CHAPTER 5
FEDERAL JURISDICTION

The course in Federal Courts is sometimes called "Federal Jurisdiction." Because courts cannot act without jurisdiction, a thorough understanding of federal jurisdiction is essential to an understanding of the powers of the federal courts.

The federal courts derive their jurisdiction from the Constitution and federal statutes. An inferior federal court must consult both to determine whether it has jurisdiction over a given case. "[T]wo things are necessary to create jurisdiction. . . . The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it." *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 252 (1868). This chapter explores both constitutional and statutory issues of federal jurisdiction.

A. FEDERAL QUESTION JURISDICTION

1. The Constitutional "Arising Under" Provision

Article III of the Constitution sets forth nine categories of federal judicial power, the most important of which is the first: "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." This category is usually described more briefly as all cases "arising under federal law."

What does it mean for a case to "arise under" federal law? Usually, the answer is obvious. A patent infringement case arises under federal law because a federal statute creates patents and the right to sue for their infringement. A typical tort case based on a car accident between private parties does not arise under federal law, because tort law is state law.

But some cases are more complicated. What happens if a plaintiff sues under state law, but the defendant raises a federal defense? What if a point of federal law comes into the case in some other way? What if the suit concerns a federal officer, a federal agency, or some other matter of particular federal interest? The cases in this section explore the outer boundaries of the "arising under" judicial power given in the Constitution.

Osborn v. Bank of the United States

22 U.S. 738 (1824)

. . . [The state of Ohio levied a tax on all banks operating in the state without a charter from the state. The law was directed at the Bank of the United States, which was chartered by an act of Congress, and which was the subject of much state hostility. The Bank declined to pay the tax of $100,000, claiming immunity under federal law. The Bank brought suit against Osborn, the Auditor of Ohio, and other state officials in federal court, seeking an injunction against collection of the tax. The injunction was issued; nonetheless, Osborn employed Harper to collect the tax. Harper collected the tax "by violence," seizing cash from the Bank. The Bank then amended its complaint to seek return of the money.]

Mr. Chief Justice Marshall delivered the opinion of the Court. . . .

At the close of the argument, a point was suggested, of such vital importance, as to induce the Court to request that it might be particularly spoken to. That point is, the right of the Bank to sue in the Courts of the United States. It has been argued, and ought to be disposed of, before we proceed to the actual exercise of jurisdiction, by deciding on the rights of the parties.

The appellants contest the jurisdiction of the Court on two grounds:

1st. That the act of Congress has not given it.

2d. That, under the constitution, Congress cannot give it.

1. The first part of the objection depends entirely on the language of the act. The words are, that the Bank shall be "made able and capable in law," "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all State Courts having competent jurisdiction, and in any Circuit Court of the United States."

These words seem to the Court to admit of but one interpretation. They cannot be made plainer by explanation. They give, expressly, the right "to sue and be sued," "in every Circuit Court of the United States," and it would be difficult to substitute other terms which would be more direct and appropriate for the purpose. The argument of the appellants is founded on the opinion of this Court, in *The Bank of the United States v. Deveaux*, (5 *Cranch*, 85.) In that case it was decided, that the former Bank of the United States was not enabled, by the act which incorporated it, to sue in the federal Courts. The words of the 3d section of that act are, that the Bank may "sue and be sued," &c. "in Courts of record, or any other place whatsoever." The Court was of opinion, that these general words, which are usual in all acts of incorporation, gave only a general capacity to sue, not a particular privilege to sue in the Courts of the United States. . . . Whether this decision be right or wrong, it amounts only to a declaration, that a general capacity in the Bank to sue, without mentioning the Courts of the Union, may not give a right to sue in those Courts. To infer from this, that words expressly conferring a right to sue in those Courts, do not give the right, is surely a conclusion which the premises do not warrant.

The act of incorporation, then, confers jurisdiction on the Circuit Courts of the United States, if Congress can confer it.

2. We will now consider the constitutionality of the clause in the act of incorporation, which authorizes the Bank to sue in the federal Courts.

In support of this clause, it is said, that the legislative, executive, and judicial powers, of every well constructed government, are co-extensive with each other; that is, they are potentially co-extensive. The executive department may constitutionally execute every law which the Legislature may constitutionally make, and the judicial department may receive from the Legislature the power of construing every such law. All governments which are not extremely defective in their organization, must possess, within themselves, the means of expounding, as well as enforcing, their own laws. If we examine the constitution of the United States, we find that its framers kept this great political principle in view. The 2d article vests the whole executive power in the President; and the 3d article declares, "that the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares, that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States.

The suit of *The Bank of the United States v. Osborn and others*, is a case, and the question is, whether it arises under a law of the United States?

The appellants contend, that it does not, because several questions may arise in it, which depend on the general principles of the law, not on any act of Congress.

If this were sufficient to withdraw a case from the jurisdiction of the federal Courts, almost every case, although involving the construction of a law, would be withdrawn; and a clause in the constitution, relating to a subject of vital importance to the government, and expressed in the most comprehensive terms, would be construed to mean almost nothing. There is scarcely any case, every part of which depends on the constitution, laws, or treaties of the United States. The questions, whether the fact alleged as the foundation of the action, be real or fictitious; whether the conduct of the plaintiff has been such as to entitle him to maintain his action; whether his right is barred; whether he has received satisfaction, or has in any manner released his claims, are questions, some or all of which may occur in almost every case; and if their existence be sufficient to arrest the jurisdiction of the Court, words which seem intended to be as extensive as the constitution, laws, and treaties of the Union, which seem designed to give the Courts of the government the construction of all its acts, so far as they affect the rights of individuals, would be reduced to almost nothing.

In those cases in which original jurisdiction is given to the Supreme Court, the judicial power of the United States cannot be exercised in its appellate form. In every other case, the power is to be exercised in its original or appellate form, or both, as the wisdom of Congress may direct. With the exception of these cases, in which original jurisdiction is given to this Court, there is none to which the judicial power extends, from which the original jurisdiction of the inferior Courts is

excluded by the constitution. Original jurisdiction, so far as the constitution gives a rule, is co-extensive with the judicial power. We find, in the constitution, no prohibition to its exercise, in every case in which the judicial power can be exercised. It would be a very bold construction to say, that this power could be applied in its appellate form only, to the most important class of cases to which it is applicable.

The constitution establishes the Supreme Court, and defines its jurisdiction. It enumerates cases in which its jurisdiction is original and exclusive; and then defines that which is appellate, but does not insinuate, that in any such case, the power cannot be exercised in its original form by Courts of original jurisdiction. It is not insinuated, that the judicial power, in cases depending on the character of the cause, cannot be exercised in the first instance, in the Courts of the Union, but must first be exercised in the tribunals of the State; tribunals over which the government of the Union has no adequate control, and which may be closed to any claim asserted under a law of the United States.

We perceive, then, no ground on which the proposition can be maintained, that Congress is incapable of giving the Circuit Courts original jurisdiction, in any case to which the appellate jurisdiction extends.

We ask, then, if it can be sufficient to exclude this jurisdiction, that the case involves questions depending on general principles? A cause may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction. Those other questions cannot arrest the proceedings. Under this construction, the judicial power of the Union extends effectively and beneficially to that most important class of cases, which depend on the character of the cause. On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the constitution, but to those parts of cases only which present the particular question involving the construction of the constitution or the law. We say it never can be extended to the whole case, because, if the circumstance that other points are involved in it, shall disable Congress from authorizing the Courts of the Union to take jurisdiction of the original cause, it equally disables Congress from authorizing those Courts to take jurisdiction of the whole cause, on an appeal, and thus will be restricted to a single question in that cause; and words obviously intended to secure to those who claim rights under the constitution, laws, or treaties of the United States, a trial in the federal Courts, will be restricted to the insecure remedy of an appeal upon an insulated point, after it has received that shape which may be given to it by another tribunal, into which he is forced against his will.

We think, then, that when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.

The case of the Bank is, we think, a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it

possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependant on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law?

Take the case of a contract, which is put as the strongest against the Bank.

When a Bank sues, the first question which presents itself, and which lies at the foundation of the cause, is, has this legal entity a right to sue? Has it a right to come, not into this Court particularly, but into any Court? This depends on a law of the United States. The next question is, has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. These are important questions, and they exist in every possible case. The right to sue, if decided once, is decided for ever; but the power of Congress was exercised antecedently to the first decision on that right, and if it was constitutional then, it cannot cease to be so, because the particular question is decided. It may be revived at the will of the party, and most probably would be renewed, were the tribunal to be changed. But the question respecting the right to make a particular contract, or to acquire a particular property, or to sue on account of a particular injury, belongs to every particular case, and may be renewed in every case. The question forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defence, it is still a part of the cause, and may be relied on. The right of the plaintiff to sue, cannot depend on the defence which the defendant may choose to set up. His right to sue is anterior to that defence, and must depend on the state of things when the action is brought. The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not.

The appellants say, that the case arises on the contract; but the validity of the contract depends on a law of the United States, and the plaintiff is compelled, in every case, to show its validity. The case arises emphatically under the law. The act of Congress is its foundation. The contract could never have been made, but under the authority of that act. The act itself is the first ingredient in the case, is its origin, is that from which every other part arises. That other questions may also arise, as the execution of the contract, or its performance, cannot change the case, or give it any other origin than the charter of incorporation. The action still originates in, and is sustained by, that charter. . . .

The clause in the patent law, authorizing suits in the Circuit Courts, stands, we think, on the same principle. Such a suit is a case arising under a law of the United States. Yet the defendant may not, at the trial, question the validity of the patent, or make any point which requires the construction of an act of Congress. He may rest his defence exclusively on the fact, that he has not violated the right of the plaintiff. That this fact becomes the sole question made in the cause, cannot oust the jurisdiction of the Court, or establish the position, that the case does not arise under a law of the United States.

It is said, that a clear distinction exists between the party and the cause; that the party may originate under a law with which the cause has no connexion; and that Congress may, with the same propriety, give a naturalized citizen, who is the mere creature of a law, a right to sue in the Courts of the United States, as give that right to the Bank.

This distinction is not denied; and, if the act of Congress was a simple act of incorporation, and contained nothing more, it might be entitled to great consideration. But the act does not stop with incorporating the Bank. It proceeds to bestow upon the being it has made, all the faculties and capacities which that being possesses. Every act of the Bank grows out of this law, and is tested by it. To use the language of the constitution, every act of the Bank arises out of this law.

A naturalized citizen is indeed made a citizen under an act of Congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The constitution then takes him up, and, among other rights, extends to him the capacity of suing in the Courts of the United States, precisely under the same circumstances under which a native might sue. He is distinguishable in nothing from a native citizen, except so far as the constitution makes the distinction. The law makes none.

There is, then, no resemblance between the act incorporating the Bank, and the general naturalization law.

Upon the best consideration we have been able to bestow on this subject, we are of opinion, that the clause in the act of incorporation, enabling the Bank to sue in the Courts of the United States, is consistent with the constitution, and to be obeyed in all Courts.

We will now proceed to consider the merits of the cause. . . .

[The Court concluded that the Bank was entitled to recover the tax.]

Mr. Justice Johnson [dissenting].

. . . I have very little doubt that the public mind will be easily reconciled to the decision of the Court here rendered; for, whether necessary or unnecessary originally, a state of things has now grown up, in some of the States, which renders all the protection necessary, that the general government can give to this Bank. The policy of the decision is obvious, that is, if the Bank is to be sustained; and few will bestow upon its legal correctness, the reflection, that it is necessary to test it by the constitution and laws, under which it is rendered. . . .

In the present instance, I cannot persuade myself, that the constitution sanctions the vesting of the right of action in this Bank, in cases in which the privilege is exclusively personal, or in any case, merely on the ground that a question might *possibly* be raised in it, involving the constitution, or constitutionality of a law, of the United States.

When laws were heretofore passed for raising a revenue by a duty on stamped paper, the tax was quietly acquiesced in, notwithstanding it entrenched so closely on the unquestionable power of the States over the law of contracts; but had the

same law which declared void contracts not written upon stamped paper, declared, that every person holding such paper should be entitled to bring his action "in any Circuit Court" of the United States, it is confidently believed that there could have been but one opinion on the constitutionality of such a provision. The whole jurisdiction over contracts, might thus have been taken from the State Courts, and conferred upon those of the United States. Nor would the evil have rested there; by a similar exercise of power, imposing a stamp on deeds generally, jurisdiction over the territory of the State, whoever might be parties, even between citizens of the same State—jurisdiction of suits instituted for the recovery of legacies or distributive portions of intestates' estates—jurisdiction, in fact, over almost every possible case, might be transferred to the Courts of the United States. . . . But still farther, as was justly insisted in argument, there is not a tract of land in the United States, acquired under laws of the United States, whatever be the number of mesne transfers that it may have undergone, over which the jurisdiction of the Courts of the United States might not be extended by Congress, upon the very principle on which the right of suit in this Bank is here maintained. Nor is the case of the alien, put in argument, at all inapplicable. The one acquires its character of individual property, as the other does his political existence, under a law of the United States; and there is not a suit which may be instituted to recover the one, nor an action of ejectment to be brought by the other, in which a right acquired under a law of the United States, does not lie as essentially at the basis of the right of action, as in the suits brought by this Bank. It is no answer to the argument, to say, that the law of the United States is but ancillary to the constitution, as to the alien; for the constitution could do nothing for him without the law: and, whether the question be upon law or constitution, still if the possibility of its arising be a sufficient circumstance to bring it within the jurisdiction of the United States Courts, that possibility exists with regard to every suit affected by alien disabilities; to real actions in time of peace—to all actions in time of war.

I cannot persuade myself, then, that, with these palpable consequences in view, Congress ever could have intended to vest in the Bank of the United States, the right of suit to the extent here claimed. . . . [Justice Johnson explained in detail his disagreement with the statutory interpretation aspect of the Court's opinion.]

My own conclusion is . . . that the Bank may, by its corporate name and metaphysical existence, bring suit . . . in the Courts specified, as though it were in fact a natural person; that is, in those cases in which, according to existing laws, suits may be brought in the Courts specified respectively. . . .

I next proceed to consider, more distinctly, the constitutional question, on the right to vest the jurisdiction to the extent here contended for.

And here I must observe, that I altogether misunderstood the counsel, who argued the cause for the plaintiff in error, if any of them contended against the jurisdiction, on the ground that the cause involved questions depending on general principles. No one can question, that the Court which has jurisdiction of the principal question, must exercise jurisdiction over every question. Neither did I understand them as denying, that if Congress could confer on the Circuit Courts appellate, they could confer original jurisdiction. The argument went to deny the right to assume jurisdiction on a mere hypothesis. It was one of description, identity, definition; they contended, that until a question involving the construction or

administration of the laws of the United States did actually arise, the *casus federis* was not presented, on which the constitution authorized the government to take to itself the jurisdiction of the cause. That until such a question actually arose, until such a case was actually presented, *non constat* [("it does not appear")], but the cause depended upon general principles, exclusively cognizable in the State Courts; that neither the letter nor the spirit of the constitution sanctioned the assumption of jurisdiction on the part of the United States at any previous stage.

And this doctrine has my hearty concurrence in its general application. A very simple case may be stated, to illustrate its bearing on the question of jurisdiction between the two governments. By virtue of treaties with Great Britain, aliens holding lands were exempted from alien disabilities, and made capable of holding, aliening, and transmitting their estates, in common with natives. But why should the claimants of such lands, to all eternity, be vested with the privilege of bringing an original suit in the Courts of the United States? It is true, a question might be made, upon the effect of the treaty, on the rights claimed by or through the alien; but until that question does arise, nay, until a decision against the right takes place, what end has the United States to subserve in claiming jurisdiction of the cause? Such is the present law of the United States, as to all but this one distinguished party; and that law was passed when the doctrines, the views, and ends of the constitution, were, at least, as well understood as they are at present. I attach much importance to the 25th section of the judiciary act,* not only as a measure of policy, but as a cotemporaneous exposition of the constitution on this subject; as an exposition of *the words* of the constitution, deduced from a knowledge of its views and policy. The object was, to secure a uniform construction and a steady execution of the laws of the Union. Except as far as this purpose might require, the general government had no interest in stripping the State Courts of their jurisdiction; their policy would rather lead to avoid incumbering themselves with it. Why then should it be vested with jurisdiction in a thousand causes, on a mere possibility of a question arising, which question, at last, does not occur in one of them? Indeed, I cannot perceive how such a reach of jurisdiction can be asserted, without changing the reading of the constitution on this subject altogether. The judicial power extends only to "cases arising," that is, actual, not potential cases. The framers of the constitution knew better, than to trust such a *quo minus* fiction in the hands of any government.

I have never understood any one to question the right of Congress to vest original jurisdiction in its inferior Courts, in cases coming properly within the description of "cases arising under the laws of the United States"; but surely it must first be ascertained, in some proper mode, that the cases are such as the constitution describes. By possibility, a constitutional question may be raised in any conceivable suit that may be instituted; but that would be a very insufficient ground for assuming universal jurisdiction; and yet, that a question has been made, as that, for instance, on the Bank charter, and may again be made, seems still worse, as a ground for extending jurisdiction. For, the folly of raising it again in every suit instituted by the Bank, it too great, to suppose it possible. Yet this supposition, and

* [Section 25 of the Judiciary Act of 1789 authorized appeals to the Supreme Court from cases decided by state courts, but only to the extent of federal questions raised, and only in cases in which the party relying on federal law had lost in state court.—Ed.]

this alone, would seem to justify vesting the Bank with an unlimited right to sue in the federal Courts. Indeed, I cannot perceive how, with ordinary correctness, a question can be said to be involved in a cause, which only may possibly be made, but which, in fact, is the very last question that there is any probability will be made; or rather, how that can any longer be denominated a question, which has been put out of existence by a solemn decision. . . .

Efforts have been made to fix the precise sense of the constitution, when it vests jurisdiction in the general government, in "cases arising under the laws of the United States." To me, the question appears susceptible of a very simple solution; that all depends upon the identity of the case supposed; according to which idea, a case may be such in its very existence, or it may become such in its progress. An action may "live, move, and have its being," in a law of the United States; such is that given for the violation of a patent-right, . . . [in which case] the plaintiff must count upon the law itself as the ground of his action. And of the other description, would have been an action of trespass, in this case, had remedy been sought for an actual levy of the tax imposed. Such was the case of the former Bank against *Deveaux*, and many others that have occurred in this Court, in which the suit, in its form, was such as occur in ordinary cases, but in which the pleadings or evidence raised the question on the law or constitution of the United States. . . . As to cases of the first description, *ex necessitate rei*, the Courts of the United States must be susceptible of original jurisdiction; and as to all other cases, I should hold them, also, susceptible of original jurisdiction, if it were practicable, in the nature of things, to make out the definition of the case, so as to bring it under the constitution judicially, upon an original suit. But until the plaintiff can control the defendant in his pleadings, I see no practical mode of determining when the case does occur, otherwise than by permitting the cause to advance until the case for which the constitution provides shall actually arise. If it never occurs, there can be nothing to complain of. . . . The cause might be transferred to the Circuit Court before an adjudication takes place; but I can perceive no earlier stage at which it can possibly be predicated of such a case, that it is one within the constitution; nor any possible necessity for transferring it then, or until the Court has acted upon it to the prejudice of the claims of the United States. It is not, therefore, because Congress may not vest an *original* jurisdiction, where they can constitutionally vest in the Circuit Courts *appellate* jurisdiction, that I object to this general grant of the right to sue; but, because that the peculiar nature of this jurisdiction is such, as to render it impossible to exercise it in a strictly original form, and because the principle of a possible occurrence of a question as a ground of jurisdiction, is transcending the bounds of the constitution, and placing it on a ground which will admit of an *enormous accession*, if not an *unlimited assumption*, of jurisdiction. . . .

Upon the whole, I feel compelled to dissent from the Court, on the point of jurisdiction; and this renders it unnecessary for me to express my sentiments on the residue of the points in the cause. . . .

NOTES AND QUESTIONS

1. The federal trial court in *Osborn* did not have jurisdiction under the general federal question jurisdiction *statute* (today, 28 U.S.C. §1331), which did not

exist at the time. The statutory basis for jurisdiction was a special statute concerning the Bank of the United States, which the Supreme Court understood to give federal jurisdiction over *any* case to which the Bank was a party. The question was whether this statute was constitutional. Into which of the nine constitutional categories of federal judicial power did the case fall?

2. What is the rule of *Osborn*? Does it hold, as Justice Johnson claims, that a case falls within the Article III judicial power whenever "a [federal] question might *possibly* be raised in it"? If it does so hold, is it correct? On this theory, is there any case that Congress could *not* assign to the federal courts?

3. There is no doubt that Congress might have authorized the Bank of the United States to sue in federal court in any case in which the Bank asserted that its rights depended on a claim that its status as a federal instrumentality required preemption of what would otherwise be the applicable state law. That is, Congress could have statutorily exempted the Bank from the "well-pleaded complaint rule." Thus, Congress could, surely, have granted jurisdiction over cases such as *Osborn* itself. *Cf.* 28 U.S.C. §1442. The more difficult cases are those such as *Bank of the United States v. Planters' Bank*, 22 U.S. 904 (1824), decided the day after *Osborn*. The Bank of the United States sued the Planters' Bank on unpaid promissory notes, i.e., for simple breach of contract, in federal circuit court. Responding to the defendant's jurisdictional challenge, the Supreme Court said only that the jurisdictional question "was fully considered by the Court in the case of *Osborn v. The Bank of the United States*, and it is unnecessary to repeat the reasoning used in that case." Is the *Planters' Bank* case correct?

4. Professor Anthony Bellia argues that Chief Justice Marshall's opinion is in fact narrower than it might appear to modern eyes. Nineteenth-century procedural rules, he suggests, required corporations to plead, or at least to prove, their corporate existence as part of any cause of action they might bring. Natural persons, by contrast, were not required to show their capacity to sue. Therefore, Bellia concludes, the federal law incorporating the Bank was truly an "ingredient" of any lawsuit the Bank might bring in a way that the law making a natural person a naturalized citizen was not. The case thus turns on rules of pleading and procedure applicable under the now-abandoned "forms of action" and should not be read so broadly as to suggest that Congress may vest federal courts with jurisdiction over any case in which a court *might* have to decide a federal question. Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 Iowa L. Rev. 777 (2004).

5. While *Osborn*'s suggestion that federal jurisdiction can be predicated "on the remote possibility of presentation of a federal question" has been "questioned," *see Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 492 (1983), the case is undoubtedly good authority for the proposition that federal jurisdiction can be predicated on a federal question that is an "ingredient" in a case, even if it is not the main question. For example, in *Verlinden*, a foreign corporation sued a Nigerian government entity in federal court for breach of contract. The basis for jurisdiction was the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §1330, which grants federal jurisdiction over any suit against a foreign sovereign, provided the foreign sovereign, under principles specified in the Act, is not immune from suit. Citing *Osborn*, the Supreme Court said that a case under the FSIA would always "arise under" federal law, because even if the main rule of decision would be provided by state law (such as state contract law), the case would necessarily involve the

threshold question of whether the defendant was immune from suit, which was a question of federal law.

The "ingredient" test is, in fact, essential to the workings of the federal system. To appreciate this point, imagine that a plaintiff brings an ordinary tort or contract case in state court, but the defendant raises a federal defense, which the state courts reject. Could the U.S. Supreme Court review the ruling of the highest state court in such a case? What would be the basis for federal jurisdiction?

6. How far does the "ingredient" test go? Does a federal question anywhere in the case suffice to make the case one "arising under" federal law? Could Congress, for example, provide for original federal jurisdiction over any case in which the plaintiff pleaded that a federal question would arise as to the admissibility of some item of evidence, or as to whether the defendant was subject to personal jurisdiction?

7. As a sidelight, is *Osborn*'s statutory interpretation holding persuasive? When Congress creates a corporation and provides that it may "sue and be sued" in the federal courts, is Congress necessarily creating federal *jurisdiction* over any case to which the corporation is a party? In *American National Red Cross v. S.G.*, 505 U.S. 247 (1992), the Court reviewed prior cases and held that such a "sue and be sued" provision "may be read to confer federal court jurisdiction if, but only if, it specifically mentions the federal courts." Under this rule, the Red Cross, which was statutorily authorized "to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States," was entitled to remove an ordinary tort action against it to federal court. Subsequently, however, the Court held that the charter of the Federal National Mortgage Association ("Fannie Mae"), which authorizes Fannie Mae "to sue and to be sued . . . in any court of competent jurisdiction, State or Federal," did *not* create federal jurisdiction over every case involving Fannie Mae. The words "in any court of competent jurisdiction," the Court held, indicated that Fannie Mae can sue or be sued only in a court that has some other basis of jurisdiction. *Lightfoot v. Cendant Mortgage Corp.*, 137 S. Ct. 553 (2017). Do these rules make sense? Do they properly implement congressional intent? Are they the best reading of the statutory text, regardless of what was intended? Or were the four dissenting Justices in the *Red Cross* case right to call the Court's holding a "wonderland of linguistic confusion"?

PROBLEMS

Problem 5-1. Congress passes the Minimum Wage Abolition Act (MWAA), which provides that (1) no employer in any industry in or affecting interstate commerce shall be obliged to pay its employees a minimum wage and (2) any employer sued in state court for failure to pay any minimum wage may remove the case to federal court upon asserting the MWAA as a defense. The MWAA is ambiguous as to whether it merely abolishes the federal minimum wage or whether it also preempts state minimum wage laws. However, Nancy, who owns a firm that manufactures kazoos in Oregon for interstate shipment, believes that the MWAA preempts state minimum wage laws, and she reduces her employees' wages to $4 per hour. Carl, one of Nancy's employees, sues Nancy in Oregon state court to compel her to pay him the state-mandated minimum wage of $9.10 per hour. Nancy removes the case to federal court and asserts the MWAA as a defense. Carl, noting that the case

does not meet the well-pleaded complaint test, moves to remand. What should the federal court do?

Problem 5-2. Congress passes the Debt Collection Jurisdiction Act, which provides that any creditor may bring any action to collect any debt in federal district court upon alleging that the debtor may assert that the debt was discharged in bankruptcy. Thereafter, the Aggressive Finance Company (AFC), a corporate citizen of New York, sues Rajesh, also a citizen of New York, in federal district court for nonpayment of debt. AFC alleges that Rajesh might assert that the debt was discharged in bankruptcy. In his answer, Rajesh asserts that he has never declared bankruptcy and that his only defense is that he does not owe the alleged debt. He moves to dismiss for lack of jurisdiction. What should the district court do?

The next case pushes the boundaries of the "arising under" judicial power in a different direction. What happens if *no* federal question is presented in a case and the parties are not diverse, but Congress for some reason desires that the case be tried in federal court? Can Congress "protect" a perceived federal interest by directing federal courts to hear a state-law case between non-diverse parties? While the Supreme Court has never squarely answered this question, the dissenting opinion in the next case contains a relevant discussion.

Textile Workers Union of America v. Lincoln Mills of Alabama

353 U.S. 448 (1957)

Mr. Justice Douglas delivered the opinion of the Court.

. . . [A labor union sued an employer, seeking an order to compel arbitration of a dispute between the two in accordance with their collective bargaining agreement. Jurisdiction was based on §301 of the Labor Management Relations Act of 1947, 29 U.S.C. §185, which gives the district courts jurisdiction over all suits for violation of collective bargaining agreements in industries affecting interstate commerce.

[The Supreme Court held that §301 implicitly instructs the federal courts to create a federal common law governing collective bargaining agreements, so that the suit was one "arising under" federal law.]

Mr. Justice Burton, whom Mr. Justice Harlan joins, concurring in the result.

. . . The District Court had jurisdiction over the action since it involved an obligation running to a union—a union controversy—and not uniquely personal rights of employees sought to be enforced by a union. . . . Having jurisdiction over the suit, the court was not powerless to fashion an appropriate federal remedy. The power to decree specific performance of a collectively bargained agreement to arbitrate finds its source in §301 itself, and in a Federal District Court's inherent equitable powers, nurtured by a congressional policy to encourage and enforce labor arbitration in industries affecting commerce.

I do not subscribe to the conclusion of the Court that the substantive law to be applied in a suit under §301 is federal law. At the same time, I agree with Judge Magruder in *International Brotherhood v. W.L. Mead, Inc.*, 1 Cir., 230 F.2d 576, that some federal rights may necessarily be involved in a §301 case, and hence that the constitutionality of §301 can be upheld as a congressional grant to Federal District Courts of what has been called "protective jurisdiction."

Mr. Justice Frankfurter (dissenting).

. . . [Justice Frankfurter first explained his disagreement with the Court's view that §301 implicitly instructed courts to create federal common law. Rather, he argued, the statute simply vested federal district courts with jurisdiction over suits arising out of collective bargaining agreements.]

