., Note, *Application of the Federal Abstention Doctrines to the Domestic Relations Exception to Federal Diversity Jurisdiction*, 1983 DUKE L.J. 1095, 1096-1100 (For over 100 years, courts have attempted to define limits for the domestic relations exemption, recognizing that the boundaries of the exception are uncertain.).

¹⁰⁰ See 28 U.S.C. § 1335(a) (1982).

¹⁰¹ For cases falling below federal scale thresholds, it would be particularly useful if states created a system for interstate transfer in scattered-litigation situations. See generally Schroeder, *supra* note 61 (proposing an interstate agreement on handling such cases).

¹⁰² See *supra* text accompanying notes 60-63.

sized cases only when scattered litigation is unavoidable or is actually occurring.¹⁰³

In addition to number-of-parties requirements, some amounts-at-stake threshold is warranted to save the federal courts from having to deal with trivial state law cases.¹⁰⁴ Whatever the amount requirements set, however, for this new jurisdiction Congress should discard the rule of *Zahn v. International Paper Co.*¹⁰⁵ *Zahn* mandates that in diversity class actions, *all* plaintiff class members in a case in which aggregation is not possible must satisfy the jurisdictional requirement *individually* to be included in the class in the federal action.¹⁰⁶ Under *Zahn*, even though some plaintiffs whose own claims satisfy the amount in controversy requirement seek to represent the class and properly bring their part of the dispute in federal court, others who do not satisfy the requirement may not join the action.¹⁰⁷ Whatever its justifiability for diversity class actions, the *Zahn* rule would subvert the purposes of a multiparty, multiforum jurisdiction: it denies a single federal forum in cases in which one would be useful, and, in fact, often forces the splitting of actions between state and federal courts.

Indeed, not only should the *Zahn* rule be inapplicable to the new jurisdiction, but also it should be possible even for those with claims below the jurisdictional minimum to initiate actions in federal court. The function of scale requirements would be to ensure that only *disputes* of a certain magnitude came to federal court. If those having or defending against smaller claims are part of the dispute and allowed to participate in the federal litigation, it should not matter which *disputant* with a real stake files or removes to invoke the jurisdiction.¹⁰⁸ The contrary rule would cause undue procedural shuffles, forcing those with smaller claims either to wait for the initiation of a federal action or, as might be necessary because of statutes of limitations, to file in state court and then seek consolidation when someone bringing or defending a larger claim finally filed in or removed to federal court.

¹⁰³ See *infra* text accompanying notes 113-14.

¹⁰⁴ By abolishing the amount in controversy requirement for the general federal question jurisdiction, 28 U.S.C. § 1331 (1982), however, Congress has reflected the widely shared sense that the federal courts should be open even for small federal law cases. For discussion of how the new jurisdiction could mesh with existing federal question jurisdiction, see *infra* notes 151-52 and accompanying text.

¹⁰⁵ 414 U.S. 291 (1973).

¹⁰⁶ See *id.* at 294-301.

¹⁰⁷ See *id.* at 301 ("Each plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case—'one plaintiff may not ride in on another's coattails.'") (quoting *Zahn v. International Paper Co.*, 469 F.2d 1033, 1035 (2d Cir. 1972), *aff'd*, 414 U.S. 291 (1973)).

¹⁰⁸ See 1979 House Hearings, *supra* note 12, at 160 (section-by-section analysis of Justice Department proposal).

B. *Invoking the Jurisdiction: Initiation, Removal—and Judicial Discretion?*

Normally, one who has a claim within federal jurisdiction may get into federal court simply by filing a complaint with appropriate allegations. With a multiparty, multiforum jurisdiction for scattered litigation problems, however, such a straightforward approach may not be the most desirable. It is one thing for the possibility of scattered litigation to exist; it is another matter for the threat to be significant or to actually ripen. If a plaintiff or plaintiffs have a choice between suing in multiple forums and suing in one, some of the same reasons that make a new jurisdiction desirable as a matter of policy—particularly economy from consolidation of related proceedings—will act as incentives to the parties and may induce them to bring all claims in a single court anyway. When that happens, no need to use a federal action-consolidating jurisdiction arises.

Yet if the federal jurisdiction were available, parties would often invoke it, just as now they often elect federal over state court in diversity actions.¹⁰⁹ To avoid burdening the federal courts with cases that are too minor or pose only slight dangers of serious scattering, some screening mechanisms almost certainly would be needed. One approach would be an explicit grant of some degree of discretion for federal courts to take or decline cases meeting the minimum requirements for the jurisdiction; another, to be used by itself or in combination with discretion, would be to employ some of the types of threshold criteria discussed in the preceding section.

Judicial discretion and the exercise of abstention are not usually regarded as consonant with the virtual mandate of the exercise of properly invoked federal court subject matter jurisdiction.¹¹⁰ Nevertheless, discretion might make sense for a new jurisdiction and would be unarguably legitimate if authorized by Congress.¹¹¹ If conferred in con-

¹⁰⁹ See 1979 House Hearings, *supra* note 12, at 260-64 (trial lawyers choose federal courts over state courts for a variety of reasons including preferences for federal judges, juries, and procedures; the federal court calendar; and geographical convenience); ALI STUDY, *supra* note 9, at 383 (parties often desire a federal forum for reasons that do not relate to the grounds for its establishment).

¹¹⁰ See, e.g., Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984). But see generally Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985) (The exercise of judicial discretion concerning jurisdiction has ancient common law roots in Anglo-American legal tradition; its use can help ease interbranch and intergovernmental tensions in the complex American governmental system.).

¹¹¹ Cf. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725-26 (1966) (pendent jurisdiction power exists when "the entire action before the court comprises but one constitutional 'case,'" but "pendent jurisdiction is a doctrine of discretion"); ALI

nection with invocations of the jurisdiction, such judicial discretion should probably reside in a single multijudge panel to ensure some regularity in its exercise, rather than in individual judges who might understandably want to decline authority over highly complex cases. Even if conferred on a panel, however, discretion to decline cases within the jurisdiction could be questionable because the decision would often call for an impossible degree of foresight about whether significant numbers of related cases were likely to be filed or not. Misjudgments on such questions could lead to wasted state court litigation and return trips to the panel. Discretion, then, might better be reserved for such post-jurisdictional decisions as consolidation and transfer, stays when a maverick party invokes federal jurisdiction though all others prefer state court, retention beyond pretrial stages, bifurcation, and remand for damage determinations.

Nondiscretionary threshold requirements could consist of a single set, as in the Justice Department and Kastenmeier proposals calling for twenty-five victims each with injuries exceeding \$10,000.¹¹² Or instead, a middle range of somewhat smaller cases might not be excluded entirely; rather, parties in such actions could be allowed to invoke the jurisdiction upon additional showings of need. The result would be a three-tier system with quite large cases qualifying automatically, medium-sized ones needing special showings, and small cases being excluded. For example, if such a limitation were not too administratively cumbersome, it might be desirable to require plaintiffs seeking to invoke the jurisdiction—at least in cases not involving many plaintiffs—to show why they could not bring the entire action in a single forum elsewhere.¹¹³ Similarly, a defendant in a middle-range case might have the right to invoke the jurisdiction by removal, upon actually being sued in

STUDY, *supra* note 9, at 29, 213-15 (proposing to codify judicial discretion in pendent jurisdiction cases).

¹¹² See H.R. 4315, *supra* note 10, § 3; H.R. 3690, *supra* note 10, § 4; 1979 House Hearings, *supra* note 12, at 158 (Justice Department proposal).

¹¹³ An illustrative type of case in which plaintiffs could show such reasons would be one in which the constitutional limits delineated in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), placed some defendants out of the reach of the only state court in which other defendants could be sued.

