1995

A New Trick From an Old and Abused Dog: Section 1441(C) Lives and Now Permits the Remand of Federal Question Cases

Edward Hartnett

Recommended Citation
Available at: http://ir.lawnet.fordham.edu/llr/vol63/iss4/8

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
A NEW TRICK FROM AN OLD AND ABUSED DOG: SECTION 1441(c) LIVES AND NOW PERMITS THE REMAND OF FEDERAL QUESTION CASES

EDWARD HARTNETT*

INTRODUCTION ............................................................................. 1100
I. THE PREDECESSORS OF SECTION 1441(c) ............................. 1106
   A. Removal Under the Judiciary Act of 1789 ....................... 1108
   B. Separable Controversy Act of 1866 .............................. 1115
   C. Prejudice or Local Influence Removal Act of 1867 ........ 1117
   D. Judiciary Act of 1875 ................................................. 1118
   E. Removal Act of 1887 .................................................. 1123
   F. Judicial Code of 1911 ................................................. 1126
II. THE REVISED JUDICIAL CODE OF 1948, SECTION 1441(c) .... 1129
   A. The Change from "Separable" to "Separate and Independent" .......................... 1131
   B. The Expansion of Separate Claim Removal to Federal Question Cases and the Interaction with Pendent Jurisdiction ........................................ 1139
   C. The Grant of Discretion to Remand and the Interaction with Pendent Jurisdiction ........................................................................................................ 1146
III. THE REMOVAL PROVISION OF SECTION 1441(c) REMAINS USEFUL AND CONSTITUTIONAL ...................... 1147
   A. The 1990 Amendment Limiting Section 1441(c) to Federal Question Cases .................. 1147
   B. The Usefulness and Constitutionality of Section 1441(c) .................................................. 1149
IV. SECTION 1441(c) NOW AUTHORIZES THE REMAND OF FEDERAL QUESTION CASES .............................. 1159
   A. Opinions Interpreting the Amended Remand Clause of Section 1441(c) ......................... 1159
   B. An Analysis of the Amended Remand Clause of Section 1441(c) ............................... 1167
   C. Applying the Remand Clause of Section 1441(c) to Cases Removed Under Section 1441(a) ........................................................................................................ 1175
CONCLUSION ............................................................................. 1181

* Assistant Professor of Law, Seton Hall University School of Law. A.B. 1982, Harvard College; J.D. 1985, New York University School of Law. The author thanks the Honorable John J. Gibbons, Eugene Gressman, Charles Sullivan, Susan Block-Lieb, Denis McLaughlin, Andrea Catania, John Jacobi, Kathleen Boozang, John B. Oakley, and Michael Risinger for their comments on earlier drafts, and John Whipple and Philip Chronakis for their research assistance.
INTRODUCTION

DAVID CURRIE once referred to 28 U.S.C. § 1441(c), the separate claim removal provision, as “one of the most unfortunate provisions in the entire Judicial Code.” He argued that every time Congress tinkered with separate claim removal, it made a bad situation worse. Currie, and others, called on Congress simply to repeal § 1441(c). In 1990, the Federal Courts Study Committee, a distinguished group of judges, legislators, academics, and practicing lawyers appointed by the Chief Justice pursuant to an act of Congress to study the federal courts, agreed that § 1441(c) should be repealed. Congress responded, not by repealing § 1441(c), but by amending it again.

As amended, § 1441(c) now reads:

Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

Several commentators have asserted that the 1990 amendment has left § 1441(c) either useless, unconstitutional, or both. Charles

2. Id. at 25 (commenting that there is no “excuse for perpetuating this confusing, complicated, and unequal provision, which with every amendment has increasingly done more harm than good”).
3. Id. at 25 n.120; William Cohen, Problems in the Removal of a “Separate and Independent Claim or Cause of Action”, 46 Minn. L. Rev. 1, 41 (1961); see also John H. Lewin, The Federal Courts’ Hospitable Back Door—Removal of “Separate and Independent” Non-Federal Causes of Action, 66 Harv. L. Rev. 423, 431-42 (1953) (arguing that § 1441(e) is unconstitutional); Charles Rothfeld, Rationalizing Removal, 1990 B.Y.U. L. Rev. 221, 239 (advocating repeal, unless the statute is made effective by allowing removal whenever a single defendant could remove if sued on alone).
7. See, e.g., Geoffrey C. Hazard et al., Cases and Materials on Pleading and Procedure: State and Federal 443 (7th ed. 1994) (noting that amended § 1441(c) is “almost entirely superfluous,” that it is “much more trouble than it can possibly be worth,” and that it should be repealed); David D. Siegel, Changes in Federal Jurisdiction and Practice Under the New (Dec. 1, 1990) Judicial Improvements Act, 133 F.R.D. 61, 79 (1991) (remarking that § 1441(c) “may have to grope for some gainful employment”); see also Paul M. Bator et al., Hart and Wechsler’s The Federal Courts and the Federal System 275 (3d ed. Supp. 1993) [hereinafter Hart & Wechsler] (“Does what is left of § 1441(c) have any constitutional application in cases not removable under the general removal provision in § 1441(a)?”); Larry L. Teply & Ralph U. Whitten, Civil
Wright argues bluntly: “Section 1441(c) is the product of a long and interesting history. The present statute, however, is useless and ought to have been repealed.”

Douglas McFarland contends that the 1990 amendment left § 1441(c) a mere “unconstitutional stub.” Essentially, the argument is that § 1441(c) is useless because federal questions claims, along with state claims within supplemental jurisdiction, are removable under § 1441(a); and insofar as § 1441(c) purports to authorize the removal of state claims outside supplemental jurisdiction, it is unconstitutional.

To demonstrate that these commentators are wrong, this Article explores the “long and interesting history” that produced § 1441(c).

Its history reveals that § 1441(c) is the current response to an ever-present problem: What to do when a case filed in state court includes both a claim within federal jurisdiction and a claim outside federal jurisdiction.

In the first half of our country’s history—before federal trial courts had general federal question jurisdiction—this problem arose principally in diversity cases. For example, a citizen of New York might sue a citizen of New Jersey in a New York state court and then join a claim against a citizen of New York. If sued on separately, the claim against the citizen of New Jersey would be within the federal court’s diversity jurisdiction on removal; the claim against the citizen of New York, however, would not.

In the second half of our country’s history, the breadth of the federal question jurisdiction of federal trial courts expanded, and the problem began to arise in federal question cases as well. For example, a California plaintiff might sue a California defendant in state court for a violation of federal trademark laws, joining a claim against the same defendant for breach of contract. If sued on separately, the trademark claim would be within the federal court’s federal question jurisdiction. But...
jurisdiction on removal; the breach of contract claim, however, would not.

A similar issue arose for cases filed directly in federal court: What to do when a case filed in federal court includes both a claim within federal jurisdiction and a claim that, by itself, is outside federal jurisdiction. In this situation, the response was the creation of what is now called supplemental jurisdiction.14 Supplemental jurisdiction enables federal courts to exercise jurisdiction over a claim that would be outside the scope of federal jurisdiction were it not for its relationship to a federal claim.15

Supplemental jurisdiction has grown considerably over the years. In 1990, as part of the same act that amended § 1441(c), Congress extended supplemental jurisdiction to the constitutional limit.16 Nevertheless, even under current doctrine, supplemental jurisdiction is

---

14. Over the years, supplemental jurisdiction has been variously called pendent, ancillary, auxiliary, incidental, and dependent jurisdiction. Texas Employers Ins. Ass'n v. Felt, 150 F.2d 227, 234 (5th Cir. 1945). Charles Wright asserts without elaboration that it was “convenient” and “useful” to distinguish between pendent jurisdiction, “referring to those claims asserted by plaintiffs in their complaints,” and ancillary jurisdiction, “refer[ring] to the joinder, ordinarily by a party other than the plaintiff, of additional claims and parties after the complaint has been filed.” Wright, supra note 8, at 120 n.42. It is doubtful that the distinction was ever as convenient or useful, or as clear, as Wright suggests. Cf. Richard A. Matasar, A Pendent and Ancillary Jurisdiction Primer: The Scope and Limits of Supplemental Jurisdiction, 17 U.C. Davis L. Rev. 103, 104 n.1 (1983) (“Pendent jurisdiction dealt with the addition of claims and parties by plaintiffs, and ancillary jurisdiction dealt with the addition of claims and parties by defendants or intervenors.”). For example, the Supreme Court in Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978), treated the case as involving the limits of ancillary jurisdiction. Id. at 376. Later, however, the Court described Kroger as involving pendent (more precisely pendent-party) jurisdiction. Finley v. United States, 490 U.S. 545, 550 (1989). Now that Congress has settled on one term, “supplemental,” to cover all such jurisdiction, there is little reason to insist on the distinction. This Article uses the term supplemental jurisdiction, unless the historical context calls for use of the term then in vogue.


Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other 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. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

not broad enough to permit federal courts to hear all claims that the law of joinder allows to be joined. This persistent gap between supplemental jurisdiction and the law of joinder presents a recurring problem in the context of removal: What to do when plaintiffs use state joinder law to join claims that are within federal jurisdiction, including supplemental jurisdiction, with claims that are outside federal jurisdiction.

To address this recurring problem, three general approaches are possible. First, the entire case could be removable whenever any part of it falls within the federal court's removal jurisdiction. Second, the part of the case that would be within federal jurisdiction if sued on alone could be removable, leaving the rest of the case in state court. Third, no part of the case could be removable unless the entire case falls within the federal court's removal jurisdiction.

From the time of the Judiciary Act of 1789, the fundamental approach has been the third one—no part of a case can be removed unless the entire case is within federal jurisdiction. This is still the rule under the basic removal statute, 28 U.S.C. § 1441(a). As a result, state joinder rules, which have always been a step ahead of evolving federal supplemental jurisdiction concepts, can be used to block removal.

In 1866, Congress sought to prevent plaintiffs from using state joinder rules to block removal by permitting removal of parts of cases. Such piecemeal removal, however, was quickly abandoned because of the confusion, cost, and embarrassment it caused. Instead, Congress enacted a special removal statute—which ultimately evolved into § 1441(c)—to permit removal of the entire case in certain circumstances. Congress's abandonment of piecemeal removal, however, did not stop the courts from occasionally permitting piecemeal re-

17. See infra text accompanying notes 301-07.

18. Cf. Texas Employers, 150 F.2d at 234 ("Congress has a reasonable range of legislative discretion to determine whether such suit, in its entirety, shall be left in the state court, removed to the federal court, or split into two parts.").


20. 28 U.S.C. § 1441(a) (1988). Section § 1441(a) provides:

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

Id. Section 1441(b) prevents the removal of diversity cases where there is an in-state defendant. 28 U.S.C. § 1441(b) (1988).

21. See infra part I.B-C.

22. See infra part I.C.

23. See infra part I.D.
moval based on a determination that the part of the case that would remain in state court was somehow "really" a separate lawsuit.24

In 1948, Congress enacted § 1441(c), repudiating the decisions that permitted piecemeal removal.25 Unfortunately, some judges—including Judge Posner and then-Judge Breyer—continued to rely on these decisions to conclude that piecemeal removal is permissible in some circumstances.26 In 1990, Congress amended § 1441(c), reemphasizing its conviction that piecemeal removal is prohibited and underscoring its view that without § 1441(c), state joinder rules could be used to prevent removal.27

Thus, while § 1441(c) has been abused by commentators for years, it is both useful and constitutional: it is the only statutory mechanism that prevents plaintiffs from using state joinder rules to defeat removal. Those who find it useless either overlook the fact that supplemental jurisdiction is narrower than the law of joinder or fail to recognize that § 1441(a) only permits removal of entire cases and only if the entire case is within federal jurisdiction.28 Those who find it unconstitutional ignore the fact that it is constitutional for Congress to act to prevent plaintiffs from using state joinder rules to defeat removal.29

Furthermore, this old and abused dog is not only useful and constitutional, but it has learned a new trick. Federal district courts around the country have begun to use the amended § 1441(c) to remand, in their entirety, federal question cases that have been properly removed from state court.30 This development is significant for three reasons. First, it flies in the face of conventional wisdom which tells us that a federal district court has "no discretion to remand a . . . federal law claim."31 Second, while there is strong support in the district courts for the conclusion that they now possess the power to remand federal question cases, there is little support in the academy for the claimed power.32 Third, remand decisions are largely, although not com-

25. See infra part II.
26. See infra text accompanying notes 258-70.
27. See infra part III.A.
28. See infra text accompanying notes 316-23.
29. See infra text accompanying notes 306-12.
30. See infra part IV.A.
31. Burks v. Amerada Hess Corp., 8 F.3d 301, 304 (5th Cir. 1993); see also Buchner v. FDIC, 981 F.2d 816, 817 (5th Cir. 1993) (holding that a district court has no discretionary authority to remand a case over which it has subject matter jurisdiction); In re Wilson Industries, Inc., 886 F.2d 93, 96 (5th Cir. 1989) (stating that a district court has no discretion to remand a case in which a federal question claim remains, even if the claim that justified removal is withdrawn); Wright, supra note 8, at 253 n.23 (endorsing Buchner).
32. Maurice Rosenberg et al., Elements of Civil Procedure: Cases and Materials 35 (5th ed. Supp. 1993) (suggesting that it would have been better to provide that the district court may remand supplemental claims under § 1441(c) in the same circumstances as it can dismiss supplemental claims under § 1367(c)); Teply & Whitten,
pletely, insulated from review by appellate courts. Particularly in

**supra** note 7, at 156 (asserting that § 1441(c) should not be construed to permit remand of an entire case); Wright, **supra** note 8, at 240 (finding remand of entire case under § 1441(c) “surprising”); id. at 253 (endorsing narrow remand power); John B. Oakley, **Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990**, 24 U.C. Davis L. Rev. 735, 750 (1991) (presuming that “matters” under § 1441(c) means “claims” and thus concluding that the provision does not authorize remand of an entire case); Thomas M. Mengler et al., **Recent Federal Court Legislation Made Some Noteworthy Changes**, Nat'l L.J., Dec. 31, 1990-Jan. 7, 1991, at 20-21 (asserting that § 1441(c) should not be construed to permit remand of an entire case); see also Richard H. Field et al., Material for a Basic Course in Civil Procedure 65 (6th ed. 1990 & Supp. 1994) (criticizing courts that remanded entire cases); 14A Charles A. Wright et al., **Federal Practice and Procedure** § 3724, at 122-24 (2d ed. Supp. 1994) [hereinafter Wright & Miller] (same). But see Siegel, **supra** note 7, at 78 (“If ‘matters’ is construed to include all ‘claims’, then a combination of claims in which a federal claim is one but in which state law is found to ‘predominate’ may justify a remand of the whole case.”); cf. Mitchell N. Berman, **Note, Removal and the Eleventh Amendment: The Case for District Court Remand Discretion To Avoid a Bifurcated Suit**, 92 Mich. L. Rev. 683, 738 (1993) (“[T]he only effect of the change in wording is to enable district courts to remand claims technically within their ‘arising under’ jurisdiction.”).

33. 28 U.S.C. § 1447(d) provides:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

28 U.S.C. § 1447(d) (1988). While, on its face, this statute would appear to bar any review of remand orders other than those removed under the civil rights removal statute, the Supreme Court has held that it only bars review of remand orders that are based on § 1447(c). Thermon Prod., Inc. v. Hermansdorfer, 423 U.S. 336, 343 (1976). At the time of *Thermtron*, § 1447(c) required remand when the case was removed “improvidently and without jurisdiction,” so that if the district court based its remand decision on a lack of subject matter jurisdiction, the remand decision is unreviewable. See, eg., Tillman v. CSX Transp., Inc., 929 F.2d 1023, 1026-27 (5th Cir. 1991) (holding that § 1447(d) “unmistakably commands” that remand order under § 1447(c) is unreviewable); *In re Merrimack Mutual Fire Ins. Co.*, 587 F.2d 642 (5th Cir. 1978) (holding that district court's invocation of § 1447(c) precluded review of remand order).

In 1988, § 1447(c) was amended to provide a time limit for motions to remand due to defects in the removal procedure, but it requires remand at any time it “appears that the district court lacks subject matter jurisdiction.” *Judicial Improvements and Access to Justice Act*, Pub. L. No. 100-702, § 1016(c), 102 Stat. 4642, 4670 (1988). Thus, if a district court remands on the basis of a lack of subject matter jurisdiction, the remand decision is unreviewable. See, eg., Tillman v. CSX Transp., Inc., 929 F.2d 1023, 1026-27 (5th Cir. 1991) (holding that review was precluded because district court remanded for lack of subject matter jurisdiction, even though court did not cite § 1447(c) in its remand order).

On the other hand, if a district court remands for some reason other than those in § 1447(c), the § 1447(d) bar on review does not apply. *Thermtron*, 423 U.S. at 345-46. This does not mean that an appeal may be taken, because an order of remand is ordinarily not a final appealable order under 28 U.S.C. § 1291. *Id.* at 352-53; see, eg., *Executive Software N. Am., Inc. v. United States Dist. Court for the Cent. Dist. of Cal.*, 24 F.3d 1545, 1562 (9th Cir. 1994) (holding that an order of remand is not a final appealable order); cf. *Waco v. United States Fidelity & Guar. Co.*, 293 U.S. 140, 143 (1934) (permitting appeal where decision on merits precedes remand order “in logic and in fact”). Instead, the available method of review is by petition for the extraordi-
these days of managerial judges who often worry about the size of their dockets,\textsuperscript{34} a controversial doctrine that permits district court judges to remand federal question cases deserves careful attention.

Part I of this Article examines the history and development of removal from the Judiciary Act of 1789 to the Judicial Code of 1911, focusing on the extent to which plaintiffs could use state joinder rules to block the availability of a federal forum for defendants. Part II reviews the changes in removal brought about by the Revised Judicial Code of 1948, including the enactment of the original version of § 1441(c), and discusses the grant of discretion to remand under the 1948 Act. Part III introduces the Judicial Improvements Act of 1990 and demonstrates the usefulness and constitutionality of the amended § 1441(c). Part IV examines the truly innovative provision of § 1441(c), the amended remand clause, and discusses how it has been used to remand federal question cases in their entirety. Finally, this Article concludes that, although virtually all of the decisions that permit remand of federal questions cases misread the amended § 1441(c), the district judges are on to something—there is a legitimate basis, in limited circumstances, for remanding federal question cases.

I. THE PREDECESSORS OF SECTION 1441(c)

Article III of the United States Constitution permits federal courts to exercise jurisdiction in certain enumerated kinds of cases and controversies.\textsuperscript{35} That power can be exercised in three basic ways: First, nary writ of mandamus. Thermtron, 423 U.S. at 353; see, e.g., Westinghouse Credit Corp. v. Thompson, 987 F.2d 682, 683-85 (10th Cir. 1993) (considering and denying petitioner's application for a writ of mandamus). For example, in Thermtron, the Supreme Court held that a writ of mandamus could issue against a district judge, compelling him to exercise jurisdiction where he had remanded simply because his docket was crowded. Thermtron, 423 U.S. at 353.

There are many unanswered questions regarding when and how remand decisions are reviewable. See generally Wright, \textit{supra} note 8, at 254-55 (outlining exceptions to the usual rule that remand orders are nonreviewable); 15A Wright & Miller, \textit{supra} note 32, § 3914.11, at 696-718 (discussing application of finality principles to orders involving remand of cases removed from state courts); id. § 3914.11, at 64-69 (Supp. 1994) (same); Mark Herrmann, Thermtron Revisited: When and How Federal Trial Court Remand Orders are Reviewable, 19 Ariz. St. J. 395 (1987) (criticizing Thermtron and attempting to reconcile with other cases); Joan Steinman, Removal, Remand, and Review in Pendent Claim and Pendent Party Cases, 41 Vand. L. Rev. 923 (1988) (discussing problems that have arisen and could arise in federal question cases removable under § 1441(a) and (b)); Rhonda Wasserman, Rethinking Review of Remands: Proposed Amendments to the Federal Removal Statute, 43 Emory L.J. 83 (1994) (advocating discretionary appellate review of removal orders); Comment, Removal, Waiver, and the Myth of Unreviewable Remand in the Fifth Circuit, 45 Baylor L. Rev. 723 (1993) (analyzing current Fifth Circuit law governing reviewability of remand orders). The point here is that it is difficult to obtain review of remand decisions, and district judges know it.

\textsuperscript{34} See generally Judith Resnik, \textit{Managerial Judges}, 96 Harv. L. Rev. 374 (1982) (examining the active role judges have assumed in managing their dockets).

\textsuperscript{35} U.S. Const. art. III, § 2. Specifically, Article III provides:
Congress can provide for a federal appellate court to review the judgments reached in cases litigated in the state courts. Second, Congress can provide for a federal trial court to hear and determine cases filed as an initial matter by a plaintiff. Third, Congress can provide for the removal to a federal trial court of cases filed in state trial courts. Over the years, Congress has used these three mechanisms in various combinations to provide a federal forum for certain cases and controversies but has never provided a federal forum for all of the cases and controversies that fall within Article III.

Removal jurisdiction is the oddest and least understood of these three mechanisms. In 1912, Judge McPherson remarked: "That there is no other phase of American jurisprudence with so many refinements and subtleties, as relate to removal proceedings, is known by all who have to deal with them." This statement remains true today. Commentators often note that removal jurisdiction is nowhere explicitly mentioned in the Constitution, yet the same is true of federal court review of state court judgments and the direct filing of cases by

The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id. cl. 1.

36. Of course, Congress can also provide for federal appellate review of decisions of federal courts.


plaintiffs in lower federal courts. All three are simply mechanisms to bring cases into the federal courts for adjudication.

A. Removal Under the Judiciary Act of 1789

The first Congress chose to utilize all three distinct mechanisms in the Judiciary Act of 1789. The Act provided for a federal appellate court—the United States Supreme Court—to review judgments denying a federal claim rendered by the highest court of a state in which a decision could be had. Also, the Act provided for a federal trial

In Martin v. Hunter's Lessee, the Virginia Court of Appeals resisted a mandate issued by the Supreme Court, contending that the Court's power of appellate review extended only to judgments of inferior federal courts and not to the judgments of a court of another sovereign. Martin, 14 U.S. at 305. The state court, however, did concede that removal of cases to federal court before judgment was permissible. Hunter, 18 Va. at 12-16. The Supreme Court, of course, rejected the exaggerated view of state sovereignty posited by the Virginia Court of Appeals but justified review of state court judgments, in part, by viewing the writ of error as a removal mechanism. Martin, 14 U.S. at 349-50; see also Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 618 (1874) (referring to Supreme Court review of state court judgments as “removal of cases from the State courts”); Hart & Wechsler, supra note 7, at 1767 (referring to Supreme Court review of state court judgments as a form of removal); cf. Judiciary Act of 1789, ch. 20, § 24, 1 Stat. 73, 85 (“And the Supreme Court shall not issue execution in causes that are removed before them by writs of error, but shall send a special mandate to the circuit court to award execution thereupon.”); 28 U.S.C. § 1447(b) (1988) (authorizing district courts to issue writs of certiorari to state courts in support of removal jurisdiction).

The constitutionality of removal is beyond question. See, e.g., Tennessee v. Davis, 100 U.S. 257, 272 (1879) (holding that removal of a criminal case to federal court does not invade state jurisdiction); Railway Co. v. Whitton's Adm'r, 80 U.S. (13 Wall.) 270, 289-90 (1871) (confirming constitutionality of removal of state action to federal court).

40. Chemerinsky, supra note 38, § 5.5, at 322 (“Article III defines the matters that federal courts may hear, but it is silent as to the procedures that may be used to initiate federal court jurisdiction.”).

41. The constitutionality of removal is beyond question. See, e.g., Tennessee v. Davis, 100 U.S. 257, 272 (1879) (holding that removal of a criminal case to federal court does not invade state jurisdiction); Railway Co. v. Whitton's Adm'r, 80 U.S. (13 Wall.) 270, 289-90 (1871) (confirming constitutionality of removal of state action to federal court).


43. Judiciary Act of 1789 § 25. Technically, Article III bestows the Supreme Court's jurisdiction, and legislation constitutes an “exception” to its jurisdiction. Ex parte McCardle, 74 U.S. (7 Wall.) 506, 513 (1868) (observing that because statute affirming Supreme Court jurisdiction is read as implied negation of other jurisdiction, “it was an almost necessary consequence that acts of Congress, providing for the exercise of jurisdiction, should come to be spoken of as acts granting jurisdiction, and not as acts making exceptions to the constitutional grant of it”).

Congress has never authorized the lower federal courts to review formally the judgments of state courts, although habeas corpus for state prisoners in custody pursuant to state court judgments is sometimes seen as the functional equivalent. Rogers v. Platt, 814 F.2d 683, 694-95 & n.15 (D.C. Cir. 1987) (insisting on explicit Congressional direction before reviewing state court judgment, but contrasting habeas jurisdiction); see also Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923) (noting that the jurisdiction possessed by the District Courts is strictly original and precludes the exercise of appellate review); James S. Liebman, Apocalyptic Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity, 92 Colum. L. Rev. 1997, 1998 (1992) (“Today, a district court's habeas corpus review of the constitutionality of a state criminal conviction and the Supreme Court's direct review of the same question are
court—in some cases the United States Supreme Court, in other cases the United States Circuit Court or the United States District Court—to hear and determine certain cases filed in those courts as an initial matter. Finally, the Act provided for the removal of certain cases commenced in state court to a federal trial court.

Although the three mechanisms were distinct, considerable overlap existed between the trial jurisdiction of circuit courts upon a direct filing and upon removal. Most significantly, cases involving more than $500 between a citizen of the state where the suit was brought and a citizen of another state could either be brought directly in a federal circuit court or, if filed in state court, could be removed to a federal circuit court by the out-of-state defendant. Yet even in this instance, the overlap was not complete—an in-state defendant sued by an out-of-state plaintiff in state court could not remove. Nevertheless, in those areas where overlap existed, judicial precedents from direct filing cases were often relied upon in removal cases.

