CHAPTER 3

Subject Matter Jurisdiction of the Federal Courts

A. THE IDEA AND THE STRUCTURE OF SUBJECT MATTER JURISDICTION

Personal jurisdiction doctrine limits both state and federal courts in relation to particular defendants. If the defendant lacks connection with the forum state, due process forbids courts sitting in that state from rendering a judgment that will bind that defendant.

Courts and lawyers in the United States must also cope with a second jurisdictional boundary—this one between the powers of state and federal courts. The Constitution created a federal government but made the federal government supreme only in certain areas. In other areas the states are sovereign, and in still others federal and state governments share power.

The centuries since the ratification of the Constitution have seen numerous political struggles and a bloody civil war fought over the location of the line between state and federal powers. That continuing struggle is reflected in the realm of civil procedure. State and federal governments both have court systems. But because of limits on federal power, federal courts can hear only certain kinds of cases. Consequently litigants, their lawyers, and federal judges need to know whether a particular kind of case must be filed in federal court. Other kinds of cases can only be filed in state court. And in many others, both state *and* federal courts are available. Lawyers describe this sorting of cases between court systems as "subject matter jurisdiction."

Doctrine	Personal Jurisdiction	Federal Subject Matter Jurisdiction
Constitutional Source	Due Process Clause of the Fourteenth Amendment	Article III
Statutory Source	State and federal long-arm statutes (e.g., Rule 4(k)(1)(A))	Federal jurisdictional statutes (e.g., 28 U.S.C. §§1331, 1332, etc.)
Effect	Limits power of state *and* federal courts in any given state over cases involving defendants without sufficient connections to that state	Limits power of federal courts to certain kinds of cases

WHAT'S NEW HERE?

- In Chapter 2, we assumed that the court in question could hear the *kind of case* at issue—Neff's trespass action against Pennoyer, the Robinsons' tort claim against World-Wide and Audi, Ms. Abdouch's right-of-privacy claim against Mr. Lopez, and so on. The only question was whether the court had the power to enter a judgment against a particular *defendant*—given the defendant's connection with the state.
- In this chapter we will flip those assumptions, taking for granted that the court has personal jurisdiction over the defendant. Instead we'll ask whether the Constitution and the relevant statutes authorize a *federal court* to hear this case or whether only a state court can hear it.
- To have the requisite authority, a federal district court must have *both* personal jurisdiction over the defendant *and* subject matter jurisdiction over the kind of case. The two forms of jurisdiction are *not* substitutes for each other.
- This chapter will not explore questions of subject matter jurisdiction as they arise in state courts. Some states have special courts for, say, traffic offenses or will probates. One could not bring a tort suit or contract action in such courts because these cases would lie outside their jurisdiction.

A sketch of constitutional history reveals several political compromises that shape the structure of federal judicial jurisdiction. Read Article III, the portion of the Constitution devoted to the judiciary. You won't be surprised to see that §1 of this Article establishes a Supreme Court. But you may be surprised to learn that the Constitution views other federal courts as optional. Section 1 authorizes, but does not require, Congress to establish lower federal courts—what we know today as the courts of appeals and the district courts. Putting the question of lower federal courts into Congress's hands represented a compromise between those who feared an overly powerful federal government and those who viewed the establishment of federal courts as one of the most important goals of

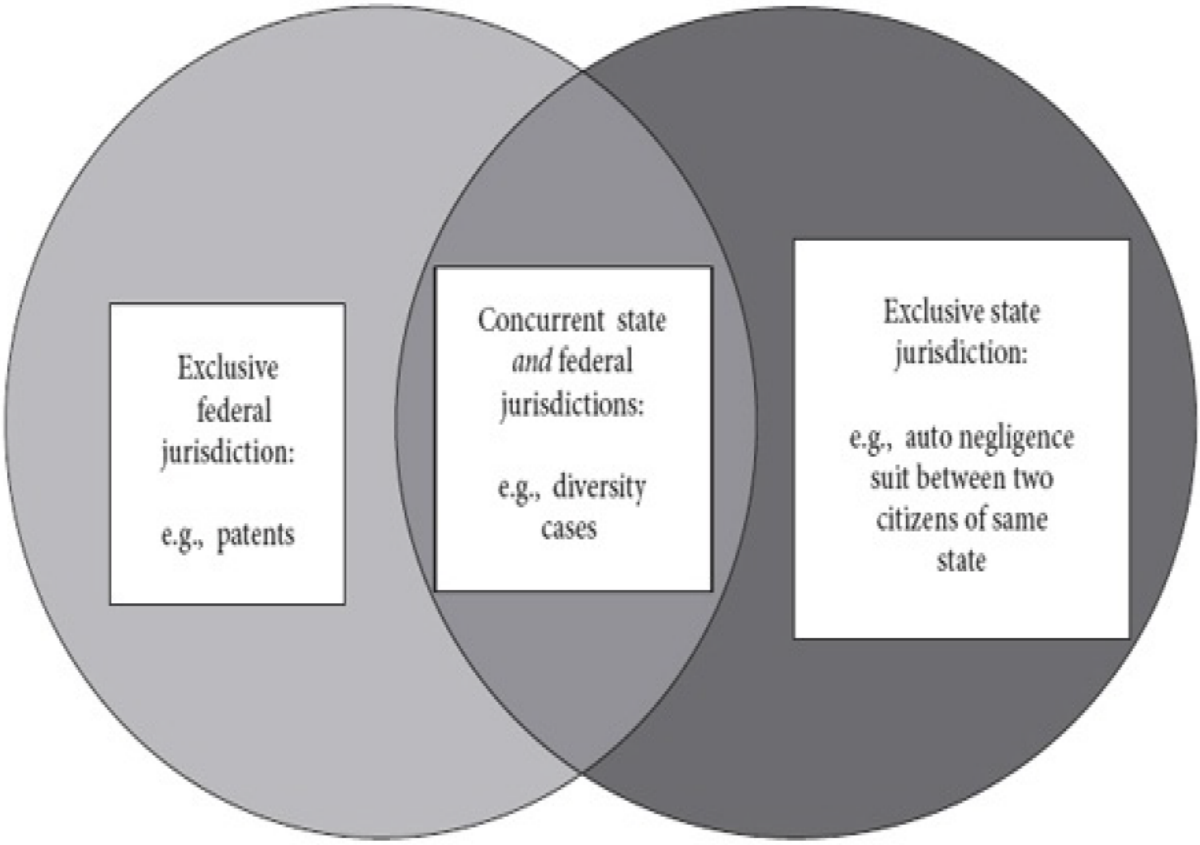
the new government. The compromise left the issue subject to changeable legislative wishes. In fact, the first Congress created lower federal courts, and their existence has never been in serious doubt since, though the exact scope of their powers has often been questioned.

Section 2 of Article III contains a second compromise, one whose terms have been fiercely contested for more than 200 years. Article III, §2 limits federal courts' jurisdiction to the list set forth in §2. By implication a case not listed in Article III, §2 may not be heard in a federal court. Such a case could be heard only in a state court. Within the boundaries of Article III, however, Congress remains free to bestow all or some of the constitutionally permissible jurisdiction on the lower federal courts.

This history has implications even in ordinary lawsuits. Because the federal courts are courts of *limited jurisdiction*, two questions lurk at the threshold of every case brought in a federal court: Does the case fall within one of the enumerated categories of Article III, §2; and has Congress further authorized the lower federal courts to assume that jurisdiction?

Rule 8(a)(1) reflects these concerns by requiring every federal complaint to begin with a "short and plain statement of the grounds for the court's jurisdiction." In judging those jurisdictional statements, the courts look to three bodies of law—the Constitution, the statutes conferring jurisdiction, and the case law interpreting both.

Skimming the jurisdictional statutes, one might not suspect another important feature: Federal courts share much of their jurisdiction with state courts.



Look, for example, at the so-called general federal question statute, 28 U.S.C. §1331. It grants federal courts jurisdiction over cases that arise under federal law. That federal courts have such jurisdiction does not seem surprising, but it may be surprising to learn that they do not have exclusive jurisdiction over such cases. So far as Congress and the Constitution are concerned, cases arising under federal law can be brought in state as well as federal courts. Lawyers describe such shared jurisdiction as *concurrent*. Like general federal question cases, diversity jurisdiction (28 U.S.C. §1332) is also concurrent. In some instances Congress has made federal jurisdiction exclusive. (28 U.S.C. §§1333 (admiralty), 1334 (bankruptcy), 1346(b) (tort suits based on negligence of a federal employee), and 1337 (antitrust).) For an example of a statute carefully discriminating between grants of concurrent

and exclusive federal jurisdiction, read 28 U.S.C. §1338. In still other instances Congress has specifically forbidden federal courts from hearing cases that might otherwise fall within their jurisdiction; for example, 28 U.S.C. §1341 forbids federal courts from enjoining state tax collection in most circumstances.

Why would a lawyer or a litigant care whether a state or federal court heard her case? Assuming some court is available, why should it matter which one? The answer has both practical and political dimensions. As a tactical matter, the reasons for seeking a federal rather than a state court range from the practical (some federal courts presently have shorter waiting times until trial than their state counterparts) to the strategic (is the defendant likely to get a more sympathetic hearing from the local state judge than from the federal judge in a city at the other end of the state; will a six-person federal jury, drawn from a broader geographic area and required to reach a unanimous verdict, be likely to award higher—or lower—damages than the state jury, which may have 12 members and may be allowed to reach a non-unanimous majority verdict; are federal judges more inclined to enforce arbitration agreements than state judges; is the federal bench generally more liberal or conservative than the state court bench in the particular jurisdiction?) to the crafty (is the opposing lawyer uncomfortable with the generally more formal conduct and faster pace of federal litigation?).

On a different plane, note that Article III, §1 gives federal judges lifetime tenure, a protection that shields them from political pressure. So a litigant with a legally strong but unpopular claim or defense might prefer federal court. The limited jurisdiction of the federal courts also shields them, however, from certain kinds of cases: Family law disputes, for example, are not part of the federal docket. These dual insulations—from political pressure and from a broad caseload—may work in opposite directions. Arguing that federal courts possess a range of virtues ranging from greater competence to "class-based predilections favorable to constitutional enforcement," a civil rights litigator once argued that in virtually every conceivable situation the federal courts would be more hospitable to his clients' claims. Bert Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105 (1977). More recently, another similar litigator argued that for his gay and lesbian clients, the state courts' closer ties both to the local community and their broad mix of cases make them the superior forum. William Rubenstein, *The Myth of Superiority*, 16 Const. Comment. 599 (2000). So even experienced lawyers believe it matters whether a state or a federal court hears the case—even in instances when the two courts would be applying the same substantive law. This proposition sets the stage for an exploration of federal subject matter jurisdiction.

B. FEDERAL QUESTION JURISDICTION

PERSPECTIVES

The Shifting Pattern of Federal Subject Matter Jurisdiction

Today, most would intuitively assume that federal trial courts have jurisdiction to hear all cases involving federal law. In fact, that assumption has not been true for much of the nation's history and is true today only in a limited form. Why?

The Framers of the Constitution agreed there should be a Supreme Court, but disagreed sharply whether there should be any lower courts. The resulting impasse, visible in Article III, authorized but did not require Congress to create lower courts. In fact, in 1789 the very first Congress passed a Judiciary Act that exercised the option given it by Article III to expand the federal judiciary beyond the Supreme Court. In choosing to create what the Constitution calls "inferior" federal courts, Congress bestowed on those courts some but not all of the jurisdiction allowed under Article III.

Among the most important early grants of jurisdiction were diversity and admiralty. Combined, these two jurisdictional grants gave federal courts jurisdiction over most significant interstate and international trade.

Most striking from a modern perspective is the absence of any general federal question jurisdiction. There were individual statutes, for example, patents and federal pension laws, but federal courts had no general power to entertain claims based on federal law. That may not have mattered much in an age when there weren't enough federal statutes to create a lot of such claims.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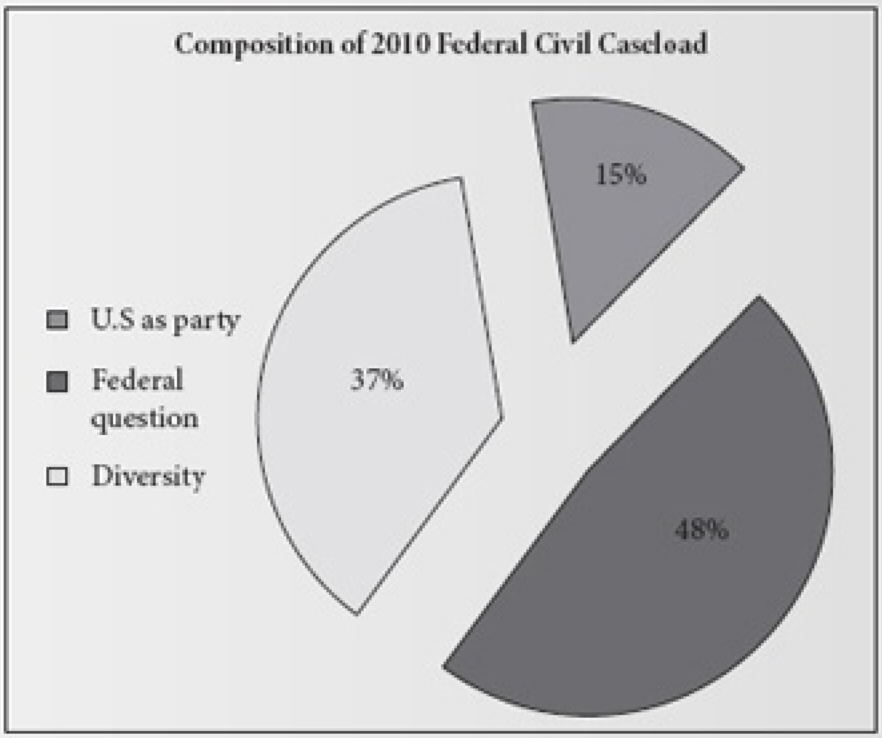

After the Civil War had reshaped understandings of federalism and, in particular, the federal courts' role in the enforcement of civil rights, Congress in 1875 enacted a general federal question statute.