Since I do not agree with the Court's conclusion that federal substantive law is to govern in actions under §301, I am forced to consider . . . the constitutionality of a grant of jurisdiction to federal courts over contracts that came into being entirely by virtue of state substantive law, a jurisdiction not based on diversity of citizenship, yet one in which a federal court would, as in diversity cases, act in effect merely as another court of the State in which it sits. The scope of allowable federal judicial power that this grant must satisfy is constitutionally described as "Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." Art. III, §2. . . .

Almost without exception, decisions under the general statutory grants have tested jurisdiction in terms of the presence, as an integral part of plaintiff's cause of action, of an issue calling for interpretation or application of federal law. . . . Although it has sometimes been suggested that the "cause of action" must derive from federal law, see *American Well Works Co. v. Layne and Bowler Co.*, 241 U.S. 257, 260, it has been found sufficient that some aspect of federal law is essential to plaintiff's success. *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180. The litigation-provoking problem has been the degree to which federal law must be in the forefront of the case and not collateral, peripheral or remote.

In a few exceptional cases, arising under special jurisdictional grants, the criteria by which the prominence of the federal question is measured against constitutional requirements have been found satisfied under circumstances suggesting a variant theory of the nature of these requirements. The first, and the leading case in the field, is *Osborn v. Bank of United States*, 9 Wheat. 738. There, Chief Justice Marshall sustained federal jurisdiction in a situation — hypothetical in the case before him but presented by the companion case of *Bank of United States v. Planters' Bank*, 9 Wheat. 904 — involving suit by a federally incorporated bank upon a contract. Despite the assumption that the cause of action and the interpretation of the contract would be governed by state law, the case was found to "arise under the laws of the United States" because the propriety and scope of a federally granted authority to enter into contracts and to litigate might well be challenged. This reasoning was subsequently applied to sustain jurisdiction in actions against federally chartered railroad corporations. *Pacific Railroad Removal Cases (Union Pac. Ry. Co. v. Myers)*, 115 U.S. 1. The traditional interpretation of this series of cases is that federal jurisdiction under the "arising" clause of the Constitution, though limited to cases involving potential federal questions, has such flexibility that Congress may confer it whenever there exists in the background some federal proposition that might be

challenged, despite the remoteness of the likelihood of actual presentation of such a federal question.

The views expressed in *Osborn* and the *Pacific Railroad Removal Cases* were severely restricted in construing general grants of jurisdiction. But the Court later sustained [the] jurisdictional section of the Bankruptcy Act of 1898 [that gave federal district courts jurisdiction over cases between a trustee in bankruptcy and adverse claimants concerning the property in the bankruptcy estate]. . . .

Under this provision the trustee could pursue in a federal court a private cause of action arising under and wholly governed by state law. To be sure, the cases did not discuss the basis of jurisdiction. It has been suggested that they merely represent an extension of the approach of the *Osborn* case; the trustee's right to sue might be challenged on obviously federal grounds—absence of bankruptcy or irregularity of the trustee's appointment or of the bankruptcy proceedings. . . . So viewed, this type of litigation implicates a potential federal question. . . .

With this background, many theories have been proposed to sustain the constitutional validity of §301. . . . [D.C. Circuit Court] Judge Wyzanski suggested, among other possibilities, that §301 might be read as containing a direction that controversies affecting interstate commerce should be governed by federal law incorporating state law by reference, and that such controversies would then arise under a valid federal law as required by Article III. Whatever may be said of the assumption regarding the validity of federal jurisdiction under an affirmative declaration by Congress that state law should be applied as federal law by federal courts to contract disputes affecting commerce, we cannot argumentatively legislate for Congress when Congress has failed to legislate. To do so disrespects legislative responsibility and disregards judicial limitations.

Another theory, relying on *Osborn* and the bankruptcy cases, has been proposed . . . which purports to respect the "arising" clause of Article III. . . . Called "protective jurisdiction," the suggestion is that in any case for which Congress has the constitutional power to prescribe federal rules of decision and thus confer "true" federal question jurisdiction, it may, without so doing, enact a jurisdictional statute, which will provide a federal forum for the application of state statute and decisional law. Analysis of the "protective jurisdiction" theory might also be attempted in terms of the language of Article III—construing "laws" to include jurisdictional statutes where Congress could have legislated substantively in a field. This is but another way of saying that because Congress could have legislated substantively and thereby could give rise to litigation under a statute of the United States, it can provide a federal forum for state-created rights although it chose not to adopt state law as federal law or to originate federal rights.

Surely the truly technical restrictions of Article III are not met or respected by a beguiling phrase that the greater power here must necessarily include the lesser. In the compromise of federal and state interests leading to distribution of jealously guarded judicial power in a federal system, . . . it is obvious that very different considerations apply to cases involving questions of federal law and those turning solely on state law. It may be that the ambiguity of the phrase "arising under the laws of the United States" leaves room for more than traditional theory could accommodate. But, under the theory of "protective jurisdiction," the "arising under" jurisdiction of the federal courts would be vastly extended. For example, every contract

or tort arising out of a contract affecting commerce might be a potential cause of action in the federal courts, even though only state law was involved in the decision of the case. At least in *Osborn* and the bankruptcy cases, a substantive federal law was present somewhere in the background. . . . But this theory rests on the supposition that Congress could enact substantive federal law to govern the particular case. It was not held in those cases, nor is it clear, that federal law could be held to govern the transactions of all persons who subsequently become bankrupt, or of all suits of a Bank of the United States. . . .

"Protective jurisdiction," once the label is discarded, cannot be justified under any view of the allowable scope to be given to Article III. "Protective jurisdiction" is a misused label for the statute we are here considering. That rubric is properly descriptive of safeguarding some of the indisputable, staple business of the federal courts. It is a radiation of an existing jurisdiction. . . . "Protective jurisdiction" cannot generate an independent source for adjudication outside of the Article III sanctions and what Congress has defined. The theory must have as its sole justification a belief in the inadequacy of state tribunals in determining state law. The Constitution reflects such a belief in the specific situation within which the Diversity Clause was confined. The intention to remedy such supposed defects was exhausted in this provision of Article III. That this "protective" theory was not adopted by Chief Justice Marshall at a time when conditions might have presented more substantial justification strongly suggests its lack of constitutional merit. Moreover, Congress in its consideration of §301 nowhere suggested dissatisfaction with the ability of state courts to administer state law properly. Its concern was to provide access to the federal courts for easier enforcement of state-created rights.

Another theory also relies on *Osborn* and the bankruptcy cases as an implicit recognition of the propriety of the exercise of some sort of "protective jurisdiction" by the federal courts. . . . Professor Mishkin . . . [argues that] where Congress has "an articulated and active federal policy regulating a field, the 'arising under' clause of Article III apparently permits the conferring of jurisdiction on the national courts of all cases in the area—including those substantively governed by state law." . . . In such cases, the protection being offered is not to the suitor, as in diversity cases, but to the "congressional legislative program." . . .

Professor Mishkin's theory of "protective jurisdiction" may find more constitutional justification if there is not merely an "articulated and active" congressional policy regulating the labor field but also federal rights existing in the interstices of actions under §301. . . .

Assuming, however, that we would be justified in pouring substantive content into a merely procedural vehicle, what elements of federal law could reasonably be put into the provisions of §301? The suggestion that the section permits the federal courts to work out, without more, a federal code governing collective-bargaining contracts must, for reasons that have already been stated, be rejected. . . .

There is a point, however, at which the search may be ended with less misgiving regarding the propriety of judicial infusion of substantive provisions into §301. The contribution of federal law might consist in postulating the right of a union, despite its amorphous status as an unincorporated association, to enter into binding collective-bargaining contracts with an employer. The federal courts might also give sanction to this right by refusing to comply with any state law that does not

admit that collective bargaining may result in an enforceable contract. It is hard to see what serious federal-state conflicts could arise under this view. At most, a state court might dismiss the action, while a federal court would entertain it. Moreover, such a function of federal law is closely related to the removal of the procedural barriers to suit. Section 301 would be futile if the union's status as a contracting party were not recognized. . . .

Even if this limited federal "right" were read into §301, a serious constitutional question would still be present. It does elevate the situation to one closely analogous to that presented in *Osborn v. Bank of United States*, 9 Wheat. 738. . . .

I believe that we should not extend the precedents of *Osborn* and the *Pacific Railroad Removal Cases* to this case even though there be some elements of analytical similarity. *Osborn*, the foundation for the *Removal Cases*, appears to have been based on premises that today . . . are subject to criticism. . . . There is nothing in Article III that affirmatively supports the view that original jurisdiction over cases involving federal questions must extend to every case in which there is the potentiality of appellate jurisdiction. . . .

Analysis of the bankruptcy power also reveals a superficial analogy to §301. The trustee enforces a cause of action acquired under state law by the bankrupt. Federal law merely provides for the appointment of the trustee, vests the cause of action in him, and confers jurisdiction on the federal courts. Section 301 similarly takes the rights and liabilities which under state law are vested distributively in the individual members of a union and vests them in the union for purposes of actions in federal courts, wherein the unions are authorized to sue and be sued as an entity. . . . Thus, the validity of the contract may in any case be challenged on the ground that the labor organization negotiating it was not the representative of the employees concerned, a question that has been held to be federal. . . . Consequently, were the bankruptcy cases to be viewed as dependent solely on the background existence of federal questions, there would be little analytical basis for distinguishing actions under §301. But the bankruptcy decisions may be justified by the scope of the bankruptcy power, which may be deemed to sweep within its scope interests analytically outside the "federal question" category, but sufficiently related to the main purpose of bankruptcy to call for comprehensive treatment. . . . Also, although a particular suit may be brought by a trustee in a district other than the one in which the principal proceedings are pending, if all the suits by the trustee, even though in many federal courts, are regarded as one litigation for the collection and apportionment of the bankrupt's property, a particular suit by the trustee, under state law, to recover a specific piece of property might be analogized to the ancillary or pendent jurisdiction cases in which, in the disposition of a cause of action, federal courts may pass on state grounds for recovery that are joined to federal grounds. . . .

If there is in the phrase "arising under the laws of the United States" leeway for expansion of our concepts of jurisdiction, the history of Article III suggests that the area is not great and that it will require the presence of some substantial federal interest, one of greater weight and dignity than questionable doubt concerning the effectiveness of state procedure. The bankruptcy cases might possibly be viewed as such an expansion. But even so, not merely convenient judicial administration but the whole purpose of the congressional legislative program — conservation and equitable distribution of the bankrupt's estate in carrying out the constitutional

power over bankruptcy—required the availability of federal jurisdiction to avoid expense and delay. Nothing pertaining to §301 suggests vesting the federal courts with sweeping power under the Commerce Clause comparable to that vested in the federal courts under the bankruptcy power.

. . . For all the reasons elaborated in this dissent, even reading into §301 the limited federal rights consistent with the purposes of that section, I am impelled to the view that it is unconstitutional in cases such as the present ones where it provides the sole basis for exercise of jurisdiction by the federal courts.

NOTES AND QUESTIONS

1. What is presented here is primarily Justice Frankfurter's *dissenting* opinion. The Court majority did not have to face the issue of whether the Constitution allows "protective" jurisdiction because it determined that §301 implicitly instructed courts to create federal common law. Justice Frankfurter's dissenting opinion is the most thorough discussion of protective jurisdiction at the Supreme Court level; the Court itself has never squarely faced the issue.

2. If Congress could create the substantive law governing a case (pursuant to, say, its commerce power), may Congress take the "lesser step" of creating only federal jurisdiction over the case, and providing that the federal court shall resolve the case under state law?

3. Recall from cases such as *Kimbell Foods* that sometimes federal law follows the state law in each state. What if Congress passed a statute that said: "Collective bargaining agreements between employers and labor unions shall be governed by federal law. The content of the federal law shall be the same as the state law that would otherwise govern the collective bargaining agreement." Would cases such as *Lincoln Mills* then "arise under" federal law? (If so, what is the fuss about?)

4. Although the Supreme Court has never squarely ruled on the permissibility of protective jurisdiction, it touched on the subject in *Mesa v. California*, 489 U.S. 121 (1989), a case concerning 28 U.S.C. §1442, the "federal officer removal" statute. The statute authorizes removal to federal court of any civil or criminal action brought in state court against "[a]ny officer of the United States or any agency thereof, or person acting under him, for any act under color of such office." The state of California charged Mesa, a federal postal carrier, with manslaughter after she accidentally killed a bicyclist with her postal truck. Mesa, with the support of the U.S. government, attempted to remove the case to federal court under §1442. She raised no federal law defense to the charge (i.e., she did not claim that her federal status gave her any special privilege to drive recklessly); apparently, her only defense was that she had not committed the crime charged. The government claimed that §1442 made Mesa's case removable without regard to whether she claimed a federal-law defense to the state charge. Justice O'Connor, writing for the Supreme Court, interpreted the statute to apply only to cases in which the defendant claims some federal defense. This interpretation was influenced by constitutional considerations:

> The Government's view, which would eliminate the federal defense requirement, raises serious doubt whether, in enacting §1442(a), Congress

would not have "expand[ed] the jurisdiction of the federal courts beyond the bounds established by the Constitution." . . . [P]ure jurisdictional statutes which seek "to do nothing more than grant jurisdiction over a particular class of cases" cannot support Art. III "arising under" jurisdiction. . . .

At oral argument the Government urged upon us a theory of "protective jurisdiction" to avoid these Art. III difficulties. . . . Congress' enactment of federal officer removal statutes since 1815 served "to provide a federal forum for cases where federal officials must raise defenses arising from their official duties . . . [and] to protect federal officers from interference by hostile state courts." . . . The Government insists that the full protection of federal officers from interference by hostile state courts cannot be achieved if the averment of a federal defense must be a predicate to removal. More important, the Government suggests that this generalized congressional interest in protecting federal officers from state court interference suffices to support Art. III "arising under" jurisdiction.We have, in the past, not found the need to adopt a theory of "protective jurisdiction" to support Art. III "arising under" jurisdiction, . . . and we do not see any need for doing so here because we do not recognize any federal interests that are not protected by limiting removal to situations in which a federal defense is alleged. In these prosecutions, no state court hostility or interference has even been alleged by petitioners and we can discern no federal interest in potentially forcing local district attorneys to choose between prosecuting traffic violations hundreds of miles from the municipality in which the violations occurred or abandoning those prosecutions. . . .We are simply unwilling to credit the Government's ominous intimations of hostile state prosecutors and collaborationist state courts interfering with federal officers by charging them with traffic violations and other crimes for which they would have no federal defense in immunity or otherwise. . . . As we said in *Maryland v. Soper (No. 2)*, 270 U.S., at 43-44, with respect to Judicial Code §33:

> "In answer to the suggestion that our construction of §33 and our failure to sustain the right of removal in the case before us will permit evilly minded persons to evade the useful operations of §33, we can only say that, if prosecutions of this kind come to be used to obstruct seriously the enforcement of federal laws, it will be for Congress in its discretion to amend §33 so that the words . . . shall be enlarged to mean that any prosecution of a federal officer for any state offense which can be shown by evidence to have had its motive in a wish to hinder him in the enforcement of federal law, may be removed for trial to the proper federal court. We are not now considering or intimating whether such an enlargement would be valid; but what we wish to be understood as deciding is that the present language of §33 can not be broadened by fair construction to give it such a meaning. . . ."

Chief Justice Taft's words of 63 years ago apply equally well today; the present language of §1442(a) cannot be broadened by fair construction to give it the meaning which the Government seeks. Federal officer removal

under 28 U.S.C. §1442(a) must be predicated upon averment of a federal defense.

Justice Brennan, concurring, noted that "[t]he days of widespread resistance by state and local governmental authorities to Acts of Congress and to decisions of this Court in the areas of school desegregation and voting rights are not so distant that we should be oblivious to the possibility of harassment of federal agents by local law enforcement authorities" and suggested that the removal statute might properly apply in a case in which a federal officer asserted no federal defense to a traffic charge, but claimed that the charge was motivated by state hostility to the federal officer's function.

If state officials did begin a campaign of bringing numerous, petty charges against federal officers performing locally unpopular duties, and Congress amended §1442 to permit removal of such cases to federal court without regard to whether the defendant raised a federal defense, could the statute be held constitutional on a theory of protective jurisdiction?

PROBLEM

Problem 5-3. Congress determines that the unpopularity in some parts of the country of the Patient Protection and Affordable Care Act (also known as "Obamacare") has made it impossible for federal health officials to get a fair trial in certain state courts on any matter, whether or not it is federally related. Accordingly, Congress passes a statute authorizing any officer or employee of the federal Department of Health and Human Services (HHS) to remove to federal court any case in any state court in which the officer or employee is a defendant, without regard to whether the officer or employee raises a federal defense, if the federal court determines that the state court from which the case is removed cannot provide a fair trial to the defendant. Thereafter, Zara, the Secretary of HHS, is sued in state court in Virginia for allegedly not paying a personal credit card bill. Zara's only defense is that the bill was properly paid. Zara seeks to remove the case to federal court under the new statute. Assuming the federal court makes the requisite finding, is the case within its jurisdiction?

2. The Statutory "Arising Under" Jurisdiction

For an inferior federal court to have jurisdiction over a case, it is not enough that the case fall within one of the nine constitutional categories of federal judicial power; Congress must also have passed a statute conferring jurisdiction on the court. *See, e.g.*, *Finley v. United States*, 490 U.S. 545, 548 (1989). The most important such statute is the general federal question jurisdiction statute, 28 U.S.C. §1331, which provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." This language parallels the language used in the first constitutional category of federal judicial power in Article III.

As with the constitutional "arising under" clause, it is usually obvious whether a case falls within §1331. A patent infringement case arises under federal law because federal law creates patents and the right to sue for their infringement, but an ordinary car accident claim between private parties does not, because such a suit would arise under state tort law.

However, like the constitutional "arising under" clause, §1331 has subtleties that require study. This section explores the outer boundaries of the "arising under" jurisdiction statute.

a. The Well-Pleaded Complaint Rule

Louisville & Nashville Railroad Co. v. Mottley

211 U.S. 149 (1908)

. . . [In 1871, plaintiffs E.L. Mottley and Annie E. Mottley, a married couple, were injured in an accident on the defendant railroad. The plaintiffs and the defendant entered into an agreement whereby the plaintiffs released the defendants from all claims arising from the accident and the defendant provided the plaintiffs with passes good for unlimited free transportation on the defendant railroad. The defendant agreed to renew these passes annually during the lives of the plaintiffs. The defendant honored this agreement until January 1, 1907, at which the time it refused to renew the passes. Plaintiffs sued the defendant in federal court. Plaintiffs asserted that the defendant's refusal to renew their passes was based on the act of Congress of June 29, 1906, which prohibited railroads from providing free passes or free transportation. Plaintiffs alleged that the statute prohibited only the creation of new free passes and did not prohibit a railroad from honoring a preexisting commitment to renew passes such as theirs. Plaintiffs also alleged that if the statute did prohibit the railroad from renewing their free passes, then the statute was unconstitutional because it deprived them of property without due process of law. The trial court ruled for the plaintiffs and the defendant appealed to the U.S. Supreme Court.]

Mr. Justice Moody . . . delivered the opinion of the court.

Two questions of law were raised by the demurrer to the bill, were brought here by appeal, and have been argued before us. They are, first, whether . . . [the federal statute prohibiting free passes] makes it unlawful to perform a contract for transportation of persons who, in good faith, before the passage of the act, had accepted such contract in satisfaction of a valid cause of action against the railroad; and, second, whether the statute, if it should be construed to render such a contract unlawful, is in violation of the 5th Amendment of the Constitution of the United States. We do not deem it necessary, however, to consider either of these questions, because, in our opinion, the court below was without jurisdiction of the cause. Neither party has questioned that jurisdiction, but it is the duty of this court to see to it that the jurisdiction of the circuit court, which is defined and limited by statute, is not exceeded. This duty we have frequently performed of our own motion. . . .

There was no diversity of citizenship, and it is not and cannot be suggested that there was any ground of jurisdiction, except that the case was a "suit . . . arising under the Constitution or laws of the United States." Act of August 13, 1888, c. 866, 25 Stat. 433, 434. It is the settled interpretation of these words, as used in this statute, conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action, and asserts that the defense is invalidated by some provision of the Constitution of the United States. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution. In *Tennessee v. Union & Planters' Bank*, 152 U.S. 454, the plaintiff, the state of Tennessee, brought suit in the circuit court of the United States to recover from the defendant certain taxes alleged to be due under the laws of the state. The plaintiff alleged that the defendant claimed an immunity from the taxation by virtue of its charter, and that therefore the tax was void, because in violation of the provision of the Constitution of the United States, which forbids any state from passing a law impairing the obligation of contracts. The cause was held to be beyond the jurisdiction of the circuit court, the court saying, by Mr. Justice Gray (p. 464): "A suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that Constitution or those laws." Again, in *Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co.* 188 U.S. 632, the plaintiff brought suit in the circuit court of the United States for the conversion of copper ore and for an injunction against its continuance. The plaintiff then alleged, for the purpose of showing jurisdiction, in substance, that the defendant would set up in defense certain laws of the United States. The cause was held to be beyond the jurisdiction of the circuit court, the court saying, by Mr. Justice Peckham (pp. 638, 639):

> "It would be wholly unnecessary and improper, in order to prove complainant's cause of action, to go into any matters of defense which the defendants might possibly set up, and then attempt to reply to such defense, and thus, if possible, to show that a Federal question might or probably would arise in the course of the trial of the case. To allege such defense and then make an answer to it before the defendant has the opportunity to itself plead or prove its own defense is inconsistent with any known rule of pleading, so far as we are aware, and is improper.
>
> "The rule is a reasonable and just one that the complainant in the first instance shall be confined to a statement of its cause of action, leaving to the defendant to set up in his answer what his defense is, and, if anything more than a denial of complainant's cause of action, imposing upon the defendant the burden of proving such defense.
>
> "Conforming itself to that rule, the complainant would not, in the assertion or proof of its cause of action, bring up a single Federal question. The presentation of its cause of action would not show that it was one arising under the Constitution or laws of the United States.

> "The only way in which it might be claimed that a Federal question was presented would be in the complainant's statement of what the defense of defendants would be, and complainant's answer to such defense. Under these circumstances the case is brought within the rule laid down in *Tennessee v. Union & Planters' Bank*, 152 U.S. 454. That case has been cited and approved many times since."

The interpretation of the act which we have stated was first announced in *Metcalf v. Watertown*, 128 U.S. 286, and has since been repeated and applied in . . . [numerous cited cases]. The application of this rule to the case at bar is decisive against the jurisdiction of the circuit court.

It is ordered that the

Judgment be reversed and the case remitted to the circuit court with instructions to dismiss the suit for want of jurisdiction.

NOTES AND QUESTIONS

1. The Constitution of the United States states that federal judicial power shall extend to all cases "arising under" the federal Constitution, federal laws, or federal treaties. The statute analyzed in *Mottley*, now 28 U.S.C. §1331, provides that the district courts shall have jurisdiction over all civil actions "arising under" the federal Constitution, federal laws, or federal treaties. Why should the words "arising under" mean one thing in the Constitution and something else in §1331?

2. Following the Supreme Court's decision in *Mottley*, the case was dismissed from federal court, and the Mottleys refiled against the railroad in state court. The railroad, as anticipated, raised the defense that the free-pass contract with the Mottleys was invalidated by the 1906 federal statute, and the Mottleys claimed that the statute did not cover their case and that, if it did, it was unconstitutional. The state courts ruled for the Mottleys, the railroad brought the case to the U.S. Supreme Court a second time, and the Court ruled for the railroad. *Louisville & N.R. Co. v. Mottley*, 219 U.S. 467 (1911).

In light of this history, was the Supreme Court's order that the first case be dismissed nothing but a waste of time? What purpose is served by punctilious insistence on dismissal in a case that will eventually return to the federal courts by a different route?

3. If the *Mottley* case was not within the federal question jurisdiction as provided by §1331, why could the U.S. Supreme Court rule on the case, particularly the second time, when, as mentioned in the previous note, the Court ruled on the merits? Why would the Supreme Court not be bound by the well-pleaded complaint rule?

The answer is that §1331 governs the jurisdiction of federal *district courts*, not the Supreme Court. The Supreme Court's jurisdiction is given by other statutes, including 28 U.S.C. §§1254, 1257. Read those statutes in the Supplement. How do they grant the Supreme Court jurisdiction in a case such as *Mottley*?

4. What if a defendant in a state-court action *actually raises* a federal defense to a plaintiff's state-law claim? Should either the plaintiff or the defendant then be permitted to remove the case to federal court? In fact, such removal is generally

not allowed: 28 U.S.C. §1441, the general removal statute, permits only defendants to remove cases, and it only permits removal of cases "of which the district courts of the United States have original jurisdiction." Thus, in general the defendant may remove a case only if the plaintiff could have brought the case in federal court originally. Is this rule appropriate?[1]

5. What if the Mottleys had sought a "declaratory judgment" that their contract with the railroad was valid despite the federal statute? The Declaratory Judgment Act, 28 U.S.C. §2201, provides that "[i]n a case of actual controversy within its jurisdiction, . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." Could the Mottleys sue for such a declaration in federal court on the ground that federal law was necessary to their own claim that their contract was valid?

The Supreme Court faced a similar fact pattern in *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950). Plaintiff Phillips Petroleum had a contract to buy gas from defendant Skelly Oil. The contract was conditioned on the issuance of a required certificate from the Federal Power Commission. The defendant gave notice of termination of the contract on the ground that the certificate had not issued. Phillips brought suit for a declaratory judgment that the contract was enforceable.

Justice Frankfurter's opinion for the Supreme Court, holding that the case must be dismissed, said that "the operation of the Declaratory Judgment Act is procedural only." The Court determined that the purpose of the Act was to change the prior practice under which federal courts, for reasons relating to Article III justiciability, would entertain only cases in which a plaintiff sought some coercive remedy such as damages or injunctive relief. *Cf. Willing v. Chicago Auditorium Ass'n*, p. 30, *supra*. The Act authorized federal courts to hear cases in which a plaintiff sought only declaratory relief, but the Act did not create *jurisdiction* over such a case if it did not otherwise exist. Here, the Court observed, any claim by Phillips for contractual damages or specific performance against Skelly would be a state-law claim, as to which a federal question would arise only as a defense, and so jurisdiction over such a suit would be barred by the well-pleaded complaint rule. That result, the Court held, should not change simply because Phillips requested declaratory relief.

Although the *Skelly Oil* case depended heavily on the nature of the federal Declaratory Judgment Act, the Court extended the ruling in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), to cases arising under *state* declaratory judgment acts. The plaintiff, a state tax authority, tried to collect unpaid state income taxes owed to it by a state citizen by garnishing money owed to that citizen by the defendant trust. The tax authority sued the trust in state court and sought a judgment for the money owed (about $380) and also a declaratory

1. Removal of a case that could *not* have started in federal court is permitted under special circumstances. *See* 28 U.S.C. §§1441-1455. Two important examples are (1) if the defendant is a federal officer or agency and asserts a federal defense to the plaintiff's claim, 28 U.S.C. §1442 permits removal without regard to whether the plaintiff could have started the case in federal court originally; and (2) if any party asserts a patent or copyright claim, 28 U.S.C. §1454 permits removal.

judgment that the defendant's obligation to comply with its garnishment request was not preempted by the Employee Retirement Income Security Act, a federal statute. The defendant removed the action to federal court.

Even though the case involved a state declaratory judgment act, the Supreme Court relied on *Skelly Oil* and reached the same result. The plaintiff, the Court observed, was seeking a judgment under state laws; the issue of preemption arose only as an anticipation of the defendant's likely defense. Even though resolving the federal issue would be necessary in deciding the plaintiff's claim for a declaration that the defendant could comply with the garnishment order, the Court held that to permit jurisdiction would eviscerate the rule of *Skelly Oil*. The Court observed that "[i]t is possible to conceive of a rational jurisdictional system in which the answer as well as the complaint would be consulted before a determination was made whether the case 'arose under' federal law," but determined that it would continue its long-standing interpretations of §1331 and §1441 until Congress decided otherwise.

6. How about the reverse situation? What if the *railroad* had brought an anticipatory suit against the Mottleys, in which the railroad sought a declaratory judgment that, by virtue of federal law, the contract of free passage was invalid? Now the federal law seems even more an essential part of the plaintiff's claim. Would the claim "arise under" federal law?

In *Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237 (1952), plaintiff Wycoff Company sued the defendant Public Service Commission of Utah in federal court. The plaintiff sought a declaratory judgment that its business consisted of interstate commerce, which would presumably have implied that the plaintiff did not require a license from the defendant. The Supreme Court said:

> In this case, as in many actions for declaratory judgment, the realistic position of the parties is reversed. The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant may assert in the Utah courts. . . . Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action. Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law.

7. In light of the rule of *Mottley* and its several variations, it seems that the rules of federal jurisdiction treat federal *defenses* less favorably than federal *claims*. Why should this be so? What happened to the principle that "[a] case consists of the right of one party as well as the other, and may truly be said to arise under the

Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either" (*Tennessee v. Davis*, *supra*)?

