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Thinking about Federal Jurisdiction - Of Serpents and Swallows.

Thomas E. Baker

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LEGAL ESSAY

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-

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eign.¹ 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.² Thus this threshold principle takes on controlling importance.³ The party invoking the federal power must affirmatively rebut a presumption against jurisdiction.⁴ Not only the party resisting jurisdiction but the court *sua sponte* must raise any jurisdictional issue, as well.⁵ This goes so far as to allow the party invoking the federal jurisdiction to challenge that jurisdiction when the result does not satisfy him.⁶ 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

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).

2. See *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 442 (1849) (statute may restrict jurisdiction of congressionally created lower federal courts); *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809) (constitutional subject matter limitations cannot be enlarged by statute). See generally *Hill & Baker, Dam Federal Jurisdiction!*, 32 EMORY L.J. 3, 3-7 (1983) (constitutional and statutory grants of jurisdiction discussed).

3. See *Turner v. President, Directors and Co. of Bank of North America*, 4 U.S. (4 Dam.) 8, 10-11 (1799) (record must affirmatively show federal jurisdiction); see also C. WRIGHT, *LAW OF FEDERAL COURTS* § 7, at 22-23 (4th ed. 1983) (federal courts are courts of limited jurisdiction).

4. See *McNatt v. General Motors Acceptance Corp.*, 298 U.S. 178, 181-82 (1935) (incumbent on plaintiff to allege jurisdictional facts).

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).

6. See, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 377 n.21 (1978) (when party disclosed lack of complete diversity in course of trial there was no jurisdiction regardless of inequity); *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 18 (1951) (defendant who removed case and successfully resisted remand may challenge jurisdiction after judgment for plaintiff); *Santos v. Alaska Bar Ass'n*, 618 F.2d 575, 577 (9th Cir. 1980) (subject matter jurisdiction may be raised for first time on appeal). But see generally *Dobbs, The Decline of Jurisdiction by Consent*, 40 N.C.L. REV. 49, 51-62 (1961) (criticizing the refusal of federal courts to recognize jurisdiction by consent to avoid inequity); *Morse, Judicial Self-Denial and Judicial Activism: The Personality of the Original Jurisdiction of the District Courts*, 3 CLEV.-MAR. L. REV. 7, 10-30 (1954) (advocating federal jurisdiction by consent).

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

7. See Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Cannons About How Statutes Are to Be Construed*, 3 *VAN. L. REV.* 395, 401 (1950) (classic application of thrust and parry format).

8. See *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (standing focuses on party seeking jurisdiction not on issues to be adjudicated). *But cf.* *Allen v. Wright*, ___ U.S. ___, ___, 104 S. Ct. 3315, 3325, 82 L. Ed. 2d 556, 570-71 (1984) (Court examines both party and issue in determining standing); *City of Los Angeles v. Lyons*, 461 U.S. 95, 106-07 n.7, n.8 (1983) (both complaint and party examined to establish standing).

9. See *Flast v. Cohen*, 392 U.S. 83, 105-06 (1968) (two prong nexus test met when taxpayers challenged specific congressional expenditure as exceeding establishment clause limitation). See generally Davis, *Standing: Taxpayers and Others*, 35 *U. CHI. L. REV.* 601, 601-28 (1968) (discussing *Flast* opinion and its ramifications); Scott, *Standing in the Supreme Court - A Functional Analysis*, 86 *HARV. L. REV.* 645, 645-49 (1973) (discussing erosion of standing doctrine in Supreme Court decisions).

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.¹¹ Local plaintiffs, however, may claim standing more easily as taxpayers challenging local expenditures.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.¹³ Injury, causation, and redressability are all that the Constitution requires.¹⁴ However, nontaxpayer standing seems more difficult to

appropriations under article 1, section 8 used to finance parochial schools attacked as violation of Establishment Clause).

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). See generally Note, *Recent Standing Cases and a Possible Alternative Approach*, 27 HASTINGS L.J. 213 (1975) (discussing *Richardson* and *Schlesinger* opinions restrictive view of *Flast*).

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).

13. See *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (three part standing test — article III minimum); see also *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 80-81 (1978) (organizations and residents had standing to challenge constitutionality of Price-Anderson Act). See generally Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case and Controversy Requirement"*, 93 HARV. L. REV. 297, 305-22 (1979) (outlining and discussing the constitutional requirements of standing).

14. See *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982) (each criteria must be satisfied); see also *City of Los Angeles v. Lyons*, 461 U.S. 95, 99 (1983) (redressability factor unsatisfied); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-46 (1976) (causation and redressability factors unsatisfied); *Rizzo v. Goode*, 423 U.S. 362, 372 (1976) (redressability factor unsatisfied); cf. also *Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 161-62 (1981) (redressability established); *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 78 (1978) (no requirement to negate speculative possibilities to establish redressability); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 261-63 (1977) (specific injury to non-profit corporation establishes standing).

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.¹⁵

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 intent¹⁷ 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).

17. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982) (congressional omission in statute examined to establish standing); see also Currie, *Judicial Review Under the Federal Pollution Laws*, 62 IOWA L. REV. 1221, 1271-80 (1977) (analyzing statutory standing under Clean Air Act).

18. See *Control Data Corp. v. Baldrige*, 655 F.2d 283, 288-91 (D.C. Cir. 1981) (plaintiff's contention requires court to apply zone of interest test); *Marshall & Isley Corp. v. Heilmann*, 652 F.2d 685, 693-98 (7th Cir. 1981) (zone of interest test applied separately to each statute).

19. See *Scheslinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 224-27 (1974) (incompatibility claim not particularized injury); *United States v. Richardson*, 418 U.S. 166, 176-78 (1974) (general interest in CIA accounts insufficient standing allegation). See generally Note, *The Generalized Grievance Restriction: Prudential Restraint or Constitutional Mandate?* 70 GEO. L.J. 1157, 1170-79 (1982) (discussion of grievance shared with citizenry at large as a bar to standing).

20. Cf. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 489 (1982) (rejecting argument that if this plaintiff does not have standing no one does); *United States v. Richardson*, 418 U.S. 166, 176-78 (1974) (citizens interest in lawful conduct by CIA generalized); *Scheslinger v. Reservists Comm. to Stop the*

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

War, 418 U.S. 208, 224 (1974) (belief in lawful conduct by Congressmen common to public at large).

