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## Determining Diversity Jurisdiction of National Banks After *Wachovia Bank v. Schmidt*

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**DETERMINING DIVERSITY JURISDICTION  
OF NATIONAL BANKS AFTER  
WACHOVIA BANK V. SCHMIDT**

*Michael Podolsky\**

*Prior to the U.S. Supreme Court’s decision in Wachovia Bank v. Schmidt, some courts held, for diversity jurisdiction purposes, that national banks were citizens of each and every state in which they had a branch. In Schmidt, the Supreme Court made it clear that this approach was incorrect, but failed to provide an alternative one. Not surprisingly, in the wake of that decision another court split developed. While some courts have found that national banks are citizens only of the state listed on their charters as their main office, others have found that national banks are also citizens of the state that is their principal place of business.*

*This Note contends that congressional intent and equitable considerations mandate that national banks be considered citizens of both the state listed on their charter as their main office and the state that is their principal place of business. Also, this Note suggests that Congress should amend the relevant statute to clarify that the two-state approach is the correct one, and thereby prevent courts from wasting valuable time and resources on this issue.*

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#### INTRODUCTION

There are many things people consider when choosing a bank with which to do business. Some people choose based upon convenience, others based upon stability, and still others based upon customer service. What most people do not consider, however, is where they can sue or be sued by the bank if a dispute arises. Yet this factor, in certain circumstances, may have a significant impact on their substantive rights as a litigant.

For example, according to the Eighth Circuit and many district courts, a resident of California who chooses to bank at the local branch of a state-chartered bank whose principal place of business is California will be able to keep her suit in California state court.<sup>1</sup> Yet, if the same California resident instead chooses to bank at a branch of a nationally chartered bank—for example, Wells Fargo—she may be forced to litigate her case in the federal court system. This is true despite the fact that Wells Fargo’s principal place of business is California.<sup>2</sup>

The reason for the different outcomes stems from the fact that courts use two different tests to determine the citizenship of each bank for diversity jurisdiction purposes. In a footnote to *Wachovia Bank v. Schmidt*,<sup>3</sup> the U.S. Supreme Court declined to decide whether national banks, for diversity jurisdiction purposes, are considered citizens of both their principal place of business and the state listed in their charter as their main office.<sup>4</sup> The Court stated that the question “may be of scant practical significance for, in almost every case . . . the location of a national bank’s main office and of its principal place of business coincide.”<sup>5</sup> However, the cases since *Schmidt* suggest otherwise, as the principal places of business of the country’s largest nationally chartered banks are in different states than their main offices.<sup>6</sup>

Part I of this Note explores the history of national banks and their access to the federal court system. Part II discusses the circuit split the Supreme Court resolved in *Schmidt*, which ultimately led to a new circuit split. Part III presents the current split over whether a national bank should be considered a citizen of the state that is its principal place of business in addition to the state its charter designates as its main office. Part IV

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1. *See infra* Part III.A.

2. The same is true of New York residents with respect to Chase Manhattan Bank. Under the Eighth Circuit’s rationale, Chase Bank would be able to remove a case brought by a New York resident to federal court even though Chase’s principal place of business is New York.

3. 546 U.S. 303 (2006).

4. *Id.* at 317 n.9.

5. *Id.*

6. *See infra* Part III.

contends that a dual-test approach most closely comports with the Supreme Court's rationale in *Schmidt*, best captures Congress's intent to achieve jurisdictional parity, and is the most equitable result. Part IV also suggests that Congress should amend 28 U.S.C. § 1348 with language similar to that found in the diversity statute for corporations, 28 U.S.C. § 1332, in order to unequivocally clarify any uncertainties.

#### I. THE HISTORY OF NATIONAL BANKS AND THEIR ACCESS TO FEDERAL COURT

Part I outlines the history of national banks and describes the current landscape of national banks' access to federal court. National banks have seen their access to federal court expanded and reduced throughout history.<sup>7</sup> While they once were given unlimited access to federal court by virtue of their existence as federally chartered institutions, they now must rely on diversity jurisdiction if they wish to get into federal court.<sup>8</sup>

##### A. Diversity 101: The Power of a Federal Court To Hear a Case

Federal courts are courts of limited jurisdiction, and as such are empowered to hear only those cases which the Constitution allows Congress to authorize and which Congress does in fact authorize.<sup>9</sup> Both of these conditions must be satisfied for a case to be heard in federal court.<sup>10</sup> Subject matter jurisdiction refers to a court's power to hear a given case and cannot be waived, cannot be consented to, and can be argued even on appeal.<sup>11</sup> The parties cannot be in federal court, even by consent, unless allowed by the Constitution or Congress.<sup>12</sup> Furthermore, even if parties themselves do not raise subject matter jurisdiction concerns, a court itself, either at the trial or appellate level, is obligated to raise the issue on its own if need be.<sup>13</sup>

The two primary sources of federal subject matter jurisdiction are federal question jurisdiction and diversity jurisdiction.<sup>14</sup> Federal question jurisdiction exists when the cause of action arises under federal law as

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7. See *infra* Part I.C.

8. See *infra* Part I.C.

9. *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1187–88 (2010); 13 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS* § 3522 (2d ed. 1984).

10. 13 WRIGHT ET AL., *supra* note 9, § 3522.

11. See *id.*

12. *Id.*

13. See *Johnson v. California*, 541 U.S. 428, 431 (2004) (“Compliance with the provisions of § 1257 is an essential prerequisite to our deciding the merits of a case brought here under that section. It is our obligation to raise any question of such compliance on our own motion, even though counsel has not called our attention to it.”); 13 WRIGHT ET AL., *supra* note 9, § 3522.

14. See 28 U.S.C. §§ 1331–1332 (2006).

determined by the well-pleaded complaint rule.<sup>15</sup> Diversity jurisdiction establishes a neutral forum to protect out-of-state litigants from the prejudices of state courts.<sup>16</sup> The intention behind diversity jurisdiction is to reduce the friction between citizens of different states by giving them a neutral forum to resolve their disputes.<sup>17</sup>

Congress granted diversity jurisdiction to federal courts in 28 U.S.C. § 1332. The statute provides that for a federal court to have jurisdiction, the amount in controversy must exceed \$75,000 and the dispute must be between citizens of different states.<sup>18</sup> When a litigant is a corporation the statute makes the corporation a citizen of two places: the state in which it is incorporated and the state where it has its principal place of business.<sup>19</sup> Though state banks are incorporated in their state, just like any other corporation, national banks are not; rather, they are federally chartered institutions.<sup>20</sup> Therefore, citizenship of national banks for diversity jurisdiction purposes is not determined by § 1332(c), but rather is determined by a different statute, codified as § 1348.<sup>21</sup>

#### B. What Is a National Bank Anyway?

The first modern version of a national bank was created in 1863 during the Civil War.<sup>22</sup> Congress adopted Treasury Secretary Samuel P. Chase's proposal to create "a national banking system under which commercial banks chartered by the federal government would be authorized to issue federal bank notes secured by government bonds."<sup>23</sup> Although national banks are no longer responsible for issuing U.S. currency, the "federal-state dual banking system . . . [is] a central feature of commercial banking in the

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15. See 28 U.S.C. § 1331. For a discussion on the well-pleaded complaint rule, see Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 TEX. L. REV. 1781 (1998).

16. See *Burgess v. Seligman*, 107 U.S. 20, 34 (1883) ("[T]he very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views.").

17. *Id.* There is much academic commentary devoted to the question of whether diversity jurisdiction remains justifiable in modern society; however, this discussion is beyond the scope of this Note. For a discussion on the continued necessity of federal diversity jurisdiction, see David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317 (1977).

18. See 28 U.S.C. § 1332(a); *DeLeon v. Wells Fargo Bank*, 729 F. Supp. 2d 1119, 1122 (N.D. Cal. 2010).

19. See 28 U.S.C. § 1332(c)(1); *DeLeon*, 729 F. Supp. 2d at 1122.

20. See 13B WRIGHT ET AL., *supra* note 9, § 3627.

21. See *infra* Part I.C.

22. See Paul E. Lund, *National Banks and Diversity Jurisdiction*, 46 U. LOUISVILLE L. REV. 73, 76 (2007) (citing Act of Feb. 25, 1863, ch. 58, 12 Stat. 665, amended by Act of June 3, 1864, ch. 106, 13 Stat. 99); Henry N. Butler & Jonathan R. Macey, *The Myth of Competition in the Dual Banking System*, 73 CORNELL L. REV. 677, 681 (1988). Though the government first tried to finance the war without a national banking system, politicians soon realized that they needed one. See Lund, *supra*, at 77.

23. Lund, *supra* note 22, at 77.

United States to this day.”<sup>24</sup> When a national bank is created, its organization certificate must designate “[t]he place where its operations of discount and deposit are to be carried on.”<sup>25</sup>

Initially, national banks were not allowed to operate branch offices.<sup>26</sup> Later, when the authority to operate branches was given, it was generally limited only to branches in the bank’s home state.<sup>27</sup> By the second half of the twentieth century, state-chartered branch banking had expanded all over the country, raising concerns over the continued competitiveness of nationally chartered banks.<sup>28</sup> To correct the inequality between state and federally chartered banks, Congress authorized national banks to open or acquire branch offices outside their home states.<sup>29</sup>

### C. *Easy Come, Easy Go: National Banks’ Access to Federal Court*

In 1824, the Supreme Court concluded that because the Bank of the United States, a precursor to the modern national banking system, had been created by an act of Congress, any suit to which a national bank was a party necessarily involved a federal question, and thus automatically qualified for federal jurisdiction, irrespective of diversity.<sup>30</sup> Implementation of this decision, however, added many cases to the federal workload, and Congress subsequently withdrew automatic jurisdiction in 1882.<sup>31</sup> In its place, Congress provided that “the jurisdiction for suits hereafter brought by or against any association established under [federal] law . . . shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States.”<sup>32</sup> In essence, national banks were now subject to the same diversity jurisdiction requirements as state banks.

In 1887, Congress revised the statute to say that “for the purposes of all actions by or against [national banks], [they should] be deemed citizens of the States in which they are respectively located.”<sup>33</sup> This language remained unchanged when Congress adopted the Judicial Code of 1911.<sup>34</sup>

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24. *Id.* at 77. Authority to charter national banks is within the power of the Comptroller of Currency. *See id.* at 78.

25. 12 U.S.C. § 22 (2006).

26. Butler & Macey, *supra* note 22, at 702 (“Under the National Bank Act of 1864, national banks could operate out of only one central office in the state in which the bank was located.”); Lund, *supra* note 22, at 79.

27. *See* Lund, *supra* note 22, at 79.

28. *See id.* at 79–80.

29. Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, § 101, 108 Stat. 2338, 2339–43.

30. *See* *Osborn v. Bank of the U.S.*, 22 U.S. 738, 759–60 (1824); 13B WRIGHT ET AL., *supra* note 9, § 3571.

31. *See* 13B WRIGHT ET AL., *supra* note 9, § 3571.

32. Act of July 12, 1882, ch. 290, § 4, 22 Stat. 162, 163.

33. Act of Mar. 3, 1887, ch. 373, § 4, 24 Stat. 552, 554–55 (“[C]ircuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State.”).

34. *See* Act of Mar. 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1091–94. Congress gave federal courts jurisdiction in cases brought by the United States (or by direction of any

Moreover, this same language still remains in the current statute, 28 U.S.C. § 1348, which now reads:

The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, [or] any civil action to wind up the affairs of any such association . . . . All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located.<sup>35</sup>

Thus, for actions brought by the United States or any of its officers, or to close a national bank, district courts were given original jurisdiction. However, for all other actions, national banks would be subject to normal diversity jurisdiction requirements with their citizenship determined by the “[s]tates in which they are respectively located.”<sup>36</sup>

This inability of national banks to automatically access federal court was confirmed and expanded by the Supreme Court in *Leather Manufacturers’ Bank v. Cooper*.<sup>37</sup> The Court found that the 1882 Act repealed automatic jurisdiction and implied that national banks could also not automatically remove cases to federal court simply because they are federally chartered institutions.<sup>38</sup> As the Court emphasized, “[a] national bank was by that statute placed before the law in this respect the same as a bank not organized under the laws of the United States.”<sup>39</sup>

Soon after *Cooper*, the Supreme Court interpreted the 1887 statute in *Petri v. Commercial National Bank of Chicago*.<sup>40</sup> The Court was forced to decide whether national banks could ever sue or be sued in federal court on diversity jurisdiction grounds.<sup>41</sup> The Court explained that there is no reason that “Congress intended that national banks should not resort to Federal tribunals as other corporations and individual citizens might.”<sup>42</sup> Therefore, the Court held that national banks, for purposes of diversity jurisdiction, are on the same footing as citizens or corporations.<sup>43</sup>

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officer thereof) and cases that involved the winding up of any bank. However, Congress reiterated that, for purposes of any other actions, national banks should still be deemed citizens of the States in which they are located. See Lund, *supra* note 22, at 82 n.48.