In 1948, Professor Herbert Wechsler made this comment:

> [A] defendant may remove a case in a state court founded on a federal "claim or right"—provided it is one "of which the district courts have original jurisdiction." The rule has quite anomalous implications. Though the plaintiff who puts forth the federal claim is content to seek its vindication in the state tribunals, the defendant may insist upon an initial federal forum. When, on the other hand, the plaintiff's reliance is on state law and the defendant claims a federal defense, neither party may remove. . . . Nor is there either original jurisdiction or removal where both the initial claim and the defense rest on state law but the plaintiff contends that the defense put forth is nullified by federal law.
>
> It would, it seems to me, be far more logical to shape the rule precisely in reverse, granting removal to defendants when they claim a federal defense against the plaintiff's state-created claim and to the plaintiff when, as the issues have developed, he relies by way of replication on assertion of a federal right. . . . The statute ought to be reshaped in terms of a consistent theory that permits removal by the party who puts forth the federal right, or else removal should be dropped entirely in cases where the jurisdiction is based on a federal question.

Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 Law & Contemp. Probs. 216 (1948). On the other hand, Judge Richard Posner has argued:

> Under present law the defendant has no right to remove a case just because he has a federal defense to it (a right that he would have if the complaint were based on federal law), although if the same federal issue were the basis of a claim made by him he could sue in the federal court. The distinction is not quite as arbitrary as it sounds. . . . [I]t would be a mistake to make all cases in which a federal defense was asserted removable as a matter of right. In many the federal defense would have little merit—would, indeed, have been concocted purely to confer federal jurisdiction—yet this fact might be impossible to determine with any confidence without having a trial before the trial. I grant that frivolous federal claims are also a problem when only plaintiffs can use them to get into court, but a less serious problem. If the plaintiff gets thrown out of federal court because his claim is frivolous and he must therefore start over in state court, he has lost time, and the loss may be fatal if meanwhile the statute of limitations has run. But the defendant may be delighted to see the plaintiff's case thrown out of federal court when the court discovers that the federal defense is frivolous. Thus, it would not be a complete solution to the problem of the frivolous federal defense to allow removal on the basis of a federal question first raised by way of defense but to give the district court discretion to remand the case back to the state court.

Richard A. Posner, *The Federal Courts: Challenge and Reform* (1996).

Which view is more persuasive? Would it at least be expedient to provide that where neither party objects to federal jurisdiction (as in *Mottley* itself), the defendant should be allowed to remove a case to federal court on the basis of a federal defense? And if that is agreed, would it be reasonable, where neither party objects, to permit a case such as *Mottley* to be brought in federal court originally, if the defendant, rather than moving to dismiss, actually raises a federal defense?

PROBLEMS

Problem 5-4. Congress passes the Federal Seat Belt Act, which provides that in any car accident case, no party shall recover from any other party damages attributable to the failure of the party seeking recovery to wear a seat belt. Thereafter, Simon, a citizen of New Jersey, sues Levi, also a citizen of New Jersey, in federal district court for $200,000 for injuries sustained in a car accident. Simon was not wearing a seat belt at the time of the accident, but alleges that his injuries were not attributable, or in the alternative not wholly attributable, to this failure. Is the case within the federal jurisdiction?

Problem 5-5. Would it make any difference if Simon also alleged that the Federal Seat Belt Act was unconstitutional because it was beyond the power of Congress to enact?

Problem 5-6. If Simon sued Levi in state court, could Levi invoke the Federal Seat Belt Act and remove the case to federal court?

Problem 5-7. If Simon sued Levi in state court and the case was resolved within the state court system and involved application of the Federal Seat Belt Act, could the losing party seek review in the U.S. Supreme Court?

b. State Law Incorporating Federal Law

In some cases, state law gives the cause of action, but to make out a case, the plaintiff must establish some point determined by federal law. For example, the plaintiff's claim might be a state-law claim of negligence, but the defendant's alleged negligence might consist of violating a federal safety statute. Does such a case "arise under" federal law for purposes of §1331? The Supreme Court has taken a surprising variety of approaches to this question. This section reviews the Court's early approaches and works forward to the current law, which is stated in the final case in the section, *Gunn v. Minton*.

AMERICAN WELL WORKS CO. v. LAYNE & BOWLER CO., 241 U.S. 257 (1916): Plaintiff Layne & Bowler, manufacturers of a certain pump, claimed that defendant American Well Works had defamed it by claiming (falsely, according to the plaintiff) that the plaintiff's pump violated a patent owned by the defendant, and that this false accusation damaged the plaintiff's business. Plaintiff sued in state court. The defendant removed the case to federal court on the ground that the case arose under the federal patent law. Speaking through Justice Holmes, the Supreme Court said:

> A suit for damages to business caused by a threat to sue under the patent law is not itself a suit under the patent law. And the same is true when the

> damage is caused by a statement of fact,—that the defendant has a patent which is infringed. What makes the defendants' act a wrong is its manifest tendency to injure the plaintiff's business; and the wrong is the same whatever the means by which it is accomplished. But whether it is a wrong or not depends upon the law of the state where the act is done, not upon the patent law, and therefore the suit arises under the law of the state. A suit arises under the law that creates the cause of action. The fact that the justification may involve the validity and infringement of a patent is no more material to the question under what law the suit is brought than it would be in an action of contract. If the state adopted for civil proceedings the saying of the old criminal law: the greater the truth, the greater the libel, the validity of the patent would not come in question at all. In Massachusetts the truth would not be a defense if the statement was made from disinterested malevolence. Rev. Laws, chap. 173, §91. The state is master of the whole matter, and if it saw fit to do away with actions of this type altogether, no one, we imagine, would suppose that they still could be maintained under the patent laws of the United States.

Justice McKenna dissented on the ground that "the case involves a direct and substantial controversy under the patent laws."

SMITH v. KANSAS CITY TITLE & TRUST CO., 255 U.S. 180 (1921): Plaintiff Smith, a shareholder in the defendant company, brought suit seeking an injunction that would prevent the company from investing in bonds issued by Federal Land Banks or Joint-Stock Land Banks under the authority of the Federal Farm Loan Act. The plaintiff claimed that the federal statute authorizing the issuance of the bonds was unconstitutional, that the bonds themselves were illegal and void, and that, therefore, it would be illegal for the company to invest in the bonds. Neither party objected to federal jurisdiction, but the Supreme Court considered the issue *sua sponte*:

> The general rule is that, where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction under this provision.
>
> At an early date, considering the grant of constitutional power to confer jurisdiction upon the federal courts, Chief Justice Marshall said: "A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends upon the construction of either," *Cohens v. Virginia*, 6 Wheat. 264, 379; and again, when "the title or right set up by the party, may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction." *Osborn v. Bank of the United States*, 9 Wheat. 738, 822. . . .
>
> In the instant case the averments of the bill show that the directors were proceeding to make the investments in view of the act authorizing the bonds about to be purchased, maintaining that the act authorizing them was constitutional and the bonds valid and desirable investments.

The objecting shareholder avers in the bill that the securities were issued under an unconstitutional law, and hence of no validity. It is therefore apparent that the controversy concerns the constitutional validity of an act of Congress which is directly drawn in question. The decision depends upon the determination of this issue.

The general allegations as to the interest of the shareholder, and his right to have an injunction to prevent the purchase of the alleged unconstitutional securities by misapplication of the funds of the corporation, gives jurisdiction. . . .

Justice Holmes, dissenting, said:

It is evident that the cause of action arises not under any law of the United States but wholly under Missouri law. The defendant is a Missouri corporation and the right claimed is that of a stockholder to prevent the directors from doing an act, that is, making an investment, alleged to be contrary to their duty. But the scope of their duty depends upon the charter of their corporation and other laws of Missouri. If those laws had authorized the investment in terms the plaintiff would have had no case, and this seems to me to make manifest what I am unable to deem even debatable, that, as I have said, the cause of action arises wholly under Missouri law. If the Missouri law authorizes or forbids the investment according to the determination of this Court upon a point under the Constitution or Acts of Congress, still that point is material only because the Missouri law saw fit to make it so. . . .

[I]t seems to me that a suit cannot be said to arise under any other law than that which creates the cause of action. It may be enough that the law relied upon creates a part of the cause of action although not the whole, as held *in Osborn v. Bank of United States*, 9 Wheat. 738, 819-823, which perhaps is all that is meant by the less guarded expressions in *Cohens v. Virginia*, 6 Wheat. 264, 379. I am content to assume this to be so, although the *Osborn Case* has been criticized and regretted. But the law must create at least a part of the cause of action by its own force, for it is the suit, not a question in the suit, that must arise under the law of the United States. The mere adoption by a State law of a United States law as a criterion or test, when the law of the United States has no force proprio vigore, does not cause a case under the State law to be also a case under the law of the United States, and so it has been decided by this Court again and again. . . .

That was the ratio decidendi of *American Wells Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260. I know of no decisions to the contrary and see no reason for overruling it now.

MOORE v. CHESAPEAKE & OHIO RAILWAY CO., 291 U.S. 205 (1934): Plaintiff Moore sued his employer, the defendant railroad, in federal district court. Plaintiff claimed to have been injured in the course of his work. One count of the plaintiff's complaint stated that, by virtue of the Kentucky Employer's Liability Act (a state

statute), the plaintiff, while working in intrastate commerce, could not be held responsible for contributory negligence or to have "assumed the risk" of his work if his injury resulted from the defendant's violation of any state or federal safety statute. Moreover, this count alleged, the plaintiff's injury resulted from the defendant's failure to comply with the Federal Safety Appliance Act.

The plaintiff and the defendant were of diverse citizenship, so the district court undoubtedly had jurisdiction. However, under then-applicable venue rules, the case was in a proper venue if it was solely a diversity case, but not if the case arose under the federal statute. A unanimous Supreme Court, speaking through Chief Justice Hughes, said:

> While invoking, in the second count, the Safety Appliance Acts, petitioner fully set forth and relied upon the laws of the state of Kentucky where the cause of action arose. In relation to injuries received in that state in intrastate commerce, aside from the particular bearing of the Federal Safety Appliance Acts, the liability of respondent was determined by the laws of Kentucky. . . . The Kentucky Legislature read into its statute the provisions of statutes both state and federal which were enacted for the safety of employees, and the Federal Safety Appliance Acts were manifestly embraced in this description. . . . Thus the second count of the complaint, in invoking the Federal Safety Appliance Acts, while declaring on the Kentucky Employers' Liability Act, cannot be regarded as setting up a claim which lay outside the purview of the state statute. . . .
>
> Questions arising in actions in state courts to recover for injuries sustained by employees in intrastate commerce and relating to the scope or construction of the Federal Safety Appliance Acts are, of course, federal questions which may appropriately be reviewed in this Court. . . . But it does not follow that a suit brought under the state statute which defines liability to employees who are injured while engaged in intrastate commerce, and brings within the purview of the statute a breach of the duty imposed by the federal statute, should be regarded as a suit arising under the laws of the United States and cognizable in the federal court in the absence of diversity of citizenship. The Federal Safety Appliance Acts, while prescribing absolute duties, and thus creating correlative rights in favor of injured employees, did not attempt to lay down rules governing actions for enforcing these rights. . . .
>
> With respect to injuries sustained in intrastate commerce, nothing in the Safety Appliance Acts precluded the state from incorporating in its legislation applicable to local transportation the paramount duty which the Safety Appliance Acts imposed as to the equipment of cars used on interstate railroads. . . .
>
> We are of the opinion that the second paragraph of the complaint set forth a cause of action under the Kentucky statute, and, as to this cause of action, the suit is not to be regarded as one arising under the laws of the United States.

NOTES AND QUESTIONS

1. *American Well Works*, *Smith*, and *Moore* illustrate what Justice Frankfurter called the "litigation-provoking problem" that arises when state law "incorporates" federal law. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 470 (1957) (Frankfurter, J., dissenting). If, in a state common law negligence action, the plaintiff alleges that the defendant committed negligence by violating a federal safety law, or if a plaintiff alleges that corporate directors violated their state-law fiduciary duties by investing in instruments that are illegal by virtue of federal law, the only substantial question in the suit may be the question of whether federal law has really been violated, but does that mean that the case "arises under" federal law?

2. To the extent that a question of federal law arises because state law makes it relevant, is the question still a question of federal law? If, for example, the *Smith* case had been considered by a state court originally, and the state court had ruled that the corporate directors had breached their fiduciary duties under state law by investing in instruments that were illegal by virtue of federal law, could the U.S. Supreme Court have reviewed the ruling? If so, should a federal court be able to rule on the question initially?

3. In *American Well Works*, Justice Holmes offers the test that "[a] suit arises under the law that creates the cause of action." This test certainly has the virtues of clarity and simplicity. Do these virtues outweigh any negative aspects of applying the test?

4. *Smith*, by contrast, suggests that a case arises under federal law "where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable." Can *Smith* be reconciled with *American Well Works*? With *Moore*? If the cases are unharmonizable, which states the best rule?

5. Can it at least be concluded that if a case passes the Holmes test (i.e., federal law supplies the cause of action), then it does "arise under" federal law for purposes of §1331? That is, does the Holmes test at least provide a *sufficient* condition for federal jurisdiction, even if not a *necessary* condition?

Although the answer is usually yes, there are rare exceptions. For such an exception, see *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900). In that case, the parties, both citizens of Idaho, had a dispute over a mining claim. A federal statute provided that any person could stake claims to mining lands "under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States." A person who had made such a claim could seek a patent (i.e., deed) to the claimed land from the federal government, and anyone else who had a claim to the same land could sue the first claimant "in a court of competent jurisdiction," which would determine the rightful claimant. The Supreme Court held that, even though federal law provided the cause of action for such suit, if the suit presented "simply a question of fact as to the time of the discovery of mineral, the location of the claim on the ground, or a determination of the meaning and effect of certain local rules and customs prescribed by the miners of the district, or the effect of state statutes, it would seem to follow that it is not one which necessarily arises under the Constitution and laws of the United States."

What would motivate the Court to issue such a ruling? (Hint: What would have happened if the Court said the case *was* within the federal jurisdiction?) Is the ruling appropriate?

6. The tension between *Smith* and *Moore* continued for decades. In 1986, the case of *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), took a new approach.

The plaintiffs in *Merrell Dow* alleged that their child was born with deformities because the mother took the defendant's drug Bendectin during pregnancy. In addition to seeking recovery on common law theories, plaintiffs' complaint asserted that the drug was "misbranded," in violation of the Federal Food, Drug, and Cosmetic Act (FDCA), because its label did not adequately warn of its potential dangers. Plaintiffs did not claim any right of action under the FDCA directly, but rather that violation of the federal statute gave rise to a "presumption of negligence." Plaintiffs sued in state court, but the defendant removed the case to federal court, arguing that the case arose under federal law.

The Supreme Court, in an opinion by Justice Stevens, held that the case did not "arise under" federal law. After noting that interpretations of §1331 "require sensitive judgments about congressional intent, judicial power, and the federal system," and that the Court had always interpreted §1331 "with an eye to practicality and necessity," the Court observed that the parties agreed that there was no private right of action for enforcement of the FDCA. Assuming this to be correct for purposes of the case, the Court said that the reasons behind implied right of action doctrine were "precisely the kind of considerations that should inform . . . construction of §1331 when jurisdiction is asserted because of the presence of a federal issue in a state cause of action." The Court said:

> [The conclusion that there is no private right of action under the FDCA means] that it would flout congressional intent to provide a private federal remedy for the violation of the federal statute. We think it would similarly flout, or at least undermine, congressional intent to conclude that the federal courts might nevertheless exercise federal-question jurisdiction and provide remedies for violations of that federal statute solely because the violation of the federal statute is said to be a "rebuttable presumption" or a "proximate cause" under state law, rather than a federal action under federal law. . . . We conclude that a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim "arising under the Constitution, laws, or treaties of the United States."

Justice Brennan, joined by three other Justices, dissented. Justice Brennan stated that he would prefer to follow *Smith* and overrule *Moore*, which he regarded as irreconcilable with *Smith*. As to the relevance of whether there is a private right of action to enforce the federal statute involved in a case, Justice Brennan said:

> Why should the fact that Congress chose not to create a private federal *remedy* mean that Congress would not want there to be federal *jurisdiction* to adjudicate a state claim that imposes liability for violating the federal law? . . . The Court's . . . conclusion requires inferring from Congress'

> decision not to create a private federal remedy that, while some private enforcement is permissible in state courts, it is "bad" if that enforcement comes from the *federal* courts. But that is simply illogical. Congress' decision to withhold a private right of action and to rely instead on public enforcement reflects congressional concern with obtaining more accurate implementation and more coordinated enforcement of a regulatory scheme. . . . These reasons are closely related to the Congress' reasons for giving federal courts original federal-question jurisdiction. Thus, if anything, Congress' decision not to create a private remedy *strengthens* the argument in favor of finding federal jurisdiction over a state remedy that is not pre-empted.

Does *Merrell Dow* make sense? Think back to the "right of action" cases (Chapter 4, section C, *supra*). Do the considerations that go into determining whether a federal statute should provide a private right of action really duplicate the considerations that should determine whether a state-law cause of action incorporating the federal statute's requirements should be deemed to "arise under" federal law? Or is the opposite true, as Justice Brennan suggests?

7. While *Merrell Dow* was criticized for the reasons stated by Justice Brennan, it at least appeared to create a clear rule governing these "incorporation" cases. That apparent clarity was, however, short-lived. In *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), the Supreme Court took yet another approach. Plaintiff Grable & Sons (Grable) sued defendant Darue Engineering (Darue) to quiet title to a piece of real property. The IRS had seized the property from Grable to satisfy a federal tax delinquency and had sold it to Darue. Grable claimed that the sale was invalid because the IRS had failed to give notice of the seizure in the manner required by a federal statute. Grable sued Darue in state court, but Darue removed the case to federal court. The IRS was not a party. The federal district court ruled for Darue on the merits, and the court of appeals affirmed.

The Supreme Court determined that the case was within the §1331 jurisdiction. Although Grable had sued on a state-law cause of action, the only real question in the case was whether the IRS had complied with the federal notice statute, and the Court held that "a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law." The Court acknowledged that Grable would have had no private right of action against Darue under the federal notice statute and that "some broad language in *Merrell Dow*" suggested that the case was therefore not within the federal jurisdiction. The Court denied, however, that *Merrell Dow* had adopted a "bright-line rule" under which the presence or absence of such a private right of action was determinative of federal jurisdiction. Rather, the Court said, the right of action inquiry was important in the circumstances of *Merrell Dow*, where allowing the suit to proceed would have attracted a "horde" of cases to federal court. Under such circumstances, the Court said, it was appropriate to block the cases absent some indication that Congress would have wanted the cases to proceed in federal court. But in a case such as *Grable*, in which the plaintiff's cause of action would rarely involve contested federal issues, allowing federal jurisdiction would not materially affect the "normal currents

of litigation," and there was therefore "no good reason to shirk from federal jurisdiction." Federal jurisdiction over "incorporated" claims is appropriate, the Court concluded, where a state-law claim "necessarily raise[s] a . . . federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." The Court later refined this test in the next case.

Is an approach that depends on the number of cases that would be likely to come to federal court justified? For an argument that the Court is justified in taking this point into account, and more generally in infusing the interpretation of §1331 with a wide range of policy considerations—and doing so, moreover, on a case-by-case basis—see Richard D. Freer, *Of Rules and Standards: Reconciling Statutory Limitations on "Arising Under" Jurisdiction*, 82 Ind. L.J. 309 (2007).

Gunn v. Minton

568 U.S. 251 (2013)

Chief Justice Roberts delivered the opinion of the Court.

Federal courts have exclusive jurisdiction over cases "arising under any Act of Congress relating to patents." 28 U.S.C. §1338(a). The question presented is whether a state law claim alleging legal malpractice in the handling of a patent case must be brought in federal court.

I

. . . [In a previous case, plaintiff Minton sued two defendants for patent infringement. Plaintiff lost that case when the court ruled that his patent was invalid on the ground that the patented invention had been on sale for more than one year before the plaintiff had applied for a patent (the patent statute disallows a patent in such a case). Plaintiff subsequently sued defendant Gunn, the counsel who had represented him in the previous case, for malpractice. Plaintiff claimed that, in the previous case, Gunn should have argued that the prior sale of Minton's invention had been part of a test of the invention and so fell within the "experimental use" exception to the "on sale" rule. Defendant Gunn argued that such an "experimental use" argument would have failed anyway.

[Plaintiff brought the malpractice action in Texas state court. The trial court agreed with the defendant's argument and ruled for the defendant. On appeal, plaintiff claimed that the case was one "arising under" federal patent law and so within the exclusive federal jurisdiction under 28 U.S.C. §1338. The Supreme Court of Texas agreed that the Texas state courts lacked jurisdiction over the case. The U.S. Supreme Court granted certiorari.]

II

"Federal courts are courts of limited jurisdiction," possessing "only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). There is no dispute that the Constitution permits

Congress to extend federal court jurisdiction to a case such as this one, see *Osborn v. Bank of United States*, 9 Wheat. 738, 823-824 (1824); the question is whether Congress has done so. . . .

As relevant here, Congress has authorized the federal district courts to exercise original jurisdiction in "all civil actions arising under the Constitution, laws, or treaties of the United States," 28 U.S.C. §1331, and, more particularly, over "any civil action arising under any Act of Congress relating to patents," §1338(a). Adhering to the demands of "[l]inguistic consistency," we have interpreted the phrase "arising under" in both sections identically, applying our §1331 and §1338(a) precedents interchangeably. See *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 808-809 (1988). For cases falling within the patent-specific arising under jurisdiction of §1338(a), however, Congress has not only provided for federal jurisdiction but also eliminated state jurisdiction, decreeing that "[n]o State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents." §1338(a) (2006 ed., Supp. V). To determine whether jurisdiction was proper in the Texas courts, therefore, we must determine whether it would have been proper in a federal district court—whether, that is, the case "aris[es] under any Act of Congress relating to patents."

For statutory purposes, a case can "aris[e] under" federal law in two ways. Most directly, a case arises under federal law when federal law creates the cause of action asserted. See *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) ("A suit arises under the law that creates the cause of action"). As a rule of inclusion, this "creation" test admits of only extremely rare exceptions, see, *e.g.*, *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900), and accounts for the vast bulk of suits that arise under federal law, see *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 9 (1983). Minton's original patent infringement suit . . ., for example, arose under federal law in this manner because it was authorized by 35 U.S.C. §§271, 281.

But even where a claim finds its origins in state rather than federal law—as Minton's legal malpractice claim indisputably does—we have identified a "special and small category" of cases in which arising under jurisdiction still lies. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699 (2006). In outlining the contours of this slim category, we do not paint on a blank canvas. Unfortunately, the canvas looks like one that Jackson Pollock got to first. . . .

In an effort to bring some order to this unruly doctrine several Terms ago, we condensed our prior cases into the following inquiry: Does the "state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities"? *Grable*, 545 U.S., at 314. That is, federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress. Where all four of these requirements are met, we held, jurisdiction is proper because there is a "serious federal interest in claiming the advantages thought to be inherent in a federal forum," which can be vindicated without disrupting Congress's intended division of labor between state and federal courts. *Id.*, at 313-314.

III

Applying *Grable*'s inquiry here, it is clear that Minton's legal malpractice claim does not arise under federal patent law. Indeed, for the reasons we discuss, we are comfortable concluding that state legal malpractice claims based on underlying patent matters will rarely, if ever, arise under federal patent law for purposes of §1338(a). Although such cases may necessarily raise disputed questions of patent law, those cases are by their nature unlikely to have the sort of significance for the federal system necessary to establish jurisdiction.

A

To begin, we acknowledge that resolution of a federal patent question is "necessary" to Minton's case. Under Texas law, a plaintiff alleging legal malpractice must establish four elements: (1) that the defendant attorney owed the plaintiff a duty; (2) that the attorney breached that duty; (3) that the breach was the proximate cause of the plaintiff's injury; and (4) that damages occurred. . . . In cases like this one, in which the attorney's alleged error came in failing to make a particular argument, the causation element requires a "case within a case" analysis of whether, had the argument been made, the outcome of the earlier litigation would have been different. . . . To prevail on his legal malpractice claim, therefore, Minton must show that he would have prevailed in his federal patent infringement case if only petitioners had timely made an experimental-use argument on his behalf. . . . That will necessarily require application of patent law to the facts of Minton's case.

B

The federal issue is also "actually disputed" here—indeed, on the merits, it is the central point of dispute. Minton argues that the experimental-use exception properly applied to his [prior sale of his invention], saving his patent from the on-sale bar; petitioners argue that it did not. This is just the sort of " 'dispute . . . respecting the . . . effect of [federal] law' " that *Grable* envisioned. . . .

C

Minton's argument founders on *Grable*'s next requirement, however, for the federal issue in this case is not substantial in the relevant sense. In reaching the opposite conclusion, the Supreme Court of Texas focused on the importance of the issue to the plaintiff's case and to the parties before it. . . . As our past cases show, however, it is not enough that the federal issue be significant to the particular parties in the immediate suit; that will *always* be true when the state claim "necessarily raise[s]" a disputed federal issue, as *Grable* separately requires. The substantiality inquiry under *Grable* looks instead to the importance of the issue to the federal system as a whole.

In *Grable* itself, for example, the Internal Revenue Service had seized property from the plaintiff and sold it to satisfy the plaintiff's federal tax delinquency. 545 U.S., at 310-311. Five years later, the plaintiff filed a state law quiet title action against the third party that had purchased the property, alleging that the IRS had failed to comply with certain federally imposed notice requirements, so that the

seizure and sale were invalid. *Ibid.* In holding that the case arose under federal law, we primarily focused not on the interests of the litigants themselves, but rather on the broader significance of the notice question for the Federal Government. We emphasized the Government's "strong interest" in being able to recover delinquent taxes through seizure and sale of property, which in turn "require[d] clear terms of notice to allow buyers . . . to satisfy themselves that the Service has touched the bases necessary for good title." *Id.*, at 315. The Government's "direct interest in the availability of a federal forum to vindicate its own administrative action" made the question "an important issue of federal law that sensibly belong[ed] in a federal court." *Ibid.*

A second illustration of the sort of substantiality we require comes from *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), which *Grable* described as "[t]he classic example" of a state claim arising under federal law. . . . In *Smith*, the plaintiff argued that the defendant bank could not purchase certain bonds issued by the Federal Government because the Government had acted unconstitutionally in issuing them. 255 U.S., at 198. We held that the case arose under federal law, because the "decision depends upon the determination" of "the constitutional validity of an act of Congress which is directly drawn in question." *Id.*, at 201. Again, the relevant point was not the importance of the question to the parties alone but rather the importance more generally of a determination that the Government "securities were issued under an unconstitutional law, and hence of no validity." *Ibid.*; see also *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 814, n.12 (1986).

Here, the federal issue carries no such significance. Because of the backward-looking nature of a legal malpractice claim, the question is posed in a merely hypothetical sense: *If* Minton's lawyers had raised a timely experimental-use argument, would the result in the patent infringement proceeding have been different? No matter how the state courts resolve that hypothetical "case within a case," it will not change the real-world result of the prior federal patent litigation. Minton's patent will remain invalid.

Nor will allowing state courts to resolve these cases undermine "the development of a uniform body of [patent] law." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 162, (1989). Congress ensured such uniformity by vesting exclusive jurisdiction over actual patent cases in the federal district courts and exclusive appellate jurisdiction in the Federal Circuit. See 28 U.S.C. §§1338(a), 1295(a)(1). In resolving the nonhypothetical patent questions those cases present, the federal courts are of course not bound by state court case-within-a-case patent rulings. See *Tafflin v. Levitt*, 493 U.S. 455, 465 (1990). In any event, the state court case-within-a-case inquiry asks what would have happened in the prior federal proceeding if a particular argument had been made. In answering that question, state courts can be expected to hew closely to the pertinent federal precedents. . . .

As for more novel questions of patent law that may arise for the first time in a state court "case within a case," they will at some point be decided by a federal court in the context of an actual patent case, with review in the Federal Circuit. If the question arises frequently, it will soon be resolved within the federal system, laying to rest any contrary state court precedent; if it does not arise frequently, it is

unlikely to implicate substantial federal interests. The present case is "poles apart from *Grable*," in which a state court's resolution of the federal question "would be controlling in numerous other cases." *Empire Healthchoice Assurance, Inc.*, 547 U.S., at 700. . . .

Nor can we accept the suggestion that the federal courts' greater familiarity with patent law means that legal malpractice cases like this one belong in federal court. . . . It is true that a similar interest was among those we considered in *Grable*, 545 U.S., at 314. But the possibility that a state court will incorrectly resolve a state claim is not, by itself, enough to trigger the federal courts' exclusive patent jurisdiction, even if the potential error finds its root in a misunderstanding of patent law.

There is no doubt that resolution of a patent issue in the context of a state legal malpractice action can be vitally important to the particular parties in that case. But something more, demonstrating that the question is significant to the federal system as a whole, is needed. That is missing here.