21. See *Tileston v. Ullman*, 318 U.S. 44, 46 (1943) (physician seeking declaration of unconstitutionality of contraceptive regulation could not rely on his patient's rights). *But see* *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965) (physician in criminal prosecution had standing to represent patients). See generally Sedler, *The Assertion of Constitutional Jus Tertii: A Substantive Approach*, 70 CAL. L. REV. 1308 (1982) (review of jus tertii cases).

22. See, e.g., *Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333, 343 (1976) (three prong test for representational standing detailed); *National Ass'n for the Advancement of Colored People v. Alabama*, 357 U.S. 449, 458-60 (1958) (nexus with members sufficient for organization to act as representative); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 183-87 (1951) (Jackson, J., concurring) (appropriate for representative to vindicate members' rights). See generally Baker, *Constitutional Law*, 27 LOY. L. REV. 805, 807 (1981) (general discussion of representational standing).

23. See, e.g., *Carey v. Population Services Int'l*, 431 U.S. 678 (1977) (seller asserts rights of potential customers); *Craig v. Boren*, 429 U.S. 190 (1976) (female vendor permitted to assert rights of underage males); *Singleton v. Wulff*, 428 U.S. 106 (1976) (physician asserts patients' abortion rights). See generally Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974) (distinguishes jus tertii from statutory overbreath).

24. See C. WRIGHT, *LAW OF FEDERAL COURTS* § 13, at 72-73 (4th ed. 1983); see also *City of Akron v. Akron Center for Reproduction Health, Inc.*, ___ U.S. ___, ___ n.30, 103 S. Ct. 2481, 2498 n.30, ___ L. Ed. 2d ___, n.30 (1983) (physician subject to potential criminal liability under statute could assert privacy rights of minor patients).

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-

26. See *A.L. Mechling Barge Lines, Inc. v. U.S.*, 368 U.S. 324, 328 (1961) (when rate discrimination eliminated before adjudication, prior order vacated rather than dismissed for mootness); *California v. San Pablo & T. R. Co.*, 149 U.S. 308, 314 (1893) (federal court not empowered to decide moot questions or abstract propositions which cannot affect result in case at bar). See generally Hill & Baker, *Dam Federal Jurisdiction!*, 32 EMORY L.J. 3, 18 (1983) (mootness focuses on sequence of events in litigation). The mootness doctrine arises out of article III's "case and controversy" requirement. See *DeFunis v. Odegaard*, 416 U.S. 312, 319 (1974). See generally Comment, *A Search for Principles of Mootness in the Federal Courts*, 54 TEXAS L. REV. 1289, 1295-1302 (1976) (surveying mootness doctrine).

27. See, e.g., *Lane v. Williams*, 455 U.S. 624, 630 (1982) (opportunity to plead anew may avoid mootness); *Ridgeway v. Baker*, 720 F.2d 1409, 1411-12 n.2 (5th Cir. 1983) (legal consequences after release from prison prevents mootness); *Niles v. University Interscholastic League*, 715 F.2d 1027, 1030 n.1 (5th Cir. 1983) (filing for money damages prevents original injunctive remedy from becoming moot). See generally Baker, *Federal Jurisdiction*, 16 TEX. TECH L. REV. 145, 153-55 (1985) (discussing recent Fifth Circuit decisions).

28. See *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911); see also *Roe v. Wade*, 410 U.S. 113, 124-25 (1973) (abortion issue "capable of repetition, yet evading review").

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).

30. See FED. R. CIV. P. 4 (process). See generally 4 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE: CIVIL* §§ 1064-73 (1969) (outlining various challenges).

31. See 4 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* §§ 1064-65, 1094 (1969) (personal jurisdiction and service discussed).

ments for corporations of state of incorporation, doing business, or presence.³² Those are all commonplace.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.³⁴ The former is both constitutional and statutory and cannot be garnered by consent, waiver, or estoppel.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.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.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.

32. *See id.* §§ 1066-67 (corporation service detailed).

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*, ___ U.S. ___, ___, 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).

There has been some recent reconsideration in the area of alien corporations which may spill-over into domestic cases. *See Note, Diversity Jurisdiction Over Alien Corporations*, 50 U. CHI. L. REV. 1458, 1464-66 (1983) (alien corporation may be deemed state citizen for diversity purposes); *Note, Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard*, 95 HARV. L. REV. 470 (1981) (proposal to correct jurisdictional immunity for aliens doing business in United States).

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).

35. *See, e.g.,* *Sosna v. Iowa*, 419 U.S. 393, 398 (1975) (residency requirement for divorce cannot be waived); *Mitchell v. Maurer*, 293 U.S. 237, 241-42 (1934) (diversity requirement cannot be waived to confer jurisdiction); *Mansfield, C. & L. M. Ry. v. Swan*, 111 U.S. 379, 382 (1884) (requisite citizenship for jurisdiction must affirmatively appear on record). *See generally* C. WRIGHT, *LAW OF FEDERAL COURTS* § 7, at 23 (4th ed. 1983) (federal court jurisdiction conferred by Constitution and Congress).

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

37. *See* FED. R. CIV. P. 37(b)(2)(A); *see also* *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea*, 456 U.S. 694, 709 (1982) (trial court sanction established personal jurisdiction over foreign insurer). *See generally* *Note, Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea: Justifying Establishment of Jurisdiction as a Discovery Sanction*, 70 CAL. L. REV. 1446, 1454-61 (1982) (discusses punitive aspect of sanction and loss of challenge to jurisdiction).

THRUST: 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.³⁸ 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.³⁹ In short, the power to decide a case or controversy is the power to decide the whole dispute.⁴⁰ 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.⁴¹ Pendent jurisdiction applies to claims raised by the plaintiff in the complaint.⁴²

38. See Miller, *Ancillary and Pendent Jurisdiction*, 26 S. TEX. L.J. 1, 2-5 (1985) (distinguishes ancillary and pendent jurisdiction and their availability); see also Baker, *Federal Jurisdiction*, 16 TEX. TECH. L. REV. 145, 148 (1985) (pendent variation raised in complaint and ancillary raised by other parties after complaint). But see *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 n.8 (1978) (unnecessary to distinguish between pendent and ancillary jurisdiction); cf. *Aldinger v. Howard*, 427 U.S. 1, 13 (1976) (differences between ancillary and pendent jurisdiction not addressed).

