

Supplemental Jurisdiction—Take It to the Limit!

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I believe that rather than looking for ways to repair the supplemental-jurisdiction statute, 28 U.S.C. § 1367, while, at the same time, striving to preserve the complete diversity requirement in diversity and alienage cases, we should instead think about extending supplemental jurisdiction toward its outer constitutional limit and eliminate the complete diversity requirement of *Strawbridge v. Curtiss*.¹ Congress could, for example, simply eliminate present 28 U.S.C. § 1367(b).² This would provide new power to the federal courts to solve national problems, particularly in the areas of mass tort and mass disaster litigation, and, in business litigation in general. Such a change has long been advocated by some³ and, indeed, seems to be striking a responsive chord today in Congress.⁴

Thus, the latest attempt of the American Law Institute (“ALI”) to strain to preserve the complete diversity requirement of *Strawbridge v. Curtiss*⁵ in diversity and alienage cases is misguided and arguably out of date.⁶

The present version of § 1367, particularly subsection (b), has been widely criticized.⁷ Reading many of the accompanying articles in this Symposium issue

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1. 7 U.S. (3 Cranch) 267 (1806). However, so long as there is a jurisdictional amount requirement, diversity and alienage jurisdiction will not be extended absolutely to their outer constitutional limits.

2. 28 U.S.C. § 1367(b) (1994) reads:

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

Id.

3. See Howard P. Fink, *Indispensable Parties and the Proposed Amendment to Federal Rule 19*, 74 YALE L.J. 403, 446-47 (1965); AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION BETWEEN STATE AND FEDERAL COURTS, TENTATIVE DRAFT NO. 2, at 36, 137-38 (1964).

4. See H.R. 1252, 105th Cong. (1998) (enacted), which was adopted by the House of Representatives on April 23, 1998, and provided, inter alia, for minimal diversity in actions arising from accidents involving more than 25 people each of whom suffered injuries of more than \$50,000. The bill is discussed further below. See *infra* note 30.

5. 7 U.S. (3 Cranch) 267.

6. See AMERICAN LAW INSTITUTE, FEDERAL JUDICIAL CODE REVISION PROJECT, TENTATIVE DRAFT NO. 2 (1998).

7. For commentary pro and con upon the present version of 28 U.S.C. § 1367, see Thomas C. Arthur & Richard D. Freer, *Close Enough for Government Work: What Happens When Congress Doesn't Do Its Job*, 40 EMORY L.J. 1007 (1991); Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 963 (1991); Richard D. Freer, *Compounding Confusion and Hampering Diversity:*

will show how complex are the proposed solutions to drafting a supplemental-jurisdiction statute that, at the same time, preserves the rule of *Strawbridge v. Curtiss* in diversity and alienage cases and, nonetheless, provides for supplemental jurisdiction in a manageable, understandable and coherent fashion. If subsection (b) were simply eliminated from § 1367, this would end the *Strawbridge v. Curtiss* rule and it would eliminate all of the issues about complete diversity, disputes over what is the “free-standing claim,” who is the “primary” plaintiff, whether there is jurisdiction over a claim by a plaintiff against a third-party defendant in a diversity or alienage action, and vice-versa,⁸ and whether there is jurisdiction with regard to an indispensable party-plaintiff who seeks to intervene in an action as of right pursuant to Rule 24.⁹ If there were minimal diversity between any plaintiff and any defendant, and the jurisdictional amount were present as to one plaintiff’s claim, other plaintiffs could join pursuant to Rule 20 if they had claims arising out the same transaction, transactions, or series of transactions as the diverse plaintiff’s claim.¹⁰ Defendants could be joined on a similar basis.¹¹

It is true that some courts have narrowly construed § 1367(b) and have *allowed* some supplemental jurisdiction in diversity cases and alienage cases since the adoption of § 1367 in 1990.¹² But other cases have not.¹³