The famous case of Strawbridge v. Curtiss involved a suit filed directly in the Circuit Court for the District of Massachusetts. Chief Justice John Marshall’s concise opinion, which was rendered without argument, states in full:


There is little doubt that the Constitution would permit lower federal courts to review state court judgments. The Federalist No. 82 (Alexander Hamilton), reprinted in Hart & Wechsler, supra note 7, at 30 (“I perceive at present no impediment to the establishment of an appeal from the state courts, to the subordinate national tribunals; and many advantages attending the power of doing it may be imagined.”). Congress has the authority to allocate the judicial power of the United States in many other ways, such as the review of state court judgments in cases between citizens of different states by regional appellate courts.

44. Plaintiffs could file in the Supreme Court as a trial court in cases where a state, an ambassador, or a public minister was a party. Judiciary Act of 1789 § 13. Plaintiffs could file cases with more than $500 at stake in the circuit courts as trial courts where “the United States [were] [sic] the plaintiffs,” where “an alien [was] a party, or where the suit [was] between a citizen of the State where the suit [was] brought, and a citizen of another State.” Id. § 11. (Yes, the “United States” was considered plural.) See James M. McPherson, Battle Cry of Freedom 859 (1988) (“Before 1861 the two words ‘United States’ were generally regarded as a plural noun.”). Plaintiffs could file in district courts as trial courts in admiralty cases, seizure cases, certain alien tort cases, suits against consuls and vice-consuls, and cases brought by the United States involving $100. Id. § 9.

45. Alien defendants in state court, out-of-state citizens defending a suit against a home state plaintiff, and a party claiming title to land under a grant from one state against an adversary claiming title under a grant from the forum state could petition for removal of cases involving $500 from state court to the Circuit Court. Id. § 12.

46. Id. §§ 11-12.

47. Compare id. § 11 (authorizing original jurisdiction of circuit courts over matters exceeding $500 and involving either the United States as a party, an alien as a party, or diversity jurisdiction) with id. § 12 (providing for removal of cases from state courts to federal district courts).

48. 7 U.S. (3 Cranch) 267 (1806).
The court has considered this case, and is of opinion that the jurisdiction cannot be supported.

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

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

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

Decree affirmed.49

Strawbridge is universally cited as establishing a rule of complete diversity—requiring diversity between each plaintiff and each defendant.50 The Court in Strawbridge, however, explicitly reserved the question of jurisdiction "where several parties represent several distinct interests."51 This reservation forms the root of separate controversy removal.

At the time Strawbridge was decided, joinder of parties in actions at law was governed by common law, which followed the substantive law. Plaintiffs who were asserting joint rights had to sue jointly, while those asserting several rights had to sue separately.52 Similarly, defendants whose liability was exclusively joint—as was often the case in

49. Id. at 267-68.


51. Strawbridge, 7 U.S. (3 Cranch) at 267.

52. 7 Wright & Miller, supra note 32, § 1651, at 367-71; John N. Pomeroy, Remedies and Remedial Rights by the Civil Action According to the Reformed American Procedure §§ 184-90, 222-23 (1876); see also Charles E. Clark, Handbook of the Law of Code Pleading § 56, at 349-51 (2d ed. 1947) (describing situations in which the courts required plaintiffs to sue jointly and exacted penalties for failure to do so and discussing cases in which no joinder was allowed, despite common questions of law or fact, because the parties' interests were several).
contract actions—had to be sued together. If the defendants’ liability was joint and several, however—as was typically the case in tort actions—the plaintiff had the option of suing them separately or together. If plaintiffs had the option of suing jointly or severally and chose to sue jointly, Strawbridge applied with full force.

Equity courts, on the other hand, developed a tripartite view of joinder of parties: 1) proper parties, denoting those who were interested in the subject matter of the action and the relief sought; 2) necessary parties, denoting those whose interests would be directly affected by a decree and should be joined if possible; and 3) indispensable parties, denoting those whose interests were so inseparably involved that the court could not proceed in their absence. As a result of these distinctions, it was in equity cases, as Justice Story explained, where the “distinct and separate interest referred to in Strawbridge” might arise.

Such a distinct and separate interest, however, did not permit the federal court to hear the entire case; instead, “if a distinct interest vested in [one defendant] so that substantial justice, (so far as he was concerned,) could be done without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone.” Thus, if a plaintiff filed a bill in equity that included a non-indispensable defendant outside the court’s jurisdiction, the court, even on appeal, would only dismiss that defendant, not the entire case. Under Strawbridge, then, out-of-state plaintiffs who feared that a state court would be biased in favor of in-state defendants could, within the limits of the law of joinder, forego some efficiencies of joining other parties and obtain a federal forum by carefully structuring the suit to avoid including any party that would defeat diversity jurisdiction.

---

53. Pomeroy, supra note 52, §§ 273-82; see also Clark, supra note 52, § 59, at 373 (“Joint obligors had to be sued together in the law courts.”).
54. 7 Wright & Miller, supra note 32, § 1651, at 367.
56. Shields v. Barrow, 58 U.S. (17 How.) 130, 139 (1854); Clark, supra note 52, § 56; 7 Wright & Miller, supra note 32, § 1601, at 7-8.
60. The Strawbridge interpretation of the Judiciary Act of 1789 produced a different problem for out-of-state plaintiffs. They could not sue any out-of-state defendant in federal court along with the in-state defendant—even if the out-of-state defendant was from a different state than was the plaintiff. Thus, a citizen of New Jersey could not sue a citizen of New York and a citizen of Massachusetts in the District of New York (even if the Massachusetts citizen were served in New York), because the citizen of Massachusetts was not a “‘citizen of the State where the suit is brought.’” Strawbridge, 7 U.S. (3 Cranch) at 267 (quoting Judiciary Act of 1789 § 11).
61. The problem was particularly acute in cases involving corporations, because under Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61 (1809), a corporation was a citizen of every state in which a member of the corporation was a citizen. Id. at 65. Congress remedied this problem in 1839, by permitting federal jurisdiction over an
Defendants, however, were in a very different position. In a series of circuit court cases, justices riding circuit held that Strawbridge applied where it was a defendant who sought the federal forum via removal.61 The argument for a different rule on removal was made eloquently before Justice Story by Peleg Sprague, representing an out-of-state defendant named Rines:

The plaintiff being a citizen of Massachusetts, the defendant, Rines, a citizen of Maine, claims the right to a trial in this court, by virtue of the constitution . . . and the judiciary act of 1789 . . . which were intended to secure the citizens of each state against being compelled to have their controversies with citizens of another state decided by the local tribunals of the state of their adversary. This right the defendant may waive, either by submitting to the state jurisdiction, or voluntarily incurring liabilities by joint contracts with citizens of another state. But such waiver must result from his own voluntary act, and not from the will or act of his adversary. If this action were founded on contract, it could not be maintained against Rines alone, it would be necessary to prove a joint contract by the defendants with the plaintiff, and in such cases Rines, by thus voluntarily associating himself with the defendants, citizens of Massachusetts, in making engagements to the plaintiff, might be held to have subjected himself to the same jurisdiction as his associates, as the remedy in actions ex contractu must be joint, and the plaintiff could

61. See, e.g., Rines, 22 F. Cas. at 641 (Story, Circuit Justice); Ward v. Arredondo, 29 F. Cas. 167, 167 (C.C.D.N.Y. 1825) (No. 17,148) (Thompson, Circuit Justice); Beardsley v. Torrey, 2 F. Cas. 1188, 1188 (C.C.D. Pa. 1822) (No. 1,190) (Washington, Circuit Justice) (not explicitly citing Strawbridge); see also A. Conkling, A Treatise on the Organization, Jurisdiction and Practice of the Courts of the United States 79 (Wm. & A. Gould & Co. 1985) (1831) ("The rule established relative to suits originally instituted in the courts of the United States, that where the jurisdiction depends upon the character of the parties, all the individuals composing the respective parties, plaintiff and defendant, must possess the requisite character, is applicable also to suits removed from the state courts.")
not sue the other defendants in the courts of the United States. But this is an action of tort brought against Rines, and other persons with whom he has never had any connexion or association, and with whom he is now coupled, without any agency of his own, and against his will, by the mere adversary act of the plaintiff. If there could be no judgment against him unless the other defendants were also found guilty, he would have the benefit of their cooperation in the defence, and that security for the impartiality of the court, which arises from the necessity of their giving judgment against their own citizens at the same time and for the same cause as against a stranger. But in this case, a verdict and judgment might be rendered against Rines alone, and he would have no right to contribution. The interest of the other defendants may be adverse to him, for if they have done wrong, it may suit their purposes to throw the whole burthen upon a stranger. ... Ought then Rines, a citizen of Maine, to be deprived of the benefit of having a trial in the courts of the United States, and compelled to submit to a final decision in the state court of an adversary, merely because that adversary has seen fit to bring in other persons, all of whom are hostile in interest to Rines.62

Although Justice Story acknowledged that Mr. Sprague argued "very ably,"63 he concluded that Strawbridge "has always been understood as equally applicable to all cases of suits removed from a state court. And, looking to the words used in the eleventh and twelfth sections of the act, as to this point, it seems absolutely impracticable to make any solid distinction between them."64 Justice Story relied upon the decisions of Justices Washington and Thompson on circuit, noting, "If I entertained any doubt upon the subject the deliberate opinions of my Brothers Washington and Thompson would be decisive with me."65

Moreover, partial removal was forbidden. As Justice Washington stated: "[I]t is most obvious that [the state action] cannot be severed, and a part only be removed. Not only would such a doctrine be attended with absurdity and inconvenience, but it would be repugnant to the language, and to the clear meaning of the twelfth section . . . ."66

Justice Story shared this view:

And this leads me, in the next place, to the consideration, which has been so strongly urged at the bar, as to the right of removal of a cause in part from a state court, leaving it still, as to other parties,

62. Rines, 22 F. Cas. at 641.
63. Id. at 642.
64. Id. Justice Story also concluded that because a tort plaintiff has the option of suing jointly or severally, if he chooses to sue jointly, the Strawbridge rule applies. Id. at 643 ("If a party has a distinct and separate interest, and also a joint interest . . . it has never been supposed, that the general rule laid down in that case did not apply.").
65. Id. at 645. He continued: "But I confess, that as an original question, I should have entertained the same view of the matter; and the weight of their authority ought, under these circumstances, to be quite conclusive with me." Id.
depending therein. It appears to me, that the very terms of the act prohibit any such partial removal of a suit.\textsuperscript{67}

Echoing \textit{Strawbridge}, Justice Thompson noted that:

There may be cases in equity where the several parties represent distinct interests, so that separate decrees may be made, where possibly some of the parties may take the cause into the circuit court, and others remain in the state court; but it ought even in such cases to be a very strong and palpable case of separate and distinct interests to sanction such a course.\textsuperscript{68}

As the Supreme Court later explained, the removal provisions of the Judiciary Act of 1789 "applied only to cases in which all the plaintiffs were citizens of the State in which the suit was brought, and all the defendants citizens of other States... If the whole suit could not be removed, no part of it could be taken from the State court."\textsuperscript{69}

From the beginning, it was clear that applying the \textit{Strawbridge} rule to removal provided a means for in-state plaintiffs to prevent an out-of-state defendant from removing.\textsuperscript{70} Justice Washington

freely admit[ted] that the doctrine which this court finds itself compelled to sanction, may be attended by all the inconveniences pointed out by the defendant's counsel, and that it may be so used, in a great measure, to defeat the provisions of the twelfth section of

\textsuperscript{67} Rines, 22 F. Cas. at 644.

\textsuperscript{68} Ward v. Arredondo, 29 F. Cas. 167, 168 (C.C.D.N.Y. 1825) (No. 17,148) (Thompson, Circuit Justice); see also Rines, 22 F. Cas. at 643 (noting that all the cases "in which a separate and distinct interest... is spoken of, were bills in equity, capable in their own nature of separate and distinct decrees upon separate and distinct interests, where there was, or might be, no community of interest, and where the general question was presented as to the proper parties necessary to be made in a suit in equity").

\textsuperscript{69} Barney v. Latham, 103 U.S. 205, 209 (1880); see also Texas Employers Ins. Ass'n v. Felt, 150 F.2d 227, 233 (5th Cir. 1945) ("From 1789 until 1866 the whole suit remained in the state court, even though it contained a separable controversy of the requisite jurisdictional amount wholly between citizens of different states, unless all of the defendants joined in the petition to remove and were citizens of different states from the plaintiff or all of the plaintiffs.").

\textsuperscript{70} The most obvious way that this could be done was by joining an in-state defendant. The Judiciary Act of 1789, however, only granted diversity jurisdiction over cases between a citizen of the state where the action was brought and a citizen of another state (rather than more generally between citizens of different states). Thus, a plaintiff could defeat removal by suing jointly with an out-of-state plaintiff—even if the out-of-state plaintiff and out-of-state defendant were from different states.

In Hubbard v. Northern Railroad, 12 F. Cas. 781 (C.C.D. Vt. 1853) (No. 6,818), joint administrators were appointed for a Vermont decedent. \textit{Id.} at 782. One administrator was a citizen of Vermont, another of New Hampshire. \textit{Id.} The defendant railroad was a New York corporation and therefore a citizen of New York. \textit{Id.} When the administrators filed suit against the railroad in Vermont state court, the railroad removed, but the case was remanded because one of the plaintiffs was not a citizen of the state where suit was brought. \textit{Id.} at 783.
the judiciary law. But the remedy, if indeed the subject be remediable, must be provided by Congress.\textsuperscript{71}

\section*{B. Separable Controversy Act of 1866}

With the revolution in civil procedure started by the Field Code in New York in 1848, the law of joinder of parties in all civil actions began to move slowly and unevenly toward the equity rules, increasing the opportunity for plaintiffs to structure actions in ways that prevented removal.\textsuperscript{72} Of course, changes in areas far more important than civil procedure were underway at the time as well. In the wake of the Civil War, the thirty-ninth Congress struggled with President Johnson over Reconstruction. In April of 1866, Congress overrode President Johnson's veto of the Civil Rights Act of 1866, and in June, it sent the Fourteenth Amendment to the states for ratification.\textsuperscript{73} In July, Congress reduced the Supreme Court to seven members to prevent President Johnson from filling vacancies\textsuperscript{74} and, four days later, provided a remedy for out-of-state defendants sued in state court by enacting the Separable Controversy Act.\textsuperscript{75} Under that Act, a non-

\textsuperscript{71} Beardsley v. Torrey, 2 F. Cas. 1188, 1189 (C.C.D. Pa. 1822) (No. 1,190). The courts did provide some relief to out-of-state defendants by holding that nominal parties could be disregarded. \textit{E.g.}, Brown v. Strode, 9 U.S. (5 Cranch) 303, 303 (1809); Wormley v. Wormley, 21 U.S. (9 Wheat.) 421, 451 (1823); \textit{Ward}, 29 F. Cas. at 168.


\textsuperscript{73} Jett v. Dallas Ind. Sch. Dist., 491 U.S. 701, 720-21 (1989) (describing history of Civil Rights Act of 1866 and Fourteenth Amendment). The Civil Rights Act of 1866 had its own removal provision that had nothing to do with either the citizenship of the parties or the nature of the claim brought by the plaintiff. Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27, 27 (current version at 28 U.S.C. § 1443 (1988)). The provision provided for the removal of both civil and criminal proceedings if the defendant was denied or could not enforce in the state court the rights given by that act. \textit{Id.; see e.g.}, Georgia v. Rachel, 384 U.S. 780, 788 (1966) (ordering removal of criminal proceedings from state court if district court determined that defendants were asked to leave and were prosecuted for trespassing on a place of public accommodation because of their race).

\textsuperscript{74} Act of July 23, 1866, ch. 210, § 1, 14 Stat. 209, 209 (reducing number of Supreme Court justices) (repealed 1911).

\textsuperscript{75} Ch. 288, 14 Stat. 306, 306-07 (1866) (authorizing separable controversy removal); see also Currie, supra note 1, at 23 ("[T]he original 'separable controversy' removal statute seems best explained as based upon the desire to give defendants the same escape from an overbroad complete-diversity requirement that plaintiffs already enjoyed because of their ability to leave nondiverse parties out of the lawsuit.").
resident defendant could remove part of a case filed in state court, so long as the removed part was "separable" from the rest of the case. As Circuit Judge Dillon\textsuperscript{76} explained, the 1866 Act

enlarges the provisions of the judiciary act in that it contemplates the case of several defendants, some residing in the state in which the suit is brought, and some in a state other than that in which suit is instituted; and it authorizes, in certain cases, the non-resident defendant to have the cause removed as to him and to proceed in the state court as to the resident defendants. The effect of this statute is plain:—without it no removal could be made, because all the defendants were not within the act, and under the ruling of the courts before mentioned, unless the cause was removable as to all, it was not removable as to any.\textsuperscript{77}

brought . . . if the suit is one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties in the cause . . . the defendant who is a citizen of a State other than that in which the suit is brought, may . . . file a petition for the removal of the cause as against him . . . . And such removal of the cause, as against the defendant petitioning therefor . . . shall not be deemed to prejudice or take away the right of the plaintiff to proceed at the same time with the suit in the State court as against the other defendants, if he shall desire to do so. 14 Stat. at 306-07.

\textsuperscript{76} Judge Dillon was one of the first Circuit Judges since the Midnight Judges were appointed by President John Adams at the conclusion of his presidency in 1801. Midnight Judges Act, ch. 4, § 3, 2 Stat. 89, 89 (1801) (repealed 1802). After the repeal of the Midnight Judges Act the following year, it was not until 1869 that judges could again be appointed to the circuit courts. Act of Apr. 10, 1869, ch. 22, § 1, 16 Stat. 44, 44; see generally Hart & Wechsler, supra note 7, at 36 (tracing the evolution of the circuit courts).


Before the passage of this act, no removal could be made in the causes to which the act applies, because all the defendants were not entitled to petition for removal, and the courts had decided that unless it was removable as to all, it was not so as to any. After the passage of the act of 1866, in certain cases the alien, or non-resident, defendant could have the cause removed as to him, while it was allowed to proceed in the state courts as to the resident defendants.

\textit{Id.} at 301-02.


Before the passage of that act no removal could be made in such a case, as some of the defendants are by that act supposed to be citizens of the State where the suit is brought, and all the courts, Federal and State, had uniformly decided that unless the cause was removable as to all the defendants it could not be removed at all, as the act of Congress contained no provision warranting any such proceeding as summons and severance for any purpose.

\textit{Id.}
In determining whether a separable controversy involving the non-resident defendant existed, courts essentially determined whether the defendant seeking removal was a necessary party to the state court action or merely a proper party. This linkage of a jurisdictional standard concerning "separable controversies" with a joinder standard concerning necessary and proper parties was only possible because separable-controversy removal was limited to diversity cases and therefore inherently involved the joinder of parties.

Significantly, removal under the 1866 Act occurred piecemeal. Parts of cases that were filed in state court were removed to the federal circuit court and other parts of the same case remained in the state court. While this helped to protect removal rights (at least marginally), it also created "[m]uch confusion and embarrassment, as well as increase in the cost of litigation."9

C. Prejudice or Local Influence Removal Act of 1867

In March 1867, at the close of the second session of the thirty-ninth Congress, Congress passed an act that purported to amend the 1866 Act. The Prejudice or Local Influence Removal Act of 1867 permitted removal by plaintiffs as well as defendants upon a filing of an affidavit that prejudice or local influence existed. It was argued that the 1867 Act was designed to broaden the inroads on Strawbridge made by the 1866 Act and to

allow a non-resident to remove the cause to the federal tribunal, whenever he had reason to believe that, from prejudice or local influence, he would be unable to obtain justice in the state courts, although there were other codefendants who were residents of the state in which the suit was brought.

78. Barney v. Latham, 103 U.S. 205, 214 (1880); see also Pullman Co. v. Jenkins, 305 U.S. 534, 538 (1939) (discussing "separable" in terms of joinder principles).
79. Barney, 103 U.S. at 213.
81. The Act provided, in relevant part:

[W]here a suit is . . . pending . . . in any State court, in which there is controversy between a citizen of the State in which the suit is brought and a citizen of another State . . . such citizen of another State, whether he be plaintiff or defendant, if he will make and file, in such State court, an affidavit stating that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court, may, at any time before the final hearing or trial of the suit, file a petition in such State court for the removal of the suit . . . .

Id. at 559.
Circuit Judge Shepley accepted the argument, but in the *Case of the Sewing Machine Companies*, the Supreme Court held that the *Strawbridge* interpretation of the Judiciary Act of 1789 applied to the 1867 Act as well:

Either the non-resident plaintiff or non-resident defendant may remove the cause under the [1867] act, provided all the plaintiffs or all the defendants join in the petition, and all the party petitioning are non-residents, as required under the Judiciary Act, but it is a great mistake to suppose that any such right is conferred by that act where one or more of the plaintiffs or one or more of the petitioning defendants are citizens of the State in which the suit is pending, as the act is destitute of any language which can be properly construed to confer any such right unless all the plaintiffs or all the defendants are non-residents and join in the petition.

Thus, the *Strawbridge* rule remained applicable to removal, unless the out-of-state defendant was involved in a separable controversy and could take advantage of the 1866 Act.

D. Judiciary Act of 1875

Several solutions were available to eliminate the problems caused by the 1866 and 1867 Acts. One would have been to return to the pre-1866 law and leave in state court any actions filed there that included either an out-of-state plaintiff or an in-state defendant. A second solution would have been simply to overrule *Sewing Machine Companies* and permit removal of any case in which a non-resident had reason to fear prejudice or local influence. Indeed, shortly after the decision in that case, a bill was reported by the House Judiciary Committee, "specifically to write into law what the Supreme Court did not find in the Act of 1867." Coincidentally, the victorious lawyer in *Sewing Machine Companies*, Ebenezer Rockwood Hoar, was serving his only term in the House at the time and vigorously opposed the bill. He objected that such an expansion of federal jurisdiction at the expense of state courts would be both unconstitutional and bad

83. Id. at 302; see also Sands v. Smith, 21 F. Cas. 345, 347-48 (C.C.D. Neb. 1870) (No. 12,305) (Dillon, Circuit Judge) (explaining that the 1867 Act modifies the Acts of 1839 and 1866 to allow a non-resident plaintiff to remove from state court, even if there is also a non-resident defendant).

84. 85 U.S. (18 Wall.) 553 (1874).

85. Id. at 587. Although the circuit court, in *Florence Sewing Machine*, and the Supreme Court, in *Sewing Machine Companies*, were addressing the same case, the case did not reach the Supreme Court on appeal from the circuit court's decision. Id. at 554. Instead, the case reached the Supreme Court on writ of error to the state court because the state court denied the petition for removal, tried the case, and entered judgment for the plaintiff. Id.


87. Id.
policy. Not surprisingly, the part of the bill that would have overruled Sewing Machine Companies was eliminated by the House.

As finally enacted, the Judiciary Act of 1875 neither returned to the pre-1866 law nor overruled Sewing Machine Companies. Instead, it provided that where a suit in state court included

a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district.

88. Id.
89. Id. at 67-68. Over time, Congressman Hoar proved wrong; there is nothing unconstitutional about vesting the federal courts with jurisdiction over cases in which only two parties are diverse. State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 530-31 (1967).

As enacted, the Judiciary Act of 1875 contained language that could be construed to overrule Strawbridge, both for direct filing and removal. It provided for jurisdiction over suits "in which there shall be a controversy between citizens of different States." Judiciary Act of 1875, ch. 137, § 2, 18 Stat. 470, 470. In the Removal Cases, 100 U.S. 457 (1879), Justice Bradley argued in a concurring opinion that this language provided for federal jurisdiction "where any of the contestants on opposite sides of the controversy are citizens of different States." Id. at 481 (Bradley, J., concurring). He dissented "from so much of the [majority] opinion as seems to assume that one condition of Federal jurisdiction... is, that each party on one side of the controversy must be a citizen of a different State from that of which either of the parties on the other side is a citizen." Id. at 479. Bradley was particularly concerned that federal jurisdiction extend to cases that "relate to the foreclosure and sale of railroads extending into two or more States, and winding up the affairs of the companies that own them." Id. at 480.

Bradley's view, however, did not carry the day. Peninsular Iron Co. v. Stone, 121 U.S. 631, 632 (1887) (interpreting the Removal Cases as continuing the rule of complete diversity to direct-filed cases); Blake v. McKim, 103 U.S. 336, 337 (1880) (interpreting the Removal Cases as continuing the rule of complete diversity in removed cases absent a separable controversy); see also Hart & Wechsler, supra note 7, at 1664 ("Under all the varying formulations of the general grant of diversity jurisdiction in successive judiciary acts, the Strawbridge decision has been consistently interpreted as requiring that there be diversity of citizenship as between each plaintiff and each defendant."). Bradley did not object to these decisions, but did succeed in establishing federal jurisdiction under the 1875 Act for all cases involving federally-chartered railroads. Pacific R.R. Removal Cases, 115 U.S. 1, 11 (1885) (Bradley, J.) (holding that, under the 1875 Act, a suit brought in state court against a United States corporation may be removed by the corporation into federal court).

In reiterating the Strawbridge complete diversity rule, the Court in Stone also repeated the rule that the "several distinct interests" reservation in Strawbridge did not apply when the plaintiffs chose to sue jointly. Stone, 121 U.S. at 632-33, (citing, inter alia, New Orleans v. Winter, 14 U.S. (1 Wheat.) 91 (1816) (holding that complete diversity rule applies when plaintiffs sue jointly)). The Court observed, "This rule has been adhered to steadily ever since... and in removal cases... it has uniformly been applied, unless there is a separable controversy." Id. at 633 (citations omitted).

