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The ALI's Complex Litigation Project and Federal-To-State Consolidation: A Due Process Analysis of Granting to State Courts Nationwide Personal Jurisdiction

I. INTRODUCTION

In response to the ever increasing burdens placed on the judicial system by multiform litigation involving multiple parties, the American Law Institute ("ALI") has drafted and proposed the enactment of a national complex litigation statute (hereinafter the "Proposal"). The Proposal addresses the problems created by multiparty, multiform litigation—particularly the costs and inefficiencies created by the relitigation of common issues—through mechanisms which transfer all related litigation to a single forum.¹ The transfer of related litigation to a single federal forum (i.e., state-to-federal and federal-to-federal consolidation) is at the core of the Proposal; nevertheless, the Proposal also includes a mechanism for the transfer of related litigation to the proper court of a single state (federal-to-state consolidation).² To facilitate state court consolidation, the Proposal confers broad powers on state transferee courts. Most notable among these powers are the authority to exert jurisdiction "to the full extent of the power conferrable on a *federal* court under the United States Constitution" and the power to exercise nationwide service of process.³ This expansion of the territorial jurisdiction exercisable by state courts probably violates the requirements of due process, but remains a useful mechanism for reducing judicial inefficiency.⁴ This paper focuses on the due process

1. AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT: STATUTORY RECOMMENDATIONS AND ANALYSIS, chs. 4, 5, and 6. (1994) [hereinafter COMPLEX LITIGATION PROPOSAL].

2. The American Law Institute has also suggested the formulation of an Interstate Complex Litigation Compact or a Uniform Complex Litigation Act which would be "designed to facilitate the transfer and consolidation in one state court of similar actions lodged in the courts of two or more states." COMPLEX LITIGATION PROPOSAL, *supra* note 1, § 4.02 ch. 4 Introductory Note (a) at 166.

3. *Id.* § 3.08 (a) at 147 (emphasis added).

4. The ALI's provision for federal-to-state transfers of multiparty, multiform

concerns implicated by the Proposal's enlargement of state court jurisdiction.

Part II of this paper outlines the general structure of the federal-to-state transfer mechanism of the Proposal. This part considers the Proposal's provisions for enlarging the territorial jurisdiction of state courts and providing them with the power to serve process nationwide. Part III addresses the constitutionality of the Proposal's expansion of the territorial jurisdiction of state courts. Finally, Part IV explores the utility of providing a mechanism for federal-to-state consolidation within the confines of Fourteenth Amendment jurisprudence.

II. STATE COURT CONSOLIDATION

State courts currently manage and adjudicate an immense (and continually increasing) number of multiparty, multiforum cases.⁵ Section 4.01 was drafted to fill "a gap"⁶ in the Proposal's scheme for single-forum consolidation: the lack of a procedure "for moving cases from the federal to the state courts in situations involving both state and federal lawsuits when a state court may be the preferable forum for the adjudication of a complex dispute."⁷ The Proposal, however, states that this consolidation to state courts should only be used "under certain very limited circumstances."⁸ Initially this part of the paper will set forth the parameters of these "very limited circumstances."⁹ The specific provisions for enlarging the territorial jurisdiction of state courts and providing them with the power of nationwide service of process will then be examined.

litigation poses numerous other constitutional questions such as: do federal-to-state transfers violate the Tenth Amendment or Article III of the Constitution?; do such transfers inappropriately curtail the jurisdiction of the federal courts?; and do such transfers violate the equal protection principles of the Fifth Amendment by treating multiforum cases with multiple parties different from other cases? For a general exploration of these issues, see Joan Steinman, *Reverse Removal*, 78 IOWA L. REV. 1029 (1993).

5. Asbestos litigation is one of the better-known illustrations of this development. Of the 17,120 asbestos exposure cases pending against Johns-Mansville at the time of its filing for bankruptcy, approximately two-thirds of the cases (11,143) had been brought in state rather than federal court. Parish, *Asbestos Litigation—Dimensions of the Problem*, STATE CT. J., Winter 1984, at 5.

6. COMPLEX LITIGATION PROPOSAL, *supra* note 1, at 166.

7. *Id.* at 165.

8. *Id.* at 166.

9. *Id.* at 220.

A. *Designation of a State Court as a Transferee Forum*

Section 4.01(a) delineates the Proposal's requisites for federal-to-state transfers:

Subject to the exceptions in subsection (c), when determining under § 3.04 where to transfer and consolidate actions, the Complex Litigation Panel¹⁰ may designate a state court as the transferee court if the Panel determines

(1) that the events giving rise to the controversy are centered in a single state and a significant portion of the existing litigation is lodged in the courts of that state;

(2) that fairness to the parties and the interests of justice will be materially advanced by transfer and consolidation of the federal actions with other suits pending in the state court; and

(3) that the state court is more appropriate than other possible transferee courts.¹¹

These federal-to-state transfer conditions are most likely to be present in the narrow range of multiparty, multiforum litigation which arises from area pollution, insurance coverage, and "single disaster" events such as the 1981 catastrophic collapse of the Hyatt Skywalk in Kansas City.¹² According to the Proposal, these types of litigation lend themselves particularly well to adjudication in state courts.¹³

Subsection (a) further requires the "consent of the appropriate judicial authority in the state in which the designated transferee court is located."¹⁴ This requirement is an attempt to address federalism concerns raised by the transfer of litigation from a federal forum to a state court. Such a transfer could be perceived as forcing yet another federal matter upon the meager resources of the state judicial systems.¹⁵

In subsection (b) of section 4.01, the Proposal lists the factors that the Complex Litigation Panel should consider in determining whether the requirements of subsection (a) (other

10. The ALI's Proposal contemplates the establishment of a Complex Litigation Panel of federal judges that would be given the responsibility of deciding whether separate civil actions that involve common questions of fact should be consolidated for pretrial proceedings, trial, or both. The Panel would also eventually choose the forum for the proceedings. See *id.* at 437-53.