Today, three kinds of cases dominate the federal district court civil docket—federal question cases are almost half, diversity cases a bit more than a third, and cases that land in federal court because the United States is a party, 15 percent.

The broadest grant of federal question jurisdiction appears in 28 U.S.C. §1331. The key provision of that statute gives district courts jurisdiction over cases "arising under" the Constitution, statutes, or treaties of the federal government.

The difficulty comes in deciding what it means for a case to "arise under" federal law. Before you despair, bear in mind that the basics are quite straightforward, although not intuitive. As a preface to our exploration, consider the following two cases.

1. Worker contends that Employer has violated the federal Fair Labor Standards Act, which, among other things, establishes a minimum wage for certain employees. Employer does not contest the applicability of the statute or the amount of the minimum wage but instead asserts that Worker has overstated the number of hours he has worked and is for that reason not entitled to the pay he seeks. Consider what issues will be contested.
2. Plaintiff claims that Newspaper has libeled her. Newspaper's defense rests on a body of law that the courts have extrapolated from the First Amendment. Specifically, it relies on a body of U.S. Supreme Court cases holding that media defendants in libel cases may prevail—even if they have published false and injurious information—so long as they have not been negligent in, for example, checking their sources. Newspaper concedes the inaccuracy of its article but nevertheless believes that it has such a First Amendment defense. Consider what the contested issues in the second case will be.

As an intuitive matter, which of these cases should be in federal court? Now consider how the following case affects the answer to this question.

Louisville & Nashville Railroad v. Mottley

[Erasmus and Annie Mottley were injured in a railway accident. To settle their claims, the railroad in 1871 gave them a lifetime pass good for free transportation on the line. Several decades later, Congress, believing that railroads were using free transportation to bribe public officials, made free passes unlawful. The railroad thereupon refused to honor the Mottleys' passes, citing the new federal legislation. The Mottleys sued in federal court seeking specific performance of their settlement. "The bill[, that is, the complaint,] further alleges: First, that the act of Congress referred to does not prohibit the giving of passes under the circumstances of this case; and, second, that if the law is to be construed as prohibiting such passes, it is in conflict with the Fifth Amendment of the constitution, because it deprives the plaintiffs of their property without due process of law. The defendant demurred to the bill." The federal trial court overruled the demurrer and granted the Mottleys the relief they had requested. Defendant railroad appealed to the 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 that part of the act of Congress of June 29, 1906 (34 Stat. 584), which forbids the giving of free passes or the collection of any different compensation for transportation of passengers than that specified in the tariff filed, 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 Fifth 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 and laws of the United States." [The Court cited the then-current version of the "arising under" jurisdiction statute.] 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, "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 & Montana Consolidated Copper & Silver Mining Company v. Montana Ore Purchasing Company, 188 U.S. 632, the…cause was held to be beyond the jurisdiction of the Circuit Court, the court saying, by Mr. Justice Peckham:

> **It would be wholly unnecessary and improper in order to prove complainant's cause of action to go into any matters of defence which the defendants might possibly set up and then attempt to reply to such defence, 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 defence and then make an answer to it before the defendant has the opportunity to itself plead or prove its own defence is inconsistent with any known rule of pleading so far as we are aware, and is improper.**
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> **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 defence is and, if anything more than a denial of complainant's cause of action, imposing upon the defendant the burden of proving such defence.**
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> **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.**
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> **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 defence of defendants would be and complainant's answer to such defence. Under these circumstances the case is brought within the rule laid down in Tennessee v. Union & Planters' Bank, 152 U.S. 454 [holding that such cases do not arise under federal law].**

…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 for want of jurisdiction.

WHAT'S NEW HERE?

- Everyone agreed that the only significant questions in the case were how to interpret a federal statute and whether that statute, if interpreted to cover the Mottleys, was constitutional. But the Supreme Court held that the lower court lacked jurisdiction to hear that case and, because the lower court lacked jurisdiction, the Supreme Court could not hear the appeal.
- Why did the trial court lack jurisdiction? Because at its heart the Mottleys' complaint was for breach of contract (the settlement agreement). Yes, the complaint referred to various defenses the railroad might (and did) raise, but those anticipated defenses were not part of a "well-pleaded complaint" for breach of contract.

Notes and Problems

1. Explain why the federal trial court lacked jurisdiction.

2. Look back at the two hypothetical cases in the text preceding *Mottley—Worker v. Employer* and *Plaintiff v. Newspaper*. Under the principle applied in *Mottley*, which case will "arise under" federal law?

3. Who raised the question of federal jurisdiction in *Mottley*?

a. If both parties were prepared to argue the merits of the case, how could a court justify dismissal on a ground unrelated to those merits? See Federal Rule 12(h)(3) for another example of the importance federal courts attach to their subject matter jurisdiction.

b. After suffering dismissal in the Supreme Court, the Mottleys refiled their suit in state court. It again made its way to the U.S. Supreme Court. The Mottleys lost again, this time on the merits. 219 U.S. 467 (1911). Is this any way to run either a railroad or a judicial system? Before answering, consider the "Implications" box below and the note following it.

c. The second *Mottley* Court remarked in passing, "It may be, as suggested, that a refusal to enforce the agreement of 1871 will operate as a great hardship upon the defendants in error"—before going on to uphold the railroad's refusal to honor the passes. Before condemning the Justices as entirely cold-hearted, note that the initial jurisdictional decision gained for the Mottleys three additional years of free rides (while the case was being relitigated in the state courts)—a circumstance of which one suspects the justices would have been aware.

Implications

PLEADING RULES AND JURISDICTIONAL TESTS

Mottley exemplifies the "well-pleaded complaint" rule, one rather rigid but widely used approach to a difficult problem. Can one justify this approach? An enormous number of claims have some federal ingredient in their background. For example, as Charles Wright pointed out, land title in most western states can be traced back to U.S. land grants. Wright, Federal Courts 104. Large numbers of checks and online payments clear through Federal Reserve banks. Does every question of land title or every suit on a bad check arise under federal law and thus belong in federal court? If one answers that question "no," then one has to find a principled way of sorting claims in which federal questions have some central importance from those in which they are merely background assumptions.

Mottley chooses to sort roughly, based on the pleadings: The federal claim must appear as part of a well-

pleaded complaint. That approach has at least one important advantage: It permits the sorting to occur at the start of the lawsuit before the parties and court have invested much time. To see the force of this point, consider the opposite extreme: One could, theoretically, postpone a decision on jurisdiction until after trial, to see whether an important question of federal law had emerged, and dismiss if it had not, allowing the case to start all over in state court. Not too surprisingly, not even the fiercest critic of *Mottley* has suggested taking things this far.

There are also some disadvantages to the *Mottley* approach. First, it eliminates cases, like *Mottley* itself, in which the central issue was a federal defense rather than a part of the plaintiff's claim. Second, the rule may make less sense now than it did when framed. In 1908, pleadings (under either common law or code pleading regimes, discussed in Chapter 6) required considerably more detail than they do under the Federal Rules. Under a notice pleading regime, in some cases it may be difficult to apply the *Mottley* approach because the complaint may offer rather little information.

4. It is clear that the restrictive reading *Mottley* (and numerous other cases) gives to "arising under" is not constitutionally required. Why? After all, both Article III and §1331 speak of cases "arising under" federal law; could that phrase mean different things in the Constitution and in the statute? Yes: the Supreme Court in several cases has said that the meaning of "arising under" in Article III is broader than the same phrase in §1331. Consider what that means.

a. Because the constitutional meaning of "arising under" is broader than its statutory meaning, the Supreme Court (operating under the broader constitutional definition) had jurisdiction to hear and decide *Mottley* the second time around, even though it previously decided that the district court (operating under the narrower statutory definition) did not have jurisdiction. Be sure you understand why before moving on.

b. As a further corollary, Congress could change the result in *Mottley* by amending §1331. It might, for example, provide that the district courts have original jurisdiction over cases "in which an essential element either of a claim or defense rests on federal law." Should Congress do so?

5. When a defendant challenges federal question jurisdiction in district court, one of three questions commonly arises:

a. Is there a federal issue at all? If the plaintiff's claim is based on some federal statute or regulation, the problem consists in interpreting legislation. If the plaintiff claims the right to relief under federal common law, the question is whether such federal common law exists.

b. Assuming there is a federal issue, does it "give rise to" plaintiff's claim? That is the question in *Mottley*.

c. If there is a federal issue that is not the basis for plaintiff's claim, is it sufficiently important to "federalize" the case?

6. *Mottley*'s bright-line test suggests that the answer to 5c is simple: No. But alongside this broad and straight mainstream view flows a narrow and meandering rivulet. In this second line of cases the federal courts have assumed "arising under" jurisdiction on the basis of something less—or different—than a claim depending on federal law. Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921), is the poster child for this more expansive view. In *Smith*, the plaintiff alleged that the defendant bank as trustee had violated a state law allowing it to invest only in legal securities. Thus stated, the suit would seem to arise entirely under state law regulating trustees. But the allegedly "illegal" securities were bonds issued by a federal agency under a federal law that plaintiff claimed was unconstitutional. Held: "arising under" jurisdiction. Is *Mottley*, not cited in *Smith*, distinguishable?

Implications

OTHER TESTS FOR ARISING UNDER JURISDICTION

Smith and other cases in this line propose an alternative to the well-pleaded complaint rule. They try to identify when a state law claim is sufficiently "federalized" that it should fall within the original jurisdiction of the district courts. That task is difficult, and the federal courts have wrestled with it for a century.

The Supreme Court's most recent effort came in Grable & Sons Metal Prod. Inc. v. Darue Eng. & Mfg., 545 U.S. 308 (2005). Land was sold to satisfy an Internal Revenue Service lien for unpaid taxes. To assure that it had clean title, the purchaser of the land brought a quiet title action in state court, at which point the original owner of the land challenged title, alleging that the notice of the sale was inadequate. Defendant sought to remove to federal court, arguing that the underlying issue was the adequacy of the IRS system of notice in their tax sales.

Federal question jurisdiction was proper, said the Court. In a unanimous opinion *Grable* set out a three-part test for such federalized claims: "[T]he question is, does a state-law claim [1] necessarily raise a federal issue, [2] actually disputed and substantial, [3] which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." Id. at 314. Lower courts interpreting this test have overwhelmingly remanded such cases to state courts, usually concluding, without much analysis, that the case fails the third of the *Grable* criteria.

Those of you who take a course in federal jurisdiction in law school will spend time puzzling over these cases.

a. What's going on in this "broader" *Smith* line of cases, cases like *Grable*? One way of explaining them is to say that the courts thought the federal law interests were important. Important in what way? A monumentally important case with a federal ingredient will eventually make its way to the Supreme Court, which, you'll recall, has a broader "arising under" jurisdiction than do the district courts. For these cases it makes little difference whether the case is initially heard in a state or federal court.

b. But the Supreme Court currently hears fewer than a hundred cases a year. So as a practical matter most federal issues litigated in state courts will never reach any federal court. The battle in the statutory "arising under" cases is fought over which federal issue cases should be heard in federal trial and intermediate appellate courts. One thoughtful analysis puts the question like this:

> Federal issues might be raised in a large number of cases, but the claimants of federal rights often are wrong in their view that federal law protects them. They would therefore lose on the federal issue, and they could win only on state law grounds. If "arising under" were interpreted expansively, many cases in federal court on the basis of "arising under" jurisdiction would be disposed of on state law grounds.…What is needed is a test that will screen out cases in which federal interests are unlikely to be strongly implicated. Can the following considerations be combined to produce a "test"? (i) What is the national interest in disposing of the case as a whole—with federal fact-finding—in the federal courts, as compared to the interest of disposing of it in the state courts? (ii) How likely is it that the national interest will in fact be implicated? (iii) How likely is it that the Supreme Court will use its limited resources to decide the federal issue where the record is made in the state court?
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> Howard Fink & Mark Tushnet, Federal Jurisdiction: Policy and Practice 396 (2d ed. 1987).

Recall that these questions—if these are the right questions—must be decided at a very early stage, with nothing more than the pleadings before the court, and you will understand why courts and scholars have struggled over the question for a century.

7. As you will see in Chapter 5, the federal Declaratory Judgment Act, 28 U.S.C. §§2201-2202, empowers federal district courts to hear certain cases in which a potential defendant seeks not a coercive remedy but a declaration of rights. Thus, for example, an insurance company might seek a declaration of nonliability under an insurance contract, or a manufacturer might seek a declaration that a device did not infringe an existing patent.

a. How does one apply the well-pleaded complaint rule to such cases? The question is made more difficult by a well-established understanding that the Declaratory Judgment Act did not expand the jurisdiction of the federal courts.

b. There is body of law wrestling with this question, with results too complex to summarize here. But some cases are simple. Suppose a patent-holder believes that a competing business is infringing his patent. He could sue for damages or file for an injunction, and such a suit would "arise under" federal law. Believing that proof of damages or of the requisites for injunctive relief would be expensive, he simply sues for a declaration that the competitor is infringing his patent. The claim for relief arises under federal law.