35. 28 U.S.C. § 1348 (2006).

36. *Id.*

37. 120 U.S. 778 (1887).

38. *Id.* at 781; see also Paul E. Lund, *Federally Chartered Corporations and Federal Jurisdiction*, 36 FLA. ST. U. L. REV. 317, 332–33 (2009) (“[The 1882 Act] was intended to place national banks ‘on the same footing’ as state-chartered banks.” (quoting *Cooper*, 120 U.S. at 780)).

39. *Cooper*, 120 U.S. at 781.

40. 142 U.S. 644 (1892).

41. *Id.* at 649–50.

42. *Id.* at 651.

43. *Id.*; see Bradley J. Johnson & George Brandon, *National Banks and Diversity Jurisdiction Revisited: More Authority For Remaining in Federal Court*, 122 BANKING L.J. 879, 894 (2005) (“In *Petri* the Court specifically held that the lower courts should exercise diversity jurisdiction over national banks in the same way they exercise diversity jurisdiction over other corporations.”).

*D. Why the Option to Access Federal Court Matters*

Prior the Supreme Court's decision in *Erie Railroad Co. v. Tompkins*,<sup>44</sup> the option to have a case heard in federal court allowed a party to choose whether it wanted to be subject to state common law or federal common law; however, *Erie* put an end to "law shopping."<sup>45</sup> Though some lawyers still believe in the benefits of "law shopping," the more common belief is that it is rarely, if ever, the reason why a party would choose to litigate in federal court.<sup>46</sup> Additionally, while varying procedural differences once drove court selection, such differences have dramatically narrowed in recent years.<sup>47</sup>

With substantive and procedural considerations no longer largely significant, the main reasons for choosing one court system over another come down to the comfort of the lawyer in a particular system, the relative speed of the docket, convenience of the court's location (to the party or the lawyer), jury pool selection, and the perception of judges in each system.<sup>48</sup>

Interestingly, plaintiffs' counsel once preferred federal court over state court as they perceived federal judges to be of higher quality and less tied to large businesses and establishments than state judges.<sup>49</sup> However, this preference has been reversed now as the perception of judges has changed.<sup>50</sup> Federal judges are no longer seen as friends of plaintiffs, and state judges are often seen by defense counsel as unsympathetic, if not outright antagonistic, to some defendants.<sup>51</sup>

Regardless of whether state or federal court is preferable to any particular party in any given case, it is clear that having the option is always an advantage.<sup>52</sup> According to an empirical study, removal has a serious

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44. 304 U.S. 64 (1938).

45. Alan B. Morrison, *Removing Class Actions to Federal Court: A Better Way To Handle the Problem of Overlapping Class Actions*, 57 STAN. L. REV. 1521, 1528 (2005).

46. *See id.* at 1528. Statistical analysis suggests that "law shopping" has very little effect on the outcome of the case. *See* Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 600 (1998) ("[F]orum-shopping for more favorable law is not a major factor in producing the removal effect.").

47. *See* Morrison, *supra* note 45, at 1528.

48. *See id.* at 1528–29.

49. *See id.*

50. *See id.* at 1529; Richard L. Marcus, *Assessing CAFA's Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765, 1775 (2008) ("Plaintiff attorneys' preference for state courts is undisputed and understandable. Reasons for avoiding federal court range from the mundane (greater familiarity with state procedure) to the strategic (greater likelihood of securing justice for clients).").

51. *See* Morrison, *supra* note 45, at 1529–30.

52. *See* Lyle Washowich, *National Banks Beware: Your Branches May Carry Greater Risk Than You Realize*, 122 BANKING L.J. 699, 700 (2005) ("In litigation of state law claims, the strategic option of removing an action to federal court serves as a weapon to diluting those claims.").

negative effect on plaintiffs' win rate.<sup>53</sup> The study states that "data on removal jurisdiction leads to the conclusion that forum really does affect outcome, with removal taking the defendant to a forum much more favorable in terms of biases and inconveniences."<sup>54</sup> Since forum has been shown to significantly affect the outcome of the case, forum-access provisions are of the utmost importance.<sup>55</sup>

## II. WACHOVIA BANK V. SCHMIDT: RESOLVING ONE CIRCUIT SPLIT WHILE CREATING ANOTHER

Until the Supreme Court decided *Schmidt* in 2006, courts of appeals were split on how to interpret the term "located" in § 1348 for diversity jurisdiction purposes.<sup>56</sup> The clarity the Court offered in *Schmidt* on this issue proved to be short lived, however, as the case opened the door for further confusion regarding federal jurisdiction over national banks.

### A. The Supreme Court's Earlier Decision on Venue

In 1977, the Supreme Court decided *Citizens & Southern National Bank v. Bougas*,<sup>57</sup> in which the Court was forced to interpret the word "located" in a previous version of 12 U.S.C. § 94 relating to venue.<sup>58</sup> The statute read in part, "[A]ctions and proceedings against any association under this chapter may be had . . . [in the court] in which such association may be established, or [in the court] in which said association is located having jurisdiction in similar cases."<sup>59</sup> The Court concluded that, for venue purposes, the words "established" and "located" were different: "established" referred to the place listed on the bank's charter as its main office, and "located" referred to all districts in which the bank operates a branch.<sup>60</sup>

The Supreme Court, however, did not rule on whether the term "located" in the diversity jurisdiction statute should be interpreted the same way as the venue statute. After *Bougas*, various district courts weighed in on the issue. Some courts held that a national bank was "located" in every state in which it operated a branch and was, thus, a citizen of every such state, while

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53. Clermont & Eisenberg, *supra* note 46, at 606–07 (noting that a plaintiff's odds are even without removal and 39 percent with removal). It should be noted, however, that some of this drop can be attributed to case selection. *Id.*

54. *Id.* at 607.

55. *Id.* at 607 n.81.

56. *Wachovia Bank v. Schmidt*, 546 U.S. 303, 309 (2006) ("We granted certiorari to resolve the disagreement among Courts of Appeals on the meaning of § 1348.").

57. 434 U.S. 35 (1977).

58. *Id.* at 37.

59. 12 U.S.C. § 94 (1976). This statute was later amended to overrule *Bougas*. It now reads: "Any action or proceeding against a national banking association [dealing with the FDIC] . . . shall be brought in the district or territorial court of the United States held within the district in which that association's principal place of business is located . . ." *Id.*

60. *Bougas*, 434 U.S. at 44; Lund, *supra* note 22, at 84.

other courts interpreted “located” to refer *only* to a bank’s principal place of business.<sup>61</sup> Eventually, federal circuit courts began to decide the issue.

*B. The Fifth and Seventh Circuits: “Located” Limited to Only Two Places—The State of the Bank’s Main Office and the State of Its Principal Place of Business*

The first circuit court to address the issue was the Seventh Circuit in *Firststar Bank v. Faul*,<sup>62</sup> where it determined that the term “located” did not refer to all places where the bank had a branch but rather, referred to *only* two locations: the state listed on the bank’s charter and the state where the bank has its principal place of business.<sup>63</sup> Firststar, a national bank, sued an individual, Faul, and his corporation in the Eastern District of Illinois.<sup>64</sup> Firststar invoked diversity jurisdiction since Faul and his corporation were both citizens of Illinois, whereas Firststar was a citizen of Ohio, its principal place of business.<sup>65</sup> Faul argued that diversity jurisdiction was lacking because Firststar operated over forty-five branches in Illinois and, therefore, should be considered a citizen of Illinois as well.<sup>66</sup>

The court needed to interpret § 1348 to determine where Firststar was “located” to see if diversity existed. First, the court tried to determine whether the statutory language of § 1348 provided a clear answer to the meaning of “located.”<sup>67</sup> Because the term is not defined in the statute, the Seventh Circuit reasoned that Congress must have intended it to have its ordinary meaning.<sup>68</sup> But the ordinary meaning, as determined from various dictionary definitions, provided no guidance.<sup>69</sup> Furthermore, the court relied on the Supreme Court’s statement in *Bougas* that “located” has “no enduring rigidity.”<sup>70</sup> Thus, the Seventh Circuit concluded, “the word has no plain meaning as between a single place or multiple areas.”<sup>71</sup>

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61. *Compare* Fin. Software Sys., Inc. v. First Union Nat’l Bank, 84 F. Supp. 2d 594 (E.D. Pa. 1999) (holding that a national bank with its principal place of business in North Carolina and branches in Pennsylvania was not a citizen of Pennsylvania for diversity purposes), *with* Nw. Bank Minn. v. Patton, 924 F. Supp. 114 (D. Colo. 1996) (holding that a national bank is a citizen, for diversity purposes, of every state in which it maintains substantial presence, including branches), *and* Conn. Nat’l Bank v. Iacono, 785 F. Supp. 30 (D.R.I. 1992) (holding that a national bank with branch offices in Rhode Island is a citizen of Rhode Island for diversity purposes).

62. 253 F.3d 982 (7th Cir. 2001).

63. *Id.* at 994.

64. *Id.* at 985.

65. *Id.*

66. *Id.*

67. *Id.* at 987. Courts will often begin their statutory analysis by seeing if the statutory language itself can provide a clear answer to the meaning of the words in question. *See* Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999).

68. *Faul*, 253 F.3d at 987 (citing *FDIC v. Meyer*, 510 U.S. 471, 476 (1994)).

69. *Id.* (“[S]uch definitions do not provide much aid in our inquiry.”).

70. *Id.* (quoting *Citizens & S. Nat’l Bank v. Bougas*, 434 U.S. 35 (1977)) (internal quotation marks omitted).

71. *Id.*

The court next considered whether “located” had acquired a specified meaning in the context of diversity jurisdiction.<sup>72</sup> The court found that indeed it had, and that it was a more restrictive meaning than the word would ordinarily connote.<sup>73</sup> To support this conclusion, the court looked at the treatment of corporations under the diversity statute and determined that the “use of the word ‘located’ in discussing a corporation likely refers to the state where the principal place of business is located or perhaps where the company is incorporated.”<sup>74</sup> The court justified this position by saying that if, in the course of discussing jurisdictional motions, a federal judge were to ask a lawyer representing a corporation, “[W]here is your client located?” the judge would likely expect to hear the lawyer respond by naming the state containing the principal place of business and probably the state of incorporation as well. The judge would not expect the lawyer to “rattle off” every state in which the corporation has a physical presence.<sup>75</sup> While the court conceded that, in the context of partnerships, “located” would refer to a large number of places, it found that national banks are more similar to corporations for this purpose.<sup>76</sup>

To bolster its argument, the court then looked to established Supreme Court precedent for the proposition that statutory words can achieve settled meaning over time through judicial interpretation.<sup>77</sup> Section 1348 was derived from previous statutes that had already been interpreted, and if Congress failed to alter the words, courts must presume that the new statute has the same meaning as the older version.<sup>78</sup> The 1882 Act and the 1887 Act contained the words “in which they are respectively located,” which remain in the statute to this day.<sup>79</sup> *Cooper* and *Petri* interpreted these two statutes respectively and concluded that the purpose of the words was to put national banks in the same position as state banks.<sup>80</sup>

The *Faul* court did not find the *Bougas* court’s conclusion that “located” refers to all locations where a bank has a branch applicable, because *Bougas* carefully limited its holding to the venue statute’s application to determine state court venue, pointing out that the question of federal court venue was not before it.<sup>81</sup> Moreover, the *Bougas* court emphasized that its holding on

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72. *Id.* (“Another interpretive method that focuses on the statutory language is to consider the subject matter to which a word or phrase refers.” (citing *U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 455 (1993))).

