Thinking About Federal Jurisdiction — Of Serpents and Swallows

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I. INTRODUCTION

Federal jurisdiction is a matter of first importance under our Constitution for federal tribunals are limited courts of a limited sover-
Today, as has been true since the earliest days of our Republic, before a federal court may deign to decide, the case or controversy must be determined to fall both within the article III empowerment and within some particular enabling act of Congress. Thus this threshold principle takes on controlling importance. The party invoking the federal power must affirmatively rebut a presumption against jurisdiction. Not only the party resisting jurisdiction but the court *sua sponte* must raise any jurisdictional issue, as well. This goes so far as to allow the party invoking the federal jurisdiction to challenge that jurisdiction when the result does not satisfy him. In a regime in which every actor must invoke the jurisdictional bar, is it any wonder that so many suits fail?

In this essay, I assume that the decision to get into or stay in federal court has been made, for whatever reason. My effort here is to provide a checklist of some of the typical challenges to jurisdiction and to highlight some uncommon responses. Organizationally, I will first consider general issues which apply to all cases, then I will consider

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1. "Before a federal court exercises any governmental power, it has a duty to determine its own jurisdiction to act." Edgar v. Mite Corp., 457 U.S. 624, 653 (1982) (Stevens, J., concurring); see also *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93 (1807) (Marshall, C. J.) (Court disclaims all jurisdiction not conferred by Constitution or statute).


5. See Louisville & N.R. Co. v. Motley, 211 U.S. 149, 152 (1908) (duty of court to see that circuit court did not exceed its jurisdiction); Cameron v. Hodges, 127 U.S. 322, 325 (1888) (federal court on its own motion must dismiss for lack of jurisdiction).

separately some issues in diversity cases and in federal question cases, the two most important heads of federal jurisdiction. My format likens a federal proceduralist to a fencer. Indeed, I believe that technique and art should characterize each "thrust" and "parry" over the issues whether the federal court has power to hear the controversy and whether that power should be exercised in the particular instance.7

II. GENERAL CONSIDERATIONS

THRUST: Plaintiff has no standing.8

PARRY: Standing rarely becomes an issue in private litigation. The victim of some contract breach or some tort may bring suit and his standing to raise the claim is obvious. In public law litigation by contrast, when a plaintiff challenges some governmental action, answering the question whether the person bringing suit is more than a mere bystander is as difficult as it is important. Public law standing doctrine divides taxpayers from others, not as if there is such a person as a nontaxpayer (they become defendants in another kind of case), but in terms of the interest on which the suit is based.

A taxpayer has standing qua taxpayer if the federal action being challenged is an exercise of the congressional spending power and if the federal action allegedly exceeds a specific constitutional limit on that power.9 Thus, even a federal taxpayer can have standing. The category is admittedly narrow and is controlled by constitutional principles. For example, a taxpayer can attack a program of federal religious school aid as a violation of the establishment clause,10 but

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10. See Flast v. Cohen, 392 U.S. 83, 103-05 (1968) (standing established when federal
cannot challenge the same program under either the due process clause or the tenth amendment.\textsuperscript{11} Local plaintiffs, however, may claim standing more easily as taxpayers challenging local expenditures.\textsuperscript{12} This approach should not be overlooked.

A nontaxpayer challenging some government action can have standing, if he shows some actual or threatened injury which is caused by the action which will be redressed by a favorable decision.\textsuperscript{13} Injury, causation, and redressability are all that the Constitution requires.\textsuperscript{14} However, nontaxpayer standing seems more difficult to

\textsuperscript{11} See Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 228 (1974) (no standing as taxpayer to reclaim reserve pay from members of Congress); United States v. Richardson, 418 U.S. 166, 175 (1974) (no standing as taxpayer to challenge CIA accounting procedures); Flast v. Cohen, 392 U.S. 83, 103-06 (1968) (tenth amendment not limitation on Congress' spending powers); see also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 478-79 (1982) (no standing as taxpayer to challenge disposition of property to religious school under article IV, section 3).

\textsuperscript{12} See, e.g., Weiman v. Updegraff, 344 U.S. 183, 185-86 (1952) (citizen and taxpayer brought suit to enforce Oklahoma loyalty oath); Adler v. Board of Educ., 342 U.S. 485, 489 (1952) (New York subversive teacher statute challenged by local taxpayers); Everson v. Board of Educ., 330 U.S. 1, 5-6 (1947) (New Jersey parochial school transportation challenge by local school taxpayers).


Causation and redressability have sometimes been considered two methods of stating the same fact — that an alleged injury must be traced to the plaintiff — but they should be treated as distinct requirements. Compare Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 74 (1978) (Court states redressability part of causation) with Watt v. Energy Action Educational Found., 454 U.S. 150, 160 (1981) (causation and redressability addressed
establish these days.  

My reader should distinguish nonconstitutional, prudential principles of standing doctrine which are frequently invoked and almost as frequently excused. Because they are mere creatures of judicial restraint, a court feeling unrestrained may pay them only lip service. When they are the "thrust," the "parry" may be either that they are satisfied or that they should be excused. There are three prudential principles. First, the plaintiff's own interest must come within the "zone of interest" protected by the statute invoked. 16 Plaintiff can find this requirement in legislative intent 17 or use the requirement's inherent ambiguity to make a bold assertion of satisfaction. 18 Second, the courts will not hear "generalized grievances" commonly shared by everyone. 19 The "parry," of course, is to convince the court that the plaintiff's grievance is particularized. 20 Third, a prudential rule

as distinct article III requirements). See generally Nichol, Causation as a Standing Require­ment: The Unprincipled Use of Judicial Restraint, 69 Ky. L.J. 185, 191-99 (1981) ("[a] substantial correlation exists between the concerns for directness of injury and redressability [but] both their aims and modes of analysis are distinct.")

15. See Allen v. Wright, ___ U.S. ___, 104 S. Ct. 3315, 3328, 82 L. Ed. 556, 571 (1984) (no standing for claim that children's education impaired by integrated school because injury not traceable to challenged government act); City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983) (no standing because whether the same plaintiff would be injured again was speculative).

