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Notes

ALI Proposals To Expand Federal Diversity Jurisdiction: Solution to Multiparty, Multistate Controversies?

The recent study by the American Law Institute of the division of jurisdiction between state and federal courts resulted generally in recommending the contraction of federal diversity jurisdiction. In the area of multiparty, multistate controversies, however, the ALI recommended the expansion of diversity jurisdiction as a means of providing a forum for cases the state courts are not equipped to hear. The author of this Note considers the proposal and concludes that the ALI's solution to the problem sought to be solved, primarily providing jurisdiction over the indispensable-necessary party who is beyond the jurisdiction of the state court, raises several difficulties, the most basic of which is that of accommodating the state policies reflected in the state's limitation of jurisdiction. He suggests that a possible alternative solution would be to authorize state courts to issue nationwide service of process.

I. INTRODUCTION

The present utilization of diversity as a head of federal jurisdiction is better explained by the lack of sufficient interest to eliminate it than by any useful purpose it serves.1 In the course of its development diversity jurisdiction has been justified as a means of providing an impartial forum for commercial litigants engaged in multistate enterprise, as a tool to aid in the development of a federal common law, and as a method of providing a just resolution of conflicts of laws in suits between citizens of different states.2 At the present time it is doubtful whether state courts are either significantly prejudiced against out of staters or inadequate forums for commercial litigation;3 the decision in Erie R.R.

v. Tompkins 4 marked the end of diversity jurisdiction as an instrument in developing a federal common law; and the Klaxon Co. v. Stentor Elec. Mfg. Co. 5 decision eliminated whatever utility exists in an independent federal resolution of conflicts of laws questions in diversity cases. 6

The American Law Institute proposals to expand diversity jurisdiction in multiparty, multistate controversies afford an opportunity to examine a different justification for this head of federal jurisdiction. The ALI proposals, like federal interpleader, employ diversity jurisdiction primarily as a means of hearing cases that a state court can not or will not hear. 7 Thus under proposed section 2341(a) a plaintiff would be able to invoke the jurisdiction of a federal district court if:

the several defendants who are necessary for a just adjudication of the plaintiff's claim are not all amenable to process of any one territorial jurisdiction, and one of any two adverse parties is a citizen of a State and the other is a citizen or subject of another territorial jurisdiction. 8

and under proposed section 2343(a) a defendant would be entitled to remove to the district court if:

one or more additional parties necessary for a just adjudication as to a defendant cannot be joined or with the exercise of reasonable diligence served with process or otherwise made subject to a fully effective judgment of the courts of that State. . . . 9

The purpose of this Note is to consider the relative seriousness of the problems the ALI proposals are designed to solve and the problems the proposals appear to create. Attention will first be directed at the scope of the indispensable-necessary party problem; next the extent of the territorial limitations on a state court's jurisdiction will be considered; then the ALI proposals will be examined from the standpoint of their constitutionality and their desirability.

II. INDISPENSABLE-NECESSARY PARTY PROBLEM

The ALI proposals are principally directed to the problem of the indispensable party who is beyond the jurisdiction of a state court. The generally accepted definition of an indispensable party is one who has an interest in the controversy that will necessarily be affected by a final decree unless the decree is framed in a man-

4. 304 U.S. 64 (1938).
5. 313 U.S. 487 (1941).
7. See ALI, STUDY 129-30. The proposals will also cover some cases that could be adjudicated in a state court. See id. at 137.
8. ALI, STUDY 35.
9. ALI, STUDY 37.
ner that makes the final termination of the controversy inconsistent with equity and good conscience.\textsuperscript{10} If a state court determines that an absentee beyond the jurisdiction of that court is indispensable, the action must be dismissed. If no state court can obtain jurisdiction over all indispensable parties, the plaintiff is left without an opportunity to adjudicate his claim.\textsuperscript{11}

To clarify discussion, the distinction drawn by the federal courts between necessary and indispensable parties will be used in this Note.\textsuperscript{12} In the federal courts a "necessary" party must be joined if he is within the jurisdiction of the court; an "indispensable" party is one without whom the action must be dismissed. The state courts draw the same distinction for practical purposes; that is, they will require dismissal of the action if one type of party cannot be joined, while they will proceed with the action if another type of party is beyond the jurisdiction of the court. Since the state courts are less likely to apply different labels to these two distinct types of parties, the federal court labels—"indispensable" and "necessary"—will serve as useful designations. The ALI proposals encompass both the necessary and the indispensable party categories.\textsuperscript{13} Obviously, their application to the indispensable party problem is more important because of the possible inability of the plaintiff to adjudicate his claim. But the ALI proposals, in applying to cases where necessary parties are beyond the reach of any state court, would increase the efficiency and fairness sacrificed when such cases are not heard in their entirety.

\textsuperscript{10} Shields v. Barrow, 58 U.S. (17 How.) 130, 139 (1855). Here all the parties to a contract were held indispensable in an action to rescind. Although this was a federal case, the principle is the same in the state courts.