8. A case can start out as a federal case, but then lose its federal status after a judgment or settlement.

a. Plaintiffs sue defendants on a claim arising under federal law. The parties then settle the case by signing an agreement. The case is dismissed by agreement of the parties in an order that makes no reference to the settlement agreement. Plaintiff then sues defendant for violation of the agreement. Is there federal question jurisdiction? No: The settlement agreement is an ordinary contract whose breach does not arise under federal law; if the conditions for diversity jurisdiction do not exist, the plaintiff will have to go to state court to enforce the agreement. But if the parties had embodied their agreement in a consent decree (which would have been part of the court's judgment), its breach would arise under federal law because federal courts have jurisdiction to enforce their own judgments. Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375 (1994).

b. Sally borrowed money from Frank, giving him a mortgage as security. She then declared bankruptcy and, in a federal bankruptcy proceeding, Frank's interest was transferred to Joe. (Recall that there is exclusive federal jurisdiction over bankruptcy.) Through an error, however, the transfer to Joe was never properly recorded. Frank now sues Joe, alleging that he still holds a mortgage on the property. Joe seeks to remove the case to federal district court, arguing that Frank's lawsuit calls into question the validity of the federal

bankruptcy judgment and thus "arises under" federal law. Held: No, in Rivet v. Regions Bank, 522 U.S. 470 (1998) (claim preclusion based on a prior federal judgment is a defense, so the claim does not arise under federal law, citing *Mottley*).

Procedure as Strategy

Effective lawyers practicing in federal court must learn the sometimes complex boundaries of federal subject matter jurisdiction. They must also learn the consequences of various strategic decisions associated with raising the lack of subject matter jurisdiction in a case. Suppose, for example, you represent a defendant in a case filed in federal district court and you think that there is no basis for federal subject matter jurisdiction over one or more claims in the case. You also think that there's an argument that the claim should be dismissed on Rule 12(b)(6) grounds, for failure to state a claim. You move to dismiss under both Rule 12(b)(1) and Rule 12(b)(6). Does it matter how that motion to dismiss is decided?

- If the federal court grants the motion to dismiss on Rule 12(b)(1) grounds, ruling that the case does not arise under federal law, plaintiff can now refile the same claim in state court. All the dismissal established was that the claim did not arise under federal law; that's entirely consistent with its arising under state law.
- If the federal court grants the Rule 12(b)(6) motion and the plaintiff refiles the same claim in state court, can defendant argue that the federal dismissal requires dismissal of the state claim? As you will see in Chapter 11, except under special circumstances, a federal Rule 12(b)(6) dismissal operates as a judgment on the merits disposing of the claim. A state court is bound to respect that judgment.

Suppose you represent a defendant in a case filed in federal district court and you think that there are grounds to bring a motion to dismiss both for lack of subject matter jurisdiction and for lack of personal jurisdiction. If either challenge is well founded, the case will be dismissed. But a dismissal will have different consequences for a refiled suit, depending on which ground is used for dismissal.

- If a case is dismissed for want of federal subject matter jurisdiction, a plaintiff is free to refile the suit in state court because the judgment establishes only the lack of federal jurisdiction, leaving the state court open.
- If the case is dismissed for want of personal jurisdiction, principles of former adjudication (Chapter 11) preclude plaintiff from refiling in state court in the same state because the federal court's decision that personal jurisdiction is lacking will bind the state court.
- Under those circumstances, should a federal court faced with motions to dismiss on both grounds always take subject matter jurisdiction first, because that will have the narrowest subsequent effect? No, the Supreme Court has said; the discretion of a trial court to handle its docket allows it to dismiss for want of personal jurisdiction if that is the most obvious ground, even though that will preclude subsequent state-court litigation in that state. Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999).

Now suppose that the defendant does not move to dismiss. Is the objection to subject matter jurisdiction waived? No: As *Mottley* demonstrates, the requirement of subject matter jurisdiction is held to be so fundamental that a court is required to raise the issue *sua sponte* (on the court's own motion) and dismiss if it finds a lack of jurisdiction. In Capron v. Van Noorden, 6 U.S. 126 (1804), plaintiff sued defendant in federal court and lost. On appeal in the Supreme Court, plaintiff suggested a lack of jurisdiction because of lack of diversity. The Supreme Court dismissed the case, leaving the plaintiff free to try again in state court (assuming that the statute of limitations had not yet run).

Given the draconian rules about the nonwaivability of federal subject matter jurisdiction, one might expect it would be easy to mount a collateral attack on a judgment alleged to be without federal jurisdiction. In fact, the answer is "probably not," though the few cases that have dealt with this question have not been resolved consistently. To get a feel for the problem, consider three situations: (1) defendant appears, challenges subject matter jurisdiction and loses; (2) defendant appears, fails to challenge subject matter jurisdiction, but loses on the merits; and (3) defendant defaults. In each case, the question is whether in a second lawsuit the former defendant may seek to avoid the effect of the first judgment by arguing that the court lacked subject matter jurisdiction.

- Parties who appear, challenge the subject matter jurisdiction of a federal court, and lose are bound by that determination; just as with personal jurisdiction, they may not thereafter challenge the judgment in a second action. Stoll v. Gottlieb, 305 U.S. 165 (1938); Durfee v. Duke (infra page 768).
- Similarly, and again as with personal jurisdiction, parties who have appeared but failed to challenge the

subject matter jurisdiction of a district court may generally not thereafter attack its judgment in another court for lack of diversity or federal question jurisdiction—absent a statute authorizing such a challenge. Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1939); Kalb v. Feuerstein, 308 U.S. 433 (1940).

- What about defendants who entirely default? Were they objecting to personal jurisdiction, they would be entitled to attack collaterally under the doctrine of *Pennoyer*. May they collaterally attack subject matter jurisdiction in the same way? Here one cannot be certain. The only entirely safe statement is that the Court has not clearly resolved the question. As one commentator put it, using an example from state rather than federal subject matter jurisdiction:

> The proverbial case involves a justice of the peace who has undertaken to grant a divorce [thus clearly overstepping his subject matter jurisdiction]. [W]ould [one] require the respondent in such a case to appear before the justice under penalty that otherwise the divorce would be legally valid[?] I cannot believe that any court would hold that.
>
> Geoffrey C. Hazard, Jr., *Revisiting the Second Restatement of Judgments Issue Preclusion and Related Problems,* 66 Cornell L. Rev. 564, 591 (1981).

WHAT'S NEW HERE?

- Either by negligence or purposely, a defendant can waive her objections to personal jurisdiction. See Rule 12(h).
- Unlike personal jurisdiction, federal subject matter jurisdiction cannot be waived. Not only can a party—even the party who invoked federal jurisdiction in the first place—raise the issue belatedly, but the court can raise it on its own motion, even on appeal—which is what happened in *Mottley*.
- When and whether a defendant raises subject matter jurisdiction may determine whether a case can be refiled in another court.

C. DIVERSITY JURISDICTION

Diversity jurisdiction was among the earliest congressional grants to the lower federal courts. The underlying justification, however, has remained obscure, and the grant has come under regular attack. The following excerpt from a congressional committee report sums up the mystery:

> Federal diversity of citizenship jurisdiction is made possible by Article III of the Constitution which was drafted to permit, but not mandate, Federal court jurisdiction based on "controversies between citizens of different States" and "between a State, or the citizens thereof, and foreign States, citizens or subjects."…
>
> The debates of the Constitutional Convention are unclear as to why the Constitution made provision for such jurisdiction; nor is pertinent legislative history much aid as to why the First Congress exercised its prerogative to vest diversity jurisdiction in the Federal courts.
>
> Abolition of Diversity of Citizenship Jurisdiction, H.R. Rep. No. 893, 95th Cong., 2d Sess. 2 (1978).

The Supreme Court has stated one understanding of diversity's justification, contrasting it with "arising under" jurisdiction:

> In order to provide a federal forum for plaintiffs who seek to vindicate federal rights, Congress has conferred on the district courts original jurisdiction in federal-question cases—civil actions that arise under the Constitution, laws, or treaties of the United States. 28 U.S.C. §1331. In order to provide a neutral forum for what have come to be known as diversity cases, Congress also has granted district courts original jurisdiction in civil actions between citizens of different States, between U.S. citizens and foreign citizens, or by foreign states against U.S. citizens. §1332.
>
> Exxon-Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 552 (2005).

In some instances Congress has legislated in ways suggesting a broader function for diversity than providing a neutral forum. For example, the Class Action Fairness Act of 2005 (discussed in more detail, infra pages 854-55) appears to depend on a "national case" justification. The idea would be that some cases have national scope and

implication and should be heard in a federal court, even if the governing law is state law. For our purposes the question is not whether the "neutral forum" or the "national case" justification for diversity is correct. Instead it is how uncertainty about diversity's purpose plays itself out in the cases.

Redner v. Sanders

2000 WL 1161080 (S.D.N.Y. 2000)

GRIESA, J.

Plaintiff in this action asserts that federal jurisdiction is based on diversity of citizenship. Defendants move under Fed. R. Civ. P. 12(b)(1) to dismiss for lack of jurisdiction. The motion is granted.

The complaint alleges that plaintiff "is, and at all times herein mentioned was, a citizen of the United States residing in France," and that two individual defendants are residents of the State of New York and the corporate defendant has its principal place of business in New York. The complaint avers that diversity jurisdiction exists because plaintiff "is a resident of a foreign state, while defendants are residents of the State of New York." The applicable statute is 28 U.S.C. §1332, which provides in pertinent part:

> **(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—**
> **(1) citizens of different States;**
> **(2) citizens of a State and citizens or subjects of a foreign state....**

Plaintiff apparently seeks to invoke subsection (a)(2) as a basis for jurisdiction. However, plaintiff's complaint speaks of *residence* whereas the statute speaks of *citizenship*. The two are not synonymous.

It appears in fact that defendants are citizens of the State of New York. But for jurisdiction to exist under (a)(2) plaintiff would need to be a citizen of a foreign state, not merely a resident, and the complaint itself alleges that plaintiff is a citizen of the United States. Thus the case does not involve an action between citizens of the United States and a citizen of a foreign state. There is no jurisdiction under §1332(a)(2).

In responding to the motion, plaintiff does not really defend the idea of jurisdiction based upon his location in France, but shifts the ground to a discussion of his connection with California. Plaintiff has filed an affidavit stating that he was raised and educated in California commencing in 1948, and that while he has resided in France for the last several years (his attorney's brief says since 1990), he has maintained certain contacts with California, including a license to practice law, and a law office there which he states he has visited at least four times a year since living abroad. He has a California drivers' license. He recently solicited two San Francisco law offices for possible employment, although there is no indication of any affirmative response. Plaintiff's affidavit states that he has "not given up the idea of returning to California" and that he considers California as his domicile.

To the extent that plaintiff now argues for a California domicile, it would appear that he might be attempting to lay a basis for jurisdiction under §1332(a)(1). This subsection would, of course, allow a citizen of California to invoke diversity jurisdiction in a suit against citizens of New York. A person is a citizen of a state of the United States within the meaning of 28 U.S.C. §1332 if he is a citizen of the United States and is domiciled within the state in question. Newman-Green Inc. v. Alfonzo-Larrain, 490 U.S. 826, 828 (1989).

However, plaintiff's factual submission is not sufficient to demonstrate a California domicile. Plaintiff's affidavit is entirely lacking in details about what his living in France has involved. Plaintiff provides no information about exactly where he lives, what kind of a residence he has, whether he has any family in France, or what professional activities he carries out in France.

Moreover, despite the discussion of domicile to some extent, neither plaintiff's affidavit nor his attorney's brief actually asserts the claim that there is jurisdiction on the basis of a California domicile or makes a request to amend the complaint to assert such a claim.

The action is dismissed for lack of subject matter jurisdiction. This dismissal is without prejudice.

WHAT'S NEW HERE?

- As with §1331, the federal question statute, the courts read §1332 very carefully. It's not enough that there are "a bunch of people not from the same state." Instead the courts insist that the diversity required exactly match one of the statutory definitions.
- "Citizen" takes on different meanings, depending on which section of §1332 one is reading. To be a "citizen" of France means that one is a French national, having taken an oath of allegiance to the Republic of France,

with all the political rights and obligations that entails. To be a "citizen" of California, for diversity purposes, means simply that one is present with the intent to remain.

Notes and Problems

1. Does this decision mean that Redner cannot sue Sanders in the United States?

2. How did Redner's lawyer make such an elementary mistake? Putting aside the possibility of carelessness or ignorance, consider the possibility that the error was induced by the way in which the underlying statute has been interpreted.

a. On one hand the courts read the statute's sections quite literally; if a given case does not fit into one of §1332's several categories, it does not fall within diversity jurisdiction—regardless of whether one might, in a very loose and intuitive way, perceive the parties as "diverse."

b. On the other hand, because the statute does not define the meaning of state "citizenship," and because, unlike the national government, states do not issue any formal documents to show that one is a "citizen" of California or Florida or Illinois, courts have developed a test of state citizenship. The standard doctrinal formulation says that state citizenship depends on present domicile and intent to remain indefinitely. That test is easy to apply for most people, who have a single clear affiliation.

c. But, like Mr. Redner, many people may reside "temporarily" in a different place for considerable periods. Thus a student who was attending law school in New York might for diversity purposes still be a citizen of Florida. In such cases, much may turn on intent, as demonstrated by external indicia. Consider, for example, *Hawkins v. Masters Farms*, supra page 7. Notice that the factual issues involved in such determinations can require significant inquiry at the outset of the lawsuit, inquiry unrelated to the merits of the case. Does this make the relatively mindless simplicity of the well-pleaded complaint rule look better by comparison?

d. Notice the "neutral forum" justification for diversity lurking in the background of *Redner*: If the original congressional intent (in 1791) lay in the concern that courts of one state might discriminate against the citizens of another state—then Redner's residence in France "de-statified" him, and thus eliminated concern that New York courts would discriminate against a Californian.