11. *Id.* at 177 (footnote added).

12. *Id.* at 168.

13. *Id.*

14. *Id.* § 4.01(a) at 178.

15. *Id.* note (d) to Chapter 4, at 174.

than the consent requirement) have been met. The factors listed in subsection (b) are:

(1) the number of the individual cases that initially were filed or are pending in state courts relative to the number of actions pending in federal courts;

(2) the number of states in which the state and federal cases are located;

(3) whether the procedures or law to be applied in the state transferee court differ from that which would have been applied by a federal transferee court to a sufficient degree that designation of the state transferee court creates a risk of prejudice to some of the parties to be transferred there; and

(4) any other factor indicating the need to accommodate a particular state or federal interest.¹⁶

Factors (1) and (2) address whether related cases are concentrated in the state court system of a particular state (judicial and geographic concentration) while factors (3) and (4) look at issues of fairness.

Even if the conditions of section 4.01(a) are met, some kinds of federal cases are not subject to the Complex Litigation Panel's authority to transfer cases. Subsection (c) of section 4.01 exempts from transfer to a state court: (one) any action that is within the exclusive jurisdiction of the federal courts; (two) any action that has been removed to a federal court under the provisions of 28 U.S.C. § 1441(d), 28 U.S.C. § 1442, or 28 U.S.C. § 1443; (three) any action brought in federal court under the provisions of 42 U.S.C. § 1983; and (four) any action brought by the United States under 28 U.S.C. § 1345 or removed by it under 28 U.S.C. § 1444.¹⁷ These actions were excluded from transfer to state court because they embrace "areas in which Congress has expressed an interest in assuring that a federal forum be available."¹⁸ Hence, the government's and the parties' substantial interests in securing a federal forum are allowed to predominate.

B. Personal Jurisdiction in the State Transferee Court

In addition to delineating the necessary conditions for federal-to-state transfer, section 4.01(a) also, through the incor-

16. *Id.* § 4.01(b) at 178.

17. *Id.* § 4.01(c) at 178.

18. *Id.* § 4.01 cmt. g at 195.

poration of other sections of the Proposal, confers various powers on state transferee courts. Specifically, section 4.01(a) provides that "[o]nce transfer is approved, a state transferee court shall have the same powers and responsibilities as a federal transferee court under sections 3.06(c), 3.08, 5.03 and 5.04."¹⁹

Addressing the personal jurisdictional power of the transferee court, section 3.08 states:

(a) Once actions have been transferred and consolidated by the Complex Litigation Panel, the transferee court may exercise jurisdiction over any parties to those actions or any parties²⁰ later joined to the consolidated proceeding to the full extent of the power conferrable on a federal court under the United States Constitution.

(b) Once actions have been transferred and consolidated by the Complex Litigation Panel, a subpoena for attendance at a hearing or trial, if authorized by the transferee court upon motion for good cause shown and upon such terms and conditions as the court may impose, may be served at any place within the jurisdiction of the United States or anywhere outside the United States if not otherwise prohibited by law.²¹

19. *Id.* § 4.01(a) at 178. Discussion of the powers conferred by §§ 3.06, 5.03, and 5.04 is outside the scope of this paper. As a general matter, § 3.06(c) discusses the discretion that the transferee court has when it severs issues, *id.* § 3.06 (c) at 114-15. Section 5.03 addresses supplemental jurisdiction, *id.* § 5.03 at 256-57, and § 5.04 confers upon transferee courts the power to enjoin transactionally related proceedings pending in other state or federal courts, *id.* § 5.04 at 263.

20. Due process analysis of the exercise of personal jurisdiction has, for the most part, focused on jurisdiction over defendants. But see *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) for an analysis of the personal jurisdictional requirements imposed when potential members of the plaintiff class in a class action are absent. Jurisdiction over the plaintiff is rarely an issue because plaintiffs are considered to have impliedly consented to jurisdiction by selecting the particular forum. See *Adams v. Saenger*, 303 U.S. 59, 67-68 (1938). As is recognized by the Proposal, however, "In many complex litigation situations under this proposal, neither the plaintiff nor the defendant will have selected the transferee forum." COMPLEX LITIGATION PROPOSAL, *supra* note 1, § 3.08 cmt. a at 148. The Proposal therefore concludes that "whether the transferee court has the power to enter a binding judgment should be determined by a standard applicable to all the parties; there should be no less rigorous a standard for asserting jurisdiction over plaintiffs than over defendants in this context." *Id.* Consequently, the due process limitations on the Proposal's provisions for personal jurisdiction in state courts to which multi-party, multiparty litigation is transferred apply with equal force to both plaintiffs and defendants. Thus, for the analytical purposes of this paper all defendant-centered language used in the due process cases should be considered to apply with equal force to plaintiffs.