\textsuperscript{11} It is highly improbable that the plaintiff would be able to successfully invoke the diversity jurisdiction of a federal court in such a situation. The federal and state rules as to parties are very similar. See note 12 infra. Even if the federal party rules would ordinarily permit the suit to be brought in the federal district court, the outcome-determinative test of Guaranty Trust Co. v. York, 326 U.S. 99 (1945) might prevent a federal adjudication where the local state court would not permit one. See Angel v. Bullington, 330 U.S. 183 (1947); Dunham v. Robertson, 198 F.2d 816 (10th Cir. 1952). \textit{But see} Ford v. Adkins, 39 F. Supp. 472 (E.D. Ill. 1941); 3 MOORE, FEDERAL PRACTICE ¶ 1907, at 2152-53 (2d ed. 1963).

\textsuperscript{12} In the federal courts, parties are divided into four categories: formal, proper, necessary, and indispensable. \textit{Id.} ¶ 19.02, at 2103. In the state courts, it is more common to fuse the necessary and indispensable groupings under the necessary heading but, in fact, to recognize that some necessary parties are so essential that a dismissal is required in their absence. See Comment, \textit{Parties: Necessary and Indispensable Parties}, 29 CALIF. L. REV. 781, 783 (1941).

\textsuperscript{13} Section 2841(a) provides a federal forum where parties necessary to a just adjudication of the plaintiff's claim are beyond the jurisdiction of any state
The proper approach in cases where the court cannot obtain jurisdiction over interested absentees is to balance the desire to give the plaintiff as much merited relief as possible against the policies underlying the indispensable party doctrine.\(^4\)  The reasons for a finding of indispensable parties are that by continuing the suit without the absentee, the defendant might be prejudiced by being subjected to double liability or a multiplicity of suits,\(^5\) the absentee might be prejudiced by a determination in which his interests are not represented,\(^6\) or the court might be powerless to formulate an effective decree.\(^7\) From these reasons have evolved rules, among which are: all parties to a contract are indispensable in an action for rescission\(^8\) or specific performance;\(^9\) joint obligees are indispensable in an action to enforce the obliga-
court. See note 8 supra. This is the essence of the necessary party concept for purposes of compulsory joinder, ALI, Study 132-34, and necessarily includes indispensable parties, since without them plaintiff cannot maintain his action at all. Section 2341(b) makes explicit the application to parties without whom an action on the claim must be dismissed. See note 55 infra. Section 2343 permits a defendant to remove if parties necessary to a just adjudication as to him cannot be brought before the state court in which plaintiff instituted the action. See note 15 infra. This section applies only to necessary parties since, by hypothesis, plaintiff has been able to bring his action in a state court.


15. When this reason is the basis for dismissal, the defendant has a legitimate interest in bringing a party before the court—not just a desire to avoid liability to the plaintiff in the particular action. Nothing will motivate the plaintiff to bring in this type of indispensable party. The ALI proposals would allow removal jurisdiction where such a party could not be subjected to the jurisdiction of the state court in which the action was brought. See ALI, Study 37 (proposed § 2343).

16. As in a decision distributing a fund to which the absentee has a superior legal claim, although his legal rights are not affected, from a factual standpoint the absentee's claim is greatly reduced in value. See Developments in the Law: Multiparty Litigation in the Federal Courts, 71 Harv. L. Rev. 874, 882 (1958).

17. In an action against a corporation for a declaration of dividends, a majority of the board of directors is essential to afford complete relief. But cf. Kroese v. General Steel Castings Corp., 179 F.2d 700 (3d Cir.), cert. denied, 339 U.S. 988 (1950), in which the court’s power over the corporation’s property within the state made it possible to compel the necessary action by the absent directors. See Developments in the Law: Multiparty Litigation in the Federal Courts, 71 Harv. L. Rev. 874, 885 (1958).


all the claimants are indispensable in a suit to determine the disposition of a fund, and a majority of the board of directors is indispensable in an action against a corporation seeking the declaration of a dividend. A blind application of these rules, however, fails to consider the plaintiff's interest in obtaining whatever relief the court is empowered to accord him.

A flexible approach to the indispensable party problem, taking into account the plaintiff's claim for relief, would reduce but not eliminate the problem the ALI proposals are designed to solve. Consideration of the plaintiff's claim for relief would result in fewer cases where an adjudication was refused entirely. But in some cases the adverse effect on the defendant, the absentee, or the court of hearing the suit without the absentee would still result in a refusal to adjudicate. In addition, since the ALI proposals would apply to necessary as well as indispensable parties, their adoption would result in some increase in efficiency and fairness no matter how flexibly the indispensable party doctrine was applied by the state courts.

III. EXTRA-TERRITORIAL JURISDICTION PROBLEM

The indispensable party problem would be nonexistent if there were no territorial limitations on state court jurisdiction. Unless the absentee is beyond the jurisdiction of the state court, he can be joined and the action can proceed.

