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## Claims, Civil Actions, Congress & the Court: Limiting the Reasoning of Cases Construing Poorly Drawn Statutes

Joan Steinman

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# Claims, Civil Actions, Congress & the Court: Limiting the Reasoning of Cases Construing Poorly Drawn Statutes

Joan Steinman\*

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\* Distinguished Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology. J.D. 1973, Harvard University; A.B. 1969, University of Rochester. I would like to thank Juli Gilliam, a student at Chicago-Kent, for her research assistance, my colleagues Mark Rosen and Margaret Stewart for their valuable contributions on drafts of this Article and in discussions of its subject matter, and the Marshall Ewell Research Fund for financial support.

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I. Introduction

In *Exxon Mobil Corp. v. Allapattah Services, Inc.*,<sup>1</sup> the Supreme Court took its first stab at construing the supplemental jurisdiction statute, 28 U.S.C. § 1367.<sup>2</sup> That statute has provoked a great outpouring of scholarly criticism and debate since its enactment in 1990,<sup>3</sup> and generated several conflicts among

1. See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 549 (2005) (holding that when complete diversity exists and at least one plaintiff "satisfies the amount-in-controversy requirement, § 1367 does authorize supplemental jurisdiction over the claims of other plaintiffs in the same Article III case or controversy, even if those claims are for less than the jurisdictional amount specified in the statute setting forth the requirements for diversity jurisdiction").

2. See 28 U.S.C. § 1367 (2000) (governing supplemental jurisdiction). The relevant text of § 1367(a)–(b) provides:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder of intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

*Id.*

In *Free v. Abbott Laboratories*, 529 U.S. 333, 333 (2000), the Court affirmed, by an equally divided court, a decision by the Fifth Circuit (*In re Abbott Labs.*, 51 F.3d 524 (5th Cir. 1995)) that § 1367 authorized supplemental jurisdiction over the claims of class members, without regard to the amount they put into controversy. However, the Court issued no opinion in that case beyond the declaration of its affirmance by an equally divided court. *Id.* Such a decision has no precedential weight. See *Rutledge v. United States*, 517 U.S. 292, 304 (1996) (describing an equally divided court's affirmance as "a judgment not entitled to precedential weight no matter what reasoning may have supported it"); *Neil v. Biggers*, 409 U.S. 188, 192 (1972) ("Nor is an affirmance by an equally divided Court entitled to precedential weight.").

3. See AMERICAN LAW INSTITUTE, FEDERAL JUDICIAL CODE REVISION PROJECT 5–136 (2004) [hereinafter "ALI FJCRP"] (citing numerous articles on the subject of 28 U.S.C. § 1367). Subsequent articles concerning supplemental jurisdiction include: Daniel C. Bruton, *To Infinity and Beyond: Related to "Related to" Jurisdiction*, AM. BANKR. INST. J., June 2005, at 28; C.

the lower federal courts.<sup>4</sup> This Article focuses particularly on important

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Douglas Floyd, *Three Faces of Supplemental Jurisdiction After the Demise of United Mine Workers v. Gibbs*, 60 FLA. L. REV. 277 (2008); Richard D. Freer, *The Cauldron Boils: Supplemental Jurisdiction, Amount in Controversy, and Diversity of Citizenship Class Actions*, 53 EMORY L.J. 55 (2004); Michelle S. Simon, *Defining the Limits of Supplemental Jurisdiction Under 28 U.S.C. § 1367: A Hearty Welcome to Permissive Counterclaims*, 9 LEWIS & CLARK L. REV. 295 (2005); James M. Underwood, *Supplemental Serendipity: Congress '[s] Accidental Improvement of Supplemental Jurisdiction*, 37 AKRON L. REV. 653 (2004); Joseph F. Cascio, Comment, *Are All Roads Tolled? State Sovereign Immunity and the Federal Supplemental Jurisdiction Tolling Provision*, 73 U. CHI. L. REV. 965 (2006); Annette B. Greitzer, Note, *Developments in the Law: Federal Jurisdiction and Forum Selection: Supplemental Jurisdiction*, 37 LOY. L.A. L. REV. 1501 (2004); Adam Hofmann, Comment, *Blurring Lines: How Supplemental Jurisdiction Unknowingly Gave the World Ancillary Personal Jurisdiction*, 38 U.S.F. L. REV. 809 (2004); M. Evan Lacke, Note, *The New Breed of Permissive Counterclaim: Supplemental Jurisdiction After 28 U.S.C. § 1367*, 56 S.C. L. REV. 607 (2005).

4. See, e.g., *HIF Bio, Inc. v. Yung Shin Pharm. Indus. Co.*, 508 F.3d 659, 667 (Fed. Cir. 2007), cert. granted, 77 U.S.L.W. 3020 (U.S. Oct. 14, 2008) (No. 07-1437) (concluding, to the contrary of decisions by several other circuits, that federal appellate courts do not have jurisdiction to review remands that are based upon district court discretionary decisions to decline to exercise supplemental jurisdiction over state law claims that were asserted in removed cases).

*HIF Bio* arose out of a dispute over ownership and inventorship of a chemical compound as an anti-cancer, anti-angiogenesis agent. *Id.* at 660–61. The complaint, filed in state court, alleged violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) and several state law claims, and plaintiffs sought a declaratory judgment. *Id.* at 661–62. Defendants removed. *Id.* at 661. After the district court dismissed the RICO claim, it declined to exercise supplemental jurisdiction over the state law claims, citing the preponderance of state law issues, and remanded them to state court. *Id.* at 662, 664. A defendant timely appealed and asserted that the remanded claims themselves arose under federal patent law. *Id.* at 662.

The Federal Circuit recognized that the district court could have exercised supplemental jurisdiction over the remanded claims, notwithstanding that the RICO claim was dismissed for failure to state a claim. *Id.* at 664 n.2. It further recognized that several other federal courts of appeals have held that review of discretionary remands pursuant to 28 U.S.C. § 1367(c) is not barred by § 1447(d), a position approved by the Wright & Miller treatise. *Id.* at 664; see also 14C WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: JURISDICTION 3d § 3740, at 535 n.39 (1998) (listing various federal circuit decisions that permit appellate review of discretionary remands ordered pursuant to 28 U.S.C. § 1367(c)).

The court, however, looked to both Justice Kennedy's concurrence in *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 130 (1995) (Kennedy, J. concurring), in which he noted that the Court had not decided whether § 1447(d) would bar review of such a discretionary remand, and the reiteration of that uncertainty in *Powerex Corp. v. Reliant Energy Servs., Inc.*, 127 S. Ct. 2411, 2418–19 (2007), which stated that "[i]t is far from clear . . . that when discretionary supplemental jurisdiction is declined the remand is not based on lack of subject-matter jurisdiction for purposes of § 1447(c) and § 1447(d)," and combined that uncertainty with *Powerex's* messages that § 1447(c) remands may be predicated on post-removal events and that a remand need be only colorably characterized as a remand for lack of jurisdiction to be beyond the reach of appellate courts. *HIF Bio*, 508 F.3d at 665–66. In its critical language, the Federal Circuit then reasoned that "§ 1367(c) constitutes an express statutory exception to the authorization of jurisdiction granted by § 1367(a)," and "when declining supplemental jurisdiction over state claims, a district court strips the claims of the only basis on which they

features of the Court's reasoning in *Allapattah*. First, in struggling to sensibly construe the statute and in reasoning to its conclusions in *Allapattah* and in the companion case of *del Rosario Ortega v. Star-Kist Foods, Inc.*, the Supreme Court sometimes conflated a "civil action" with a "claim." If the lower federal courts were to accept the Court's redefinitions of these terms in § 1367 and in 28 U.S.C. §§ 1331–1332, and carry them into other contexts in which the terms have long been understood to share the meanings of those words and phrases as they are used in the federal question and diversity subject-matter jurisdiction statutes, significant and undesirable changes in doctrine would result. The federal courts have not taken the opportunity to extend the redefinition into such other statutory contexts, however. Most opinions of the courts that could discuss *Allapattah*'s and *Rosario Ortega*'s implications in this respect reflect no awareness of those implications.<sup>5</sup> Once in a great while a district court has mentioned an implication of the Court's treatment of claims and civil actions, but pushed it aside.<sup>6</sup>

In Part II, this Article will discuss the reasoning in *Allapattah* and *Rosario Ortega* in detail, showing, among other things, when and why it conflated a "civil action" with a "claim."<sup>7</sup> As part of that discussion, Part II also will

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are within the jurisdiction of the court. . . . Without the cloak of supplemental jurisdiction, state claims must be remanded for lack of subject matter jurisdiction," as they can be colorably characterized as such. *Id.* at 667.

*HIF Bio* is criticized in Deborah J. Challener & John Howell, *The Scent of Subject Matter Jurisdiction: Remand and Appellate Review Under the Supplemental Jurisdiction Statute*, 81 TEMP. L. REV. (forthcoming 2008) (on file with the Washington and Lee Law Review).

5. See, e.g., *Main Drug, Inc. v. Pharmicare Mgmt. Servs., Inc.*, No. 2:05-CV-277-WKW, 2006 WL 1214800, at \*3–4 (M.D. Ala. May 4, 2006) (interpreting the *Allapattah* opinion narrowly and granting plaintiff's motion to remand a class action because, while putative class action plaintiffs' claims might have exceeded the \$75,000 amount-in-controversy requirement, the named plaintiff's claim was only \$74,500).

6. See *Wilson v. Lowe's Home Ctr., Inc.*, 401 F. Supp. 2d 186, 193 n.7 (D. Conn. 2005) (noting that language in *Allapattah* suggests that "civil action" could refer to individual claims but concluding that, "in the context of the removal statutes 'civil action' should be interpreted to refer to an entire case, rather than individual claims"). *Wilson* also notes that "civil action" is "commonly understood to refer to an entire case, as opposed to fewer than all the claims in a case," *id.* at 192, and does so in § 1441(a) in particular, *id.* at 193.

7. Other law review materials concerning *Allapattah* include: Debra Lyn Bassett, *Statutory Interpretation in the Context of Federal Jurisdiction*, 76 GEO. WASH. L. REV. 52, 90 (2007) (analyzing "[t]he *Allapattah* majority's emphasis on § 1367's plain meaning"); Adam N. Steinman, *Sausage-Making, Pigs' Ears, and Congressional Expansions of Federal Jurisdiction: Exxon Mobil v. Allapattah and Its Lessons for the Class Action Fairness Act*, 81 WASH. L. REV. 279, 335 (2006) (arguing that "*Allapattah* fails to provide coherent guidance for interpreting" the CAFA); Salvatore Joseph Bauccio, Recent Decision, *Supplemental Jurisdiction Extended Over Claims From Class Action Plaintiffs: Exxon Mobil Corporation v. Allapattah Services, Inc.*, 44 DUQ. L. REV. 729, 729–43 (2006) (summarizing the *Allapattah* majority and dissenting opinions); Graham M. Beck, Comment, *Supplemental Jurisdiction over Permissive*

address both how the Court's treatment of "indivisibility theory" and "contamination theory" influenced its view of civil actions, and the relevance of an earlier Supreme Court decision, *City of Chicago v. International College of Surgeons*,<sup>8</sup> to its reasoning and conclusions. Part II also will discuss how the reasoning and ultimate holdings of *Allapattah* and *Rosario Ortega*—and the views of the dissent—compare with the recommendations in the American Law Institute's Federal Judicial Code Revision Project, published in 2004, and with my own thoughts on the issues raised.

Part III will illustrate how, if the lower federal courts were to accept the Court's redefinition of "civil action" and "claim," and carry it into other contexts in which the terms have long been understood to share the meanings of those words and phrases as they are used in the federal question and diversity subject-matter jurisdiction statutes, significant—and undesirable—changes in doctrine would result.

Part IV will ponder why the federal courts nonetheless have not taken the opportunity to extend the redefinition or conflation into such other statutory

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*Counterclaims in Light of Exxon v. Allapattah*, 41 U.S.F. L. REV. 45, 68 (2006) (examining *Allapattah* and concluding "[p]ermissive counterclaims are supported by supplemental jurisdiction so long as they are so related to the original claim that they make up the same case or controversy under Article III"); Shawn Doyle, Note, *Weaving the Cloth of Supplemental Jurisdiction: The Role of Dialogue in Tailoring Judicial Power*, 82 NOTRE DAME L. REV. 843, 880 (2006) (contending that *Allapattah* "exhibits the independence of thought predicted by the dialogic model," which argues that the "discourse between the coequal branches actually determines the contours of lower federal court subject-matter jurisdiction"); Joseph Escandón, Note, *Better Luck Next Time, Congress: The Supreme Court Interprets § 1367 Supplemental Jurisdiction in Exxon Mobil Corp. v. Allapattah Services, Inc.*, 25 MISS. C. L. REV. 263, 271 (2006) (arguing that the *Allapattah* majority "simplifies the application of the former doctrines of pendent and ancillary jurisdiction"); Brian E. Foster, Note, *Serious Mischiefs: Exxon Mobil Corp. v. Allapattah Services, Inc., Supplemental Jurisdiction, and Breaking the Promise of Finley*, 81 NOTRE DAME L. REV. 2013, 2018–19 (2006) (applying the lessons of *Allapattah* to the interpretation of the Class Action Fairness Act of 2005's removal provision); David J. Gold, Case Comment, *Exxon Mobil Corporation v. Allapattah Services, Inc.*, 125 S. Ct. 2611 (2005), 39 SUFFOLK U. L. REV. 1097, 1104 (2006) (summarizing *Allapattah* and concluding that the majority's opinion "will likely lead to an increase in the amount [sic] of claims brought to federal court"); Recent Case, *Ortega v. Star-Kist Foods, Inc.*, 370 F.3d 124 (1st Cir.), cert. granted, 125 S. Ct. 314 (2004), 118 HARV. L. REV. 1062, 1068 (2005) (arguing that "[a] more intellectually honest approach [to *Ortega*] would have been for the court to acknowledge the conflict between the intent and the plain reading and to lay out arguments why intent should control and why the court's policy considerations should trump the text's plain meaning") (citations omitted).

8. See *City of Chi. v. Int'l Coll. of Surgeons*, 522 U.S. 156, 174 (1997) (holding that the federal court had supplemental jurisdiction over claims for on-the-record review of a local landmark commission's decisions where the complaint also alleged factually related, state-created, administrative law claims that had embedded federal constitutional issues and, therefore, arose under federal law).

contexts, despite some reasons—including principles of stare decisis—to do so. It then will consider the jurisprudential question of the propriety of courts' silently eschewing the precedent set by *Allapattah* and *Rosario Ortega* in their treatment of "claim" and "civil action." Part IV will argue that it would be far preferable for the courts to explicitly grapple with, distinguish, and limit, rather than ignore or "sweep under the rug," the Court's adoption of altered definitions of "claim" and "civil action" in the contexts of the supplemental jurisdiction and removal statutes. Finally, it will urge better drafting by Congress, to avoid strained interpretations invited by poor legislative drafting.

## II. Exxon Mobil v. Allapattah Services, Rosario Ortega v. Star-Kist Foods, and the Claim-Civil Action Conflation

### A. Background

The question presented in *Allapattah* and *Rosario Ortega*, as formulated by the Court, was "whether a federal court in a diversity action may exercise supplemental jurisdiction over additional plaintiffs whose claims do not satisfy the minimum amount-in-controversy requirement, provided the claims are part of the same case or controversy as the claims of plaintiffs who do allege a sufficient amount in controversy."<sup>9</sup> The Court answered affirmatively, so long as the other requirements of jurisdiction—namely, complete diversity of citizenship between plaintiffs and defendants, and an Article III case or controversy—are met.<sup>10</sup>

*Allapattah* posed its question in the context of a class action in which the named class representatives were diverse from the defendant, Exxon Corporation,<sup>11</sup> and satisfied the \$75,000 amount in controversy requirement,<sup>12</sup> although at least some of the unnamed class members did not.<sup>13</sup> The suit was brought by current and former Exxon dealers who alleged overcharges in the

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9. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 549 (2005).

10. *Id.*

11. The Court has long held that, in a class action, the complete diversity requirement of 28 U.S.C. § 1332 is satisfied if all named representative plaintiffs are diverse from all defendants; § 1332 does not require that unnamed class members also be diverse from their adversaries. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 366 (1921).

12. For ease of expression, I sometimes will refer to § 1332 as requiring \$75,000 to be in controversy, rather than in excess of \$75,000.

13. See *Allapattah*, 545 U.S. at 550 ("[T]he District Court certified the case for interlocutory review, asking whether it had properly exercised § 1367 supplemental jurisdiction over the claims of class members who did not meet the jurisdictional minimum amount in controversy.").

wholesale price of motor fuel, in breach of agreements.<sup>14</sup> *Rosario Ortega* posed its question in a suit by a child, who had suffered unusually severe personal injuries when she sliced her finger on a tuna can, and by members of her family, where all plaintiffs were diverse from the defendant but only the child sought damages in excess of \$75,000.<sup>15</sup>

The Court began its search for the answer to the question it had posed by invoking the seminal case of *United Mine Workers v. Gibbs*<sup>16</sup> for the proposition that "once a court has original jurisdiction over some claims in the action, it may exercise supplemental jurisdiction over additional claims that are part of the same case or controversy."<sup>17</sup> *Gibbs* could not take the necessary analysis far, however, because the questions posed by *Allapattah* and *Rosario Ortega* required the construction of statutes—§§ 1332 and 1367—while *Gibbs* focused on the power of federal courts under Article III of the Constitution to hear state law claims pendent to a federal question.<sup>18</sup> It was not until the line of cases including *Aldinger v. Howard*,<sup>19</sup> *Owen Equipment & Erection Co. v. Kroger*,<sup>20</sup> and *Finley v. United States*,<sup>21</sup> that the Court had focused upon the need to reconcile exercises of supplemental jurisdiction with Congressional grants of jurisdiction.<sup>22</sup> In *Finley*, the Court jettisoned weaker requirements

14. *Id.*

15. *Id.* at 551.

16. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966) (recognizing the federal judicial power to adjudicate state law claims when a substantial "federal claim . . . confer[s] subject matter jurisdiction on the court" and both "state and federal claims . . . derive from a common nucleus of operative fact" so that the plaintiff "would ordinarily be expected to try them all in one judicial proceeding").

17. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005).

18. *Gibbs*, 383 U.S. at 725; see *Allapattah*, 545 U.S. at 552–53 ("*Gibbs* confirmed that the District Court had the additional power . . . to exercise supplemental jurisdiction over related state claims that arose from the same Article III case or controversy . . . . [T]he decision . . . did not mention . . . the text of the jurisdictional statutes and the bedrock principle that federal courts have no jurisdiction without statutory authorization.").

19. See *Aldinger v. Howard* 427 U.S. 1, 17 (1976) (holding that a pendent party claim was not within the jurisdiction of the federal courts in a suit when jurisdiction was predicated on 28 U.S.C. § 1343).

20. See *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 377 (1978) (disapproving the exercise of supplemental jurisdiction over a state law claim asserted by plaintiff against a third-party defendant that was not diverse from plaintiff, reasoning that to do otherwise would permit evasion of the statutory complete diversity requirement and flout Congress's command).

21. See *Finley v. United States*, 490 U.S. 545, 555–56 (1989) (denying pendent-party jurisdiction, pursuant to the Federal Tort Claims Act (FTCA), over plaintiff's state law claim against a nondiverse defendant whom plaintiff sought to sue along with the Federal Aviation Authority (FAA), notwithstanding that the claim against the FAA was exclusively within the jurisdiction of the federal courts).

22. See *Aldinger*, 427 U.S. at 13–16 (emphasizing that, unlike in *Aldinger*, the Court, in



suggested by *Aldinger* and *Owen*,<sup>23</sup> and declared the need for Congress to

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*Gibbs* and *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), did not inquire into a statutory grant of federal jurisdiction because Congress had not enacted any such legislation). Specifically, the Court stated:

*Gibbs* and its lineal ancestor, *Osborn*, were couched in terms of Art. III's grant of judicial power in "Cases . . . arising under this Constitution, the Laws of the United States, and [its] Treaties," since they (and implicitly the cases which linked them) represented inquiries into the scope of Art. III jurisdiction in litigation where the "common nucleus of operative fact" gave rise to non-federal questions or claims between the parties. None of them posed the need for a further inquiry into the underlying statutory grant of federal jurisdiction or a flexible analysis of concepts such as "question," "claim," and "cause of action," because Congress had not addressed itself by statute to this matter. In short, Congress had said nothing about the scope of the word "Cases" in Art. III which would offer guidance on the kind of elusive question . . . whether and to what extent jurisdiction extended to a parallel state claim against the existing federal defendant.

Thus, it was perfectly consistent with Art. III, and the particular grant of subject-matter jurisdiction upon which the federal claim against the defendant in those cases was grounded, to require that defendant to answer . . . to a second claim deriving from the "common nucleus" of fact . . .

...

. . . In *Osborn* and *Gibbs* Congress was silent on the extent to which the defendant . . . might be called upon to answer nonfederal questions or claims; the way was thus left open for the Court to fashion its own rules under the general language of Art. III. . . . [But pendent party jurisdiction, with a state claim to be asserted against a defendant against whom no federal question was pleaded] must be decided, not in the context of congressional silence or tacit encouragement . . . The question here . . . is whether by virtue of the statutory grant of subject-matter jurisdiction, upon which petitioner's principal claim . . . rests, Congress has addressed . . . the *party* as to whom jurisdiction pendent to the principal claim is sought. And it undoubtedly has done so.

*Id.* (emphasis in original).

23. See *Aldinger*, 427 U.S. at 18 (opining that it is essential that "Congress in the statutes conferring jurisdiction has not expressly or by implication negated . . . [the] existence" of the particular form of supplemental jurisdiction in question). The Court decided, however, that Congress "ha[d] by implication declined to extend federal jurisdiction over" a state law claim against a county. *Id.* at 19. The Court reasoned that in providing for jurisdiction over 42 U.S.C. § 1983 suits in 28 U.S.C. § 1343(3), Congress had conferred jurisdiction over suits against defendants that could be sued under § 1983, and those defendants only. *Id.* at 17. The Court deduced that "the reach of the statute conferring jurisdiction should be construed in light of the scope of the cause of action as to which federal judicial power *has* been extended by Congress." *Id.* (emphasis in original). At the time, a county—the proposed pendent party—could not be sued under § 1983, so the Court concluded that plaintiff's claims against the county could not be heard as within pendent party jurisdiction. *Id.* at 16.

In *Owen* the Court found in § 1332 "a congressional mandate that diversity jurisdiction [not be] available when any plaintiff is a citizen of the same State as any defendant." *Owen*, 437 U.S. at 374. Thus, it rejected supplemental jurisdiction over a state law claim asserted by a plaintiff against a third-party defendant who was not diverse from plaintiff. *Id.* at 373. One might have inferred from *Owen* that anything short of a mandate that prohibited a particular

affirmatively confer on federal courts the authority to exercise pendent party jurisdiction, a form of what came to be called supplemental jurisdiction,<sup>24</sup> prompting enactment of 28 U.S.C. § 1367.<sup>25</sup> The *Finley* Court was willing, however, to posit Congressional intent to authorize federal courts to exercise all the power that Article III's "case or controversy" language permits over claims between or among parties who are before a federal court without resort to supplemental jurisdiction, as distinguished from claims by or against other persons.<sup>26</sup>

One also might question *Gibbs*'s relevance to the issues of diversity jurisdiction raised by *Allapattah* and *Rosario Ortega* because *Gibbs* (as well as *Aldinger* and *Finley*) was in federal court by virtue of federal question jurisdiction.<sup>27</sup> *Allapattah* itself declared that the Court has not applied as expansive an approach to interpretation of the diversity jurisdiction statute as it has applied in interpreting grants of federal question jurisdiction.<sup>28</sup> Prior to the enactment of 28 U.S.C. § 1367, however, the Court's approach to pendent party jurisdiction had been grudging in federal question cases as well.<sup>29</sup> Even if

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form of supplemental jurisdiction permitted that form of supplemental jurisdiction.

24. See *Finley*, 490 U.S. at 556 ("Whatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress . . . Congress [must] be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.").

25. In *Finley*, the Court rejected the view that jurisdiction to hear "civil actions" itself conferred power to hear claims within supplemental jurisdiction—but its holding really was narrower. *Id.* at 553. The Court interpreted the FTCA and concluded that a revision that changed the FTCA's conferral of jurisdiction to hear "*any claim* against the United States" for specified torts to "jurisdiction of *civil actions on claims* against the United States" did not broaden the scope of the statute to permit assertion of jurisdiction over any "civil action"—including pendent party claims—so long as that action included a claim against the United States. *Id.* at 554 (emphasis in original).

26. See Doyle, *supra* note 7, at 877 (finding, in various cases concerning supplemental jurisdiction, including *Allapattah*, greater support in the Court's reasoning for a dialogic discourse between Congress and the Court that determines the actual contours of lower federal court subject-matter jurisdiction than for an approach that makes Congress the ultimate authority determining federal subject-matter jurisdiction). The Note concluded that the *Allapattah* Court responded "through the guise of statutory interpretation, with its own judgment on the proper scope of supplemental jurisdiction and the effect of supplemental jurisdiction on the requirements of diversity jurisdiction." *Id.* at 864–65. Further, "[d]espite its reiteration of congressional power, the Court's refusal to overturn *Gibbs* speaks volumes." *Id.* at 877.

27. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 720–21 (1966) (detailing the procedural posture of the case).

28. See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 553 (2005) ("We have not . . . applied *Gibbs*'s expansive interpretive approach to other aspects of the jurisdictional statutes.").

29. See *supra* notes 19 & 22–25 and accompanying text (regarding *Aldinger v. Howard*,

not surpassing the Court's reticence in the federal question context, consistent with that conservative approach and based upon the Court's view of the purposes of the diversity requirement, the Court consistently had (and has) insisted that each properly joined plaintiff must be diverse from each properly joined defendant.<sup>30</sup> The *Allapattah* Court explained that *Gibbs* did not undermine the complete diversity rule because "[i]ncomplete diversity destroys original jurisdiction with respect to all claims, so there is nothing to which supplemental jurisdiction can adhere."<sup>31</sup> By contrast, "the federal-question and amount-in-controversy requirements . . . can be analyzed claim by claim."<sup>32</sup> For reasons elaborated in Part C hereof, this purported distinction may not hold-up. In any event, until *Allapattah* and *Rosario Ortega* the Court also had maintained its insistence that each plaintiff individually have a claim or claims that satisfy the amount in controversy requirement, subject to the common law rules governing aggregation; that is, plaintiffs asserting a "common undivided interest, single title or right" can "aggregate"—or perhaps one might more accurately say "need not disaggregate"—their claims, and the amount of an allegedly joint liability will not be disaggregated in determining the amount in controversy.<sup>33</sup> Outside these situations, under § 1332(a) multiple plaintiffs may not aggregate their claims, the claims against multiple defendants may not be aggregated and, until *Allapattah* and *Rosario Ortega*, courts could not exercise supplemental jurisdiction over the claims of plaintiffs whose claims did not

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427 U.S. 1 (1976), and *Finley v. United States*, 490 U.S. 545 (1989)). Reasoning as it had in *Aldinger*, the *Finley* Court concluded that the jurisdictional statute in play, 28 U.S.C. § 1346, authorized jurisdiction over claims against the United States only and hence did not confer jurisdiction to hear pendent state law claims against a defendant other than the United States. *Finley*, 490 U.S. at 552–53.