21. COMPLEX LITIGATION PROPOSAL, *supra* note 1, § 3.08 at 147 (footnote added).

The comments following section 4.01 explain the Proposal's reasoning in conferring such expansive jurisdictional power on the state transferee court: "[I]f the court were limited by its own long-arm statute, it might not be able to embrace all of the elements of the dispersed litigation . . . [and thus] might not be able to provide the just and efficient resolution of all the consolidated actions."²² The Proposal thus confers powers upon state courts which the state legislature itself may have seen fit to withhold from the state's courts.

III. DUE PROCESS ANALYSIS OF THE TERRITORIAL JURISDICTION OF STATE TRANSFEEEE COURTS

In analyzing the due process issues raised by the Proposal's expansion of a state transferee court's territorial jurisdiction, this section of the paper will first set forth the due process arguments presented in the Proposal to justify such expansion. These arguments will then be evaluated.

A. *The Proposal's Due Process Analysis*

The distinction between the due process limits that restrain the assertion of federal judicial power and the limits on the states' exercise of judicial power is the basis for the Proposal's assertion that the expansion of a state transferee court's territorial jurisdiction does not violate the United States Constitution. In the comments to section 4.01, the Proposal states:

Nationwide service of process for complex litigation would be under the authorization of a federal statute and not simply an assertion of state power. Congress has the power to enact such a statute as part of its authority over interstate commerce. Thus, jurisdiction under this federal statute would not be limited by the Due Process Clause of the Fourteenth Amendment, but would be controlled by the Fifth Amendment and the power of Congress to enforce the Fourteenth Amendment under Section 5 of that Amendment.²³

In other words, the Proposal asserts that because the source of legislation is federal, the Fifth Amendment due process analysis is more appropriately applied to a state transferee court's

22. *Id.* § 4.01 cmt. f at 193.

23. *Id.* § 4.01 cmt. f at 193-94.

exercise of nationwide personal jurisdiction. Application of the Fifth Amendment is important because the Supreme Court cases which have struck down extraterritorial assertions of personal jurisdiction have been based on the limits placed on state power by the Due Process Clause of the Fourteenth Amendment.²⁴

Although the Proposal asserts that a Fifth Amendment due process analysis is the appropriate test for determining the constitutionality of a state transferee court's exercise of nationwide personal jurisdiction, the Proposal does not specifically analyze the restraints that the Fifth Amendment places on the assertion of personal jurisdiction by state transferee courts. Rather, the Proposal apparently presumes that because jurisdiction would be provided by a federal statute, the Fifth Amendment would place duplicate restrictions on the exercise of personal jurisdiction by both federal and state transferee courts. Accordingly, the Proposal's due process analysis of the personal jurisdictional power of state transferee courts under section 4.01, for the most part, merely incorporates the Proposal's due process analysis of the personal jurisdictional power of federal transferee courts under section 3.08.²⁵ It is therefore necessary to examine the due process analysis provided in the comments to section 3.08.

Comment (e) to section 3.08 appraises the limitations on the personal jurisdictional power of the transferee court under the Fifth Amendment by drawing analogies from the Supreme Court's decisions concerning the Fourteenth Amendment. Such comparisons are necessary because the Supreme Court has never decided a personal jurisdiction case under the Fifth Amendment. It is therefore uncertain how due process limitations under the Fifth Amendment are to be determined.²⁶ As

24. *Id.* at 194. The comments to § 4.01 also rely on § 5 of the Fourteenth Amendment, the Amendment's enforcement provision, to justify expansion of state jurisdiction. This is neatly done since the Due Process Clause of the Fourteenth Amendment places demands on state governments which restrict state sovereignty. Under the aegis of § 5 of that amendment, however, the Proposal wishes to expand state sovereignty to an unprecedented degree. Section 5 states, "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. Whether the Proposal is enforcing "the provisions of this article [Amendment XIV]" or implementing some other goal is beyond the scope of this paper, but the Proposal's reliance on § 5, at least initially, seems misplaced.

25. COMPLEX LITIGATION PROPOSAL, *supra* note 1, § 4.01 cmt. f at (238-39).

26. *Id.* § 3.08 cmt. e at 156.

the Proposal indicates, however, "[t]he analogies are well-founded . . . because the relevant language of both amendments is identical."²⁷

Under well-known Fourteenth Amendment jurisprudence, a state may assert personal jurisdiction over a defendant who has "minimum contacts" with the forum state when the assertion of jurisdiction will not violate traditional notions of "fair play and substantial justice."²⁸ Drawing from the Fourteenth Amendment's due process analysis, the Proposal concludes that "just as an analysis of state contacts and fairness are [sic] pertinent to the decision of whether a particular assertion of jurisdiction violates the Fourteenth Amendment, reference to national contacts and fairness appears to be proper for determining whether Fifth Amendment constraints are satisfied."²⁹ The Proposal thus advances a two-prong test for determining whether the transferee court's exercise of personal jurisdiction conforms with the due process requirements of the Fifth Amendment: (1) national contacts and (2) fairness. These prongs will be discussed in turn.