A state court's jurisdictional reach is bounded by the limitations of the fourteenth amendment due process clause unless further

20. See Comment, 29 Calif. L. Rev. 731, 736-37 n.32 (1941).
24. The New York Civil Practice Law and Rules illustrates an attempt to consider equitable factors in deciding whether to dismiss an action for want of an absent party, rather than to make a rigid conceptual distinction between necessary and indispensable parties. New York Civ. Prac. L. & R. § 1001 (b); see 2 Weinstein, Korn & Miller, New York Civil Practice ¶¶ 1001.08, .09 (1964).
restricted by the limitations of the state’s jurisdictional statutes.\textsuperscript{29} As a limitation on a state court’s exercise of personal jurisdiction, \textit{Pennoyer v. Neff}\textsuperscript{27} read into the due process clause of the fourteenth amendment the “rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.”\textsuperscript{28} At the time \textit{Pennoyer} was decided these established rules and principles meant that presence or actual consent was required for the invocation of personal jurisdiction by a state court.\textsuperscript{29} After \textit{Pennoyer} it became clear that domicile\textsuperscript{30} and implied consent\textsuperscript{31} would also support personal jurisdiction. Both these bases of personal jurisdiction permit a state court decree to bind extra-territorial defendants. The approach taken by the Supreme Court in \textit{International Shoe Co. v. Washington},\textsuperscript{32} however, makes them superfluous. Under \textit{International Shoe}, whether a state court has validly obtained jurisdiction over an out-of-state defendant depends on whether the defendant has had sufficient contacts with the state to justify requiring him to defend an action there.\textsuperscript{33} After \textit{International Shoe}, which sustained jurisdiction on the basis of substantial in-state activities giving rise to the cause of action sued upon, the extra-territorial reach of state court jurisdiction has been further extended. \textit{Perkins v. Benquet Cons. Mining Co.}\textsuperscript{34} upheld a state court’s right to exercise jurisdiction in a cause of action not related to the defendant’s substantial in-state activities, and in \textit{McGee v. International Life Ins. Co.},\textsuperscript{35} jurisdiction over an out-of-state insurance company, in a suit brought by the only policyholder in the forum state, was found to satisfy the due process requirements.

\textsuperscript{26} The judicial doctrine of forum non conveniens provides an additional limitation on a court’s exercise of jurisdiction. However, the doctrine is not universally recognized and is infrequently applied even when it is available. See generally \textit{Developments in the Law—State-Court Jurisdiction}, 73 HARV. L. REV. 909, 1008–17 (1960).

\textsuperscript{27} 95 U.S. 714 (1877).

\textsuperscript{28} Id. at 733.

\textsuperscript{29} According to \textit{Pennoyer}, in order for a state court to obtain personal jurisdiction over the defendant, “he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.” \textit{Ibid.}


\textsuperscript{32} 326 U.S. 310 (1945).

\textsuperscript{33} \textit{Id.} at 316.

\textsuperscript{34} 342 U.S. 487 (1952).

\textsuperscript{35} 355 U.S. 220 (1957).
As a counterbalance to the liberal assumption of jurisdiction in *McGee, Hanson v. Denckla* serves as a reminder that "it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts." The due process limitations are no longer as restrictive, and the nature of the inquiry prevents a precise predetermination of the existence of jurisdiction, but an appropriate factual connection between the parties and the forum is still required if a state court is validly to obtain jurisdiction.

Few states claim to authorize jurisdiction coextensive with the due process limitations, but several have enacted long arm statutes which extend the jurisdiction of their courts beyond the territorial boundaries in certain circumstances. As the American public has become more mobile and the economy more complex, the significance of state boundaries has decreased, creating a need for extending the jurisdictional authority of state courts in order to vindicate state interests. Continued statutory expansion of state court jurisdiction seems likely.

The present expansion of state court jurisdiction, like the adoption of a flexible approach to indispensable party problems, can reduce, but not eliminate, the problem at which the ALI proposals are directed. A reliable forecast of the rate at which states will choose to extend their extra-territorial jurisdiction is impossible. At the present time some state limitations on the exercise of jurisdiction are based on substantive policy considerations, which are

38. The Rhode Island statute, however, provides jurisdiction over all parties "that shall have the necessary minimum contacts with the state of Rhode Island" in cases where the assumption of jurisdiction is "not contrary to the provisions of the constitution or laws of the United States." R.I. GEN. LAWS ANN. § 9-5-33 (Supp. 1963). The Wisconsin statute is also designed to go to the due process limitations. See Foster, *Expanding Jurisdiction Over Non-residents*, 32 Wis. BAR BULL. SUPP. 3, 4 (1959).
unlikely to change.\textsuperscript{40} Furthermore, \textit{Hanson v. Denckla}\textsuperscript{41} indicates that no matter how far a state may wish to extend its extra-territorial exercise of personal jurisdiction, there is some point beyond which the due process limitations prohibit this extension. The largest group of cases to which the ALI proposals would apply is that in which necessary or indispensable parties cannot be subjected to the jurisdiction of any state court because the jurisdictional statutes of the relevant states do not extend far enough. If, for example, \textit{A} and \textit{B} are jointly owed money by \textit{C}, a resident of another state, on an obligation incurred in \textit{C}'s state, which does not provide jurisdiction over extra-territorial persons on the basis of a single in-state act, then \textit{A} cannot obtain a judgment against \textit{C} if neither \textit{B} nor \textit{C} is willing to participate in an action outside his own state. The ALI proposals would also apply to an extremely small group of cases where the only limitations on the extra-territorial jurisdiction of the relevant state courts were those imposed by the fourteenth amendment due process clause. An example is the joint obligee situation, if the obligor is from a different state and the obligation is incurred outside the United States.