Life After Finley and the Supplemental Jurisdiction Statute, 40 EMORY L.J. 445 (1991); Denis F. McLaughlin, *The Federal Jurisdictional Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849 (1992); Thomas M. Mengler et al., *Congress Accepts Supreme Court’s Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213 (1991); Karen Nelson Moore, *The Supplemental Jurisdiction Statute: An Important but Controversial Supplement to Federal Jurisdiction*, 41 EMORY L.J. 31 (1992); Wendy Collins Perdue, *The New Supplemental Jurisdiction Statute—Flawed but Fixable*, 41 EMORY L.J. 69 (1992); and Joan Steinman, *Section 1367—Another Party Heard From*, 41 EMORY L.J. 85 (1992).

8. Thus overruling *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978).

9. The present language of § 1367(b) specifically prohibits supplemental jurisdiction for a plaintiff who qualifies for intervention as of right under Federal Rule 24(a) but who would destroy complete diversity. The elimination of § 1367(b) would restore the prior practice of allowing intervention as of right to a plaintiff who would otherwise destroy complete diversity. Indeed, it would go farther than the former practice, which had refused to allow such intervention when the outsider plaintiff was an indispensable party—a truly absurd result. See *Pulitzer-Polster v. Pulitzer*, 784 F.2d 1305 (5th Cir. 1986); *Field v. Volkswagenwerk AG*, 626 F.2d 293 (3d Cir. 1980).

10. FED. R. CIV. P. 20(a).

11. See *id.* 20(b).

12. See, e.g., *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928 (7th Cir. 1996) (holding the jurisdictional amount not necessary where additionally joined plaintiff was an indispensable party); *In re Abbott Labs.*, 51 F.3d 524 (5th Cir. 1995) (holding that *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), which had required that each member of a plaintiff diversity class have a claim exceeding the jurisdictional amount, was overruled by 28 U.S.C. § 1367); *Shanaghan v. Cahill*, 58 F.3d 106 (4th Cir. 1995); *Leszczynski v. Allianz Ins.*, 176 F.R.D. 659 (S.D. Fla. 1997); see also Laura L. Hirschfeld, *The \$50,000 Question: Does Supplemental Jurisdiction Extend to Claims Between Diverse Parties Which Do Not Meet § 1332’s Amount-in-Controversy Requirement?*, 68 TEMP. L. REV. 107 (1995); Mark Hutcheson, Comment, *Unintended Consequences: 28 U.S.C. § 1367’s Effect on Diversity’s Amount-In-Controversy Requirement*, 48 BAYLOR L. REV. 247 (1996); Sean G. Saxon, Comment, *Civil Procedure—Free v. Abbott Laboratories: Supplemental Jurisdiction for*

I believe that all attempts to harmonize the *Strawbridge* rule with supplemental jurisdiction will not only fail to achieve simplicity but, more importantly, point in the wrong direction. We should advocate changes that would open the door of the federal courts to virtually all mass tort, mass disaster, and major class actions, where they can best be handled.

Obviously, if nothing else were done, the elimination of the complete diversity requirement of *Strawbridge* would vastly increase the number of cases which could be brought to the federal court originally under 28 U.S.C. § 1332, and by removal from state courts under 28 U.S.C. § 1441. I suggest that the solution to the inundation threat is for Congress to use the jurisdictional amount requirement as the governor on excessive use of the federal courts rather than using the complete diversity requirement as the primary limiting device.

As a concomitant to removal of the complete diversity requirement the jurisdictional amount requirement in 28 U.S.C. § 1332 could be raised to, say, \$250,000. And Congress would, of course, continue to control entry to federal courts of state-law cases by future statutory adjustments. Raising the jurisdictional amount would channel the “big” cases to federal court while keeping less complex and smaller cases in the state courts. Obviously, keying subject-matter jurisdiction to the existence of complete diversity does little to separate “big” cases from “small” cases.