1. *National contacts*

The national contacts prong of the Proposal's Fifth Amendment analysis is derived from *International Shoe Co. v. Washington's* pronouncement that for a state to exercise juris-

27. *Id.* The pertinent language of both amendments states that no person shall be deprived "of life, liberty, or property, without due process of law." U.S. CONST. amend. V, amend. XIV, §1.

It should be noted that the Supreme Court has relied on Fourteenth Amendment cases to analyze due process constraints on the federal government in areas other than personal jurisdiction. For instance, in *Mathews v. Eldridge* the Supreme Court stated: "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." 424 U.S. 319, 332 (1976).

Such precedents provide some support for the Proposal's analogy, but the United States Supreme Court has applied different standards to state and federal governments in the past. In voting rights cases, for example, the Court has held that the Equal Protection Clause of the Federal Constitution imposes a "one-man, one-vote principle." See *Reynolds v. Sims*, 377 U.S. 533 (1963). This principle has been applied with virulence to state and local governments. See *Avery v. Midland County*, 390 U.S. 474 (1968). This principle of absolute equality in vote strength flies in the face of the United States Constitution which allows each state to send two Senators to the federal legislative branch regardless of population.

28. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken V. Meyer*, 311 U.S. 457, 463 (1940)).

29. COMPLEX LITIGATION PROPOSAL, *supra* note 1, § 3.08 cmt. e at 156.

diction over a person, certain "minimum contacts" must exist between that state and the person over whom jurisdiction is asserted. Extending this concept of "minimum contacts" to its Fifth Amendment analysis, the Proposal asserts that due process, in the federal context, requires minimum contacts between the United States and the person over whom jurisdiction is asserted.³⁰

The Proposal's national contacts test is not new. When lower federal courts have tested the constitutionality of federal statutes conferring nationwide jurisdiction, national contacts have been central to their inquiry. These courts have sustained jurisdiction on the basis of the defendant's presence in, or the defendant's mere contact with, the United States.³¹ Although the full Court has not addressed the issue, two Supreme Court Justices have supported federal court jurisdiction on the basis of the defendant's presence in, or contacts with, the United States.³² In *Stafford v. Briggs*, the national contacts approach was applied by the lower courts to uphold jurisdiction authorized by the Mandamus and Venue Act.³³ The Supreme Court reversed on other grounds, but dissenting Justice Stewart, joined by Justice Brennan, addressed the national contacts question. Justice Stewart wrote that "due process requires only certain minimum contacts between the defendant and the sovereign that has created the court."³⁴

In short, based on analogies to *International Shoe's* Fourteenth Amendment analysis, decisions of the lower federal courts, and dicta from two retired Supreme Court Justices, the Proposal asserts that national contacts is the proper basis for asserting personal jurisdiction under the Fifth Amendment.³⁵

30. *Id.* at 157.

31. See, e.g., *Trans-Asiatic Oil Ltd. v. Apex Oil Co.*, 743 F.2d 956 (1st Cir. 1984); *Hogue v. Milodon Eng'g, Inc.*, 736 F.2d 989 (4th Cir. 1984); *FTC v. Jim Walter Corp.*, 651 F.2d 251 (5th Cir. 1981).

32. *Stafford v. Briggs*, 444 U.S. 527, 530-33 (1980).

33. *Id.*

34. *Id.* at 554 (Stewart, J., dissenting). Justices Stewart and Brennan are, however, no longer with the Court.

35. It should be noted, however, that the national contacts approach has only been addressed within the context of federal question cases. Nevertheless, the Proposal concludes that "there is no basis for concluding that the Fifth Amendment supports a national-contacts test for nondiversity cases, but that a more limited test must be used in diversity cases." COMPLEX LITIGATION PROPOSAL, *supra* note 1, at 157 (citing Maryellen Fullerton, *Constitutional Limits on Nationwide Jurisdiction in the Federal Courts*, 79 NW. U.L. REV. 1, 70 (1984)). Furthermore, the Proposal argues:

2. *Fairness*

Among the lower federal courts that have employed a national contacts test, there is disagreement about the precise standard that should be applied. This disagreement centers on whether jurisdiction can be based purely on national contacts or whether a fairness requirement must also be satisfied.³⁶ Nevertheless, even courts adopting the "pure" national contacts approach have acknowledged that all litigants enjoy the right to a fair forum.³⁷ These courts, however, maintain that the right to a fair forum is addressed adequately by statutory provisions regarding venue and transfer.³⁸

As mentioned, the Proposal has adopted a standard that includes both the fairness requirement and the showing of national contacts.³⁹ The reporter's notes to section 3.08 comment (e) state that "[g]iven the eradication of precise venue limitations on transfer under this proposal, reliance on national contacts without a separate fairness inquiry would be questionable."⁴⁰ In the case of state transferee courts the issue of removing venue and transfer protections is irrelevant because federal statutory venue and transfer provisions are not applicable to state courts.

Complex diversity litigation has all of the characteristics that currently justify the national-contacts standard: (1) the need to provide a forum for litigation to correct and control severe problems in the national economy that are likely to involve parties across the country acting in a similar fashion or being injured by similar conduct; (2) the need to provide a forum where all parties can be subjected to jurisdiction, when no single state has that power; and (3) the need to provide a convenient forum for litigation to marshal and conserve the assets of an insolvent party.

Id. Nevertheless, the appropriateness of a national contacts test for nondiversity cases remains uncertain.