39. See Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U. PITT. L. REV. 759, 762-69 (1972) (proposal to expand jurisdiction based on fairness, convenience, and efficiency); see also Miller, *Ancillary and Pendent Jurisdiction*, 26 S. TEX. L.J. 1, 2-5 (1985) (federal court may decide cases not within its usual jurisdiction); Note, *A Closer Look at Pendent and Ancillary Jurisdiction: Toward a Theory of Incidental Jurisdiction*, 95 HARV. L. REV. 1935 (1982) (proposes structure to determine jurisdiction over incidental claims).

40. See *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 742 (1824) (court of original jurisdiction must have power to decide all questions to be effective). See generally Minahan, *Pendent and Ancillary Jurisdiction of United States Federal District Courts*, 10 CREIGHTON L. REV. 279, 285-96 (1976) (discusses scope of federal trial court jurisdiction).

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);⁴³ or in an intervention as of right under Rule 24(a);⁴⁴ or when a third-party is impleaded under Rule 14;⁴⁵ or when a cross-claim is asserted under Rule 13(g),⁴⁶ as all such claims may fall under the ancillary power. A plaintiff also may convince a

from common nucleus of operative facts and would be expected to be tried in one proceeding); *Hagans v. Lorine*, 415 U.S. 528, 539 (1974) (advantages of convenience and economy in hearing pendent claims); *Transource Int'l, Inc. v. Trinity Industries, Inc.*, 725 F.2d 274, 285 (5th Cir. 1984) (state antitrust claims heard under pendent jurisdiction after federal claims dismissed). *But see Laird v. Board of Trustees*, 721 F.2d 529, 534 (5th Cir. 1983) (pendent jurisdiction not applicable when unsettled state law questions predominated). *See generally Seid, The Tail Wags the Dog: Hagans v. Lorine and Pendent Jurisdiction*, 53 J. URBAN LAW 1 (1975) (severely criticizes *Hagans* decision).

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 (2d 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.⁴⁷ And, at least when federal question jurisdiction is exclusive, a federal court may even allow joinder of a pendent party.⁴⁸ 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.⁴⁹ 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.⁵⁰ The *Burford* abstention doctrine generally allows the federal court to defer to a state's administration of state affairs and avoid unnecessary conflict.⁵¹ A variant of *Burford* abstention, the *Younger* doctrine, requires that a federal court abstain from granting declaratory or injunctive relief when a state criminal

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).

48. Compare *Aldinger v. Howard*, 427 U.S. 1, 15-18 (1976) (statute on grants and alignment of parties might call for pendent party) with *Ayala v. United States*, 550 F.2d 1196, 1200 (9th Cir. 1977) (*Aldinger* pendent party jurisdiction not adopted), cert. *dism'd*, 435 U.S. 982 (1978). See generally Fortune, *Pendent Jurisdiction--The Problem of "Pendent Parties"*, 34 U. PITT. L. REV. 1, 7-18 (1972) (encouraging use of pendent party jurisdiction to promote judicial economy). Some courts have not limited pendent party jurisdiction to exclusive jurisdiction cases. See C. WRIGHT, *LAW OF FEDERAL COURTS* § 19, at 109 n.39 (4th ed. 1983).

49. See C. WRIGHT, *LAW OF FEDERAL COURTS* § 52, at 303 n.3 (4th ed. 1983) (courts and commentators differ on existing number of abstention doctrines). For a general discussion of all types of abstention doctrine, see Wells, *The Role of Comity in the Law of Federal Courts*, 60 N.C.L. REV. 59 (1981).

50. See *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941) (mandates abstention on ancillary state issues). See generally Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 12 U. PA. L. REV. 1071, 1080 (1974) (discussion of cases in which application of *Pullman* doctrine proper).

51. See *Burford v. Sun Oil Co.*, 319 U.S. 315, 327 (1943) (federal courts decline when regulations in issue). See generally C. WRIGHT, *LAW OF FEDERAL COURTS* § 52, at 308 (4th ed. 1983) (discusses *Burford*-type abstention).

proceeding or its equivalent is pending against the federal plaintiff.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.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.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,⁵⁵ must be of dubious validity considering recent Supreme Court opinions⁵⁶ requiring exceptional circumstances to

52. See *Younger v. Harris*, 401 U.S. 37, 45 (1971) (no federal intervention in state criminal proceedings). See generally Theis, *Younger v. Harris: Federalism in Context*, 33 HASTINGS L.J. 103, 106-21 (1981) (concerns of federalism applied to abstention situations).

53. See *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207, 212 (1960) (state statute permits federal court to certify state law questions to state supreme court). See generally Brown, *Certification-Federalism in Action*, 7 CUM. L. REV. 455 (1977) (discussion of certification by Florida, Louisiana and Alabama); Roth, *Certified Questions from the Federal Courts: Review and Re-Proposal*, 34 U. MIAMI L. REV. 1 (1979) (discussing Florida certification). But see *United Servs. Life Ins. Co. v. Delaney*, 396 S.W.2d 855, 861 (Tex. 1965) (determination by Texas court would be advisory when Fifth Circuit retains jurisdiction); see also Note, *Refusal of State Court to Assume Jurisdiction After Federal Abstention*, 20 SW. L.J. 402, 409 (1966) (criticizing technicality of calling decision on merits in *Delaney* an advisory opinion); Note, *Courts - Advisory Opinions - State Court Has No Jurisdiction to Render a Declaratory Judgment When a Federal Court Has Abstained and Retained Jurisdiction Over the Case*, 44 TEXAS L. REV. 1394, 1406 (1966) (discussion of Texas prohibition on certification in *Delaney*). See generally Baker, *Federal Jurisdiction*, 16 TEX. TECH L. REV. 145, 179 (1985) (current proposal to overcome Texas Supreme Court holding concerning state constitutional ban on advisory opinions). On November 5, 1985, Texas voters adopted a constitutional amendment allowing the Texas Supreme Court and Court of Criminal Appeals of Texas to answer certified questions from federal appellate courts.