\textbf{IV. PROBLEMS RAISED BY THE ALI PROPOSALS}

\textbf{A. CONSTITUTIONALITY}

In \textit{Strawbridge v. Curtiss}\textsuperscript{42} the Supreme Court construed the Judiciary Act of 1789,\textsuperscript{43} which contained language very similar to the constitutional authorization for diversity jurisdiction, to require each party having an interest on one side of a controversy to be from a different state than each party with the same interest on the other side. The ALI proposals would provide diversity jurisdiction in the federal district courts if any two adverse parties are of diverse citizenship. This attempt to encompass as large a portion as possible of multiparty cases that cannot be satisfactorily adjudicated in any state court raises an unresolved constitutional question.\textsuperscript{44} Since \textit{Strawbridge} the possibility has existed that total diversity is a constitutional requirement for federal diversity jurisdiction.

\textsuperscript{40} See 1 \textit{Weinstein, Korn \& Miller, New York Civil Practice} ¶ 302.11 (1963).

\textsuperscript{41} 357 U.S. 235 (1958).

\textsuperscript{42} 7 U.S. (3 Cranch) 266 (1806).

\textsuperscript{43} 1 Stat. 78.

The ALI draftsmen present an exhaustive constitutional justification for the minimal diversity requirement in the proposals. The Judiciary Act phrase construed in Strawbridge differs from the constitutional grant of diversity jurisdiction. Even if this language difference is not in itself dispositive, in general constitutional language may justifiably be more liberally construed than similar statutory language. A difference in the purposes of the constitutional and statutory diversity grants provides a possible basis for distinguishing Strawbridge. There are several instances in which the federal courts have upheld diversity juris-

45. See ALI, Study 176–86 (Supporting Memoranda A).
46. “[W]here . . . the suit is between a citizen of the state where the suit is brought, and a citizen of another state.” 1 Stat. 78 (1789). (Emphasis added.)
48. It is arguable that the difference between a “suit” and a “controversy” would support a different result if the constitutional grant of diversity jurisdiction were construed. See ALI, Study 177. In Frisk v. Henarie, 32 Fed. 417, 422–24 (1887), rev’d on other grounds, 142 U.S. 459 (1892), the language difference was relied on to sustain a partial diversity action under the removal section of the Judiciary Act of 1887. This interpretation of the statute allowing partial diversity was followed in City of Detroit v. Detroit City Ry., 54 Fed. 1 (1893), cert. denied, 163 U.S. 683 (1895) but was overruled on non-constitutional grounds in Cochran v. Montgomery County, 199 U.S. 260 (1905). See ALI, Study 179 n.8. The argument based on the language difference assumes that a suit may be made up of several controversies, in any one of which diversity between opposing parties will support federal jurisdiction in the entire suit. But what Chief Justice Marshall said about an interest in Strawbridge, that each distinct interest must be represented by persons capable of suing or being sued in a federal court, is equally applicable to this view of a controversy. Indeed, the ALI’s view of “controversy” and Marshall’s “distinct interest” are the same.
49. See Mishkin, The Federal “Question” in the District Courts, 53 Colum. L. Rev. 187, 160–65, n.25 (1953). The one case involves a question of congressional intent, which can be more definitively expressed by subsequent enactment in case of erroneous interpretation; the other requires a constitutional amendment if too restrictive an interpretation is given. See Shoshone Mining Co. v. Rutter, 177 U.S. 505, 506 (1900) (A restrictive interpretation given to a federal jurisdiction statute is justified by referring to the question as “not one of the power of Congress, but of its intent.”); ALI, Study 177.
50. ALI, Study 183–85. However, the adoption of the Constitution and the enactment of the Judiciary Act were so close in time that such a distinction in purpose seems tenuous. A sounder basis for distinguishing Strawbridge might be provided by openly recognizing the advantages and appropriateness of construing constitutional grants of power broadly when it serves a legitimate present day purpose. See M’Culloch v. Maryland, 18 U.S. (4 Wheat.) 316, 406–07, 421 (1819).
diction based on less than total diversity;" examples are removal cases, intervention, and interpleader.

B. SECTION 2341

In analyzing the effect and desirability of proposed section 2341, at least four interests must be considered, the plaintiff's,


53. See the discussion of Drumright v. Texas Sugarland Co., 16 F.2d 657 (5th Cir. 1927), in Reed, supra note 51, at 527–29.


55. § 2341. Dispersed necessary parties; original diversity of citizenship jurisdiction

(a) The district courts shall have original jurisdiction of any civil action in which the several defendants who are necessary for a just adjudication of the plaintiff's claim are not all amenable to process of any one territorial jurisdiction, and one of any two adverse parties is a citizen of a State and the other is a citizen or subject of another territorial jurisdiction.

(b) A defendant is necessary for a just adjudication of the plaintiff's claim, within the meaning of this chapter, 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. 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.