30. See, e.g., *Allapattah*, 545 U.S. at 553 ("[W]e have consistently interpreted § 1332 as requiring complete diversity: In a case with multiple plaintiffs and multiple defendants, the presence in the action of a single plaintiff from the same State as a single defendant deprives the district court of original diversity jurisdiction over the entire action.").

31. *Id.* at 554.

32. *Id.*

33. Compare *Snyder v. Harris*, 394 U.S. 332, 337 (1969) (stating that the claims of class members can be added together only when they sue to enforce a single right or title in which they hold a common or undivided interest), and *Troy Bank v. G. A. Whitehead & Co.*, 222 U.S. 39, 40–41 (1911) (reasoning that federal court had jurisdiction to enforce a vendor's lien—a common security for the payment of two separate promissory notes, separately insufficient but together sufficient to meet the amount-in-controversy requirement—when plaintiffs had a common and undivided interest in the lien), with *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 512 (1973) (precluding aggregation when multiple plaintiffs have separate and distinct claims in spurious class suits sought to be maintained as diversity class actions and requiring dismissal of litigants whose individual claims did not satisfy the jurisdictional amount requirement). See generally 14C WRIGHT ET AL., *supra* note 4, § 3704 (discussing the aggregation rules).

meet the \$75,000 jurisdictional minimum, to allow those claims to hang on to the coattails of claims by other plaintiffs whose claims did satisfy the \$75,000 jurisdictional amount requirement.<sup>34</sup> To this point in its analysis, the Court distinguished claims from civil actions.

### B. Civil Actions Versus Claims

Posing the question presented in *Allapattah* and *Rosario Ortega* as "whether a diversity case in which the claims of some plaintiffs satisfy the amount-in-controversy requirement, but the claims of other plaintiffs do not, presents a 'civil action of which the district courts have original jurisdiction,'"<sup>35</sup>—a necessary predicate under § 1367—the Court answered:

When the well-pleaded complaint contains at least one claim that satisfies the amount-in-controversy requirement, and there are no other relevant jurisdictional defects, the district court . . . has original jurisdiction over that claim. The presence of other claims in the complaint, over which the district court may lack original jurisdiction, is of no moment. *If the court has original jurisdiction over a single claim in the complaint, it has original jurisdiction over a "civil action" within the meaning of § 1367(a), even if the civil action over which it has jurisdiction comprises fewer claims than were included in the complaint.* [The court may then turn to whether it may exercise supplemental jurisdiction over the other claims in the action.]<sup>36</sup>

The italicized statement is in some respects remarkable. When persons knowledgeable of federal civil procedure think of a civil action, we normally

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34. See *supra* note 2 and accompanying text (providing the relevant text of 28 U.S.C. § 1367(a)–(b)). The Court had no occasion to speak to the fate of monetarily insufficient claims against a diverse defendant when a plaintiff asserts a monetarily sufficient claim against a different diverse defendant, for example, *P v. D1*, for \$50,000, + *D2*, for \$80,000. Under 28 U.S.C. § 1367(b), "the district courts shall not have supplemental jurisdiction . . . over claims by plaintiffs against persons made parties under Rule [20 of the Federal Rules of Civil Procedure] . . . when exercising supplemental jurisdiction over such claims would be inconsistent with . . . section 1332." In the wake of *Allapattah*, at least one district court has held that federal courts may not exercise supplemental jurisdiction over the monetarily insufficient claim. See *State Farm Mut. Auto. Ins. Co. v. Greater Chiropractic Ctr. Corp.*, 393 F. Supp. 2d 1317, 1323 (M.D. Fla. 2005) ("Even if the requirements for diversity jurisdiction are met for a claim against one defendant, the district courts may not exercise supplemental jurisdiction as to claims against different defendants, when such claims do not meet the requisite amount in controversy.").

35. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 558 (2005) (quoting U.S.C. § 1367(a)).

36. *Id.* at 559 (emphasis added).

conceive of the collection of claims and defenses that plaintiffs, defendants, intervenors, third-party defendants, and the like, are permitted by the Rules to assert against one another: claims by plaintiffs, counterclaims, cross-claims, third-party claims, etc., and the defenses to those claims.<sup>37</sup> Of course, a federal court may adjudicate only claims within its jurisdiction.<sup>38</sup> If the initial civil action—that constituted by the claims asserted by plaintiff(s)—is within the original jurisdiction of the federal courts, then courts can consider whether they may assert supplemental jurisdiction over subsequently-filed claims

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37. See ALI FJCRP, *supra* note 3, at 30–31 (explaining the meaning of a "civil action"). Specifically, it says:

A "civil action" is understood to be a judicial proceeding for relief of a civil nature, commenced by the pleading of one or more claims, and to which other claims may be joined in the conduct of the litigation. A "civil action," thus conceived, is simply a generic, transsubstantive means or "form of action" for seeking judicial relief of a civil nature. . . . There is no intrinsic scope of a "civil action," which is contingent on the decisions of the parties, shaped and limited by the rules of pleading, joinder, jurisdiction, and preclusion, as to which claims are submitted simultaneously for enforcement at one time by one judge . . . .

*Id.*; see also *Walter Kidde Portable Equip., Inc. v. Universal Sec. Instruments, Inc.*, 479 F.3d 1330, 1335 (Fed. Cir. 2007) (determining that an order that granted a motion for voluntary dismissal was a final and reviewable order because it dismissed the action, which encompassed the entire proceedings and included both claims and counterclaims); *In re Mut. Fund Market-Timing Litig.*, 468 F.3d 439, 444 (7th Cir. 2006) (observing that cases are removed and remanded as units, except under 28 U.S.C. § 1441(c), criticizing the district court for permitting defendants to break a single case into two, ordering remand of the entire case to state court, and ordering dismissal of the portion that constituted an attempt to engineer a partial removal of a single case); *In re Air Crash Disaster Near Roselawn*, 96 F.3d 932, 943 (7th Cir. 1996) (concluding that although "entire case" and "civil action" ordinarily share the same meaning, "action" in the second sentence of Section 1447(d) refers only to claims against foreign state defendants so as to preserve the right to jury trial against non-foreign state defendants); *Spring Garden Assocs. v. Resolution Trust Corp.*, 26 F.3d 412, 415–16 (3d Cir. 1994) (concluding that, under 28 U.S.C. § 1441(a)(1), defendant RTC had authority to remove all claims in lawsuit because statute did not confer jurisdiction over claims asserted by or against defendant but over any action to which defendant was a party); *Superior Partners v. Chang*, 471 F. Supp. 2d 750, 757–58 (S.D. Tex. 2007) (concluding that if a class action covered by the Securities Litigation Uniform Standards Act (SLUSA) is removed to federal court and the "Delaware carve-out" applies to any claims therein, the federal court must remand the entire civil action to state court because the statute directs remand of the "action"); *In re Lord Abbett Mut. Funds Fee Litig.*, 463 F. Supp. 2d 505, 510–14 (D.N.J. 2006) (concluding that preclusion of any claim by SLUSA required dismissal of entire action because SLUSA preempts entire class actions rather than individual claims, looking to statutory language, legal dictionary definitions, Congressional intent, and case precedents); *Comes v. Microsoft Corp.*, 403 F. Supp. 2d 897, 903 (S.D. Iowa 2005) (distinguishing a civil action from a claim to determine when a civil action is commenced for purposes of CAFA).

38. See, e.g., *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute . . . .") (citations omitted).

(counterclaims, cross-claims, third-party claims, etc.) that do not themselves independently satisfy federal jurisdictional requirements.<sup>39</sup> But, conventionally, we do not conflate a court's original jurisdiction over a claim asserted in the complaint with the court's jurisdiction over the civil action of which it is a part.<sup>40</sup> We do not infer from a court's jurisdiction over a claim that it has jurisdiction over the entire civil action of which that claim is a part.<sup>41</sup> A federal court will have jurisdiction over—and a federal civil action will encompass—only the claims that are permitted by the governing Rules and are supported either by an independent basis of subject-matter jurisdiction (that is, the claims that themselves satisfy the requirements for federal question or diversity jurisdiction, sometimes called "freestanding claims")<sup>42</sup> or by supplemental jurisdiction.<sup>43</sup>

So, we define a civil action not only in terms of the claims that the Federal Rules—or another sovereign's rules—permit to be brought within the scope of a single litigation,<sup>44</sup> but also by reference to the court's subject-matter jurisdiction.<sup>45</sup> And when we do so, we distinguish between a claim and a civil

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39. See, e.g., *supra* note 2 and accompanying text (providing the text of 28 U.S.C. § 1367(a)).

40. See, e.g., ALI FJCRP, *supra* note 3, at 5–6 ("The proposition that the claim and not the civil action is the fundamental unit of litigation for purposes of federal jurisdiction fits comfortably within the established analytical structure of federal-question jurisdiction . . .").

41. See, e.g., *id.* at 30–31 (clarifying the basic understanding of a "claim" and distinguishing a claim from a civil action).

42. See *id.* at 13 (using the term "freestanding claim" to refer to a claim for relief that is within the original jurisdiction of the district courts independently of the supplemental jurisdiction statute). In this Article, I use "federal question or diversity jurisdiction" for simplicity, although other forms of federal jurisdiction (such as admiralty jurisdiction) exist.

43. See, e.g., *Port Drum Co. v. Umphrey*, 852 F.2d 148, 149 (5th Cir. 1988) (concluding that the Federal Rules of Civil Procedure implement only the grants of jurisdiction made by Congress).

44. See, e.g., FED. R. CIV. P. 13(g) (permitting as a cross-claim only a claim by one party against a coparty arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action). The Federal Rules of Civil Procedure exclude a cross-claim that is transactionally unrelated to plaintiff's claims or to defendant's counterclaims that are supported by an independent basis of jurisdiction.

45. See *supra* note 37 and accompanying text (providing text from the ALI FJCRP). The ALI FJCRP further states:

For purposes of federal jurisdiction . . . the scope of the claims that may be adjudicated in a single "civil action" is limited by the intrinsic scope of the constitutional concept of a "case or controversy," which permits federal judicial power to be exercised not only over designated categories of claims but also, and only, over such other claims as may be transactionally related to and joined in a single civil action with claims that qualify categorically for federal jurisdiction.

action.<sup>46</sup> This is easily illustrated. For example, although the Federal Rules permit plaintiffs to assert any and all claims that they have against a defendant,<sup>47</sup> a plaintiff may not assert wholly unrelated claims against a defendant unless each of those claims is supported by an independent basis of jurisdiction or aggregation rules allow jurisdiction in the diversity context.<sup>48</sup> Absent an independent jurisdictional basis for each, or diversity jurisdiction by virtue of aggregation of amounts in controversy and all plaintiffs diverse from all defendants, or supplemental jurisdiction with non-federal claims dependent upon a federal claim, a plaintiff's claims cannot be part of the same federal civil action.<sup>49</sup> A factually separate, non-federal claim between nondiverse parties would have to be dismissed to avoid dismissal of the entire collection of claims.

Similarly, the Federal Rules allow permissive counterclaims, but most such claims will not fall within the scope of supplemental jurisdiction because they will not arise out of a common nucleus of operative fact with the "principal" claim.<sup>50</sup> Most courts, therefore, will regard permissive counterclaims as not part of the same Article III case or controversy as the principal claim.<sup>51</sup> If the permissive counterclaim is not itself a federal question

ALI FJCRP, *supra* note 3, at 31.

46. See *supra* note 41 and accompanying text (distinguishing a claim and a civil action).

47. See FED. R. CIV. P. 18(a) ("A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party.").

48. See 6A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: CIVIL 2D § 1588, at 535 (1990 & Supp. 2008) (discussing subject-matter jurisdiction in relation to Rule 18). The treatise states:

Joinder of claims under Rule 18(a) does not present any special jurisdictional difficulties in cases in which ordinary subject-matter jurisdiction requirements are satisfied regarding each of the asserted claims.

... [I]n an action involving a single [diverse] plaintiff and a single [diverse] defendant, a party may aggregate all the claims he has against an opposing party in order to satisfy the requisite jurisdictional amount.

*Id.*

49. See *id.* § 1582, at 520 ("Except for the limitations imposed by the requirements of federal subject-matter jurisdiction [i.e., federal question, diversity, and supplemental jurisdiction], there is no restriction on the claims that may be joined in actions brought in the federal courts.").

50. See FED. R. CIV. P. 13(a) (requiring that a claim arise out of the same transaction or occurrence as the subject matter of an opposing party's claim for it to qualify as a compulsory counterclaim); see also FED. R. CIV. P. 13(b) ("A pleading may state as a counterclaim against an opposing party any claim that is not compulsory."). Thus, Rule 13(b) permits, but does not compel, pleadings to state as counterclaims any claims against an opposing party that do not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim.

51. See 6 CHARLES ALAN WRIGHT, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1421, at 166 (1990 & Supp. 2008) (citing numerous cases that regard a counterclaim as "permissive if it

claim and does not meet the requirements for diversity subject-matter jurisdiction or some other jurisdictional basis, the court will have to dismiss it.<sup>52</sup> But the permissive counterclaim is not the civil action; and a civil action, as defined by the Rules and jurisdictional requirements, will remain.

If a lawsuit is filed in state court by one plaintiff against one non-diverse defendant and contains a federal question claim and a state law claim that arises out of completely unrelated circumstances—both filed by plaintiff—the courts have understood that that combination of claims does not constitute a civil action within the original jurisdiction of the federal courts, and hence that it is not removable under 28 U.S.C. § 1441(a).<sup>53</sup>

In all of this, the notion of a claim is distinct from the notion of a civil action. The distinction between a claim and a civil action is evident in many other respects. By way of illustration only, consider the following examples: (1) Courts dismiss claims for failure to state a claim on which relief can be granted; courts do not dismiss entire civil actions on that basis unless no purported claim asserted by a party states a claim on which relief can be granted.<sup>54</sup> We similarly measure many other defenses and motions for summary judgment in relation to particular claims so that what is fatal to, or otherwise determinative of, one claim need not be fatal to, or otherwise determinative of, other claims in the same civil action;<sup>55</sup> (2) Various Federal

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relates to business transactions or events, other than those that are at issue in the main claim").

52. See, e.g., *By-Prod Corp. v. Armen-Berry Co.*, 668 F.2d 956, 961 (7th Cir. 1982) (stating that a permissive counterclaim, can "withstand dismissal on jurisdictional grounds if, but only if, it has an independent basis of federal jurisdiction") (emphasis added).

53. See 28 U.S.C. § 1441(a) (2000) ("Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants . . ."); see also *Wilson v. Lowe's Home Ctr., Inc.*, 401 F. Supp. 2d 186, 193 (D. Conn. 2005) ("[A]n action containing a claim outside the original jurisdiction of the district court is not removable under this section [§ 1441(a)], even if the action contains other claims within the district court's original jurisdiction."). Complementarily, 28 U.S.C. § 1441(c) states:

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

28 U.S.C. § 1441(c) (2000).

54. See 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE: CIVIL 3D* § 1357, at 640–76 (2004 & Supp. 2008) ("[T]he question on a motion to dismiss under Rule 12(b)(6) is whether . . . the complaint states any legally cognizable claim for relief. If the answer to the question is in the affirmative, the motion to dismiss must be denied and the action should be permitted to continue.").

55. See FED. R. CIV. P. 12(b) & 56 (allowing defenses and motions to dismiss or for summary judgment to specific *claims*). Conversely, when a statute prohibits the bringing of



Rules address the circumstances under which parties or the court may join claims within a single civil action. Judicial consolidation of actions is, and is seen as, a different matter;<sup>56</sup> (3) Federal Rule 54(b) speaks to when and how a district court may direct the entry of final judgment as to one or more, but fewer than all, of the claims or parties "[w]hen an action presents more than one claim for relief";<sup>57</sup> (4) Res judicata, claim preclusion, is determined claim by claim, not action by action.<sup>58</sup> I will not further belabor the point. Courts distinguish between claims and civil actions on innumerable occasions.

certain actions, those actions, not merely particular claims, must be dismissed in their entirety. *See In re Lord Abbett Mut. Funds Fee Litig.*, 463 F. Supp. 2d 505, 511–13 (D.N.J. 2006) (concluding that preclusion of one class action claim under SLUSA required dismissal of entire complaint because the statute prohibited certain "actions"); *Comes v. Microsoft Corp.*, 403 F. Supp. 2d 897, 903 (S.D. Iowa 2005) (reasoning that under CAFA a civil action commences only once despite subsequent amendments of the pleadings) (citing *Weekley v. Guidant Corp.*, 392 F. Supp. 2d 1066, 1067 (E.D. Ark. 2005) (noting instances when Congress distinguished between whole proceedings and portions thereof by speaking of civil actions, and claims or causes of action, respectively)); *Greaves v. McAuley*, 264 F. Supp. 2d 1078, 1083–86 (N.D. Ga. 2003) (concluding that language in "Delaware Carve-Out" and SLUSA's "preemption" called for remand of entire "action" when certain of plaintiff's claims were subject to the carve-out and SLUSA).

56. Compare FED. R. CIV. P. 18–20 (providing for joinder of claims and joinder of parties within a civil action), with FED. R. CIV. P. 42(a) (allowing the consolidation of separate civil actions to create one civil action). *See also* FED. R. CIV. P. 79(a) (directing that a civil action receive a single docket number, and making no distinction between actions depending upon the number of claims encompassed).

57. FED. R. CIV. P. 54(b).

58. *See Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380–87 (1985) (concluding in part that federal courts, faced with contentions of res judicata bar—arising from a state court judgment—of claims exclusively within federal subject-matter jurisdiction, should first determine the preclusive effect of the earlier judgment under state law); *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984) (concluding that an individual's claim of discrimination was not precluded by a prior judgment in a class action, of which he was part, that alleged a pattern of practice of discrimination, because the individual and class claims were distinct); *Cromwell v. County of Sac*, 94 U.S. 351, 355–60 (1876) (discussing merger's and bar's application to all aspects of the cause adjudicated, including those aspects that were not, but might have been, raised). *See generally* RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982) (stating the general rule concerning "splitting"). Specifically, § 24 says:

When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

*Id.* (emphasis added); *see also* 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: JURISDICTION 2D §§ 4402, 4406–4414 (2002 & Supp. 2008) (noting that res judicata is also known as claim preclusion, although some refer to both claim preclusion and issue preclusion, *i.e.*, collateral estoppel, as claim preclusion; discussing definitions of "claim" and "cause of action"; and illustrating the workings of res judicata doctrine).

Certainly, a single claim *can* constitute a civil action and does so when it is the sole claim asserted between the parties. Similarly, multiple claims, such as a federal question and a state law claim within supplemental jurisdiction, can constitute a civil action and do so when they are the sole claims asserted between the parties. However, the *Allapattah* Court stated, "[i]f the court has original jurisdiction over a single claim in the complaint, it has original jurisdiction over a 'civil action' within the meaning of § 1367(a), even if the civil action over which it has jurisdiction comprises fewer claims than were included in the complaint."<sup>59</sup> A possible implication is that if a district court has original jurisdiction over a single claim in the complaint, it has original jurisdiction over a civil action within the meaning of § 1367(a), even if the collection of claims that plaintiff has pleaded exceeds the scope of jurisdiction permissible under Article III.<sup>60</sup> The accuracy of the Court's assertion—and the manner in which the Court characterized the situation—is dubious. The fact that a single claim *can* constitute a civil action and does so when it is the sole claim asserted between the parties is insufficient to support the Court's assertion.

The Court's reasoning in *Allapattah* is worth returning to: Having discussed some common law history of supplemental jurisdiction, the structure of 28 U.S.C. § 1367 and the grant of supplemental jurisdiction in § 1367(a), the Court proceeded to observe that 28 U.S.C. § 1367(b) "does not withdraw supplemental jurisdiction over the claims of the additional parties at issue here,"<sup>61</sup> which is literally true. "Nothing in the text of § 1367(b) . . . withholds supplemental jurisdiction over the claims of plaintiffs permissively joined under Rule 20 . . . or certified as class-action members pursuant to Rule 23 . . . ."<sup>62</sup> The Court then rejected the view "that a district court lacks original

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59. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 559 (2005).

60. *See* *York v. Day Transfer Co.*, 525 F. Supp. 2d 289, 295 (D.R.I. 2007) (stating, in dicta, that "[a] civil action filed in a state court may be removed to federal court if at least one of the claims arises under federal law"). Section 1367(a), by its terms, confers upon district courts supplemental jurisdiction over "other claims that are so related to claims in the action within such [district courts'] original jurisdiction that they form part of the same case or controversy under Article III." 28 U.S.C. § 1367(a) (2000). However, any limitation on supplemental jurisdiction that is implied by this language may be distinguished from the district courts' original jurisdiction over a civil action, the predicate for any exercise of supplemental jurisdiction.

61. *Allapattah*, 545 U.S. at 560.

62. *Id. Contra* 28 U.S.C. § 1367(b) (withholding supplemental jurisdiction over the monetarily insufficient claims of plaintiffs against *defendants* joined under FED. R. CIV. P. 20); *see, e.g., State Farm Mut. Auto. Ins. Co. v. Greater Chiropractic Ctr. Corp.*, 393 F. Supp. 2d 1317, 1323 (M.D. Fla. 2005) (concluding, *post-Allapattah*, that the federal court could not assert supplemental jurisdiction over monetarily insufficient claims of plaintiffs against

jurisdiction over a civil action unless the court has original jurisdiction over every claim in the complaint."<sup>63</sup> This assertion is closely related to—indeed, it is another way of making—the assertion that I challenged in the preceding paragraph.<sup>64</sup> But, for me, this formulation facilitates scrutiny of the position.

There are some senses in which the proposition quoted at note 63 hereof is incorrect and was rightly rejected by the Court, and some senses in which the quoted proposition is accurate and was wrongly rejected by the Court. This bipolar nature derives from the different meanings that may be attributed to the phrase "original jurisdiction." That phrase may be used to distinguish (at least) the following: appellate jurisdiction from the kind of jurisdiction that trial courts exercise (the jurisdiction of a *nisi prius* court<sup>65</sup>);<sup>66</sup> supplemental jurisdiction from the jurisdiction explicitly conferred by statutes such as 28 U.S.C. §§ 1331 & 1332;<sup>67</sup> and jurisdiction-upon-removal of an action from

defendants joined under FED. R. CIV. P. 20).

63. *Allappattah*, 545 U.S. at 560.

64. *Supra* text accompanying note 59. If a district court need not have original jurisdiction over every claim in the complaint in order to have original jurisdiction over a civil action, it can have original jurisdiction over a civil action even if the civil action over which it has jurisdiction comprises fewer claims than were included in the complaint.

65. See BALLENTINE'S LAW DICTIONARY 852 (3d ed. 1969) (defining "*nisi prius*" as "[u]nless before. A trial before a single judge . . . . In modern terminology, the trial, as distinguished from the appellate court, where both have exercised jurisdiction in a cause"); BLACK'S LAW DICTIONARY 1072 (8th ed. 2004) (defining "*nisi prius*" as "[a] civil trial court in which, unlike in an appellate court, issues are tried before the jury"); GARNER, A DICTIONARY OF MODERN LEGAL USAGE 589 (2d ed. 1995) (adding that, in the United States, "the phrase has even been extended to refer to nonjury trials," to the extent that it is not obsolete).

66. *E.g.*, *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 291–94 (2005) (reiterating, in the context of deciding proper occasions for application of the *Rooker-Feldman* doctrine, that federal district courts exceed their authority in exercising jurisdiction over suits seeking reversal or modification of state courts' judgments because district courts are empowered to exercise only original, not appellate, jurisdiction); *City of Chi. v. Int'l Coll. of Surgeons*, 522 U.S. 156, 163–91 (1997) (reflecting disagreement between majority and dissenting Justices as to whether state law claims for on-the-record review of local administrative action fell within the original jurisdiction of the federal courts, or was an unauthorized appellate function); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11–14 (1992), *superseded by statute on other grounds*, Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214, *as recognized in Williams v. Taylor*, 529 U.S. 362, 375–90 (2000) (distinguishing between original and appellate jurisdiction in explaining that habeas corpus is an original civil action, not an appellate proceeding).

67. See, *e.g.*, *Surgeons*, 522 U.S. at 167 (treating the notions of original jurisdiction and supplemental jurisdiction as mutually exclusive). In *Surgeons*, the majority emphasized the supposed distinction between "original jurisdiction" (present in that case by virtue of federal constitutional claims) and "supplemental jurisdiction," saying:

[T]he relevant inquiry respecting the accompanying state claims [for deferential judicial review of the claims that administrative orders violated state law] is whether they fall within a district court's supplemental jurisdiction, not its original

state court from jurisdiction-invoked-by-commencement in federal court under statutes such as 28 U.S.C. §§ 1331 & 1332.<sup>68</sup> Courts generally *are* consistent in differentiating appellate jurisdiction from the jurisdiction of the courts that hear cases in the first instance.<sup>69</sup> They are less consistent in characterizing the

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jurisdiction. . . . The whole point of supplemental jurisdiction is to allow the district courts to exercise pendent jurisdiction over claims as to which original jurisdiction is lacking.

*Id.* The Court went on to say that "to decide that state law claims for on-the-record review of a local agency's decision fall within the district courts' 'supplemental' jurisdiction under § 1367(a), does not answer the question, nor do we, whether those same claims, if brought alone, would substantiate the district courts' 'original' jurisdiction over diversity cases under § 1332." *Id.* at 172. *But see, e.g.,* ALI FJCRP, *supra* note 3, at 74–75 (discussing *Surgeons*).

Contrast the view made clear in the ALI's proposed revision of § 1367(b) that "the supplemental jurisdiction it grants is a form of original jurisdiction," which would not authorize district courts to exercise appellate jurisdiction, something the Court arguably permitted in *Surgeons*. *Id.* at 18; *see also* ALI FJCRP, *supra* note 3, at 602, which states:

"[S]upplemental jurisdiction" [is] merely a procedural subcategory of original jurisdiction: it is a term used to describe the exercise of original jurisdiction over particular claims in an action that would not qualify for the statutorily limited original jurisdiction of the district courts if litigated independently of their joinder to other claims that fall within the terms of the statutes vesting the district courts with original jurisdiction. . . . [A]t least when it is exercised by a district court . . . , "supplemental jurisdiction" is a form of original jurisdiction, resulting in a judgment on the merits of the claim in question by a court of the first instance.