54. See *United Servs. Life Ins. Co. v. Delaney*, 328 F.2d 483, 484 (5th Cir. 1964) (proceedings stayed), cert. denied sub nom., *Paul Revere Life Ins. Co. v. First National Bank*, 377 U.S. 935 (1965). But see 28 U.S.C. §§ 1441-1451 (1982) (removal from state courts available). See generally 14A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 3721-23, 3725-29 (1985) (removal from state courts preferred practice).

55. Compare *Strode Publishers, Inc. v. Holty*, 665 F.2d 333, 335 (11th Cir. 1982) (mere pendency in state court not sufficient on abstention even if subject matter same) with *Guilini v. Blessing*, 654 F.2d 189, 193 (2d Cir. 1981) (sound discretion to stay federal proceeding when identical issue pending in state court).

56. See *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 19 (1983) (abuse of discretion in granting stay); *Colorado River Water Conservation Dist. v. United*

stay a federal action.⁵⁷ 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.⁵⁸ 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.⁵⁹ 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-

States, 424 U.S. 800, 813-17 (1976) (dismissal not appropriate under any form of abstention doctrine). *But see* *Microsoft Computer Sys. v. Ontel Corp.*, 686 F.2d 531, 535-37 (7th Cir. 1982) (stay should have been granted). For a comprehensive discussion of staying proceedings, see generally Note, *Staying Diversity Proceedings Pending the Outcome of Parallel Suits in State Court*, 48 MO. L. REV. 1017 (1983).

57. See *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 664 (1978) (majority agreed that *Colorado River* still is authoritative on appropriateness of stay in federal court when pending state proceeding); see also Comment, *Federal Court Stays and Dismissal in Deference to Parallel State Court Proceedings: The Impact of Colorado River*, 44 U. CHI. L. REV. 641, 652 (1977) (questions validity of staying proceedings unless unique circumstances present); Note, *Abstention and Mandamus After Will v. Calvert Fire Ins. Co.*, 64 CORNELL L. REV. 566 (1979) (impact of *Calvert* on traditional power to stay examined).

58. See *Baggett v. Beillett*, 377 U.S. 360, 375-79 (1964) (since abstention requires piecemeal adjudication special circumstances must justify its exercise); *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 426 (1964) (Douglas, J., concurring) (seven years without a decision on merits is unnecessary price to pay for federalism). See generally *Currie, The Federal Courts and the American Law Institute (Part II)*, 36 U. CHI. L. REV. 268, 317 (1969) (commenting on the high price of abstention to avoid friction, error, and constitutional questions).

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).

journal. 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

60. See *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 704 (1972) (removal governed by federal law). See generally C. WRIGHT, *LAW OF FEDERAL COURTS* § 38, at 209-11 (4th ed. 1983) (history of removal statutes detailed).

61. See Bertelsman, *Removal Jurisdiction of the United States Courts*, 47 KY. BENCH & BAR 41 (Oct. 1983) (discussing procedure for removal and attorneys' common difficulties); Fousekis and Beelsford, *Removal*, 11 LITIGATION, Spring 1985, at 39 (reasons and procedure for removal); Manginness, *Removing a Case to Federal Court*, 12 COLO. LAW. 1639 (Oct. 1983) (tactical jurisdictional and procedural considerations for removal).

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).

62. See 28 U.S.C. §§ 1441-1451 (1982) (statutes governing removal from state courts to federal courts). See generally 14A C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* §§ 3721-23, 3725-29 (1985) (analyzing and applying removal statutes).

63. See C. WRIGHT, *LAW OF FEDERAL COURTS* § 38, at 209 (4th ed. 1983) (right of defendant to choose forum unknown at common law and absent from Constitution).

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.⁶⁴ 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.⁶⁵ General federal question corrolaries, 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.⁶⁶ Removal jurisdiction based on diversity is likewise coextensive 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.⁶⁷

64. See 28 U.S.C. § 1447(a) (1982); *Gen. Inv. Co. v. Lakeshore Ry. Co.*, 260 U.S. 261, 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 Intern, Inc.*, 227 F. Supp. 365, 368 (D.C. Wis. 1964).

65. See 28 U.S.C. §§ 1441(a), (b) (1982) (actions removable generally). Examples of express prohibitions against removal include: 15 U.S.C. § 772(a) (1982) (actions under the Securities Act of 1933); 28 U.S.C. § 1445(c) (1982) (actions arising under state workmen's 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, Inc. v. Moitie: Removal and Relitigation Appraised*, 1983 WISC. L. REV. 989, 994 (1983) (effect of parties' litigation strategies on court's disposition of case discussed).

67. See 28 U.S.C. § 1441(b) (1982); see also *Kaneshiro v. North Am. Co.*, 496 F. Supp. 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 Other State Relation Back Doctrines in Federal Diversity Cases*, 35 STAN. L. REV. 297 (1983) (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

68. 28 U.S.C. § 1441(c) (1982); *see also* *Suffolk Co. v. Long Island Lighting Co.*, 549 F. Supp. 1250, 1263 (E.D. N.Y. 1982) (when one cause of action removable entire case removable).

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.

Id.; *see also* H. R. REP. NO. 308, 80th Cong., 1st Sess. (1947) (purpose of change was simplification). *But see* *Harper v. Sonnabend*, 182 F. Supp. 594, 595 (D.C. N.Y. 1960) (statute causes confusion and uncertainty).

70. *See* *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 11 (1951) (separable controversy no longer adequate for removal unless an independent cause of action). *See generally* *Cohen, Problems in Removal of a "Separate and Independent Claim or Cause of Action"*, 46 MINN. L. REV. 1, 13 (1961) (discussing restrictive ruling of *Finn*). *But see* *Climax Chemical Co. v. C. F. Braun & Co.*, 370 F.2d 616, 618-19 (10th Cir. 1967) (claims based on single construction of plant but numerous breaches of warranties by three defendants may be removed under section 1441(c)); *see also* *Hermann v. Braniff Airways, Inc.*, 308 F. Supp. 1094, 1097 (D.C. N.Y. 1969) (removal allowed under section 1441(c) despite *Finn*).