90. Ch. 137, 18 Stat. 470.
91. Id. § 2. The Judiciary Act of 1875 provided, in relevant part:

[A]ny suit of a civil nature... pending... in any State court... in which there shall be a controversy between citizens of different States... either party may remove... And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States,
In *Barney v. Latham,* the Supreme Court concluded that this Act provided "for the removal of the entire suit," not simply the separable controversy. Justice Harlan explained:

That such was the intention of Congress is a proposition which seems too obvious to require enforcement by argument. While the act of 1866 expressly confines the removal to that part of the suit which specially relates to or concerns the defendant seeking the removal, there is nothing whatever in the act of 1875 justifying the conclusion that Congress intended to leave any part of a suit in the State court where the right of removal was given to, and was exercised by, any of the parties to a separable controversy therein. Much confusion and embarrassment, as well as increase in the cost of litigation, had been found to result from the provision in the former act permitting the separation of controversies arising in a suit, removing some to the Federal court, and leaving others in the State court for determination. It was often convenient to embrace in one suit all the controversies which were so far connected by their circumstances as to make all who sue, or are sued, proper, though not indispensable parties. Rather than split up such a suit between courts of different jurisdictions, Congress determined that the removal of the separable controversy to which the judicial power of the United States was, by the Constitution, expressly extended, should operate to transfer the whole suit to the Federal court.

Thus, the *Strawbridge* rule of complete diversity continued to apply in cases filed directly in federal court, as well as to removed cases where there was no separable controversy involving diverse parties. The

and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove . . . .

*Id.*

The Judiciary Act of 1875 is best known, of course, for its far more wide-ranging change—the grant of general federal question jurisdiction to the circuit courts.Judiciary Act of 1875 § 1. Interestingly, the bill as introduced and as passed by the House only concerned removal jurisdiction; the provisions granting general federal question jurisdiction were added as an amendment by the Senate with little discussion. Frankfurter & Landis, *supra* note 86, at 65-69; Hart & Wechsler, *supra* note 7, at 995; James H. Chadbourn & A. Leo Levin, *Original Jurisdiction of Federal Questions,* 90 U. Pa. L. Rev. 639, 642-45 (1942); Ray Forrester, *The Nature of a "Federal Question","* 16 Tul. L. Rev. 362, 374-75 (1942). David Currie argues that with the 1875 amendment, "the statute ceased to make sense, for it gave the defendant alone, unjustifiably, the opportunity to litigate in federal court without splitting one lawsuit into two." Currie, *supra* note 1, at 23. This criticism ignores, however, that the 1875 Act permitted plaintiffs, as well as defendants, to remove. Indeed, plaintiffs and defendants had equal removal power under the 1875 Act. Moreover, Currie's criticism overlooks that defendants and plaintiffs are, in general, differently situated with regard to the desirability of splitting one lawsuit into two. *See infra* notes 429-36 and accompanying text (discussing how plaintiffs and defendants are differently situated).

92. 103 U.S. 205 (1880).
93. *Id.* at 212.
94. *Id.* at 212-13.
rule, however, could be effectively avoided on removal in cases involving separable controversies wholly between citizens of different states.

The Court rejected the argument that if the plaintiff joined causes of action that need not or should not have been joined in one suit, only the cause of action between citizens of different states should be removed, leaving the other cause of action in state court.\textsuperscript{95} Observing that "[i]n a variety of cases it is in the discretion of the plaintiff as to whom he will join as defendants," and that "[c]onsistently with established rules of pleading he may be governed often by considerations of mere convenience,"\textsuperscript{96} the Supreme Court insisted that the entire case be removed and such questions left "for the determination of the trial court, that is, the Federal court, after the cause is there docketed."\textsuperscript{97} If, after considering such joinder issues in accordance with federal practice, the court determines that "the cause does not really and substantially involve a dispute or controversy within the jurisdiction of that court, it can, under the fifth section of the act of 1875, dismiss the suit, or remand it to the State court as justice requires."\textsuperscript{98}

Despite \textit{Barney}'s insistence that the entire case be removed, the Circuit Court for the Northern District of Illinois could not believe that the Supreme Court meant what it said. In \textit{City of Chicago v. Hutchinson},\textsuperscript{99} Chicago brought an action in state court to condemn approximately 200 parcels of land to open a street. The owner of one of the lots was a woman from Michigan, who filed a petition for removal. The circuit court first concluded that there was a separable controversy between the city and her as to the value of her land that could be fully determined as between them.\textsuperscript{100} Three days later, it faced the question of whether this meant that the entire case was removed, or only that portion of the case involving the petitioner. The court concluded that "the controversies between the city and the various parties are distinct and separate,"\textsuperscript{101} and therefore, only the controversy involving the removing defendant was removed, with the rest of the case left in state court.\textsuperscript{102} The court explained:

In taking this view of the case I concede we have, to some extent, to qualify the general principle laid down by the supreme court of the United States in \textit{Barney v. Latham}. In that case there were several controversies between the parties, and the supreme court of the United States held that did not deprive the court of jurisdiction, and did not prevent the various controversies in the case from being brought into the federal court, when application was made for re-

\textsuperscript{95} Id. at 214.
\textsuperscript{96} Id. at 215.
\textsuperscript{97} Id. at 216.
\textsuperscript{98} Id.
\textsuperscript{99} 15 F. 129 (C.C.N.D. Ill. 1882).
\textsuperscript{100} Id. at 132.
\textsuperscript{101} Id. at 136.
\textsuperscript{102} Id. at 137.
moval by one of the parties to a separate controversy. All I can say about that is, that to some extent the various questions in that case were blended together, although separate and distinct. But it is clear, I think, that this kind of a case was not in the mind of the supreme court when it made that decision, and if it had been, it would have modified the language, or the principle would not have been stated in such broad terms as are contained in the opinion of the court.\textsuperscript{103}

The circuit court professed to know what one suit really is—a view informed by common law procedure—regardless of what the state statutes authorized. Observing that the condemnation proceeding is "unlike an ordinary case at law or in equity, and resting wholly on the authority of the statute of the state, which describes the mode of proceeding,"\textsuperscript{104} the court determined that while "[i]n form the whole is one suit, in which there are many defendants[,] in substance and reality one suit, in which each defendant who owns a particular lot is a party . . . is sole."\textsuperscript{105} Thus, a distinction was born between separable and separate controversies, with the former resulting in removal of the entire case under \textit{Barney} and the latter resulting in removal only of the separate controversy.\textsuperscript{106}

\textit{Hutchinson} might have become regarded as simply an erroneous lower court decision if the Supreme Court had not employed the same reasoning in the \textit{Pacific Railroad Removal Cases}.\textsuperscript{107} The Court's decision in the \textit{Pacific Railroad Removal Cases} is best known for its expansive view of statutory federal question jurisdiction, treating all cases in which federally-chartered corporations are parties as cases "arising under the law of the United States" within the meaning of the Judiciary Act of 1875.\textsuperscript{108} One of the cases, however, was remarkably similar to \textit{Hutchinson}: Kansas City instituted a proceeding to condemn land, including land owned by the Union Pacific Railway Company, for the purpose of widening a street.\textsuperscript{109} The railway removed.\textsuperscript{110} The Supreme Court found the question of whether the removal brought the entire case regarding the widening of the street to federal court "embarrassing."\textsuperscript{111} Echoing \textit{Hutchinson} without citing it, the Court

\begin{itemize}
  \item 103. \textit{Id.} (citation omitted).
  \item 104. \textit{Id.}
  \item 105. \textit{Id.}
  \item 107. 115 U.S. 1 (1885).
  \item 108. \textit{Id.} at 11; 13B Wright & Miller, \textit{supra} note 32, § 3571, at 176-85. This holding has been legislatively overruled. 28 U.S.C. § 1349 (1988) (denying jurisdiction on grounds of federal incorporation unless the United States owns more than one-half of the stock).
  \item 109. Pacific Railroad Removal Cases, 115 U.S. at 5.
  \item 110. \textit{Id.} at 6.
  \item 111. \textit{Id.} at 19.
\end{itemize}
concluded that the controversy between the city and the railway was a “distinct and separate one” and therefore removable while leaving the rest of the case in state court.\textsuperscript{112} Just as \textit{Hutchinson} had found that the portion of the case involving each owner was a single separately-removable suit “in substance and reality,”\textsuperscript{113} so too the \textit{Pacific Railroad Removal Cases} found this to be true “to all intents and purposes.”\textsuperscript{114} Although the Supreme Court did not cite \textit{Barney}, perhaps because \textit{Barney} involved separable controversy removal (which was limited to diversity jurisdiction) and the \textit{Pacific Railroad Removal Cases} involved federal question removal, the decision nevertheless opened the door to recreating the confusion, waste, and embarrassment of piecemeal removal that, as the Court had said in \textit{Barney}, Congress had acted to prevent.\textsuperscript{115}

\section*{E. Removal Act of 1887}

In 1887, two years after the \textit{Pacific Railroad Removal Cases}, Congress eliminated the power of plaintiffs to remove with the passage of the Removal Act.\textsuperscript{116} Furthermore, Congress rewrote the general re-

\begin{enumerate}
\item Id. at 23.
\item City of Chicago v. Hutchinson, 15 F. 129, 137 (C.C.N.D. Ill. 1882).
\item \textit{Pacific Railroad Removal Cases}, 115 U.S. at 23.
\item \textit{Barney v. Latham}, 103 U.S. 205, 212-13 (1880).
\item Ch. 373, 24 Stat. 552 (1887); \textit{see generally} Frankfurter & Landis, \textit{supra} note 86, at 94-95 (explaining the stages by which a bill was proposed, changed and eventually became law). The following year, Congress made formal corrections and reenacted the Removal Act of 1887. Act of Aug. 13, 1888, ch. 866, 25 Stat. 433.
\end{enumerate}

The 1888 Act provided, in pertinent part:

\begin{quote}
[T]he circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature . . . arising under the Constitution or laws of the United States . . . or in which there shall be a controversy between citizens of different States . . . .

[A]ny suit of a civil nature . . . arising under the Constitution or laws of the United States . . . of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district. Any other suit of a civil nature . . . of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any State court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being non-residents of the State. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district. And where a suit is now pending, or may be hereafter brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local
moval provision in a way that no longer defined removal jurisdiction independently. Instead, removal jurisdiction was defined by reference to the kinds of cases that could be brought directly in district court.

In *Tennessee v. Union & Planters' Bank*, the Supreme Court held that a defendant could remove under the Removal Act only if the plaintiff could have brought the case in circuit court. Justices Harlan and Field dissented, arguing that the purpose of the Removal Act was to limit removal to defendants, not to prevent defendants

influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause: *Provided*, That if it further appears that said suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said circuit court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein.

At any time before the trial of any suit which is now pending in any circuit court or may hereafter be entered therein, and which has been removed to said court from a State court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said State court, the circuit court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in such State court, it shall cause the same to be remanded thereto.

Removal Act of 1887 §§ 1-2.

Frankfurter and Landis suggest that plaintiffs continued to have the right to remove under the Removal Act if local prejudice were shown. Frankfurter & Landis, supra note 86, at 94. The Act, however, not only limited "prejudice or local influence" removal to defendants, but also permitted the court to remand the action as to other defendants not subject to such prejudice if "no party to the suit will be prejudiced by a separation of the parties." Removal Act of 1887 § 2. It appears that Frankfurter and Landis may have been misled by the provision of the Act permitting a circuit court to inquire into the truth of an affidavit of prejudice or local influence filed by a plaintiff, and, if unsatisfied by it, to remand the action. *Id*. That provision, however, was not a grant of removal jurisdiction, but only a grant of a remand power applicable to a suit "which is now pending in any circuit court or may hereafter be entered therein, and which has been removed to said court from a State court." *Id*.

Removal at the time was a two-step process. First, the party would file a petition for removal in the state court. Second, the party would enter a copy of the state court record in the federal circuit court "on the first day of its then next session." *Id*. § 3. What was contemplated by the provision dealing with inquiry into the truth of removal affidavits filed by plaintiffs, then, was remanding not only cases already removed by plaintiffs and entered in the circuit court, but also cases in which the plaintiff had removed the action from state court but not yet entered the record in the circuit court because that court's next session had not yet begun. This interpretation is confirmed by contrasting this language with the language of the removal provisions in the Act, which apply to suits "which may now be pending or which may hereafter be brought, in any State court." *Id*. § 2.


118. *Id*.

119. 152 U.S. 454 (1894).

120. *Id*. at 462.
from removing on the basis of a federal defense. In their view, Congress defined removability by reference to jurisdiction over cases brought directly in federal court to avoid repetition of the language providing the jurisdictional predicates, including the jurisdictional amount, not to restrict removal to cases that could have been filed there directly.

Since the decision in Union & Planters' Bank, the irony of testing removal jurisdiction by determining whether a plaintiff who chose a state forum could have chosen a federal forum has been "a more-or-less constant feature of the removal statute, under which a case is removable if a federal district court could have taken jurisdiction had the same complaint been filed." The result of this decision is not only that a court considering a removal petition must determine whether a plaintiff could have filed the case directly in federal district court, but also that courts and commentators tend to have a reflexive inclination toward insisting on parallelism in direct-filed and removed cases. Nevertheless, despite the general parallelism created by the Union & Planters' Bank interpretation of the Removal Act of 1887, that Act continued to authorize defendants to remove the entire case to the federal circuit court if actually interested in a separable controversy wholly between citizens of different states.

In addition, lower courts began to rely on the Pacific Railroad Removal Cases to permit piecemeal removal of "separate" controversies. For example, in In re Stutsman County, the circuit court permitted out-of-state citizens to remove that part of a condemnation proceeding involving their property, while leaving the rest of the case in state court. Citing the Pacific Railroad Removal Cases, the court stated that "[t]he matter which has been removed to this court is not a 'separable controversy,' but a separate suit." Similarly, in Deepwater Railway Co. v. Western Pocohontas Coal & Lumber Co., the circuit court relied on Hutchinson, the Pacific Railroad Removal Cases, and Stutsman to permit partial removal of a condemnation proceeding, explaining that the case presented "a separable controversy or, speaking accurately, a distinct and separate controversy." The court rejected as "unteachable" the suggestion

121. Id. at 469.
122. Id. at 469-72.
124. 115 U.S. 1 (1885).
125. See supra notes 107-15 and accompanying text (discussing the Pacific Railroad Removal Cases).
126. 88 F. 337 (C.C.D.N.D. 1898).
127. Id. at 342; see also id. at 343 (noting that the removed matter is "to all intents and purposes, a separate suit").
128. 152 F. 824 (C.C.S.D.W.V. 1907).
129. Id. at 826.
that Barney required the removal of the entire case, reasoning that Barney only applied where joinder was accomplished under "‘established rules of pleading.’”? The circuit court apparently viewed the only “established rules” to be the rules of the common law. While the court acknowledged that the state statute permitted joinder, it emphasized that “under the ‘established rules’ of common-law pleading, unaided by statutory permission, a demurrer for multifariousness and misjoinder would have to be sustained instantly.” Thus, the courts continued to insist that, regardless of the enactment of laws governing joinder, they knew what a suit “really” was.

F. Judicial Code of 1911

The Judicial Code of 1911 carried forward the separable controversy provisions. The only change was to make the federal district courts the recipients of removed cases. Thus, under the 1911 Judicial Code, federal district courts exercised removal jurisdiction over entire cases that contained a “controversy which is wholly between citizens of different States, and which can be fully determined between them.” Indeed, in 1928, the Supreme Court reiterated its adherence to Barney, noting that its rule that separable controversy removal results in the removal of the whole case “has never been varied or questioned.”

However, lower courts applied the distinction between “separable” and “separate” to a broader range of cases. For example, in Idaho v. American Surety Co., the State of Idaho brought suit in state court upon a bond against the surety on behalf of sixteen depositors in a failed bank. The defendant removed, but most of the depositors did not have claims in excess of the federal statutory amount in con-

130. Id. at 830 (quoting Barney v. Latham, 103 U.S. 205, 215 (1880)).
131. Id.
132. Ch. 231, 36 Stat. 1087.
134. Id. This change was necessary because the Judicial Code of 1911 also abolished the old circuit courts with their trial jurisdiction. Id. § 128; Hart & Wechsler, supra note 7, at 39. Indeed, § 28 of the Judicial Code of 1911 carried forward the provision permitting a federal court to inquire into the truth of an affidavit of prejudice or local influence filed by a removing plaintiff, even though there had been no authorization for such a removal since 1887. Id. § 28.
137. The doctrine also continued to be applied in condemnation cases. See, e.g., Stuart v. Colorado E. R. Co., 156 P. 152, 155 (Colo. 1916) (permitting removal by non-resident defendant in condemnation proceeding but leaving proceeding against resident defendant in state court).
138. 218 F. 678 (S.D. Idaho 1914).
139. Id. at 679.
trovery. Conceding the "general rule that the removal of a separable controversy carries with it the entire suit," the court nevertheless determined that each "claim must be held to constitute a separate and distinct cause of action," and thus was separately removable.140 Again, common-law joinder was the point of reference, with the court commenting on how "unusual" it was that sixteen different plaintiffs could effectively join their causes of action "with no joint or community interest" in one action141 "to save the expense of numerous suits, and for no other reason."142 Similarly, where a broker sued one defendant for commissions and a second defendant on the ground that it had assumed the obligation to pay commissions, each cause of action was treated as "separate," with the court noting that they could not be joined at common law or even under an earlier version of the New York Code of Civil Procedure.143

The Circuit Court of Appeals for the Second Circuit permitted piecemeal removal of "separate" causes of action in Young v. Southern Pacific Co.144 In Young, sixteen plaintiffs sued the Southern Pacific Company, demanding a certain amount of stock.145 Fourteen were of diverse citizenship; two were not. The defendant sought removal as to the fourteen, but the plaintiffs objected—and the state court found—that the claims were joint. Defendants filed the record in federal district court and successfully moved for an injunction against the state proceeding. On appeal, the Second Circuit affirmed, reasoning that although the New York Practice Act authorized the joinder for convenience, it "does not pretend to make joint causes of action previously separate and single."146 Moreover, even if it were shown that the Legislature of New York intended by this legislation to make something called a joint cause of action by permitting separate causes belonging to separate individuals to be united in one complaint, then such joinder cannot operate to destroy the jurisdiction of the courts of the United States over such of the separate controversies incorporated in one complaint as exist between citizens of different states.147

140. Id. at 681.
141. Id.
142. Id. at 679.
143. Lucania Societa Italiana di Navigazione v. United States Shipping Bd. Emergency Fleet Corp., 15 F.2d 568, 569 (S.D.N.Y. 1923); see also State Improvement-Dev. Co. v. Leininger, 226 F. 884, 888 (N.D. Cal. 1914) (authorizing federal officer to remove separate cause of action to district court in case against federal and state officials). In both of these cases, the removing party was performing a federal function and, while not explicitly relied upon, this consideration may have influenced the result.
144. 15 F.2d 280 (2d Cir. 1926).
145. Id. at 281.
146. Id. at 282.
147. Id.
Although the court permitted the removal of these fourteen "separate" controversies while leaving the other two in state court, it did not distinguish between "separate" and "separable." Indeed, it determined that "causes of action removed are in their nature separable," and that "a series of separable and removable controversies exist[ed]." The court did not discuss Barney, or even mention the possibility that the whole case should have been removed based on the "separable" or "separate" controversy, perhaps because the parties did not frame the issue this way.

In Tillman v. Russo Asiatic Bank, however, the same court explicitly distinguished between "separable" controversies, which are governed by the Barney rule requiring removal of the whole case, and "separate" controversies, which are separately removable under Young and the Pacific Railroad Removal Cases. The court reasoned that each one of the "two entirely disconnected causes of action" that were joined in accordance with local practice in order to eliminate many trials, was "in every fundamental sense a separate suit."

Similarly, in Galveston, Harrisburg & San Antonio Railway v. Hall, the plaintiff Hall sued the railway for negligence leading to the death of his cattle. In accordance with Texas procedure, the railway filed a cross-action against a third-party, alleging breach of a contract to maintain stock pens in a sanitary condition. When Hall amended his claim to rely on the Interstate Commerce Act, the railway removed. Although the district court decided the entire case, the Fifth Circuit concluded that the "two controversies here are wholly distinct," and therefore only Hall's claim was removable.

The cross-action, which lacked an independent basis for federal jurisdiction and was outside the scope of "dependent" jurisdiction, could not be heard in federal court as part of the whole case that was removed under the separable controversy removal provision because that provision only applied in diversity cases.

On the other hand, if the federal claim and the state claim were not considered "separate," the unavailability of separable claim removal in federal question cases meant that if a claim arising under federal law were joined in state court with a state law claim outside the scope of supplemental jurisdiction, the case had to remain in state court.

148. Id. at 283.
149. Id. at 282.
150. 51 F.2d 1023 (2d Cir. 1931) (Learned Hand, J., on panel), cert. denied, 285 U.S. 539 (1932).
151. Id. at 1027-28.
152. Id.
153. 70 F.2d 608 (5th Cir. 1934).
154. Id.
155. Id. at 609.
156. Id. at 610.
157. Id.
Thus, in *Tullar & Tullar v. Illinois Central Railroad*, the plaintiffs sued a railroad in state court for charges in excess of those permitted by the Interstate Commerce Commission and for damages caused by a delay in shipping. Under Iowa state law, the joinder was proper. The defendant removed, but the court ruled that the removal was improper. The entire case could not have been brought directly in federal court because the delay claim was outside the scope of supplemental jurisdiction and therefore could not be removed except under the separable controversy provision. That provision, however, was unavailable because it only applied in diversity cases. The court refused to allow the defendant "to compel [the plaintiff], by removal of the suit or otherwise, to split his suit into parts and prosecute one part in one court and another part in some other court."

Despite Congress' attempt in 1875 to avoid the waste, confusion, and embarrassment resulting from piecemeal removal, courts—in both federal question and diversity cases—occasionally permitted the removal of parts of cases on the grounds that the removed part, despite proper joinder under state law, should be considered its own separate suit. This judge-made distinction between separate and separable controversies was attacked as unjustified by the language of the removal statute and its history, because it lead to "widely divergent results in its application," and for "introducing further uncertainty and complexity into a subject already hopelessly confused."

Congress responded with § 1441(c) of the Revised Judicial Code of 1948.

II. THE REVISED JUDICIAL CODE OF 1948, SECTION 1441(c)

The Revised Judicial Code of 1948 made three significant changes to the Judicial Code of 1911. First, it changed the requirement of a separable controversy as the predicate for removal to "separate and

---

158. 213 F. 280 (N.D. Iowa 1914).
159. *Id.* at 281.
160. *Id.* at 283.
161. *Id.* at 284. The court left open the possibility that removal might be appropriate if a plaintiff joined a trifling state claim in order to defeat removal.
162. See *supra* notes 90-94 and accompanying text (discussing Judiciary Act of 1875).
165. The Revised Judicial Code was "[r]epresented to the Congress by distinguished statesmen as making no changes in the existing law which would not meet with substantially unanimous approval." Arthur J. Keefe et al., * Venue and Removal Jokers in the New Federal Judicial Code*, 38 Va. L. Rev. 569, 571 (1952). The changes regarding separable claim removal were certainly substantial and, in Keefe's view, based on a highly controversial determination to restrict diversity jurisdiction. *Id.* at 603-04.
independent claim or cause of action." 166 Second, it changed the kind of claim that could be the basis of removal from a "controversy... between citizens of different States" 167 to a "claim or cause of action, which would be removable if sued upon alone." 168 Third, it gave the district court discretion to remand matters not otherwise within its original jurisdiction. 169

The revisers explained the first change as follows:

This quoted language has occasioned much confusion. The courts have attempted to distinguish between separate and separable controversies, a distinction which is sound in theory but illusory in substance. 170

Subsection (c) permits the removal of a separate cause of action but not of a separable controversy unless it constitutes a separate and independent claim or cause of action within the original jurisdiction of United States District Courts. In this respect it will somewhat decrease the volume of Federal litigation. 171

The revisers made no mention of the second change. This omission is rather odd because in the eighty-two years of its existence, the separable controversy provisions had always been limited to diversity cases. Piecemeal removal on the basis of a "separate" claim, on the other hand, was available in both diversity cases and federal jurisdiction cases, and the revisers clearly criticized the distinction between "separate" and "separable." Nevertheless, by changing the kind of claim that could be the basis of removal from a "controversy... between citizens of different States" 172 to a "claim or cause of action which would be removable if sued upon alone," 173 the Revised Judicial Code of 1948 made removal of an entire case based on the presence of a separate claim available in federal question cases as well. Moreover, by making separate claim removal applicable to federal question cases, the revisers—perhaps unwittingly—set the stage for a complex interaction between separate claim removal and pendent jurisdiction.

169. Id.; Hart & Wechsler, supra note 7, at 1783. In addition, the entity to be removed was described as an "action" rather than a "suit." This change underlined that the whole case, not simply a part of it, was to be removed. See infra text accompanying note 263.
170. 28 U.S.C. § 1441(c) (1988) historical and revision notes (citing Note, Separation of Causes, supra note 106, at 1048-51 (discussing the distinction between separable and separate controversies) and Comment, Chaos of Jurisdiction in the Federal District Courts, 35 Ill. L. Rev. 566, 576 (1941) (advocating the implementation of a comprehensive plan for redefining the jurisdiction of the federal district courts)).
Finally, the revisers explained the third change, which provides the district court with discretion to remand matters not within its original jurisdiction, as follows:

Rules 18, 20, and 23 of the Federal Rules of Civil Procedure permit the most liberal joinder of parties, claims, and remedies in civil actions. Therefore there will be no procedural difficulty occasioned by the removal of the entire action. Conversely, if the court so desires, it may remand to the State court all nonremovable matters.\textsuperscript{174}

By giving district courts the discretion to exercise jurisdiction, the revisers not only provided another link to pendent jurisdiction, but they also laid the groundwork for a broader claim of discretion to decline the exercise of jurisdiction.