A danger of such threshold requirements, of course, is too much threshold litigation. Although we would hope that routine motion practice under Rule 12 could handle such matters without undue complication and expense, we have no strong views on whether the particular threshold requirement mentioned in the text should be part of a new federal jurisdiction. In contrast to the definitional issues discussed in Part III, in which we argued that one particular approach was clearly preferable, we regard most of the issues addressed in Part IV as ones for political judgments. Congress could, if it saw too great a danger of threshold litigation, keep the number and complexity of threshold barriers at a minimum.

different courts.¹¹⁴ The resulting structure would offer opportunities to invoke the jurisdiction to both plaintiffs and defendants under not entirely overlapping circumstances but with the distinctions existing to respond to the degree of need for the federal multiparty, multiforum jurisdiction.¹¹⁵

¹¹⁴ No hermetic division between plaintiffs and defendants could or should be fully maintained. Parties in complex litigation will sometimes be plaintiffs on one claim and defendants on another. Even a party making no claims for conventional relief might be a declaratory judgment or interpleader plaintiff. The sensible approach to such cases seems to be to allow removal to federal court under a multiparty, multiforum jurisdiction if a proper plaintiff in one forum finds itself a proper defendant on the same matter in another forum.

In addition, because parties can be adversely affected by dispersion of litigation when they are brought in as third-party defendants or by other joinder after initial filing, the present practice in many federal courts, allowing removal only by *original* defendants, would have to be changed for a multiparty, multiforum jurisdiction. See generally 1A J. MOORE, B. RINGLE & J. WICKER, *MOORE'S FEDERAL PRACTICE* ¶ 0.167[10] (2d ed. 1985) (discussing third-party claims and problems with removal).

The text does not consider the possibility of allowing removal if *different* defendants in related cases were sued in different courts. One passenger or survivor might sue the airline in one state while another sued the airplane manufacturer elsewhere. Removal for consolidation in the federal court system in such cases could be provided for if it were thought desirable, although it appears less crucial than if the same defendant faces scattered litigation. Conflicting factual findings, although not as intolerable as conflicting obligations, are more undesirable if reached about the same party than about different parties. It is also more reasonable to expect a single party to recognize and respond to the existence of scattered litigation than to expect two different companies' legal departments to get in touch with each other. Given the need for some time limit on removal, cf. 28 U.S.C. § 1446(b) (1982) (30 days), making defendants eligible to remove because someone *else* was sued and then telling them they had become ineligible because they did not learn of the other action in time would be unreasonable.

¹¹⁵ If the proposed jurisdiction sketched in the text seems already too much like a Rube Goldberg contraption, we ask for the reader's patience. Given the problems being addressed, a degree of complexity is inevitable. Nonetheless, the basic structure is relatively straightforward: automatic qualification for bigger cases that seem by their nature highly likely to lead to scattered litigation, and screening for need in smaller cases (down to some minimum, large enough to keep out minor matters). Plaintiffs in such smaller cases could demonstrate need by showing inevitability of scattering and defendants by pointing to its actuality. For illustrations of how the jurisdiction could work on the facts of two actual cases, see *infra* text accompanying notes 139-50. Moreover, a concern for complexity in a new jurisdiction should not blind us—as sheer habituation to the status quo may do—to the many arcane, pointless, and obscure complexities of existing practice under the general diversity jurisdiction. For a discussion of some of these problems, see Currie, *supra* note 28; Rowe, *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963 (1979). By contrast, any complex requirements of a new jurisdiction would serve a coherent and important purpose.

The basic structure we are suggesting could actually minimize the incidence of maneuver and purely procedural litigation. Larger cases eligible for automatic qualification will often involve scattered defendants anyway, making defendant-shopping ploys to ensure or prevent eligibility superfluous. Cases near the scale borderline would not be totally excluded because they might still qualify on a showing of need; the absence of automatic disqualification would reduce the consequences of failure to satisfy large-case scale requirements, making the issue of their satisfaction less crucial. Plain-

C. Joinder

Once the jurisdiction itself is defined, a basic choice is whether to force the joinder of all possible related litigation when the jurisdiction is invoked. The alternative is to leave the extent of joinder primarily to the initiative of the parties. In the case of plaintiffs, the extent of joinder will depend on whether they bring suit at all, with what co-plaintiffs, and whom they choose to name as defendants within the federal jurisdiction. Defendants' influence on joinder will depend mainly on their exercise of the rights to remove and seek consolidation. If a party not joined appears to be necessary under federal procedural rules,¹¹⁶ then once part of the case is in federal court it should be possible for joinder to proceed under Rule 19 as it now stands. As long as the statute creating the jurisdiction includes sufficiently broad provisions for process, venue, and transfer,¹¹⁷ joinder of indispensable and necessary absentees who could be found and had minimum contacts with the United States should be easy. Indeed, within the new jurisdiction, federal courts should rarely have to undertake the difficult analysis now required when a Rule 19(a) party cannot be joined.¹¹⁸ The legislation creating the new jurisdiction should eliminate two of the main reasons why joinder is often impossible at present: incomplete diversity and inadequacy of process provisions.

Beyond Rule 19(a) parties, however, are others whose joinder would be possible but not essential. If their joinder were left to party initiative, to some extent the purpose of the jurisdiction could be defeated—scattered litigation could continue, simultaneously or through

tiffs in smaller cases trying to show need for federal jurisdiction, but having engaged in questionable joinder, would risk weakening their own position. *Cf.* 28 U.S.C. § 1359 (1982) (denying federal jurisdiction in cases of improper or collusive joinder). Defendants actually facing scattered litigation should have no need to use questionable tactics. Finally, one form of "maneuver" would be far from objectionable: if plaintiffs in a smaller case wanted to keep a case in state court, they could "collude" to bring it there—thus assuring a single forum, the purpose of this new jurisdiction.

¹¹⁶ See FED. R. CIV. P. 19.

¹¹⁷ Several such provisions, which seem to present no great complexity, in addition to those discussed in the text would have to be part of a statute creating a multiparty, multiforum jurisdiction. Discussion of them here probably would be more tedious than informative; we include them, along with brief commentary, in our proposed draft statute contained in the Appendix.

¹¹⁸ See, e.g., *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 108-09 (1968) (recognizing a court's difficulty in deciding to dismiss an action in the absence of a person who "should be joined if feasible" or to proceed without that person); see also FED. R. CIV. P. 19(b) and advisory committee's notes (1966) (when 19(a) joinder is not feasible, court must consider four factors listed in 19(b)—prejudice to absent party, possibility of lessening such prejudice, adequacy of judgment in absence of party, and adequacy of plaintiff's remedy in case of dismissal—to determine whether in equity and good conscience, it should dismiss that action or allow it to proceed).

the filing of later actions. Although dispersion of related litigation stems from scatter among forums (geographically or systemically as between federal and state systems), scatter in time, or both, our primary focus is the definition of a federal jurisdiction to deal with litigation scattered among forums. A jurisdiction defined as we suggest should be able to accommodate either permissive or mandatory approaches to issues of joinder in order to deal with geographical *and* temporal scatter. We will, however, offer some observations on the considerations that might appropriately influence responses to these problems.

As for litigation scattered among forums at the same time, we favor leaving joinder to party initiative. If the system offers parties the chance to invoke a federal action-consolidating jurisdiction, but they prefer to exercise their forum and joinder choices in favor of scattered litigation, that is their right. This conclusion seems particularly justified if the jurisdiction provides for defendants to remove and seek consolidation whenever they face the actuality of scattered litigation coming within the terms of the federal jurisdiction. Defendants will have the power to keep scattered litigation from being imposed on them and, presumably, in most cases will use it. If, for whatever reason, a defendant is content to face litigation in multiple forums, there is no strong reason to oblige the federal courts to override the forum choices of the parties themselves.¹¹⁹ This view is not, of course, the only plausible one; Professor McCoid, for instance, tentatively inclined in the interest of judicial economy to favor court authority to insist upon mandatory joinder although "the parties are indifferent or even opposed to it."¹²⁰ Again, our basic jurisdictional definition could accommodate whichever approach were deemed preferable.