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.⁷² 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. DIVERSITY⁷³

THRUST: There is no diversity jurisdiction over domestic relations cases.⁷⁴

72. See *White v. Wellington*, 627 F.2d 582, 587 (2d Cir. 1980) (conflict between official's state obligation and federal law sufficient for removal under section 1443). See generally Note, *An Expansive Interpretation of the Civil Rights Removal Statute - One Step Too Far*, 47 BROOKLYN L. REV. 739 (1981) (discusses sweeping impact of *White* in permitting removal when constitutional rights would be denied in state court action).

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.

A person establishes state citizenship for diversity purposes by being domiciled in a state. See *Sun Printing & Pub. Assn. v. Edwards*, 194 U.S. 377, 387 (1904) (residence in state insufficient for diversity jurisdiction); *Chicago & N.W. R. Co. v. Ohle*, 117 U.S. 123, 128-29 (1886) (domicile rather than residence controls in determining diversity); see also C. WRIGHT, *LAW OF FEDERAL COURTS* § 26, at 146 (4th ed. 1983) (diversity depends on citizenship and domicile). The need for and propriety of diversity jurisdiction has been widely debated, compare Sheran & Isaacman, *State Cases Belong In State Courts*, 12 CREIGHTON L. REV. 1, 15 (1978) (advocating abolishing diversity jurisdiction) with Frank, *The Case for Diversity Jurisdiction*, 16 Harv. J. Legis. 403, 407 (1979) (diversity jurisdiction play important role in federal system of adjudicating rights). While I personally advocate abolishing diversity jurisdiction, in this section I discuss methods of using rules on diversity to the practitioner's benefit. See Baker, *Federal Jurisdiction*, 16 TEX. TECH L. REV. 145, 164 (1985).

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); *Magazener v. Montemuro*, 468 F.2d 782, 787 (3rd Cir. 1972) (since domestic relations peculiarly 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.⁷⁵ 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.⁷⁶ Instead, this has been a judge-made exception to the jurisdictional statute which recently has shown signs of narrowing.⁷⁷

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.⁷⁸ Just when a claim is within or without the exception is not easily determined. One

75. The point may be traced to *dictum* in *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1858). See generally Atwood, *Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction*, 35 HASTINGS L.J. 571 (1984) (proposal to abandon domestic relations exception in favor of applying statutory jurisdictional prerequisites); Comment, *Federal Jurisdiction and the Domestic Relations Exception: A Search For Parameters*, 31 UCLA L. REV. 843 (1984) (proposal to examine nature of intrafamilial rights before abstention). Abstention may be the appropriate response. See Note, *Application of the Federal Abstention Doctrines to the Domestic Relations Exception to Federal Diversity Jurisdiction*, 1983 DUKE L.J. 1095 (1983) (arguing for the application of *Burford* and *Younger* abstention doctrines to domestic relations).

76. See *De La Rama v. De La Rama*, 201 U.S. 303, 308 (1906) (appeal from divorce granted by territorial court heard); *Simms v. Simms*, 175 U.S. 162, 168 (1899) (Court assumed appellate jurisdiction over divorce decree of territorial court). See generally 13B C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3609 n.5 (1984) (federal court may have jurisdiction to determine validity of foreign divorce decree).

77. See 23B C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3609 n.5 (1984).

78. See, e.g., *Wasserman v. Wasserman*, 671 F.2d 832, 834 (4th Cir. 1982) (federal jurisdiction exists when child removed by estranged husband since tort not dependent on family relationship); *Crouch v. Crouch*, 566 F.2d 486, 487-88 (5th Cir. 1978) (federal jurisdiction to collect unpaid alimony); *Anastasi v. Anastasi*, 532 F. Supp. 720, 724 (D.N.J. 1982) (palimony contract not within domestic relations exception to federal jurisdiction). See generally Note, *The Domestic Relations Exception to Diversity Jurisdiction*, 83 COLUM. L. REV. 1824 (1983) (advocating application of federalism doctrines and federal jurisdiction principles to domestic relations); Note, *Federal Courts — The Continued Vitality & Questionable Validity of the Domestic Relations Exception to Diversity Jurisdiction*, 56 TEMPLE L.Q. 228 (1983) (criticism of *Bennett* holding that best interests of child beyond federal court competence); Note, *Enforcing State Domestic Relations Decrees in Federal Court*, 50 U. CHI. L. REV. 1357 (1983) (federal courts should enforce state alimony and support decrees that are not modifiable).

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

THRUST: 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 property 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 interference and the federal claim may be heard.⁸⁴ A second, more common approach examines the procedures which would have been followed

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*, 50 U. CHI. L. REV. 1357 (1983) (final decrees from state enforced).

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).

81. C. WRIGHT, *LAW OF FEDERAL COURTS* § 25, at 145 (4th ed. 1983). *Compare* *Turton v. Turton*, 644 F.2d 344, 347 (5th Cir. 1981) (no federal jurisdiction to transfer property 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).

84. *Compare* *Lee v. Hunt*, 431 F. Supp. 371, 377-78 (W.D. La. 1977) (claim against exec-

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.⁸⁵ If the claim could have been enforced in a state court of general jurisdiction, the federal court will entertain the suit.⁸⁶ Either approach or some combination allows for significant federal jurisdiction despite the general rule.⁸⁷ That is my point.

THRUST: A state is not a citizen for purposes of diversity and may not be sued under that jurisdiction.⁸⁸

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).⁸⁹ 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.⁹⁰

THRUST: A party "by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction. . . ."⁹¹

utor not within probate exception) *with* *Akin v. Louisiana Nat'l Bank*, 322 F.2d 749, 753-54 (5th Cir. 1963) (adopted child's claim against executor within federal 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).

88. *See* *Moor v. County of Alameda*, 411 U.S. 693, 717 (1973); *Minnesota v. Northern Securities Co.*, 194 U.S. 48, 63 (1904); *Postal Telegraph Cable Co. v. Alabama*, 155 U.S. 482, 487 (1894).

