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FEDERAL DIVERSITY JURISDICTION— AN OPPOSING VIEW

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There is now pending before the country a proposal of the American Law Institute to revise the Federal Judicial Code. This proposal, if adopted, would eliminate from the federal jurisdiction and move over to the state courts a very large part of the diversity jurisdiction. Sponsors think that the cut would be about fifty per cent of all diversity cases. I believe the number would approach sixty per cent. Whatever it is, it is a big cut.

Let me take it in terms of purely personal experience. At this moment, I have four federal cases. In one, an Arizona resident has sued a national insurance company for 300,000 dollars, alleging some breach of duty in connection with an automobile insurance contract. This would be knocked out on two grounds under the proposal—the Arizona resident could not sue in federal court and the corporation, which is doing business in Arizona and which maintains an establishment there out of which this claim arose, would not be regarded as diverse for this purpose.

Second, I have a much larger contract suit involving an Illinois corporation and an Arizona resident. There are numerout claims, some of which probably arise out of activities of the corporation's establishment in Arizona and others that do not. It is a cumbersome case—we have had about thirty court days in it already and more coming. Under the proposed draft, on top of all our other issues, we would need to determine how much of the case arises from the Arizona "establishment" of the corporation and how this affects where the whole lawsuit ought to be.

Third is a case in which two Arizona residents are seeking to determine whether movements of the Colorado River have resulted in a change of title to land. It is an accretion case, and there are numerous California defendants. Because of peculiar details of the law of accretion as it applies to interstate rivers, the practical effect of determining the title of the property will also determine where an interstate boundary lies. Under the proposed revision, this case could not possibly be in the federal district court because the plaintiffs are Arizonians. Because of the interstate implications of the case, it is particularly desirable

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to have it in the federal court, but under the proposal, out it goes.

In terms of hard dollar values, perhaps the largest of these suits is the fourth, an action for breach of contract by an Arizona corporation against an eastern concern. The Arizona producers allege that the eastern corporation entered into a contract to distribute items produced by the Arizona company and then failed to use its best efforts to do so. Because it is a best efforts case and because thousands of sales may need to be taken into account, quite possibly the best place to handle the case would be in a federal district court in the east, where the records are; and we shall, in behalf of the eastern corporation, make an effort to transfer the case, therefore, to the eastern district on a forum non conveniens basis. Under the proposed amendment, it is doubtful whether this case could be in the federal district court at all because it may well arise from activities of an Arizona establishment—I am not deep enough in the case to be sure. If it could not be in the federal court to start with, then of course it could not be transferred to the location of the records; and in that case, we would find ourselves trying a case involving some two million dollars in damages with the relevant documents and witnesses all two thousand miles away. Moreover, we might find ourselves trying the case before a state judge who had no real experience in matters of this kind.

It is apparent that if Professor Field's proposal is to become law, I had best find, not necessarily another line of business, but certainly another place in which to earn my living. In this I am not alone.

In preparation for these remarks I have had a review made of approximately 100 recent cases from the United States District Court for the Northern District of California, Southern Division —the San Francisco District Court. Of suits brought by individuals, out of 56 cases, 30 could not have been brought in the federal district court under this proposal. Of cases brought by corporations, it appears that 20 out of 27 could not have been so brought. Putting together both the original and the removal cases, the percentage declined in jurisdiction on those 100 cases would be sixty per cent.

A similar study was made for the district in Arizona. Again on a sample of approximately 100 cases, fifty-three per cent would have been excluded by this revision.

There were about 67,000 civil cases filed in the federal courts last year, of which about 43,000 were private civil cases. Of those, roughly 19,000 were federal question cases and roughly 20,000 were diversity cases. Of those diversity cases, some 5,300 were in contract and some 14,000 were in tort. Of the torts, about 11,500 were personal injury cases, 8,000 or so being automobile accident cases and the rest being others.

But do not ask, gentlemen of the Fourth Circuit, for whom the bell tolls—it also tolls for thee. In this circuit last year, there were 550 diversity cases filed in contract and around 1,200 in personal injuries, as well as miscellaneous other diversity litigation. It is therefore apparent that this reallocation of where we are to do our business hits everyone, and it hits hard indeed. The essentials of this proposal are first, that no one can invoke diversity jurisdiction, whether originally or on removal, in any state in which he is a citizen. No corporation can either originate or remove a case on grounds of diversity in any state in which it maintains a local establishment if the cause of action arises out of the activities of that local establishment. Pretty obviously there would only rarely be a suit which did not arise out of the activities of the local establishment. Specifically knocked out, for example, are any corporations which maintain offices which sell insurance or securities or real property or maintain a showroom or engage in production of processing if the suit relates to any of these things.

I am opposed to this proposal to gut the diversity jurisdiction. My objection is entirely in principle, and I shall take no time to talk about this detail or that. I freely grant that if the goal is to run a steam roller over diversity, this is a fine way to do it; the craftsmanship of the draft is excellent. To change a figure of speech, the amputation is clean and complete. There is nothing wrong with this proposal except its substance.