Joinder of claims and parties, in one action, should be encouraged by the courts and by Congress rather than being discouraged. Bringing more cases involving wider joinder of claims and parties to federal courts means fewer cases overall in state courts, and, perhaps, indeed, fewer cases in the nation as a whole—obviously an efficiency interest. Cases involving more parties and claims also mean that “whole disputes” will be settled in one action—one of the paramount ideals of the Federal Rules of Civil Procedure¹⁴—and that more persons will be bound by res judicata after either the settlement of a dispute or a judgment on the merits, thereby eliminating more future law suits from state and federal courts. Who is harmed thereby?

Pendent Plaintiffs Becomes More Affordable, 27 U. MEM. L. REV. 229 (1996); Joel E. Tasca, Comment, *Judicial Interpretation of the Effect of the Supplemental Jurisdiction Statute on the Complete Amount in Controversy Rule: A Case for Plain Meaning Statutory Construction*, 46 EMORY L.J. 435 (1997); Recent Case, *Seventh Circuit Holds that 28 U.S.C. § 1367 Allows Supplemental Jurisdiction Over Permissively Joined Plaintiffs in Diversity Suits*, 110 HARV. L. REV. 1173 (1997).

13. See, e.g., *Butcher v. Hildreth*, 992 F. Supp. 1420 (D. Utah 1998); *Parker v. Crete Carrier Corp.*, 914 F. Supp. 156 (E.D. Ky. 1996); *6427 Atlas Corp. v. Marine Ins. Co.*, 155 F.R.D. 454 (S.D.N.Y. 1994); *Riverside Transp., Inc. v. BellSouth Telecomm., Inc.*, 847 F. Supp. 453 (M.D. La. 1994); *Lederman v. Marriott Corp.*, 834 F. Supp. 112 (S.D.N.Y. 1993); *Leung v. Checker Motors Corp.*, No. 93 C 2704, 1993 WL 515470 (N.D. Ill. Dec. 7, 1993); *Mayatextil, S.A. v. Litzex U.S.A., Inc.*, No. 92 CIV 4528 (LJF), 1993 WL 180371 (S.D.N.Y. May 19, 1993); *Meredith v. Schreiner Transp., Inc.*, 814 F. Supp. 1001 (D. Kan. 1993); *Averdick v. Republic Fin. Servs., Inc.*, 803 F. Supp. 37 (E.D. Ky. 1992); *Pellegrino v. Pesch*, No. 91 C 4967, 1992 WL 159169 (N.D. Ill. June 29, 1992).

14. See CHARLES E. CLARK, *HANDBOOK OF THE LAW OF CODE PLEADING* (2d ed. 1947); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

The immediate reaction that one might expect is that this kind of change flies in the face of federal court history, acquiesced in by the Supreme Court in case after case, and by Congress through one revision of the Judicial Code after another. However, the history of federal court jurisdiction is very complex, and records many changes by Congress over the past two centuries, often going in opposite directions¹⁵—sometimes enlarging the subject-matter jurisdiction of the federal trial courts, sometimes retracting it.¹⁶ And what if it would fly in the face of history? Congress controls federal jurisdiction and can expand it or retract it, within constitutional limits, as it chooses to do so.¹⁷

The rule of *Strawbridge v. Curtiss*¹⁸ goes back to an early nineteenth-century decision of the United States Supreme Court, which, later decisions of the Court make clear, was a reading by Chief Justice Marshall of a jurisdictional statute—now 28 U.S.C. § 1332—not an interpretation of the parallel language of Article III.¹⁹ Even Chief Justice Marshall, who wrote the Court's opinion in *Strawbridge*, later expressed some serious doubts and regret about the case.²⁰ What hold should this decision, rendered in a far different era, continue to have upon us today?²¹