Litigation scattered in time introduces additional factors that make the case against overriding party preferences stronger, at least as far as

¹¹⁹ The reasons for litigants' mutual choices in favor of scattered but smaller proceedings are often good ones, such as a preference for greater control and less complexity in individual cases. When *both* sides seem to share a preference not to invoke an action-consolidating federal jurisdiction, it is all the more probable that such reasons underlie their forum choices and that the system should respect those choices. *See, e.g., In re Asbestos & Asbestos Insulation Material Prods. Liab. Litig.*, 431 F. Supp. 906, 910 (J.P.M.D.L. 1977) (the unanimous opposition of the parties to transfer, though not by itself determinative, "is a very persuasive factor in our decision to deny transfer . . ."). *See generally* D. HERR, *supra* note 26, §§ 5.6.3, 5.7.4 (the views of the parties are a factor in deciding whether transfer is appropriate, and unanimous opposition of the parties militates strongly against transfer). Additionally 28 U.S.C. § 1407(a) (1982) requires that the transfer be "for the convenience of the parties and witnesses." Transfer over the objection of all parties would probably not be for their convenience.

¹²⁰ McCoid, *supra* note 32, at 728; *cf.* Mullenix, *supra* note 51, at 1066-68 (for proposed mass-tort class action act, suggesting mandatory joinder but with opt-in or opt-out requirements).

the working of a federal multiparty, multiforum jurisdiction is concerned. Mandatory joinder of a prospective plaintiff who has not chosen to bring suit gives a defendant, in effect, the right to seek a declaratory judgment of nonliability.¹²¹ That may or may not be a good idea: Mandatory joinder of prospective plaintiffs can be advantageous in that it consolidates cases and prevents relitigation of the same issues; it may be disadvantageous in forcing litigation of claims that might otherwise remain dormant. But regardless of the view taken toward such mandatory joinder, whether or not to allow it is a question of substantive import. At least for state law claims, we suggest that a federal action-consolidating jurisdiction should go only so far as to make possible the joinder of cases brought under existing substantive and procedural law.

D. Choice of Law

Some of the thorniest issues in both the framing and the operation of a federal multiparty, multiforum jurisdiction may arise from choice of law problems. Because the cases would all be multistate by definition, a great many would require choices among possibly applicable and conflicting state or even foreign law rules. As have others treating similar problems, we favor a federalized choice of law regime. Before we explain our reasons, however, some background may be useful on choice of law doctrines for federal courts applying state law.

The starting point on federal court choice of state law is *Klaxon Co. v. Stentor Electric Manufacturing Co.*,¹²² which held that in diversity cases a federal court must follow the conflicts law of the forum state.¹²³ While often criticized,¹²⁴ this rule has a good deal to recommend it, particularly when a federal court is primarily acting as another court of the state, as is true in diversity cases. It furthers the policy of *Erie Railroad Co. v. Tompkins*¹²⁵ of preventing federal diversity jurisdiction from erecting a different regime of substantive law available to those who can get into federal court. The rule also discourages *intrastate* (between federal and state court) forum shopping,

¹²¹ See generally F. JAMES & G. HAZARD, CIVIL PROCEDURE § 11.24, at 636 (3d ed. 1985) (action seeking declaratory judgment of nonliability is available in some circumstances to defendants facing multiple claims, but is rarely used).

¹²² 313 U.S. 487 (1941).

¹²³ See also *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3 (1975) (per curiam) (summarily reaffirming *Klaxon* in an extreme case in which forum state's conflicts law appeared to require application of Cambodian substantive law).

¹²⁴ See, e.g., C. WRIGHT, *supra* note 70, § 57, at 369; sources cited in *id.* at 369 n.24.

¹²⁵ 304 U.S. 64 (1938).

though interstate forum-shopping possibilities will always exist whatever the policy of the federal courts.¹²⁶

Yet merely because a federal court applies the law of a state does not necessarily mean that it is largely acting as a surrogate state court. The federal court plays a different role, for example, if federal statutory interpleader serves its original purpose of providing a forum when no state court can bring all the scattered claimants together, or if a multiparty, multiforum jurisdiction provides an otherwise unavailable single forum. In such situations, the *Klaxon* rule is subject to serious criticism for creating the possibility of applying to some litigants a substantive state law regime that could not, but for the federal jurisdiction, have governed them—much the sort of thing *Erie* meant to avoid. It makes little sense to oblige the federal court to follow the conflicts law of a state in whose courts it might not even have been possible to bring the case.¹²⁷

In addition, the unavailability of a single state forum in some federal statutory interpleader situations reduces the possibility of “vertical” intrastate forum shopping between federal and state courts; a similar condition would often exist in cases under a multiparty, multiforum jurisdiction as well. Yet tying choice of law to local rules, as *Klaxon* does, makes possible “horizontal” forum shopping among federal courts in different states that would not take place under a uniform federal approach. For these reasons, commentators have reacted with unanimous hostility to the Supreme Court’s seemingly uncritical extension of the *Klaxon* rule to statutory interpleader in a companion case to *Klaxon* itself, *Griffin v. McCoach*.¹²⁸ For the same reasons, the ALI proposal was on firm ground when it suggested a federalized choice of law regime for its proposed dispersed necessary parties jurisdiction: “Whenever State law supplies the rule of decision on an issue, the district court may make its own determination as to which State rule of decision is applicable.”¹²⁹ Similarly, these arguments support federal-

¹²⁶ Cf. Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 715 n.125 (1974) (given possibilities of “horizontal uniformity among all federal courts and vertical uniformity between the federal and state courts of a given state[,] . . . the promotion of one kind of uniformity inevitably sacrifices the other . . .”).

¹²⁷ See, e.g., Abraham, *supra* note 78, at 528 (to do so might extend “the law of the state where the court is located to persons over whom that state has no jurisdiction”).

¹²⁸ 313 U.S. 498 (1941). For examples of the critical commentary, see 3A J. MOORE & J. LUCAS, *MOORE’S FEDERAL PRACTICE* ¶ 22.14[5], at 22-138 to -140 (2d ed. 1986); 7 C. WRIGHT, A. MILLER & M. KANE, *supra* note 69, § 1713, at 579-80; *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 924-26 (1958).

¹²⁹ ALI STUDY, *supra* note 9, at 73 (proposed 28 U.S.C. § 2374(c)); see also *id.* at 402-04 (commentary on proposal), 442-48 (memorandum supporting constitutional-

ized choice of law in a multiparty, multiforum federal jurisdiction.

For such a jurisdiction, however, the situation would be more complex than under the ALI proposal. That proposal's narrowness, requiring a finding that the necessary parties were "not all amenable to process of any one territorial jurisdiction,"¹³⁰ meant that cases within its scope could *not* have been brought before any single state court. We are considering a broader jurisdiction that would include some cases that might have been brought in one state court, but could use the federal forum either because their scale made it unlikely that the parties would agree on a state forum or because scattered litigation had actually arisen, perhaps in different state courts.¹³¹ In such cases it might be unfair to deprive a plaintiff of the law whose application she had "earned" by a proper filing in state court.¹³² Given the large numbers of parties, original filings and cross-filings in various state and federal courts, removals, transfers, and remands, conflicts problems could be numerous and exquisitely difficult. This complexity, however, probably says more about the state of conflicts doctrine than about the feasibility of an action-consolidating jurisdiction.¹³³

For such a federal jurisdiction, the resolution of these complexities may lie in federalized choice of law with authorization to the federal courts to develop special choice of law principles for cases within the jurisdiction. At the same time, Congress might include either in legislative history or in the statutory text factors that federal courts should consider in making their conflicts decisions.¹³⁴ Such a listing of factors would avoid the rigidity and unsatisfactory results that might flow from

ity of independent federal court choice of law).

¹³⁰ *Id.* at 67 (proposed 28 U.S.C. § 2371(a)).

¹³¹ See, e.g., *In re Northern Dist. Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 849 (9th Cir. 1982) (scattered litigation in various state as well as federal courts), *cert. denied*, 459 U.S. 1171 (1983).

¹³² See *Phillips Petroleum Co. v. Shutts*, 105 S. Ct. 2965, 2980 (1985) ("When considering fairness in [the] context [of interstate law choice], an important element is the expectation of the parties."). But see Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 696-701 (1984) (arguing that concerns underlying venue provisions have little connection to factors that should influence conflicts decisions).