D

It follows from the foregoing that *Grable*'s fourth requirement is also not met. That requirement is concerned with the appropriate "balance of federal and state judicial responsibilities." *Ibid.* We have already explained the absence of a substantial federal issue within the meaning of *Grable*. The States, on the other hand, have "a special responsibility for maintaining standards among members of the licensed professions." *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 460 (1978). Their "interest . . . in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been officers of the courts." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) (internal quotation marks omitted). We have no reason to suppose that Congress — in establishing exclusive federal jurisdiction over patent cases — meant to bar from state courts state legal malpractice claims simply because they require resolution of a hypothetical patent issue.

* * *

As we recognized a century ago, "[t]he Federal courts have exclusive jurisdiction of all cases arising under the patent laws, but not of all questions in which a patent may be the subject-matter of the controversy." *New Marshall Engine Co. v. Marshall Engine Co.*, 223 U.S. 473, 478 (1912). In this case, although the state courts must answer a question of patent law to resolve Minton's legal malpractice claim, their answer will have no broader effects. It will not stand as binding precedent for any future patent claim; it will not even affect the validity of Minton's patent. Accordingly, there is no "serious federal interest in claiming the advantages thought to be inherent in a federal forum," *Grable, supra*, at 313. Section 1338(a) does not deprive the state courts of subject matter jurisdiction.

The judgment . . . is reversed, and the case is remanded. . . .

NOTES AND QUESTIONS

1. What does this case add to the understanding of the test from *Grable*? What added meaning does the Court give to the inquiry into whether the federal question is "substantial"? What became of *Grable*'s emphasis on the volume of expected litigation?

2. Is it appropriate for the existence of federal jurisdiction to turn on "the importance of the issue to the federal system as a whole"? Is that a judgment for Congress or the courts? Will courts generally be in a good position to gauge the systemic importance of the issues raised by a case? Will they be in a good position to do so at the *beginning* of a case? In *Gunn,* the Supreme Court saw the case only after it had been fully played out in state court, but if this kind of case were filed in federal district court and the defendant immediately moved to dismiss, the district court would have to gauge the systemic importance of the case based solely on the plaintiff's complaint. Would the court be able to do so? For that matter, would the court be able to tell at the beginning of a case whether any given issue is "actually disputed"?

3. The final factor is whether a federal court can resolve the case "without disrupting the federal-state balance approved by Congress." What is the "balance approved by Congress"? Has Congress approved the tests formulated in this line of cases? What congressional, statutory text do all of these cases implement?

4. If federal law supplies a plaintiff's cause of action, is a federal court empowered to decline jurisdiction on the ground that the issues raised by the plaintiff's case are not "important . . . to the federal system as a whole"?

5. In a concurring opinion in *Grable*, Justice Thomas indicated that in an appropriate case he would be willing to consider adopting the Holmes test from *American Well Works*. Justice Thomas said that "[j]urisdictional rules should be clear," and suggested that "[w]hatever the virtues of the *Smith* standard, it is anything but clear" and "[w]hatever the vices of the *American Well Works* rule, it is clear." Is clarity in the jurisdictional rule the most important consideration, overriding the need for appropriate rulings in varying circumstances?

PROBLEMS

Problem 5-8. Congress passes a federal statute that makes it unlawful to lend money at a rate of interest that is more than twice the maximum rate permitted by state or federal law. The federal statute provides that any person injured by a violation of the statute may sue the violator for three times the resulting damages. Carlos sues Speedcash, Inc. in federal district court. Carlos alleges that Speedcash made him a "payday loan" in New Jersey at an annual interest rate of 100 percent, whereas the maximum rate permitted under New Jersey law is 16 percent. He seeks judgment for three times the amount of interest above 32 percent that he has paid. Is the case within the federal jurisdiction?

Problem 5-9. Earth Defenders, an environmental organization, posts a report on its website stating that Thripskill, a pesticide manufactured by Costello Laboratories, violates the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and that any user of Thripskill could therefore be subjected to penalties by the

federal government. Sales of Thripskill decline. Costello sues Earth Defenders on a claim of "product disparagement." As defined by the law of Illinois, where Costello is headquartered, product disparagement occurs when a party causes damage by making false statements about a product. Costello asserts that Thripskill fully complies with FIFRA. Costello brings its suit in federal district court. Earth Defenders moves to dismiss for lack of jurisdiction. What should the court do?

B. DIVERSITY JURISDICTION

Article III of the Constitution provides that "[t]he judicial Power shall extend . . . to Controversies . . . between Citizens of different States . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." The first part of this provision authorizes the "diversity jurisdiction" of the federal courts and the second part authorizes the "alienage jurisdiction," although the term "diversity jurisdiction" is often used to cover both.[2] Congress has implemented this constitutional provision by granting diversity jurisdiction to the federal courts ever since the First Judiciary Act of 1789, although it has never vested diversity jurisdiction as broadly as the Constitution would allow—among other things, Congress has always limited diversity jurisdiction by including an amount-in-controversy requirement.

The study of diversity jurisdiction encompasses, on the one hand, some very practical, rules-oriented questions and, on the other hand, questions of policy. Rules questions arise from the great variety of possible configurations of parties and claims. It is easy enough to say that the federal courts should have jurisdiction of cases between citizens of different states, but this simple concept may be surprisingly difficult to apply. How is citizenship determined? How is the amount in controversy determined? What happens when there are multiple parties? What if the case involves a mixture of state and federal claims? These and other practical questions are explored in this chapter.

The main policy question implicated by diversity jurisdiction is whether the jurisdiction is a good use of federal court time. In an age of crowded dockets and long wait times, should the federal courts expend their scarce resources on cases arising out of car accidents and medical malpractice? Abolition of diversity jurisdiction has been proposed, but Congress has always chosen to retain it.

1. The Policy of Diversity Jurisdiction

Diversity jurisdiction is the subject of continuing policy debate. What justifies diversity jurisdiction? Why was it originally created, and do the original reasons continue to make sense today? Is it a good use of federal court time, or should it be abolished?

2. *E.g.*, *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823, 829 (1969).

The Federalist, No. 80: "The Powers of the Judiciary"

Alexander Hamilton

To JUDGE with accuracy of the proper extent of the federal judicature, it will be necessary to consider, in the first place, what are its proper objects.

It seems scarcely to admit of controversy, that the judiciary authority of the Union ought to extend to these several descriptions of cases: 1st, to all those which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation; 2d, to all those which concern the execution of the provisions expressly contained in the articles of Union; 3d, to all those in which the United States are a party; 4th, to all those which involve the PEACE of the CONFEDERACY, whether they relate to the intercourse between the United States and foreign nations, or to that between the States themselves; 5th, to all those which originate on the high seas, and are of admiralty or maritime jurisdiction; and, lastly, to all those in which the State tribunals cannot be supposed to be impartial and unbiased. . . .

[After examining the first three points, Hamilton continued:] The fourth point rests on this plain proposition, that the peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the security of the public tranquillity. A distinction may perhaps be imagined between cases arising upon treaties and the laws of nations and those which may stand merely on the footing of the municipal law. The former kind may be supposed proper for the federal jurisdiction, the latter for that of the States. But it is at least problematical, whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the lex loci, would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations of a treaty or the general law of nations. And a still greater objection to the distinction would result from the immense difficulty, if not impossibility, of a practical discrimination between the cases of one complexion and those of the other. So great a proportion of the cases in which foreigners are parties, involve national questions, that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals.

The power of determining causes between two States, between one State and the citizens of another, and between the citizens of different States, is perhaps not less essential to the peace of the Union than that which has been just examined. . . .

It may be esteemed the basis of the Union, that "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." And if it be a just principle that every government *ought to possess the means of executing its own provisions by its own authority*, it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in

which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded.

. . . The reasonableness of the agency of the national courts in cases in which the State tribunals cannot be supposed to be impartial, speaks for itself. No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different States and their citizens. . . .

Having thus laid down and discussed the principles which ought to regulate the constitution of the federal judiciary, we will proceed to test, by these principles, the particular powers of which, according to the plan of the convention, it is to be composed. . . .

Fifth. To controversies between two or more States; between a State and citizens of another State; between citizens of different States. These belong to the fourth of those classes, and partake, in some measure, of the nature of the last. . . .

Seventh. To cases between a State and the citizens thereof, and foreign States, citizens, or subjects. These have been already explained to belong to the fourth of the enumerated classes, and have been shown to be, in a peculiar manner, the proper subjects of the national judicature.

From this review of the particular powers of the federal judiciary, as marked out in the Constitution, it appears that they are all conformable to the principles which ought to have governed the structure of that department, and which were necessary to the perfection of the system. . . .

PUBLIUS.

NOTES AND QUESTIONS

1. What reasons does Hamilton give for vesting diversity jurisdiction in the federal courts? Do those reasons make sense today?

2. Many commentators, judges, and law reform organizations have recommended abolishing or substantially limiting diversity jurisdiction. Arguments against retaining broad diversity jurisdiction include the following:

a. Prejudice against out-of-state litigants no longer exists in state courts, if indeed it ever existed, and in any event federal courts cannot do much to protect out-of-state litigants against such prejudice.

b. Diversity cases impose a considerable burden on federal courts (they make up about 30 percent of federal district court filings); the dockets of federal courts are crowded enough with federal question cases, and diversity cases would impose less of a burden on state courts because there are so many more state courts than federal courts.

c. Because of *Erie*, federal courts cannot definitively resolve state-law issues presented in diversity cases, but can only make their best assessment of how a

state court would resolve the issues; federal courts sometimes wrongly follow their own inclinations instead of following state law; in other cases, they waste time sincerely wrestling with difficult state-law issues, only to have their opinions disregarded when the issues later arise in state court.

d. Federal courts also waste time determining whether diversity jurisdiction exists in a given case; the many intricate rules relating to diversity jurisdiction may make it difficult to tell whether a given case is within the jurisdiction.

e. By providing a choice of forums, diversity jurisdiction creates incentives for each side to try to get a case into the forum that would be more favorable for it, without regard to whether that forum would be more likely to produce a just outcome; to this end, lawyers use unworthy strategies such as removing a case to federal court simply to increase costs, or joining unnecessary parties to destroy diversity and prevent removal.

These arguments have been made repeatedly over numerous decades. *See, e.g.*, David Crump, *The Case for Restricting Diversity Jurisdiction: The Undeveloped Arguments, from the Race to the Bottom to the Substitution Effect*, 62 Me. L. Rev. 1 (2010); Debra Lyn Bassett, *The Hidden Bias in Diversity Litigation*, 81 Wash. U. L.Q. 119 (2003); Federal Courts Study Committee, Report of the Federal Courts Study Committee (1990); David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and A Proposal*, 91 Harv. L. Rev. 317 (1977); Henry J. Friendly, *Federal Jurisdiction: A General View* (1973); Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 Cornell L.Q. 499 (1928).

3. On the other hand, defenders of diversity jurisdiction point out that:

a. Some prejudice against out-of-state litigants still exists, and in any event federal courts play a useful role and promote interstate commerce by addressing the fear of such prejudice, whether the prejudice itself be real or imagined; without diversity jurisdiction, businesses would fear to operate in distant states.

b. If diversity jurisdiction were abolished to lighten the caseload of federal courts, the cases would have to be resolved in state courts, which also have heavy caseloads.

c. The private bar likes diversity jurisdiction and the options that it provides.

d. Diversity jurisdiction is a valuable social service and is as justified as the school lunch program, the federal highway program, or any other social service provided by the federal government.

e. Concurrent jurisdiction over diversity cases, and the resulting creation of a substantial set of practitioners who practice in both state and federal courts, leads to valuable procedural innovation, as each system learns from the best practices of the other.

These arguments have also been repeated over the decades. *See, e.g.*, Adrienne J. Marsh, *Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts*, 48 Brook. L. Rev. 197 (1982); John P. Frank, *The Case for Diversity Jurisdiction*, 16 Harv. J. Leg. 403 (1979); Shapiro, *supra*; Robert C. Brown, *The Jurisdiction of the Federal Courts Based on Diversity of Citizenship*, 78 U. Pa. L. Rev. 179 (1929).

4. How would you evaluate the arguments for and against diversity jurisdiction? Can some of the arguments (e.g., the existence or nonexistence of prejudice

against out-of-state parties) be assessed without empirical study? How could these factors be empirically measured?

5. Assuming Congress continues to retain diversity jurisdiction (as it always has so far), should courts consider the policy arguments for and against its existence as they fashion the many rules that determine whether diversity jurisdiction exists in a given case? Bear this question in mind as you read the next section.

2. Requirements for Diversity Jurisdiction

a. Complete Diversity

The Constitution provides for jurisdiction over "Controversies . . . between Citizens of different States," and the diversity jurisdiction statute implements this provision by conferring original jurisdiction on federal district courts over "all civil actions . . . between . . . citizens of different States" where the amount-in-controversy requirement is met. These simple phrases were perhaps drafted in contemplation of a prototypical case in which a single plaintiff sues a single defendant on a single claim. How do these words apply to sprawling, real-life cases, which may involve multiple parties and claims?

Strawbridge v. Curtis

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

This was an appeal from a decree of the circuit court, for the district of Massachusetts, which dismissed the complainants' bill in chancery, for want of jurisdiction.

Some of the complainants were alleged to be citizens of the state of Massachusetts. The defendants were also stated to be citizens of the same state, excepting Curtiss, who was averred to be a citizen of the state of Vermont, and upon whom the subpoena was served in that state.

The question of jurisdiction was submitted to the court without argument, by *P.B. Key*, for the appellants, and *Harper*, for the appellees.

On a subsequent day,

Marshall, Ch. J. delivered the opinion of the court.

The court has considered this case, and is of opinion that the jurisdiction cannot be supported.

The words of the act of congress are, "where an alien is a party; or the suit is between a citizen of a state where the suit is brought, and a citizen of another state."

The court understands these expressions to mean that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts.

But the court does not mean to give an opinion in the case where several parties represent several distinct interests, and some of those parties are, and others are not, competent to sue, or liable to be sued, in the courts of the United States.

Decree affirmed.

NOTES AND QUESTIONS

1. Although the diversity jurisdiction statute has changed over the years, and although it has never contained any language specifically directed at the question presented by *Strawbridge*, the Supreme Court has always maintained its interpretation of the statute as requiring "complete diversity." Look at the language of the First Judiciary Act construed in *Strawbridge* as well as the current language of 28 U.S.C. §1332. Is the rule of complete diversity convincing as a matter of statutory interpretation? Is it sound as a matter of policy?

2. The rule of complete diversity is statutory only. The constitutional diversity provision, the Supreme Court has held, is satisfied by "minimal diversity." That is, Congress may choose to vest a federal court with jurisdiction over a case based on diversity "so long as any two adverse parties are not co-citizens." *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 531 (1967). Thus, Congress could choose to vest federal courts with jurisdiction over cases where a citizen of state A sues a citizen of state A and a citizen of state B on a state-law claim.

Congress has taken advantage of this power in specialized circumstances. One example is the federal interpleader statute, 28 U.S.C. §1335. An interpleader action is used when a plaintiff holds property belonging to someone else, but is uncertain who the true owner is. Such a plaintiff sues all the potential claimants to the property and lets them fight among themselves as to who is the true owner. (An example might be the executor of an ambiguous will, who is uncertain to whom to give the decedent's property.) Section 1335 authorizes federal jurisdiction over an interpleader case where the amount in controversy is $500 or more and any two adverse claimants in the action are of diverse citizenship, even if other claimants are not.

Another example of federal jurisdiction based on minimal diversity is the Class Action Fairness Act, 28 U.S.C. §1332(d) (CAFA), which authorizes federal jurisdiction over class actions where the amount in controversy exceeds $5 million and any member of the plaintiff class is of diverse citizenship from any defendant.

Given that Article III and §1332 both refer to cases "between citizens of different States," why should the constitutional diversity clause be understood differently from the diversity jurisdiction statute? What motives could have caused Congress to authorize jurisdiction based on minimal diversity in the interpleader statute and the Class Action Fairness Act?

3. It is often said that the diversity statute "applies only to cases in which the citizenship of each plaintiff is diverse from the citizenship of each defendant." *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996). In fact, this statement is not quite true. Suppose plaintiff A from Massachusetts sues defendant B from Massachusetts and defendant C from New York on different claims: The plaintiff brings a federal-law claim against defendant B and a state-law claim against defendant C. Is the case within

the federal jurisdiction (assuming the amount-in-controversy requirement is met)? The answer is yes. The rule of complete diversity does not require dismissal of the suit against C, because the federal claim provides an independent basis of jurisdiction against B. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 381 (1959).

Cases such as *Romero* illustrate the difficulty of stating rules of diversity jurisdiction in a form that correctly applies to all the different configurations that a case might present. Can you state the rule of complete diversity more successfully than the Supreme Court did in *Caterpillar*?

4. The alienage jurisdiction also gives rise to puzzles when combined with the rule of complete diversity. Hamilton said in The Federalist, No. 80 that "the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned," and §11 of the First Judiciary Act provided for federal jurisdiction in all cases where the amount in controversy exceeded $500 and in which "an alien is a party." But the Constitution's alienage jurisdiction clause provides for jurisdiction for controversies "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." What happens, then, in a case between two aliens? Such a case would satisfy the First Judiciary Act (because "an alien is a party"), but is the jurisdiction constitutional? In *Mossman v. Higginson*, 4 U.S. 12 (1800), the Supreme Court said no: "[T]he judiciary act can, and must, receive a construction, consistent with the constitution." Why was the jurisdiction provided by the First Judiciary Act inconsistent with the Constitution? How does the current diversity jurisdiction statute, 28 U.S.C. §1332, resolve the problem?

5. How can Congress best ensure that the succinct provisions of §1332 properly apply to all the different configurations of parties and claims that courts face in real cases? What should courts do when confronted with permutations that Congress apparently did not anticipate?

b. Determining Citizenship

The Constitution provides that the judicial power shall extend to controversies "between Citizens of different States," and the diversity statute, 28 U.S.C. §1332, uses the same language. What does it mean to be a citizen of a state?

i. Natural Persons

Washington v. Hovensa LLC

652 F.3d 340 (3d Cir. 2011)

Before: Scirica, Rendell, and Ambro, Circuit Judges.

Rendell, Circuit Judge: In this appeal, we review the District Court's grant of defendants' motion to dismiss for lack of subject-matter jurisdiction based on its determination that plaintiff Gloria Washington was domiciled in the Virgin Islands at the time she filed her complaint against defendants Hovensa, LLC ("Hovensa") and Triangle Construction and Maintenance, Inc. ("Triangle"), notwithstanding her insistence that she was domiciled in Texas. . . .

I.

. . . [Plaintiff was injured in 2006 while driving a rental car on property owned by defendant Hovensa, because of the alleged negligence of employees of defendant Triangle.] On July 24, 2006, she filed a complaint in the District Court of the Virgin Islands against Hovensa and Triangle, citizens of the Virgin Islands, based on diversity of citizenship. . . .

At the time Washington filed this complaint, she had ties to both the Virgin Islands and Texas. She owned a home in Baytown, Texas, but also had an apartment in St. Croix, where she had been living and working for seven months. She had been employed in Baytown, Texas by Sabine Storage Operations, a Texas corporation, but went to the V.I. in December 2005 to work as a pipe inspector for Sabine; there, she was assigned to work at the Hovensa refinery in St. Croix. When asked by opposing counsel at her deposition whether she knew, in December 2005, "how long the assignment [at the Hovensa refinery] was going to be, or was it indefinite," she replied: "I didn't know. It was indefinite." . . .

Washington was born in St. Croix, and several of her family members, including her mother, sister, and brothers, resided there in July 2006. Upon returning to the Virgin Islands in December 2005, Washington rented and furnished an apartment that she was living in at the time of the accident. The District Court found that her apartment "was in close proximity" to her "mother, sisters, brothers, nieces and nephews" and that "she socialized with them on a regular basis." . . . In addition, Washington began a romantic relationship with a V.I. resident after arriving in St. Croix but before filing her complaint. Between her arrival in St. Croix and the time of the accident, Washington had not returned to Texas.

At the time she filed her complaint, Washington also had several links to Texas: she owned the home in Baytown, Texas, which she was maintaining at the time of the suit and in which her daughter now lives; she received mail at her Baytown address; her primary care doctor, whom she saw at least yearly, was located in Texas; she maintained her Texas driver's license and owned a car in Texas; she paid taxes in Texas; she continued to have a bank account in Texas; she maintained a cell phone with a Texas company; and she visited Texas about three to five times a year. Conversely, in the V.I., she did not have a primary care physician, a driver's license, or a bank account, and she had never purchased a home or joined any organizations there. In July 2006, she was receiving a $100 per diem from her employer to cover her rent and other living expenses during her time in St. Croix. In an affidavit submitted after defendants filed their motion to dismiss, Washington stated that, when she traveled to St. Croix, she intended to return to Texas when her project was complete, and to continue to live in Texas.

II.

. . . [D]efendants filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction . . . on the ground that Washington was domiciled in the V.I. when she filed her complaint. . . . The District Court granted defendants' motion, finding it significant that "the center of [Washington's] business, domestic, and social life was in St. Croix," and that she was living and working in the V.I. when the complaint was filed. . . . It placed particular emphasis on her expectation that her job

in the V.I. would "continue indefinitely." . . . In determining Washington's domicile, the District Court determined that her own affidavit statement declaring her intention to return to and permanently reside in Texas "must be disregarded [as self-serving]." . . .

III.

Under §1332(a)(1), federal district courts have original jurisdiction over civil actions where the matter in controversy exceeds the sum or value of $75,000 and is between "citizens of different States." 28 U.S.C. §1332(a)(1). We determine the citizenship of the parties based on the relevant facts at the time the complaint was filed. . . . A party's citizenship is determined by her domicile, and " 'the domicile of an individual is his true, fixed and permanent home and place of habitation. It is the place to which, whenever he is absent, he has the intention of returning.' " . . . Thus, domicile is established by an objective physical presence in the state or territory coupled with a subjective intention to remain there indefinitely. . . . When the objective and subjective concur, one's domicile is immediately established. . . .

[A] court considers several factors in determining an individual's domicile, including " 'declarations, exercise of political rights, payment of personal taxes, house of residence, and place of business.' " . . . Other factors to be weighed may include "location of brokerage and bank accounts, location of spouse and family, membership in unions and other organizations, and driver's license and vehicle registration." . . . More generally, the court must locate "the center of one's business, domestic, social and civic life." . . .

IV.

. . . We begin our review of the District Court's domicile determination by noting a legal precept that may not have been stressed before the District Court but that we nonetheless consider important. As we have explained, an individual's domicile changes instantly if he "takes up residence at the new domicile" and "intend[s] to remain there." . . . But " '[a] domicile once acquired is presumed to continue until it is shown to have been changed.' " . . . "This principle . . . gives rise to a presumption favoring an established domicile over a new one." . . . This presumption does not shift the *burden of proof* to establish diversity of citizenship away from the proponent of federal jurisdiction; the party asserting diversity jurisdiction — here, Washington — retains the burden of proving that diversity of citizenship exists by a preponderance of the evidence. . . . Nevertheless, the presumption does demand more from the party seeking to establish a new domicile — here, Hovensa and Triangle — than if that party were seeking to establish a continuing domicile. . . .

The second legal principle we wish to stress relates to the consideration to be given to an admittedly self-serving affidavit. Washington submitted an affidavit after defendants filed their motion to dismiss, stating that, at the time she filed her complaint, she intended to return to Texas and to continue to live in Texas once her project in the V.I. was completed. Citing *Korn* [*v. Korn*, 398 F.2d 689, 691 (3d Cir. 1968)], the District Court determined that the affidavit "must be disregarded." . . .

In *Korn,* we stated that "[o]ne's testimony as to his intention to establish a domicile, while entitled to full and fair consideration, is subject to the infirmity

of any self-serving declaration, and it cannot prevail to establish domicile when it is *contradicted or negatived* by an inconsistent course of conduct." 398 F.2d at 691 (emphasis added). In *Korn*, a divorce action, the plaintiff sought to establish domicile in St. Thomas. He declared in an affidavit that he traveled to St. Thomas with the intent to make it his permanent residence and domicile. Yet, as we outlined in detail, his "entire course of conduct" contradicted his declaration of intent.[4] We thus discounted his self-serving testimony that he planned to stay in the V.I., and drew the "inescapable conclusion" that he was forum shopping in his quest for a divorce. *Id.* at 693.

However, this is not a case like *Korn* where "the surrounding facts and circumstances clearly indicate" that plaintiff's testimony is fabricated. 398 F.2d at 691. To the contrary, Washington's statement that she intended to return to and reside in Texas is buttressed, not contradicted, by her course of conduct at the time she filed her complaint. Accordingly, *Korn* is not controlling, and Washington's affidavit should not have been disregarded.

We think it is important that a court be guided by these key legal principles in determining domicile, and we will remand for it to do so and render its ruling giving them due consideration. . . .

VI.

Relatedly, we note that, while it is generally useful to analogize fact patterns of other cases and base rulings on outcomes in similar cases, it may not be quite so useful in this type of case, where the facts presented can vary so slightly, and yet the slightest variation leads to a different result.

Here, the District Court concluded that Washington's statement that the length of her job was "indefinite" when she went to the V.I. made her case analogous to the situation in *Krasnov* [*v. Dinan*, 465 F.2d 1298 (3d Cir. 1972)]. In *Krasnov*, we ruled that defendant, a member of a semi-monastic teaching order headquartered in Connecticut who was working in Pennsylvania when he filed his complaint, was domiciled in Pennsylvania. Defendant was regularly transferred to different locations for teaching assignments. He had very few possessions and owned no property other than a foot locker which accompanied him to Pennsylvania. . . . In determining that he was a Pennsylvania domiciliary, we considered these facts as well as his testimony that he intended to remain in Pennsylvania as long as he was assigned to teach there and that the term of his teaching assignment was

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4. Plaintiff was a doctor who had practiced osteopathic medicine in Philadelphia, Pennsylvania for thirty-one years before going to St. Thomas. He had been convicted in Philadelphia of performing an illegal abortion and was in the midst of divorce proceedings in both Philadelphia and New Jersey when he left suddenly for St. Thomas, discontinued the pending actions, and commenced a new divorce suit. Despite his testimony that he was coming to the V.I. to "make a new life" and start a new practice there, he made no attempt to ascertain the requirements for medical licensing until five months after arriving there. Moreover, at the time he filed the divorce action, he had made no attempt to establish a permanent home in the V.I., had traveled back and forth to the U.S. several times, had checked in and out of several hotels in the V.I., continued to list his address on official documents as Philadelphia, PA, and continued to maintain his health insurance in Philadelphia. *Korn*, 398 F.2d at 693.

indefinite. . . . However, there was no discussion in *Krasnov* of any other, let alone established, residence to which the defendant said he intended to return. Unlike Washington, he went from assignment to assignment in a different location each time. This variation in the facts makes a difference; here, we think, it is an important one. Washington's testimony as to her lack of knowledge of the length of her assignment in the V.I. is not analogous to the situation in *Krasnov*.

Accordingly, we will vacate and remand for further proceedings consistent with this opinion. . . .

NOTES AND QUESTIONS

1. You are probably already familiar with the rules that (a) for diversity purposes, the state citizenship of a natural person is determined by that person's domicile, and (b) a person's domicile is the place where he or she resides with the intention to remain. But how is domicile to be proved in a case in which it is disputed? A critical factual component of domicile is intention, which is truly knowable only by the person involved. If a person resides in one place, but claims to be domiciled elsewhere, should a court accept the person's statements regarding his intentions? If not, how can the court determine the person's true intentions? What distinguishes a case like *Washington*, in which the court gave weight to the party's statement of intention, from a case like *Korn* (cited within *Washington*), where the court discredited the party's statement?

2. The court states that a party's domicile is the party's "true, fixed and *permanent* home" (emphasis added), but the court also states that "domicile is established by an objective physical presence in the state or territory coupled with a subjective intention to remain there *indefinitely*" (emphasis added). Are these statements consistent? If a person, originally domiciled in state A, takes up residence in state B for a new job of indefinite duration, but intends to return to state A at some hazy and indefinite point far in the future (perhaps upon retirement), has the person's domicile changed? What if the person plans to retire to state C? What about the fact pattern (common among students) of a person who grows up in state A, moves to state B for college or graduate school, has decided not to return to state A, but has no plan as to where to live after graduation?

The court also suggests that domicile is "the center of one's business, domestic, social and civic life." Is this statement consistent with the other definitions of domicile that the court gives?

3. Special statutory rules provide a constructive domicile for certain representative parties: "[T]he legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent." 28 U.S.C. §1332(c)(2). What is the motivation for these rules?

PROBLEMS

Problem 5-10. Ximena, born and raised in California, is a student at Siegel College in Nevada. Ximena plans to return to California after graduation. Ximena

is injured in Nevada when Leslie, a citizen of Nevada, hits her in a car accident. Ximena sues Leslie in federal district court in Nevada for $200,000 in damages. Is the case within the federal jurisdiction?