3. Suppose Redner's lawyer explains (with some embarrassment) to his client (also a lawyer!) why his case has been dismissed. Both still believe that federal court is by far the best forum for the case and would like to refile it in federal court. Can they?

a. The time for measuring citizenship for diversity purposes is as of the date on which the complaint is filed in federal court. That is true even if the plaintiff has moved to another state for the sole purpose of establishing diversity:

> On May 5, 1997, plaintiff filed an…action in Kansas state court. At the time, plaintiff was domiciled in Kansas. Shortly after filing suit, plaintiff moved to Oklahoma and became domiciled there. Plaintiff voluntarily dismissed his state action on January 10, 2000, then filed this case on February 1, 2000.
>
> Plaintiff alleges that this Court has diversity jurisdiction under 28 U.S.C. §1332. Defendant contends that the parties are not truly diverse. The complaint shows otherwise. Diversity of citizenship is determined at the commencement of the action. Commencement of the action occurs at the time the complaint is filed. When plaintiff filed his complaint here, he was a citizen of Oklahoma. Defendant does not contend otherwise. Rather, defendant argues that the Court must refer back to May 5, 1997, when plaintiff filed his state action.…
>
> Defendant notes that plaintiff could not have removed his original state action to federal court and argues that plaintiff should not be allowed the "tactical advantage" of doing essentially the same thing now.…Federal subject matter jurisdiction… does not focus on whether a party is attempting to gain a tactical advantage. Litigants constantly attempt to gain so-called tactical advantages in various ways, including both removing cases and avoiding removal. Defendant cites no authority for the proposition that subject matter jurisdiction is defeated if it somehow affords one party a tactical advantage. Indeed, defendant's argument that plaintiff is attempting to gain a "tactical advantage" rings entirely hollow because defendant's argument for lack of jurisdiction appears to be nothing more than an attempt to gain his own tactical advantage—a return to state court.…
>
> Smith v. Kennedy, 2000 WL 575024 (D. Kan. 2000).

b. Having absorbed the point above, what would you advise Redner to do if he still wants to invoke diversity jurisdiction?

4. Consider two variations on the facts of the case:

a. Suppose Redner had been a French citizen. Diversity?

b. Suppose Redner had been a French citizen who had moved to the United States and, while not becoming a U.S. citizen, had become a permanent resident alien domiciled in New York. Read §1332(a)(2) and explain how it applies to this situation.

5. Suppose Redner convinces a judge that in spite of his current French residence he remains a citizen of California. At that point a citizen of California is suing two citizens of New York. Assuming the amount in controversy requirement is met, diversity jurisdiction exists. But what if Redner (whom we are now assuming is a California citizen) wants to join with Jones, a New York citizen, in suing the two New York defendants. Diversity?

a. No. Although 28 U.S.C. §1332 does not by its terms require that each plaintiff be diverse from each defendant, that interpretation was attached to the predecessor statute by Chief Justice Marshall in Strawbridge v. Curtiss, 7 U.S. 267 (1806), and has been unquestioned law ever since. Thus even in a case with multiple diverse parties the existence of a single party with the same state citizenship as that of an opposing party will destroy diversity. As an opinion written more than 200 years after *Strawbridge* explained it:

> 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.
>
> Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 553 (2005) (emphasis added).

b. Explain the reasoning behind this passage: How would "[t]he presence of parties from the same State on both sides of a case dispel" concern that the forum would not be neutral?

c. At the time *Strawbridge* was decided and the complete diversity rule was framed, joinder was limited and comparative negligence unknown. Fast-forward to a 2016 traffic accident involving three cars. N.J. plaintiff sues N.Y. defendant and N.J. defendant for negligently inflicted injuries; both defendants counterclaim against plaintiff, and N.J. defendant cross-claims against N.Y. defendant. Because diversity is incomplete, the case will be heard in a state court, let us say in N.J. In such a case, a N.J. judge or jury could still express bias against the N.Y. defendant by finding for the N.J. plaintiff on his claim and finding for the N.J. defendant on his cross-claim, thus throwing all the liability on the N.Y. codefendant. Section 1332 does not account for or protect against such a possibility.

WHAT'S NEW HERE?

- Like the well-pleaded complaint rule for "arising under" jurisdiction, the requirement of complete diversity flows from a judicial interpretation of a jurisdictional statute—not from Article III.
- Like the well-pleaded complaint rule, courts have consistently enforced the complete diversity requirement for a very long time—more than two centuries in the case of complete diversity.
- Like the well-pleaded complaint rule, the long-standing interpretation applies only to the particular jurisdictional statute in question. The analogous constitutional provision and other statutes receive a broader interpretation.

Implications

WHEN "BARE" DIVERSITY IS ENOUGH

The Constitution, as opposed to §1332, requires only minimal diversity, that is, at least one claimant diverse in citizenship from another. State Farm v. Tashire, 386 U.S. 523 (1967). That means that Congress can—in settings

other than the general diversity statute—authorize a federal court to hear cases where complete diversity is lacking. Several federal statutes rest on the proposition that minimal diversity satisfies Article III.

- The Federal Interpleader Act, 28 U.S.C. §1335, discussed in Chapter 12 (infra pages 836-39) provides for federal jurisdiction so long as any claimant to a disputed fund is of citizenship different from that of any other. The legislative history of this statute suggests that legislators thought that without it, courts of different states could issue conflicting judgments awarding the same property to different claimants.
- The Class Action Fairness Act of 2005 (codified in scattered sections of 28 U.S.C., including §1332(d) and known as CAFA) provides for federal diversity jurisdiction in class actions over amounts in excess of $5 million in which "*any* member" of the class possesses the requisite diversity based on state or foreign citizenship. The legislative history suggests that Congress was concerned that state courts were hearing and deciding class actions in which many or most members of the class came from other states; it reached for diversity jurisdiction as a way to address this problem.

Do the federal Interpleader Act and CAFA suggest a "national case" justification for class actions, in addition to the traditional "neutral forum" basis?

6. Suppose a court faces a case where there is diversity, but also a nondiverse party. Must the entire case be dismissed? No: Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826 (1989), permitted a court to retain jurisdiction by dismissing a nondiverse party not held to be indispensable. See Rule 19 and infra page 812.

7. Apply the statutory language to the following cases, assuming that in each case, the amount in controversy requirement is met:

a. A citizen of Mexico sues a citizen of Japan. §1332(a)(2)-(4).

b. A citizen of California sues citizens of Mexico and Japan. §1332(a)(2).

c. A citizen of California and a citizen of Mexico sue a citizen of New York and a citizen of Japan. See §1332(a)(3).

d. Finally, suppose the same facts as in 7c, and the citizen of New York drops out. At that point a citizen of California and a citizen of Mexico are suing a citizen of Japan. The case no longer falls within §1332(a); do you see why? (And if you belong to the "neutral forum" school of thought regarding diversity, that makes sense because, with foreign citizens on both sides of the case, a state court could not discriminate against foreign citizens.) Should diversity jurisdiction extend to this situation? In what might be called a strong dictum, the Supreme Court has suggested not. Ruhrgas AG v. Marathon Oil, 526 U.S. 574 (1999) ("Marathon joined an alien plaintiff (Norge) as well as an alien defendant (Ruhrgas). If the joinder of Norge is legitimate, the complete diversity required by 28 U.S.C. §1332 (1994 ed. and Supp. III), but not by Article III,…is absent.").

8. Section 1359 of 28 U.S.C. deprives district courts of jurisdiction in those cases in which a party has been "improperly or collusively…joined" to invoke diversity jurisdiction. For example, a party wishing to invoke diversity jurisdiction cannot achieve it simply by assigning his claim to an out-of-state representative. But the courts are not unanimous in what is "improper." The statute resolves one situation: For diversity purposes the representative of a child, an incompetent, or a deceased person (appointed to administer the estate) has the same citizenship as the individual represented. 28 U.S.C. §1332(c)(2). You saw this principle in operation in *Hawkins v. Masters Farms* (Chapter 1), in which the relevant citizenship was not that of the executors but of the deceased, Mr. Creal.

9. Is a citizen of the District of Columbia (or of Puerto Rico, Guam, or another American territory not a state) a citizen of a "state" for diversity purposes? 28 U.S.C. §1332(e) says so, and its constitutionality was upheld in National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949).

10. Beyond the requirement of complete diversity, the other less than intuitive principle of diversity jurisdiction arises from corporate citizenship. Section 1332(c) provides that, unlike natural persons, corporations can have *two* states of citizenship—that of the state that incorporates them and that of their "principal place of business," if it is different from the state of incorporation. Congress added this provision in 1958 to remedy complaints that too many "home" corporations were able to invoke diversity citizenship by incorporating out of state. For decades thereafter courts struggled with inconsistent tests about how to define the corporation's "principal place of business." After half a century of disagreement, the Supreme Court stepped in to settle the matter.

Hertz Corp. v. Friend

559 U.S. 77 (2010)

Justice BREYER delivered the unanimous 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.…

[The case grew from a class action. Hertz employees in California alleged that Hertz had failed to conform to California's wage and hour laws. Hertz sought to remove to federal court, invoking diversity jurisdiction. The employees resisted with the argument that California was a principal place of business for Hertz, since it derived more revenue from that state than any other and the plurality of its business activities also occurred there. Reasoning that, because of this business activity Hertz was, like them, a citizen of California, the plaintiffs resisted removal. The District Court found that Hertz was a citizen of California, relying on Ninth Circuit precedent instructing "courts to identify a corporation's 'principal place of business' by first determining the amount of a corporation's business activity State by State. If the amount of activity is 'significantly larger' or 'substantially predominates' in one State, then that State is the corporation's 'principal place of business.'" The Ninth Circuit affirmed. The Supreme Court reviewed the history of "principal place of business" and its divergent interpretations.]

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, as applied [in a case decided shortly after the 1958 amendment to §1332 created dual corporate citizenship]. 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.…

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.

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.…

Notes and Problems

1. The version of the diversity statute with its dual definition of corporate citizenship came into being in 1958 in response to concerns that the prior law made it too easy for corporations to manipulate jurisdiction (simply by incorporating outside the state where they conducted most of their activities). Unfortunately, it became almost immediately apparent that courts and litigants would be uncertain where the principal place of business was. One might wonder why it took the Court 50 years to resolve the question—with a solution that commanded a unanimous Court.
   a. Is this an obvious solution that the Court simply did not get to for half a century given the importance of other cases on its docket?
   b. Alternatively, was the Court hoping that Congress, which had created the problem in the first place, would get around to clarifying the phrase that had given the lower courts and litigants so much difficulty?
   c. Should we worry that because the Court had left the multiple tests undisturbed for 50 years, litigants might justifiably have come to rely on them? Does this argument have less force when the Court is changing a procedural rule than one that regulates basic conduct?
2. Another question might be whether the Court reached the correct decision. Note that the Court assumes that the purpose of the diversity statute is to guard against local prejudice that might be manifested in state courts. (That is a leading theory of the basis for diversity jurisdiction, but there is as little historical basis for this theory as there is for any other.) But if that is the reason for diversity jurisdiction, does a test that ignores the likelihood of such prejudice (as the Court's New York/New Jersey example illustrates) properly apply the statute?

Implications

DIVERSITY MEETS THE PARTNERSHIP

For diversity purposes, partnerships are currently not considered as entities but as collections of individuals; thus the citizenship of each of the members of a partnership must be considered. Consider two examples:

Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567 (2004). Atlas, a Texas limited partnership, sued Grupo Dataflux, a Mexican corporation. At the time suit was filed, Atlas had a number of Texan and two Mexican partners. After losing at trial, Dataflux filed a motion to dismiss for want of subject matter jurisdiction. Held: Dismissal required. Compare this result with that in *Caterpillar Inc. v. Lewis*, at the end of this chapter.

Coudert Brothers v. Easyfind Int'l, Inc., 601 F. Supp. 525 (S.D.N.Y. 1985). Coudert was a law firm based in New York City. Most of its partners were citizens of New York, but a few partners were U.S. citizens living in France and working at their Paris office. Defendants were U.S. and foreign citizens. Coudert filed in state court and defendants sought to remove. Held: case remanded to state court. "If we were dealing with the situation

where a partnership had partners who were citizens of New York and citizens of France, there would be diversity jurisdiction under subdivision (3) of the statute. However our case is different. The status of the Coudert partners residing in France is that they are still citizens of the United States and are not citizens of France. If these partners were suing by themselves they would not fit within any of the categories referred to in the statute, since they are neither citizens of a state of the United States nor are they citizens or subjects of a foreign state.…It would appear to be a logical extension of the rules of law referred to above that the Coudert partnership is not a party who can sue in federal court under diversity jurisdiction." Id. at 526-27. See also *Redner v. Saunders*.

Note: Amount in Controversy

Besides diversity, §1332 requires an amount greater than $75,000 in controversy. Congress has from time to time increased this amount, most recently in 1997, from $50,000 to the present figure. Given modern understandings of inflation, one can imagine that Congress might "index" the amount in controversy, linking it to some widely accepted measure of inflation. (Congress has pegged post-judgment interest to the rate of widely traded government notes.) What are the arguments for—and against—such a move?

Whatever the dollar figure, the courts have treated this requirement in much the same way as they have the issue of federal question jurisdiction—that is, they have by and large viewed the allegations of the pleading as all but controlling, rather than engaging in judicial guessing about the likelihood that the plaintiff would succeed in collecting as much as he had prayed for. The leading Supreme Court case, St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 289 (1938), stated as follows:

> 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 of 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.

But the courts' trust in the pleadings is not boundless. Consider, for example, a plaintiff who brought a diversity action against a hotel, alleging its security personnel had assaulted him; the likely compensatory damages were small, but the plaintiff relied on a punitive damage count to lift him over the amount in controversy:

> Plaintiff has not provided "competent proof" to meet his burden of demonstrating the requisite amount in controversy. Instead, he argues that he satisfies the jurisdictional requirement because he is entitled to recovery of punitive damages that could result in a verdict in excess of $75,000.
>
> …[Plaintiff] has pled that the Defendants acted "intentionally," thus punitive damages are potentially recoverable under Illinois law if [he] can prove what he has alleged.
>
> Even assuming [Plaintiff] can recover punitive damages, [however,]…he would have to recover multiple times his actual damages to satisfy the $75,000 amount. Such a recovery certainly would "stretch[] the normal ratio, and would face certain remittitur." Plaintiff's mere hope for an extreme punitive award cannot be the sole basis for jurisdiction.…
>
> Salmi v. D.T. Management, Inc., 2002 U.S. Dist. LEXIS 17970 (N.D. Ill. 2002).