16. See Barow v. Collins, 397 U.S. 159, 164 (1970) (without discussion Court held tenant farmers within zone of interests intended by act); Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150, 153-54 (1970) (interest may include both economic and noneconomic injuries within zone intended to be protected).


allows a plaintiff to assert only his own and not some third party's legal interests. 21 The "parry" is the exception allowing representational standing, an exception of near swallowing proportions. 22 To say that the third rule has been markedly relaxed may be an understatement. 23 Any person involved in a relationship which is affected by the challenged government action likely will be allowed to proceed under the representational standing theory. 24 Litigation surrogates also may be created as, for example, when a not-for-profit corporation sues on behalf of its members. 25

This is the important point to observe here and elsewhere in federal jurisdiction: the exceptions to the rules have themselves become

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25. See Sierra Club v. Morton, 405 U.S. 727, 739-40 (1972). While the Supreme Court held there was no organizational standing, a subsequent amendment to the complaint alleging how the environmental group's members were suffering harm satisfied the requirement. See Sierra Club v. Morton, 348 F. Supp. 219, 220 (N.D. Cal. 1972); see also Save Our Wetlands, Inc. v. Sands, 711 F.2d 634, 640 (5th Cir. 1983) (organization had standing to challenge utility line construction along river bank). Furthermore, a corporation might have standing in its own right. See Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982) (concrete injury to organization's activities establishes standing); Hudson Valley Freedom Theatre, Inc. v. Heimbach, 671 F.2d 702, 706 (2d Cir.) (non-profit corporation has standing to assert racial discrimination), cert. denied, 459 U.S. 857 (1982). See generally Note, A Corporation of a Different Color: Hudson Valley Freedom Theatre, Inc. v. Heimbach, 49 BROOKLYN L. REV. 1179, 1181 (1983) (representative standing may be constructed).
means of access to federal court. A good proceduralist uses them to advantage.

**THrust:** The case is moot. 26

**Parry:** The mootness doctrine is not a talisman requiring dismissal upon invocation. There is always room for some advocacy explaining how there remains something for the judgment to accomplish (i.e., there is a live case or controversy). 27 Alternatively, a commonly applied exception allows an otherwise moot case to survive if the controversy is “capable of repetition, yet evading review.” 28 If the challenged action is of such brief duration as to be completed before the ordinary run of litigation and there is a reasonable likelihood that the plaintiff will suffer the same alleged injury again, the case may go on. 29

**THrust:** There is no personal jurisdiction over the defendant.

**Parry:** Put aside the metaphysics of arguing there really is in personam, in rem, or quasi in rem jurisdiction. 30 Leave out arguments for individuals of personal service, 31 domicile, or consent, and argu-

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29. See, e.g., Nebraska Press Ass’n v. Stuart, 427 U.S. 539, 541 (1976) (expired pretrial order issue likely to recur); Roe v. Wade, 410 U.S. 113, 124-25 (1973) (natural termination does not render abortion issue moot); Valley Constr. Co. v. Marsh, 714 F.2d 26, 28 (5th Cir. 1983) (present unavailability of contracts does not moot challenge to arbitrary minority program). But see City of Los Angeles v. Lyons, 461 U.S. 95, 100-01, 104-05 (1983) (absent sufficient likelihood same party will be injured again injunction not issued).


ments for corporations of state of incorporation, doing business, or presence.\textsuperscript{32} Those are all commonplace.\textsuperscript{33} What about jurisdiction by default? There is always jurisdiction to determine jurisdiction. A federal court has the inherent power to consider whether there is jurisdiction over both subject matter and the person.\textsuperscript{34} The former is both constitutional and statutory and cannot be garnered by consent, waiver, or estoppel.\textsuperscript{35} The latter, however, is part and parcel of due process liberty. Entering a special appearance to contest personal jurisdiction, of course, permits that determination.\textsuperscript{36} However, the court may enter a discovery sanction order establishing personal jurisdiction over an obstreperous party who has frustrated discovery efforts to establish jurisdictional facts.\textsuperscript{37} This strategy may be too much of a long shot for a plaintiff to pursue, but a defendant resisting jurisdiction and discovery should take care not to resist too much.

\textsuperscript{32} See id. §§ 1066-67 (corporation service detailed).

\textsuperscript{33} The troublesome due process concept of minimum contacts is made more difficult when the issue becomes what minimum contacts are enough minimum contacts. Compare Burger King Corp. v. Rudzewicz, \textemdash U.S. \textemdash, \textemdash 105 S. Ct. 2174, 2185-86, 85 L. Ed. 2d 528, 546-47 (1985) (prior negotiations, future consequences, contract terms, and course of dealings as factors to be considered) with Lakeside Bridge & Steel Co. v. Mountain State Constr. Co., 445 U.S. 907, 909 (1980) (White, J., dissenting) (minimum contacts not found despite telephone, mail, and shipment contacts).


\textsuperscript{34} See United States v. United Mine Workers, 330 U.S. 258, 290 (1947) (court has power to preserve existing conditions pending a decision on its jurisdiction).


\textsuperscript{36} See 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1344 (1969) (special appearance procedure detailed in regard to jurisdiction determination).

THIRST: There is no independent jurisdiction to support joining a particular claim or party.

PARRY: Once there is a federal jurisdictional anchor, other claims and other parties may be appended sometimes without an independent basis, under the related doctrines of ancillary jurisdiction and pendent jurisdiction. These doctrines are much too complicated and subtle to allow for much more than a mention in this format. Nonetheless, they should be mentioned because their potential allows claims and parties into federal court which would never otherwise be permitted. The underlying policy is that if a federal court has some jurisdiction over part of a dispute it may have power to reach beyond its jurisdiction and decide related aspects over which there is no independent jurisdiction. In short, the power to decide a case or controversy is the power to decide the whole dispute. The doctrines can apply in diversity and federal question cases and they may apply to claims and to parties which neither jurisdiction reaches. Ancillary jurisdiction applies to claims and parties joined after the complaint by parties other than the plaintiff. Pendent jurisdiction applies to claims raised by the plaintiff in the complaint.


41. See, e.g., Aldinger v. Howard, 427 U.S. 1, 11 n.7 (1976) (without ancillary jurisdiction to hear all later claims to property some valid claims may be excluded for diversity reasons); Moore v. New York Cotton Exch., 270 U.S. 593, 609-10 (1926) (compulsory counterclaim on same property heard after plaintiff's claim dismissed); Freeman v. Howe, 65 U.S. (24 How.) 450, 460 (1860) (party whose interests affected by federal court suit may assert claim regardless of diversity).

42. See United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) (pendent claims arise
The liberal joinder provisions in the Federal Rules of Civil Procedure create the occasion for exercise of these two auxiliary jurisdictions. Complete diversity may not be required for a compulsory counterclaim under Rule 13(a) even when additional parties are brought in under Rule 13(h); or in an intervention as of right under Rule 24(a); or when a third-party is impleaded under Rule 14; or when a cross-claim is asserted under Rule 13(g), as all such claims may fall under the ancillary power. A plaintiff also may convince a


43. See Fed. R. Civ. P. 13(h); see also H. L. Peterson Co. v. Applewhite, 383 F.2d 430, 433-34 (5th Cir. 1967) (independent jurisdiction not necessary when additional party brought in by counter-claimant); United Artists Corp. v. Masterpiece Productions, 221 F.2d 213, 216 (2nd Cir. 1955) (jurisdiction extends to additional party when counterclaim compulsory). See generally C. WRIGHT, LAW OF FEDERAL COURTS § 79, at 536 n.63 (4th ed. 1983) (skepticism about of jurisdiction unless joinder is compelled under Rule 19); Miller, Ancillary and Pendent Jurisdiction, 26 S. TEX. L.J. 1, 7 (1985) (ancillary jurisdiction under Federal Rule 13(h) for compulsory counterclaims discussed).