Problem 5-11. Cathy, born and raised in Minnesota, is a student at St. Desmond's College in Minnesota. In February of her senior year, she accepts a job with an investment bank in New York City and makes plans to move permanently to New York City in September. In March, she is injured in a car accident in Minnesota. Luke, the other driver, is a citizen of Minnesota. In May, Cathy sues Luke in federal district court in Minnesota over the car accident and claims $150,000 in damages. Is the case within the federal jurisdiction?

Problem 5-12. Peter, who was born and raised in New York, is living in a college dorm room in Rhode Island. William, a citizen of Rhode Island, sues Peter in federal district court in Rhode Island for $100,000 in damages suffered in a car accident. Peter moves to dismiss on the ground that he is also a citizen of Rhode Island. Peter submits an affidavit stating that he intends to remain in Rhode Island permanently. Using discovery, William demonstrates that Peter has a New York state driver's license and is registered to vote in New York state, that Peter's bank account is in New York, that Peter's cell phone uses a New York area code, and that most of Peter's tangible possessions are at his parents' home in New York. When asked about his plans at a deposition, Peter states that he has no firm plans regarding his occupation or specific place of residence after graduation but that he intends to remain in Rhode Island. Peter shows that the address listed on his cell phone account is that of his college dorm room. He states that he has not had occasion to change his driver's license or voter registration as he has no car with him at college (the accident occurred when he was driving someone else's car) and there has been no election since he started college. What should the court do?

ii. Corporations and Other Artificial Entities

Section 1332 provides that a corporation "shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." 28 U.S.C. §1332(c)(1). This rule, combined with the rule of complete diversity, means that for diversity jurisdiction to exist a party opposing a corporation may not be a citizen of *either* the state where the corporation is incorporated or the state where the corporation has its principal place of business. *E.g.*, *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 920 (5th Cir. 2001). Determining a corporation's state of incorporation is usually straightforward, but how is one to know where a corporation has its "principal place of business"?

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559 U.S. 77 (2010)

Justice Breyer delivered the opinion of the Court.

The federal diversity jurisdiction statute provides that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated *and of the State*

where it has its principal place of business." 28 U.S.C. §1332(c)(1) (emphasis added). We seek here to resolve different interpretations that the Circuits have given this phrase. In doing so, we place primary weight upon the need for judicial administration of a jurisdictional statute to remain as simple as possible. And we conclude that the phrase "principal place of business" refers to the place where the corporation's high level officers direct, control, and coordinate the corporation's activities. Lower federal courts have often metaphorically called that place the corporation's "nerve center." . . . We believe that the "nerve center" will typically be found at a corporation's headquarters.

I

. . . [Plaintiffs, citizens of California, sued defendant Hertz Corporation in state court in California on a state-law claim. The defendant sought to remove the case to federal court on the basis of diversity jurisdiction. The defendant claimed that its "principal place of business" was in New Jersey; the plaintiffs claimed that it was in California.]

Hertz submitted a declaration by an employee relations manager that sought to show that Hertz's "principal place of business" was in New Jersey, not in California. The declaration stated, among other things, that Hertz operated facilities in 44 States; and that California—which had about 12% of the Nation's population . . .—accounted for 273 of Hertz's 1,606 car rental locations; about 2,300 of its 11,230 full-time employees; about $811 million of its $4.371 billion in annual revenue; and about 3.8 million of its approximately 21 million annual transactions, *i.e.*, rentals. The declaration also stated that the "leadership of Hertz and its domestic subsidiaries" is located at Hertz's "corporate headquarters" in Park Ridge, New Jersey. . . .

[The district court, based on Hertz's declaration, determined Hertz's principal place of business to be California, because that was where Hertz conducted the most business activity. The district court therefore found that Hertz was a citizen of California and that diversity jurisdiction was lacking. It ordered the case remanded to state court. The Ninth Circuit affirmed and the Supreme Court granted certiorari.]

III

We begin our "principal place of business" discussion with a brief review of relevant history. . . . [I]n the First Judiciary Act [of 1789], Congress granted federal courts authority to hear suits "between a citizen of the State where the suit is brought, and a citizen of another State." §11, 1 Stat. 78. The statute said nothing about corporations. In 1809, Chief Justice Marshall, writing for a unanimous Court, described a corporation as an "invisible, intangible, and artificial being" which was "certainly not a citizen." *Bank of United States v. Deveaux*. . . . But the Court held that a corporation could invoke the federal courts' diversity jurisdiction based on a pleading that the corporation's shareholders were all citizens of a different State from the defendants. . . .

In *Louisville, C. & C.R. Co. v. Letson*, 2 How. 497 (1844), the Court modified this initial approach. It held that a corporation was to be deemed an artificial

person of the State by which it had been created, and its citizenship for jurisdictional purposes determined accordingly. . . . [F]or the limited purpose of determining corporate citizenship, courts could conclusively (and artificially) presume that a corporation's *shareholders* were citizens of the State of incorporation. . . . [T]he practical upshot was that, for diversity purposes, the federal courts considered a corporation to be a citizen of the State of its incorporation. . . .

In 1928 this Court made clear that the "state of incorporation" rule was virtually absolute. It held that a corporation closely identified with State A could proceed in a federal court located in that State as long as the corporation had filed its incorporation papers in State B, perhaps a State where the corporation did no business at all. See *Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 522-525 (refusing to question corporation's reincorporation motives and finding diversity jurisdiction). Subsequently, many in Congress and those who testified before it pointed out that this interpretation was at odds with diversity jurisdiction's basic rationale, namely, opening the federal courts' doors to those who might otherwise suffer from local prejudice against out-of-state parties. . . . Through its choice of the State of incorporation, a corporation could manipulate federal-court jurisdiction. . . .

[A]s federal dockets increased in size, many judges began to believe those dockets contained too many diversity cases. A committee of the Judicial Conference of the United States . . . found a general need "to prevent frauds and abuses" with respect to jurisdiction. . . . The committee recommended . . . a statutory amendment that would make a corporation a citizen both of the State of its incorporation and any State from which it received more than half of its gross income. . . . [This suggestion was criticized.]

[T]he committee filed a new report . . . [which] proposed that " 'a corporation shall be deemed a citizen of the state of its original creation . . . [and] shall also be deemed a citizen of a state where it has its principal place of business.' " . . .—the source of the present-day statutory language. . . . The committee wrote that this new language would provide a "simpler and more practical formula" than the "gross income" test. . . .

Subsequently, in 1958, Congress both codified the courts' traditional place of incorporation test and also enacted into law a slightly modified version of the Conference Committee's proposed "principal place of business" language. A corporation was to "be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." . . .

IV

The phrase "principal place of business" has proved more difficult to apply than its originators likely expected. . . . If a corporation's headquarters and executive offices were in the same State in which it did most of its business, the test seemed straightforward. The "principal place of business" was located in that State. . . . But suppose those corporate headquarters, including executive offices, are in one State, while the corporation's plants or other centers of business activity are located in other States? In 1959 a distinguished federal district judge, Edward Weinfeld, . . . [said]:

> "Where a corporation is engaged in far-flung and varied activities which are carried on in different states, its principal place of business is the nerve center from which it radiates out to its constituent parts and from which its officers direct, control and coordinate all activities." . . . *Scot Typewriter Co.*, 170 F. Supp., at 865.

Numerous Circuits have since followed this rule, applying the "nerve center" test for corporations with "far-flung" business activities. . . .

Scot's analysis, however, did not go far enough. For it did not answer what courts should do when the operations of the corporation are not "far-flung" but rather limited to only a few States. When faced with this question, various courts have focused more heavily on where a corporation's actual business activities are located. . . .

Perhaps because corporations come in many different forms, involve many different kinds of business activities, and locate offices and plants for different reasons in different ways in different regions, a general "business activities" approach has proved unusually difficult to apply. Courts must decide which factors are more important than others: for example, plant location, sales or servicing centers; transactions, payrolls, or revenue generation. . . . The number of factors grew as courts explicitly combined aspects of the "nerve center" and "business activity" tests to look to a corporation's "total activities," sometimes to try to determine what treatises have described as the corporation's "center of gravity." . . .

This complexity may reflect an unmediated judicial effort to apply the statutory phrase "principal place of business" in light of the general purpose of diversity jurisdiction, *i.e.*, an effort to find the State where a corporation is least likely to suffer out-of-state prejudice when it is sued in a local court. . . . But, if so, that task seems doomed to failure. After all, the relevant purposive concern—prejudice against an out-of-state party—will often depend upon factors that courts cannot easily measure, for example, a corporation's image, its history, and its advertising, while the factors that courts can more easily measure, for example, its office or plant location, its sales, its employment, or the nature of the goods or services it supplies, will sometimes bear no more than a distant relation to the likelihood of prejudice. At the same time, this approach is at war with administrative simplicity. And it has failed to achieve a nationally uniform interpretation of federal law, an unfortunate consequence in a federal legal system.

V

A

In an effort to find a single, more uniform interpretation of the statutory phrase, we have reviewed the Courts of Appeals' divergent and increasingly complex interpretations. Having done so, we now return to, and expand, Judge Weinfeld's approach. . . . We conclude that "principal place of business" is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities. It is the place that Courts of Appeals have called the corporation's "nerve center." And in practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the

actual center of direction, control, and coordination, *i.e.*, the "nerve center," and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have traveled there for the occasion).

Three sets of considerations, taken together, convince us that this approach, while imperfect, is superior to other possibilities. First, the statute's language supports the approach. The statute's text deems a corporation a citizen of the "State where it has its principal place of business." 28 U.S.C. §1332(c)(1). The word "place" is in the singular, not the plural. The word "principal" requires us to pick out the "main, prominent" or "leading" place. . . . And the fact that the word "place" follows the words "State where" means that the "place" is a place *within* a State. It is not the State itself.

A corporation's "nerve center," usually its main headquarters, is a single place. The public often (though not always) considers it the corporation's main place of business. And it is a place within a State. By contrast, the application of a more general business activities test has led some courts, as in the present case, to look, not at a particular place within a State, but incorrectly at the State itself, measuring the total amount of business activities that the corporation conducts there and determining whether they are "significantly larger" than in the next-ranking State. . . .

This approach invites greater litigation and can lead to strange results, as the Ninth Circuit has since recognized. Namely, if a "corporation may be deemed a citizen of California on th[e] basis" of "activities [that] roughly reflect California's larger population . . . nearly every national retailer—no matter how far flung its operations—will be deemed a citizen of California for diversity purposes." . . . But why award or decline diversity jurisdiction on the basis of a State's population? . . .

Second, administrative simplicity is a major virtue in a jurisdictional statute. . . . Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims. . . . Complex tests produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits. Judicial resources too are at stake. Courts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it. . . . So courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case. . . .

Simple jurisdictional rules also promote greater predictability. Predictability is valuable to corporations making business and investment decisions. . . . Predictability also benefits plaintiffs deciding whether to file suit in a state or federal court.

A "nerve center" approach, which ordinarily equates that "center" with a corporation's headquarters, is simple to apply *comparatively speaking*. The metaphor of a corporate "brain," while not precise, suggests a single location. By contrast, a corporation's general business activities more often lack a single principal place where they take place. That is to say, the corporation may have several plants, many sales locations, and employees located in many different places. If so, it will not be as easy to determine which of these different business locales is the "principal" or most important "place."

Third, the statute's legislative history, for those who accept it, offers a simplicity-related interpretive benchmark. The Judicial Conference provided an

initial version of its proposal that suggested a numerical test. A corporation would be deemed a citizen of the State that accounted for more than half of its gross income. . . . The Conference changed its mind in light of criticism that such a test would prove too complex and impractical to apply. . . . That history suggests that the words "principal place of business" should be interpreted to be no more complex than the initial "half of gross income" test. A "nerve center" test offers such a possibility. A general business activities test does not.

B

We recognize that there may be no perfect test that satisfies all administrative and purposive criteria. We recognize as well that, under the "nerve center" test we adopt today, there will be hard cases. For example, in this era of telecommuting, some corporations may divide their command and coordinating functions among officers who work at several different locations, perhaps communicating over the Internet. That said, our test nonetheless points courts in a single direction, towards the center of overall direction, control, and coordination. Courts do not have to try to weigh corporate functions, assets, or revenues different in kind, one from the other. Our approach provides a sensible test that is relatively easier to apply, not a test that will, in all instances, automatically generate a result.

We also recognize that the use of a "nerve center" test may in some cases produce results that seem to cut against the basic rationale for 28 U.S.C. §1332. . . . For example, if the bulk of a company's business activities visible to the public take place in New Jersey, while its top officers direct those activities just across the river in New York, the "principal place of business" is New York. One could argue that members of the public in New Jersey would be *less* likely to be prejudiced against the corporation than persons in New York—yet the corporation will still be entitled to remove a New Jersey state case to federal court. And note too that the same corporation would be unable to remove a New York state case to federal court, despite the New York public's presumed prejudice against the corporation.

We understand that such seeming anomalies will arise. However, in view of the necessity of having a clearer rule, we must accept them. Accepting occasionally counterintuitive results is the price the legal system must pay to avoid overly complex jurisdictional administration while producing the benefits that accompany a more uniform legal system.

The burden of persuasion for establishing diversity jurisdiction, of course, remains on the party asserting it. . . . When challenged on allegations of jurisdictional facts, the parties must support their allegations by competent proof. . . . And when faced with such a challenge, we reject suggestions such as, for example, the one made by petitioner that the mere filing of a form like the Securities and Exchange Commission's Form 10-K listing a corporation's "principal executive offices" would, without more, be sufficient proof to establish a corporation's "nerve center." . . . Such possibilities would readily permit jurisdictional manipulation, thereby subverting a major reason for the insertion of the "principal place of business" language in the diversity statute. Indeed, if the record reveals attempts at manipulation—for example, that the alleged "nerve center" is nothing more than a mail drop box, a bare office with a computer, or the location of an annual

executive retreat—the courts should instead take as the "nerve center" the place of actual direction, control, and coordination, in the absence of such manipulation.

VI

Petitioner's unchallenged declaration suggests that Hertz's center of direction, control, and coordination, its "nerve center," and its corporate headquarters are one and the same, and they are located in New Jersey, not in California. Because respondents should have a fair opportunity to litigate their case in light of our holding, however, we vacate the Ninth Circuit's judgment and remand the case for further proceedings. . . .

NOTES AND QUESTIONS

1. The Supreme Court's opinion shows that the issue of corporate citizenship for diversity purposes has a long history. Did the Court do a good job of balancing the various considerations on this point? Did it implement the purpose of diversity jurisdiction? Did it respect the text of the diversity statute? Was it appropriate for the Court to give so much weight to concerns about administrability?

2. A suit by or against an unincorporated association, such as a partnership, labor union, or unincorporated religious or charitable organization, is treated differently than a suit against a corporation. Even where the association may sue or be sued in its own name, the suit, for diversity purposes, is treated as a suit by or against all the members of the association. *Chapman v. Barney*, 129 U.S. 677 (1889). This rule, combined with the rule of complete diversity, means that the suit is within the diversity jurisdiction only if the opposing party is diverse from every member of the association. If the association is a partnership with both general and limited partners, the opposing party must be diverse from all the partners, including the limited partners. *Carden v. Arkoma Associates*, 494 U.S. 185 (1990); *see also Americold Realty Trust v. Conagra Foods, Inc.*, 577 U.S. 378 (2016) (applying a similar rule to an unincorporated real estate investment trust). If the association is a labor union, the opposing party must be diverse from every member of the union. *United Steelworkers of America v. R.H. Bouligny, Inc.*, 382 U.S. 145 (1965).

Does it makes sense to treat unincorporated associations so differently from corporations? In *Carden*, the Supreme Court recognized that such treatment "can validly be characterized as technical, precedent-bound, and unresponsive to policy considerations raised by the changing realities of business organization," but said that "it honors the more important policy of leaving that to the people's elected representatives."

Congress has acted with regard to unincorporated associations in one respect: The Class Action Fairness Act, 28 U.S.C. §1332(d), provides that an unincorporated association shall be deemed a citizen "of the State where it has its principal place of business and the State under whose laws it is organized." §1332(d)(10). So for cases where CAFA applies, unincorporated associations are deemed to have more limited state citizenship.

3. Class actions under CAFA, as noted earlier, may be based on "minimal diversity." Even where CAFA does not apply, in a class action under Fed. R. Civ.

P. 23, diversity is determined by considering only the citizenship of the named class representatives. *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921). Why should a class be treated differently from an unincorporated association in this regard?

c. The Amount-in-Controversy Requirement

Section 1332 limits diversity jurisdiction to civil actions "where the matter in controversy exceeds the sum or value of $75,000." The stated goal of this provision is that "[t]he jurisdiction amount should not be so high as to convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies." S. Rep. No. 1830, 85th Cong., 2d Sess. 1 (1958).

How is the amount in controversy determined? The Supreme Court has stated:

> [U]nless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. The inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction. Nor does the fact that the complaint discloses the existence of a valid defense to the claim. But if, from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed. Events occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction.
>
> *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-289 (1938).

NOTES AND QUESTIONS

1. The "sum claimed by the plaintiff" is not limited to the plaintiff's claimed economic damages. A claim for noneconomic damages, such as damages for pain and suffering in a tort action, counts for purposes of determining the amount in controversy. *E.g.*, *Duchesne v. American Airlines, Inc.*, 758 F.2d 27, 28 (1st Cir. 1985). Because tort law typically leaves such claims to a jury's discretion, a court would usually not be in a position to determine "to a legal certainty" that the plaintiff could not recover the jurisdictional amount in a case with a substantial claim for pain and suffering. *Id.* A claim for punitive damages also counts toward the amount in controversy, assuming that such damages are potentially recoverable under the applicable law. *Bell v. Preferred Life Assur. Soc'y of Montgomery, Ala.*, 320 U.S. 238, 240 (1943). However, where a claimed form of damages is not recoverable under the applicable law, such damages are not considered in determining the amount in controversy, and in practice claims for punitive damages receive closer scrutiny that claims for other kinds of damages, especially when they form the bulk of the claimed amount in controversy. *E.g.*, *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1046 (3d Cir. 1993).

2. Under what circumstances, therefore, might it appear to a legal certainty that the plaintiff cannot recover the jurisdictional amount, thereby justifying dismissal? Most commonly, this would occur in a case, such as a contract case, in which the applicable law provides for recovery only of narrowly defined damages. *E.g.*, *Insurance Brokers West, Inc. v. Liquid Outcome, LLC*, 874 F.3d 294 (1st Cir. 2017). Less commonly, it could also occur with regard to a case involving unliquidated, non-economic damages, if the court determines that no reasonable jury could award damages exceeding the jurisdictional amount. *E.g.*, *Rosario Ortega v. Star-Kist Foods, Inc.*, 370 F.3d 124 (1st Cir. 2004) (holding that plaintiff could not possibly recover enough in emotional distress damages based on her daughter's cutting her finger while opening a can of tuna), *rev'd on other grounds sub nom. Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005).

3. What if the plaintiff is seeking relief other than money damages? In suits seeking property, the value of the property is the amount in controversy. In cases where the plaintiff seeks declaratory or injunctive relief, the amount in controversy is measured "by the value of the object of the litigation." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 347 (1977). There is a division of authority as to how to measure this value. Some cases say that the amount must be "calculated from the plaintiff's standpoint"; that is, the court considers only how much value the relief would have for the plaintiff. *E.g.*, *Correspondent Services Corp. v. First Equities Corp. of Florida*, 442 F.3d 767 (2d Cir. 2006). Other cases, however, state that the amount-in-controversy requirement is met if either the value of the relief to the plaintiff or the cost of the relief to the defendant exceeds the jurisdictional amount. *E.g.*, *JTH Tax, Inc. v. Frashier*, 624 F.3d 635, 639 (4th Cir. 2010).

4. When are plaintiffs allowed to aggregate claims to meet the jurisdictional amount? The rules addressing this question do not make a great deal of policy sense and must simply be memorized:

a. A single plaintiff suing a single defendant may aggregate claims, whether or not the claims are related. *E.g.*, *Snyder v. Harris*, 394 U.S. 332, 335 (1969); *Everett v. Verizon Wireless, Inc.*, 460 F.3d 818 (6th Cir. 2006). If A has multiple claims against B, any one of which is so small that trying it in federal court would amount to "fritter[ing] away [the court's] time in the trial of petty controversies," why should combining them produce a case that is worthy of a federal court's attention, if the claims are unrelated?

b. Multiple plaintiffs suing a single defendant may not aggregate claims unless they are suing on a "common and undivided interest," and neither may a single plaintiff aggregate claims against multiple defendants. *E.g.*, *Snyder v. Harris*, *supra*; *Travelers Property Cas. v. Good*, 689 F.3d 714 (7th Cir. 2012). If a single proceeding could simultaneously resolve related claims arising out of a single set of facts, with a total value exceeding the jurisdictional amount, why is this not a good use of federal judicial resources? Is it clear that the statutory phrase "the matter in controversy," 28 U.S.C. §1332, applies only to each plaintiff's claim individually?

c. Where multiple plaintiffs join together in a single lawsuit and some, but not all of them, have claims individually satisfying the amount-in-controversy requirement, the insufficient claims may not be aggregated with the sufficient claims to satisfy 28 U.S.C. §1332, but in some cases the insufficient claims may

come in under the supplemental jurisdiction provided by §1367. *Zahn v. International Paper Co.*, 414 U.S. 291 (1973); *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005). This point is further explored in the section on supplemental jurisdiction, below.

3. Judicially Created Exceptions to Diversity Jurisdiction

The diversity jurisdiction statute gives the federal district courts jurisdiction over "*all* civil actions" that meet the diversity and amount-in-controversy requirements. 28 U.S.C. §1332 (emphasis added). Yet there are two kinds of cases that federal district courts will not consider, even if the diversity requirements are met: a domestic relations case (a suit seeking a divorce, alimony, or child custody) or a probate case (a suit seeking to probate a will or administer an estate). What could be the basis for these exceptions?

Marshall v. Marshall

547 U.S. 293 (2006)

Justice Ginsburg delivered the opinion of the Court.

In *Cohens v. Virginia*, Chief Justice Marshall famously cautioned: "It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." 6 Wheat. 264, 404 (1821). Among longstanding limitations on federal jurisdiction otherwise properly exercised are the so-called "domestic relations" and "probate" exceptions. Neither is compelled by the text of the Constitution or federal statute. Both are judicially created doctrines stemming in large measure from misty understandings of English legal history. . . . In *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), this Court reined in the "domestic relations exception." Earlier, in *Markham v. Allen*, 326 U.S. 490 (1946), the Court endeavored similarly to curtail the "probate exception." . . .

I

. . . [Vickie Lynn Marshall (also known by her stage name, Anna Nicole Smith) filed for bankruptcy after the death of her husband, J. Howard Marshall, and during a dispute over his estate. Pierce Marshall, Howard's son, filed a claim in the bankruptcy proceeding, alleging that Vickie had defamed him with the assertion that he had engaged in fraud to gain control of Howard's assets. Vickie counterclaimed, alleging that Pierce had tortiously interfered with Howard's intent to give her a large gift during his life. The bankruptcy court resolved both claims in Vickie's favor and awarded her over $400 million, although this amount was reduced to $88 million by the district court. On appeal, the Ninth Circuit held that there was no jurisdiction because of the "probate exception" to federal jurisdiction, which, the court held, extends to any claim that raises "questions which would ordinarily

be decided by a probate court in determining the validity of the decedent's estate planning instrument," whether those questions involve "fraud, undue influence[, or] tortious interference with the testator's intent." The Ninth Circuit also stated that "[w]here a state has relegated jurisdiction over probate matters to a special court and [the] state's trial courts of general jurisdiction do not have jurisdiction to hear probate matters, then the federal courts also lack jurisdiction over probate matters." The Supreme Court granted certiorari.]

II

In *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), we addressed both the derivation and the limits of the "domestic relations exception" to the exercise of federal jurisdiction. Carol Ankenbrandt, a citizen of Missouri, brought suit in Federal District Court on behalf of her daughters, naming as defendants their father (Ankenbrandt's former husband) and his female companion, both citizens of Louisiana. . . . Ankenbrandt's complaint sought damages for the defendants' alleged sexual and physical abuse of the children. Federal jurisdiction was predicated on diversity of citizenship. . . . The District Court dismissed the case for lack of subject-matter jurisdiction, holding that Ankenbrandt's suit fell within "the 'domestic relations' exception to diversity jurisdiction." . . .

Holding that the District Court improperly refrained from exercising jurisdiction over Ankenbrandt's tort claim, . . . we traced explanation of the current domestic relations exception to *Barber v. Barber*, 21 How. 582 (1859). . . . In *Barber*, the Court upheld federal-court authority, in a diversity case, to enforce an alimony award decreed by a state court. In dicta, however, the *Barber* Court announced—without citation or discussion—that federal courts lack jurisdiction over suits for divorce or the allowance of alimony. . . .

Finding no Article III impediment to federal-court jurisdiction in domestic relations cases, . . . the Court in *Ankenbrandt* anchored the exception in Congress' original provision for diversity jurisdiction. . . . Beginning at the beginning, the Court recalled:

> "The Judiciary Act of 1789 provided that 'the circuit courts shall have original cognizance, concurrent with the courts of the several States, of *all suits of a civil nature at common law or in equity, where the matter in dispute exceeds,* exclusive of costs, the sum or value of *five hundred dollars,* and . . . an alien is a party, or the suit is *between a citizen of the State where the suit is brought, and a citizen of another State.*' " *Id.*, at 698 (quoting Act of Sept. 24, 1789, §11, 1 Stat. 78; emphasis added in *Ankenbrandt*).

The defining phrase, "all suits of a civil nature at common law or in equity," the Court stressed, remained in successive statutory provisions for diversity jurisdiction until 1948, when Congress adopted the more economical phrase, "all civil actions." . . .

The *Barber* majority, we acknowledged in *Ankenbrandt*, did not expressly tie its announcement of a domestic relations exception to the text of the diversity statute. . . . But the dissenters in that case made the connection. They stated that English courts of chancery lacked authority to issue divorce and alimony decrees. Because "the jurisdiction of the courts of the United States in chancery is bounded

by that of the chancery in England," *Barber*, 21 How., at 605 (opinion of Daniel, J.), the dissenters reasoned, our federal courts similarly lack authority to decree divorces or award alimony, *ibid.* Such relief, in other words, would not fall within the diversity statute's original grant of jurisdiction over "all suits of a civil nature at common law or in equity." We concluded in *Ankenbrandt* that "it may be inferred fairly that the jurisdictional limitation recognized by the *[Barber]* Court rested on th[e] statutory basis" indicated by the dissenters in that case. . . .

We were "content" in *Ankenbrandt* "to rest our conclusion that a domestic relations exception exists as a matter of statutory construction not on the accuracy of the historical justifications on which [the exception] was seemingly based." . . . "[R]ather," we relied on "Congress' apparent acceptance of this construction of the diversity jurisdiction provisions in the years prior to 1948, when the statute limited jurisdiction to 'suits of a civil nature at common law or in equity.' " *Ibid.* (quoting 1 Stat. 78). We further determined that Congress did not intend to terminate the exception in 1948 when it "replace[d] the law/equity distinction with the phrase 'all civil actions.' " . . . Absent contrary indications, we presumed that Congress meant to leave undisturbed "the Court's nearly century-long interpretation" of the diversity statute "to contain an exception for certain domestic relations matters." . . .

We nevertheless emphasized in *Ankenbrandt* that the exception covers only "a narrow range of domestic relations issues." . . . The *Barber* Court itself, we reminded, "sanctioned the exercise of federal jurisdiction over the enforcement of an alimony decree that had been properly obtained in a state court of competent jurisdiction." . . . Noting that some lower federal courts had applied the domestic relations exception "well beyond the circumscribed situations posed by *Barber* and its progeny," . . . we clarified that only "divorce, alimony, and child custody decrees" remain outside federal jurisdictional bounds. . . . While recognizing the "special proficiency developed by state tribunals . . . in handling issues that arise in the granting of [divorce, alimony, and child custody] decrees," . . . we viewed federal courts as equally equipped to deal with complaints alleging the commission of torts. . . .

III

Federal jurisdiction in this case is premised on 28 U.S.C. §1334, the statute vesting in federal district courts jurisdiction in bankruptcy cases and related proceedings. Decisions of this Court have recognized a "probate exception," kin to the domestic relations exception, to otherwise proper federal jurisdiction. See *Markham*, 326 U.S., at 494; see also *Sutton v. English*, 246 U.S. 199 (1918) . . . . Like the domestic relations exception, the probate exception has been linked to language contained in the Judiciary Act of 1789.

Markham, the Court's most recent and pathmarking pronouncement on the probate exception, stated that "the equity jurisdiction conferred by the Judiciary Act of 1789 . . ., which is that of the English Court of Chancery in 1789, did not extend to probate matters." . . . As in *Ankenbrandt*, so in this case, "[w]e have no occasion . . . to join the historical debate" over the scope of English chancery jurisdiction in 1789, . . . for Vickie Marshall's claim falls far outside the bounds of the probate exception described in *Markham*. We therefore need not consider in this

case whether there exists any uncodified probate exception to federal bankruptcy jurisdiction under §1334.