In another respect, the Supreme Court has suggested that the amount in controversy requirement differs from the requirement of complete diversity. The issue surfaced in Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546 (2005). In *Allapattah*, the Court had to decide whether to include within the supplemental jurisdiction granted by 28 U.S.C. §1367 (discussed infra at pages 234-42) claims held by parties who met the diversity requirement but for less than $75,000. Yes, said the court, in part because the amount in controversy requirement was less central to the idea of diversity jurisdiction:

> To ensure that diversity jurisdiction does not flood the federal courts with minor disputes, §1332(a) requires that the matter in controversy in a diversity case exceed a specified amount, currently $75,000.…
>
> [W]e 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. Strawbridge v. Curtiss. The Court…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.…
>
> 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.…
>
> 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.

Id. at 551, 553, 566.

Other significant issues in determining the amount in controversy for jurisdictional purposes are:

1. What should be done if the plaintiff asks for an injunction rather than money damages? The basic principle is to try to value the injunction, using one of several approaches: Determine the value of the injunction to the plaintiff; determine the cost to the defendant of complying; determine the cost or value to the party invoking federal jurisdiction (the plaintiff, if the action is brought in federal court, and the defendant, if the action was brought in state court and defendant is attempting to remove); and allow jurisdiction if any of the tests above yields a figure above $75,000. For a discussion of these approaches (and an application of the fourth), see McCarty v. Amoco Pipeline Co., 595 F.2d 389 (7th Cir. 1979).

2. May a plaintiff aggregate the amount sought as relief for different claims to reach the statutory minimum? Sometimes: In some circumstances, different claims may be aggregated to meet the statutory amount. Saying when that can happen is harder:

> The law on aggregation…is in a very unsatisfactory state. The traditional rules in this area evolved haphazardly and with little reasoning. They serve no apparent policy and "turn on a mystifying conceptual test."…Thus it is not altogether easy to say what the law is in this area and it is quite hard to say why it is as it seems to be.
>
> Wright, Federal Courts 210.

Some guidelines from the case law:

a. A single plaintiff with two or more unrelated claims against a single defendant may aggregate claims to satisfy the statutory amount.

b. If two plaintiffs each have claims against a single defendant, they may not aggregate if their claims are regarded as "separate and distinct."

c. If one plaintiff has a claim in excess of the statutory amount and a second plaintiff has the same claim for less than the statutory amount, both against the same defendant, the first plaintiff can sue in federal court. What about the second? Yes: so long as the second plaintiff's claim arises out of the "same case or controversy" as the first there will be supplemental jurisdiction. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546 (2005).

d. In situations involving multiple plaintiffs or multiple defendants with a common undivided interest and single title or right, the value of the total interest will be used to determine the amount in controversy. This is not the case if the various claims are considered several and distinct, and they may be so considered even though the claims arose from a single instrument or the parties have a community of interest.

e. The preceding rules have complex application to class actions.

- **i.** For class actions that meet the criteria of the Class Actions Fairness Act of 2005, codified in part in §1332(d) (discussed more fully in Chapter 12), one can aggregate the claims of all class members; if they reach $5 million, the amount in controversy requirement is met.
- **ii.** For class actions based on diversity that do not meet the requirements of the Act, one cannot simply add up the claims of all class members. Instead at least some members must have claims that individually satisfy the jurisdictional amount. Snyder v. Harris, 394 U.S. 332 (1969). But if one member meets the amount in controversy requirement, the others can take advantage of supplemental jurisdiction. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546 (2005).

f. Counterclaims are treated differently, depending on their classification under Rule 13 as either compulsory or permissive. Basically, when a plaintiff's claim exceeds $75,000 (the statutory amount), a compulsory counterclaim may be heard regardless of amount. A permissive counterclaim not arising from the same transaction or occurrence requires an independent jurisdictional basis. The law is unsettled, however, when plaintiff's claim falls short of $75,000 but defendant's counterclaim increases the amount in controversy to more than $75,000. See generally Wright, Federal Courts 217 (reporting "virtually no holdings" addressing the question).

g. Apply these principles to a hypothetical variation on *Louisville & Nashville Railroad v. Mottley*. Suppose the plaintiffs, Erasmus and Annie Mottley, having learned they cannot state an "arising under" claim, still want a federal forum for the trial of their case. So, taking advantage of the fact that diversity is measured at the time of filing, they move out of state and file their action as a diversity case. In each variation, assume that the requisite diversity exists and only the amount in controversy is an issue.

- **i.** Erasmus sues Railroad for $75,000 for breach of contract.

ii. Erasmus sues Railroad for $100,000 for breach of contract; Railroad counterclaims for $5,000, alleging that on some occasions Erasmus, in violation of the settlement terms, allowed a friend to use his pass.

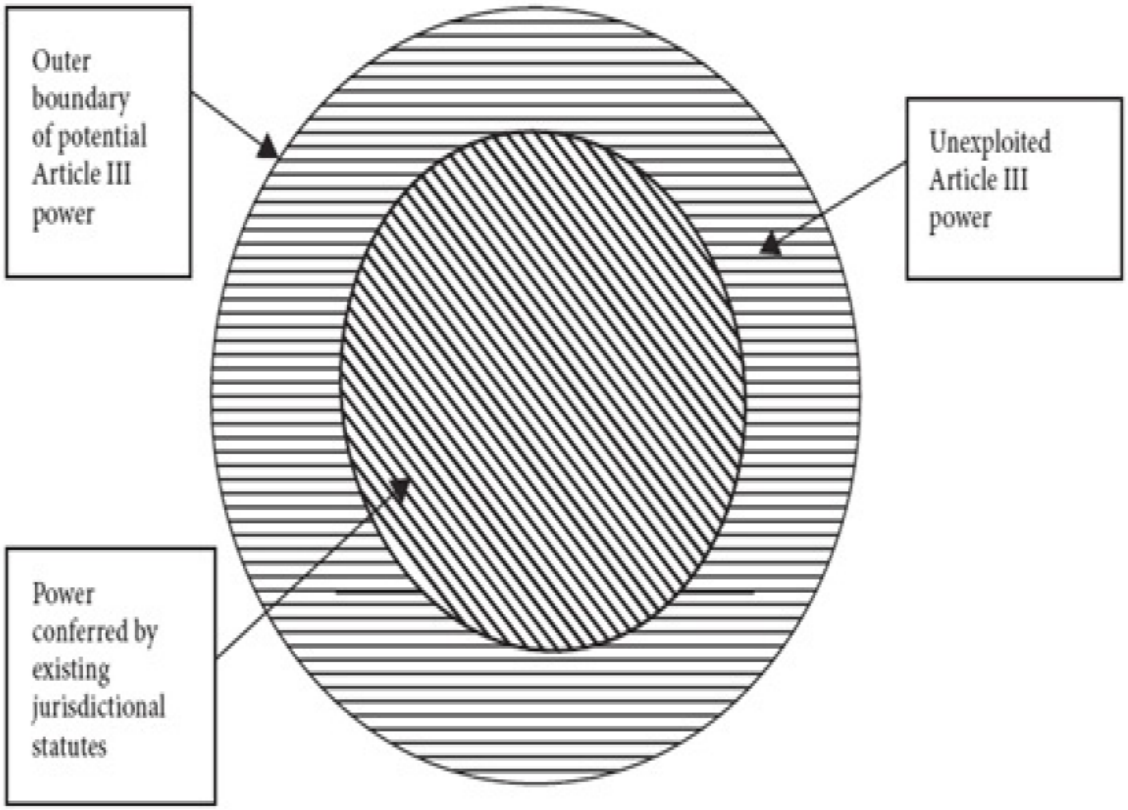
iii. Erasmus sues Railroad on two unrelated claims: breach of the settlement agreement ($72,000) and a due but unpaid Railroad bond ($5,000).

iv. Annie and Friend sue Railroad. Annie, alleging breach of the settlement agreement, seeks $60,000; Friend, alleging she was riding the train with Annie when a luggage rack fell off and injured her, seeks $40,000.

v. Erasmus and Annie both sue Railroad for breach of the settlement agreement, each seeking $50,000.

D. SUPPLEMENTAL JURISDICTION

Thus far we have examined aspects of federal subject matter jurisdiction that narrow the doors to federal courts in ways that neither intuition nor the texts of the Constitution and the statutes might suggest. The resulting picture displays some substantial areas of unexploited constitutional power:



We turn now to a doctrine that broadens federal jurisdiction, filling in selectively some of the area between the inner and the outer rings. This doctrine is known as supplemental jurisdiction. Supplemental jurisdiction originated in case law that stretched federal jurisdiction to cover parts of cases that, if brought independently, would not have fit within the district courts' subject matter jurisdiction. Congress then codified some and modified other case law results. Examine the statute, 28 U.S.C. §1367, and consider structure and its application to some basic problems.

Notes and Problems

1. Not all cases described by §1367(a) are covered by §1367(b). What's the key difference?

2. In these problems, assume the litigation occurs in federal district court and that amount in controversy requirements, if they apply, are satisfied. Also assume the joined party or claim would fall within the applicable joinder Rule (see Chapter 12). In working out your analysis, first identify the portion of §1367 that applies, and then apply that section to the facts.

a. *A*, a citizen of Illinois, sues *B*, also a citizen of Illinois, alleging that *B* violated federal civil rights statutes in firing her. *A* seeks to add a state law claim alleging that her firing also violated a state wrongful discharge law. Is there supplemental jurisdiction?

b. *A*, a citizen of Illinois, sues *B*, also a citizen of Illinois, alleging that *B* violated federal civil rights statutes in firing her. *A* seeks to add a state law claim alleging that *B* negligently caused her injuries when his car backed into hers in the company parking lot. Is there supplemental jurisdiction?

c. *A*, a citizen of Illinois, sues *B*, also a citizen of Illinois, alleging that *B* violated federal civil rights statutes by permitting co-workers to engage in sexual harassment. *A* invokes Rule 20 to join *C*, a co-worker from Illinois, who actually engaged in the harassment. State tort law is the basis of *A*'s claim against *C*. Because *C* is not *A*'s employer, the claim against him does not arise under federal law. Is there supplemental jurisdiction over the claim against *C*?

d. *A*, a citizen of Illinois, sues *B*, a citizen of Wisconsin, alleging breach of an employment contract and seeking a recovery in excess of $75,000. *A* invokes Rule 20 to join *C*, a citizen of Illinois; *A* alleges that *C* conspired with *B* to breach the employment contract. Is there supplemental jurisdiction over the claim against *C*?

e. Arthur, a citizen of New York, sues Barbara, a citizen of Pennsylvania, in federal district court. He alleges several claims: federal antitrust violations, federal securities law violations, and state law breach of contract. He alleges more than $100,000 in damages for each claim. Will the district court have to analyze how closely related the federal and state law claims are for purposes of deciding whether supplemental jurisdiction exists or whether any of the reasons in §1367(c) for declining to exercise jurisdiction apply? Why not?

3. Having applied the statute to some cases, step back and consider its constitutional underpinnings.

a. A statute that gave federal district courts jurisdiction to decide a case based entirely on state law between two Florida citizens would be unconstitutional—beyond the power granted by Article III. How then can it be constitutional for a district court to hear such a claim when the same parties also are embroiled in litigation over a federal claim?

b. The statute supplies a clue in subsection (a), which speaks of "claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the Constitution." Article III says that federal "judicial Power…extend[s] to all Cases" of the sorts enumerated and to "Controversies" of sorts that are further enumerated. From this phrase the courts have drawn the idea that:

> [Supplemental] jurisdiction, in the sense of judicial power, exists whenever there is a claim [within the constitutional jurisdiction], and the relationship between that claim and the [claim outside the constitutionally enumerated jurisdiction of the federal courts] 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.[13]
>
> United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

c. *United Mine Workers v. Gibbs* and §1367 espouse a principle that may look surprising at first glance. Its rationale emerges more clearly if one recalls that a central feature of the Federal Rules is the ease with which they permit joinder of claims. See, e.g., Rule 18(a). It would be logically possible, but awkward, to permit parties to join closely connected claims but then deny the federal courts power over claims that did not bring their own jurisdictional basis with them. In such situations, whichever court (state or federal) tried the related claim second would have to engage in elaborate analyses of which issues were precluded in the first lawsuit. Section 1367 allows some—but not all—of these related claims to come to federal court under the wing of supplemental jurisdiction.

4. Consider the following two cases in which courts wrestle with applying the statute, including their discretionary authority to decline to exercise supplemental jurisdiction.

In re Ameriquest Mortgage Co. Mortgage Lending Practices Litigation

2007 U.S. Dist. LEXIS 70805 (N.D. Ill. 2007)

ASPEN, J.

Pursuant to Federal Rule of Civil Procedure 12(b)(1) and 28 U.S.C. §§1367(a) and (b), defendant Douglas Trevino now moves to dismiss Counts II and III of plaintiff Barbara Skanes' Amended Complaint.…

We deny Trevino's motion. We find that: a) there is a sufficient nexus between Skanes' state law claims and her TILA claim to support supplemental jurisdiction; and b) the discretionary factors set forth in [§1367(c)] do not weigh in favor of a decision to decline to exercise supplemental jurisdiction.

I. Background

In her Amended Complaint, Skanes alleges that in April 2004, she consummated a mortgage transaction with Ameriquest. Shortly before the close of the transaction, Ameriquest ordered from co-defendant Homestead Appraisal of Rockford a property appraisal of Skanes' future home. Homestead, through its agent Trevino [appraised the house at] $163,000.…

Skanes alleges that the "true value" of her home was much less than the amount reflected in Trevino's report.…The reason for this inflation, Skanes contends, was to increase the loan amount for which she could qualify and thereby increase Ameriquest's potential profit. [When the adjustable rate reset, Skanes could not refinance.]