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.⁹² A nondiverse assignor might sell a liquidated claim to a diverse assignee, but that strategy is limited to negotiable claims.⁹³ 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.⁹⁴ 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.⁹⁵ The collusion issue commonly arises in actions initiated by nonresident fiduciaries such as administrators or guardians. Two approaches have emerged.⁹⁶ Some courts apply a “motive/function” test to the appointment and consider: (1) the relationship between the representa-

other jurisdictional bases such as the minimum jurisdictional amount or the federal question requirement. For example, the appointment of a receiver in bankruptcy can be ripe with section 1359 problems. *See* Gross v. Houghland, 712 F.2d 1034, 1038 (6th Cir. 1983) (receiver properly appointed may rely on his citizenship to create diversity). For a general discussion of the problems addressed by section 1359, see Cohan & Tate, *Manufacturing Federal Jurisdiction by the Appointment of Representatives: Its Legality and Propriety*, 1 VILL. L. REV. 201 (1956).

92. *See* R. C. Hedreen Co. v. Crow Tribal Hous. Auth., 521 F. Supp. 599, 607 (D.C. Mont. 1981) (assignor relinquished all interest in construction contracts); Slaughter v. Mallet Land & Cattle Co., 141 F. 282, 287 (5th Cir.) (conveyance bona fide with no reconveyance contemplated), *cert. denied*, 201 U.S. 646 (1905).

93. *See* Kramer v. Caribbean Mills, Inc., 394 U.S. 823, 828 n.9 (1969) (motive irrelevant when transfer of interest in lawsuit is absolute).

94. *See* Williamson v. Osenton, 232 U.S. 619, 624-25 (1914) (motive in changing domicile irrelevant). *But see* Dossett v. Davis, 29 F. Supp. 483, 483 (E.D. Tenn. 1939) (verdict set aside when plaintiff moved to Kentucky to create diversity without requisite intent to become Kentucky resident).

95. *See, e.g.,* Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183, 190 (1931) (Louisiana administrator appointed to defeat diversity upheld); McSparevan v. Weist, 402 F.2d 867, 875, *cert. denied*, 395 U.S. 903 (1968) (manufactured diversity inadequate to invoke federal jurisdiction); Herrick v. Pioneer Gas Products Co., 429 F. Supp. 80, 84 (W.D. Okl. 1977) (section 1359 relates to improper creation of federal diversity not destruction). *But see* Miller v. Perry, 456 F.2d 63, 65 (4th Cir. 1972) (statute requiring appointment of in-state administrator should not prevent federal removal). *See generally*, C. WRIGHT, LAW OF FEDERAL COURTS § 31, at 171-72 (4th ed. 1983) (discussion on choosing personal representatives to defeat diversity).

96. *Compare* Bass v. Texas Power & Light Co., 432 F.2d 763, 766 (5th Cir. 1970) (“motive function” test adopted), *cert. denied*, 401 U.S. 975 (1971) with Bishop v. Hendricks, 495 F.2d 289, 294-95 (4th Cir.) (“substantial stake” test used), *cert. denied*, 419 U.S. 1056 (1974). *See generally* Baker, *Federal Jurisdiction*, 16 TEX. TECH L. REV. 145, 165-67 (1985) (discussing Fifth Circuit “totality of circumstances” approach in *Bianca*).

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 automomo-

97. See, e.g., *Bianca v. Parke-Davis Pharmaceutical Div.*, 723 F.2d 392, 398-99 (5th Cir. 1984) (adopting "totality of circumstances" approach for ultimate inquiry into motive and purpose of appointment); *Hackney v. Newman Memorial Hosp., Inc.*, 621 F.2d 1069, 1070 (10th Cir.) (changing representative to create diversity effective when new representative also beneficiary), *cert. denied*, 449 U.S. 982 (1980); *Joyce v. Seyel*, 429 F.2d 128, 130 (3rd Cir. 1970) (appointing nonresident administrator experienced in financial affairs and removed from family's personal problems not artificial diversity).

98. See *Vaughan v. Southern Ry. Co.*, 542 F.2d 641, 644 (4th Cir. 1976) (no jurisdiction when ancillary administrator has no stake in outcome); *Bishop v. Hendricks*, 495 F.2d 289, 295 (4th Cir.) (out-of-state administrator must have more than nominal relationship to sustain jurisdiction), *cert. denied*, 419 U.S. 1056 (1974). *But see* *Sadler v. New Hanover Memorial Hosp., Inc.*, 588 F.2d 914, 917 (4th Cir. 1978) (executrix named by will controlling for section 1359 purposes). One circuit has adopted a "nominal interest" test in evaluating section 1359 issues. See *Betar v. De Haviland Aircraft of Canada, Ltd.*, 603 F.2d 30, 34 (7th Cir. 1979), *cert. denied*, 444 U.S. 1098 (1980).

99. See Baker, *The History and Tradition of the Amount in Controversy Requirement: A Proposal to "Up the Ante" in Diversity Jurisdiction*, 102 F.D.R. 299, 307 (1984).

100. See 28 U.S.C. § 1332(a)(1)(1976); see also *Clark v. National Travelers Life Ins. Co.*, 518 F.2d 1167, 1169 (1975) (attorney's fees, penalty, fees cost and interest not included in \$10,000 minimum). See generally 14A C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3712 (1985) (discussion of the "interest and costs" computation).

101. See 28 U.S.C. §§ 1331-1332 (1958) (\$10,000 excluding costs and interest). The requirement is presently codified at 28 U.S.C. § 1332(a)(1)(1976).

bile for that price.¹⁰² 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.”¹⁰³ 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.¹⁰⁴ 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.¹⁰⁵ 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.”¹⁰⁶ 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,¹⁰⁷ but the rules change

102. See Baker, *The History and Tradition of the Amount in Controversy Requirement: A Proposal to “Up the Ante” in Diversity Jurisdiction*, 102 F.D.R. 299, 324-25 (1984) (comparing consumer price indices).

103. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938).

104. See, e.g., *Hague v. CIO*, 307 U.S. 496, 516-18 (1939) (value of free speech in question); *Barry v. Mercein*, 46 U.S. (5 How.) 103, 110 (1847) (custody of child value-determination); *Lister v. Commissioner Court*, 566 F.2d 490, 492-93 (5th Cir. 1978) (dilution of vote by reapportionment value addressed).