A. The Change from “Separable” to “Separate and Independent”

The change from “separable” to “separate and independent” was ill-conceived from the start. The revisers correctly perceived that the problem under the Judicial Code of 1911 was that courts attempted to distinguish between “separable” and “separate” controversies. The Judicial Code, however, contained no such distinction, but instead instructed the district courts to accept jurisdiction of the entire case when it contained a separable controversy wholly between citizens of different states. It was the courts that created the problem by reading such a distinction into the statute.\textsuperscript{175}

The solution should have been clear—repudiate the cases that had created the distinction and make clear that piecemeal removal was not authorized under the statute. Ironically, that is precisely what the Harvard Law Review Note cited by the revisers advocated: “It seems best that this judge-made distinction between separate and separable controversies, introducing further uncertainty and complexity into a subject already hopelessly confused, should be discarded.”\textsuperscript{176}

Although the Harvard Note limited its critique to diversity cases, the identical distinction was relied upon in federal question cases and was equally subject to attack.

Alternatively, if a change in separable claim removal were necessary to decrease the volume of federal litigation, a return to the pre-1875 practice of removing only the separable controversy, or even to the pre-1866 practice of precluding any such removal, would have been coherent. This change, however, would have been at the price of either efficiency or the protection of removal rights.

Instead, the revisers chose to build into the statute the very distinction they correctly identified as the cause of the problem. Rather than

\textsuperscript{174} 28 U.S.C. § 1441 (c) (1988) historical and revision notes.

\textsuperscript{175} See supra text accompanying notes 99-115, 124-31, and 137-64.

\textsuperscript{176} Note, Separation of Causes, supra note 106, at 1049-50.
discarding the confusing distinction between "separate" and "separable," they insisted that "separate" claims or causes of action could be the basis for removal while "separable" controversies could not.\(^{177}\) Moreover, they then proceeded to ignore the very point of the distinction—that a "separate" controversy was so disconnected from the rest of the case that it could be regarded as its own suit and removed separately while leaving the rest of the case in state court—by providing for the removal of an entire case that contains a separate claim or cause of action.\(^{178}\) Thus, a case containing two controversies that could properly be adjudicated separately had to remain together in state court, while a case that contained two claims or causes of action that were so separate from each other that they could be regarded as two different suits could be kept together as one and removed in its entirety to federal court.

One bright spot existed in all of this: by providing for removal of the entire case based on the presence of a separate removable claim, the revisers did at least repudiate the notion of piecemeal removal. Thus, just as Congress in 1875 had abandoned its own short-term experiment with piecemeal removal, Congress in 1948 rejected the court's invention of piecemeal removal based on the presence of a separate claim.

In 1951, the Supreme Court considered the meaning of § 1441(c) under the Revised Judicial Code of 1948. In *American Fire & Casualty Co. v. Finn*,\(^{179}\) Florence Finn sued two insurance companies and an insurance agent in state court after her house burned down.\(^{180}\) She claimed that she either had insurance coverage with one of the two insurers or that the insurance agent was liable for failing to procure such coverage.\(^{181}\) Both she and the agent were citizens of Texas.\(^{182}\) The insurance companies were not citizens of Texas and removed the case to federal court.\(^{183}\) After a jury trial, judgment was entered against one of the insurance companies, American Fire & Casualty Company, but in favor of the other insurance company and the agent.\(^{184}\) After affirmation by the Court of Appeals for the Fifth Circuit, American argued to the Supreme Court that the removal was improper because there was no separate and independent claim or

---

178. Id.
179. 341 U.S. 6 (1951), rev'g 181 F.2d 845 (5th Cir. 1950).
180. Id. at 7-8.
181. *Finn*, 181 F.2d at 846.
183. Id. at 8.
184. Id.
cause of action. The Supreme Court agreed and reversed the judgment of the Court of Appeals.

The Supreme Court concluded that Congress had two purposes in adopting the "separate and independent claim or cause of action" test in 1948. The first was to simplify the determination of removability; the second was to limit removal. In light of the failure of the revisers to have a coherent rationale for § 1441(c), the Supreme Court, not surprisingly, could discern no more substantial purpose.

This feature of § 1441(c) and the Finn decision alone would have created enormous difficulties for lower courts, for it is difficult to apply a statute properly to widely differing cases without some guiding principles more substantial than simplicity and reduction of caseloads. The Supreme Court's opinion, however, sowed further confusion by describing the characteristics of a "separate and independent claim or cause of action" in two very different ways in the course of its opinion.

First, the Court spoke in terms of the number of wrongs to the plaintiff: where a plaintiff "suffered but one actionable wrong and [is] entitled to but one recovery," there is "a single wrongful invasion of a single primary right," and therefore only one cause of action. Finn, the Court noted, sought relief for a single wrong—"the failure to pay compensation for the loss on the property." Accordingly, there was only one cause of action and, therefore, no separate and independent claim or cause of action against the insurance companies.

In addition, however, the Court spoke in terms of factual relatedness. It noted that the "facts in each portion of the complaint involve [the agent], the damage comes from a single incident," and that "the allegations in which [the agent] is a defendant involve substantially the same facts and transactions as do the allegations against the foreign insurance companies." Therefore, "[i]t cannot be said that there are separate and independent claims for relief as § 1441(c) requires."

In 1961, William Cohen observed that these two aspects of Finn echoed an academic debate in the 1920s and 30s regarding the meaning of "cause of action," and he identified the chief protagonists in that earlier debate as Oliver McCaskill and Charles Clark. As he
saw it, the first aspect of Finn echoed McCaskill's view of a "cause of action," while the second echoed Clark's view of a "cause of action." In Cohen's view, Finn had one foot solidly in both the McCaskill camp and the Clark camp in the battle over the proper meaning of "cause of action." Recently, however, Douglas McFarland has argued that while "[t]he opinion in Finn does seem to waver between the two schools of thought," in the end, the Court "clearly adopts the Clark view." He goes so far as to interpret Finn as a knock-out punch to McCaskill. Both Cohen and McFarland, however, set the scope too narrowly—the Supreme Court in Finn did not simply straddle the debate between Clark and McCaskill, it straddled a debate between the two of them (together on the same side) and Pomeroy. To understand this point, and thus to unravel Finn, requires a brief excursion into the debate over the meaning of a cause of action.

To Pomeroy, a cause of action consisted of "one primary right and one delict being a breach thereof." He noted that a "single primary right" can include "particular subordinate rights," and cautioned against the "mistake" of thinking that "a distinct cause of action will arise from each special subordinate right included in the general primary right." Clark observed that application of Pomeroy's test in practice "has seemed to revolve around the idea of the 'primary right,'" and that "those applying this definition look[ ] for the primary right as the principal or most important right in a group of legal relations." For example, "in actions of trespass to land, ejectment and the like, my 'property right in the land' is sometimes viewed as the primary right, which is over and above such subordinate and lesser rights as my right that you shall not trespass upon it and the like." He found the concept "quite elusive," noting that "[i]n the case of injury to person and property at the same time, there might be two primary rights, a right to an uninjured personality [and] a right to uninjured property; or perhaps there is only one, a right not to be caused loss by defendant's negligence." To overcome this elusiveness,

193. Id. ("The Court's opinion seems to take both sides of the McCaskill-Clark debate on the definition of a cause of action.").
194. McFarland, supra note 9, at 1070.
195. Id. at 1068.
196. Id. at 1070 ("Eight, nine, ten. Justice Reed counts McCaskill out and raises Clark's arm, winner by a knockout.").
197. Pomeroy, supra note 52, § 454; see also id. § 453 ("[T]he primary right and duty and the delict or wrong combined constitute the cause of action."); John N. Pomeroy, Code Remedies §§ 347-349 (4th ed. 1904) (asserting that a cause of action arises from a "primary and corresponding duty and delict or breach"); George L. Phillips, An Exposition of the Principles of Pleading Under the Codes of Civil Procedure §§ 32-33 (1896) (referring repeatedly to "primary rights").
198. Pomeroy, supra note 52, § 455.
200. Id. at 827.
201. Id. at 826-27.
Clark posited that "the cause of action is an aggregate of operative facts, a series of acts or events, which gives rise to one or more legal relations of right-duty enforceable in the courts." 202 "The size of such aggregate should be worked out in each case pragmatically with an idea of securing convenient and efficient dispatch of trial business." 203

McCaskill, like Clark, rejected Pomeroy's view that "the character and scope of a single cause of action . . . should be determined solely from the number of primary rights and delicts involved." 204 He agreed with Clark that a test that looks for "single rights and single wrongs" is "indefinite" in scope. 205 However, he rejected Clark's proposed solution—that the scope of a cause of action should be determined "by the trial judge pragmatically with a view to his notion of administrative convenience"—believing instead that Clark's proposal was also "elusive." 206

McCaskill's solution was to "boldly take the position" that "the character and scope of a single cause of action . . . will be found only in a study of remedies." 207 McCaskill maintained that a "cause of action" was "that group of operative facts which, standing alone, would show a single right in the plaintiff and a single delict to that right giving cause for the state, through its courts, to afford relief to the party or parties whose right was invaded." 208 Thus, for McCaskill, each different theory of recovery constituted a cause of action. 209

McFarland uses the following tort hypothetical to illustrate the distinction between McCaskill's and Clark's views: "A approaches B, (1) strikes B in the face, (2) calls B a horse thief, (3) grabs B's arm to

202. Id. at 828.
203. Id. at 837.
205. Id.
206. Id.; see also Oliver L. McCaskill, The Elusive Cause of Action, 4 U. Chi. L. Rev. 281 (1937) (discussing uses of the term "cause of action").
207. McCaskill, supra note 204, at 634; see also id. at 638 n.42 ("The distinction between [my definition] and the definition[ ] given by Pomeroy [is that mine] is definitely tied up to remedies.").
208. Id. at 638.
209. In essence, McCaskill preferred a lawyer's perspective, insisting that the "cause of action" reflects the underlying legal theory. Clark, however, preferred a non-lawyer's perspective, viewing the "cause of action" as the facts that a non-lawyer would group together to tell a story. Compare Clark, supra note 52, § 19, at 130 (defining a cause of action as a "group of facts . . . limited as a lay onlooker would to a single occurrence or affair, without particular reference to the resulting legal right or rights") with McCaskill, supra note 204, at 648 (observing that a rule that adopts the Clark view of "cause of action" but requires a separate statement of distinct causes of action "seems to be more in the interest of literary style in story telling than service in the trial of law suits [because] it is difficult to see any practical advantage to be obtained in having [such] a separate statement . . . since facts are not grouped according to the legal principles applicable to them in any part of the pleading"); see also McFarland, supra note 9, at 1065-66 (comparing McCaskill's perspective on pleading with Clark's approach).
prevent escape, and (4) takes money from B's wallet to pay for the horse." He correctly observes that both Clark and McCaskill would agree that A has four rights of action against B, namely for (1) battery, (2) slander, (3) false imprisonment, and (4) conversion. Clark, however, would find only one cause of action, whereas McCaskill would find four causes of action. Pomeroy, too, would likely find four causes of action because of four primary rights invaded: (1) bodily safety, (2) good reputation, (3) freedom of movement, and (4) ownership of property.

As a formal matter, Clark clearly won in 1938, the year the Federal Rules of Civil Procedure were promulgated. The Federal Rules,

210. McFarland, supra note 9, at 1063.
211. Id.
212. Id. at 1063-66.
213. It is far from clear that Clark has prevailed in practice. As McCaskill would have preferred, it remains "common to draft complaints with multiple counts, each of which specifies a single statute or legal rule." Shannon v. Shannon, 965 F.2d 542, 552-53 (7th Cir. 1992). Perhaps, as McFarland suggests, this is simply old ways taking a long time to die. McFarland, supra note 9, at 1067 n.26. There are, however, few practicing lawyers today who were trained prior to 1938. It seems more reasonable to suppose that practicing lawyers find some value in organizing complaints according to legal theories and making clear what those legal theories are. And they are right. They will have to organize the allegations in this way to defeat a motion to dismiss. They will have to Marshall the evidence in this way to defeat a motion for summary judgment. They will have to argue the evidence in this way to prevail at trial. And, they will have to think in this way before filing the complaint both to advise their clients and in order to comply with Rule 11. Indeed, they will even have to think in this way in order to determine in which court they can file. The "well-pleaded complaint rule" for federal jurisdiction, for example, certainly seems to envision a McCaskill-like complaint. Matasar, supra note 39, at 1436 (stating that a "well-pleaded complaint" is one which contains what is "required to be pleaded in order to make out the elements of the cause of action"). Thus, while McFarland argues that McCaskillites are "fighting a rear guard retreat [and] do not realize their base camp has been captured," McFarland, supra note 9, at 1075, perhaps it is the Clarkians who do not realize that the war is won or lost on the battlefield, not in the generals' war room.

None of this is to advocate a return to detailed fact pleading. See generally Richard L. Marcus, The Revival of Fact Pleading under the Federal Rules of Civil Procedure, 86 Colum. L. Rev. 433 (1986) (documenting revival of detailed fact pleadings). A complaint can be short, plain, simple, and quite bereft of factual detail, yet still be drafted to make clear the legal theories on which it is based. Clark himself, while preferring complaints to be organized in lay transaction terms, found it tolerable to organize complaints by legal theory. Charles E. Clark, Joinder and Splitting of Causes of Action, 25 Mich. L. Rev. 393, 412-14 (1927).

Finally, it appears that the different senses in which earlier generations used "cause of action"—including McCaskill's sense—have been reproduced in the current usage of "claim." Thus, it is common for lawyers and judges to refer in a products liability case to the "negligence claim," the "strict liability claim," and the "breach of warranty claim," or in a securities action, to refer to the "section 10b-5 claim," the "section 12(2) claim," and the "state law fraud claim." See, e.g., Marcus, supra, at 493 (noting that it is "often difficult to identify elements of a claim that plaintiffs should be forced to establish"). Ironically, this is the sense in which Clark used the word "claim" when he fought to establish his interpretation of "cause of action." See, e.g., Clark, supra at 401 (observing a "single cause of action upon which varying claims, both legal and equitable, may be made"); Charles E. Clark, The Cause of Action, 82 U. Pa. L. Rev.
drafted by an advisory committee with Clark as its reporter, abandoned the term "cause of action" and adopted instead the term "claim"—designed to "track[ ] closely Clark's definition of 'cause of action.'" 214 Despite Clark's victory in the Federal Rules in 1938, however, § 1441(c) of the Revised Judicial Code of 1948 used both "claim" and "cause of action."

The Supreme Court in *Finn* did not distinguish between a "claim" and a "cause of action," but treated the two words as synonymous. 215 Quoting its 1927 decision in *Baltimore S.S. Co. v. Phillips*, 216 it set forth "an accepted description" of cause of action:

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

A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. 217

---


215. American Fire & Casualty Co. v. *Finn*, 341 U.S. 6, 12 n.5 (1951); see also McFarland, *supra* note 9, at 1070 n.45 (explaining the decision in *Finn*).

216. 274 U.S. 316 (1927) (a res judicata case).

Cohen interprets this quotation as a "clear endorsement" of McCaskill.\textsuperscript{218} McFarland responds that "the language may sound like McCaskill, but the result [of Phillips] is pure Clark."\textsuperscript{219} Both are wrong—the language and the result are Pomeroy.\textsuperscript{220}

Thus, when the Court in \textit{Finn} concluded that "where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441(c),"\textsuperscript{221} it was not embracing Clark, or blending Clark and McCaskill, but blending Clark and Pomeroy. If the Court were truly adopting Clark’s view, it would have simply said that there was only one claim or cause of action because of the factual relatedness of all three legal theories. Instead, in speaking of "a single primary right," "one actionable wrong," and "but one recovery,"\textsuperscript{222} it was applying a test that both Clark and McCaskill rejected.\textsuperscript{223}

Not surprisingly, \textit{Finn} caused considerable confusion. Some courts and commentators have relied on the "single wrong/single remedy" aspect of \textit{Finn}, treating two claims as separate and independent whenever the plaintiff’s recovery on one claim would not preclude her recovery on another.\textsuperscript{224} Other courts and commentators have focussed

\begin{itemize}
\item \textsuperscript{218} Cohen, \textit{supra} note 3, at 16.
\item \textsuperscript{219} McFarland, \textit{supra} note 9, at 1070 n.47.
\item \textsuperscript{220} Moreover, it is far more plausible that the Supreme Court in 1927 would apply Pomeroy’s view of a cause of action than either contrary view launched in the law reviews a scant three years earlier. Indeed, as late as 1947, Clark noted that “the definition of cause of action often quoted by the courts [is] that of Pomeroy.” Clark, \textit{supra} note 52, § 19, at 130.
\item McFarland is correct that, on the facts of \textit{Finn}—where “[l]iability lay among three parties, but it was uncertain which one was responsible”—Clark would have found only one cause of action while McCaskill would have found three. McFarland, \textit{supra} note 9, at 1063–66 (quoting \textit{Finn}, 341 U.S. at 14). McCaskill, however, would have observed that only the hypothesis that proved to be true was the plaintiff’s cause of action and that the other hypotheses were fictional causes of action that did not exist. McCaskill, \textit{supra} note 204, at 640. In making this distinction, McCaskill was distancing himself not from Clark, but from writers on pleading as early as Stephens who treated different theories of a single recovery as “merely different ways of setting forth the same cause of action.” \textit{Id.} at 639. McCaskill acknowledged that “[t]here may be a reasonable difference of opinion” as to whether different theories of a single recovery should be considered different causes of action or merely different ways of setting forth the same cause of action. \textit{Id.}
\item \textsuperscript{221} \textit{Finn}, 341 U.S. at 14.
\item \textsuperscript{222} \textit{Id.} at 13 (quoting Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 321 (1927)).
\item \textsuperscript{223} Clark, \textit{The Cause of Action, supra} note 213, at 358 (criticizing Pomeroy); McCaskill, \textit{supra} note 206, at 283 (criticizing Pomeroy).
\item \textsuperscript{224} 1A James W. Moore & Brett A. Ringle, Moore’s Federal Practice § 0.163[4.—5] (2d ed. 1993) (“Whenever . . . two or more defendants individually act in such a manner that each has invaded a separate right of the plaintiff and thereby caused as many wrongs, the plaintiff has multiple claims against the several defendants individually; and although plaintiff joins defendants in one action, on the basis of a common question of law or fact, the claims are separate and independent within the intent- ment of § 1441(c).”); \textit{see also} Siegel, \textit{supra} note 7, at 77 (“Perhaps the best measure of what ‘a separate and independent claim’ is under the \textit{Finn} test . . . can be best deter-
on the "same facts and transactions" aspect of Finn, treating two claims as separate and independent only if they do not involve substantially the same facts and transactions.\textsuperscript{225} Courts using the first approach found cases relatively easily removable under § 1441(c); courts using the second approach found almost no cases removable under § 1441(c).

It was this confusion that led to calls for the repeal of § 1441(c) and eventually to its amendment in 1990. Before turning to these developments, however, the other major changes wrought by the 1948 amendment must be considered.

B. The Expansion of Separate Claim Removal to Federal Question Cases and the Interaction with Pendent Jurisdiction

As noted above, separable controversy removal from 1866 until 1948 was only available in diversity cases. Indeed, it is best understood as a means of ameliorating for defendants some of the harshness of applying the Strawbridge rule of complete diversity to removal. The Revised Judicial Code of 1948 extended separate claim removal to federal question cases. Although there is no evidence that either Congress or the revisers were conscious of this extension, there is little doubt that § 1441(c) applies to federal question cases.\textsuperscript{226} The extension of separate claim removal to federal question cases led to a complex interaction between separate claim removal and pendent jurisdiction and should have led courts to repudiate piecemeal removal of federal question cases.

Pendent jurisdiction permits a federal court exercising jurisdiction over a federal claim\textsuperscript{227} to exercise jurisdiction over a related state

\textsuperscript{225} 14A Wright & Miller, supra note 32, § 3724, at 379 nn.43-47 (citing cases approving removal under § 1441(c)).

\textsuperscript{226} "The addition was unusual, because the Revision Committee and Congress believed they were restricting separate claim removal. This suggests Congress at that time did not even consider the applicability of section 1441(c) to federal question cases." McFarland, supra note 9, at 1080 (footnote omitted). The closest thing to a doubt that has been expressed is by Judge Posner. Thomas v. Shelton, 740 F.2d 478, 484 (7th Cir. 1984) (Posner, J.) ("[I]t can be argued . . . that it is wrong to attribute to Congress in 1948 an intent to broaden removability by bringing federal-question cases within the scope of the separate-claim removal section.").

\textsuperscript{227} I use the word "claim" in this discussion in the narrow, McCaskill-like sense of legal theory of recovery, not only because that is common usage, but also because that is how the Supreme Court has used the term in its pendent jurisdiction cases. See, e.g., United Mine Workers v. Gibbs, 383 U.S. 715, 720-25 (1966) (referring to a "state law claim," a "claim under § 303," a "claim based on federal law," and "state and federal claims"); Hurm v. Oursler, 289 U.S. 238, 239-40 (1933) (referring to "claim of infringement," "claims other than for a violation of the copyright law," and "claim of unfair competition"); see also 28 U.S.C. § 1367 (Supp. V 1993) (authorizing federal courts to exercise supplemental jurisdiction over "all other claims that are so related to claims
claim that would not, by itself, be within federal jurisdiction. The leading case on pendent jurisdiction at the time of the Revised Judicial Code of 1948 was Hurn v. Oursler.

In Hurn, the plaintiff alleged a federal claim against the defendant for infringement of a copyrighted play and a "general law" claim for unfair competition based on the defendant’s use of that same copyrighted play. In addition, the plaintiff alleged an unfair competition claim against the defendant for the defendant’s use of a somewhat different and uncopyrighted version of the same play. The Supreme Court held that the district court could properly exercise jurisdiction over both claims involving the copyrighted version of the play because the two claims involving the copyrighted play were part of the same cause of action, but could not exercise jurisdiction over the claim regarding the uncopyrighted version of the play because it was a separate and distinct cause of action.

In reaching this conclusion, the Court applied as a test its definition of a cause of action from Phillips, just as it later did in Finn. As to the copyrighted version of the play, there was only one cause of action because there was only "a single right, namely, the right to protection of the copyrighted play." Thus tested, the claims of infringement and of unfair competition averred in the . . . bill of complaint [were] not separate causes of action, but different grounds asserted in support of the same cause of action." In contrast, the "claim" for unfair competition regarding the uncopyrighted version of the play involved a different right—"the right to the protection of the

in the action . . . that they form part of the same case or controversy" and permitting court to decline supplemental jurisdiction if it dismisses "all claims over which it has original jurisdiction").

228. See, e.g., Susan Block-Lieb, The Case Against Supplemental Bankruptcy Jurisdiction: A Constitutional, Statutory, and Policy Analysis, 62 Fordham L. Rev. 721, 739 (1994) (observing that supplemental jurisdiction is "relied upon by federal courts . . . to adjudicate jurisdictionally insufficient state law claims related to claims over which federal jurisdiction exists"); McLaughlin, supra note 15, at 863 (noting that pendent jurisdiction "permitted the exercise of jurisdiction over claims for which no independent basis of subject matter jurisdiction existed, provided the claims were closely related to claims within the proper jurisdiction of the court"); Wright, supra note 8, § 19 (discussing the evolution of supplemental jurisdiction).

229. 289 U.S. 238 (1933).
230. Id. at 239. Hurn was decided five years before Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).
231. Hurn, 289 U.S. at 239.
232. Id. at 247-48.
233. See supra notes 216-20 and accompanying text.
234. Hurn, 289 U.S. at 246.
235. Id.
236. Id. at 247.
uncopyrighted play.”\textsuperscript{237} As we saw earlier, this is not McCaskill or Clark, this is Pomeroy.\textsuperscript{238}

The connection between \textit{Finn} and \textit{Hum} is not simply that both relied on \textit{Phillips} to define a cause of action. The Court in \textit{Finn} quoted from \textit{Hum} as well in its discussion of what constitutes an independent cause of action.\textsuperscript{239} Thus, the \textit{Hum} test for pendent jurisdiction was remarkably similar to the “single wrong/single remedy” test for separate claim removal. Both were connected to an older concept of “cause of action” that had been under attack since the 1920s by both Clark and McCaskill.

But just as \textit{Finn} also relied on a broader concept of “cause of action,” its emphasis on the factual relatedness of all of the claims in the case also pointed toward a broader view of pendent jurisdiction. In \textit{United Mine Workers v. Gibbs},\textsuperscript{240} the Supreme Court vastly increased the scope of pendent jurisdiction, noting that \textit{Hum} was “unnecessarily grudging.”\textsuperscript{241} In words strikingly reminiscent of the “factual relationship” portions of \textit{Finn}, the Court held that pendent jurisdiction existed if the federally-cognizable claim and the non-federally-cognizable claim shared a “common nucleus of operative fact.”\textsuperscript{242} Again, both the factual-relatedness test for separate claim removal and the less grudging test for pendent jurisdiction were connected to the broader concept of a “cause of action” advocated by Clark. Indeed, McFarland notes of \textit{Gibbs} that “Clark could hardly have written it better.”\textsuperscript{243} Thus, \textit{Finn} can be viewed as a transitional case in the de-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{237} \textit{Id.} at 248.
\item \textsuperscript{238} See \textit{supra} text accompanying notes 192-223. Just as McFarland is wrong to assert that \textit{Finn} is a clear endorsement of Clark, he is wrong to assert that \textit{Hum} “defined cause of action broadly, along the lines urged by Clark.” McFarland, \textit{supra} note 9, at 1076. \textit{Hum} defined the cause of action, not in terms of factual relatedness as Clark would have it, nor in terms of legal theories as McCaskill would have it, but in terms of single primary rights, as Pomeroy would have it.
\item \textsuperscript{239} American Fire & Casualty Co. v. Finn, 341 U.S. 6, 13 n.11 (1951).
\item \textsuperscript{240} 383 U.S. 715 (1966).
\item \textsuperscript{241} \textit{Id.} at 725.
\item \textsuperscript{242} \textit{Id.} Specifically, the \textit{Gibbs} Court stated:
\begin{quote}
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 and 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.\textit{Id.} (citation omitted). Although \textit{Gibbs} can be read to establish a three prong test, the “common nucleus of operative fact” prong “is the heart of the \textit{Gibbs} test.” McLaughlin, \textit{supra} note 15, at 872. The “sufficient substance” prong is “the same jurisdictional requirement that applies generally to all federal question claims.” \textit{Id.} at 871. The “ordinarily expected to try” prong is essentially just “a restatement of the ‘common nucleus of operative fact’ test.” \textit{Id.} at 873.
\end{quote}
\item \textsuperscript{243} McFarland, \textit{supra} note 9, at 1077; see also Matasar, \textit{supra} note 39, at 1452 (“Judge Clark’s... views clearly influenced the Supreme Court in \textit{Gibbs}.”); McFarland, \textit{supra} note 9, at 1077 n.77 (citing cases in which Clark used similar language).
\end{itemize}
\end{footnotesize}
velopment of pendent jurisdiction. In part, it looked backward to \textit{Hum} and it part in looked forward to \textit{Gibbs}.