36. *Id.* § 3.08 reporter's note to cmt. e (10), at 157-58. For cases which have employed a "pure" national contacts approach in their Fifth Amendment analysis, see *Trans-Asiatic Oil Ltd. v. Apex Oil Co.*, 743 F.2d 956 (1st Cir. 1984); *Hogue v. Milodon Eng'g, Inc.*, 736 F.2d 989 (4th Cir. 1984); *FTC v. Jim Walter Corp.*, 651 F.2d 251 (5th Cir. 1981). Cases which have articulated a fairness requirement in addition to a showing of national contacts include *Handley v. Indiana & Mich. Elec. Co.*, 732 F.2d 1265 (6th Cir. 1984) and *Horne v. Adolph Coors Co.*, 684 F.2d 255 (3d Cir. 1982).

37. See, e.g., *Trans-Asiatic Oil*, 743 F.2d 956; *Hogue*, 736 F.2d 989; *Jim Walter Corp.*, 651 F.2d 251.

38. *Id.*

39. COMPLEX LITIGATION PROPOSAL, *supra* note 1, § 3.08 cmt. e at 157. See also *supra* note 28 and accompanying text.

40. *Id.* reporter's notes to cmt. e (10) at 158 (citation omitted).

The factors contemplated by the Proposal in determining whether a transferee court's assertion of personal jurisdiction over a litigant is fair can be derived from comment (f) to section 3.08, "Application of the proposed standard."⁴¹ According to comment (f), the Complex Litigation Panel should balance two factors in determining whether exercise of personal jurisdiction by the transferee court is fair: (1) the actual hardship or inconvenience imposed on a particular party and (2) the "systemic interests and need to provide a conclusive adjudication for all of the litigants."⁴² Comment (f) does not indicate the relative weight the Complex Litigation Panel should give each factor, although it does acknowledge that it may be egregiously unfair to force "a truly local party" to litigate in a distant court, thereby leaving the litigant without remedy if he or she refuses (or is unable) to travel cross-country to vindicate legitimate rights.⁴³ The Proposal, however, does grant the Complex Litigation Panel the authority to exempt litigants from having their cases sent to the transferee forum whenever "fairness concerns so require."⁴⁴

*B. Analysis of the Proposal's Fifth Amendment National
Contacts and Fairness Test as Applied to
State Transferee Courts*

Having examined the Proposal's Fifth Amendment analysis and its rationale for applying such analysis to the exercise of nationwide personal jurisdiction by a state transferee court, this paper will next examine the appropriateness of applying the Proposal's Fifth Amendment analysis to state transferee courts.

1. National contacts

As previously noted, the Proposal asserts that the Fifth Amendment's national contacts analysis is properly applied to state transferee courts because they will be exercising nationwide personal jurisdiction under the authority of federal legislation.⁴⁵ Some support for this assertion can perhaps be found

41. *Id.* cmt. f at 158.

42. *Id.* at 159.

43. *Id.*

44. *Id.* at 160.

45. *See supra* part III.A.

in *World-Wide Volkswagen Corporation v. Woodson*.⁴⁶ In *Volkswagen* the Supreme Court stated that the concept of minimum contacts

perform[s] two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond limits imposed on them by their status as coequal sovereigns in a federal system.⁴⁷

If restrictions on state power are at the core of the minimum contacts requirement of the Due Process Clause, then the source of legislation under which a state is acting would seem critical. As the Proposal recognizes, "the *Volkswagen* Court's concern about possible friction between coequal sovereigns is inapplicable when the state tribunal is acting under authority granted by Congress."⁴⁸ Without the concern about possible friction between coequal sovereigns, it is arguable that the minimum contacts analysis need not be restricted to state boundaries. Thus, when states are acting under authority granted by Congress, a national contacts approach to a due process analysis may be appropriate.

Nevertheless, the significance of the Due Process Clause in restricting state power was questioned in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*:

The restriction on state sovereign power described in *World-Wide Volkswagen Corp.* . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.⁴⁹

46. 444 U.S. 286 (1986).

47. *Id.* at 291-92.

48. COMPLEX LITIGATION PROPOSAL, *supra* note 1, §4.01. cmt. f at 194.

49. 456 U.S. 694, 703 n.10 (1982).

If restrictions on state power are, as *Bauxites* implies, only tangential to the minimum contacts requirement of the Due Process Clause, then the source of legislation under which a state is acting would seem to be of limited importance. Thus, even when states are acting under authority granted by Congress, state boundaries may still be significant in a minimum contacts analysis.

Additional questions concerning the appropriateness of applying a national contacts analysis to the state court's exercise of nationwide personal jurisdiction are raised in cases and literature addressing the application of a national contacts approach to questions of federal court jurisdiction. According to some lower courts and commentators, the Due Process Clause permits courts to exercise personal jurisdiction over any defendant who is located within or has minimum contacts with the government responsible for creating the court.⁵⁰ The Proposal itself quotes Supreme Court language which indicates that due process requires contacts with the government responsible for creating the court: "[D]ue process requires only certain minimum contacts between the [defendant] and the sovereign that has created the court."⁵¹

If contacts with the government responsible for creating the court is the proper due process analysis, then, while minimum contacts with the United States may be sufficient to support a federal court's exercise of nationwide personal jurisdiction, it is not sufficient to support a state court's exercise of such power. Thus, the Proposal's application of a national contacts analysis to the state transferee court's exercise of personal jurisdiction may be improper. Although the state courts would be acting under the auspices of the federal government, such courts are still the creation of state governments and not of the federal government.