In *Markham*, the plaintiff Alien Property Custodian[4] commenced suit in Federal District Court against an executor and resident heirs to determine the Custodian's asserted rights regarding a decedent's estate. . . . Jurisdiction was predicated on §24(1) of the Judicial Code, now 28 U.S.C. §1345, which provides for federal jurisdiction over suits brought by an officer of the United States. At the time the federal suit commenced, the estate was undergoing probate administration in a state court. The Custodian had issued an order vesting in himself all right, title, and interest of German legatees. He sought and gained in the District Court a judgment determining that the resident heirs had no interest in the estate, and that the Custodian, substituting himself for the German legatees, was entitled to the entire net estate, including specified real estate passing under the will.

Reversing the Ninth Circuit, which had ordered the case dismissed for want of federal subject-matter jurisdiction, this Court held that federal jurisdiction was properly invoked. The Court first stated:

> "It is true that a federal court has no jurisdiction to probate a will or administer an estate. . . . But it has been established by a long series of decisions of this Court that federal courts of equity have jurisdiction to entertain suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims' so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." . . .

Next, the Court described a probate exception of distinctly limited scope:

> "[W]hile a federal court may not exercise its jurisdiction to disturb or affect the possession of property in the custody of a state court, . . . it may exercise its jurisdiction to adjudicate rights in such property where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court." . . .

The first of the above-quoted passages from *Markham* is not a model of clear statement. The Court observed that federal courts have jurisdiction to entertain suits to determine the rights of creditors, legatees, heirs, and other claimants against a decedent's estate, "so long as the federal court does not *interfere with the probate proceedings*." . . . Lower federal courts have puzzled over the meaning of the words "interfere with the probate proceedings," and some have read those words to block federal jurisdiction over a range of matters well beyond probate of a will or administration of a decedent's estate. . . .

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4. Section 6 of the Trading with the Enemy Act, 40 Stat. 415, 50 U.S.C. App., authorizes the President to appoint an official known as the "alien property custodian," who is responsible for "receiv[ing,] . . . hold[ing], administer[ing], and account[ing] for" "all money and property in the United States due or belonging to an enemy, or ally of enemy. . . ." . . .

We read *Markham*'s enigmatic words, in sync with the second above-quoted passage, to proscribe "disturb[ing] or affect[ing] the possession of property in the custody of a state court." . . . [W]e comprehend the "interference" language in *Markham* as essentially a reiteration of the general principle that, when one court is exercising *in rem* jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res*. . . . Thus, the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.

A

As the Court of Appeals correctly observed, Vickie's claim does not "involve the administration of an estate, the probate of a will, or any other purely probate matter." . . . Provoked by Pierce's claim in the bankruptcy proceedings, Vickie's claim, like Carol Ankenbrandt's, alleges a widely recognized tort. . . . Vickie seeks an *in personam* judgment against Pierce, not the probate or annulment of a will. . . . Nor does she seek to reach a *res* in the custody of a state court. . . .

Furthermore, no "sound policy considerations" militate in favor of extending the probate exception to cover the case at hand. . . . Trial courts, both federal and state, often address conduct of the kind Vickie alleges. State probate courts possess no "special proficiency . . . in handling [such] issues." . . .

B

The Court of Appeals advanced an alternate basis for its conclusion that the federal courts lack jurisdiction over Vickie's claim. Noting that the Texas Probate Court "ruled it had exclusive jurisdiction over all of Vickie Lynn Marshall's claims against E. Pierce Marshall," the Ninth Circuit held that "ruling . . . binding on the United States [D]istrict [C]ourt." . . . We reject that determination.

Texas courts have recognized a state-law tort action for interference with an expected inheritance or gift, modeled on the Restatement formulation. . . . It is clear, under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), that Texas law governs the substantive elements of Vickie's tortious interference claim. It is also clear, however, that Texas may not reserve to its probate courts the exclusive right to adjudicate a transitory tort. We have long recognized that "a State cannot create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any court having jurisdiction." . . . [T]he jurisdiction of the federal courts, "having existed from the beginning of the Federal government, [can] not be impaired by subsequent state legislation creating courts of probate." . . . We therefore hold that the District Court properly asserted jurisdiction over Vickie's counterclaim against Pierce. . . .

. . . [T]he judgment . . . is reversed, and the case is remanded. . . .

Justice Stevens, concurring in part and concurring in the judgment.

. . . I do not believe there is any "probate exception" that ousts a federal court of jurisdiction it otherwise possesses.

. . . *Markham v. Allen*, 326 U.S. 490 (1946), like this case, was an easy case. In *Markham*, as here, it was unnecessary to question the historical or logical underpinnings of the probate exception to federal jurisdiction because, whatever the scope of the supposed exception, it did not extend to the case at hand. . . .

The Court is content to adopt the approach it followed in *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), and to accept as foundation for the probate exception *Markham*'s bald assertion that the English High Court of Chancery's jurisdiction did not "extend to probate matters" in 1789. . . . I would not accept that premise. Not only had the theory *Markham* espoused been only sporadically and tentatively cited as justification for the exception, but the most comprehensive article on the subject has persuasively demonstrated that *Markham*'s assertion is "an exercise in mythography." . . . Rather than preserving whatever vitality that the "exception" has retained as a result of the *Markham* dicta, I would provide the creature with a decent burial. . . .

NOTES AND QUESTIONS

1. Although *Marshall* concerned the bankruptcy jurisdiction of the federal courts, its reasoning is similar to the reasoning used in the cases explaining the domestic relations and probate exceptions to the diversity jurisdiction.

Federal law vests federal district courts with jurisdiction over "*all* civil actions" that meet the diversity and amount-in-controversy requirements, *see* 28 U.S.C. §1332 (emphasis added), and "*all* cases under title 11 [the bankruptcy title]," *see* 28 U.S.C. §1334 (emphasis added). If a case falls within the judicial power set forth in Article III of the Constitution and is also within a federal court's jurisdiction as specified by an act of Congress (relating to diversity, bankruptcy, or something else), is it ever appropriate for the court to decline to exercise the jurisdiction conferred on it by statute? Certainly, the general rule, as stated in *Cohens v. Virginia* (cited in the first paragraph of the Court's opinion), is that judicial jurisdiction, where it exists, is mandatory. What could justify exceptions to this rule?

2. In *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), discussed in detail in the Court's opinion, the Court accepted, but limited, the "domestic relations exception" to diversity jurisdiction. The Court and individual Justices explored several possible bases for the exception:

a. Diversity jurisdiction cannot exist in a divorce action because a husband and wife cannot be citizens of different states and because the action involves no pecuniary value.

b. From 1789 to 1948, the diversity jurisdiction statute was limited to "suits of a civil nature at common law or in equity," and an action for divorce or alimony is neither a suit at "common law" nor in "equity," because in England, historically, such actions would have been handled neither in the courts of law nor the courts of equity, but in the ecclesiastical courts.

c. Even if the foregoing statement about the historical practice of the English courts is wrong (as modern research suggests), federal decisions had clearly established the existence of the "domestic relations exception" to diversity jurisdiction prior to 1948, and when Congress comprehensively

revised the judiciary statutes in that year, it did nothing to change this established interpretation and thereby implicitly accepted it.

d. Even though the federal courts have jurisdiction over domestic relations matters where the requirements of the diversity statute are met, they should abstain from exercising that jurisdiction as a matter of respect for state authority over the area of domestic relations.

The Court endorsed reason c in *Ankenbrandt*. Do any of the reasons provide a sufficient basis for failing to exercise jurisdiction conferred by the unqualified text of the diversity jurisdiction statute?

3. Even accepting the existence of the "domestic relations" and "probate" exceptions to diversity jurisdiction, it is important to understand the limit of these exceptions. As *Marshall* and *Ankenbrandt* demonstrate, these exceptions do not mean that a federal court lacks jurisdiction in every matter *relating to* a divorce or an estate. A federal court will not grant a divorce, award alimony or child custody, probate a will, or administer an estate, but, as *Marshall* and *Ankenbrandt* show, there is no barrier, for example, to a federal court's hearing a tort action between diverse parties simply because the parties are former spouses or co-claimants to property from a decedent's estate.

4. Several of the Supreme Court's cases exploring the domestic relations and probate exceptions to diversity jurisdiction share the same curious pattern: The Court states that there is such an exception, but holds that the exception does not bar the claim before the Court in the particular case. *See Marshall* (probate exception does not bar claim for tortious interference with a decedent's intention to give an *inter vivos* gift); *Ankenbrandt* (domestic relations exception does not bar a tort claim for sexual abuse of a divorced couple's children); *Markham v. Allen* (probate exception does not bar a claim by a creditor against an estate so long as it does not interfere with probate proceedings); *Barber v. Barber*, 62 U.S. 582 (1858) (domestic relations exception does not bar an action to enforce an award of alimony previously given by a state court).

Justice Stevens complained in *Ankenbrandt* that there was no occasion to determine whether the domestic relations exceptions to diversity jurisdiction existed; all that was necessary was for the Court to determine that even *if* the exception existed, it had no application to the case before the Court. Was Justice Stevens's point valid? Were the statements in these cases that the exceptions existed advisory opinions?

5. *Marshall v. Marshall* later returned to the Supreme Court as *Stern v. Marshall*, 564 U.S. 462 (2011), which concerned the limits on Congress's power to vest dispute-resolution authority in non-Article III tribunals. As is explained in Chapter 3, Vickie ultimately lost on the ground that Congress could not authorize bankruptcy courts (which are not Article III courts) to resolve common law claims such as Vickie's counterclaim against Pierce.

PROBLEMS

Problem 5-13. Jen and Brad are married citizens of New York. Brad leaves Jen and moves to California, where he takes up permanent residence. Jen sues Brad

for divorce in state court in New York and seeks alimony totaling $1 million. Brad attempts to remove the case to federal district court. Is the case within the federal jurisdiction?

Problem 5-14. The state of Washington recognizes an action for breach of promise of marriage. A plaintiff in such an action is entitled to damages for embarrassment and humiliation, but not for loss of expected financial support. Edwin, a citizen of Oregon, is engaged to Angelina, a citizen of Washington. Edwin fails to show up at the wedding, and Angelina is left standing at the altar in front of hundreds of guests, causing her intense humiliation and embarrassment. She sues Edwin in Washington state court for breach of promise of marriage and seeks $100,000 in damages. Edwin attempts to remove the case to federal court. Is the case within the federal jurisdiction?

Problem 5-15. Luis and Casilda are married citizens of Michigan. Casilda leaves Luis and moves to Illinois, where she takes up permanent residence. She takes money out of their joint bank account and puts it in an account in her own name. Luis sues Casilda in Michigan state court. His complaint seeks a division of their marital property of about $250,000 in accordance with their written prenuptial agreement, which contains provisions regarding division of property in the event of separation or divorce. Casilda attempts to remove the case to federal court. Is the case within the federal jurisdiction?

C. SUPPLEMENTAL JURISDICTION

A plaintiff injured by a defendant's conduct will usually wish to pursue all possible causes of action against the defendant. The plaintiff's potential claims may include both federal claims and state claims—defendants usually do not take care to violate federal law only or state law only. But if the parties are not diverse, is the plaintiff permitted to combine federal and state claims into a single federal lawsuit?

United Mine Workers of America v. Gibbs

383 U.S. 715 (1966)

Mr. Justice Brennan delivered the opinion of the Court.

. . . [The Grundy Company hired plaintiff Gibbs as a mine superintendent to attempt to open a new coal mine in the southern Appalachian coal fields. Grundy also gave Gibbs a contract to haul the new mine's coal. Gibbs hired members of the Southern Labor Union to open the mine. Members of the local unit of the defendant United Mine Workers (UMW) thought that they had been promised the work by Grundy's parent company, and they used force and violence to prevent the mine from opening and subsequently maintained a picket line at the mine site. Gibbs lost his job as superintendent, the mine never produced any coal to be hauled under Gibbs's haulage contract with Grundy, and Gibbs allegedly started to lose other business in the region.

[Gibbs sued UMW in federal district court. His complaint asserted that UMW's tactics constituted an illegal "secondary boycott" in violation of §303 of the Labor Management Relations Act (a federal statute) and that UMW's conduct was also tortious under Tennessee law. The case was tried by jury. The jury found that UMW had violated both §303 and Tennessee law, and it awarded damages to Gibbs. The trial court then determined that UMW's conduct did not violate §303 and so it entered judgment notwithstanding the verdict on the §303 claim. However, the trial court, after reducing the amount of the damages, entered judgment on the jury's verdict against UMW on Gibb's claim under Tennessee law. The court of appeals affirmed and the Supreme Court granted certiorari.]

A threshold question is whether the District Court properly entertained jurisdiction of the claim based on Tennessee law. . . . "[W]e have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. . . ."

The fact that state remedies were not entirely pre-empted does not, however, answer the question whether the state claim was properly adjudicated in the District Court absent diversity jurisdiction. The Court held in *Hurn v. Oursler*, 289 U.S. 238, that state law claims are appropriate for federal court determination if they form a separate but parallel ground for relief also sought in a substantial claim based on federal law. The Court distinguished permissible from non-permissible exercises of federal judicial power over state law claims by contrasting "a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the nonfederal *ground*; in the latter it may not do so upon the nonfederal *cause of action*." . . . The question is into which category the present action fell.

Hurn was decided in 1933, before the unification of law and equity by the Federal Rules of Civil Procedure. At the time, the meaning of "cause of action" was a subject of serious dispute; the phrase might "mean one thing for one purpose and something different for another." . . . The Court in *Hurn* identified what it meant by the term by citation of *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, a case in which "cause of action" had been used to identify the operative scope of the doctrine of *res judicata*. In that case the Court had noted that "the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time," 274 U.S., at 320. It stated its holding in the following language, quoted in part in the *Hurn* opinion:

> "Upon principle, it is perfectly plain that the respondent (a seaman suing for an injury sustained while working aboard ship) suffered but one actionable wrong, and was entitled to but one recovery, whether his injury was due to one or the other of several distinct acts of alleged negligence, or to a combination of some or all of them. In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex.

> "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action. 'The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear.' " . . .

Had the Court found a jurisdictional bar to reaching the state claim in *Hurn*, we assume that the doctrine of *res judicata* would not have been applicable in any subsequent state suit. But the citation of *Baltimore S.S. Co.* shows that the Court found that the weighty policies of judicial economy and fairness to parties reflected in *res judicata* doctrine were in themselves strong counsel for the adoption of a rule which would permit federal courts to dispose of the state as well as the federal claims.

With the adoption of the Federal Rules of Civil Procedure and the unified form of action, Fed. Rule Civ. Proc. 2, much of the controversy over "cause of action" abated. The phrase remained as the keystone of the *Hurn* test, however, and, as commentators have noted, has been the source of considerable confusion. Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged. Yet because the *Hurn* question involves issues of jurisdiction as well as convenience, there has been some tendency to limit its application to cases in which the state and federal claims are, as in *Hurn*, "little more than the equivalent of different epithets to characterize the same group of circumstances." . . .

This limited approach is unnecessarily grudging. Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .," U.S. Const., Art. III, §2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. . . . The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.

That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them, *Erie R. Co. v. Tompkins*, 304 U.S. 64. Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable

law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals. There may, on the other hand, be situations in which the state claim is so closely tied to questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong. In the present case, for example, the allowable scope of the state claim implicates the federal doctrine of pre-emption; while this interrelationship does not create statutory federal question jurisdiction, *Louisville & N.R. Co. v. Mottley*, 211 U.S. 149, its existence is relevant to the exercise of discretion. Finally, there may be reasons independent of jurisdictional considerations, such as the likelihood of jury confusion in treating divergent legal theories of relief, that would justify separating state and federal claims for trial, Fed. Rule Civ. Proc. 42(b). If so, jurisdiction should ordinarily be refused.

The question of power will ordinarily be resolved on the pleadings. But the issue whether pendent jurisdiction has been properly assumed is one which remains open throughout the litigation. Pretrial procedures or even the trial itself may reveal a substantial hegemony of state law claims, or likelihood of jury confusion, which could not have been anticipated at the pleading stage. Although it will of course be appropriate to take account in this circumstance of the already completed course of the litigation, dismissal of the state claim might even then be merited. For example, it may appear that the plaintiff was well aware of the nature of his proofs and the relative importance of his claims; recognition of a federal court's wide latitude to decide ancillary questions of state law does not imply that it must tolerate a litigant's effort to impose upon it what is in effect only a state law case. Once it appears that a state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim may fairly be dismissed.

We are not prepared to say that in the present case the District Court exceeded its discretion in proceeding to judgment on the state claim. We may assume for purposes of decision that the District Court was correct in its holding that the claim of pressure on Grundy to terminate the employment contract was outside the purview of §303. Even so, the §303 claims based on secondary pressures on Grundy relative to the haulage contract and on other coal operators generally were substantial. Although §303 limited recovery to compensatory damages based on secondary pressures, . . . and state law allowed both compensatory and punitive damages, and allowed such damages as to both secondary and primary activity, the state and federal claims arose from the same nucleus of operative fact and reflected alternative remedies. Indeed, the verdict sheet sent in to the jury authorized only one award of damages, so that recovery could not be given separately on the federal and state claims.

It is true that the §303 claims ultimately failed and that the only recovery allowed respondent was on the state claim. We cannot confidently say, however, that the federal issues were so remote or played such a minor role at the trial that in effect the state claim only was tried. Although the District Court dismissed as unproved the §303 claims that petitioner's secondary activities included attempts to induce coal operators other than Grundy to cease doing business with respondent, the court submitted the §303 claims relating to Grundy to the jury. The jury

returned verdicts against petitioner on those §303 claims, and it was only on petitioner's motion for a directed verdict and a judgment n.o.v. that the verdicts on those claims were set aside. The District Judge considered the claim as to the haulage contract proved as to liability, and held it failed only for lack of proof of damages. Although there was some risk of confusing the jury in joining the state and federal claims—especially since, as will be developed, differing standards of proof of UMW involvement applied—the possibility of confusion could be lessened by employing a special verdict form, as the District Court did. Moreover, the question whether the permissible scope of the state claim was limited by the doctrine of pre-emption afforded a special reason for the exercise of pendent jurisdiction; the federal courts are particularly appropriate bodies for the application of pre-emption principles. We thus conclude that although it may be that the District Court might, in its sound discretion, have dismissed the state claim, the circumstances show no error in refusing to do so.

. . . [On the merits, the Court held that federal labor law preempted the ability of state law to provide damages under the circumstances of the case.]

[The concurring opinion of Justice Harlan is omitted.]

NOTES AND QUESTIONS

1. Which of the nine constitutional categories of federal judicial power allowed the federal courts to hear the state-law tort claim between the non-diverse parties to this case? Which word in Article III of the Constitution does this case effectively interpret?

2. Federal jurisdiction in inferior federal courts exists only when a case falls within the judicial power under Article III of the Constitution *and* Congress has implemented that judicial power by passing a jurisdictional statute. Justice Brennan's opinion explains why the state-law claims in *Gibbs* fall within the Article III judicial power. But which federal statute conferred jurisdiction over a district court to hear them? Justice Brennan's opinion does not say. Can you find a jurisdictional statute that would arguably have covered Gibbs' state-law claims? Why do you suppose Justice Brennan did not do so?

3. Justice Brennan justifies the rule of this case in part by saying that "the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time," and that "joinder of claims, parties and remedies is strongly encouraged" because of "the weighty policies of judicial economy and fairness to parties." But accepting that, because of judicial economy, it is important that a plaintiff be able to bring all claims together in one court, is federal pendent jurisdiction over state-law claims necessary to achieve that goal? What else could a plaintiff do to achieve the goal if such jurisdiction did not exist? In light of this other possibility, what reason justifies pendent jurisdiction?

Further development of the *Gibbs* principle is probably familiar to you from your course in Civil Procedure. In cases such as *Gibbs* itself, where the original plaintiff brought both a state and federal claim against the original defendant, and the two claims arose from a common nucleus of operative fact, jurisdiction over

the state claim was said to be "pendent." In other configurations where one party brought a state-law claim against another party arising from the same facts as a federal claim already in the case (e.g., the defendant brought a state-law counterclaim against the plaintiff arising from the same facts as the plaintiff's federal-law claim against the defendant), the federal court's jurisdiction over the state claim was called "ancillary."

Pendent and ancillary jurisdiction were relatively uncontroversial so long as they concerned claims brought against parties already involved in a federal case. Problems arose, however, when such jurisdiction was used to bring a new party into a federal case. Three cases were particularly significant.

a. In *Aldinger v. Howard*, 427 U.S. 1 (1976), the plaintiff, an employee of Spokane County, Washington, was fired because she was living with her boyfriend. She sued her supervisor under 42 U.S.C. §1983 (claiming that the firing violated her constitutional rights), and she sued the county itself under state law. The interpretation of §1983 at the time (subsequently overruled) was that the statute did not apply to counties and other municipal defendants. The Court held that "it is one thing to authorize two parties, already present in federal court by virtue of a case over which the court has jurisdiction, to litigate in addition to their federal claim a state-law claim over which there is no independent basis of federal jurisdiction. But it is quite another thing to permit a plaintiff, who has asserted a claim against one defendant with respect to which there is federal jurisdiction, to join an entirely different defendant on the basis of a state-law claim over which there is no independent basis of federal jurisdiction." Before permitting such jurisdiction, the Court held, "a federal court must satisfy itself not only that Art. III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence." Because Congress had excluded counties from federal jurisdiction under 42 U.S.C. §1983, the Court held, Congress had implicitly precluded §1983 plaintiffs from using ancillary jurisdiction to bring counties into federal court. Three Justices dissented.

b. In *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978), the plaintiff, a citizen of Iowa, brought a tort action under the diversity jurisdiction against the defendant, a corporate citizen of Nebraska. The defendant impleaded a third-party defendant that was a corporate citizen of both Iowa and Nebraska. The plaintiff then attempted to add a claim against the third-party defendant. As in *Aldinger*, however, the Court held that Congress had implicitly negated the use of ancillary jurisdiction in the circumstances. Diversity jurisdiction rests on 28 U.S.C. §1332, which courts have traditionally understood to require "complete diversity," and the Court held that §1332 therefore implicitly precludes the plaintiff in a diversity case from using ancillary jurisdiction where doing so would break the rule of complete diversity. Two Justices dissented.

c. Finally, in *Finley v. United States*, 490 U.S. 545 (1989), the plaintiff attempted to bring a tort action against the United States pursuant to the Federal Tort Claims Act, 28 U.S.C. §1346(b), and a parallel state-law tort claim against a non-diverse private defendant arising out of a single accident that killed her husband and two of her children. This time, instead of

phrasing the test as whether Congress had implicitly *negated* the existence of ancillary jurisdiction, the Supreme Court said that, for federal jurisdiction to exist, "[t]he Constitution must have given to the court the capacity to take it, *and an act of Congress must have supplied it.*" Without changing the existing rules governing pendent and ancillary claims, the Court said that "a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties." Four Justices dissented.

Finley was the last straw. In *Aldinger* and *Owen*, the plaintiff at least could have brought all of her claims together in one court, by bringing them all in state court. In *Finley*, however, this was not possible, because federal jurisdiction over tort claims against the United States is exclusive. The rule of *Finley* therefore compelled plaintiffs such as Finley to split their claims between state and federal court.

Congress responded by passing 28 U.S.C. §1367. The new statute finally supplied the missing statutory basis for pendent and ancillary jurisdiction, which were combined and renamed "supplemental jurisdiction." By virtue of §1367, supplemental jurisdiction is now a statutory matter, rather than a matter of judicial doctrine. Read the text of §1367, which appears in the Supplement.

The most important issue arising under §1367 has been the effect of §1367(b), which was designed to preserve the rule of *Owen v. Kroger*, described above. Section 1367(b) achieves this goal by excluding supplemental jurisdiction, in diversity cases, over claims by plaintiffs against parties joined under certain, specified rules of the Federal Rules of Civil Procedure. For example, if the defendant in a diversity case impleads a third-party defendant under Rule 14, §1367(b) bars the plaintiff from using supplemental jurisdiction to assert a claim against that party.

The drafters of §1367 neglected, however, the possibility of multiple plaintiffs joining against a defendant, either in a class action under Rule 23 or in the simpler case of two or more plaintiffs who join to sue a single defendant under Rule 20. Section 1367(b) does not mention Rule 23, and while it excludes claims *against* persons made parties under Rule 20, it does not mention claims *by* persons made parties under Rule 20. The question thus arises, if one plaintiff in a federal case meets the requirements of the diversity statute (both as to diversity and amount in controversy) can the case proceed if other plaintiffs with jurisdictionally insufficient claims are joined? After more than a decade of conflicting appellate opinions, the Supreme Court finally decided the matter in the following case.

Exxon Mobil Corp. v. Allapattah Services, Inc.

545 U.S. 546 (2005)

Justice Kennedy delivered the opinion of the Court.

These consolidated cases present the question whether a federal court in a diversity action may exercise supplemental jurisdiction over additional plaintiffs

whose claims do not satisfy the minimum amount-in-controversy requirement, provided the claims are part of the same case or controversy as the claims of plaintiffs who do allege a sufficient amount in controversy. Our decision turns on the correct interpretation of 28 U.S.C. §1367. . . . We hold that, where the other elements of jurisdiction are present and at least one named plaintiff in the action satisfies the amount-in-controversy requirement, §1367 does authorize supplemental jurisdiction over the claims of other plaintiffs in the same Article III case or controversy, even if those claims are for less than the jurisdictional amount specified in the statute setting forth the requirements for diversity jurisdiction. . . .

[Exxon's retail dealers filed a class action against Exxon in federal district court under Fed. R. Civ. P. 23 alleging that Exxon overcharged them for fuel. Jurisdiction was based on diversity. At least one class representative satisfied the amount-in-controversy requirement, but not all class members did.

[In a companion case, *Rosario Ortega v. Star-Kist Foods, Inc.*, a 9-year-old girl and some of her family members sued Star-Kist for injuries the girl suffered when opening a can of tuna. The family members sued for emotional distress and medical expenses. The suit was in federal court on the basis of diversity, and the claims were joined together under Fed. R. Civ. P. 20. The girl satisfied the amount-in-controversy requirement but her family members did not.

[In both cases the Supreme Court granted certiorari on the question of whether the district court could, under 28 U.S.C. §1367, exercise jurisdiction over the claims of the plaintiffs who did not meet the amount-in-controversy requirement.

[The Court reviewed the history and background of §1367, including the *Gibbs*, *Aldinger*, *Owen*, and *Finley* cases. Among other things, the Court said:]

We have not . . . applied *Gibbs*' expansive interpretive approach to other aspects of the jurisdictional statutes. For instance, we have consistently interpreted §1332 as requiring complete diversity: In a case with multiple plaintiffs and multiple defendants, the presence in the action of a single plaintiff from the same State as a single defendant deprives the district court of original diversity jurisdiction over the entire action. . . . The complete diversity requirement is not mandated by the Constitution . . . or by the plain text of §1332(a). The Court, nonetheless, has adhered to the complete diversity rule in light of the purpose of the diversity requirement, which is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants. The presence of parties from the same State on both sides of a case dispels this concern, eliminating a principal reason for conferring §1332 jurisdiction over any of the claims in the action. . . . The specific purpose of the complete diversity rule explains both why we have not adopted *Gibbs*' expansive interpretive approach to this aspect of the jurisdictional statute and why *Gibbs* does not undermine the complete diversity rule. In order for a federal court to invoke supplemental jurisdiction under *Gibbs*, it must first have original jurisdiction over at least one claim in the action. Incomplete diversity destroys original jurisdiction with respect to all claims, so there is nothing to which supplemental jurisdiction can adhere.

In contrast to the diversity requirement, most of the other statutory prerequisites for federal jurisdiction, including the federal-question and amount-in-controversy requirements, can be analyzed claim by claim. True, it does not follow by necessity from this that a district court has authority to exercise supplemental

jurisdiction over all claims provided there is original jurisdiction over just one. Before the enactment of §1367, the Court declined in contexts other than the pendent-claim instance to follow *Gibbs*' expansive approach to interpretation of the jurisdictional statutes. The Court took a more restrictive view of the proper interpretation of these statutes in so-called pendent-party cases involving supplemental jurisdiction over claims involving additional parties — plaintiffs or defendants — where the district courts would lack original jurisdiction over claims by each of the parties standing alone.

Thus, with respect to plaintiff-specific jurisdictional requirements, the Court held in *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939), that every plaintiff must separately satisfy the amount-in-controversy requirement. . . . The Court reaffirmed this rule, in the context of a class action brought invoking §1332(a) diversity jurisdiction, in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). . . .

[The Court then turned to the interpretation of §1367.]