15. See Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769 (1992).

16. While the diversity grant and the *Strawbridge v. Curtiss* rule have been with us essentially unchanged from the beginning, except for increases in the jurisdictional amount requirement, the general federal question jurisdiction was broader when it was added by the Judiciary Act of 1875 than that which is now provided for in 28 U.S.C. §§ 1331 and 1441. The Act of 1875 had allowed for removal—by either plaintiffs or defendants—of an action in which a substantial federal question was pleaded either in the complaint or as a defense to a state law claim. This removal jurisdiction, based upon the presence of either a federal claim or a federal defense, was amended by the Judiciary Act of 1887, precluding removal based upon a federal defense. And the right to remove was limited to defendants. See the discussion in *Tennessee v. Union & Planters' Bank*, 152 U.S. 454 (1894). Until 1980 there was an amount-in-controversy requirement in the general federal-question jurisdictional statute. See discussion in HOWARD P. FINK ET AL., *FEDERAL COURTS IN THE 21ST CENTURY* 278-80 (1996). For a general history of federal court jurisdiction, see 15 MARTIN H. REDISH, *MOORE'S FEDERAL PRACTICE* §§ 100 app. 01 to 100 app. 02[9] (3d ed. 1998).

17. See FINK, *supra* note 16, at 163-228.

18. 7 U.S. (3 Cranch) 267 (1806).

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

20. See *Louisville, Cincinnati, & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 555 (1844).

We remark too, that the cases of *Strawbridge* and *Curtis* [sic] and the *Bank and Deveaux* have never been satisfactory to the bar, and that they were not, especially the last, entirely satisfactory to the court that made them. They have been followed always most reluctantly and with dissatisfaction. By no one was the correctness of them more questioned than by the late chief justice who gave them. It is within the knowledge of several of us, that he repeatedly expressed regret that those decisions had been made, adding, whenever the subject was mentioned, that if the point of jurisdiction was an original one, the conclusion would be different.

Id.

21. See Redish, *supra* note 15, at 1803 & n.175.

The federal courts are a tremendous engine for judicial reform and consolidation, but they have not yet been utilized to their full capacity. Why not? By and large, they have been underutilized because federal judges have feared increases in their dockets. But an increase in federal court subject-matter jurisdiction should not come at the expense of overcrowding federal dockets. We should add Article III federal judges and federal magistrate judges that are needed to avoid overcrowded federal dockets if federal jurisdiction with regard to state-law cases were expanded. Indeed the cost of adding federal judges would be a minuscule item in the federal budget.²²

Moreover, as far as our nation as a whole is concerned, the additional cost is essentially zero, since every case that is not tried in a federal court might otherwise have been brought in a state court, often in states which have fewer tax resources than does the federal government and many of whose courts are just as crowded or more crowded as are some federal courts.²³

I suspect that there is also an elitist point of view behind some arguments against increasing the number of federal judges—that somehow this would depreciate the “coin” of the federal judiciary, by reducing the overall quality of federal judges, as if federal judges were somehow inherently superior to those judges sitting in the state courts.²⁴ I simply do not believe that there are only about 500 lawyers or judges in the United States who qualify to the exalted position of federal judge, that is, who have the requisites of integrity, legal knowledge and skills, and who know somebody who knows the President!

Much as I respect the federal judiciary, and I do, I do not believe that the quality of the federal judiciary would be reduced; indeed, it might even be enhanced, were there to be a bi-partisan effort to make the federal courts the primary venue for major business litigation. Congress can increase the number of federal judgeships easily and distribute them to those parts of the country where they are most needed. And federal judges can be temporarily transferred from one

22. Estimates given to me by the Administrative Office of the U.S. Courts compiled for their own budget purposes indicate that the cost of adding a single new federal district judgeship comes to \$958,000 in the first year and \$759,000 for each year after that in 1998 dollars. The cost of adding a court of appeals judge is about \$866,000 in the first year and \$686,000 each year thereafter, in 1998 dollars. As an Ohio State faculty member, I think vividly of what would have been the cost of just the first day of a questionable invasion of Iraq that was averted partly because of public sentiment so strongly and clearly expressed here. The cost of a hundred more federal judges seems easy to bear.

23. See Henry J. Reske, *Long-Range Plan Would Cut Federal Cases*, 81 A.B.A. J. 22, 24 (1995) (discussing the comments of Chief Judge Judith Kaye of the New York Court of Appeals).