50. See, e.g., *Haile v. Henderson Nat'l Bank*, 657 F.2d 816 (6th Cir. 1981) cert. denied, 455 U.S. 949 (1982); *Fitzsimmons v. Barton*, 589 F.2d 330 (7th Cir. 1979); *Driver v. Helms*, 577 F.2d 147 (1st Cir. 1978), rev'd on other grounds sub nom. *Stafford v. Briggs*, 444 U.S. 527 (1980); *Mariash v. Morrill*, 496 F.2d 1138 (2d Cir. 1974). See also Thomas F. Green, Jr., *Federal Jurisdiction in Personam of Corporations and Due Process*, 14 VAND. L. REV. 967 (1960-61); Note, *Alien Corporation and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard*, 95 HARV. L. REV. 470.

51. *Stafford*, 444 U.S. at 554 (Stewart, J., dissenting), quoted in COMPLEX LITIGATION PROPOSAL, § 3.08, reporter's notes to cmt. e (10), at 158.

It could be argued that because state transferee courts would assert nationwide jurisdiction under the authorization of a federal statute, the state transferee courts would assume the nature of federally created fora making nationwide contacts the appropriate personal jurisdiction analysis. Nevertheless, the Proposal does not envision the state transferee court being co-opted into the federal judiciary system.

Comment (f) to section 4.01 states that the "state judge handling consolidation proceedings under section 4.01 continues to sit as a state judge."⁵² State transferee judges must continue to sit as state judges because "Congress could not effectively confer Article III authority in this context because most state judges do not have life-time tenure and the other attributes of the federal judiciary."⁵³ Furthermore, "[a]lthough Congress might designate state transferee courts as Article I courts, that might be deemed to conflict with various state constitutional provisions prohibiting judges from serving in incompatible offices, thereby effectively preventing judges from those states from serving as transferee courts."⁵⁴ Thus, even if the Proposal did seek to conscript state judges for federal service, state court judges would be prevented from serving the federal system by the federal constitution and in many cases by individual state constitutions.

Since state courts are the creation of state governments, regardless of the source of legislation under which the state court operates, the pertinent forum for a due process analysis of a state court's exercise of personal jurisdiction may well be the state in which the court is located. Under a state contacts analysis, litigants would need minimum contacts with the state in which the state transferee court sits in order to meet the due process requirements of either the Fourteenth or the Fifth Amendment.

Thus far, only one commentator has addressed the appropriateness of the Proposal's nationwide contacts analysis for determining the constitutionality of a state transferee court's exercise of personal jurisdiction. Joan Steinman argues against a national contacts analysis:

52. COMPLEX LITIGATION PROPOSAL, *supra* note 1, § 4.01 cmt. f at 192.

53. *Id.*

54. *Id.*

"[T]he question is whether the polity, whose power the court wields, possesses a legitimate claim to exercise force over the defendant" (quoting Marryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts* 79 NW. U.L. REV. 1, 15 (1984)). However, state governments, not the federal government, create state courts. Thus, it is the state that must possess a legitimate basis for exercising personal jurisdiction. The power of the United States to subject those within its borders or those who have minimum contacts with the nation to jurisdiction in any of its courts is irrelevant. While, "[a]s far as exercise of the *federal judicial* power is concerned, state boundaries are given no significance by the Constitution," when it comes to *federal legislative* power concerning *state judicial* power, state boundaries have constitutional significance. Regardless of who is doing the legislating, the relevant boundaries are those of the sovereign that has created the court (quoting *Lisak v. Mercantil Bankcorp*, 34 F.2d 668, 671 (7th Cir. 1987), *cert denied sub nom. Lisak v. Mercantile Nat'l Bank*, 485 U.S. 1007 (1988)). The state is the entity with which defendants must have contact.⁵⁵

Steinman's view is by no means conclusive. Nevertheless, it suggests that the national contacts prong of the Proposal's Fifth Amendment analysis is of questionable application within the context of a state transferee court's exercise of nationwide personal jurisdiction.

2. *Fairness*

In applying the Proposal's Fifth Amendment fairness standard, section 3.08's comment (f) employs factors resembling those currently used to evaluate "fair play" in the Fourteenth Amendment cases.⁵⁶ First, comment (f) stresses the need to measure the actual hardship or inconvenience imposed on a particular litigant.⁵⁷ This examination of the hardship on or inconvenience to a litigant reflects the Fourteenth Amendment analysis of the burden on the defendant.⁵⁸

Second, comment (f) also appears to require that the hardship or inconvenience on the litigants be balanced against the

55. Steinman, *supra* note 4, at 1119.

56. COMPLEX LITIGATION PROPOSAL, *supra* note 1, at 158.

57. *Id.* at 159-60.