44. See Fed. R. Civ. P. 24(a) (intervention); see also Blake v. Pallan, 554 F.2d 947, 951-55 (9th Cir. 1977) (four-fold test for intervention of right not met); Gaines v. Dixie Carriers, Inc., 434 F.2d 52, 54 (5th Cir. 1970) (diversity determined at commencement despite later changes in parties by intervention). See generally Note, Ancillary Jurisdiction and Intervention Under Federal Rule 24: Analysis and Proposals, 58 IND. L.J. 111, 112 n.6 (1982). Permissive intervention under Rule 24(b) does require independent jurisdiction. See Fed. R. Civ. P. 24(b); see also Blake v. Pallan, 554 F.2d 947, 955-56 (9th Cir. 1977) (Rule 82 provides that federal rules not construed to alter jurisdiction); Francis v. Chamber of Commerce of the United States, 481 F.2d 192, 195 n.6 (4th Cir. 1973) (permissive intervention requires independent jurisdictional grounds for defense or claim).

45. When a third-party plaintiff and a third-party defendant are co-citizens, jurisdiction is deemed ancillary to the main claim. When a plaintiff and the third-party defendant are co-citizens, the same rule applies unless the plaintiff amends the complaint to assert his own claim against the third-party defendant or the later asserts a counter-claim against the former. See generally 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3523 (1984); Stephens, Ancillary Jurisdiction: Plaintiffs' Claims Against Non-Diverse Third-Party Defendants, 14 LOY. U. CHI. L.J. 419 (1983).

46. If the cross-claim is for indemnity or contribution, ancillary jurisdiction is sufficient. See Fed. R. Civ. P. 13(g). When the cross-claim is for the cross-claimant's own loss, some courts require independent jurisdiction. Compare Farr v. Detroit Trust Co., 116 F.2d 807, 811-12 (6th Cir. 1941) (cross-claim dismissed when realignment of parties destroyed diversity) with Belcher v. Grooms, 406 F.2d 14, 15 (5th Cir. 1968) (judge declined to realign parties which would destroy diversity).
federal court to decide a pendent state law claim without independent jurisdiction, even after the federal claim is dismissed on the merits. And, at least when federal question jurisdiction is exclusive, a federal court may even allow joinder of a pendent party. Thus an attorney who can get one foot in the federal courthouse door may be able to get all the way in and may even be allowed to bring along others.

**THrust:** The federal court should abstain.

**Parry:** The abstention doctrine is really five more or less distinct categories in which the federal court declines to proceed although there is jurisdiction. The Pullman abstention doctrine allows a federal court to refrain from deciding a constitutional challenge to state conduct if there is an unsettled question of state law that may control and obviate the federal issue. The Burford abstention doctrine generally allows the federal court to defer to a state's administration of state affairs and avoid unnecessary conflict. A variant of Burford abstention, the Younger doctrine, requires that a federal court abstain from granting declaratory or injunctive relief when a state criminal

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47. See United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) (federal court had power to hear state contract claim after federal action dismissed). Two recent Fifth Circuit decisions demonstrate the principle of dismissing the remaining state claim when state interests dominate. Compare Laird v. Board of Trustees, 721 F.2d 529 (5th Cir. 1983) (rejecting pendent jurisdiction because issue was of statewide importance) with Transource Int'l, Inc. v. Trinity Indus., Inc., 725 F.2d 274, 285 (5th Cir. 1984) (pendent jurisdiction approved on state antitrust claims). See generally Baker, Federal Jurisdiction, 16 TEx. TECH L. REV. 145, 150 (1985) (state claim should be retained when “common sense” suggests).


proceeding or its equivalent is pending against the federal plaintiff.\textsuperscript{52} A fourth category, certification, recognizes the legitimacy of exercising federal court discretion to certify state law questions to the highest court of the state under some state statute or state court rule.\textsuperscript{53} A fifth category, of doubtful validity but mentioned for the sake of completeness, posits federal discretion to stay or dismiss the federal action simply because a parallel action is pending in state court.\textsuperscript{54}

It may be unfair to mention these doctrines and then weakly finesse my "parry" by observing that they are so subtle and full of nuance as not to be readily captured in this format. So be it. A few observations, however, are in order.

The last mentioned doctrine, from time to time invoked in wild-cat fashion by lower courts,\textsuperscript{55} must be of dubious validity considering recent Supreme Court opinions\textsuperscript{56} requiring exceptional circumstances to


stay a federal action. Hence, a straightforward challenge to its legitimacy by the party hoping for a federal forum is in order. Certification, the fourth variation, applies in diversity cases; is a creature of the relevant state provision; and merely stays the federal proceeding, usually on appeal. Its effect is to substitute a state court for the federal court only for the state law question. Everything else remains federal. The first three doctrines — the Pullman, Burford and Younger hybrids — can be costly in terms of delay and lost federal opportunity. Their application may sound in abstractions of constitutional law. The degree of certainty of the state law may control. Interim relief may possibly be afforded by the federal court while state proceedings are pursued. Later federal proceedings, if likely, and including Supreme Court review of state court decisions affecting federal rights, should be within counsel's contemplation during the state court so-


59. See, e.g., Babbitt v. United Farm Workers Nat. Union, 442 U.S. 289, 312 n.18 (1979) (suggestion that appellees be protected against enforcement of statute pending certification left to district court); Catrone v. Massachusetts State Racing Comm., 535 F.2d 669, 672 (1st Cir. 1976) (fairness and equity suggest preliminary injunction to protect Catrone's livelihood until state outcome); Deck House, Inc. v. New Jersey State Board of Architects, 531 F. Supp. 633, 644-48 (N.J. 1982) (injunctive relief should be issued until state decision). But see DeSpain v. Johnston, 731 F.2d 1171, 1176 (5th Cir. 1984) (federal court must abstain from granting relief when state criminal action pending); McDonald v. Burrows, 731 F.2d 194, 197 (5th Cir. 1984) (federal injunction not appropriate against state criminal prosecution). See generally Wells, Preliminary injunctions and Abstention: Some Problems in Federalism, 63 Cornell L. Rev. 65 (1977) (proposes more extensive preliminary relief to accommodate interests and further goals of abstention).
These doctrines are indeed very complex, to the point of being downright metaphysical. That, however, is their vulnerability. It seems to me, that is the secret of much of federal jurisdiction. Incantation and ritual can move the court to act or not to act. Steeped in their lore, a persuasive advocate often can convince the federal court to go on. My best, last advice is to research and reflect, never losing sight of the federalism concerns which undergird this area.