24. See, e.g., *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 59 (1954) (Frankfurter, J., concurring); *Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 398 app. D (1975) (letter from Chief Justice Warren E. Burger to Sen. Roman L. Hruska, May 29, 1975); Robert Bork, *Dealing with the Overload in Article III Courts*, 70 F.R.D. 231, 236-37 (1976); Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499 (1928); Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928).

district or circuit to another to fill particular needs.²⁵ There is presently no similar possibility of moving state court judges from one state to another to fill a temporary need. Indeed, we might even think about a system in which the President nominates some federal judges to be "at large," to be used where most needed given the caseloads of various districts or circuits. So we need not be deterred by potential costs. We should be guided by logic and should seek the best policy, not the choices most constrained by political "reality."

Why are the federal courts superior for major business litigation? The federal district courts are a single, unified, nationwide trial-court system, with judges who have life tenure and freedom from salary reduction,²⁶ as well as the statutory power to consolidate cases for pre-trial purposes²⁷ and transfer cases from one proper venue to another.²⁸ The federal courts have judges who gain national expertise in general federal-question cases as well as in diversity, alienage, bankruptcy, patent, copyright, and admiralty cases, and who deservedly have the confidence of the business community, as demonstrated by the number of business cases that are initiated in or removed to the federal district courts.

In the class action area today, there is a great deal of confusion and the possibility, or at least the fear, of excessive influence by lawyers over carefully selected local judges to settle mass-tort and mass-disaster litigation in ways that benefit lawyers and defendants, but often do not adequately benefit class members. After the Supreme Court's decision in *Phillips Petroleum v. Shutts*,²⁹ more class actions are being brought in state courts with judges who may have little or no expertise in handling massive litigation.³⁰

25. See 28 U.S.C. §§ 291-292 (1994).

26. See U.S. CONST. art. III, § 1.

27. See 28 U.S.C. § 1407 (1994). The Supreme Court has recently held that the Multidistrict Litigation court to which actions have been transferred and consolidated under § 1407 may not then transfer to itself the entire case for trial. See *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956, 959 (1998). But this is a statutory construction that can be changed by Congress. See discussion *infra* pp. 7-8.

28. See 28 U.S.C. § 1404(a) (1994); see also *Ferens v. John Deere Co.*, 494 U.S. 516 (1990).

29. 472 U.S. 797 (1985).

30. See *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, 877-78 (1996) (holding that the federal court must give full faith and credit to a state-court settlement, even if the settlement releases claims that are within exclusive federal jurisdiction); Marcel Kahan & Liuda Silberman, *Matsushita and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims*, 1996 SUP. CT. REV. 219, 242 & n.91; Linda S. Mullenix, *New Opinions Defer to State Law, Courts*, NAT'L L.J., July 29, 1996, at C5.

In response to the problem, in 1998 the House Judiciary Committee's Subcommittee on the Judiciary approved H.R. 3789 which would have allowed the removal of class actions from state court to the federal court so long as there was minimal diversity. See *House Subcommittee Approves Legislation to Ease Removal of Putative Class Actions*, 66 U.S.L.W. 2798, 2798-99 (June 30, 1998). The bill did not advance further when Congress adjourned in October of 1998, but presumably it will be reintroduced.

As to other aspects of the issue of securing collusive settlement in state and federal courts, see John C. Coffee, Jr., *The Corruption of Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851 (1995); Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159 (1995); cf. Mark C. Weber,

Federal legislation has provided for minimal diversity and nationwide service of process under the Federal Interpleader Act.³¹ There is nationwide service of process also provided in many federal statutes.³²

Federal courts could lead a revolution in the simplification of the problems of conflicts of law interstate litigation. As discussed below, it is plausibly argued that there could be a single set of nationwide conflict of laws rules applied in the federal courts, particularly in product liability and mass-disaster cases involving interstate commerce.³³ Indeed the ALI is proposing just such a reform. There might, of course, be constitutional law problems with this particular item.³⁴