[Count I of the complaint alleged a claim against Ameriquest under the federal Truth in Lending Act (TILA), seeking both rescission of the mortgage and statutory damages.] In Count I, her TILA claim, Skanes further states that at the time of her closing, Ameriquest provided her with improper and misleading disclosures of her right to cancel her mortgage. Ameriquest's disclosures, she alleges, triggered an extended right for her to later rescind her mortgage. [Counts II and III alleged state law fraud claims against all defendants.] In addition, Skanes requests that we enter a "judgment declaring what obligation, if any, plaintiff has toward each defendant [following rescission], *taking into account…the inflated appraised value*" (emphasis added).…

II. Analysis

A. §1367(a) Supplemental Jurisdiction

28 U.S.C. §1367 provides that in any action in which we already have jurisdiction over some federal claim, we also have supplemental jurisdiction over state claims "that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."…A loose factual connection may be sufficient to confer supplemental jurisdiction, so long as those facts are both common and operative. To determine whether the federal and state law claims are connected by common and operative facts, "[c]ourts routinely compare the facts necessary to prove the elements of the federal claim with those necessary to the success of the state claim." We also may ask "whether the state claims can be resolved or dismissed without affecting the federal claims."

Here, Skanes explicitly connected her federal and state claims, such that we cannot now conclude that her state claims could be dismissed or resolved without affecting her TILA claim. As set forth in the Amended Complaint, the facts underlying her state and federal claims combine to tell one story: Skanes did not fully know of her right to cancel her mortgage at its outset; because that mortgage was overstated, she paid too much during the life of her loan; and—also because of the overstatement—she has not been able to refinance the mortgage. Alleging a [federal] TILA disclosure violation, Skanes now wishes to void her allegedly overstated mortgage. In doing so, Skanes expressly links her TILA prayer for relief to her state claims. Skanes seeks a judgment voiding her mortgage and a judgment declaring what, if any, payment obligation exists after taking into account Skanes' state law challenge to her home appraisal.

We find this connection operative: if we dismiss Counts II and III, we may be unable to grant the full measure of relief Skanes seeks in Count I: if she is entitled to rescission, and she is correct that her home value was over-appraised, then she may be (or may not be—we do not intend to decide that issue here) entitled to reduce the post-TILA judgment tender amount in light of the over-appraisal. Without a determination of the over-appraisal issue, though, that offset would be unavailable. Because we cannot conclude that the resolution of one of her state claims will have no effect on the resolution on her federal claims, we cannot deny our supplemental jurisdiction here.

B. §1367[(c)] Discretionary Exercise of Supplemental Jurisdiction

Even if we find that we have supplemental jurisdiction over a plaintiff's state law claims, 28 U.S.C. §1367[(c)] provides four instances in which we may choose not to exercise that jurisdiction: "(1) the claim raises a novel or complex issue of State law; (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction; (3) the district court has dismissed all claims over

which it has original jurisdiction; or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction."

We do not perceive a problem with respect to factors (2) through (4): we cannot tell from the face of the Amended Complaint that Skanes' inflated appraisal allegations "substantially predominate" over her TILA claims; we have not dismissed Skanes' TILA claims; and Trevino has not highlighted any persuasive "exceptional circumstances" or "compelling reasons" for us to decline to exercise supplemental jurisdiction. Nor are we persuaded that because the Michigan Mortgage Brokers, Lenders and Servicers Lending Act [a state statute] has not been specifically applied to appraisers or appraisal services, we will not be able to resolve Skanes' claims through reference to existing precedent (which, by the time this case has concluded, could well include applications of the MMBLSLA to appraisers and appraisal services). Accordingly, we choose to exercise our discretion in favor of retaining jurisdiction over Counts II and III of the Amended Complaint.…

Szendrey-Ramos v. First Bancorp

512 F. Supp. 2d 81 (D.P.R. 2007)

CASELLAS, J.

[Carmen Szendrey-Ramos, the plaintiff (referred to in the opinion as Szendrey), worked for the defendant bank in Puerto Rico as its general counsel.]

In March 2005, Szendrey received a report from an external law firm that included information about possible ethical and/or legal violations committed by bank officials in relation to the accounting for the bulk purchase of mortgage loans from other financial institutions. Szendrey conducted an investigation into this issue, focusing on the possibility of whether the bank officials' conduct amounted to a violation of law or the bank's Code of Ethics. Upon conclusion of such investigation, Szendrey concluded that there had been irregularities and violations of the Code of Ethics and reported such findings to outside counsel for the bank as well as bank officials. She also divulged her findings to the Board of Directors at a meeting in which she was present.…

[After additional events surrounding the question of which officers should be dismissed from the bank with what severance packages and for what stated reasons, Szendrey herself was fired. In subsequent events the bank blamed Szendrey for some of the events she had investigated. She sued, alleging violations of federal employment law (Title VII) and additionally stating a number of claims under the laws of Puerto Rico for wrongful discharge, violations of the P.R. Constitution, and for defamation and tortious interference with contracts.]

Applicable Law and Analysis

Upon careful consideration of the issues presented by this case, and the law governing such issues, we decline to exercise supplemental jurisdiction over the P.R. law claims. Accordingly, these claims will be dismissed without prejudice, and Defendants' arguments for dismissal on the merits of such claims are thus moot. As for the Title VII discrimination and retaliation claims, they survive the motion to dismiss. This case thus goes forward solely under Title VII. We explain our reasoning below.…

The Court finds that two of §1367(c)'s subsections are at issue here: (1) that the state law claims raise complex or novel issues and (2) that the state-law claims substantially predominate over the federal claim. We start with the latter and work our way back to the former.

Plaintiffs' complaint includes two lonesome claims under Title VII, for discrimination and retaliation thereunder. The remaining claims all arise out of P.R. law. Not only do the P.R. law claims far outnumber the federal claims, but their scope also exceeds that of the federal claims. On that point we note that although some of the P.R. law claims mimic the federal claims…the remaining P.R. law claims (wrongful discharge, tortious actions infringing Plaintiff's constitutional rights, tortious interference with contracts, and defamation) are distinct and each has its own elements of proof; proof that is not necessary to establish the Title VII claims. That the state-law claims predominate over the federal claims is, in and of itself, reason enough to decline to exercise supplemental jurisdiction.

Moreover, we note that the P.R. law claims require a much fuller incursion into the performance of Szendrey as General Counsel and any shortcomings she may have had as such. This, in turn, leads us to the other reason for declining to exercise supplemental jurisdiction: the presence of complex or novel issues of state law. The main issue raised by Defendants in their motion to dismiss, that Plaintiffs' prosecution of their claims would run afoul of Canon 21 of the Puerto Rico Code of Professional Ethics, is at its apex in the P.R. law claims. For example, in order to prove that Defendants defamed her, Szendrey would have to establish that what was said about her (i.e., that she participated in wrongful acts) was false. In order to prove such

falsity, Szendrey would have to reveal the extent of her participation regarding such wrongful acts, including what information she became aware of as General Counsel, what actions she took after learning such information, and what advice she offered her client with regards to such information. [Defendants argued that Canon 21 of Puerto Rican legal ethics rules forbade a lawyer from disclosing client confidences, even in litigation between lawyer and client.]

Canon 21 undisputably belongs to an exclusively Puerto Rican body of law, and one that deals with the highly sensitive matter of lawyers' conduct, and its relation to society's interest in a fully functioning legal system. The interpretation of the canons is normally the province of the Puerto Rico Supreme Court, which is entrusted with the regulation and supervision of the legal profession. We note, moreover, that Canon 21 is decidedly different to the corresponding Model Rule of the American Bar Association. Unlike this Court and several U.S. jurisdictions, Puerto Rico has not adopted the latest version of the American Bar Association's Model Rules.

Canon 21 is decidedly silent on the issue of a lawyer's claim—whether in-house or not—against his former client, and the possibility of divulging confidential information in order to pursue such a claim.…This is an issue of Puerto Rico law that has yet to be addressed by the Puerto Rico courts and which is imbued with important considerations of public policy.…

Because the Puerto Rico law claims substantially predominate over the federal claims in this case, and because they posit novel and complex issues of state law, the Court declines to exercise supplemental jurisdiction. Accordingly, the Puerto Rico law claims will be dismissed without prejudice, so that Plaintiffs may re-file them in the Puerto Rico courts.…

Notes and Problems

1. Why did *Ameriquest* and *Szendrey-Ramos* reach different results on the question of supplemental jurisdiction?
- **a.** What key allegation of the complaint convinced the judge in *Ameriquest* to extend supplemental jurisdiction?
- **b.** Did the judge in *Szendrey-Ramos* have the statutory power to extend supplemental jurisdiction over plaintiff's non-federal claims? What argument of the defendants convinced the judge in *Szendrey-Ramos* not to exercise supplemental jurisdiction?

2. In cases like *Ameriquest*, other courts facing a number of state law claims have taken a stance substantially less hospitable to supplemental jurisdiction.
- **a.** One district court has in several cases used the following justification in declining to exercise supplemental jurisdiction:

> Litigation in the federal courts involving both federal law claims and supplemental state law claims has caused procedural and substantive problems. Even if the federal and state claims in this action arise out of the same factual situation, litigating these claims together may not serve judicial economy or trial convenience. Federal and state law each have a different focus, and the two bodies of law have evolved at different times and in different legislative and judicial systems. Because of this, in almost every case with supplemental state claims, the courts and counsel are unduly preoccupied with substantive and procedural problems in reconciling the two bodies of law and providing a fair and meaningful proceeding.
>
> The attempt to reconcile these two distinct bodies of law often dominates and prolongs pre-trial practice, complicates the trial, lengthens the jury instructions, confuses the jury, results in inconsistent verdicts, and causes post-trial problems with respect to judgment interest and attorney fees. Consequently, in many cases the apparent judicial economy and convenience of the parties' interest in the entertainment of supplemental state claims may be offset by the problems they create.
>
> National Fair Housing Alliance, Inc. v. Hobson-Hollowell, 2007 U.S. Dist. LEXIS 66538 (E.D. Mich. 2007).

- **b.** Which section(s) of §1367(c) is the court invoking in so ruling?

3. In *Hobson-Hollowell*, cited in the preceding note, the court appears to have taken a blanket stance toward all or most state law claims. More usual are courts that take varying stances depending on the circumstances of the case. Consider some common variations:
- **a.** Robert files a federal employment discrimination claim and a state law wrongful discharge claim, which the district court finds to be within the scope of §1367. His federal civil rights claim is dismissed on a Rule 12(b)(6) motion after he fails to plead his membership in any of the racial, religious, or other categories protected by the civil rights statutes as a factor in his dismissal. Should the court continue to exercise supplemental jurisdiction over the state claim?
- **b.** Same claim, but Robert pleads racial discrimination and the case proceeds to discovery. After substantial discovery, Employer moves for summary judgment on the discrimination claim and the court grants the motion, ruling that Robert has failed to produce evidence that race was a factor in his dismissal. Trial is set to

begin two weeks later. Should the court exercise supplemental jurisdiction over the state claim?

c. Same facts as in 3b, but the state law in question is a newly enacted statute in which it is unclear whether plaintiff must prove that his discharge is wrongful or defendant must show that it was for good cause. Should the court exercise supplemental jurisdiction?

4. Supplemental jurisdiction can create difficult problems for plaintiffs who guess wrong in invoking federal question jurisdiction. Suppose plaintiff believes she has been discriminated against in her employment. Believing she can bring both state and federal law claims and preferring a federal forum, plaintiff files in federal court, invoking supplemental jurisdiction for the state claims. It turns out that plaintiff was wrong about the federal claims: After the state statute of limitations has run, the federal court dismisses the federal claims and declines to exercise jurisdiction over the remaining state law claims. What can plaintiff do?

a. Some states have "savings" statutes that toll the state statute of limitations under such circumstances, so plaintiff has a limited time to refile in state court.

b. But not all states have such statutes. In such cases §1367(d) seeks to address the problem by opening a 30-day "window." Suppose our hypothetical plaintiff is in a state that has no "savings" statute; how does §1367(d) help her? What should she do?

c. The U.S. Supreme Court has held the 30-day extension unconstitutional as applied to a claim against a state agency that had not consented to such a provision. Raygor v. Regents, 534 U.S. 533 (2002).

E. REMOVAL

Jurisdictional statutes give plaintiffs an initial choice of state or federal court for cases in which federal and state court jurisdictions overlap. Congress has also given defendants the power to trump plaintiffs who choose a state court in cases that could have been brought in federal court. The process, known as *removal*, has as its basic text 28 U.S.C. §1441. Read the statute and consider its operation in the following problems.

Notes and Problems

1. Which of the following cases would be removable?

a. *P* sues *D* for defamation in state court; *D* believes the statement she published is protected under the First Amendment.

b. *P* sues *D* in state court, alleging violation of *P*'s rights under the Equal Protection Clause of the U.S. Constitution.

c. *P*, a citizen of Florida, sues *D*, a citizen of New Jersey, on a personal injury claim, in a Florida state court, seeking $100,000 in damages.

d. *P*, a citizen of Florida, sues *D*, a citizen of New Jersey, on a personal injury claim in New Jersey state court, seeking $100,000 in damages.

e. The facts are the same as in Problem 1d, except that *P* adds a claim that *D* has violated her federal civil rights.

f. *P*, a citizen of Florida, sues *D*, a citizen of New Jersey, and *E*, a citizen of New York, on a personal injury claim in New York state court, seeking $100,000 in damages.