We are dealing with an alteration of the legal system of major proportion. This is not some pee-wee question which will affect an isolated case here and there. To accept the calculation of the sponsors of the change themselves, something over 10,000 cases are going to be put out of the federal court system and into the state court systems in one year. Simply in terms of the numerical shift of cases from one court system to another, I believe that no legislation in the history of the United States has affected in substantial fashion so many cases in its first year of operation. The proposal, accepting the figures of its sponsors, will knock

out of the federal court system something over twenty-five per cent of all the private civil cases in it.[1]

We must not shrink from any proposal merely because it is drastic. If the need is great enough, a drastic solution may be essential, and it frequently is. But before a drastic remedy is adopted, there ought to be at least some substantial reasons for doing so. The most astonishing aspect of this particular cure is that to date we have been given substantially no diagnosis of the illness to be cured, no reasons for adopting this particular solution. The 215 page pamphlet in which this remedy is advanced contains scarcely a page in it telling us why to adopt the proposal at all. All jurisdictional changes ought to be the product of a need. Historically all substantial changes have been the product of needs. What need is suggested here to warrant this change? In all the discussions so far, only two grounds have been suggested:

1. There is a suggestion that federal justice is being delayed by an expanding work load and that this causes undesirable pressure for expanding the federal court system. We are given no evidence at all as to just how it is that the diversity cases are causing this result, and we are certainly not told why the system should not be expanded to take care of these cases.

Let me be concrete about this in terms of the Fourth Circuit. In this circuit, the median time for disposition of all private civil cases for 1964 was 7.5 months from filing to final disposition. The Western District of Virginia was whizzing the cases through with a median of five months, the Northern District of West Virginia in three months. Maryland was ten months, and the Eastern District of North Carolina thirteen. The figures are not as clear as they might be, but, so nearly as can be told, not even the Eastern District of North Carolina has its problems principally with diversity—it has an exceptionally heavy weight in other areas including particularly habeas corpus. If the object therefore is to reduce congestion, this particular revision is not created to fit you.

But let me meet this point head-on, with a more general consideration. Viewing the matter over all, what is the virtue in taking cases off a crowded federal court docket and dumping them on a crowded state court docket? This proposal, I submit, is a kind of a jurisdictional variation of the old three shell game. You will remember that at the carnivals the sleight-of-hand man

1. This figure excludes habeas corpus.

stood behind three walnut shells, the pea went under one shell, and then it vanished—it was never under the shell you expected it to be under. This jurisdictional proposal has only half the magic of the three shell game—these 10,000 cases are going to disappear from under the shell of the federal walnut, but there is no doubt as to where they are going—they are simply moving over to a state court shell. Generally speaking the areas which are behind, are behind in both their federal and state court dockets. I see no merit whatsoever in moving a case from a federal court docket where it may have to wait two years for disposition to a state court docket where it may have to wait four.

2. The second principal consideration advanced is that somehow in our federal system, as a matter of political theory, these are disputes which ought to be handled by the states. This is the argument from federalism, an argument that somehow in terms of the theory of national and local interests, these are matters which the states ought to handle entirely on their own. This is the argument which uses the phrase that "state cases belong in state courts."

The real trouble with this argument is that it comes more than 175 years late. The diversity jurisdiction was expressly provided in the federal constitution in 1787. The original Judiciary Act of 1789 provided that these cases should be heard in federal courts, and for almost the first hundred years of American history they were the only private civil cases (apart from admiralty) which would be heard in the federal courts. George Washington presided at the birth of this jurisdiction, James Madison helped put it into the original Judiciary Act, and a large share of Abraham Lincoln's law practice consisted of trying in the federal courts exactly the kind of cases which this proposal would eradicate.

There are many functions which the federal courts perform which may be open to some earnest debate in terms of federalism; I have heard it earnestly argued that school segregation or legislative redistricting are unsuitable matters for federal court adjudication. But to argue in terms of the theory of the federal system that a branch of federal jurisdiction unquestionably created by our founding fathers somehow conflicts with the American theory of federal-state relations is unsalable argument. The founding fathers believed, whether rightly or wrongly, that the diversity jurisdiction would avoid regional prejudices, that it would give a fair forum for the business interests of the

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country, and above all that it would achieve a more competent administration of justice. In pushing for the adoption of the Constitution, James Madison expressly spoke of the "tardy, and even defective, administration of justice . . . in some states."[2] As a lawyer more bluntly put it in an argument before the U. S. Supreme Court in 1797, it was hoped that the federal courts would "discountenance and reject the errors and irregularities of the practice of the state courts."[3]

We need not now accept the argument of 1789. Conditions may have changed, and there may be reasons based either on experience or on our expectations for the future. But no serious argument can be made that diversity conflicts with the theory of federalism for it is of the essence of the theory of federalism; it is at least as traditionally federal as the Flag and the 4th of July. If there is to be a change, it will have to be for some better reason than tradition.