**THRUST:** The plaintiff has filed suit in state court.

**PARRY:** Removal may be possible; the trick is to know why, when and how. Our basic judicial scheme contemplates concurrent state and federal court jurisdiction. Under the federal statutes, an action may be transferred from a state court to a federal district court for trial. The choice to remove is an isomer of the choice of the original forum, which I assume in this essay prefers the federal court. Removal is a right which, if applicable, prevents a state from confining a controversy to its courts and obliges the federal court to accept jurisdiction. 60

Curiously, lawyers seem to have more problems with removal than with other federal jurisdictional issues. 61 The device is purely statutory and first attention must rest on the provisions in 28 U.S.C. §§ 1441-1451. 62 Removal jurisdiction is meant to insure both a competent and impartial forum and an appropriate forum for vindicating federal rights. 63 Thus, removal parallels, but is not quite identical with, the diversity and federal question original jurisdictions. Removal jurisdiction is derivative which means that the state court must

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The text will discuss only civil cases. Criminal cases are removable by federal officers charged for acts done in their official duty and by defendants with certain civil rights claims. See 28 U.S.C. §§ 1442 (federal officers) & 1443 (civil rights) (1982).


have had jurisdiction before the federal court may act. Since state
courts are courts of general jurisdiction, state subject matter jurisdic­tion is not too much of a problem, although state personal jurisdiction
can be more troublesome. A removing defendant may choose to re­move and then litigate the latter question in the federal forum. If
the state court does have jurisdiction, the matter must also fall within
the federal removal jurisdiction. Unless a specific statute provides
otherwise, a case within the original federal question jurisdiction may
be removed. General federal question corollaries, such as the “arising
under” analysis and the well-pleaded complaint rule, all apply.
There may be some play in the jurisdictional joints, however, for a
removing party to entreat the federal court not to allow the plaintiff to
be so complete a master of his claim as to use “artful pleading” to
prevent removal. Removal jurisdiction based on diversity is likewise
coeextensive with the original jurisdiction with one important limita­tion, that a defendant who is a citizen of the forum may not remove
solely on diversity grounds.

269 (1922). Defects in service of process may be cured while removal is pending in federal
court. See 28 U.S.C. § 1448 (1980); see also 14A C. WRIGHT, A. MILLER & E. COOPER,
FEDERAL PRACTICE AND PROCEDURE § 3738 (1985) (procedure after removal). The defend­ant, however, does not waive any procedural defects by removing the case to federal court. See
George v. Lewis, 228 F. Supp. 725, 727 (D.C. Colo. 1964); Mid-Wisconsin, Inc. v. Sun-X

compensation laws); 28 U.S.C. § 1445(a) (1982) (certain actions against railroads); & 28
U.S.C. § 1445(b) (suits against common carriers under Interstate Commerce Act unless
amount exceeds $3,000). See generally 14A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL
PRACTICE AND PROCEDURE § 3729 (1985) (proceedings under other statutes providing for or
prohibiting removal).

66. See Federated Dep’t Stores, Inc. v. Moitie, 452 U.S. 394, 397 n.2 (1981) (nature of
claim, not plaintiff’s characterization, examined). See generally Note, Federated Dep’t Stores,
of parties’ litigation strategies on court’s disposition of case discussed).

452, 455 (Hawaii 1980) (diversity must exist when original action filed as well as when petition
for removal filed).

Removal becomes more problematical in diversity cases involving state fictitious party pro­visions sometimes called “John Doe practice.” See generally Note, John Doe, Where Are You? The Effects of Fictitious Defendants on Removal Jurisdiction in Diversity Cases, 34 ALA. L.
REV. 99 (1983) (removal defeated by nominal disinterested parties); Note, Doe Defendants and
(proposal for courts to take jurisdiction over fictional defendants).
The removal statute does provide a small window into federal court beyond the original jurisdictions. When there are multiple claims or multiple parties, section 1441(c) allows a defendant to remove the entire case if there is "a separate and independent claim or cause of action, which would be removable if sued upon alone."\(^68\) The district court may then retain jurisdiction over the whole case or sever and remand the matters not within its original jurisdiction.\(^69\) That window has been almost closed by a Supreme Court interpretation which suggests that the kind of relatedness required by the typical state joinder rules negates the necessary condition of separateness and independence for removal to federal court.\(^70\) Nevertheless, the subsection should not be overlooked, for lower courts do not speak with one voice on many key issues.\(^71\)

Finally, Title 28 contains a number of special removal provisions, each with separate annotations, in addition to the general statute, for

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69. 28 U.S.C. § 1441(c) provides:
Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.


71. Application of section 1441(c) to third party claims is an example of an issue dividing the lower courts. Compare Ford Motor Credit Co. v. Aaron-Lincoln Mercury, Inc., 563 F. Supp. 1108, 1111-12 (N.D. Ill. 1983) (under section 1441(c) third party claim removable when basis of liability and recovery separate) with Carr v. Mid-South Oxygen, Inc., 543 F. Supp. 299, 301 (N.D. Miss. 1982) (wife's loss of consortium claim is not separate from husband's personal injury claim and not removable). See generally 14A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3724 (1985) (independent causes of action under section 1441(c) analyzed); Note, Third Party Removal Under Section 1441(c), 52 FORDHAM L. REV. 133, 143 (1983) (claims by third parties are not separate and independent to justify removal).
example: section 1441(d) (removal of civil action against foreign state); section 1442 (suit or prosecution against federal officers); section 1442a (suit or prosecution against member of armed forces); section 2241(c)(2) (habeas corpus relief from state custody); section 2679(d) (injury caused by federal employee within scope of employment); section 1443 (civil rights actions). Of these the last mentioned is the most expansive. And there are other provisions in the Code recognizing a particularized right to remove, for example: 12 U.S.C. § 632 (Federal Reserve Bank); 12 U.S.C. § 1452(e) (Federal Home Loan Mortgage Corporation); 22 U.S.C. § 282f (International Finance Corporation); 22 U.S.C. § 286a (International Monetary Fund and International Bank for Reconstruction and Development). These and other special provisions should not be overlooked.

III. DIVERSITY

THRUST: There is no diversity jurisdiction over domestic relations cases.

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73. U.S. CONST. art. III, § 2 provides in part:

The judicial Power shall extend to all Cases, in Law and Equity ... between Citizens of different States. . . .

U.S. CONST. art. III, § 2.