(c) A person is amenable to process of a territorial jurisdiction, for the purposes of this section, if, and only if, that person—

(1) being an individual, has his domicile or an established residence or his principal place of employment or business activity in that jurisdiction; or

(2) being a corporation or other entity sued as such, is incorporated or has its principal office in that jurisdiction; or

(3) has an agent in that jurisdiction authorized by appointment to receive service of process; or

(4) may, under the laws of that jurisdiction, be subjected to a fully effective judgment of its courts without delivery of process within the territorial jurisdiction to him or his agent authorized by appointment to receive it.

the interest of defendants over whom a state court cannot exercise jurisdiction, the federal interest, and the interest of the states.

The adoption of proposed section 2341 would strike a new balance between the interests of the plaintiff and extra-territorial defendants. Presently, absentee defendants can be subjected to the jurisdiction of a state court only if it would be reasonable to require them to defend an action in that court. Proposed section 2341 would subject absentees to the jurisdiction of a federal court without regard to the burden on them, if they are beyond the jurisdiction of any state court and "necessary for a just adjudication of the plaintiff's claim." If the plaintiff is otherwise unable to obtain relief, the equities in his favor are clear. But the necessary party situations encompassed by the ALI proposals present a harder case. A suit against joint obligors from different states would be permissible under section 2341 even though the plaintiff would be able to obtain complete relief in state courts by bringing separate actions. It is true that the plaintiff has to assume a risk of inconsistent verdicts if he brings separate actions, but very little consideration is given to the burden that will be imposed on widely separate joint obligors if they are forced to defend in the same action. Proposed section 2344(e) does authorize the federal district court to dismiss the action, totally or in part, if no interested party has more than five thousand dollars at stake. But this section affords no comfort to the defendant having a small interest in the controversy if anyone's interest exceeds five thousand dollars. A better adjustment of the conflicting interests of the plaintiff and absentee defendants could be achieved by in-


57. Proposed § 2342 provides:
A civil action wherein jurisdiction is founded solely on section 2341 of this title may be brought only in a district where a substantial part of the events or omissions giving rise to the claim occurred or where a substantial part of property which is the subject of the action is situated, except that where there is no such district within the United States, the action may be brought in any district where any party resides.

ALI, Study 36–37. If the state's jurisdictional statute does not go to the due process limitations, then perhaps the burden on the absent defendant will not be too severe. But, if under the fourteenth amendment it is unreasonable to require the absentee to defend an action there, the problem is a serious one.

58. ALI, Study 41.

creasing the discretionary power of the district court to dismiss an action, taking into consideration both the burden on the defendants and the possibility of the plaintiff obtaining complete relief in separate actions.60

The federal government may have a legitimate interest in providing a forum for litigation arising from national activities in cases that would not otherwise be heard or would be heard at some cost in efficiency and fairness.61 A countervailing consideration is the burden proposed section 2341 would impose on the federal district courts. Two prerequisites to federal district court jurisdiction are established by proposed section 2341, no state court is capable of hearing the plaintiff's suit in its entirety and the defendant or defendants making state court jurisdiction impossible must be necessary to a just adjudication of the plaintiff's claim. Although the main thrust of the section is to provide a forum when no state court can give the plaintiff relief, the "necessary to a just adjudication" test incorporates a federal standard of necessary parties as well as those parties without whom either a state or federal court would have to dismiss the action.62 This expansion of the number of parties about whom a determination concerning amenability to state court process must be made makes the determination quantitatively more difficult. The ALI draftsmen attempt to minimize the burden by pointing out that proposed section 2341(c)63 establishes objective factors as the basis for the determination, that investigation of these factors will likely be confined to only one or two state jurisdictions, and that in no event will the number exceed that with which the defendant least amenable to process was involved.64 The first three of section 2341(c)'s criteria by which to determine state judicial jurisdiction, whether an individual has his residence, domicile, or principal place of business there, a corporation its principal office there, or either has an agent authorized to receive process there, are undeniably easy to apply. The fourth criterion, however, whether the defendant would be subject to an effective judgment of the local court if process were not served on the defendant or his agent within the territorial limits of the jurisdi-

60. This would resemble the process of applying the doctrine of forum non conveniens. See note 27 supra. A transfer of venue can achieve no more than to fix the place of trial at the optimum location for all concerned — this could still seriously burden one or more defendants.
61. See text accompanying note 82 infra.
62. See ALI, Study 129, 134-35.
63. See note 55 supra.
64. ALI, Study 131 n.19, 137 n.26.
tion, is not at all easy to apply. If the defendant does not fit within the three factual categories, the district court must decide what may be a very difficult question of state law in order to establish its jurisdiction. The question must be decided for each jurisdiction that could conceivably entertain the suit. It does not help to say that the number of state jurisdictions that must be considered is limited to those with which the least amenable defendant is involved. Who is the least amenable defendant depends upon which jurisdiction is being considered, not vice versa.