58. See *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

"systemic interests and need to provide a conclusive adjudication for all the litigants."⁵⁹ Similarly, Fourteenth Amendment due process analysis as explicated by the Supreme Court balances the burden placed on the defendant against the interests of the other parties to the litigation and of the judicial system itself. More explicitly, the Court's due process analysis weighs the plaintiff's interest in obtaining convenient and effective relief, the forum's interest in adjudicating the dispute, the interstate judicial system's interest in obtaining the most efficient resolution of disputes, and the states' shared interest in furthering substantive social policies.⁶⁰

Comparing the factors applied in the Proposal's fairness inquiry and those factors currently used to evaluate whether the assertion of jurisdiction conforms to "traditional notions of fair play and substantial justice" in Fourteenth Amendment cases,⁶¹ it is questionable whether any substantial difference exists between the two tests. The only factor the Proposal implies which may be significantly divergent between Fourteenth Amendment cases and those falling within the purview of the Proposal is the role played by state boundaries in determining the hardship or burden placed on the litigant.⁶²

Comment (f) to section 3.08 asserts that "state boundaries cannot be used as a proxy for fairness in the Fifth Amendment context; crossing state boundaries does not accurately measure the practical degree of hardship or inconvenience to litigants because their circumstances may be so different."⁶³ This comment seems to imply that state boundaries are only important in evaluating the burden on the defendant in Fourteenth Amendment cases.

Nevertheless, if minimum contacts with the state in which the transferee court is located are required to justify the exercise of personal jurisdiction by state transferee courts, the Proposal's argument that state boundaries are not determinative in assessing fairness under the Fifth Amendment may be moot. At least within the context of section 4.01, then, the Proposal's fairness prong would be practically indistinguishable

59. COMPLEX LITIGATION PROPOSAL, *supra* note 1, §3.08 cmt. f at 159.

60. *World Wide Volkswagen*, 444 U.S. at 292.

61. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

62. COMPLEX LITIGATION PROPOSAL, *supra* note 1, at 160.

63. COMPLEX LITIGATION PROPOSAL, *supra* note 1, §3.08 cmt. f at 160.

from the criteria currently used to evaluate "fair play" in Fourteenth Amendment cases.

IV. VIABILITY OF A STATE COURT TRANSFEREE PROVISION UNDER A FOURTEENTH AMENDMENT DUE PROCESS ANALYSIS

As previously noted, the Proposal's argument that national contacts can sustain nationwide personal jurisdiction under a Fifth Amendment due process analysis may not apply in the context of state transferee courts because state courts are the creation of state governments.⁶⁴ If national contacts cannot sustain state transferee jurisdiction, litigants who do not freely consent to the jurisdiction of an alien court must have the requisite minimum contacts with the state in which the transferee court sits to be subject to that forum. In short, state transferee court jurisdiction would be subject to the same Fourteenth Amendment minimum as state court jurisdiction generally. In addition, state transferee court jurisdiction would have to satisfy the Fifth Amendment fairness analysis, which, as we have seen,⁶⁵ is essentially equivalent to the Fourteenth Amendment fair play analysis that non-transferee state court jurisdiction also must satisfy. Thus, if nationwide contacts are not an appropriate indicator of state transferee jurisdiction, state transferee courts, in exercising personal jurisdiction, will be subject to the same due process requirements that the Fourteenth Amendment imposes on all state courts.

Given the facts that Fourteenth Amendment due process limitations may apply to state transferee courts' exercise of personal jurisdiction, it becomes necessary to examine whether any state consolidation provisions (such as that exemplified by section 4.01) can actually be a viable part of this (or any other) complex litigation statute. The Proposal asserts that "state transferee courts can be true partners in handling complex litigation only if they are able to exert the same nationwide jurisdiction as do their federal counterparts."⁶⁶ Nevertheless, this part of the paper will argue that a federal-to-state consolidation provision such as section 4.01 of the Proposal remains a useful tool for the efficient adjudication of multiforum, multiparty liti-

64. *See supra* part III.B.

65. *See supra* part III.B.2.

66. *Id.* §4.01, cmt. f at 193.

gation even if state transferee courts lack nationwide personal jurisdiction.

A. A Significant Number of Related Federal Cases Will Be Eligible for Transfer to State Court

One of the purposes of section 4.01 federal-to-state consolidation is to promote judicial efficiency by reducing, and if possible, eliminating the duplication of effort that is inevitable in the independent prosecution of parallel state and federal claims.⁶⁷ Not all related federal cases must be consolidated in order to reduce such duplicative effort. Thus, "[e]ven if it is determined that a particular litigant should not be required to participate in the consolidated proceeding, that conclusion does not inevitably require that the consolidated resolution of the dispute be abandoned."⁶⁸ Nevertheless, the usefulness of section 4.01 is, at least to some degree, dependent on the ability to transfer a sufficient portion of the cases lodged in federal courts to the state transferee court to achieve a meaningful reduction in judicial redundancy.

In calculating the proportion of federal cases that will generally be amenable to consolidation in a state transferee court, it is important to consider the two types of federal cases that will exist: (1) cases in which the transferee state court could exercise jurisdiction over all the litigants,⁶⁹ but for the fact that one of the parties opted for a federal forum; and (2) cases in which the transferee state court could not exercise jurisdiction over all the litigants. The first category of federal cases are capable of being consolidated in the state transferee forum, while the second category of federal cases is not constitutionally transferrable to the state court if the state transferee court cannot assert nationwide personal jurisdiction. Thus, in determining the proportion of federal cases that will generally be susceptible to consolidation in a state transferee court, it is necessary to know the ratio of cases falling within the first category to cases falling within the second category.