Section 1367(a) is a broad grant of supplemental jurisdiction over other claims within the same case or controversy, as long as the action is one in which the district courts would have original jurisdiction. The last sentence of §1367(a) makes it clear that the grant of supplemental jurisdiction extends to claims involving joinder or intervention of additional parties. The single question before us, therefore, is whether a diversity case in which the claims of some plaintiffs satisfy the amount-in-controversy requirement, but the claims of other plaintiffs do not, presents a "civil action of which the district courts have original jurisdiction." . . .

We now conclude the answer must be yes. When the well-pleaded complaint contains at least one claim that satisfies the amount-in-controversy requirement, and there are no other relevant jurisdictional defects, the district court, beyond all question, has original jurisdiction over that claim. The presence of other claims in the complaint, over which the district court may lack original jurisdiction, is of no moment. If the court has original jurisdiction over a single claim in the complaint, it has original jurisdiction over a "civil action" within the meaning of §1367(a), even if the civil action over which it has jurisdiction comprises fewer claims than were included in the complaint. Once the court determines it has original jurisdiction over the civil action, it can turn to the question whether it has a constitutional and statutory basis for exercising supplemental jurisdiction over the other claims in the action.

Section 1367(a) commences with the direction that §§1367(b) and (c), or other relevant statutes, may provide specific exceptions, but otherwise §1367(a) is a broad jurisdictional grant, with no distinction drawn between pendent-claim and pendent-party cases. In fact, the last sentence of §1367(a) makes clear that the provision grants supplemental jurisdiction over claims involving joinder or intervention of additional parties. . . . Nothing in §1367 indicates a congressional intent to recognize, preserve, or create some meaningful, substantive distinction between the jurisdictional categories we have historically labeled pendent and ancillary.

. . . While §1367(b) qualifies the broad rule of §1367(a), it does not withdraw supplemental jurisdiction over the claims of the additional parties at issue here. The specific exceptions to §1367(a) contained in §1367(b), moreover, provide additional support for our conclusion that §1367(a) confers supplemental jurisdiction over these claims. Section 1367(b), which applies only to diversity cases,

withholds supplemental jurisdiction over the claims of plaintiffs proposed to be joined as indispensable parties under Federal Rule of Civil Procedure 19, or who seek to intervene pursuant to Rule 24. Nothing in the text of §1367(b), however, withholds supplemental jurisdiction over the claims of plaintiffs permissively joined under Rule 20 . . . or certified as class-action members pursuant to Rule 23. . . . The natural, indeed the necessary, inference is that §1367 confers supplemental jurisdiction over claims by Rule 20 and Rule 23 plaintiffs. This inference, at least with respect to Rule 20 plaintiffs, is strengthened by the fact that §1367(b) explicitly excludes supplemental jurisdiction over claims against defendants joined under Rule 20.

We cannot accept the view, urged by some of the parties, commentators, and Courts of Appeals, that a district court lacks original jurisdiction over a civil action unless the court has original jurisdiction over every claim in the complaint. As we understand this position, it requires assuming either that all claims in the complaint must stand or fall as a single, indivisible "civil action" as a matter of definitional necessity—what we will refer to as the "indivisibility theory"—or else that the inclusion of a claim or party falling outside the district court's original jurisdiction somehow contaminates every other claim in the complaint, depriving the court of original jurisdiction over any of these claims—what we will refer to as the "contamination theory."

The indivisibility theory is easily dismissed, as it is inconsistent with the whole notion of supplemental jurisdiction. If a district court must have original jurisdiction over every claim in the complaint in order to have "original jurisdiction" over a "civil action," then in *Gibbs* there was no civil action of which the district court could assume original jurisdiction under §1331, and so no basis for exercising supplemental jurisdiction over any of the claims. . . .

The contamination theory . . . can make some sense in the special context of the complete diversity requirement because the presence of nondiverse parties on both sides of a lawsuit eliminates the justification for providing a federal forum. The theory, however, makes little sense with respect to the amount-in-controversy requirement, which is meant to ensure that a dispute is sufficiently important to warrant federal-court attention. The presence of a single nondiverse party may eliminate the fear of bias with respect to all claims, but the presence of a claim that falls short of the minimum amount in controversy does nothing to reduce the importance of the claims that do meet this requirement. . . .

We also reject the argument . . . that while the presence of additional claims over which the district court lacks jurisdiction does not mean the civil action is outside the purview of §1367(a), the presence of additional parties does. . . . Section 1367(a) applies by its terms to any civil action of which the district courts have original jurisdiction, and the last sentence of §1367(a) expressly contemplates that the court may have supplemental jurisdiction over additional parties. So it cannot be the case that the presence of those parties destroys the court's original jurisdiction, within the meaning of §1367(a), over a civil action otherwise properly before it. . . . The argument that the presence of additional parties removes the civil action from the scope of §1367(a) also would mean that §1367 left the *Finley* result undisturbed. *Finley*, after all, involved a Federal Tort Claims Act suit against a federal defendant and state-law claims against additional defendants not otherwise subject to federal

jurisdiction. Yet all concede that one purpose of §1367 was to change the result reached in *Finley*.

Finally, it is suggested that our interpretation of §1367(a) creates an anomaly regarding the exceptions listed in §1367(b): It is not immediately obvious why Congress would withhold supplemental jurisdiction over plaintiffs joined as parties "needed for just adjudication" under Rule 19 but would allow supplemental jurisdiction over plaintiffs permissively joined under Rule 20. The omission of Rule 20 plaintiffs from the list of exceptions in §1367(b) may have been an "unintentional drafting gap." . . . If that is the case, it is up to Congress rather than the courts to fix it. The omission may seem odd, but it is not absurd. An alternative explanation for the different treatment of Rules 19 and 20 is that Congress was concerned that extending supplemental jurisdiction to Rule 19 plaintiffs would allow circumvention of the complete diversity rule: A nondiverse plaintiff might be omitted intentionally from the original action, but joined later under Rule 19 as a necessary party. . . .

And so we circle back to the original question. When the well-pleaded complaint in district court includes multiple claims, all part of the same case or controversy, and some, but not all, of the claims are within the court's original jurisdiction, does the court have before it "any civil action of which the district courts have original jurisdiction"? It does. Under §1367, the court has original jurisdiction over the civil action comprising the claims for which there is no jurisdictional defect. No other reading of §1367 is plausible in light of the text and structure of the jurisdictional statute. Though the special nature and purpose of the diversity requirement mean that a single nondiverse party can contaminate every other claim in the lawsuit, the contamination does not occur with respect to jurisdictional defects that go only to the substantive importance of individual claims.

It follows from this conclusion that the threshold requirement of §1367(a) is satisfied in cases, like those now before us, where some, but not all, of the plaintiffs in a diversity action allege a sufficient amount in controversy. We hold that §1367 by its plain text . . . authorized supplemental jurisdiction over all claims by diverse parties arising out of the same Article III case or controversy, subject only to enumerated exceptions not applicable in the cases now before us. . . .

The proponents of the alternative view of §1367 insist that the statute is at least ambiguous and that we should look to other interpretive tools, including the legislative history of §1367, which supposedly demonstrate Congress did not intend §1367 to overrule *Zahn*. We can reject this argument at the very outset simply because §1367 is not ambiguous. For the reasons elaborated above, interpreting §1367 to foreclose supplemental jurisdiction over plaintiffs in diversity cases who do not meet the minimum amount in controversy is inconsistent with the text, read in light of other statutory provisions and our established jurisprudence. Even if we were to stipulate, however, that the reading these proponents urge upon us is textually plausible, the legislative history cited to support it would not alter our view as to the best interpretation of §1367.

Those who urge that the legislative history refutes our interpretation rely primarily on the House Judiciary Committee Report on the Judicial Improvements Act. H.R. Rep. No. 101-734 (1990) (House Report or Report). This Report explained that §1367 would "authorize jurisdiction in a case like *Finley*, as well as

essentially restore the pre-*Finley* understandings of the authorization for and limits on other forms of supplemental jurisdiction." *Id.*, at 28. The Report stated that §1367(a) "generally authorizes the district court to exercise jurisdiction over a supplemental claim whenever it forms part of the same constitutional case or controversy as the claim or claims that provide the basis of the district court's original jurisdiction," and in so doing codifies *Gibbs* and fills the statutory gap recognized in *Finley*. House Report, at 28-29, and n.15. The Report then remarked that §1367(b) "is not intended to affect the jurisdictional requirements of [§1332] in diversity-only class actions, as those requirements were interpreted prior to *Finley*," citing, without further elaboration, *Zahn* and *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921). House Report, at 29, and n.17. . . .

As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms. Not all extrinsic materials are reliable sources of insight into legislative understandings, however, and legislative history in particular is vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in "'looking over a crowd and picking out your friends.'" See Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 Iowa L. Rev. 195, 214 (1983). Second, judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text. We need not comment here on whether these problems are sufficiently prevalent to render legislative history inherently unreliable in all circumstances, a point on which Members of this Court have disagreed. It is clear, however, that in this instance both criticisms are right on the mark.

First of all, the legislative history of §1367 is far murkier than selective quotation from the House Report would suggest. The text of §1367 is based substantially on a draft proposal contained in a Federal Court Study Committee working paper, which was drafted by a Subcommittee chaired by Judge Posner. . . . While the Subcommittee explained, in language echoed by the House Report, that its proposal "basically restores the law as it existed prior to *Finley*," Subcommittee Working Paper, at 561, it observed in a footnote that its proposal would overrule *Zahn* and that this would be a good idea, Subcommittee Working Paper, at 561, n.33. . . . Therefore, even if the House Report could fairly be read to reflect an understanding that the text of §1367 did not overrule *Zahn*, the Subcommittee Working Paper on which §1367 was based reflected the opposite understanding. The House Report is no more authoritative than the Subcommittee Working Paper. The utility of either can extend no further than the light it sheds on how the enacting Legislature understood the statutory text. Trying to figure out how to square the Subcommittee Working Paper's understanding with the House Report's understanding, or which is more reflective of the understanding of the enacting legislators, is a hopeless task.

Second, the worst fears of critics who argue legislative history will be used to circumvent the Article I process were realized in this case. The telltale evidence is the statement, by three law professors who participated in drafting §1367, see House Report, at 27, n.13, that §1367 "on its face" permits "supplemental jurisdiction over claims of class members that do not satisfy section 1332's jurisdictional amount requirement, which would overrule [*Zahn*]. [There is] a disclaimer of intent to accomplish this result in the legislative history. . . . It would have been better had the statute dealt explicitly with this problem, and the legislative history was an attempt to correct the oversight." Rowe, Burbank, & Mengler, Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer, 40 Emory L.J. 943, 960, n.90 (1991). The professors were frank to concede that if one refuses to consider the legislative history, one has no choice but to "conclude that section 1367 has wiped *Zahn* off the books." *Ibid.* So there exists an acknowledgment, by parties who have detailed, specific knowledge of the statute and the drafting process, both that the plain text of §1367 overruled *Zahn* and that language to the contrary in the House Report was a *post hoc* attempt to alter that result. One need not subscribe to the wholesale condemnation of legislative history to refuse to give any effect to such a deliberate effort to amend a statute through a committee report.

In sum, even if we believed resort to legislative history were appropriate in these cases—a point we do not concede—we would not give significant weight to the House Report. The distinguished jurists who drafted the Subcommittee Working Paper, along with three of the participants in the drafting of §1367, agree that this provision, on its face, overrules *Zahn*. This accords with the best reading of the statute's text, and nothing in the legislative history indicates directly and explicitly that Congress understood the phrase "civil action of which the district courts have original jurisdiction" to exclude cases in which some but not all of the diversity plaintiffs meet the amount-in-controversy requirement.

No credence, moreover, can be given to the claim that, if Congress understood §1367 to overrule *Zahn*, the proposal would have been more controversial. We have little sense whether any Member of Congress would have been particularly upset by this result. This is not a case where one can plausibly say that concerned legislators might not have realized the possible effect of the text they were adopting. Certainly, any competent legislative aide who studied the matter would have flagged this issue if it were a matter of importance to his or her boss, especially in light of the Subcommittee Working Paper. There are any number of reasons why legislators did not spend more time arguing over §1367, none of which are relevant to our interpretation of what the words of the statute mean. . . .

[The Court affirmed the judgment in *Allapattah* and reversed in *Rosario Ortega*.]

Justice Stevens, with whom Justice Breyer joins, dissenting.

. . . Not only does the House Report specifically say that §1367 was not intended to upset *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), but its entire explanation of the statute demonstrates that Congress had in mind a very specific and relatively modest task—undoing this Court's 5-to-4 decision in *Finley v. United States*, 490 U.S. 545 (1989). In addition to overturning that unfortunate and much-criticized

decision, the statute, according to the Report, codifies and preserves "the pre-*Finley* understandings of the authorization for and limits on other forms of supplemental jurisdiction," House Report, at 28, with the exception of making "one small change in pre-*Finley* practice," *id.*, at 29, which is not relevant here.

The sweeping purpose that the Court's decision imputes to Congress bears no resemblance to the House Report's description of the statute. But this does not seem to trouble the Court, for its decision today treats statutory interpretation as a pedantic exercise, divorced from any serious attempt at ascertaining congressional intent. . . .

The Court's reasons for ignoring this virtual billboard of congressional intent are unpersuasive. That a subcommittee of the Federal Courts Study Committee believed that an earlier, substantially similar version of the statute overruled *Zahn*, see *ante*, at 2626, only highlights the fact that the statute is ambiguous. What is determinative is that the House Report explicitly rejected that broad reading of the statutory text. Such a report has special significance as an indicator of legislative intent. In Congress, committee reports are normally considered the authoritative explication of a statute's text and purposes, and busy legislators and their assistants rely on that explication in casting their votes. . . .

Justice Ginsburg, with whom Justice Stevens, Justice O'Connor, and Justice Breyer join, dissenting.

. . . The Court adopts a plausibly broad reading of §1367, a measure that is hardly a model of the careful drafter's art. There is another plausible reading, however, one less disruptive of our jurisprudence regarding supplemental jurisdiction. If one reads §1367(a) to instruct, as the statute's text suggests, that the district court must first have "original jurisdiction" over a "civil action" before supplemental jurisdiction can attach, then *Clark* and *Zahn* are preserved, and supplemental jurisdiction does not open the way for joinder of plaintiffs, or inclusion of class members, who do not independently meet the amount-in-controversy requirement. . . .

. . . [Justice Ginsburg reviewed the history of pendent and ancillary jurisdiction prior to §1367 and noted that, in that period, the Court had "unyieldingly adhered to the nonaggregation rule" that multiple plaintiffs may not aggregate claims to meet the amount-in-controversy requirement.]

These cases present the question whether Congress abrogated the nonaggregation rule long tied to §1332 when it enacted §1367. In answering that question, . . . [t]he Court should assume, as it ordinarily does, that Congress legislated against a background of law already in place and the historical development of that law. . . . Here, that background is the statutory grant of diversity jurisdiction, the amount-in-controversy condition that Congress, from the start, has tied to the grant, and the nonaggregation rule this Court has long applied to the determination of the "matter in controversy."

. . . [Section] 1367(a) addresses "civil action[s] of which the district courts have original jurisdiction," a formulation that, in diversity cases, is sensibly read to incorporate the rules on joinder and aggregation tightly tied to §1332 at the time of §1367's enactment. On this reading, a complaint must first meet that "original jurisdiction" measurement. If it does not, no supplemental jurisdiction is authorized. If it does, §1367(a) authorizes "supplemental jurisdiction" over

related claims. In other words, §1367(a) would preserve undiminished, as part and parcel of §1332 "original jurisdiction" determinations, both the "complete diversity" rule and the decisions restricting aggregation to arrive at the amount in controversy. . . .

The less disruptive view I take of §1367 . . . accounts for the omission of Rule 20 plaintiffs and Rule 23 class actions in §1367(b)'s text. If one reads §1367(a) as a plenary grant of supplemental jurisdiction to federal courts sitting in diversity, one would indeed look for exceptions in §1367(b). Finding none for permissive joinder of parties or class actions, one would conclude that Congress effectively, even if unintentionally, overruled *Clark* and *Zahn*. But if one recognizes that the nonaggregation rule delineated in *Clark* and *Zahn* forms part of the determination whether "original jurisdiction" exists in a diversity case, . . . then plaintiffs who do not meet the amount-in-controversy requirement would fail at the §1367(a) threshold. Congress would have no reason to resort to a §1367(b) exception to turn such plaintiffs away from federal court, given that their claims, from the start, would fall outside the court's §1332 jurisdiction. . . .

. . . What is the utility of §1367(b) under my reading of §1367(a)? Section 1367(a) allows parties other than the plaintiff to assert *reactive* claims once entertained under the heading ancillary jurisdiction. . . . [Section] 1367(b) stops plaintiffs from circumventing §1332's jurisdictional requirements by using another's claim as a hook to add a claim that the plaintiff could not have brought in the first instance. . . .

While §1367's enigmatic text defies flawless interpretation, . . . the precedent-preservative reading, I am persuaded, better accords with the historical and legal context of Congress' enactment of the supplemental jurisdiction statute, . . . and the established limits on pendent and ancillary jurisdiction. . . .

For the reasons stated, I would hold that §1367 does not overrule *Clark* and *Zahn*. . . .

NOTES AND QUESTIONS

1. Because supplemental jurisdiction is now statutory, it raises a different set of issues than before. When supplemental jurisdiction was a judicial doctrine, courts could mold it to the needs of a specific case and were guided primarily by the logic and reasons behind the doctrine. Now, however, supplemental jurisdiction raises issues of statutory construction.

2. If a statute enacted by Congress directs a certain result, but a court determines that the result was not intended by the members of Congress who voted for the statute, what should the court do?

3. What could lead a court to conclude that a statute's text is inconsistent with congressional intent? Should a court consider extrinsic evidence of Congress's intention, such as reports written by congressional committees or statements made by individual members of Congress during consideration of the statute? Does it matter if the result indicated by the statutory text departs surprisingly from prior law? What if the result indicated by the statutory text seems undesirable or absurd as a policy matter?

4. Does the text of §1367 clearly indicate that a claim that does not meet the amount-in-controversy requirement may be joined with a claim that does? Does other evidence clearly indicate that that result was not intended by Congress?

5. Should the courts, as Justice Ginsburg suggests, read statutes, where possible, to maintain long-established background principles of law? Is the nonaggregation rule for amounts in controversy such a principle? If the Supreme Court has been justified in reading the complete diversity requirement into §1332 all these years (even though the Court itself notes that the requirement is "not mandated" by the statutory text), why should it not read the nonaggregation principle into §1367?

6. Does the case have an ideological component? As the Court observes, the 1973 case of *Zahn v. International Paper Co.* (decided before the adoption of §1367) held that §1332 required *each* plaintiff in a federal diversity case, including unnamed plaintiffs in a class action, to satisfy the amount-in-controversy requirement individually. In that case, the most liberal members of the Court (Justices Brennan, Marshall, and Douglas) dissented. In the 5-4 decision in *Allapattah*, by contrast, most of the more conservative Justices held that §1367 permitted courts to exercise supplemental jurisdiction over claims by class members who did not individually meet the amount-in-controversy requirement, with most of the more liberal Justices dissenting. What, other than the possibility that all the Justices in both cases were simply doing their best to construe the statutes involved, might account for this ideological role reversal?

7. *Allapattah* represented a substantial change in the rules for diversity class actions, but for practical purposes its impact was overshadowed by the Class Action Fairness Act (CAFA), enacted by Congress in 2005, the same year that *Allapattah* was decided. CAFA, codified in part in 28 U.S.C. §1332(d), authorizes diversity jurisdiction in any class action where the *aggregate* amount in controversy exceeds $5 million and *any* member of the plaintiff class is diverse from *any* defendant, with some exceptions provided in §1332(d)(3)-(5), (9).

CAFA authorizes jurisdiction over diversity class actions more liberally than *Allapattah* because it may provide jurisdiction even where *no* individual plaintiff meets the amount in controversy requirement, but it is also more restrictive in that the aggregate amount in controversy must exceed $5 million rather than merely $75,000. Therefore, either CAFA or *Allapattah* may provide jurisdiction over a class action that would not be covered by the other, and so in determining whether a federal court has jurisdiction over a class action based on diversity, it is necessary to determine both whether jurisdiction exists under 28 U.S.C. §§1332(a), 1367, as interpreted by *Allapattah*, and, separately, whether jurisdiction exists under §1332(d). (Note that both CAFA and *Allapattah* are relevant only to *diversity* class actions. Federal question jurisdiction may apply to a class action without regard to the amount in controversy or the citizenship of the parties.)

CAFA also facilitates *removal* of a diversity class action from state to federal court by overriding the normal principles that (1) a case may not be removed on the basis of diversity if any defendant is a citizen of the forum state and (2) all defendants must consent to removal. *Compare* 28 U.S.C. §§1441(b)(2), 1446(b)(2)(A) *with* §1453(b).

What motive would have caused Congress to liberalize federal jurisdiction over diversity class actions in the ways accomplished by CAFA?

PROBLEMS

Problem 5-16. Alice, a citizen of Colorado, is injured in a car accident in which her car is hit by a bus owned by Big Bus, Inc., a corporation incorporated in Delaware with its principal place of business in Arizona. She sues Big Bus in federal district court for $100,000 in tort damages. Pursuant to Federal Rule 14, Big Bus impleads Common Carrier, Inc., a corporation incorporated in Delaware with its principal place of business in Colorado. Big Bus alleges that although it owned the bus, the bus at the time of the accident was leased to and being operated by Common Carrier and so Common Carrier is liable to Big Bus for any amount that Big Bus might be liable to Alice. Common Carrier moves to dismiss the claim against it for lack of subject matter jurisdiction. What should the court do?

Problem 5-17. In the previous problem, Alice moves to amend her complaint to assert a tort claim against Common Carrier. Common Carrier opposes the motion on the ground that the court would lack subject matter jurisdiction over the claim. What should the court do?

Problem 5-18. Arnold, a citizen of Massachusetts, sues Bolton Books, a corporation incorporated in Delaware with its principal place of business in New York, for copyright infringement, alleging that a book published by Bolton infringed Arnold's copyright. He claims $500,000 in damages. Bolton impleads Carl, a citizen of Massachusetts, under Rule 14, alleging that Carl, the author of the book, had promised Bolton that it contained no infringing material and that Carl is liable to Bolton for whatever Bolton might owe Arnold. Arnold attempts to add a claim against Carl for copyright infringement. Carl moves to dismiss this claim for lack of subject matter jurisdiction. What should the court do?

Problem 5-19. Amitola and Bill, citizens of Wyoming, own adjacent parcels of land in Wyoming. The Calamity Chemical Corporation, a corporation incorporated in Delaware with its principal place of business in New Mexico, causes a chemical spill that damages Amitola and Bill's properties. Amitola and Bill bring a lawsuit against Calamity Chemical for tort damages. Amitola claims that her property was damaged in the amount of $250,000; Bill claims that his property was damaged in the amount of $25,000. Is the lawsuit within the federal jurisdiction?

Problem 5-20. Would the previous problem come out any differently if Amitola and Bill each claimed $50,000 in damages?

Problem 5-21. Allen, a citizen of Florida, sues Bank of America, a corporate citizen of Delaware and North Carolina. Allen has a Bank of America credit card, and he alleges that Bank of America has improperly computed interest charges and has charged him more than the proper amount of interest under their contract. Allen also alleges that Bank of America has done the same thing to numerous customers nationwide, and he sues on behalf of a class consisting of all Bank of America credit card customers who have been subjected to such improper charges. The plaintiff class members include citizens of all 50 states. Jurisdiction is allegedly based on diversity. Is the lawsuit within the federal jurisdiction if Allen alleges that:

(a) there are 100,000 class members, each of whom has suffered about $100 in damages?
(b) there are 10,000 class members, who on average have suffered damages of about $100 each, but Allen, the named plaintiff, has suffered damages of $100,000?
(c) there are 10,000 class members, who on average have suffered damages of about $100 each, as has the named plaintiff, Allen, but an unnamed class member has suffered $100,000 in damages?
(d) there are 10,000 class members, each of whom has suffered about $100 in damages?

Would the answers be different if Allen were a citizen of Delaware? Would the answers be different if Allen alleged that the wrongful charges violated federal banking laws?

D. REMOVAL JURISDICTION

Some cases initiated in state court may be removed to federal court. Removal jurisdiction is conferred by multiple federal statutes, most of which are found at 28 U.S.C. §§1441-1455.[3] Like other forms of federal jurisdiction, removal jurisdiction is usually straightforward, but also has nuances that require attention.

1. The General Removal Statute

Most removal occurs pursuant to 28 U.S.C. §1441(a), which provides that:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

Several important points are evident from the statutory provision itself:

- The statute authorizes removal in one direction only, from state court to federal court. The statute does not authorize removal of any case from federal court to state court.
- The statute authorizes removal of an action only by the defendant, not by the plaintiff. Indeed, even a plaintiff who becomes a defendant on a counterclaim may not remove under §1441(a). *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941).
- Because the statute authorizes removal of actions "of which the district courts of the United States have original jurisdiction," it authorizes removal

3. Congress's *constitutional* power to provide for removal jurisdiction is considered in *Tennessee v. Davis*, p. 300, *supra*.

of an action only if the plaintiff could have filed the action in federal court originally.

This last requirement means that all of the considerations that go into determining whether a case is within the original federal jurisdiction apply in determining whether a case may be removed under §1441(a). In particular, as is discussed in the notes following the *Mottley* case, p. 426, *supra*, a party attempting to remove a case under §1441(a) on the basis of federal question jurisdiction is as bound by the "well-pleaded complaint rule" as a party attempting to file a case in federal court originally. Therefore, if a plaintiff brings a state-law case in state court, the defendant's assertion of a federal defense does not make the case removable under §1441(a).

However, as the next case shows, this principle is not without exception.

a. Federal Question Jurisdiction Removal under §1441(a)—The "Complete Preemption" Rule

Beneficial National Bank v. Anderson

539 U.S. 1 (2003)

Justice Stevens delivered the opinion of the Court.

The question in this case is whether an action filed in a state court to recover damages from a national bank for allegedly charging excessive interest in violation of both "the common law usury doctrine" and an Alabama usury statute may be removed to a federal court because it actually arises under federal law. We hold that it may.

. . . [Plaintiffs received loans from defendant Beneficial National Bank. Plaintiffs sued the bank in Alabama state court. Their complaint alleged that the interest rate on their loans exceeded the rate permitted by Alabama state law. The complaint did not mention any federal law. The defendant removed the case to federal district court in Alabama.

[The defendant was a national bank chartered pursuant to the National Bank Act, a federal statute. The defendant asserted that §§85, 86 of the National Bank Act provided the exclusive law governing the rate of interest a national bank may charge and that they preempted any state law governing such rates. Section 85 allowed national banks to charge any interest rate permitted by state law in the state in which they were located, or a rate up to 1 percent more than a specified rate in effect at the Federal Reserve Bank in the federal reserve district in which they were located, whichever was greater. Section 86 provided that if a national bank made a loan at an interest rate higher than permitted by §85, it would forfeit the right to collect any interest on the loan. It also permitted any person that had actually paid the unlawful rate to sue the bank and recover twice the amount of interest paid.

[The plaintiffs moved to remand the case to state court. The district court denied that motion, but certified the question of its jurisdiction for interlocutory appeal. The court of appeals reversed, and the Supreme Court granted certiorari.]

A civil action filed in a state court may be removed to federal court if the claim is one "arising under" federal law. . . . To determine whether the claim arises under federal law, we examine the "well pleaded" allegations of the complaint and ignore potential defenses. . . . *Louisville & Nashville R. Co. v. Mottley,* 211 U.S. 149, 152 (1908). . . . Thus, a defense that relies on the preclusive effect of a prior federal judgment, *Rivet v. Regions Bank of La.,* 522 U.S. 470 (1998), or the pre-emptive effect of a federal statute, *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.,* 463 U.S. 1 (1983), will not provide a basis for removal. As a general rule, absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim.

Congress has, however, created certain exceptions to that rule. For example, the Price–Anderson Act contains an unusual pre-emption provision, 42 U.S.C. § 2014(hh), that not only gives federal courts jurisdiction over tort actions arising out of nuclear accidents but also expressly provides for removal of such actions brought in state court even when they assert only state-law claims. . . .

We have also construed § 301 of the Labor Management Relations Act, 1947 (LMRA), 29 U.S.C. § 185, as not only pre-empting state law but also authorizing removal of actions that sought relief only under state law. *Avco Corp. v. Machinists,* 390 U.S. 55 (1968). We later explained that holding as resting on the unusually "powerful" pre-emptive force of § 301:

> "The . . . petitioner's action 'arose under' § 301, and thus could be removed to federal court, although the petitioner had undoubtedly pleaded an adequate claim for relief under the state law of contracts and had sought a remedy available *only* under state law. The necessary ground of decision was that the pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. *Avco* stands for the proposition that if a federal cause of action completely pre-empts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." *Franchise Tax Bd.,* 463 U.S., at 23-24. . . .