105. Compare *Alphonso v. Hillsborough County Aviation Auth.*, 308 F.2d 724, 727 (5th Cir. 1962) (controversy valued only from plaintiff’s viewpoint) and *Family Motor Inn, Inc. v. L-K Enterprises Div. Consol. Foods Corp.*, 369 F. Supp. 766, 769 (E.D. Ky. 1973) (value assessed only from defendant’s viewpoint) with *Oklahoma Retail Grocers Ass’n v. Walmart Stores, Inc.*, 605 F.2d 1155, 1159 (10th Cir. 1979) (value determined from either plaintiff’s or defendant’s viewpoint). See generally Kennedy, *Valuing Federal Matters in Controversy: Hohfeldian Analysis in Symbolic Logic*, 35 TENN. L. REV. 423, 429-34 (1968) (either viewpoint rule is better rule); Note, *The Jurisdictional Amount Requirement--Valuation from the Defendant’s Perspective*, 11 Loy. L.A.L. Rev. 637, 652 (1978) (either viewpoint rule effectuates purpose of jurisdictional amount requirement—consideration of non-trivial cases by federal court).

106. C. WRIGHT, *LAW OF FEDERAL COURTS* § 36, at 196 (4th ed. 1983).

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.¹⁰⁸ The point, again, is that the complexities of the jurisdictional rules create windows into federal court.

IV. FEDERAL QUESTIONS

THRUST: The Declaratory Judgment Act¹⁰⁹ is not a grant of jurisdiction to the federal courts.¹¹⁰

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.¹¹¹ 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-

Griffin v. Red Run Lodge, Inc., 610 F.2d 1198, 1204 (4th Cir. 1979) (when one claim satisfies amount requirement jurisdiction exists for all claims); Davis H. Elliott Co. v. Caribbean Utilities Co., 513 F.2d 1176, 1183 (6th Cir. 1975) (one plaintiff can aggregate causes of action against one defendant). See generally 14A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3704 (1985) (aggregating claims of single plaintiff proper rule); Note, *The Federal Jurisdictional Amount and Rule 20 Joinder of Parties: Aggregation of Claims*, 53 MINN. L. REV. 94, 99-105 (1968) (aggregation permissible only by one plaintiff with several claims against one defendant).

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).

109. See 28 U.S.C. §§ 2201-02 (1982).

110. See *Public Serv. Comm. of Utah v. Wycoff Co.*, 344 U.S. 237, 248-49 (1952) (procedural purpose of Declaratory Judgment Act would be distorted if suit could be based on anticipated defense); *Skelley Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673-74 (1950) (Declaratory Judgment Act is procedural device not tool for creating jurisdiction). See generally Trautman, *Federal Right Jurisdiction and the Declaratory Remedy*, 7 VAND. L. REV. 445, 451-63 (1954) (discussing cases that could never be brought absent declaratory relief).

111. See *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (test is whether there is substantial controversy, adverse legal interests, sufficient immediacy and reality to warrant declaratory judgment); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 232 (1937) (declaratory judgment statute constitutional because case and controversy requirement satisfied). Declaratory judgments as a type of cause of action emerged from a demand for quick judicial resolution of disputes. See Zamir, *The Declaratory Judgment Revisited*, 30 CURRENT LEGAL PROBLEMS 43, 45 (1977); see also Borchard, *The Declaratory Judgment--A Needed Procedural Reform*, 28 YALE L.J. 1, 105-30 (1918).

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

112. See *Louisville & N. R. Co. v. Mottley*, 211 U.S. 149, 153 (1908) (complaint which raised federal question as anticipated defense must be dismissed). *But see Zaconick v. City of Hollywood*, 85 F. Supp. 52, 55 (S.D. Fla. 1949) (federal claim in defendant's complaint confers jurisdiction). See generally C. WRIGHT, *LAW OF FEDERAL COURTS* § 100, at 671-72 (4th ed. 1983) (discussing well-pleaded complaint rule and its limitations). Only tax matters are excluded under 28 U.S.C. § 2201 (federal) and under 28 U.S.C. § 1341 (state). See *id.* at 672-73.

113. See *Talbot v. Quakerstate Oil Ref. Co.*, 104 F.2d 967, 968 (3d Cir. 1939). See generally Note, *Patent Licensee Standing and the Declaratory Judgment Act*, 83 COLUM. L. REV. 186, 199 (1983) (proposes heightened standing barrier to prevent harassment of patentees).

114. Compare *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 259-60 (1916) (no well-pleaded federal question before the Act) with *Hanes Corp. v. Millard*, 531 F.2d 585, 594 n.8 (D.C. Cir. 1976) (federal question well-pleaded after the Act).

115. See *Hanes Corp. v. Millard*, 531 F.2d 585, 595-96 (D.C. Cir. 1976) (declaratory judgment of collective bargaining agreement); *E. Edlemann & Co. v. Triple A Specialty Co.*, 88 F.2d 852, 853-54 (7th Cir.) (declaratory judgment on infringement permissible), *cert. denied*, 300 U.S. 680 (1937).

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

ing anticipating defense distorts purpose of Declaratory Judgment Act). *See generally* Comment, *Federal Question Jurisdiction of the Federal Courts and the Declaratory Judgment Act*, 1966 KY. L.J. 150, 159-63 (defense based on federal law not sufficient to confer jurisdiction).

118. *See Zanconick v. City of Hollywood*, 85 F. Supp. 52, 54-55 (S.D. Fla. 1949) (auctioneer challenging ordinance regulating his business hours based complaint on equal protection); *see also* Note, *Federal Jurisdiction*, 3 VAND. L. REV. 320 (1950) (broad view of artful pleading to invoke declaratory relief). *See generally* 10A C. WRIGHT, A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2767 n.65 (1983) (additional cases applying broad view); C. WRIGHT, LAW OF FEDERAL COURTS § 18, at 101-02 (4th ed. 1983) (discussing simple application of broad view).

119. *See* Conference of Fed. Sav. & Loan Ass'ns v. Stein, 604 F.2d 1256, 1259-60 (9th Cir. 1979) (Federal Home Loan Bank Board regulatory scheme preempted California Housing Act); *First Fed. Sav. & Loan v. Greenwald*, 591 F.2d 417, 422 (1st Cir. 1979) (Federal Home Loan Bank Board regulations in conflict with Massachusetts statute); *Braniff Int'l, Inc. v. Florida Pub. Serv. Comm'n*, 576 F.2d 1100, 1105 (5th Cir. 1978) (federal jurisdiction to entertain constitutional challenge to Florida statute regulating interstate air carriers); *Rath Packing Co. v. Becher*, 530 F.2d 1295, 1304 (9th Cir. 1975) (federal meat packaging regulation preempted state statutes), *aff'd sub nom. Jones v. Rath Packing Co.*, 430 U.S. 519 (1977). *See generally* Note, *The Expanded Federal Question: On the "Independent Viability" of Declaratory Claims*, 57 NOTRE DAME LAW. 809 (1982) (discussing expansion of declaratory judgment use).