68. *See, e.g.,* Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 592 (2004) (Ginsburg, J., dissenting) (commenting that "[i]t would be odd, indeed, to hold . . . that jurisdictional flaws fatal to original jurisdiction are nonetheless tolerable when removal jurisdiction is exercised"); *El Paso Natural Gas Co. v. Neztzossie*, 526 U.S. 473, 477 (1999) (noting that a provision of the Price-Anderson Act grants district courts original and removal jurisdiction over all public liability actions arising out of nuclear incidents); *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 390–91 (1998) (referring to differences between "diversity" and "Eleventh Amendment" cases with respect to original and removal jurisdiction); *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 10 n.9 (1983) ("It is possible to conceive of a rational jurisdictional system in which . . . original and removal jurisdiction were not coextensive.").

Even a document as carefully drawn as the ALI FJCRP, and which explicitly recognizes that "removal is merely a procedural subcategory of original jurisdiction—the power to try the action in the first instance," sometimes contrasts cases in federal court by removal with cases within original jurisdiction. ALI FJCRP, *supra* note 3, at 602. "The district court whose jurisdiction is invoked, either originally or by removal, must determine whether it would have jurisdiction over the action were declaratory relief unavailable and the dispute brought before it by either party in an action seeking coercive relief." *Id.* at 639. "[When] preemption is a defense to the state claim, . . . the rule that jurisdiction must be based on the complaint rather than on defenses is enough to defeat removal [predicated on original jurisdiction of the claim under § 1331]." *Id.* at 648 (bracketed material in original) (quoting CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* § 38, at 230 (5th ed. 1994)).

69. *See, e.g.,* 13 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE: JURISDICTION* 2D § 3521, at 51–60 (1984 & Supp. 2008) (outlining the constitutional basis of

relationship between supplemental jurisdiction and original jurisdiction.<sup>70</sup> The widely-held understanding is that the term "original jurisdiction" embraces (trial court) jurisdiction over both freestanding claims and supplemental claims, that is, claims within supplemental jurisdiction.<sup>71</sup> But, at times, the Supreme Court seems to take a different view and to differentiate between original and supplemental jurisdiction, treating them as different from one another in ways that go beyond the former (original jurisdiction) encompassing both the latter (supplemental jurisdiction) and more.<sup>72</sup> Notice, however, that if one *consistently* distinguished original jurisdiction from supplemental jurisdiction, it would be true—not false, as the Court said—that a district court lacks original jurisdiction over a civil action unless the court has original jurisdiction over every claim in the complaint—because a district court might have not original, but supplemental jurisdiction over some of the claims. The Court may have had two meanings of "original" in mind and have intended to reject the view that a district court lacks original (trial court-type) jurisdiction over a civil action unless the court has original (non-supplemental) jurisdiction over every claim in the complaint.<sup>73</sup> That view would deserve to be rejected: Not every claim must be freestanding—but the correctness of that rejection still does not support the Court's assertion that "[i]f the court has original jurisdiction over a single claim in the complaint, it has original jurisdiction over a 'civil action' within the meaning of § 1367(a), even if the civil action over which it has

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federal judicial power, including the powers of appellate jurisdiction and original jurisdiction).

70. The jurisdiction of a federal court upon removal of a case also is original (non-appellate) jurisdiction. *Freeman v. Bee Mach. Co.*, 319 U.S. 448, 452 (1943); *Ry. Co. v. Whitton's Adm'r*, 81 U.S. (14 Wall.) 270 (1871). But courts may distinguish between the two, particularly if the rights or duties of the parties vary depending upon whether the case was removed to, rather than commenced in, federal court. For example, whether plaintiffs or defendants have the burden to prove federal subject-matter jurisdiction depends on whether plaintiff filed in federal court or defendant removed to federal court and plaintiffs may appeal dismissal of a case for lack of subject-matter jurisdiction section of a case for lack of subject-matter jurisdiction.

71. See CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* § 19, at 116 (6th ed. 2002) (explaining the history of 28 U.S.C. § 1367 and the incorporation of pendent jurisdiction as within the federal court's original jurisdiction in actions where the supplemental claim forms "part of the same case or controversy" as the original action).

72. See the Court's statement in *Surgeons* that "the relevant inquiry respecting the accompanying state claims is whether they fall within a district court's supplemental jurisdiction, not its original jurisdiction . . . . The whole point of supplemental jurisdiction is to allow the district courts to exercise pendent jurisdiction over claims as to which original jurisdiction is lacking." *City of Chi. v. Int'l Coll. of Surgeons*, 522 U.S. 156, 167 (1997).

73. See *id.* at 166 (rejecting respondent's argument that state law claims for on-the-record review of an administrative action do not qualify as a proper civil action over which the district court can exercise original jurisdiction).

jurisdiction comprises fewer claims than were included in the complaint."<sup>74</sup> For, while it is true that if a freestanding claim is pleaded in the complaint, a federal court will, by definition, have subject-matter jurisdiction over that claim, I submit that the better view—and the generally accepted view—is that there is no civil action of which the court has jurisdiction if that freestanding claim is joined with other claims that are neither freestanding nor within supplemental jurisdiction.<sup>75</sup> Importantly, if one rejects the Court's view that "[i]f the court has original jurisdiction over a single claim in the complaint, it has original jurisdiction over a 'civil action' within the meaning of § 1367(a), even if the civil action over which it has jurisdiction comprises fewer claims than were included in the complaint,"<sup>76</sup> then its interpretation of § 1367, permitting supplemental jurisdiction in *Rosario Ortega*, must be rejected.<sup>77</sup>

The Court's position is closely related to its views on the indivisibility and contamination theories, discussed in subsection C, below.

### C. Indivisibility and Contamination

The Court posited:

[I]ndivisibility theory [that all claims in a complaint must stand or fall as a single, indivisible "civil action" as a matter of definitional necessity] is easily dismissed, as it is inconsistent with the whole notion of supplemental jurisdiction. If a district court must have original jurisdiction over every claim in the complaint in order to have "original jurisdiction" over a "civil action," then in *Gibbs* there was no civil action of which the district court could assume original jurisdiction under § 1331, and so no basis for exercising supplemental jurisdiction over any of the claims.<sup>78</sup>

The paragraph quoted immediately above indicates that when the *Allapattah* Court said that "the indivisibility theory . . . is inconsistent with the

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74. *Exxon Mobile Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 559 (2005).

75. *See Aldinger v. Howard*, 427 U.S. 1, 9 (1976) (refusing to uphold supplemental jurisdiction over a plaintiff's claim against a second defendant who was outside the reach of the statute upon which the court's jurisdiction depended); *Clark v. Paul Gray, Inc.*, 306 U.S. 585, 590 (1939) (explaining that supplemental jurisdiction was proper over multiple plaintiffs' claims only if each plaintiff independently satisfied the amount-in-controversy requirement).

76. *Allapattah*, 545 U.S. at 559.

77. This is so because the "civil action of which the district courts have original jurisdiction" predicate for supplemental jurisdiction would be lacking. *See infra* text accompanying note 201 (discussing the author's previous writings on the differences between claims and civil actions).

78. *Allapattah*, 545 U.S. at 561 (bracketed language added as interpretation).

whole notion of supplemental jurisdiction,<sup>79</sup> it apparently meant to reject the view that a district court lacks original jurisdiction over a civil action unless the court has original (non-supplemental) jurisdiction over every claim in the complaint.<sup>80</sup> It should be recalled, however, that in *Gibbs*—which the Court invoked here—when the Court recognized federal judicial power to decide plaintiff-asserted state law claims that form part of the same case or controversy as a substantial federal question claim asserted by plaintiff,<sup>81</sup> the Court made no effort to reconcile the imprimatur it bestowed upon pendent jurisdiction with the language of § 1331 or any other jurisdictional statute.<sup>82</sup> Its focus was explaining how pendent jurisdiction could be squared with Article III.<sup>83</sup> And in articulating its view that a constitutional case and judicial power exist "whenever there is a [substantial] claim 'arising under [federal law],'"<sup>84</sup> joined with state law claims that derive from a common nucleus of operative fact with federal claims and are such that a plaintiff ordinarily would be expected to try them in one judicial proceeding,<sup>85</sup> the Court never wrestled with the definition of a civil action because it was not thinking in statutory terms.<sup>86</sup> Although, in defining "case" within Article III, the Court might have wrestled with the chicken-and-egg kind of mind bender that it got into in *Allapattah* in construing § 1367,<sup>87</sup> it did not do so. So, again, the Court seems to put more weight on *Gibbs* than that case fairly can bear.

79. *Id.*

80. *Id.*

81. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966).

82. *See id.* at 726 (discussing pendent jurisdiction in constitutional terms as a doctrine of judicial discretion, and failing to discuss its statutory basis).

83. *Id.*

84. *Id.* at 725.

85. *See id.* (concluding that such a relationship between state- and federal-law claims created a single constitutional "case" for jurisdictional purposes).

86. *See supra* text accompanying notes 18, 22 (explaining the Court's failure to reconcile the jurisdictional grant in *Gibbs* with Congress's statutory requirements for supplemental jurisdiction). Later, however, in *Aldinger*, the Court commented—in speaking about its decision in *Gibbs*—that, "[i]t was perfectly consistent with Art. III, and the particular grant of subject-matter jurisdiction upon which the federal claim against the defendant in those cases was grounded, to require that defendant to answer . . . to a second claim deriving from the 'common nucleus' of fact . . ." *Aldinger v. Howard*, 427 U.S. 1, 14 (1976) (emphasis added).

87. By a "chicken-and-egg kind of mind bender" I mean the conundrum that, under § 1367, there needs to be a civil action within the judicial power of the United States in order for a federal court to exercise supplemental jurisdiction and for the federal court to have statutory power to hear the piece of litigation, *see* 28 U.S.C. § 1367(a) (2000) (setting forth the requirements for a district court to exercise supplemental jurisdiction); yet, if a federal claim—or a claim between plaintiffs none of which is a citizen of the same state as any defendant, and seeking more than \$75,000, *see* 28 U.S.C. § 1332(a) (establishing requirements for federal

The same chicken-and-egg problem may lurk in the interpretation of Article III, for there needs to be an Article III case or controversy in order for a piece of litigation to fall within the judicial power of the United States.<sup>88</sup> Yet, if a federal claim alone makes up that case, then related state law claims are not part of the case.<sup>89</sup> But if they are not part of the case, there is no federal judicial power to hear them. *Gibbs's* definition of an Article III case to include both freestanding claims and claims within pendent jurisdiction<sup>90</sup> seems to undercut the conundrum by contradicting the hypothesis that a federal claim alone makes up the case, though the sine qua non of federal judicial power is the freestanding claim. In contrast, by analogy to the Court's analysis in *Allapattah*,<sup>91</sup> if a federal court has original jurisdiction over a single claim in the complaint, it has original jurisdiction over a "case" or "controversy" within

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courts to exercise diversity jurisdiction)—alone or makes-up that civil action, then related state law claims between nondiverse plaintiffs and defendants (and/or for \$75,000-or-less) are not part of that same civil action. But if they are not part of the action, there is no federal jurisdiction to hear them. See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 556 (2005) (quoting *Finley v. United States* that "a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties").

88. See U.S. CONST. art. III, § 2, cl. 1 ("The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority . . ."); 28 U.S.C. § 1331 (2000) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

89. See ALI FJCRP, *supra* note 3, at 612–13 (examining the relationship between the statutory grant of federal question jurisdiction and the common law interpretations that have surrounded the statute). Oakley notes:

[L]awyers have been trained to think in bifurcated terms of the jurisdiction-conferring "federal claim" and its transactional relationship to "state" claims joined in the same action and subject only contingently to the exercise of "pendent-claim" jurisdiction. The tortuous course of the law . . . featured recurrent debate about the scope of the district courts' power to exercise pendent jurisdiction over claims impleading additional parties and the relationship between pendent and ancillary jurisdiction, but never called into question the fundamentally claim-specific operation of § 1331 . . . .

*Id.*

90. See *United Mine Workers of Am. v. Gibbs*, 383 U.S. 713, 725 (2005) (giving the federal court power to hear plaintiff's state and federal claims so long the claims arise from the "same nucleus of operative fact" and are "such that he would ordinarily be expected to try them all in one judicial proceeding").

91. Cf. *Allapattah*, 545 U.S. at 559 (concluding that a diversity case in which some plaintiffs' claims satisfy the amount-in-controversy requirement and others do not present a "civil action of which the district courts have original jurisdiction," and that § 1367(a) confers supplemental jurisdiction over all the monetarily insufficient claims).



the meaning of Article III—and the conundrum returns.<sup>92</sup> Given the different view taken in *Gibbs*, however, this is not an issue with which the *Gibbs* Court wrestled.<sup>93</sup>

More importantly perhaps, for reasons implied by the discussion in Part B, above, parts of the Court's quoted paragraph are misleading. In particular, while indivisibility theory may be incorrect,<sup>94</sup> that theory is not inconsistent with the notion of supplemental jurisdiction: To say that an action must stand or fall as a whole is not inconsistent with supplemental jurisdiction; there can be power over the federal question and the supplemental claims or over none of them.<sup>95</sup> I take it that indivisibility theory, as the Court defined it, relates to judicial power, and that nothing about indivisibility theory would prohibit, or be inconsistent with, the dismissal or remand of supplemental claims, *as a matter of discretion*, as under 28 U.S.C. § 1367(c).<sup>96</sup> Moreover, on my view, a district court must have original jurisdiction over every claim in the complaint in order to have original jurisdiction over a civil action, but in *Gibbs* there *was* a civil action of which the district court could assume original jurisdiction

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92. It also might be argued that cases such as *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824)—with its minimal requirement of a federal law ingredient in a claim to satisfy Article III, while other (state law) questions of fact or law also are involved and may even predominate in the litigation—imply that there is no chicken-and-egg problem in Article III analogous to that posed by the federal jurisdictional statutes. However, *Osborn* and similar cases do not address jurisdiction over distinct claims that are not freestanding claims within federal jurisdiction. *See id.* at 823 (stating that Congress has power to grant the federal courts original jurisdiction over a claim whenever federal law questions are an ingredient of the claim, even if other state or federal issues also are raised). Nonfederal issues presented within the context of freestanding claims do not pose the same challenges in justification as distinct claims pose. Similarly, the fact that it suffices for Article III purposes that federal issues enter a case by way of defense does not touch upon the rationale supporting supplemental jurisdiction. Thus, the fact that the notion of a "civil action" has diverged from that of a case does not imply that there are no similar chicken-and-egg problems shared by the statutory text and by the language of Article III, when it comes to supplemental jurisdiction.

93. *See Gibbs*, 383 U.S. at 725 (concluding that the relation between the state and federal claims creates a single case or controversy under the Constitution).

94. *See infra* text accompanying notes 101–09 (illustrating several situations in which the Court has found it inappropriate to conclude that all claims must stand or fall as a single entity).

95. *See* WRIGHT & KANE, *supra* note 71, § 19 (tracing the history of supplemental jurisdiction cases and finding support for the court's power to exercise jurisdiction over both federal question claims and related claims in a single "case or controversy").

96. *See Exxon Mobile Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 560–61 (2005) (interpreting indivisibility theory as contradictory to the principle set forth in *Gibbs* and *Clark* that a case may be salvaged by dismissing jurisdictionally insufficient claims).

under § 1331; it was composed of a federal question claim and state law claims over which the courts could exercise supplemental jurisdiction.<sup>97</sup>

If indivisibility theory required only that a district court have original jurisdiction over every claim in the complaint in order to have original jurisdiction over a civil action, I also would question whether indivisibility theory truly is belied by the federal courts' practice of curing jurisdictional defects by dismissing offending claims.<sup>98</sup> Indeed, the Court's characterization of problematic situations as containing jurisdiction "spoilers," rather than as involving merely "offending" parties or claims,<sup>99</sup> itself may subtly support the view that the presence of such offenders creates a broader jurisdictional defect. It is true that the inclusion of a claim falling outside both a court's original jurisdiction over freestanding claims and its original jurisdiction over supplemental claims often has *not* been treated as "somehow contaminat[ing] every other claim in the complaint, depriving the court of original jurisdiction over any of these claims"<sup>100</sup>—what the Court refers to as contamination theory.<sup>101</sup> Federal courts have been permitted to dismiss the claims that are neither supported by an independent basis of jurisdiction nor fall within supplemental jurisdiction, while retaining jurisdiction over the claims that are in either of the above-described categories.<sup>102</sup> Thus, neither the "contamination theory" nor the "indivisibility theory" as defined by the Court is consistent with long-standing practice. But this practice may have developed in both the federal question and the diversity realms as an economizing shortcut that made unnecessary the re-filing of only those claims within federal jurisdiction and on

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97. See *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 722 (1966) ("[S]tate law claims are appropriate for federal court determination if they form a separate but parallel ground for relief also sought in a substantial claim based on federal law.").

98. Cf. *Allapattah*, 545 U.S. at 561 (dismissing indivisibility theory as inconsistent with the concept of supplemental jurisdiction).

99. See, e.g., *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 580 (2004) (characterizing parties who fail to meet citizenship requirements of diversity jurisdiction as jurisdictional "spoilers").

100. *Allapattah*, 545 U.S. at 560.

101. *Id.*; *infra* text accompanying notes 153–54; see *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989) (holding that federal appeal courts had authority to dismiss dispensable nondiverse party, employing FED. R. CIV. P. 21 and reaffirming *Carneal v. Banks*, 23 U.S. (10 Wheat.) 181 (1825)); see also *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 300 (1973) (holding that plaintiffs whose claims do not meet the jurisdictional amount requirement should be dismissed from a case); *Clark v. Paul Gray, Inc.*, 306 U.S. 585, 590 (1939) (same).

102. See, e.g., *City of Chi. v. Int'l Coll. of Surgeons*, 522 U.S. 156, 174 (1997) (upholding the federal court's original, supplemental jurisdiction of a state law claim requiring analysis of federal law questions); *Newman-Green*, 490 U.S. at 830 (upholding the lower court's decision to dismiss a party who failed to meet the criteria for diversity or supplemental jurisdiction).

occasion avoided statute of limitations problems.<sup>103</sup> As such a mere shortcut, it need not be viewed as inconsistent with the indivisibility or contamination theories.

The practice of dismissing offending claims also may have roots in a view that separate claims were in effect separate suits<sup>104</sup>—a view that is rejected by the Federal Rules and is rejected generally today,<sup>105</sup> despite the Court's contrary language in *Allapattah*<sup>106</sup> and *City of Chicago v. International College of Surgeons*.<sup>107</sup> To the extent these roots explain the practice of dismissing claims that are beyond federal subject-matter jurisdiction but that are present in litigation that otherwise is within federal subject-matter jurisdiction,<sup>108</sup> those roots demonstrate that the practice itself was not inconsistent with a view that all of a civil action must fall within federal subject-matter jurisdiction. The

103. See *Newman-Green*, 490 U.S. at 830 (holding that federal appeal courts had authority to dismiss dispensable nondiverse party, employing FED. R. CIV. P. 21, and that, on facts presented, it was unnecessary and counter to effective judicial administration—i.e., needlessly wasteful—to dismiss suit and have plaintiff refile against diverse parties only).

104. See, e.g., *Zahn*, 414 U.S. at 296 (quoting Judge Frank, writing for himself and for Judges Learned and Augustus Hand, for the proposition that spurious class actions under the initial FED. R. CIV. P. 23(c)(3) were "in effect, but a congeries of separate suits"); Charles D. Bonanno Linen Serv., Inc. v. McCarthy, 708 F.2d 1, 11 (1st Cir. 1983) ("[B]efore 1948, the 'arising under' defendant was allowed to remove his 'suit,' leaving other defendants behind, if necessary.") (internal citation omitted). The view is also expressed as follows:

[T]he idea that a single suit could consist for jurisdictional purposes not just of multiple claims but even of multiple "actions" had been developed . . . in the removal context. Judge Posner sought to sidestep the problematic construction of 28 U.S.C. § 1441(c) by treating the joinder of a federal claim with a wholly unrelated nonfederal claim as the de facto commencement of two cases, not one, so that the federal claim was removable as a separate "action" under 28 U.S.C. § 1441(a) rather than as a "separate and independent claim" under § 1441(c).

ALI FJCRP, *supra* note 3, at 653 (citing *Thomas v. Shelton*, 740 F.2d 478, 483 (7th Cir. 1984)).

105. See, e.g., FED. R. CIV. P. 20(a) ("Persons may join *in one action* as plaintiffs if they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences . . .") (emphasis added).

106. See *Exxon Mobile Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 558 (2005) (stating the question presented as "whether a diversity case in which the claims of some plaintiffs satisfy the amount-in-controversy requirement, but the claims of other plaintiffs do not, presents a 'civil action of which the district courts have original jurisdiction'").

107. See *City of Chi. v. Int'l Coll. of Surgeons*, 522 U.S. 156, 166–68 (1997) (concluding that the district court's jurisdiction over plaintiff's related state law claims depended on the presence of federal claims that were civil actions within the original jurisdiction of the federal courts); see also *supra* notes 67 and *infra* text accompanying notes 159–80 (discussing the Court's interpretation of "civil action" in *Surgeons*).

108. *Allapattah*, 545 U.S. at 560.

"civil actions" within federal jurisdiction remained and "civil actions" (claims) beyond federal jurisdiction were dismissed.

But perhaps the Court was correct to reject indivisibility theory and contamination theory, and should have gone further to reject the latter even as to controversies arguably within diversity jurisdiction. The American Law Institute Federal Judicial Code Revision Project, published in 2004, takes and supports the view that the basic statutory grants of original jurisdiction to the district courts—including the diversity statute—operate in a claim-specific, rather than an action-specific, way.<sup>109</sup> Professor John Oakley, the Reporter for the Project, recognized that:

The rule of complete diversity as conventionally understood bars original jurisdiction based solely on diversity over any claim joined in the complaint if there is a lack of complete diversity as between all plaintiffs and all defendants . . . subject to the somewhat unruly exception that once proceedings of substance have occurred in the mistaken exercise of diversity jurisdiction, a belatedly discovered, nondiverse "jurisdictional spoiler" can be dismissed from the action without invalidating the prior proceedings for lack of subject-matter jurisdiction.<sup>110</sup>

But Professor Oakley came to the conclusion that the diversity statute, as well as the federal question statute, operates claim-specifically, not only because of the historic practice of dismissing plaintiffs' claims against nondiverse defendants rather than entire suits that presented minimal diversity,<sup>111</sup> but for additional reasons: (1) Common law ancillary jurisdiction shows it to be untrue that diversity jurisdiction may not be exercised over any claim unless every

109. ALI FJCRP, *supra* note 3, at 5.

110. *Id.* at 39 (internal citations omitted).

111. "Minimal diversity" means fewer than all plaintiffs diverse from all defendants. *See, e.g.,* Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 578 n.6 (2004) ("We understand 'minimal diversity' to mean the existence of at least *one* party who is diverse in citizenship from one party on the other side of the case, even though the extraconstitutional 'complete diversity' required by our cases is lacking.") (emphasis added). The Court has held that Congress may authorize federal court jurisdiction in cases of minimal diversity. *See* Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 584 (2005) ("[S]o long as one party on the plaintiffs' side and one party on the defendants' side are of diverse citizenship, Congress may authorize federal courts to exercise diversity jurisdiction."); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 492 n.18 (1983) (noting that since the diversity clause in Article III requires only minimal diversity, diversity jurisdiction would be a constitutionally sufficient basis for jurisdiction where the parties are minimally diverse); *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530 (1967) (upholding the constitutionality of the interpleader statute, 28 U.S.C. § 1335, interpreted to require only minimal diversity, "diversity of citizenship between two or more claimants, without regard to the circumstance that other rival claimants may be cocitizens").

claim in an action qualifies independently for diversity jurisdiction;<sup>112</sup> (2) The doctrines governing aggregation of claims show it to be untrue that diversity jurisdiction may not be exercised over any claim unless every claim joined in the complaint qualifies independently for diversity jurisdiction;<sup>113</sup> (3) The "Romero exception"<sup>114</sup> belies the view that diversity jurisdiction may not be exercised over any claim unless every claim joined in the complaint is between diverse parties;<sup>115</sup> and (4) *Newman-Green, Inc. v. Alfonzo-Larrain*,<sup>116</sup> undercuts even the view that diversity jurisdiction may not be exercised over any claim unless every claim joined in the complaint "qualifies independently for some form of statutory original jurisdiction, but not necessarily diversity jurisdiction."<sup>117</sup> In *Newman-Green* the Court recognized appellate courts' authority to cure a lack of complete diversity after final judgment by dismissing dispensable parties that had proved to be nondiverse.<sup>118</sup> Professor Oakley noted that "[i]f indeed § 1332 confers no jurisdiction over any claim unless all claims in an action qualify independently for federal jurisdiction, the effect of the

112. ALI FJCRP, *supra* note 3, at 616.

113. *Id.*

114. See *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 381 (1959) (approving the district court's exercise of jurisdiction in a suit in which the complaint alleged some claims that fell within diversity jurisdiction and other claims that fell within federal jurisdiction over claims brought under the Jones Act).

115. ALI FJCRP, *supra* note 3, at 617.

116. See *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 833 (1989) (holding that an appellate court need not remand a case so that the trial court can dismiss a dispensable nondiverse party, but may grant such a motion on its own authority). In *Newman-Green*, the Court recognized authority in the district courts, deriving from Rule 21, and in the federal courts of appeals to drop a nondiverse party that is not indispensable, as an alternative to dismissing the entire action. *Id.* at 833 n.7. Justice Kennedy, joined by Justice Scalia, dissented, questioning whether Rule 21 provides this power to the district courts, particularly where the nondiverse party has not been misjoined, and stating, "[s]ince dismissing a nondiverse party confers jurisdiction retroactively . . . , it is questionable whether relying on Rule 21 is consistent with Rule 82's clear admonition [that the Rules must not be construed to extend the jurisdiction of the district courts]." *Id.* at 840 (Kennedy, J., dissenting). Professor Suzanna Sherry has asked whether, by accepting contamination theory for diversity cases in *Allapattah*, Justice Kennedy made his dissent in *Newman-Green* the law of the land. Posting of Professor Suzanna Sherry, [suzanna.sherry@vanderbilt.edu](mailto:suzanna.sherry@vanderbilt.edu) to [fedcourts@law.wisc.edu](mailto:fedcourts@law.wisc.edu) and [civ-pro@listserv.nd.edu](mailto:civ-pro@listserv.nd.edu) (June 24, 2005) (on file with the Washington and Lee Law Review); see also *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 590 (1939) (holding that those plaintiffs who had not established the requisite amount in controversy should be dismissed from a suit by several plaintiffs asserting separate claims). The Court reported Justice Black to be of the opinion that the case should be dismissed for lack of jurisdiction as to all the plaintiff-appellees. *Id.* at 600.