74. See, e.g., Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 512-14 (2d Cir. 1973) (strong interest of state in domestic relations justifies jurisdiction); Magazenar v. Montemuro, 468 F.2d 782, 787 (3rd Cir. 1972) (since domestic relations pecu­ liarly suited to state control, exception to federal jurisdiction justified); Buerchold v. Ortiz, 401 F.2d 371, 373 (9th Cir. 1968) (experience and interest justifies state court jurisdiction to decide paternity and child support).
Parry: For more than a hundred years, that has been the announced rule. Traditionally, diversity plaintiffs have been denied a federal forum in domestic relations suits for divorce, property settlements, alimony, and child custody. Nothing in the Constitution requires this approach. Instead, this has been a judge-made exception to the jurisdictional statute which recently has shown signs of narrowing.

Results in recent cases have been inconsistent and unpredictable, in part, because the courts do not seem willing or able to define the boundaries of the exception. An opportunistic proceduralist should view this confusion as an opening into federal court. Recent decisions by some federal courts have held that causes of action sounding in tort or contract between family members fall outside the exception if resolution of the issues does not depend on familial relation and the suit is not a transparent effort at avoiding the rule. Just when a claim is within or without the exception is not easily determined. One


recent decision illustrates the wavering nature of the line. A man’s
tort action to recover money damages from his ex-wife for the alleged
kidnapping of their child was within the diversity jurisdiction while
his request for injunctive relief to enforce a child custody decree was
not within the exception and barred.79

**THRU**ST: Federal courts may not hear probate matters.80

**PARRY:** The analysis follows the last thrust-parry. Nothing in the
Constitution or in the statute necessarily requires this second judge-
made rule. There seems to be even more room for exception here. A
leading commentator has observed that the rule “is far from absolute”
and depends on “unclear distinctions of the utmost subtlety.”81
Again, some recent decisions seem to be narrowing the bar.

There is agreement that “pure” probate matters are outside federal
diversity jurisdiction. A federal court may not take control of prop-
erty in a state court’s custody, may not invoke a general jurisdiction
over the probate, and may not otherwise interfere with the state
court’s probate proceeding.82 Once the suit may be characterized as
not involving “pure” probate, the issue becomes whether the federal
action will interfere unduly with the state probate proceedings. The
courts have developed two ways to evaluate “interference.” One
approach focuses on the nature of the claim. If plaintiff would have the
federal court rule on the validity of the will, there is interference and
the claim is barred.83 If plaintiff admits the validity of the will and
merely asserts a claim to share in the distribution there is no interfer­
ence and the federal claim may be heard.84 A second, more common
approach examines the procedures which would have been followed

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79. Bennett v. Bennett, 682 F.2d 1039, 1042-44 (D.C. Cir. 1982); see also Wasserman v.
Wasserman, 671 F.2d 832, 834-35 (4th Cir. 1982) (tort of child enticement within federal
jurisdiction). See generally Note, Enforcing State Domestic Relations Decrees in Federal Court,

80. See Byers v. McAuley, 149 U.S. 608, 617 (1983) (no federal jurisdiction to distribute
property in state court custody); Turton v. Turton, 644 F.2d 344, 348 (5th Cir. 1981) (federal
court may not oversee estate administration or require premature accounting).

Turton v. Turton, 644 F.2d 344, 347 (5th Cir. 1981) (no federal jurisdiction to transfer prop­
erty still under probate) with Akin v. Louisiana Nat’l Bank, 322 F.2d 749, 753 (5th Cir. 1963)
(federal court exercises jurisdiction over suit against executor).

82. See Armstrong, Practice and Procedure, 34 MERCER L. REV. 1363, 1364-65 (1983)
(limited probate jurisdiction of federal courts discussed and approved).

83. See Mitchell v. Nixon, 200 F.2d 50, 51-52 (5th Cir. 1952) (will contest not within
probate exception to allow federal jurisdiction).

had the federal claim been brought in state court. If the claim would be cognizable only in the state probate court, interference is established and the federal court will refuse to exercise jurisdiction. If the claim could have been enforced in a state court of general jurisdiction, the federal court will entertain the suit. Either approach or some combination allows for significant federal jurisdiction despite the general rule. That is my point.

THRUST: A state is not a citizen for purposes of diversity and may not be sued under that jurisdiction.

PARRY: That is the well-established rule. Also as well-established, however, is that a political subdivision of a state is a citizen of that state for diversity purposes unless it is the state's alter ego, (i.e., the state is the real party in interest as determined by state law). A diversity suit may proceed against a state agency which is established to be independent, separate, and distinct from the state. If appropriate, naming the state agency may be the ticket into federal court.

THRUST: A party "by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction . . . ."

85. See Sutton v. English, 246 U.S. 199, 205 (1918) (no federal jurisdiction when county court exercises original probate jurisdiction); Ledbetter v. Taylor, 359 F.2d 760, 761 (10th Cir. 1966) (no federal jurisdiction when exclusive jurisdiction in county probate court).

86. See Burgess v. Murray, 194 F.2d 131, 133 (5th Cir. 1952) (federal court has jurisdiction to remove trustee).

87. See Rice v. Rice Found., 610 F.2d 471, 476 (7th Cir. 1979) (either, both approaches or a new approach may be used to determine jurisdiction in probate-like action). See generally Note, The "Probate Exception" to Federal Diversity Jurisdiction: Matters Related to Probate, 48 Mo. L. Rev. 564 (1983) (probate and estate administration while matters of state interest may fall within federal court jurisdiction).


89. See Moor v. County of Alameda, 411 U.S. 693, 717 (1973). This rule is separate and distinct from any issue of eleventh amendment immunity although the analysis of the two issues is "virtually identical." See Tradigrain, Inc. v. Mississippi State Port Auth., 701 F.2d 1131, 1132 (5th Cir. 1983).

90. See Ex parte Young, 209 U.S. 123, 126 (1908) (suit against attorney general was not a suit against Minnesota barred by the eleventh amendment). But see Penhurst State School & Hosp. v. Halderman, ___ U.S. ___, 104 S. Ct. 900, 917-19, 79 L. Ed.2d 67, 91 (1984) (state law claims against state officials brought in federal court barred by eleventh amendment).