¹³³ Cf. Abrams, *supra* note 78, at 53-54 (although possible changes in federal jurisdiction "will require abandonment if no choice of law rule can prevent consequences so harmful as to outweigh the benefits, . . . adoption of a federal choice of law rule applicable in all cases is not so unattractive as to scuttle the whole enterprise of altering federal assertions of judicial power"). Nor should it be assumed that conflicts problems would always be tortuously complex; often in mass tort cases, "the court may find . . . that the same law governs all cases . . ." MANUAL, *supra* note 26, § 33.23, at 297.

¹³⁴ Cf. ALI STUDY, *supra* note 9, at 403-04 (discussing factors that should influence federal law choice under ALI's proposed jurisdiction).

legislative efforts at simply prescribing governing conflicts law. A non-exhaustive list of relevant factors would include: unfairness to litigants through change in law following change in forum; the forums in which the litigation was or might have been brought, the interests underlying their respective policies, and whether their conflicts rules might all have yielded the same substantive law; and the danger of creating incentives for undesirable forum shopping through differences in substantive law.¹³⁵

The 1979 Justice Department proposal provided for federalized choice of law rules, but only in part: if a case within the multiparty, multiforum jurisdiction were one in which a *transfer* between federal courts had taken place to consolidate the litigation, then the transferee court would determine the source of the applicable law, with the same substantive law to govern both transferred cases and those originally filed in the transferee court.¹³⁶ No such provision was made for cases *originally* filed within the jurisdiction. There appears to be no reason for the transferred-original distinction, and even the same-law provision is open to question. Uniformity of applicable law is certainly desirable;¹³⁷ it could be an additional factor for a federal court to consider seriously in making choice of law decisions. An inflexible rule requiring it, however, ignores possible reasons for differences in governing law. Such reasons include the possible legitimacy of expected application of the law governing in the state courts where an action was properly filed and the avoidance of incentives to dispute transfers because of possible changes in governing law.¹³⁸

¹³⁵ For arguments that in some mass tort cases the federal courts should develop and apply substantive federal common law, see Mullenix, *supra* note 51, at 1077-79 & n.201; Vairo, *Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role for Federal Common Law?*, 54 *FORDHAM L. REV.* 167 (1985). Nothing in this article precludes this possibility should Congress or the federal courts find the arguments for it persuasive.

Even short of a substantive federal common law, the debates among conflicts scholars about the exact content of a federalized law choice regime would no doubt be intense; this article with its primarily jurisdictional focus is not the place to attempt to resolve them. For our purposes, it suffices to note the reasons why the *Griffin* requirement of following forum state conflicts rules should not govern. Beyond that, disagreements might be so fierce that the best approach would be simply to authorize the federal courts to develop a decisional conflicts law for cases within the jurisdiction. For further discussion of the issues involved in framing a federal conflicts statute for such a jurisdiction, see Miller & Crump, *supra* note 72, at 78-79.

¹³⁶ See 1979 *House Hearings*, *supra* note 12, at 159 (proposed amendments to 28 U.S.C. § 1407). The 1983 and 1986 Kastenmeier bills have contained the same provision. See H.R. 4315, *supra* note 10, § 3(c); H.R. 3690, *supra* note 10, § 4(c).

¹³⁷ Cf., e.g., R. MARCUS & E. SHERMAN, *supra* note 79, at 327 (1985) (asking whether uniform rule could solve law choice problems in complex cases).

¹³⁸ An additional reason for not insisting on uniform law would arise in cases like *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), in which part of a

The 1979 proposal's distinction in conflicts treatment between cases involving and not involving transfers seems quite arbitrary and unjustifiable. There is no apparent reason why the lack of need for transfer should leave the *Klaxon* rule governing in a case that was impossible to bring in the courts of the forum state. The distinction could, in addition, create incentives for procedural maneuver and litigation over transfer issues inspired by law change possibilities. Federalized choice of law in a multiparty, multiforum jurisdiction should thus apply to *all* cases properly within the jurisdiction.

E. *Two Examples: Tashire and the Skywalk Litigation*

To demonstrate the basic workings of the proposed federal jurisdiction, we apply its principles to the facts of two cases familiar to many. The first illustration is *State Farm Fire & Casualty Co. v. Tashire*,¹³⁹ the Supreme Court decision that clipped the wings of federal statutory interpleader as an action-consolidating device. The case arose out of a bus-truck collision in northern California, with at least thirty-six potential plaintiffs in the bus. Eleven of the potential plaintiffs were Canadians, and the rest were citizens of five American states. One Canadian and one American passenger were killed; thirty-three passengers and the bus driver, a citizen of Oregon, were injured. The driver of the truck and its passenger-owner, both Oregonians, were also injured. State Farm, the truck driver's insurer, was an Illinois corporation; Greyhound Lines, owner of the bus, was incorporated in California.¹⁴⁰

If all defendants had been Californians, then because the accident occurred there as well, under our proposal (assuming for the moment the abolition of general diversity) the California state courts would have been the only possible forum, despite the several citizenships among the potential plaintiffs. But because the actual case involved both multistate defendants and an event occurring in a state (California) other than that of the residence of some appropriate defendants (Oregon, and probably Illinois as well), plus a large number of plaintiffs seriously

dispute could have been brought in the courts of the forum state and part could not. For the part that could not have been brought there, scant reason might support the application of forum state law. See *supra* note 127 and accompanying text. Yet for the part that could have been brought there, especially if the event and defendant were local (such as an in-state driver of the other car), application of any law other than that of the forum state would make even less sense. But see 1979 House Hearings, *supra* note 12, at 161 (Justice Department analysis of proposed jurisdiction, arguing for uniformity in applicable law to avoid possible inconsistent adjudications on merits).

¹³⁹ 386 U.S. 523 (1967).

¹⁴⁰ See *id.* at 525.

injured or claiming for others deceased, it would have been an ideal case for initial invocation of federal multiparty, multistate jurisdiction by any appropriate plaintiff. In the actual litigation, four injured passengers brought suit in California state court against all the likely defendants except State Farm. If everyone were content to conduct the action there, both present federal jurisdiction and our proposed multistate forum would, of course, allow that. Given the scale of the potential litigation, however, it would also have been a logical candidate for removal by any defendant from California state to California federal court under a federal multiforum jurisdiction.¹⁴¹

The actual litigation at first remained in the California state court. State Farm, the Illinois insurer, which had a relatively small policy insuring the Oregon truck driver for bodily injury liability, then brought a federal statutory interpleader action in Oregon against all claimants in order to determine and limit its liability.¹⁴² At that point, if the entire case were not already in federal court, under a multiparty, multiforum jurisdiction at least the truck owner and the driver (now facing suit in California state court and Oregon federal court on the same occurrence) would be able to remove the California case to federal court there. The truck owner and driver could then seek and almost certainly obtain consolidation of the two proceedings, with the combined litigation most likely assigned to the federal district embracing the site of the accident. If severance of any individual claims or of damage determinations after pretrial proceedings or liability rulings were called for, the federal court should have authority to take such steps, including remanding to state courts in which cases had been properly brought. This overall approach could bring the federal system much nearer than it is today to solving "the vexing problems of multiparty litigation arising out of a mass tort."¹⁴³

The more recent skywalk litigation provides an opportunity to view the possible workings of a multiparty, multiforum jurisdiction from several angles. After the collapse in 1981 of the skywalks in the Kansas City Hyatt Regency Hotel, which killed more than a hundred

¹⁴¹ In a multiparty, multiforum jurisdiction even home-state corporation Greyhound should be able to remove, although it could not do so under the present diversity jurisdiction even if there were complete diversity. *See* 28 U.S.C. § 1441(b) (1982) (forbidding removal in diversity cases if any defendant properly joined and served is forum state citizen). Since the common rationale for diversity jurisdiction is the protection of out-of-staters from home-court bias, the present removal ban has some logic. But, because the concern underlying the proposed jurisdiction is not prejudice against outsiders, but rather the prevention of scattered litigation, the prohibition on removal by home staters should not apply to cases within the proposed jurisdiction.