117. ALI FJCRP, *supra* note 3, at 617-18.

118. See *Newman-Green*, 490 U.S. at 833 (noting the Court's reluctance to deviate from the long-established judicial construction that allows an appellate court to dismiss a nondiverse party under Rule 21).

dismissal of the jurisdictional spoiler would be to confer retroactively and nonstatutorily the power to adjudicate the previously adjudicated claims between the diverse parties."<sup>119</sup>

Professor Oakley also reexamined *Strawbridge v. Curtis*,<sup>120</sup> the font of the complete diversity requirement, and found further support for the view that, from the beginning, the Court viewed diversity jurisdiction as claim-specific.<sup>121</sup> He found this support in the Court's reservation of the question whether any exercise of jurisdiction would be permissible in an incomplete diversity case where the interests of the opposing parties were several, rather than where the nondiverse defendants and the diverse defendant shared a joint interest, as was the situation in *Strawbridge*.<sup>122</sup> He concluded:

The question then becomes whether the dismissal of the nondiverse claims precludes the exercise of jurisdiction over the remaining claims. Today we would view this question as governed by Rule 19 and the law of compulsory joinder: if the nondiverse parties are indispensable parties, the entire action must be dismissed. At the time of *Strawbridge*, however, this question was conceived in jurisdictional terms, and it was only in the decades immediately following *Strawbridge* that it came gradually to be recognized that the retention and exercise of jurisdiction as against those parties properly before the court was not, strictly speaking, a matter of jurisdiction as opposed to equitable discretion.<sup>123</sup>

Given all this, Professor Oakley concluded that diversity jurisdiction can be reconciled with, and indeed is best understood as falling within, the claim-specific model of federal jurisdiction.<sup>124</sup> If this is correct, does it prove the

119. ALI FJCRP, *supra* note 3, at 618.

120. *See Strawbridge v. Curtis*, 7 U.S. (3 Cranch.) 267, 267 (1806) ("If there be two or more joint plaintiffs, and two or more joint defendants, *each* of the plaintiffs must be capable of suing each of the defendants, in the courts of the United States, in order to support the jurisdiction.") (emphasis added).

121. ALI FJCRP, *supra* note 3, at 620–22.

122. *See id.* (arguing that the Court's reservation of the question of the status of statutory diversity jurisdiction over nondiverse several claims makes sense only if the jurisdiction conferred by the statute attaches at the claim level rather than to the action as a whole).

123. *Id.* at 623–24.

124. *See id.* at 623 (using a claim-specific perspective on diversity jurisdiction to reconcile *Strawbridge*'s complete diversity requirement for plaintiffs' joint claims with Chief Justice Marshall's other decisions approving the dismissal of jurisdictional spoilers). Professor Oakley does acknowledge that the aggregation rules are not fully consistent with a claim-specific model because they permit diversity jurisdiction over claims that individually do not satisfy the diversity statute's amount-in-controversy requirement. *Id.* at 624–28. He would address this by reinterpreting that requirement to make it conform to the claim-specific structure, and utilize supplemental jurisdiction to allow federal courts to hear some—but not all—of the claims that now can be aggregated. *See id.* at 627 (asserting that the time has come to subsume the law of

Court's reasoning in *Allapattah* and *Rosario Ortega* to have been correct? The answer must be a resounding "no." For one thing, Professor Oakley's view rejects contamination theory for diversity cases as well as for federal question cases,<sup>125</sup> and in that respect it differs from the Court's analysis.<sup>126</sup> In addition, the consequence of Professor Oakley's analysis was the proposal of a statutory scheme that would confer (original) jurisdiction over supplemental claims<sup>127</sup> when freestanding claims<sup>128</sup> are asserted in the same suit,<sup>129</sup> and that would further refine and prescribe the circumstances under which a district court would have jurisdiction over supplemental claims when the court's supplemental jurisdiction depends upon a freestanding claim that has been asserted in the same pleading<sup>130</sup> and that qualifies as a freestanding claim solely

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aggregation of amounts in issue within a coherent framework of supplemental jurisdiction).

125. *See id.* at 599–601 (summarizing the Project's approach to proposed new § 1367, utilizing a claim-specific approach to both federal-question and diversity jurisdiction).

126. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 562 (2005) (justifying contamination theory in regards to the complete diversity requirement on the basis that "the presence of nondiverse parties on both sides of a lawsuit eliminates the justification for providing a federal forum").

127. A supplemental claim is defined as "a claim for relief, not itself freestanding, that is part of the same case or controversy under Article III of the Constitution as a freestanding claim that is asserted in the same civil action." *See* ALI FJCRP, *supra* note 3, at 13 (providing the full text of proposed § 1367(a)(2)).

128. A freestanding claim is defined as a claim "for relief that is within the original jurisdiction of the district courts independently of this section." *See id.* at 13 (providing the full text of proposed § 1367(a)(1)). Commentary further explains:

A freestanding claim is, with one exception, a claim that would be within the original jurisdiction of the district court if it were the sole claim pleaded in a complaint commencing a civil action in the district court as between a single plaintiff and a single defendant. The exception is a claim between diverse parties that is within the original jurisdiction conferred by 28 U.S.C. § 1332(a), but only because the value of the claim satisfies the jurisdictional amount required . . . when added to the value of other claims that in the aggregate are determinative of the "matter in controversy."

*Id.* at 49.

129. *See id.* at 13 (providing the text of proposed § 1367(a)(2)).

130. The ALI FJCRP proposal defines "asserted in the same pleading" to mean:

[T]hat the relevant claims have been asserted either in the pleading as originally filed with the court, or by amendment of the pleading, or by the pleader's assertion of a claim other than a counterclaim or a claim for indemnity or contribution against a third party impleaded in response to the pleading, or by order of the court reformulating the pleading, or by the assertion of the claim or defense of an intervenor who seeks to be treated as if the pleading had asserted a claim by or against that intervenor.

*Id.* at 13.

This elaborate definition implements the recognition that complete diversity concerns can

on the basis of 28 U.S.C. § 1332. By contrast, the *Allapattah* Court attempted to impose a somewhat similar view of how §§ 1331 & 1332 work<sup>131</sup> upon a statutory scheme (current § 1367) that is differently framed than ALI-proposed § 1367 and that predicates supplemental jurisdiction upon the pre-existence of a civil action (rather than a claim) within the original jurisdiction of the federal courts.<sup>132</sup> The result was a construction of "civil action" that is in tension with common, long-enduring understandings of the phrase.<sup>133</sup>

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be raised by claims that are added to a complaint by amendment; by a plaintiff's assertion of a claim against a party who was brought into the action through a defendant's impleader, as in *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978); by plaintiff's assertion of a claim against a defendant who was brought into the action by order of the court under Rule 19; or by plaintiff's actual or constructive assertion of a claim against a defendant intervenor. ALI FJCRP, *supra* note 3, at 28. The Project does not deny supplemental jurisdiction over a plaintiff's claim against a third-party defendant when plaintiff is acting defensively to assert a counterclaim or a claim for indemnity or contribution. *See id.* at 86 (suggesting that a literal interpretation of proposed new § 1367(c) would at times permit plaintiffs to invoke supplemental jurisdiction over counterclaims against third-party defendants). It also does not deny supplemental jurisdiction over a plaintiff's claim against a defendant intervenor who is not an indispensable party. *See id.* at 14 (providing the full text of proposed § 1367(c)(3)). Its rationale is that, "[t]o the extent that the intervention does not independently qualify for diversity jurisdiction only for lack of a sufficient amount in controversy, there is no reason to withhold supplemental jurisdiction." *Id.* at 94. If the intervenor is not diverse from the plaintiff, more tension exists with the complete diversity rule. However, if there is an alternative forum in which all interested parties can be joined, the court often will be able to hold the person in question to be indispensable under FED. R. CIV. P. 19(b)—in which case, no supplemental jurisdiction would be permitted. *Id.* at 95–96. And if no alternative forum is available and for that, among other reasons, the would-be intervenor is not indispensable, but (by definition under FED. R. CIV. P. 24) the would-be intervenor has an interest in the property or transaction that is the subject of the action and is so situated that its disposition in his absence may impair or impede his ability to protect that interest or the would-be intervenor has a claim or defense that shares a question of fact or law with the main action or the would-be intervenor has a federally-conferred conditional or unconditional right to intervene, justice and judicial economy are served by authorizing the courts to assert supplemental jurisdiction over claims by or against the defendant intervenor. *Id.*

131. The ALI FJCRP takes the position that neither indivisibility theory nor contamination theory is correct, for it sees both federal question and diversity subject-matter jurisdiction as claim based. *Id.* at 599–601. The Court in *Allapattah* found contamination theory to be consistent with diversity jurisdiction although not with federal question jurisdiction, and rejected indivisibility theory. *See supra* text at notes 79–80, *infra* text at notes 141, 153–57 (discussing *Allapattah*'s holding and dissents).

132. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 559 (2005) ("Once the court determines it has original jurisdiction over the civil action, it can turn to the question whether it has a constitutional and statutory basis for exercising supplemental jurisdiction over the other claims in the action.").

133. *See id.* at 582–84, 591–95 (Ginsburg, J., dissenting) (justifying a more moderate interpretation of § 1367, in line with historical context and congressional intent in enacting the statute).



It is entirely understandable why the Court felt the need to interpret § 1367 as it did—given the way in which § 1367 is drafted to authorize supplemental jurisdiction in civil actions of which the district courts have original jurisdiction<sup>134</sup>—if it was to hold the statute to confer supplemental jurisdiction over claims asserted by plaintiffs. Federal courts have jurisdiction over particular cases or civil actions,<sup>135</sup> but if a court must have before it a civil action within the original jurisdiction of the United States before it can exercise supplemental jurisdiction<sup>136</sup>—thereby creating a case or civil action that encompasses claims within supplemental jurisdiction—then it would seem that a single claim, supported by an independent basis of subject-matter jurisdiction and regarded independently of other claims that have been pleaded, must constitute that civil action. But, as explained in Part II below, the dangers of so interpreting § 1367 outweigh the benefits, particularly given Congress's ability to cure its drafting deficiencies by adopting the Federal Judicial Code Revision Project's proposal, or something akin to it. Before proceeding to Part II, however, additional reasoning of the *Allapattah* opinion deserves to be explored.

#### *D. Rejection of Indivisibility Theory Led the Court to Misconstrue §§ 1331 and 1332*

Having found reason to reject indivisibility theory in federal question cases, the Court was unwilling to accept it for diversity cases, noting that to do so would require giving the phrase "original jurisdiction of all civil actions"<sup>137</sup> different meanings in §§ 1331 and 1332.<sup>138</sup> However, the Court's rejection of

134. 28 U.S.C. § 1367 (2000). The relevant portion of the statute reads:

[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

*Id.*

135. See, e.g., 28 U.S.C. § 1331 (2000) (granting jurisdiction over questions of federal law); 28 U.S.C. § 1332 (2000 and Supp. 2005) (granting jurisdiction over claims based upon diversity of citizenship and meeting certain amount-in-controversy requirements); 28 U.S.C. § 1367 (granting supplemental jurisdiction over related claims in cases and controversies where the court already has found jurisdiction over some claims on the basis of § 1331 or § 1332).

136. *Id.*

137. 28 U.S.C. §§ 1331–1332 (2000).

138. See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 561 (2005) (calling it implausible that the phrase "original jurisdiction of all civil actions" was intended to mean something different in § 1331 and § 1332).

the idea that all claims in a complaint must stand or fall as a single, indivisible "civil action" as a matter of definitional necessity led it to conclude that the phrase "original jurisdiction of all civil actions"<sup>139</sup>—which is used, not in § 1367, but in §§ 1331's and 1332's conferrals of jurisdiction upon the district courts—means "original jurisdiction in all actions where at least one claim in the complaint meets [certain] requirements,"<sup>140</sup> rather than "original jurisdiction in all actions where every claim in the complaint meets [certain] requirements."<sup>141</sup> I, on the other hand, would conclude that the latter is the preferable interpretation, with the understanding that the requirements that must be satisfied are the terms of § 1331, § 1332 (or other similarly-phrased jurisdiction-conferring statutes) by one or more of plaintiff's claims, and satisfaction of the requirements of § 1367 by any claims that do not independently satisfy another jurisdiction-conferring statute. Although a district court need not have original (i.e., non-supplemental) jurisdiction over every claim in a complaint in order to have "original [non-appellate, trial-court type] jurisdiction" over a "civil action"<sup>142</sup> (the totality of the claims permitted under the governing Rules)—this being the basis of the Court's rejection of indivisibility theory in the federal question context—it does not follow that a district court need not have *any* form of original (non-appellate) jurisdiction—neither an independent basis of jurisdiction nor supplemental jurisdiction—over every claim in a complaint in order to have original (non-appellate) jurisdiction over a civil action (the totality of the claims permitted under the governing Rules).

It should be noted that this latter view (my view) is reconcilable with rejection of the contamination theory: When pleaded claims include one or more that are neither freestanding claims nor supplemental claims, and hence are beyond the scope of original federal jurisdiction, this view permits those claims to be dismissed without prejudice, leaving a civil action within the original jurisdiction of the federal courts. It simply does not recognize the pre-dismissal group of claims as a civil action within the original jurisdiction of the federal courts.<sup>143</sup> The view I embrace similarly is consistent with *rejection* of

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139. 28 U.S.C. §§ 1331–1332.

140. *Allapattah*, 545 U.S. at 561.

141. *Id.*

142. *See id.* (dismissing indivisibility theory on the basis that it is inconsistent with supplemental jurisdiction and would require courts to dismiss whole actions whenever they could not exercise original jurisdiction over every claim in the action).

143. One might ask, if the pre-dismissal group of claims is not a civil action within the original jurisdiction of the federal courts, how the district court has power to do anything, in particular to dismiss claims. Reason and authority suggest that, just as a federal appellate court has power to dismiss particular claims as beyond federal jurisdiction, *see Newman-Green, Inc.*

indivisibility theory, which posits that all claims in a complaint must stand or fall as a single, indivisible "civil action" as a matter of definitional necessity.<sup>144</sup>

Thus, on my view, *under current* § 1367, a purported diversity suit that looked like any of the following, by way of example, would not be a civil action of which the federal district courts had original jurisdiction "period," "when exercising supplemental jurisdiction . . . would be inconsistent with . . . section 1332"<sup>145</sup>—although dismissal of particular claims or parties could sculpt out of them civil actions of which the federal district courts have original jurisdiction:

(a) *P1* (citizen of Ill.) + *P2* (citizen of N.Y.) v. *D* (citizen of N.Y.);

(b) *P1* (citizen of Ill.), asserting a claim for \$80,000 + *P2* (citizen of Ill.) asserting a claim for \$50,000 v. *D* (citizen of N.Y.) [This is essentially *Rosaria Ortega*.];

(c) *P* (citizen of Ill.), asserting claims for \$80,000 v. *D1* (citizen of N.Y.) + *D2* (citizen of Ill.), made a party under Rules 19, 20 or 24, or initially impleaded under Rule 14,<sup>146</sup>

(d) *P* (citizen of Ill.), asserting a claim for \$80,000 v. *D1* (citizen of N.Y.) + a claim for \$50,000 v. *D2* (citizen of N.Y.), made a party under Rules 19, 20 or 24, or initially impleaded under Rule 14;

(e) *P1* (citizen of Ill.) + *P2* (citizen of N.Y.), proposed to be joined under Rule 19 or to intervene under Rule 24 v. *D* (citizen of N.Y.).

The reasons I come out differently—and find jurisdiction—in the situation of *P* (citizen of Florida, asserting a claim in excess of \$75,000) + class

v. *Alfonzo-Larrain*, 490 U.S. 826, 838 (1989) (upholding appellate courts' ability to dismiss a dispensable, nondiverse party without remanding to the trial court); *supra* notes 101, 103, and text accompanying notes 116–17, power to hold that a district court lacked jurisdiction, to vacate a decision in that circumstance, to remand with directions to dismiss, and to award costs—even when jurisdiction fails under Article III rather than as a mere statutory matter, *see* *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 21 (1994) ("The Supreme Court . . . may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."), so a federal district court should have power, in connection with determining its own jurisdiction, to make the non-merits determination that certain claims are beyond its subject-matter jurisdiction and dismiss them without prejudice.

144. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 561 (2005) (rejecting indivisibility theory as incompatible with supplemental jurisdiction and contrary to previous Court precedent).

145. 28 U.S.C. § 1367(b) (2000).

146. It is true that § 1367(b) directs that district courts shall have not supplemental jurisdiction under § 1367(a) of the claims described in hypotheticals (c), (d), and (e) here. *Id.* That direction would be superfluous or "belt and suspenders," however, if the understanding of "civil action" discussed in the text were adopted.

members (whose citizenship is irrelevant under *Supreme Tribe of Ben Hur v. Cauble*<sup>147</sup>), with some or all members asserting claims for \$75,000 or less v. *D* (citizen of New Jersey)—this is essentially *Allapattah*— is discussed below.<sup>148</sup>

By the same token, on my view, a purported federal question suit that looked like the following would not be a civil action of which the federal district courts had original jurisdiction "period" (assuming that the *P* and *D* are not completely diverse from one another): (f) *P* v. *D*, asserting a federal question claim and a factually wholly separate state law claim.<sup>149</sup>

In these situations, in my view, there is no civil action within the original (non-appellate) jurisdiction of the federal courts, despite the existence in all of the hypotheticals of one or more claims that, if sued upon alone, would be within the original (non-appellate) jurisdiction of the federal courts. Thus, I disagree with the Court's pronouncement that "[i]f the court has original jurisdiction over a single claim in the complaint, it has original jurisdiction over a 'civil action' within the meaning of § 1367(a), even if the civil action over which it has jurisdiction comprises fewer claims than were included in the complaint."<sup>150</sup> I nonetheless would permit district courts to "save" the claims that are supported by an independent basis of subject-matter jurisdiction or that fall within supplemental jurisdiction by dismissing only the unqualified or "offending" claims.

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147. See *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 367 (1921) (finding that federal courts are entitled to jurisdiction over class suits and requiring that the court's determination be binding on all class members).

148. See *infra* text accompanying note 199 (discussing why federal courts can exercise supplemental jurisdiction over monetarily insufficient claims of absent plaintiff class members).

149. Here, the hypotheticals are intended to illustrate situations in which the state law claims are not part of the same constitutional case as the federal question claim. So, if one theorizes a definition of "case" that is broader than *Gibbs*'s common nucleus of operative fact test, see, e.g., TEPLY & WHITTEN, *CIVIL PROCEDURE*, 119–21, 133–34 (3d ed. 2004) (arguing that both history and sound reason support defining the scope of a case or controversy to include unrelated claims, in some circumstances); Richard A. Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction*, 71 CAL. L. REV. 1399, 1405–07 (1983) (arguing the Court wrongly identified substantiality of a federal question and common nucleus of operative fact as constitutional requirements because these requirements may undermine Congress's ability to ensure a fair and efficient federal judiciary, and that the only constitutional ingredient that produces "an intellectually palatable whole" is the setting of "case" or "controversy" parameters by procedural rules for joinder of claims and parties); Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849, 910 (1992) (arguing that a constitutional case or controversy should consist "of all claims that bear some 'logical relationship' to the original jurisdiction claim sufficient to justify joinder of the claims in a single action," imagine that the state law claims and the federal question claim are not part of the same constitutional case, however the latter is defined).

150. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 559 (2005).

*E. Contamination Theory in Diversity Cases*

As noted earlier, the *Allapattah* Court rejected the argument that indivisibility theory captures the law as to diversity cases<sup>151</sup> (just as it rejected that theory for failing to reflect the law as to federal question cases), in part because federal court practice has been to dismiss only the claims that fail to satisfy the requirements of diversity jurisdiction, rather than dismissing the jurisdiction-satisfying claims as well.<sup>152</sup> But the Court accepted the contamination theory as applied to the complete diversity requirement, relying on the policy argument that "the presence of nondiverse parties on both sides of a lawsuit eliminates the justification for providing a federal forum."<sup>153</sup> At the same time, the Court found the contamination theory to make little sense as applied to the amount in controversy requirement because the latter "is meant to ensure that a dispute is sufficiently important to warrant federal-court attention . . . . [T]he presence of a claim that falls short of the minimum amount in controversy does nothing to reduce the importance of the claims that

151. See *id.* at 561 (dismissing indivisibility theory).

152. See *id.* (differentiating indivisibility theory from the common federal practice of dismissing jurisdictionally deficient claims in order to maintain jurisdiction over the rest of the action).

153. *Id.* at 562; see also *id.* at 564 (explaining the Court's embrace of the contamination theory in the context of diversity jurisdiction). The Court does not explain, however, how or why the presence of a nondiverse plaintiff eliminates the bias that a diverse out-of-state coplaintiff may experience. Although some commentators have questioned that argument, see, e.g., Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "the Martian Chronicles,"* 78 VA. L. REV. 1769, 1805 (1992) (illustrating the possibility that bias might operate against out-of-staters when parties are minimally diverse); Foster, *supra* note 7, at 135–36 (same), this is not an aspect of the Court's reasoning that I am interested in taking on here.

Professor Jon Siegel has questioned whether the contamination theory can be squared with *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), where the Court approved the exercise of jurisdiction over a case in which plaintiff was diverse from (and satisfied the amount in controversy requirement as to) three defendants, *id.* at 381, and the Court had admiralty jurisdiction over the nondiverse defendant. Posting of Professor Jon Siegel, jsiegel@law.gwu.edu to owner-civilprocedure@law.wisc.edu on behalf of Jonathon R. Siegel (June 24, 2005) (on file with the Washington and Lee Law Review). Perhaps one could reason that a claim that is supported by an independent basis of subject-matter jurisdiction does not have the contaminating effect that a state law claim that lacks an independent basis of subject-matter jurisdiction would have. Just as permitting the dismissal of offending claims rather than entire lawsuits saves time and money and avoids statute of limitations problems, recognizing jurisdiction over a suit that contains claims some of which can be in federal court under diversity jurisdiction and the remainder of which can be in federal court by virtue of federal question and/or admiralty jurisdiction saves time and money, avoids statute of limitations problems, and obviates the need for Rule 42 consolidation of what could be brought as two separate suits.

do meet this requirement."<sup>154</sup> Having concluded that the presence of a single claim that satisfies the diversity jurisdiction statute suffices to provide a civil action within the original jurisdiction of the federal courts so long as the claim is not contaminated by the presence of a plaintiff that is not diverse from a defendant,<sup>155</sup> the Court concluded that § 1367—which omits any prohibition of supplemental jurisdiction over claims by plaintiffs joined under Rule 20 or made class members under Rule 23—overruled *Clark v. Paul Gray, Inc.*,<sup>156</sup> and

154. *Allapattah*, 545 U.S. at 562. As noted by Adam Steinman:

The Court offered no textual basis for this distinction . . . . Justice Kennedy, despite his avowed fidelity to the text, . . . defined the same phrase ["original jurisdiction in all civil actions"] to mean different things in the *same* statute: the presence of a non-diverse plaintiff contaminates original jurisdiction for all plaintiffs, but the presence of a plaintiff without the requisite amount-in-controversy does not.

Steinman, *supra* note 6, at 314.

Thus, "[t]he Court's words impart a lesson of textualism . . . . The Court's actions, however, indicate a willingness to compromise strict fidelity to the text in order to avoid expanding jurisdiction far beyond what Congress apparently intended." *Id.* at 318; *see also* Foster, *supra* note 7, at 2015 (observing that the *Allapattah* Court "compromised the 'clear interpretive rules' it had committed to use," thereby breaking *Finley's* promise to apply such rules, upon which Congress could rely). Foster goes on to say:

According to the Supreme Court majority . . . the plain text of § 1367 is clear and unambiguous, . . . and thus permits supplemental jurisdiction over claims that do not meet the amount-in-controversy requirement as long as at least one claim is jurisdictionally sufficient . . . . [D]espite some indication in the legislative history that this was not an intended result, the plain text . . . controls. But . . . when it comes to the *Strawbridge* rule of complete diversity, none of the foregoing applies. The plain text of § 1367 does *not* clearly and unambiguously overrule *Strawbridge*, and for complete diversity, the intent of Congress is taken into account—even though . . . the authoritative statement is the statutory text, not the legislative history or any other extrinsic material.

*Id.* at 2041 (internal quotations omitted).

Foster continues:

The Court held that a "civil action of which the district courts have original jurisdiction" can consist of a single claim . . . , regardless of the jurisdictional sufficiency of other claims in the complaint, but claimed in dicta that the "special nature and purpose" of the complete diversity requirement nevertheless permits claims by nondiverse parties to destroy original jurisdiction . . . . [T]his distinction [between the diversity requirement and the amount-in-controversy requirement] is . . . utterly irreconcilable with the holding and rationale of *Allapattah*.

*Id.* at 2042.

Detailed support of the latter proposition follows. *See id.* at 2043–48 (criticizing the Court's effort to reconcile *Strawbridge's* complete diversity requirement with *Allapattah's* interpretation of the supplemental jurisdiction statute).

155. *Allapattah*, 545 U.S. at 566.

156. *See Clark v. Paul Gray, Inc.*, 306 U.S. 585, 589 (1939) (requiring each plaintiff to

*Zahn v. International Paper Co.*<sup>157</sup> The Court's ultimate conclusion that supplemental jurisdiction existed over the monetarily insufficient plaintiffs' claims presented in *Allapattah* and *Rosario Ortega* became inevitable.

#### F. *The Questionable Relevance of Surgeons*

Before reaching that ultimate conclusion, however, the Court added another ingredient to the theoretical difficulties that the Court had found with the need for original jurisdiction over each claim and to the precedential conflict that it had found with the practice of dismissing only offending claims; namely, it added the precedential conflict that it found, in the "closely analogous context of removal jurisdiction,"<sup>158</sup> with the Court's decision in *City of Chicago v. International College of Surgeons*.<sup>159</sup> There, plaintiffs in a state court suit sought judicial review of decisions by a landmarks commission that had denied demolition permits to the College of Surgeons, which had made both federal and state constitutional challenges and administrative challenges to underlying ordinances and to the manner in which the commission had conducted its proceedings.<sup>160</sup> The Court had to decide whether the suit was removable as a civil action arising under federal law.<sup>161</sup> Framing the question as "whether a case containing claims that local administrative action violates federal law, but also containing state law claims for on-the-record review of the administrative findings, is within the jurisdiction of federal district court,"<sup>162</sup> the Court held the action removable.<sup>163</sup> It found that federal question claims were asserted although the federal law issues were embedded in a claim created by state statutory law and that the purely state law claims fell within supplemental jurisdiction.<sup>164</sup> The Court rejected arguments that the suit was in the nature of an appeal and hence was not a civil action within the original jurisdiction of the

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satisfy the amount in controversy requirement).

157. See *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 300 (1973) (extending the rules of non-aggregation and no supplemental jurisdiction into the class action context).

158. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 562 (2005).

159. See *City of Chi. v. Int'l Coll. of Surgeons*, 522 U.S. 156, 163 (1997) (holding that a case containing both state and federal law claims can be removed to federal court).

160. *Id.* at 164.

161. See *id.* at 163–64 (finding that ICS's state court complaint raised federal and state law claims that were properly removable to federal court).

162. *Id.* at 163.

163. *Id.* at 164.

164. See *id.* (adhering to the principle that a district court's original jurisdiction over federal questions carries with it supplemental jurisdiction over related state law claims).

federal courts,<sup>165</sup> and arguments that an exception to supplemental jurisdiction should be made for claims that require on-the-record review of a state or local administrative determination.<sup>166</sup> Of importance for present purposes, the Court stated that plaintiff's federal claims:

[S]uffice to make the actions "civil actions" within the "original jurisdiction" of the district courts for purposes of removal . . . . Nothing in the jurisdictional statutes suggests that the presence of related state law claims somehow alters the facts that [plaintiffs'] complaints, by virtue of their federal claims, were "civil actions" within the federal courts' "original jurisdiction." [¶] . . . [T]he relevant inquiry respecting the accompanying state claims is whether they fall within a district court's supplemental jurisdiction, not its original jurisdiction . . . . The whole point of supplemental jurisdiction is to allow the district courts to exercise pendent jurisdiction over claims as to which original jurisdiction is lacking.<sup>167</sup>

The *Allapattah* Court said that in *Surgeons* it already had rejected a "virtually identical argument" to that made in *Allapattah*,<sup>168</sup> and it is true that the Court in *Surgeons* did reject the argument that all claims have to be supported by an independent basis of jurisdiction—that none may be merely within supplemental jurisdiction—for a suit to present a civil action within the original jurisdiction of the federal courts.<sup>169</sup> Similarly, the Court in *Surgeons* did characterize plaintiffs' federal claims as sufficing to make the actions "civil actions" within the "original jurisdiction" of the district courts.<sup>170</sup> These similarities support the Court's suggestion that *Surgeons* bound it to decide *Allapattah* as it did.

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165. *See id.* at 170 (refusing to hold that jurisdiction turns on whether judicial review of an administrative action was deferential or de novo).

166. *See id.* at 166–72 (holding supplemental jurisdiction applicable to state law claims for on-the-record review of local administrative determinations).

167. *Id.* at 166–67.

168. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 562 (2005).

169. *See City of Chi. v. Int'l Coll. of Surgeons*, 522 U.S. 156, 172 (1997) (concluding that § 1367(a) authorizes district courts to exercise supplemental jurisdiction over some claims in a civil action in which other claims are supported by an independent basis of jurisdiction).

170. For that reason, I always have thought that *Surgeons* was mistakenly reasoned. *See* Joan Steinman, *Crosscurrents: Supplemental Jurisdiction, Removal, and the ALI Revision Project*, 74 IND. L.J. 75, 86–90 (1998); *see also* John B. Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. DAVIS L. REV. 855, 939 n.358 (1998) (implicitly criticizing the Court's placement of great weight on a supposed distinction between the original jurisdiction required to bring § 1367 into play and the broader supplemental jurisdiction it grants, and asserting that *Surgeons* threatened to flood the district courts with cross-system appeals seeking on-the-record review of local administrative agencies' compliance with state law).



But *Surgeons* did not ordain the decision in *Allapattah* and provides less support for *Allapattah* than the Court implies. *Surgeons* did not even focus on the chicken-and-egg problem created by the phraseology of § 1367. It focused on whether the litigation presented a federal question claim,<sup>171</sup> whether the state law contentions were legal claims and derived from a common nucleus with the federal question,<sup>172</sup> whether the claims were in the nature of civil actions as opposed to appeals,<sup>173</sup> and whether the purely state law claims should be held to fall within an exception to supplemental jurisdiction.<sup>174</sup> Moreover, in light of the Court's rejection of the arguments that the *Surgeons* suit was in the nature of an appeal and that an exception should be made to supplemental jurisdiction, the suit fit the classic *Gibbs* pattern of federal question claims accompanied by state law claims arising from a common nucleus of operative fact.<sup>175</sup> Thus, the Court could have reached the same result that it did reach had it required, for a civil action within the original jurisdiction of the federal courts, each claim asserted by the plaintiff to fall within original (non-appellate) jurisdiction, by virtue of *either* an independent basis of jurisdiction or supplemental jurisdiction.<sup>176</sup> Nothing in *Surgeons* commanded a new or different understanding of when a civil action is within the original jurisdiction of the federal courts;<sup>177</sup> and *Surgeons* did not in fact permit the removal to federal court of a set of claims that could not originally have been brought in federal

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171. See *Surgeons*, 522 U.S. at 171 ("It is long settled law that a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law.") (internal quotations omitted).

172. See *id.* at 165 ("We think it clear that [ICS' claims] . . . are legal 'claims,' in the sense that . . . the state and federal claims 'derive from a common nucleus of operative fact,' namely, ICS[s] unsuccessful efforts to obtain demolition permits from the Chicago Landmarks Commission.") (internal citations omitted).

173. See *id.* at 170 (rejecting the argument that the claims were appellate in nature).

174. See *generally id.* at 164–69.

175. See *id.* at 169 ("There is nothing in the text of § 1367(a) that indicates an exception to supplemental jurisdiction for claims that require on-the-record review of a state or local administrative determination."). "Instead, the statute generally confers supplemental jurisdiction over 'all other claims' in the same case or controversy as a federal question, without reference to the nature of the review." *Id.*

176. Admittedly, that conclusion begs the chicken-and-egg problem, but it is fully consistent with how the federal courts long have interpreted 28 U.S.C. § 1441(a). See *generally* 14B CHARLES ALAN WRIGHT, FEDERAL PRACTICE & PROCEDURE § 3722 (1998 & Supp. 2008); cases cited nn.121–23.

177. See *City of Chi. v. Int'l Coll. of Surgeons*, 522 U.S. 156, 172 (1997) ("[T]o decide that state law claims . . . fall within the district courts' 'supplemental' jurisdiction under § 1367(a), does not answer the question, *nor do we*, whether those same claims, if brought alone, would substantiate the district courts' 'original' jurisdiction over diversity cases under § 1332.") (emphasis added).

court—as the Court conceived of the claims involved.<sup>178</sup> The view expressed in *Surgeons* and in *Allapattah* that a single claim can make an action a "civil action" within the original jurisdiction of the federal courts is problematic, however, because—among many other things—that view might permit the removal to federal court of a set of claims that could not originally have been brought in federal court without a preceding dismissal of the claims beyond federal jurisdiction.<sup>179</sup>

It also should be recalled that *Surgeons* did not involve diversity jurisdiction. The *Allapattah* Court nonetheless opined that *Surgeons*'s "interpretation of § 1441(a) applies to cases involving additional parties whose claims fall short of the jurisdictional amount."<sup>180</sup> Furthermore, on the view the Supreme Court itself expressed in *Allapattah* and *Rosario Ortega*, *Surgeons* addressed a realm (the realm of federal question jurisdiction) in which a plaintiff's claim that does not satisfy the requirements for an independent basis of jurisdiction does not contaminate other claims while, when diversity is the

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178. See *id.* at 163 ("[P]ropriety of removal thus depends on whether the case could have been filed in federal court."). *Surgeons* has been much criticized, however, for, in effect, permitting a cross-jurisdictional appeal of state administrative proceedings. See, e.g., ALI FJCRP, *supra* note 3, at 75–77 (criticizing *Surgeons* because of the flood of cross-jurisdictional appeals of state administrative proceedings the case could permit into district courts); Oakley, *supra* note 170, at 938–39 n.358 (same); Jacob Edward Daly, Casenote, City of Chicago v. International College of Surgeons: *The Interplay Between Supplemental Jurisdiction and Cross-System Appeals, and the Impact on Federalism*, 50 MERCER L. REV. 1137, 1150–54 (1999) (criticizing *Surgeons* for ignoring the *Burford* abstention doctrine, undermining federalism, and threatening the district courts with a flood of cross-jurisdictional appeals of state administrative proceedings); Michael P. Devlin, Case Note, *Federal Jurisdiction—Expanding Supplemental Jurisdiction of Appeals from Non-Federal Administrative Agencies—City of Chicago v. International College of Surgeons*, 118 S. Ct. 523 (1997), 72 TEMP. L. REV. 529, 549–54 (1999) (same).

179. *Infra* notes 218, 249–65 and accompanying text. The generally accepted view is that the joinder of a claim that is neither freestanding nor within supplemental jurisdiction, in a suit filed in state court, renders the action nonremovable under 28 U.S.C. § 1441(a). The collection of claims may, however, be removable under § 1441(c). See 14C WRIGHT, *supra* note 4, § 3724, at 60–61 (1998 & Supp. 2007) ("A proper supplemental claim is removable under Section 1441(b) . . . . Indeed, a supplemental claim under section 1367 presumably could not qualify as a separate and independent claim or cause of action under Section 1441(c)."); ALI FJCRP, *supra* note 3, at 56 (same). The constitutionality of Section 1441(c) is questionable, 14C WRIGHT, *supra* note 4, at § 3724, at 63–65, and some legislators and commentators regard it as being saved by a requirement that the federal court remand any claims that fall outside the bounds of an Article III case or controversy. See *infra* note 235 (presenting Senator Grassley's view that a remand to state court of state law claims outside the scope of Article III would not be discretionary).

180. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 564 (2005).

basis of subject-matter jurisdiction, contamination—through a nondiverse plaintiff or defendant, if not by a monetarily insufficient claim—is a concern.<sup>181</sup>

Although *Surgeons* did not mandate the decision in *Allapattah*, as illustrated above, mistaken notions and language in *Surgeons* did contribute to the problematic reasoning in *Allapattah*. By way of further example, in speaking of *Surgeons*, the *Allapattah* Court said, "[o]nce the case was removed, the district court had original jurisdiction over the federal-law claims and supplemental jurisdiction under § 1367(a) over the state-law claims."<sup>182</sup> In my view, this puts the cart before the horse: The case was removable only because the District Court had original jurisdiction over the federal-law claims and supplemental jurisdiction under § 1367(a) over the state-law claims. There is a difference between first determining whether a federal court may assert supplemental jurisdiction over state law claims in order to determine whether a suit is removable—as courts should do—and having the presence of a federal question claim alone render a suit removable, with supplemental jurisdiction determining only what the federal court may retain. If it were "true" that a plaintiff's federal claim alone sufficed to make an action a "civil action" within the original jurisdiction of the district courts, then the distinctive functions of § 1441(a) and (c) would be lost. But more on that later.<sup>183</sup> The present point is that the view articulated in *Surgeons* that a plaintiff's federal claim alone suffices to make an action a "civil action" within the original jurisdiction of the district courts influenced *Allapattah*, to ill effect, even though *Surgeons* was distinguishable in many respects from the *Allapattah/Rosario Ortega* cases.

### G. Back-Tracking and Equivocating

The remaining portions of the Court's opinion in *Allapattah* addressed the anomalies created by § 1367(a) and (b),<sup>184</sup> whether they are read as the *Allapattah* majority held that they should be read or as the dissent, led by Justice Ginsburg, argued that they should be construed.<sup>185</sup> The remainder also debated the relevance and weight of the legislative history of this statute.<sup>186</sup> These matters are not of particular concern to the theses of this Article. In

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181. *Id.*

182. *Id.* at 563.

183. See *infra* notes 232–38 and accompanying text.

184. *Allapattah*, 545 U.S. at 564–66.

185. Justice Ginsburg, echoing many commentators, remarked that § 1367 "is hardly a model of the careful drafter's art." *Id.* at 579 (Ginsburg, J., dissenting).

186. See generally *id.* at 567–71.

whichever manner the statute is interpreted, its structure and terms are problematic,<sup>187</sup> and the utility of and the need for resort to its legislative history are debatable. Moreover, these issues have been explored in countless other scholarly writings<sup>188</sup> and need not be further scrutinized here. Instead, like the Court, I circle back to the original question. The Court concluded:

When the well-pleaded complaint . . . includes multiple claims, all part of the same case or controversy, and some, but not all, of the claims are within the court's original jurisdiction, . . . the court [has] before it "a [] civil action of which the district courts have original jurisdiction[.] . . . Under § 1367, the court has original jurisdiction over the civil action comprising the claims for which there is no jurisdictional defect. No other reading of § 1367 is plausible . . . . It follows . . . that the threshold requirement of § 1367(a) is satisfied in cases . . . where some, but not all, of the plaintiffs in a diversity action alleged a sufficient amount in controversy. We hold that § 1367(a) by its plain text . . . authorized supplemental jurisdiction over all claims by diverse parties arising out of the same Article III case or controversy, subject only to enumerated exceptions not applicable in the cases now before us."<sup>189</sup>

The qualifications that the Court added to its conclusions are important. The Court here appeared to be saying that when a well-pleaded complaint includes multiple claims, only some of which are supported by an independent basis of subject-matter jurisdiction, a federal court has before it a civil action of which the district courts have original jurisdiction, but only if all the claims form part of the same case or controversy. I believe that Justice Ginsburg (and I) would agree with that. But most of the Court's opinion had suggested that the presence of a plaintiff's federal question claim in-and-of-itself rendered a suit a civil action of which the district courts have original jurisdiction, regardless of what other claims the plaintiff asserted.<sup>190</sup> (Thus, I detect some

187. In *Allapattah*, Justice Ginsburg noted that "§ 1367's enigmatic text defies flawless interpretation." *Id.* at 594 (Ginsburg, J., dissenting).

188. See ALI FJCRP, *supra* note 3, at 34–37 and *supra* note 4 for a lengthy list of legal literature on § 1367. Commentary on the Court's handling of these issues in *Allapattah* can be found in other articles that focus on that case, cited *supra* note 7. See, e.g., Doyle, *supra* note 7, at 864–75.

189. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 566–67 (2005).

190. In the first sentence of the opinion, the Court described the cases as presenting the question "whether a federal court in a diversity action may exercise supplemental jurisdiction over additional plaintiffs whose claims do not satisfy the minimum amount-in-controversy requirement, provided the claims are part of the same case or controversy . . .," and it answered affirmatively. *Id.* at 549. But the same case or controversy is a constitutional requirement, expressly incorporated by 28 U.S.C. § 1367(a), which the Court did not utilize in its analysis of the critical "civil action" language of § 1367(a), except for recognizing that the case or controversy requirement sets a limit on the scope of a civil action. *Id.* at 549, 552–53, 555–58,

back-tracking.) Similarly, the Court here said, "[u]nder § 1367, the court has original jurisdiction over the civil action comprising the claims for which there is no jurisdictional defect."<sup>191</sup> I believe that Justice Ginsburg (and I) would agree with that, too. But what *is* the civil action comprising the claims for which there is no jurisdictional defect? That is where the majority and dissent parted company. Justice Kennedy, writing for a five-judge majority, believed that the fact patterns presented by *Allapattah* and *Rosario Ortega* constituted civil actions comprising claims for which there was no jurisdictional defect.<sup>192</sup> Justice Ginsburg, for a four-judge minority, believed that the fact patterns presented *no* civil actions within original federal jurisdiction because the monetarily-insufficient claims of some plaintiffs prevented there from being any action within the diversity jurisdiction of the federal courts.<sup>193</sup>

#### H. *The Dissent, the ALI, and Me*

The conventional view of a civil action within the original jurisdiction of the federal courts was that advocated by Justice Ginsburg, joined by Justices Stevens, O'Connor, and Breyer, dissenting in *Allapattah*.<sup>194</sup> The implications of that construction of a civil action would lead to a holding against jurisdiction over at least the monetarily-insufficient claims of co-plaintiffs in *Rosario Ortega*, notwithstanding that, as a policy matter, one might prefer the bottom-line result that the Court reached, allowing the exercise of supplemental jurisdiction over the claims of co-plaintiffs with monetarily insufficient claims.<sup>195</sup> On the conventional view—indeed, even on a view that rejects the indivisibility and contamination theories and views diversity jurisdiction, as well as federal question jurisdiction, as claim- (not action-) specific—to allow supplemental jurisdiction over such claims, § 1367 needs to be re-drafted as recommended by the American Law Institute Federal Judicial Code Revision

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566–67.

191. *Id.* at 548.

192. *See id.* at 566 ("When the well-pleaded complaint . . . includes multiple claims, all part of the same case or controversy, and some, but not all, of the claims are within the court's original jurisdiction, . . . the court [has] before it 'a civil action of which the district courts have original jurisdiction' . . .").

193. *Id.* at 579 (Ginsburg, J., dissenting).

194. *Id.* at 584–87, 589–95 (Ginsburg, J., dissenting). Justices Ginsburg and Stevens dissented in *Surgeons* as well, but their focus there was on the appellate nature of the proceeding. *City of Chi. v. Int'l Coll. of Surgeons*, 522 U.S. 156, 175 (1997).

195. For the reasons that the ALI FJCRP supports supplemental jurisdiction over the monetarily insufficient claims of co-plaintiffs, see *supra* note 130.

Project,<sup>196</sup> or similarly. The Project recommends that the rule of *Clark v. Paul Gray, Inc.*,<sup>197</sup> be countermanded. The Project would effectuate that change in the law by providing that:

When the jurisdiction of a district court over a supplemental claim depends upon a freestanding claim that is asserted in the same pleading and that qualifies as a freestanding claim solely on the basis of the jurisdiction conferred by section 1332 of this title, the court shall have jurisdiction of the supplemental claim under subsection (b) only if it—

...

(2) would be a freestanding claim on the basis of section 1332 of this title but for the value of the claim; . . .<sup>198</sup>

The Project drafters embraced this view, reasoning that failure to authorize supplemental jurisdiction over monetarily-insufficient claims encourages duplicative litigation, since the absence of such supplemental jurisdiction is unlikely to dissuade a party who has a claim worth more than \$75,000 from proceeding with that claim in federal court.<sup>199</sup>

Even if one largely agrees with Justice Ginsburg's conventional interpretation of a civil action, however, one can concur with the majority's conclusion that the federal courts can exercise supplemental jurisdiction over the monetarily-insufficient claims of absent plaintiff class members. I reach that result in this way: When an action is filed as a purported class action, there initially are before the court only the named plaintiffs and their claims; the claims of proposed class members are not before the court until the court certifies a class. Hence, so long as the named plaintiffs are completely diverse from the defendants and all individually or by virtue of the ordinary operation of aggregation doctrines present claims in excess of \$75,000, there is a civil

196. See *infra* note 198; see also *supra* note 130, *infra* note 203 and accompanying text.

197. *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939); *supra* notes 101, 116.

198. ALI FJCRP, *supra* note 3, at 14.

199. *Id.* at 90–91. The Project continues:

The same reasoning applies with only slightly lesser force in the obverse context. A single plaintiff with related claims of disparate amount against two defendants might prefer to litigate both claims at one time in state court, but this is far from assured and would be sensitive to the number and value of claims that would remain eligible for federal litigation after the claims of insufficient amount were dismissed. Thus, new § 1367(c)(2) extends supplemental jurisdiction to related claims against additional parties-defendant as well as to related claims by additional parties-plaintiff. The discretion of the district court to decline supplemental jurisdiction in extraordinary circumstances provides sufficient means to protect against manipulative abuse of this extension of supplemental jurisdiction.

*Id.* at 91.

action within the original jurisdiction of the federal courts. With that, the court may assert supplemental jurisdiction over the claims of unnamed class members because nothing in § 1367(b) denies supplemental jurisdiction over claims asserted under Rule 23.<sup>200</sup> The same argument *cannot* be made in support of supplemental jurisdiction over the claims of Rule 20 co-plaintiffs who sue together and simultaneously.<sup>201</sup>

The ALI Project reaches this same result, but differently. It provides that:

When the jurisdiction of a district court over a supplemental claim depends upon a freestanding claim that is asserted in the same pleading and that qualifies as a freestanding claim solely on the basis of the jurisdiction conferred by section 1332 of this title, the court shall have jurisdiction of the supplemental claim under subsection (b) only if it—

(1) is asserted representatively by or against a class of additional unnamed parties.<sup>202</sup>

The Project thereby abrogates *Zahn's*<sup>203</sup> limitation on supplemental jurisdiction in diversity class actions, subject to the courts' discretion to decline to exercise supplemental jurisdiction.<sup>204</sup> It does so for the same

200. See *supra* note 42 and accompanying text.

201. My past writings are consistent with these positions, although I cannot say that I always focused on the distinction between a claim and a civil action. Compare, e.g., Joan Steinman, *Crosscurrents: Supplemental Jurisdiction, Removal, and the ALI Revision Project*, 74 IND. L.J. 75, 86–90, 98–99 (1998) (discussing my disagreement with the concept of civil action proffered in *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997)), and Joan Steinman, *Section 1367—Another Party Heard From*, 41 EMORY L. J. 85, 99–104 (1992) (discussing claims of Rule 20 parties and of absent plaintiff class members), with Joan Steinman, *Removal, Remand, and Review in Pendent Claim and Pendent Party Cases*, 41 VAND. L. REV. 923, 943–46 (1988) (noting that, prior to the recognition of supplemental jurisdiction over pendent party claims, combinations of federal and state claims could be asserted in state courts that would not fall within the federal courts' jurisdiction under 28 U.S.C. §§ 1331–1346). In the latter article, I argued that defendants could not remove such suits under 28 U.S.C. § 1441(a) and (b) because such suits would not be civil actions within the original jurisdiction of the federal courts. *Id.* at 944–45. I also noted that courts have permitted the removal only of entire lawsuits, not of individual claims that by themselves would satisfy the requirements for federal jurisdiction, if the presence of other claims caused the suit not to be a civil action within the original jurisdiction of the federal courts. *Id.*

202. ALI FJCRP, *supra* note 3, at 14.

203. *Supra* notes 33, 101.

204. That discretion is codified in proposed § 1367(d) which states:

(d) *Discretion to decline to exercise jurisdiction.* This section does not permit a district court to decline to exercise jurisdiction of any freestanding claim except as provided by subsection (e). A district court may decline to exercise jurisdiction of a supplemental claim under subsection (b) if—

(1) all freestanding claims that are the basis for its jurisdiction of a supplemental

reasons that justify supplemental jurisdiction over the \$75,000-or-less claims of co-plaintiffs.<sup>205</sup>

I also do not agree with Justice Ginsburg's characterization that *Allapattah* and *Rosario Ortega* "present[ed] the question whether Congress abrogated the nonaggregation rule."<sup>206</sup> Supplemental jurisdiction is distinct from aggregation,<sup>207</sup> although both can enable courts to adjudicate claims that independently fail to meet the jurisdictional amount requirement. Supplemental jurisdiction has that effect only when one or more claims satisfy the amount requirement. By contrast, no such claim needs to exist where aggregation is permitted. More importantly, I find confused and confusing Justice Ginsburg's formulation that, "[o]nce there is a civil action presenting a qualifying claim arising under federal law, § 1331's sole requirement is met. District courts . . . may then adjudicate, additionally, state-law claims

claim have been dismissed before trial of that claim; or

(2) the supplemental claim raises a novel or complex issue of State law that the district court need not otherwise decide; or

(3) the exercise of supplemental jurisdiction would substantially alter the character of the litigation; or

(4) in exceptional circumstances, there are other compelling reasons for declining supplemental jurisdiction.

ALI FJCRP, *supra* note 3, at 14.

205. *Supra* note 135 and accompanying text.

206. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 587 (2005).

207. *See, e.g., Zahn v. Int'l Paper Co.*, 414 U.S. 291, 305 (1973) (Brennan, J., dissenting) (arguing in support of ancillary jurisdiction over the monetarily-insufficient claims of absent class members and distinguishing between ancillary jurisdiction and aggregation rules); *Wolde-Meskel v. Vocational Instruction Project Cmty. Servs., Inc.*, 166 F.3d 59, 65 (2d Cir. 1999) ("[A]ggregated claims have never been treated individually for jurisdictional purposes, and nothing in § 1367 suggests that Congress intended otherwise. When state law claims are aggregated, regardless of the amounts at issue, all of them together are 'original,' and none of the constituent claims are 'supplemental.'"); *Herremans v. Carrera Designs, Inc.*, 157 F.3d 1118, 1121 (7th Cir. 1998) ("The diversity statute confers federal jurisdiction over 'civil actions' satisfying the required minimum amount in controversy, 28 U.S.C. § 1332 (a), not over counts, thus permitting the plaintiff to aggregate the stakes in his separate claims or counts to come up to the minimum . . . . We doubt that *Shanaghan v. Cahill*, 58 F.3d 106 (4th Cir. 1995), opining that aggregation is a species of supplemental jurisdiction—such that when one claim was dismissed on the merits, the remaining claims could be dismissed under § 1367(c)—*Shanaghan* comports with the diversity statute."); ALI FJCRP, *supra* note 3, at 101 (discussing the fact that the opinion expressed in *Shanaghan v. Cahill*, has been questioned and rejected by other courts); *see also* Amanda Dalton, Notes and Comments: *Shanaghan v. Cahill: Supplementing Supplemental Jurisdiction*, 1996 B.Y.U. L. REV. 281, 290–300 (1996) (arguing, based on the language and legislative history of § 1367, that the *Shanaghan* court erred in concluding that Congress intended § 1367 to apply to diversity claims that were aggregated to satisfy the jurisdictional amount requirement).



'deriv[ing] from a common nucleus of operative fact.'"<sup>208</sup> Eliminate from the first sentence the words "a civil action presenting," leaving "[o]nce there is . . . a qualifying claim arising under federal law, § 1331's sole requirement is met," and you have the ALI's position;<sup>209</sup> but include that set of words and, without definition of a "civil action," it is unclear what Justice Ginsburg intends § 1331 to require. Eliminate from Justice Ginsburg's sentence the words "presenting a qualifying claim," and you have left the tautology that once there is a civil action arising under federal law, § 1331's sole requirement is met. I would say instead that once there is a claim arising under federal law, district courts have jurisdiction over that claim and claims supplemental thereto, and the combination forms a civil action within the original jurisdiction of the federal courts; moreover, there is such a civil action if, but only if, any pleaded state law claims are part of the same case or controversy as the federal question claim. This differs from what Justice Ginsburg articulated, whatever she may have intended. I would say (unsurprisingly) that, to have a civil action that satisfies § 1332, the suit must be between the kinds of parties described in § 1332 (a)(1)–(4) and satisfy the amount in controversy requirement under the normal aggregation rules. Only if such a suit is presented (it was not in *Rosario Ortega*) may the court assert supplemental jurisdiction over other claims (cross-claims, counterclaims, third-party claims), subject to § 1367(b),<sup>210</sup> absent a rewriting of the supplemental jurisdiction statute.

### I. Summary

By way of quick summary, the reasoning in *Allapattah* and *Rosario Ortega* suffers from fundamental flaws that the exposition above revealed. The

208. *Allapattah*, 545 U.S. at 546, 556, 558–67.