91. 28 U.S.C. 1359 (1982). The typical case within this statute involves the making or joining of parties to satisfy the diversity requirement. The statute, however, would apply for
PARRY: In those words, 28 U.S.C. § 1359 prohibits the manufacture of diversity. When the transfer is absolute and the assignor retains no interest, the citizenship of the assignee controls and there is no impropriety or collusion. A nondiverse assignor might sell a liquidated claim to a diverse assignee, but that strategy is limited to negotiable claims. A party can change his own domicile to another state and gain jurisdiction even if the move is motivated solely by a desire to create jurisdiction. Most claims, however, are not so marketable and do not justify moving to another state. Short of those strategies, section 1359 must be overcome. Arguably, section 1359 is as effective in creating jurisdiction as it is in defeating it. The collusion issue commonly arises in actions initiated by nonresident fiduciaries such as administrators or guardians. Two approaches have emerged. Some courts apply a “motive/function” test to the appointment and consider: (1) the relationship between the representa-
tive and the represented person; (2) the representative's powers and responsibilities; (3) whether the diverse representative is a logical choice; and (4) the nature of the suit. 97 Other courts apply a "substantial stake" test which deemphasizes motive and considers how much of an interest the representative has in the outcome of the suit. 98 In courts following this second approach, the advocate might be able to structure the assignment in such a way as to strengthen an anticipated claim of diversity. In any event, the creative lawyer seeking entry to federal court should identify the applicable test and argue accordingly.

THRUSt: The jurisdictional amount requirement is not satisfied.

PARRY: As long as we have had diversity jurisdiction, we have had the requirement that a certain minimum amount be in controversy before suit can be brought in federal court. 99 Since 1958, when the figure was last increased, the amount in controversy, exclusive of interest and costs, 100 has been established at "in excess of $10,000." 101 The most obvious "parry" is simply to allege that the requisite amount is in controversy, which seems easy enough. Back in 1958, $10,000 was a more significant amount than it is today. Then that was how much a house cost, today you can find an economy automo-


bile for that price. In most cases, alleging satisfaction will be "parry" enough. The Supreme Court has held that "[t]he sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." A second "parry" is available when the value of the benefit to the plaintiff is different from the value of the loss to the defendant, as frequently is true when the suit is for an injunction. Choosing the viewpoint with the higher value may save jurisdiction. While some courts woodenly value the controversy from the plaintiff's viewpoint alone and other courts woodenly use the defendant's viewpoint alone, a recent trend suggests a more flexible approach to look at both to determine if either viewpoint satisfies the requirement. A third possible "parry" —aggregation— can be little more than mentioned in the brief compass of this essay. A leading commentator has concluded, "[t]he law on aggregation of claims to satisfy the requirement of amount in controversy is in a very unsatisfactory state ... [t]hus it is not altogether easy to say what the law is in this area, and it is quite hard to say why it is as it seems to be." For now, it is enough to say that aggregating separate claims by a single plaintiff against a single defendant may allow the suit to continue, but the rules change


107. See Fed. R. Civ. P. 18; see also Lynch v. Porter, 446 F.2d 225, 228 (8th Cir.) (once diversity invoked single plaintiff may aggregate claims), cert. denied, 404 U.S. 1047 (1971);
when there are either multiple plaintiffs or multiple defendants. The point, again, is that the complexities of the jurisdictional rules create windows into federal court.

IV. FEDERAL QUESTIONS

THRUST: The Declaratory Judgment Act is not a grant of jurisdiction to the federal courts.

PARRY: I have no quarrel with that truism, but I might suggest that invoking the court's discretion under the Act can be an important part of an overall effective jurisdiction strategy. Generally, the declaratory judgment statute allows earlier access to federal court when neither party may yet be able to sue for a coercive remedy, so long as there exists a genuine case or controversy. The difficulty-to-be-turned-to-advantage involves the rigid requirement that the federal question appear on the face of the complaint well-pleaded, a require-


108. See Walter v. Northeastern R. Co., 147 U.S. 370, 374 (1893) (each separate plaintiff with separate claim(s) must satisfy jurisdictional amount); Wheless v. City of St. Louis, 96 F. 865 (E.D. Mo.) (distinct claims cannot be aggregated to satisfy jurisdictional amount), aff'd, 180 U.S. 379 (1899). See generally C. Wright, A. Miller & E. Cooper, 14A Federal Practice and Procedure: Jurisdiction 2D § 3704 (1985) (aggregation of claims analyzed).


ment which dates from the forms of action era.112 The situation in which plaintiff sues on an affirmative federal right obviously satisfies the well-pleaded complaint rule, as when an alleged owner of a patent seeks a declaration of validity and infringement rather than suing the defendant for damages.113 Suppose, however, that the request is for a declaration that the opposing party does not have a federal right. Before the creation of the declaratory remedy, such a complaint only would have anticipated a federal question defense and would not have satisfied the well-pleaded complaint rule.114 Today, the defendant in the patent example above can seek a declaration that he has not infringed or that the alleged owner does not hold a valid patent.115 Such use of the Act does allow some plaintiffs into federal courts who could not gain access otherwise.

One additional creative use of the declaratory judgment involves a plaintiff seeking a declaration that federal law immunizes him from a nonfederal claim by a defendant.116 Suppose one party to a contract asks for a declaration that an after-enacted federal statute excuses his further performance and preempts the other party's suit for breach. As one begins to expect in matters of federal jurisdiction, there are two approaches. The narrow approach would require dismissal, since in the coercive action suing for breach the federal question would arise only as a defense to the contract suit brought by the nonbreaching party.117 The broader and seemingly viable view would allow the


116. See Jewell Ridge Coal Corp. v. Local No. 6167, UMW, 325 U.S. 161, 162-63 (1945) (employer sought declaratory judgment that under Fair Labor Standards Act he was not liable to employees).

117. See Skelley Oil v. Phillips Petroleum Co., 339 U.S. 667, 673-74 (1950) (artful plead-
artful pleading.118 Recent decisions119 suggest that a party, claiming that federal law controls the issue and preempts otherwise applicable state law, can institute a federal declaratory judgment action even though a coercive suit by the party who is relying on the state law could not be brought in or removed to federal court.120 Strategy thus almost overtakes jurisdictional principles as the party claiming a federal preemption will seek to avoid an unsympathetic state forum by bringing a declaratory judgment action in federal court.121


121. See Note, Federal Jurisdiction Over Preemption Claims: A Post-Franchise Tax Board Analysis, 62 TEXAS L. REV. 893 (1984) (discussion of federal question jurisdiction over declaratory judgments which raise preemption as sole federal issue). Another strategic use of a declaratory judgment seeks to have a party declared not liable or liable for future acts. While commentators have suggested that jurisdiction should not exist because the controversy is a mere contingency, courts have generally found a sufficient dispute to create jurisdiction. Compare HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 132 (Baton, Mishkin, Shapiro & Wechsler ed. 1973) (legal consequences of future conduct too speculative to justify jurisdiction) with Steffel v. Thompson, 415 U.S. 452, 461 (1974) (possibility of future criminal liability sufficient threat to create jurisdiction) and Int'l Harvester Co. v. Deere & Co.,
THREAT: Federal law creates a duty without expressly providing a remedy and, consequently, there is no federal question.