73. *Id.*

74. *Id.*

75. *Id.* For an argument that the Seventh Circuit’s reasoning in this context is circular, see Lund, *supra* note 22, at 88.

76. *Id.* at 987.

77. *Id.* at 988 (“If a phrase or section of a law is clarified through judicial construction, and the law is amended but retains that same phrase or section, then Congress presumably intended for the language in the new law to have the same meaning as the old.” (citing *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998))).

78. *Id.* (citing *Cottage Sav. Ass’n v. Comm’r*, 499 U.S. 554, 562 (1991); *NBD Bank v. Bennett*, 67 F.3d 629, 632 (7th Cir. 1995)).

79. *Id.*

80. *Id.* at 988.

81. *Id.* at 989.

venue would not impose significant costs or inconvenience on the bank.<sup>82</sup> While this justification is relevant in the venue context—since the primary purpose of venue statutes is to limit inconvenience to the parties—it does not apply in determining subject matter jurisdiction.<sup>83</sup> Subject matter jurisdiction instead is about the power of federal courts to hear certain types of cases.<sup>84</sup> As the *Faul* court explained, “[R]eductions in the cost of litigating do not justify separating national banks from all other corporations so as to deny them federal diversity jurisdiction.”<sup>85</sup>

The Seventh Circuit then assessed the defendant’s argument that the words “established” and “located” must have two separate meanings based on the canon of statutory interpretation to that effect.<sup>86</sup> Without interpreting the meaning of “established” (since the issue was not before the court), the court suggested that the canon could be satisfied without “location” referring to all places in which a bank has a branch.<sup>87</sup> While “established” could refer only to the location listed on the bank’s charter, “located” could refer to both the location on the charter and the principal place of business.<sup>88</sup>

The Seventh Circuit further dismissed *Faul*’s other argument that by amending the venue statute to include “principal place of business,” but not amending the diversity statute, Congress evinced its intention for courts to apply *Bougas*’s definition of “located” in the diversity context.<sup>89</sup> The court reasoned that since the statutes at hand are from different acts and different sections of the code, *Faul*’s argument was unpersuasive.<sup>90</sup> Additionally, it was just as plausible to conclude that by changing 12 U.S.C. § 94 to limit the number of locations where venue would be appropriate, Congress showed that it disagreed with *Bougas*’s conclusion and did not intend “located” to refer to any branch locations in *any* context, including the diversity jurisdiction context.<sup>91</sup>

The final argument the court rejected was that national banks with local state branches would suffer from bias in those state courts because they do in fact have local ties.<sup>92</sup> Therefore, the argument went, they should not be

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82. *Id.*

83. *Id.* at 989–90 (“This rationale supports an expansive view of venue since the primary purpose of venue statutes is to limit inconvenience to the parties.”).

84. *See supra* notes 8–12 and accompanying text.

85. *Faul*, 253 F.3d at 990.

86. *Id.* at 991.

87. *Id.* at 992.

88. *Id.* (“Thus, the canon that different words in the same statute should be given different meanings can be complied with by considering ‘established’ as referring only to the place specified in the bank’s charter, while giving ‘located’ a meaning that includes a bank’s principal place of business.”).

89. *Id.*

90. *Id.*

91. *Id.* at 992–93 (“[O]ne could just as easily read [from Congress’s actions] that it disagreed with *Bougas* and did not desire for ‘located’ to refer to any place where a branch is found.”).

92. *Id.* at 993.

allowed to resort to federal court since the purpose of diversity jurisdiction is to provide a fair venue for out-of-state litigants to be heard without fear of local biases and prejudices.<sup>93</sup> However, the court rejected this argument by comparing national banks to corporations.<sup>94</sup> Despite the fact that a corporation can have many locations, Congress explicitly decided that corporations could still maintain diversity jurisdiction in states where they conduct business and have substantial ties (other than their state of incorporation and their principal place of business), regardless of whether or not there might not be any bias.<sup>95</sup> Thus, the Seventh Circuit in *Faul* held that, for purposes of 28 U.S.C. § 1348, a national bank is “‘located’ in, and thus a citizen of, the state of its principal place of business and the state listed in its organizational certificate” and not in every state where it operates a branch.<sup>96</sup>

The Fifth Circuit in *Horton v. Bank One*<sup>97</sup> reached the same conclusion as the Seventh Circuit, holding that a national bank is not located (for purposes of the statute) in each and every state in which it has a branch.<sup>98</sup> Horton, a Texas citizen, filed suit against Bank One, a nationally chartered bank, in Texas state court asserting common law claims and statutory consumer protection claims.<sup>99</sup> After Bank One removed the case to federal court, Horton attempted to remand, claiming that Bank One had branches in Texas and thus was “located” in Texas.<sup>100</sup> Because Horton was a Texas citizen, he argued that diversity was lacking and thus the federal court had no jurisdiction to hear his case.<sup>101</sup>

The Fifth Circuit decided that Bank One was not a citizen of Texas and allowed the suit to proceed.<sup>102</sup> In doing so, the court explicitly followed and adopted all of *Faul*’s rationales.<sup>103</sup> Particularly, it emphasized the need for establishing jurisdictional parity between state banks and national banks.<sup>104</sup> The court explained, “[W]e should read section 1348 as retaining its objective of jurisdictional parity for national banks vis-à-vis state banks and corporations.”<sup>105</sup> The Fifth Circuit in *Horton*, therefore, could not conclude that a national bank is located in every state in which it has a

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93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 994.

97. 387 F.3d 426 (5th Cir. 2004).

98. *Id.* at 436.

99. *Id.* at 428.

100. *Id.*

101. *Id.*

102. *Id.* at 436.

103. *Id.* at 429 (“We follow [*Faul*]’s holding that a national bank is not ‘located’ in, and thus not a citizen of, every state in which it has a branch.”).

104. *Id.* at 431 (“Since a state bank, under 28 U.S.C. § 1332(c)(1), may be a citizen of no more than two states—the state where its principal place of business is located and its state of incorporation—maintaining jurisdictional parity between a national and state bank requires that the national bank have no more than two possible states of citizenship.”).

105. *Id.*

branch, as that “would restrict a national bank’s access to federal court . . . without similarly restricting a state bank.”<sup>106</sup>

*C. The Second and Fourth Circuits: “Located” Refers to Any State in Which a National Bank Operates a Branch*

The Second Circuit, in *World Trade Center Properties, L.L.C. v. Hartford Fire Insurance Co.*,<sup>107</sup> in contrast to the Fifth and Seventh Circuits, found that a national bank should be “deemed to be a citizen of every state in which it has offices.”<sup>108</sup> It did not, however, expand on this conclusion, and it is now considered dicta.<sup>109</sup> The Fourth Circuit, in *Wachovia Bank v. Schmidt*,<sup>110</sup> took the same position as the Second Circuit, yet it went into great detail to explain its decision. In the case, Schmidt and others filed a complaint in South Carolina state court claiming that Wachovia fraudulently induced the plaintiffs to engage in a risky tax-motivated investment scheme.<sup>111</sup> In response, Wachovia filed a petition in federal court seeking to compel arbitration of the state claims.<sup>112</sup> The court was forced to decide whether Wachovia was “located” in South Carolina for diversity purposes merely by operating a branch there.<sup>113</sup> If so, then Wachovia was not able to sue in federal court, as Schmidt was a South Carolina citizen and diversity jurisdiction would thus be lacking.<sup>114</sup>

The Fourth Circuit first rooted its approach in the canon of statutory construction that the plain meaning of an unambiguous statute should govern, barring exceptional circumstance.<sup>115</sup> The court found that the term “located” as it appears in § 1348 is unambiguous and referred to each and every place in which the bank maintains a branch.<sup>116</sup> The court quoted *Webster’s Third New International Dictionary* as defining “locate” to mean, “to set or establish in a particular spot or position.”<sup>117</sup> It also quoted *Black’s Law Dictionary*, which defined location as “[t]he specific place or position of a person or thing.”<sup>118</sup> The court stated that, not only is “located” unambiguous today, it was also unambiguous in 1948 when § 1348 was

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106. *Id.* at 432.

107. 345 F.3d 154, 161 (2d Cir. 2003).

108. *Id.* at 161.

109. See Lund, *supra* note 22, at 93 (“[T]he court provided no supporting rationale for this assertion, and the statement appeared as dicta.”).

110. 388 F.3d 414 (4th Cir. 2004), *rev’d*, 546 U.S. 303 (2006).

111. *Id.* at 416.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 416.

116. *Id.* at 418 (“In light of these definitions, the dissent’s conclusion that the word ‘located’ is ambiguous is puzzling.”).

117. *Id.* at 416–17 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1327 (1993)) (internal quotation marks omitted).

118. *Id.* at 417 (quoting BLACK’S LAW DICTIONARY 958 (8th ed. 2004)) (internal quotation marks omitted).

enacted, and in 1887 when first put into the statute.<sup>119</sup> Moreover, the sixth edition of *Black's Law Dictionary*—the only source to consider the verb “located” separately from location—defined “located” as a legal term: “having physical presence or existence in a place.”<sup>120</sup> Thus, the court did not find “located” to be ambiguous; rather, it unambiguously means every place where a bank has a physical presence.

The Fourth Circuit also applied the statutory interpretation canon that different terms in the same statute should be given different meanings.<sup>121</sup> Section 1348 uses two different terms when referring to the presence of a banking association: “established” and “located.”<sup>122</sup> The first part of the statute, which states that “any action by a banking association established in the district for which the court is held,” refers to automatic federal jurisdiction for actions by the government, while the second part, which states that national banks shall be “deemed citizens of the States in which they are respectively located,”<sup>123</sup> refers to all other actions. The Fourth Circuit concluded that the word “established” refers to the bank’s establishment, which is the place listed on its certificate of incorporation, while “located” refers to any place in which a bank may have a branch.<sup>124</sup> In fact, the Supreme Court in *Bougas*, when faced with a similar scenario, gave “established” and “located” two distinct meanings.<sup>125</sup> Interestingly, subsequent to the decision in *Bougas*, Congress amended the venue statute, removing the word “located” and inserting “principal place of business.”<sup>126</sup> The Fourth Circuit reasoned that if Congress intended to exclude branches in the diversity statute, it would have amended § 1348 in the same way that it amended the venue statute.<sup>127</sup>

The Fourth Circuit then relied on the canon of statutory interpretation known as *in pari materia*.<sup>128</sup> According to this canon, statutes that relate to the same subject matter should be interpreted in light of and consistently with one another.<sup>129</sup> Since the jurisdiction statute (28 U.S.C. § 1348) and the venue statute (12 U.S.C. § 94) related to the same subject matter (the

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119. *Id.* (citing BLACK’S LAW DICTIONARY 1089 (4th ed. 1968); OXFORD ENGLISH DICTIONARY 1081 (2d ed. 1989) (providing examples from 1807 to 1896)).

120. *See id.* (quoting BLACKS LAW DICTIONARY 940 (6th ed. 1990)) (internal quotation marks omitted).

121. *Id.* at 418.

122. *Id.* (citing 28 U.S.C. § 1348 (2000)).

123. 28 U.S.C. § 1348 (2000).

124. *Schmidt*, 388 F.3d. at 419.

125. *Id.* at 420 (“The principle that different terms conjunctively used in the same statute should be given different meanings is *identically* applicable here. Indeed, section 1348 includes the very same words . . . used in similarly close proximity and in a highly similar context . . . . As in *Bougas*, the two words must be given their distinct meanings.”).

126. *See* 12 U.S.C. § 94 (2006).

127. *Schmidt*, 388 F.3d. at 421 (“In sum, if Congress wishes to specify *principal* place of business and thereby exclude branch locations, it can easily do so. And in fact it has done so elsewhere.”).

128. *Id.* at 422.