¹⁴² *Tashire*, 386 U.S. at 525-26.

¹⁴³ *Id.* at 535.

people and injured over two hundred others, plaintiffs filed numerous state law claims in Missouri state court and a smaller number in Missouri federal court.¹⁴⁴ The state and federal courts cooperated for a time in managing the litigation; however, the federal district court then attempted full consolidation by certifying a class action,¹⁴⁵ which froze the state court proceedings for six months.¹⁴⁶ The Eighth Circuit reversed because it viewed the federal court's action as constituting an injunction against state proceedings in violation of the federal anti-injunction act.¹⁴⁷ Litigation then continued in both forums, with a mixture of intersystem cooperation and conflict.¹⁴⁸ Eventually, class settlements (after the Eighth Circuit reversal, the federal district court certified a nonmandatory class) were reached in both state and federal courts.¹⁴⁹

Under the new federal jurisdiction, split litigation over the skywalks disaster could have been avoided whether the present diversity jurisdiction survived or not. With general diversity continued, the minimal diversity feature of the new jurisdiction would have permitted non-diverse plaintiffs to join in bringing the action in federal court and defendants to remove from state court if sued there. (Were any actions filed in the courts of *other* states, defendants already sued in the main

¹⁴⁴ See Morris & See, *The Hyatt Skywalks Litigation: The Plaintiffs' Perspective*, 52 UMKC L. REV. 246, 246, 254 (1984) (stating that there were a total of 18 cases on file in federal court in late 1981, as compared to the 100 to 200 cases pending in state court at various times. Because both Missouri and Kansas corporations were potential defendants, the great majority of victims, residents of Missouri or Kansas, lacked the requisite diversity of citizenship for federal court jurisdiction, so that only state court was open to them.).

¹⁴⁵ See *id.* at 254, 259-60 (stating that cooperation through a joint plaintiffs' liaison committee permitted "a massive discovery effort . . . applicable to all cases in both courts" for the first six months of the litigation until the federal court certified a mandatory class action in January 1982).

¹⁴⁶ See *id.* at 260. The authors note:

The certification of the mandatory class created a permanent and sometimes bitter division between the federal court and the overwhelming majority of skywalks victims whose cases were pending in state court. Because of the federal court's action, state court plaintiffs could neither settle nor continue the massive discovery activity conducted during the previous six months. Their attorneys, who had spent thousands of hours reviewing documents and preparing for depositions, suddenly had no role in determining how discovery or a trial on behalf of their clients would be conducted. Attorneys who represented a total of two victims now controlled the litigation.

Id.

¹⁴⁷ *In re Federal Skywalk Cases*, 680 F.2d 1175, 1181-83 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982).

¹⁴⁸ See Morris & See, *supra* note 144, at 263-71; Student Project, *A Case Study in Mass Disaster Litigation*, 52 UMKC L. REV. 151, 167-72 (1984).

¹⁴⁹ See Morris & See, *supra* note 144, at 267-71.

federal action could remove and seek transfer for consolidation with the main action.) And with general diversity abolished, assuming that the claims were under state law, they might all have been brought in Missouri state court, in which case no dispersion problem would arise. If some plaintiffs sued in the courts of other states, the defendants sued in both forums could then remove all cases from state to federal courts and seek their consolidation.¹⁵⁰ The unification of the litigation in one forum, state or federal, should prevent many of the problems that arose in the actual skywalk cases, and it would permit a single court to consider class treatment free from concern over the impact of certification on proceedings in other forums.

V. RELATION TO EXISTING FEDERAL JURISDICTIONS

A. *Federal Question Jurisdiction*

Our discussion thus far has focused on scattered litigation problems arising in state law or diversity cases. But just as an ordinary federal question case today may happen also to satisfy the requirements for diversity jurisdiction, dispersed federal question actions could similarly meet the criteria for the new federal jurisdiction. If and only if such a case did so, it could qualify for the new jurisdiction and make use of its provisions without regard to the source or sources of law upon which the claims in the case rested. If the new jurisdiction were defined with a careful eye to the purpose of a federal action-consolidating device—making it possible to gather scattered, related litigation—the substantive law involved should be irrelevant to the availability of the federal forum. If a federal question case did not satisfy the criteria, it would not have enough need for the new jurisdiction; if it did meet the jurisdictional standards, it could use the mechanisms afforded by the jurisdiction regardless of its federal question nature.

A precedent for such an approach to federal question matters is the current section 1407 of the Judicial Code, which authorizes transfer for *pretrial* proceedings in civil actions involving common questions of fact pending in different federal districts. Such transfers are available without regard to the source of the right claimed and are used in diversity and federal question matters alike.¹⁵¹ To a considerable extent, ex-

¹⁵⁰ If the filings were mostly in the courts of one state, some provision perhaps should be made for discretionary remand of the entire consolidated action to that state's courts.

¹⁵¹ See, e.g., *In re Baldwin-United Corp. Litig.*, 581 F. Supp. 739 (J.P.M.D.L. 1984) (consolidating annuity purchasers' actions alleging fraud and federal and state securities laws violations); *In re Air Crash Disaster at Covington, Kentucky*, on June

isting section 1407, especially if used in combination with authority under section 1404 to transfer some cases for *trial*, handles for federal question cases the problems to which our proposal responds. It cannot do so entirely, however, at least for federal question cases over which state courts have concurrent jurisdiction. Even if section 1407 were expanded to allow for trial as well as pretrial proceedings, as long as it remains the rule that all defendants must join in a removal petition under section 1441¹⁵² some defendants may find themselves stuck in state courts even though they face scattered federal question claims and wish to remove. The primary need for a multiparty, multiforum jurisdiction, of course, exists in state law matters, which can sometimes be brought only in state courts or—given the present structure of the general diversity jurisdiction—must be split between state and federal courts.

B. *General Diversity of Citizenship Jurisdiction*

Those who favor retaining the present general diversity jurisdiction sometimes contend that it plays the sort of role we propose for a federal multiparty, multiforum jurisdiction, by making possible at least

2, 1983, 579 F. Supp. 1057 (J.P.M.D.L. 1984) (consolidating actions, many against Air Canada by Americans so diversity jurisdiction presumably was present, arising out of an in-flight fire); *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 568 F. Supp. 1250 (J.P.M.D.L. 1983) (consolidating securities laws actions). *See generally* D. HERR, *supra* note 26, § 5.4.2 (canvassing types of cases transferred, including matters mainly governed by federal law such as securities, antitrust, patent, labor, and discrimination actions, and litigation commonly under state law such as mass torts and products liability cases).

Because § 1407 authorizes consolidation of cases involving common questions of fact without the further relatedness requirement that they arise out of the same transaction or occurrence or series of transactions or occurrences, its coverage goes beyond what we suggest for a new federal jurisdiction. The existing provision thus would not be entirely superseded by our proposal. Indeed, § 1407 may bear expanding beyond its present availability for coordinated or consolidated *pretrial* proceedings. Representative Kastenmeier also introduced in 1983 a bill that would permit transferee courts to retain transferred actions for determinations of liability and, upon findings of convenience for parties and service to the interests of justice, damages as well. H.R. 4159, 98th Cong., 1st Sess. (1983).