2. The procedure for removal is set forth in 28 U.S.C. §1446; that for challenging removal in §1447. Read these statutes and apply them to the following questions.

a. Plaintiff, a citizen of Pennsylvania, files a complaint in Pennsylvania state court alleging state law violations, naming Danielle as defendant and seeking $100,000 in damages. Danielle is a citizen of Georgia. If Danielle wishes to remove, what must her notice of removal say?

b. If in her notice of removal Danielle falsely states that she is a citizen of Georgia, what risks does she run?

c. Danielle files her notice of removal two months after being served with the state court complaint. Assuming that the conditions for diversity exist, can she remove?

d. Same problem as in 2a, except that plaintiff's initial complaint seeks only $10,000 in damages. Six months later, after some discovery, plaintiff amends his state complaint to add an additional cause of action, so he now seeks $85,000 in damages. May Danielle now remove?

e. Same problem as in 2a. Defendant removes, invoking diversity. What if plaintiff seeks remand to state court, offering to stipulate that she would seek less than $75,000 in damages? The Sixth Circuit, in Rogers v. Wal-Mart Stores Inc., 230 F.3d 868 (6th Cir. 2000), affirmed a denial of the remand motion, saying that the propriety of removal should be judged by the apparent amount in controversy at the time removal is sought.

f. Plaintiff's complaint seeks $10,000 in damages. Danielle seeks to remove, claiming that if she is liable, which she denies, the damages are far more than the jurisdictional amount alleged. May she remove? What does §1446(c) say about this problem? See *Troupe*, in Chapter 5 (page 306), for an illustration of this problem.

g. Same problem as in 2d, except that plaintiff amends his complaint more than a year after the original complaint. What obstacle to removal does §1446(c) pose?

h. As in 2g, the complaint when first filed alleges less than the amount in controversy and the motion to remove is made over a year after the complaint is filed. Suppose defendant contends that the plaintiff knew from the start that the claim—if it was worth anything, which defendant denies—was worth at least $100,000. Can defendant remove? See §1446(c)(3)(B).

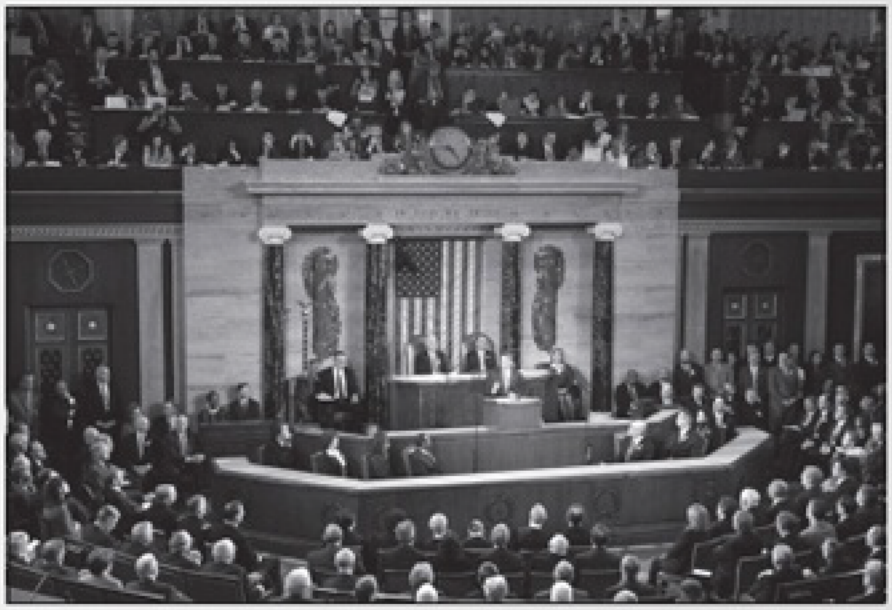
i. Suppose a complaint filed in state court alleges federal employment discrimination and additional state law claims. If the state law claims are so closely related to the federal claim that they fall within supplemental jurisdiction, the entire case may be removed. But suppose they are not—they are contract claims too unconnected with the discrimination count to be part of the "same case or controversy." Read §1441(c) and explain what will happen to the state and federal claims.

PERSPECTIVES

Congress, the Courts, and Diversity

Congress, while unwilling to repeal diversity jurisdiction, has restricted it in a number of small ways.

- It has retained and occasionally increased the amount in controversy requirement.
- It has created dual citizenship for corporations, thus decreasing the number of situations in which they can avail themselves of diversity.
- It has limited diversity removal more than federal question removal, including the one-year time limit on diversity-based removal.
- It has placed more restrictions on supplemental jurisdiction in diversity-only cases.



These restrictions reflect a low-level continuing debate about the contemporary usefulness of diversity jurisdiction. Most observers do not think that discrimination based on state citizenship (as opposed to other characteristics) plays a major role in the United States today. *If* the only reason for diversity jurisdiction were to guard against such discrimination, then one could challenge its contemporary role.

Defenses of diversity jurisdiction take several forms. Some argue that by providing "competition" for state courts, federal diversity cases raise the standards of some state judiciaries. Others argue that by providing a stream of "ordinary" cases (auto accidents, contract disputes), diversity cases prevent federal judges from becoming narrow specialists. Still others argue a variation on traditional justification for diversity: even if bias against out-of-staters is not strong, in many regions there *is* a bias in favor of "the home team" and that diversity jurisdiction prevents that type of bias from distorting litigation outcomes.

3. Federal courts are sticklers for the removal rules; they generally require parties rigorously to follow each of the removal statute's procedural requirements and remand those cases that do not comply.

a. Take, for example, The Formula Inc. v. Mammoth 8050 LLC, 2008 WL 60428 (S.D. Fla. Jan. 3, 2008). Formula filed its complaint in state court in Florida, and served a Summons and Complaint on Mammoth on October 23, 2007. On November 26, 2007, Mammoth removed the case to federal court based on diversity of citizenship. The district court remanded the case to state court on the ground that the removal was untimely.

> Mammoth erroneously calculated the thirty day time frame so as not to include November 23, 2007 (believing that the Court was closed the day after Thanksgiving) and failed to file a notice of removal until November 26, 2007. Technically, November 23rd is not a legal holiday, as defined for instance in Federal Rule 6(a)(4)—only Thanksgiving Day itself is a legal holiday. Admittedly, the day after Thanksgiving is, for all practical purposes, a day in which many people do not go to work to kickoff the holiday buying-spree season (i.e., Black Friday). It is thus understandable that one may treat that day as a continuation of the Thanksgiving holiday. But no Federal statute, Court Rule, or Court Order deems that Friday as a holiday per se….Mammoth concedes this fact but argues that, under the circumstances, there is good cause to excuse this technical one-day delay. The Court, however, is duty bound to strictly apply and enforce section 1446(b) that is an express statutory requirement for removal. The statute was drafted in mandatory language ("shall be filed within thirty days") and, thus, the failure to comply with the statute "can fairly be said to render the removal 'defective' and justify a remand pursuant to Section 1447(c)."

b. Or consider Schafer v. Bayer Cropscience LP, 2010 WL 1038518 (E.D. Ark. Mar. 19, 2010). The initial complaint, alleging state law claims, was filed in state court on August 29, 2006. On May 20, 2009, plaintiffs filed an amended complaint, adding Bayer as a defendant. Bayer removed the case on September 17, 2009, but the case was remanded to state court. After the state court severed nondiverse plaintiffs from the case, Bayer again removed the case to federal court on March 16, 2010. This time, the district court remanded the case to state court on the ground that the removal was untimely because it occurred more than one year after

the case was first filed. The court acknowledged that Bayer was not a defendant in the case until more than one year after it had been filed.

> [T]he statute is unambiguous that "it plainly prohibits removal on diversity grounds of a case that was commenced in state court more than a year prior to its removal."…Although this rule may seem harsh to later added defendants, "[c]ongress accepted a 'modest curtailment in access to diversity jurisdiction' in exchange for avoiding 'substantial delay and disruption' after 'substantial progress in state court.'"

c. One significant exception to this punctilious reading of the removal statutes can be found in the Supreme Court's decision in *Caterpillar, Inc. v. Lewis*. As you read the opinion, consider why.

Caterpillar, Inc. v. Lewis

519 U.S. 61 (1996)

Justice GINSBURG delivered the opinion of the Court.…

The question presented is whether the absence of complete diversity at the time of removal is fatal to federal-court adjudication. We hold that a district court's error in failing to remand a case improperly removed is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered.

Respondent James David Lewis, a resident of Kentucky, filed this lawsuit in Kentucky state court on June 22, 1989, after sustaining injuries while operating a bulldozer. Asserting state-law claims based on defective manufacture, negligent maintenance, failure to warn, and breach of warranty, Lewis named as defendants both the manufacturer of the bulldozer—petitioner Caterpillar Inc., a Delaware corporation with its principal place of business in Illinois—and the company that serviced the bulldozer—Whayne Supply Company, a Kentucky corporation with its principal place of business in Kentucky.

Several months later, Liberty Mutual Insurance Group, the insurance carrier for Lewis' employer, intervened in the lawsuit as a plaintiff. A Massachusetts corporation with its principal place of business in that State, Liberty Mutual asserted subrogation claims against both Caterpillar and Whayne Supply for workers' compensation benefits Liberty Mutual had paid to Lewis on behalf of his employer.

Lewis entered into a settlement agreement with defendant Whayne Supply less than a year after filing his complaint. Shortly after learning of this agreement, Caterpillar filed a notice of removal, on June 21, 1990, in the United States District Court for the Eastern District of Kentucky. Grounding federal jurisdiction on diversity of citizenship, Caterpillar satisfied with only a day to spare the statutory requirement that a diversity-based removal take place within one year of a lawsuit's commencement, see 28 U.S.C. §1446(b).[*] Caterpillar's notice of removal explained that the case was nonremovable at the lawsuit's start: Complete diversity was absent then because plaintiff Lewis and defendant Whayne Supply shared Kentucky citizenship. Proceeding on the understanding that the settlement agreement between these two Kentucky parties would result in the dismissal of Whayne Supply from the lawsuit, Caterpillar stated that the settlement rendered the case removable.

Lewis objected to the removal and moved to remand the case to state court. Lewis acknowledged that he had settled his own claims against Whayne Supply. But Liberty Mutual had not yet settled its subrogation claim against Whayne Supply, Lewis asserted. Whayne Supply's presence as a defendant in the lawsuit, Lewis urged, defeated diversity of citizenship. Without addressing this argument, the District Court denied Lewis' motion to remand on September 24, 1990, treating as dispositive Lewis' admission that he had settled his own claims against Whayne Supply.

In June 1993, [Liberty Mutual and Whayne settled].…With Caterpillar as the sole defendant adverse to Lewis, the case proceeded to a 6-day jury trial in November 1993, ending in a unanimous verdict for Caterpillar.…

We note, initially, two "givens" in this case as we have accepted it for review. First, the District Court, in its decision denying Lewis' timely motion to remand, incorrectly treated Whayne Supply, the nondiverse defendant, as effectively dropped from the case prior to removal. Second, the Sixth Circuit correctly determined that the complete diversity requirement was not satisfied at the time of removal. We accordingly home in on this question: Does the District Court's initial misjudgment still burden and run with the case, or is it overcome by the eventual dismissal of the nondiverse defendant?…

Having preserved his objection to an improper removal, Lewis urges that an "all's well that ends well" approach is inappropriate here. He maintains that ultimate satisfaction of the subject-matter jurisdiction requirement ought not swallow up antecedent statutory violations. The course Caterpillar advocates, Lewis observes, would disfavor diligent plaintiffs who timely, but unsuccessfully, move to check improper removals in district court. Further, that course would allow improperly removing defendants to profit from their disregard of Congress' instructions, and their ability to lead district judges into error.

Concretely, in this very case, Lewis emphasizes, adherence to the rules Congress prescribed for removal would have kept the case in state court. Only by removing prematurely was Caterpillar able to get to federal court inside the 1-year limitation set in §1446(b). Had Caterpillar waited until the case was ripe for removal, i.e., until Whayne Supply was dismissed as a defendant, the 1-year limitation would have barred the way, and plaintiff's choice of forum would have been preserved.[14] These arguments are hardly meritless, but they run up against an overriding consideration. Once a diversity case has been tried in federal court, with rules of decision supplied by state law under the regime of Erie R. Co. v. Tompkins [infra page 259] considerations of finality, efficiency, and economy become overwhelming.…

Our view is in harmony with a main theme of the removal scheme Congress devised. Congress ordered a procedure calling for expeditious superintendence by district courts. The lawmakers specified a short time, 30 days, for motions to remand for defects in removal procedure, 28 U.S.C. §1447(c), and district court orders remanding cases to state courts generally are "not reviewable on appeal or otherwise," §1447(d). Congress did not similarly exclude appellate review of refusals to remand. But an evident concern that may explain the lack of symmetry relates to the federal courts' subject-matter jurisdiction. Despite a federal trial court's threshold denial of a motion to remand, if, at the end of the day and case, a jurisdictional defect remains uncured, the judgment must be vacated. See Fed. R. Civ. Proc. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.") In this case, however, no jurisdictional defect lingered through judgment in the District Court. To wipe out the adjudication postjudgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice. Lewis ultimately argues that, if the final judgment against him is allowed to stand, "all of the various procedural requirements for removal will become unenforceable"; therefore, "defendants will have an enormous incentive to attempt wrongful removals." In particular, Lewis suggests that defendants will remove prematurely "in the hope that some subsequent developments, such as the eventual dismissal of nondiverse defendants, will permit the case to be kept in federal court." We do not anticipate the dire consequences Lewis forecasts.

The procedural requirements for removal remain enforceable by the federal trial court judges to whom those requirements are directly addressed. Lewis' prediction…rests on an assumption we do not indulge—that district courts generally will not comprehend, or will balk at applying, the rules on removal Congress has prescribed. The prediction furthermore assumes defendants' readiness to gamble that any jurisdictional defect, for example, the absence of complete diversity, will first escape detection, then disappear prior to judgment. The well-advised defendant, we are satisfied, will foresee the likely outcome of an unwarranted removal—a swift and nonreviewable remand order, see 28 U.S.C. §1447(c), (d), attended by the displeasure of a district court whose authority has been improperly invoked. The odds against any gain from a wrongful removal, in sum, render improbable Lewis' projection of increased resort to the maneuver.