The closer a state gets to extending its jurisdiction to the constitutional limits, the more difficult becomes the jurisdictional determination in the federal district court. Under the Rhode Island long arm statute, for example, the preliminary jurisdictional question in the district court becomes one of constitutional dimensions. Perspective is gained by noting the reluctance of the Supreme Court to decide hypothetical constitutional questions. Deciding the preliminary jurisdictional question would seriously interfere with state interests as well as burden the federal district courts. By design the cases to which proposed section 2841 might apply involve questions as to the outermost limits of state process. These questions involve considerations of state policy peculiarly suited to state court determination. To allow a federal court to determine the outermost reach of state court jurisdiction hypothetically, as a preliminary to accepting jurisdiction, would prejudice the state. In the first place, a state court would be unable to hear the particular controversy if the federal court adversely determined the jurisdictional question. Atkinson v. Superior Court exemplifies a situation where after careful consideration a state court may assume jurisdiction under a fact situation that would likely be given short shrift if decided hypothetically by the district court. In Atkinson the court's decree bound an absent defendant could be subjected to a judgment in rem or quasi-in-rem as well as whether he would be amenable to process for personal jurisdiction purposes. See Atkinson v. Superior Court, 49 Cal. 2d 388, 316 P.2d 960 (1957), appeal dismissed and cert. denied, 357 U.S. 569 (1958).

trustee in a controversy between two rival in-state claimants to the proceeds from a trust fund. A state's legitimate interest in providing a forum for its citizens in this type of controversy might be denied under section 2341. Secondly, because the jurisdiction of the state courts and the federal district courts is mutually exclusive under proposed section 2341, a liberal assumption of jurisdiction by the federal courts under this section could not help but restrict the jurisdiction of the state courts in the future. Even though the state jurisdictional question determined in the federal courts would not bind the state court in subsequent decisions, it would be at least persuasive. Furthermore, once the district court has determined that it has jurisdiction over the controversy, future litigants would likely bring the same kind of actions in the district court— not giving the state court a chance to clarify its jurisdictional reach. Thus an inward pressure would be exerted on the expansion of state court jurisdiction, which might disturb the balance of federalism.

A solution to the problems raised by a hypothetical federal court determination of a state's jurisdictional limitations might be sought through abstention or certification. If the jurisdictional question appeared difficult, the district court might abstain from accepting jurisdiction pending a determination by the relevant state court or courts. Or the federal court could request a certification as to jurisdiction from the relevant state courts. The difficulty with abstention by the federal court is the burden to which it would put the parties. The plaintiff would have to attempt to bring his action in as many different courts as the federal court would have to consider if it decided the jurisdictional question hypothetically. Seeking a certification from the state courts that could conceivably entertain the suit would be a better approach, but it is doubtful that certification presently has this wide an application.

71. The ALI draftsmen decided to permit assumption of jurisdiction in cases not authorized by state statutes rather than draw the line at the constitutional disability of the states to assume jurisdiction. This avoids the problem of creating a series of constitutional decisions determining when the indispensable-necessary party cases can be brought in the federal district court. ALI, Study 123–24.

72. See Hart, The Relations Between State and Federal Law, 54 COLUM. L. REV. 489, 501–02 (1954). If the district court decision were based on constitutional grounds rather than on interpretation of the state's jurisdictional statutes, the decision would bind the state court in future decisions.

C. **Section 2343**

Proposed section 2343,\(^7\) which permits a defendant to remove to a federal district court when a party necessary for a just adjudication as to him cannot be brought before the state court in which plaintiff originated the action, would not create problems of the same magnitude as those arising under proposed section 2341. The prejudice to the defendant which justifies bringing the absent party before the court goes beyond merely inconveniencing the defendant. The defendant under section 2343 must be inadequately protected in the suit as it exists in the state court in order to remove and take advantage of the nationwide service of process provided in the federal district court.

The burden on the federal district court in determining whether it could take jurisdiction would be less under proposed section 2343 than under proposed section 2341. First, the federal court

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\(^7\)§ 2343. Dispersed necessary parties diversity of citizenship jurisdiction; removal of actions brought in State courts

(a) Any civil action commenced in a State court in which one or more additional parties necessary for a just adjudication as to a defendant cannot be joined or with the exercise of reasonable diligence served with process or otherwise made subject to a fully effective judgment of the courts of that State, may be removed by any adversely affected defendant to the district court for the district and division embracing the place where such action is pending if one of any two adverse parties is a citizen of a State and the other is a citizen or subject of another territorial jurisdiction.

In actions wherein jurisdiction is founded on this section, the word “parties” as used in this chapter includes all persons named in the petition for removal as necessary for a just adjudication as to the defendant, whether or not such persons were named or joined as parties in the action in the State court.

(b) A person is necessary for a just adjudication as to a defendant, within the meaning of this chapter, if he claims or may claim an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action in his absence may leave the defendant subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligation by reason of his claimed interest. A person is not thus necessary for a just adjudication simply because he is or may be liable to a defendant for all or part of the plaintiff’s claim against the defendant.

(c) A counterclaim asserted in a State court arising out of the same transaction or occurrence as the plaintiff’s claim shall be deemed an action for purposes of this section, and if the requirements hereof are met, the entire State court action may be removed. For the purpose of determining whether absent persons are necessary for a just adjudication of such a counterclaim, a plaintiff in the State court shall be considered as a defendant under subsection (b) of this section, and a
would have to consider only one state court — that in the state in which suit was brought — in order to determine whether the absent party could be brought before the court. It need not be determined, as it must under proposed section 2341, that no state court could hear the entire controversy. Secondly, the federal court need not determine the outermost limits of a state’s assumption of judicial jurisdiction under section 2343 as it must under section 2341. Section 2343(d) requires only a certification by the removing party that all reasonable effort has been made to subject the absent party to a fully effective judgment in the state court. Thus, if the question as to the outermost limits of a state court’s jurisdiction arises, it will have been decided by the state court.