The connection that \textit{Finn} made between separate claim removal under § 1441(c) and pendent jurisdiction raised doubts about the constitutionality of § 1441(c). To the extent that \textit{Hum} marked the constitutional limits of pendent jurisdiction, § 1441(c) appeared unconstitutional. That is, if a federal court could not constitutionally exercise jurisdiction over a cause of action that was separate and distinct from the cause of action over which it had jurisdiction, then the only cases for which § 1441(c) would authorize removal would be those which the federal court lacked constitutional power to hear.\footnote{244} Those who found § 1441(c) constitutional tended to interpret \textit{Hum} as limiting pendent jurisdiction more narrowly than did the Constitution.\footnote{245}

In addition, the connection between separate claim removal and pendent jurisdiction meant that developments in pendent jurisdiction influenced the interpretation of § 1441(c). Most significantly, once \textit{Gibbs} overruled \textit{Hum}, courts and commentators tended to focus on the \textit{Gibbs}-like language in \textit{Finn} rather than the \textit{Hum}-like language in \textit{Finn}.\footnote{246} As a result, the line of cases viewing \textit{Finn} as precluding removal where the claims arose from the “same facts and transactions” began to dominate, although the line of cases viewing \textit{Finn} as precluding removal only where there was a “single wrong” did not fully succumb.\footnote{247}

The Supreme Court itself now reads \textit{Finn} through the lens of \textit{Gibbs}. In \textit{Carnegie-Mellon University v. Cohill},\footnote{248} the Court stated that a pendent claim is not a separate and independent claim within the meaning of § 1441(c).\footnote{249} The dissenters agreed.\footnote{250} Thus, although \textit{Cohill} was not, strictly speaking, a § 1441(c) case, because the case was not removed on the basis of § 1441(c), all members of the Court agreed that

\footnote{244. Lewin, \textit{supra} note 3, at 424; see also McFarland, \textit{supra} note 9, at 1081 n.89 (citing other commentators).}

\footnote{245. See, e.g., 1A Moore & Ringle, \textit{supra} note 224, § 0.163[3]; James W. Moore & William VanDercreek, \textit{Multi-party, Multi-claim Removal Problems: The Separate and Independent Claim Under Section 1441(c)}, 46 Iowa L. Rev. 489, 498 (1961); see also Twentieth Century-Fox Film Corp. v. Taylor, 239 F. Supp. 913, 919 (S.D.N.Y. 1965) (noting the presumption of constitutionality cloaking all legislation and a “history of decisions implicitly recognizing the constitutionality of removal of nonfederal, nondiverse controversies”), \textit{disapproved in} Gardner & Florence Call Cowles Found. v. Empire Inc., 754 F.2d. 478, 482 n.5 (2d Cir. 1985).}

\footnote{246. As noted earlier, McFarland goes so far as to assert that \textit{Finn} “clearly” adopts the Clarkian view that animates \textit{Gibbs}. McFarland, \textit{supra} note 9, at 1068.}

\footnote{247. \textit{Compare} 14A Wright & Miller, \textit{supra} note 32, § 3724, at 128 nn.38-42 (Supp. 1994) (citing cases denying removal under § 1441(c)) \textit{with id.} at 129 nn.43-47 (Supp. 1994) (citing cases permitting removal under § 1441(c)).}

\footnote{248. 484 U.S. 343 (1988).}

\footnote{249. \textit{Id.} at 354.}

\footnote{250. \textit{Id.} at 359-60 (White, J. joined by Rehnquist, J. and Scalia, J., dissenting).}
a claim that meets the *Gibbs* test for pendent jurisdiction fails the § 1441(c) test for separateness.

*Cohill* should have ended the confusion over the proper reading of *Finn*. Unfortunately, it appears that a number of courts and commentators addressing § 1441(c) overlook *Cohill*. Even the Working Papers of the Federal Court Study Committee, while citing *Cohill* for its holding, neglect to mention it at all in discussing § 1441(c) and

---

251. *Cohill* "makes clear beyond a doubt that claims cannot be both pendent and 'separate and independent,' within the meaning of the removal statute." Steinman, *supra* note 33, at 983 n.290; cf. Teply & Whitten, *supra* note 7, at 149 ("The structure and probable purpose of § 1441(c), together with the legislative history of the 1990 amendment to the section, should dispel any doubt about the meaning of the terms 'separate and independent.' Only claims that arise from entirely unrelated facts and seek separate recoveries should be removable under the section.").

This understanding of *Cohill* should also eliminate (or nearly so) the confusion in the cases regarding the application of § 1441(c) to third-party claims. Wright, *supra* note 8, at 237 ("The cases are quite divided on whether § 1441(c) applies only to claims joined by plaintiff or whether a third-party claim . . . can be the basis for removal . . . ."); 14A Wright & Miller, *supra* note 32, § 3724, at 130 nn.60-65 (Supp. 1994) (collecting cases); Haden P. Gerrish, Note, *Third-Party Removal Under Section 1441(c)*, 52 Fordham L. Rev. 133, 136 (1983) (observing that a minority of courts permit third-party removal). Any claim that could properly be brought as a third-party claim under Rule 14 of the Federal Rules of Civil Procedure or its state law analogs would be within supplemental jurisdiction and therefore not separate and independent. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 367-68 (1978) (finding a third-party claim to be within ancillary jurisdiction); Thomas v. Shelton, 740 F.2d 478, 487 (7th Cir. 1984) (noting that removal is not available "in the broad run of third-party cases"); Patient Care, Inc. v. Freeman, 755 F. Supp. 644, 651 (D.N.J. 1991) ("[A]ny third-party claim for indemnification is not a claim 'separate and independent' from the main action."). I know of no procedural system that permits a defendant to bring in a third-party on a claim that is unrelated to the dispute already before the court and can think of no reason why a procedural system would do so. Thus, the only situations in which a "separate and independent" claim might arise in a third-party complaint is where a third-party plaintiff has a third-party claim against a third-party defendant that is related to the main action and has an unrelated claim against that same party. See Fed. R. Civ. P. 18 (permitting joinder of unrelated claims to a Rule 14 claim). Moreover, now that § 1441(c) is limited to federal question cases, the unrelated claim would have to be a federal question claim. The possibility that a party would be sued in state court, and have a related claim against a third-party, and have an unrelated federal claim against that party, and choose to join that unrelated federal claim in the state action in order to trap the third-party defendant in state court on a federal claim seems terribly remote. It is one thing to think that enterprising plaintiffs with federal claims who wish to stay in state court might join unrelated state claims to achieve their objective; it is another to think that such plaintiffs would wait until they were sued by others in state court on an unrelated matter, but in which they could bring a third-party claim against the same party they wish to sue on the federal claim.

252. See, e.g., Eyak Native Village v. Exxon Corp., 25 F.3d 773, 781-82 (9th Cir.) (holding that the case is removable under § 1441(c) because "different 'primary rights' are being asserted by different plaintiffs"), cert. denied, 115 S. Ct. 351 (1994). Most surprisingly, McFarland does not mention *Cohill* even though it is powerful support for his reading of *Finn*. Interestingly, *Cohill* is not cited under § 1441(c) in either the U.S.C.A. or the U.S.C.S.
seem to endorse the more Hurn-like reading of Finn.253 As a result, the confusion continued.

Meanwhile, the doctrine of pendent jurisdiction became increasingly complex in the 1970s and 80s. Neither Hurn nor Gibbs had identified any statutory source for pendent jurisdiction, an omission that proved costly. In Aldinger v. Howard254 and Owen Equipment & Erection Co. v. Kroger,255 the Court held that pendent jurisdiction could not be exercised in a particular kind of case if there was evidence that Congress would disapprove.256

Aldinger and Kroger made it particularly difficult for federal courts to exercise pendent-party jurisdiction, that is, jurisdiction over a claim not independently cognizable in federal court based on its factual relationship to a federally-cognizable claim involving a different party. The result was a no man’s land in removed federal question cases: If the claims were sufficiently related and did not involve the joinder of additional parties, removal was appropriate under § 1441(a). If the claims were sufficiently unrelated, removal was appropriate under § 1441(c). If the claims were related but involved the joinder of additional parties, however, removal might well be unavailable under either §§ 1441(a) or (c).257

This unfortunate gap between pendent jurisdiction and § 1441(c) led then-Judge Breyer to revive piecemeal removal. In Charles D. Bonanno Linen Service v. McCarthy,258 he concluded that piecemeal removal was permissible in federal question cases where federal claims were embedded in state cases that included state claims beyond the federal court’s pendent jurisdiction.259 To justify this conclusion, he turned to the pre-1948 decisions that permitted such removal on the grounds that the federal claims were “separate.”260 He reasoned that prior to 1948, each “cause of action” was considered a separate suit and that the change in language in 1948 from removing a “suit” to removing an “action” was “cosmetic.”261

253. Federal Courts Study Comm., Working Papers and Subcommittee Reports 538 (1990) ( remarking on “substantial reasons to doubt” lower court decisions treating § 1441(c) and Gibbs as coextensive because “Gibbs was not decided until 15 years after Finn and the Court in Finn used language reflecting the then-prevailing understanding of pendent jurisdiction, which was narrower than Gibbs.”). The Working Papers are not to be construed as having been adopted by the Committee.
256. Aldinger, 427 U.S. at 18-19; Kroger, 437 U.S. at 377.
259. Id. at 10-11.
260. Id. at 11 (citing Pacific Railroad Removal Cases, 115 U.S. 1 (1885); Galveston, H. & S.A. Ry. v. Hall, 70 F.2d 608 (5th Cir. 1934); and Tillman v. Russo Asiatic Bank, 51 F.2d 1023 (2d Cir. 1931), cert. denied 285 U.S. 539 (1932)).
261. Id.
Although this reasoning would seem to require him to declare that the federal claim before the court was "separate" from the rest of the case, he did not explicitly say this, evidently because it would clash too obviously with his conclusion that the federal claim was not "separate and independent" under section § 1441(c) as interpreted in *Finn*.\(^{262}\) Moreover, even assuming that the change from "suit" to "action" was merely cosmetic—a debatable point in light of the reviser's note that removal of "the entire action" will cause no procedural difficulty because " 'Rules 18, 20, and 23 of the Federal Rules of Civil Procedure permit the most liberal joinder of parties, claims, and remedies in civil actions' \(^{263}\)—this reasoning ignores that the doctrine that permitted piecemeal removal based on "separateness," and which was repudiated in 1948, was in no way limited to federal question cases, but instead was based on a judicial assertion of knowing that parts of a case in state court are somehow "really" separate lawsuits.

Judge Posner made just such an assertion in *Thomas v. Shelton*.\(^{264}\) There, he said that "[e]ven if we could think of some way in which a plaintiff could impede the removal of a federal-question case, a way that section 1441(c) was intended to block,"\(^{265}\) removal would not be justified because, if two unrelated claims were joined, "there would really be two cases, not one," and the federal case could be removed, leaving the state case behind.\(^{266}\)

Judge Posner further asserted, in accord with Judge Breyer's decision in *Bonanno*, that even if a plaintiff joined a related claim that was outside the scope of a federal court's supplemental jurisdiction (because pendent jurisdiction, particularly pendent party jurisdiction, might be narrowly conceived), "this would again be a situation of two cases masquerading as one."\(^{267}\) In *Thomas*, Judge Posner sounded eerily like Judge Drummond in *City of Chicago v. Hutchinson*,\(^{268}\) asserting that what appears to be one lawsuit is "in substance and reality"

\(^{262}\) *Id.* at 10.

\(^{263}\) American Fire & Casualty Co. v. *Finn*, 341 U.S. 6, 10 n.28 (1951) (quoting 28 U.S.C. § 1441 historical and revision notes); *see also* Frances J. v. *Wright*, 19 F.3d 337, 340 (7th Cir.) (treating "action" under § 1441(a) to mean entire case), *cert. denied*, 115 S. Ct. 204 (1994); Adolph Coors Co. v. *Sickler*, 608 F. Supp. 1417, 1426-27 (D.C. Cal. 1985) (criticizing *Bonanno*, but ultimately following it in light of circuit precedent as the "lesser of two evils"); *Lewin*, *supra* note 3, at 426 (noting the broad interpretation of "civil action" to mean "all claims that have been properly brought procedurally in the state court").

\(^{264}\) 740 F.2d 478 (7th Cir. 1984).

\(^{265}\) *Id.* at 484.

\(^{266}\) *Id.* at 483. Judge Posner stated, "We know of no federal-question case that was held nonremovable before section 1441(c) was enacted merely because the plaintiff had joined a state claim with his federal claim." *Id.* This, however, is precisely what had happened in *Tullar & Tullar v. Illinois Central Railroad*, 213 F. 280 (N.D. Iowa 1914). For a discussion of *Tullar*, *see supra* notes 158-61 and accompanying text.

\(^{267}\) *Thomas*, 740 F.2d at 483.

\(^{268}\) 15 F. 129 (C.C.N.D. Ill. 1882). For a discussion of *Hutchinson*, *see supra* notes 99-106 and accompanying text.
more than one.\textsuperscript{269} The difference is that in the past, courts used the common law of joinder as the reference point for what was "really" a separate controversy in the teeth of contrary statutory joinder law, while this time around, courts used the scope of supplemental jurisdiction (itself influenced by developments in the law of joinder) as the reference point.\textsuperscript{270}

C. The Grant of Discretion to Remand and the Interaction with Pendent Jurisdiction

There was no provision in any of the successive separable-controversy removal statutes for a discretionary remand.\textsuperscript{271} One of the innovations of the Revised Judicial Code of 1948 was granting the district court the discretion to remand "all matters not otherwise within its original jurisdiction."\textsuperscript{272} Thus, district courts had the discretion under § 1441(c) of the Revised Judicial Code of 1948 to remand those matters that could not have been brought directly in federal court, or could not have been removed to federal court if sued upon alone, but were removed to federal court solely because they were part of a case that contained a separate and independent claim that could have been brought directly in federal court or removed to federal court if sued upon alone.\textsuperscript{273}

This discretionary power to remand paralleled the discretionary power to dismiss, without prejudice, state claims filed directly in federal court that were pendent to a federal claim. Indeed, in \textit{Cohill} the Supreme Court held that district courts have the discretion to remand pendent claims in removed cases, reasoning by analogy from § 1441(c) that because Congress gave courts in § 1441(c) the discretionary power to remand separate and independent claims that could not have been heard on their own in federal court, Congress would have (if it had thought about it) also given courts the discretionary power to re-

\textsuperscript{269} \textit{Hutchinson}, 15 F. at 137.
\textsuperscript{270} See, e.g., Samaroo v. Samaroo, 743 F. Supp. 309, 318 (D.N.J. 1990) (finding that a divorce claim and an ERISA claim joined in state court pursuant to requirement of New Jersey joinder law were "really two cases masquerading as one" and holding ERISA claim removable, while divorce claim was not).
\textsuperscript{271} The statutory provision permitting removal on the grounds of prejudice or local influence did, however, give the court discretion to remand the suit as to defendants who would not be affected by local prejudice or influence. Act of March 3, 1887, ch. 373, § 2, 24 Stat. 552, 553; Judiciary Act of 1911, ch. 231, § 28, 36 Stat. 1087, 1094-95; cf. Judiciary Act of 1875, ch. 137, § 5, 18 Stat. 470, 472 (stating that the court shall remand whenever "it shall appear to the satisfaction of said circuit court ... that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act").
\textsuperscript{273} Cohen, \textit{supra} note 3, at 6-9.
mand pendent claims that similarly could not have been heard on their own in federal court. 274

III. THE REMOVAL PROVISION OF SECTION 1441(c) REMAINS USEFUL AND CONSTITUTIONAL

In 1990 the Federal Courts Study Committee issued a far-ranging report advocating certain changes in the federal courts. Among its recommendations was the following: "Congress should repeal 28 U.S.C. § 1441(c) (concerning removal of separate and independent claims)." 275

Strangely, the black letter recommendation of repeal is not consistent with the explanation of that recommendation. The explanation states that § 1441(c) has caused great confusion in diversity cases and should be repealed only if diversity jurisdiction is retained. 276 The clear implication is that § 1441(c) itself should be retained if diversity jurisdiction is eliminated. Indeed, the explanation specifically notes that § 1441(c) has value in a small number of federal questions cases. 277 If § 1441(c) has value in federal question cases and should be retained if diversity jurisdiction is eliminated, it would follow—contrary to the Committee's black letter recommendation—that § 1441(c) should not be repealed but instead should simply be made inapplicable to diversity cases and retained for federal questions cases.

A. THE 1990 AMENDMENT LIMITING SECTION 1441(c) TO FEDERAL QUESTION CASES

In the Judicial Improvements Act of 1990, 278 Congress amended § 1441(c) to limit separate claim removal to cases where the separate and independent claim or cause of action is "within the jurisdiction conferred by section 1331 of this title." 279 Thus, removal under § 1441(c) no longer applies to diversity cases but is confined to federal question cases. Although Congress has been repeatedly criticized for failing to follow the Committee's recommendation that § 1441(c) be

274. Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 357 (1988); Swing, supra note 38, at 616 (suggesting that § 1441(c) would support remand in such circumstances).
275. Federal Courts Study Comm., supra note 4, at 94 (emphasis omitted). The Working Papers put it this way: "On balance, we side with those commentators who advocate outright repeal of § 1441(c) . . . . Our conclusion is buttressed by our skepticism that diversity jurisdiction is necessary at all. It would be preferable to dispense with § 1441(c) . . . ." Federal Courts Study Comm., supra note 253, at 539-540.
276. Federal Courts Study Comm., supra note 4, at 95; see also Federal Courts Study Comm., supra note 253, at 538 ("In any event, § 1441(c) plainly has serious, possibly fatal, flaws . . . . [I]t is virtually never available in diversity cases . . . .")
277. Federal Courts Study Comm., supra note 4, at 95.
repealed, in fact Congress implemented the Committee’s insights regarding § 1441(c) more carefully than the Committee itself.

The House Report explained that § 1441(c) should be retained for federal question cases to prevent a plaintiff from defeating removal by joining an unrelated state claim to a federal question case. It noted that joinder rules of many states make it possible to join completely unrelated claims. The underlying assumption, of course, was that § 1441(a) only authorizes removal if the entire case is within federal jurisdiction and that § 1441(a) does not authorize piecemeal removal of only the federal claim. Thus, just as it had done in 1875 and 1948, Congress in 1990 again repudiated piecemeal removal.

280. See, e.g., Mengler et al., supra note 32, at 20 (observing that “perhaps Congress would have been better advised to adopt the committee’s recommendation to repeal Sec. 1441(c) entirely”); Jason C. N. Smith, Comment, Update on Changes in Federal Jurisdiction: Supplemental Jurisdiction, Venue, and Removal, 23 Tex. Tech L. Rev. 571, 589 (1992) (“Congress should have heeded the committee’s recommendation and abolished 1441(c) entirely.”).


Those states that restrict or do not allow joinder are: Connecticut (Conn. Practice Book § 133) (requiring that joined claim be related—based on the same theory or transaction—and affect all of the parties to the action), Louisiana (La. Code Civ. Proc. Ann. art. 462 (West 1960)) (permitting plaintiff to cumulate two or more actions based on different grounds if: (1) jurisdiction and venue are proper, and (2) they are mutually consistent and employ the same form of procedure), Michigan (Mich. C. P.R. 2.203) (requiring same transaction), Nebraska (Neb. Rev. Stat. § 25-701 (1979)) (requiring that claims be related), New Hampshire (no mention of joinder of claims in statutes or rules), Virginia (Va. Code Ann. § 8.01-272 (Michie 1994)) (permitting joinder of any claim in tort or contract if same transaction).
With the Judicial Improvements Act of 1990, the transformation of separate claim removal was complete. Originally applicable only to diversity cases and extended to federal question cases without apparent thought, it was now available only in federal question cases. In another sense, however, it had returned to its original purpose, which had been largely obscured since 1948, of preventing (in some circumstances) a plaintiff from using the options available under state joinder rules to defeat removal.

B. The Usefulness and Constitutionality of Section 1441(c)

The interconnections between § 1441(c) and pendent jurisdiction continued in the Judicial Improvements Act of 1990. In addition to amending § 1441(c), the Act codified supplemental jurisdiction to the apparent limits of the Constitution. The Act provided for supplemental (i.e., pendent and ancillary) jurisdiction "over all other claims that are so related to claims in the action within [a district court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." As a result of the expansion of supplemental jurisdiction to the apparent limits of the Constitution, doubts about the constitutionality of § 1441(c) again came to the fore. Indeed, a number of commentators have suggested that the amended version of § 1441(c) has no constitutional applications whatsoever: If the state claims are sufficiently related to the federal claims to be within supplemental jurisdiction, then the case is removable under § 1441(a) and § 1441(c) does not apply, while if the state claims are sufficiently unrelated to the federal claims to be beyond the constitutional scope of supplemental jurisdiction, then § 1441(c)'s apparent attempt to bring them within federal jurisdiction is unconstitutional.

The constitutional question was evidently brought to Congress' attention during the legislative process. While the House Report contained a section-by-section analysis of the bill that indicated that § 1441(c) would obviate the need to determine whether pendent jurisdiction existed, when the section-by-section analysis of the bill was placed before the Senate, this sentence was deleted. Instead, Senator Grassley, who had served on the Federal Courts Study Committee,
stated that any portion of the removed case that was beyond the scope of Article III would of course have to be remanded to state court.\textsuperscript{288} Thus, it appears that Congress chose to address the constitutional difficulty by counting on federal courts to use the power of remand.

There are certainly cases in which § 1441(c) can operate constitutionally. Congress has determined, in certain limited circumstances such as the Federal Employer’s Liability Act (“FELA”),\textsuperscript{289} to give plaintiffs an undisturbed choice of forum for federal claims by barring removal.\textsuperscript{290} For example, if a plaintiff files a FELA claim in state court and joins an unrelated Age Discrimination in Employment Act (“ADEA”)\textsuperscript{291} claim, § 1441(c) permits removal of the entire case. The ADEA claim is a separate and independent claim within the jurisdiction conferred by § 1331 joined with a nonremovable FELA claim.

While courts have debated whether the bar on removal of FELA claims in § 1445 trumps the removal power of § 1441(c), the real difficulty in these cases has been their generous \textit{Hurn}-like reading of “separate and independent.”\textsuperscript{292} The key to unravelling this problem is to

\begin{footnotes}
\textsuperscript{288} 136 Cong. Rec. S17,577-78 (daily ed. Oct. 27, 1990) (statement of Sen. Grassley); see also Casad, supra note 7, at 1618 (“If the state law claim is unrelated to the federal claim and the parties are not diverse . . . the federal court would have to remand the state claim, despite the discretionary language of § 1441(c).”). This deletion removes the only possible basis for suggesting that somehow Congress wanted the Supreme Court to interpret the words “separate and independent”—which were left unchanged—in a different way than it had previously. Arthur D. Wolf, \textit{Codification of Supplemental Jurisdiction: Anatomy of a Legislative Proposal}, 14 W. New Eng. L. Rev. 1, 37 n.20 (1992) (suggesting such Congressional power and referring to the omitted section of the House Report).

\textsuperscript{289} Ch. 149, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. § 51 (1988)).

\textsuperscript{290} 28 U.S.C. § 1445(a) (1988). Section 1445(a) states: “A civil action in any State court against a railroad or its receivers or trustees, arising under Sections 51-60 of Title 45, may not be removed to any district court of the United States.” \textit{Id}.


\textsuperscript{292} Compare Gamble v. Central Ry., 486 F.2d 781, 782-83 (5th Cir. 1973) (holding that § 1445 prohibits removal under § 1441(c)), overruled in part by Lirette v. N.L. Sperry Sun, Inc., 820 F.2d. 116, 116 (5th Cir. 1987) (en banc) (holding that plaintiff waives the bar of § 1445 by failure to raise a timely objection to removal) \textit{with} Palser v. Burlington N.R.R., 698 F. Supp. 793, 794-95 (E.D. Mo. 1988) (removal under § 1441(c) permitted despite bar of § 1445); Hages v. Aliquippa & So. R.R., 427 F. Supp. 889, 891-92 (W.D. Pa. 1977) (same); Emery v. Chicago B. & Q.R. Co., 119 F. Supp. 654, 657 (S.D. Iowa 1954) (same); \textit{see also} 14A Wright & Miller, supra note 32, § 3724, at 409 (suggesting that the argument that § 1441(c) overcomes a statutory bar on removal because it does not have an “except as otherwise provided by law” clause “has considerable force”); \textit{cf.} Hunter v. Missouri-Pacific-Texas R.R., 252 F. Supp. 590, 591 (N.D. Ok. 1966) (allowing no removal under § 1441(c) because FELA claim not separate and independent); Hall v. Illinois Cent. R.R., 152 F. Supp. 549, 552-53 (W.D. Ky. 1957) (same); Harold K. Watson, \textit{Modern Practice Considerations in Maritime Personal Injury Litigation: Procedural Weapons for Venue Battles}, 68 Tul. L. Rev. 473, 497-98 (1994) (observing that claims under the Jones Act, which is based on FELA, are rarely removable under § 1441(c) because joined claims are seldom separate and independent).
\end{footnotes}
recognize, as the Supreme Court did in Cohill,\(^\text{293}\) that claims that are within the scope of supplemental jurisdiction are not “separate and independent.”\(^\text{294}\) Once this is done, both § 1441(c) and § 1445 can be given full effect. If a plaintiff joins, with the FELA claims, only claims that are sufficiently related to be within the scope of supplemental jurisdiction, § 1441(c) does not apply and the case must remain in state court. This is consistent with the Congressional decision to give FELA plaintiffs an undisturbed choice of a state forum, in the same way that supplemental jurisdiction itself is necessary to give effect to the Congressional decision to permit federal question plaintiffs to choose federal court. Just as a plaintiff who could not use supplemental jurisdiction to bring her related state law claims in federal court might be dissuaded from exercising her statutory right to a federal forum, so too a FELA plaintiff who could not keep related federal claims in state court might be dissuaded from either raising her federal claims or exercising her statutory right to a state forum for her FELA claim. On the other hand, if a plaintiff joins unrelated federal claims and a FELA claim, § 1441(c) applies so that the presence of the FELA claim does not prevent removal. While it is important to implement plaintiff’s forum choice under FELA to keep related claims in state court, there is no justification to empower the plaintiff to defeat a defendant’s removal rights on unrelated federal claims. Such a use of § 1441(c) is fully consistent with the Congressional purpose of preventing plaintiffs from joining unrelated claims in order to defeat removal.