209. One might also say that you have the majority's position in *Allapattah*, but the ALI drafted a statute that implements this view while the *Allapattah* majority attempted to graft the view onto a statute that is worded to require a civil action within the original jurisdiction of the federal courts as a predicate for supplemental jurisdiction, and the graft does not "work."

210. Of course, this broad statement leaves questions unresolved. Those questions include: When would exercising supplemental jurisdiction over the claims listed in § 1367(b) be inconsistent with the jurisdictional requirements of § 1332, and when would it not be inconsistent? 28 U.S.C. § 1367(b) (2000). If a nondiverse plaintiff or defendant, or a plaintiff with a monetarily inadequate claim, is added under Rule 15 after commencement of an action, may a federal court assert supplemental jurisdiction over the claims asserted by or against those parties? If a federal court may assert supplemental jurisdiction over the claims asserted by or against such Rule 15 parties, the Court's decision in *Rosario Ortega* might be seen as justified by making such strategic behavior unnecessary. But the potential costs of interpreting the statute as the Court did, illustrated in Part III, below, would need to be balanced against that virtue.

Court twisted and conflated the meaning of the critical term "civil action" in an attempt to make the supplemental jurisdiction statute, 28 U.S.C. § 1367, workable in a way that enabled the Court to reach the results that it desired. However, as the discussion above shows,<sup>211</sup> the Court did not need to reason as it did to reach the result it desired in *Allapattah*, the class action case, which arguably presented the more important question; its questionable reasoning was "necessary" only to reach the desired result in *Rosario Ortega*, the Rule 20 case.

If the federal courts were to accept the Court's redefinition of "civil action" and "claim," however, and carry them into other contexts in which the terms have long been understood to share the meanings of those words and phrases as they are used in the federal question and diversity subject-matter jurisdiction statutes, significant—and undesirable—changes in doctrine would result. Part III demonstrates the problems that would be created if federal courts were to take too seriously the reasoning of *Surgeons*, *Allapattah*, and *Rosario Ortega*.

### *III. The Implications of Extending the Reasoning of Surgeons, Allapattah, and Rosario Ortega into Other Statutory Contexts*

In the interpretation of jurisdictional statutes, the language, structure and purposes of the statutes and sometimes their legislative history have a place. Other things, particularly context, related statutory provisions, policies of judicial administration, precedent, and canons of construction properly may be considered as well.<sup>212</sup>

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211. *Supra* note 201 and accompanying text.

212. See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 556, 558–67 (2005) (noting the relevance of statutory text and structure, context, related statutory provisions, the Court's established jurisprudence and, if a statute is ambiguous, its legislative history and other extrinsic materials, when interpreting a statute, and employing canons of construction based upon policy); *Finley v. United States*, 490 U.S. 545, 549–56 (1989) (relying on canons of construction including the canon not to broadly construe jurisdictional statutes, statutory language, the posture and context of claims, and history of legislation); *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 372–77 (1978) (demanding an examination of the posture in which nonfederal claims are asserted and of the specific statute that confers jurisdiction over the federal claim, as well as underlying policy, in order to determine whether Congress expressly or by implication negated the exercise of jurisdiction over the particular nonfederal claim); *Aldinger v. Howard*, 427 U.S. 1, 16–19 (1976) (looking to statutory language, related statutory provisions, legislative history, and deductions of congressional intent). See generally WILLIAM N. ESKRIDGE ET AL., *CASES & MATERIALS ON LEGISLATION, STATUTES AND THE CREATION OF PUBLIC POLICY*, 669–1098 (3d ed. 2001) (canvassing theories and doctrines of statutory interpretation, excerpting a variety of writings, and citing a great many additional writings,

Federal jurisdictional statutes and related procedural statutes, including federal question jurisdictional statutes, diversity statutes, the supplemental jurisdiction statute, and the removal statutes, among others, ideally should be interpreted so that they harmonize with and complement one another, and further policies of judicial administration, subject of course to Article III constraints. The way in which the Court interpreted § 1367 in *Allapattah* and *Rosario Ortega* instead created a puzzle of ill-fitting pieces, cacophony instead of harmony, and threatens to undermine a variety of policies of judicial administration. The poor fit of the pieces was described above.<sup>213</sup> The lack of harmony among the statutes and the undermining of policies of judicial administration are demonstrated by consideration of what the consequences would be if the lower federal courts were to accept the Court's view of the relation between claims and civil actions,<sup>214</sup> and carry it into other contexts in which the terms have long been understood to share the meanings of those words and phrases as they are used in the federal question and diversity subject-

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concerning the same) and Appendix B at [19]–[25] (collecting the Rehnquist Court's Canons of Statutory Interpretation); WILLIAM ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994); Stephen Breyer, *The Uses of Legislative History*, 65 S. CAL. L. REV. 845 (1992); Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1085–91 (1993) (examining the Court's approach to interpretation of procedural statutes and arguing for enhanced consideration of statutory policies and purposes, the relationship of a provision to the statute as a whole and to other statutes, legislative history, and historical context, to broaden "plain meaning" analysis); William N. Eskridge, Jr. & Philip Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); Peter J. Smith, *Textualism and Jurisdiction*, 109 COLUM. L. REV. (forthcoming 2008) (addressing the proper relationship between Congress and the courts in crafting a jurisdictional regime, with focus on the tension in textualism between an urge to constrain judicial power and a conviction that courts should act as a faithful agent of Congress). The "legal process classics" are Lon Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949) and HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William Eskridge, Jr. & Philip Frickey eds., 1994).

In a recent article, Professor Bassett argues that "operating under the dual constraints of conflict of interest and general separation of powers principles . . . federal jurisdiction raises distinctive statutory interpretation issues." Debra Lyn Bassett, *Statutory Interpretation in the Context of Federal Jurisdiction*, 76 GEO. WASH. L. REV. 52, 53 (2007). In particular, the construction of jurisdictional statutes should be informed by Article III, and courts should eschew constructions that save such statutes from unconstitutionality. *Id.* at 54. In the case of § 1367, which purports to incorporate Article III's scope and its limitations, the interpretation of the two are inextricably intertwined. However, the interpretive issues raised in *Allapattah* and *Rosario Ortega* did not implicate the limitations on federal jurisdiction that Article III imposes, since Article III requires only minimal diversity, *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 531 (1966), and has no amount in controversy requirement.

213. See *supra* text at notes 35–156, 188–91 and accompanying text.

214. I refer to the Court's view as stated in *Allapattah*, in all but the Court's conclusion.

matter jurisdiction statutes. Significant—and undesirable—changes in doctrine would result. In this Part, I illustrate how that is so.<sup>215</sup>

### A. Removal

Consider the potential implications of *Allapattah* and *Rosario Ortega* for cases that defendants seek to remove from state court. Although neither *Allapattah* nor the companion case of *Rosario Ortega* were removed to federal court, the decision of these cases will determine the removability of cases similar in structure to *Allapattah* and *Rosario Ortega*. More importantly, the Court's reasoning could have significant consequences for other aspects of removal doctrine.

For reference, § 1441(a) and (b) are set out here:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter [28 U.S.C. §§ 1441 et seq.], the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.<sup>216</sup>

1. Of course, given *Allapattah* and *Rosario Ortega*, cases that look as they looked<sup>217</sup> and that are brought in state court now will be removable to federal court as civil actions of which the district courts have original jurisdiction.

2. *Case-Splitting*. The reasoning of the Supreme Court in *Allapattah* that a single claim can qualify as a "civil action of which the district courts have original jurisdiction" raises the question whether a single defendant will be able to remove a federal question claim asserted against it or a claim for more than

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215. The discussion that follows is illustrative only; it makes no attempt to be exhaustive.

216. 28 U.S.C. § 1441(a)–(b) (2000).

217. That is, cases that present at least one named plaintiff who satisfies 28 U.S.C. § 1332(a)'s amount in controversy requirement and other plaintiffs—whether absent class members or joined parties—who present claims of \$75,000 or less in the same Article III case or controversy.

\$75,000 brought against it by a diverse plaintiff, without removing the other claims that have been asserted prior to removal, although they too are supported by an independent basis of jurisdiction or are claims within supplemental jurisdiction. If so, the long history of the entire case being the removable unit<sup>218</sup> will have been undermined, and the possibility of considerable inefficiency will have been introduced into the system, particularly when overlapping claims are left in state court.<sup>219</sup> Under existing law, § 1441(a)'s authorization of the removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction" permits the removal of federal question claims and claims within supplemental jurisdiction when they (or they and other claims that fall within another grant of federal jurisdiction, such as diversity jurisdiction<sup>220</sup>) constitute the totality of a

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218. See generally Edward Hartnett, *A New Trick from an Old and Abused Dog: Section 1441(c) Lives and Now Permits the Remand of Federal Question Cases*, 63 FORDHAM L. REV. 1099, 1156–58 (1995). Part I.B of Professor Hartnett's article traced the history of the Separable Controversy Act and its successors:

From the Judiciary Act of 1789 forward, it has been clear that the general removal statutes do not permit removal of an entire case on the basis that a part of the case is removable; that is precisely why the Separable Controversy Act and its successors were passed. Moreover, that is precisely the understanding of § 1441(a) demonstrated by Congress in amending § 1441(c) in 1990. If the general removal statutes authorized the removal of an entire case based on the presence of some claim within federal jurisdiction, with the understanding that the rest of the case would then be remanded, . . . successive statutes . . . that Congress enacted would have been unnecessary. Perhaps most graphically, *Strawbridge* would not apply on removal—the presence of a controversy between any two diverse parties would authorize the removal of the entire case and the district court would simply remand the rest of the case. Nor could the defendant remove only [some] claims, leaving [another] in state court. There is simply no statutory authority for such piecemeal removal and history makes clear why: From 1789 until 1866, piecemeal removal was forbidden. The experiment with piecemeal removal under the Separable Controversy Act of 1866 resulted in confusion, waste, and embarrassment, so Congress abandoned it nine years later in 1875. When courts reintroduced piecemeal removal by viewing certain parts of a state proceeding as "separate" from other parts, the result was the same, and Congress again repudiated piecemeal removal. . . . Congressional removal policy emerges as rational and coherent, consisting of two basic rules and one exception. First, a case can only be removed if the entire case is within the federal court's jurisdiction. Second, parts of cases cannot be removed, only entire cases. If a plaintiff joins an unrelated claim that would otherwise defeat removal . . . the entire case is removable under § 1441(c) and only under § 1441(c).

*Id.* (footnotes omitted) (emphasis added).

219. See *Francis J. v. Wright*, 19 F.3d 337, 341 (7th Cir. 1994) (noting that "preventing a defendant from splitting a single case into two, one state and the other federal, furthers judicial economy").

220. *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 358 (1959).

suit,<sup>221</sup> but defendants may not pick and choose which of the asserted claims they may remove.<sup>222</sup> Only the district court may decide, as a matter of discretion, whether to remand or dismiss claims within its supplemental jurisdiction.<sup>223</sup>

The ability to remove individual claims would be a potent weapon in the arsenal of defendants who sought to burden plaintiffs with the substantial costs and other inconveniences of parallel litigation. And, because neither plaintiffs nor courts have a statutory right to remove, neither of them could rectify the partial removal and bring back together the claims that previously were part of a single litigation. Moreover, complications would arise under claim preclusion and issue preclusion doctrines. If claims could be divided between federal and state courts, as contemplated above, then the number of occasions when *res judicata* or collateral estoppel could bite a litigant could greatly multiply. Defendants could remove federal question claims or claims within diversity

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221. Absent that situation, the collection of claims does not constitute a civil action of which the district courts have original jurisdiction. *See, e.g., Wilson v. Lowe's Home Ctr., Inc.*, 401 F. Supp. 2d 186, 193 (D. Conn. 2005) ("[A]n action containing a claim outside the original jurisdiction of the district court is not removable under [§ 1441(a)], even if the action contains other claims within the district court's original jurisdiction.")

222. *See, e.g., In re Mut. Fund Mkt.-Timing Litig.*, 468 F.3d 439, 444 (7th Cir. 2006) ("Cases are removed, or not, as units; either all defendants agree to removal or none does."). After removal the case either stays in federal court or returns to state court as a unit (subject to the district court's option under 28 U.S.C. § 1441(c) to remand "a separate and independent [nonremovable] claim"). 28 U.S.C. § 1441(c) (2000). *See Torrence v. Shedd*, 144 U.S. 527, 533 (1892) (remanding, with directions to remand to state court, and reasoning that a suit for partition of land could not be removed from state to federal court upon the petition of plaintiff and one of numerous defendants where the controversy related to the title in an undivided share of the land).

Professor Kevin Clermont made similar points in an email he sent to the federal courts listserv on June 24, 2005. He wrote:

Justice Kennedy puts a very novel spin on removal . . . . He would split a federal and state suit into two parts, allowing removal of the federal claim under 1441(a), and a sort of "reassertion" of the state claim in federal court under 1367(a). If this approach were accepted, its effects would be revolutionary. A defendant could then remove part of a suit, even if the other part did not come with supplemental jurisdiction; this would act somewhat like 1441(c), but reach related claims; once in federal court, the plaintiff could not reassert the state part of the claims, but that would hardly bother the defendant.

Imagine P1 of State A suing D1 of State B for \$100,000 and D2 of State B for \$1000. Then D1 and D2 (or presumably D1 alone) could remove the original-jurisdiction action between P1 and D1. There is no supplemental jurisdiction for the P1 and D2 claim because of 1367(b), so that claim stays in state court (or in limbo). This cannot be. And it should not prevail.

E-mail from Professor Kevin Clermont (June 24, 2005) (on file with author).

223. *Carnegie Mellon Univ. v. Cohill*, 484 U.S. 343, 348 (1988).

jurisdiction while leaving behind other such claims or factually-related claims within supplemental jurisdiction, and whichever litigation went to judgment first would produce a judgment that might be issue- or claim-preclusive in the other forum. Rather than plaintiffs splitting their cause of action, defendants could effectuate the splitting by partial removal and leave the plaintiffs (or themselves) to suffer preclusion consequences. The courts would be left the sometimes difficult task of determining the res judicata and collateral estoppel effects of the earlier judgment. None of these consequences would further policies of judicial administration. To the contrary, these consequences would undermine the goals of efficiency, convenience, cost-savings, and avoidance of both duplication and the creation of unnecessary and potentially complex issues.

3. *Unilateral, rather than unanimous, removal.* The reasoning of the Supreme Court in *Allapattah* that a single claim can qualify as a "civil action of which the district courts have original jurisdiction" raises the question whether a single defendant will be able to remove a federal question claim asserted against it or a claim for more than \$75,000 brought against it by a diverse plaintiff, without the consent or joinder in the removal of other defendants against whom claims supported by an independent basis of jurisdiction or claims within supplemental jurisdiction have been pleaded. If so, the long history of requiring unanimous consent to removal<sup>224</sup> will have been

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224. The long history is illustrated by cases such as *Hanrick v. Hanrick*, 153 U.S. 192 (1984), *Torrence v. Shedd*, 144 U.S. 527 (1982), and *Chicago, Rock Island & Pacific Railway Co. v. Martin*, 178 U.S. 245 (1900) (affirming denial of removal because all defendants had not united in removal petition, under the act of Congress of March 3, 1887, as corrected by the act of August 13, 1888, where a joint cause of action was alleged against the defendants for causing the death of a person). There are a few exceptions to this rule. See generally 14C WRIGHT, *supra* note 4, § 3731 (noting exceptions that a foreign state or entity thereof may remove independently under 28 U.S.C. § 1441(d), that many courts hold that only the defendants to a separate and independent claim that would be removable if sued on alone need remove under 28 U.S.C. § 1441(c), that only federal agencies or officers need remove under 28 U.S.C. § 1442, and that defendants who have not been served with process need not join a removal). Cases also hold that fraudulently joined defendants need not join the removal. *E.g.*, *Rico v. Flores*, 481 F.3d 234, 239–42 (5th Cir. 2007) (reversing denial of remand to state court based on lack of subject-matter jurisdiction and holding that railroad failed to establish improper joinder of nondiverse railroad employee defendants in wrongful death action; also holding that removing party did not need to obtain consent-to-removal of allegedly nondiverse codefendants); *United Computer Sys., Inc. v. AT&T Info. Sys. Inc.*, 298 F.3d 756, 762 (9th Cir. 2002) (concluding that a defendant who allegedly has been fraudulently joined has no obligation to join in removal, and there is no good reason for the date of service on a such a defendant to commence the thirty-day period for removal); *Anderson v. Merck & Co.*, 417 F. Supp. 2d 842, 846–49 (E.D. Ky. 2006) (refusing to remand for defective removal, holding that because non-diverse sales representatives were fraudulently joined in action against them and pharmaceutical company for alleged harm from Vioxx, absence of sales representatives' consent to removal was irrelevant); *Shaffer v. Nw. Mut. Life*

undermined. The unanimous consent requirement serves the purposes of preventing "some defendants from imposing their choice of forum not only on unwilling plaintiffs but on unwilling defendants as well,"<sup>225</sup> and of preventing individual defendants from splitting the plaintiff's claims between state and federal courts.<sup>226</sup> It also, of course, is consistent with the general policy of restricting removals by strictly construing the removal statutes.<sup>227</sup> All of these goals, as well as the goals identified above, would be undermined if fewer than all defendants could remove the claims against them while related claims were left in state court.

4. *Time to remove.* If such single-defendant removal of claims were to become accepted, questions concerning how the timeliness of removal should be determined when multiple defendants receive removal-triggering papers at varying times would be mooted. Under current law, there is a split, if not a splintering, of authority on this issue. Some courts subscribe to the "first-served defendant rule," pursuant to which if the first defendant to be served fails to file a notice of removal with the federal district court within thirty days of service upon it, subsequently served defendants cannot remove, if the removal is challenged, because removal will be untimely as to at least the first-served defendant—who will have waived its right to remove.<sup>228</sup> Such a

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Ins. Co., 394 F. Supp. 2d 814, 819–20 (N.D. W. Va. 2005) (upholding removal of suit alleging failure to fully pay on a disability insurance policy and holding that fraudulently joined parties need not have joined in removal); *Jonathan Pepper Co. v. Hartford Cas. Ins. Co.*, 381 F. Supp. 2d 730, 731–32 (N.D. Ill. 2005) (denying remand of fire insurance policyholders' suit against insurers and holding removal to have been timely filed, indicating that misjoined defendant-insurer's joinder in or consent to removal was not required).

225. *Gibson v. Inhabitants of Town of Brunswick*, 899 F. Supp. 720, 721 (D. Me. 1995).

226. *See Carr v. Mesquite Indep. Sch. Dist.*, 2004 U.S. Dist. LEXIS 10895 at \*7 (N.D. Tex. 2004) (stating that "a principal reason for the unanimity-of-removal requirement is to prevent individual defendants from splitting the plaintiff's claim between state and federal fora"). The court cites *Chicago, Rock Island* for the proposition that "[a] defendant has no right to say that an action shall be several which a plaintiff elects to make joint." *Chicago, Rock Island*, 178 U.S. at 248.

227. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108–09 (1941) (emphasizing the policy of federal courts to confine their jurisdiction to the precise limits set by Congress so as to give due regard to the rightful independence of state courts); *see also Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 692 (2003) (acknowledging the policy to narrowly construe removal legislation (citing *Shamrock*, 313 U.S. at 108–09)); *Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1263 & n.13 (5th Cir. 1988) (noting that promoting unanimity among the defendants is consistent with limiting removal jurisdiction and the principle of strictly construing the removal statutes).

228. *E.g., Getty Oil Corp.*, 841 F.2d at 1263 (holding that all served defendants must join in removal no later than 30 days from the day on which the first-served defendant was served); *Nationwide Anesthesia Servs., Inc. v. Diaz*, 442 F. Supp. 2d 1231, 1232 (M.D. Fla. 2006) (stating that defendants could not meet unanimity requirement for removal because first-named



challenge to removal is waivable, however, and is waived if not asserted within thirty days of the filing of the removal notice.<sup>229</sup> Other courts subscribe to the "last-served defendant rule," under which the filing of a removal notice by the defendants within thirty days of service on the last-served defendant will be deemed timely as to all defendants.<sup>230</sup> And still other courts employ variants of

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defendants failed to remove within thirty days of service and further waived the right to remove by proceeding with discovery and filing a motion to dismiss plaintiff's original complaint in state court); *Air Starter Components, Inc. v. Molina*, 442 F. Supp. 2d 374, 378, 380 (S.D. Tex. 2006) (remanding, holding that defendants could not meet the unanimity requirement for removal, even though earlier-served defendants filed notice of consent to removal by newly added defendants, because the earlier-served defendants had failed to timely remove and had waived their right to remove by seeking summary judgment in state court). ALI FJCRP, *supra* note 3, § 1446(b)(2) would codify the first-served defendant rule, subject to a grant of equitable power to extend the time to remove in the interest of justice, if defendants file a removal notice that is untimely with respect to some, but not all, of the defendants required to join in the removal.

229. *Payne ex rel. Estate of Calzada v. Brake*, 439 F.3d 198, 203, 205 (4th Cir. 2006) (affirming dismissal without prejudice and holding that plaintiff cross-appellant waived right to challenge removal on appeal for failure of all defendants to join the removal because plaintiff failed to timely object to this defect, which did not implicate subject-matter jurisdiction); *Bowers v. J & M Disc. Towing*, 472 F. Supp. 2d 1248, 1262 (D.N.M. 2006) (stating that the court would not consider whether removal was procedurally defective because removal was untimely where no party had made a timely motion to remand based on such a defect and the court lacked power to remand sua sponte for a procedural defect); *In re Edward Jones Holders Litig.*, 453 F. Supp. 2d 1210, 1212–13 (C.D. Cal. 2006) (holding that customers had waived objections to untimely removal and to successive removals by filing motion to remand outside thirty day period following removal); *Novick v. Bankers Life Ins. Co. of N.Y.*, 450 F. Supp. 2d 196, 198 (E.D.N.Y. 2006) (holding that plaintiffs waived the procedural defect of an untimely consent to removal by arguing in their motion for remand that their claims did not fall within ERISA, and raising the procedural defect for the first time in a reply paper filed more than ninety days after the initial remand motion); *Bova v. U.S. Bank, N.A.*, 446 F. Supp. 2d 926, 932, 941 (S.D. Ill. 2006) (remanding for lack of subject-matter jurisdiction, but refusing to consider plaintiff's challenge to timeliness of removal because challenge was waived when not raised in motion to remand).

230. *E.g.*, *McKinney v. Bd. of Trs. of Mayland Cmty. Coll.*, 955 F.2d 924, 928 (4th Cir. 1992) (holding that thirty-day time to remove begins to run, as to each defendant, when that defendant is served, with consequence that removal that was timely for earlier-served defendants was timely as to all defendants where later-served defendant joined the removal within thirty days after he was served); *C.L.B. v. Frye*, 469 F. Supp. 2d 1115, 1119–20 (M.D. Fla. 2006) (adopting last-served defendant rule in the absence of controlling Eleventh Circuit precedent, as "more consistent with the plain reading of § 1446(b)," "more likely to produce equitable results," desirably discouraging plaintiffs from manipulating the time of service, and allowing defendants adequate time to decide whether to remove). The courts that take this position generally regard the first-served defendant rule as unfair because it deprives later-served defendants of their removal right and denies them the opportunity to persuade the first-joined defendant to join in the removal. *McKinney*, 955 F.2d at 928. *See generally* 14C WRIGHT, *supra* note 4, § 3732, at 339 (1998 & Supp. 2007).

one or the other of these "rules."<sup>231</sup> The issue will disappear if federal courts uniformly hold that individual defendants can remove the claim or claims against them as "civil action[s] of which the district courts have original jurisdiction," despite the presence of other properly named and served defendants in the same case.

In and of itself, eliminating the confusion and disparities in the law as to how the timeliness of removal should be determined when multiple defendants receive removal-triggering papers at varying times would be desirable. But the costs of doing so by making individual claims removable are too high. If the courts cannot reach consensus on their own, then a statutory amendment, clarifying Congress's intent as to how the timeliness of removal should be determined in multi-defendant situations, could have the same salutary effects with none of the adverse effects described elsewhere in this Part.

5. *Effects on § 1441(c) removals.* Under the current regime, the actions removable under § 1441(a) are different from the actions removable under § 1441(c), and who may remove under each also differs. Section § 1441(c) provides that:

Whenever a separate and independent claim or cause of action within the original jurisdiction conferred by section 1331 . . . is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.<sup>232</sup>

The defendant or defendants who are party to the separate and independent claim or cause of action within the original jurisdiction conferred by Section

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231. Some go even further in protecting defendants. *E.g.*, *Marano Enters. of Kan. v. Z-Teca Rests., L.P.*, 254 F.3d 753, 755–57 (8th Cir. 2001) (holding that later-served defendants had thirty days from service on them to remove with the unanimous consent of co-defendants, although the first-served had not filed a notice of removal within thirty days of service on them); *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 532–33 (6th Cir. 1999) (same); *Bonner v. Fuji Photo Film*, 461 F. Supp. 2d 1112, 1115–19 (N.D. Cal. 2006) (denying remand of suit while rejecting first-served defendant rule and holding that business entity timely-removed action even though the thirty-day clock for removal had expired as to the first-served defendant). In February 2004, the Committee on Federal-State Jurisdiction of the Judicial Conference of the United States, circulated proposed statutory amendments that were described as resulting from positions adopted by the Judicial Conference on September 23, 2003. These proposals recommended that each defendant have thirty days to remove after its receipt, by service or otherwise, of the initial pleading, or after service on it of the summons (in specified circumstances); and that earlier-served defendants might consent to removal during the thirty-day period following service on later-served defendants, even if they did not previously initiate or consent to removal. Proposal of the Committee on Federal-State Jurisdiction of the Judicial Conference of the United States (February, 2004) (on file with author).

232. 28 U.S.C. § 1441(c) (2000).

1331, but only they, need join the removal notice.<sup>233</sup> That might change under *Allapattah* to the extent that even multiple defendants on a "separate and independent claim or cause of action within the original jurisdiction conferred by Section 1331"<sup>234</sup> might not have to join the removal because—at least absent joint liability—the court could find a distinct separate and independent claim against each defendant. Further, as with § 1441(a) removals, under current law the entire case is removed upon a § 1441(c) removal, and the district court decides, in its discretion—and, to some degree, as mandated by Article III—which claims to remand.<sup>235</sup> If individual claims constitute "civil action[s] of which the district courts have original jurisdiction,"<sup>236</sup> however, then do individual claims also constitute "entire case[s]" such that removing defendants would be able to remove individual claims and deny the trial court the opportunity to exercise discretion to remand—or not to remand—particular "matters" to the State court?<sup>237</sup> If so, then again the possibility of inefficiency will have been introduced into the system, particularly when overlapping claims are left in state court. Policies of good judicial administration will have been undermined. Because occasions for use of § 1441(c) are relatively unusual,<sup>238</sup>

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233. *Montana v. Abbot Labs.*, 266 F. Supp. 2d 250, 261–63 (D. Mass. 2003) (remanding suit removed pursuant to § 1441(c) because fewer than all defendants that were sued on a removable federal claim timely consented to the removal); *Riggs v. Plaid Pantries, Inc.*, 233 F. Supp. 2d 1260, 1266–67 (D. Or. 2001) (denying remand, holding that Title VII retaliation claim was separate and independent from claims related to sexual harassment and assault, and therefore only defendant named in retaliation claim needed to consent to § 1441(c) removal).