129. *Id.* (citing *United States v. Stewart*, 311 U.S. 60, 64 (1940)).

ability to sue national banks), this canon applied.<sup>130</sup> As § 1348 adopted the same words, which were already defined by *Bougas*, *in pari materia* directed the court to adopt the same meaning of the term “located” for the diversity jurisdiction statute as has been adopted for the venue statute.<sup>131</sup> Because the Supreme Court in *Bougas* interpreted “located” in the venue statute to refer to all places where the bank had a branch, so too, the Fourth Circuit reasoned, “located” in the diversity jurisdiction statute must be interpreted the same way.<sup>132</sup>

Following its in-depth statutory interpretation analysis, the Fourth Circuit rejected the argument that “located” in § 1348 has a “settled background understanding” and must therefore be interpreted in that light, as the Fifth and Seventh Circuits suggested.<sup>133</sup> The court found that no “consistent statutory usage, no settled meaning in the case law, and no historical statutory purpose addressed the question whether ‘located’ includes branch offices.”<sup>134</sup> Rather, the court believed that the issue “had never been ‘clarified by judicial construction’ and had never reached any ‘established understanding’ at the time of section 1348’s enactment.”<sup>135</sup> Only one court had considered the meaning of “located” under the 1887 Act (the precursor to § 1348), holding that “located” refers to the principal place of business.<sup>136</sup> However, the Fourth Circuit reasoned that one case was not enough to establish a “settled background meaning” of “located” upon which Congress necessarily relied.<sup>137</sup> In sum, the Fourth Circuit concluded that there was no settled background understanding of “located” prior to Congress’s enactment of § 1348.<sup>138</sup>

After its statutory analysis, the Fourth Circuit then analyzed the historical purpose of § 1348.<sup>139</sup> Wachovia argued that the Act of 1882 and the Act of 1887 established a background understanding which was apparently

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130. *Id.* (“Because the jurisdiction and venue statutes pertain to the same subject matter, namely the amenability of [national banks] to suit in federal court . . . the two statutes should be interpreted as using the same vocabulary consistently to discuss this same subject matter.”).

131. *Id.* (“Here, section 1348 adopted the same vocabulary . . . [and s]ince the Supreme Court in *Bougas* provided the definitive construction of those terms in the venue statute, [the canon] directs us to adopt the same construction for the jurisdiction statute.”).

132. *Id.*

133. *Id.* at 425.

134. *Id.*

135. *See id.* (quoting *Faul*, 253 F.3d at 988). The court proceeded to list various statutes in which “located” had been interpreted to mean the charter location and others where it means all the branch locations. *Id.*

136. *Id.* at 426 (citing *Am. Sur. Co. v. Bank of Cal.*, 133 F.3d 160, 161–62 (9th Cir. 1943)).

137. *Id.* The court then stressed that the other cases on which Wachovia relied in order to suggest that “located” has a settled background meaning all predated the McFadden Act (the Act which allowed branch offices) and thus the “charter location was the *only* candidate for ‘location.’” *Id.*

138. *Id.* In fact, interstate branch offices did not exist prior to 1933 and the issue was “very seldom raised, much less settled” between 1933 and when § 1348 was enacted in its current form. *Id.*

139. *Id.*

readopted in § 1348, namely Congress's intent "to give national banks the same access to diversity jurisdiction as that enjoyed by state corporations and individual citizens generally."<sup>140</sup> However, the Fourth Circuit reasoned that the historical intent was not so clear. The Act of 1882 reads, in pertinent part, "[J]urisdiction for suits hereafter brought by or against [a national bank] . . . shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under [federal charter]."<sup>141</sup> The *Cooper* court, in 1887, held that the purpose of the Act was "to put national banks on the same footing as the banks of the state where they were located for . . . jurisdiction."<sup>142</sup>

Subsequently, in 1887, the Act was changed to read that national banks shall, for the purposes of all actions by or against them . . . be deemed citizens of the States in which they are respectively located; and in such cases [there shall be no jurisdiction] other than such as they would have in cases between individual citizens of the same State.<sup>143</sup>

The Court in *Petri*, interpreting the 1887 Act, held that the Act established parity between national banks and "other corporations *and* individual citizens."<sup>144</sup>

The Fourth Circuit reasoned that history shows that there are three possible parties that Congress believed national banks should be in parity with: individual citizens, state banks, other corporations, or all three.<sup>145</sup> Since there are "several different formulations of that parity principle [and] no guidance on how to select among them," the court reasoned that there is no obvious background principle under which Congress was legislating.<sup>146</sup>

The Fourth Circuit also found the historical purpose argument to be weak.<sup>147</sup> It emphasized that the courts in *Petri* and *Cooper* rested on the actual text of the Act as it stood at the time, which explicitly made reference to jurisdictional parity between national and state banks.<sup>148</sup> However, that language was replaced by § 1348, which contains no reference to state banks, corporations, or individual citizens.<sup>149</sup> Furthermore, the parity principle that is claimed to be established by the 1882 and 1887 Acts would "be inapplicable or, at best, neutral as to the issue" since there were no bank branches prior to 1933.<sup>150</sup>

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140. *Id.*

141. Act of July 12, 1882, ch. 290, 22 Stat. 163.

142. *Leather Mfrs. Nat'l Bank v. Cooper*, 120 U.S. 778, 780 (1887).

143. Act of March 3, 1887, ch. 373, 24 Stat. 554–55.

144. *Schmidt*, 388 F.3d at 427 (emphasis added) (quoting *Petri v. Commercial Nat'l Bank of Chi.*, 142 U.S. 644, 651 (1892)).

145. *Id.*

146. *Id.*

147. *Id.* at 428 ("But even if we thought the statute was ambiguous enough to warrant consulting such abstract, judicially intuited purposes, and even if the abstract purpose urged upon us were sufficiently definite to provide clear guidance, we would reject [the historical argument] for at least three reasons.").

148. *See id.* at 428.

149. *See id.*

150. *See id.* (emphasis omitted).

Rather, the parity principle that Congress incorporated is the principle that national banks are subject to diversity jurisdiction just like state banks, corporations, and individuals, as opposed to automatic federal question jurisdiction, to which national banks were previously entitled.<sup>151</sup> The Fourth Circuit found it telling that Congress did not adopt language in § 1348 similar to the language that it adopted in § 1332(c).<sup>152</sup> If Congress truly intended for national banks to be treated like state banks and corporations, the Fourth Circuit reasoned, it would have changed the language in § 1348 to limit jurisdiction to the state of incorporation and principal place just as it did in § 1332(c).<sup>153</sup>

Based on the plain meaning of the statute, canons of interpretation, and the absence of any contrary background meaning, the Fourth Circuit concluded that national banks, for diversity jurisdiction purposes, must be considered citizens of each state in which they operate a branch.<sup>154</sup>

*D. The Supreme Court Sides With the Fifth and Seventh Circuits:  
“Located” Does Not Mean Each and Every State Where There Is a Branch;  
But What Does It Mean?*

The Supreme Court granted certiorari in *Schmidt*, and reversed the Fourth Circuit’s holding.<sup>155</sup> The Supreme Court analyzed the Fourth Circuit’s three principle reasons for deciding that “located” refers to each state in which a bank has a branch, and proceeded to reject each one.<sup>156</sup>

First, the Court did not believe that the term “located” had a fixed and plain meaning.<sup>157</sup> In fact, the Court cited its earlier decision in *Bougas* for the proposition that “[t]here is no enduring rigidity about the word ‘located.’”<sup>158</sup> The Court added that, in some places in the National Banking Act, “located” refers to a single location, while in others, it includes bank branches.<sup>159</sup>

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151. *See id.* at 429 (“In other words, even if the parity principle(s) ascribed by the Supreme Court to Congress in the 1882 Act and the 1887 Act were somehow incorporated into the 1948 statute, any such principle would only guarantee that *national banks are subject to the rules of diversity jurisdiction . . .*”).

152. *See id.* at 431.

153. *See id.*

154. *Id.* at 432 (“The word ‘located’ in 28 U.S.C. § 1348 must be interpreted in accordance with its ordinary meaning . . . [a]nd no contrary background meaning is available counseling against this interpretation. Therefore [the court held] that a national banking association is ‘located’ under section 1348 in any state where it operates branch offices.”).

155. *See Wachovia Bank v. Schmidt*, 546 U.S. 303 (2006).

156. *See id.* at 312–13.

157. *See id.* at 313 (citing various statutes which use the word “location,” some of which refer to the charter location and some which refer to all branch locations).

158. *Id.* at 314 (quoting *Citizens & S. Nat’l Bank v. Bougas*, 434 U.S. 35 (1977)).

159. *Id.* at 314 n.7. *Compare* 12 U.S.C. § 52 (2006) (stating that a national bank’s stock must state “the name and location of the association”), and 12 U.S.C. § 55 (2006) (requiring notice of the sale of stock “in a newspaper of the city or town in which the bank is located”), and 12 U.S.C. § 75 (2006) (requiring a bank to reschedule its annual shareholder meeting when it “falls on a legal holiday in the State in which the bank is located”), with 12 U.S.C. § 85 (2006) (limiting allowable interest rate to the “rate allowed by the laws of the State,

Second, the Court discussed the Fourth Circuit's attempt to give the words "established" and "located" different meanings.<sup>160</sup> The Fourth Circuit held that "established" refers to a bank's main office and "located" to each place where the bank has a branch.<sup>161</sup> However, the Supreme Court concluded that the words "established" and "located" may in fact have been meant as synonyms.<sup>162</sup> When Congress enacted § 1348's statutory predecessors and § 1348 itself, a national bank generally could not operate branches outside its home state.<sup>163</sup> Therefore, it could not be that Congress intended for the two words to have different meanings.<sup>164</sup> Rather, the Supreme Court concluded that Congress's use of the two terms was merely a coincidence of statutory consolidation—the two parts coming from two different provisions, which were combined in the 1911 revision of the Judicial Code.<sup>165</sup> As the Court put it, "'located' . . . is a chameleon word; its meaning depends on the context in and purpose for which it is used."<sup>166</sup>

Third, the Court addressed the Fourth Circuit's reasoning that under the canon of *in pari materia* the venue statute and the jurisdiction statutes should be interpreted consistently.<sup>167</sup> The Court held that *Bougas* does not control the meaning of "located" in § 1348.<sup>168</sup> While acknowledging that it is true that statutes addressing the same subject matter should be read *in pari materia*, the Court explained, "[V]enue and subject-matter jurisdiction are not concepts of the same order."<sup>169</sup> Rather, venue is a matter of convenience and can be waived, while subject matter jurisdiction concerns a court's competence to adjudicate a particular category of cases.<sup>170</sup> Because venue is about convenience, the *Bougas* Court held that interpreting the venue statute to include all branch locations would not inconvenience the bank or unfairly burden it.<sup>171</sup> Subject matter jurisdiction, on the other hand, does not depend on convenience, but rather is based upon whether "the Legislature [has] empowered the court to hear cases of a

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Territory, or District where the bank is located"), and 12 U.S.C. § 92 (2006) (permitting a bank to act as an insurance agent when the bank is "located and doing business in any place the population of which does not exceed five thousand").

160. *Schmidt*, 546 U.S. at 314.

161. *Id.* at 312–13.

162. *See id.* at 314.

163. *See id.*

164. *See id.*

165. *Id.* In fact the codifying "Act explicitly stated that 'so far as [its provisions were] substantially the same as existing statutes,' they should 'be construed as continuations thereof, and not as new enactments.'" *Id.* at 314–15 (quoting Act of March 3, 1911, ch. 13, § 294, 36 Stat. 1167).

166. *Id.* at 318.

167. *Id.* at 313.

168. *See id.* at 315.

169. *Id.* at 316.