¹⁵² *See, e.g.*, C. WRIGHT, *supra* note 70, § 40, at 227. For a multiparty, multiforum jurisdiction this rule would have to be abandoned. Permitting a single defendant who prefers state court to bar removal by other defendants facing scattered litigation would defeat the purposes of the jurisdiction. Severance and remand as to defendants who did not join in removing, if the whole action rather than just claims against a removing defendant were removed, might remain in the discretion of the federal courts after removal. Precedent for not applying the all-defendants requirement to situations in which it conflicts with apparent congressional intent exists in practice under the separate claim removal provision, 28 U.S.C. § 1441(c) (1982). *See* 14A C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3731, at 507-08 n.9 (2d ed. 1985).

consolidated pretrial proceedings via the use of section 1407 when diversity cases are initially dispersed among federal courts.¹⁵³ The argument is that the valuable function of permitting consolidation of related state law cases scattered among federal courts in litigation over such matters as airline crashes, now performed by the diversity jurisdiction, would be lost if it were abolished.¹⁵⁴ The point is technically correct as far as it goes, but it could fairly count against abolition only if diversity were not replaced with a jurisdiction that would itself permit the same or greater consolidation. The argument also ignores the extent to which present diversity jurisdiction fails to serve its ostensible purposes and, in fact, is part of the scattered litigation problem.¹⁵⁵

Practitioners understandably find attractive the forum choices and possibilities for maneuvering that diversity jurisdiction creates. A rationalized federal multiparty, multiforum jurisdiction, however, offers much that the bar—not to mention the clients it serves—should find attractive as a supplement to or replacement for general diversity. The assurance of being able to bring a complex case in or remove it to an action-consolidating federal forum, instead of having to worry about a litigation split among several courts with the dangers of inconsistency and greater expense, should be of great value. Even if general diversity were abolished, many cases that now come within that jurisdiction would still come under a multiparty, multiforum provision—in full, rather than in part, as is often the case today. Those cases that now come before federal courts because of diversity but that would no longer qualify for the federal forum upon its abolition would usually be procedurally simpler matters that have the very least need to be in federal

¹⁵³ See, e.g., Mullenix & Shepherd, *For the Retention of Diversity Jurisdiction*, 65 A.B.A. J. 860, 860 (1979) (arguing that abolition or curtailment of diversity jurisdiction would result in the loss of "the machinery available under 28 U.S.C. § 1407 for pretrial consolidation of multidistrict litigation involving mass disasters . . . when diversity is the only basis for federal jurisdiction.").

¹⁵⁴ See *Diversity of Citizenship Jurisdiction—1982: Hearing on H.R. 6691 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 123, 126 (1982) (letter from Robert D. Evans to Chairman Robert W. Kastenmeier); 1979 *Senate Hearings*, *supra* note 12, at 166 (statement of Prof. John Reed); Mullenix & Shepherd, *supra* note 153. *But cf.* Schroeder, *supra* note 61 (suggesting state laws providing for interstate transfer and pretrial consolidation of related cases pending in different states).

¹⁵⁵ See *supra* text accompanying notes 64-68.

In the interest of full disclosure, we should perhaps mention that the senior co-author of this article has previously advocated the abolition of diversity jurisdiction. See 1979 *House Hearings*, *supra* note 12, at 72-94 (testimony of Prof. Thomas D. Rowe, Jr.); Rowe, *supra* note 65; Rowe, *supra* note 115. The desirability of a federal action-consolidating jurisdiction, however, is a separate question; general diversity could either coexist with or be replaced by the new jurisdiction. See *infra* text accompanying notes 156-57.

court.

Should these benefits of a new multiparty, multiforum provision not be enough to warrant abolition of diversity, the proposed jurisdiction would still be well worth adopting alongside existing general diversity. The continuation of diversity should pose no unique or insuperable problems for a new jurisdiction; the additional provision could, indeed, deal well with the splitting of cases between federal and state courts that diversity jurisdiction now intensifies. A defendant sued by a cocitizen in state court and on a related matter by an out-of-stater in federal court would have the right to remove and join the cases in federal court.¹⁵⁶ The expansion of federal jurisdiction would give cause for some concern about docket congestion, but most of the time a multiparty, multiforum provision should add only *parties* to a litigation part of which would already be before federal courts under diversity jurisdiction. And finally, the occasion of creating a new jurisdiction might be the moment for a long-overdue increase in the amount in controversy required for general diversity cases.¹⁵⁷

CONCLUSION

The proposal for a federal multiparty, multiforum jurisdiction attempts to meet a growing need to deal with problems of scattered litigation. The Supreme Court's decision in *World-Wide Volkswagen Corp. v. Woodson*¹⁵⁸ has heightened that need by making it clear that state court systems lack constitutional authority to respond adequately to the problem. The benefits of such a jurisdictional measure should have broad appeal, for use of the federal forum to deal with scattered litigation is an appropriate expenditure of a uniquely federal resource.¹⁵⁹

¹⁵⁶ Such a provision would reduce the effect of the complete diversity rule by permitting eventual consolidation of incomplete diversity cases in federal court. It would not, however, negate the thrust of the complete diversity rule. To begin with, if removal were allowed only when the *same* defendant faced related claims in different forums, cases involving a single plaintiff claiming against *more than one* defendant would not be affected. Normally, such a plaintiff could still bring and keep a multidefendant case together in state court or split the litigation between state and federal courts without possibility of removal by the state court defendants, as is most often true today. In a multiplaintiff incomplete diversity case, if the plaintiffs wanted to avoid giving the defendant the tactical advantage of a choice between split litigation and consolidation in federal court, they would have to join forces and bring all claims in the same state court, thus unifying the litigation.

¹⁵⁷ The last change in the amount in controversy requirement for diversity matters occurred nearly 30 years ago. In 1958, the minimum amount was raised from \$3,000 to \$10,000. *See* Act of July 25, 1958, Pub. L. 85-554(a), 72 Stat. 415 (currently codified as 28 U.S.C. § 1332 (1982)).

¹⁵⁸ 444 U.S. 286 (1980).

¹⁵⁹ *Cf.* H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 149-50 (1973)

Lawyers should welcome the opportunities made possible by the new jurisdiction; clients should welcome a reduction of the travails of scattering in addition to the usual burdens of litigation. Academics—and perhaps even their students—could be pleased with the creation, at long last, of a rationalized jurisdiction responsive to a coherent need in place of or alongside the present patchwork. Because the federal courts already deal with large segments of many scattered proceedings, the added burden on them should not be major. The new jurisdiction could actually simplify some complex federal litigation, and the federal caseload might further be reduced by curtailing or abolishing diversity. The federal system can do much better than it now does with the problem of scattered litigation; a new federal jurisdiction should be part of the solution.

(supporting retention of alienage jurisdiction and statutory interpleader while at the same time calling for abolition of general diversity jurisdiction as an inappropriate use of "scant federal judge-power").

APPENDIX

DRAFT PROVISIONS FOR FEDERAL MULTIPARTY, MULTIFORUM
JURISDICTION

28 U.S.C.

§ 1367. *Multiparty, multiforum jurisdiction*

(a) *The district courts shall have original jurisdiction of civil actions arising out of the same transaction, occurrence, or series of related transactions or occurrences, if:*

COMMENT on § 1367(a): The basic phrasing above is taken partly from the 1979 Justice Department proposal, most readily accessible in 1979 *House Hearings*, *supra* note 12, at 158-59, and partly from Federal Rule of Civil Procedure 20(a) on permissive joinder. This *jurisdictional* provision lacks the additional Rule 20(a) *joinder* requirement of a common question of law or fact so as to allow broader invocation of the jurisdiction, with the joinder rules remaining applicable to the grouping of actions, claims, and parties within the jurisdiction.

- (1) *any party is a citizen of a State and any adverse party is—*
(A) *a citizen of another State;*
(B) *a citizen or subject of a foreign state; or*
(C) *a foreign state, as defined in section 1603(a) of this title;*
and

COMMENT on § 1367(a)(1): This subsection simply attempts to put into statutory language the constitutional minimal diversity requirement, authorizing exercise of the jurisdiction in all cases in which this requirement (along with those that follow) is satisfied but in no others. In a very few cases that meet the remaining requirements of draft § 1367(a)-(b), minimal diversity might be lacking. *See supra* note 89. To avoid possible unconstitutional applications, this subsection hangs the statute squarely on its constitutional peg.