On the affirmative side, diversity is worth its salt.

1. The 10,000 or more cases proposed to be pushed out of the federal system are in fact being disposed of each year to the general satisfaction of those who need their disposition. This is not to say that everyone is happy with the results of every case, nor is it to say that everyone is happy with the federal court administration. Good natured losers are hard to find. Not all federal judges are wiser or abler, nor are all federal procedures more satisfactory than state procedures. There are areas or pockets of federal ineptitude or maladministration.

But with a high degree of uniformity, the system has been generally satisfactory. It is a rare loser who feels that he would have been much better off in a different system. Where political considerations make the federal judges poor, they are likely to make the local judges worse. There is a general feeling that justice in federal courts is being well administered—there is no obvious abuse to be corrected.

2. There is great value in the interaction of the two systems. The success of the federal rules has led to their widespread use in the states, and the federal system of revision of the rules is keeping the state procedure moving as well. A major factor here is cost. My own state is an example. It is a small state with no funds available for extensive procedural studies. Hundreds

2. ELLIOTT, DEBATES 533.
3. Brown v. von Bramm, 3 U.S. (3 Dall.) 344, 350 (1797).

of thousands of dollars have been spent to keep the national rules system current with the needs of the times. My own state was the first to adopt the original federal rules, was probably the first to adopt the 1946 amendments, beat the Supreme Court in the adoption of the 1955 amendments, and was first in adopting the last two sets of amendments. We have had, in short, the full benefit of federal rules work which we could not possibly have afforded for ourselves.

This is by no means a one-way street. The federal system learns from the states as well. A recent change in the federal rule on process comes from progress made in Illinois;[4] an impending change on parties comes from developments in Michigan and New York;[5] a recent change in directed verdict procedure comes from an earlier rule in Arizona.[6] In instance after instance, ideas are moving both ways.

I believe that this rules interaction, this great procedural exchange, would be radically limited if the two systems did not deal with highly similar cases. Fundamentally the exchange depends upon overlapping bars, upon the fact that the most experienced trial lawyers of a jurisdiction are in the state court one day and the federal court the next. Cutting back the jurisdiction to federal questions means the creation of a specialty bar—the Jones Act men, the patent men, the antitrust men, the tax men. If the two systems are to be kept coordinate, it is useful to have an interchangeable cog between them, the product of this overlapping jurisdiction.

3. Finally, there are elements of prejudice and competence. A native given the practical alternative of having a suit against an out-of-stater in a particular county of his state system may well conclude that speed, ability, impartiality or plain convenience will be best served in the federal court. The out-of-state defendant is normally not hurt by this judgment, and the whole

4. *Compare* FED. R. CIV. P. 4(e) *with* ILL. STAT. ANN. ch. 110, § 14 (Smith-Hurd 1956).

5. The proposed amendment of FED. R. CIV. P. 19 draws heavily from MICH. STAT. ANN. GENERAL COURT RULE 205 (1963) and N. Y. CIV. PRAC. § 1001 (1963).

6. Rule 50(a) as amended in 1963 eliminates the requirement that after the judge has directed a verdict, the jury must sign a piece of paper giving the verdict which he has already told them they must give. This is an aimless and stultifying business. Rule 50(a) as adopted in 1963 provides that "the order of the court granting a motion for a directed verdict is effective without any assent of the jury." Arizona's Rule 50(e) as adopted in 1961 provided that upon the grant of a directed verdict it might be entered "by an appropriate order of the court in accordance with the motion."

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cause may benefit from it. There is not a lawyer in general practice in any state who cannot call to mind a county in which the quality of state justice is such that he would prefer to go to a federal court if he could get there.

To this argument, the proponents of slashing diversity say that the existence of the federal alternative is undesirable because by virtue of it the lawyer "is under that much less pressure to seek improvement in his state's courts." This argument, that we should give up diversity jurisdiction to make ourselves so uncomfortable that we will thereupon improve the state courts, is to me fanciful in the extreme. It is a kind of hair-shirt approach—one should put on the new proposal for the express purpose of being uncomfortable; it is a repentance for one's sins and an incentive to do better. The suggestion that the litigant, if dissatisfied with his state justice, should not escape it but improve it, is visionary. The litigant has a problem which needs solving now, not in some indefinite future. Moreover the concurrent system is one way of developing improvements. Further isolating justice in the counties is a wrong-way step for improvement.

4. The diversity system provides a legitimate federal service to the people of the United States. There are federal services of varying degrees of utility and of necessity, such as the giving out of seed catalogs, the highway program, the school lunch program, Social Security. Each of us will have our individual attitudes about individual ones of these services and the hundreds like them. But of all these services, the diversity jurisdiction is the oldest. It is a federal dispute-settling service which has existed since 1789. The privilege of taking those disputes which involve citizens of different states into federal courts is a good, working system. We should preserve it, not because it is old but because it is useful. We certainly ought not junk it.