67. See COMPLEX LITIGATION PROPOSAL, *supra* note 1, Ch. 3, Introductory Note at 36-37.

68. *Id.* §3.08 cmt. f at 159.

69. In addition to being limited by the Due Process Clause of the Fourteenth Amendment, the territorial jurisdiction of a state court can be limited by its own long-arm statute. See *id.* at 150. For the purpose of analysis, however, this paper will only look at limits imposed by the Constitution, not those imposed on a court by the state itself.

Under section 4.01 of the Proposal, a federal-to-state transfer will only be appropriate when "the events giving rise to the controversy are centered in a single state and a significant portion of the existing litigation is lodged in the courts of that state."⁷⁰ When events and parties are concentrated in a single state, it would seem that cases fitting in the first category of federal cases would be prevalent, because minimum contacts would likely exist between the litigants and the state forum. For example, in the cases arising from the 1981 collapse of the Hyatt Skywalk in Kansas City, those injured or killed were obviously present in Missouri at the time of the accident. Those not residents of the state likely had some minimum contacts with Missouri which brought them to the area. Furthermore, most, if not all, of the defendants were subject to Missouri's jurisdiction because they were defending themselves in the significant portion of the existing litigation already lodged in the courts of Missouri.⁷¹

It follows that in most multiparty, multiforum litigation falling within the ambit of section 4.01 a significant portion of the related federal cases will be capable of consolidation in the state transferee court. Consequently, section 4.01 should allow a meaningful reduction in the duplicative adjudication of parallel state and federal claims.

B. Cooperative Adjudication of Transferable and Nontransferable Section 4.01 Cases

In addition to reducing duplicative adjudication of parallel state and federal claims by transferring a significant portion of related federal cases to a state transferee court, section 4.01's provisions for consolidation to state courts could reduce the ultimate costs of adjudicating those federal cases which—because of due process restraints—are not capable of being transferred to the state forum.

With most cases consolidated in the state transferee court, cooperation between the state forum and the federal forum(s) adjudicating the nontransferable cases is not only highly likely, but also preferable, and, in fact, indispensable. For example, after transferring as many of the cases as possible to the state

70. COMPLEX LITIGATION PROPOSAL, *supra* note 1, §4.01 (a)(1) at 17.

71. See David R. Morris & Andrew See, *The Hyatt Skywalk Litigation: The Plaintiffs' Perspective*, 52 UMKC L. REV. 246 (1984).

court under section 4.01, the Complex Litigation Panel could consolidate the remaining federal cases in the federal district court in the district in which the state transferee court sits.⁷² A transfer in tandem would allow the state and federal judges to coordinate the litigation through, for example, joint pretrial conferences,⁷³ joint discovery,⁷⁴ and even joint trial.⁷⁵ Such coordination reduces the negative impact of duplicative adjudication on both litigants and on the American judicial system.

V. CONCLUSION

The ALI's Complex Litigation Project's proposal to grant state transferee courts nationwide personal jurisdiction is of dubious constitutionality. The theories which support a federal court's exercise of nationwide personal jurisdiction may not apply within the context of state courts—even when jurisdiction is supposedly derived from a federal statute.

Even though a state transferee court may not be able to constitutionally exercise nationwide personal jurisdiction, however, the federal-to-state transfer provisions of the Complex Litigation Project would still serve as a useful tool in reducing the duplication of effort that unavoidably occurs in the independent adjudication of parallel state and federal claims. Many of the single event disaster multiforum, multiparty cases filed in federal court that have related cases that were brought in state courts should be transferable to a state court—due pro-

72. See COMPLEX LITIGATION PROPOSAL, *supra* note 1, § 3.01 for the Proposal's provisions for federal-to-federal consolidation. See also George T. Conway, III, *The Consolidation of Multistate Litigation in State Courts*, 96 YALE L.J. 1099, 1111 (1987) (making the argument of tandem transfer in connection with a proposal to amend 28 U.S.C. §1407 to allow the Judicial Panel on Multidistrict Litigation to transfer cases both to and from state courts).

The question may be (and probably *should* be) posed as to why, given the possible inability to consolidate all of the related litigation in the *state* transferee forum, should not all such multiforum cases with multiple parties be consolidated into the federal system. Presumably, in consideration of the factors for designating a state court as a transferee forum for federal action, see *supra* part II, the state, not the federal, court is the preferable forum for adjudication of claims asserted under state law.

73. Conway, *supra* note 72, at 1111.

74. In the Hyatt Skywalk litigation the federal district court and the state court cooperated extensively to facilitate "a massive [joint] discovery effort." Conway, at 1111 (quoting David R. Morris & Andrew See, *The Hyatt Skywalk Litigation: The Plaintiffs' Perspective*, 52 UMKC L. REV. 246, 254 (1984)).

75. See MANUAL FOR COMPLEX LITIGATION, SECOND, which suggests that "consideration . . . be given to a joint trial, at which separate state and federal juries would sit . . . and hear evidence." §31.31, n.53 at 261 (1985).

cess limitations notwithstanding. Furthermore, even those cases filed in federal courts but not transferable to the state forum because of the state forum's lack of personal jurisdiction can still be effectively coordinated with the state transferee court, thereby achieving the major efficiency aim of the proposed complex litigation law.

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