- (2) (A) *any defendant resides in a State and—*
(i) *a substantial part of the acts or omissions giving rise to the action occurred in any other State, even if a substantial part of such acts or omissions also occurred in the State where such defendant resides; or*
(ii) *any other defendant resides in a different State, or*
(B) *a substantial part of the acts or omissions giving rise to the action occurred in two or more different States.*

COMMENT on § 1367(a)(2): This subsection, particularly its subpart (A)(i), embodies the heart of our proposal. It attempts to capture in statutory form the condition that we argue should be necessary (but not sufficient) for the exercise of a federal multiparty, multiform jurisdiction—any defendant's residency in a state other than one in which a substantial part of the acts or omissions giving rise to the action occurred. Because that condition is covered in subpart (A)(i), for most purposes subpart (A)(ii) would be superfluous. It is included primarily for clarity and administrative ease, to make it unnecessary to consider issues about where events occurred when defendants have residences in different states and scattered litigation is thus possible. Subpart (A)(ii) does, however, deal with one situation not covered by subpart (A)(i): cases in which all events took place abroad but litigation in American courts is possible because defendants reside in different American states. For a somewhat converse and probably also unusual situation, subpart (B) confers subject matter jurisdiction in cases involving non-resident defendants and events that occurred in two or more American states.

Reference to a defendant's *residence*, rather than citizenship, is necessary for the subsection to encompass United States citizens and resident aliens alike and also because residence is traditionally one of the principal factors in the venue statutes determining where suit can be brought. Residence would thus draw on judicial constructions of that term in the venue statutes and, for United States citizens, should coincide with state citizenship. Possible multiple residence of corporate defendants should not be a problem because a case involving an event in one of a corporation's states of residence could still present a threat of scattered litigation, with the corporation also suable on the event in another state or states of its residence; such situations would come within the definition in this subsection. If specific definition of corporate residence were thought necessary, one approach appears in the ALI's proposed 28 U.S.C. § 2372(b).

The draft statute deals only with scattered litigation resulting from dispersed *events* or *defendants*. If general diversity jurisdiction is abolished, these situations should be the only sources of scattered litigation. But diversity jurisdiction makes it possible for litigation to be split vertically between state and federal courts of the same state, even if all events and defendants are entirely local. Hence, if diversity and the new jurisdiction were on the books at the same time, a special provision might be desirable to deal with such vertical dispersion. Such a provision could be a scattered-victims clause in the original definition of the jurisdiction, such as that found in the Justice Department and Kas-

tenmeier proposals. *See supra* notes 84, 90. Perhaps preferably (to respond only to *actual* dispersion), it could allow removal even without original jurisdiction in the special circumstances of vertical split without scattered events or defendants, provided that the cases satisfied the scale and minimal diversity requirements of the original dispersed-litigation jurisdiction.

(b) The jurisdiction created by subsection (a) may be invoked only [if the action involves claims for personal injury or injury to property and] in the following circumstances:

COMMENT on § 1367(b): Without further limitation, § 1367(a) could bring into the federal courts trivial matters and cases in which the danger of scattered litigation was only theoretical. Because it states the conditions in which such litigation is possible and within the constitutional authority of the federal courts, however, § 1367(a) could remain unchanged if other subsections were amended in the future to respond to experience and the needs of courts and litigants. Section 1367(b) offers one set of possible limitations within the core definition, drawing on our suggestion that the jurisdiction be automatically available in large cases, *see infra* subsection (1), and in somewhat smaller ones only if scattered litigation were unavoidable, *see infra* subsection (2)(A), or had actually arisen, *see infra* subsection (2)(B). If coverage of the somewhat smaller cases were viewed as nonessential or the effort to take them into federal court irremediably complex, subsection (2) below could be dropped or amended to include an element of judicial discretion. Reference to types of claims, drawn from the Justice Department proposal, is bracketed to highlight the policy question whether the jurisdiction's definition should include any subject matter limits.

(1) if [the matter in controversy is alleged in good faith to exceed the sum or value of (\$25,000) for each of any (twenty-five) actual or prospective plaintiffs,] [the sum or value of the injury alleged in good faith to have been incurred by any (twenty-five) persons exceeds (\$25,000) per person,] exclusive of interest and costs; or

COMMENT on § 1367(b)(1): This subsection is based on the theory that the jurisdiction should be automatically available in large cases when scattered litigation is likely or has already arisen. The second bracketed clause comes from the Justice Department draft and is preferable if the jurisdiction is limited to personal injury and property damage cases. If there is no such limitation, broader phrasing like that in the first brack-

eted clause—based on present 28 U.S.C. § 1332 (1982)—is necessary. The somewhat awkward “actual or prospective” phrasing appears essential because none of these proposals mandates joinder of all potential parties to a multiparty case (Rule 19 requirements aside); the joinder is instead permissive. Our idea is to make the jurisdiction available in appropriate cases, at the initiative of any proper plaintiff or plaintiffs, and then to allow others to join if they wish. The setting of specific amounts both here and in the following subsection is a matter for political judgment and alteration; the amounts are in parentheses to indicate their tentative nature.

(2) if [the matter in controversy is alleged in good faith to exceed the sum or value of (\$5,000) for each of any (five) actual or prospective plaintiffs,] [the sum or value of the injury alleged in good faith to have been incurred by any (five) persons exceeds (\$5,000) per person,] exclusive of interest and costs, and if

COMMENT on § 1367(b)(2): This subsection makes possible the invocation of multiparty, multiform jurisdiction in somewhat smaller cases than those covered in the previous subsection. This language authorizes invocation of the jurisdiction in smaller cases at the initiative of plaintiffs when scattered litigation is demonstrably inevitable but for the federal jurisdiction or, primarily at the initiative of defendants, when defendants are actually facing scattered litigation. The availability of the jurisdiction for such smaller cases is not, in our view, essential, although it is desirable if it can be administered fairly easily.

(A) any plaintiff stating a claim or claims upon which relief can be granted cannot join all proper parties defendant to that plaintiff's claim or claims in the courts of any one State, and can join them in one district court under the provisions of this title; or

COMMENT on § 1367(b)(2)(A): This subsection attempts to respond to some situations like the one that would have arisen had the plaintiffs in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), wanted to sue a local driver and all the defendants in the actual case in a single forum, which is not constitutionally possible in any one state court after that decision. It does not necessarily include all such cases, depending on the jurisdictional amount and how many actual or prospective *plaintiffs* are required; requiring more than one or a very few might be necessary to avoid too-easy invocations of the jurisdiction by

questionable joinder of scattered defendants by one or a few plaintiffs. The requirement of possibility of joinder in one federal district court is meant to limit the exercise of the jurisdiction to cases in which the federal system can in fact uniquely serve a need and makes implicit reference to possible use of transfer provisions, *see infra* § 1407.

(B) any party to a civil action

(i) in the courts of any State is subsequently sued, as an original defendant or otherwise, in a court of the United States or of any other State, or (ii) in a court of the United States is subsequently sued, as an original defendant or otherwise, in a court of any State, by a plaintiff stating a claim upon which relief can be granted and the claim in the second action arises out of the same transaction, occurrence, or series of related transactions or occurrences at issue in the first action.

COMMENT on § 1367(b)(2)(B): This subsection attempts to deal with some smaller cases in which a defendant actually faces scattered litigation. It does not require that such a party be a *defendant* in all of the scattered actions, because someone who is properly sued in one forum might be sued on a related matter in another. It provides for jurisdiction when a party faces dispersed litigation as a result of either being sued originally or being made a defendant through subsequent joinder as a third party defendant, additional party defendant to a counterclaim, etc. The danger of scattered litigation is the same whether the party facing it is an original or added defendant. Invocation of the jurisdiction under this subsection could be at the initiative of *any* party to the claim in the second action and would be by means of removal, *see infra* § 1441. The reference to “stating a claim upon which relief can be granted” is meant to avoid too-easy invocation of the jurisdiction by legally insufficient allegations. It does not appear necessary to deal at this point with situations involving litigation scattered between two or more *federal* courts, since those cases can be handled by means of transfer under amended § 1407, *infra*.

(c) When an action within the jurisdiction of the district courts under this section has been commenced in or removed to any district court, any person with a claim within the terms of subsection (a) shall be permitted to intervene as a party plaintiff in such action, notwithstanding that such person could not have brought an action in a district court as an original matter.