170. *See id.*

171. *See id.*

certain genre.”<sup>172</sup> Although the *Bougas* analysis is proper in the venue context, it is improper in the subject matter jurisdiction context.<sup>173</sup>

The Supreme Court refused to “render[] national banks singularly disfavored corporate bodies with regard to their access to federal courts.”<sup>174</sup> To that end, the Court settled the existing circuit split by ruling that, in the diversity jurisdiction context, the term “located” does not refer to each and every place in which the bank has a branch office.<sup>175</sup> The Court compared diversity for national banks with that of citizens and corporations:

There is no reason to suppose Congress used [the words “in which they are respectively located”] to effect a radical departure from the norm. An individual who resides in more than one State is regarded, for purposes of federal subject-matter (diversity) jurisdiction, as a citizen of but one State. . . . Similarly, a corporation’s citizenship derives, for diversity jurisdiction purposes, from its State of incorporation and principal place of business. It is not deemed a citizen of every State in which it conducts business or is otherwise amenable to personal jurisdiction. Reading § 1348 in this context, one would sensibly “locate” a national bank for the very same purposes, i.e., qualification for diversity jurisdiction, in the State designated in its articles of association as its main office.<sup>176</sup>

Although the Court acknowledged that one could “sensibly” locate a national bank in its designated place of charter, it did not address the issue of whether a national bank is also a citizen of the state in which it has its principal place of business. In footnote nine, the court observed,

To achieve complete parity with state banks . . . [a national bank] would have to be deemed a citizen of both the State of its main office and the State of its principal place of business. Congress has prescribed that a corporation “shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.” The counterpart provision for national banking associations, § 1348, however, does not refer to “principal place of business”; it simply deems such associations “citizens of the States in which they are respectively located.”<sup>177</sup>

The Court went on to state the “[t]he absence of a ‘principal place of business’ reference in § 1348 may be of scant practical significance for, in almost every case, as in this one, the location of a national bank’s main offices and of its principal places of business coincide.”<sup>178</sup>

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172. *Id.*

173. *Id.* In fact, interpreting venue the way *Bougas* did effectively aligns the treatment of national banks with that of state banks and corporations, while interpreting diversity jurisdiction in the same way would cause a divergence between national banks and state banks or corporations. *Id.* at 316–17.

174. *Id.* at 319.

175. *See id.* at 318.

176. *Id.* at 318 (citation omitted).

177. *Id.* at 317 n.9 (citations omitted).

178. *Id.*

However, the Court appears to have been wrong about this assertion. Two of the world's largest national banks, JP Morgan Chase and Wells Fargo, each have their main office and principal place of business in different states.<sup>179</sup> Not surprisingly then, many courts recently have had to decide precisely this issue that the Supreme Court, intentionally or inadvertently, failed to decide.

### III. POST-*SCHMIDT*: WHAT HAPPENS WHEN A NATIONAL BANK'S MAIN OFFICE AND PRINCIPAL PLACE OF BUSINESS ARE IN DIFFERENT STATES?

Although *Schmidt* definitively ruled that a national bank is not a citizen of each and every state in which it has a branch, it did not end the national bank diversity jurisdiction problem. After *Schmidt* two distinct views emerged with respect to diversity jurisdiction. The first, championed by the Eighth Circuit and followed by many district courts, claims that a national bank is only a citizen of the place where its main office is located, as listed in its charter. The second, upon which the Fifth and Seventh Circuits, the Eighth Circuit dissent, and many district courts rely, holds that a national bank is a citizen of the state of its principal place of business as well.

#### A. *A National Bank Is a Citizen Only of the State Where It Has Its Main Office*

Since *Schmidt*, one circuit court and several district courts have ruled that a national bank is only a citizen of the state where it has its main office as listed on its charter and is not a citizen of the state that is its principal place of business.

##### 1. The Eighth Circuit Follows the One-State Approach

The only circuit court to have weighed in on the debate since *Schmidt* was the Eighth Circuit in *Wells Fargo Bank v. WMR e-PIN, LLC*.<sup>180</sup> The court was tasked with confirming an arbitration award in favor of Wells Fargo relating to alleged violations of software Licensing Agreements.<sup>181</sup> In a 2–1 opinion, written by Judge Wollman, the court held that a national bank is *only* located in the state listed as its main office on its organizational charter.<sup>182</sup> In *Wells Fargo*, WMR and Synoran, the defendants, asserted that the district court did not have subject matter jurisdiction because diversity was lacking.<sup>183</sup> Synoran was a citizen of California, and the defendants claimed that Wells Fargo was also a citizen of California because California is the state of its principal place of business.<sup>184</sup>

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179. See *Excelsior Funds, Inc. v. JP Morgan Chase Bank*, 470 F. Supp. 2d 312, 317 n.6 (S.D.N.Y. 2006); Lund, *supra* note 22, at 104.

180. 653 F.3d 702 (8th Cir. 2011).

181. *Id.* at 705.

182. *Id.* at 709.

183. *Id.* at 705.

184. *Id.*

However, the Eighth Circuit upheld the district court's decision, holding that a national bank is only a citizen of the state of its main office and is not a citizen of the state that is its principal place of business.<sup>185</sup>

Like the Supreme Court in *Schmidt*, the Eighth Circuit acknowledged that the term "located" is ambiguous.<sup>186</sup> It then proceeded to analyze whether the term "located" includes a national bank's principal place of business. The court admitted that the principle of jurisdictional parity existed but questioned whether it remained intact after Congress enacted § 1332(c)(1) in 1958, which added the principal place of business as an additional consideration in determining a corporation's citizenship.<sup>187</sup>

The court noted that the Supreme Court did not squarely address the issue in *Schmidt*, stating, "Because Wells Fargo's main office is in a state other than that of its principal place of business, we must consider the outlier scenario identified in footnote nine of [*Schmidt*]."<sup>188</sup> The court then reasoned that the Seventh Circuit, in *Hicklin Engineering L.C. v. Bartell*,<sup>189</sup> had changed Seventh Circuit jurisprudence by reading *Schmidt* as effectively overruling *Faul*.<sup>190</sup> In *Hicklin*, the Seventh Circuit stated, "until [*Schmidt*] . . . there was a distinct possibility that national banks would be deemed citizens of every state . . . . But [*Schmidt*] held that national banks are citizens only of the states in which their main offices are located."<sup>191</sup> The dissent, however, argued that this statement could not have overturned precedent since the issue was not before the court and the statement was merely dicta.<sup>192</sup>

The court then addressed its rationale for deciding that a national bank is a citizen only of the state in which it has its main office as listed on its charter. The court reasoned that *Faul* and *Horton* were decided based on an "assumption that Congress intended to change the meaning of the former statute [§ 1348] when it enacted the latter [§ 1332(c)] in order to perpetuate jurisdictional parity."<sup>193</sup> The Eighth Circuit did not find this argument persuasive.<sup>194</sup> Rather, the court believed that "[t]he most relevant time period for determining a statutory term's meaning is the time when the

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185. *Id.* at 709.

186. *Id.* at 706 ("We begin by noting that every court to consider the meaning of § 1348 for purposes of jurisdiction has recognized that the term 'located' is ambiguous.").

187. *Id.* at 707 ("Thus, the principle of jurisdictional parity emerged from the evolving statutory framework governing national banks. The more vexing question is whether that principle remained intact after Congress adopted § 1332(c)(1) . . .").

188. *Id.* at 708.

189. 439 F.3d 346 (7th Cir. 2006).

190. *Wells Fargo*, 653 F.3d at 708 ("The Seventh Circuit has gone further, reading [*Schmidt*] to reject the proposition embraced in its *Firststar Bank* decision that a national bank's principal place of business is an independent basis for citizenship.").

191. *Hicklin Eng'g*, 439 F.3d at 348.

192. *Wells Fargo*, 653 F.3d at 718 n.9.

193. *Id.* at 708.

194. *Id.*

statute was enacted.”<sup>195</sup> Therefore, “[i]n 1948, when Congress last amended § 1348, it had not yet created principal-place-of-business citizenship. At that time the term ‘located’ referred to the state in which the national bank had its main office, as designated by its articles of association.”<sup>196</sup> At the time when § 1348 was last amended, the majority of the Eighth Circuit reasoned that “located” could not possibly have referred to the principal place of business, since the concept was not yet created. Additionally, when Congress created principal-place-of-business citizenship in § 1332(c)(1), “it made no reference to jurisdictional parity, nor to national banks or § 1348.”<sup>197</sup>

The Eighth Circuit majority rejected the alternative contention that “Congress intended to alter the meaning of § 1348 retroactively when it passed § 1332(c)(1) so as to retain jurisdictional parity.”<sup>198</sup> In doing so, it refused to “assume . . . that jurisdictional parity is an immutable principle that endures long after the statutes from which it arose have been amended and all references to it have been excised.”<sup>199</sup> The majority held that if Congress intended for there to be parity it would have said so; but “[i]t did not, and consequently the concept no longer applies.”<sup>200</sup> According to the majority, whether or not that concept of parity should be revived is a matter for Congress to determine and not the courts.<sup>201</sup> Thus, the majority in *Wells Fargo* found that a national bank is a citizen only of the state in which its main office is located.<sup>202</sup>

The majority also found support for its conclusion from a discussion between Justice Ginsburg and the attorney for the Office of the Comptroller of Currency (OCC), Sri Srinivasan, during oral argument in *Schmidt*.<sup>203</sup> When asked by Justice Ginsburg what happens if the principal place of business is different from the main office, Srinivasan replied, “[W]e don’t think that a national banking association is a citizen of a State in which its principal place of business is found.”<sup>204</sup> He continued, “[t]hat’s because of the historical chronology. The word located was first used in 1887 and the current version of section 1348 was enacted in 1948, which was 10 years before the concept of principal place of business had any jurisdictional

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195. *Id.* (quoting *Excelsior Funds, Inc. v. JP Morgan Chase*, 470 F. Supp. 2d 312, 319 (S.D.N.Y. 2006)) (internal quotations omitted).

196. *Id.*

197. *Id.* The court continued, “These circumstances strongly suggest that, with the passage of § 1332(c)(1), Congress reconfigured the jurisdictional landscape of state banks and state corporations, but left that of national banks undisturbed.” *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 709.

201. *Id.* (“Whether it ought to be revived is a policy question for Congress, not the federal courts. We will not import a jurisdictional concept into § 1348 that was unknown at the time of its adoption.”).

202. *Id.* at 709.

203. *Id.* at 709–10 (citing Transcript of Oral Argument at 20–21, *Wachovia Bank v. Schmidt*, 546 U.S. 303 (2006) (No. 04-1186)).

204. *Id.* at 710 (quoting Transcript of Oral Argument at 20–21, *Wachovia Bank v. Schmidt*, 546 U.S. 303 (2006) (No. 04-1186)).

salience.”<sup>205</sup> The *Wells Fargo* majority acknowledged that the OCC admitted that it was not an easy case, and that it was possible to conclude that § 1332(c)’s reference to principal place of business should also apply to national banks.<sup>206</sup> However, based upon the above arguments, the Eighth Circuit held that a national bank is not a citizen of the state where it has its principal place of business, if that state is different from that of its main office.<sup>207</sup>

## 2. District Courts Since *Schmidt* That Have Followed the One-State Approach

The Southern District of New York in *Excelsior Funds, Inc. v. J.P. Morgan Chase Bank* also followed the one-state approach.<sup>208</sup> Excelsior Funds sued Chase in New York state court, alleging various causes of action.<sup>209</sup> In response, Chase removed the action to federal court claiming that the federal courts had jurisdiction based on diversity.<sup>210</sup> Excelsior, a citizen of New York, made a motion to remand arguing that Chase was a citizen of New York and thus removal was improper.<sup>211</sup> It argued that Chase’s principal place of business was in New York and thus should be deemed a citizen of New York.<sup>212</sup> Chase, however, argued that it is only a citizen of Ohio, the state listed as its main office in its charter and, therefore, removal to federal court was proper.<sup>213</sup>

The question before the court was whether a national bank for diversity jurisdiction purposes is considered a citizen of the state of its principal place of business in addition to the state listed on its charter.<sup>214</sup> Judge Koeltl first analyzed footnote nine of *Schmidt*.<sup>215</sup> Excelsior argued that the footnote adopts the principal of parity between national and state banks, while Chase argued that the footnote explicitly rejects such an idea.<sup>216</sup> The judge concluded that although Chase’s reading was the fairest reading, the language was inconclusive and did not give a definitive answer.<sup>217</sup>

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205. *Id.* (quoting Transcript of Oral Argument at 21, *Wachovia Bank v. Schmidt*, 546 U.S. 303 (2006) (No. 04-1186)).

206. *See id.*

207. *Id.*

208. 470 F. Supp. 2d 312 (S.D.N.Y. 2006).

209. *Id.* at 312–13.

210. *Id.* at 313.

211. *Id.*

212. *Id.*

213. *Id.* at 313–14.

214. *Id.* at 313.

215. *Id.* at 317.