The fact that the federal court does not have to decide the limits of a state court’s jurisdiction in order to establish its own

defendant therein as a plaintiff under subsection (b) of section 2341 of this title; for all other purposes of removing such action, including the procedural steps therefor, original plaintiffs or defendants may be deemed defendants.

A counterclaim asserted in a State court which does not arise out of the same transaction or occurrence as the plaintiff’s claim shall be deemed an action for the purposes of this section and may be removed by a plaintiff in the State court action if as a defendant he would have been able to remove under subsections (a) and (b) of this section.

(d) A petition for removal under this section shall contain a statement that every reasonable effort has been made by or on behalf of the removing party to have each absent person who is necessary for a just adjudication as to him made a party and served with process or otherwise made subject to a fully effective judgment in the State court. In addition to meeting all the requirements of section 1446 of this title, every such petition of a party represented by counsel shall be signed by such counsel, which signature shall constitute a certificate that the foregoing statement is correct.

(e) In any action where jurisdiction is founded solely on this section, if there is a State court in which an action on the claim may be maintained and to whose process all parties necessary for a just adjudication are answerable or agree to submit, the district court on motion of any party or on its own motion may stay proceedings before it pending prosecution of an action on the claim in the courts of that State. In determining whether to stay proceedings for this purpose, the district court shall take into account, in addition to the convenience of parties and witnesses, whether the rules for decision of the action or any substantial part thereof are the laws of the State in whose courts the action would be prosecuted during pendency of the stay and the reasons why the action was not commenced in that State court originally. The decision of a district court staying proceedings or refusing to dissolve a stay under this subsection shall not be reviewable except under the provisions of subsection (b) of section 1292 of this title.

jurisdiction under section 2343 also reduces the interference with state interests. Even though some cases that would ordinarily be heard in a state court would be removed to a federal court, the hypothetical decision of a difficult question of state law with its far reaching consequences for federal-state relations is avoided.

D. Federal-State Relations

Whether or not the *Erie* doctrine is constitutionally based, it raises a serious problem of federal-state relations in connection with the ALI proposals. The proposals would provide a forum in cases which no state court would hear. This appears to violate the outcome-determinative test announced in *Guaranty Trust Co. v. York*76—the outcome is obviously different if the plaintiff is enabled to recover. In *Angel v. Bullington*77 the Supreme Court determined that a federal district court sitting in diversity jurisdiction could not hear a case the state prohibited its own courts from hearing. *Angel* involved a North Carolina statute prohibiting deficiency judgment suits. If state limitations on judicial jurisdiction represent a legislative failure to keep up with the relaxation of the fourteenth amendment due process requirements rather than an affirmative expression of state policy, then state interests are not thwarted by providing a federal forum to hear cases the state court could not hear.79 The difficulty lies in distinguishing jurisdictional limitations imposed for substantive reasons from those resulting from purposeless legislative inaction. The ALI proposals do not attempt to do so. They would appear to permit a foreign joint obligee to sue for a deficiency judgment even though the

76. 326 U.S. 99 (1945).
77. 380 U.S. 183 (1947).
78. 89 U.S. 158 (1947).
79. There has been a tendency to interpret state jurisdictional statutes, framed in terms of the pre-*International Shoe* test of “doing business” in the state, more liberally since the *International Shoe* case relaxed the requirements for the assertion of jurisdiction. This may have reduced the pressure on state legislatures to expand their jurisdictional scope. See *Developments in the Law—State-Court Jurisdiction*, 73 Harv. L. Rev. 909, 1000–02 (1960).
state in which the land was located would not permit such a suit if it could constitutionally obtain jurisdiction over all the parties. 80 If the difficulty in making the distinction justifies a failure to attempt it—which is not clear 81—something further is required to justify the resultant interference with state policy.

If the justification for the ALI proposals is a strong federal interest in providing a forum for litigation arising out of nationwide activities, then perhaps this interest can justifiably override the states' interest in determining the application of their substantive law. But the proposals merely provide a forum in which state law can be applied—they create no substantive federal law. In this light it is difficult to view the federal interest as one of overriding importance. 82 As long as the law to be applied is state law there seems to be little reason to permit state policy to be frustrated by ignoring the substantive qualifications a state imposes. As diversity jurisdiction is presently utilized, the federal courts

80. Section 2844(c) releases the district court in these cases from the obligation to apply the choice of law rules of the state in which it sits, imposed in regular diversity cases by Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941) and Griffin v. McCoach, 313 U.S. 498 (1941). ALI, Study 41, 147-50. The power to select the state law to be applied might constitute "substance" in the sense that it determines the outcome of the suit, but as long as no state court could have heard the case there can be no incentive to forum shop between state and federal courts. In discussing § 2844(c) the ALI draftsmen indicate that substantive policy embodied in state jurisdictional limitations should be taken into account but cannot automatically prevail because of the effect on parties beyond the reach of the state. See ALI, Study 149.