COMMENT on § 1367(c): This subsection is based in part on the 1979 Justice Department proposal. As the commentary to that proposal pointed out, such a provision is needed because not all plaintiffs who may *join* an action within the jurisdiction may *initiate* one: minimal diversity is essential, and a plaintiff who has only a state law claim against a co-citizen may have to wait until someone of diverse citizenship commences a federal action and then intervene or remove a state court case already filed. This subsection authorizes joinder of *all* related matters without regard to jurisdictional amount, contrary to current law as enunciated in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973).

(d) In any action over which the district court has jurisdiction pursuant to this section, the district court wherein the action is pending shall promptly notify the judicial panel on multidistrict litigation of the pendency of such action.

COMMENT on § 1367(d): Based on the 1979 Justice Department proposal.

§ 1391. Venue generally

(g) A civil action wherein jurisdiction of the district court is based upon section 1367 of this title may be brought in any district in which any defendant resides or in which a substantial part of the events or omissions giving rise to the action occurred.

COMMENT on § 1391(g): Based on the 1979 Justice Department proposal.

§ 1407. Multidistrict litigation

(i) In actions transferred pursuant to the provisions of this section when jurisdiction is based in whole or in part on section 1367 of this title, notwithstanding any other provision of this section, the transferee district court may retain actions transferred for determination as to liability. Those actions retained for determination as to liability shall be remanded to the district courts from which they were transferred, or to the state courts from which they were removed, for determination as to damages unless the court finds that for the convenience of parties and witnesses and in the interest of justice an action should be retained for determination of damages. Any decision concerning remand for determination as to damages under this subsection shall not be reviewable by appeal or otherwise.

COMMENT on § 1407(i): This subsection is based on the 1979 Justice

Department proposal, with the addition of possible direct remand to state courts. Further subsections to § 1407 in that proposal, dealing with choice of law and subpoena power, are treated elsewhere, *see infra* §§ 1657, 1785, because of our belief that they should be general provisions applicable or available however the multiparty, multiforum jurisdiction is invoked and should not be limited to cases involving transfers. Existing § 1407(a) gives the multidistrict panel authority to decide whether or not to order transfer and consolidation, based on its judgment whether transfers “will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.” Consequently, even if a claim were within our proposed jurisdiction, the panel could refuse to transfer it if for some reason—such as simplicity or tenuous connection to related cases—it appeared better treated by itself. Concerning unreviewability of decisions whether or not to remand, *see infra* comment on § 1441.

§ 1441. Actions removable generally

(f) Any party to a claim in an action pending in a State court that arises out of the same transaction, occurrence, or series of related transactions or occurrences as an action pending within the jurisdiction of the district courts under section 1367 of this title may remove that claim to the district court of the United States for the district and division embracing the place where such claim is pending even if the claim is not otherwise removable pursuant to this section. When no such action is pending in a district court, such removal may take place only if the parties to the state court claim are of minimally diverse citizenship as defined in section 1367(a)(1) of this title. The removal of a claim pursuant to this subsection shall be made in accordance with the provisions of section 1446 of this title, except that when a State court action is begun before the commencement of an action within section 1367 of this title in any district court of the United States, the time within which removal shall be made pursuant to section 1446(b) of this title shall run from the commencement of the action in the district court.

Whenever a claim removed to a district court within this subsection is pending in the district court to which it was removed and a liability determination requiring further proceedings as to damages has been reached, the district court shall remand the claim to the state court from which it had been removed for determination as to damages unless the court finds that for the convenience of parties and witnesses and in the interest of justice an action should be retained for determination of damages. Any decision concerning remand for determina-

tion as to damages under this subsection shall not be reviewable by appeal or otherwise.

COMMENT on § 1441(f): The first two sentences are based in large part on the 1979 Justice Department proposal. This draft intends to permit removal both to *invoke* the multiparty, multiform jurisdiction (as by a defendant sued on related matters in the courts of two or more states) and to *join* actions within the jurisdiction pending in federal court (as by a defendant sued in state court after the filing of a federal multiform jurisdiction action). General removal practice provides for removal of an entire action, sometimes allowing (in § 1441(c)) for remand of matters not within original federal jurisdiction. Such an approach would be possible under this jurisdiction, but we prefer removability of individual claims to minimize procedural shuffle. The focus on claims rather than actions would also entail abandonment of the all-defendants requirement for removal, which we regard as a necessary step for this jurisdiction.

The draft allows removal by either plaintiffs or defendants, even if a plaintiff had a chance to bring a federal action and did not, for various reasons: sometimes a plaintiff could not have brought a federal action (in the absence of minimal diversity) and may have appropriately sued in state court, and it might be too cumbersome to sort out cases in which plaintiffs could and could not readily have sued in federal court. Also, if removal is of claims rather than of actions, defendants with a monopoly on the right to remove might try to engage in tactical maneuvers involving removal of one claim on which they were sued but not another. (Removal by plaintiffs would require technical amendments to several subsections of § 1446.) The draft's "even if not otherwise removable" language would override existing § 1441(b)'s limitation on removal in diversity cases to those involving no home-state defendants; since our concern is not prejudice but scattered litigation, the present limitation is irrelevant.

We include the possibility of discretionary remand (sometimes called "reverse removal") to state courts for damage determinations after liability rulings both for federalist reasons of respect for state courts and to reduce the burden on the federal judiciary. Consolidation might be important only for the liability stage, and some damage claims appropriately included in a multiparty liability determination could be in no need of further federal court attention. A district court considering a remand in these circumstances should take into account such factors as whether related actions were still pending in state court and the relative speed and economy with which the actions could be concluded in the two systems. The exclusion of the possibility of review of the decision

whether to remand is for reasons of economy. If it were felt that the consequences of misuse of the remand authority (either way) might be serious enough to warrant opening the door to a second round on the point, review could be allowed.

§ 1657. Choice of law in multiparty, multiforum actions

When an action is within the jurisdiction of the district court under section 1367 of this title, the court shall determine the source or sources of applicable substantive law. Whenever State law supplies the rule of decision on an issue, the court may make its own determination as to which State rule of decision is applicable. [In making this determination, the factors the court may consider include: the law that might have governed if the jurisdiction created by section 1367 of this title did not exist; the forums in which the claims were or might have been brought; the desirability of application of uniform law to some or all aspects of the action; whether a change in applicable law in connection with removal or transfer of the action would cause unfairness; and the danger of creation of unnecessary incentives for forum shopping.]

COMMENT on § 1657: The first sentence is based in part on the 1979 Justice Department proposal; but in accordance with our argument in the text of the article, federalized choice of law is the rule for *all* actions within the jurisdiction and not just those in which transfer and consolidation have taken place. The second sentence is taken verbatim from the ALI's proposed 28 U.S.C. § 2374(c). The third sentence, bracketed to highlight the possibility of confining such considerations to legislative history, attempts to provide some guidance without undertaking the probably impossible task of drafting a complete code of choice of law principles. Whether such limited guidance could be codified or even included in legislative history would depend on the level of consensus about specific choice of law approaches, a matter that is outside the scope of this article.

§ 1697. Service in multiparty, multiforum actions

When the jurisdiction of the district court is based in whole or in part upon section 1367 of this title, process, other than subpoenas, may be served at any place throughout the jurisdiction of the United States, or anywhere without the United States if otherwise permitted by law.

COMMENT on § 1697: Based on the 1979 Justice Department proposal.

§ 1785. *Subpoenas in multiparty, multiforum actions*

When the jurisdiction of the district court is based in whole or in part upon section 1367 of this title, if authorized by the court upon motion for good cause shown, upon such terms and conditions as the court may impose, a subpoena for attendance at a hearing or trial may be served at any place within the jurisdiction of the United States, or anywhere without the United States if otherwise permitted by law.

COMMENT on § 1785: This section is based on the 1979 Justice Department proposal but with availability broadened to all multiparty, multiforum jurisdiction actions instead of being limited to cases in which transfer and consolidation had taken place. If the provision is needed at all, it could be useful in actions entirely filed in or removed to one district court as well as in those that have been consolidated.