FELA is not the only example of a statutory bar on removal. The Securities Act of 1933\(^\text{295}\) also gives plaintiffs a choice of forum by denying removal.\(^\text{296}\) Courts have been similarly troubled with the interaction between its non-removal provision and § 1441(c).\(^\text{297}\) The answer should be the same: Removal should only be available if the plaintiff joins an unrelated federal claim with the non-removable claim under the 1933 Act. Of course, using § 1441(c) to permit adjudication of the entire case in such circumstances would be plainly constitutional because both claims would be federal question claims.\(^\text{298}\)

---

293. See supra notes 248-50 and accompanying text.
296. Id. § 22(a) (codified at 15 U.S.C. § 77v(a) (1988)).
298. Oakley, supra note 32, at 749-50 n.45. McFarland acknowledges this in a footnote. McFarland, supra note 9, at 1079 n.81 (citing Oakley). He does not, however, let this interfere with his conclusion that § 1441(c) is unconstitutional. While it would be constitutional to adjudicate the entire case, it would better serve Congressional intent for the court to remand the FELA or the ‘33 Act claim (and any related claims) while
Similarly, a plaintiff could join a federal question claim (say, under the ADEA) with an unrelated state claim (say, for strict liability in tort arising from the sale of a consumer good) in which there was minimal diversity. Again, removal would be possible under § 1441(c) because the ADEA claim would be separate and independent from the state contract claim. Moreover, exercising jurisdiction would be perfectly constitutional because, while minimal diversity is an insufficient jurisdictional predicate for a direct filing in federal court under 28 U.S.C. § 1332, minimal diversity is sufficient under Article III.

If the only constitutional use of § 1441(c) were to prevent a plaintiff from defeating removal of a federal claim by joining an unrelated claim in which there is minimal diversity or that happens to be one of the handful as to which removal is statutorily prohibited, it might not be worth the trouble. The usefulness of § 1441(c) would be this limited if—but only if—the courts were to interpret the constitutional "case" (and thereby the scope of supplemental jurisdiction under § 1367) to include all claims that the law of joinder permits to be joined. While Richard Matasar has made a powerful argument that this is the correct methodology for determining the scope of a constitutional case there is little sign that courts are accepting this view. Moreover, even if Matasar is correct—and I tend to think that he is—that the scope of a case is ultimately subject to legislative rather than judicial determination, Congress has punted the ques-

300. State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 530-31 (1967); Oakley, supra note 32, at 749 & n.45.
301. Matasar, supra note 39, at 1478-79 (arguing that the scope of a "case" is defined by the law of joinder); cf. Harold Feld, Saving the Citizen Suit: The Effect of Lujan v. Defenders of Wildlife and the Role of Citizen Suits in Environmental Enforcement, 19 Col. J. Envtl. L. 141 (1994) (asserting, unpersuasively, that "Congress can authorize the courts to act beyond their constitutional limits if at least one element of the case satisfies the constitutional requirements of Article III").
302. Teply and Whitten agree with Matasar. Teply & Whitten, supra note 7, at 129 n.286. They have observed, however, that only one court has found factually unrelated claims to be within supplemental jurisdiction. Id. (citing Wesley v. General Motors Acceptance Corp., No. 91-C3368, 1991 WL 169204 (N.D. Ill. Aug. 23, 1991)). In Wesley, however, it appears that the claims were factually related; the primary claim challenged an installment contract under the Truth in Lending Act and the counterclaim sought recovery under the underlying installment contract. Wesley, 1991 WL 169204, at *1.
303. Perhaps if Matasar's view were reformulated as a rational basis test, it might receive a warmer reception in the courts. So reformulated, Congress does not have a free hand to determine the scope of a case, but instead only needs to have a rational basis for its determination of the scope of a case. There is a rational basis for hearing in one case not only those matters that are factually related, but also those matters that are related in any way, including those involving property before the court or even simply those where the parties involved are the same. It is hard to imagine that Congress would ever permit the joinder of claims that have no relationship to each
tion right back to the courts. Not only do the Federal Rules of Civil Procedure explicitly provide that they "shall not be construed to extend or limit the jurisdiction of the United States district courts," but when Congress defined the scope of supplemental jurisdiction in § 1367 in constitutional terms, it also plainly indicated in the legislative history of that statute that it viewed the Gibbs test of factual relatedness as the constitutional standard.

If Gibbs marks the outer limits of a constitutional case, as most believe it does, then it would be unconstitutional for federal courts to adjudicate claims merely because they were joined with claims that are within federal jurisdiction. It is this assumption, of course, that leads the critics of § 1441(c) to conclude that it is unconstitutional because it purports to permit courts to do exactly that.

The critics of the constitutionality of § 1441(c), however, fail to make a crucial distinction between the constitutionality of permitting the removal of an entire case in the first instance and the constitutionality of ultimately adjudicating that entire case. Simply because, under Gibbs, it may be unconstitutional to adjudicate factually unrel-
lated claims, does not mean that it is unconstitutional for Congress to authorize a defendant to remove the entire case in the first instance so that the federal court can determine the scope of its own jurisdiction. That is, while there may be cases in which it would be unconstitutional under Gibbs to "determine all issues therein," it does not follow that § 1441(c) is unconstitutional in authorizing removal of such cases.307

"A primordial element of our jurisprudence is that federal courts have jurisdiction to determine whether they have subject matter jurisdiction."308 As Justice Holmes stated:

[Even if the Circuit Court had no jurisdiction to entertain [the petition for a writ of habeas corpus], and if this court had no jurisdiction of the appeal, this court, and this court alone, could decide that such was the law. It and it alone necessarily had jurisdiction to decide whether the case was properly before it.]309

Moreover, "[r]emoval proceedings are in the nature of process to bring the parties before the United States court."310 Thus, to permit a defendant to remove an entire action to federal court even though the federal court may ultimately determine some part of it to be outside the scope of federal jurisdiction, as § 1441(c) does, should be no more controversial than permitting a plaintiff to file an action directly in federal court even though the federal court may ultimately determine some part of it to be outside the scope of federal jurisdiction. Surely it is preferable to have the federal court decide the scope of its jurisdiction on removal rather than leave it to the state court (by addressing removal petitions to it as was done in most cases prior to 1948)311 or to

307. Surely, it is commonplace that a statute may be perfectly constitutional in certain applications and unconstitutional in other applications. Students of civil procedure deal with that concept all the time in testing whether long-arm statutes can be constitutionally applied in particular situations. Moore seems to overlook this point when he argues that § 1441(c) is constitutional even to the extent that it authorizes jurisdiction over unrelated claims because "[t]he authority conferred on Congress by the Constitution is not limited to a legislative course of perfection." 1A Moore & Ringle, supra note 224, § 0.163[3]. While a statute is not wholly invalid simply because it sweeps broadly enough to have unconstitutional applications, this does not mean it is somehow constitutional even when applied unconstitutionally.


310. Mackay v. Unita Dev. Co., 229 U.S. 173, 176 (1913); see also Wenzler v. Robin Line S.S. Co., 277 F. 812, 819 (W.D. Wash. 1921) (remarking that removal "is merely the machinery for getting the case into the right court").

311. 1A Moore & Ringle, supra note 224, § 0.168[2]. The state court's decision was not conclusive, but could be challenged either on ultimate appeal to the United States Supreme Court or by filing a transcript of the record in federal court and either asking it to enjoin the state proceeding or pursuing both actions simultaneously. Id.; see also Chesapeake & Ohio Ry. v. McCabe, 213 U.S. 207, 222 (1909) (holding that the federal court had jurisdiction to determine whether the case was removable or not). The result, naturally, was "friction." 1A Moore & Ringle, supra note 224, § 0.168[2].
the defendant (by permitting piecemeal removal) to make such decisions.

It might be objected that a defendant can always remove a case and leave it to the federal court to determine its jurisdiction. But there is a crucial difference. Absent § 1441(c), if a defendant removes a case that includes a claim outside the federal court's jurisdiction, the district court is obliged to remand the entire case because § 1441(a) permits removal only if the entire case is within the district court's original jurisdiction.312

McFarland's example illustrates the point: A plaintiff sues a nondiverse defendant in state court for (1) violation of the federal civil rights laws in firing the plaintiff, (2) common law breach of the employment contract, and (3) common law breach of an entirely unrelated business contract.313 If the plaintiff joined only the first two claims, the defendant could remove the entire case under § 1441(a) because, if plaintiff brought the entire case there directly, the district court would have original jurisdiction over it. The first claim is within the district court's general federal question jurisdiction,314 and the second claim is within the scope of its supplemental jurisdiction.315

McFarland seems to think that, even absent § 1441(c), the case would be removable even if joined with the third claim, although the court would have to remand the third claim.316 Despite the authori-

---

312. This appears to be the view of Professor Rowe. Oakley, supra note 32, at 750 n.45 (citing correspondence with Professor Rowe); see also Frances J. v. Wright, 19 F.3d 337, 341-42 (7th Cir.) (treating "action" under § 1441(a) to mean entire case), cert. denied, 115 S. Ct. 204 (1994); Nolan v. Boeing Co., 919 F.2d 1058, 1066 (5th Cir. 1990) ("In federal practice, the terms 'case' and 'action' refer to the same thing, i.e., the entirety of a civil proceeding . . . .' ), cert. denied, 499 U.S. 962 (1991); Gibson v. City of Glendale Police Dept., 786 F. Supp. 1452, 1457 (E. D. Wis. 1992) ("Is the entire 'civil action' within the original jurisdiction of the district court or is it not? If . . . it is not, removal is improper . . . .' ).

313. McFarland, supra note 9, at 1085. Ironically, McFarland has organized his hypothetical complaint as a good McCaskillite would, with three counts each expressing a different legal theory of recovery.


315. 28 U.S.C. § 1367 (Supp. V 1993). One might have thought this obvious because there would be pendent jurisdiction even under Hurst's single primary right approach, but several district courts disagree. See, e.g., Benton v. Kroger Co., 635 F. Supp. 56, 59 (S.D. Tex. 1986) (holding that there was no common nucleus of operative fact between a sex discrimination claim and a workers' compensation retaliation claim, even though plaintiff contended that she was fired for one or both of these illegal reasons); Mason v. Richmond Motor Co., 625 F. Supp. 883, 888 (E.D. Va. 1986) (finding that there was no common nucleus of operative fact between ADEA claim of unlawful discharge and contract claim for breach of employment contract's guarantee of continued employment and alternatively declining to exercise pendent jurisdiction), aff'd, 825 F.2d 407 (4th Cir. 1987). Distressingly, the United States Court of Appeals for the Third Circuit has recently stated that these decisions are "compelling." Lyon v. Whisman, Nos. 94-7190, 94-7283, 1995 WL 23671, at *5-*6 (3d Cir. Jan. 19, 1995).

316. McFarland, supra note 9, at 1085.
ties that have seemingly endorsed this view, the history of removal statutes demonstrates that this is wrong. From the Judiciary Act of 1789 forward, it has been clear that the general removal statutes do not permit removal of an entire case on the basis that a part of the case is removable; that is precisely why the Separable Controversy Act and its successors were passed. Moreover, that is precisely the understanding of § 1441(a) demonstrated by Congress in amending § 1441(c) in 1990. If the general removal statutes authorized the removal of an entire case based on the presence of some claim within federal jurisdiction, with the understanding that the rest of the case would then be remanded, all of the successive statutes discussed in this Article that Congress enacted would have been unnecessary. Perhaps most graphically, Strawbridge would not apply on removal—the presence of a controversy between any two diverse parties would authorize the removal of the entire case and the district court would simply remand the rest of the case.

Nor could the defendant remove only the first two claims, leaving the third claim in state court. There is simply no statutory authority for such piecemeal removal and history makes clear why: From 1789 until 1866, piecemeal removal was forbidden. The experiment with piecemeal removal under the Separable Controversy Act of 1866 resulted in confusion, waste, and embarrassment, so Congress abandoned it nine years later in 1875. When courts reintroduced piecemeal removal by viewing certain parts of a state proceeding as "separate" from other parts, the result was the same, and Congress again repudiated piecemeal removal.

This understanding that removal under § 1441(a) is only available if the entire case is within the federal court's jurisdiction also resolves the division among the Courts of Appeals regarding the removability of cases that include claims barred by the Eleventh Amendment. As


318. See supra part IB (tracing the history of the Separable Controversy Act and its successors).

319. H.R. Rep. No. 734, 101st Cong., 2d Sess. 23 (1990) (explaining that § 1441(c) should be retained for federal questions cases in order to prevent a plaintiff from defeating removal by joining an unrelated state claim to a federal question case).

320. See supra text accompanying notes 66-71.

321. See supra text accompanying notes 72-79.

322. See supra part ID. Indeed, perhaps Congress intended to repudiate piecemeal removal the next year when it passed the Prejudice and Local Influence Act of 1867, ch. 196, 14 Stat. 558. The Supreme Court, however, did not read the Act this way. Case of the Sewing Mach. Cos., 85 U.S. (18 Wall.) 553, 580 (1873); see also Swing, supra note 38, at 608-09 (discussing Supreme Court's interpretation of the 1867 Act in Sewing Machine Companies); supra text accompanying note 85 (discussing Sewing Machine Companies).

323. See supra text accompanying notes 99-115, 124-31, 137-64, 260-70, and 275-82.
the Seventh Circuit recently put it, "if even one claim in an action is jurisdictionally barred from federal court by a state’s sovereign immunity, or does not otherwise fit within the original or supplemental jurisdiction of the federal courts, then, as a consequence of § 1441(a), the whole action cannot be removed to federal court."324

The Sixth Circuit reached a contrary result in Henry v. Metropolitan Sewer District,325 and a student note326 has recently argued in support of Henry. The flaw in both Henry and the student note is the apparent assumption that as long as any part of a case is removable, the entire case is removable. Neither Henry nor the student note reconciles this view with the history of removal or explains how this view would not overrule Strawbridge in removal cases.327 In Francis J. v. Wright,328 on the other hand, the Seventh Circuit noted that "preventing a defendant from splitting a single case into two, one state and the other federal, furthers judicial economy."329 It is particularly appropriate to prohibit removal where jurisdiction over part of the case is barred by the Eleventh Amendment, because in almost all cases it will be state officials seeking removal, and it is difficult to justify state officials removing cases to federal court.330

324. Frances J. v. Wright, 19 F.3d 337, 341 (7th Cir.) (citation omitted), cert. denied 115 S. Ct. 204 (1994); see also McKay v. Boyd Constr., 769 F.2d 1084, 1088 (5th Cir. 1985) (vacating District Court’s judgment because the Eleventh Amendment barred the exercise of jurisdiction over one claim); Simmons v. California, 740 F. Supp. 781, 785 (E.D. Cal. 1990) (following McKay); Berman, supra note 32, at 706 (reconstructing McKay in this way).


326. Berman, supra note 32, at 702-09.

327. Id. at 707 (stating that there is “no warrant for reading the removal statute to direct the district court to resolve all jurisdictional questions before it grants removal”); cf. id. at 698-99 (arguing that an “out-of-state defendant should be able either to separate and remove all claims asserted only against herself or to remove the entire case” and observing that the only reason defendants can not remove in such circumstances is to limit diversity jurisdiction). Berman also reads § 1441(a) to permit “removal of parts of cases,” but overlooks the repeated Congressional repudiation of such piecemeal removal. Id. at 708.

Berman concludes that district courts should have the discretion to balance the interest in a federal court adjudicating the federal questions versus the interest in maintaining a single suit in determining what to do upon removal of a case including both a federal claim barred by the Eleventh Amendment and a federal claim not barred by the Eleventh Amendment. Id. at 714-16. Congress, however, has already done this balancing based on decades of experience. Cf. id. at 715 n.186 (suggesting that discretion is better than a legislative solution).

Like the Seventh Circuit, I find Berman’s analysis “unpersuasive.” Wright, 19 F.3d at 341 n.5.

328. 19 F.3d 337 (7th Cir.), cert. denied, 115 S. Ct. 204 (1994).

329. Id. at 341.

Furthermore, it is galling for state officials to remove and then raise the bar of the Eleventh Amendment. As the *Wright* court observed, "We are curious why Defendants would engage in such a paradoxical jurisdictional maneuver, unless they merely had hoped to split" the case in two.331

Of course, if a plaintiff joins an unrelated claim that is barred by the Eleventh Amendment to a federal claim that is not barred by the Eleventh Amendment, § 1441(c) permits removal. This serves to prevent a plaintiff from trapping a defendant in state court on a federal claim by joining a claim that is not related to the removable claim.332

So understood, Congressional removal policy emerges as rational and coherent, consisting of two basic rules and one exception. First, a case can only be removed if the entire case is within the federal court’s jurisdiction. Second, parts of cases cannot be removed, only entire cases. If a plaintiff joins an unrelated claim that would otherwise defeat removal, however, removal is nonetheless permitted. Returning to McFarland’s example,333 the entire case is removable under § 1441(c) and only under § 1441(c).334 Once removed, the district court should (1) remand the unrelated breach of contract claim because it does not share a common nucleus of operative fact with the federal civil rights claim; (2) exercise or decline supplemental jurisdiction over the breach of employment contract claim in accordance with the standards of § 1367(c); and (3) at least ordinarily, retain and adjudicate the federal civil rights claim.

The question that remains is whether there are any properly removed cases in which the court can and should also remand the federal claim as well. It is to that remand power that we now turn.

---


332. The *Wright* court dismissed the applicability of § 1441(c) in a footnote, reasoning that because it calls for the court to determine “all issues therein,” it is “incompatible with a case of this sort.” *Id.* at 340 n.4. The right reason to conclude that § 1441(c) was inapplicable there, however, was simply that the claims were not “separate and independent.”

333. See *supra* notes 313-15 and accompanying text.

334. Cf. 14A *Wright & Miller*, *supra* note 32, § 3724, at 122 (Supp. 1994) (“It is difficult to see . . . what was gained by leaving Section 1441(c) at play in federal-question cases.”).
IV. SECTION 1441(c) NOW AUTHORIZES THE REMAND OF FEDERAL QUESTION CASES

In the Judicial Improvements Act of 1990, Congress also amended the remand provision of § 1441(c).\textsuperscript{335} Now, district courts are explicitly given the discretion, in cases removed under § 1441(c), to "remand all matters in which State law predominates."\textsuperscript{336} This amendment has led to an assertion of power by district courts to remand not only separate and independent claims that could not have been brought on their own in federal court, but also to remand entire cases, including federal claims that could have been brought on their own in federal court.

Soon after the enactment of the Judicial Improvements Act of 1990, Thomas Mengler, Stephen Burbank, and Thomas Rowe observed that the term "matters" in § 1441(c) could be construed broadly enough to include the entire case,\textsuperscript{337} but argued against such a construction.\textsuperscript{338} David Siegel similarly noted the possibility of construing § 1441(c) to permit the remand of the entire case.\textsuperscript{339} He did not address whether § 1441(c) should be interpreted in this way, perhaps because he confused the question of predominance with the question of strength. He asserted that if state law predominates, then the federal claim is a "weakling," as to which "summary judgment shouldn't be too far away."\textsuperscript{340} Nevertheless, federal district courts quickly began asserting, first in dicta but then in holdings, the power to remand entire federal question cases that had been removed from state court.\textsuperscript{341}

A. Opinions Interpreting the Amended Remand Clause of Section 1441(c)

Judge Acker of the Northern District of Alabama pointed the way in \textit{Martin v. Drummond Coal Company}.\textsuperscript{342} Martin filed an action in state court in Alabama for fraud and breach of fiduciary duty.\textsuperscript{343} Mar-

\begin{footnotes}
\item[336] Id.
\item[337] Mengler et al., supra note 32, at 20 ("If courts construe the term "matters" as synonymous with constitutional cases or controversies, then the language authorizes the district court to remand an entire case or controversy—including the federal question claim—to the state court if the case or controversy is one in which state law issues predominate.").
\item[338] Id. at 21.
\item[339] Siegel, supra note 7, at 78 ("If 'matters' is construed to include all 'claims', then a combination of claims in which a federal claim is one but in which state law is found to 'predominate' may justify a remand of the whole case . . . .").
\item[340] Id.
\item[341] Id. at 21.
\item[343] Id. at 526.
\end{footnotes}
tin then amended his complaint in anticipation of a res judicata defense based on a Delaware judgment, claiming that enforcement of that judgment would violate his federal due process rights. The defendants removed and Martin sought remand. As Judge Acker acknowledged, a straightforward application of the well-pleaded complaint rule barred removal and required remand. But Judge Acker was not content to rely on a straightforward application of the well-pleaded complaint rule. Instead, he read the 1990 amendment to § 1441(c) as granting "broad discretion" to a federal district court to make a "value judgment" as to whether or not "state law predominates." He concluded that the word "matter," as used in amended § 1441(c), permits remand of the entire matter, that is, the entire case. Accordingly, because state law predominated in Martin's case, the entire case was remanded.

Without citing Martin, Judge Patrick Kelly of the District of Kansas reached the same conclusion in Peoples National Bank v. Darling. There, the plaintiff sued in Kansas state court alleging violations of section 12(2) of the Securities Act of 1933, Kansas securities law, and Kansas common law. Defendants removed and plaintiff sought remand. Noting that Congress expressly made section 12(2) claims non-removable, Judge Kelly ruled that there was no other federal claim that would support removal. First, he observed that, as amended, § 1441(c) only applies to cases within the district court's federal question jurisdiction and stated there was no

344. Id. Oddly, although Judge Acker stated that the "well-pleaded complaint rule is so ingrained in federal question removal jurisprudence that it needs no citation of authority," he also noted that if he were "inclined to do so," he could distinguish both Gully v. First National Bank, 299 U.S. 109 (1936), and In re Carter, 618 F.2d 1093 (5th Cir. 1980), cert. denied, 450 U.S. 949 (1981). Martin, 756 F. Supp. at 526.

345. Martin, 756 F. Supp. at 527. He also observed that he had been "privileged to attend a seminar at Yale Law School at which the legislation which ended up as the Act adopted on December 1, 1990, was under consideration by Congress" and that there he saw "virtual unanimity" among the federal judges present and the Congressional representatives "over the need to subtract substantially from the removal jurisdiction of the federal courts." Id. at 526. The seminar at Yale was a conference on "Modern Civil Procedure: Issues in Controversy," co-sponsored by the Yale Law School Program in Civil Liability and Aetna Life & Casualty. It was held on June 15-16, 1990. Undated note from the Honorable William M. Acker, Jr., N.D. Ala., to Edward Hartnett, Assistant Professor of Law, Seton Hall University School of Law (on file with author).


350. Id. at *5. Judge Kelly rejected arguments that the § 12(2) claim was so baseless as to constitute a fraudulent attempt to defeat federal jurisdiction and that the state law security claim was merely an artfully pleaded federal claim under the Securities Exchange Act of 1934. Id. at *2-5.
such federal question in plaintiff's well-pleaded complaint.\textsuperscript{351} Second, he concluded that the plaintiff's claims were not separate and independent because they were "interlocked, closely related and allege essentially one wrong for which a single relief is sought."\textsuperscript{352} Accordingly, he ordered remand.\textsuperscript{353} Almost in passing, he observed that the 1990 amendment to § 1441(c) "gives the federal court discretionary authority, where before it had none, to remand the entire case to state court if state law predominates."\textsuperscript{354}

In \textit{Darling}, as in \textit{Martin}, the discussion of the 1990 amendment to § 1441(c) did not affect the disposition of the case—remand of the entire case was required in any event because the case should not have been removed.\textsuperscript{355} In \textit{Holland v. World Omni Leasing, Inc.}\textsuperscript{356} another decision by Judge Acker, this view of amended § 1441(c) did make a difference. There, plaintiffs filed an action in Alabama state court alleging fraud, breach of contract, and a violation of the federal Racketeer Influenced and Corrupt Organization Act ("RICO").\textsuperscript{357} The "predicate acts" alleged for the RICO claim were essentially the same facts involved in the state law fraud and breach of contract claims. Defendants removed and plaintiffs moved to remand. The action was undoubtedly removable because plaintiff's well-pleaded complaint contained a RICO claim, which plainly arises under federal law.

At oral argument, Judge Acker expressed some doubt about whether he had been correct in his interpretation of § 1441(c) in \textit{Martin}. Upon further reflection, including consideration of \textit{Darling}, he concluded that "even if there is a federal question identified in plaintiff's well-pleaded complaint, as is true in the instant case, § 1441(c) can still justify remanding the entire case 'if state law predomi-

\textsuperscript{351} \textit{Id.} at *6. In this regard, Judge Kelly appears to have overlooked that the § 12(2) claim was within the district court's federal question jurisdiction if the plaintiff had chosen to file the action in federal court. In effect, he, quite sensibly, read the statute as if it continued to include the phrase "which would be removable if sued upon alone," a phrase that was omitted in the 1990 amendment. \textit{See} 28 U.S.C. § 1441(c) (Supp. V 1993); \textit{see also} Field et al., \textit{supra} note 32, at 58 (Supp. 1994) (asserting that "1441(c) must mean that the entire case is removable only if the federal question claim 'would be removable if sued upon alone' as the statute provided before the 1990 amendment").