PARRY: If a remedy may be implied, there is federal question jurisdiction.\(^{122}\) Such a remedy may be implied directly under the Constitution\(^{123}\) or under some relevant statute.\(^{124}\) The important jurisdictional point is that the implication of a remedy simultaneously and necessarily creates federal question jurisdiction over the newly-created private cause of action. While the constitutional category is somewhat limited by that document's text, in our highly regulated economic system there are many statutes from which to choose.\(^{125}\) Four factors generally justify the implication of a statutory remedy: (1) whether the plaintiff is a member of the class sought to be protected by the statute; (2) whether there is any indication of legislative intent to create or deny a private remedy; (3) whether a private remedy would further the legislative purpose; and (4) whether the cause of action is one traditionally reserved to state law so that a federal implication would be inconsistent.\(^{126}\) The key factor, however, is divining a congressional intent to establish a private right of action in the entrails of legislative history, and more recent Supreme Court decisions suggest a hardening of attitude against that implication.\(^{127}\)

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\(^{125}\) The courts seem to see themselves to be freer to imply remedies under the Constitution than under a statute. See Davis v. Passman, 442 U.S. 228, 239-43 (1979).


\(^{127}\) See, e.g., California v. Sierra Club, 451 U.S. 287, 301 (1981) (no private cause of action implied for violation of Rivers and Harbor Act); Cort v. Ash, 422 U.S. 66, 82-84 (1975) (no private right of action implied for shareholder when corporation violated political contri-
The plaintiff should hope for a precedent from the earlier period of 
willingness-to-implicate, since these days new implications seem so 
difficult to obtain. Nevertheless, the implication of a private cause of 
action is still possible, and some federal judges may be more willing to 
imply a remedy and create the corresponding jurisdiction on a com­ 
pelling record. 128

THrust: There is no federal question arising under either the 
Constitution or any federal statute.

PARRY: The statutory term “laws” for the general “arising 
under” jurisdiction includes federal common law. 129 That federal 
common law exists we may accept as an article of faith; just what it is 
and when it applies are questions not readily answered by any similarly bold assertion. 130 There are three hallmarks of federal common 
law any of which might justify its invocation. 131 First, some situa­ 
tions require a federal common law to protect an uniquely federal 
interest when state law would be in conflict. 132 Second, some situa­ 
tions are so dominated by federal statutes that federal common law 
seems a necessary concommitant. 133 Third, there are some situations

128. Cf. Note, Closing the Courthouse Door on Section 503 Complaints: Davis v. United 
persuaded to recognize a cause of action under section 1983 and jurisdiction therefore under 


130. No less a jurist than Justice Brandeis made the point in two opinions on the same 
decision day. Compare Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (“There is no 
federal general common law.”) with Hinderlinder v. La Plata River & Cherry Creek Ditch Co., 
304 U.S. 92, 110 (1938) (“[It is a question of ‘federal common law’ upon which neither the 
statutes nor the decisions of either State may be conclusive.”)

131. See C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: 
JURISDICTION § 4514 (1982) (federal common law outlined and analyzed).

132. See Wilson v. Omaha Indian Tribe, 442 U.S. 653, 654 (1979) (change of course of 
stream on Indian land governed by federal law). But see Burks v. Lasher, 441 U.S. 471, 477 
(1979) (termination of stockholders suit by directors under federal acts governed by state law); 
loan program governed by state law).

in which the federal and national concern is inherently superior and federal law must control.\textsuperscript{134}

Federal common law thus may be invoked if there are significant federal interests at stake which would be impaired if state law is used and if there would be no significant displacement of state law.\textsuperscript{135} When federal common law does apply of course, federal jurisdiction follows.\textsuperscript{136}

**THRUST:** There is no general federal question jurisdiction.

**PARRY:** Assuming that is so, the attorney should look over the menu of special federal question jurisdiction statutes. Between 1875 and 1980, the general federal question statute carried a jurisdictional amount requirement.\textsuperscript{137} Consequently, Congress enacted a plethora of special statutes without an amount requirement which are spread throughout Chapter 85 of Title 28 and beyond. Given the equation of

\hspace{1cm} (Interstate Commerce Act regulation of tariffs predicates all actions for payment arising under federal law); Louisville & Nashville R. v. Rice, 247 U.S. 201, 202 (1918) (duty and obligation to pay tariff depends on Interstate Commerce Act to the exclusion of all other rules).

\hspace{1cm} 134. See, e.g., Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (federal common law exists for rights of United States, interstate, international, and admiralty disputes); Deitrick v. Greaney, 309 U.S. 190, 201 (1940) (purpose of National Bank Act to protect creditors against insolvency of bank national concern); Dyke v. Dyke, 227 F.2d 461, 464 (6th Cir. 1955) (federal law must govern rights and duties of United States on insurance policies issued to servicemen).

\hspace{1cm} 135. See, e.g., Hinderlinder v. La Plata Co., 304 U.S. 92, 110 (1938) (state statutes not conclusive as to interstate water apportionment); City of Evansville v. Ky. Liquid Recycling, Inc., 604 F.2d 1008, 1018 (7th Cir. 1979) (interstate effects of water pollution states federal common law nuisance claim); In re Agent Orange Product Liability Litigation, 506 F. Supp. 737, 749 (E.D. N.Y. 1979) (war contractor’s liability to soldiers for effects of toxic chemicals not yet developed in state law), rev’d, 635 F.2d 987, 993 (2d Cir. 1980) (no federal interest in servicemen’s claim against private manufacturer), cert. denied, 102 S. Ct. 980 (1981). See generally, Note, In re Agent Orange Product Liability Litigation: Limiting the Use of Federal Common Law as the Basis for Federal Question Jurisdiction in Private Litigation, 48 BROOKLYN L. REV. 1027, 1042 (1982) (restricting federal common law in private suits).

\hspace{1cm} The concept is not unlike the doctrine of protective jurisdiction which surfaces from time to time. Protective jurisdiction is invoked in federal court cases between nondiverse parties which are governed by nonfederal rules of decision. The case is said to “arise under” the jurisdictional statute. See Verlinden B. V. v. Cent. Bank of Nigeria, 461 U.S. 480, 497 (1983). See generally, Note, The Theory of Protective Jurisdiction, 57 N.Y.U. L. REV. 933, 948 (1982) (protective jurisdiction justified by belief that state determination of state law inadequate).