120. *Compare* *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 n.14 (1983) (federal jurisdiction exists when ERISA regulation preempts state human rights law) *with* *Franchise Tax Bd. of the State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 11 (1983) (state tax levy against union welfare benefit trust not preempted by ERISA federal regulation or removable to federal court). *See generally* 10A C. WRIGHT, A. MILLER & K. KANE, FEDERAL PRACTICE AND PROCEDURE § 2767 (1983) (federal question issues in declaratory judgments analyzed).

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 strategical 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.*,

THRUST: 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 Constitution¹²³ 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

623 F.2d 1207, 1215-17 (7th Cir. 1980) (future business transactions immediate controversy for jurisdictional purposes).

122. See *Carlson v. Green*, 446 U.S. 14, 19 (1980) (remedy against federal officials implied from violation of deceased inmate's eighth amendment rights); *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979) (private cause of action under Title IX education amendments for sex discrimination in medical school admission); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 392 (1971) (remedy implied from violation of constitutional rights under fourth amendment).

123. See, e.g., *David v. Passman*, 442 U.S. 228, 241-42 (1979) (cause of action implied under fifth amendment); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 392 (1971) (implied remedy for fourth amendment right violation); *Bell v. Hood*, 327 U.S. 678, 684 (1946) (violation of fourth and fifth amendment rights requires court to adjust remedy necessary to grant relief).

124. See, e.g., *Merrill Lynch Pierce Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 (1982) (right of action under Commodity Exchange Act); *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11, 19 (1979) (private action under Investment Advisers Act); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 388 (1970) (cause of action under Securities Exchange Act of 1934).

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).

126. See *Cort v. Ash*, 422 U.S. 66, 78 (1975).

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 compelling 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 situations require a federal common law to protect an uniquely federal interest when state law would be in conflict.¹³² Second, some situations are so dominated by federal statutes that federal common law seems a necessary concomitant.¹³³ Third, there are some situations

bution prohibition of 18 U.S.C. § 610); *Wheeldin v. Wheeler*, 373 U.S. 647, 650 (1963) (no private cause of action for dress of subpoena power by federal officer); *see also* 19 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* § 4514 (1978) (reluctance to infer remedies not provided by Congress); Hill & Baker, *Dam Federal Jurisdiction!*, 32 EMORY L.J. 3, 40 (1983); Luneberg, *Justice Rehnquist, Statutory Interpretation, the Policies of Clear Statement, and Federal Jurisdiction*, 58 IND. L.J. 211, 253 (1982); Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1289 (1982).

128. *Cf. Note, Closing the Courthouse Door on Section 503 Complaints: Davis v. United Airlines, Inc.*, 49 BROOKLYN L. REV. 1159, 1164 n.20 (1983). Alternatively, a court might be persuaded to recognize a cause of action under section 1983 and jurisdiction therefore under 28 U.S.C. § 1343. *See Sunstein, Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 415 (1982).

129. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 99-100 (1972).

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); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 715 (1979) (priority of liens under federal loan program governed by state law).

133. *See Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 534 (1983)

in which the federal and national concern is inherently superior and federal law must control.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.¹³⁵ When federal common law does apply of course, federal jurisdiction follows.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.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

(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).

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).

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).

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).

136. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 99-100 (1972) (claims based on federal common law are within federal jurisdiction). *See generally* C. WRIGHT, LAW OF FEDERAL COURTS § 17, at 97 (4th ed. 1983) (when federal common law exists there is federal jurisdiction).

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.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.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.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.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.¹⁴²

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).

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

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).

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).

142. See *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 676 (1982) (all vessels commercial or noncommercial subject to federal admiralty jurisdiction); see also Carnilla & Drzal, *Foremost Ins. Co. v. Richardson: If This Is Water, It Must Be Admiralty*, 59 WASH. L. REV. 1, 17 (1983). See generally Hill & Baker, *Dam Federal Jurisdiction!*, 32 EMORY L.J. 3, 26-27 (1983) (Foremost's extension of admiralty jurisdiction perceived as serious "erosion of federalism"). There are some limits to this principle. See *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*, 644 F.2d 1132, 1135 (5th Cir.) (extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740 (1982), is not an automatic grant of jurisdiction), *cert. denied*, 454 U.S. 1081 (1981).

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).¹⁴³ Additionally, specific grants of jurisdiction are sprinkled throughout the substantive statutes.¹⁴⁴ 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.¹⁴⁵ First, 28

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).

144. See 15 U.S.C. § 78aa (1982) (Securities and Exchange Act of 1934); 42 U.S.C. § 405(g) (1982) (Social Security Act). See generally Jacobs, *Procedural Matters in Actions Brought Under Rule 10b-5*, 27 N.Y.L. SCH. L. REV. 361, 365-70 (1981) (discussion of subject matter and personal jurisdiction).

145. See 28 U.S.C. § 1341 (1982) (Tax Injunction Act); 28 U.S.C. § 1342 (1982) (Johnson Act); see also Note, *The Johnson Act - A Return to State Independence*, 30 ILL. L. REV. 215 J. D. (1935) (review of first three cases decided under Johnson Act); Comment, *Limitation of*

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.¹⁴⁶ 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.¹⁴⁷

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 procedualist 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.'¹⁴⁸

Lower Federal Court Jurisdiction Over Public Utility Rate Cases, 44 YALE L.J. 119 (1934) (discussing 28 U.S.C. § 1342). See generally C. WRIGHT, LAW OF FEDERAL COURTS § 51, at 299-300 (4th ed. 1983) (discussing statutory restrictions on injunctions).

146. See 26 U.S.C. § 7421(a) (1982) (barring injunctions against the collection of federal taxes).

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

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!)

R. Kipling, "Rikki-Tikki-Tavi," *THE COLLECTED WORKS OF RUDYARD KIPLING*, vol. xi at 245 (1970 ed.).