\textsuperscript{353} \textit{Id.}

\textsuperscript{354} \textit{Id.}

\textsuperscript{355} Similarly, in Lang v. American Elec. Power Co., 785 F. Supp. 1331 (N.D. Ind. 1992), the court noted that the removal was defective due to failure of all defendants to join. \textit{Id.} at 1334-35. But instead of remanding on this basis, the court relied on \textit{Martin} to remand the "[because] state law predominates." \textit{Id.} at 1334.


\textsuperscript{357} \textit{Id.} at 1443.
nates.’ Finding that state law predominated, he remanded the entire case, including the federal RICO claim.\footnote{358}{Id. at 1444 (citation omitted).}

In Moore v. DeBiase,\footnote{359}{Id. Judge Acker reasoned that to retain only the RICO claim and remand the state claims would result in a “race-to-judgment” and a serious res judicata problem that “may have influenced Congress when it chose its words in the amendment to § 1441(c), imperfect though these words may be.” Id.} Judge Lechner of the District of New Jersey built upon the foundation laid by Judge Acker. Moore, a police officer for the Borough of Dunellen, New Jersey, sued the Chief of Police, various other public officials, the Dunellen Police Department, and the Borough of Dunellen in state court in New Jersey, alleging that the defendants initiated a campaign to discredit and terminate him in retaliation for the filing of a grievance against the Chief of Police.\footnote{360}{766 F. Supp. 1311 (D.N.J. 1991).}

The bulk of Moore’s nineteen-count complaint relied upon state common law. The thirteenth count sought recovery for violation of an unspecified constitution.\footnote{361}{Id. at 1313.} The fourteenth and fifteenth counts sought recovery under 42 U.S.C. § 1983, alleging a deprivation of both state and federal constitutional rights. The defendants removed and Moore sought remand.\footnote{362}{Id. at 1314.}

Judge Lechner first concluded that removal was proper because the § 1983 claims arose under federal law and the state law claims were within the scope of supplemental jurisdiction.\footnote{363}{Id.} Accordingly, he held that remand under § 1447(c) was not appropriate.\footnote{364}{Id. at 1447(c).} He then addressed the possibility of remand under § 1441(c), even though the plaintiffs did not specifically mention it.\footnote{365}{Id.}

After tracing the legislative history of § 1441(c), Judge Lechner cited Judge Acker’s opinion in Martin and stated, “By permitting remand of a case in which state law predominates, Congress granted district courts broad discretion to decide whether to retain such a removed matter or remand it to state court.”\footnote{366}{Moore, 766 F. Supp. at 1315.} He recognized, however, that “Congress did not state whether ‘matters’ refers to the entire case or just that portion in which state law can be said to predominate.”\footnote{367}{Id. at 1319-20 (footnote omitted).} Prior to the 1990 amendment, Judge Lechner observed that “a district court could remand the state law claims not within its original jurisdiction but was required to retain the federal jurisdiction.”

\footnote{368}{Id. at 1315 n.7.}

\footnote{369}{Id. at 1320.
law claims.\textsuperscript{370} Reasoning that the change in statutory language from "all matters not otherwise within its original jurisdiction" to "all matters in which State law predominates" should be interpreted as a meaningful change, Judge Lechner inferred that "Congress intended to change the scope of what a district court could remand."\textsuperscript{371} He stated:

Before, a district court could only remand the claim over which it did not have original jurisdiction: a non-federal law claim between non-diverse parties. Under the amended section 1441(c), it appears a district court may remand even a claim over which it has original jurisdiction, so long as state law somehow predominates in that particular claim or cause of action. In other words, the term "matters," construed in the context of amended section 1441(c), should be read to permit remand of the entire case if the circumstances justify such remand. Congress, by granting the discretion to remand all matters in which state law predominates, intended to permit a district court to remand the entire case and not just the state law claims.\textsuperscript{372}

Judge Lechner observed that sixteen of the nineteen counts were based purely on state law while only the fourteenth and fifteenth counts involved federal law claims.\textsuperscript{373} Moreover, he noted that "even the Counts containing the federal law claims invoke state law."\textsuperscript{374} He concluded, "State law is implicated and therefore predominates in every aspect of this action and remand of the entire case is appropriate."\textsuperscript{375}

In \textit{Alexander v. Goldome Credit Corp.},\textsuperscript{376} Judge Hobbs of the Middle District of Alabama signed on to the view that § 1441(c) now permits remand of federal question cases. In \textit{Alexander}, the plaintiffs gave a mortgage on their home to a credit company to obtain financing for certain home improvements but refused to sign a certification of completion because, they contended, the construction company's work was unsatisfactory. After the credit company paid the construction company anyway, the plaintiffs filed suit in state court in Alabama against the construction company, an agent of the construction company, and the credit company. The plaintiffs alleged state law fraud and breach of contract claims against all of the defendants. In addition, the plaintiffs alleged that the credit company violated the

\begin{center}
\textsuperscript{370} \textit{Id.}
\textsuperscript{371} \textit{Id.}
\textsuperscript{372} \textit{Id.} at 1320-21.
\textsuperscript{373} \textit{Id.} at 1321.
\textsuperscript{374} \textit{Id.}
\textsuperscript{375} \textit{Id.}
\textsuperscript{376} 772 F. Supp. 1217 (M.D. Ala. 1991).
\end{center}
federal Truth in Lending Act. The credit company, but not the other defendants, removed, and the plaintiffs sought remand.

It was clear that if the credit company had been the only defendant in the case, removal "undoubtedly" would have been proper. It was similarly clear that the failure of the other defendants to join or consent to the removal would have been fatal to the removal unless the case could be brought within § 1441(c). In Judge Hobbs' view, the Truth in Lending Act claim was "separate and independent" from the fraud and breach of contract claims because it was "possible that [the credit company] may have violated the provisions of the Truth in Lending Act, but that the work on plaintiffs' residence was performed properly by [the construction company]." He concluded, therefore, that the case was properly removed under § 1441(c).

Turning to the issue of remand under § 1441(c), Judge Hobbs followed the "clear trend among the few jurisdictions that have considered this question . . . that the amended remand clause of § 1441(c) now allows for a remand of the entire case, federal claim included, where 'state law predominates.'" He reasoned that this interpretation is consistent with Congressional intent to restrict removal jurisdiction and "allows a court to avoid piecemeal litigation and to properly limit those cases removed to federal court to those that truly present federal issues." In his view, removal of a case with a "relatively insignificant federal claim when compared to the state law

379. Id. at 1221.
380. Id. at 1222.
381. Id. at 1223. Judge Hobbs cited American Fire & Casualty Co. v. Finn, 341 U.S. 6 (1951), and acknowledged that "the subsequent application of the Finn test has resulted in a substantial lessening of the number of cases that can be removed under § 1441(c)." Alexander, 772 F. Supp. at 1223; see also supra notes 179-225 and accompanying text (discussing Finn). However, he concluded that "[i]t cannot be said that the Supreme Court . . . meant to completely foreclose the use of § 1441(c) as a basis for removal." Alexander, 772 F. Supp. at 1223. Especially in light of Carnegie-Mellon University v. Cohill, 484 U.S. 343 (1988), however, Judge Hobbs was wrong to treat these claims as "separate and independent." See supra notes 248-53 and accompanying text (discussing Cohill).
382. Alexander, 772 F. Supp. at 1223. Judge Hobbs also noted that § 1441(c), as amended, "will see little use," and is "not really needed," because supplemental jurisdiction "will provide all the jurisdictional support that is needed, or could be provided, to bring a case involving a mix of federal and nonfederal claims before the court under § 1441(a) and (b)." Id. at 1222-23. As he saw it, the only situation in which § 1441(c) would find some use is in cases such as Alexander where "procedural irregularities have rendered § 1441(a) and (b) unavailable." Id. at 1223.
383. Id. at 1224.
384. Id. at 1225.
claims is a classic illustration of 'the tail wagging the dog.' Accordingly, he ordered remand of the entire case. These judges are not alone. Judge Zatkoff of the Eastern District of Michigan has *sua sponte* remanded a case involving a federal claim for breach of a collective bargaining agreement. He reasoned that district courts now have "considerable discretion" to "remand ... the whole case, with the federal claim[s] included," where state law claims are found to predominate. Judge Alesia of the Northern District of Illinois has used § 1441(c) to remand a case including a federal civil rights claim. He agreed with the "uniform[ ]" interpretation "that the court has discretion to remand an entire case, including federal claims, if it determines that questions of state law predominate." Judge Marovich, also of the Northern District of Illinois, has remanded a case that included a claim asserting a violation of the due process clause of the United States Constitution. He concluded that § 1441(c) "gives discretion ... to remand the whole case, both state and federal claims, when matters of state law predominate." Moreover, in addition to these judges who have asserted and exercised a power to remand federal question cases under § 1441(c), at least one district judge has asserted such a power but declined to exercise it in the circumstances of the case.

---

385. *Id.* Judge Hobbs noted that state court resolution was particularly appropriate in *Alexander* because the plaintiff sought to "prevail on an exception to the general rule in Alabama that punitive damages are not recoverable for breach of contract." *Id.*

386. *Id.*


388. *Moralez, 778 F. Supp. at 370 (alteration in original) (citation omitted).*


390. *Id.* at *2.*


392. *Id.*

393. *Dobiecki v. Chicago Osteopathic Hosps. & Medical Ctrs., No. 93-C1595, 1993 WL 266579, at *6 (N.D. Ill. July 15, 1993) (Hart, J.)* ("When state law would predominate, the entire case can be remanded to the state court."). The judge exercised his discretion in favor of keeping the entire case in federal court because the plaintiff was considering amending his complaint to assert another federal claim and because the plaintiff's brother had a similar action pending before the court. Similarly, in *Roe v. Little Co. of Mary Hospital, 800 F. Supp. 620 (N.D. Ill. 1992), Judge Parsons appeared to read § 1441(c) to permit remand of the entire case where jurisdiction was based on § 1331. *Id.* at 626. He found § 1441(c) inapplicable, however, because jurisdiction was based not on § 1331 but on the Congressional charter of the Red Cross. *Id.; see also* 36 U.S.C. § 2 (1988) (charter provision). The Supreme Court has interpreted the Congressional charter of the Red Cross as an independent jurisdictional grant. American Nat'l Red Cross v. S.G., 112 S. Ct. 2465, 2471-72 (1992); *see also* *Padilla v. City of Saginaw, 867 F. Supp. 1309, 1315 (E.D. Mich. 1994)* (citing
On the other hand, several district judges have concluded that they lack the power to remand federal question cases despite the 1990 amendments to § 1441(c). All of these judges rely on *Buchner v. FDIC.* In *Buchner,* the Court of Appeals for the Fifth Circuit stated that “federal question jurisdiction is not discretionary with the district court” and that a district court “has no discretionary authority” to “remand a federal cause of action to state court.” As a result, district judges in the Fifth Circuit have concluded that they lack power to remand federal question cases. In addition, in *Kabealo v. Davis,* Judge Graham of the Southern District of Ohio relied on *Buchner* in holding that § 1441(c) “does not authorize the remand of claims arising under federal law which are properly removed and which fall within the district court’s subject matter jurisdiction.” In light of *Buchner,* Judge Graham concluded that “[t]he word ‘matters’ [in § 1441(c)] is reasonably construed as meaning ‘claims.’”

While the broad language in *Buchner* certainly supports the decision in *Kabealo* (and while it is certainly reasonable for district judges within the Fifth Circuit to rely on that broad language), *Buchner* did not analyze the meaning of “matters” in § 1441(c) or so much as mention any of the cases interpreting the amended § 1441(c) to permit remand of the entire case. Instead, because the removed action was against the FDIC, and Congress has declared that “all suits of a civil nature ... to which the [FDIC], in any capacity, is a party shall be deemed to arise under the laws of the United States,” the *Buchner* court concluded that “all of the component claims are conclusively deemed to have arisen under federal law” and § 1441(c)’s remand provision is inapplicable. Thus, neither *Buchner* nor the cases relying on it significantly undermines those decisions holding that the

---

Moralez v. Meat Cutters Local 539, 778 F. Supp. 368 (E.D. Mich. 1991), and concluding that while § 1441(c) does not apply to cases where the state and federal claims derive from a common nucleus of operative fact, remand of the entire case is proper when the case truly involves separate and independent claims. 394. 981 F.2d 816 (5th Cir. 1993).
395. Id. at 820.
396. Id. at 817.
399. Id. at 926.
400. Id. *Kabealo* also relied on the description of § 1441(c) in Carnegie-Mellon University v. Cohill, 484 U.S. 343 (1988), as permitting remand of a “removed state-law claim.” *Kabealo,* 829 F. Supp. at 926 (quoting Cohill). *Kabealo* ignores, however, that *Cohill* was decided prior to the 1990 amendment of § 1441(c).
402. Buchner v. FDIC, 981 F.2d 816, 819 (5th Cir. 1993); see also Spring Garden Assocs. v. Resolution Trust Corp., 26 F.3d 412, 415-17 (3d Cir. 1994) (deeming civil action in which RTC is a party to arise under federal law and to be removable in its entirety).
amended § 1441(c) permits the remand of entire cases, including federal question claims.\footnote{403}

**B. An Analysis of the Amended Remand Clause of Section 1441(c)**

Are the federal district judges who believe that they possess the power to remand federal question cases in their entirety correct?\footnote{404} Or are the commentators, who are nearly unanimous that the district judges lack such power, correct?\footnote{405}

There is certainly textual support for the judges' reading of the remand clause of the statute.\footnote{406} To interpret "matters" as limited to state law claims would render the phrase "in which State law predominates" meaningless because State law predominates in every state law claim.\footnote{407} If Congress intended simply to provide the district courts with discretion to remand state law claims, it could have left the remand clause unchanged, thus continuing to authorize the remand of only those matters not within the district court's original jurisdiction.

It might be thought that the amendment to the remand power was designed to refer to the discretionary power to remand supplemental state law claims. Indeed, a letter from Larry Kramer to Judge Weiss contained in the legislative history of the 1990 amendments suggests that § 1441(c) should contain a cross-reference to § 1367(c), the provision codifying the discretion to decline to exercise supplemental juris-

\footnote{403. The *Buchner* court may well have been hampered by poor briefing of the issue by Buchner's counsel. The court specifically criticized that brief for making "patently inaccurate assertions," such as "Plaintiffs' last Amended Petition does not state any claims arising under federal law but seeks relief for violation of the National Bank Act." *Buchner*, 981 F.2d at 819 n.10. Judge Acker certainly has not been convinced to change his mind. See, e.g., Burnett v. Birmingham Bd. of Educ., 861 F. Supp. 1036, 1039 (N.D. Ala. 1994) (adhering to his prior decisions).

404. See supra part IV.A.

405. See supra note 32 (listing commentators).

406. Siegel, *supra* note 7, at 78 ("If 'matters' is construed to include all 'claims', then a combination of claims in which a federal claim is one but in which state law is found to 'predominate' may justify a remand of the whole case."); Mengler et al., *supra* note 32, at 20 ("If courts construe the term 'matters' as synonymous with constitutional cases or controversies, then the language authorizes the district court to remand an entire case or controversy—including the federal question claim—to the state court if the case or controversy is one in which state law issues predominate."); cf. Teply & Whitten, *supra* note 7, at 156 (noting that there is "only the barest justification under the statutory language" for remand of the entire case). The discussion here is limited to the remand clause. I address later whether any of these decisions correctly interpret the removal clause of the statute. See infra notes 437-40 and accompanying text.

407. Mengler et al., *supra* note 32, at 21 ("If, instead, courts construe the term 'matters' to mean discrete claims to relief . . . presumably every state 'matter' is necessarily one in which state law predominates."). Thus, Teply and Whitten's criticism that the word "matters" did not include entire cases before the 1990 amendment and therefore does not after the amendment is unpersuasive—the phrase "in which State law predominates" was not in the statute prior to the 1990 amendment. Teply & Whitten, *supra* note 7, at 156 n.380.
At first blush, this makes sense because the language "in which State law predominates" appears both in Gibbs and in § 1367(c) as grounds for the decline of supplemental jurisdiction. In that context, it is clear that the federal court only has discretion to dismiss the supplemental claim, not the federal claim.409 Treating cases directly filed in federal court and those removed to federal court in a parallel manner has an attractive symmetry, and our view of removal jurisdiction since the decision in Tennessee v. Union & Planters' Bank410 has largely been one of such symmetry.

Closer analysis, however, makes this symmetry impossible on a textual level. In the direct-filed context, both Gibbs and § 1367(c) permit the federal court to decline to exercise jurisdiction over the state law claims if state law predominates in the case as a whole. In that context, one looks to the whole to test for predominance and, if the test is satisfied, remands a part of the whole. Thus, the entity that is tested for predominance of state law is a superset of the entity that is not adjudicated if the test is met.

Under § 1441(c), however, "matters" is both the entity to be tested and the entity to be remanded. The text does not support reading "matters" to refer to the case as a whole in order to determine predominance and simultaneously reading "matters" to refer only to the state law claims in order to determine the scope of the remand.411 To

---

408. Federal Courts Study Committee Implementation Act and Civil Reform Act: Hearing on H.R. 5381 and 3898, Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 720 (1990) (letter dated Aug. 21, 1990 from Larry Kramer, Visiting Professor of Law, University of Michigan Law School); see also Oakley, supra note 32, at 750 (noting that "matters" presumably means "claims"); Rosenberg et al., supra note 32, at 35 ("Would it have been better to provide that, when removable claims are joined with non-removable claims as to which there would be supplemental competence under § 1367(a), the entire case may be removed but that the district court may remand in the circumstances specified in § 1367(c)?").

409. The statute empowers courts to "decline to exercise supplemental jurisdiction," not to decline to exercise jurisdiction over the case. 28 U.S.C. 1367(e) (Supp. V 1993); see, e.g., Joan Steinman, Reverse Removal, 78 Iowa L. Rev. 1029, 1102 (1993) (stating that the "discretion not to exercise supplemental jurisdiction does not apply to claims within federal question or diversity jurisdiction").

410. 152 U.S. 454 (1894); see also supra notes 116-23 and accompanying text (discussing the interpretation of the Removal Act of 1887 in Union & Planters' Bank).

411. "A term appearing in several places in a statutory text is generally read the same way each time it appears. We have even stronger cause to construe a single formulation . . . the same way each time it is called into play." Ratzlaf v. United States, 114 S. Ct. 655, 660 (1994) (citation omitted). "[T]o give a single term two different and inconsistent meanings . . . for a single occurrence is an offense so unlikely that no common prohibition has ever been thought necessary to guard against it." BFP v. Resolution Trust Corp., 114 S. Ct. 1757 (1994) (Souter, J., dissenting).
read the statute that way, in effect, would rewrite it to provide that the
district court "may remand all state law claims if state law predomi-
nates in the action as a whole."

It is possible, of course, to read the statute as if it had been written
this way and conclude that Congress was simply sloppy.\textsuperscript{412} The diffi-
culty with doing so is that the effect of the amendment would be to
narrow the district court's authority to remand. Prior to the amend-
ment, the district court had the discretion to remand all matters not
within its original jurisdiction. This discretion was in no way limited
to cases in which state law predominated. It is unlikely that Congress,
at the same time that it eliminated separate claim removal for diver-
sity cases, narrowed the power of district courts to remand state law
claims.\textsuperscript{413}

Moreover, the codification of supplemental jurisdiction was con-
tained in the very same act as the amendment to § 1441(c).\textsuperscript{414} There is
no doubt that supplemental jurisdiction is available in removed cases
as well as in direct-filed cases.\textsuperscript{415} Therefore, district courts "may de-

\textsuperscript{412} Congress certainly was sloppy. As originally enacted, the remand clause pro-
vided that the district court, "in its discretion, may may [sic] remand all matters in
which State law predominates." Judicial Improvements Act of 1990, Pub. L. No. 101-
650, § 312, 104 Stat. 5089, 5114. This was corrected the next year. Act of Dec. 9, 1991,
Pub. L. No. 102-198, § 4, 105 Stat. 1623. Sloppiness is not surprising, considering that
the Act was the last public act by the 101st Congress and was passed after midnight,
after enactment of the massive budget act. Oakley, supra note 32, at 737 n.2.

Similar problems beset the 1887 Act, which had to be corrected in 1888:
Parts of the act . . . are obscure and very ambiguous; in several places its
language is extremely confused . . . . Indeed, as the act was first officially
promulgated, the profession was astonished to find that it so abounded in
errors of grammar and orthography as to be, in places, absolutely
unintelligible.


It is lamentably true . . . that it is obscure and ambiguous; that the unjustifi-
able practice of changing laws so momentous as these, in the turmoil, impa-
tience, partisanship, and confusion incident to the closing hours of a
Congressional term, is for every reason deplorable.

Emory Speer, Removal of Causes 9, 10 (1888), quoted in Note, The Constitutionality
of Federal Removal Jurisdiction over Separable Controversies Involving Citizens of the
Same State, 94 U. Pa. L. Rev. 239, 240 n.11 (1946).

\textsuperscript{413} Some, however, appear to read the statute this way. 14A Wright & Miller,
supra note 32, § 3724, at 122 (Supp. 1994) ("It is unclear what policy interests are
served by narrowing a district court's power to remand unrelated claims . . . ."); see also Steinman, supra note 7, at 321 n.53 (stating that courts possess discretion to re-
mand under § 1441(c) "only when state law predominates"). Steinman, however,
continues to believe that Cohill was wrongly decided. Id. at 319; see also Steinman,
supra note 33, at 923 (criticizing the reasoning in Cohill).

5089, 5113 (enacting 28 U.S.C. § 1367 (Supp. V 1993)); see also id. § 312 (amending
§ 1441(c) (Supp. V 1993)).

Controversial Supplement to Federal Jurisdiction, 41 Emory L.J. 31, 57 (1992); Stein-
man, supra note 7, at 308-10. Some seek to raise doubts by observing that the supple-
mental jurisdiction statute does not specifically mention removed cases and that a
prior draft of the statute did. Michael D. Moberly et al., Penetrating the Thicket: Pen-
cline to exercise [supplemental] jurisdiction" in any of the circumstances listed in § 1367(c) in removed cases as well as in direct-filed cases. The difference is that when a court declines to exercise supplemental jurisdiction in direct-filed cases, it dismisses the supplemental claims without prejudice, whereas when a court declines to exercise supplemental jurisdiction in a removed case, it may (and usually does) remand the supplemental claims. Indeed, even Joan Steinman, a leading and persistent critic of Cohill, agrees that if Cohill is followed, a court "can remand some or all of the claims that it declines to hear." Thus, under Cohill, there was no need to provide for the discretionary remand of state law claims if state law predominated in the action as a whole in § 1441(c) because that power was provided for in § 1367(c). Indeed, to construe the remand power in § 1441(c) as limited to state law claims makes the remand provision of § 1441(c) redundant of § 1367(c).

Perhaps, then, amended § 1441(c) should be read as if Larry Kramer's suggestion has been accepted. That is, perhaps § 1441(c) should be read as if it simply contained a cross reference to § 1367(c) to allay any fears that the discretionary power to decline supplemental jurisdiction in § 1367(c) might have been read as inapplicable to cases removed under § 1441(c). Under this reading, Congress' choice of language was ham-fisted, but there would be beautiful symmetry between direct-filed cases and removed cases.

dent Party Removal Jurisdiction in the Ninth Circuit, 30 Idaho L. Rev. 1, 29-30 (1993-94); Wolf, supra note 288, at 35. The earlier draft provided for supplemental jurisdiction in any civil action of which the district courts have "original jurisdiction, including an action removed from a state court." McLaughlin, supra note 15, at 55; Wolf, supra note 288, at 57. Thus, the earlier draft treated removal jurisdiction as a subset of original jurisdiction. Freeman v. Bee Mach. Co. 448, 452 (1943) ("[T]he jurisdiction exercised on removal is original not appellate."); cf. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 349-50 (1816) (treating Supreme Court review of state court judgments as a removal mechanism). Viewed in this light, the phrase "including an action removed from a state court" was unnecessary.

The real difficulty with the supplemental jurisdiction statute's failure to address removed cases directly is whether and how the limitations on the exercise of supplemental jurisdiction in § 1367(b) apply to removed cases. McLaughlin, supra note 15, at 949-52, 992; Moore, supra, at 57.

416. Steinman, supra note 7, at 318.

417. Id. at 320. In this regard, she is surely correct. While Cohill itself involved a case where all federal claims were eliminated and only state claims remained, there is no reason to treat discretionary refusals to exercise supplemental jurisdiction under § 1367(c)(3) (where only state claims remain) differently than discretionary refusals to exercise supplemental jurisdiction under § 1367(c)(1), (2), and (4). See Carnegie-Mellon University v. Cohill, 484 U.S. 343, 351 (1988) ("[T]he animating principle behind the pendent jurisdiction doctrine supports giving a district court discretion to remand when the exercise of pendent jurisdiction is inappropriate."). Steinman, however, would insist that district courts declining to exercise supplemental jurisdiction in removed cases dismiss rather than remand because, in her view, Cohill was wrongly decided. Steinman, supra note 7, at 319-20.

418. See supra note 408 and accompanying text.
Such an interpretive revision of the remand provision of § 1441(c) might be justified if there were important reasons, other than aesthetic, for symmetry between direct-filed and removed cases. However, there are none. Instead, there is good reason to treat direct-filed and removed cases differently, particularly where state law predominates in the case as a whole.