Similarly, in *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58 (1987), we considered whether the "complete pre-emption" approach adopted in *Avco* also supported the removal of state common-law causes of action asserting improper processing of benefit claims under a plan regulated by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.* For two reasons, we held that removal was proper even though the complaint purported to raise only state-law claims. First, the statutory text in § 502(a), 29 U.S.C. § 1132, not only provided an express federal remedy for the plaintiffs' claims, but also in its jurisdiction subsection, § 502(f), used language similar to the statutory language construed in *Avco,* thereby indicating that the two statutes should be construed in the same way. . . . Second, the legislative history of ERISA unambiguously described an intent to treat such actions "as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor–Management Relations Act of 1947." . . .

Thus, a state claim may be removed to federal court in only two circumstances — when Congress expressly so provides, such as in the Price–Anderson Act, . . . or when a federal statute wholly displaces the state-law cause of action through complete pre-emption.[3] When the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law. This claim is then removable under 28 U.S.C. § 1441. . . . In the two categories of cases where this Court has found complete pre-emption — certain causes of action under the LMRA and ERISA — the federal statutes at issue provided the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action. . . .

[R]espondents' complaint sought relief for "usury violations" and claimed that petitioners "charged . . . excessive interest in violation of the common law usury doctrine" and violated "Alabama Code § 8–8–1, et seq. by charging excessive interest." . . . Respondents' complaint thus expressly charged petitioners with usury. *Metropolitan Life* [and] *Avco* . . . provide the framework for answering the dispositive question in this case: Does the National Bank Act provide the exclusive cause of action for usury claims against national banks? If so, then the cause of action necessarily arises under federal law and the case is removable. If not, then the complaint does not arise under federal law and is not removable.

Sections 85 and 86 [of the National Bank Act] serve distinct purposes. The former sets forth the substantive limits on the rates of interest that national banks may charge. The latter sets forth the elements of a usury claim against a national bank . . . and prescribes the remedies available to borrowers who are charged higher rates. . . . If, as petitioners asserted in their notice of removal, the interest that the bank charged to respondents did not violate § 85 limits, the statute unquestionably pre-empts any common-law or Alabama statutory rule that would treat those rates as usurious. The section would therefore provide the petitioners with a complete federal defense. Such a federal defense, however, would not justify removal. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987). Only if Congress intended § 86 to provide the exclusive cause of action for usury claims against national banks would the statute be comparable to the provisions that we construed in the *Avco* and *Metropolitan Life* cases.[5]

In a series of cases decided shortly after the Act was passed, we endorsed that approach. In *Farmers' and Mechanics' Nat. Bank v. Dearing*, 91 U.S. 29, 32-33 (1875), we rejected the borrower's attempt to have an entire debt forfeited, as authorized by New York law, stating that the various provisions of §§ 85 and 86 "form a system

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3. Of course, a state claim can also be removed through the use of the supplemental jurisdiction statute, 28 U.S.C. § 1367(a), provided that another claim in the complaint is removable.

5. Because the proper inquiry focuses on whether Congress intended the federal cause of action to be exclusive rather than on whether Congress intended that the cause of action be removable, the fact that these sections of the National Bank Act were passed in 1864, 11 years prior to the passage of the statute authorizing removal, is irrelevant, contrary to respondents' assertions.

of regulations . . . [a]ll the parts [of which] are in harmony with each other and cover the entire subject," so that "the State law would have no bearing whatever upon the case." We also observed that "[i]n any view that can be taken of [§ 86], the power to supplement it by State legislation is conferred neither expressly nor by implication." . . . In *Evans v. National Bank of Savannah,* 251 U.S. 108, 114 (1919), we stated that "federal law . . . completely defines what constitutes the taking of usury by a national bank, referring to the state law only to determine the maximum permitted rate." . . .

In addition to this Court's longstanding and consistent construction of the National Bank Act as providing an exclusive federal cause of action for usury against national banks, this Court has also recognized the special nature of federally chartered banks. Uniform rules limiting the liability of national banks and prescribing exclusive remedies for their overcharges are an integral part of a banking system that needed protection from "possible unfriendly State legislation." *Tiffany v. National Bank of Mo.,* 18 Wall. 409, 412 (1874). The same federal interest that protected national banks from the state taxation that Chief Justice Marshall characterized as the "power to destroy," *McCulloch v. Maryland,* 4 Wheat. 316, 431 (1819), supports the established interpretation of §§ 85 and 86 that gives those provisions the requisite pre-emptive force to provide removal jurisdiction. In actions against national banks for usury, these provisions supersede both the substantive and the remedial provisions of state usury laws and create a federal remedy for overcharges that is exclusive, even when a state complainant, as here, relies entirely on state law. Because §§ 85 and 86 provide the exclusive cause of action for such claims, there is, in short, no such thing as a state-law claim of usury against a national bank. Even though the complaint makes no mention of federal law, it unquestionably and unambiguously claims that petitioners violated usury laws. This cause of action against national banks only arises under federal law and could, therefore, be removed under § 1441.

The judgment of the Court of Appeals is reversed.

Justice Scalia, with whom Justice Thomas joins, dissenting.

. . . [F]ederal courts may exercise removal jurisdiction over state-court actions "of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). . . .

[Original jurisdiction based on the] so-called "arising under" or "federal question" jurisdiction has long been governed by the well-pleaded-complaint rule, which provides that "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams,* 482 U.S. 386, 392 (1987). A federal question "is presented" when the complaint invokes federal law as the basis for relief. It does not suffice that the facts alleged in support of an asserted state-law claim would *also* support a federal claim. "The [well-pleaded-complaint] rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." . . .

Under the well-pleaded-complaint rule, "a federal court does not have original jurisdiction over a case in which the complaint presents a state-law cause of action, but also asserts that federal law deprives the defendant of a defense he may raise, . . . or that a federal defense the defendant may raise is not sufficient to

defeat the claim." . . . Of critical importance here, the rejection of a federal defense as the basis for original federal-question jurisdiction applies with equal force when the defense is one of federal pre-emption. . . . "[A] case may *not* be removed to federal court on the basis of . . . the defense of pre-emption. . . ." *Caterpillar, supra,* at 393. To be sure, pre-emption requires a state court to *dismiss* a particular claim that is filed under state law, but it does not, as a general matter, provide grounds for *removal.*

This Court has twice recognized exceptions to the well-pleaded-complaint rule, upholding removal jurisdiction notwithstanding the absence of a federal question on the face of the plaintiff's complaint. First, in *Avco Corp. v. Machinists,* 390 U.S. 557 (1968), we allowed removal of a state-court action to enforce a no-strike clause in a collective-bargaining agreement. The complaint concededly did not advance a federal claim, but was subject to a defense of pre-emption under § 301 of the Labor Management Relations Act, 1947 (LMRA), 29 U.S.C. § 185. The well-pleaded-complaint rule notwithstanding, we treated the plaintiff's state-law contract claim as one arising under § 301, and held that the case could be removed to federal court. . . .

The only support mustered by the *Avco* Court for its conclusion was a statement wrenched out of context from our decision in *Textile Workers v. Lincoln Mills of Ala.,* 353 U.S. 448, 457 (1957), that "[a]ny state law applied [in a § 301 case] will be absorbed as federal law and will not be an independent source of private rights." To begin with, this statement is entirely unnecessary to the landmark holding in *Lincoln Mills*—that § 301 not only gives federal courts jurisdiction to decide labor relations cases but also supplies them with authority to create the governing substantive law. . . . More importantly, understood in the context of that holding, the quoted passage in no way supports the proposition for which it is relied upon in *Avco*—that state-law claims relating to labor relations necessarily *arise under* § 301. If one reads *Lincoln Mills* with any care, it is clear beyond doubt that the relevant passage merely confirms that when, in deciding cases arising under § 301, courts employ legal rules that overlap with, or are even explicitly borrowed from, state law, such rules are nevertheless rules of federal law. It is in this sense that "[a]ny state law applied [in a § 301 case] will be absorbed as federal law"—in the sense that federally adopted state rules become federal rules, not in the sense that a state-law claim becomes a federal claim.

Other than its entirely misguided reliance on *Lincoln Mills,* the opinion in *Avco* failed to clarify the analytic basis for its unprecedented act of jurisdictional alchemy. The Court neglected to explain *why* state-law claims that are pre-empted by § 301 of the LMRA are exempt from the strictures of the well-pleaded-complaint rule, nor did it explain *how* such a state-law claim can plausibly be said to "arise under" federal law. Our subsequent opinion in *Franchise Tax Board* [quoted in the majority opinion] . . . [provides no] explanation for [the] decision in *Avco.* . . . It provides nothing more than an account of what *Avco* accomplishes, rather than a justification . . . for the radical departure from the well-pleaded-complaint rule. . . .

Metropolitan Life Ins. Co. v. Taylor, supra, was our second departure from the prohibition against resting federal "arising under" jurisdiction upon the existence of a federal defense. In that case, Taylor sued his former employer and its insurer, alleging breach of contract. . . . Though Taylor invoked no federal law in his

complaint, we treated his case as one arising under § 502 of the Employee Retirement Income Security Act of 1974 (ERISA) . . . and upheld the District Court's exercise of removal jurisdiction. . . .

In reaching this conclusion, the *Taylor* Court broke no new analytic ground; its opinion follows the exception established in *Avco* . . . but says nothing to commend that exception to logic or reason. Instead, *Taylor* simply relies on the "clos[e] parallels" . . . between the language of the pre-emptive provision in ERISA and the language of the LMRA provision deemed in *Avco* to be so dramatically pre-emptive as to summon forth a federal claim where none had been asserted. . . .

It is noteworthy that the straightforward (though similarly unsupported) rule announced in today's opinion — under which (1) removal is permitted "[w]hen [a] federal statute completely pre-empts a state-law cause of action," . . . and (2) a federal statute is completely pre-emptive when it "provide[s] the exclusive cause of action for the claim asserted," . . . — is nowhere to be found in either *Avco* or *Taylor*. . . . [Justice Scalia argued that *Avco* and *Taylor* rested on points particular to the LMRA and ERISA and did not establish the general rule asserted by the majority.]

The difficulty with today's holding, moreover, is not limited to the flimsiness of its precedential roots. As has been noted already, the holding cannot be squared with bedrock principles of removal jurisdiction. One or another of two of those principles must be ignored: Either (1) the principle that merely setting forth in state court facts that would support a federal cause of action — indeed, even facts that would support a federal cause of action and would not support the claimed state cause of action — does not produce a federal question supporting removal . . . or (2) the principle that a federal defense to a state cause of action does not support federal-question jurisdiction . . . . Relatedly, today's holding also represents a sharp break from our long tradition of respect for the autonomy and authority of state courts. For example, in *Healy v. Ratta,* 292 U.S. 263, 270 (1934), we explained that "[d]ue regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." And in *Shamrock Oil & Gas Corp. v. Sheets,* 313 U.S. 100, 108 (1941), we insisted on a "strict construction" of the federal removal statutes. Today's decision ignores these venerable principles and effectuates a significant shift in decisional authority from state to federal courts.

In an effort to justify this shift, the Court explains that "[b]ecause [12 U.S.C.] §§ 85 and 86 provide the exclusive cause of action for such claims, there is . . . no such thing as a state-law claim of usury against a national bank." . . . But the mere fact that a state-law claim is invalid no more deprives it of its character as a state-law claim which does not raise a federal question, than does the fact that a federal claim is invalid deprive it of its character as a federal claim which does raise a federal question. The proper response to the presentation of a nonexistent claim to a state court is *dismissal,* not the "federalize-and-remove" dance authorized by today's opinion. For even if the Court is correct that the National Bank Act obliterates entirely any state-created right to relief for usury against a national bank, that does not explain how or why the claim of such a right is transmogrified into the claim of a federal right. Congress's mere act of creating a federal right and eliminating all

state-created rights *in no way* suggests an expansion of federal jurisdiction so as to wrest from state courts the authority to decide questions of pre-emption under the National Bank Act. . . .

I respectfully dissent.

NOTES AND QUESTIONS

1. As the majority and dissenting opinions agree, the usual rule is that a state-law claim brought in state court may not be removed to federal court merely because the defendant asserts a federal defense to it, and this principle usually applies even where the asserted federal defense is that federal law preempts the plaintiff's state-law claim. But the majority holds that a different rule applies when federal law "completely" preempts the plaintiff's state-law claim. What is the difference between preemption and complete preemption?

2. The majority indicates that "complete preemption" will apply when Congress intended federal law to provide the exclusive cause of action for the kind of claim alleged. Suppose the National Bank Act had authorized national banks to charge interest up to some specified maximum rate, but had not provided any private cause of action against national banks that charged more interest than that. If a national bank were sued in state court for charging a higher interest rate than allowed by state law, and it raised the defense that the National Bank Act preempted the state's limit on interest, could the bank remove the case to federal court under the "complete preemption" rule?

3. Are the cases made removable by the "complete preemption" rule the cases that *ought* to be removable on the basis of the assertion of a federal defense? Are these cases distinguished from cases raising a preemption (but not complete preemption) defense in ways that are relevant to policy considerations governing removal? Are they distinguished from cases raising other federal defenses? Or is Justice Scalia correct that all of these cases would better be left to state courts, which would, of course, have the obligation to give appropriate effect to any federal defense, including a defense of preemption, that a defendant might raise? For some thoughts on these questions, *see* Gil Seinfeld, *The Puzzle of Complete Preemption*, 155 U. Pa. L. Rev. 537 (2007).

b. Diversity Jurisdiction Removal under §1441(a)

Section 1441(a) allows removal of a case "of which the district courts of the United States have original jurisdiction." The necessary original federal jurisdiction is not limited to federal question jurisdiction. It may be based on diversity jurisdiction as well (or, indeed, any other form of original federal jurisdiction). But removal of a case to federal court based on diversity jurisdiction is subject to §1441(b), subsection (2) of which provides:

> A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

This provision is sometimes called the "forum defendant rule." What is the purpose of this rule? How is that purpose connected with the purpose of diversity jurisdiction under §1332(a)?

Note the exact language of §1441(b)(2). The section is often summarized by saying that it prohibits removal of a case based on diversity jurisdiction if any defendant is a citizen of the forum state. But that is not quite what it says. The precise language of §1441(b)(2) has given rise to a practice known as "snap removal," which is discussed in the next case.

Encompass Insurance Co. v. Stone Mansion Restaurant Inc.

902 F.3d 147 (3d Cir. 2018)

Before: CHAGARES, JORDAN, FUENTES, Circuit Judges.

CHAGARES, Circuit Judge.

. . . [Brian Viviani attended an event at Stone Mansion, a restaurant in Pittsburgh, Pennsylvania. Allegedly, the restaurant served him alcohol even after he was already intoxicated. Viviani then left the event and drove an automobile with Helen Hoey as a passenger. He drove the vehicle into a guardrail. Viviani was killed and Hoey was seriously injured. Hoey sued Viviani's estate. Encompass Insurance Company ("Encompass"), Viviani's insurer, handled the defense. It settled with Hoey for $600,000.

[Encompass, which was a corporate citizen of Illinois, then sued Stone Mansion Restaurant Inc. ("Stone Mansion"), a corporate citizen of Pennsylvania that owned the Stone Mansion restaurant, in state court in Pennsylvania. Encompass claimed that the defendant was liable under Pennsylvania state law because it served Viviani alcohol after he was already intoxicated.

[Prior to the commencement of the suit, counsel for Stone Mansion informed counsel for Encompass that he would be willing to accept electronic service of process on behalf of the defendant. Accordingly, when Encompass filed the lawsuit in Pennsylvania state court, counsel for Encompass electronically sent counsel for Stone Mansion a copy of the complaint and an acceptance form for service of process. Counsel for Stone Mansion filed a notice of removal removing the case to federal district court in Pennsylvania on the basis of diversity jurisdiction. After filing the notice of removal, counsel for Stone Mansion accepted service of process on behalf of Stone Mansion.

[Encompass moved to remand the case to state court on the ground that it was improperly removed in violation of §1441(b)(2), as the defendant was a corporate citizen of Pennsylvania. Stone Mansion, asserting that it was not liable to the plaintiff under Pennsylvania state law, moved to dismiss the case for failure to state a claim on which relief could be granted. The district court denied the motion to remand and granted the motion to dismiss.]

Where federal [removal] jurisdiction is premised only on diversity of the parties, the forum defendant rule applies. That rule provides that "[a] civil action otherwise removable solely on the basis of [diversity jurisdiction] may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." [28 U.S.C.] §1441(b)(2). . . .

When interpreting a statute, we "must begin with the statutory text." . . . "It is well-established that, '[w]here the text of a statute is unambiguous, the statute should be enforced as written and only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language.' " . . . Nevertheless, it is also a "basic tenet of statutory construction . . . that courts should interpret a law to avoid absurd or bizarre results." . . . An absurd interpretation is one that "defies rationality or renders the statute nonsensical and superfluous." . . .

Starting with the text, we conclude that the language of the forum defendant rule in section 1441(b)(2) is unambiguous. Its plain meaning precludes removal on the basis of in-state citizenship only when the defendant has been properly joined and served. Thus, it remains for us to determine whether there has been a "most extraordinary showing of contrary intentions" and consider whether this literal interpretation leads to "absurd or bizarre results."

We therefore turn to section 1441, which contains the forum defendant rule. Section 1441 exists in part to prevent favoritism for in-state litigants . . . and discrimination against out-of-state litigants. . . . The specific purpose of the "properly joined and served" language in the forum defendant rule is less obvious. The legislative history provides no guidance; however, courts and commentators have determined that Congress enacted the rule "to prevent a plaintiff from blocking removal by joining as a defendant a resident party against whom it does not intend to proceed, and whom it does not even serve." . . .

Citing this fraudulent-joinder rationale, Encompass argues that it is "inconceivable" that Congress intended the "properly joined and served" language to permit an in-state defendant to remove an action by delaying formal service of process. . . . This argument is unavailing. Congress' inclusion of the phrase "properly joined and served" addresses a specific problem—fraudulent joinder by a plaintiff—with a bright-line rule. Permitting removal on the facts of this case does not contravene the apparent purpose to prohibit that particular tactic. Our interpretation does not defy rationality or render the statute nonsensical or superfluous, because: (1) it abides by the plain meaning of the text; (2) it envisions a broader right of removal only in the narrow circumstances where a defendant is aware of an action prior to service of process with sufficient time to initiate removal;[4] and (3) it protects the statute's goal without rendering any of the language unnecessary. Thus, this result may be peculiar in that it allows Stone Mansion to use pre-service machinations to remove a case that it otherwise could not; however, the outcome is not so outlandish as to constitute an absurd or bizarre result.

In short, Stone Mansion has availed itself of the plain meaning of the statute. . . . Encompass has not provided, nor have we otherwise uncovered, an

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4. We are aware of the concern that technological advances since enactment of the forum defendant rule now permit litigants to monitor dockets electronically, potentially giving defendants an advantage in a race-to-the-courthouse removal scenario. However, the briefs fail to address this concern, let alone argue that the practice is widespread. If a significant number of potential defendants (1) electronically monitor dockets; (2) possess the ability to quickly determine whether to remove the matter before a would-be state court plaintiff can serve process; and (3) remove the matter contrary to Congress' intent, the legislature is well-suited to address the issue.

extraordinary showing of contrary legislative intent. Furthermore, we do not perceive that the result in this case rises to the level of the absurd or bizarre. There are simply no grounds upon which we could substitute Encompass' interpretation for the literal interpretation. Reasonable minds might conclude that the procedural result demonstrates a need for a change in the law; however, if such change is required, it is Congress—not the Judiciary—that must act. . . .

[The court also rejected the argument that Stone Mansion's agreement to accept electronic service of process "precluded" it from arguing that it had not yet been served with process at the time it removed the case.]

[On the merits, the court held that Encompass' complaint stated a claim against Stone Mansion under Pennsylvania state law.]

For the foregoing reasons, we will affirm in part and reverse in part.

NOTES AND QUESTIONS

1. What is the purpose of the forum defendant rule? Is that purpose served by allowing an in-state defendant to remove a diversity case after the case has been filed in state court but before process has been served on that defendant? Is it relevant that defendant's counsel deliberately tricked plaintiff's counsel?

2. When the text of a statute commands a result that seems contrary to the likely intent of the statute's drafters, or a result that seems likely to have been unanticipated by those drafters and contrary to sensible policy, what should a court do? The court in *Encompass* acknowledged that it should "interpret a law to avoid absurd or bizarre results," but found the result to be at most "peculiar." How is an "absurd or bizarre" result to be distinguished from one that is merely "peculiar"?

3. Suppose a plaintiff brings a state-court action against multiple defendants, some of whom are citizens of the forum state and some of whom are not, and serves process first on one of the out-of-state defendants. If the defendants file a notice of removal before the plaintiff serves process on any of the in-state defendants, is the case properly removed (assuming of course that the diversity jurisdiction requirements are met)? *See, e.g.*, *Texas Brine Co. v. American Arbitration Ass'n*, 955 F.3d 482 (5th Cir. 2020). What if, as suggested in footnote 4 of the *Encompass Insurance* opinion, a party that anticipates being sued keeps an eye on the state-court docket and thereby manages to file a notice of removal after a case against it has begun but before being served with process?

4. As of mid-2022, the Supreme Court has not weighed in on snap removal. For an extended argument that §1441(b)(2) does not permit snap removal, *see Sullivan v. Novartis Pharmaceuticals Corp.*, 575 F. Supp. 2d 640 (D.N.J. 2008) (arguing that taking a "plain meaning" approach to the statute "would lead to bizarre results that Congress could not have intended"). For a suggested change, *see* Arthur Hellman, Lonny Hoffman, Thomas D. Rowe Jr., Joan Steinman & Georgene Vairo, *Neutralizing the Stratagem of "Snap Removal": A Proposed Amendment to the Judicial Code*, 9 Fed. Cts. L. Rev. 103 (2016).

5. Another issue that arises in removal of diversity cases is how to determine whether the amount-in-controversy requirement is satisfied. As discussed earlier in this chapter, the sum claimed by the plaintiff in the complaint is usually controlling in cases filed initially in federal court, *see St. Paul Mercury Indem. Co.*, p. 463, *supra*,

and this rule usually takes care of removed cases as well. But what if state practice in the state in which a case is filed does not require, or perhaps even forbids, the plaintiff to specify the amount in controversy, with the result that no amount is claimed in the state-court complaint? In 2011, Congress amended the removal statute to permit the defendant in such a case to assert the amount in controversy in the notice of removal. 28 U.S.C. §1446(c)(2). The defendant's good faith allegation of the amount in controversy, if not contested by the plaintiff or questioned by the district court, is sufficient. If the plaintiff contests the amount allegation, or if the court questions it, then both sides may submit evidence concerning the amount in controversy, and the amount is sufficient "if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a)." §1446(c)(2)(B); *see Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81 (2014).

2. Federal Officer Removal

Although most removal occurs pursuant to the general removal statute, 28 U.S.C. §1441(a), other statutes provide for removal in specialized circumstances. The most important of these statutes is 28 U.S.C. §1442, which provides for removal of any "civil action or criminal proceeding" commenced in a state court against "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office." What is the purpose of §1442 removal? For discussion, *see Mesa v. California*, p. 423, *supra*.

Also recall that although the text of §1442 would apparently permit removal of *any* case brought in state court against a federal officer for any act taken as part of the officer's official duties, the Supreme Court in *Mesa* interpreted §1442 to permit removal only if the defendant officer asserts some federal defense. This requirement ensures that some federal question will be presented in a case removed under §1442. Still, even taking this requirement into account, isn't §1442 inconsistent with the well-pleaded complaint rule? The statute permits a defendant who is a federal officer to remove a purely state-law claim, provided the defendant raises a federal defense. How can that be allowed?

3. Other Removal Provisions

Some other, less common, removal provisions are mentioned briefly below.

a. Civil Rights Removal

28 U.S.C. §1443, entitled "Civil Rights Cases," permits removal of cases "[a]gainst any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof." §1443(1). This provision is rarely used, because the Supreme Court has generally interpreted it to permit

removal only when a state statute denies a right conferred by a federal law providing for equal rights. *See, e.g.*, *Strauder v. West Virginia*, 100 U.S. 303 (1879) (permitting §1443 removal in a case in which a Black man was charged with murder in state court and a state statute limited jury service to white men). The Court has generally declined to permit removal under §1443 when a defendant asserts that state *practice*, as opposed to state *law*, will cause the defendant's rights to be denied. *E.g.*, *Virginia v. Rives*, 100 U.S. 313 (1879) (denying §1443 removal in a case in which two Black men were charged in state court with murder of a white man and alleged that although state law provided for jury service by men without regard to race, Black men had never in practice been allowed to serve as jurors "in any case, civil or criminal, in which their race had been in any way interested"); *City of Greenwood v. Peacock*, 384 U.S. 808 (1966) ("It is not enough to support removal under §1443(1) to allege or show that . . . the defendant is unable to obtain a fair trial in a particular state court."). *But see Georgia v. Rachel*, 384 U.S. 780 (1966) (permitting §1443 removal on the ground that the defendants, who were charged with criminal trespass after refusing to leave restaurants from which they were trying to obtain service, had a right under the Civil Rights Act of 1964 not even to be tried upon the charges against them).

b. Removal under the Class Action Fairness Act

The Class Action Fairness Act relaxes some of the requirements for diversity jurisdiction in class actions. Among other things, it permits certain class actions filed in state court to be removed to federal court on the basis of diversity jurisdiction without regard to whether any defendant is a citizen of the forum state. 28 U.S.C. §1453. For discussion, see note 7 following the *Allapattah* case, p. 487, *supra*. What purpose is served by this provision?

c. Certain Intellectual Property Cases

28 U.S.C. §1454 permits removal of a civil action "in which any party asserts a claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights." §1454(a). Such a case may be removed "by any party." §1454(b)(1). This statute thus relaxes the rule of the general removal statute, §1441, that permits removal only by the defendant, so that a plaintiff who brings a state-law claim and is subjected to a counterclaim arising under federal patent or copyright law could remove.

d. Nonremovable Actions

The removal statutes also provide that certain actions are *not* removable, including actions under any state workers' compensation law and actions under the Federal Employer's Liability Act (FELA), which provides liability for work-related accidents suffered by interstate railroad workers. 28 U.S.C. §1445. In such cases, the plaintiff may be able to bring suit in state or federal court, either on the basis of diversity or, in the case of FELA actions, federal question jurisdiction, but if the plaintiff chooses to proceed in state court, the defendant may not remove. What policy is served by this provision?

4. Removal Procedures

The removal statutes also set forth removal procedures, the most significant of which include:

- *Where to Remove*: A case filed in state court may be removed only to "the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. §§1441(a), 1446(a). After removal, however, the federal district court to which the case is removed may consider a motion to transfer the case to some other district. *E.g.*, *Hinkley v. Envoy Air, Inc.*, 968 F.3d 544, 550 (5th Cir. 2020).
- *How to Remove*: A defendant or defendants desiring to remove a civil action must file a "notice of removal," which must contain "a short and plain statement of the grounds for removal." §1446(a). This notice is filed in the federal district court to which the case is to be removed. *Id.*
- *When to Remove*: The notice must be filed "within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter." §1446(b)(1). If a case as initially filed in state court is not removable, a notice of removal may be filed "within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable," §1446(b)(3), except that a case cannot be removed on the basis of diversity jurisdiction more than one year after its commencement unless the district court finds that the plaintiff acted in bad faith to prevent removal. §1446(c)(1).
- *Who Must Remove*: For a case removed solely under the general removal statute, §1441(a), *all* defendants who have been properly joined and served must join in or consent to the removal of the action. §1446(b)(2)(A).
- *Wrongful Removal*: If a case is improperly removed, a party may move that the case be "remanded," i.e., returned to state court. For removal defects other than lack of subject matter jurisdiction (e.g., untimely removal; failure of all defendants to consent to removal; or removal in violation of the forum defendant rule), the motion to remand must be filed within 30 days after the filing of the notice of removal. §1447(c). A district court may not remand a case based on a nonjurisdictional defect in the absence of a timely remand motion. *E.g.*, *Northern California Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co.*, 69 F.3d 1034, 1038 (9th Cir. 1995). But if at any time before final judgment the district court determines that it lacks subject matter jurisdiction, "the case shall be remanded." §1447(c).

PROBLEMS

Problem 5-22. Hiroshi is a citizen of New York. After a video posted on YouTube accuses Hiroshi of embezzlement, Hiroshi loses his job. Hiroshi sues Google,

Inc., the owner of YouTube, for defamation in state court in Delaware. He seeks $1,000,000 in damages. Google is a corporation incorporated in Delaware with its principal place of business in California. Section 230 of the Communications Decency Act, a federal statute, provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider" and that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." Google learns of the case when it is served with the summons and complaint. Ten days later, asserting that §230 preempts Hiroshi's defamation claim against it, Google files a notice of removal removing the case to federal district court in Delaware. Ten days after that, Hiroshi moves for remand. What should the district court do?

Problem 5-23. In the previous problem, would it make a difference if Hiroshi's motion for remand were filed 60 days after Google filed its notice of removal?