234. 28 U.S.C. § 1441(c) (2000).

235. Senator Grassley, who served on the Federal Courts Study Committee, stated that any portion of a case removed under the authority of 28 U.S.C. § 1441(c) that went beyond the scope of Article III would have to be remanded to state court; the remand would not be discretionary despite the permissive language ("may remand") of the section. *See* 136 CONG. REC. 36,287–92 (1990); *accord*, Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1618 (1992) (observing that if a state law claim is unrelated to a federal claim and the parties are not diverse, the federal court would have to remand the state claim, notwithstanding the discretionary language of § 1441(c)); *see also* Hartnett, *supra* note 217, at 1153–54 (opining that although it may be unconstitutional for federal courts to adjudicate claims that are factually unrelated to federal question claims, it does not follow that it is unconstitutional for Congress to authorize the removal that § 1441(c) authorizes and allow the federal court to determine the outer bounds of its jurisdiction over the collection of claims so removed).

236. 28 U.S.C. § 1441(b) (2000).

237. *See, e.g., In re Air Crash Disaster Near Roselawn*, 96 F.3d 932, 943 (7th Cir. 1996) ("That § 1441(c) uses 'the entire case' and § 1441(d) uses 'civil action' suggests a linguistic but not substantive difference.").

238. A number of factors have led to the infrequent, proper use of § 1441(c). These include: Its inapplicability to cases where diversity jurisdiction (rather than federal question jurisdiction) would support jurisdiction over a separate and independent claim, the conflict between the "separate and independent" requirement and the frequent state law limitation upon

however, the danger of inefficiency would be far less than that posed by § 1441(a) removals if the piecemeal removals envisioned in this Article were to be permitted.

6. *Bringing all proper parties into federal court.* Section 1447, governing procedure after removal, also speaks in terms of removed "cases."<sup>239</sup> If the case that is removed were to contain fewer than all the claims asserted in state court, then the orders and process that the district court might issue to bring before it all proper parties could be affected because the proper parties presumably would be limited to those who were proper parties to the removed claim(s). Again, the federal court would be powerless to reunite the claims that were brought together in state court.<sup>240</sup>

7. *Effects on removals of actions against foreign states.* Section 1441(d) authorizes removal of a civil action against a foreign state.<sup>241</sup> If, under

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joinder of plaintiffs and defendants that the claims they assert or that are asserted against them arise out of a single transaction, occurrence or series—so that few cases filed in state court fit the pattern demanded by § 1441(c), and the widespread belief that if the supplemental jurisdiction codified in 28 U.S.C. § 1367(a) reflects the outer limits of permissible federal subject-matter jurisdiction, then § 1441(c) is unconstitutional—at least insofar as it would permit federal courts to adjudicate state law claims between nondiverse parties, where those claims are separate from and independent of the federal question claims that would be removable if sued on alone, rather than deriving from a common nucleus of operative fact. *See generally* 14C WRIGHT ET AL., *supra* note 4, § 3724, at 2. As to the constitutional issues that arise concerning § 1441(c), see *Porter v. Roosa*, 259 F. Supp. 2d 638, 653–54 (S.D. Ohio 2003) (opining that the statute exceeds constitutional limits, and remanding separate and independent claims not otherwise within federal jurisdiction); *Fullin v. Martin*, 34 F. Supp. 2d 726, 735 (E.D. Wis. 1999) (reasoning similarly); *see also* ALI FJCRP, *supra* note 3, § 1441(c), at 346, 374–78 (requiring that unrelated, and otherwise nonremovable, claims be severed and remanded, rather than ostensibly leaving the decision whether to remand such claims to the discretion of the district courts).

239. 28 U.S.C. § 1447 provides in part:

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise. (b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

*Id.*

240. The federal courts have no authority to remove cases on their own motion because no statute authorizes them to do so. *See Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 34 (2002) (disapproving removals, by parties or federal courts, under the All Writs Act, 28 U.S.C. § 1651(a) (2000)).

241. 28 U.S.C. § 1441(d) provides:

Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title [28 U.S.C. § 603(a)] may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of

*Allapattah*, § 1441(d) were interpreted to permit the removal of only one or, at the option of the foreign state, more claims against the state, but not the removal of other claims asserted, for example against co-defendants, then that would change the operation of § 1441(d),<sup>242</sup> and again would permit the uneconomical split-up of claims, arising out of the same transaction, occurrence or series thereof. Parallel trials with overlapping evidence, outcomes in tension with one another, and unnecessary burdens on litigants, witnesses, judges and jurors all might result.

8. *Making nonsense of § 1441(f)*. Section 1441(f) states that:

The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is [sic] removed did not have jurisdiction over that claim.

Section 1441(f)—which did away with the doctrine of derivative jurisdiction<sup>243</sup> in cases removed pursuant to § 1441(a)—would become potentially nonsensical if "claim" and "civil action" were synonymous. By the manner in which it distinguishes "claim" from "civil action," the section makes clear that it intends the latter term to be more encompassing than the former.<sup>244</sup>

9. *Altering federal officer and civil rights removals*. The federal officer removal statute, 28 U.S.C. § 1442,<sup>245</sup> and the civil rights removal statute, 28

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section 1446(b) of this chapter [28 U.S.C. § 1446(b)] may be enlarged at any time for cause shown.

*Id.*

242. See 14C WRIGHT ET AL., *supra* note 4, § 3729.1, at 238–42 & nn.3, 6 (noting that § 1441(d) now is understood to contemplate the removal of the entirety of any state court action, with the district court having discretion to remand to state court claims as to which it has no independent basis of subject-matter jurisdiction).

243. See 14B WRIGHT ET AL., *supra* note 176, § 3721, at 304–06 (discussing derivative jurisdiction). Under the doctrine of derivative jurisdiction, federal courts acquired jurisdiction over a case upon removal only if the state court from which the case was removed had subject-matter jurisdiction over the case. *Id.* at 304. If derivative jurisdiction was lacking, the federal court had to dismiss the removed case, even if the case was within exclusive federal subject-matter jurisdiction. *Id.*

244. See 28 U.S.C. § 1441(f) (2000) (using the term "claim" to mean a subset of a larger "civil action").

245. See 28 U.S.C. § 1442 (2000) (addressing removal by federal defendants). Section 1442 authorizes the defendant United States or any agency or officer thereof, or a person acting under that officer, to remove civil actions and criminal prosecutions commenced in a state court when the defendant has been sued for any act under color of office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue. Certain refinements as to who is entitled to remove under this section follow. *Id.*

U.S.C. § 1443,<sup>246</sup> also authorize the removal of certain "civil actions." If, under *Allapattah*, they were interpreted to permit the removal of one or more, but fewer than all, of the claims that have been asserted in state court as part of a litigation, that again would alter the scope of what is removable,<sup>247</sup> permit the uneconomical split-up of claims arising out of the same transaction, occurrence or series thereof, and potentially create preclusion issues and preclusion consequences.

10. *Splitting of litigations that include claims whose removal is barred.* Section 1445 prohibits the removal of described "civil actions" including Federal Employer's Liability Act (FELA) of 1908,<sup>248</sup> actions against a railroad, Jones Act claims, and suits arising under workmen's compensation laws.<sup>249</sup> Courts' application of § 1445 in multiclaim cases is mixed, although there is not a great deal of case law, particularly from the appellate courts.<sup>250</sup> Some district courts have allowed § 1441(c) to be used to remove cases that include claims against a railroad or Jones Act claims that otherwise would be

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246. See 28 U.S.C. § 1443 (2000) (authorizing removal of civil rights based civil actions and criminal prosecutions under certain circumstances).

247. See, e.g., *Alsup v. 3-Day Blinds, Inc.*, 435 F. Supp. 2d 838, 842 (S.D. Ill. 2006) (citing 14C WRIGHT, *supra* note 4, § 3739 for the principle that § 1442(a)(1) authorizes removal of entire cases although only one of the controversies therein involves a federal officer or agency); *Gen. Motors Corp. v. Hirschfield Steel Serv. Ctr., Inc.*, 402 F. Supp. 2d 800, 807–08 (E.D. Mich. 2005) (exercising discretion to remand remaining state law claims after claims against federal agency defendant, United States Army Corps of Engineers, were dismissed because of sovereign immunity and concluding that there was no good reason to retain jurisdiction where the litigation was in its initial stages); *Allender v. Scott*, 379 F. Supp. 2d 1206, 1220–21 (D.N.M. 2005) (granting tribal officer defendants' motion for certification under the Federal Tort Claims Act (FTCA) but dismissing FTCA claims because administrative remedies were not exhausted and remanding remaining claims to state court because federal party was eliminated and judicial economy would not be sacrificed by remand). Very few cases are successfully removed under § 1443. Some § 1443 cases in which remand was denied and that included state law, as well as federal, claims are: *White v. Wellington*, 627 F.2d 582, 587–88 (2d Cir. 1980) (reversing remand to state court of case involving removal under the "refusal to act" clause of § 1443(2) and referring to state law claims); *AEL Fin., LLC v. Tessier*, 2007 U.S. Dist. LEXIS 17801, at \*3–6 (N.D. Ill. 2007) (denying motion to remand case removed pursuant to § 1443, among other federal statutes, although jurisdiction was upheld as related to bankruptcy, and also asserting state law claims); *Voinovich v. Cleveland Bd. of Educ.*, 539 F. Supp. 1100, 1102 (N.D. Ohio 1982) (holding case, including state law claims, to have been properly removed pursuant to § 1443(2), and denying remand to state court).

248. Federal Employer's Liability Act of 1908, Pub. L. No. 60-100, 35 Stat. 65 (codified as amended at 45 U.S.C. §§ 51–60 (2000)).

249. While § 1445 also prohibits removal of civil actions arising under a specified section of the Violence Against Women Act of 1994, Pub. L. No. 106-386, 108 Stat. 1902 (codified at 42 U.S.C. § 13981 (2000)), that section was declared unconstitutional in *United States v. Morrison*, 529 U.S. 598, 627 (2000).

250. See generally 14C WRIGHT ET AL., *supra* note 4, § 3729, at 210–15.

unremovable by virtue of § 1445.<sup>251</sup> So long as the claims that would be unremovable by virtue of § 1445 are separate and independent from the federal question claim(s) that are necessary for removal, and so long as the claims that would be unremovable by virtue of § 1445 are remanded to state court,<sup>252</sup> that procedure is acceptable.<sup>253</sup> That is, if the claims that would be unremovable by virtue of § 1445 are not part of the same case—and hence not properly part of the same civil action—as the federal question claim(s) that are necessary for removal, then the former should not prevent the removal of the latter, but the claims whose removal is barred by § 1445 should have to be remanded to state court.

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251. See *id.* at 212 n.37 (citing district court cases that permitted removal of FELA claims under § 1441(c)); *Brooks v. Maersk Line, Ltd.*, 396 F. Supp. 2d 711, 715 (E.D. Va. 2005) (remanding, opining that action could be removed if Jones Act claims were separate and independent of federal question claims, but holding that no jurisdiction existed because plaintiff's discrimination claims were not separate and independent from non-removable Jones Act claim); see also *Albarado v. S. Pac. Transp. Co.*, 199 F.3d 762, 765 (5th Cir. 1999) (dismissing appeal for lack of appellate jurisdiction but stating in dicta that "a FELA claim, if filed originally in state court, may not be removed unless it is joined with separate and independent claims over which the federal courts exercise exclusive jurisdiction"); *Lewis v. Louisville & Nashville R.R. Co.*, 758 F.2d 219, 222 (7th Cir. 1985) (directing remand on other grounds, not deciding whether FELA claims are removable under § 1441(c) although stating that they never can be removed, but then opining that the district court could have severed the FELA claims and remanded them to state court while retaining jurisdiction of another removed claim); *Gamble v. Cent. of Ga. Ry. Co.*, 486 F.2d 781, 784–85 (5th Cir. 1973) (ordering remand, concluding that § 1445 prohibited a third-party defendant's removal of FELA action in which third party had been impleaded to indemnify defendant, stating in dicta that district court should have granted the motion to remand the entire action or alternatively should have severed and remanded the FELA claim). Professor Jon Oakley has opined that by providing the severance option, the Fifth Circuit "implicitly found § 1445(a) to operate in a claim-specific fashion." ALI FJCRP, *supra* note 3, at 548. I disagree with Professor Oakley to some extent because the language was just dicta; the court did not remand to the district court to choose between remand and severance—it ordered remand to state court. In *Lirette v. N.L. Sperry Sun, Inc.*, 820 F.2d 116 (5th Cir. 1987), the Fifth Circuit repudiated *Gamble* to the extent that *Gamble* construed § 1445(a)'s nonremovability provision as strictly jurisdictional and non-waivable. See *id.* at 118 ("The language in *Gamble* which construes the nonremovability provision of § 1445(a) in strict jurisdictional terms is overruled."). As Professor Oakley reports, despite *Lirette*, "courts purporting to apply *Gamble* have held that § 1445(a) requires that entire actions, including non-FELA claims, be remanded." ALI FJCRP, *supra* note 3, at 548.

The ALI FJCRP would make clear the unremovability of claims otherwise removable "solely on the basis of the nonexclusive admiralty or maritime jurisdiction conferred by 28 U.S.C. § 1333(1)." See proposed § 1441(f)(4), and ALI FJCRP, *supra* note 3, at 335, 390–91.

252. *Supra* note 251 and accompanying text.

253. The ALI FJCRP would permit removal if a nonremovable claim is joined with an otherwise-removable federal question claim but the two are not part of the same case, and it would require the severance and remand of the unrelated, nonremovable claim. ALI FJCRP, *supra* note 3, at 389–90.

When a plaintiff has pleaded a federal question claim and a supplemental workers' compensation claim, the civil action composed of that combination of claims is not removable, and more federal courts have so held than have held to the contrary.<sup>254</sup> The majority has got it right because § 1445 bars the removal of "civil actions,"<sup>255</sup> and claims supported by an independent basis of federal jurisdiction and claims supplemental to them are part of the same civil action. Similar analysis could be done with respect to other specialized statutes that prohibit the removal of particular kinds of "civil actions," such as that prohibiting removal of actions for misrepresentation under the Securities Act of 1933.<sup>256</sup>

However, if "civil action" were equated with a claim, à la *Allapattah*, different results could follow when a claim whose removal is statutorily precluded by § 1445 or a similar statute has been joined with other claims and all share the relationship that makes some supplemental to the others. Taking an *Allapattah*-like view, federal courts would be more likely to uphold the

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254. See 14C WRIGHT ET AL., *supra* note 4, § 3724, at 221 (stating that "[i]n the few decided cases, the federal courts have answered [that § 1445's restriction on removability should trump the removability of a federal question claim joined with a workers' compensation claim]"); see, e.g., *Jones v. C.J. Mahan Constr. Co.*, 393 F. Supp. 2d 390, 393 (S.D. W. Va. 2005) (remanding case despite conclusion that ERISA claim and age discrimination claim were completely preempted by ERISA because claim of discriminatory and retaliatory termination under state workers' compensation act was not removable and the remaining state and federal claims arose from the same wrong). *But see Nabors v. City of Arlington*, 688 F. Supp. 1165, 1168–70 (E.D. Tex. 1988) (denying remand and permitting removal where retaliatory discharge workers' compensation claim was pendent to federal question claim).

255. See 28 U.S.C. § 1445 (2000) (using the term civil action in describing each of the four areas where removal is specifically prohibited).

256. See Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C.A. § 77 (West 1997 & Supp. 2008)) (providing for federal regulation of sales of securities); see also *Cal. Pub. Employees' Ret. Sys. v. WorldCom, Inc.*, 368 F.3d 86, 107–08 (2d Cir. 2004) (affirming denial of remand to state court of individual Securities Act of 1933 securities fraud actions brought by pension fund against Chapter 11 debtor's officers and directors where actions were related to bankruptcy estate). Specifically, as a matter of first impression in the courts of appeals, the court held that the bankruptcy statute's provision for removal trumped the Securities Act's anti-removal provision because the bankruptcy removal statute contains no exception for claims arising under an act of Congress that otherwise prohibits removal. *Id.* The court reasoned that its reading furthered the purposes of decreasing litigation costs to the estate and thereby preserving it, and that a contrary reading could interfere with operation of the system created by the bankruptcy code. *Id.* at 101–03. The court rejected, *inter alia*, plaintiffs' argument that Congress granted plaintiffs an absolute choice of forum. *Id.* at 104–05. In reaching its result, the court applied the principle that if removal is effectuated through a provision that confers removability beyond that authorized by the general removal statute, 28 U.S.C. § 1441(a)—as the bankruptcy removal provision does—and that contains no exception for nonremovable federal claims, the provision should be given "full effect." *Id.* at 107.



removal of otherwise removable claims, despite their joinder, in state court, with claims whose removal is barred. This would be undesirable from the perspective of judicial economy and burden on the parties. Although the courts might have a ground under § 1367(c) to remand some of the claims,<sup>257</sup> the courts would not have discretion to remand federal question claims or claims within their diversity (or another independent basis of subject-matter) jurisdiction. Thus, an unremediable division of related claims, between state and federal courts, could result from the *Allapattah*-induced view that claims within federal jurisdiction are civil actions distinct from the supplemental claims whose removal is barred by § 1445, with which the federal claims were joined.

One of the few cases to explicitly address *Allapattah*'s implications—though only in a footnote<sup>258</sup>—arose in just this context. In *Wilson v. Lowe's Home Center, Inc.*,<sup>259</sup> plaintiff sued in state court, alleging that defendant had fired her in violation of the state workers' compensation act's anti-retaliation provision and asserting various other state law claims that fell within the federal courts' diversity jurisdiction.<sup>260</sup> Defendant removed, and plaintiff sought remand based on § 1445(c).<sup>261</sup> After concluding that plaintiff's workers' compensation claim was within the scope of § 1445(c), the court decided for a variety of reasons<sup>262</sup> that § 1445(c)'s prohibition on removal required the remand of the entire set of removed claims.<sup>263</sup> The court noted that language in *Allapattah* suggested that, at least in the context of § 1367, "civil action" could refer to individual claims,<sup>264</sup> but it concluded (for the reasons listed in note 262 hereof) that "in the context of the removal statutes, 'civil action' should be interpreted to refer to an entire case, rather than [to] individual claims."<sup>265</sup>

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257. See 28 U.S.C. § 1367(c) (2000) (outlining four discretionary reasons to decline to exercise supplemental jurisdiction).

258. *Wilson v. Lowe's Home Ctr., Inc.*, 401 F. Supp. 2d 186, 193 n.7 (D. Conn. 2005).

259. See *id.* at 198–99 (holding that plaintiff's workers' compensation suit was within the scope of § 1445(c) and remanding all claims).

260. *Id.* at 188.

261. *Id.*

262. These reasons included the commonly understood meaning of civil action, the history of § 1441(a), the inapplicability of § 1441(c), the policies motivating § 1445(c), the undesirable alternatives—pleading only workers' compensation claims or litigating in both state and federal fora—and inefficiency that a different decision would impose upon plaintiffs diverse from their defendants, and the fact that holding otherwise "would be tantamount to permitting piecemeal removal in diversity cases, which Congress has prohibited." *Id.* at 196.

263. *Id.* at 192–97.

264. *Id.* at 193 n.7.

265. *Id.* *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 500 F.3d 171, 178–79 (2nd Cir. 2007), also refers to the *Allapattah* Court's ruling that the assertion, by a single diverse plaintiff,

Certainly, Congress has power to modify the rules of federal jurisdiction in removed cases and to modify the non-jurisdictional procedural rules that govern removal and remand. The *Allapattah* Court's pronouncement that, "[n]o sound canon of interpretation requires Congress to speak with extraordinary clarity in order to modify the rules of federal jurisdiction within appropriate constitutional bounds. Ordinary principles of construction apply,"<sup>266</sup> has equal pertinence in the realms of removal and remand. But, in enacting § 1367, Congress did nothing directly to change removal jurisprudence,<sup>267</sup> although by altering the scope of supplemental jurisdiction from its pre-existing common law state, Congress did indirectly affect what litigation could be removed. In considering how courts that face removals and motions challenging removals should determine the implications of *Allapattah* for issues such as those identified above, some words recently written by Judge Posner of the Court of Appeals for the Seventh Circuit have value. He advised:

[W]hether a decision can be distinguished, in order to avoid its having precedential force in a subsequent case . . . depends on the breadth of its holding, and . . . often there is a choice as to how broadly a holding should be understood. . . . Courts read precedents broadly or narrowly depending on what the courts have learned subsequent to the precedents.<sup>268</sup>

Courts also may consider what they learned before a new precedent came into existence. I propose that in considering how to handle the language and reasoning of *Allapattah* in deciding issues raised by removals, the courts should reject the conclusions that, under § 1441(a), fewer than all properly joined and served defendants may effectuate a removal and that defendants may remove fewer than all of the claims asserted in the state court litigation. Courts also should reject the conclusions that under § 1441(c) fewer than all properly joined and served defendants named on a separate and independent federal question claim may effectuate a removal or may remove fewer than all of the claims asserted in the state court litigation. (If the courts reject these positions, then the other issues raised above in points numbered 2–3 and 5–10 will be obviated.) The courts should reject the positions described above in part

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of a claim that satisfies § 1332 is a civil action over which the district court may assert jurisdiction, but this point did not influence the court's decision. The decision was influenced, however, by the contamination theory and the court's understanding from *Allapattah* that contamination theory furnishes limitations on supplemental jurisdiction beyond those stated in § 1367(b). *Id.* at 179.

266. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 558 (2005).

267. *See* 28 U.S.C. § 1367 (2000) (standing silent on removal while establishing a statutory framework for supplemental jurisdiction).

268. *Fairley v. Fermaid*, 471 F.3d 826, 831–32 (7th Cir. 2006) (Posner, J., dissenting).

because the only indication of Congressional intent to alter the law as to these matters is the enactment of an inartfully drafted § 1367, which does not directly address removal at all.<sup>269</sup> It is only the Court's construction of that statute in cases that were not removed to federal court (*Allapattah* and *Rosario Ortega*), and the Court's language in *Surgeons*, a case removed to federal court but in which the Court's language that was pertinent to claims and civil actions was not necessary to the result,<sup>270</sup> that cast doubt on how the removal and remand statutes should be interpreted and applied. There is no reason to believe that Congress intended to overthrow more than a century of practice under the removal statutes—concerning who may remove, and the scope of what is removed—when it took a stab at codifying supplemental jurisdiction in response to the Court's invitation of such legislation.

If resort to the legislative history is appropriate, consideration of that history reveals that there is little or nothing there that supports changed interpretation of the removal statutes. Nothing in the short presidential signing statement<sup>271</sup> concerning the legislation of which § 1367 was part<sup>272</sup> related to removal. According to the Congressional Information Service's (CIS) legislative history of the Judicial Improvements Act of 1990 (JIA), there were eleven committee reports issued by the House or Senate in conjunction with the JIA, including two from prior Congresses.<sup>273</sup> Only one of the eleven committee reports dealt with the act that became Title III of the JIA (the title adding § 1367), and it did not treat the relationship between § 1367 and § 1441.<sup>274</sup>

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269. See Joan Steinman, *Supplemental Jurisdiction in § 1441 Removed Cases: An Unsurveyed Frontier of Congress'[s] Handiwork*, 35 ARIZ. L. REV. 305, 308–10 (1993) (arguing that § 1367 should be read to apply to removed cases). This is despite the provision in § 1367 that it applies to cases commenced, not "commenced or removed," on or after its effective date, its grant of supplemental jurisdiction only in civil actions of which the district courts have "original" jurisdiction, and its tie of a toll of the statute of limitations to the time at which claims were dismissed, never mentioning the possibility of remand. *Id.*

270. *Supra* text accompanying notes 176, 178.

271. See Statement on Signing the Judicial Improvements Act of 1990, 2 Pub. Papers 1731 (Dec. 1, 1990) (standing silent on the issue of removal while noting that the act provided for new judgeships and helped give better access to the justice system through gains in efficiency).

272. See Judicial Improvements Act (JIA) of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended in scattered sections of 28 U.S.C.) (comprising eight titles, the JIA was a piece of omnibus legislation, section 310 of Title III of which, the Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, 104 Stat. 5104, added to 28 U.S.C. § 1367).

273. See Judicial Improvements Act of 1990, *legislative history collected in CONGRESSIONAL INFORMATION SERVICE LEGISLATIVE HISTORIES OF PUBLIC LAWS 1990 [HEREINAFTER CIS]*, at 782–94 (1990) (compiling citations and abstracts for related legislative documents).

274. See H.R. REP. NO. 101-734, pt. 114 (1990) (outlining the general historical rationale

Additionally, of the twenty committee hearings identified by CIS, nine of which were from prior Congresses, only one was related to the subject matter of Title III.<sup>275</sup> The abstract of this hearing mentions supplemental jurisdiction, but not removal.<sup>276</sup> Finally, the CIS identified fifteen instances of floor debate concerning the JIA.<sup>277</sup> Only three concerned § 1367, and only one discussed anything related to removal.<sup>278</sup> That one floor debate reiterated the points made in the committee report and did not treat the relationship between § 1367 and § 1441.<sup>279</sup> In sum, there was little mention of removal in the record of the twenty hearings on the bill. None of these mentions treated the relationship between § 1367 and § 1441.

Courts have been correct not to make radical changes in removal practice, with untoward consequences, without a far clearer manifestation of Congressional intent. Nothing in the language of the removal statutes, their structure, their legislative history, the broader context of jurisdictional and related procedural statutes, or good judicial policy suggests that courts should do otherwise.<sup>280</sup>

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for statutory changes to supplemental jurisdiction doctrine).

275. See CIS, *supra* note 273, at 786–93 (listing hearings by subject matter and including abstracts if available at the time of printing).

276. Tom Gaylord, Law Librarian at Chicago-Kent College of Law, and I did not, however, review for mentions of removal or the removal statutes the 783 pages of microfiche from the one hearing—among the twenty that are abstracted—that appear to have been potentially relevant.

277. See CIS, *supra* note 273, at 785 (listing floor debates and including bill numbers for each debate).

278. See *id.* (identifying all instances of floor debate related to the JIA).

279. See 136 CONG. REC. 26,255, 26,261 (1990) (statement of Rep. Kastenmeir) (explaining the changes that the bill would make, including the topics of removal and supplemental jurisdiction, without directly addressing the relationship between the two areas).