\hspace{1cm} 137. See C. WRIGHT, LAW OF FEDERAL COURTS § 17, at 91 (4th ed. 1983) ($10,000 jurisdictional amount until 1980).
the "arising under" test usually used in these special statutes with that test in the general statute, the elimination of the general amount requirement may render these special provisions surplusage.\textsuperscript{138} I am not so sure. First, the special statutes have been viewed as primary exercises of congressional power to create docket priorities, while the general statute is more correctly viewed as residual, a delegation to the courts to deal with those matters Congress neglected.\textsuperscript{139} Second, some special federal question statutes impose an amount requirement which still applies after the repeal of the amount requirement for general federal questions.\textsuperscript{140} Third, lawyers and judges have formed the habit of invoking the particular statute which, logic impels, should control over the general. Fourth, while the "arising under" test is analytically the same in the two categories, I cannot help but believe that when a court is asked to consider a case under a particular statutory grant there is somewhat more hydraulic pressure toward finding jurisdiction than there is under the general provision.\textsuperscript{141} Fifth, some special federal question jurisdictions go further, upon some research, than might be thought possible upon first reading. They thus provide a broader access to federal court. For example, suppose two private pleasure boats collide during a weekend skiing or fishing outing, causing serious personal injury and property damage. Is the subsequent negligence suit "[a]ny civil case of admiralty or maritime jurisdiction" under section 1333(1)? Yes, the Supreme Court said, so long as the accident occurs on navigable waters.\textsuperscript{142}

\textsuperscript{138} See C. WRIGHT, LAW OF FEDERAL COURTS § 17, at 91 n.3 (4th ed. 1983) (statutes granting jurisdiction without regard to amount have lost significance).

\textsuperscript{139} See Luneberg, Justice Rehnquist, Statutory Interpretation, the Policies of Clear Statement, and Federal Jurisdiction, 58 IND. L.J. 211, 228 (1982).

\textsuperscript{140} See 28 U.S.C. § 1337(a) (statutes regulating commerce); see also Overnite Transp. Co. v. Chicago Indus. Tire Co., 668 F.2d 274, 276 (7th Cir. 1981) (certain actions under Interstate Commerce Act require $40,000 amount in controversy).

\textsuperscript{141} But see C. WRIGHT, LAW OF FEDERAL COURTS § 17, at 91 n.3 (4th ed. 1983) (arising under has same meaning in special statutes as in section 1331).

THINKING ABOUT FEDERAL JURISDICTION

In any event, the special federal question statutes should not be overlooked. A partial list of examples from Title 28 discloses their breadth: section 1333 (admiralty); section 1337 (statutes regulating commerce); section 1338 (patents); section 1339 (postal matters); section 1343 (civil rights); section 1344 (election disputes); section 1352 (federal bonds); and section 1346 (U.S. as defendant). Additionally, specific grants of jurisdiction are sprinkled throughout the substantive statutes. Any of them can be an entree to the federal forum.

THrust: There is a statute depriving the federal court of jurisdiction.

PARRY: Argue that this case does not fall within the statutory prohibition. Two provisions are commonly invoked. First, 28

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143. The following statutes also appear in 28 U.S.C.:
§ 1334 (bankruptcy matters and proceedings; after 1984 this will cover only bankruptcy appeals).
§ 1336 (review of certain ICC orders).
§ 1340 (internal revenue; customs duties).
§ 1350 (alien’s action for tort).
§ 1351 (actions against consuls, vice consuls, and members of a diplomatic mission).
§ 1364 (certain suits by the Senate or a committee thereof—this is one of three sections numbered § 1364).
§ 1352 (actions on bonds executed under federal law).
§ 1353 (cases involving Indian land allotments).
§ 1355 (actions to recover fines, penalties, or forfeitures incurred under federal law).
§ 1356 (seizures not within admiralty jurisdiction).
§ 1357 (injuries under certain federal laws).
§ 1362 (federal question actions by certain Indian tribes).
§ 1363 (actions to protect juror’s employment rights).

A number of sections of 28 U.S.C. also grant jurisdiction without regard to amount in controversy of cases to which the United States is a party:
§ 1345 (United States as plaintiff).
§ 1346 (United States as defendant).
§ 1347 (partition actions where United States is joint tenant).
§ 1348 (actions by United States to wind up national banking associations).
§ 1349 (actions by or against corporations where United States owns more than one-half of the stock).
§ 1358 (eminent domain).
§ 1361 (action in nature of mandamus against a government officer or agency).


U.S.C. § 1342 deprives the district courts of jurisdiction to enjoin the effect of any order of a state agency affecting public utility rates, if, and only if: (1) jurisdiction is based on diversity or a federal question arising under the Constitution; (2) the challenged rate order does not frustrate interstate commerce; (3) the rate order was preceded by a reasonable notice and hearing; and (4) there is an effective remedy in state court. Second, 28 U.S.C. § 1341 prohibits an injunction against the assessment or collection of any state tax if an effective remedy in state court exists. The strength of such provisions is easily used against their application. Their particularity means that if any of the identified conditions is missing the statute has no force or effect. Some research leavened with persuasion shows how the particular suit does not fit the bar and should go forward.

V. CONCLUSION

What should we make of all these thrusts and parries?

My theme has been that federal jurisdiction is complicated, sophisticated, and theoretical. We should expect that from a legal specialty which deals with such important issues of federalism. The litigator must be equal to that challenge. The crafty proceduralist uses that sophistication and complexity to advantage. In this, as in the rest of the trial arts, one must strive for mastery. One of Aesop’s Fables best describes what is at stake:

A swallow hatched her brood under the eaves of a Court of Justice. Before her young could fly, a serpent crept out of his hole and ate all the nestlings. When the poor bird returned and found her nest empty, she began a pitiable wailing. Another swallow suggested, by way of comfort, that she was not the first bird who had lost her young. ‘True,’ she replied, ‘but it is not only for my little ones that I mourn, but that I should have been wronged in that very place where the injured fly for justice.’


147. See 17 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 4236, 4237 (1978) (Johnson Act and Tax Injunction Act may be used as effective method of gaining access to federal forum).

148. Adapted from AESOP WITHOUT MORALS 188 (L. Daly trans. 1961).
A lawyer pleading into federal court may resemble our swallow. He brings his client's suit in federal court seeking a juster justice. Principles of federal jurisdiction, however, may play the role of the serpent. Often, all is lost without even the opportunity to argue the merits of the cause. In this essay I have highlighted some special ways to get into and to stay in federal court once that forum has been chosen over state court. These are some ways, in short, to build your nest out of the serpent's reach.  

149. Even if the nest is within reach, the serpent will lose to a sly mongoose:

At the hole where he went in
Red-Eye called to Wrinkle-Skin.
Hear what little Red-Eye saith:
'Nag, come up and dance with death!'  
Eye to eye and head to head,
(Keep the measure, Nag.)
This shall end when one is dead;
(At thy pleasure, Nag.)
Turn for turn and twist for twist —
(Run and hide thee, Nag.)

Hah! The hooded Death has missed!
(Woe betide thee, Nag!)