We thus should consider a unified strategy for using the federal courts to the utmost in this area. Assuming this is the goal, Congress could approach the problem in two different ways. One, would be simply to amend § 1367 to remove all statutory limitation upon supplemental jurisdiction, and raise the jurisdictional amount—thus focusing on the *size* of the case. Or it could legislate more selectively, say in mass-tort or mass-disaster cases, thus focusing on the *type* of the case. Moreover, if it followed the latter strategy, Congress could go even farther and grant such jurisdiction *exclusively* to the federal courts—as it has done in patent and copyright cases.³⁵

This would allow the full battery of federal court power to be utilized to solve major litigation problems in a court presided over by a federal judge with Article III life tenure. Thus we already have all the tools in place for a comprehensive systemic solution to many national litigation problems. We just have to sharpen them.

Recent developments support the hypothesis that neither the Supreme Court nor Congress would be averse to an expansion of supplemental jurisdiction. In *City of Chicago v. International College of Surgeons*,³⁶ the U.S. Supreme Court has

Managing Complex Litigation in the Illinois Courts, 27 LOY. U. CHI. L.J. 959 (1996); and George T. Conway III, Note, *The Consolidation of Multistate Litigation in State Courts*, 96 YALE L.J. 1099 (1987).

31. 28 U.S.C. § 1335 (1994); *id.* § 2361.

32. *See, e.g.*, 15 U.S.C. § 78aa (1994) (regulating service of process in securities cases); Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1965 (1994); Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132(e) (1994). *See also* the discussion by Professor Casad in 16 ROBERT C. CASAD ET AL., MOORE'S FEDERAL PRACTICE § 108.123[2][b] (3d ed. 1998).

33. *See infra* text accompanying note 40.

34. *See infra* text accompanying notes 41-44.

35. *See* 28 U.S.C. § 1338 (1994).

36. 118 S. Ct. 523 (1997). The *International College of Surgeons* Court held that there is removal and supplemental jurisdiction under 28 U.S.C. §§ 1367(a) and 1441, of a court review of a city commission's determination in a landmarks case, though that involved an on-the-record review under state law of the agency's action, when it was coupled with a federal constitutional challenge to the statute under which the agency acted. It was arguable that the review was an appeal rather than an original action and so should not have been removable to the federal court, under the *Rooker-Feldman* doctrine. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). At the very least, the decision cannot be seen as a grudging acceptance of supplemental jurisdiction. The *Surgeons* Court said that while Congress could have limited supplemental jurisdiction in state administrative review cases, it did not do so. Rather, it was the duty of the

given an unusually broad reading to § 1367. While the case did not directly deal with diversity or alienage jurisdiction, the Court can hardly be seen as hostile to an expansive reading of supplemental jurisdiction.

Moreover, the Court has already recognized a kind of supplemental jurisdiction in diversity-based class actions, where diversity is only measured by the citizenship of the representative parties in a plaintiff class, rather than looking for a coincidence of citizenship of members of the class and those parties opposing the class.³⁷

On the legislative side, the House of Representatives recently passed House Bill 1252,³⁸ that would extend the jurisdiction of the federal courts to any "accident" suit, so long as there is minimal diversity present, where any twenty-five persons have suffered injuries of more than \$25,000 each. This is exactly the direction I would wish Congress to go, but it is applicable only to a limited set of cases.

However, the changes contained in House Bill 1252 fall into the category of special legislation. Rather than entirely eliminating § 1367(b), Congress created a special exception for "accident" cases involving more than twenty-five persons each of whom has allegedly suffered injuries amounting to more than \$50,000. But the legislation does utilize each of the techniques that I have outlined to enhance the utility of the federal courts as a vehicle for solving major disputes of a nationwide character.