216. *See id.*

217. *Id.* (“The language is inconclusive and it would have been unnecessary, based on the facts of the case, for the Supreme Court to decide the issue. This footnote, therefore, does not resolve the question . . . . Yet, at the same time, the fairest reading of footnote nine is that the Supreme Court expressed skepticism over whether the term ‘located’ in § 1348 included a national banks ‘principal place of business,’ in view of the absence of such term in the statute.”).

Judge Koeltl then proceeded to the statutory analysis.<sup>218</sup> Relying on *Schmidt*, he declared that there is no plain meaning of the word “located,” and other methods of statutory interpretation are insufficient to give a meaning to the term.<sup>219</sup> So, the court looked to the legislative history of § 1348.<sup>220</sup> The court acknowledged that the original purpose of the statute was to put national banks on the same footing as state banks.<sup>221</sup> However, “[t]he issue, then, is whether the term ‘located’ in § 1348, the current version of which was enacted in 1948, can be interpreted to include the concept of ‘principal place of business,’ which was first introduced in 1958.”<sup>222</sup> The court cited Supreme Court cases holding that the most relevant time period for determining a terms meaning is the time when the statute was enacted.<sup>223</sup> The court concluded that there is “nothing in the text of § 1348 that suggests that the word ‘located’ changes its meaning in § 1348 depending on the citizenship of state banks.”<sup>224</sup> Rather, the statute must be interpreted based on the congressional intent at the time the statute was enacted, at which time principal-place-of-business jurisdiction had not yet existed.<sup>225</sup> If Congress wanted jurisdictional parity forever, then it could have put language in § 1348 that “would have supported an argument for incorporating by reference subsequent changes to the citizenship of state banks or individual citizens.”<sup>226</sup> But this is not the case, as all language mentioning parity was removed in 1911.<sup>227</sup> Also, there is nothing to suggest that these statutes were intended to operate in tandem.<sup>228</sup>

According to the court, there is nothing in the statutory text, nor in the legislative history, that supports the conclusion that “located” in § 1348 was meant to incorporate the concept of principal-place-of-business jurisdiction.<sup>229</sup> Therefore, the court held that Chase is only a citizen of

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218. *Id.* at 318.

219. *Id.* (“Turning first to the statute’s plain meaning, as the Supreme Court explained, ‘[t]here is no enduring rigidity about the word ‘located’ . . . . The Supreme Court also rejected the applicability of several tools of construction that the Fourth Circuit Court of Appeals relied upon . . . .’ (alteration in original) (quoting *Wachovia Bank v. Schmidt*, 546 U.S. 303, 314 (2006))).

220. *See id.*

221. *See id.* at 318–19.

222. *Id.* at 319.

223. *See id.*

224. *Id.*

225. *Id.* (“The statute should thus be interpreted consistent with congressional intent at the time it was enacted, and at that time, the modern concept of principal place of business, which originated with the passage of § 1332(c)(1) ten years later, was not a test for citizenship for any corporation, including state banks.”).

226. *Id.* at 319–20.

227. *See id.* at 320.

228. *Id.* at 321 (“[Section] 1348 and § 1332 were not enacted at virtually the same time and do not have virtually identical scope. There is nothing to indicate that these statutes were designed to operate in tandem.”).

229. *Id.* at 322 (“Therefore, because neither the statutory text nor the legislative history support reading the term ‘located’ in § 1348 to incorporate by reference a concept that did not exist until ten years later, a national bank is not also ‘located’ in the state where it

Ohio, which was the state listed as its main office on its charter, and not a citizen of New York.<sup>230</sup> *Excelsior* could not have the case remanded to state court since there was complete diversity.<sup>231</sup>

In *DeLeon v. Wells Fargo Bank*,<sup>232</sup> Judge Fogel of the Northern District of California came to the same conclusion as Judge Koeltl. In this case, DeLeon brought claims against Wells Fargo in state court claiming violations under California state law, including wrongful foreclosure.<sup>233</sup> Wells Fargo moved to remove the case to federal court claiming diversity jurisdiction.<sup>234</sup> DeLeon, a California citizen, moved to remand the case to state court and claimed that Wells Fargo was a citizen of California since it has its principal place of business there.<sup>235</sup> In the absence of Ninth Circuit authority on the issue, and relying on the rationale of *Excelsior*, the court declined to apply the dual-test approach.<sup>236</sup>

*B. Courts Holding That a National Bank Is a Citizen Both of the State That Is Its Principal Place of Business and the State of Its Main Office*

To date, there have not been any circuit court decisions since *Schmidt* that have ruled that a bank is a citizen of the state that is its principal place of business in addition to the state of its main office. However, Fifth and Seventh Circuit precedent, the dissent in the Eighth Circuit, and many district courts do not follow the one-state approach but rather follow the dual-citizenship test.

1. The *Wells Fargo* Dissent

The Eighth Circuit's 2–1 decision in *Wells Fargo* was accompanied by a strong dissent by Judge Murphy.<sup>237</sup> Judge Murphy argued that footnote nine in *Schmidt* leads to two different interpretations, and that the majority had in fact followed the one with less support.<sup>238</sup>

Judge Murphy stressed that the two Supreme Court decisions that interpreted the precursors to § 1348, *Cooper* and *Petri*, placed national banks on the same footing as state banks.<sup>239</sup> In addition, the first circuit court to interpret “located” was the Ninth Circuit in *American Surety Co. v.*

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maintains its principal place of business, when that state is different from the state of the national bank's main office.”)

230. *See id.* at 323.

231. *See id.*

232. 729 F. Supp. 2d 1119 (N.D. Cal. 2010).

233. *Id.* at 1121.

234. *See id.*

235. *See id.* at 1121–22.

236. *Id.* at 1124 (“In the absence of controlling Ninth Circuit authority, this Court will decline Plaintiffs’ invitation to apply a principal place of business test to Wells Fargo.”).

237. *Wells Fargo Bank v. WMR e-PIN, LLC*, 653 F.3d 702, 715 (2011) (Murphy, J., dissenting).

238. *Id.*

239. *Id.* at 716.

*Bank of California*,<sup>240</sup> in which it held that national banks were citizens of the “states in which their principal places of business were maintained.”<sup>241</sup> Furthermore, according to the dissent, neither the Supreme Court nor Eighth Circuit precedent suggested in any way that the 1958 addition of principal-place-of-business jurisdiction for corporations (§ 1332(c)) changed “the longstanding and unanimous interpretations of § 1348 and its predecessors requiring jurisdictional parity between national and state banks.”<sup>242</sup>

Judge Murphy then cited *Faul* (Seventh Circuit) and *Horton* (Fifth Circuit) as supporting the conclusion that national banks are citizens of the state in which their principal place of business is located and said that both decisions “were referenced positively” in *Schmidt*.<sup>243</sup> According to Judge Murphy, the *Schmidt* court reaffirmed the reasoning in *Faul* and *Horton* in the course of its decision.<sup>244</sup> Most significantly, the *Schmidt* court in fact employed the principle of jurisdictional parity as a basis for its conclusion, in direct contrast to the assertion by the majority that such a principle no longer applies.<sup>245</sup>

Judge Murphy disagreed with the majority’s framing of the issue as whether the concept of jurisdictional parity “‘remained intact’ after the adoption of § 1332(c)(1).”<sup>246</sup> Rather, according to him, the question that needed to be answered was whether *Schmidt* undermines the longstanding and unanimous precedent that national banks are citizens of their principal places of business.<sup>247</sup> The answer for Judge Murphy was obviously not, as *Schmidt* should be read in light of the preexisting precedent and the policy of jurisdictional parity.<sup>248</sup> As already mentioned, *Schmidt* applied the concept of jurisdictional parity in order to reverse the Fourth Circuit’s decision.<sup>249</sup> If, as the majority in *Wells Fargo* suggested, the passage of § 1332(c)(1) abrogated the concept of jurisdictional parity, then the Supreme Court in *Schmidt* would not have relied on this principle to reach its conclusion.<sup>250</sup>

Furthermore, the Supreme Court in footnote nine hinted that a national bank “would have to be deemed a citizen of both the State of its main office and the State of its principal place of business.”<sup>251</sup> According to Judge Murphy, this statement, the Court’s reliance on the principal of jurisdictional parity, and the positive reference of the court to *Faul* and

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240. 133 F.2d 160 (9th Cir. 1943).

241. *Wells Fargo*, 653 F.3d at 716 (quoting *Am. Sur. Co.*, 133 F.2d at 162).

242. *Id.*

243. *Id.*

244. *Id.* at 717.

245. *Id.*

246. *Id.*

247. *Id.*

248. *See id.*

249. *Id.* at 718.

250. *See id.*

251. *Id.* (quoting *Wachovia Bank v. Schmidt*, 546 U.S. 303, 317 n.9 (2006)).

*Horton*, show that the Supreme Court would consider a national bank a citizen of its principal place of business if it was faced with the issue.<sup>252</sup>

Judge Murphy also focused on a different part of Srinivasan's testimony, the attorney for the OCC, during the oral argument in *Schmidt*.<sup>253</sup> In response to Justice Stevens, who asked if a national bank could have two parallel locations, Srinivasan remarked that a "[c]ourt in a case that specifically raised the issue . . . could construe 1332(c) . . . as also applying to national banking associations."<sup>254</sup> Justice Scalia then remarked that, if it was interpreted that way, it would eliminate any favoritism to national banks, to which Srinivasan agreed.<sup>255</sup> According to Judge Murphy's reading of the conversation, Chief Justice Roberts and Justices Scalia and Stevens seemed to question the logic of the rule issued by the majority.<sup>256</sup>

Judge Murphy found it relevant that all the Justices concurred in footnote nine and its acknowledgement that to achieve parity a national bank would have to be a citizen in both places.<sup>257</sup> Furthermore, her position is supported by the position the OCC took in its Interpretive Letter in 2002 and its amicus brief in *Horton*.<sup>258</sup> Judge Murphy concluded that Congress could and should have made § 1348 clearer when it enacted § 1332(c)(1), but "it need not have done so given the preexisting understanding of the statute and its predecessors which placed national and state banks on equal jurisdictional footing."<sup>259</sup> Rather, if Congress intended to abrogate the principle of jurisdictional parity it would have affirmatively done so, since it would have been a "'noteworthy departure' from established jurisdictional principles."<sup>260</sup>

## 2. The Continued Authority of the Seventh and Fifth Circuits After *Schmidt*

The Seventh Circuit in *Faul* and the Fifth Circuit in *Horton*, as previously mentioned, held that a national bank, for diversity jurisdiction purposes, is a citizen of both the state listed as its main office on its charter and the state that is its principal place of business.<sup>261</sup> *Faul*, in limiting the

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252. *Id.* ("In view of the Court's reliance on the principle of jurisdictional parity . . . footnote 9 is most fairly read to suggest that, in the rare case where a bank's main office and principal place of business are in different states, the national bank would be 'located' in both . . . . That would explain the Court's citations to [*Faul*] and *Horton* and its emphasis that corporations are citizens of their state of incorporation 'and' the state of their principal place of business." (alteration in original) (quoting *Wachovia Bank v. Schmidt*, 546 U.S. 303, 317 n.9 (2006))).

253. *Id.* at 719.

254. *Id.* at 718–19 (alteration in original).

255. *Id.* at 719.

256. *Id.* ("Chief Justice Roberts and Justice Scalia both appeared concerned . . . [and] Justice Stevens questioned the logic of a rule that would allow a national bank to chose its main office in a small state removed from where it does a majority of its business.").

257. *Id.*

258. *See id.*

259. *Id.* at 720.

260. *Id.* (quoting *Am. Sur. Co. v. Bank of Cal.*, 133 F.3d 166 (9th Cir. 1943)).