If a plaintiff files directly in federal court a case that contains a federal claim but in which state law predominates, the district court under § 1367(c) may dismiss the supplemental state claims without prejudice.\(^{419}\) The result is to force the plaintiff to make a choice between a federal forum for the federal claim and the economy of a single forum for all claims. If a federal forum for the federal claim is sufficiently important, the plaintiff can continue to pursue the federal claim in federal court and file the state claims in state court. Alternatively, if the economy of a single forum for all claims is more important to the plaintiff, the plaintiff can voluntarily dismiss the federal claim and refile the entire action in state court. Section 1367(d) is designed to facilitate the latter choice by tolling the statute of limitations on any claim that is voluntarily dismissed upon the court’s decision to decline to exercise supplemental jurisdiction.\(^{420}\)

Consider the same case—one that contains a federal claim but in which state law predominates—filed as an initial matter in state court but removed to federal court. If the federal district court concludes that state law predominates in the case as a whole and treats the case the same as a direct-filed case, the court would remand the state claims but retain the federal claim. The plaintiff would not then be faced with a choice between a federal forum and judicial economy, but would be forced to either abandon the federal claim or litigate in both state and federal court.\(^{421}\) In essence, the plaintiff has already

---

\(^{420}\) 28 U.S.C. § 1367(d) (Supp. V 1993). Suppose the plaintiff acts as invited by § 1367(d) by voluntarily dismissing the federal claim and refiling in state court. Suppose further that the defendant then removes pursuant to § 1441(a). Surely the federal district court should be able to remand the entire case to implement both its decision to decline supplemental jurisdiction and the Congressional policy embodied in § 1367(d). Thus, just as supplemental jurisdiction is necessary to avoid discouraging a plaintiff from choosing a federal forum for a federal claim, the power to remand an entire federal question case is necessary to avoid discouraging a plaintiff from raising a federal claim in a case in which state law predominates. Cf. supra note 292 and accompanying text (discussing the importance of protecting a plaintiff’s statutory right to choose, and keep, a state forum for a FELA claim).

\(^{421}\) It might be thought that the ability of plaintiffs to voluntarily dismiss their federal claims and refile them in state court makes it unnecessary for federal courts to have the power to remand the entire case including the federal claim. This would only be true if, when the plaintiff refiled in state court, the defendant would be barred from removing a second time. Certainly, if the plaintiff filed a new action in state court, separate from the remanded one, the new action would be removable. But even if the plaintiff raised the federal claim by amendment in the remanded action, it would seem that the defendant could remove a second time.
made the choice between a federal forum and judicial economy and opted for judicial economy. Thus, the direct-filed and removal situations are not the same, and attempting to treat them in the same way is inappropriate. If the plaintiff would have been forced to choose between a federal forum for the federal claim and judicial economy if the plaintiff filed directly in federal court, the entire case—including the federal claim—should be remanded if the case is filed in state court and removed to federal court.

A recent case illustrates that this is not a fanciful concern. In Padilla v. City of Saginaw, the personal representative of a decedent’s estate sued the City of Saginaw and two police officers in state court, alleging that a police officer shot and killed the mentally disabled decedent while he was naked and unarmed. The complaint raised various state law claims, including assault and battery, tortious violation of duties, intentional infliction of emotional distress, and violation of

Certainly, there is no flat prohibition on subsequent removal petitions. Instead, the longstanding, pre-Cohill rule has been that a defendant may not remove a second time on the same grounds as the first removal, but may remove a second time on new grounds. Fritzlen v. Boatmen’s Bank, 212 U.S. 364, 372-74 (1909); Powers v. Chesapeake & O. Ry., 169 U.S. 92, 98-99 (1898); St. Paul & C. Ry. v. McLean, 108 U.S. 212, 217 (1883); see generally 1A Moore & Ringle, supra note 224, § 0.169[3] (discussing rules pertaining to second petition for removal). “These cases stand for the proposition that a defendant who fails in an attempt to remove on the initial pleadings can file a removal petition when subsequent pleadings or events reveal a new and different ground for removal.” Federal Deposit Ins. Corp. v. Santiago Plaza, 598 F.2d 634, 636 (1st Cir. 1979).

This general rule need not be applied woodenly to bar subsequent removals. See, e.g., Doe v. American Red Cross, 14 F.3d 196, 203 (3d Cir. 1993) (permitting second removal, based on same grounds, after intervening Supreme Court decision involving same defendant); Sawyer v. Commonwealth Edison Co., 847 F. Supp. 96, 101 (N.D. Ill. 1994) (finding that defendant incorrectly removed to Central District of Illinois and permitting subsequent removal to correct district, the Northern District of Illinois). A defendant who seeks to remove a second time after a plaintiff amends to restore a voluntarily dismissed federal claim, while relying on the same ground as the first removal, is relying on a previously successful basis for removal, not trying a second bite at the same removal apple.

The Supreme Court in Cohill observed that a district court has discretion to keep the supplemental claims even after a voluntary dismissal of the federal claims, if the plaintiff has engaged in manipulative tactics. Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 357 (1988). Thus, if the district court suspects this ploy in advance, it can simply deny remand. If the court does not foresee that a plaintiff might seek to reinstate its federal claims upon remand, the defendant should not be foreclosed from removing again. The contrary rule would be too open to easy manipulation: any plaintiff who wanted to litigate a federal claim in state court could simply amend her complaint to drop the federal claim, thereby hoping to prompt a remand, and then bar defendants from a second removal. Fed. R. Civ. P. 15(a) (permitting unilateral amendment of a complaint before answer); Fed. R. Civ. P. 81(c) (applying rules to removed actions).

422. Thus, the decision in Bodenner v. Graves, 828 F. Supp. 516 (W.D. Mich. 1993), which relies on the § 1441(c) decisions, discussed above, to dismiss a direct-filed case in its entirety—including a federal RICO claim—is clearly wrong. See supra notes 342-93 and accompanying text (discussing decisions under § 1441(c)).

state civil rights. In addition, the complaint raised claims for violation of federal civil rights. The defendants removed and plaintiff sought remand. Judge Cleland concluded that because the case was properly removed under §§ 1441(a) and (b), remand of the entire cases under § 1441(c) was unavailable. Instead of remanding the entire case, Judge Cleland remanded all of the state claims, noting that "Plaintiff's counsel intimated at oral argument that Plaintiff might prefer to abandon her federal claims rather than pursue them in federal court." The result is remarkable: state officials were not only permitted to remove from their home court to the federal court, but, by doing so in a case in which state law predominated, evidently coerced the plaintiff into abandoning the federal claim against them.

It might be thought that the direct-filed and removed cases are parallel and that the difference is that in the direct-filed case the plaintiff is given the choice between a federal forum and judicial economy while in the removal situation it is the defendant who is given the choice between a federal forum and judicial economy. That is, if the court on removal were to remand the state claims and retain the federal claims and the defendant preferred judicial economy to a federal forum, the defendant could seek remand of the federal claim as well. Even if there were no statutory authority to do so, it seems unlikely that a court would deny a request to remand if all parties agreed, particularly because the same result is readily achieved by dismissal and refiling.

Plaintiffs and defendants, however, are not similarly situated with regard to the choice between a federal forum and judicial economy. Structurally, a decision by a plaintiff to seek a federal forum for a federal claim is likely based on a belief that the federal forum will be

---

424. Id. at 1311.
425. Id.
426. Id. at 1312-14. The court was especially critical of Moore for relying on § 1441(c) in a case where the state and federal claims share a common nucleus of operative fact. Id. at 1314. On the other hand, the court agreed that, in cases removed under § 1441(c), remand of the entire case was permissible. Id. at 1315 (citing Moralez v. Meat Cutters Local 539, 778 F. Supp. 368 (E.D. Mich. 1991)). Finally, the court declined to "enter th[e] legal thicket" regarding whether § 1367(c) authorizes a court to remand federal claims along with supplemental claims. Id. at 1315 n.4 (citing Administaff, Inc. v. Kaster, 799 F. Supp. 685 (W.D. Tex. 1992); Bodenner v. Graves, 828 F. Supp. 516 (W.D. Mich. 1993); and Kabealo v. Davis, 829 F. Supp. 923 (S.D. Ohio 1993)). In my view, Padilla illustrates the importance of distinguishing between direct-filed cases such as Bodenner—as to which under § 1367(c) a court cannot dismiss a federal claim—and removed cases such as Administaff and Padilla—as to which § 1441(c) can be used by analogy to remand entire federal question cases.
427. Padilla, 867 F. Supp. at 1316 n.5. While the basis for the remand of the state claims was the risk of jury confusion, it also appears that state law predominated in the case.
428. See Sellick Equip., Inc. v. Boutte, 114 S. Ct. 1399, 1399 (1994) (denying certiorari to an unreported decision of the Fifth Circuit in a case where the district court apparently remanded based on the consent of the parties).
more protective of that federal claim, while a plaintiff who chooses a state forum for a federal claim must not be significantly motivated by fear of state court hostility to the federal claim.\textsuperscript{429} Defendants, who may not remove on the basis of a federal defense, must be motivated by considerations other than fear of state court hostility to a federal claim in seeking a federal forum.\textsuperscript{430} For example, a defendant may be attracted by the greater availability of summary judgment in federal court.\textsuperscript{431} Similarly, a defendant may seek the federal court's requirement of jury unanimity.\textsuperscript{432} Worse, if the case cannot be decided on motion, a defendant may simply want to impose the higher costs usually associated with federal court litigation on an adversary less able to pay or one represented by an attorney unfamiliar with and uncomfortable in federal court.\textsuperscript{433}

Moreover, as a general matter, plaintiffs and defendants differ in their litigation resources and therefore in their need for a single forum. Plaintiffs are more likely than defendants to feel the need to

\textsuperscript{429} See, e.g., Burt Neuborne, \textit{Toward Procedural Parity in Constitutional Litigation}, 22 Wm. & Mary L. Rev. 725 (1981) (arguing that federal courts are better fora for constitutional claims due largely to procedural advantages); Burt Neuborne, \textit{The Myth of Parity}, 90 Harv. L. Rev. 1105 (1977) (arguing that federal fora are preferred by litigators for adjudication of constitutional rights).

\textsuperscript{430} Study of the Division of Jurisdiction Between State and Federal Courts, A.L.I. at 91 (Tentative Draft No. 5, 1967) ("The number of cases in which defendant removed because he feared that a state court would give an over-generous interpretation to plaintiff's claim must be very small indeed."); see also Berman, supra note 32, at 715 n.185 ("That defendants are sometimes motivated to remove action for tactical reasons unconnected to an interest in litigating in a federal forum is well recognized."). Indeed, it has long been questioned whether defendants should be able to remove on the basis of the plaintiff's federal claim at all. Herbert Wechsler, \textit{Federal Jurisdiction and the Revision of the Judicial Code}, 13 Law & Contemp. Probs. 216, 233-34 (1948).


\textsuperscript{432} Fed. R. Civ. P. 48.

\textsuperscript{433} In an adversary system, it must be rare for a defendant to remove a federal claim solely for the greater expertise of federal judges in federal law. An advocate seeks the best result for the client, not the most expert decision.
avoid litigation in multiple forums. Therefore, while it may be difficult for a plaintiff to choose between a federal forum for the federal claim and judicial economy, a defendant may view the choice as a win-win solution—not only does the defendant get a federal forum for the federal claim, but also he forces the plaintiff to litigate in two different forums. This disparity in litigation resources between plaintiffs and defendants is especially dramatic in removed cases. The majority of cases that get removed are those filed by individuals against corporations.

Therefore, there is good reason to treat removed cases differently than direct-filed cases and permit district courts to remand an entire case where state law predominates. Accordingly, the language of § 1441(c) should not be revised through interpretation to achieve symmetry between direct-filed and removed cases.

C. Applying the Remand Clause of Section 1441(c) to Cases Removed Under Section 1441(a)

One might object that the above rationalization of the amended remand provision of § 1441(c) and the recent decisions under it go too far, for there is nothing in the analysis above that is limited to cases removed under § 1441(c). Thus, if this analysis is correct, district courts should have the discretion to remand the entire case when state law predominates, even if the case contains no separate and independent claim. Indeed, recent decisions remanding the entire case have been criticized for improperly concluding that there were separate and independent claims in the first place.

434. Cf. Marc Galanter, Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change, 9 L. & Soc’y Rev. 95, 108-09 (1974) (“[T]he great bulk of litigation” is brought by institutional “repeat players” against individual “one-shot” defendants.). While this may be true of the routine collection, eviction, and enforcement cases that Galanter discusses, such cases are rarely removable or removed.


436. This analysis is similar to that offered by Judge Posner, who argues that critics of the current doctrine, which permits plaintiffs to invoke federal jurisdiction for federal claims but prevents defendants from invoking federal jurisdiction for federal defenses, overlook that defendants may well benefit from the cost and delay brought about by the remand of a case removed on the basis of a weak federal defense, while plaintiffs suffer if they invoke federal jurisdiction only to have to start again in state court. Richard A. Posner, The Federal Courts: Crisis and Reform 190-91 (1985).

437. Field et al., supra note 32, at 65 (observing that “claims [in Goldome] seem too related to be ‘separate and independent’”); see also Williams v. Huron Valley Sch. Dist., 858 F. Supp. 97, 100 (E.D. Mich. 1994) (criticizing Martin and Holland); Teply & Whitten, supra note 7, at 156 (criticizing Neal and Moore for applying § 1441(c) to
There is little doubt that most of these recent decisions have not involved separate and independent claims, at least after Cohill, which teaches that pendent claims are not separate and independent. Probably the best known example is Moore v. DeBiase, where the court explicitly stated that "the factual allegations in the federal and state law claims are related and are largely the same." Surely such claims are not separate and independent. Although not all of the opinions contain a sufficient description of the claims involved to be fully confident regarding the factual relationship of the claims, only one case appears to have perhaps involved truly separate and independent claims.

Although most, if not all, of these decisions were wrong in their application of the removal provision of § 1441(c) as interpreted in Cohill, Cohill also teaches that it is proper to rely on § 1441(c)'s remand clause by analogy for cases that are not removed under § 1441(c). Thus, these courts should not have attempted to shoehorn their cases into the removal provision of § 1441(c) to justify remand of the entire case, but instead should simply have invoked Cohill to use the amended remand authority of § 1441(c) by analogy.

One court has done exactly this.
In Administaff, Inc. v. Kaster, the plaintiff was a staff leasing company that claimed that state officials improperly refused to consider it an employer under the Texas Unemployment Compensation Act. It sued in state court, alleging state law claims including violation of that Act, breach of a settlement agreement, and interference with contractual relations. In addition, the plaintiff asserted a claim under § 1983, alleging a denial of equal protection and due process. The defendants removed and plaintiff sought remand, arguing that state law predominated.

Although Judge Sparks "agree[d] with the underlying reasoning" in the decisions remanding entire cases under § 1441(c)—citing "the difficulty and waste of splitting up federal and state law claims factually tied together"—he refused to remand under § 1441(c) because, he concluded, § 1441(c) did not apply. The reason that § 1441(c) was inapplicable was that "[a]ll of Plaintiff’s claims are based on a ‘common nucleus of operative fact.’" Thus, under Gibbs, they were within the court’s pendent jurisdiction and, under Cohill, they were not "separate and independent." Judge Sparks nevertheless remanded the entire case, relying on § 1441(c) by analogy, just as the Supreme Court had done in Cohill:

The Court [in Cohill] also found support for a district court’s discretion to remand in Section 1441(c), although it held that section did not apply to cases involving pendent jurisdiction. Because Section 1441(c) [at that time] authorized remand of independently nonremovable claims, the Court stated that it “clearly manifest[s] a belief that when a court has discretionary jurisdiction over a removed state-law claim and the court chooses not to exercise its jurisdiction, remand is an appropriate alternative.” Now that Section 1441(c) authorizes remand of an entire case, and not just the pendent state claims, it lends even stronger support to the authority of a court to remand an entire case when a court could otherwise decline to exercise supplemental jurisdiction under Cohill or Section 1367(c) statutory grants of jurisdiction in the interests of judicial economy, fairness, convenience, and comity." Berman, supra note 32, at 725; see also David L. Shapiro, Jurisdiction and Discretion, 60 N.Y.U. L. Rev. 543, 544 (1985) (arguing that in determinations of the reach of federal jurisdiction, broad discretion should be given to federal courts).

444. Id. at 686.
445. Id. at 689 n.9.
446. Id.
447. Id. at 687-88; see also Clark v. Milam, 813 F. Supp. 431, 434 n.3 (S.D. W. Va. 1993) (holding that remand under § 1441(c) is inappropriate where no separate and independent claim exists).
448. Administaff, 799 F. Supp. at 688 (citation omitted).
449. Id. at 687-88.
where, as in this case, state law claims predominate and novel issues of state law are involved.450

Judge Sparks also relied on abstention under Railroad Commission v. Pullman Co.451 to justify the remand, reasoning that resolution of the difficult state law claims could make a federal constitutional decision unnecessary.452 While Judge Sparks was the first to rely explicitly on Pullman abstention in addition to § 1441(c) for his remand order, it is striking how many of the decisions remanding entire cases under § 1441(c) raise concerns similar to those of Pullman. For example, the plaintiff in Neal v. Fairman453 alleged federal constitutional violations as well as violations of various administrative regulations of the Illinois Department of Corrections.454 In ordering remand of the entire case, Judge Alesia echoed Pullman without citing it, observing that the state regulations may provide greater protection than required by federal due process, thus enabling "the state court . . . to decide the case without reaching the merits of the federal claim."455 Similarly, in Libertyville Community High School District 128 v. North Chicago Unit School District 187,456 several school districts brought suit in state court against another school district seeking to block the defendant school district from dissolving. Apparently seeking to avoid having to absorb the students from the dissolving district, they claimed that the statutory scheme for dissolution violated their rights under the Due Process Clause of the United States Constitution and the due process and equal protection clauses of the Illinois Constitution.457 Judge Marovich remanded the entire case, reasoning not only that § 1441(c) "gives discretion to the court to remand the whole case, both state and federal claims, when matters of state law

450. Id. at 689 (footnotes and citations omitted); cf. Williams v. Huron Valley Sch. Dist., 858 F. Supp. 97, 100-01 (E.D. Mich 1994) (criticizing Holland for using § 1441(c) in a case not removed under § 1441(c), reasoning that "federal courts already possess the power to remand a case involving supplemental claims under 28 U.S.C. § 1367(c)(1) and (2) as well as [Cohill]"). As Judge Sparks noted, one court had remanded a case against various state agencies and officials that included a § 1983 claim but was based largely on state tort law, even before the 1990 amendment to § 1441(c). Administaff, 799 F. Supp. at 689 (citing Harrison v. Texas Dep't of Corrections, 694 F. Supp. 226, 228-29 (E.D. Tex. 1988)). Although Harrison was wrongly decided because at the time § 1441(c) did not allow remand of properly removed federal question cases, I am quite sympathetic to the result—the last people who should be able to remove cases from state courts are state agencies and officials. See supra note 330.

451. 312 U.S. 496 (1941). In Pullman, the Supreme Court held that federal courts may stay a federal action presenting a federal constitutional question that might be avoided by resolution of a difficult question of state law. Id. at 501-02.

452. Administaff, 799 F. Supp. at 690 (citing Railroad Comm'n v. Pullman Co., 312 U.S. 496, 489-500 (1941)).


454. Id. at *1.

455. Id. at *2.


457. Id. at *1.
predominate," but also that the state law claims were "novel," "unique," "far-reaching," and closely connected to state "public policy concerns," while the federal claim was "clearly a secondary issue." Finally, while Judge Lechner did not discuss the issue in *Moore v. DeBiase*, the § 1983 claim in that case for alleged deprivation of federal constitutional rights might have been effectively mooted if the plaintiff recovered on any of his numerous state common law claims.

At first blush, this comparison to *Pullman* abstention seems to cast a shadow on remand of the entire case because, when a district court abstains in a direct-filed case under *Pullman*, it retains jurisdiction of the federal claim in order to adjudicate it, if necessary, at the conclusion of the state court proceedings. Under *England v. Louisiana State Board of Medical Examiners*, the plaintiff in such cases has a choice between retaining the federal claim for the federal court or submitting the federal claim to the state court. Moreover, the Court in *England* stated that "the defendant also, by virtue of the removal jurisdiction . . . has a right to litigate the federal question [in federal court and] . . . may protect his right . . . with the appropriate reservation." Despite this dictum, there is no reason to permit a defendant to invoke the *England* reservation. The holding in *England* is troubling enough because it is difficult to square with the statutory requirement that federal courts give full faith and credit to state court judgments. Assuming the legitimacy of *Pullman* abstention in the first place, the ultimate justification of *England* is that a party seeking to vindicate a federal claim may need the fact-finding capability of a federal district court because Supreme Court review of a state court judgment is insufficient to protect against fact-finding by a state court hostile to the federal claim. With regard to the choice of a federal

---

458. *Id.* at *2.
459. *Id.* at *3.
462. *Id.* at 422 n.13. Wright and Miller take the position that all defendants, not merely removing defendants, may invoke the *England* reservation. 17A Wright & Miller, supra note 32, § 4243, at 76 n.34.
forum, plaintiffs and defendants are not similarly situated. When a defendant invokes federal jurisdiction by removal of the plaintiff's federal claim, the reason is certainly not concern that the state court will be hostile to the federal claim.

Thus, in a removed case, if a court abstains under Pullman, the England reservation should not be permitted and the entire case should be remanded. My point is not that Judge Sparks was correct to abstain under Pullman in Administaff, and certainly not that the other judges who remanded entire cases should have abstained under Pullman. To the contrary, I merely assume (not endorse) the legitimacy of Pullman abstention. My point is simply that the similarity in the § 1441(c) cases to Pullman—which can result in retention of the federal claim pursuant to an England reservation—does not undermine those decisions because an England reservation should not be available to defendants. Indeed, remand under § 1441(c) is more legitimate than Pullman itself because it is rooted in an Act of Congress and is not merely a judicially-created common law doctrine.

Those who have argued against interpreting § 1441(c) to permit remand of the entire case argue that such an interpretation undermines the central purpose of the removal provision of § 1441(c)—preventing plaintiffs from defeating removal by joinder of unrelated state claims. This concern can be addressed, however, if courts exercising their discretion keep in mind both this central purpose of the removal provision of § 1441(c) and the reason for reading the remand clause to permit remand of cases in their entirety.


466. Surely England reservation should not be permitted in order to preserve a federal forum for a federal defense in light of the unavailability of federal defense removal in the first place. But see Instructional Systems, 35 F.3d at 820 (authorizing England reservation for a federal defense).

467. See generally Martin H. Redish, Abstention, Separation of Powers, and the Limits of the Judicial Function, 94 Yale L.J. 71 (1984) (criticizing abstention as illegitimate judicial lawmaking). Moreover, while there is a considerable tension between Pullman abstention and the general rule that exhaustion of state remedies is not required in § 1983 actions, see Patsy v. Board of Regents of Florida, 457 U.S. 496, 516 (1982); Monroe v. Pape, 365 U.S. 167, 190-92 (1961), there is no need to be concerned about imposing an exhaustion requirement on plaintiffs who choose to invoke state remedies and file their actions in state court. Again, it is simply wrong to assume, without analysis, that direct-filed and removed cases should be treated identically.

468. Mengler et al., supra note 32, at 20-21; Teply & Whitten, supra note 7, at 156 (arguing that because removal of both federal and state claims undermines the purpose of 1441(c), the "better interpretation" is "that only nonremovable claim(s) can be remanded"); cf. Berman, supra note 32, at 738 ("[T]he only effect of the change in wording is to enable district courts to remand claims technically within their 'arising under' jurisdiction.").
Where a plaintiff joins an unrelated state claim to a federal claim that would be removable if sued on alone, § 1441(c) permits removal despite the joinder of the unrelated claim. Upon removal, the unrelated state claim should be remanded. Because the remanded claim is not related to the federal claim, there is little (if any) cost to judicial economy by splitting the case, a difficult constitutional question is avoided, and the defendant's removal rights are preserved against manipulation. Even if the state claim predominates, a court should not remand the whole case. To do so would not significantly further judicial economy and would permit the very manipulation that Congress sought to prevent.

Where a plaintiff joins both a related state claim and an unrelated state claim to a federal claim that would be removable if sued on alone, § 1441(c) again permits removal despite the joinder of the unrelated claim. As in the previous example, the unrelated state claim should be remanded. In deciding whether to remand the federal claim and the related state claim, the court should consider whether the related state claim predominates over the federal claim. In thinking about this question, the district judge should imagine the plaintiff filing the federal claim and the related state claim in federal court. If the response would be to dismiss the state claim because state law predominates, the entire case should be remanded. If the response to such a direct filing would be to retain the state claim, it should likewise be retained on removal.

Finally, where a plaintiff joins a related state claim to a federal claim that would be removable if sued on alone, the action is removable under § 1441(a), not § 1441(c). Nevertheless, by analogy to the remand provision of § 1441(c), the district court should remand the entire case if state law predominates such that it would dismiss the state claim if the case were directly filed in federal court.

CONCLUSION

The basic removal statutes have been construed from the beginning to permit removal from state court to federal court only of whole cases and only when the whole case could have been brought in federal court. For just as long, the opportunity that this basic doctrine gives to plaintiffs to use state joinder rules to prevent removal has also been obvious.

For the most part, Congress has chosen simply to tolerate this possibility, finding it less troubling than permitting piecemeal removal. Indeed, on the one occasion that Congress authorized piecemeal removal, it quickly abandoned the experiment, and when courts invented a doctrine to permit piecemeal removal, Congress repudiated it. However, if a plaintiff goes so far as to join an unrelated claim to a removable federal claim, § 1441(c) permits removal of the entire case.
This useful function is constitutional, although the court must remand any claims that are outside the scope of Article III.

Finally, as amended in 1990, § 1441(c) now permits the district court to remand an entire case removed under § 1441(c)—and, by analogy, of an entire case removed under § 1441(a)—if state law predominates. In keeping with the purpose of § 1441(c), this power to remand the entire case should only be exercised if, had the federal claim and the related state claims been filed directly in federal court, the court would have declined to exercise supplemental jurisdiction over the state claims.