Section 10(c) of the bill amends 28 U.S.C. § 1407, which deals with consolidation for pre-trial purposes of multidistrict litigation. It would partially overrule the Supreme Court's decision in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*³⁹ which had precluded a Multidistrict Litigation court ("MDL court") from transferring to itself a case for trial which had earlier been consolidated with other cases in that court for pre-trial purposes under § 1407. The House Bill provides that the MDL court, in appropriate accident cases, may try issues of liability and punitive damages and then, if liability were established in the MDL court, return the case to the federal or state court from which it came, for trial of ordinary damages.

In addition, the House Bill would provide, for the first time, a national code of conflicts of law for such accident cases. It sets out factors for the federal district judge to consider in choosing the applicable substantive law. Such a national law of conflicts of law has been advocated by scholars and by the ALI.⁴⁰ However the constitutionality of such federal conflicts codes or rules may be questioned. It

federal courts to apply supplemental jurisdiction as broadly as Congress has chosen, within, of course the constitutional limitation of *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), that the state claim arise out of the same nucleus of operative facts as the federal claim.

37. See *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); *In re Orange Prod. Liab. Litig.*, 818 F.2d 145, 162 (2d Cir. 1987); 5 TIMOTHY J. CHORVAT ET AL., *MOORE'S FEDERAL PRACTICE* § 23.07[3][a] (3d ed. 1998).

38. H.R. 1252, 105th Cong. (1998).

39. 118 S. Ct. 956 (1998).

40. See Linda S. Mullenix, *Federalizing Choice of Law for Mass-Tort Litigation*, 70 TEX. L. REV. 1623 (1992); AMERICAN LAW INSTITUTE, *COMPLEX LITIGATION PROJECT, STATUTORY PROPOSALS AND RECOMMENDATIONS* (1993) [hereinafter *COMPLEX LITIGATION PROJECT*].

would seem that the creation of such rules might be held to be constitutional under the Supreme Court's definition of the constitutionally permissive scope of federal procedure in *Hanna v. Plumer*⁴¹—rules that regulate matters that are rationally capable of falling in the realm of procedure—but unconstitutional under the Supreme Court's earlier decisions in *Erie Railroad Co. v. Tompkins*⁴² and *Klaxon v. Stentor Electronic Manufacturing, Co.*⁴³ which had held that the establishment of "local" rules of conflicts of law in nonfederal actions are beyond the legislative power of the federal government. This dispute would have to be settled by another decision of the United States Supreme Court.⁴⁴

Indeed, the House Bill does not go as far as Congress might go in extending federal jurisdiction to utilize the full potential of the federal courts in settling disputes of a national character. But it uses all the tools that such a national solution would require. Congress could apply the tools utilized in House Bill 1252 to solve other national problems as well. Mass-tort and product liability cases go beyond "accidents" as defined in House Bill 1252. Class actions also often go beyond the subject of "accidents." Congress could decide that the best national policy would be to provide a vehicle for massive litigation to be brought in or removed to the federal courts. It could even require that such cases be brought there, as it now requires federal antitrust,⁴⁵ patent and copyright,⁴⁶ and bankruptcy⁴⁷ cases to be brought in federal court. Or it could use the jurisdictional amount requirement to be the dividing line between actions that must be brought in federal courts and those that would remain in state courts. Or Congress could preserve dual jurisdiction, allowing litigant choice to determine the forum in which this national litigation will take place.

To summarize, the tools are all there, the concepts are not novel, and one House of Congress has already taken the first big step to breaking the hold that Chief Justice Marshall's offhand opinion in 1804 has for too long a time had upon federal court jurisdiction. Supplemental jurisdiction is the unused weapon in Congress's arsenal to solve national litigation problems in the federal courts, where they belong.

41. 380 U.S. 460 (1965).

42. 304 U.S. 64 (1938).

43. 313 U.S. 487 (1941).

44. See COMPLEX LITIGATION PROJECT, *supra* note 40, which takes the position that Congress has the power to create federal conflicts of law rules. See also Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1 (1991) (arguing that Congress has the power to enact federal choice of law rules and should do so).

45. See 28 U.S.C. § 1337 (1994 & Supp. II 1996).

46. See *id.* § 1338 (1994).

47. See *id.* § 1334.