261. *See supra* notes 63, 98 and accompanying text.

locations where a national bank should be considered a citizen, compared national banks to corporations.<sup>262</sup> It thus concluded that “‘located’ should be construed to maintain jurisdictional equality between national banks and state banks or other corporations.”<sup>263</sup> In fact the court explicitly stated that a “national bank is ‘located’ in, and thus a citizen of, the state of its principal place of business *and* the state listed in its organization certificate.”<sup>264</sup> Although *Schmidt* was decided after the Seventh Circuit decision, it in no way overruled any of its holdings or rationales. In fact, the *Schmidt* Court acknowledged in footnote nine that to achieve complete parity, national banks would have to be citizens of the state that is their principal place of business as well as the state of their main offices.<sup>265</sup>

Similarly, *Horton* held that § 1348 should be read as having the objective of ensuring jurisdictional parity between national banks and state banks.<sup>266</sup> Since state banks are citizens of two states, the state of incorporation and the state of its principal place of business, national banks must also be citizens of two states.<sup>267</sup> The court did not want to restrict or expand a national bank’s access to federal court any more than that of a state bank, since that would break the desired parity.<sup>268</sup> As the court noted, “[t]his results in a national bank’s having access to federal courts by diversity jurisdiction to the same extent as a similarly situated state bank or corporation.”<sup>269</sup> The Supreme Court, in deciding *Schmidt*, relied heavily on *Horton*’s concept of jurisdictional parity. In overturning the Fourth Circuit’s conclusion that a national bank was a citizen of all states where it has a branch, the Supreme Court refused to “render[] national banks singularly disfavored corporate bodies,” echoing *Horton*’s demand for jurisdictional parity.<sup>270</sup>

*Faul* and *Horton* were decided before *Schmidt* but are still good law in their respective circuits. *Faul*’s and *Horton*’s rationales and holdings were actually bolstered by *Schmidt*, especially *Schmidt*’s emphasis on jurisdictional parity.

### 3. District Courts Since *Schmidt* That Have Followed the Dual-Test Approach

Although only one circuit court has addressed the issue since *Schmidt*, many district courts have weighed in. While many district courts have followed the one-state approach, many others have found that a national

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262. See *supra* note 94 and accompanying text.

263. *Firstar Bank v. Faul*, 253 F.3d 982, 993 (7th Cir. 2001).

264. *Id.* at 994 (emphasis added).

265. *Wachovia Bank v. Schmidt*, 546 U.S. 303, 317 n.9 (2006).

266. *Horton v. Bank One*, 387 F.3d 426, 436 (5th Cir. 2004) (“We construe section 1348 in light of Congress’s intent to maintain jurisdictional parity between national banks on the one hand and state banks and corporations on the other.”).

267. *Id.*

268. *Id.*

269. *Id.*

270. *Schmidt*, 546 U.S. at 319.

bank is located in the state that is its principal place of business in addition to the state listed on the charter as its main office.<sup>271</sup>

In *Stewart v. Wachovia Mortgage Corp.*,<sup>272</sup> Judge Morrow of the Central District of California held that a federally chartered bank, for diversity jurisdiction purposes, is considered a citizen of both the state listed on its charter and the state that is its principal place of business.<sup>273</sup> Wells Fargo, successor to Wachovia Mortgage, had its principal place of business in San Francisco, California.<sup>274</sup> Since the Plaintiff was also a California citizen, Judge Morrow remanded the case to state court for lack of subject matter jurisdiction.<sup>275</sup>

The court reaffirmed that *Schmidt* did not decide the issue of whether a national bank is merely a citizen of the state listed on its charter or is additionally a citizen of the state where it has its principal place of business.<sup>276</sup> According to the court in *Stewart*, the *Schmidt* Court did “not consider, or have occasion to consider, whether, given the imprecision of the word ‘located,’ a national bank might *also* be ‘located’ . . . in the state where it maintains its principal place of business.”<sup>277</sup> Rather, the Supreme Court specifically noted that, in the case before it, the principal place of business was the state listed on the charter as its main office.<sup>278</sup> Because the Supreme Court was silent on the issue, as was the Ninth Circuit, Judge Morrow was tasked with deciding the issue.<sup>279</sup>

Judge Morrow reasoned that the Supreme Court noted that “located” was not a word of enduring rigidity, but rather one that gains its precise meaning from context.<sup>280</sup> Moreover, according to the court in *Stewart*, the Supreme

271. Compare *Yong Chull Kim v. Wells Fargo Bank*, No. 5:12-CV-02066-EJD, 2012 WL 3155577, at \*1 (N.D. Cal. Aug. 2, 2012) (holding that complete diversity exists because Wells Fargo is not a citizen of South Dakota, the state where it has its principal place of business), and *DeLeon v. Wells Fargo Bank*, 729 F. Supp. 2d 1119 (N.D. Cal. 2010) (declining to apply a principal place of business test), with *Stewart v. Wachovia Mortg. Corp.*, No. CV 11-06108 MMM (AGRx), 2011 WL 3323115 (C.D. Cal. Aug. 2, 2011) (holding that complete diversity does not exist because Wells Fargo, the parent company of Wachovia, is a citizen of California, its principal place of business), and *Saberi v. Wells Fargo Home Mortg.*, No. 10CV1985 DMS(BGS), 2011 WL 197860 (S.D. Cal. Jan. 20, 2011) (holding that since Defendant and both Plaintiffs are citizens of California, no diversity jurisdiction existed).

272. No. CV 11-06108 MMM (AGRx), 2011 WL 3323115 (C.D. Cal. Aug. 2, 2011).

273. *Id.* at \*6.

274. *Id.* at \*4 (“Wells Fargo ‘has regularly described its principal place of business as San Francisco, California.’” (quoting *Mount v. Wells Fargo Bank*, No. CV 05-6298 GAF (MANx), 2008 WL 5046286, at \*1 (C.D. Cal. Nov. 24, 2008))).

275. *Id.* at \*6 (“Because complete diversity is lacking, plaintiff’s *ex parte* application to remand is granted.”).

276. *Id.* at \*5 (“*Schmidt* did not decide whether a national bank is ‘located’ in the state where it has its principal place of business, when that location is different from the state in which its main headquarters are situated . . .”).

277. *Id.* at \*3.

278. *Id.*

279. *Id.* at \*4 (“The Ninth Circuit has similarly not addressed whether, for purposes of § 1348, a national banking association is ‘located’ in the state where it has its principal place of business.”).

280. *Id.* at \*5 (quoting *Wachovia Bank v. Schmidt*, 546 U.S. 303, 306–07 (2006)).

Court emphasized that Congress desired for there to be jurisdictional parity between state chartered banks and federally chartered banks.<sup>281</sup> A state chartered bank is a citizen of both the state of incorporation and the state of its principal place of business.<sup>282</sup> Since Congress intended for there to be jurisdictional parity, a national bank must also be “located” in the state of its principal place of business.<sup>283</sup> Judge Morrow also cited *Faul* and *Horton*, stating that they “rejected the contention that a national bank is located wherever it has branches . . . and both concluded a national bank is a citizen of the state of its principal place of business and the state listed in its organization certificate or articles of association.”<sup>284</sup> Therefore, based on *Horton*, *Faul*, and other California district court decisions, Judge Morrow concluded that a national bank is both a citizen of the state listed on its charter and the state where it has its principal place of business.

Similarly, other courts in the Central and Southern Districts of California have also followed the dual-test approach by relying on footnote nine of *Schmidt* in light of statutory history, various circuit court precedents, and the policy of parity between national and state banks.<sup>285</sup>

Another district court to follow the dual-test approach is the Northern District of Oklahoma, in *Dutton v. Wells Fargo Bank*.<sup>286</sup> In this case, Dutton brought an action in state court relating to allegations of breach of agreement and harassment by the defendant Wells Fargo.<sup>287</sup> Wells Fargo then sought to remove the case to federal court under diversity jurisdiction.<sup>288</sup> Dutton, a citizen of California, claimed, inter alia, that the removal was improper since Wells Fargo was also a citizen of California, and thus complete diversity was lacking.<sup>289</sup> According to Dutton, Wells Fargo was a citizen of California because California is the state of Wells

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281. *Id.*

282. *See id.*

283. *Id.* (“Since Congress wished national banks to have the same access to federal courts as state-chartered banks, interpreting § 1348 so as to foreclose the possibility that a national bank is ‘located’ where it maintains its principal place of business would not further Congress’ purposes.”).

284. *Id.* at \*4 (quoting *Mount v. Wells Fargo Bank*, No. CV 08-6298 GAF(MANx), 2008 WL 5046286, at \*2 (C.D. Cal. Nov. 24, 2008)) (internal quotation marks omitted).

285. *See, e.g., Rouse v. Wachovia Mortg., FSB*, No. EDCV 11-00928 DMG(DTBx), 2012 WL 174206, at \*6 (C.D. Cal. Jan. 13, 2012) (holding that the court must follow the precedent set by *American Surety*; but even if no precedent existed, the court would hold that national banks are citizens of their principal place of business, since Congress intended for there to be jurisdictional parity between national banks and state-chartered banks); *Goodman v. Wells Fargo Bank*, No. CV 11-2685-JFW(RZx), 2011 WL 2372044, at \*3 (C.D. Cal. June 1, 2011) (holding that no diversity existed since Plaintiff was a citizen of California, and Wells Fargo has its principal place of business in California); *Saberi v. Wells Fargo Home Mortg.*, No. 10CV1985 DMS(BGS), 2011 WL 197860, at \*3 (S.D. Cal. Jan. 20, 2011) (“Accordingly, for purposes of diversity jurisdiction, Wells Fargo Bank is both a citizen of South Dakota . . . and California, where it has its principal place of business.”).

286. No. 11-CV-0352-CVE-PJC, 2011 WL 4526768 (N.D. Okla. Sept. 28, 2011).

287. *Id.* at \*1.

288. *Id.* at \*2.

289. *Id.* at \*4.

Fargo's principal place of business.<sup>290</sup> Wells Fargo, on the other hand, asserted that a national banking association is only a citizen of the one state listed in its articles of association as its main office.<sup>291</sup>

Chief Judge Eagan noted that the case represented the outlier situation that *Schmidt* failed to address.<sup>292</sup> Chief Judge Eagan asserted that there is no Tenth Circuit precedent on this issue.<sup>293</sup> He found *Stewart's* reasoning to be persuasive and thus held that Wells Fargo is both a citizen of South Dakota, the state of its main office, as well as California, the state of its principal place of business.<sup>294</sup> The case was remanded to state court since both Dutton and Wells Fargo were citizens of California and, therefore, diversity jurisdiction was lacking.<sup>295</sup>

#### IV. THE DUAL-TEST APPROACH: A NATIONAL BANK SHOULD BE DEEMED A CITIZEN OF BOTH THE STATE THAT IS DESIGNATED AS ITS MAIN OFFICE BY ITS CHARTER AND THE STATE THAT IS ITS PRINCIPAL PLACE OF BUSINESS

Part IV of this Note explains why national banks should be on equal footing with state banks (i.e., why they should be considered citizens of both the states in which they have their principal places of business and the states in which they have their main office). The term "located" is ambiguous, and thus the legislative history behind the implementation of § 1348 must be used to determine how it should be interpreted. The policy of jurisdictional parity demands that "located" be interpreted to refer to the state that is the principal place of business in addition to the state listed on the charter. Part IV advocates that Congress, under its authority to grant access to federal court, should amend § 1348 to this effect.

##### A. Wachovia Bank v. Schmidt *Left the Door Open for a Further Circuit Split*

The Supreme Court in *Schmidt* was forced to decide whether national banks should be considered citizens of each and every state in which they maintain a branch.<sup>296</sup> In doing so, the court was tasked with interpreting the term "located" as mentioned in § 1348.<sup>297</sup> Section 1348 provides that the national banks should be deemed citizens of the States in which they are "respectively located."<sup>298</sup> The Court concluded that the term "located" does not refer to each and every state in which a bank has a location.<sup>299</sup>

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290. *Id.*

291. *Id.*

292. *Id.* at \*6.

293. *Id.* at \*7.

294. *Id.*

295. *Id.*

296. *See supra* note 156 and accompanying text.

297. *See supra* notes 165–66 and accompanying text.

298. *See supra* note 35 and accompanying text.

299. *See supra* note 175 and accompanying text.

Additionally, the Court had the opportunity to decide whether “located” referred only to the state listed on the charter or to both the state of the banks principal place of business and the state listed on the charter. However, the Court refused to resolve the issue, and language from the opinion gives weight to both sides of the split. Although the Court declared, “[O]ne would sensibly ‘locate’ a national bank . . . in the State designated in its articles of association,” it acknowledged that to achieve complete parity a national bank would have to be deemed a citizen of both the state of its main office as well as the state that is its principal place of business.<sup>300</sup> In doing so, the Supreme Court left the door open for the current circuit split.