280. As Professor Kevin Clermont wrote in an email on June 24, 2005:

1. Justice Kennedy wrote an opinion surveying a whole area and rapidly got out of his depth. He says a number of things in the course of *Exxon Mobil* that are clearly misstatements. This [that a defendant could remove a federal claim under § 1441(a) and reassert state law claims in federal court under § 1367(a)] must be another one. It is the purest dictum. 2. Justice Ginsburg takes issue with much that he says, including in her footnote 11 his reference to *College of Surgeons*. But she did not read him to say that § 1441(a) should be read to allow § 1441(c)-type splitting, so maybe Kennedy's misstatement is vaguer than it seems to me. 3. Kennedy's approach would be new law. *College of Surgeons* said: "The propriety of removal thus depends on whether the case originally could have been filed in federal court." It was looking at the whole state case and asking if it could have been brought in federal court. 4. Kennedy's approach would have revolutionary and undesirable impacts . . . Thus, I do not think that our approach to removal should be jettisoned in response to an unpondered throw-away line in a case that did not involve removal.

### B. Costs and Fees

In specified circumstances, 28 U.S.C. § 2412 provides for judgments, for costs, and for awards of reasonable fees and expenses of attorneys to the prevailing party in civil actions brought by or against the United States, its agencies or officials.<sup>281</sup> It requires a party who seeks an award to submit an application for fees and other expenses "within thirty days of final judgment in the action,"<sup>282</sup> and it requires the applicant to allege that the position of the United States was not substantially justified, which the court is to determine on the basis of the record made in the civil action.<sup>283</sup> "Final judgment" is defined to mean "a judgment that is final and not appealable. . . ."<sup>284</sup> "Party" is defined as an individual or entity whose net worth does not exceed specified amounts "at the time the civil action was filed."<sup>285</sup>

The operation of these provisions would change depending upon whether "civil action" is given the meaning ordinarily attributed to the phrase or is interpreted to mean "claim." A claim could go to judgment before the entire civil action of which it is part does so, influencing when the application for fees and other expenses has to be filed. Whether the position taken by the United States was substantially justified also could be influenced by whether the court, in making this determination, focuses upon a particular claim or upon the litigation as a whole. Net worth can change and pleadings can be amended to add claims after a civil action—in the potentially multi-claim sense—was commenced. Thus, whether a party is eligible to recover fees and other costs could depend upon whether the civil action is regarded as filed when suit initially was commenced or whether—if "civil action" is equated with "claim"—the civil action as to which fees and other costs are sought is regarded as filed at the possibly later date when a particular claim was filed. Currently, the federal courts examine the civil action as a whole in determining a party's entitlement to fees, while excluding attorney time spent on unsuccessful

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E-mail from Kevin Clermont, James and Mark Flanagan Professor of Law, Cornell Law School, to fedcourts@law.wisc.edu (June 24, 2005) (on file with author).

281. 28 U.S.C. § 2412 (2000).

282. 28 U.S.C. § 2412(d)(1)(B) (2000).

283. *Id.*

284. 28 U.S.C. § 2412(d)(2)(G) (2000). In providing that a party must seek fees within thirty days of a final judgment so defined, Congress did not mean that the judgment must not *yet* be appealable but rather that the period in which to file a notice of appeal or petition for writ of certiorari must have expired, rendering the final judgment no longer appealable. *Melkonyan v. Sullivan*, 501 U.S. 89, 95–96 (1991).

285. 28 U.S.C. § 2412(d)(2)(B) (2000).

claims.<sup>286</sup> Thus, the operation of the Equal Access Justice Act of 1980 (EAJA) would change significantly if "civil action" were interpreted to mean "claim." Nothing in the language of the EAJA, its structure, legislative history<sup>287</sup> or purposes, the broader context of fee-shifting statutes, or good judicial policy suggests that such a change was intended by Congress or would be desirable.<sup>288</sup>

### C. Three-Judge Courts

28 U.S.C. § 255 provides that:

(a) Upon application of any party to a civil action, or upon his own initiative, the chief judge of the Court of International Trade shall designate any three judges of the court to hear and determine any civil action which the chief judge finds: (1) raises an issue of the constitutionality of an Act of Congress, a proclamation of the President or an Executive order; or (2) has broad or significant implications in the administration or interpretation of the customs laws.

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286. The courts generally follow the guidelines laid down by the Supreme Court in *Commissioner, INS v. Jean*, 496 U.S. 154, 161–62 (1990) (noting the trial court's discretion in fee awards and explaining the presumption that a fee award will encompass all aspects of the litigation) and *Hensley v. Eckerhart*, 461 U.S. 424, 429–30 (1983) (reasoning similarly in applying a different attorneys' fee award statute). See, e.g., *Loomis v. United States*, 74 Fed. Cl. 350, 354 (2006) (noting that under *Jean* "the EAJA, like other fee-shifting statutes, favors treating a case as an inclusive whole, rather than as atomized line-items"). The government's position in *Loomis* was not substantially justified by law or fact even though the government prevailed on most issues in the litigation. *Id.* at 354–55. Here, plaintiff failed in attacks against Army policies on homosexual conduct, but succeeded on claims of improper divestment of retirement entitlements. *Id.* at 355. The court found that the critical relief sought was tied to the ultimately successful retirement divestment claims. *Id.* at 355–56. In deciding to grant the motion for attorneys' fees, the court relied on *Hensley's* emphasis on the significance of the overall relief obtained in relation to attorney hours reasonably expended, instead of the number of claims on which plaintiff prevailed. *Id.* at 359; see also *Owen v. Payne*, 861 F.2d 1273, 1274 (Fed. Cir. 1988) (invoking *Hensley* in applying the EAJA); *United States v. Basler Turbo-67 Conversion DC-3 Aircraft*, 34 Fed. App'x 346, 347 (9th Cir. 2002) (relying on *Hensley* for the approach to measuring success in cases raising multiple claims in a case in which attorneys' fees and costs were sought under the EAJA).

287. See Equal Access to Justice Act of 1980, Pub. L. No. 96-481, 94 Stat. 2325 (codified as amended at 5 U.S.C. § 504 (2000)) (requiring an administrative agency to pay costs of an adversarial adjudication to the prevailing party unless the agency position was substantially justified).

288. That this is so is evidenced by the manner in which the courts interpreted the EAJA before, as well as after, *Allapattah*. See *Loomis v. United States*, 74 Fed. Cl. 350, 353–56 (2006) (using a pre-*Allapattah* broad understanding of civil action to determine costs under the EAJA). Were it otherwise, from the outset the courts could have focused upon individual claims in determining parties' eligibility for awards of reasonable attorneys' fees and expenses in civil litigation involving the United States.

(b) A majority of the three judges designated may hear and determine the civil action and all questions pending therein.

Who may apply for a three-judge court to determine issues and the scope of the issues that that court may decide could change depending upon whether "civil action" is construed to mean a collection of claims permitted to be brought together under the Federal Rules and jurisdictional grants, or a single claim, for parties to a civil action in the former (broader) sense might not be parties to a civil action in the latter (narrower) sense, and the scope of the three-judge court's authority could change because the collection of claims and the questions they raise might be broader than any single claim therein or the questions it raises. Little, if any, case law interprets "civil action" or "party" in the context of multi-claim or multi-party cases.<sup>289</sup> However, an *Allapattah*-like view would tend to lead federal courts to limit those who would be eligible to seek a three-judge court to those parties who themselves raise the kinds of issues described in § 255 or against whom such issues are raised (i.e., it would tend to exclude other parties to the same litigation from the "eligible"). An *Allapattah*-like view similarly would tend to limit the issues—through narrow definition of the "civil action"—that such a three-judge court could determine to the issues raised by the claims that put into issue the constitutionality of an Act of Congress, a proclamation of the President or an Executive order, or that are found to have "broad or significant implications in the administration or interpretation of the customs laws."<sup>290</sup> Under the narrow view, the three-judge court would not be empowered to hear supplemental claims or even other federal question claims that do not challenge the constitutionality of Congressional or executive acts and are not found to themselves have "broad or significant implications in the administration or interpretation of the customs laws."<sup>291</sup> Such an interpretation often could waste judicial and party resources due to the duplication of effort that would be required by (perhaps different) judges and/or by the parties and witnesses who had to proceed before both the three-judge tribunal and a single federal judge. It also might enhance the possibilities for conflicting results. To the extent that the chief judge of the

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289. Cases may note that, by statute, when a civil action is assigned to a three-judge panel, a majority of the designated panel "may hear and determine the civil action and all questions pending therein." See, e.g., *Fundicao Tupy S.A. v. United States*, 652 F. Supp. 1538, 1543 (Ct. Int'l Trade 1987) (noting in rejecting contention that motion to sever a portion of a case for review by a three-judge panel raised the possibility that the panel would issue an advisory opinion, where the court found that plaintiffs had made no such motion). However, such a statement does not make clear the scope of the "civil action."

290. 28 U.S.C. § 255(a)(2) (2000).

291. *Id.*

Court of International Trade would deny a three-judge tribunal that s/he otherwise would designate, in order to avoid such inefficiencies and problems, that would undermine the purposes of § 255.

#### D. Arbitration

Subject to a variety of exceptions, under 28 U.S.C. § 654:

[A] district court may allow the referral to arbitration of any civil action (including any adversary proceeding in bankruptcy) pending before it when the parties consent, except that referral to arbitration may not be made where—

(1) the action is based on an alleged violation of a right secured by the Constitution of the United States;

(2) jurisdiction is based in whole or in part on section 1343 of [28 U.S.C.];  
or

(3) the relief sought consists of money damages in an amount greater than \$150,000.<sup>292</sup>

If "civil action," within 28 U.S.C. § 654, means a collection of claims permitted to be brought together under the Federal Rules and jurisdictional grants, then § 654 authorizes a district court to refer to arbitration a larger set of matters than § 654 authorizes the court to refer if "civil action" refers to a claim. While the units that may be referred are potentially larger if "civil action" means a collection of claims, the prohibitions on referral also are potentially broader if "civil action" means a collection of claims rather than an individual claim. I did not find case law interpreting "civil action," within the meaning of § 654, in the context of multi-claim or multi-party cases, although I did find cases involving multiple parties that were referred to arbitration pursuant to § 654.<sup>293</sup> An *Allapattah*-like view would not alter application of the grant of authority to refer to arbitration—putting the exceptions aside, for the moment—if consent to arbitration of a civil action implies consent to arbitration of each claim therein. If consent to arbitration of a civil action does not imply consent to arbitration of each claim therein, however, an *Allapattah*-like view

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292. 28 U.S.C. § 654(a) (2000).

293. See *Route 18 Cent. Plaza, L.L.C. v. Beazer East, Inc.*, No. 00-2436, 2000 U.S. Dist. LEXIS 22420, at \*13 (D.N.J. 2000) (ordering the filing of an amended complaint containing additional jurisdictional allegations in a case brought by one plaintiff against multiple defendants that had been automatically referred to compulsory arbitration).



would tend to lead federal courts to limit referrals-to-arbitration to pending claims to whose arbitration the parties had consented. An *Allapattah*-like view would tend: (a) to restrict the exception that prohibits referrals to claims based on an alleged violation of a right secured by the Constitution of the United States, permitting the referral of non-Constitutional federal questions and supplemental state law claims that are part of the same litigation; (b) to restrict the exception that prohibits referrals to claims as to which the court's jurisdiction is based in whole or in part on 28 U.S.C. § 1343, permitting the referral of non-civil rights claims that are part of the same litigation—in some tension with the "jurisdiction . . . based in whole or in part on 28 U.S.C. § 1343"<sup>294</sup> language of § 654; and (c) to restrict the exception that prohibits referrals to claims as to which the relief sought consists of money damages in an amount greater than \$150,000, permitting the referral of claims that are part of the same litigation but as to which the relief sought is something other than money damages of more than \$150,000. I must leave to others whether these outcomes would be desirable from the perspective of federal policy concerning arbitration, but clearly they would be inefficient and burdensome—because they might lead to duplicative proceedings before arbitrators and courts—and would increase the odds of outcomes that are in tension, if not direct conflict, with one another.

### *E. Venue and Transfer*

The primary federal venue statute, 28 U.S.C. § 1391, also uses "civil action" as a key term,<sup>295</sup> dictating the proper venues for civil actions in which jurisdiction is founded only on diversity jurisdiction and slightly different proper venues for civil actions in which jurisdiction is not founded solely on diversity jurisdiction.<sup>296</sup> Section 1391 has been interpreted to require venue to be proper for each claim initially asserted by the plaintiffs against the defendants.<sup>297</sup> This is not the same thing as construing "civil action" as "claim"—indeed, it recognizes that civil actions may be constituted by multiple claims. It treats the civil action as an entity insofar as it indicates that a

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294. 28 U.S.C. § 654(a)(2) (2000).

295. See 29 U.S.C. § 1391 (2000) (using the term "civil action" for purposes of venue in both diversity and federal question cases).

296. *Id.*

297. See, e.g., *Hicklin Eng'g, L.C. v. Bartell*, 116 F. Supp. 2d 1107, 1109 (S.D. Iowa 2000) ("Where, as here, there are multiple claims involved, unless the doctrine of 'pendent venue' applies, venue must be proper as to each claim.").

particular judicial district either is or is not a proper venue for the action.<sup>298</sup> On the other hand, this interpretation requires courts to analyze claim by claim, to determine whether a particular judicial district is a proper venue for the action. While this interpretation does not create problems when venue is based on the defendants' residence, or where any defendant may be found, because defendants' residence, and where a defendant may be found, will not change from claim to claim, this interpretation can create problems when plaintiffs rely on the provision for venue in a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred: A substantial part of the events or omissions giving rise to one claim may have occurred in a particular judicial district while no such "substantial part" may have occurred there as to other claims that plaintiff asserts.<sup>299</sup> The Rules' prohibition of a plaintiff's joinder of claims that did not arise out of a single transaction, occurrence or series<sup>300</sup> reduces the frequency with which this problem occurs, but does not eliminate it. Particularly where joinder of claims is permissible because they arose out of a series of transactions or occurrences,<sup>301</sup> there may be no single judicial district in which a substantial part of the events or omissions giving rise to each claim occurred. Courts increasingly invoke a doctrine of "pendent venue" that permits them to hold venue to be proper so long as otherwise

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298. 28 U.S.C. § 1391 (2000).

299. When plaintiffs rely on the provision for venue in a judicial district in which a substantial part of property that is the subject of the action is situated under 28 U.S.C. § 1391(a)(2) or 28 U.S.C. § 1391(b)(2), difficulties might arise if a property is not the subject of the entire action. Because this section focuses on the subject of the action rather than where events or omissions giving rise to a "claim" occurred, *id.*, the nature of the difficulty is a little different, however—the rub may be in determining whether to conclude that a property is the subject of the action where it is the subject of some claims but not others. However, once an affirmative determination is made, that determination renders the venue proper for all claims in the action. 28 U.S.C. § 1391 (2000).

The requirement that venue be proper for each claim asserted by the plaintiffs against the defendants also may create difficulties if plaintiff seeks to lay venue where any defendant is subject to personal jurisdiction when the action is commenced. *See* 28 U.S.C. § 1391(a)(3) (2000) (allowing venue in any judicial district where any defendant is subject to personal jurisdiction at the time the action commences). A defendant could be subject to personal jurisdiction, in a particular judicial district, to adjudicate one claim but not be subject to personal jurisdiction in that judicial district to adjudicate a different claim, at least if that different claim were brought alone. For example, the Northern District of Illinois might constitutionally be able to assert specific jurisdiction over a defendant to adjudicate claim one but lack specific jurisdiction over the defendant to adjudicate claim two and be unable constitutionally to assert general jurisdiction over defendant to adjudicate claim two.

300. *See* FED. R. CIV. P. 20(a) (requiring that joined plaintiffs assert a right to relief arising out of the same transaction, occurrence, or series of transactions or occurrences).

301. *Id.*

improperly venued claims are joined with a properly-venued claim and all arise out of a common nucleus of operative fact.<sup>302</sup>

The definition of "civil action" also might affect transfer. 28 U.S.C. §§ 1404 and 1406 permit district courts to transfer civil actions (or, in the words of § 1406, "cases") to other districts where they might (or "could") have been brought.<sup>303</sup> If "civil action" were understood to refer to an individual claim (à la *Allappattah*), then collections of claims brought as a single piece of litigation could be broken up and individual claims transferred, apparently with no prerequisite of severance. (Perhaps the transfer of only some claims would not be terrible, because such transfers could be made only in the discretion of district courts, in the interest of justice, and even now a district court that wanted to transfer fewer than all of the claims in a litigation could sever the claims and then transfer only those as to which transfer served the interest of justice.) Severance of claims into distinct civil actions to be separately litigated would be highly desirable, however, if some of the claims are to be transferred, because all sorts of confusion would likely be spawned by having claims that are regarded—for some purposes—as part of the same civil action litigated in different courts, at different paces.

While there are other jurisdictional and procedural statutes that speak of "civil actions"<sup>304</sup> and whose meaning and implementation would change if "civil action" were understood as "claim," I make no attempt to cover that waterfront here. I seek only to illustrate the kind of analysis in which a court considering whether to extend the reasoning of *Allappattah* into other realms

302. See 14D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: JURISDICTION 3D, § 3808, at 256 (2007) (observing that "it is not clear how federal courts should treat the situation in which several claims are brought . . . and transactional venue is proper for some but not all of the claims"). However, a growing number of federal courts apply the doctrine of pendent venue, which the authors find unobjectionable. *Id.*

The treatise also discusses a variation on pendent venue when some claims are governed by a restrictive venue statute. *Id.* at 259–63. Similarly, "the line that generally has been drawn is that if the claim against [an] additional [*i.e.*, subsequently joined] party is so closely related to the original action that it can be regarded as 'ancillary' for purposes of avoiding the constitutional limits on federal jurisdiction, it also may be regarded as ancillary to avoid the purely statutory privilege of venue." *Id.* at 268–69. Thus, the venue statutes would have to be independently satisfied for a permissive, but not for a compulsory, counterclaim. *Id.* at 269–70.

303. See 28 U.S.C. § 1406 (2000) (authorizing the transfer of "cases" brought in a wrong venue or in a district court that cannot properly assert personal jurisdiction over one or more defendants).

304. See, *e.g.*, 28 U.S.C. § 2242 (2000) (allowing for the standard for applications for writs of habeas corpus to change based on the rules of procedure applicable to civil actions). A Lexis search combining the terms "28 U.S.C." and "civil action" in the U.S. Code Service Materials produced 910 statutory documents.

ought to engage, and to show how extending the reasoning of *Allapattah* into other realms frequently would engender undesirable changes.

#### IV. *Why Haven't the Federal Courts Extended the Reasoning of Surgeons and Allapattah?*

One may ponder why the federal courts have not taken opportunities to carry the re-definitions into other contexts in which the terms have long been understood to share the meanings of those words and phrases as they are used in the federal subject-matter jurisdiction statutes. Presumably, the undesirability of the changes that frequently would result from importation into other statutory contexts of the re-definition of "civil action" and "claim" that the Court adopted in *Surgeons* and *Allapattah* is a very important reason. But lower courts are not free to disregard Supreme Court decisions that those courts think are undesirable. That principle is, of course, most strictly binding as to actual holdings of the Court, but courts often say that they pay homage to the Supreme Court's well-considered dicta, as well, to guide their rulings.<sup>305</sup> The compulsion is strong when the ratio decidendi of a court's opinion is involved; that reasoning is regarded as part of the holding. The Court wrote in *Seminole Tribe of Florida v. Florida*,<sup>306</sup> that "[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."<sup>307</sup> And in 2005, Judge Posner of the Seventh Circuit wrote:

[T]he holding of a case includes, besides the facts and the outcome, the reasoning essential to that outcome . . . . [I]f the fact that a court considers one of its previous decisions to be incorrect is a sufficient ground for overruling it, then stare decisis is out the window, because no doctrine of deference to precedent is needed to induce a court to follow the precedents that it agrees with . . . . The doctrine of stare decisis "imparts authority to a decision, depending on the court that rendered it, merely by virtue of the authority of the rendering court and independently of the quality of its reasoning. The essence of stare decisis is that the mere existence of certain

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305. See, e.g., *IFC Interconsult, AG v. Safeguard Int'l Partners, LLC*, 438 F.3d 298, 311 (3d Cir. 2006) ("[W]e pay due homage to the Supreme Court's well-considered dicta as pharoi that guide our rulings.").

306. See *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 76 (1996) (dismissing the Seminole Tribe of Florida's action because, under the Eleventh Amendment, Congress cannot pass legislation allowing Florida to be sued in federal court).

307. *Id.* at 67.

decisions becomes a reason for adhering to their holdings in subsequent cases."<sup>308</sup>

So, why haven't we seen the tentacles of *Surgeons* and *Allapattah/Rosario Ortega* extend further? There seems to be little question that the Court's reasoning concerning the meaning of the terms "civil action" and "claim" was essential to the outcome of at least *Rosario Ortega*, although not to the outcome in *Surgeons*, and arguably not to the outcome in *Allapattah*. I would speculate that the following (and perhaps additional factors) are involved: The Court's definitions of "claim" and "civil action" were not obvious in the ultimate outcomes of the cases. A very limited view of the scope of the holding that binds the lower courts gives them more latitude to disregard the Court's notions of "claim" and "civil action."

As noted above, the consequences of the extension often would be undesirable, and the Court probably did not intend them. Lower courts hesitate to extend the Court's reasoning to contexts about which the Court was not thinking, particularly when the consequences of the extension would be undesirable.<sup>309</sup> As one court recently said, "[o]bedience to a Supreme Court decision is one thing, extrapolating from its implications a holding on an issue that was not before the Court in order to upend settled circuit law is another thing."<sup>310</sup>

Perhaps the parties have not argued for the extension, and the courts have not independently thought through the implications of the Court's reasoning. Is the courts' foregoing of opportunities to carry the re-definitions into other contexts jurisprudentially defensible? I submit that it is. Particularly where the Court explicitly recognizes that it is interpreting a poorly drafted statute (as in *Allapattah/Rosario Ortega*) and is attempting to do the best it can with a statute whose terminology is such that any construction is problematic, those factors

308. *Tate v. Showboat Marina Casino P'ship*, 431 F.3d 580, 582–83 (7th Cir. 2005) (quoting *Midlock v. Apple Vacations W., Inc.*, 406 F.3d 453, 457 (7th Cir. 2005)) (internal citation omitted); see also *Smith v. Patrick*, 508 F.3d 1256, 1260 (9th Cir. 2007) (stating that the Court's holding "necessarily refers not only to the result reached, but also the rationale necessary to the reaching of that result"); *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 241 F.R.D. 185, 191–92 (S.D.N.Y. 2007) (noting that it is well established that lower courts are bound by the reasoning of Supreme Court opinions).

309. See Timothy Schwarz, Comment, *Cases Time Forgot: Why Judges Can Sometimes Ignore Controlling Precedent*, 56 EMORY L.J. 1475, 1484 (2007) ("Judges attempt to avoid precedent when they believe the results suggested by the precedent do not correctly decide the case being adjudicated.") (citing KARL N. LEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 63 (10th ed. 1996)). In this passage, in speaking of avoiding precedent, the author has in mind overruling, distinguishing, treating a precedent as mistaken so as to keep its range of application narrow, and ignoring precedent. *Id.* at 1486–91.

310. *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*, 475 F.3d 1228, 1230 (11th Cir. 2007).

provide good reason for lower courts not to carry over the Court's construction to other statutes that use some identical terms. Jurisdictional statutes may be particularly vulnerable to problematic drafting and hence to interpretations that should be cabined because of Congress's lack of expertise in governing such a technical matter as federal court jurisdiction. Unworkability, inconsistency with long lines of precedent that the Court evinced no intention to overrule, inconsistency with the other statutes' legislative history, the undesirability of "messaging" with a (fairly) smoothly-working mosaic of jurisdictional legislation and of imposing inefficient and burden-imposing consequences to no apparently beneficial end, all provide good reasons for lower federal courts to narrowly read a Supreme Court case that otherwise could have systemically disruptive consequences across a broad range of issues.<sup>311</sup>

Still, it would be far preferable for the lower federal courts to explicitly grapple with and distinguish, rather than ignore or "sweep under the rug," the Court's adoption of altered definitions of "claim" and "civil action" in the contexts of the supplemental jurisdiction and removal statutes. Indeed, the facts that the Court does value uniform interpretation of similar statutory language<sup>312</sup> and views *stare decisis* in respect of statutory language to have "special force,"<sup>313</sup> suggests that it is incumbent upon lower courts to grapple with these altered definitions when construing related jurisdictional statutes. Doing so also could aid other courts and the Supreme Court itself to come to better decisions when they face similar issues. While a blindered approach may appear to avoid disrespect of the Court's decisions, reasoned justification for declining to extend the Court's reasoning beyond the contexts that gave rise to it would better serve the common law tradition.<sup>314</sup>

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311. I thank my colleague, Mark Rosen, for his thoughts on the jurisprudential defensibility of courts narrowly cabining the Court's reasoning in *Allapattah*. See Schwarz, *supra* note 309, at 1475 (arguing that in addition to following, distinguishing, and overruling precedent, precedent also may be ignored, in good faith).

312. See *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 760 (2008) (Ginsburg, J., dissenting) (citing *Rodriguez de Quijas v. Sherson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)).

313. *Id.* at 756.

314. See Schwarz, *supra* note 309, at 1493–1509 (arguing that ignoring precedent can be differentiated from overruling, distinguishing, and treating the precedent as mistaken). The comment further argues that it is legitimate for courts to ignore precedent that can "not be comfortably situated within a coherent understanding of the law based on" continuing dominant values. *Id.* at 1493. Even if one accepts the viewpoint expressed in the Comment, *Allapattah* should be limited not so much because it can "not be comfortably situated within a coherent understanding of the law based on," *id.*, continuing dominant values, but because of the uniqueness (at this time) of the statutory context that gave rise to it and because of the undesirable and unintended consequences that would flow from extending it.

Finally, although the courts' restraint and avoidance of importation into other statutory contexts of the re-definition of "civil action" and "claim" that the Court adopted in *Surgeons* and *Allapattah/Rosario Ortega* has limited the harm done by those decisions, clearer drafting by Congress also would help to avoid distorted judicial reasoning that needs to be cabined. Amending the supplemental jurisdiction statute along the lines of the ALI proposal would help to clarify Congress's intent as to how supplemental jurisdiction should operate, and would make unnecessary the kind of verbal distortions of § 1367's terminology that were invited by poor legislative drafting. And, of course, when Congress passes or amends other statutes for whatever reasons, it should take care to avoid incoherent usages of terms—including, but not limited to, "civil action" and "claim." That would help a great deal.

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