81. An affirmative limitation on state court jurisdiction, such as the North Carolina statute in Angel, is easily distinguished from limitations on state court service of process resulting from insufficient statutory authorization. The difficult problem lies in determining whether and when state substantive policy is embodied in a limited statutory authorization of the exercise of extra-territorial jurisdiction. It would be possible to incorporate into the ALI proposals the notion that any substantive limitations a state wished to put on its jurisdictional reach must be expressly declared in order to be considered in applying state law under the proposals. The declaration in N.Y. Civ. Prac. L. & R. § 302(a)(2) excepting defamation actions from the grant of jurisdiction over persons committing torts within the state who cannot be served within the state is an example. See 1 Weinstein, Korn & Milhem, New York Civil Practice ¶ 302.11 (1963), for a discussion of the substantive reasons for the limitation. Many problems involving statutory interpretation raise difficulties as serious as distinguishing jurisdictional limitations based on oversight or a desire to avoid overloading state trial dockets from those grounded on substantive policy considerations.

must respect a state’s denial of a forum in cases based on state law. There does not appear to be anything peculiar about multi-party cases that would justify overriding state policy embodied in jurisdictional limitations for the sake of providing a forum.

If it is impossible to determine why a state limits the jurisdiction of its courts and thereby impossible to avoid frustrating state policy under the ALI proposals whenever state court jurisdiction is limited for substantive reasons, it would be worthwhile to consider another approach to the indispensable-necessary party problem. Suppose Congress authorized nationwide service of process in the state courts in the kind of cases covered by the ALI proposals. The advantages of this approach would be the avoidance of the hypothetical determination in the federal courts of a state’s jurisdictional limitations, the ability of a state court to apply its own substantive law in such a case, and the preservation of a state’s right to limit its jurisdiction for substantive reasons as it sees fit. Application of the judicial doctrine of forum non conveniens\textsuperscript{83} would not be as satisfactory as the change of venue provision in the ALI proposals\textsuperscript{84} for the purpose of allocating these multiparty cases to the most appropriate forum for optimum efficiency and fairness. But once it has been determined that it is desirable to adjudicate these cases, the burden litigation imposes on the various parties becomes a question of degree — some burden on someone is a necessary result. The real problem with this approach is the constitutional one — would the fourteenth amendment due process restrictions on a state’s exercise of extraterritorial jurisdiction prevent such an authorization by Congress? In \textit{Atkinson v. Superior Court}\textsuperscript{85} Justice Traynor contends that a state court, without violating fourteenth amendment due process, could hear any case a federal court could hear under the federal interpleader provisions. If the due process limitations on a state court’s exercise of jurisdiction are solely a matter of fairness, then Justice Traynor’s position must be correct and there is no constitutional problem. There is no difference between the burden of defending in a state or federal court in the same area. But \textit{Hanson v. Denckla}\textsuperscript{86} indicates that the due process restrictions “are a consequence of territorial limitations on the power of the respective

\textsuperscript{83} It would, however, have to be more widely used than at present. See \textit{Developments in the Law—State-Court Jurisdiction}, 73 Harv. L. Rev. 909, 1008–17 (1960).

\textsuperscript{84} ALI, \textit{Study} 36–37, 137–88 (proposed § 2342).


\textsuperscript{86} 357 U.S. 235 (1958).
The question is one of sovereignty, not fairness — this is why Hanson phrases the jurisdictional test in terms of contacts rather than solely in terms of reasonableness. Hanson, however, only makes it clear that, in the absence of congressional authorization, a state court cannot exercise nationwide in personam jurisdiction. The addition of congressional authorization radically alters the situation. This is not a simple case of Congress authorizing the states to violate the fourteenth amendment — which obviously cannot be done. Since the primary judicial objection to state court exercise of nationwide in personam jurisdiction is the limited sovereignty of the states, a declaration by the ultimate sovereign authority, Congress, serving a legitimate federal purpose, would eliminate the reason for holding the assertion of jurisdiction unconstitutional. Although the Supreme Court cannot permit congressional action to encroach upon due process conceptions of fairness, a sovereignty question is a different matter. The Court’s role as protector of the national interest is no longer appropriate after Congress has spoken. Thus, with respect to the commerce clause, the court has found congressional authorization dispositive on the question whether state regulation of interstate commerce violates the Constitution.

CONCLUSION

It is impossible to determine how serious the indispensable-necessary party problem is in terms of the number of persons denied a fair adjudication. It seems likely that the number is quite small.

Some of the difficulties raised by the ALI proposals — section 2341 in particular — might be obviated by giving more careful consideration to the interests affected. But the basic problem inherent in any ambitious grant of diversity jurisdiction, that of coordinating the federal courts with state law and policy, is a much harder one.

A possible alternative would be to authorize state courts to issue nationwide service of process as a solution to the indispensable-necessary party problem. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him." Ibid.


Ibid.
necessary party problem. The advantage of this approach is the allocation of important state policy decisions to state courts.

If the alternative is not satisfactory — and it remains to be carefully examined — it might be best to leave as the solution to the indispensable-necessary party problem the partial one of relaxation of the indispensable party doctrine and the expansion of state court jurisdiction.