*B. The Textual Canons of Statutory Interpretation Are  
Insufficient to Define “Located”*

This section analyzes several possible canons of statutory interpretation that could possibly be used in analyzing the meaning of “located” in § 1348. However, the various canons do not provide a clear answer and are thus insufficient.

1. The Term “Located” Is Ambiguous on Its Face and Thus Its Definition  
Cannot Be Derived From Its Plain Meaning

When trying to interpret a statutory term, a court will often first try to determine whether the term is unambiguous.<sup>301</sup> If the term is unambiguous then there is no need for further methods of interpretation.<sup>302</sup> The Seventh and Fifth Circuits found that “located” does not have a plain meaning in the text and, therefore, moved on to other methods of statutory interpretation.<sup>303</sup> The Fourth Circuit, however, held that “located,” according to various dictionaries it cited, is unambiguous and refers to any place where there is a physical presence.<sup>304</sup> Without giving much reasoning, the Supreme Court definitively answered the question, declaring in *Schmidt* that the term “located” does not have a plain meaning, but rather is ambiguous.<sup>305</sup>

Thus, since the term “located” has been declared to be ambiguous by the Supreme Court, its plain meaning cannot be relied upon in deciding whether “located” refers to the state that is a bank’s principal place of business in addition to the state that has its main office as listed on its charter, or simply to one state. Therefore, further axioms of statutory interpretation must be considered in order to resolve the issue.

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300. *See supra* note 175.

301. *See supra* note 67 and accompanying text.

302. *See supra* note 72 and accompanying text.

303. *See supra* notes 69–72, 103 and accompanying text.

304. *See supra* note 116 and accompanying text.

305. *See supra* note 157 and accompanying text.

## 2. The Presence of “Established” and “Located” in § 1348 Is Most Likely a Coincidence of Statutory Drafting

The first paragraph of § 1348 contains the word “established,” while the second paragraph contains the word “located.”<sup>306</sup> Under the canons of statutory interpretation, generally when two different words are used in the same statute, they each should be given separate and distinct meanings.<sup>307</sup> Therefore, the Fourth Circuit held that “established” refers to the bank’s state listed on its charter and “located” refers to any state where the bank maintains a branch.<sup>308</sup> The Seventh Circuit, on the other hand, said that it is possible that “established” could refer only to the state listed on the charter, while “located” could mean the state listed on the charter *and* the state that is the principal place of business.<sup>309</sup>

The Seventh Circuit’s argument, if accepted, would help support the dual-test approach. However, the Supreme Court in *Schmidt* did not take that route. Rather, the Court held that the canon was inapplicable to this case.<sup>310</sup> The two terms did not have to be given distinct and separate meanings since they were likely a coincidence of statutory drafting.<sup>311</sup> The two parts of the statute likely came from two different earlier provisions and were combined to form the statute as it now stands.<sup>312</sup>

Since the Supreme Court has held that the words “established” and “located” are likely present only by coincidence, the canon that two words in the same provision should be given separate and distinct meaning is inapplicable. Therefore, the canon cannot be used to help figure out the correct interpretation of the word “located,” as used in § 1348.

## 3. The Canon of *In Pari Materia* Cannot Be Applied to the Venue Statute and the Diversity Statute

The canon of *in pari materia* applies when two statutes that relate to the same subject matter use the same statutory term.<sup>313</sup> The canon says that the two statutes should be interpreted in light of, and consistently with, one another.<sup>314</sup>

The Supreme Court in *Bougas* determined that under 12 U.S.C. § 94, the previous venue statute, the term “located” referred to each and every state in which the bank had a branch.<sup>315</sup> The Fourth Circuit, using the canon of *in pari materia*, determined that “located” in the diversity jurisdiction context should also be interpreted to mean each and every state in which the

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306. 28 U.S.C. § 1348 (2006).

307. *See supra* note 121 and accompanying text.

308. *See supra* note 124 and accompanying text.

309. *See supra* note 88 and accompanying text.

310. *See supra* note 165 and accompanying text.

311. *See supra* note 165 and accompanying text.

312. *See supra* note 165 and accompanying text.

313. *See supra* notes 128–29 and accompanying text.

314. *See supra* note 129 and accompanying text.

315. *See supra* notes 58–59 and accompanying text.

bank had a branch.<sup>316</sup> However, the Supreme Court in *Schmidt* rejected the Fourth Circuit's reasoning.<sup>317</sup> Rather, the Court determined that the venue statute and the subject matter jurisdiction statute have different purposes and therefore cannot be read *in pari materia*.<sup>318</sup> While venue is about the convenience of the litigants, subject matter jurisdiction is about the power of the federal court system to hear a case.<sup>319</sup> Since § 1348 has a radically different function than the venue statute, the canon of *in pari materia* is inapplicable to the diversity statute. Thus, the meaning of "located" cannot be understood by looking at how it has been defined in the venue statute. Since the textual canons of statutory interpretation are insufficient to provide assistance in interpreting "located" as it is written in § 1348, congressional intent and public policy must be considered.

### C. Congressional Intent Supports the Dual-Test Approach

Since 1882, Congress has always intended that national banks be treated the same as state banks for purposes of diversity jurisdiction.<sup>320</sup> Indeed, because of this desire for parity, Congress stripped national banks from their automatic federal jurisdiction and instead subjected them to diversity jurisdiction in the same manner as state banks.<sup>321</sup> Though, in 1887, the explicit parity language was changed, there was and still is an understanding that Congress intended for the jurisdictional parity to remain in place. For example, the *Cooper* Court in 1887 and the *Petri* Court in 1892 understood that Congress used the term "located" in a way as to give national banks the same access to federal court as state banks and other corporate institutions.<sup>322</sup> Similarly, the Seventh and Fifth Circuits, when dealing with the modern day statute, § 1348, understood that the statute's purpose was to create jurisdictional parity between national banks and state banks.<sup>323</sup> Most importantly, the Supreme Court, in *Schmidt*, reached its decision by comparing national banks to state banks and corporations.<sup>324</sup>

Those who support the alternative view, such as the Eighth Circuit, argue that, at the time when § 1348 was enacted in its current form, § 1332 did not contain a principal place of business reference, so there is no way "located" in § 1348 could have referred to principal place of business jurisdiction.<sup>325</sup> They argue that Congress could not have possibly intended for the word "located" to automatically change when § 1332 was amended. According to this view, even if national bank and state bank parity was originally the goal, Congress "reconfigured the jurisdictional landscape" in

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316. See *supra* notes 130–32 and accompanying text.

317. See *supra* note 168 and accompanying text.

318. See *supra* note 169 and accompanying text.

319. See *supra* notes 170–73 and accompanying text.

320. See *supra* notes 32–43 and accompanying text.

321. See *supra* notes 30–32 and accompanying text.

322. See *supra* notes 37–43 and accompanying text.

323. See *supra* notes 94–96, 104 and accompanying text.

324. See *supra* note 176 and accompanying text.

325. See *supra* note 196 and accompanying text.

1948 when it amended § 1332 to include principal-place-of-business jurisdiction but left § 1348 unchanged.<sup>326</sup>

However, framing the issue as whether or not “located” was meant to automatically change ignores the historical salience of the word “located.” As the various cases before *Schmidt* (and *Schmidt* itself) show, the word “located” in the context of § 1348 does not have a specific meaning, but rather is a “chameleon word,” whose definition is contingent upon achieving jurisdictional parity.<sup>327</sup> In the case of § 1348, “located” means, and has always meant, the various states where the bank would be considered a citizen if it were chartered as a state corporation.

Once the definition of “located” is understood in this way, it becomes clear that the question is not whether parity continues to be valid after § 1332(c) was enacted, but rather whether any case or statute has eviscerated the precedent of interpreting the word “located” to refer to the states in which the bank would be considered a citizen if it were a state bank. The answer to this must be no.<sup>328</sup>

In fact, *Schmidt* reaffirmed the longstanding policy that the term “located” in § 1348 should always be interpreted in order to put national banks on the same footing as state banks.<sup>329</sup> If by enacting § 1332(c) Congress evinced its intent to end the concept of jurisdictional parity between national and state banks, then the Supreme Court in *Schmidt* would not have relied on the exact same principal of parity to conclude that national banks are not citizens of every state in which they have a branch.<sup>330</sup> Indeed, the Supreme Court stressed that the concept of jurisdictional parity remains a viable principle.<sup>331</sup>

Congressional intent requires, and has always required, that jurisdictional parity between national banks and state banks be maintained. Since a state bank is a citizen of both the state of its main office and its principal place of business, a national bank must also be a citizen of both of these places.

*D. Equitable Considerations Require That National Banks Be Placed on the Same Footing As State Banks*

In 1882, Congress made it clear that national banks should not be given any additional access to federal court by their status as nationally chartered institutions, but rather national and state banks should be on the same footing.<sup>332</sup> The Supreme Court similarly stressed the importance of not favoring one form of bank over another, when it refused to render national banks “singularly disfavored corporate bodies with regard to their access to

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326. See *supra* note 197 and accompanying text.

327. See *supra* notes 37–43 and accompanying text.

328. See *supra* note 242 and accompanying text.

329. See *supra* notes 244–50 and accompanying text.

330. See *supra* notes 244–50 and accompanying text.

331. See *supra* notes 244–50 and accompanying text.

332. See *supra* notes 31–32 and accompanying text.

federal courts.”<sup>333</sup> For the same reasons that national banks should not be disfavored corporate entities, they should also not be favored corporate entities.

The one-state approach would in fact grant national banks greater access to federal court in the states where they have the most ties and the least justification for being able to select a federal forum.<sup>334</sup> Under the one-state approach, when national banks are sued in the states that are their principal places of business, the banks have the option of removing the case to federal court. Allowing the banks this option is an unnecessary burden on plaintiffs and has a serious effect on the plaintiffs’ chances of winning their cases.<sup>335</sup> Since forum has been shown to affect the outcome of a case, allowing access to federal courts on the basis of diversity jurisdiction should be carefully examined and limited only to those situations where Congress has determined that it is appropriate.<sup>336</sup>

It is inequitable to allow national banks to invoke diversity jurisdiction in states where they have the most ties simply to statistically lower the plaintiffs’ chances of winning, to burden plaintiffs and to reduce the value of potential settlements. Rather, the equitable outcome is that national banks be treated the same as state banks and be considered citizens of the state that is their principal place of business.

*E. Congress Should Amend § 1348, As It Did § 1332(c), by Adding the Words “Principal Place of Business” To End the Confusion and Stop the Inequitable Results Reached by Some Courts*

As the majority of the Eighth Circuit correctly noted, access to federal courts is under the purview of Congress.<sup>337</sup> Thus, Congress has the power to amend § 1348 and add the words “principal place of business.”

The dual-test approach most closely comports with congressional intent, equity, and the Supreme Court’s ruling in *Schmidt*. Congress can easily confirm this approach, without the need for the district courts, the circuit courts, or the Supreme Court to spend valuable resources on this issue.

#### CONCLUSION

The Supreme Court in *Schmidt* noted that the question whether national banks should be citizens of the state of their principal place of business in addition to the state listed on their charter as their main office was of scant practical significance. The Court believed this because it assumed that in nearly every case the principal place of business would be the state listed on

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333. See *supra* note 174 and accompanying text.

334. See *supra* notes 14–16 and accompanying text (explaining that the purpose of diversity jurisdiction was to provide a neutral forum for out-of-state residents, with few ties to a particular state, from the possible prejudices of state court).

335. See *supra* note 53 and accompanying text (citing empirical studies that show as much as an 11 percent decline in the win rate in cases which have been removed).

336. See *supra* note 55 and accompanying text.

337. See *supra* note 201 and accompanying text.

the charter. However, many of the nation's largest banks, such as Wells Fargo and JP Morgan Chase, have their principal places of business in a different state than their main office. Thus, numerous courts since *Schmidt* have been forced to decide the issue that the Supreme Court failed to decide.

If the Supreme Court decides the issue, it should follow the dual-test approach. Congressional intent and equity considerations demand that a national bank be considered a citizen of the state of its principal place of business in addition to the state where it has its main office, as listed on its charter. In order to resolve the issue definitively and to confirm the dual-test approach, Congress should step in and amend § 1348 to add the phrase "principal place of business." This will prevent the courts from wasting valuable time and resources.