For the reasons stated, the judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.…

PERSPECTIVES

Ruth Bader Ginsburg
Justice Ginsburg, whose Supreme Court nomination was confirmed in 1993, had two careers before assuming her present position, both of which mark her pioneering role as a woman in the legal profession.

Having earned a distinguished record both at Harvard and Columbia Law Schools, Ginsburg found herself highly recommended as a clerk to Justice Felix Frankfurter of the Supreme Court by the dean of Harvard Law School. Frankfurter reportedly turned her down because she was a woman—a practice in which Frankfurter was then not alone among his fellow Justices. Nor, in spite of having been first in her law school class, was she offered a job by any of the 12 New York law firms with whom she interviewed. A similar pattern marked her entry into academia. Initially appointed as a research associate at Columbia Law School, she taught at Rutgers-Newark for ten years before accepting an appointment in 1972 as the first tenured woman in the history of Columbia Law School. Her academic specialties included comparative civil procedure and conflicts of law.

While teaching, Ginsburg co-founded the Women's Rights Project at the American Civil Liberties Union and briefed and argued before the U.S. Supreme Court several pioneering gender discrimination cases. Press accounts credit her with a strategy of small, incremental steps and choosing unthreatening lead plaintiffs—frequently men—in her cases. One account described her strategy as "not expect[ing] to force social change; she wanted [instead] to 'give it a green light' in her words, and she moved the Justices to send that signal through a series of simple, scarcely controversial cases."

Notes and Problems

1. *Caterpillar* splendidly illustrates the pitfalls of removal.

a. Explain why removal was improper at the time Caterpillar attempted it.

b. Explain why removal would still have been improper had Caterpillar waited until the point in the lawsuit when complete diversity existed.

2. Removal is not an entirely popular idea, either with states or with plaintiffs who find their initial choice of a forum thwarted.

a. Why did Congress place a one-year "statute of limitations" on removal petitions in diversity cases—even in cases like *Caterpillar* where the basis for removal did not present itself until after that date? See §1446(c). Notice that in some cases this time limit allows plaintiffs an opportunity to manipulate jurisdiction, joining nondiverse parties and then dropping them after a year. But note as well that 28 U.S.C. §1446(c)(1) allows

removal even after a year if the plaintiff has acted in "bad faith" to block removal.

b. Ohio sought to discourage removal by enacting a statute providing that any out-of-state insurer that removed a case to federal court was barred from doing business in the state for three years. Held: unconstitutional. International Insurance Co. v. Duryee, 96 F.3d 837 (6th Cir. 1996).

3. In *Capron v. Van Noorden*, supra page 218, the plaintiff sued defendant in federal court and lost. On appeal in the Supreme Court, plaintiff argued there was no subject matter jurisdiction over the case because of lack of diversity. The Supreme Court dismissed the case—so the plaintiff won dismissal of the very case he had brought! Contrast *Caterpillar*, in which the plaintiff properly and accurately objected to removal. But the Court in *Caterpillar*, acknowledging that diversity did not exist at the time of removal, nevertheless affirmed the federal judgment. Can one distinguish the two cases?

4. Other federal statutes expand or contract the removal power granted by 28 U.S.C. §1441.

a. For example, §1442 permits removal of suits by federal officers or agencies sued for the performance of their duties even when §1441 would not permit removal. A companion section does the same for members of the military. 28 U.S.C. §1442a.

b. The Class Action Fairness Act of 2005, whose minimal diversity provision we have already noted (supra page 226) contains a removal provision in 28 U.S.C. §1453 allowing some claims based entirely on state law and lacking complete diversity nevertheless to be removed to federal court.

c. The Securities Litigation Uniform Standards Act of 1998 (SLUSA) (15 U.S.C. §77p(b)) takes matters one step further—and takes us back to *Mottley*, which began this chapter. First, SLUSA (how's that for an attractive acronym?) preempts state securities class actions alleging fraud in the sales of securities. It provides, in other words, that in such cases federal law displaces otherwise applicable state law. Second, it provides that securities fraud class actions based entirely on state law "shall be removable to the federal district court for the district in which the action is pending." 15 U.S.C. §77p(c). Finally, it orders dismissal of the removed class actions. This three-step process provides a review of much of this chapter. Congress has essentially created a federal defense to state law securities class actions. Think back to *Mottley*, in which a federal defense to a state law claim did not create "arising under" jurisdiction. Congress might have left things there, relying on the state courts and occasional Supreme Court review to enforce this scheme. But SLUSA goes beyond that, using removal jurisdiction to assure that its substantive preemption of state law will be systematically enforced. In this specific category of cases SLUSA creates exactly what *Mottley* rejected: federal jurisdiction, here removal jurisdiction, based on a federal defense to a state law claim.

d. What Congress can give, Congress can take away. As a final reminder of the extent to which federal jurisdiction is a creature of statute, consider 28 U.S.C. §1445. It forbids removal of some actions that otherwise would be removable under §1441. Examine that statute and consider why Congress might have made such actions nonremovable and thus allowed plaintiffs to dictate the choice between state and federal court.

* * *

The jurisdictional reach of U.S. federal courts has played an important and often controversial role in the nation's history. Over the past two centuries these courts, sometimes denounced as protectors of powerful national corporations, sometimes denounced and simultaneously hailed as vindicators of racial justice and the rights of women, have also played a homelier role in everyday disputes, ranging from the claim of a worker to his wages to claims arising from auto accidents involving out-of-state tourists. The overlapping jurisdictions of the state and federal courts also figure in lawyers' strategy, as they maneuver to gain (or avoid) a forum with characteristics that often differ from those of the state courts.

Not too long ago, those federal courts also represented an escape from state law, even on claims based on state law. How that happened, how that era ended, and the continuing issues its end created form the subject of the next chapter.

Assessment Questions

Q1. Sue, a resident of Los Angeles, sues the *L.A. Times* for libel. The *Times* believes that the First Amendment to the U.S. Constitution probably protects it from Sue's lawsuit. Which of the following is true?

A. Sue can bring her action in federal district court.

B. The action must be decided by a state trial court.

C. If Sue starts the case in state court the *Times* can remove to federal court.

D. If a state court renders a judgment for Sue, the *Times* can base an appeal to the U.S. Supreme Court on the First Amendment.

Q2. Sue, a resident of New York, sues the *L.A. Times* for libel in a California state court. The *Times* believes that the First Amendment to the U.S. Constitution probably protects it from Sue's lawsuit. Which of the following is true?

A. Sue can bring her action in federal district court no matter what amount of damages she claims.

B. Sue can bring her action in federal district court only if she claims more than $75,000 in damages.

C. If Sue brings her claim in state court in California, the *Times* can remove if she seeks more than $75,000.

D. If Sue is a British citizen who is a permanent resident alien living in California and seeks more than $75,000, she can sue in federal court.

Q3. Sue (California) sues Ben (New York) alleging breach of contract. In which of the following situations is it clear that Sue *cannot* properly invoke original jurisdiction under 28 U.S.C. §1332?

A. If Sue seeks only an injunction.

B. If Sue seeks $75,000 in damages.

C. If Sue joins Carol (New York) as a plaintiff.

D. If, after the lawsuit is filed, Sue moves to New York.

Q4. Sue (a California resident) sues the *L.A. Times* for libel in federal district court. The *Times* asserts that, even if its story was defamatory, it is protected by the First Amendment to the U.S. Constitution. Which of the following is true?

A. If the *Times* moves to dismiss under Rule 12(b)(1), its motion should be granted.

B. If the *Times* does not move to dismiss for want of jurisdiction, it will have waived the defense.

C. The district court can dismiss the case without a motion.

D. If the case goes to judgment, only the losing party can challenge jurisdiction on appeal.

Q5. In which of the following cases, filed originally in state court, can the defendant remove to federal district court?

A. Sue (California) v. Newspaper (California): libel, with Newspaper invoking the First Amendment in California state court.

B. Sue (California) v. Newspaper (New York): breach of contract, $100,000 in New York state court.

C. Sue (California) v. Newspaper (New York): federal antitrust, $50,000, in New York state court.

D. Sue (California) v. Newspaper (New York): breach of contract, $100,000 in California state court.

Q6. Abe of Illinois sues Barbara of Illinois in federal court alleging that she violated a federal civil rights statute in firing him. Abe seeks to add a state law claim alleging that the firing also violated a state wrongful discharge law. Which of the following is true?

A. Abe's civil rights claim arises under federal law.

B. Abe's state law claim, brought alone, would not fall within federal jurisdiction.

C. Abe's state law claim falls within the same case or controversy as his civil rights claim.

D. Abe's state law claim will be within the supplemental jurisdiction of the federal district court hearing his federal civil rights claim.

Q7. Abe of Illinois sues Barbara of Illinois in federal court alleging that she violated a federal civil rights statute in firing him. Abe seeks to add a state law claim alleging that Barbara, a notoriously bad driver, negligently damaged his car backing out of her spot in the company parking lot. Which of the following is true?

A. Abe's civil rights claim arises under federal law.

B. Abe's state law claim, brought alone, would not fall within federal jurisdiction.

C. Abe's state law claim falls within the same case or controversy as his civil rights claim.

D. Abe's state law claim will be within the supplemental jurisdiction of the federal district court hearing his federal civil rights claim.

Q8. Alice, a citizen of Illinois, sues Ben, a citizen of Wisconsin, alleging breach of an employment contract and damages of $100,000. Alice wants to add Catherine, a citizen of Illinois, to her suit as a second defendant, under Rule 20 on the ground that Catherine allegedly urged Ben to breach his contract with Alice and come to work for her instead. (Assume that Rule 20 properly applies to the joinder of Catherine.) Which of the following is true?

A. Alice's claim against Ben is within the original jurisdiction of a federal district court.

B. Alice's claim against Catherine, if brought by itself, would not be within the jurisdiction of the federal district court.

C. Alice's claim against Catherine is part of the same case or controversy as the claim against Ben.

D. The court will not have supplemental jurisdiction over Alice's claim against Catherine.

Analysis of Assessment Questions

Q1. B and D are correct responses. A is wrong because the well-pleaded complaint rule (illustrated in *Mottley*) says that Sue's claim—as opposed to the *Times*'s defense—does not arise under federal law. B is correct because the well-pleaded complaint rule operates to put such cases into state courts. C is wrong because removal is available only if the original case could have been brought in federal court—and this one could not. D is correct because the Supreme Court, as in *Mottley*, has jurisdiction to hear and decide any question of federal law, not just claims that arise under federal law.

Q2. B is the only correct response. A is wrong because the diversity statute requires *both* diversity and the stated amount in controversy. C is wrong because a resident of the forum state cannot remove if the only basis for jurisdiction is diversity—as is the case here. D is wrong because the "except" clause of §1332(a)(2) treats permanent resident aliens as citizens of the state where they reside, and so plaintiff and defendant are not diverse.

Q3. B and C are correct responses. A is wrong because an injunction may be "valued," and diversity jurisdiction will lie if that value exceeds $75,000. D is wrong because diversity is measured from the date on which suit is filed; a later move is irrelevant. B is correct (but sneaky) because the statute requires that the amount in controversy *exceed* $75,000. C is correct because the presence of a New York party on both sides of the suit violates the complete diversity rule.

Q4. A and C are correct. A is correct because there is no diversity and the claim (as opposed to the defense) does not arise under federal law. B is wrong because the lack of federal subject matter jurisdiction is not waived (Rule 12(h)(3)). C is correct (12(h)(3)). D is wrong because several cases have held that even a party who invoked the court's subject matter jurisdiction can thereafter challenge it. *Capron v. Van Noorden*, supra page 218.

Q5. C and D are the correct responses. A is wrong because removal is possible only if there would have been original jurisdiction; here there is no federal claim and no diversity—thus no removal. B is wrong because, although there is diversity, a home-state defendant cannot remove. C is correct because the antitrust claim is federal, and thus removable. D is correct because both diversity and the amount in controversy requirements are met and the out-of-state defendant seeks to remove.

Q6. A, B, C, and D are all correct responses. A is correct because federal law creates Abe's claim. B is correct because there's no diversity and the state claim, by definition, does not arise under federal law. C is correct because it's a claim arising from the same facts as the federal claim. D is correct because §1367(a) so provides.

Q7. Only A and B are correct. For A and B see the preceding question. C is wrong because, unlike the preceding question, the state law claim arises from a different set of facts and invokes a distinct body of law. D is wrong: *Because* there's no linkage between the two claims, they do not arise out of the same constitutional case or controversy as required in §1367(a).

Q8. A, B, C, and D are all correct responses. A is correct because there's diversity jurisdiction. B is correct because the claim against Catherine does not arise under federal law and there's no diversity. C is correct because this dispute apparently involves both the employer (who has lost Ben as an employee) and the lurer-away (Catherine), whose actions induced Ben to breach the contract. D is correct because even though the claim

against Catherine involves the same constitutional case or controversy, 28 U.S.C. §1367(b) does not permit supplemental jurisdiction to extend to claims by plaintiffs against nondiverse parties joined under Rule 20 when the only basis for jurisdiction is diversity.

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13. While it is commonplace that the Federal Rules of Civil Procedure do not expand the jurisdiction of federal courts, they do embody "the whole tendency of our decisions…to require a plaintiff to try his…whole case at one time," Baltimore S.S. Co. v. Phillips, [274 U.S. 316], and to that extent emphasize the basis of pendent [now called supplemental] jurisdiction.

* [The relevant provision is now found in §1446(c)—EDS.]

14. Lewis preferred state court to federal court based on differences he perceived in, inter alia, the state and federal jury systems and rules of evidence.